No. 13-640

IN THE
Supreme Court of the United States

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI,

Petitioner,

v.

INDYMAC MBS, INC., ET AL.,

Respondents.

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

BRIEF FOR BUSINESS ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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BRIEF FOR BUSINESS ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The **Business Roundtable (BRT)** is an association of chief executive officers of leading U.S. companies that together have $7.4 trillion in annual revenues and more than 16 million employees. The BRT's member companies comprise more than a third of the total value of the U.S. stock market and pay more than $200 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and participate in litigation as *amici curiae* where important business interests are at stake.

This case presents an issue of great importance to the Nation's business community—indeed one more broadly significant than the particular phrasing of the question presented might otherwise suggest. Many of the BRT's members routinely are named as defendants in putative class actions in federal court, under federal and state statutes that impose an absolute time limit on defendants' liability. This case

[1] The parties' blanket consents to the filing of *amicus curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

involves one such statute, the Securities Act of 1933 (Securities Act), but many federal and state laws contain similar provisions, of varying duration. These absolute temporal limits on defendants' liability are termed "statutes of repose." *See CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182-83 (2014); 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1, at 4-5 (1991). And class-action litigation is common under many or most of these federal and state statutes.

The issue here is whether the mere pendency of a putative class action can prevent a statute of repose from limiting liability to the time period set by Congress or a state legislature. Petitioner asserts that even though statutes of repose are designed as absolute time limits, federal courts may not treat them as absolute, but that whenever a putative class action is filed in federal court, the class-action tolling rule of *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974), automatically suspends the running of *any* statute of repose. Under petitioner's rule, the statute of repose in the Securities Act, and presumably any other federal or state statute of repose, may be circumvented by the simple expedient of filing a complaint ostensibly on behalf of a putative class. Were that the rule, it could very well expose the BRT's members and other business defendants across the Nation to new litigation—and potentially to new liability—long after the point at which, in the legislature's judgment, they are entitled to peace. The BRT therefore has a strong interest in the resolution of this issue.

SUMMARY OF ARGUMENT

As this Court recognized as recently as June, statutes of repose are fundamentally legislative judgments. They effect a judgment by Congress or a state legislature that defendants, at a certain and readily ascertained point, are entitled to peace and need no longer worry about defending actions taken long ago. By adopting a statute of repose, a legislature completely extinguishes liability after a clearly specified time. Federal and state laws contain numerous such absolute statutes of repose.

Petitioner's position—that such absolute time bars nonetheless must be tolled by a federal court merely because of a previously pending class action—would replace the certain, legislatively selected time period with whatever time the class action, or series of class actions, consumes. Petitioner submits that the mere filing of a class action before the repose date is enough to justify tolling, because it provides a degree of notice. But the purpose of statutes of repose is to put an end to unasserted claims after a date certain, not to inform defendants that they may need to answer such claims in the future. *American Pipe* tolling therefore is not "consonant with the legislative scheme" that statutes of repose reflect. 414 U.S. at 558.

Even if notice were the touchstone (and it is not), the mere pendency of a class action often does not reliably inform defendants of the potential scope of their exposure. Abusive applications of the *American Pipe* rule have proliferated—for example, extending class tolling to *different* claims than those raised by the class; extending tolling even to filings by wholly

inadequate placeholder plaintiffs, who file claims merely to stop the clock so a suitable representative can be sought; and approving the use of successive class actions to evade adverse rulings. Using these tools, class-action plaintiffs' lawyers in many cases are able to stretch out the repose period far beyond what Congress or the state legislature selected.

Further, petitioner's position does not just threaten *federal* statutes of repose. If petitioner is right that *American Pipe*'s tolling rule is mandated by Federal Rule of Civil Procedure 23, that rule potentially may begin to displace *state* statutes of repose as well, in diversity cases.

These consequences all may be avoided simply by enforcing statutes of repose as they are written and as they were meant to be applied: to cut off liability absolutely once the statutory period has run. Contrary to petitioner's and its *amici*'s arguments, declining to extend *American Pipe* to repose periods does not threaten the efficacy of the class-action procedure. Empirical evidence shows that federal courts efficiently manage putative class actions, including those brought under the securities laws, leaving adequate time to afford a meaningful choice whether to opt out. Any need for urgency comes not from slow judicial resolution, but from dilatory conduct by class-action and other plaintiffs in filing suit with too little time remaining on the repose clock. The solution is not to reset the repose clock: the solution is merely to announce a clear rule that statutes of repose will be enforced as written.

ARGUMENT

I. Statutes of Repose Are Important Under a Wide Range of Federal and State Statutory Schemes That Routinely Are the Subject of Class-Action Litigation

Section 13 of the Securities Act is just one of the many statutes of repose, federal and state, that could potentially be affected by the Court's holding in this case. These statutes take many forms, but they share a common purpose: ensuring that "'after the legislatively determined period of time,'" the defendant "should be able to put past events behind him." *CTS Corp.*, 134 S. Ct. at 2183 (quoting 54 C.J.S., LIMITATION OF ACTIONS § 7, at 24 (2010)). Because that purpose is "central" to statutes of repose, their time periods "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* And although class-action litigation is common under many of these statutes, none of them makes an exception to that strong policy of repose for unnamed class members. Endorsing petitioner's position that a statute of repose *can* be tolled, ostensibly for the sake of better class-action administration, threatens the efficacy of hundreds of federal and state statutes of repose and the careful legislative judgments they reflect.

A. Congress and State Legislatures Have Deliberately Selected Statutes of Repose to Limit Liability

As this Court recently explained, a legislative body's enactment of a statute of repose represents a significant policy choice. While "there is substantial

overlap between the policies of the two types of statute," statutes of repose are animated by "a distinct purpose," *CTS Corp.*, 134 S. Ct. at 2183, and in pursuing that purpose they "strike a stronger defendant-friendly balance." *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199-200 (3d Cir. 2007). The principle that a statute of repose cannot be tolled is "central" to the selection of one form of time limit over the other—or, as here, to the selection of a shorter statute of limitations and a longer, but absolute, statute of repose. *CTS Corp.*, 134 S. Ct. at 2183. Both Congress and state legislatures have opted to include repose periods, and to reject tolling, in a number of significant statutes—statutes that may well be affected by the resolution of this case. While a complete catalogue of repose statutes is beyond the scope of this brief, certain key examples are illustrative.

1. Perhaps the best-known federal example is the five-year repose period that governs fraud and related claims under the Securities Exchange Act of 1934, 28 U.S.C. § 1658(b)(2). The same statute creates a corresponding limitations period for the same Exchange Act claims (two years from discovery). This Court recently emphasized that no matter how the *limitations* provision is construed, the *repose* provision "giv[es] defendants total repose," thereby "diminish[ing] th[e] fear" of being "subject … to liability for acts taken long ago." *Merck & Co., Inc.* v. *Reynolds*, 559 U.S. 633, 650 (2010).

But federal statutes of repose also appear outside the securities context, in a number of important and frequently invoked statutes. For instance, Congress included statutes of repose in the Fair Credit Report-

ing Act (FCRA), 15 U.S.C. § 1681 *et seq.*, and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.* Both statutes place an absolute five-year limit on recovery. *See* 15 U.S.C. §§ 1681p(2) (FCRA), 1691e(f) (ECOA); *see also, e.g.*, *Archer* v. *Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008) (describing "[t]he ECOA time prescription" as "a statute of repose," as shown by its "sweeping and direct language that '[n]o action shall be brought later than two years from the date of the occurrence of the violation'").[2] Similarly, the Truth in Lending Act (TILA), 15 U.S.C. § 1631 *et seq.*, imposes an absolute statute of repose on one of the forms of relief it makes available (rescission). *See id.* § 1635(f); *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998).

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1101 *et seq.*, contains a similar statute of repose—though it provides a six-year period in which to sue. *See* ERISA § 413(1), 29 U.S.C. § 1113(1). Federal courts treat that provision as "an outside limit" that "serves as an absolute barrier to an untimely suit." *Radford* v. *Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998); *accord, e.g.*, *Tibble* v. *Edison Int'l*, 729 F.3d 1110, 1120 (9th Cir. 2013) ("[S]ection 413(1) 'suggests a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests,

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[2] ECOA's two-year statute of repose was lengthened to five years, its current duration, after *Archer* was decided. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1085(7), 124 Stat. 1376, 2085 (2010).

such as a plaintiff's right to seek a remedy.'" (citation omitted)).

2. Statutes of repose also are common in many statutory schemes at the state level. Those limiting construction-defect claims provide a notable example. Many States have legislated that claims "based upon or arising out of the defective or unsafe condition of an improvement to real property shall [not] be brought" more than a certain number of years, typically ranging from five to ten or more, "from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." *E.g.*, N.C. GEN. STAT. § 1-50(a)(5)(a) (six-year statute of repose).[3] As those States' courts have said, the purpose of these statutes "is to protect from liability those persons who make improvements to real property." *Bryant* v. *Don Galloway Homes, Inc.*, 556 S.E.2d 597, 600 (N.C. Ct. App. 2001). Buildings are designed to last for decades, and if the threat of liability lasted for the life of the building (thanks to the discovery rule), it would increase the time and cost needed to construct a new building, and might discourage some from participating in the construction industry at all. Moreover, the statute of repose forecloses litigation at a time "when '[a]rchitectural plans may have been discarded, copies of building codes in force at the time of construc-

[3] *See also, e.g.*, MASS. GEN. LAWS ch. 260, § 2B (six-year statute of repose for tort claims "arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property"); NEB. REV. STAT. § 25-223 (providing ten-year repose period for claims of "deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property").

tion may no longer be in existence, [and] persons individually involved in the construction project may be deceased or may not be located.'" *Klein* v. *Catalano*, 437 N.E.2d 514, 520 (Mass. 1982) (quoting *Howell* v. *Burk*, 568 P.2d 214, 220 (N.M. Ct. App. 1977)).

States employ statutes of repose in other contexts for similar reasons. As Judge Posner noted in *McCann* v. *Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011), the argument for absolute limits on liability is "particularly strong in the case of product defects," and for that reason, many States have forbidden their courts under any circumstances from hearing product-liability claims arising many years "from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury." GA. CODE § 51-1-11(b)(2) (ten-year repose period).[4] States have made similar judgments with respect to professional-malpractice claims,[5] statutory consumer-protection or unfair-and-

[4] *See also, e.g.*, OR. REV. STAT. § 30.905(2)(a).

[5] *E.g.*, MICH. COMP. LAWS § 600.5838b(1)(b) (six-year statute of repose for legal malpractice claims); TENN. CODE § 28-3-104(c)(2) (five-year repose period for claims against accountants or attorneys "except where there is fraudulent concealment on the part of the defendant, in which case the action or suit shall be commenced within one (1) year after discovery").

deceptive-practice claims,[6] and, of course, blue-sky-law claims.[7]

B. Statutes of Repose Strike a Careful Legislative Balance to Mitigate the Threat of Long-Pending Contingent Liabilities

Judge Posner has explained succinctly the overriding rationale for statutes of repose: "[B]usiness planning is impeded by contingent liabilities that linger indefinitely." *McCann*, 663 F.3d at 930. State courts have recognized the same point: "There comes a time when he [the defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim" at that point. *Rosenberg* v. *Town of N. Bergen*, 293 A.2d 662, 667-68 (N.J. 1972). Statutes of repose reflect careful legislative weighing of just how long should be deemed too long, *ex ante*. That is a classically legislative judgment, providing important balance to the statutory scheme.

Accordingly, some statutes of repose are not designed as one-size-fits-all time limits, but reflect circumstance-specific legislative calibration. Indeed, some of the federal statutes are made "subject … to legislatively created exceptions"—explicit statutory rules that allow the plaintiff more time to sue in cer-

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[6] *E.g.*, TENN. CODE § 47-18-110 (five-year statute of repose for consumer protection act claims); WIS. STAT. § 425.307(1) (six-year statute of repose for statutory consumer-protection claims asserted in an affirmative, rather than defensive, posture).

[7] *E.g.*, CAL. CORP. CODE § 25506(b) (five-year statute of repose for private state securities law claims); TEX. REV. CIV. STAT. art. 581, § 33(H)(2)(b) (same).

tain circumstances—that (unlike tolling rules courts read into statutory time bars) are "set forth in the statute of repose" itself. 1 CORMAN, *supra* § 1.1, at 5. For example, ECOA's statute of repose provides for a limited period of tolling when a governmental plaintiff—but *not* a private plaintiff seeking to be appointed class representative—is pursuing the same claim. 15 U.S.C. § 1691e(f). And ERISA's statute of repose makes special provision for "fraud or concealment," in which case the repose period runs from the discovery of the ERISA violation, an unusual example that is nonetheless unsurprising given the defendant's status as a fiduciary. 29 U.S.C. § 1113.

The statute of repose can be further calibrated by working in tandem with a statute of limitations, as the Securities Act provision at issue here does. In such cases, the statute of repose in practical terms marks the point beyond which a (shorter) statute of limitations may not be tolled. There may be a relatively short statute of limitations, incorporating a discovery rule and potentially subject to various forms of tolling not explicitly provided for in the statute. But there is also a statute of repose, setting the outer limit.

In setting that outer limit—often considerably longer than the limitations period—Congress can and does weigh the need to allow a reasonable but limited time for the considerations that typically justify tolling of a statute of *limitations*, such as delays in discovering the violation. Thus, for instance, Congress has twice extended the statute of repose for ECOA claims, including one extension expressly for the purpose of providing more time to "develop[ ] and

investigat[e] … the necessary facts." S. Rep. No. 94-589, at 14 (1976). "Such an accommodation would have been unnecessary if Congress intended the courts to engraft equitable tolling doctrines onto the statute." *Archer*, 550 F.3d at 508-09.

C. This Case Implicates a Wide Range of Statutes of Repose, Because Class-Action Litigation Is Common Under the Relevant Statutes

The question presented here potentially implicates the entire spectrum of federal and state statutes of repose (including those discussed above), because class-action litigation is commonplace under virtually all of those statutes. The impact of extending *American Pipe* tolling to statutes of repose therefore would be felt well beyond the securities context.[8]

Congress plainly contemplated class-action litigation under the consumer-credit statutes. Indeed, the very same provision of ECOA that includes the statute of repose also provides that plaintiffs may sue on behalf of a class. *See* 15 U.S.C. § 1691e(a); *see also id.* § 1691e(b) (imposing a special cap on damages recoverable in an ECOA class action). In fact, class actions are commonplace under all of the federal consumer-credit statutes, *see* 6 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 21:1, at 388-90 (4th ed. 2002), and ECOA in particular has

[8] Indeed, federal courts have already faced the question whether *American Pipe* tolling applies to statutes of repose under ERISA and TILA. *Compare Arivella* v. *Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176-78 (D. Mass. 2009) (ERISA, yes), *with McMillian* v. *AMC Mortgage Servs., Inc.*, 560 F. Supp. 2d 1210, 1215 (S.D. Ala. 2008) (TILA, no).

recently seen "a wave of putative class action lawsuits." Laura C. Baucus *et al.*, *Emerging Topic*, 64 CONSUMER FIN. L.Q. REP. 155, 157 (2010). Yet despite making certain exceptions to the timeliness rules set out in the ECOA and FCRA statutes of repose, Congress created none for class-action plaintiffs.

The same is true under ERISA. Class-action litigation against ERISA-plan fiduciaries is thriving, in part because ERISA provides an avenue to claim damages from a stock drop without complying with the numerous procedural and substantive protections of the securities laws, including those added by the Private Securities Litigation Reform Act (PSRLA). This Court considered a putative ERISA class action only last Term. *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2464 (2014).

State-law class actions also regularly implicate statutes of repose. The construction-related and products-liability statutes of repose discussed above are examples: recent years have seen a number of putative class actions against builders and others in the construction industry, arising from alleged construction defects and allegedly defective products (or both). *See, e.g.*, *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576, 582 (5th Cir. 2014) (describing multiple class actions, coordinated for pretrial proceedings, brought by plaintiffs alleging that "drywall imported from China" installed in their homes "caused them property damage and health problems"); *Albano* v. *Shea Homes Ltd. P'ship*, 634 F.3d 524, 526 (9th Cir. 2011) (describing prior class

action alleging defective construction claims against common developer).

Even professional malpractice—another area where statutes of repose are well-established—sees its share of class-action litigation, especially in contexts where the malpractice tort is used to pursue securities-related claims against accountants and lawyers. *See, e.g.*, *Johnson* v. *Nextel Commc'ns, Inc.*, 660 F.3d 131, 134, 137 (2d Cir. 2011); *Piazza* v. *Ebsco Indus., Inc.*, 273 F.3d 1341, 1347 (11th Cir. 2001); *Ackerman* v. *Price Waterhouse*, 683 N.Y.S.2d 179, 184-86 (App. Div. 1998).

Thus, the statute of repose at issue here is hardly the only one that will raise the question of class-action tolling. To the contrary, class actions collide with statutes of repose in many different contexts, under both federal and state law. The question of *American Pipe*'s scope that confronts the Court here, therefore, has ramifications extending far beyond the federal securities laws.

II. Allowing Class-Action Tolling of Statutes of Repose Would Override Congress's and The States' Legislative Judgments, Depriving Defendants of the Certainty That Statutes of Repose Are Meant to Provide

Extending *American Pipe* tolling to statutes of repose, as petitioner and its *amici* advocate, necessarily would disrespect the "legislative judgment" those statutes represent: "that defendants should 'be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'" *CTS*

Corp., 134 S. Ct. at 2183 (quoting 54 C.J.S., *supra*, § 7, at 24). Instead, federal courts would be called upon to substitute their own judgments for Congress's or the state legislature's, upsetting the balance those legislatures tried to achieve in enacting the relevant statutory scheme. In so doing, the judiciary also would deprive defendants of any certainty about when their exposure to litigation over particular acts will finally end, instead allowing for "contingent liabilities that [may] linger indefinitely," which in turn would "impede[ ]" "business planning." *McCann*, 663 F.3d at 930.

Petitioner's proposed rule, in sum, threatens the fundamental objectives that statutes of repose are designed to achieve. And petitioner's position threatens to affect state-law class actions even more perniciously: if petitioner and its *amici* are correct that Rule 23 mandates *American Pipe*'s tolling rule, then federal courts may well be left in the awkward position of applying a federal procedural rule to create state-law liability in federal court, where the state legislature intended none and the state courts would impose none.

A. The Class Complaint Alone Does Not Provide Defendants with Adequate Notice of the Claims They May Someday Face Under *American Pipe* Tolling

In justifying the tolling of a statute of limitations during the pendency of a putative class action, this Court emphasized the idea that the filing of the class-action complaint "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." *American Pipe*, 414 U.S. at 555. The Court reasoned that the class action thereby provides defendants with "the essential information necessary to determine both the subject matter and size of the prospective litigation" within the limitations period. *Id.*; *accord Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims … but these ends are met when a class action is commenced.").

Respondents correctly discern (at 45) that "notice" is not the point of statutes of repose: the goal instead is to "assur[e] [defendants] that any claims not properly asserted within the statutory window can never be brought, enabling defendants to plan their affairs with certainty." Thus, even assuming that "generic" notice of a claim could be said to satisfy the objectives of a *limitations* period,[9] it certainly does not satisfy the purposes that underlie statutes of *repose*. Statutes of repose are not enacted with a view to ensuring that defendants are "notifie[d] … of the number and generic identities of the potential plaintiffs who may participate in the judgment" later down the line. *American Pipe*, 414 U.S. at 555. Rather, they are meant to give defendants a date certain by which their liability for certain acts—whether selling a defective product, substantially

[9] "A mere announcement of an intention to sue puts defendants on notice. No one contends, however, that this simple notice is sufficient to toll the statute." *In re Copper Antitrust Litig.*, 436 F.3d 782, 796 (7th Cir. 2006).

completing a building, issuing securities, etc.—will come to an end, so that defendants can plan their future affairs accordingly.

These purposes simply are not served by a "generic" notification that some indeterminate number of claimants are waiting in the wings, ready to take the stage if the putative class action falters (which could come many years after the repose period has lapsed)—and perhaps even sooner. *See, e.g.*, *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254 (2d Cir. 2007) (holding that *American Pipe* tolling "applies also to class members who file individual suits before class certification is resolved"); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2007) (same). Not only is the defendant receiving such "notice" left in the dark about when his potential exposure will terminate, but the class action in many cases will not even provide an accurate picture of whose claims, and how many, lie over the horizon.

American Pipe tolling, after all, rests on the notion that the defendant is on notice of the claims of everyone in the putative class, up until the moment when class certification is denied.[10] *Crown, Cork*, 462 U.S. at 354. But it is not uncommon for class certification to be denied *precisely because* the class definition—

[10] Of course, it may end earlier than that if, *e.g.*, the case never survives to see the class-certification stage. *See Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011) ("Tolling lasts from the day a class claim is asserted until the day the suit is conclusively not a class action[.]"); *cf. Edwards* v. *Boeing Vertol Co.*, 717 F.2d 761, 766 (3d Cir. 1983), *vac'd on other grounds*, 468 U.S. 1201 (1984) ("[T]olling of the statute of limitations continue[s] until a final adverse determination of class claims.").

the very thing that under *American Pipe* is supposed to provide defendants with "essential information" about their liability exposure—*is inadequate to identify who is within the class and who is not*. *E.g.*, *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 312 (3d Cir. 2013) (vacating class certification because members of class were not ascertainable); *Adashunas* v. *Negley*, 626 F.2d 600, 603-05 (7th Cir. 1980) (same). At most, such class definitions can only hint at defendants' potential exposure. A defendant may well know, for example, how many products it sold, and to whom, but may have few means of determining which of their customers (if any) could have suffered the complained-of injury. In such cases, petitioner's rule would leave defendants in great doubt about whether they will be forced to defend old claims (and how many and for how much), even where the legislature, by including a statute of repose, crafted the cause of action to provide certainty and peace on a certain date.

Furthermore, even if the class *definition* recited by the plaintiffs were deemed to provide the defendant with adequate notice, the class *claims* may not mark the outer limit of *American Pipe* tolling. Aggressive plaintiff's counsel regularly rely on *American Pipe* to assert claims after a limitations period has run, even though those claims appear *nowhere* in the original complaint. Significant new issues, theories, and potential liabilities can thereby be smuggled into a case despite the time bar.

The differences can be dramatic. For instance, the court below has twice allowed new claims seeking *treble* damages to be added after the limitations peri-

od has run, even though the original class-action complaint did not contain any claim that permitted recovery of treble damages. *See, e.g.*, *Benfield* v. *Mocatta Metals Corp.*, 26 F.3d 19, 23 (2d Cir. 1994) (allowing a plaintiff to add an otherwise-untimely RICO claim based on *American Pipe* tolling, even though the original class-action complaint contained no RICO claims and "RICO requires more in the way of evidence" than the claims pleaded in that original complaint); *Cullen* v. *Margiotta*, 811 F.2d 698, 720-21 (2d Cir.) (similar), *overruled on other grounds by Agency Holding Corp.* v. *Malley–Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). The court of appeals held that adding new claims that changed "the degree of exposure to liability (single damages vs. treble damages plus attorneys' fees)" was not a significant difference. *Cullen*, 811 F.2d at 721. That reasoning is untenable in the context of a statute of repose: understanding the exposure to liability on the repose date is *precisely* what a statute of repose is supposed to accomplish.[11]

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[11] Other courts of appeals have applied *American Pipe* tolling more narrowly, limiting it to causes of action that are identical to those alleged in the putative class-action complaint. *E.g.*, *Williams* v. *Boeing Co.*, 517 F.3d 1120, 1136 (9th Cir. 2008). That reasoning is more consistent with Justice Powell's admonition that *American Pipe* tolling should not "leave[ ] a plaintiff free to raise different or peripheral claims following denial of class status." *Crown, Cork*, 462 U.S. at 354. The lack of consensus as to the scope of *American Pipe*'s tolling rule is itself an important source of uncertainty for defendants as to the temporal duration of their liabilities—uncertainty which is anathema to statutes of repose and the reasons for them.

B. Abusive Applications of *American Pipe* Tolling Can Compound the Potential Unfairness to Class-Action Defendants

The concerns discussed above are only further compounded by longstanding disagreement over the scope of *American Pipe*'s tolling rule, which has led to a number of troubling and abusive applications of the rule to proliferate and persist. That was not unforeseen: concurring in *American Pipe* itself, Justice Blackmun presciently warned that the Court's decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights," and encouraged district judges to "prevent th[at] type of abuse." 414 U.S. at 561-62. Justice Powell echoed those warnings in *Crown, Cork*, adding that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354. Unfortunately, some class-action attorneys have come to regard *American Pipe*'s tolling rule as precisely the sort of "encouragement" that these Justices insisted it should not be.

1. *Placeholder Plaintiffs*: In a number of cases over the last four decades, class-action lawyers have too often made use of "placeholder" suits: plaintiffs who are named in the complaint to represent a putative class, but who in fact have no standing or are otherwise unsuited to assert the class members' claims. Primarily, the purpose of these "placeholders" is to buy time until a more suitable class representative can be substituted. Indeed, there have been

cases where the placeholder complaint was filed literally on "the last day of the statute of limitations period." *Hill* v. *State St. Corp.*, No. 09-cv-12146-NG, 2011 WL 3420439, at *25 (D. Mass. Aug. 3, 2011).

The federal courts have failed to reach consensus as to the permissibility of such tactics, creating uncertainty that itself undermines the purpose of statutes of repose. *See* note 11, *supra*. To their credit, many federal courts have rightly rejected these efforts as abuses of *American Pipe*'s already "generous" tolling rule, and refused to allow tolling. *See, e.g.*, *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990) ("There appears to be no good reason to encourage bringing of a suit merely to extend the period in which to find a class representative."); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987) (recognizing that to permit tolling where named plaintiffs lack standing "may condone or encourage attempts to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene with the benefit of the tolling rule").[12] Other federal courts appear to adopt a categorical ban on allowing tolling where the named plaintiff lacked standing, which serves the same function of curbing abuse. *See, e.g.*, *Boilermakers Nat'l Annuity Trust Fund* v. *WaMu Mortgage Pass Through Certificates, Series AR1*, 748 F. Supp. 2d 1246, 1258-59 (W.D.

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[12] *Accord N.J. Carpenters Health Fund* v. *DLJ Mortgage Capital, Inc.*, No. 08 Civ. 5653 (PAC), 2010 WL 6508190, at *2 n.1 (S.D.N.Y. Dec. 15, 2010); *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, No. 02-CV-3089 (ILG), 2006 WL 1212512, at *5-6 (E.D.N.Y. May 3, 2006).

Wash. 2010); *Palmer* v. *Stassinos*, 236 F.R.D. 460, 465-66 & n.6 (N.D. Cal. 2006).

Even so, not every federal court has heeded Justice Blackmun's and Justice Powell's admonitions. Indeed, in allowing tolling where the named plaintiffs lacked standing, one court has gone so far as to say that there is nothing "singular or peculiar with respect to 'standing' that would generally prevent the application of the [efficiency-based] consideration expressed in *American Pipe*." *Rose* v. *Ark. Valley Envtl. & Util. Auth.*, 562 F. Supp. 1180, 1193 (W.D. Mo. 1983).[13] Others have taken a similar view, out of vague, largely anecdotal concerns that any doubts about the named plaintiff's standing might threaten the efficacy of *American Pipe* tolling, by leading class members to flood the docket with protective filings.[14]

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[13] In a similar vein, two courts of appeals have allowed *American Pipe* tolling where the named plaintiff was later found to lack standing, at least where the class had already been certified and notice sent to the class members. *See Griffin* v. *Singletary*, 17 F.3d 356, 357, 360-61 (11th Cir. 1994); *Haas* v. *Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1095-98 (3d Cir. 1975).

[14] *See, e.g.*, *Genesee Cnty. Emps.' Ret. Sys.* v. *Thornburg Mortgage Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1161-64 (D.N.M. 2011); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 456 (S.D.N.Y. 2005), *abrogated on other grounds*, 574 F.3d 29 (2d Cir. 2009). Still others have tried to stake out a middle ground, allowing tolling where class members arguably had some reasonable basis for believing the named plaintiff had standing, or where the named plaintiff's standing "was neither 'straightforward' nor 'well settled,'" but rejecting it where "the purported class representative so clearly lacks standing that allowing [tolling] would condone (and even invite) the filing of placeholder lawsuits." *Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 894 F. Supp. 2d 144, 156 (D. Mass. 2012); *In re Morgan Stanley Mortgage Pass-*

In other words, these courts have allowed efficacy considerations to trump the statute: even though the original class-action complaint was filed by a mere placeholder who did not share any injury (or the relevant injury) with the putative class, these courts nonetheless have deemed it preferable to tolerate such abuses than to have the plaintiffs with standing file their own timely complaints.

The upshot of these discordant approaches is that class-action lawyers, often enough, can get away with relying on placeholder plaintiffs and broad class definitions, effectively allowing them to extend the otherwise-applicable time limits for as long as the placeholder class definition remains pending. That may well end up being long after the statute of repose would otherwise have run, allowing absent class members extra time to bring claims that the statute was supposed to have cut short.

2. *"Stacked" Class Actions*: The problem is further exacerbated by the phenomenon of "stacked" class actions: when a putative class action is dismissed or denied certification, members of that failed class bring not just their own individual cases, but *a new putative class action*. The goal is generally to seek a different result from a different judge. *See, e.g.*, *Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11-12 (1st Cir. 1998).

Here, too, the federal courts are divided. The Third Circuit allows tolling so long as the prior class action

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Through Certificates Litig., 810 F. Supp. 2d 650, 670 (S.D.N.Y. 2011).

"was not rejected because of any defects in the class itself but because of [the named plaintiff's] deficiencies as a class representative." *Yang* v. *Odom*, 392 F.3d 97, 108 (3d Cir. 2004) (citation omitted). More recently, the Sixth Circuit allowed tolling for a successive class action simply because the district court never reached the class-certification issue. *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 479 (6th Cir. 2013). Other courts hold to the contrary that "potential individual plaintiffs cannot extend th[e] limitations period by relying on successive class actions which allege the same class and the same claims." *Basch*, 139 F.3d at 12; *accord Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

Both practices—placeholder plaintiffs and stacked class actions—stem from a longstanding lack of clarity in the federal courts concerning the scope of *American Pipe*'s tolling rule, and raise the very real possibility of unlimited tolling. Too often, courts applying *American Pipe* have approved tactics that would allow a succession of suits, even wholly inadequate placeholder suits, to toll the time limit "perpetually." *Basch*, 139 F.3d at 11. Combined, the lack of doctrinal clarity and the abusive applications of *American Pipe* that arise from it critically undermine the certainty for defendants that statutes of repose are meant to provide. But in this case, this Court need not formulate any special rule to stop these practices—it can simply apply the outer limit that Congress wrote, without allowing the *American Pipe* doctrine to override the statute of repose.

C. *American Pipe*'s Scope, on Petitioner's Theory, Potentially Is Not Limited to Federal Statutes of Repose

Petitioner's explanation of *American Pipe*'s tolling rule is that it is mandated by Federal Rule 23 itself, rather than deriving from the traditional equitable powers of the federal courts. Pet. Br. 35-36. Many of petitioner's *amici* agree. *See* Fed. Judges' Br. 7-8; Huff Br. 25-32; AARP Br. 5-13; Public Citizen Br. 8-9. If they are right, their reasoning would seem to apply to *any* case in federal court, including state-law diversity cases governed by a state-law statute of repose. In other words, petitioner's desired holding would apparently use a *Federal* Rule of Civil Procedure to lengthen a *state* statute of repose, part of the substantive law that federal courts sitting in diversity must apply. The result would be a tangled federalism issue—one easily avoided by adopting respondents' proposed rule and declining to extend *American Pipe* to statutes of repose.

The Federal Rules of Civil Procedure are rules, not just guidelines: any valid Federal Rule is binding on the federal courts with respect to the matters they address. *See* FED. R. CIV. P. 1. If petitioner and its supporters are correct that *American Pipe*'s class-action-tolling rule is required by Federal Rule 23, then federal courts may be obliged to conclude that "[that rule] governs [in federal court]—[state] law notwithstanding." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

Accordingly, if *American Pipe* is just Rule 23 by another name, then its application potentially may not be confined just to federal time limits, be they

statutes of limitations or statutes of repose. *Any* state law that answered the tolling question differently than *American Pipe* could be open to challenge in federal court based on the federal tolling rule. *Shady Grove*, 559 U.S. at 399, 405-06. Whenever *American Pipe* would "unavoidabl[y]" "clash" with a contrary state-law rule, even if it did so only "implicitly," plaintiffs would surely argue that it trumps in federal court, *Hanna* v. *Plumer*, 380 U.S. 460, 470 (1965), so long as it is a valid exercise of the rule-making power; that is, "'whether [the] rule really regulates procedure,'" or is at least "rationally capable of classification as" procedural. *Id.* at 464, 472 (citation omitted). At a minimum, accepting petitioner's argument that Rule 23 requires *American Pipe* tolling invites a debate similar to that which so divided this Court in *Shady Grove*: must a federal court sitting in diversity apply "substantive" state-law tolling rules even though they conflict with *American Pipe*, or does the applicability of *American Pipe* depend solely on Rule 23's validity? *See Shady Grove*, 559 U.S. at 416-17 (Stevens, J., concurring).

Should the Court venture down that road, there is good reason to think that federal courts sitting in diversity will be forced to decide a number of "clashes" between *American Pipe* and state law.[15] While many States, as part of their own decisional law, have embraced the general principle of class-action tolling that *American Pipe* embodies, *see Wade* v. *Danek Med., Inc.*, 182 F.3d 281, 286-87 (4th Cir. 1999) (col-

[15] Federal diversity jurisdiction over state-law class actions has been expanded considerably in recent years. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

lecting cases), that is not universally so. The Virginia Supreme Court, for example, recently held that Virginia law does not allow that State's statutory time limits to be tolled for absent members of a putative class action *at all*, for the simple reason that "Virginia jurisprudence does not recognize class actions." *Casey* v. *Merck & Co., Inc.*, 722 S.E.2d 842, 846 (Va. 2012). And even in those States that recognize class-action tolling, not all of them give it the expansive reading that petitioner advocates here. For instance, the Arizona Supreme Court, faced with a nearly identical question as that presented here—does a pending class action toll a statute of repose?—answered it unequivocally in the negative. *Albano* v. *Shea Homes Ltd. P'ship*, 254 P.3d 360, 364-67 (Ariz. 2011); *accord Cacha* v. *Montaco, Inc.*, 554 S.E.2d 388, 392-93 (N.C. Ct. App. 2001) (same).

And there are examples that appear outside the statute-of-repose context, too. Many States that subscribe to class-action tolling as a general principle draw the line at allowing a class action that is pending in a foreign jurisdiction—including federal courts—to toll a state-law limitations period. *E.g.*, *Maestas* v. *Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000).[16] Such States are understandably loath "to make the commencement of the [State's] statute of limitations contingent on the outcome of

[16] A minority of States take a different view, as is their prerogative. *See Dow Chem. Corp.* v. *Blanco*, 67 A.3d 392, 393 (Del. 2013); *Stevens* v. *Novartis Pharms. Corp.*, 247 P.3d 244, 251 (Mont. 2010); *see also Vaccariello* v. *Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002) (adopting tolling based on the pendency of a class action "in Ohio or the federal court system").

class certification as to any litigant who is part of a putative class action filed in any federal court in the United States." *Id.* at 809; *accord Portwood* v. *Ford Motor Co.*, 701 N.E.2d 1102, 1104 (Ill. 1998) ("State courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.").

If the *American Pipe* rule is found in Rule 23, such doctrinal and policy choices might well be out of the States' hands, at least when a state-law case is litigated in federal court.[17] The inevitable results would be "inequitable administration of the laws" and forum-shopping, the twin evils that this Court's *Erie* cases have long sought to avoid. *Hanna*, 380 U.S. at 468. That outcome can easily be avoided here, by not treating *American Pipe* as a rule-based command that potentially applies in every federal case.

III. Declining to Extend the Tolling Doctrine to Statutes of Repose Will Not Overwhelm Court Dockets or Prevent Adjudication of Legitimate Claims

Much of petitioner's argument rests on the result-driven notion that *American Pipe* tolling *must* apply to repose periods, lest federal courts "see a 'needless multiplicity of actions,'" apparently because Section

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[17] Indeed, some federal courts, in cases decided before *Shady Grove*, have already held—or at least left open the possibility—that state law which precludes tolling must in some cases give way to the federal interest embodied by *American Pipe*'s tolling rule. *E.g.*, *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 914-15 (8th Cir. 2004); *Vaught* v. *Showa Denko K.K.*, 107 F.3d 1137, 1146-47 (5th Cir. 1997).

13's three-year repose period is too short—and securities class-action litigation takes too long—for putative class members to wait until the fate of the class action is decided before deciding whether to opt out. Pet. Br. 32 (quoting *Crown, Cork*, 462 U.S. at 351). *See also* LACERA Br. 33-37; Public Pensions Br. 9-21; Profs.' Br. 3-17; Fed. Judges' Br. 3-19; Public Citizen Br. 10-15.

To be sure, the tolling rule this Court adopted in *American Pipe* was animated by a concern that denying tolling there "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. Even so, the Court recognized that its authority to grant tolling extended no further than what was "consonant with the legislative scheme." *Id.* at 558. Here, as explained, tolling is simply incompatible with a "legislative scheme" that includes a statute of repose. And even if this Court were free to craft petitioner's contrary rule—irrespective of the text of the statute of repose, the contents of Rule 23, and the constraints of the Rules Enabling Act—petitioner's submission rests on a flawed analysis.

Specifically, certain academic *amici* have submitted an empirical analysis of federal-court securities class actions filed between 2002-2009, which professes to show that in a large fraction of such cases, the applicable repose periods, unless tolled, would have expired before a decision dismissing the action or ruling on class certification. Profs.' Br. 3-15. The professors' analysis is open to criticism, and in any event fails to support reversal here.

A. At the outset, even assuming the professors' figures are accurate, their analysis does not provide a complete picture of why the claims that are the focus of their analysis are at risk of being time-barred without tolling of the repose period. The professors' figures show only (1) the date when the class action complaint was filed, and (2) how long it took to reach a dismissal or certification ruling from the date when the repose period first started running. *Id.* at 4 & n.4, 9 n.9. What that presentation leaves obscured, however, is how long it actually took the *federal court* to rule on dismissal or class certification *after the class-action complaint was filed*. In other words, the professors' analysis does not differentiate between class members whose time ran out because the district judge took too long, and those whose time ran out only because the named plaintiff—and indeed, the absent class member himself—simply waited too long to file in the first place.

At least one recent study suggests that, in most cases, federal courts are not taking too long to dispose of securities class actions. That study, comprising all federal-court securities class actions filed between 2000 and 2013, found that: (1) the vast majority, 73 percent, were dismissed or settled before any motion for class certification was filed; (2) of the minority of cases in which a class certification motion was filed, only 56 percent (*i.e.*, 15 percent of all cases) reached a decision on that motion; (3) "[a]pproximately 66% of the decisions on motions for class certification [*i.e.*, 9.9 percent of all cases] that were reached were within three years from the original filing date of the complaint"; and (4) "[t]he median time is about 2.4 years." RENZO COMOLLI &

SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2013 FULL-YEAR REVIEW 18-20 (Jan. 21, 2014), *available at* http://www.nera.com.[18]

In sum, federal courts in the vast majority of recent securities class actions disposed of motions to dismiss or for class certification with time to spare on the statute-of-repose clock. In the Securities Act context, that time, even if only a little less than a year in most cases, should be adequate for class members deciding whether to opt out, considering that (1) plaintiffs already are required to bring claims under Section 11 or 12(a)(2) of the Securities Act "within one year after the discovery of the untrue statement or the omission," 15 U.S.C. § 77m, (2) plaintiffs need not start from scratch, but can to some extent make use of the work the named plaintiff's counsel has already done, and (3) plaintiffs, in many jurisdictions, need not wait for class certification to be denied before filing in order to reap the benefit of *American Pipe* tolling of the applicable limitations period. *See Hanford Nuclear*, 534 F.3d at 1009; *WorldCom*, 496 F.3d at 255.

B. Moreover, even assuming that the Securities Act's repose period creates special problems—and there is no clear evidence that it does—it is not at all apparent that similar difficulties exist under other

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[18] The same study reports that the median "time to resolution," *i.e.*, "the time between filing of the first complaint and resolution (whether settlement or dismissal)," for federal-court securities class actions filed in recent years (2005-2010) has been "remarkably stable," "varying between 2.3 and 2.5 years." *Id.* at 25.

statutes of repose in the mine-run of federal-court class-action litigation. As noted, many statutes of repose at both the federal and state level, *see* Part I.A, are significantly longer than the one at issue here. For blue sky, professional malpractice, and consumer protection claims (as well as breach-of-fiduciary-duty claims under ERISA), five- or six-year periods are typical.[19] With construction-defect and product-liability claims, ten-year periods also are common.[20]

Recent studies confirm that these periods are long enough to afford putative class members considering whether to opt out a meaningful opportunity to do so. For example, a 2012 study examined federal-court, federal-question class actions filed or removed between 2003 and 2007. *See* Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. Cin. L. Rev. 315, 316-26 (2012). The authors found that for cases originally filed in federal court (excluding Fair Labor Standards Act collective actions), those that did not end in settlement ended in a median of "about 9.3 months." *Id.* at 328, 344. Those that were settled "took a median time of … about 20.9 months." *Ibid.* The picture was much the same for federal-question class actions removed to federal court: those that were not remanded (typically, within 3.7 months) terminated within "about 9.9 months" in cases that were not settled, about 24.6 months in cases that were. *Ibid.*

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[19] *E.g.*, 15 U.S.C. § 1681p(2); 29 U.S.C. § 1113; CAL. CORP. CODE § 25506(b); MICH. COMP. LAWS § 600.5838b(1)(b).

[20] *E.g.*, NEB. REV. STAT. § 25-223; OR. REV. STAT. § 30.905(2)(a); *but see* MASS. GEN. LAWS ch. 260, § 2B.

These findings are largely consistent with those of a 2008 study, by the same authors, of 231 federal-court diversity class actions filed between 2003 and 2005. *See* EMERY G. LEE III & THOMAS E. WILLGING, IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 1, 17-18 (2008), *available at* http://www.uscourts.gov. That study found that of those cases that were not remanded, after a median of about 3.5 months: (1) the median time for voluntary dismissals was 9 months; (2) the median time to disposition by "motion, sua sponte order, or summary judgment" was 14 months; and (3) the median time to class settlement was 18.4 months. *Id.* at 7.

Against a statute of repose that allows ten, five, or even three years to sue, the one or two years necessary to dispose of many class actions leaves ample time to make an informed choice whether to opt out. *Cf. Heimeshoff* v. *Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 612 n.4 (2013) (concluding that plaintiff who must spend "15 to 16 months" exhausting administrative remedies out of a three-year contractual limitations period "still [has] ample time for filing suit"). To the extent that time still proves insufficient, in all likelihood that will most often be a function of delay in filing suit in the first place, not of delay in case management.

C. In any event, even assuming for the sake of discussion (and contrary to all evidence) that a three-year statute of repose is too short to accommodate the realities of federal-court securities-class-action practice in the absence of *American Pipe* tolling, that

is a legislative question, not a judicial one. *See Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). Congress is perfectly free to lengthen the repose period if it wishes; indeed, Congress has acted to lengthen statutes of repose at least twice in recent memory, including in the securities context. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801 (inserting what is now 28 U.S.C. § 1658(b)(2), providing five-year statute of repose for securities fraud claims);[21] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1085(7), 124 Stat. at 2085 (lengthening ECOA's statute of repose to five years).

The Securities Act, of course, has a three-year statute of repose precisely because Congress previously adopted a much longer repose period, thought better of it, and amended the statute to shorten it. Resp. Br. 4-5. Congress selected three years as the "reasonable time" after which a corporate officer need no longer fear liability. 78 Cong. Rec. 8198 (May 7, 1934) (statement of Sen. Fletcher). Arguments that Congress chose too short a time to suit the interests of class-action plaintiffs should be addressed to that body, not to this Court.

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[21] The statute of repose for such claims previously was three years. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n.9 (1991) (citing 15 U.S.C. § 78i(e)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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