No. 17-432

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,

v.

MICHAEL RESH, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION FOR JUSTICE AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The **American Association for Justice**, formerly known as the Association of Trial Lawyers of America, was established in 1946 to safeguard victims' rights, strengthen the civil-justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. Based on its members' expertise in class action litigation—and its organizational concern for the development of the law in this area—AAJ is well positioned to offer a unique perspective on the questions presented by this case.

The **National Consumer Law Center** is a non-profit research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a recognized expert on consumer issues and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress, state legislatures, agencies, and courts for nearly fifty years. NCLC is the author of a widely praised twenty-volume Consumer Credit and Sales Legal Practice Series, which includes a manual on *Consumer Class Actions* (9th ed. 2016).

SUMMARY OF ARGUMENT

The petitioner describes this case as an opportunity for the Court to reject makeshift, unprincipled theories of equitable tolling. That framing is correct. But it is the petitioner's argument—not the decision below—that falls flat when tested against the nation's tradition of equity.

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[1] No counsel for a party authored this brief in whole or in part and no person other than the *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

As this Court recently confirmed, tolling under *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), is "based on traditional equitable powers." *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2052 (2017). Accordingly, the very first question that this Court must address is whether any recognized tradition of equity supports the petitioner's account of how *American Pipe* operates here.

Although it pays homage to that requirement, the petitioner's entire argument depends on violating it. An unspoken premise of the petitioner's brief is that equitable tolling can render a claim timely on the condition that the claim not be litigated using certain rules of civil procedure. Put differently, the petitioner believes that people with live claims can be forbidden from using certain claim-processing rules because the timeliness of their claims is the result of equitable tolling.

This account of equitable tolling and the ongoing procedural handicaps that it can supposedly inflict is without foundation. None of the Court's cases describe equity as operating this way, and several cases (including *American Pipe* itself) signal that it cannot do so. The petitioner's efforts to evade this conclusion only lead it to more fundamental errors—including a conflation of substantive claims with the procedures through which they are processed, and a description of equitable tolling that assigns decisive weight to events *after* the tolling period.

There is thus little need to grapple with the mysteries of the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). Regardless of whether the petitioner's conception of *American Pipe* is foreclosed by those authorities, it fails on its own terms as a proper and legitimate account of equitable tolling.

ARGUMENT

The petitioner improperly contends that equitable tolling imposes procedural limitations that have no basis in traditions of equity.

The parties' disagreement is a narrow one. They both recognize that *American Pipe* tolling is a valid and appropriate doctrine grounded in the Court's equitable powers. *See* Pet. Br. 2; Resp. Br. 1; *see also ANZ Secs.*, 137 S. Ct. at 2051. They both agree that *American Pipe* protects plaintiffs who have diligently relied on a pending class action to protect their rights, and that tolling is justified by the extraordinary need to avoid a direct conflict with the central purposes of Rule 23. *See* Pet. Br. 30; Resp. Br. 39; *see also American Pipe*, 414 U.S. at 552–55. Finally, both parties acknowledge that by virtue of *American Pipe* tolling, every individual member of the *Resh* class action had a timely claim that it could have asserted when the *Resh* class complaint was filed. *See* Pet. Br. 30-31; Resp. Br. 20; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

At bottom, there is just one dispute here: whether individuals with live claims are foreclosed from availing themselves of Rule 23's procedural mechanism because the timeliness of their claims is the result of equitable tolling. According to the petitioner, if a claim is rendered timely by virtue of *American Pipe* equitable tolling, it *can* be asserted in federal court, but equity nevertheless forbids the plaintiff from using one particular rule of civil procedure that would otherwise apply.

As the respondents explain, even if the petitioner's account of *American Pipe* were defensible on its own terms, this asserted limitation would still have to be rejected under *Shady Grove*, 559 U.S. at 393. *See* Resp. Br. 21-23. There, the Court made clear that Rule 23

"unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met." *Id.* at 406 (emphasis in original). Thus, courts may not impose additional, atextual requirements for use of the class action procedure. *See* Pet. App. 17a (explaining that Rule 23 cannot "be set aside when a suit's timeliness depends on a tolling rule." (citation omitted)).

But there is a simpler and more fundamental flaw in the petitioner's argument. *American Pipe* tolling is a species of equitable tolling. Accordingly, the petitioner's account of *American Pipe* cannot stand unless it is supported by recognized principles and traditions of equity. Can the application of an equitable-tolling rule strip away a claim-holders' ability to use certain rules of civil procedure in litigating her claim? If not, the petitioner's argument fails at the very first step—and it is unnecessary to ask whether *American Pipe* tolling can supplement Rule 23's criteria under *Shady Grove*.

As this brief explains, equity does not stretch so far. Ironically, while the petitioner stakes its case on arguments against expanding equitable tolling, that is just what it would have this Court do. Indeed, the expansion that it proposes is far more radical than the straightforward application of *American Pipe* approved by the court below. To our knowledge, this Court has never held that equitable tolling can function to preserve a claim's timeliness, but only on the condition that the plaintiff not make use of specific rules of civil procedure (or other claim-processing rules) when he files his claim. While *American Pipe* "did not consider the criteria of the formal doctrine of equitable tolling in any direct manner," that is no basis for tossing aside settled principles

of equity or manufacturing new ones in assessing how to apply *American Pipe*. *ANZ Secs.*, 137 S. Ct. at 2052.

Because the petitioner asks equity to do something that equity cannot do—preserve a claim only on the condition that specified rules of civil procedure be rendered unavailable—its argument collapses right out of the gate and must be rejected.

A. Equitable tolling is not an unregulated power.

Although the Judiciary's equitable powers are broad, they are not unbounded. As this Court has emphasized time and again, "courts of equity 'must be governed by rules and precedents no less than the courts of law.'" *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

That principle applies with full force to equitable tolling. *See Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (observing that equitable tolling is not "an unregulated power of administering abstract justice at the expense of well-settled principles"). The judicial power to equitably toll statutes of limitations is justified only by "the presumption that Congress legislates against a background of common-law adjudicatory principles." *ANZ Secs.*, 137 S. Ct. at 2051 (quotation marks and citations omitted). On this basis, courts have held that a wide array of statutory limitations periods are subject to equitable tolling. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158 (2013) (collecting cases); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990).

These decisions, however, have emphasized that Congress "can hardly expect [courts] to break with historic principles of equity." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). The Court has therefore rejected requests to invent rules that are "divorced from long-settled equitable-tolling principles." *Credit Suisse Sec.*

(USA) LLC v. Simmonds, 566 U.S. 221, 226 (2012). As the Court has recognized, fashioning a new kind of tolling rule without a solid foundation in traditions of equity would raise substantial separation-of-powers concerns. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017).

B. *American Pipe* itself does not justify the petitioner's asserted limits on equitable tolling.

Notwithstanding its own criticism of unmoored equitable doctrines, the petitioner makes virtually no effort to explain how its proposed rule is consistent with—much less required by—traditional equitable principles. At no point does the petitioner cite any case for the key proposition that it must establish to prevail: that equitable tolling can render a plaintiff's claim timely, but only on the condition that she not later available herself of a particular, otherwise-applicable rule of civil procedure.

The sole authority that the petitioner invokes for this claim is *American Pipe* itself. *See* Pet. Br. 28-30. The petitioner imputes to *American Pipe* (and to *Crown, Cork*) a novel theory of equitable tolling—one that preserves claims while imposing post-tolling constraints on which rules of civil procedure may be invoked while litigating them.

That is not a tenable reading of precedent. Neither *American Pipe* nor *Crown, Cork* announced an entirely new species of equitable tolling. In fact, both cases use expansive language that is directly at odds with the procedural limitation fabricated by the petitioner.

First, *American Pipe* held without qualification that its tolling rule covers "*all* asserted members of the class." 414 U.S. at 554 (emphasis added). In applying *American Pipe* beyond the specific context of motions to

intervene after the denial of class certification, *Crown, Cork* echoed its broad reasoning and emphasized "that the holding of that case is not to be read so narrowly." 462 U.S. at 350; *see also id.* at 353–54 ("Once the statute of limitations has been tolled, it remains tolled for *all* members of the putative class until class certification is denied." (emphasis added)). Since then, this Court has repeatedly described *American Pipe* tolling as applying to *all* members of a putative class—and has never suggested that *American Pipe* is inapplicable to members who later choose to aggregate their individual claims. *See ANZ Secs.*, 137 S. Ct. at 2051; *Credit Suisse*, 566 U.S. at 226 n.6; *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974). Thus, neither *American Pipe* nor *Crown, Cork* supports the notion that claims rendered timely by equitable tolling are uniquely barred from being processed under certain rules of civil procedure.

Second, rather than embrace such limits, *Crown, Cork* emphatically rejected any added procedural straightjackets for claims rendered timely by *American Pipe*. *See* 462 U.S. at 351–54. In describing how it expected tolling would operate, the Court explained that class members with claims preserved by *American Pipe* "may choose to file their own suit" instead of intervening in the original litigation. *Id.* at 354. The Court did not identify any limitations that would follow (and restrict) class members in filing "their own suit." Nor did it suggest that they could not use any rule of procedure governing aggregation of claims. Consistent with this conception of *American Pipe*, the Court has applied it in a diverse range of procedural settings. *See* Resp. Br. 30 (discussing *American Pipe*, 414 U.S. at 461; *Eisen*, 417 U.S. at 176 n.13; *United Airlines, Inc. v. McDonald*, 432

U.S. 385, 391 (1977); *Crown, Cork*, 462 U.S. at 354; and *Chardon v. Fumero Soto*, 462 U.S. 650, 654 (1983)).

Finally, as the Court recently observed, *American Pipe* "relied on cases that are paradigm applications of equitable tolling principles." *ANZ Secs.*, 137 S. Ct. at 2052. These cases included *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959), and *Holmberg*, 327 U.S. 392. *American Pipe* thereby justified its tolling rule by reference to traditions of equity that are "older than the country itself." *Glus*, 359 U.S. at 234. Given *American Pipe*'s deliberate reliance on canonical equitable-tolling cases, there is no reason to accept the petitioner's claim that the *American Pipe* Court saw itself as fashioning entirely new principles of equity. If anything, the opposite is true: the Court based its rule "on traditional equitable powers" that are "deeply rooted in our jurisprudence." *ANZ Secs.*, 137 S. Ct. at 2052.

In sum, whereas the petitioner imputes its novel theory of equitable tolling to *American Pipe*, that case is more faithfully read as adhering to inherited rules of Anglo-American equity jurisprudence. And those traditional rules do not support the petitioner's contention that claims rendered timely by equitable tolling are properly subject to ongoing procedural restrictions.

C. No other traditional principle of law or equity supports the petitioner's proposed limitation on claims rendered timely by *American Pipe*.

Apart from *American Pipe* and *Crown, Cork*, the petitioner does not even purport to identify any case or principle in this Court's jurisprudence that substantiates its account of equitable tolling. Nor could it. There is no such thing as equitable tolling on a condition subsequent, where the relevant condition involves the availability of a

claim-processing rule. *See Shady Grove*, 559 U.S. at 408 ("A class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."). The absence of judicial authority for this theory is sufficient proof that it lacks any foundation in traditional equitable principles. *See Holland*, 560 U.S. at 651 ("[G]iven the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments.").

Indeed, judicial authorities point the other way. In a series of recent decisions, this Court has identified two—and only two—"elements" of equitable tolling: diligence and extraordinary circumstances. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016) (citation omitted). Further, the Court has emphasized that these elements are central to the doctrine, "not merely factors of indeterminate or commensurable weight." *Id.*[2] Equitable-tolling precedent thus offers no foundation for a third element restricting the procedural rules that a plaintiff can use in alleging his claim.

If such an element did exist, it is unclear what limitations might apply. Would *American Pipe* forbid tolling when a plaintiff invoked other "rules allowing multiple claims . . . to be litigated together," such as Rule 18 (joinder of claims), Rule 20 (joinder of parties), and Rule 42(a) (consolidation of actions)? *Shady Grove*, 559 U.S. at 408. Or does the petitioner believe that plaintiffs with claims preserved by *American Pipe* are denied only the prerogative to use a single rule of civil procedure—

[2] As the parties acknowledge, *see* Pet Br. 2; Resp Br. 1, and as the Court has explained, *see ANZ Secs.*, 137 S. Ct. at 2051–52, these requirements are both fully satisfied with respect to applications of *American Pipe* tolling.

namely, Rule 23? In making these determinations about whether and how to aggregate claims, what equitable principles would the petitioner have the Court invoke? What precedents would guide the determination? And does this rule apply elsewhere? Are there any circumstances other than class actions where a claim rendered timely by equitable tolling may be pursued, but only if the plaintiff does not use certain rules of civil procedure?

The petitioner offers no answers to these questions. Nor does it identify any limiting principle. That is because the petitioner has asked the Court to use its equitable power in ways divorced from traditional principles of equity. For this reason alone, the petitioner's account of the limits imposed by *American Pipe* cannot be accepted.

D. The petitioner's argument depends on faulty premises about how equitable tolling works.

Ultimately, the petitioner offers an adventurous and far-reaching account of equitable tolling under *American Pipe*: not only does it preserve the timeliness of claims, but it also scrubs away claim-holders' ability to avail themselves of certain procedural rules in any resulting litigation. Described this way, the petitioner's argument is plainly out of key with traditions of equitable tolling.

Accordingly, the petitioner works hard to re-describe its argument. In the petitioner's telling, the only question here is whether the underlying rationale for *American Pipe* properly applies to subsequent class actions, as compared to subsequent individual actions. This framing of the issue, however, depends on two key premises—neither of which withstands careful scrutiny.

1. The petitioner's account of equitable tolling conflates substance and procedure.

The petitioner's first error is to presume that there is some kind of metaphysical distinction between "class actions" and "individual actions," such that equitable tolling can save one kind of action but not the other for the *exact same* substantive claim. *See, e.g.*, Pet. Br. 28-29, 31, 33-37. This presumption animates the petitioner's contention that the Court should engage in separate analyses of whether the policies underlying *American Pipe* apply to individual actions and class actions. But the distinction on which the petitioner builds this argument has no basis in law.

By its terms, and consistent with the Rules Enabling Act, Rule 23 does not create any substantive rights or confer any substantive claims. Instead, Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged," altering only how "claims are processed." *Shady Grove*, 559 U.S. at 408 (plurality opinion); *see also id.* at 447 (Ginsburg, J., dissenting) (observing that "Rule 23 describes a method of enforcing a claim for relief").

Accordingly, when a person has a substantive claim for relief, he does not have both an "individual claim" and a "class claim." Rather, he has a single, unified "claim." And in seeking to vindicate that claim, he may avail himself of many different procedural rules that describe how claims may be processed in federal court. *E.g.*, Rule 3; Rule 18; Rule 20; Rule 23; Rule 24. A "class action" and an "individual action" are merely two possible procedures for litigating his "claim" (or for litigating it alongside other claims aggregated in a single proceeding). *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326,

332 (1980) ("The right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

In that respect, it confuses substance with procedure to suggest that equity can toll an "individual action" but not a "class action" for a single claim. These issues cannot be analyzed separately, as the petitioner would prefer. When a person is injured (or learns of his injury) and a claim accrues, that claim remains timely for a finite period. While equity can extend that period by tolling the limitations clock, this Court has never held that equity might somehow split the substantive claim in half and toll the "individual" part but not the "class" part.

The petitioner thus missteps in contending that *American Pipe* tolling can be analyzed separately for class actions and individual actions seeking relief for the same underlying claim. If *American Pipe* operates to preserve a claim as timely, it necessarily preserves the *whole* claim. The question whether claim-holders can avail themselves of specific procedural rules is a distinct issue. And for the reasons already given, traditional principles of equity foreclose the petitioner's assertion that claims preserved by tolling are subject to continuing procedural restrictions.

2. The petitioner's account of equitable tolling focuses on the wrong point in time.

The petitioner's argument also depends on a second, related error: it assigns controlling weight to procedural decisions that a plaintiff makes in filing his claim *after* the tolling period has ended, even though such conduct has never been seen as relevant to the tolling inquiry.

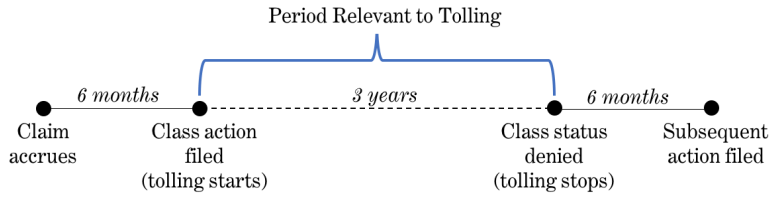
Under *American Pipe*, when a class action is filed within the limitations period, it "suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. As indicated by the Court's use of the present tense in that sentence ("suspends"), the suspension of the tolling period occurs *immediately* upon the filing of the class action. *Id.* at 554. This understanding is confirmed by many other equitable-tolling cases, which have used the present tense to describe "equitable tolling [as] a doctrine that *pauses* the running of, or *tolls*, a statute of limitations." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation omitted) (emphasis added).

Equitable tolling thus operates in real time. *See Artis v. D.C.*, 138 S. Ct. 594, 601–02 (2018) ("Ordinarily, 'tolled' . . . means that the limitations period is suspended (stops running) . . . then starts running again when the tolling period ends, picking up where it left off."). Where a plaintiff is acting diligently but is subjected to extraordinary circumstances, equity keeps the limitations clock frozen in place. *See United States v. Ibarra*, 502 U.S. 1, 4, n.2 (1991) (per curiam). Only after one or both of these elements is no longer satisfied does the clock resume.

The proper orientation of an equitable-tolling analysis is therefore *backward*—not to the plaintiff's procedural decisions in filing his current lawsuit (whose timeliness may depend on tolling), but rather to the earlier point in time at which he allegedly acted with diligence while facing extraordinary circumstances. The key question is whether, at that moment, the plaintiff met the standard for equitable tolling. *See Artis*, 138 S. Ct. at 602. Generally, the plaintiff's conduct *after* the tolling period ended is

of limited or no relevance to the equitable-tolling inquiry. *See Gibbs v. Legrand*, 767 F.3d 879, 892 (9th Cir. 2014).

This point is illustrated by the following diagram, which represents the ordinary operation of *American Pipe* tolling. For purposes of the diagram, it can be presumed that the limitations period is two years:



As this diagram shows, the events relevant to equitable tolling all take place in the historical past, as measured against the moment when the subsequent action is filed. Ordinarily, events after the tolling period concludes thus have no bearing whatsoever on an equitable assessment of whether the clock was stopped in the first place.

Here, however, the petitioner inverts that rule by centering the equitable-tolling inquiry around the moment in time at which the claim is filed. In the petitioner's telling, the most important decision is what procedural rule the plaintiff chooses to invoke when filing his claim *in the present*. *See* Pet. Br. 35–37. On that view, whether a claim receives the benefit of equitable tolling depends entirely on a procedural choice that the plaintiff makes long after the tolling period has concluded.

The petitioner does not identify any other equitable-tolling precedent in which the availability of tolling has depended on procedural decisions later made by the

plaintiff in filing his case, rather than on his conduct in the tolling period. That is because there are no such cases. Here, too, the petitioner advances a rule unmoored from the traditional principles of equitable tolling.

* * * * *

Last Term, this Court clarified that *American Pipe* tolling is fundamentally equitable in character. *See ANZ Secs.*, 137 S. Ct. at 2051. In light of this holding, there can be no doubt that applications of *American Pipe* must be consistent with the traditional equitable principles that Congress presumptively incorporates into statutes of limitations. *See id.* While the petitioner asserts that the court of appeals improperly expanded equitable tolling in the decision below, it is the petitioner that commits this sin. There is no basis in precedent for holding that a plaintiff may benefit from equitable tolling, but not if he decides to avail himself of certain rules of civil procedure in bringing his claim. Imposing that requirement would not only restrict *American Pipe* without a proper basis, but it could also cause broader mischief in the law of equitable tolling. This Court has wisely declined to "break from historic principles of equity," *Holmberg*, 327 U.S. at 395, and it should not accept the petitioner's invitation to do so here.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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