No. 15-55432

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL RESH, WILLIAM SCHOENKE, HEROCA HOLDING, B.V., and NINELLA BEHEER, B.V.,
Plaintiffs-Appellants,

v.

CHINA AGRITECH, INC., YU CHANG, YAU-SING TANG, GENE MICHAEL BENNETT, XIAO RONG TENG, MING FANG ZHU, LUN ZHANG DAI, HAI LIN ZHANG, CHARLES LAW, and ZHENG ANNE WANG,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
The Honorable R. Gary Klausner
(No. 2:14-cv-05083-RGK-PJW)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF REHEARING

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Dated: June 19, 2017

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry section, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including class action matters.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files *amicus curiae* briefs on behalf of the retail industry.

Amici's members and affiliates have a keen interest in ensuring that courts even-handedly enforce the substantive and procedural requirements applicable to

class action lawsuits. Because the panel decision erroneously extends a judicially created tolling doctrine to effectively eliminate statutes of limitations in a recurring class action scenario, exacerbating an existing and acknowledged circuit conflict on an important question of nationwide importance, *amici* support rehearing.[*]

REASONS FOR GRANTING THE PETITION

The panel decision in this case eviscerates the balance between timely filing and procedural efficiency struck in the class action context by the Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork, & Seal Co. v. Parker*, 462 U.S. 345 (1983). In so doing, the panel casts aside long-extant Circuit precedent—including a decision by this Court sitting en banc—and commits this Court to the minority side of an entrenched and acknowledged conflict among the courts of appeals that, unless corrected, will require intervention by the Supreme Court. And the panel decision is wrong.

To enhance the "efficiency and economy of litigation," the Supreme Court in *American Pipe* held that "the commencement of [a] class suit tolls the running of the statute [of limitations] for all purported members of the class." 414 U.S. at 553. This rule is designed to "ensure that [potential class members'] rights w[ill] not be

[*] Pursuant to Federal Rule of Appellate Procedure 29, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. 9th Cir. R. 29-2(a).

lost in the event that class certification [i]s denied." *Crown, Cork*, 462 U.S. at 350. As *American Pipe* and *Crown, Cork* make clear, tolling ends once class certification has been denied (or reversed): At that time, absent class members must timely "file an *individual* claim or move to intervene in the suit." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011) (emphasis added).

"The tolling rule of *American Pipe* is a generous one, inviting abuse." *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring). Thus, for nearly three decades, this Court has been careful not to stretch the *American Pipe* doctrine "beyond its carefully crafted parameters into the range of abusive options." *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (quoting *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987)). Specifically, this Court has repeatedly rejected the suggestion that *American Pipe* tolling can or should be extended to a "subsequently filed class action" after class certification has been denied in the initial suit. *Id.*; *see also Catholic Soc. Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1147 (9th Cir. 2000) (en banc) ("[I]f plaintiffs in this action were seeking to relitigate the correctness of that denial, we would not permit plaintiffs to bring a class action."). This has become known as the "anti-stacking" rule—the tolling attendant to an initial class action does not extend to a subsequent (or "stacked") class action following denial of certification.

Nearly every other court of appeals to have considered the stacking question has agreed with this Court that *American Pipe* tolling applies only through the initial

denial of class certification, and cannot be extended to a subsequent class action seeking a second bite at the apple. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Korwek*, 827 F.2d at 879 (2d Cir.); *Yang v. Odom*, 392 F.3d 97, 104 (3d Cir. 2004); *Angles v. Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 n.10 (4th Cir. 2012); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1325 (11th Cir. 2015); *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994). And for good reason. As court after court has recognized, a contrary rule would allow "lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely," thereby eviscerating the functional operation of statutes of limitations so long as one class action broad enough to encompass all the subsequent claims is timely filed. *Yang*, 392 F.3d at 113 (Alito, J., concurring in part); *see also Griffin*, 17 F.3d at 359 (prohibiting indefinite tolling); *Korwek*, 827 F.2d at 879 (finding this reasoning "compelling"); *Salazar-Calderon*, 765 F.2d at 1351 (same).

In *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), the Sixth Circuit purported to distinguish circuit precedent squarely endorsing the anti-stacking rule—to wit, "the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class," *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988)—on the ground that this rule is inapplicable where "no court had denied class certification" of a class

with the identical scope as the subsequently filed class. 792 F.3d at 647. But if tolling comes to an end upon the denial of certification, as *American Pipe* and *Crown, Cork* clearly hold, then tolling cannot extend to a follow-on class regardless of its scope. Certainly nothing in the logic of *American Pipe* would support the indefinite filing of class actions so long as later claims are brought on behalf of a subgroup of an earlier class. The panel decision in this case is even more extreme, allowing for endless refiling of class actions even after the clear denial of earlier class actions of the same scope.

The Seventh Circuit has also incorrectly opined that serial relitigation of class certification issues should be prevented, not through reasonable limits on *American Pipe* tolling, but instead through the application of nonparty issue preclusion to bind all absent class members to the initial decision declining to certify a class. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011). That approach has been expressly rejected by the Supreme Court in *Smith*, 131 S. Ct. 2368, which held that nonparty issue preclusion cannot be used to bind absent class members to a decision denying class certification.

Relying in part on the strained reasoning of *Phipps* and *Sawyer*, the panel here stated that its departure from the long-standing anti-stacking rule was not only justified, but mandated, by three recent Supreme Court decisions. Slip op. 18-22 (discussing *Smith*, 131 S. Ct. 2368, *Shady Grove Orthopedic Assocs., P.A. v. Allstate*

Ins. Co., 559 U.S. 393 (2010), and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)). Nothing could be further from the truth.

The only one of these three decisions that even *mentioned* tolling was *Smith*—and it did so in a passage, which the panel ignores, reaffirming that *American Pipe* preserves only the right of absent class members to go at it alone should an attempt at class certification fail. *See* 131 S. Ct. at 2379 n.10 ("[A] putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit"). The remainder of the *Smith* opinion addresses the scope of the Anti-Injunction Act and nonparty issue preclusion, neither of which is implicated by a statute of limitations defense. *Id.* at 2380-82. *Shady Grove* held only that Rule 23 applies to all claims brought in federal court (notwithstanding state laws that purport to restrict the use of class actions). *See* 559 U.S. at 398-406. It certainly did not suggest, much less hold, that Rule 23 authorizes courts to toll statutes of limitations indefinitely while plaintiffs engage in serial attempts to certify a class in successive actions. To the contrary, it reaffirmed that Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* at 408 (plurality opinion). *Tyson*, which addressed the extent to which plaintiffs in a class action could rely on representative evidence to prove their claims, reaffirmed this same principle. 136 S. Ct. at 1046-48.

These authorities are perfectly consistent with the anti-stacking rule. As *American Pipe* held, the "proper test" for determining whether tolling is appropriate "in a given context" is whether it is "consonant with the legislative scheme"; that is because Rule 23 cannot be used to alter or undermine the rules of decision that apply to the merits of the underlying claims. 414 U.S. at 557-58. *Shady Grove* and *Tyson* make this clear. In the context of stacked class actions, extending *American Pipe* tolling is thus inappropriate under *American Pipe*, *Shady Grove*, and *Tyson* because it is inconsistent with the functional operations of statutes of limitations. In other words, tolling in the context of stacked class actions changes a rule of decision—the statute of limitations. In a single plaintiff case, the statute of limitations prevents a plaintiff from seeking to relitigate a procedural ruling by simply refiling his or her claim after the limitations period has run. Under the panel decision, the statute of limitations does not present a similar bar in the class action context.

Statutes of limitations are fundamental to our judicial system because they provide for "repose, [the] elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 468 n.14 (1975) (a "policy of repose" is "inherent in a limitation period"). The panel decision upends each of these expectations. The ability to file class action complaints *ad infinitum* strips statutes of limitations of their "vital" ends, making it

more difficult to defend against putative class actions. *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (citation omitted). It also flies in the face of the Supreme Court's admonition that judicially created tolling doctrines, such as *American Pipe*, are "very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it." *Id.* at 1224.

The panel's new rule not only removes the right to repose established by even-handed application of statutes of limitations, but to finality in any form—even where class certification has failed and individual claims have been resolved. Under the proper application of *American Pipe*, judicial disposition of the initial class certification request would allow the case to proceed to resolution on the merits. But under the approach adopted by the panel below, nothing would prevent an attorney from identifying new named plaintiffs and refiling class action complaints in perpetuity until they "find a district court judge who is willing to certify the class," or they force the defendant into a large settlement. *Yang*, 392 F.3d at 113 (Alito, J., concurring in part). For this reason, the panel's new rule exponentially expands "the risk of 'in terrorem' settlements that class actions entail," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011), requiring defendants to buy peace from even unmeritorious claims on a classwide basis rather than going through expensive and serial attempts to (again) defeat class certification.

As the Supreme Court has repeatedly held, strict enforcement of statutes of limitations is integral to the "evenhanded administration of the law." *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam) (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). Limitations provisions "inevitably reflect[ ] [Congress's] value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll. v. Ricks*, 449 U.S. 250, 260 (1980) (citation omitted). In this regard, statutes of limitations serve to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired" by the passage of time, *United States v. Kubrick*, 444 U.S. 111, 117 (1979), because "evidence has been lost, memories have faded, and witnesses have disappeared," *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944); *see also American Pipe*, 414 U.S. at 554. By allowing statutes of limitations to be extended indefinitely while *procedural* questions concerning the propriety of class certification are litigated and relitigated in serial litigation, the panel's rule allows the merits of the underlying claims to grow stale, and the documentary and testimonial evidence related to those claims to be clouded by the passage of time, making it more difficult to defend against these claims. *See Bell v. Morrison*, 26 U.S. 351, 360 (1828) (explaining that statutes of limitations "afford security against stale demands, after the true state of the transaction may have been

forgotten, or be incapable of explanation, by reason of the death or removal of witnesses").

Statutes of limitations also serve a "vital" function for the business community by "giving security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). The panel's decision here eliminates this certainty and stability by eliminating the temporal cutoff date for bringing claims. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (statutes of limitations allow "peace of mind"). It also creates different rules in different jurisdictions about when, if at all, absent class members must step forward in order to assert timely claims. The same class action would be allowed to proceed in the Sixth and Ninth Circuits, but would be dismissed as untimely in the First, Second, Third, Fourth, Fifth, and Eleventh Circuits. The panel's new rule will thus make it substantially more difficult for nationwide businesses to make an accurate assessment of their future liabilities, and will encourage forum shopping by class action plaintiffs.

The panel's expansion of *American Pipe* tolling is not only unmoored from Supreme Court precedent but creates perverse incentives for class action plaintiffs to file sequential class complaints. It destroys the efficiencies that otherwise might be gained through the proper use of Rule 23 and places at risk the rights of both defendants and absent class members. By effectively abrogating the statutes of limitations applicable to putative class members—well beyond the limited tolling

previously approved in *American Pipe* and *Crown, Cork*—the panel has arrogated to the Judiciary—and exercised—authority properly reserved to the Legislature.

"The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than [some] sort of case-specific judicial determination." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). As a result, Congress's legislative judgments in enacting statutes of limitations are "not to be disregarded by courts out of a vague sympathy for particular litigants." *Brown*, 466 U.S. at 152. Simply put, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014). Nor may they cast aside statutes of limitations in the name of Rule 23, which "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072; *see also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (holding that there is no right to proceed via class action). Yet that is precisely what the panel did here. Slip op. 22.

Review by the en banc Court is warranted to restore the long-standing principle that *American Pipe* tolling starts with the "filing of a class action" and ends once "class certification is denied," at which point individuals must act "within the time that remains on the limitations period" if they wish to pursue claims previously

asserted ostensibly on their behalf. *Crown, Cork*, 462 U.S. at 346-47, 354; *see also Smith* 131 S. Ct. at 2379 n.10.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Dated: June 19, 2017

By: /s/ Mark A. Perry
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Counsel for Amici Curiae *Chamber of Commerce of the United States of America and Retail Litigation Center*

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(a)(4)(G), the *Amici Curiae* Brief of the Chamber of Commerce of the United States of America and Retail Litigation Center complies with the page limitations set forth in Ninth Circuit Rule 29-2(c)(2). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: June 19, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 19, 2017.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: June 19, 2017

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