

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CHINA AGRITECH, INC., )  
 )  
Petitioner, )  
 )  
v. ) No. 17-432  
 )  
MICHAEL H. RESH, ET AL., )  
 )  
Respondents. )  
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Pages: 1 through 62

Place: Washington, D.C.

Date: March 26, 2018

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CHINA AGRITECH, INC., )  
 Petitioner, )  
 v. ) No. 17-432  
 MICHAEL H. RESH, ET AL., )  
 Respondents. )

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Washington, D.C.

Monday, March 26, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

SETH A. ARONSON, ESQ., Los Angeles, California;  
 on behalf of the Petitioner.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf  
 of the Respondents.

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 17-432, China Agritech  
5 versus Resh.

6 Mr. Aronson.

7 ORAL ARGUMENT OF SETH A. ARONSON

8 ON BEHALF OF THE PETITIONER

9 MR. ARONSON: Mr. Chief Justice, and  
10 may it please the Court:

11 American Pipe gave individual  
12 claimants the benefit of equitable tolling for  
13 two reasons: One, the plaintiff had shown  
14 diligence by coming to court to assert his  
15 claim when class certification was denied; and,  
16 two, enforcing the statute of limitations would  
17 undermine Rule 23 by encouraging individual  
18 claimants to come forward while the class  
19 action was pending.

20 Neither of those reasons suggests that  
21 the Court today should expand American Pipe.  
22 There's no basis to extend tolling to absent  
23 class members who have not shown diligence  
24 by -- by not filing their own claims when class  
25 certification was denied, and once class

1 certification is denied, the extraordinary  
2 circumstance of -- of protective individual  
3 actions no longer exists.

4 JUSTICE GINSBURG: Is it your position  
5 that once certification is denied, then members  
6 of the now-defunct class can come in and bring  
7 their own individual actions, but that's it?  
8 That what -- what American Pipe preserves is a  
9 right -- if you were a putative member of a  
10 class, the class motion denied, you can then  
11 bring your individual claim but not any class  
12 claim?

13 MR. ARONSON: Yes, if the statute of  
14 limitations had expired and you are seeking  
15 equitable tolling, then American Pipe and  
16 Crown, Cork say that you can come to court and  
17 assert your individual claim. If the statute  
18 of limitations had not expired, another class  
19 action could be brought. And what we're  
20 proposing is that the Court honor the statute  
21 of limitations and require that anyone who  
22 wants to file a class action come to court  
23 early and in no event later than the -- the  
24 running of the statute of limitations.

25 JUSTICE KAGAN: Mr. Aronson --

1 CHIEF JUSTICE ROBERTS: But what about  
2 -- what about honoring Rule 23? It seems to me  
3 that you're creating an exception to the rule.  
4 If you just read it on its face, the statute of  
5 limitations hasn't run because of American Pipe  
6 and Crown, Cork, so why shouldn't that rule be  
7 available to you?

8 MR. ARONSON: The statute of  
9 limitations has run. What an individual can do  
10 is show that it's entitled to equitable  
11 tolling. And you do that two ways. By showing  
12 that -- by coming forward to the court and  
13 asserting your claim and to show that the  
14 extraordinary circumstances no longer exists.

15 So these people have their claims, but  
16 Rule 23 has run out on them. Remember, in this  
17 case, we already have a determination by a  
18 court twice that class certification is not  
19 appropriate.

20 The statute of limitations has run.  
21 American Pipe and Crown, Cork say you can bring  
22 your action, but it has to be an individual  
23 action.

24 JUSTICE KAGAN: I guess I don't  
25 understand, Mr. Aronson, why the diligence

1 argument doesn't work the same way in the  
2 second stage, after the denial, as it does in  
3 the first. In other words, in American Pipe,  
4 what we said was, if you're relying on a class  
5 action, that's diligence enough.

6 Now, you know, that might itself be  
7 controversial, contestable, but that's what we  
8 said in American Pipe. And I guess, having  
9 said that, I don't see why it's also not  
10 diligence enough to rely on a new class action.

11 MR. ARONSON: What American Pipe and  
12 Crown, Cork say, it is diligent to rely on the  
13 class action until class certification is  
14 denied. And at that point, you must come  
15 forward with your claim.

16 JUSTICE KAGAN: No, I don't -- I mean,  
17 it obviously didn't deal with this case, but  
18 the whole theory of American Pipe was that for  
19 any given individual, we weren't going to make  
20 them come forward; we were going to say  
21 reliance on a class action is sufficient to  
22 show diligence.

23 So, here, these people were doing just  
24 that. They're relying on a class action. It  
25 happens to be a second class action, but under

1 the same theory, they should be able to rely in  
2 order to show diligence, that that's what we  
3 said counted as diligence.

4 MR. ARONSON: But once the class  
5 action fails, it is not diligence to rely on an  
6 untimely class. That's the difference. The  
7 statute of limitations has run. And if the  
8 court enforces the statute of limitations, all  
9 of these issues would be solved up front. We  
10 would have before the court early on in the  
11 case all those who wish to present class  
12 claims, not wait until the end, not wait until  
13 after the statute of limitations, but everyone  
14 come in early so that the district court can  
15 pick the best representative and make the best  
16 class determinations early on.

17 JUSTICE SOTOMAYOR: I'm sorry, that's  
18 not -- the statute doesn't talk about the best  
19 represent -- best representative in terms of  
20 individual members. It says the best  
21 representative is who has the greatest  
22 financial interest.

23 So if I'm -- if my financial interest  
24 is moderately sized or small sized, there's no  
25 inducement for me to do anything other than



1 what American tolling tells me to do, which is  
2 to wait until the class issues are resolved  
3 before stepping forward.

4 MR. ARONSON: Well, Your Honor, I was  
5 -- I was answering the question from Justice  
6 Kagan in the broadest sense, but in the --  
7 under the Private Securities Litigation Reform  
8 Act, the PSLRA, which you mention, yes, there's  
9 a regime there that does require that these  
10 issues be resolved early on.

11 JUSTICE SOTOMAYOR: It does, but it  
12 says how, and that how is based on American  
13 tolling, in part, because it's suggesting who  
14 should be the lead counsel and the lead  
15 plaintiff.

16 MR. ARONSON: Right. The PSLRA does  
17 have a regime set out for who should be the  
18 lead plaintiff and the lead counsel, and it --  
19 and it anticipates that there will be multiple  
20 class actions filed and those class actions  
21 will be consolidated, and then the court will  
22 pick the best lead plaintiff and the best lead  
23 plaintiff's counsel. And that regime is --

24 JUSTICE SOTOMAYOR: So your regime is  
25 now encouraging the very thing that American

1 Pipe was trying to avoid, which is to have a  
2 multiplicity of suits being filed and  
3 encouraging every class member to come forth  
4 and file their own suit.

5 MR. ARONSON: No, Your Honor.

6 JUSTICE SOTOMAYOR: That's what you're  
7 suggesting has to be done.

8 MR. ARONSON: No, American Pipe and  
9 Crown, Cork say we don't want you bringing your  
10 individual actions while the class action is  
11 pending. It says nothing about bringing on  
12 your own class action.

13 JUSTICE SOTOMAYOR: Please tell me --

14 JUSTICE KAGAN: Well --

15 JUSTICE SOTOMAYOR: I'm sorry, go  
16 ahead.

17 JUSTICE KAGAN: Let's suppose you're  
18 right about that, Mr. Aronson, that what Rule  
19 23 is primarily about, it's a comparison of  
20 class actions to individual actions and saying  
21 there are times in which we think class actions  
22 is the more efficient way to do things than a  
23 million individual actions.

24 But, again, that interest seems to be  
25 the same here because, once the class

1 certification is denied, you're saying, well,  
2 now everybody has to come bring their  
3 individual actions.

4           And I think what somebody who was  
5 looking at the American Pipe reasoning might  
6 say is something to the effect of: No, just  
7 as, at time one, it made more sense to have a  
8 class action than a thousand individual  
9 actions, so too, at time two, it makes more  
10 sense to have a class action than a thousand  
11 individual actions.

12           Nothing has changed.

13           MR. ARONSON: Well, American Pipe and  
14 Crown, Cork say you bring your individual  
15 actions. So this is not my proposal. It's  
16 what the courts have said should happen  
17 because --

18           JUSTICE KAGAN: Well, here, again, of  
19 course, they didn't deal with this case. All  
20 I'm suggesting is that both interests that they  
21 mention are served in the identical way with  
22 respect to what should happen after denial of a  
23 class certification motion as before.

24           MR. ARONSON: In the abstract, yes,  
25 Your Honor, but when the statute of limitations

1 intervenes and it does cut off rights, then we  
2 have to see whether or not the individual  
3 members are entitled to equitable tolling.

4 JUSTICE KAGAN: Well, there was always  
5 a question in American Pipe that we were doing  
6 something extraordinary, that we were saying it  
7 doesn't matter that the statute of limitations  
8 has run on you. And we did it for two reasons:  
9 Because we think -- thought that there was  
10 enough diligence and because we thought that  
11 Rule 23 policies indicated that we should  
12 encourage the class action device rather than  
13 the individual action device.

14 And here, again, the exact same thing  
15 is true. Diligence is shown in the same way by  
16 reliance on the class, and, once again, even  
17 after the denial of a single motion for class  
18 certification, Rule 23 would indicate that we  
19 don't want to have a million individual suits  
20 but instead want to encourage a class.

21 MR. ARONSON: Well, Your Honor, it is  
22 not reasonable to rely on a class action where  
23 the -- where the statute of limitations has  
24 already expired.

25 If you -- if we enforce a statute of

1 limitations, Rule 23's interests would be  
2 served because we would have the classes coming  
3 forward early. And those who want to lead the  
4 class who feel they can do a better job than  
5 someone else will come forth to the court, make  
6 their case, present their class representative,  
7 and the court can decide which is the best way  
8 to proceed.

9 That's much -- much more efficient but  
10 much more in line with Rule 23 than having  
11 seriatim shots at trying to get a class  
12 certified, which is what we had here.

13 JUSTICE GORSUCH: Counsel --

14 JUSTICE SOTOMAYOR: Is it -- I'm  
15 sorry.

16 JUSTICE GORSUCH: -- I just -- no,  
17 please go ahead.

18 JUSTICE SOTOMAYOR: My question is,  
19 does the reason why the class was denied have  
20 any bearing on the rule you're proposing? I  
21 mean, I see various different potential kinds  
22 of reasons.

23 Let's say that the plaintiff is  
24 inadequate, like happened in the second case  
25 here, that there was some collusion between

1 plaintiff's counsel -- and I -- I'm using a  
2 loaded term, but I'm -- more as a  
3 hypothetical -- which is the plaintiff isn't  
4 representative of the class. The plaintiff has  
5 a special relationship with counsel.

6 Any of those inadequacies of  
7 plaintiff's counsel, is that different from a  
8 deficiency in pleading in your mind?

9 MR. ARONSON: It is until you get to  
10 the statute of limitations. But, yes, if  
11 there's a class-wide defect, that's one thing.  
12 And that's what happened in the first class  
13 here, where there was a ruling from the court  
14 that this case cannot go forward --

15 JUSTICE SOTOMAYOR: Well, all right.  
16 So are you saying that if that ruling had been  
17 that plaintiff's counsel was inadequate, the  
18 former -- the Third Circuit rule, let's call  
19 it, that that wouldn't bar a subsequent class  
20 action?

21 MR. ARONSON: It would if the statute  
22 of limitations had run.

23 JUSTICE SOTOMAYOR: So you don't see  
24 the reason for the failure of the class to have  
25 any bearing on the right of a subsequent class

1 to be formed?

2 MR. ARONSON: Not once the -- the  
3 statute of limitations has expired. It'd --  
4 that person who is part of the class who wants  
5 to proceed can come forward with his or her  
6 individual claim.

7 But if we follow the statute of  
8 limitations, again, and we have multiple class  
9 actions that are decided at the outset of who's  
10 the best lead plaintiff, and something happens  
11 -- and -- and they join those cases, whether  
12 through consolidation or however they join  
13 them, those other people who want to lead the  
14 class will be part of this case.

15 So, if something happens with the lead  
16 plaintiff, then there's someone else right  
17 there who can step right in and say, okay, that  
18 lead plaintiff, the lead plaintiff might have  
19 died, or something might have happened with the  
20 lead plaintiff, there will be others there  
21 lining up ready to take over.

22 That's why enforcing the statute of  
23 limitations would serve the interests of the  
24 class members and serve the interests of Rule  
25 23 by having all of this decided at the outset.

1 JUSTICE GORSUCH: Counsel, just  
2 returning to where the Chief Justice started  
3 us, under American Pipe, we say that equitable  
4 tolling gets you a new claim here. And you  
5 accept that.

6 But you ask us to write an exception  
7 to Rule 23. So you get a new claim, except for  
8 Rule 23. You don't get the benefit of that  
9 rule.

10 Is there another circumstance where  
11 courts have allowed equitable tolling but  
12 denied access to procedural mechanisms in a  
13 subsequent suit?

14 MR. ARONSON: Well, yes, there are.  
15 There are class action waivers that have been  
16 upheld by this Court.

17 JUSTICE GORSUCH: No, I'm talking  
18 about after equitable tolling, that this Court  
19 has imposed and allowed --

20 MR. ARONSON: Not --

21 JUSTICE GORSUCH: -- a new suit, can  
22 you think of another example where in that new  
23 suit the equitably tolled plaintiff is  
24 forbidden from accessing a particular  
25 procedural right --



1 MR. ARONSON: Well --

2 JUSTICE GORSUCH: -- otherwise  
3 available to all litigants?

4 MR. ARONSON: I'm not aware of another  
5 procedural rule, but the -- it directly applies  
6 here under Rule 23 because the absent class  
7 members, their claims are untimely. They  
8 cannot be abrogated. The absent class members  
9 who sit on their rights have their claims  
10 expire. So there -- there cannot be a class of  
11 untimely class members.

12 What we --

13 JUSTICE SOTOMAYOR: I'm sorry, you're  
14 creating that rule. I think the question was,  
15 is there any other situation where we have  
16 equitably tolled someone's right to bring a  
17 suit and deprived them of a -- of a procedural  
18 right?

19 MR. ARONSON: I'm not aware of any.  
20 But we're not asking the Court to write a new  
21 rule. We're asking the Court to apply American  
22 Pipe.

23 JUSTICE SOTOMAYOR: Oh, you are,  
24 because you're -- by its terms, and we said it  
25 in Shady Grove, Rule 23 is a procedural

1 mechanism that -- that is available to everyone  
2 who can meet its requirements.

3 MR. ARONSON: Right. But Shady Grove  
4 is different from Rule -- from -- from this  
5 case and equitable tolling in this sense: Last  
6 term, in the CalPERS versus ANZ Securities  
7 case, this Court said that the origins of  
8 American Pipe tolling do not come from Rule 23.  
9 Rule 23 says nothing about statute of  
10 limitations, tolling, or -- or limitations.

11 The American Pipe rule comes from  
12 traditional principles of equity, and those  
13 principles require diligence and extraordinary  
14 circumstances.

15 JUSTICE SOTOMAYOR: So it seems to me  
16 that what you're proposing is that we give  
17 preclusive effect, something we've said doesn't  
18 exist, to bar named plaintiffs in a second suit  
19 to whatever the findings of the court -- prior  
20 court were with respect to the class. So  
21 you're asking us to say: No, no, no, there is  
22 a preclusive effect.

23 MR. ARONSON: No --

24 JUSTICE SOTOMAYOR: It stops you from  
25 invoking a class act -- your class action

1 rights in a second suit.

2 MR. ARONSON: We're not claiming  
3 preclusive effect at all. And we know from  
4 Smith versus Bayer we could not bind an  
5 absolute --

6 JUSTICE SOTOMAYOR: But I don't  
7 understand how it's not.

8 MR. ARONSON: Because we have a  
9 statute of limitations that's -- that's cutting  
10 off their claims, not a preclusive effect.

11 JUSTICE SOTOMAYOR: What you're asking  
12 us is to write a new American Pipe rule.

13 MR. ARONSON: No, we're asking the  
14 Court to apply the statute of limitations as  
15 written.

16 JUSTICE ALITO: Are you asking for an  
17 exception to equitable tolling, or are you  
18 argue -- arguing that these claims are not  
19 equitably tolled because there was not  
20 diligence with respect to them?

21 MR. ARONSON: The latter, Your Honor.  
22 Equitable tolling requires diligence and  
23 extraordinary circumstances. And someone who  
24 sleeps on their rights and doesn't present her  
25 claim, those claims will expire when the

1 statute of limitation expires.

2           Someone who's -- who's just sitting  
3 back and doing nothing is not entitled to  
4 equity. We're not aware of any case in which  
5 someone slept on their rights and was given  
6 equity.

7           JUSTICE GINSBURG: But the person --

8           JUSTICE KENNEDY: Well, not -- not on  
9 the first class action. On the first class  
10 action, you might not have ever heard about it  
11 until it's dismissed, and then you say, oh,  
12 well, there was an action there, and -- and you  
13 have the -- you have tolling.

14           MR. ARONSON: Right, that --

15           JUSTICE KENNEDY: For the -- for the  
16 -- for the first one.

17           MR. ARONSON: Right, you -- you have  
18 tolling for whenever --

19           JUSTICE KENNEDY: You don't have to  
20 show diligence. You just have to show there  
21 was a class action pending.

22           MR. ARONSON: Well, the diligence  
23 shown is asserting your claim if the statute of  
24 limitations has expired.

25           JUSTICE KENNEDY: Once the class

1 action has ended.

2 MR. ARONSON: Correct.

3 JUSTICE KENNEDY: Yes.

4 MR. ARONSON: Right.

5 JUSTICE KAGAN: But that --

6 JUSTICE GINSBURG: You're diligent  
7 with respect to bringing -- a class action  
8 terminates. You then file as timely as you can  
9 after that, and you say the individual claim is  
10 all right, but that person who has not slept on  
11 her rights because she has brought it  
12 immediately can't bring her suit as a class?

13 MR. ARONSON: Correct, because it  
14 would be being brought on behalf of other class  
15 members who were not entitled to equitable  
16 tolling because they have done nothing.

17 We cannot use Rule 23 to resuscitate  
18 claims that are not alive. That would be a  
19 Rules Enabling Act issue.

20 CHIEF JUSTICE ROBERTS: So -- so what  
21 they all have to do is they all have to file  
22 individual claims, every -- every member of the  
23 class?

24 MR. ARONSON: Anyone who wants to file  
25 a claim can come forward and file a claim.

1 That's exactly what American Pipe said when  
2 they said that they should move to intervene,  
3 and Crown, Cork, which says that they should --  
4 they can file their own class -- their own  
5 complaint. And --

6 JUSTICE BREYER: If the judge -- if a  
7 lawyer walks into the judge's chambers and says  
8 here in my hand I have 10,000 complaints, and  
9 he says, you know, they're identical, would it  
10 be all right to consider those as a class, just  
11 those? That's okay because they all wrote out  
12 the complaint, right?

13 MR. ARONSON: Well, the -- the federal  
14 courts are equipped to deal with -- with mass  
15 torts, with -- with mass situations like that,  
16 Justice Breyer. And they -- they deal with  
17 that whether there's a class or not.

18 So the fact that it happens after the  
19 class shouldn't matter. The courts have  
20 consolidation orders. They have the full  
21 panoply of -- of docket management that our  
22 federal judges have on a day-to-day basis.

23 Sometimes, yeah, there are claims that  
24 come by the thousands. Sometimes they don't.

25 JUSTICE KENNEDY: Suppose, and this

1 is -- the -- the first class action is  
2 dismissed. A thousand plaintiffs diligently  
3 bring -- or 100 plaintiffs diligently bring  
4 their individual causes of action within the  
5 statute.

6 At that point, would your rule say if  
7 they can -- there can be a second class action,  
8 but there's no further repose --

9 MR. ARONSON: Well --

10 JUSTICE KENNEDY: -- or no further  
11 tolling?

12 MR. ARONSON: Well, it's not my rule.  
13 It's the statute of limitations. But if -- if  
14 I understand the hypothetical, if the statute  
15 has not yet run --

16 JUSTICE KENNEDY: Correct.

17 MR. ARONSON: -- after the denial of  
18 the first class, you can file a second class  
19 action.

20 JUSTICE KENNEDY: Right.

21 MR. ARONSON: Because it's not binding  
22 on absent class members. We know that from  
23 Smith versus Bayer.

24 JUSTICE SOTOMAYOR: I'm sorry, you're  
25 basically saying there's a statute of

1 limitations to bring a class action. There's  
2 no statute of limitations under American Pipe  
3 after the statute has expired for bringing an  
4 individual claim.

5 MR. ARONSON: Well --

6 JUSTICE SOTOMAYOR: So, assuming  
7 Justice Kennedy's hypothetical, cases lasted  
8 more than the statute of limitations, there's a  
9 thousand individual suits that were filed,  
10 could the Court then say: Those thousand I'm  
11 going to treat as a class? You're saying no.

12 MR. ARONSON: If it's -- I'm not  
13 saying no to that. If it's a class of those  
14 thousand people only, I could see that the  
15 court might want to deal with that, but it  
16 doesn't have to be a class. The court can deal  
17 with it however it wants to.

18 JUSTICE SOTOMAYOR: I'm sorry, this  
19 makes no sense to me. You just said the  
20 statute of limitations would stop it from being  
21 a class if it's run.

22 MR. ARONSON: It would stop --

23 JUSTICE SOTOMAYOR: But the court  
24 could do it anyway?

25 MR. ARONSON: Because the court cannot



1 certify a class of absent class members who  
2 have slept on their rights and are not entitled  
3 to tolling. But if a thousand people show up  
4 in court, the -- there's many things that the  
5 judge can do to deal with the thousand people.  
6 It happens all the time.

7           It's not optimum, but that could  
8 happen even if there wasn't a class in the  
9 first place. There could be some event that  
10 occurs. People say I don't want to file a  
11 class action; I want to file my own action.  
12 And a thousand other people say the same thing.  
13 That can happen. And -- and American Pipe  
14 doesn't save them. A statute of limitations  
15 would apply for their claims, and they were all  
16 diligent by -- by stepping forward, but they're  
17 not diligent if they sit back and wait until  
18 someone tries a class action twice, the statute  
19 of limitations fails. At that point, they have  
20 to do something. And equity requires that they  
21 come into court and file their complaint.

22           JUSTICE SOTOMAYOR: But not as a  
23 class?

24           MR. ARONSON: Not as a class. Because  
25 the -- the interest that Crown, Cork and

1 American Pipe were protecting was -- and this  
2 is the extraordinary circumstance. What the  
3 court said was we have a class action going  
4 here. We don't want all of you individuals out  
5 there to file your individual actions while the  
6 class action is pending. Let's give the class  
7 action a chance and see if it works.

8           And if it doesn't work, okay, the  
9 extraordinary circumstance is gone. Now step  
10 forward. Your claims are alive, you have your  
11 claims. We're not taking away anyone's claims.  
12 The class didn't work and the interest was  
13 protecting individual claims. Those are the  
14 ones that are entitled to tolling, not class  
15 claims.

16           Neither of those courts said don't  
17 come forward with your class action. And  
18 multiple class actions can be brought, as you  
19 pointed out, Your Honor, in the Private  
20 Securities Litigation Reform Act. And if you  
21 enforce the statute of limitations, you push  
22 all of this to the front end of the case and  
23 not to the back end.

24           And the back end is where we get into  
25 all these problems as to whether or not we have

1 equitable tolling, whether or not people have  
2 asserted their rights. They will -- they will  
3 all be protected because they will have the  
4 best class representatives and the court will  
5 be able to make the best class decision at the  
6 outset.

7           That -- and that -- all we're asking  
8 the Court to do is apply the statute of  
9 limitations. We're not asking to -- to come up  
10 with a new rule. We have the rule. Congress  
11 gave us the rule. And what we're proposing is  
12 that we not expand the intrusion into the  
13 statute of limitations with another court-made  
14 doctrine that we did in American Pipe by saying  
15 now it applies to class actions. There's no  
16 justification for that. There's no basis.

17           JUSTICE KAGAN: Well, Mr. Aronson, let  
18 me give you a hypothetical. I mean, suppose  
19 it's one of these class actions where there's  
20 actually a very serious wrong and aggregate  
21 damages are very high, but each individual  
22 person's damages are very low, \$32.

23           And there's a class certification  
24 motion, and let's say in this there is -- that  
25 motion is denied for a reason that really has

1 nothing to do with whether this is something  
2 that's properly treated by a class action.  
3 Let's suppose that, just on the individual  
4 facts of the case, this was a bad named  
5 plaintiff, not adequate -- not an adequate  
6 representative.

7 Your theory would then say: Okay, so  
8 he's dismissed, the statute of limitations has  
9 run because these things take a long time, and  
10 then all these people with extremely valid  
11 claims, claims that we would want to be brought  
12 in order to force defendants to internalize the  
13 costs of their illegal behavior, well, too bad,  
14 that just can't go forward.

15 MR. ARONSON: Under our theory, if you  
16 enforce the statute of limitations and announce  
17 that we have a statute of limitations, we're  
18 not going to allow all of this back-end  
19 maneuvering, then people will step forward so  
20 that if there's a problem --

21 JUSTICE KAGAN: They all have claims  
22 that are \$32 claims.

23 MR. ARONSON: Well, 30 -- you know,  
24 people have \$32 claims and they have to make a  
25 decision as to whether or not they want to

1 pursue the \$32 million -- \$32 claims.

2 JUSTICE KAGAN: But that is the entire  
3 purpose of our -- of -- of Rule 23, is that we  
4 understand that with respect to some category  
5 of claims, we're not going to have them  
6 individually or it will be so ridiculous if we  
7 have them individually that we would prefer the  
8 class action device.

9 MR. ARONSON: If it works. But if the  
10 class action device doesn't work, then the --  
11 then the individuals have their own claims.

12 JUSTICE KAGAN: Well, but, again,  
13 here, it's not working just for some reason  
14 that has nothing to do with the appropriateness  
15 of class treatment; it just has to do with the  
16 fact that one named plaintiff is not a good  
17 named plaintiff.

18 MR. ARONSON: Right. And if -- if we  
19 have all of these cases up front by enforcing a  
20 statute of limitations and requiring anyone who  
21 wants to lead the class, and, hopefully, there  
22 will be more than one and not others sitting  
23 back and waiting for the statute of limitations  
24 to -- to expire, but coming up forward and  
25 something happens with the class representative

1 that you mentioned, there will be someone else  
2 waiting there because they will have filed  
3 their claims early, they would have been part  
4 of that case and can step forward, and they  
5 could fix that.

6 And even if the statute had run and if  
7 they were part of the case, then it would  
8 relate back, so the statute of limitations  
9 would not be an issue --

10 JUSTICE KENNEDY: Does --

11 MR. ARONSON: -- if we get people in  
12 court early.

13 JUSTICE KENNEDY: In -- in that  
14 instance, is there ever an amended complaint  
15 that relates back?

16 MR. ARONSON: You can have an amended  
17 complaint that relates back also, Justice  
18 Kennedy. So it's the -- it's the -- the  
19 subsequent class action where the evils are,  
20 not in the initial class action. And if we get  
21 everyone up front in that class action, then  
22 you'll have -- you won't have this problem,  
23 because you'll have other class representatives  
24 ready to go and can step right up and they will  
25 have been part of the litigation. The

1 litigation should not miss a beat at that  
2 point.

3 But if there's a problem with a class  
4 representative and there's someone else who  
5 says, you know what, I wasn't chosen to lead  
6 this class, but I think I can do a good job,  
7 and -- and apply to the court to do that.

8 I'd like to reserve the rest of my  
9 time.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. Frederick.

13 ORAL ARGUMENT OF DAVID C. FREDERICK

14 ON BEHALF OF THE RESPONDENTS

15 MR. FREDERICK: Thank you, Mr. Chief  
16 Justice, and may it please the Court:

17 I'd like to start with the question  
18 that you posed and the one that Justice Gorsuch  
19 posed about the application of Rule 23.  
20 Petitioner concedes that every individual class  
21 member had a timely claim at the time the  
22 second class certification motion was denied.  
23 That concession means that you have to consider  
24 whether or not there is some exception to the  
25 notion that all of the Rules of Civil Procedure

1 apply.

2 In the Shady Grove case, this Court  
3 held that if an application for class  
4 certification is made under Rule 23, it applies  
5 automatically if the conditions for Rule 23 are  
6 satisfied. So, under the Rules of Civil  
7 Procedure, Civil Procedure Rule Number 1 says  
8 it applies to "all civil actions." So --

9 JUSTICE GINSBURG: But -- but, Mr. --

10 JUSTICE ALITO: Well, I don't think  
11 they -- I don't think they made that  
12 concession. I don't think that's a fair  
13 characterization of their argument. And I -- I  
14 don't know whether I agree with their argument  
15 or not, but I don't think that's the -- that's  
16 the argument.

17 The argument is basically this:  
18 You've got a statute of limitations. The  
19 courts have to follow it, like it or not. Now  
20 how does a court justify allowing somebody to  
21 file a claim after the statute of limitations  
22 has run?

23 And the theory, they say, is that  
24 there was this old doctrine of equitable  
25 tolling, and when Congress enacted the statute



1 of limitations, it did so with the  
2 understanding that it would be subject to the  
3 doctrine of equitable tolling.

4 So, in order to allow the -- the case  
5 -- the claim to be filed after the statute of  
6 limitations has run, it has to fit within the  
7 doctrine of equitable tolling. And equitable  
8 tolling requires diligence and extraordinary  
9 circumstances.

10 So you have to show that those are  
11 present in the case where a new class action is  
12 filed after the -- the expiration of the  
13 statute of limitations.

14 If -- if, you know -- if you proceed  
15 from the assumption that their -- they -- that  
16 all of the members of the class had claims that  
17 were equitably tolled for all purposes, then,  
18 of course, your argument is a good one, but  
19 they don't proceed on the basis of that. That  
20 is not -- they do not concede that premise.

21 MR. FREDERICK: Well, the second class  
22 action here, Smyth, was filed within the  
23 statute of limitations period, so I think you  
24 have to confront the question of the logic that  
25 Justice Kagan's questions pose, which is why

1 doesn't the same diligence and extraordinary  
2 circumstances that applied in the first timely  
3 filed class action also apply in the second  
4 timely filed class action?

5 JUSTICE KAGAN: Well -- well, that's  
6 true, Mr. Frederick, but I had the same  
7 question that Justice Alito had because let's  
8 assume, just for the sake of argument, and you  
9 can tell by my questions I'm a little bit  
10 skeptical of this, but let's assume that the  
11 interests were different. Is your argument  
12 about Rule 23, about the Rules Enabling Act,  
13 about Shady Grove, about Tyson, do -- is that  
14 an argument that applies even if you think that  
15 we're in a different world with respect to  
16 diligence and exceptional circumstances?

17 MR. FREDERICK: It would, although I  
18 think that it is fair to say that this Court's  
19 decisions, including last term in ANZ and  
20 CalPERS, described the American Pipe rule as a  
21 different form of judicial equitable power  
22 designed to enforce the principles behind Rule  
23 23 and to promote judicial efficiency in the  
24 adjudication of individual claims.

25 And that's why in the Menominee

1 decision the Court distinguished between "class  
2 action tolling" and the type of equitable  
3 tolling that arose in Holland for individual  
4 claims where you have to look at both due  
5 diligence and extraordinary circumstances.

6           And I would think that the way you  
7 synthesize and rationalize these principles is  
8 that you say the American Pipe rule does  
9 satisfy those classic instances of due  
10 diligence and extraordinary circumstances, but  
11 they do it in a somewhat different way because  
12 we are trying to incentivize people not to  
13 bring duplicative claims.

14           That was the whole driver behind the  
15 American Pipe rule to begin with. That's the  
16 extraordinary circumstance. And the question  
17 then about due diligence is, do you look at due  
18 diligence before or after the case was filed?

19           Classically, under equitable  
20 principles, you looked at what was the due  
21 diligence of the person before the case was  
22 filed.

23           Here, the idea is that a class member  
24 who is an absent class member is exercising the  
25 due diligence by relying on the American Pipe

1 rule.

2 JUSTICE GORSUCH: Exactly. All right.

3 And that's pretty --

4 JUSTICE BREYER: What about after --  
5 I'm sorry.

6 JUSTICE GORSUCH: I'm sorry, and  
7 that's pretty unusual, right? I can't think of  
8 another example in equitable tolling doctrine  
9 where we do this, which may suggest some  
10 question about whether American Pipe is  
11 correct.

12 And if we have doubts about that, why  
13 should we extend it so radically here in a way  
14 that was unforeseen even by the authors of  
15 American Pipe?

16 MR. FREDERICK: Well, you're not  
17 extending it, Justice Gorsuch, and the reason  
18 you're not extending it is because, if a claim  
19 is a timely-filed individual claim, all of the  
20 reasons to deny, encouraging and incentivizing  
21 duplicative multiple -- multiple claims, those  
22 all apply.

23 JUSTICE GORSUCH: I'm sorry -- I'm  
24 sorry to interrupt, but -- but if -- if we  
25 doubt those rationales, if we doubt American

1 Pipe and think that it doesn't really represent  
2 true equitable tolling principles at common  
3 law, why would we extend that?

4 MR. FREDERICK: Well, you wouldn't --  
5 again, you would not be extending that. What I  
6 think you would be doing is to say, as Mr.  
7 Aronson, I think, has acknowledged, that the  
8 individual claims are timely under his reading  
9 and his understanding, and then the question is  
10 --

11 JUSTICE GORSUCH: But only on the  
12 understanding of American Pipe that it's after  
13 the fact rather than before the fact. That's  
14 the difference, I guess.

15 MR. FREDERICK: And that is an  
16 expansion -- what he's proposing is an  
17 expansion on the idea of what due diligence is,  
18 because you don't classically look at due  
19 diligence after a case has been filed.

20 You look at what was the plaintiff  
21 doing before the case was filed. And so, to  
22 that extent, he is asking for an expansion from  
23 what the common law understanding of equity was  
24 in the determination of equitable tolling.

25 JUSTICE GORSUCH: I guess I'm not --

1 JUSTICE GINSBURG: Mr. Frederick,  
2 there's one thing I find very puzzling about  
3 your argument. That is your reliance on Shady  
4 Grove.

5 Rule 23 says nothing about tolling.  
6 Tolling is, as you have said, an equitable  
7 doctrine. Tolling is made up by courts.  
8 Courts decide if there is tolling, how long the  
9 tolling will be.

10 They're not -- tolling questions are  
11 not resolved by the federal rules. Equitable  
12 tolling is court-made law, not rule-made law.

13 MR. FREDERICK: Justice Ginsburg, it  
14 is correct that Shady Grove did not address  
15 tolling. We distilled the principle from Shady  
16 Grove, however, that if a plaintiff has a  
17 timely claim, which we assert has been conceded  
18 here for individual claims, then the Rules of  
19 Civil Procedure apply automatically and all of  
20 the rules apply.

21 He's acknowledged, I think today, that  
22 Rule 20 and Rule 24 apply, so that intervention  
23 and joinder can occur, and the question is,  
24 what is the principle of equity that says Rule  
25 23 doesn't apply?

1                   JUSTICE BREYER: He says it's, I  
2 think, I think, and I don't want to put words  
3 in his mouth, but I think let us focus on  
4 someone like me, a common person. What you do  
5 is you sit home, you go to your office, and one  
6 day this complicated letter comes, and it says:  
7 There is a class action being filed, did you  
8 buy some pencils from so and so during a period  
9 of time? And if so, you are entitled to some  
10 damages. And do you know what I do about that?  
11 Nothing. It tells me I have a right to opt  
12 out. Nothing. Do I finish reading it? No.

13                   All right. Now think of people who  
14 are like that. Now what happens is that first  
15 letter came in plenty of time to file a suit.  
16 Then there was a class action. Then it got  
17 dismissed.

18                   Then some individual people filed  
19 because they were tolled. Now he's saying:  
20 Let's look back to that common person there.  
21 You know what he did the second time? Nothing.  
22 Did he read the letter? No. Did he throw it  
23 in the wastebasket? Probably.

24                   All right. So, as to that, he is  
25 saying, it is not equitable to give that person

1 who didn't even read the letter a second chance  
2 again to be a person who didn't read the  
3 letter.

4 I think -- I think that's something  
5 like what the argument is.

6 MR. FREDERICK: And I think that the  
7 answer to that was actually addressed by the  
8 principal drafter or reporter of Rule 23 when  
9 it was amended in 1966. Professor Benjamin  
10 Kaplan, who was the reporter, had a very long  
11 article, which this Court has cited, I think,  
12 nine times, in the Harvard Law Review in 1967.

13 And what he explained was that the  
14 reason for this change, in part, was to address  
15 the situation of the small claim of the small  
16 person. Those were his words, not mine.

17 But the idea behind bringing a  
18 representative action was the idea that if you  
19 had what would be a small value claim, you had  
20 the ability to aggregate those claims by the  
21 filing of your class action. And Rule 23  
22 allowed that.

23 JUSTICE GORSUCH: I don't think  
24 anybody questions the importance of that --  
25 that function of the rule. I think the



1 question that Justice Breyer is getting at, and  
2 I guess I am too in a way, is can you stack  
3 them forever, so that try, try again, and that  
4 the statute of limitations never really has any  
5 force in these cases. What do we do about  
6 that, given the congressional judgment that  
7 there should be a statute of limitations?

8           And what restraints might there be  
9 if -- if not the ones that your friend proposes  
10 that the Ninth Circuit suggested, for example,  
11 that class action attorneys would exercise  
12 restraint. Should we rely on that?

13           MR. FREDERICK: Justice Gorsuch, I  
14 would have a couple of responses to your  
15 question. In the securities context, we know  
16 the answer, that the repose period is the outer  
17 limit.

18           For cases where there is no repose  
19 period, what the Ninth Circuit proposed and  
20 suggested was that the principle of comity is  
21 the most powerful mechanism for limiting the --  
22 any concern that there might be about serial  
23 class certification motions.

24           We know from Smith versus Bayer that  
25 the first denial of a class certification is

1 not issue or claim preclusive. So then the  
2 question is, what respect does the second court  
3 apply when the same class is brought forward  
4 with the same claims?

5 There are multiple cases in the  
6 district courts that have dealt with this very  
7 issue outside of statutory contexts where there  
8 is a repose period. We've cited them on pages  
9 41 and 42 of our brief in Note 9.

10 I would point the Court in particular  
11 to a case called Winco Foods, where Judge  
12 Breyer in the California district court has  
13 noted that there is -- it is relatively easy  
14 for a district judge to determine whether the  
15 same rationale would apply to deny the second  
16 class certification motion as the first.

17 There's another decision called Ott,  
18 which we cite in that footnote, and there the  
19 district court looked very carefully at what  
20 were multiple subclasses and said one of them  
21 the same rationale would apply. That one is  
22 not allowed to be brought.

23 A second one, the same rationale would  
24 not apply.

25 JUSTICE GINSBURG: That's preclusion

1 but not calling it preclusion, if you're saying  
2 we look at the two class actions, if the second  
3 one is the same as the first, we're not going  
4 to allow it, but we'll call it comity instead  
5 of preclusion. Is that --

6 MR. FREDERICK: No, it's not  
7 preclusion, Justice Ginsburg. It really is  
8 comity in the sense that the rationale has to  
9 be the same.

10 So here we know in our case the first  
11 class certification motion was denied because  
12 the lawyer and his expert made a foot fault.  
13 They were unable to come up with the requisites  
14 of the fraud on the market reliance theory, a  
15 problem that was corrected in the second case,  
16 the Smyth case, where the evidence was so  
17 overwhelming to meet the fraud on the market  
18 presumption that the other side did not put in  
19 any contrary evidence.

20 And so the question here really is are  
21 you going to deny what is undoubtedly a  
22 meritorious fraud by a company that was  
23 delisted from the NASDAQ stock exchange by the  
24 SEC for completely cooking the books because  
25 the claims that are being brought are by small

1 value claims that are seeking to aggregate  
2 them.

3 CHIEF JUSTICE ROBERTS: No, you're --  
4 you're going to deny it because the claims are  
5 filed outside the statute of limitations.

6 MR. FREDERICK: Your Honor,  
7 respectfully, the Smyth case was filed inside  
8 the statute of limitations. And so the  
9 question is, why would you apply a different  
10 equitable principle for tolling to the second  
11 one as opposed to the first one?

12 And, here, what everybody I think has  
13 acknowledged --

14 JUSTICE KENNEDY: Because they slept  
15 on their rights once, it's okay, but they can't  
16 sleep on their rights twice.

17 MR. FREDERICK: I think that the  
18 question in equity, Justice Kennedy, is whether  
19 or not -- there are two questions. One is does  
20 equity allow the Court to say you can apply  
21 certain Rules of Civil Procedure in one setting  
22 but not in another because equitably we say so.

23 JUSTICE BREYER: Do you -- perhaps --  
24 all right. So your response is, if I  
25 understand this correctly, to my worry I said,

1 well, I sit up in the -- you know, with my  
2 pencils and whatever, and I sit up in the attic  
3 and I never read my mail and -- and dah, dah,  
4 dah, and you can bring the class action, and I  
5 get rewarded even though I've never really done  
6 much of anything, and I've done it.

7           And you say: Well, why does that  
8 solve -- why do -- why does my claim survive  
9 the running of the statute of limitations? And  
10 your response to that is, well, you behaved no  
11 worse the second time than you did the first  
12 time and that the reasons for giving you this  
13 reward are exactly the same, they are no  
14 different, because it really had nothing to do  
15 with time. It had to do with the desirability  
16 of allowing small claims to be recognized. Do  
17 I have that correct?

18           MR. FREDERICK: Well, I -- I think  
19 that the problem about the incentives is  
20 misunderstanding what the representative action  
21 that's being brought in a class action is  
22 designed to do. It's intended to say in this  
23 kind of context: I have a low-value claim. If  
24 my claim individually were to proceed, I  
25 probably would spend more on lawyers than I

1 would be able to recover.

2 And that's why Rule 23 provides, as a  
3 representative matter, that you can aggregate  
4 these claims in order to make sure that the  
5 low-value --

6 JUSTICE BREYER: They are.

7 MR. FREDERICK: -- claims are all  
8 brought together.

9 JUSTICE BREYER: So you're saying --

10 MR. FREDERICK: And --

11 JUSTICE BREYER: You're saying that,  
12 and his -- his -- what they have to show is,  
13 well, why is it worse the second time than it  
14 was the first time?

15 MR. FREDERICK: And what --

16 JUSTICE BREYER: Is that right?

17 MR. FREDERICK: Yes. But what the  
18 courts have said -- what the courts have said  
19 is that the reason -- this Court in particular  
20 in Crown, Cork and American Pipe -- is we want  
21 to avoid having duplicative filings.

22 I mean, one solution to the issue that  
23 you're surfacing through your various questions  
24 is that multiple class action cases get filed,  
25 and then the district court is dealing with

1 what are a large number of filings in a  
2 procedurally complex matter to determine which  
3 class action ought to be the one to rise to the  
4 top.

5 And you're having exactly the same  
6 problem this Court asked to avoid. In  
7 Petrobras, which the National Council --  
8 National Conference of Public Employment  
9 Retirement Systems' brief on page 7 points out  
10 that there were 500 protective filings in the  
11 Petrobras Securities Litigation.

12 CHIEF JUSTICE ROBERTS: Well, one  
13 reason that the second might be different --  
14 might be different than the first, because if  
15 you allow the second, you've got to allow the  
16 third and then the fourth and the fifth. And  
17 there's no end in sight.

18 MR. FREDERICK: And what judges have  
19 held, Mr. Chief Justice, is that the end in  
20 sight is that you have to have a new rationale  
21 for why the subsequent class certification  
22 motion should be granted. And they get denied  
23 -- and they get denied fairly routinely, and  
24 they get denied across the broad spectrum of  
25 the statutory claims that people bring.

1           And that is the empirical truth of it.  
2           And it is a solution that this Court in Smith  
3           identified as the mechanism because this Court  
4           could have cut this off at Smith several years  
5           ago by simply saying: You only get one shot at  
6           class certification. But the Court unanimously  
7           held no, because it is not preclusive against  
8           the absent members. And if you apply that  
9           rationale with the idea that if there is  
10          tolling, you have the chance for a meritorious  
11          class.

12                 Here, we had the situation where,  
13           because of inadequate representation  
14           functionally, a class of what would have been a  
15           very meritorious claim -- set of claims against  
16           this company that had committed fraud is  
17           basically being foreclosed because of the  
18           inability to bring high-value claims on an  
19           individual basis or to have adequate counsel  
20           who can properly construct a securities class  
21           action.

22                 JUSTICE ALITO: You -- you argue that  
23           if the second -- let's say class certification  
24           is denied in the first case. Then a second  
25           case is brought. And the new district judge



1 doesn't -- just says, well, I just think the  
2 first district judge was wrong and I don't care  
3 about -- I know -- I'm not going to accept that  
4 as a matter of comity.

5 Is there any remedy for that?

6 MR. FREDERICK: Well, I think, Justice  
7 Alito, I've not encountered that in the cases.  
8 What frequently happens is that these  
9 subsequent cases get related and transferred  
10 back as related cases under various MDL  
11 procedures, but I think the answer to your  
12 question would be resolved under a -- abuse of  
13 discretion standard, and the issue on appeal  
14 would be: Should the second judge have applied  
15 comity on the -- on the basis that the same  
16 rationale applied? I think that would be the  
17 argument and that would be how a court of  
18 appeals would review that.

19 JUSTICE ALITO: I -- I've never seen  
20 this as an enforceable -- you know, as an  
21 enforceable doctrine. I would think the second  
22 district judge would be perfectly right in  
23 saying: Look, I have to apply the law  
24 independently. And I'll give respectful  
25 consideration to what the first judge did, but

1 if the first judge was wrong, I'm not going to  
2 follow what the first --

3 MR. FREDERICK: And that's why --

4 JUSTICE ALITO: -- judge did.

5 MR. FREDERICK: I think that -- and  
6 that's why it is under an abuse of discretion  
7 standard, because one would be looking at, did  
8 the district court abuse the discretion vested  
9 to him or her in that circumstance?

10 But I would point out that I'm not  
11 aware of where these kinds of cases get  
12 appealed and brought up. And precisely because  
13 of the point that Justice Gorsuch raised from  
14 the Ninth Circuit opinion, which is that  
15 attorneys who are bringing these cases tend not  
16 to bring them if they are not going to succeed,  
17 here, we have a situation where, because of the  
18 default by the attorney, there is a meritorious  
19 case. It should have been certified had it  
20 been properly brought. And the question is  
21 whether or not the time ran out.

22 And that leads me --

23 JUSTICE GORSUCH: Well, if we -- if we  
24 were to rule against you, it seems to me the  
25 effect might be that we would encourage more

1 protective filings, and that would solve the  
2 problem, wouldn't it? We wouldn't have to  
3 create these extraordinary rules in extending  
4 American Pipe in new ways; we'd just create a  
5 new incentive structure that would ensure that  
6 there are backup class actions available. What  
7 -- what's wrong with that?

8 MR. FREDERICK: I think that what's  
9 wrong with that is that it is inconsistent with  
10 what led the Court to the American Pipe  
11 principle to begin with, which was that this  
12 was really a balancing among a multiplicity of  
13 interests.

14 JUSTICE GORSUCH: And -- and we're now  
15 balancing a multiplicity of interests in a  
16 slightly different context. And why wouldn't  
17 the balance with respect to encouraging  
18 protective filings might be slightly different  
19 here?

20 MR. FREDERICK: I think that the  
21 answer is that one of the rationales of the  
22 American Pipe rule was to protect district  
23 judges from having to do a lot of unnecessary  
24 work in processing both individual and  
25 protective class action claims and to do a lot

1 of things that have to be done as an  
2 administrative matter that's unnecessary if you  
3 recognize the representative nature of the  
4 class action that is filed. So --

5 JUSTICE GORSUCH: The alternative is  
6 backhand administration over comity questions  
7 that are effectively unreviewable.

8 MR. FREDERICK: Well --

9 JUSTICE GORSUCH: So how do we weigh  
10 those two interests?

11 MR. FREDERICK: I -- I don't agree  
12 that these are comity questions that are  
13 unreviewable. And, of course, where you have  
14 transfer --

15 JUSTICE GORSUCH: Are you aware of any  
16 court that's ever held that a district court  
17 abused its discretion in -- in -- in declining  
18 to follow another district court's decision?

19 MR. FREDERICK: No, but I'm also not  
20 aware of any decision of a court that says that  
21 just because you have an equitable tolling of  
22 an individual claim, you can't use all of the  
23 Rules of Civil Procedure that are available to  
24 you. I mean, we are in uncharted waters to  
25 some extent, Justice Gorsuch.

1           But I think that the first instinct of  
2 the American Pipe Court, as reaffirmed in  
3 Crown, Cork, was to say that the tolling  
4 applied to "all class members." And remember,  
5 when --

6           JUSTICE GINSBURG: But in -- in the --  
7 the underlying idea, I thought, of American  
8 Pipe, was class action denied, anyone can come  
9 in in a window after that, they are diligent,  
10 but the class members that have done nothing,  
11 that are sitting tossing the notices into the  
12 wastepaper basket, they -- they are not  
13 diligent.

14           So American Pipe is protecting  
15 diligent parties who will come in immediately  
16 after the class action is denied, and the ones  
17 who don't come in are still sleeping on their  
18 rights.

19           MR. FREDERICK: Right. But the second  
20 subsequent class action here, Smyth, would  
21 satisfy the diligence rationale.

22           JUSTICE GINSBURG: Well, that -- that  
23 one case, Smyth was within the statute of  
24 limitations.

25           MR. FREDERICK: That's correct. And

1 so --

2 JUSTICE GINSBURG: This one isn't.

3 MR. FREDERICK: That's correct, but  
4 the rationale, the logic of it applies in the  
5 same way. And it's not correct, I don't think,  
6 Justice Ginsburg, to say that the Court in  
7 Crown, Cork was talking about diligence.  
8 Remember that in both American Pipe and in  
9 Crown, Cork, the class certification denials  
10 were done because the class certification could  
11 not meet the requisites of Rule 23(a), and that  
12 meant that there was not going to be a  
13 possibility of a class in those factual  
14 circumstances. So it would have been natural  
15 to suppose that what --

16 JUSTICE GINSBURG: Well, there could  
17 have been people who were worried about the --  
18 the weaknesses, the vulnerability of the class  
19 representative could have intervened in that --  
20 in that action. They didn't have to wait until  
21 the class action was denied.

22 MR. FREDERICK: The -- and, Justice  
23 Ginsburg, that goes to my point, which is that  
24 equity should not allow the courts to pick and  
25 choose which Rules of Civil Procedure apply if

1 you have a timely filed claim.

2 You know, the principle here that I  
3 think has been important is the idea that the  
4 procedural rules shouldn't matter. And what  
5 ends up happening is that the Petitioner's  
6 position has particularly harsh results because  
7 the defendant has much more control over the  
8 running of the statute of limitations.

9 Here, both the Dean case and the Smyth  
10 case were settled through individual  
11 settlements. So, if you were to hypothesize  
12 that a defendant who did not want to face a  
13 follow-on class action would simply wait until  
14 one day after the statute of limitations has  
15 expired and the class certification motion has  
16 not been acted on yet, will simply buy off the  
17 lead plaintiff and know that it will never face  
18 a class action. And --

19 JUSTICE SOTOMAYOR: Mr. Frederick,  
20 there's been a circuit split, I see it as three  
21 ways. The First, Second, Fifth, and Eleventh  
22 Circuits have basically followed your  
23 adversary's rule. The Third and Eighth say if  
24 there's a deficiency in the plaintiff, they  
25 will permit a follow-on class action but

1 otherwise, no.

2 And I'm assuming that that's the rule  
3 you should -- you would like here to say: In  
4 Smith, it was a timely class action. The only  
5 deficiency was in the plaintiff, not in my  
6 claim. And so you would win here.

7 And in the Ninth and I think the Ninth  
8 and the Sixth, and somebody else has -- have  
9 followed the rule you're trying to advocate  
10 for. Go back to the Third and Eighth argument  
11 a little bit and tell me if we're thinking of  
12 doing what your adversary says, why shouldn't  
13 we accept that compromise?

14 MR. FREDERICK: I think that the  
15 compromise position would certainly solve the  
16 problem in this case because of the --

17 JUSTICE SOTOMAYOR: For you.

18 MR. FREDERICK: For me.

19 JUSTICE SOTOMAYOR: Yeah.

20 MR. FREDERICK: So leaving that aside,  
21 I think that if you were to do that, you would  
22 affirm on a separate basis, but the judgment of  
23 the Ninth Circuit would be upheld and the case  
24 would be timely and allowed to go forward.

25 I think that the -- the principal



1 difficulty from it as a doctrinal matter is  
2 that the Court has not tended to use these  
3 types of equitable arguments as a way of having  
4 Rule 23 operate as a toggle on and off switch.  
5 And that, I think, is where you have a certain  
6 amount of analytical difficulty.

7           The way we have proposed the solution  
8 to this case is if the claim is timely and it's  
9 timely as an individual matter, the individual  
10 can bring in, under Rule 23, that is a very  
11 straightforward, clean, simple rule.

12           So, if you were to then look at, say,  
13 we don't accept the simple rule, we want to  
14 have something a little bit more complex, I  
15 think at the very least you would say: Was the  
16 plaintiff who brought that adequate to  
17 represent the class and was there a deficiency  
18 in the adequacy of that representation?

19           And I think to that extent, you would  
20 then have to look hard at what were the various  
21 factors that went into that adequacy. It  
22 becomes a much more complicated question when I  
23 think, as the Court has told us, we want these  
24 timing rules generally to be simple and  
25 straightforward so that litigants know how to

1 follow them.

2 But certainly, as a matter of equity,  
3 it does not seem fair where you're talking  
4 about a rule that is allowing potentially  
5 meritorious claims to go forward to be snuffed  
6 out simply because the person who got to the  
7 courthouse first happened not to be competent  
8 in bringing about the kind of case that would  
9 be representative of all of the various  
10 plaintiffs.

11 Unless the Court has any further  
12 questions, we'll submit.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Aronson, five minutes.

16 REBUTTAL ARGUMENT OF SETH ARONSON  
17 ON BEHALF OF THE PETITIONERS

18 MR. ARONSON: Let me begin by saying  
19 that we have not conceded that all of the  
20 absent shareholders' claims are timely. They  
21 are not timely. They are not timely because  
22 they have not come forward.

23 Mr. Resh's individual claim is timely  
24 because he showed the diligence by filing an  
25 action, and these extraordinary circumstances

1     existed beforehand where he should not have  
2     filed that action.

3             But as to absent class members, they  
4     have not shown any diligence, they have not  
5     stepped forward to file anything, and there are  
6     no extraordinary circumstances because the  
7     class has been denied.

8             And we're not saying that Mr. Resh is  
9     not able to use Rule 23. He can. But what he  
10    cannot do is use Rule 23 to revive claims that  
11    have been dormant, that are not timely. That's  
12    what he can't do with Rule 23.

13            But if he wants to come into court and  
14    say: I've got a Rule 23 claim, fine, there's  
15    no one else in that class, because they have  
16    not filed their -- they're not entitled to  
17    equitable tolling.

18            Let me also address what Justice Alito  
19    and Justice Gorsuch identified on comity. To  
20    illustrate how weak comity is as a defense is  
21    -- we asked the judge in Smyth, who was the  
22    same judge in Dean, we couldn't say you're  
23    precluded because Smyth was filed in a timely  
24    way, so we could not use preclusion under Smith  
25    versus Bayer, so we said we'd like you to show

1 comity. The district judge wouldn't even show  
2 deference to himself. So how can we expect  
3 other judges to show deference to other judges?  
4 That's how --

5 JUSTICE KAGAN: Well, I thought that  
6 that was because the problem that he identified  
7 had been cured.

8 MR. ARONSON: It had not been -- well,  
9 it had not been cured. He thought that -- that  
10 Smyth might be able to do it in a different way  
11 and then threw out Smyth because of adequacy  
12 and typicality grounds.

13 But -- but we asked for comity, and we  
14 didn't get it from the same judge.

15 And, Justice Kagan, you earlier  
16 remarked that American Pipe says that the class  
17 members are diligent for relying on the class.  
18 Yes, but up to a point. And let me read from  
19 Crown, Cork.

20 And I'm reading from 103 Supreme Court  
21 at 2397 to 98. "We conclude, as did the Court  
22 in American Pipe, that the commencement of a  
23 class action suspends the applicable statute of  
24 limitations as to all members of the class who  
25 would have been parties had the suit been

1 determined to continue as a class action. Once  
2 the statute of limitations has been tolled, it  
3 remains tolled for all members of the putative  
4 class until certification is denied. At that  
5 point, class members may choose to file their  
6 own suits or to intervene as plaintiffs in the  
7 pending action."

8           So reliance on the class action  
9 alone -- on -- on the class action itself is  
10 not enough. You have to do something else.

11           Counsel said that he's okay with  
12 getting tolling from one of the class actions  
13 but not the both -- but not both. If you do  
14 the math, they filed so late that Respondents  
15 need tolling from both cases.

16           So, if you rule that he's not entitled  
17 to tolling in the first case because it was on  
18 a class-wide basis, then their claims are  
19 time-barred under any standard.

20           But let me go back to the -- the basic  
21 point that we're trying to make here by  
22 enforcing the statute of limitations. We think  
23 that if -- if class members get in there early,  
24 class representatives apply early, it solves  
25 all of these problems.

1           It solves the problem, Justice Kagan,  
2           of the \$32 claimant. That person -- this --  
3           this will have -- this will enhance Rule 23  
4           because the best class representatives will be  
5           there early. The district judge will be able  
6           to make the best decision early on.

7           And if we have multiple class actions,  
8           fine. The driver of American Pipe was not  
9           multiple class actions. American Pipe and  
10          Crown, Cork said we don't want all these  
11          individual actions while we're trying to deal  
12          with class issues.

13          Dealing with more class issues, better  
14          class representatives, we think that's a good  
15          thing. We think that the PSLRA, for example,  
16          does the same thing for us.

17          So I have to remark that in -- in  
18          Crown, Cork at the end, in -- in Justice  
19          Powell's closing concurrence, he said that  
20          American Pipe gives us a very generous rule and  
21          it invites abuse. And we think that serial  
22          litigation of class actions is that abuse.

23          We ask that the court below be  
24          reversed. Thank you.

25          CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:06 p.m., the case  
3 was submitted.)

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## Official

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