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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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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 running of  
24 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 will 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 thought that there was enough  
10 diligence and because we thought that Rule 23  
11 policies indicated that we should encourage the  
12 class action device rather than the individual  
13 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? And  
21 I see various different potential kinds of  
22 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 statute of  
3 limitations has expired. That person who is  
4 part of the class who wants to proceed can come  
5 forward with his or her individual claim.

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

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

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

25 JUSTICE GORSUCH: Counsel, just

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

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

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

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

16 JUSTICE GORSUCH: No, I'm talking  
17 about after equitable tolling, that this Court  
18 has imposed and allowed a new suit, can you  
19 think of another example where in that new suit  
20 the equitably tolled plaintiff is forbidden  
21 from accessing a particular procedural right  
22 otherwise available to all litigants?

23 MR. ARONSON: Well, I'm not aware of  
24 another procedural rule, but it directly  
25 applies here under Rule 23 because the absent

1 class members, their claims are untimely. They  
2 cannot be abrogated. The absent class members  
3 who sit on their rights have their claims  
4 expire. So there -- there cannot be a class of  
5 untimely class members.

6 What we --

7 JUSTICE SOTOMAYOR: I'm sorry, you're  
8 creating that rule. I think the question was,  
9 is there any other situation where we have  
10 equitably tolled someone's right to bring a  
11 suit and deprived them of a -- of a procedural  
12 right?

13 MR. ARONSON: I'm not aware of any.  
14 But we're not asking the Court to write a new  
15 rule. We're asking the Court to apply American  
16 Pipe.

17 JUSTICE SOTOMAYOR: Oh, you are,  
18 because you're, by its terms, and we said it in  
19 Shady Grove, Rule 23 is a procedural mechanism  
20 that -- that is available to everyone who can  
21 meet its requirements.

22 MR. ARONSON: Right. But Shady Grove  
23 is different from Rule -- from -- from this  
24 case and equitable tolling in this sense: Last  
25 term, in the CalPERS versus ANZ Securities

1 case, this Court said that the origins of  
2 American Pipe tolling do not come from Rule 23.  
3 Rule 23 says nothing about statute of  
4 limitations, tolling, or -- or limitations.

5 The American Pipe rule comes from  
6 traditional principles of equity, and those  
7 principles require diligence and extraordinary  
8 circumstances.

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

17 MR. ARONSON: No, it's --

18 JUSTICE SOTOMAYOR: It stops you from  
19 invoking a class act -- your class action  
20 rights in a second suit.

21 MR. ARONSON: We're not claiming  
22 preclusive effect at all. And we know from  
23 Smyth versus Bayer we could not bind an  
24 absolute --

25 JUSTICE SOTOMAYOR: Then I don't

1 understand how it's not.

2 MR. ARONSON: Because we have a  
3 statute of limitations that's -- that's cutting  
4 off their claims, not a preclusive effect.

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

7 MR. ARONSON: No, we're asking the  
8 Court to apply the statute of limitations as  
9 written.

10 JUSTICE ALITO: Are you asking for an  
11 exception to equitable tolling, or are you  
12 arguing that these claims are not equitably  
13 tolled because there was not diligence with  
14 respect to them?

15 MR. ARONSON: The latter, Your Honor.  
16 Equitable tolling requires diligence and  
17 extraordinary circumstances. And someone who  
18 sleeps on their rights and doesn't present her  
19 claim, those claims will expire when the  
20 statute of limitation expires.

21 Someone who's just sitting back and  
22 doing nothing is not entitled to equity. We're  
23 not aware of any case in which someone slept on  
24 their rights and was given equity.

25 JUSTICE GINSBURG: But the person --

1 JUSTICE KENNEDY: Well, not -- not on  
2 the first class action. On the first class  
3 action, you might not have ever heard about it  
4 until it's dismissed, and then you say, oh,  
5 well, there was an action there, and -- and you  
6 have the -- you have tolling.

7 MR. ARONSON: Right, that --

8 JUSTICE KENNEDY: For -- for the first  
9 one.

10 MR. ARONSON: Right, you -- you have  
11 tolling for whenever --

12 JUSTICE KENNEDY: You don't have to  
13 show diligence. You just have to show there  
14 was a class action pending.

15 MR. ARONSON: Well, the diligence  
16 shown is asserting your claim if the statute of  
17 limitations has expired.

18 JUSTICE KENNEDY: Once the class  
19 action has ended?

20 MR. ARONSON: Correct.

21 JUSTICE KENNEDY: Yes.

22 MR. ARONSON: Right.

23 JUSTICE KAGAN: But back --

24 JUSTICE GINSBURG: That's diligence  
25 with respect to bringing -- a class action

1 terminates. You then file as timely as you can  
2 after that, and you say the individual claim is  
3 all right, but that person who has not slept on  
4 her rights because she has brought it  
5 immediately can't bring her suit as a class?

6 MR. ARONSON: Correct, because it  
7 would be being brought on behalf of other class  
8 members who were not entitled to equitable  
9 tolling because they have done nothing.

10 We cannot use Rule 23 to resuscitate  
11 claims that are not alive. That would be a  
12 Rules Enabling Act issue.

13 CHIEF JUSTICE ROBERTS: So -- so what  
14 they all have to do is they all have to file  
15 individual claims, every -- every member of the  
16 class?

17 MR. ARONSON: Anyone who wants to file  
18 a claim can come forward and file a claim.  
19 That's exactly what American Pipe said when  
20 they said they should move to intervene, and  
21 Crown, Cork, which says that they should --  
22 they can file their own class -- their own  
23 complaint. And --

24 JUSTICE BREYER: If the judge -- if a  
25 lawyer walks into the judge's chambers and says

1 here in my hand I have 10,000 complaints, and  
2 he says, you know, they're identical, would it  
3 be all right to consider those as a class, just  
4 those? That's okay because they all wrote out  
5 the complaint, right?

6 MR. ARONSON: Well, the -- the federal  
7 courts are equipped to deal with -- with mass  
8 torts, with mass situations like that, Justice  
9 Breyer. And they -- they deal with that  
10 whether there's a class or not.

11 So the fact that it happens after the  
12 class shouldn't matter. The courts have  
13 consolidation orders. They have the full  
14 panoply of -- of docket management that our  
15 federal judges have on a day-to-day basis.

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

18 JUSTICE KENNEDY: Suppose, and this  
19 is -- the first class action is dismissed. A  
20 thousand plaintiffs diligently bring -- or 100  
21 plaintiffs diligently bring their individual  
22 causes of action within the statute.

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

1 MR. ARONSON: Well --

2 JUSTICE KENNEDY: -- or no further  
3 tolling?

4 MR. ARONSON: Well, it's not my rule.  
5 It's the statute of limitations. But if -- if  
6 I understand the hypothetical, if the statute  
7 has not yet run --

8 JUSTICE KENNEDY: Correct.

9 MR. ARONSON: -- after the denial of  
10 the first class, you can file a second class  
11 action.

12 JUSTICE KENNEDY: Right.

13 MR. ARONSON: Because it's not binding  
14 on absent class members. We know that from  
15 Smyth versus Bayer.

16 JUSTICE SOTOMAYOR: I'm sorry, you're  
17 basically saying there's a statute of  
18 limitations to bring a class action. There's  
19 no statute of limitations under American Pipe  
20 after the statute has expired for bringing an  
21 individual claim.

22 MR. ARONSON: Well --

23 JUSTICE SOTOMAYOR: So, assuming  
24 Justice Kennedy's hypothetical, cases lasted  
25 more than the statute of limitations, there's a

1 thousand individual suits that were filed,  
2 could the Court then say: Those thousand I'm  
3 going to treat as a class? You're saying no.

4 MR. ARONSON: If it's -- I'm not  
5 saying no to that. If it's a class of those  
6 thousand people only, I could see that the  
7 court might want to deal with that, but it  
8 doesn't have to be a class. The court can deal  
9 with it however it wants to.

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

14 MR. ARONSON: It would stop --

15 JUSTICE SOTOMAYOR: But the court  
16 could do it anyway?

17 MR. ARONSON: Because the court cannot  
18 certify a class of absent class members who  
19 have slept on their rights and are not entitled  
20 to tolling. But if a thousand people show up  
21 in court, there's many things that the judge  
22 can do to deal with the thousand people. It  
23 happens all the time.

24 It's not optimum, but that could  
25 happen even if there wasn't a class in the

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

15 JUSTICE SOTOMAYOR: But not as a  
16 class?

17 MR. ARONSON: Not as a class. Because  
18 the interest that Crown, Cork and American Pipe  
19 were protecting was -- and this is the  
20 extraordinary circumstance. What the court  
21 said was we have a class action going here. We  
22 don't want all of you individuals out there to  
23 file your individual actions while the class  
24 action is pending. Let's give the class action  
25 a chance and see if it works.

1           And if it doesn't work, okay, the  
2 extraordinary circumstance is gone. Now step  
3 forward. Your claims are alive, you have your  
4 claims. We're not taking away anyone's claims.  
5 The class didn't work and the interest was  
6 protecting individual claims. Those are the  
7 ones that are entitled to tolling, not class  
8 claims.

9           Neither of those courts said don't  
10 come forward with your class action. And  
11 multiple class actions can be brought, as you  
12 pointed out, Your Honor, in the Private  
13 Securities Litigation Reform Act. And if you  
14 enforce the statute of limitations, you push  
15 all of this to the front end of the case and  
16 not to the back end.

17           And the back end is where we get into  
18 all these problems as to whether or not we have  
19 equitable tolling, whether or not people have  
20 asserted their rights. They will -- they will  
21 all be protected because they will have the  
22 best class representatives and the court will  
23 be able to make the best class decision at the  
24 outset.

25           That -- and all we're asking the Court

1 to do is apply the statute of limitations.  
2 We're not asking to -- to come up with a new  
3 rule. We have the rule. Congress gave us the  
4 rule. And what we're proposing is that we not  
5 expand the intrusion into the statute of  
6 limitations with another court-made doctrine  
7 that we did in American Pipe by saying now it  
8 applies to class actions. There's no  
9 justification for that. There's no basis.

10 JUSTICE KAGAN: Well, Mr. Aronson, let  
11 me give you a hypothetical. I mean, suppose  
12 it's one of these class actions where there's  
13 actually a very serious wrong and aggregate  
14 damages are very high, but each individual  
15 person's damages are very low, \$32.

16 And there's a class certification  
17 motion, and let's say in this there is -- that  
18 motion is denied for a reason that really has  
19 nothing to do with whether this is something  
20 that's properly treated by a class action.  
21 Let's suppose that, just on the individual  
22 facts of the case, this was a bad named  
23 plaintiff, not adequate -- not an adequate  
24 representative.

25 Your theory would then say: Okay, so

1 he's dismissed, the statute of limitations has  
2 run because these things take a long time, and  
3 then all these people with extremely valid  
4 claims, claims that we would want to be brought  
5 in order to force defendants to internalize the  
6 costs of their illegal behavior, well, too bad,  
7 that just can't go forward.

8 MR. ARONSON: Under our theory, if you  
9 enforce the statute of limitations and announce  
10 that we have a statute of limitations, we're  
11 not going to allow all of this back-end  
12 maneuvering, then people will step forward so  
13 that if there's a problem --

14 JUSTICE KAGAN: They all have claims  
15 that are \$32 claims.

16 MR. ARONSON: Well, 30 -- you know,  
17 people have \$32 claims and they have to make a  
18 decision as to whether or not they want to  
19 pursue the \$32 million -- \$32 claims.

20 JUSTICE KAGAN: But that is the entire  
21 purpose of our -- of -- of Rule 23, is that we  
22 understand that with respect to some category  
23 of claims, we're not going to have them  
24 individually or it will be so ridiculous if we  
25 have them individually that we would prefer the

1 class action device.

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

5 JUSTICE KAGAN: Well, but, again,  
6 here, it's not working just for some reason  
7 that has nothing to do with the appropriateness  
8 of class treatment; it just has to do with the  
9 fact that one named plaintiff is not a good  
10 named plaintiff.

11 MR. ARONSON: Right. And if we -- if  
12 we have all of these cases up front by  
13 enforcing a statute of limitations and  
14 requiring anyone who wants to lead the class,  
15 and, hopefully, there will be more than one and  
16 not others sitting back and waiting for the  
17 statute of limitations to expire, but coming  
18 forward and something happens with the class  
19 representative that you mentioned, there will  
20 be someone else waiting there because they will  
21 have filed their claims early, they would have  
22 been part of that case and can step forward,  
23 and they could fix that.

24 And even if the statute had run and if  
25 they were part of the case, then it would

1 relate back, so the statute of limitations  
2 would not be an issue --

3 JUSTICE KENNEDY: Does --

4 MR. ARONSON: -- if we get people in  
5 court early.

6 JUSTICE KENNEDY: In that instance, is  
7 there ever an amended complaint that relates  
8 back?

9 MR. ARONSON: You can have an amended  
10 complaint that relates back also, Justice  
11 Kennedy. So it's the -- it's the -- the  
12 subsequent class action where the evils are,  
13 not in the initial class action. And if we get  
14 everyone up front in that class action, then  
15 you'll have -- you won't have this problem,  
16 because you'll have other class representatives  
17 ready to go and can step right up and they will  
18 have been part of the litigation. The  
19 litigation should not miss a beat at that  
20 point.

21 But if there's a problem with a class  
22 representative and there's someone else who  
23 says, you know what, I wasn't chosen to lead  
24 this class, but I think I can do a good job,  
25 and apply to the court to do that.

1 I'd like to reserve the rest of my  
2 time.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Frederick.

6 ORAL ARGUMENT OF DAVID C. FREDERICK  
7 ON BEHALF OF THE RESPONDENTS

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

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

20 In the Shady Grove case, this Court  
21 held that if an application for class  
22 certification is made under Rule 23, it applies  
23 automatically if the conditions for Rule 23 are  
24 satisfied. So, under the Rules of Civil  
25 Procedure, Civil Procedure Rule Number 1 says

1 it applies to "all civil actions." So --

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

3 JUSTICE ALITO: Well, I don't think  
4 they -- I don't think they made that  
5 concession. I don't think that's a fair  
6 characterization of their argument. And I -- I  
7 don't know whether I agree with their argument  
8 or not, but I don't think that's the -- that's  
9 the argument.

10 The argument is basically this:  
11 You've got a statute of limitations. The  
12 courts have to follow it, like it or not. Now  
13 how does a court justify allowing somebody to  
14 file a claim after the statute of limitations  
15 has run?

16 And the theory, they say, is that  
17 there was this old doctrine of equitable  
18 tolling, and when Congress enacted the statute  
19 of limitations, it did so with the  
20 understanding that it would be subject to the  
21 doctrine of equitable tolling.

22 So, in order to allow the -- the case  
23 -- the claim to be filed after the statute of  
24 limitations has run, it has to fit within the  
25 doctrine of equitable tolling. And equitable

1 tolling requires diligence and extraordinary  
2 circumstances.

3 So you have to show that those are  
4 present in the case where a new class action is  
5 filed after the -- the expiration of the  
6 statute of limitations.

7 If -- if, you know -- if you proceed  
8 from the assumption that their -- they -- that  
9 all of the members of the class had claims that  
10 were equitably tolled for all purposes, then,  
11 of course, your argument is a good one, but  
12 they don't proceed on the basis of that. That  
13 is not -- they do not concede that premise.

14 MR. FREDERICK: Well, the second class  
15 action here, Smyth, was filed within the  
16 statute of limitations period, so I think you  
17 have to confront the question of the logic that  
18 Justice Kagan's questions pose, which is why  
19 doesn't the same diligence and extraordinary  
20 circumstances that applied in the first timely  
21 filed class action also apply in the second  
22 timely filed class action?

23 JUSTICE KAGAN: Well -- well, that's  
24 true, Mr. Frederick, but I had the same  
25 question that Justice Alito had because let's

1     assume just for the sake of argument -- and you  
2     can tell by my questions I'm a little bit  
3     skeptical of this -- but let's assume that the  
4     interests were different.  Is your argument  
5     about Rule 23, about the Rules Enabling Act,  
6     about Shady Grove, about Tyson, do -- is that  
7     an argument that applies even if you think that  
8     we're in a different world with respect to  
9     diligence and exceptional circumstances?

10           MR. FREDERICK:  It would, although I  
11     think that it is fair to say that this Court's  
12     decisions, including last term in ANZ and  
13     CalPERS, described the American Pipe rule as a  
14     different form of judicial equitable power  
15     designed to enforce the principles behind Rule  
16     23 and to promote judicial efficiency in the  
17     adjudication of individual claims.

18           And that's why in the Menominee  
19     decision the Court distinguished between "class  
20     action tolling" and the type of equitable  
21     tolling that arose in Holland for individual  
22     claims where you have to look at both due  
23     diligence and extraordinary circumstances.

24           And I would think that the way you  
25     synthesize and rationalize these principles is

1 that you say the American Pipe rule does  
2 satisfy those classic instances of due  
3 diligence in extraordinary circumstances, but  
4 they do it in a somewhat different way because  
5 we are trying to incentivize people not to  
6 bring duplicative claims.

7 That was the whole driver behind the  
8 American Pipe rule to begin with. That's the  
9 extraordinary circumstance. And the question  
10 then about due diligence is, do you look at due  
11 diligence before or after the case was filed?

12 Classically, under equitable  
13 principles, you looked at what was the due  
14 diligence of the person before the case was  
15 filed.

16 Here, the idea is that a class member  
17 who is an absent class member is exercising the  
18 due diligence by relying on the American Pipe  
19 rule.

20 JUSTICE GORSUCH: Exactly. All right.

21 And that's pretty --

22 JUSTICE BREYER: What about after --

23 I'm sorry.

24 JUSTICE GORSUCH: I'm sorry, and  
25 that's pretty unusual, right? I can't think of

1 another example in equitable tolling doctrine  
2 where we do this, which may suggest some  
3 question about whether American Pipe is  
4 correct.

5 And if we have doubts about that, why  
6 should we extend it so radically here in a way  
7 that was unforeseen even by the authors of  
8 American Pipe?

9 MR. FREDERICK: Well, you're not  
10 extending it, Justice Gorsuch. And the reason  
11 you're not extending it is because, if a claim  
12 is a timely-filed individual claim, all of the  
13 reasons to deny, encouraging and incentivizing  
14 duplicative multiple claims, those all apply.

15 JUSTICE GORSUCH: I'm sorry -- I'm  
16 sorry to interrupt, but -- but if -- if we  
17 doubt those rationales, if we doubt American  
18 Pipe and think that it doesn't really represent  
19 true equitable tolling principles in common  
20 law, why would we extend that?

21 MR. FREDERICK: Well, you wouldn't --  
22 again, you would not be extending that. What I  
23 think you would be doing is to say, as Mr.  
24 Aronson, I think, has acknowledged, that the  
25 individual claims are timely under his reading

1 and his understanding, and then the question is  
2 --

3 JUSTICE GORSUCH: But only on the  
4 understanding of American Pipe that it's after  
5 the fact rather than before the fact. That's  
6 the difference, I guess.

7 MR. FREDERICK: And that is an  
8 expansion -- what he's proposing is an  
9 expansion on the idea of what due diligence is,  
10 because you don't classically look at due  
11 diligence after a case has been filed.

12 You look at what was the plaintiff  
13 doing before the case was filed. And so, to  
14 that extent, he is asking for an expansion from  
15 what the common law understanding of equity was  
16 in the determination of equitable tolling.

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

18 JUSTICE GINSBURG: Mr. Frederick,  
19 there's one thing I find very puzzling about  
20 your argument. That is your reliance on Shady  
21 Grove.

22 Rule 23 says nothing about tolling.  
23 Tolling is, as you have said, an equitable  
24 doctrine. Tolling is made up by courts.  
25 Courts decide if there is tolling, how long the

1 tolling will be.

2 They're not -- tolling questions are  
3 not resolved by the federal rules. Equitable  
4 tolling is court-made law, not rule-made law.

5 MR. FREDERICK: Justice Ginsburg, it  
6 is correct that Shady Grove did not address  
7 tolling. We distilled the principle from Shady  
8 Grove, however, that if a plaintiff has a  
9 timely claim, which we assert has been conceded  
10 here for individual claims, then the Rules of  
11 Civil Procedure apply automatically and all of  
12 the rules apply.

13 He's acknowledged, I think today, that  
14 Rule 20 and Rule 24 apply, so that intervention  
15 and joinder can occur, and the question is,  
16 what is the principle of equity that says Rule  
17 23 doesn't apply?

18 JUSTICE BREYER: He says it's, I  
19 think, I think, and I don't want to put words  
20 in his mouth, but I think let us focus on  
21 someone like me, a common person. What you do  
22 is you sit home, you go to your office, and one  
23 day this complicated letter comes, and it says:  
24 There is a class action being filed, did you  
25 buy some pencils from so and so during a period

1 of time? And if so, you are entitled to some  
2 damages. And do you know what I do about that?  
3 Nothing. It tells me I have a right to opt  
4 out. Nothing. Do I finish reading it? No.

5 All right. Now think of people who  
6 are like that. Now what happens is that first  
7 letter came in plenty of time to file a suit.  
8 Then there was a class action. Then it got  
9 dismissed.

10 Then some individual people filed  
11 because they were tolled. Now he's saying:  
12 Let's look back to that common person there.  
13 You know what he did the second time? Nothing.  
14 Did he read the letter? No. Did he throw it  
15 in the wastebasket? Probably.

16 All right. So, as to that, he is  
17 saying, it is not equitable to give that person  
18 who didn't even read the letter a second chance  
19 again to be a person who didn't read the  
20 letter.

21 I think -- I think that's something  
22 like what the argument is.

23 MR. FREDERICK: And I think that the  
24 answer to that was actually addressed by the  
25 principal drafter or reporter of Rule 23 when

1 it was amended in 1966. Professor Benjamin  
2 Kaplan, who was the reporter, had a very long  
3 article, which this Court has cited, I think,  
4 nine times in the Harvard Law Review, in 1967.

5 And what he explained was that the  
6 reason for this change, in part, was to address  
7 the situation of the small claim of the small  
8 person. Those were his words, not mine.

9 But the idea behind bringing a  
10 representative action was the idea that if you  
11 had what would be a small value claim, you had  
12 the ability to aggregate those claims by the  
13 filing of your class action. And Rule 23  
14 allowed that.

15 JUSTICE GORSUCH: I don't think  
16 anybody questions the importance of that --  
17 that function of the rule. I think the  
18 question that Justice Breyer is getting at, and  
19 I guess I am too in a way, is can you stack  
20 them forever, so that try, try again, and the  
21 statute of limitations never really has any  
22 force in these cases. What do we do about  
23 that, given the congressional judgment that  
24 there should be a statute of limitations?

25 And what restraints might there be

1 if -- if not the ones that your friend proposes  
2 that the Ninth Circuit suggested, for example,  
3 that class action attorneys would exercise  
4 restraint. Should we rely on that?

5 MR. FREDERICK: Justice Gorsuch, I  
6 would have a couple of responses to your  
7 question. In the securities context, we know  
8 the answer, that the repose period is the outer  
9 limit.

10 For cases where there is no repose  
11 period, what the Ninth Circuit proposed and  
12 suggested was that the principle of comity is  
13 the most powerful mechanism for limiting the --  
14 any concern that there might be about serial  
15 class certification motions.

16 We know from Smith versus Bayer that  
17 the first denial of a class certification is  
18 not issue or claim preclusive. So then the  
19 question is, what respect does the second court  
20 apply when the same class is brought forward  
21 with the same claims?

22 There are multiple cases in the  
23 district courts that have dealt with this very  
24 issue outside of statutory contexts where there  
25 is a repose period. We've cited them on pages

1 41 and 42 of our brief in Note 9.

2 I would point the Court in particular  
3 to a case called WinCo Foods, where Judge  
4 Breyer in the California district court has  
5 noted that there is -- it is relatively easy  
6 for a district judge to determine whether the  
7 same rationale would apply to deny the second  
8 class certification motion as the first.

9 There's another decision called Ott,  
10 which we cite in that footnote, and there the  
11 district court looked very carefully at what  
12 were multiple subclasses and said one of them  
13 the same rationale would apply. That one is  
14 not allowed to be brought.

15 A second one, the same rationale would  
16 not apply.

17 JUSTICE GINSBURG: That's preclusion  
18 but not calling it preclusion, if you're saying  
19 we look at the two class actions, if the second  
20 one is the same as the first, we're not going  
21 to allow it, but we'll call it comity instead  
22 of preclusion. Is that --

23 MR. FREDERICK: No, it's not  
24 preclusion, Justice Ginsburg. It really is  
25 comity in the sense that the rationale has to

1 be the same.

2 So here we know in our case the first  
3 class certification motion was denied because  
4 the lawyer and his expert made a foot fault.  
5 They were unable to come up with the requisites  
6 of the fraud on the market reliance theory, a  
7 problem that was corrected in the second case,  
8 the Smyth case, where the evidence was so  
9 overwhelming to meet the fraud on the market  
10 presumption that the other side did not put in  
11 any contrary evidence.

12 And so the question here really is are  
13 you going to deny what is undoubtedly a  
14 meritorious fraud by a company that was  
15 de-listed from the NASDAQ stock exchange by the  
16 SEC for completely cooking the books because  
17 the claims that are being brought are by small  
18 value claims that are seeking to aggregate  
19 them.

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

23 MR. FREDERICK: Your Honor,  
24 respectfully, the Smyth case was filed inside  
25 the statute of limitations. And so the

1 question is, why would you apply a different  
2 equitable principle for tolling to the second  
3 one as opposed to the first one?

4 And, here, what everybody I think has  
5 acknowledged --

6 JUSTICE KENNEDY: Because they slept  
7 on their rights once, it's okay, but they can't  
8 sleep on their rights twice.

9 MR. FREDERICK: I think that the  
10 question in equity, Justice Kennedy, is whether  
11 or not -- there are two questions. One is does  
12 equity allow the Court to say you can apply  
13 certain Rules of Civil Procedure in one setting  
14 but not in another because it's inequitable to  
15 say so.

16 JUSTICE BREYER: So your response is,  
17 if I understand this correctly, to my worry I  
18 said, well, I sit up in the -- you know, with  
19 my pencils and whatever, and I sit up in the  
20 attic and I never read my mail and -- and dah,  
21 dah, dah, and you can bring the class action,  
22 and I get rewarded even though I've never  
23 really done much of anything, and I've done it.

24 And you say: Well, why does that  
25 solve -- why do -- why does my claim survive

1 the running of the statute of limitations? And  
2 your response to that is, well, you behaved no  
3 worse the second time than you did the first  
4 time and that the reasons for giving you this  
5 reward are exactly the same, they are no  
6 different, because it really had nothing to do  
7 with time. It had to do with the desirability  
8 of allowing small claims to be recognized. Do  
9 I have that correct?

10 MR. FREDERICK: Well, I -- I think  
11 that the problem about the incentives is  
12 misunderstanding what the representative action  
13 that's being brought in a class action is  
14 designed to do. It's intended to say in this  
15 kind of context: I have a low-value claim. If  
16 my claim individually were to proceed, I  
17 probably would spend more on lawyers than I  
18 would be able to recover.

19 And that's why Rule 23 provides, as a  
20 representative matter, that you can aggregate  
21 these claims in order to make sure that the  
22 low-value --

23 JUSTICE BREYER: They are.

24 MR. FREDERICK: -- claims are all  
25 brought together.

1 JUSTICE BREYER: So you're saying --

2 MR. FREDERICK: And --

3 JUSTICE BREYER: You're saying that,  
4 and his -- his -- what they have to show is,  
5 well, why is it worse the second time than it  
6 was the first time?

7 MR. FREDERICK: And what --

8 JUSTICE BREYER: Is that right?

9 MR. FREDERICK: Yes. But what the  
10 courts have said, what the courts have said, is  
11 that the reason -- this Court in particular in  
12 Crown, Cork and American Pipe -- is we want to  
13 avoid having duplicative filings.

14 I mean, one solution to the issue that  
15 you're surfacing through your various questions  
16 is that multiple class action cases get filed,  
17 and then the district court is dealing with  
18 what are a large number of filings in a  
19 procedurally complex matter to determine which  
20 class action ought to be the one to rise to the  
21 top.

22 And you're having exactly the same  
23 problem this Court asked to avoid. In  
24 Petrobras, which the National Council --  
25 National Conference of Public Employment

1 Retirement Systems' brief on page 7 points out  
2 that there were 500 protective filings in the  
3 Petrobras Securities Litigation.

4 CHIEF JUSTICE ROBERTS: Well, one  
5 reason that -- the second might be different --  
6 might be different than the first because if  
7 you allow the second, you've got to allow the  
8 third and then the fourth and the fifth. And  
9 there's no end in sight.

10 MR. FREDERICK: And what judges have  
11 held, Mr. Chief Justice, is that the end in  
12 sight is that you have to have a new rationale  
13 for why the subsequent class certification  
14 motion should be granted. And they get denied  
15 -- and they get denied fairly routinely, and  
16 they get denied across the broad spectrum of  
17 the statutory claims that people bring.

18 And that is the empirical truth of it.  
19 And it is a solution that this Court in Smith  
20 identified as the mechanism because this Court  
21 could have cut this off at Smith several years  
22 ago by simply saying: You only get one shot at  
23 class certification. But the Court unanimously  
24 held no, because it is not preclusive against  
25 the absent members. And if you apply that

1 rationale with the idea that if there is  
2 tolling, you have the chance for a meritorious  
3 class.

4 Here we had the situation where,  
5 because of inadequate representation  
6 functionally, a class of what would have been a  
7 very meritorious set of claims against this  
8 company that had committed fraud is basically  
9 being foreclosed because of the inability to  
10 bring high-value claims on an individual basis  
11 or to have adequate counsel who can properly  
12 construct a securities class action.

13 JUSTICE ALITO: You -- you argue that  
14 if the second -- let's say class certification  
15 is denied in the first case. Then a second  
16 case is brought. And the new district judge  
17 doesn't -- just says, well, I just think the  
18 first district judge was wrong and I don't care  
19 about -- I know -- I'm not going to accept that  
20 as a matter of comity.

21 Is there any remedy for that?

22 MR. FREDERICK: Well, I think, Justice  
23 Alito, I've not encountered that in the cases.  
24 What frequently happens is that these  
25 subsequent cases get related and transferred

1 back as related cases under various MDL  
2 procedures, but I think the answer to your  
3 question would be resolved under a -- abuse of  
4 discretion standard, and the issue on appeal  
5 would be: Should the second judge have applied  
6 comity on the -- on the basis that the same  
7 rationale applied? I think that would be the  
8 argument and that would be how a court of  
9 appeals would review that.

10 JUSTICE ALITO: I -- I've never seen  
11 this as an enforceable -- you know, as an  
12 enforceable doctrine. I would think the second  
13 district judge would be perfectly right in  
14 saying: Look, I have to apply the law  
15 independently. And I'll give respectful  
16 consideration to what the first judge did, but  
17 if the first judge was wrong, I'm not going to  
18 follow what the first --

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

20 JUSTICE ALITO: -- judge did.

21 MR. FREDERICK: I think that -- and  
22 that's why it is under an abuse of discretion  
23 standard, because one would be looking at did  
24 the district court abuse the discretion vested  
25 to him or her in that circumstance?

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

13           And that leads me --

14           JUSTICE GORSUCH: Well, if we -- if we  
15 were to rule against you, it seems to me the  
16 effect might be that we would encourage more  
17 protective filings. And that would solve the  
18 problem, wouldn't it? We wouldn't have to  
19 create these extraordinary rules in extending  
20 American Pipe in new ways; we'd just create a  
21 new incentive structure that would ensure that  
22 there are backup class actions available. What  
23 -- what's wrong with that?

24           MR. FREDERICK: I think that what's  
25 wrong with that is that it is inconsistent with

1 what led the Court to the American Pipe  
2 principle to begin with, which was that this  
3 was really a balancing among a multiplicity of  
4 interests.

5 JUSTICE GORSUCH: And -- and we're now  
6 balancing a multiplicity of interests in a  
7 slightly different context. And why wouldn't  
8 the balance with respect to encouraging  
9 protective filings might be slightly different  
10 here?

11 MR. FREDERICK: I think that the  
12 answer is that one of the rationales of the  
13 American Pipe rule was to protect district  
14 judges from having to do a lot of unnecessary  
15 work in processing both individual and  
16 protective class action claims and to do a lot  
17 of things that have to be done as an  
18 administrative matter that's unnecessary if you  
19 recognize the representative nature of the  
20 class action that is filed. So --

21 JUSTICE GORSUCH: The alternative is  
22 backhand administration over comity questions  
23 that are effectively unreviewable.

24 MR. FREDERICK: Well --

25 JUSTICE GORSUCH: So how do we weigh

1 those two interests?

2 MR. FREDERICK: I -- I don't agree  
3 that these are comity questions that are  
4 unreviewable. And, of course, where you have  
5 transfer --

6 JUSTICE GORSUCH: Are you aware of any  
7 court that's ever held that a district court  
8 abused its discretion in -- in declining to  
9 follow another district court's decision?

10 MR. FREDERICK: No, but I'm also not  
11 aware of any decision of a court that says that  
12 just because you have an equitable tolling of  
13 an individual claim, you can't use all of the  
14 Rules of Civil Procedure that are available to  
15 you. I mean, we are in uncharted waters to  
16 some extent, Justice Gorsuch.

17 But I think that the first instinct of  
18 the American Pipe Court, as reaffirmed in  
19 Crown, Cork, was to say that the tolling  
20 applied to "all class members." And remember,  
21 when --

22 JUSTICE GINSBURG: But in -- in the --  
23 the underlying idea, I thought of American  
24 Pipe, was class action denied, anyone can come  
25 in in a window after that, they are diligent,

1 but the class members that have done nothing,  
2 that are sitting tossing the notices into the  
3 wastepaper basket, they -- they are not  
4 diligent.

5 So the American Pipe is protecting  
6 diligent parties who will come in immediately  
7 after the class action is denied and the ones  
8 who don't come in are still sleeping on their  
9 rights.

10 MR. FREDERICK: Right. But the second  
11 subsequent class action here, Smyth, would  
12 satisfy the diligence rationale.

13 JUSTICE GINSBURG: Well, that -- that  
14 one, Smyth was within the statute of  
15 limitations.

16 MR. FREDERICK: That's correct. And  
17 so --

18 JUSTICE GINSBURG: This one isn't.

19 MR. FREDERICK: That's correct, but  
20 the rationale, the logic of it applies in the  
21 same way. And it's not correct, I don't think,  
22 Justice Ginsburg, to say that the Court in  
23 Crown, Cork was talking about diligence.  
24 Remember that in both American Pipe and in  
25 Crown, Cork, the class certification denials

1 were done because the class certification could  
2 not meet the requisites of Rule 23(a). And  
3 that meant that there was not going to be a  
4 possibility of a class in those factual  
5 circumstances.

6 So it would have been natural to  
7 suppose that what --

8 JUSTICE GINSBURG: Well, there could  
9 have been people who were worried about the --  
10 the weaknesses, the vulnerability of the class  
11 representative could have intervened in that --  
12 in that action. They didn't have to wait until  
13 the class action was denied.

14 MR. FREDERICK: The -- and Justice  
15 Ginsburg, that goes to my point, which is that  
16 equity should not allow the courts to pick and  
17 choose which Rules of Civil Procedure apply if  
18 you have a timely filed claim.

19 You know, the -- the principle here  
20 that I think has been important is the idea  
21 that the procedural rule shouldn't matter. And  
22 what ends up happening is that the Petitioner's  
23 position has particularly harsh results because  
24 the defendant has much more control over the  
25 running of the statute of limitations.

1           Here both the Dean case and the Smyth  
2 case were settled through individual  
3 settlements. So if you were to hypothesize  
4 that a defendant who did not want to face a  
5 follow-on class action would simply wait until  
6 one day after the statute of limitations has  
7 expired and the class certification motion has  
8 not been acted on yet, will simply buy off the  
9 lead plaintiff and know that it will never face  
10 a class action. And --

11           JUSTICE SOTOMAYOR: Mr. Frederick,  
12 there's been a circuit split. I see it as  
13 three ways. The First, Second, Fifth, and  
14 Eleventh Circuits have basically followed your  
15 adversary's rule. The Third and Eighth say if  
16 there's a deficiency in the plaintiff, they  
17 will permit a follow-on class action but  
18 otherwise no.

19           And I'm assuming that that's the rule  
20 you should -- you would like here to say: In  
21 Smith it was a timely class action, the only  
22 deficiency was in the plaintiff, not in my  
23 claim. And so you would win here.

24           And in the Ninth and I think the Ninth  
25 and the Sixth, and somebody else have followed

1 rule you are trying to advocate for. Go back  
2 to the Third and Eighth argument a little bit  
3 and tell me if we're thinking of doing what  
4 what your adversary says, why shouldn't we  
5 accept that compromise?

6 MR. FREDERICK: I think that the  
7 compromise position would certainly solve the  
8 problem in this case because of the --

9 JUSTICE SOTOMAYOR: For you.

10 MR. FREDERICK: -- for me. So leaving  
11 that aside, I think that if you were to do  
12 that, you would affirm on a separate basis, but  
13 the judgment of the Ninth Circuit would be  
14 upheld and the case would be timely and allowed  
15 to go forward.

16 I think that the principle difficulty  
17 from it as a doctrinal matter is that the Court  
18 has not tended to use these types of equitable  
19 arguments as a way of having Rule 23 operate as  
20 a toggle on and off switch. And that, I think,  
21 is where you have a certain amount of  
22 analytical difficulty.

23 The way we have proposed the solution  
24 to this case is if the claim is timely and it's  
25 timely as an individual matter, the individual

1 can bring in, under Rule 23, that is a very  
2 straightforward, clean, simple rule.

3 So if you were to then look at, say,  
4 we don't accept the simple rule, we want to  
5 have something a little bit more complex, I  
6 think at the very least you would say: Was the  
7 plaintiff who brought that adequate to  
8 represent the class and was there a deficiency  
9 in the adequacy of that representation?

10 And I think to that extent, you would  
11 then have to look hard at what were the various  
12 factors that went into that adequacy. It  
13 becomes a much more complicated question when I  
14 think, as the Court has told us, we want these  
15 timing rules generally to be simple and  
16 straightforward, so that litigants know how to  
17 follow them.

18 But certainly as a matter of equity,  
19 it does not seem fair where you're talking  
20 about a rule that is allowing potentially  
21 meritorious claims to go forward to be snuffed  
22 out simply because the person who got to the  
23 courthouse first happened not to be competent  
24 in bringing about the kind of case that would  
25 be representative of all of the various

1 plaintiffs.

2 Unless the Court has any further  
3 questions, we'll submit.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Aronson, five minutes.

7 REBUTTAL ARGUMENT OF SETH ARONSON

8 ON BEHALF OF THE PETITIONERS

9 MR. ARONSON: Let me begin by saying  
10 that we have not conceded that all of the  
11 absent shareholders claims are timely. They  
12 are not timely. They are not timely because  
13 they have not come forward.

14 Mr. Resh's individual claim is timely  
15 because he showed the diligence by filing an  
16 action, and these extraordinary circumstances  
17 existed beforehand where he should not have  
18 filed that action.

19 But as to absent class members, they  
20 have not shown any diligence, they have not  
21 stepped forward to file anything, and there are  
22 no extraordinary circumstances because the  
23 class has been denied.

24 And we're not saying that Mr. Resh is  
25 not able to use Rule 23. He can. But what he

1 cannot do is use Rule 23 to revive claims that  
2 have been dormant, that are not timely. That's  
3 what he can't do with Rule 23.

4 But if he wants to come into court and  
5 say: I have got a Rule 23 claim, fine, there  
6 is no one else in that class, because they have  
7 not filed -- they are not entitled to equitable  
8 tolling.

9 Let me also address what Justice Alito  
10 and Justice Gorsuch identified on comity. To  
11 illustrate how weak comity is as a defense is  
12 -- we asked the judge in Smyth, who was the  
13 same judge in Dean, we couldn't say you're  
14 precluded because Smyth was filed in a timely  
15 way so we could not use preclusion under Smith  
16 versus Bayer, so we said we'd like you to show  
17 comity. The district judge wouldn't even show  
18 deference to himself. So how can we expect  
19 other judges to show deference to other judges?  
20 That's how --

21 JUSTICE KAGAN: I thought that that  
22 was because the problem that he identified had  
23 been cured?

24 MR. ARONSON: It had not been -- well,  
25 it had not been cured. He thought that -- that

1 Smyth might be able to do it in a different way  
2 and then threw out Smyth because of adequacy  
3 and typicality grounds.

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

6 And, Justice Kagan, you earlier  
7 remarked that American Pipe says that the class  
8 members are diligent for relying on the class.  
9 Yes, but up to a point. And let me read from  
10 Crown, Cork.

11 And I am reading from 103 Supreme  
12 Court at 2397 to 98. "We conclude, as did the  
13 Court in American Pipe, that the commencement  
14 of a class action suspends the applicable  
15 statute of limitations as to all members of the  
16 class who would have been parties had the suit  
17 been determined to continue as a class action.  
18 Once the statute of limitations has been  
19 tolled, it remains tolled for all members of  
20 the putative class until certification is  
21 denied. At that point class members may choose  
22 to file their own suits or to intervene as  
23 plaintiffs in the pending action."

24 So reliance on the class action  
25 alone -- on -- on the class action itself is

1 not enough. You have to do something else.

2 Counsel said that he's okay with  
3 getting tolling from one of the class actions  
4 but not the both -- but not both. If you do  
5 the math, they filed so late that Respondents  
6 need tolling from both cases.

7 So if you rule that he is not entitled  
8 to tolling in the first case because it was on  
9 a class-wide basis, then their claims are  
10 time-barred under any standard.

11 But let me go back to the -- the basic  
12 point that we're trying to make here by  
13 enforcing the statute of limitations. We think  
14 that if -- if class members get in there early,  
15 class representatives apply early, it solves  
16 all of these problems.

17 It solves the problem, Justice Kagan,  
18 of the \$32 claimant. That person -- this --  
19 this will enhance Rule 23 because the best  
20 class representatives will be there early. The  
21 district judge will be able to make the best  
22 decision early on.

23 And if we have multiple class actions,  
24 fine. The driver of American Pipe was not  
25 multiple class actions. American Pipe and

1 Crown, Cork said we don't want all these  
2 individual actions while we're trying to deal  
3 with class issues.

4 Dealing with more class issues, better  
5 class representatives, we think that's a good  
6 thing. We think that the PSLRA, for example,  
7 does the same thing for us.

8 So I have to remark that in Crown,  
9 Cork at the end, in Justice Powell's closing  
10 concurrence he said that American Pipe gives us  
11 -- is a very generous rule and it invites  
12 abuse. And we think that serial litigation of  
13 class actions is that abuse.

14 We ask that the court below be  
15 reversed. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel. The case is submitted.

18 (Whereupon, 12:06 p.m., the case was  
19 submitted.)

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