No. 17-432

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,
v.
MICHAEL RESH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

ABBY F. RUDZIN
ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

BRADLEY N. GARCIA
JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

SETH ARONSON
(Counsel of Record)
saronson@omm.com
WILLIAM K. PAO
BRITTANY ROGERS
MICHELLE C. LEU
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, Cal. 90071
(213) 430-6000

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

RULES

OTHER AUTHORITIES

ARGUMENT

Respondents' answering brief only confirms why the Ninth Circuit's decision extending tolling of the statute of limitations under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to follow-on class actions must be reversed.

American Pipe held that the filing of a class action tolls the limitations period to allow former absent class members to file their own individual claims after the class fails. Tolling was justified because the two preconditions of equitable tolling—plaintiff diligence and extraordinary circumstances—were satisfied. Specifically, the Court held that class members who rely on the class while it is pending and then file their own individual claims have not sat on their rights. And tolling was required to prevent the proliferation of individual protective actions by class members while a class was still pending, a result that would undermine the policies embodied in Rule 23.

Petitioner's opening brief demonstrated that neither of these elements is satisfied when former class members bring follow-on *class* rather than individual actions. Absent class members who do nothing to protect their rights when class certification is denied obviously have exercised no diligence. And tolling for follow-on class actions is not required to protect any Rule 23 policy.

Respondents' main answer is not that these equitable tolling elements are satisfied for follow-on class actions, but rather that equity is irrelevant because *American Pipe* tolling is automatic for every class member in all circumstances—even for class mem-

bers who do nothing to protect their rights. Thus, respondents argue, *American Pipe* tolling applies equally to every former class member's individual claim, and those individual claims can be aggregated if Rule 23 is otherwise satisfied.

But this Court has repeatedly held that *American Pipe* announced a rule of equitable—not automatic—tolling, so the question is always whether tolling is warranted in the circumstances based on traditional elements of equity. Respondents are thus wrong when they say that every former class member's claim is timely under *American Pipe*, so all that matters is whether those claims can be aggregated under Rule 23. Rather, every former class member's claim is *untimely* because the statute of limitations has run, and the question is whether equity nevertheless requires allowing them to proceed under the circumstances. And the traditional elements of equity are satisfied only when former absent class members themselves file *individual* claims after the class fails—and not when other former class members purport to bring a new class action on their behalf.

Respondents' position, in other words, rests on a fundamental misunderstanding of *American Pipe* tolling, and of equitable tolling more generally. Nor do respondents have any convincing answer to the fact that extending *American Pipe* to follow-on class actions would result in significant adverse consequences—including the prospect of abusive serial class litigation—that cannot be reconciled with Congress's decision to enact a statute of limitations. The decision below should be reversed.

A. *American Pipe* Recognized a Rule of Equitable Tolling Based on Traditional Equitable Principles, Not a Rule of Automatic Tolling

1. *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), allowed tolling of statutes of limitations during the pendency of a class action to permit *individual* absent class members to file *individual* claims once the class failed. *See* Pet. Br. 26–30. This tolling decision rested on two necessary preconditions, derived from the two traditional elements of equitable tolling: plaintiff diligence and "extraordinary circumstances" justifying tolling. *See* Pet. Br. 25–36 (citing, *inter alia*, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016)).

In particular, absent class members exercise diligence when they assert their rights by filing their own claim when a potential class fails. *Crown, Cork*, 462 U.S. at 352–53; *see also Am. Pipe*, 414 U.S. at 554; Pet. Br. 34. And extraordinary circumstances justify tolling because without tolling, absent class members who want to protect their rights would file individual claims before the statute of limitations runs, which would undermine Rule 23's specific policy of encouraging representative actions rather than a "needless multiplicity" of individual ones—that is, tolling is *required* to avoid conflict with Rule 23 policies. *Crown, Cork*, 462 U.S. at 351; *see also Am. Pipe*, 414 U.S. at 553–54; Pet. Br. 38.

But the fact that these equitable preconditions are satisfied when absent class members file *individual* claims after a class fails does not mean that

they are satisfied when class members file follow-on class actions. Whether equitable tolling is also warranted in this latter circumstance is the core dispute in this case. And neither plaintiff diligence nor Rule 23 policy justifies extending *American Pipe* tolling to otherwise-untimely class actions, so the class action in this case is time-barred. *See* Pet. Br. 30–45; *infra* Section B.

2. a. According to respondents, class members need not assert their own individual claims to get the benefit of tolling because the two equitable tolling factors are irrelevant under *American Pipe*. Respondents contend that *American Pipe* establishes an automatic tolling rule for every class member once a class action is filed—even class members who do nothing to protect their rights. Resp. Br. 21–26.

Indeed, the explicit premise of respondents' brief is the assertion that "every class member ha[s] a timely individual claim." Resp. Br. 15. Respondents reason that if every class member has a timely claim, then a class aggregating those claims must also be timely. That result, respondents contend, follows from *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), which held that Rule 23 allows individuals who possess a valid claim to aggregate those claims so long as the preconditions of the Rule are otherwise satisfied. And it follows from the Rules Enabling Act, under which evidence relevant to an individual claim or defense must necessarily be relevant to a class action claim. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). If the filing of a class action automatically tolls the limitations period for all individu-

al claims, that same class action must also toll the limitations period for a subsequent class action.

b. Respondents would be right if *American Pipe* were an automatic tolling rule rendering every class member's claim timely. *American Pipe*, however, is not an automatic tolling rule but rather an *equitable* tolling rule subject to the general rules of equity. This Court made that clear just last Term, holding that *American Pipe* tolling was not "mandated by the text of a statute or federal rule" such as Rule 23 but "was instead grounded in the traditional equitable powers of the judiciary." *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2052 (2017); *see* Pet. Br. 26.

Respondents' assertion that "[p]etitioner's equitable arguments cannot overcome the force of Rule 23 and the Rules Enabling Act," Resp. Br. 18, is thus backwards. The question is not whether class members' timely claims can be aggregated under Rule 23, but whether class members' otherwise *untimely* claims should nevertheless be allowed to proceed as a matter of equity. And as this Court has repeatedly explained, equitable tolling is never automatic; it applies only when the plaintiff carries his burden to demonstrate "that he has been pursuing his rights diligently" *and* when tolling is otherwise justified by "extraordinary circumstances." *Menominee*, 136 S. Ct. at 755–56; *see also Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); Pet. Br. 30–31. Indeed, courts may not apply equitable tolling rules that "break with historic principles of equity," *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946), or that are "completely divorced from long-settled equitable-tolling

principles," *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012). Such an approach would amount to courts impermissibly "overrid[ing] the statute of limitations Congress prescribed," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014), and "mak[ing] the law instead of administering it," *Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (internal quotation marks omitted); *see* Pet. Br. 45–46 (explaining why this result violates the separation of powers). There is no basis for treating the variant of equitable tolling recognized under *American Pipe* as somehow exempt from these strictures.

3. Respondents' contrary position is based on mischaracterizations and out-of-context quotations of this Court's cases.

Respondents rely most heavily on this Court's statement in *American Pipe* that the filing of a class action "suspends the applicable statute of limitations as to all asserted members of the class," *Am. Pipe*, 414 U.S. at 554, contending that this passage means that "a timely class action tolls the limitations period for *all* asserted class members." Resp. Br. 30. But as *Crown, Cork* explained, quoting this exact language, *see* 462 U.S. at 353–54, the point of this passage was that tolling applies to any class members *who file individual claims*. That is why the very next sentences of *Crown, Cork* explain that the statute is only tolled "until class certification is denied," at which point "class members may choose to *file their own suits or to intervene* as plaintiff in the pending action." *Id.* at 354 (emphasis added).

Indeed, in the cases respondents cite applying *American Pipe*, the plaintiff seeking tolling exercised

diligence by filing her own individual claim. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) (plaintiff filed individual action after opting out of class); *Chardon v. Fumero Soto*, 462 U.S. 650, 653 (1983) (individual claims following denial of class certification).[1] Respondents believe that these cases stand for the proposition that *American Pipe* applies in every procedural context and thus must apply to subsequent class actions, Resp. Br. 30, but the cases merely reiterate that equitable tolling can apply in any context when a former class member presses her own individual claim. *See supra* at 3–4.

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[1] Respondents also cite *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), but in that case the Court held that *American Pipe* did not apply to the question of appellate intervention at issue. *Id.* at 392. The Court did note, however, that *American Pipe* would have applied "if the respondent had sought to intervene in order to join the named plaintiffs in litigating her individual claim." *Id.* *McDonald* thus confirms that *American Pipe* has been limited to when class members seek to press their own individual claims.

Respondents' reliance on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), is even more off point. *Devlin* had nothing to do with tolling—the question was whether absent members of a certified class are "parties" for purposes of the right to appeal an approved class settlement. In explaining why absent class members are like "parties" in some respects but not in others, the Court cited *American Pipe* for the proposition that they are "parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." *Id.* at 10. Respondents think that this statement supports an automatic tolling rule, Resp. Br. 30–31, but it says nothing on the question presented here: can absent class members get the benefit of equitable tolling *if they do nothing*.

The question in *this* case, by contrast, is whether the elements of equitable tolling are met when former class members *do not* take action to enforce their own rights, but instead continue to remain absent. For the reasons explained below, the answer is no.

B. Extending *American Pipe* to Follow-On Class Actions Would Violate Both Equitable Tolling Preconditions

Unlike with tolling of absent class members' individual claims, applying *American Pipe* to follow-on class actions would (i) impermissibly reward non-diligent plaintiffs and (ii) not further any Rule 23 policy.

1. Extending *American Pipe* to follow-on class actions would flout the diligence requirement in two respects.

a. Former absent class members who continue to remain absent rather than asserting their own rights by definition have not exercised diligence. Pet. Br. 35–37.

Respondents' answer is that an absent class member automatically satisfies the diligence requirement so long as a putative class action is pending. Resp. Br. 35–36. Respondents cite this Court's statement in *Crown, Cork* that absent class members "cannot be accused of sleeping on their rights" if they fail to act while the initial class action is pending, Resp. Br. 35 (quoting *Crown, Cork*, 462 U.S. at 352–53), and reason that the same holds true while the second (and third, fourth, and so on) class action is pending as well. According to respondents, absent

class members show their diligence simply by pointing to the existence of any "timely class action itself." *Id.* (emphasis omitted).

Respondents are incorrect. It is true that under *American Pipe* and *Crown, Cork*, an absent class member's decision not to file an individual action during the pendency of a class action does not by itself demonstrate a *lack* of diligence, since an individual who seeks to enforce her own rights can reasonably rely on a pending class action. *See*, *e.g.*, *Crown, Cork*, 462 U.S. at 352–53. But how has an absent class member who continues to sit back once class certification is denied acted diligently? She obviously has not, because it is the "[f]iling [of the lawsuit] itself"—not waiting to see whether serial class actions succeed—that "shows the proper diligence on the part of the plaintiff." *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962); *see also McQuiddy v. Ware*, 87 U.S. 14, 19 (1873) ("[P]ersonal diligence . . . is required . . . to bring into activity the powers of a court of equity.").

Certainly, respondents have not cited a single case even suggesting that a plaintiff who has never lifted a finger to protect her rights—even after a court has held that her claims are not suitable for class treatment—might be entitled to the "rare remedy" of equitable tolling. *Wallace v. Kato*, 549 U.S. 384, 396 (2007). After all, if a potential plaintiff does not *ever* seek to assert her own rights, there is no reason to believe that the plaintiff has any interest in pursuing them. That is why both *American Pipe* and *Crown, Cork* describe the applicable rule as applying to "all purported members of the class *who*

make timely motions to intervene," *Am. Pipe*, 414 U.S. at 553 (emphasis added), or who "file their own suits" after class certification is denied, *Crown, Cork*, 462 U.S. at 354. And because absent members of a follow-on class have done nothing to assert their rights, basic equitable principles—not to mention the Rules Enabling Act, *see* Pet. Br. 54—prevent affording them the benefit of tolling. That suffices to defeat respondents' position.

b. Formerly absent class members who, like respondents, later seek to lead a class action have also failed to exercise diligence sufficient to justify tolling. A diligent class member who wants to represent a class would file a class action within the limitations period; she would not strategically wait until after another class member tries and fails to secure certification. Petitioner explained this basic point, Pet. Br. 35–36, yet respondents do not even attempt a response. The plaintiff-diligence requirement is not satisfied in follow-on class actions for this independent reason.

2. An extension of *American Pipe* to follow-on class actions should also be rejected because no "extraordinary circumstances" justify it. Pet. Br. 37–45. In particular, the Rule 23 policy that supports tolling for individual actions—i.e., preventing the "multiplicity" of individual actions Rule 23 is meant to avoid, *see Am. Pipe*, 414 U.S. at 551; *Crown, Cork*, 462 U.S. at 351—does not apply to follow-on class actions.

Respondents at times suggest that their proposed tolling rule could be justified based only on "the judiciary's institutional interest in litigative efficiency

and economy." Resp. Br. 28 (internal quotation marks omitted). But courts have no free-roving "authority to rewrite" statutory deadlines in pursuit of "judicial economy." *ANZ*, 137 S. Ct. at 2053 (internal quotation marks omitted); *see also Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) ("We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (similar). It is principally Congress's judgment about judicial economy that counts, and Congress decided here to enact a two-year time bar, subject only to the "rare remedy" of equitable tolling. *Wallace*, 549 U.S. at 396. The question is whether tolling is *required* to avoid conflict with policies reflected in Rule 23. *See Am. Pipe*, 414 U.S. at 551; *Crown, Cork*, 462 U.S. at 351. Respondents offer no persuasive argument that it is.

a. Respondents' principal argument is that requiring class actions to be filed within the limitations period will result in the filing of "protective" class actions—a consequence that respondents believe should be avoided for the same reason *American Pipe* sought to avoid the filing of protective individual actions. Resp. Br. 33. This argument is both factually and legally incorrect.

As an initial matter, requiring the timely filing of class actions is not likely to result in a material number of "protective" class actions because any class member who desires to lead the class already has every incentive to file a class action as soon as possible. Pet. Br. 39. That is because if the original

class is certified and its leader appointed, those who hang back will not be able to realize their desire. Respondents speculate that there might be class members who do not want to represent a class but would nevertheless come forward late in order to ensure that "class members are represented" by someone. Resp. Br. 34. Respondents offer no reason to believe that any substantial number of such deferential, altruistic class representatives exist. And if a rule enforcing statutory time bars against follow-on class actions would lead to unwarranted protective class filings, then there would be evidence of such lawsuits in the numerous circuits that have for *decades* applied that rule.[2] Respondents have offered none. *See ANZ*, 137 S. Ct. at 2054 (dismissing similar concern as "likely . . . overstated").

In any event, even if respondents were right, it would not matter because unlike with the Rule 23 policy of avoiding a proliferation of *individual* actions, there is no Rule 23 policy of avoiding the filing of multiple class actions. To the contrary, Rule 23 policies promote the filing of early class actions, because that facilitates courts' ability to choose adequate representatives and counsel at an "early practicable time," Fed. R. Civ. P. 23(c)(1); *see also* Pet. Br. 40, thereby ensuring that class certification is fairly litigated from the outset. And the PSLRA makes the preference for early participation by all interested plaintiffs explicit, Pet. Br. 41, so if re-

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[2] *See*, *e.g.*, *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985); *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994); *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998).

spondents are right that their rule would discourage early participation, that rule should be rejected as inconsistent with congressional policy reflected in the PSLRA. Respondents argue that smaller shareholders may often lack incentive to seek lead-plaintiff status because courts prefer to appoint larger shareholders. Resp. Br. 49. But Congress intended for anyone who wants to lead a class to come forward early so that the court can choose the best candidate, and respondents' proposed rule would explicitly contradict that preference.

Finally, any marginal increase in "protective class filings" would not imperil any statutory interest because federal courts have extensive experience managing multiple class actions and access to numerous congressionally-provided and judge-made tools to do so. *See* Pet. Br. 41–42; *see also* S. Rep. No. 109-14, at 52–54 (2005) (noting that "federal courts can coordinate 'copy cat' or overlapping class actions" and have experience managing "even 100 class actions filed on the same subject matter"). Respondents have no answer.

b. Respondents' secondary argument is that "judicial economy" would be served by a tolling rule for follow-on class actions because otherwise, "defendants will face a multitude of individual actions" by formerly-absent class members once any timely-filed class actions fail. Resp. Br. 34. That argument makes no sense. There is no Rule 23 policy against individual actions by former class members once a class fails. If there were, then *American Pipe* and *Crown, Cork* would have come out the other way—those decisions expressly *encouraged* individual class

members to file individual actions once class certification failed. Regardless, respondents' proposed rule would in all likelihood only delay the proliferation of individual actions, not avoid it, because class members would still have every incentive to bring their own individual claims once the second (or third, or fourth) class action fails. Respondents' rule thus implicitly rests on the proposition that a follow-on class action is likely to succeed where the original class action failed. The problem with that assumption (besides its improbability) is that it essentially *requires* inconsistent class certification judgments. *See* Pet. Br. 56. And in any event, if defending a single class action rather than many individual actions would be easier for a particular defendant, then that defendant would simply acquiesce to class certification.[3]

In short, plaintiff diligence and extraordinary circumstances—the two equitable preconditions that justified tolling for individual actions in *American Pipe*, and that must be satisfied to warrant equitable tolling more generally, *see supra* at 3—do not apply to follow-on class actions. Respondents' attempt to

[3] Respondents also argue that allowing tolling here creates no "unfair surprise" to defendants. But respondents admit that "the absence of unfair surprise is not an independent basis for tolling," Resp. Br. 37 n.8; *see also* Pet. Br. 42, so the lack of unfair surprise is irrelevant. Respondents are also wrong. No defendant reasonably expects that the filing of a single class action will result in an endless stream of identical, difficult-to-defend class actions despite the existence of a statute of limitations. *See* Pet. Br. 43–45.

extend *American Pipe* to follow-on class actions should thus fail.

C. Extending *American Pipe* to Follow-On Class Actions Would Lead to Serious Adverse Policy Consequences Inconsistent with the Purposes of Statutes of Limitations

1. The foregoing suffices to reverse the decision below. But respondents' rule also would result in significant adverse policy consequences contrary to the very purposes of statutes of limitations.

Specifically, expanding *American Pipe* tolling to follow-on class actions "could extend the statute of limitations almost indefinitely." *Yang v. Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J. concurring); *see also* Pet. Br. 46-47. That consequence would conflict with the basic policies underlying all statutes of limitation: plaintiff diligence, defendant repose, and eliminating stale claims. Pet. Br. 24, 47. And as this Court has made clear, a rule that allows a limitations period to "continue indefinitely," even "in principle," "conflicts with a basic objective—repose—that underlies limitations period," *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997), and "is out of step with the purpose of limitations periods in general," *Credit Suisse*, 566 U.S. at 227–28.

2. Respondents offer several reasons why other doctrines might in some circumstances mitigate the negative consequences of extending *American Pipe* to follow-on class actions. Even if that were true, it would be no reason to ignore a congressionally-enacted time bar, the purpose of which is to provide

a clear and uniform end date to a claim, subject only to narrow exception when the traditional equitable tolling factors are met. Respondents' arguments, moreover, are unconvincing on their own terms.

a. Respondents correctly argue that perpetual tolling is "literally impossible" *in this case*, because securities claims are subject not only to a two-year statute of limitations but also a five-year statute of repose that cannot be tolled. *See* Resp. Br. 45. But the question presented is whether *American Pipe* tolls *all* limitations periods for follow-on class actions, and statutes of repose afford no protection in the ordinary case because such non-tollable time limits are "relatively rare." *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 397 (2d Cir. 2016). Adopting respondents' rule would mean that most time limits in the U.S. Code would be subject to indefinite tolling for repeated class actions. That result cannot be reconciled with Congress's decision to enact a statute of limitations in the first place.

b. Respondents also cite *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), which held that preclusion does not apply to absent class members. In response to the worry that this would allow absent class members to later bring similar claims, the Court observed that "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.* at 317. Respondents cite this passage as proof that the Court "already considered and unanimously dismissed petitioner's policy concerns." Resp. Br. 40.

Not so. The problem with the Ninth Circuit's rule is not that similar litigation can be brought by different plaintiffs. The problem is that plaintiffs can press new class actions past the time that Congress judged appropriate. And as this Court recently explained, "[t]he enactment of a statute of limitations" itself reflects a congressional determination that the best solution to repetitive, out-of-time filings is a "generally hard and fast [legal] rule rather than the sort of case-specific judicial determination" required (for example) by the doctrine of comity. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). Respondents strangely suggest that statutes of limitations themselves are malleable because they (unlike statutes of repose) are subject to equitable tolling, Resp. Br. 45–46, but this simply ignores this Court's repeated insistence on "strict adherence" to congressionally-prescribed time limits, *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam), subject only to equitable tolling in extraordinary circumstances, Pet. Br. 24–25.

Certainly, the doctrine of comity, on which respondents rely most heavily, is no substitute for a statute of limitations. It is, rather, a "weak" bulwark against abusive class filings, *Smentek v. Dart*, 683 F.3d 373, 388 (7th Cir. 2012), as this case—in which comity did not stop three identical class actions from proceeding—demonstrates. Indeed, one of the cases that respondents cite as "understand[ing] the proper role in comity-based analyses of subsequent class-certification efforts," Resp. Br. 41–42, derides courts' application of comity to class certifi-

cation decisions as "'cryptic'" and "'novel.'" *Ford v. Ford Motor Co.*, 2014 WL 12570925, at *3 (C.D. Cal. Jan. 17, 2014) (quoting *Smentek*, 683 F.3d at 375–76); *see also* 6 Newberg on Class Actions § 18:30 (5th ed. 2017) (noting that courts are "struggling to give meaning to 'principles of comity'" referenced in *Smith*).

Perhaps the only thing weaker than comity, however, is attorney self-restraint, on which respondents also rely. Respondents are right that plaintiffs' counsel are "rational economic actors," Resp. Br. 47, but that is exactly the problem. As this case demonstrates, it *is* rational for plaintiffs' counsel to repeatedly try their hand at class certification, because the costs of filing a copy-cat complaint are low and the value of a certified class is high. *See* Pet. Br. 44, 48; *see also, e.g.*, *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) (noting incentives for plaintiffs' lawyers to "roll the dice as many times as they please"), *overruled by Smith*, 564 U.S. 299. And it is rational for a defendant in these circumstances to settle even a meritless claim, since *in terrorem* settlement pressures are immense even in ordinary class litigation. *See* Pet. Br. 44.

Respondents thus offer no plausible response to the certainty of abusive litigation that would follow if the Ninth Circuit rule were adopted. They do argue that petitioner has failed to provide examples of abusive litigation in circuits that have adopted that rule. But the Ninth Circuit first adopted its rule in this case, and the Sixth Circuit adopted its own rule only three years ago, so one would not yet expect any

such evidence from those courts. The Seventh Circuit, however, extended *American Pipe* to follow-on class actions in 2011, Resp. Br. 46, and that court *has* on several occasions noted the abusive nature of follow-on class actions.[4] Congress enacts statutes of limitations to avoid this precise result.

3. Respondents close with examples of supposedly inequitable results under petitioner's rule. It would not be surprising if applying a limitations statute as written would sometimes result in an inequitable result, since the time bar's purpose is to cut off meritorious claims. Even so, respondents fail to show any substantial inequity.

For example, respondents note that if a court in a PSLRA case chooses a lead plaintiff other than the plaintiff who filed the original complaint, the new plaintiff would be required to file an amended complaint, possibly outside the limitations period. Resp. 48–49. But such an amended complaint would obviously relate back to the original one under Rule 15—no court would dismiss such a complaint as time-barred, which is why respondents do not cite a single court that ever has. And in any event, respondents' hypothetical itself is highly unlikely, because experienced attorneys "can cobble together a complaint . . . within hours or days" of the events that give rise to a

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[4] *See*, *e.g.*, *Smentek*, 683 F.3d at 377 (affirming grant of class certification after two other district courts had denied certification in materially identical cases, rejecting comity as only a "weak" bar to re-litigation, and noting that twelve more identical suits remained pending); *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 550, 552 (7th Cir. 2012) (noting vexatious nature of "copycat" class action forum shopping).

claim, Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby,"* 61 Vand. L. Rev. 543, 654 n.85 (2008), and lead plaintiffs will ordinarily be selected within a few months of filing, 15 U.S.C. §§ 78u-4(a)(3)(A)(i), (B)(i). In fact, the *Dean* complaint was filed just eight days after the LM Report. Pet. Br. 7.

Respondents also hypothesize a case in which the named plaintiff is dismissed for lack of standing. Resp. Br. 48. But a named plaintiff's standing would be adjudicated at the outset of the litigation, leaving plenty of time for a new class filing within the limitations period. Moreover, to the extent such a risk exists, it would be ameliorated by a rule encouraging other potential class representatives to file class actions early—just as respondents say would be the case under petitioner's rule. And again, several circuits have for decades rejected extending *American Pipe* to follow-on class actions, yet respondents do not cite a single case in which a defect in named-plaintiff standing has resulted in a class action's dismissal as time-barred. Respondents further speculate (again without a single actual example) that defendants will try to "pick off" all the named plaintiffs after the statute of limitations has run by offering individual settlements. But any such strategy would be precluded after class certification, *see* Fed. R. Civ. P. 23(e); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), and is unlikely to prevent courts from reaching the certification question in any event, *see, e.g.*, *Richardson v. Bledsoe*, 829 F.3d 273, 278–86 (3d Cir. 2016) (canvassing case law allowing named plaintiffs subject to pickoff attempts to litigate class

certification, even where motion for class certification had not yet been filed).

Finally, respondents assert that there are "[m]any situations" in which class treatment may be "appropriate" even after class certification has been denied in the first class action. Resp. Br. 51. That might be true, but limitations periods always cut off claims regardless of their merits, so the fact that meritorious claims might not proceed is irrelevant. Respondents simply fail to offer any inequity that could plausibly support ignoring the statute of limitations for follow-on class actions.

D. *American Pipe* Should at the Very Least Not Apply When the Propriety of Class Treatment Has Been Previously Adjudicated, a Rule That Would Require Reversal Here

1. At the very least, *American Pipe* should not be extended to class actions when, as here, the propriety of classwide adjudication has already been rejected. Respondents' assertion that this fallback argument is "an implicit concession that [petitioner's] main position is overly harsh and inequitable," Resp. Br. 48, is nonsense. Petitioner maintains that this Court should not extend *American Pipe* to follow-on class actions in any circumstance because doing so would violate fundamental principles of equitable tolling and lead to significant adverse consequences. But authorizing tolling for a new class action when class treatment has already been rejected for a class-based reason would simply be perverse.

It is, after all, decidedly unreasonable for a plaintiff to "rely" on the class mechanism to protect her rights where a court has already ruled that the class mechanism cannot do so. Pet. Br. 55. Serial relitigation of already-decided class certification questions would waste judicial and party resources and is designed to produce inconsistent judgments. Pet. Br. 56. And denying tolling when class treatment has been rejected would not prejudice any individual class member's claim because any such claim would be timely filed under *American Pipe*. Pet. Br. 57.

Respondents' principal response is that even when certification has been denied for a class-based reason, tolling should be allowed to let a new named plaintiff "incorporate [the] court's guidance." Resp. Br. 51. That is a non sequitur. Equitable tolling is not a mechanism for new plaintiffs to learn from old ones' mistakes. No one would argue that equitable tolling is warranted for an individual plaintiff to learn from a court decision rejecting a prior plaintiff's similar individual claim. Respondents fail to proffer a plausible principle of equitable tolling that would lead to a different result in the class action context.

2. Respondents are also wrong that their claims would survive under this fallback rule. *See* Resp. Br. 50–52. The *Dean* court denied certification on predominance grounds because those plaintiffs could not establish a fraud-on-the-market presumption that would obviate the need for individualized showings of reliance. JA192. Respondents now say that the court's predominance-based holding was really a plaintiff-specific rejection of class treatment because

it "was caused by deficiencies in the expert reports submitted by the *Dean* plaintiffs." Resp. Br. 51. But as already explained, Pet. Br. 58, the operative question is whether the class determination was class-based (e.g., predominance or numerosity) or plaintiff-based (e.g., typicality or adequacy of representation), regardless whether the given reason is the named plaintiff's "failure to meet her burden." *Yang*, 392 F.3d at 110. A contrary rule would effectively eviscerate the statute of limitations, since a new plaintiff can always argue that she can do a better job of proving a class-based element like predominance than a previous plaintiff could. Pet. Br. 58–59.

Respondents' contrary argument rests in substantial part on a mischaracterization of the Third Circuit's decision in *Yang*. There, as here, a follow-on class was allowed to proceed where the prior named plaintiff could not prove a fraud-on-the-market theory. 392 F.3d at 108–09. But in *Yang*, the failure of proof was *plaintiff-based*: class certification was denied "solely because [the named plaintiff] was not an appropriate class representative and not because the class itself was deficient under Rule 23." *Id.*

Here, by contrast, the district court specifically found that the *Dean* plaintiffs *did* satisfy the typicality and adequacy requirements, JA184-86, but held that the *Dean* plaintiffs were "unable to establish that questions of law or fact common to class members predominate[d]," JA192. Class certification, in other words, failed for a class-based and not plaintiff-based reason, as the district court itself held. Pet. App. 36a. No equitable principle allows re-

litigation of that question after the statute of limitations has run.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

ABBY F. RUDZIN
ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

BRADLEY N. GARCIA
JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

SETH ARONSON
(Counsel of Record)
saronson@omm.com
WILLIAM K. PAO
BRITTANY ROGERS
MICHELLE C. LEU
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, Cal. 90071
(213) 430-6000

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