

No. 24A-\_\_\_

IN THE  
**Supreme Court of the United States**

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UNION PACIFIC RAILROAD COMPANY,  
*Applicant,*

v.

ROBERT ANTHONY ZARAGOZA  
*Respondent.*

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APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A  
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Under this Court's Rule 13.5, applicant Union Pacific Railroad Company (Union Pacific) respectfully requests a 30-day extension of time, to and including December 12, 2024, within which to file a petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion and judgment in *Zaragoza v. Union Pacific Railroad Company* on August 12, 2024, App., *infra*, at 1a. Unless extended, the time within which to file a consolidated petition for a writ of certiorari will expire on November 12, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important and recurring question regarding how courts should resolve ambiguity as to the scope of a putative or certified class in determining whether a plaintiff's claims have been equitably tolled under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Under *American Pipe*, the claims of individual parties included in the definition of a putative class are tolled during the pendency of the class action proceedings. After the class is denied certification or is decertified, individuals whose claims were tolled may bring their own claims during any time that remains within the previously tolled limitations period. The decision below broke from the Eleventh Circuit's rule that parties seeking to benefit from *American Pipe* tolling bear the burden of showing that they were unambiguously included within the scope of the definition of the putative class. The Fifth Circuit instead held that an individual plaintiff bringing a successive action

benefits from *American Pipe* tolling unless the defendant can demonstrate that the putative class definition “unambiguously exclude[d]” the plaintiff. App., *infra*, at 13a.

2. This case arises from the decertification of a putative class of current and former Union Pacific employees who allege that Union Pacific violated provisions of the Americans with Disabilities Act in its use of standardized tests to determine if employees were fit for duty. See *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030 (8th Cir. 2020). After the Eighth Circuit decertified the class, individual plaintiffs began bringing claims under the same theory of liability. Although the proposed class definition in the original Complaint was extraordinarily broad—applying to current and former employees who had experienced an adverse employment action as a result of insufficient performance on a fitness-for-duty examination—by the time the class was certified by the district court it was substantially narrowed. See *Harris v. Union Pac. R.R. Co.*, 329 F.R.D. 616, 621, 628 (D. Neb. 2019). As certified, the class included only those current or former employees who had been or would be subject to a fitness-for-duty evaluation as a result of a “reportable health event.” *Id.* Respondent was formerly employed as railroad conductor and brakeman for Union Pacific. App., *infra*, at 2a. During that time, respondent failed Union Pacific’s standard colorblindness test and was able to maintain employment by passing a secondary test. *Id.* at 17a. Following a 2012 safety incident, however, Union Pacific revised the protocol for secondary testing, after which respondent failed both the primary and secondary colorblindness tests and was removed from his position. *Id.* Respondent sued Union Pacific on the theory that his inability to pass the revised secondary

examination as part of a routine certification protocol constituted a “reportable health event,” and that he was therefore a member of the decertified class in *Harris* and had had his claim tolled by that litigation. *See id.* at 23a. The district court disagreed. *See id.* at 24a.

3. Respondent appealed and the Court of Appeals reversed the district court. The Court of Appeals concluded that the definition of the decertified class did not unambiguously exclude the respondent, and that individual plaintiffs’ claims benefit from *American Pipe* tolling unless the class definition at issue “unambiguously exclude[s] them.” *Id.* at 13a. The court reasoned that this was consistent with *American Pipe* because the alternative rule could result in duplicative claim-preserving filings that would frustrate the intent of *American Pipe*. *Id.*

4. The Fifth Circuit’s ruling is diametrically opposed to the rule in the Eleventh Circuit, which earlier held that *American Pipe* places the burden on would-be plaintiffs to show that they fall within the relevant class definition in order to benefit from *American Pipe* tolling. That rule was first stated in *Raie v. Cheminova, Inc.*, in which the Eleventh Circuit rejected a plaintiff’s contention that his claim was subject to tolling under *American Pipe* because of an earlier class action suit. 336 F.3d 1278 (11th Cir. 2003). The court stated that “[i]t is not enough for [plaintiffs] to rely on only that ambiguous class definition to support their argument for tolling under *American Pipe*; they must demonstrate that their wrongful death action was included in the [prior] class action.” *Id.* at 1282–83. The Eleventh Circuit’s rule is thus directly contrary to the Fifth Circuit’s. Both the Fifth Circuit decision below and

the Eleventh Circuit decision in *Raie* found it ambiguous whether the plaintiff's claim fell within the scope of an earlier putative class. The Fifth Circuit imposed a burden on the defendant to show that the plaintiff was not definitively excluded, while the Eleventh Circuit held that the plaintiff bears the obligation of showing entitlement to equitable relief from statutory deadlines. Absent this Court's intervention, *American Pipe* tolling will be applied in starkly contrasting ways across different circuits. The Fifth Circuit's new rule is a dramatic expansion of the equitable exception created by *American Pipe*, and it casts aside Justice Powell's warning that *American Pipe*'s "generous" rule "invites abuse," and that it must not be read expansively so as to "leav[e] a plaintiff free to raise different or peripheral claims following denial of class status." *Crown, Cork, & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring). Far from securing the efficiency and avoidance of duplicative litigation that the Fifth Circuit cited as reasons for its ruling, the decision below would improperly abrogate statutory limitations periods and invite long-delayed claims based on expansive and tenuous interpretations of rejected classes. It thus also runs contrary to the longstanding principle that litigants who seek equitable tolling must carry the burden of demonstrating an entitlement to it. *Cf. Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

5. Good cause exists for a 30-day extension of time to file a petition for a writ of certiorari. Undersigned counsel currently faces a press of other matters,<sup>1</sup> and Union Pacific is not aware of any prejudice that would result from a 30-day extension.

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For the foregoing reasons, Union Pacific respectfully requests that the time within which to file a petition for a writ of certiorari be extended by 30 days, to and including December 12, 2024.

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<sup>1</sup> Among other obligations, in October undersigned counsel will be presenting an appellate argument in the Georgia Court of Appeals and a summary disposition argument in a confidential JAMS arbitration.

Respectfully submitted,

/s/ Thomas H. Dupree, Jr.

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