

No. 16-1128

IN THE
Supreme Court of the United States

ITT CORPORATION, *ET AL.*,

Petitioners,

v.

RICKY ALLEN LEE AND PAUL VERNON RIGSBY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Ninth Circuit held in an unpublished, nonprecedential opinion that a statute of limitations applicable to claims asserted on behalf of a class had not run out. The court's calculations assumed that the running of the statute was suspended up to the point class certification was first denied by the district court, resumed running immediately when certification was denied, was suspended again when the court certified a class, and ran again when class certification was reversed in a prior appeal.

The question presented is whether the court of appeals erred in suspending the running of the statute of limitations during the time a certified class existed, while assuming that the statute continued to run during any period in which certification had been denied.

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INTRODUCTION

In a unanimous, unpublished, nonprecedential opinion, a panel of the Court of Appeals for the Ninth Circuit applied tolling principles derived from this Court's opinion in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), to a set of unusual facts. The panel assumed that the statute of limitations on class claims was not tolled during time periods when class certification had been denied, but held that it was tolled when a certified class existed. Although this ruling followed an approach petitioner ITT Corporation had suggested during oral argument, the resulting calculations turned out not to bar the claims of the class, as ITT had mistakenly thought they would.

ITT has therefore now asked this Court to grant certiorari and rule that limitations periods continue to run on class claims even when a class has been certified. Although ITT claims that review is necessary to resolve conflicts among decisions of the courts of appeals, it does not cite a single appellate decision that, in conflict with the decision below, holds that a statute of limitations runs on class claims when a class has been certified. Absent a conflict, ITT's unprecedented suggestion that class members cannot even rely on a *certified* class action to preserve the timeliness of their claims falls far short of establishing an important reason for review of the factbound decision below, which affects only the specific parties to this dispute.

STATEMENT

A. The complaint and the district court's initial certification rulings—On April 12, 2010, two former employees of ITT Federal Services International Corporation (FSIC) filed this class action in the United States District Court for the Western District

of Washington against FSIC and its parent company, ITT Corporation (collectively, ITT). The complaint alleged that ITT breached contracts of employment with workers it hired to perform work on a contract to provide services to the U.S. Army in Kuwait. The claim was based on ITT's failure to pay overtime and other benefits required by Kuwaiti law, and was brought before the expiration of the ITT-Army contract.

On June 24, 2011, the district court provisionally denied class certification. The court found that the class satisfied all the requirements of Federal Rule of Civil Procedure 23(a), but determined that it could not conclude that common issues would predominate, as required by Rule 23(b), until it conducted a choice of law analysis to determine what substantive law would apply to remedial issues. *See* Pet. App. 46a.

The plaintiffs again moved for class certification, which the district court granted on February 10, 2012. The court addressed the choice of law issue and determined that Kuwaiti substantive law would apply to all claims of all plaintiffs, and that Washington state's six-year statute of limitations would determine the timeliness of the claims of all class members. Based on those determinations, the court concluded that common issues would predominate. It therefore certified the class. *See* Pet. App. 25a–35a.

B. The first appeal and the district court's second certification order—The district court stayed proceedings while ITT pursued an interlocutory appeal of the certification order, and the Ninth Circuit vacated the order in a four-paragraph, unpublished opinion. The court of appeals held that under a Washington state statute addressing the application of statutes of limitations in cases governed by the substantive

law of another state, Kuwait's one-year limitations period for claims based on employment contracts, which runs from the last day of the contract, applied to all claims. Because the court of appeals could not discern what portion of the class as certified would be affected by application of the Kuwaiti statute, it vacated the certification order and remanded for further proceedings. *See* Pet. App. 21a–24a. The court's opinion was dated July 24, 2013, but its ruling vacating the class certification order did not become effective until the mandate issued on August 19, 2013. *See* Pet. App. 4a–5a.

On remand, the plaintiffs again moved for certification. ITT opposed the motion on the ground that, in its view, the claims of all class members other than named plaintiff Ricky Lee were barred by the one-year statute of limitations. ITT's theory was that because Kuwait has no class action procedure, its limitations period cannot be satisfied by filing a class action, notwithstanding the principles applied in *American Pipe*. ITT therefore argued that because more than one year had elapsed after the case was filed, with no suspension of the running of the statute during that period, the claims of all class members were necessarily time-barred. *See* Pet. App. 10a.

The district court rejected ITT's argument. The court noted that ITT's argument was not, like most tolling arguments, an argument about the effect of a denial of class certification on class members' ability to pursue separate litigation later. *See id.* at 11a–14a. Rather, ITT was making the unprecedented argument that the court should “import[] Kuwait's lack of a class-action mechanism” and hold that any class member who wanted to preserve a claim would have to intervene in a proposed class action immediately upon its

filing to stop the running of the statute. *Id.* at 14a. The court rejected that argument for two reasons. First, the court held that ITT had failed to preserve its argument that filing the action had not stopped the running of the statute for any class members by failing to make that argument in its answer or in its opposition to the first motion for class certification. *See id.* at 14a–16a. Second, the court held that Kuwait’s lack of a class-action procedure is not determinative, because the availability of a class action in a federal court is, under *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), governed by Federal Rule of Civil Procedure 23. *See* Pet. App. at 16a–19a. Given the availability of class action procedures, the court held that it could not adopt a rule foreclosing all tolling, which would effectively “prevent[] even the possibility of a class action.” *Id.* at 19a.

Having rejected ITT’s argument that filing the action was not timely as to any members of the proposed class, the court certified a narrowed class of 421 ITT employees who performed work under ITT’s Army contract in Kuwait on or after April 12, 2009.¹ The court held that the reasons it had previously given for the appropriateness of class certification continued to apply to the class as so narrowed. *See id.* at 19a.

C. ITT’s second appeal—ITT once again pursued interlocutory review, arguing that the class claims were time-barred. On appeal, ITT changed its argument in two respects. First, it claimed for the first time that the reason *American Pipe* tolling did not apply was that the time-bar under Kuwaiti law was really a statute of repose, not a statute of limitations. ITT C.A. Br.

¹ The parties have now identified approximately 700 other employees who are members of the class.

6. Second, it argued that even if the statute was subject to tolling, it had run out on the non-named class members because of the time that elapsed following the rulings denying class certification (that is, the district court's initial denial of certification and the Ninth Circuit's vacatur of the district court's first certification order) that preceded the district court's ultimate grant of class status. *Id.* at 7.

ITT's principal brief highlighted the statute of repose argument (*id.* at 8–16) much more than the tolling argument (*id.* at 16–19). Regarding tolling, it focused almost entirely on arguing that the statute resumed running when the district court initially denied class certification, with only a short footnote addressing the effect of the court's later order granting certification. *Id.* at 19 n.13. Even that footnote did not present the argument ITT now advances in its petition (that a later certification order can *never* cause tolling to resume). Instead, it argued that the district court's first certification order should not count because it was rendered void when it was vacated in the first appeal. *Id.*

ITT's reply brief devoted about three pages to trying to develop the argument that the court's initial denial of certification prevented tolling from resuming even when certification was later granted, *see* ITT C.A. Reply Br. 4–5, but also offered another theory: that even if the statute's running was suspended during the period between the district court's order granting certification and its vacatur in the first appeal, more than a year still ran on the statute while certification was denied. *Id.* at 5 n.3.

At argument, ITT changed focus yet again. Acknowledging that it had failed to raise its statute of repose argument below, it relegated that argument to

secondary status and focused on tolling.² Although ITT’s counsel briefly mentioned the theory that the statute was not tolled even when a class had been certified in the district court, the centerpiece of her argument was her calculation that a combined 366 days had run on the statute during (a) the period between the district court’s initial denial of class certification and its first order granting certification, and (b) the period between the first appeal and the ultimate grant of certification. That calculation was based on the assertion that the statute ran for 231 days from the denial of class certification on June 24, 2011, until the grant of certification on February 10, 2012, and then for another 135 days between the Ninth Circuit’s issuance of its opinion on July 24, 2013, and the district court’s ultimate certification order on December 6, 2013. On rebuttal, ITT’s counsel returned to the 366-day calculation, which, she acknowledged, “gave them the benefit of [tolling during] the time between the first class certification order until the Ninth Circuit ruled.” Oral Arg. Video at 27:07–16.

The Ninth Circuit affirmed class certification. First, it determined that the Kuwaiti law was a statute of limitations rather than a statute of repose because “there is no evidence that Kuwait sought to grant employers a substantive right to be free from liability after only one year.” Pet. App. 3a. The court therefore held that the tolling principles of *American Pipe* applied. *Id.*

² ITT’s counsel acknowledged the failure to raise a statute of repose argument most clearly in rebuttal, at 26:14–32 of the argument video, available on the Ninth Circuit website at http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010150.

ITT's petition for certiorari does not seek review of the court of appeals' holding that the Kuwaiti statute is not a statute of repose.³

Second, contrary to ITT's argument that the limitations period for all class members' claims had run for over a year after the complaint was filed, the court of appeals determined that the statute of limitations had run for, at most, only 340 days after the complaint's filing and so had not yet expired. *See* Pet. App. 4a–5a. The court arrived at this figure by accepting for purposes of argument ITT's contention that tolling stopped when the district court initially denied certification on June 24, 2011, and that the statute of limitations then ran for 231 days until the district court

³ Because ITT's question presented raises only an issue concerning application of *American Pipe* to statutes of limitations, *see* Pet. i, it has abandoned any statute of repose argument in this Court even if it did not waive the argument below. This Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, No. 16-373 (June 26, 2017) ("*CalPERS*"), holding *American Pipe* tolling inapplicable to statutes of repose, thus has no direct application to ITT's current arguments. Not only did ITT forgo making a repose argument here despite the pendency of *CalPERS*, but such an argument would be unavailing even if ITT had made it: The panel below anticipated *CalPERS* by applying principles derived from *American Pipe* only after determining that the statute was *not* a statute of repose.

Notably, even if the Kuwaiti statute were a statute of repose, *CalPERS* would provide no support for the extreme argument ITT made below: that the class-action filing did not stop the running of the Kuwaiti statute for members of the class even for an instant. On the contrary, *CalPERS* assumes that the filing of a timely class action satisfies a statute of repose for class members who remain with the class as ultimately certified, and holds only that if class members file separate actions, *American Pipe* tolling does not apply to the timeliness of those actions under the statute of repose. *See CalPERS*, slip op. at 15.

granted the renewed motion for certification on February 10, 2012. *See id.* at 4a. Tolling then began again, as ITT “implicitly conceded at oral argument” in proffering the 366-day calculation that gave the plaintiffs the benefit of resumed tolling as of that date. *Id.* at 4a.

The court further assumed, in agreement with ITT, that tolling stopped again, and the limitations period resumed running, when the first appeal ended with the vacatur of the district court’s first certification order. The panel disagreed, however, with ITT’s calculation of the number of days the statute ran following the earlier appeal. ITT’s 135-day figure started with the date of the memorandum opinion in the first appeal and ended with the district court’s second certification order. But the court of appeals’ decision did not vacate the certification order until the mandate issued on August 19, 2013. The Ninth Circuit determined “that the statute resumed running no earlier than when the mandate issued,” as “until that point, the vacatur was not final and the parties’ obligations were not fixed.” *Id.* at 5a. The court pointed out that only 109 days elapsed between the mandate and the district court’s certification order, and that period, combined with the earlier 231-day period in which the statute ran, amounted to only 340 days.

The court concluded that “the statute ran for no more than 340 days following the initial denial of class certification in June 2011.” *Id.* at 5a. ITT’s appeal of the district court’s certification order rested entirely on its assertion that the claims of all class members other than named plaintiff Lee had become time-barred by the passage of more than one year that counted against the statute after the complaint was filed. Because ITT had failed to make that showing even on its own theory

that the statute resumed running while certification was denied, the court affirmed the certification order.

REASONS FOR DENYING THE WRIT

I. This case presents no conflict of decisions over the application of *American Pipe* principles.

The court of appeals assumed that the statute of limitations for unnamed members of the class was *not* tolled during periods in which class certification was denied, but held that it *was* tolled during the time between filing the action and the initial denial of certification, as well as in later periods when there was a certified class. The decision that the running of the statute was suspended during the time a class actually existed fully follows the principles of *American Pipe* and every appellate decision petitioners have cited in their attempt to conjure up a relevant conflict among the circuits. No decision petitioners cite, and no decision of which we are aware, denies tolling during a period in which a class has been certified. Because petitioners offer no other reason for this Court to review the court of appeals' nonprecedential application of tolling principles to the specific and highly unusual facts of this case, the petition should be denied.

A. The panel's determination that the statute of limitations did not run during periods when a class was certified follows the reasoning of *American Pipe*.

In *American Pipe*, this Court held that “the filing of a timely class action complaint commences the action for all members of the class as subsequently determined.” 414 U.S. at 550. The Court further held that if

certification of a class is ultimately denied, class members who intervene in the action to assert their individual claims have the benefit of tolling of the statute of limitations during the time the class action was pending, until certification was denied. *See id.* at 553, 561. The Court reasoned that a putative class action “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.” *Id.* at 554.

Later, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court extended the *American Pipe* tolling principle to cover cases where class members file separate lawsuits following the denial of class certification. The Court held that “the filing of a class action tolls the applicable statute of limitations, and thus permits all members of the putative class to file individual actions in the event that class certification is denied, provided, of course, that those actions are instituted within the time that remains on the limitations period.” *Id.* at 346–47.

American Pipe and *Crown, Cork* rest on this Court’s view that filing a class action serves the purposes of statutes of limitation by putting the defendant on notice of claims and preventing plaintiffs from sleeping on their rights. *See id.* at 352. The Court has recognized that “[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights” because “Rule 23 both permits and encourages class members to rely on the named plaintiff to press their claims.” *Id.* at 352–53. Once a suit is “strip[ped] ... of its class action character,” however, the statute resumes running for class members who

have not brought their own suits. *American Pipe*, 414 U.S. at 561; see *Crown, Cork*, 462 U.S. at 354.

The decision of the court of appeals follows those principles. The court held the statute of limitations was tolled between the lawsuit's filing and the district court's initial denial of class certification, and between the district court's subsequent order granting class certification and the vacatur of that order in the first appeal. In *Crown, Cork's* terms, "the class action [was] pending" during those periods, *id.* at 352, and class members were entitled and encouraged to rely on the class representatives to assert their claims. See *id.* at 352–54. The court of appeals did not, however, give the class members the benefit of suspension of the statute during *any* period when an order denying certification was in effect.

B. The panel's decision is fully consistent with the decisions of other circuits.

ITT nonetheless contends that the court's ruling conflicts with decisions of other circuits adopting what it calls a bright-line rule that tolling stops immediately when a trial or appellate court issues a ruling denying certification. See *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 378 (5th Cir. 2013); *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 117 (2d Cir. 2013); *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 213 (4th Cir. 2006); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355 (Fed. Cir. 2000); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir. 1998); *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 389 (5th Cir. 1989); *Andrews v. Orr*, 851 F.2d 146, 149–50 (6th Cir. 1988). None of the cases ITT cites addresses the circumstances here or so much as hints that the court of appeals was wrong to hold the running of the

statute suspended *when a class had actually been certified*.

1. The panel assumed, consistently with the decisions ITT cites, that tolling stopped when certification was denied.

In each case ITT cites, a court of appeals held that tolling ceased when certification was denied, without regard to whether the ruling was subject to reconsideration, whether it was subject to appeal, or whether the plaintiffs were seeking to file a new certification motion. The reasoning of the decisions is summed up in the Eleventh Circuit's *Armstrong* decision, which explains that when certification has been denied, class members no longer can reasonably rely on class representatives to represent their interests because the named plaintiffs no longer have any such responsibility once the case has been "strip[ped] ... of its character as a class action." 138 F.3d at 1381; *see also Bridges*, 441 F.3d at 211 ("[N]o absentee class member could reasonably have relied on the named plaintiffs, nor the district court, to protect their interests in the period following the district court's 2001 certification denial."). These courts hold that tolling ends when a case "cease[s] to be a class action," *Andrews*, 851 F.2d at 150 (6th Cir.1988), and they identify an order denying class status as the point of demarcation because, "having been subjected to a legal decision, the class is either extant or not," *Giovaniello*, 726 F.3d at 117.

The decision below squares completely with the decisions ITT cites. The Ninth Circuit panel's calculations assumed *arguendo* that tolling stopped *immediately* upon the district court's initial denial of certification (although the decision could have been viewed as

tentative) and *immediately* upon the effective date of the appellate decision overturning the district court’s first certification order (although the appellate decision did not bar further consideration of class certification). The panel did not hold that the prior orders denying certification were ineffective to stop tolling because they were subject to later reconsideration, and it specifically declined to rest its decision on the view that, once certification was denied, the mere pendency of a motion to recertify would toll the limitations period. *See* Pet. App. 5a n.1

Even if, as ITT contends, the “bright-line rule” of the decisions it describes is in tension with decisions of the Third and Seventh Circuits indicating that tolling is stopped only by a “final” or “conclusive” denial of class certification, *see Yang v. Odom*, 392 F.3d 97, 102 (3d Cir. 2004), *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011) (*dicta*), that tension is not presented here, where the court held that even inconclusive denials of class status were enough to stop tolling.⁴

⁴ ITT overstates just how “bright” the line is in the circuits whose decisions it touts. *See, e.g., Odle v. Wal-Mart Stores, Inc.*, 747 F.3d 315 (5th Cir. 2014) (holding, notwithstanding *Calderon*, that tolling continued after an appellate ruling that a district court’s class certification was erroneous, where the court of appeals directed the district court to consider a different certification on remand). ITT also appears incorrect in suggesting that *Yang* is a departure from the consensus of other circuits, as *Yang* merely indicates that a ruling that did not really deny certification, but only rejected a stipulation defining a class, did not qualify as a denial of certification that would end tolling. *See* 392 F.3d at 102. Even under a bright-line rule that a denial of certification ends tolling, a court still must determine whether any given ruling is a denial of certification. For purposes of this case, however, the
(Footnote continued)

The absence of any conflict on this point is underscored by ITT's citation of a *precedential* Ninth Circuit decision, *Immigrant Assistance Project v. INS*, 306 F.3d 842 (9th Cir. 2002), which ITT acknowledges reflects what it calls the correct, "bright-line" rule. Pet. 22. In fact, *Immigrant Assistance Project* and the panel decision in this case are consistent: Both treated limitations periods as running during periods when certification was denied. But even if the two decisions were inconsistent, *Immigrant Assistance Project*, as the earlier, precedential opinion, would remain controlling in the Ninth Circuit. See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). ITT's acknowledgment that *Immigrant Assistance Project* applies the correct rule belies its assertion that Ninth Circuit law presents a conflict requiring this Court's review and correction.

2. The panel's holding that tolling resumed when a class was certified is fully consistent with the case law ITT cites.

The Ninth Circuit panel also held that tolling *resumed* when the district court, having initially denied certification, later certified the class. But none of the decisions ITT cites conflicts with that holding. None directly addresses the issue whether tolling resumes when a class is certified after an earlier denial, and none says anything that, read in context, even remotely suggests that the panel here erred in its resolution of that issue.

question is academic, as the Ninth Circuit assumed that both the district court's initial certification ruling and the decision in the first appeal were denials of certification that ended tolling.

The reasoning of the decisions ITT invokes strongly *supports* the view that the statute was properly tolled when a certified class existed. Once the class was certified, the class representatives unquestionably had a duty to represent the absent class members, and, under the reasoning of *Armstrong* and *Bridges* (and *Crown, Cork*) class members could again rely on the named plaintiffs to protect their interests. At that point, the case had obviously not “ceased to be a class action.” *Andrews*, 851 F.2d at 150. Quite the opposite: In *Giovaniello*’s words, “having been subjected to a legal decision, the class [was] either extant or not,” 726 F.3d at 117—and in this case it was extant. ITT’s case law does not question the tolling effect of an *extant* class.

The Fifth Circuit’s decision in *Calderon* is the only decision cited by ITT to support its claim of inter-circuit conflict that even touches on the effect of a later certification following an initial denial. *Calderon*’s discussion of the subject, however, does not support ITT’s position. *Calderon* held that the tolling effect of a class action stopped when the district court denied certification, and that a later certification did not *revive* claims of class members for whom the statute of limitations “had run *during the time between the original denial and the district court’s reversal.*” 863 F.3d at 390 (emphasis added). Implicit in that holding is that for class members as to whom the statute had *not* run out by the time of the ultimate class certification, the certification would stop further running of the statute if the case remained a class action. *Calderon*, like the rest of the decisions ITT cites, suggests no conflict with the panel’s decision.

Likewise, *Immigrant Assistance Project*, the precedential Ninth Circuit decision ITT touts as embodying

the correct approach to the issue, provides no support for ITT’s argument that tolling does not resume when a case again becomes a class action. As ITT itself points out, *Immigrant Assistance Project* declined to apply tolling to “the time between the denial of class certification and the *filing* of [a] Second Amended Complaint” that made allegations aimed at overcoming the earlier denial. 306 F.3d at 856 (emphasis added). Nothing in that statement, or anywhere else in the opinion, suggests that tolling does not resume once certification is actually *granted*.

C. The decisions ITT cites involving the effect of *American Pipe* tolling on successive class actions are irrelevant.

Curiously, ITT invokes a separate line of cases addressing a wholly distinct question not even posed by this case: whether *American Pipe* tolling applies when members of a class that has been finally refused certification in one case file a new class action, as opposed to new individual actions. *See* Pet. 13–14. Citing appellate case law predating this Court’s decisions in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), and *Shady Grove*, 559 U.S. 393, ITT argues that the circuits agree that only successive individual actions, and not successive class actions, may benefit from the tolling effect of an earlier case in which class certification was denied.

The cases on *American Pipe*’s application to successive class actions do not affect this case, which involves no successive class action and does not present the issue that troubled the courts in those cases: repeated attempts to go to new courts to obtain certification of classes denied certification in previous cases. Nothing in those decisions suggests that when a plaintiff class convinces a court that previously denied certification

that certification is in fact warranted, the class should be denied the benefit of suspension of the limitations period when the class is certified.

The policy arguments against allowing plaintiffs to mount collateral challenges to certification denials, on which the decisions ITT cites rested, have also been superseded by this Court's holdings in *Smith* and *Shady Grove*. *Smith* holds that denials of certification are not binding on members of the uncertified class, and *Shady Grove* holds that if a plaintiff has an actionable individual claim against a defendant, he may assert it on behalf of a class of others with similar claims if the class satisfies the requirements of Rule 23. After *Smith* and *Shady Grove*, both the Sixth and Ninth Circuits have concluded that the case law indicating that *American Pipe* tolling is unavailable in a successive class action is no longer viable. See *Resh v. China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir. 2017); *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 653 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1163 (2016). Because of *Resh* and *Phipps*, and their firm grounding in *Smith* and *Shady Grove*, the supposed doctrinal consensus against applying *American Pipe* to successive class actions that ITT invokes is now obsolete—besides being entirely inapplicable and irrelevant to this case.

II. This case would be an unsuitable choice for review of the question ITT poses.

Even if ITT's claim that its question presented might one day warrant review by this Court had any arguable merit, this case would remain an unsuitable candidate for review, for several reasons.

First, the decision below is unpublished and non-precedential, and does not foreclose further develop-

ment of Ninth Circuit case law on this or any other issue. Given the absence of any precedential case law one way or the other that focuses on the issue ITT seeks to present—whether tolling of the statute of limitations resumes during periods in which a district court grants class certification after previously denying it—the Court should, at a minimum, await further development of the law rather than granting review of a decision that is not binding precedent even within its own circuit.

Second, ITT waived the argument it now presents, or at least failed to present it clearly enough for the lower courts to give it sufficient consideration to provide a basis for review by this Court. In the district court, ITT’s argument was that Kuwait’s statute of limitations was not subject to *American Pipe*-style tolling because Kuwaiti law does not recognize class actions, and the claims of all the non-named plaintiffs were barred. But ITT’s petition does not present that question, and the argument it presents—that any order denying certification permanently ends tolling even if the district court later certifies the class—was not timely advanced in the district court. Indeed, that court held that ITT had preserved *no* arguments about tolling.

On appeal, ITT first sought to emphasize another argument it neither raised in the district court nor advances before this Court: that the Kuwaiti limitations period is a statute of repose not subject to *American Pipe* tolling. In its reply brief, it briefly sketched the argument that tolling, once it stops, cannot start again if the district court certifies a class. At oral argument, however, ITT appeared to the court to concede that the statute did not run while a certified class existed in the

district court. Moreover, ITT emphasized a tolling calculation that gave the plaintiffs the benefit of tolling during that period—an argument that ultimately failed because it was premised on an incorrect view of when the Ninth Circuit’s ruling in the first appeal became effective.

Given ITT’s shifting arguments, and particularly its ultimate emphasis on a calculation that implicitly conceded the issue it now seeks to raise, the Ninth Circuit panel understandably did not perceive that ITT was seriously arguing that the statute was not tolled during the time the district court had certified the class. The court’s unpublished ruling therefore devoted no detailed analysis to that question. Having failed to present to the court of appeals the argument it now seeks to advance here in a manner clear enough for the lower court to discern it, ITT should be treated as having forfeited it, as this Court rarely addresses an issue that was “not raised or briefed below.” *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001). Even if the circumstances established no forfeiture of the argument, this Court would be better served by awaiting a case in which the issue had been fully fleshed out and received the considered attention of a lower court.

Third, although ITT now seeks to present the tolling issue in this Court as if it were a matter of federal law, it acknowledges that in this diversity case, federal law does not govern whether or how *American Pipe* tolling applies. See *Chardon v. Soto*, 462 U.S. 650 (1983). Rather, tolling involves the interplay of Washington choice-of-law principles, Washington procedural law (which applies *American Pipe* as a matter of state law, see *Pickett v. Holland America Line-Westours, Inc.*, 35 P.3d 351 (Wash. 2001)), and substantive Kuwaiti

law, as ITT itself acknowledges. *See* Pet. 10. Although this Court cannot render definitive decisions on matters of either Washington state law or Kuwaiti law, it would, if it accepted review, have to wrestle with the interplay of those two bodies of law on the way to a decision that could not authoritatively resolve any question under either of them. Given that the decision below is already nonprecedential, the time and attention required for such an exercise would be better spent on other subjects.

Fourth, although the lower court gave ITT the benefit of the doubt in holding that this case presented a question of “tolling” under *American Pipe* principles, and in assuming that time ran against the class members when certification had been denied, that assumption is, at best, highly questionable, and would itself require examination were this Court to grant review. As the district court pointed out, whether a limitations period applicable to a putative class member’s claims has been “tolled” by the pendency of an unsuccessful class action arises when a class member either seeks to intervene as in individual in a failed class action (as in *American Pipe*) or brings a successive action based on the same claims (as in *Crown, Cork*).

Where a case brought as a class action is ultimately certified as a class action, by contrast, the proper rule is provided by *American Pipe*’s holding that “the filing of a timely class action complaint commences the action for all members of the class as subsequently determined.” 414 U.S. at 550. Put another way, if the class is ultimately certified, certification relates back to the time of filing and satisfies the statute of limitations for all class members who had live claims when the action was filed. *See Knable v. Wilson*, 570 F.2d 957, 964 n. 46

(D.C. Cir. 1977) (“There seems to be no question but that upon reinstatement of the class action, all claims embraced therein would, for purposes of the statute of limitations, relate back to the date in which that action was originally filed. This would be so as to all members of the class.”); *see also* *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 330 n.3 (1980); *Gelman v. Westinghouse Elec. Corp.*, 556 F.2d 699, 701 (3d Cir. 1977).

This Court’s recent decision in *CalPERS* strongly suggests that the realm of *American Pipe* tolling is confined to cases in which a member of a putative class later brings claims *separately* from the original class that would not be timely but for tolling. By contrast, the timeliness of claims asserted within the confines of the original class action is not a question of “tolling,” but only of the timeliness of the original complaint. The *CalPERS* Court repeatedly referred to the *American Pipe* tolling rule as allowing limitations periods to be suspended for “later filed suits by individual members of the class.” *CalPERS*, slip op. 12. As the Court put it, *American Pipe* “creat[es] a tolling rule, necessary to permit the *ensuing* individual actions to proceed” when class certification is denied or members opt out of a class. *Id.* at 15 (emphasis added).

Nothing in *CalPERS*, however, suggests that “tolling” is necessary to allow a class action complaint to establish the timeliness of the claims of class members who *remain* within the class once it is ultimately certified. To the contrary, although *CalPERS* held that *American Pipe* tolling is inapplicable to a statute of repose, its baseline assumption was that the original class action complaint satisfied the statute of repose for all class members who remained within the ultimately certified class in the original action. The denial of

American Pipe tolling only prevented that class action from “splinter[ing] into individual suits,” *id.* at 13; it did not affect the viability of the class action itself.

Whether a case like this one is properly treated as involving “tolling” principles, or is controlled by the principle that a timely filed class action satisfies the statute of limitations for all class members who had live claims when it was filed if the class is ultimately certified, is a question that has rarely arisen. That question was not thoroughly analyzed by the panel below—because the panel’s analysis made it unnecessary. This Court, however, would have to address it before the question ITT raises would be determinative, and the lack of development of the issue in the courts below or in other federal courts provides yet another reason for this Court not to review the case. At a minimum, this Court should allow lower courts to consider the possible impact of *CalPERS*’s discussion of the nature of tolling on this question before granting review in a case that would require grappling with the subject.

III. ITT’s other criticisms of the panel’s opinion offer no support for its petition.

ITT suggests in passing that the lower courts “largely disregarded” Kuwait’s statute of limitations and “erroneously failed to apply Kuwaiti tolling law,” under which, ITT asserts, “one employee’s filing of a claim for breach of his or her employment contract does not toll the deadline for another employee to assert the same or similar claim against the same employer.” Pet. 10–11. These assertions appear to rehash the argument, rejected by the district court, that because Kuwaiti law, unlike the Federal Rules of Civil Procedure, does not provide for class actions, it forecloses a federal

court from applying the principle that filing a class action commences an action on behalf of all class members. But that theory was not considered by the court of appeals, and it is not the basis of ITT's petition for certiorari. ITT's question presented does not seek review of the panel's decision to apply *American Pipe* principles, but only of the way the panel applied them. ITT's assertion that the lower courts erred under Kuwaiti law is thus both waived in this Court and irrelevant to the question ITT asks this Court to resolve. And it is meritless and intrinsically unworthy of this Court's review: The Court does not sit to resolve issues of Kuwaiti law.

Equally irrelevant is ITT's half-hearted suggestion that the panel erred in applying its own tolling analysis and should have concluded that some class members' claims were time-barred even under its ruling that the statute of limitations did not run when the class was certified in the district court. *See* Pet. 23. ITT, however, did not argue below that some class members' claims were barred while others were timely. It gambled everything on theories that certification should have been denied because all class members' claims were barred. Even now, ITT does not substantiate its claim that the class contains "many expired claims" with anything more than its own *ipse dixit*. Pet. 23. Most important, the point is irrelevant to whether the Court should grant this petition: The petition presents only the question whether the panel erred in allowing tolling to resume when the district court granted certification after earlier denying it, not whether the court incorrectly applied its approach to the idiosyncratic facts of this case. Even if the petition sought review of that factbound issue, it would run smack-dab against

this Court's longstanding practice of not granting certiorari to review the application of a correctly stated rule of law to the facts of a particular case. S. Ct. R. 10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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