APPEAL NO. CTQ-2019-00003

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# Court of Appeals
OF THE
# State of New York

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TOBIAS BERMUDEZ CHAVEZ, et al.,
Respondents,

v.

OCCIDENTAL CHEMICAL CORPORATION
Appellant.

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## NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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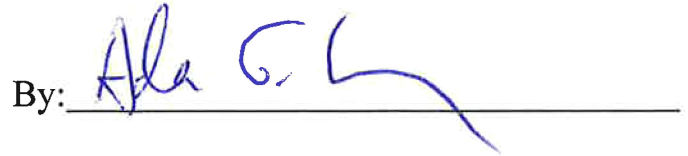
**PLEASE TAKE NOTICE,** that upon the annexed Affirmation of Adam G. Unikowsky, and upon a copy of the proposed *Amicus Curiae* brief, the Chamber of Commerce of the United States of America will move this Court on March 23, 2020, or as soon thereafter as counsel may be heard, at 20 Eagle Street, Albany, New York, 12207, for an order for *amicus curiae* relief pursuant to N.Y.C.R.R. § 500.23(a).

Date: March 13, 2020

Respectfully submitted,

By: 

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# Court of Appeals
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TOBIAS BERMUDEZ CHAVEZ, et al.,
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Appellant.

**AFFIRMATION OF ADAM G. UNIKOWSKY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

ADAM G. UNIKOWSKY, an attorney admitted to practice law in the Courts of New York, and not a party to this action, hereby affirms the following to be true under penalty of perjury pursuant to CPLR § 2106:

1. I am a partner in the law firm Jenner & Block LLP and serve as counsel to *amicus curiae* the Chamber of Commerce of the United States of America ("the Chamber") in this action. I am a member in good standing of the Bar of the State of New York. I submit this Affirmation in support of the Chamber's Motion for Leave to File Brief as *Amicus Curiae.* The Chamber has a demonstrated interest in the

issues in this matter and can be of special assistance to the Court. A copy of the proposed *amicus curiae* brief is attached hereto as Exhibit A.

2. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before courts and legislatures. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

3. The Chamber has a strong interest in this case. Businesses, including the Chamber's members, are almost always the defendants in class action litigation. Even when class certification is denied, class action litigation is expensive, time-consuming, and burdensome. When courts deny class certification, defendants have an interest in being able to assess accurately—and to limit as much as possible—their exposure to individual lawsuits by putative class members. Cross-jurisdictional tolling would harm defendants by permitting putative class members to file new lawsuits in New York after plaintiffs' putative class actions failed in far-flung jurisdictions—under unfamiliar procedural and evidentiary rules—thus subjecting defendants to unpredictable liability on stale

claims. The Chamber and its members would therefore be harmed by Respondents' proposed rule.

4. Under Rule 500.23(a)(4)(i), the Court may grant leave to file an *amicus* brief if the brief "could identify law or arguments that might otherwise escape the Court's consideration; or the proposed amicus curiae brief otherwise would be of assistance to the Court." *Id*. Here, the Chamber's brief meets those criteria. Whereas the parties' briefs rightly focus on the specific facts of this case, the Chamber's brief provides a complementary, higher-level perspective on the legal questions at issue. The Chamber elucidates the policy justifications for standard, intra-jurisdictional class action tolling, and explains why those policy justifications do not extend to cross-jurisdictional tolling. The Chamber also examines why deference to legislative judgments is particularly warranted in the context of statutes of limitations.

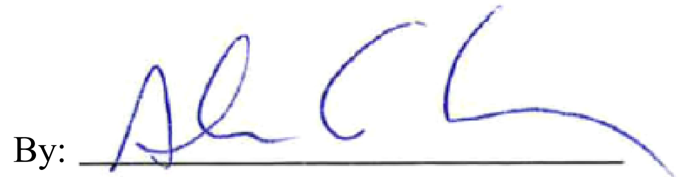
5. Pursuant to Rule 500.23(a)(4)(iii), I affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

6. Counsel for both Respondents and Appellant have represented that they do not oppose the Chamber's Motion for Leave to File Brief as *Amicus Curiae* in this case.

WHEREFORE, the Chamber respectfully requests that the Court grant this motion in its entirety.

Date: March 13, 2020

Respectfully submitted,



By: ________________________________

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# EXHIBIT A

APPEAL NO. CTQ-2019-00003

# Court of Appeals
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TOBIAS BERMUDEZ CHAVEZ, et al.,
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OCCIDENTAL CHEMICAL CORPORATION
Appellant.

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT**

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Date Completed: March 13, 2020

## CORPORATE DISCLOSURE STATEMENT

In accordance with Court of Appeals rule 500.1(f), *amicus curiae* states that it is a non-profit membership organization, with no parent company and no publicly traded stock.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should not adopt cross-jurisdictional class action tolling. Although the U.S. Supreme Court has recognized intra-jurisdictional class action tolling as a matter of federal law, *see American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the doctrinal and policy justifications for intra-jurisdictional tolling do not extend to inter-jurisdictional tolling.

First, *American Pipe* tolling is premised on the view that it is reasonable for a plaintiff to rely on a pending class action *in a particular forum* rather than file a protective lawsuit *in that forum*. Thus, New York plaintiffs might reasonably wait to sue in New York courts if they believe their rights are protected by a putative class action in a New York court asserting claims under New York law ostensibly on their behalf. But they could not reasonably conclude that their rights are protected by a putative class action filed in a different jurisdiction under different procedural rules.

Second, although *American Pipe* tolling imposes serious burdens on defendants, the burdens of cross-jurisdictional class action tolling are much worse. Under *American Pipe* tolling, a New York defendant served with a putative class action in New York can assess the merit of and potential exposure from those claims. That exposure cannot go up after class certification is denied, because the only claims that may be refiled are claims by putative class members in the same

forum as the original class action. But that same defendant would have no ability to evaluate its exposure in New York based on a putative class action filed in another jurisdiction and governed by that jurisdiction's unique substantive and procedural rules.

Third, New York courts can mitigate the delays caused by *American Pipe* class action tolling by restricting class certification discovery, enforcing deadlines, and otherwise keeping class litigation moving. But a New York court has no authority to control a case in another jurisdiction and may become a magnet for stale lawsuits if the Court recognizes cross-jurisdictional tolling.

Thus, whatever the merit of the policy arguments for *American Pipe* tolling, they do not apply to cross-jurisdictional tolling.

But even if cross-jurisdictional tolling made sense as a policy matter, this Court should not adopt it. Setting limitations periods and tolling rules necessarily involves weighing the competing interests of plaintiffs, defendants, and the courts. That balancing is classically the province of the Legislature—which regularly revises statutes of limitations and tolling rules in response to policy concerns. To date, however, the Legislature has not sought fit to allow for cross-jurisdictional class action tolling. This Court should not overrule the Legislature's judgment by enacting cross-jurisdictional class action tolling as a matter of judge-made law.

## ARGUMENT

### I. The Policy Justifications For Intra-Jurisdictional Class Action Tolling Do Not Extend To Cross-Jurisdictional Class Action Tolling.

Under the doctrine known as "*American Pipe* tolling," the U.S. Supreme Court has held that, in certain circumstances, the filing of a federal class action tolls limitations periods for class members' individual claims *when those claims are refiled in federal court*. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

The Chamber does not support *American Pipe* tolling as a matter of state law. In the Chamber's view, any tolling rule—whether logical as a policy matter or not—should come from the legislature, rather than the courts. Further, there are sound policy objections to *American Pipe* that have led to subsequent limitations on that doctrine by the U.S. Supreme Court. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017) ("*CalPERS*").

But even if the Court accepts *American Pipe* as a matter of state law, it should not adopt cross-jurisdictional tolling. The U.S. Supreme Court has never extended *American Pipe* to cross-jurisdictional tolling, and the logic undergirding *American Pipe* does not support cross-jurisdictional tolling.

Properly understood, *American Pipe* is designed to provide for orderly management of the *same* claims in the *same* judicial system. As the U.S. Supreme

Court has recognized, class actions are a procedural mechanism for aggregating multiple claims. "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.). "And like traditional joinder," a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.*

Thus, when a plaintiff brings a putative class action in federal court, the claims of the individual putative class members are *already on file* in federal court, via the procedural vehicle of a putative class action. *American Pipe* extends limitations periods for claims that were *actually* filed within the limitations period, but which could not proceed in the class action because class certification was denied.

Only when viewed in this light does *American Pipe* make sense. This is so from the perspective of plaintiffs, defendants, and the courts.

First, from plaintiffs' perspective, *American Pipe* is an equitable doctrine that protects plaintiffs who "ha[ve] not slept on their rights." *China Agritech*, 138 S. Ct. at 1808. In the U.S. Supreme Court's view, plaintiffs who "reasonably relied on the class representative," *id.*, and "anticipated their interests would be protected by a class action but later learned that a class suit could not be

maintained for reasons outside their control," should be protected by equitable tolling, *CalPERS*, 137 S. Ct. at 2055. In other words, when plaintiffs are putative class members in a timely-filed class action in federal court, they may await the result of class certification rather than being forced to file duplicative federal-court lawsuits within the limitations period to protect their rights to file a lawsuit that, in effect, has already been filed.

That logic does not extend to cross-jurisdictional tolling. It may be reasonable for a plaintiff who wants to file a *federal* suit to await the result of class certification in *federal* court. But it is not reasonable for a plaintiff who wants to file a lawsuit in one state to await the results of class certification in a different state. Different state judicial systems may have vastly different procedural rules, and those differences may have a dramatic effect on the outcome of litigation. "Pleading standards, for example," are among the "state rules ostensibly addressed to procedure" that differ based on each jurisdiction's "policy preferences about the types of claims that should succeed." *Shady Grove Orthopedic Assocs.*, 559 U.S. at 404. So are rules on the right to a jury trial, the right to appeal, "rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence." *Id.*

Rules of evidence may also differ from jurisdiction to jurisdiction—for instance, New York courts have declined to adopt the federal *Daubert* standard for

assessing the admissibility of expert testimony. *See Sean R. ex rel. Debra R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 809 & n.1 (2016); *People v. Wesley*, 83 N.Y.2d 417, 423 n.2 (1994). Statutes of limitations may also differ depending on the forum in which a claim is filed, even for claims arising under the same substantive law. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). And—of particular relevance here—class certification requirements may vary from state to state. "The class certification standards in various states … often differ from the federal standards." Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev. 339, 369 (2016). Even where the language of the applicable rule is the same, different courts "can and do apply identically worded procedural provisions in widely varying ways." *Smith v. Bayer Corp.*, 564 U.S. 299, 309 (2011).

Given the variance among judicial systems, it is not reasonable for a plaintiff who wants to litigate in one jurisdiction to rely on a class action filed in a different jurisdiction. If a plaintiff wants to litigate in New York's judicial system, the plaintiff should be required to file a claim in the New York judicial system within the limitations period prescribed by New York law.

Second, from defendants' perspective, the burden of *American Pipe* tolling, although significant, is mitigated by the fact that tolling applies only within the same judicial system that the class action was filed. Thus, a putative class action

"notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Am. Pipe*, 414 U.S. at 554-55. As a result, within the limitations period, "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation." *Id.* at 555.

This information allows the defendant to assess its potential exposure. Based on the applicable law in the jurisdiction—including its procedural rules—the defendant can evaluate the strength of the putative class claims and potential defenses, and the likelihood that the claims could be dismissed before trial. The defendant also has a window into how any eventual trial might look in that jurisdiction, including the character of evidence that might be offered and whether the factfinder might see the plaintiff as particularly sympathetic. Crucially, *American Pipe* tolling will not change that exposure because individual claims filed after class certification is denied are the same claims in the same judicial system that were already on file as part of the putative class action. Thus, if a new claim is brought after the limitations period expires, the defendant will already

have accounted for it because the new plaintiff will already have been a putative class member during the limitations period.

Obviously, there are practical differences between class actions and individualized claims. The all-or-nothing nature of class actions may impose enormous financial risk on defendants—which is why defendants feel enormous settlement pressure, even for weak substantive claims. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense."); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). And class action trials are typically much more complex and burdensome for judges and juries than individualized trials—which is why it is so important that courts rigorously enforce class certification requirements. Nevertheless, in principle, if a defendant is confident it has a meritorious procedural or evidentiary defense to a class action suit, then that defendant should have the same degree of confidence that it will win follow-on

individual suits—because the follow-on suits will be filed in the same jurisdiction, and hence be subject to the same procedural and evidentiary rules.

But if the Court expands *American Pipe* and adopts a rule of cross-jurisdictional tolling, it will impose significant and unfair burdens on defendants. A defendant facing a putative class action will face the risk that it will be hit with post-limitations period lawsuits in New York long after it defeats class certification in a different jurisdiction with different procedural rules, evidentiary rules, limitations periods, and class-certification procedures. Any rule imposing those sorts of burdens on defendants should come from the legislature. As the U.S. Supreme Court recently summarized in declining to extend *American Pipe* to toll statutes of repose: "If the number and identity of individual suits, where they may be filed, and the litigation strategies they will use are unknown, a defendant cannot calculate its potential liability or set its own plans for litigation with much precision." *CalPERS*, 137 S. Ct. at 2053. That is precisely the predicament New York defendants will face if this Court recognizes cross-jurisdictional class action tolling.

Third, from the perspective of the courts, *American Pipe* tolling does not impose substantial burdens on judicial dockets—and may even advance judicial economy. *American Pipe* tolling ensures that if a particular putative class member's claim is already on a federal court docket as part of a class action, there

is no reason for it to simultaneously also be on the federal court docket styled as an individual claim in a separate lawsuit. This may reduce the total number of filings because would-be individual plaintiffs and interveners may opt against filing protective actions and motions while the putative class action is pending. *See American Pipe*, 414 U.S. at 553-54; *Crown, Cork*, 462 U.S. at 350-51. Of course, this may also result in stale claims being filed after a limitations period would otherwise have expired. But a judge concerned about the courthouse being overrun with stale claims can take appropriate steps to speed up resolution of a class action. The judge can manage discovery, set hard deadlines for briefing, and ensure that litigation does not get bogged down. Alternatively, if a jurisdiction has struggled with an overabundance of stale claims, it can craft local rules designed to ensure that class certification proceedings occur efficiently. *Cf.* Fed. R. Civ. P. 23(d) (authorizing federal courts to issue orders for prescribing how class actions are conducted).

By contrast, cross-jurisdictional class action tolling frustrates rather than furthers judicial economy. If New York recognizes cross-jurisdictional class action tolling, it "may actually increase the burden on [its] court system" and "expose the [state] court system to … forum shopping" because it will "invite into its courts a disproportionate share of suits" that other courts "refused to certify as class actions after the statute of limitations has run." *Portwood v. Ford Motor Co.*,

701 N.E.2d 1102, 1103-04 (Ill. 1998). That risk is particularly acute for a global financial center and commercial hub like New York, where so many plaintiffs may wish to file claims and where so many defendants may be subject to personal jurisdiction. "By rejecting cross-jurisdictional tolling," however, this Court can "ensure that the protective filings predicted by plaintiffs will be dispersed throughout the country." *See id.* at 1105.

Even worse, if cross-jurisdictional tolling causes New York courts to be beset by stale claims filed years or decades after applicable limitations periods have expired, they will be powerless to do anything about it. New York courts have no authority to speed up putative class action cases filed in other judicial systems. And conversely, judges in other judicial systems—including those systems that do not recognize cross-jurisdictional tolling—have no incentive to accelerate class action litigation because they will not be the ones who have to resolve a surprise onslaught of post-suit stale claims filed in a different jurisdiction that allows for cross-jurisdictional class action tolling. New York courts should not be at the mercy of docket management (or lack thereof) by judges in other jurisdictions. *See, e.g.*, *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000) ("[W]e decline to adopt the doctrine of cross-jurisdictional tolling in Tennessee. . . . Tennessee 'simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another

jurisdiction, whether those of the federal courts or those of another state.'"
(quoting *Wade v. Danek Med., Inc.*, 182 F.3d 281, 287 (4th Cir. 1999) (concluding the Virginia Supreme Court would not adopt cross-jurisdictional tolling)));
*Portwood*, 701 N.E.2d at 1104 ("because state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification.").

To be sure, rejecting cross-jurisdictional class action tolling may modestly increase the number of protective suits filed by cautious plaintiffs. But the New York Unified Court System (not to mention plaintiffs and defendants) may be better served by the timely filing of a claim, which "would put that state's court system on notice of the potential claim." *Portwood*, 701 N.E.2d at 1104-05.

Even so, there is no reason to believe that any increase in protective suits will overwhelm the judiciary. The U.S. Supreme Court dismissed that very concern in both of its recent decisions declining to extend class action tolling. In *CalPERS*, for example, the Court concluded that the fear of increased protective filings was "likely . . . overstated," as there was no empirical evidence of such an "influx" of lawsuits after courts (including the Second Circuit) declined to apply class action tolling to statutes of repose. 137 S. Ct. at 2054. That result was "not surprising," the Court explained, given that "[m]any individual class members may

have no interest in protecting their right to litigate on an individual basis." *Id.* In *China Agritech*, the Court similarly emphasized that courts (including the Second Circuit) had not experienced a flood of litigation in the more than thirty years after holding that class action tolling did not apply to successive class actions. 138 S. Ct. at 1810. If the federal courts were not inundated with lawsuits after reasonably limiting class action tolling, "there is little reason to think that protective class filings will substantially increase" if this Court similarly rejects cross-jurisdictional class action tolling. *See id*.

Furthermore, the New York State courts have ample authority to manage their dockets and handle any protective lawsuits that are filed. Those suits could be consolidated and stayed pending the outcome of litigation in another jurisdiction, or proceed—whatever the court deems best under the circumstances. *Cf. China Agritech*, 138 S. Ct. at 1811 (noting the "Federal Rules provide a range of mechanisms to aid courts" in managing protective filings, "including the ability to stay, consolidate, or transfer proceedings"); *CalPERS*, 137 S. Ct. at 2054 ("District courts, furthermore, have ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion.").

In deciding whether to extend class action tolling, the U.S. Supreme Court has returned to the foundational principles of efficiency and economy of litigation. Where those guiding lights do not "support tolling of individual claims," the Court

declined to extend the doctrine's reach. *See China Agritech*, 138 S. Ct. at 1806. That is precisely the situation here. This Court should therefore decline to adopt cross-jurisdictional class action tolling.

## II. Limitations Periods Are The Province Of The Legislature, Not The Court.

Even if the Court concludes that cross-jurisdictional tolling makes sense as a policy matter, this Court should still decline to adopt it. Statutes of limitations are enacted by the Legislature based on its decision about how to balance plaintiffs' interests in bringing claims, defendants' interests in repose, and the judiciary's interest in efficiently managing dockets. Judge-made exceptions to statutes of limitations undermine that balance and usurp the Legislature's policymaking role. Accordingly, whatever the supposed benefit of adopting cross-jurisdictional class action tolling, this Court should not blue-pencil the statutory deadlines that the Legislature duly enacted.

Enacting limitations periods is "one of the most sacred and important of sovereign rights and duties." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831). Determining the "period sufficient to constitute a bar to the litigation of stale demands, is a question" that "belongs to the discretion of every government, consulting its own interest and convenience." *Sun Oil Co.*, 486 U.S. at 726 (internal quotation marks and citation omitted). In New York (as elsewhere), the legislature is the branch of government properly charged with

fulfilling that duty, exercising that discretion, and making those value judgments. *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 435-36 (1993) ("the responsibility for balancing the equities and altering Statutes of Limitations lies with the Legislature.").

Of course, judges should always be appropriately deferential to legislative judgments (subject to constitutional constraints). But in the specific context of statutes of limitations, courts should be especially wary of creating new judge-made exceptions without legislative authority. This is so for three reasons.

*First*: Determining the appropriate statute of limitations for a particular claim involves the quintessential legislative task of balancing competing, incommensurate interests. The plaintiff needs adequate time to develop and bring a case; the defendant has an interest in repose, and ensuring that evidence does not become stale; and courts have an interest in disputes being resolved accurately based on fresh memories. *See Snyder*, 81 N.Y.2d at 435-36 (noting that statute of limitations requires balancing "the interests of injured parties" against defendants' interest in "a fair opportunity to defend claims against them before their ability to do so has deteriorated"). If the limitations period is too short, some plaintiffs with meritorious claims may lose their rights, while others may file knee-jerk claims before conducting an adequate investigation; if the limitations period is too long, plaintiffs may strategically wait until the end of the limitations period and force

defendants to defend against allegations that they do not remember or do not have evidence to disprove. Whether, in light of all of these interests, the limitations period should be two, three, four, or five years is not the type of question that has an answer that can be deduced from a legal premise. The appropriate limitations period is a pure policy judgment that legislatures, not courts, are equipped to make. *See Del. State Coll. v. Ricks*, 449 U.S. 250, 259-60 (1980) ("[T]he period allowed for instituting suit inevitably reflects a 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."). And similarly, the question of whether there should be cross-jurisdictional class action tolling, intra-jurisdictional class action tolling, or no class action tolling is a pure value judgment. Courts are not best positioned to decide in the first instance whether the benefits of tolling to absent class members outweigh the burdens to defendants and the judicial system: those types of value judgments—just like the duration of the limitation period itself— are appropriately made by officials in the legislative branch.

*Second*: Legislatures have more flexibility than courts to craft statutes that reflect careful and balanced compromises between competing interests. CPLR § 214-c is a classic example: it was passed "as a part of a larger tort reform package," and reflects "numerous compromises" about the length of the limitations

period, when it would be tolled, and for how long. *Giordano v. Mkt. Am., Inc.*, 15 N.Y.3d 590, 603-04 (2010) (Read, J., dissenting); *see also Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 206 (2d Cir. 2002); *Matter of N.Y.C. DES Litig.*, 89 N.Y.2d 506, 512 (1997). For instance, § 214-c provides that a plaintiff may sue within *one* year of discovering the cause of his injury, so long as such discoveries occur less than *five* years after the time he discovers the injury itself, and provided further that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined" within *three* years of discovering the injury. CPLR § 214-c(2), (4). A court could never properly announce such a rule—establishing the arbitrary one-year, three-year, and five-year cutoff points would be outside the permissible scope of judicial decisionmaking. Here, likewise, a legislature concerned about fair treatment for both class members and defendants would have the option of enacting compromise legislation—such as permitting tolling subject to fixed outer time limits (i.e. a statute of repose). Hence, the Legislature is the right branch of government to be enacting tolling rules.

*Third*: the New York legislature has not been shy about enacting, and modifying, statutes of limitations—making it all the more incongruous for the Court to enact Respondents' proposed judge-made tolling rule. The CPLR contains a plethora of different statutes of limitations, with limitations periods

ranging from one to twenty years. CPLR §§ 211-215. Those statutes—including tolling rules associated with those statutes—are routinely amended in response to particular policy problems that arise. For instance, CPLR § 214-a shortened the limitations period for certain forms of professional malpractice in response to '"a crisis in the medical profession posed by the withdrawal and threatened withdrawal of insurance companies from the malpractice insurance market."' *Bazakos v. Lewis*, 12 N.Y.3d 631, 634 (2009) (quoting *Bleiler v. Bodnar*, 65 N.Y.2d 65, 68 (1985)). CPLR § 214-b was designed "to overcome the caselaw by creating a discovery rule for the benefit of veterans who were exposed to Agent Orange in the Vietnam War." CPLR § 214-b *Practice Commentaries.* And "[t]he enactment of CPLR 214-f was prompted by a drinking water disaster that occurred in Hoosick Falls, New York, in 2015-2016." CPLR § 214-f *Practice Commentaries*.

Yet the Legislature has never enacted Respondents' proposed tolling rule. This is not for lack of opportunity—lower state courts and federal courts in New York, as well as courts in other states, have grappled with cross-jurisdictional class action tolling for years. *See* Appellant's Opening Br. at 23-24 & nn.9-10. In other contexts, and where it saw fit, the Legislature amended statutes of limitations to address gaps identified by this Court's decisions. *See, e.g.*, CPLR § 214-c *Practice Commentaries* ("CPLR 214-c was the Legislature's response … to repeated invitations from the Court of Appeals to enact a discovery rule for tort cases based

on exposure to toxic substances"). Yet in the face of all those judicial decisions, the Legislature has stayed its hand on cross-jurisdictional tolling. The natural inference is that the Legislature does not want cross-jurisdictional tolling—and that decision is the Legislature's prerogative.

This Court has "been reluctant to modify the law governing limitations, even when a party's case seems particularly compelling," *Snyder*, 81 N.Y.2d at 435-36, and it should adhere to that position. There is simply no basis for overruling the Legislature and injecting a new overlay of judge-made tolling law keyed to denial of class-certification in a foreign judicial system.

## CONCLUSION

The Court should reverse the judgment below and hold that New York does not recognize cross-jurisdictional class action tolling.

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**NEW YORK STATE COURT OF APPEALS**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word using a proportionally spaced typeface (Times New Roman), with font size 14 and double spacing.

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Dated: March 13, 2020

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## CERTIFICATE OF SERVICE

Gabriel K. Gillett, an attorney, certifies that he caused three copies of the Notice of Motion For Leave To File Brief As *Amicus Curiae*, and accompanying Affirmation of Adam G. Unikowsky In Support Of Motion For Leave To File Brief As *Amicus Curiae* to be served by hand on all counsel of record on the 13th day of March 2020.

Gabriel K. Gillett