No. 21-505

In the Supreme Court of the United States

BANK OF AMERICA CORPORATION, ET AL.,
Petitioners,

v.

FUND LIQUIDATION HOLDINGS LLC, AS ASSIGNEE AND SUCCESSOR-IN-INTEREST TO FRONTPOINT ASIAN EVENT DRIVEN FUND L.P., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

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[1] No counsel for any party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amicus curiae*, its members, or its counsel—made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were timely notified more than 10 days prior to filing, and all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court's longstanding precedents recognize, Article III limits federal court jurisdiction to "real controvers[ies] with real impact *on real persons*." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (emphasis added) (citation omitted). That limitation is critical to preserving the separation of powers enshrined in the Constitution, which prohibits federal courts from exercising the judicial power except when there is a real controversy to be resolved. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 752 (1984).

The Second Circuit in this case flagrantly discarded that fundamental principle. The court allowed a suit to proceed even after concluding that the named plaintiffs did not exist. The court held that dismissal was unnecessary, because there was a real party that *could* have (but did not) timely bring a claim. And the Second Circuit permitted the real party to intervene in the case via substitution, even though the statute of limitations had run. The court purported to do so based on "practical" considerations, but this Court's precedents clearly establish that such results-oriented reasoning is not permitted when it comes to constitutional standing requirements. And in any event, the decision below is deeply *impractical*, and opens the door to significant mischief.

Petitioners have already persuasively explained the circuit split among the lower courts on the question presented, Pet. 10-15, and why the decision below is wrong, *id.* at 15-18. The Chamber submits this brief to elaborate upon how this case is exceptionally important, both jurisprudentially and practically, and thus warrants review.

First, the decision below is irreconcilable with this Court's precedents regarding the fundamental and inflexible nature of Article III standing, and with the common law prohibition on suits with no proper plaintiff. By its own terms, the Second Circuit's decision was motivated by "practical" considerations and by the court's view that applying Article III's requirements on the facts of the case would not serve the "concerns animating" Article III. But this Court has insisted on strict compliance with Article III's rigorous requirements, and has consistently rejected arguments that the policies underlying those requirements can justify jettisoning the requirements themselves. The decision below compounds this error by mischaracterizing the relevant historical record. The Second Circuit ignored an unbroken line of common law cases rejecting precisely the kind of plaintiff-less lawsuits at issue here.

Second, the Second Circuit's rule will have severe, adverse policy consequences and is deeply *impractical*. The decision below openly permits unnamed and unknown parties to control litigation from the shadows, exacerbating serious problems that are beginning to arise in the fast-growing practice of litigation funding. The Second Circuit's holding also gravely undermines the purposes of statutes of limitations by rewarding plaintiffs who sleep on their rights, protracting litigation, and creating substantial uncertainty for defendants. And those practical concerns are especially troubling in the class-action context, where misalignments between the interests of attorneys and parties in interest already abound.

This Court's review is warranted to resolve profound confusion in the lower courts about what Article III requires, and to prevent the serious

problems that will result absent this Court's intervention. The petition should be granted.

ARGUMENT

I. THE SECOND CIRCUIT'S RULE IS FUNDAMENTALLY OUT OF STEP WITH THIS COURT'S ARTICLE III PRECEDENTS

The Second Circuit's decision is fundamentally inconsistent with the Court's standing jurisprudence. Contrary to the decision below, a judge may not discard Article III's requirements based on a conclusion that they lead to a harsh result in a given case. And the historical record only further demonstrates that suits by nonexistent plaintiffs are not amenable to judicial resolution.

A. Review Is Needed To Reaffirm That Article III's Strict Mandates Do Not Permit Results-Oriented Exceptions

The Second Circuit recognized "the requirement that 'the party invoking jurisdiction ha[ve] the requisite stake in the outcome when the suit [i]s filed.'" App. 37a (alterations in original) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). And the court concluded that all plaintiffs named in the original complaint "lacked Article III standing at the case's initiation." *Id.* at 18a (capitalization normalized). But the court nevertheless thought dismissal would be a "needless formality." *Id.* at 43a. The Second Circuit instead adopted what it considered a "more practical approach" to Article III standing, *id.*, based on its perception that "'the concerns animating [Article III standing] are absent' where a real party in interest exists and is willing to join an action." *Id.* at 31a (quoting *Cortlandt St.*

Recovery Corp. v. Hellas Telecomms. S.à.r.l., 790 F.3d 411, 427 (2d Cir. 2015) (Sack, J., concurring)).

That ruling cannot be squared with this Court's Article III precedents. Article III standing is a "'bedrock requirement,'" and this Court "ha[s] always insisted on strict compliance" with it. *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) (citation omitted). This Court has long emphasized that "neither the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous Art. III requirements themselves"—as "[s]atisfaction of the former cannot substitute for a demonstration of" the latter. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). Just last term, the Court reiterated that federal courts shall not "loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

"Strict compliance" is required because of the critical role Article III plays in the constitutional separation of powers. Article III, § 2 provides the federal courts jurisdiction over a dispute only if it is a "[c]ase" or "[c]ontrovers[y]." U.S. Const. art. III., § 2. At its most fundamental level, this constitutional limit on jurisdiction means that "a federal court may resolve only 'a real controversy with real impact *on real persons*.'" *TransUnion*, 141 S. Ct. at 2203 (emphasis added) (quoting *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment)). Absent this critical limitation, courts would be able to overreach into areas properly committed to the legislative and executive branches by rendering

advisory opinions in cases where no controversy existed.

The Second Circuit's "practical" approach to standing is squarely at odds with this bedrock principle. Here, after concluding that the named plaintiffs lacked "legal existence when the complaint was filed," App. 30a, the Second Circuit nevertheless allowed the case to go forward. But the Article III standing inquiry specifically asks whether "the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*." *Davis*, 554 U.S. at 734 (emphasis added). If the answer is no, then the inquiry must end. A court cannot define the limits of its own power through its own "practical" inquiry regarding the limits of that power. As this Court has explained, Article III "states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations." *Valley Forge Christian Coll.*, 454 U.S. at 475.[2] To permit courts to extend their jurisdiction beyond its

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[2] The Second Circuit's discussion of diversity jurisdiction exemplifies its confusion. The court supported its conclusion that the lack of Article III standing at the outset of a suit is not fatal by citing the complete diversity requirement, as that requirement (some courts have held) may be cured by "events occurring after the filing of a complaint." App. 40a (citation omitted). But the complete diversity requirement is created by *statute*, not the Constitution. The court acknowledged this difference, but seemed to make nothing of it. *Id.* at 40a-41a. Treating the strict mandates of Article III as nothing more than a flexible default rule that may be bent or set aside in the name of expediency deeply misapprehends the unique role of Article III in our constitutional system. The "principle [most] fundamental to the judiciary's proper role in our system of government" cannot be so lightly discarded. *Raines*, 521 U.S. at 818 (citation omitted).

traditional boundaries based on their own view of what is "practical" would expand the judicial power far beyond what the Framers envisioned.

This threshold question regarding the proper role of the judiciary within the separation of powers is an area where this Court has traditionally granted review, in the exercise of its supervisory authority over the federal courts. *See Valley Forge Christian Coll.*, 454 U.S. at 470 (stating that certiorari was granted "[b]ecause of the unusually broad and novel view of standing . . . adopted by the Court of Appeals"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (stating that certiorari was granted "[b]ecause of the importance of the issue and the novel view of standing adopted by the Court of Appeals").

The Court's review is critical in such cases to delimit and enforce the proper boundaries of the judiciary's role in constitutional separation of powers, as without clear guidance courts may overstep those boundaries and intrude upon powers vested in the other coequal branches. Because the Second Circuit's rule substantially reworks the boundaries of judicial power, review is vitally important here.

B. The Historical Record Weighs Strongly Against The Second Circuit's Rule

As this Court has explained, "history is particularly relevant to the constitutional standing inquiry" because "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523

U.S. 83, 102 (1998)); *see id.* (finding standing based in part on "the long tradition of *qui tam* actions in England and the American Colonies").

The Second Circuit's decision badly misconstrues the historical practice relating to suits like this one, and thus conflicts with this aspect of the Court's Article III jurisprudence as well. An examination of the historical record demonstrates that courts traditionally did *not* permit suits by nonexistent plaintiffs to proceed, by substitution or otherwise.

In *Hurst v. Fisher*, for instance, the Supreme Court of Pennsylvania recognized that "[n]othing can be more clear than that at law a suit can not be brought in the name of a deceased person." 1 Watts & Serg. 438, 441, 1841 WL 4117, at *1 (Pa. 1841). The named plaintiff died before the lawsuit was brought, but it was argued that the action was "brought for the use of an equitable assignee." *Id.* at *2. The court rejected that argument and held that "[t]he death of a plaintiff before suit [is] brought . . . not only suspends the action, but destroys it altogether," *id.* at *4, and "compel[s] . . . bring[ing] another suit," *id.* at *3.

Similarly, in *Brooks v. Boston & Northern Street Railway Co.*, the Supreme Judicial Court of Massachusetts held that "[n]o judgment can be entered in a case which never has had an existence and is a nullity" due to the death of the plaintiff before the suit was brought. 97 N.E. 760, 761 (Mass. 1912). The court specifically rejected the argument that "the administrator [of the plaintiff's estate] now may be substituted as party plaintiff," which would impermissibly "give[] a body and a substance" to "something phantasmal and visionary." *Id.* at 760-61.

Other examples abound. *See MacAffer v. Boston & Maine Railroad*, 197 N.E. 328, 329 (N.Y. 1935) (dismissal required where "plaintiff ha[s] no corporate existence and hence no capacity to sue"); *Thompson v. Peck*, 181 A. 597, 598 (Pa. 1935) ("It is fundamental that an action at law requires a person or entity which has the right to bring the action . . . . By its very terms, an action at law implies the existence of legal parties . . . [which] must be entities which the law recognizes as competent."); *Banks v. Emps.' Liability Assurance Corp.*, 4 F.R.D. 179, 180 (W.D. Mo. 1944) (dismissal required where "[t]he original suit [was] filed after the death of the named plaintiff").

By contrast, the decision below did not cite a *single* case where a common law court entertained suit by a nonexistent plaintiff. Such suits therefore would plainly not be of the "sort traditionally amenable to, and resolved by, the judicial process" as the Framers would have understood it. *Vermont Agency of Nat. Res.*, 529 U.S. at 774 (citation omitted). That alone is grounds to reject the Second Circuit's novel rule.

Remarkably, however, the Second Circuit claimed that history *supported* a rule with no precedent whatsoever in the common law. The court based its conclusion on the historical change in who is considered a proper party in cases involving an assignment: at early common law, the holder of the legal right (i.e. the assignor) was considered the proper plaintiff, but gradually the law shifted to allow the holder of the beneficial interest (i.e. the assignee) to bring suit. App. 34a-36a. In the Second Circuit's view, this must have meant that "the rule concerning which party's name a case must be prosecuted under (either the nominal plaintiff or the real party in

interest) is nonjurisdictional," and "if we can alter the party in whose name a case must be prosecuted without offending Article III, it stands to reason that failing to initially name the correct party is not itself a constitutional problem." *Id.* at 36a.

But that conclusion simply does not follow. The fact that the rules as to *who* should be deemed the proper plaintiff might evolve over time does not mean that a case may proceed where there was concededly *no* proper plaintiff before the court. In that situation, dismissal is obviously proper—today or at common law. *See, e.g.*, *Wells v. Merrill*, 204 A.D. 696, 697 (N.Y. App. Div. 1923) (dismissing complaint where plaintiff alleged neither legal right nor beneficial interest).

The panel's discussion of history was thus deeply misguided. And the *actual* relevant history (which the panel ignored) makes clear that suits by nonexistent plaintiffs were not "traditionally amenable to . . . the judicial process." *Steel Co.*, 523 U.S. at 102. That historical record weighs strongly against the Second Circuit's radical departure from fundamental, long-recognized principles of standing.

II. THE SECOND CIRCUIT'S RULE IS DEEPLY IMPRACTICAL AND WARRANTS THIS COURT'S REVIEW

The Second Circuit's purported "practical approach" is in fact deeply impractical, opening the door to mischief by anonymous parties and undermining the important goals of statutes of limitations. The practical ramifications of the Second Circuit rule underscore the need for review here.

A. The Second Circuit's Rule Will Open The Door To Significant Mischief

The Second Circuit's rule gravely exacerbates the real threat to judicial legitimacy posed by the increasingly common practice of third-party litigation funding, in which often unnamed and unknown parties control litigation from the shadows. Third-party litigation funding is a recent development, having "entered the U.S. commercial market in the mid-2000s."[3] But in little more than a decade, it has grown to "a multibillion-dollar global industry."[4]

The decision below will seriously exacerbate concerns relating to such litigation funding. The Second Circuit held that a party in interest can opt *not* to timely bring suit but instead to "pull[] the strings behind the scenes" using nonexistent nominal plaintiffs as proxies. App. 10a. Thus, under the Second Circuit's rule, a party can opt to remain anonymous and shielded from scrutiny while controlling every aspect of a litigation because no actual plaintiff exists. Indeed, that is precisely what happened below. The allegations in the complaint relate to conduct allegedly occurring between 2007

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[3] Mary Ellen Egan, *Other People's Money: Rise of litigation finance companies raises legal and ethical concerns*, ABA Journal (Dec. 1, 2018), https://www.abajournal.com/magazine/article/litigation_finance_legal_ethical_concerns.

[4] Egan, *supra*; *see also* U.S. Chamber Inst. For Legal Reform, *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later* 6-7, 12-25 (Jan. 2020) ("*Selling More Lawsuits*"), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf (citing $9.52 billion under management by U.S. funders).

and 2011 and allegedly discovered in 2013. *Id.* at 9a. The named plaintiffs purported to assign their claims to Fund Liquidation in July 2011. *See id.* at 53a. And the named plaintiffs were dissolved in November 2011 and December 2012. *Id.* at 10a. Nevertheless, Fund Liquidation opted *not* to bring suit in 2013. The statute of limitations ran out in June 2017, *see id.* at 63a, but it was only in late 2017 that the named plaintiffs were revealed to be nonexistent, and later still when it was revealed that "Fund Liquidation . . . was, and had always been, the real plaintiff behind the case," *id.* at 11a. Thus, for *four years*, the only party pulling the strings in this case was not subject to scrutiny by the defendants or the court. That is an astonishing result that entirely upends the ordinary adversary process of litigation.

These concerns are far from hypothetical given the swift rise of third-party litigation funding and the problems that practice has created, particularly in the class-action context. In the normal litigation funding scenario, litigation funders identify a *real* plaintiff to bring a suit.[5] That scenario already raises concerns regarding the misalignment between the goals and incentives of the funders, on the one hand, and those of the plaintiff, on the other.

Third-party litigation funding undermines the foundational principle that the plaintiff and his or her

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[5] *See generally Selling More Lawsuits, supra*, at 12-25 (explaining practical and ethical issues related to litigation funding, particularly in class-action context); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. Econ. & Pol'y 613, 627-35 (2012) (detailing negative consequences of unregulated litigation funding, including increased frivolous litigation and exacerbated principal-agent problems).

lawyer (not an unidentified third party) should control the prosecution of the underlying litigation.[6] That problem is keenly felt in the class-action context, in particular, where class action attorneys routinely privilege their own interests, or their funders' interests, over the interests of those whose legal rights are at stake.[7] Indeed, there are demonstrated examples of third-party litigation funders influencing plaintiffs to act in ways that are dangerous and contrary to plaintiffs' own interests.[8]

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[6] *See, e.g. Selling More Lawsuits*, *supra*, at 18; Kidd, *supra*, at 634 (explaining risk that litigation funding will "exacerbate the principal-agent problems already present in the legal profession").

[7] *See generally* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 470-71 (2000) ("In virtually every class action seeking money damages, the person with the most at stake financially is the attorney representing the class. The attorney's interest in securing the highest fee and the class members' interest in attaining the greatest recovery often diverge," as "class counsel's own self-interest may cause her to prefer early settlement to trial" and "[t]he class members, with so little at stake in the first place, have insufficient incentive to closely monitor class counsel and her strategic choices."); *Selling More Lawsuits*, *supra*, at 22-25, 31 (explaining that "class counsel and the named plaintiffs already have significant difficulty satisfying their fiduciary obligations to the class they are seeking to represent, and adding a funder to the class action mix only exacerbates that challenge and makes carrying out those fiduciary responsibilities all the more difficult").

[8] *See* Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times (Apr. 14, 2018), https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html (explaining that funders have led "hundreds, perhaps thousands of women" to receive unnecessary vaginal mesh removal surgery to drive up funders' profits, despite severe costs to women).

Litigation funders may seek to advance financial, political, ideological, or personal interests that are not aligned with the interests of the plaintiffs—and that are not evident from the papers. *See generally* Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding As A New Threat to Journalism*, 66 Am. U. L. Rev. 761, 769-83 (2017) (detailing examples of third-party-funded lawsuits brought to harass disfavored media entities); Davey Alba & Jennifer Chaussee, *Got a Beef With the Media? Pay Someone Else to Sue Them*, Wired (May 20, 2016), https://www.wired.com/2016/05/thiel-gawker-hulk-litigation-finance/ (same).

Litigation funding thus raises deep concerns related to party accountability, the goals of a lawsuit, and who makes the decisions in a lawsuit. These problems will only metastasize under the Second Circuit's rule. The duty that class-action counsel has to represent the interest of individual plaintiffs (rather than maximizing lawyers' and funders' proceeds) is completely undermined when *no named plaintiff* exists to act as a check on counsel. Litigation funders and class-action counsel can sue in the name of nonexistent plaintiffs before identifying *any* real parties in interest. Under the Second Circuit's rule, a real party in interest may later be substituted for the nonexistent named plaintiff. In the interim, funders and counsel can act purely in their own interest without the need to consult any real party whose rights are at stake.

The Second Circuit's rule likewise further enables funders who wish to advance financial, political, ideological, or personal interests without being held accountable for their actions. In the normal litigation funding scenario, a funder must at least identify

another *real* person to serve as a proxy plaintiff. However, it may in some cases be difficult to find a party willing to (1) be named in the suit and (2) surrender all control over the litigation. Proceeding via a nonexistent proxy plaintiff represents a far simpler path to achieve the funder's ends. And if the named plaintiff's nonexistence is never discovered, the funder achieves those ends without *ever* revealing his identity or goals. Under the Second Circuit's rule, the funder is able to proceed with such a strategy without any serious risk, because if the truth about the named plaintiff is uncovered, a real party in interest can simply substitute into the lawsuit at that stage.

The decision below tried to deflect these serious concerns by asserting that its rule "will not result in unchecked abusive practices by plaintiffs" as courts "retain[] discretion to dismiss the suit" if plaintiffs act in bad faith. App. 42a-43a. But that is wholly inadequate as a check on misconduct—as this case itself underscores. Here, the Second Circuit *rewarded* Fund Liquidation Holdings LLC for opting *not* to timely bring suit but instead to "pull[] the strings behind the scenes" using nonexistent nominal plaintiffs. *Id.* at 10a. So, the Second Circuit plainly believed that anonymously "pulling the strings" in litigation is not itself bad faith. And because the boundaries of "bad faith" are indeterminate, it is unclear whether any of the deeply concerning activity described above would actually be limited by such a requirement.

In any event, there is simply no reason to invite such mischief when settled principles of standing plainly foreclosed the tactics at issue here.

B. The Second Circuit's Rule Undermines The Purposes Of Statutes Of Limitations

Furthermore, the Second Circuit's rule has the additional practical harm of undermining the purposes of statutes of limitations—in litigation generally and in class actions in particular.

Limitations periods generally serve to prevent plaintiffs from sleeping on their rights, promote judicial economy, and provide defendants with certainty. *Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("[T]he basic policies of all limitations provisions [are] repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("[C]ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."). The Second Circuit's holding that "Article III is satisfied so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed," App. 30a, undermines each of those goals.

The Second Circuit's rule excuses plaintiffs who sleep on their rights. Here, for instance, the complaint alleges that the complained-of conduct was discovered in 2013. *Id.* at 9a. But Fund Liquidation opted *not* to bring suit in 2013. The statute of limitations ran out in June 2017, and only later that year did Fund Litigation attempt to join the litigation. *See id.* at 11a, 63a. The Second Circuit's approach thus invites counsel to file placeholder lawsuits within the limitations period and then try to find a real party in interest. And the real party in interest can later be substituted into the action, *regardless* of

whether it exercised its rights within the limitations period. In other words, so long as *someone* files within the limitations period, the limitations bar simply does not apply at all. The Second Circuit's approach thus dramatically undermines statues of limitations, excusing parties who sleep on their rights—or even those who deliberately choose to evade a limitations bar for strategic reasons.

The decision below also would unnecessarily strain judicial resources. The Second Circuit's rule mandates a counterfactual analysis under which a court asks whether the potential joiner would have had standing, if it had originally been named as plaintiff in the complaint. The Second Circuit imposes no time limit on when a joiner can come forward to try and save a plaintiff-less case,[9] meaning that parties may have to litigate complex factual questions (like whether an attempted assignment was successful) long after the relevant events occurred. *See* App. 12a. That is not to say courts are incapable of deciding these types of questions, but statutes of limitations generally "relieve[]" courts "of the burden" of answering precisely such questions "when a plaintiff has slept on his rights."

The decision below also undermines the interest in certainty that statutes of limitations are designed to promote. *Rotella*, 528 U.S. at 555. While a defendant may be on notice of a suit even if the plaintiff is nonexistent, the defendant's potential liability may

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[9] The court stated that substitution must be "within a reasonable time," App. 30a-31a, but the reason statutes of limitations exist is to establish a date certain, rather than subjecting litigants to the uncertainty associated with a flexible standard.

change dramatically if a new and different plaintiff is substituted. A named plaintiff may, for instance, bring only individual claims, or it may be apparent that the named plaintiff is not a suitable class representative. Once the statute of limitations expires, defendants generally would be able to safely assess the range of their potential liability. But under the Second Circuit's rule, a party in interest with a stronger claim as a class representative may be substituted into the action after the limitations period expires. Thus, substitution may upend a litigation that was near its conclusion, preventing defendants from enjoying the repose and certainty that usually comes when a limitations period lapses.

Similarly, the Second Circuit's rule permits litigants to end-run this Court's carefully calibrated jurisprudence on how statutes of limitations apply in the class action context. In particular, the Second Circuit's rule is incompatible with *China Agritech, Inc. v. Resh* and would undermine the important protections for class defendants that decision recognized. 138 S. Ct. 1800, 1806 (2018). In *China Agritech*, following the denial of class certification in two class actions filed *within* the limitations period, plaintiff Resh sought to bring a third class action a year and a half *after the statute of limitations had expired*. *Id.* at 1804-05. In an attempt to excuse the suit's untimeliness, Resh invoked the Court's decision in *American Pipe & Construction Co. v. Utah*, which held that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint to permit members of a failed class to intervene as individual plaintiffs in the still pending action. 414 U.S. 538, 552-53 (1974). But the Court in *China Agritech* held

that *American Pipe* is limited to subsequent *individual* actions. 138 S. Ct. at 1810 (*American Pipe* "does not provide for the extension of the statute of limitations . . . for institution of an untimely third class suit"). The Court held that this rule would promote "efficiency and economy of litigation," by "propel[ling] putative class representatives to file suit well within the limitation period and seek certification promptly." *Id.* at 1811.

The Second Circuit's rule is fundamentally incompatible with *China Agritech*. By permitting a putative class representative to intervene *after* the statute of limitations expires, the Second Circuit's rule permits *exactly* what *China Agritech* forbids. The Court in *China Agritech* specifically rejected the notion that "a plaintiff who waits out the statute of limitations [can] piggyback on an earlier, timely filed class action." *Id.* at 1806. But that is precisely what happened in this case. Fund Liquidation waited on the sidelines for four years as the litigation proceeded, and did not even reveal its existence until months after the statute of limitations had expired. App. 11a, 63a. Here, as in *China Agritech*, "efficiency and economy of litigation," weigh strongly in favor of a rule that will "propel putative class representatives to file suit well within the limitation period and seek certification promptly." 138 S. Ct. at 1811. The Second Circuit's rule would create the exact opposite incentives by encouraging sandbagging and delay.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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