No. __-____

IN THE
Supreme Court of the United States

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI,
Petitioner,

v.

INDYMAC MBS, INC., ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH J. CABRASER
JOY A. KRUSE
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111
(415) 956-1000

MICHAEL J. MIARMI
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
250 Hudson Street
8th Floor
New York, NY 10013
(212) 355-9500

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

November 22, 2013

QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. Section 13 of the Securities Act of 1933 – titled "Limitation of actions" – provides, in relevant part, that "[i]n no event shall" an action under § 11 of that Act "be brought . . . more than three years after the security was bona fide offered to the public, or under [§ 12](a)(2) . . . more than three years after the sale." 15 U.S.C. § 77m. The question presented is:

Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in § 13 of the Securities Act with respect to the claims of putative class members?

PARTIES TO THE PROCEEDINGS

Petitioner Public Employees' Retirement System of Mississippi ("MissPERS") was a proposed intervenor in the district court proceedings and an appellant in the court of appeals proceedings.

The General Retirement System of the City of Detroit ("DGRS") and the Los Angeles County Employees Retirement Association ("LACERA") also were proposed intervenors in the district court proceedings and appellants in the court of appeals proceedings. Pursuant to Supreme Court Rule 12.6, DGRS and LACERA are considered respondents in the proceedings before this Court.

IndyMac MBS, Inc.; Deutsche Bank Securities Inc.; Goldman, Sachs & Co.; Morgan Stanley & Co. LLC; Credit Suisse Securities (USA) LLC; John Olinski; S. Blair Abernathy; Samir Grover; Simon Heyrick; and Victor H. Woodworth were defendants in the district court proceedings and appellees in the court of appeals proceedings. During the pendency of the court of appeals proceedings, Messrs. Olinski, Abernathy, Grover, Heyrick, and Woodworth (collectively, the "Individual Defendants") were dismissed from the district court proceedings and the court of appeals proceedings in accordance with a partial settlement of claims in the case. Accordingly, the Individual Defendants are not parties to the proceedings before this Court.

The City of Philadelphia Board of Pensions and Retirement ("Philadelphia Board") was a proposed intervenor in the district court proceedings and filed a joint notice of appeal with MissPERS and LACERA. The Philadelphia Board subsequently dismissed its appeal, however, and therefore is not a party to the proceedings before this Court.

The Iowa Public Employees' Retirement System was a proposed intervenor in the district court proceedings. It did not participate in the court of appeals proceedings, however, and therefore is not a party to the proceedings before this Court.

The Police and Fire Retirement System of the City of Detroit, individually and on behalf of all others similarly situated, as well as the Wyoming State Treasurer and the Wyoming Retirement System, individually and on behalf of all others similarly situated, were plaintiffs in the district court proceedings. None of them participated in the court of appeals proceedings, however, and therefore none is a party to the proceedings before this Court.

IndyMac Home Equity Mortgage Loan Asset-Backed Trust, Series 2006-H2; IndyMac Home Equity Mortgage Loan Asset-Backed Trust, Series 2006-H3; IndyMac IMJA Mortgage Loan Trust; IndyMac IMJA Mortgage Loan Trust 2007-A1; IndyMac IMJA Mortgage Loan Trust 2007-A2; IndyMac IMSC Mortgage Loan Trust 2007-F1; IndyMac INDA Mortgage Loan Trust; IndyMac INDA Mortgage Loan Trust 2006-AR1; IndyMac INDA Mortgage Loan Trust 2006-AR2; IndyMac INDA Mortgage Loan Trust 2006-AR3; IndyMac INDA Mortgage Loan Trust 2007-AR1; IndyMac INDA Mortgage Loan Trust 2007-AR2; IndyMac INDA Mortgage Loan Trust 2007-AR3; IndyMac INDX Mortgage Loan Trust; IndyMac INDX Mortgage Loan Trust 2006-1; IndyMac INDX Mortgage Loan Trust 2006-AR6; IndyMac INDX Mortgage Loan Trust 2006-AR9; IndyMac INDX Mortgage Loan Trust 2006-AR11; IndyMac INDX Mortgage Loan Trust 2006-AR12; IndyMac INDX Mortgage Loan Trust 2006-AR13; IndyMac INDX Mortgage Loan Trust 2006-AR14 (and 5 Additional Grantor Trusts for the Class 1-A1A, Class 1-A2A, Class 1-A3A, Class 1-A3B and Class 1-A4A Certifi-

cates, to be established by the depositor); IndyMac INDX Mortgage Loan Trust 2006-AR19; IndyMac INDX Mortgage Loan Trust 2006-AR21; IndyMac INDX Mortgage Loan Trust 2006-AR23; IndyMac INDX Mortgage Loan Trust 2006-AR25; IndyMac INDX Mortgage Loan Trust 2006-AR27; IndyMac INDX Mortgage Loan Trust 2006-AR29; IndyMac INDX Mortgage Loan Trust 2006-AR31; IndyMac INDX Mortgage Loan Trust 2006-AR33; IndyMac INDX Mortgage Loan Trust 2006-AR35; IndyMac INDX Mortgage Loan Trust 2006-AR37; IndyMac INDX Mortgage Loan Trust 2006-AR39; IndyMac INDX Mortgage Loan Trust 2006-AR41; IndyMac INDX Mortgage Loan Trust 2006-FLX1; IndyMac INDX Mortgage Loan Trust 2006-R1; IndyMac INDX Mortgage Loan Trust 2007-AR1; IndyMac INDX Mortgage Loan Trust 2007-AR5; IndyMac INDX Mortgage Loan Trust 2007-AR7; IndyMac INDX Mortgage Loan Trust 2007-AR9; IndyMac INDX Mortgage Loan Trust 2007-AR11; IndyMac INDX Mortgage Loan Trust 2007-AR13; IndyMac INDX Mortgage Loan Trust 2007-FLX1; IndyMac INDX Mortgage Loan Trust 2007-FLX2; IndyMac INDX Mortgage Loan Trust 2007-FLX3; IndyMac INDX Mortgage Loan Trust 2007-FLX4; IndyMac INDX Mortgage Loan Trust Series 2006-AR2; IndyMac INDX Mortgage Loan Trust Series 2006-AR4; IndyMac INDX Mortgage Loan Trust Series 2006-AR7; IndyMac INDX Mortgage Loan Trust Series 2006-AR14; IndyMac INDX Mortgage Loan Trust Series 2006-AR15; IndyMac Residential Asset Backed Trust Series 2006-D; IndyMac Residential Mortgage Backed Trust Series 2006-L2; Residential Asset Securitization Trust; Residential Asset Securitization Trust 2006-A5CB; Residential Asset Securitization Trust 2006-A6; Residential Asset Securitization Trust 2006-A7CB; Residential Asset Securitization Trust

2006-A8; Residential Asset Securitization Trust 2006-A10; Residential Asset Securitization Trust 2006-A11; Residential Asset Securitization Trust 2006-A12; Residential Asset Securitization Trust 2006-A13; Residential Asset Securitization Trust 2006-A14CB; Residential Asset Securitization Trust 2006-A15; Residential Asset Securitization Trust 2006-A16; Residential Asset Securitization Trust 2006-R2; Residential Asset Securitization Trust 2007-A1; Residential Asset Securitization Trust 2007-A2; Residential Asset Securitization Trust 2007-A3; Residential Asset Securitization Trust 2007-A5; Residential Asset Securitization Trust 2007-A6; Residential Asset Securitization Trust 2007-A7; Banc of America Securities LLC; Bank of America Corporation, as successor-in-interest to Merrill Lynch, Pierce, Fenner & Smith, Inc.; Citigroup Global Markets Inc.; Countrywide Securities Corporation; Deutsche Bank National Trust Company; Greenwich Capital Markets, Inc.; HSBC Securities (USA) Inc.; IndyMac Securities Corporation; JPMorgan Chase & Co.; J.P. Morgan Securities Inc., as successor-in-interest to Bear, Stearns Company, Inc.; Lehman Brothers Inc.; RBS Securities, Inc.; UBS Securities LLC; and Michael Perry were defendants in the district court proceedings. None of them participated in the court of appeals proceedings, however, and therefore none is a party to the proceedings before this Court.

Lynette Antosh; Raphael Bostic; Fitch, Inc.; Moody's Investors Service, Inc.; and The McGraw-Hill Companies, Inc. were defendants in the district court proceedings but no longer are participating in the case.

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Petitioner Public Employees' Retirement System of Mississippi ("MissPERS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

This case presents an important question about the application of this Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to securities claims that are subject to § 13 of the Securities Act of 1933, 15 U.S.C. § 77m. *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. Section 13, titled "[l]imitation of actions," provides in pertinent part that "[i]n no event shall" an action under § 11 of the Securities Act "be brought . . . more than three years after the security was bona fide offered to the public, or under [§ 12](a)(2) . . . more than three years after the sale." 15 U.S.C. § 77m. The court of appeals held that *American Pipe* does not apply to claims subject to § 13 because that provision is a "statute of repose" rather than a statute of limitations. App. 16a-21a, 26a.

The Second Circuit's holding creates a direct and acknowledged conflict with the Tenth Circuit's holding that *American Pipe* applies to the three-year period in § 13. *See Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000). It also is inconsistent with the reasoning of multiple Federal Circuit decisions that have applied *American Pipe* to "jurisdictional" time limitations contained in provisions waiving federal

sovereign immunity. *See Bright v. United States*, 603 F.3d 1273, 1279-80, 1287-90 (Fed. Cir. 2010).

The decision below has greatly increased uncertainty in the lower federal courts regarding the reach of *American Pipe*. The Fifth Circuit has noted the conflict between the Tenth Circuit's decision in *Joseph* and the Second Circuit's decision in this case. *See Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 n.5 (5th Cir. 2013). District courts in circuits with no controlling precedent have reached conflicting conclusions regarding the application of *American Pipe* to § 13 and other time limitations characterized as "statutes of repose." The question presented has been extensively debated in the lower courts and was addressed directly in the Second Circuit's opinion below. The time is ripe for this Court's review.

In addition, this Court's intervention is required because the Second Circuit's rule unsettles long-standing class-action practice. Under its rule, investors can no longer safely rely on *American Pipe* to protect their claims in the event that class certification is denied. The result will be needless and duplicative filings, or inadvertently defaulted claims by unwary investors, and unnecessary work for district courts – precisely the *opposite* of how this Court determined in *American Pipe* that Federal Rule of Civil Procedure 23 was intended to operate.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 721 F.3d 95. The memorandum opinions of the district court (App. 28a-50a, 51a-84a) are reported at 793 F. Supp. 2d 637 and 718 F. Supp. 2d 495.

JURISDICTION

The court of appeals entered its judgment on June 27, 2013. On September 17, 2013, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including November 22, 2013. App. 86a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, is reproduced at App. 85a.

STATEMENT

1. Before it collapsed in 2008, IndyMac Bank, F.S.B. was a major player in the market for residential mortgage-backed securities. App. 54a. The securities at issue in this case, known as mortgage pass-through certificates, were issued by a subsidiary of IndyMac Bank (IndyMac MBS, Inc.) and offered and sold to investors, including petitioner MissPERS. App. 28a-32a & n.13, 54a. The certificates entitled their holders to a portion of the revenue stream generated by an underlying pool of residential mortgage loans. App. 54a.

MissPERS and other plaintiffs in this consolidated litigation allege essentially that the certificates in question were backed by bad mortgage loans. C.A. App. 159-61, 200, 237-39 (Am. Consol. Compl. ¶¶ 8, 11-12, 119, 212-214). IndyMac Bank originated or acquired those loans, supposedly in accordance with underwriting guidelines designed to ensure that borrowers could make their payments. *Id.* at 157, 194 (¶¶ 4, 109). In practice, however, IndyMac Bank ignored its guidelines to pump up the volume of loans that it originated or acquired. *Id.* at 199 (¶ 117). For these and other reasons, plaintiffs allege, the loans

were much riskier than they should have been. *Id.* at 163, 237-39 (¶¶ 16, 212-214).

IndyMac Bank transferred the bad loans to IndyMac MBS, which divided them into pools and parceled those pools out to various issuing trusts funded by the flow of repayments from the underlying loan pools. App. 29a, 54a. The issuing trusts then transferred the certificates back to IndyMac MBS, which in turn sold the certificates to underwriters (several of which are respondents in this Court). *Id.*

In 2005, 2006, and 2007, the underwriters offered and sold certificates to investors such as MissPERS pursuant to offering documents such as registration statements, prospectuses, and prospectus supplements. App. 30a-31a & n.13, 54a-55a. Plaintiffs allege that those documents contained materially false and misleading statements about IndyMac Bank's underwriting guidelines and omitted the material fact that IndyMac Bank had in fact abandoned those guidelines. App. 55a, 73a-76a. MissPERS and others bought the certificates and only later discovered – when the certificates were downgraded from investment-grade to junk status and their value declined sharply – that they were backed by bad loans. C.A. App. 243, 245 (Am. Consol. Compl. ¶¶ 228, 237).

2. On May 14, 2009, the Police and Fire Retirement System of the City of Detroit ("DetroitPFRS") filed a putative class-action complaint asserting claims under §§ 11, 12(a)(2), and 15 of the Securities Act, 15 U.S.C. §§ 77k, 77*l*(a)(2), 77*o*, against IndyMac MBS and certain other respondents based on alleged material untrue statements and omissions in the offering documents for the certificates. App. 29a;

C.A. App. 106-47.[1] DetroitPFRS's complaint asserted claims on behalf of itself as well as MissPERS and others as putative class members. C.A. App. 127 (Compl. ¶ 55). On June 29, 2009, the Wyoming State Treasurer and the Wyoming Retirement System (collectively, "Wyoming") filed a similar complaint. App. 29a. In accordance with the Private Securities Litigation Reform Act of 1995, the district court consolidated the two cases and appointed Wyoming the lead plaintiff. App. 29a-30a. On October 29, 2009, Wyoming filed an amended consolidated class-action complaint in which it asserted claims on behalf of itself and a putative class defined to include MissPERS. App. 30a; *see* App. 23a ("[Miss]PERS . . . [was], at all times, [a] member[] of the asserted class in the consolidated action").

On February 17, 2010, the district court heard argument on motions to dismiss the amended consolidated class-action complaint and indicated that it intended to dismiss a substantial number of claims on the ground that Wyoming lacked standing to assert claims arising from offerings in which it did not purchase certificates – including certain offerings in which MissPERS had purchased certificates. App. 45a n.56. Accordingly, on May 17, 2010, MissPERS (among others) moved to intervene in the litigation to assert claims based on offerings in which it, but not Wyoming, had purchased certificates. Mot. to Intervene, Dkt. No. 202. Consistent with its statements during the February 17, 2010 hearing, the court later ruled that Wyoming lacked standing to assert certain

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[1] IndyMac Bank was not named as a defendant, as it had filed for Chapter 7 bankruptcy protection in 2008. C.A. App. 113 (Compl. ¶ 21).

class claims on behalf of MissPERS and others. App. 58a.

The district court subsequently denied in large part the motions to intervene by MissPERS and others. App. 32a-46a. It reasoned that § 13's three-year period had continued running, even after DetroitPFRS filed its putative class-action complaint on May 14, 2009, as to the claims MissPERS sought to assert. App. 33a ("Although some cases have reached a different result, this Court is persuaded by Judge Castel's recent ruling [in *Footbridge Ltd. Trust v. Countrywide Financial Corp.*, 770 F. Supp. 2d 618, 624-27 (S.D.N.Y. 2011),] that neither *American Pipe* nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13 of the Securities Act of 1933."). The court concluded that most of MissPERS's claims had become time-barred, therefore, before MissPERS filed its motion. App. 37a-38a. After voluntarily dismissing the claims as to which the court had permitted MissPERS to intervene, MissPERS appealed the district court's order to the extent it had denied MissPERS's motion. App. 7a-9a.[2]

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[2] The certificates at issue here were offered to the public and sold to MissPERS after May 14, 2006 (which is three years before the filing of DetroitPFRS's original class-action complaint). *See* Decl. of Nicole Lavallee in Supp. of Mot. to Intervene, Ex. F, Dkt. No. 204 (filed May 17, 2010); C.A. App. 256-90 (Am. Consol. Compl., Ex. D).

While petitioner's appeal was pending in the Second Circuit, that court issued a decision adopting a broader understanding of a securities purchaser's standing to pursue claims on behalf of class members that purchased other, related securities. *See* App. 22a n.19 (citing *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624 (2013)). The district court subsequently granted

3. On appeal, the Second Circuit affirmed. App. 9a-27a. The court began by observing that it confronted an "unsettled question of law" and later described *American Pipe* and this Court's "subsequent statements on the matter" as providing "little clarity" on the nature of the *American Pipe* rule. App. 1a, 16a-17a; *see also* App. 17a-18a (observing that the "Courts of Appeals are divided" on whether the rule of *American Pipe* is equitable in nature). The court then concluded that *American Pipe* did not apply to the three-year period of § 13 for either of two alternative reasons. First, the court reasoned, if *American Pipe* is a species of equitable tolling, then applying it to § 13 would be inconsistent with this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). App. 19a. Second, the court determined, if *American Pipe* tolling is not equitable in nature, but is rather (as some courts have characterized it) a form of "legal" tolling, then its force is derived from Federal Rule of Civil Procedure 23, and applying it to a defendant's "substantive right" derived from § 13 would violate the Rules Enabling Act, 28 U.S.C. § 2072(b). App. 19a.

The court of appeals acknowledged the argument of MissPERS and other appellants that refusing to apply *American Pipe* to § 13's three-year period would "burden the courts and disrupt the functioning of class action litigation." App. 20a. The court dismissed that concern, however, suggesting that "sophisticated, well-counseled litigants" could find unspecified ways to deal with the problem. *Id.* In any event, the court added, "even if the decision causes

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reconsideration of its standing ruling as to some, but not all, of the claims as to which MissPERS was denied intervention. *See* Order, Dkt. No. 450 (July 23, 2013).

some such problem, it is a problem that only Congress can address." App. 21a.[3]

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED ON THE APPLICATION OF *AMERICAN PIPE*

A. The Second Circuit Has Created A Direct Conflict With The Tenth Circuit Over Whether *American Pipe* Applies To The Three-Year Time Limitation In § 13 Of The Securities Act

1. In *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), the Tenth Circuit held that *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies to § 13's three-year period. 223 F.3d at 1168. There, Joseph purchased convertible debentures in a public offering. *Id.* at 1157. After the sale, the issuer announced that purchasers should not rely upon its prior financial statements because of irregular business practices. *Id.* That announcement led to a "prodigious amount of litigation," including a class action filed within three years of the offering on behalf of both common stock and debenture purchasers, a putative class defined to include Joseph. *Id.* After the district court provisionally declined to certify a class of debenture purchasers in that case, Joseph filed his own class-action complaint asserting claims under § 11. *Id.* The court dismissed Joseph's action, concluding that, because he filed suit more than

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[3] The Second Circuit also affirmed the district court's ruling that the proposed intervenors' claims could not "relate back" to DetroitPFRS's timely complaint under Rule 15(c), a theory that had been advanced as a separate reason that the district court's judgment was erroneous. App. 21a-26a. MissPERS does not challenge that holding here.

three years after the debentures were offered to the public, § 13 barred his claim. *Id.* at 1157-58.

On appeal, the Tenth Circuit reversed. It held that, because Joseph was covered by the previously (and timely) filed class action, § 13 did not bar his later-filed action. *Id.* at 1168. The court explained that, under *American Pipe*, "'the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.'" *Id.* at 1167 (quoting *American Pipe*, 414 U.S. at 553). It further noted that, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court "expanded [the *American Pipe*] rule . . . to include putative class members who later seek to file independent actions." *Id.*

The Tenth Circuit rejected the defendants' argument that this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) – which those defendants characterized as "hold[ing] that equitable tolling does not apply to statutes of repose," *Joseph*, 223 F.3d at 1166 – precluded applying *American Pipe* to § 13's three-year period. *See id.* at 1166-67. The court explained that *Lampf* did not apply because Joseph was not relying on "[e]quitable tolling," which occurs "where, for example, the claimant has filed a defective pleading during the statutory period or where the plaintiff has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 1166 (citation omitted). The rule of *American Pipe*, the court concluded, is better understood as "legal rather than equitable in nature" because it "occurs

any time an action is commenced and class certification is pending." *Id.* at 1166-67.

The Tenth Circuit also stated that *Lampf* is not "incompatible" with *American Pipe* and *Crown, Cork & Seal* because "*Lampf* states that the 'litigation . . . must be *commenced* . . . within three years after [a] violation.'" *Id.* at 1167 (quoting *Lampf*, 501 U.S. at 364) (emphasis supplied by *Joseph*; first ellipsis in original). The court reasoned that, because "the claim was brought within this period on behalf of a class of which Mr. Joseph was a member," Joseph's claim was also commenced in accordance with *Lampf*'s command. *Id.* at 1168. Viewed in this way, "application of . . . *American Pipe* . . . does not involve 'tolling' at all," but rather a recognition that "Mr. Joseph ha[d] effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Id.*

The *Joseph* court added that applying *American Pipe* to § 13's three-year period "serves the purposes of Rule 23." *Id.* at 1167. "If all class members were required to file claims in order to insure" that their claims do not become time-barred during the consideration of class certification, "the point of Rule 23 would be defeated." *Id.* In particular, "the notice and opt-out provision of Rule 23(c)(2) would be irrelevant" because "the limitations period for absent class members would most likely expire" before they received notice, "making the right to pursue individual claims meaningless." *Id.* (internal quotation marks omitted).[4]

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[4] Multiple district courts in the Tenth Circuit have followed *Joseph* in applying *American Pipe* to § 13 and other similar time limitations under the securities laws. *See Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3*, 825 F.

2. In this case, the Second Circuit reached the opposite conclusion, holding that *American Pipe* "does not apply to the three-year statute of repose in Section 13." App. 26a. Both of the reasons that the court gave for that conclusion conflict with *Joseph*.

First, the Second Circuit reasoned that, "[i]f [*American Pipe*'s] tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf*." App. 19a. As the Second Circuit acknowledged, *see* App. 18a, the *Joseph* court rejected that line of reasoning, holding that "*Lampf* . . . [is] not relevant in the present context because the tolling that Mr. Joseph seeks is legal rather than equitable in nature," 223 F.3d at 1166.

Second, the court below asserted that, if the *American Pipe* rule is "based upon Rule 23," "its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act." App. 19a. According to the Second Circuit, "[p]ermitting a plaintiff to file a complaint or intervene after the repose period set forth in Section 13 of the Securities Act has run would . . . enlarge or modify a substantive right and violate the Rules Enabling Act." App. 20a. But, under the Tenth Circuit's reasoning, applying *Ameri-*

Supp. 2d 1082, 1128-29 (D.N.M. 2011) (Securities Act § 13); *Grubka v. WebAccess Int'l, Inc.*, 445 F. Supp. 2d 1259, 1266-67 (D. Colo. 2006) (five-year period in 28 U.S.C. § 1658(b) and Securities Act § 13), *amended on other grounds*, No. 05-CV-02483-LTB-OES, 2006 WL 2527815 (D. Colo. Aug. 31, 2006); *see also Mott v. R.G. Dickinson & Co.*, No. 92-1450-PFK, 1993 WL 63445, at *5 (D. Kan. Feb. 24, 1993) (dictum) (three-year period adopted in *Lampf* with respect to private claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities Act § 13) (decided before *Joseph* but reaching the same conclusion independently).

can Pipe does not "[p]ermit[] a plaintiff to file a complaint or intervene after the repose period . . . has run." *Id.* The Tenth Circuit concluded that, because "the claim was brought within [the three-year] period on behalf of a class of which Mr. Joseph was a member," the time-for-suit requirement was satisfied as to Joseph. 223 F.3d at 1168. Therefore, applying *American Pipe* "does not involve 'tolling' at all," *id.*, but is a recognition that the filing of a putative class action satisfies § 13 for members of the putative class. No substantive rights are enlarged or abridged when the unnamed class members are permitted to intervene or file their own complaints.

This case therefore would have come out differently in the Tenth Circuit. Here, as in *Joseph*, a class-action complaint was filed within three years of the offering and sale of the relevant securities, and petitioner was a member of the putative class on whose behalf that complaint was filed. *See supra* pp. 4-6. Under the Tenth Circuit's decision, that filing would have stopped the running of – or "tolled" – "the repose period for [petitioner's] section 11 [and 12(a)(2)] claim[s]." *Joseph*, 223 F.3d at 1168. "As a result," petitioner's intervention would have been considered "timely filed" under Tenth Circuit law. *Id.*

B. The Second Circuit's Decision Is Also Inconsistent With Federal Circuit Decisions Applying *American Pipe* To Jurisdictional Time-For-Suit Provisions

The Second Circuit's decision is also inconsistent with Federal Circuit decisions that have applied *American Pipe* to "jurisdictional" provisions setting time limits for bringing claims against the United States. *See* App. 18a (acknowledging the Federal Circuit's contrary decision in *Bright v. United States*,

603 F.3d 1273 (Fed. Cir. 2010)); *see also Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785, 792-93 (Fed. Cir. 2009); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000).

In *Bright*, a landowner filed a class-action complaint in the Court of Federal Claims, asserting takings claims on behalf of herself and similarly situated landowners. *See* 603 F.3d at 1276. That complaint was filed within six years of the alleged taking, as required under 28 U.S.C. § 2501. *See id.* The Court of Federal Claims, however, subsequently dismissed the action as to all landowners except the original named plaintiff. It held that, notwithstanding the timely filing of a class-action complaint on behalf of all affected landowners, the claims of those landowners who had not either requested inclusion or filed their own complaint within six years were untimely under § 2501. *See id.* at 1277-78.[5] In rejecting the landowners' reliance on *American Pipe*, the court reasoned in part that § 2501 was viewed by this Court in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), "as being jurisdictional in nature and more absolute and rigid than other statutes of limitation, whereas the statutes of limitation in *American Pipe* [and] *Crown Cork* . . . have not been characterized in that manner." 603 F.3d at 1277-78 (internal quotation marks omitted).

On appeal, the Federal Circuit reversed. The court began its analysis by tracing its prior decisions in the area. *See id.* at 1279-80. In *Stone Container*, it had

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[5] Unlike Federal Rule of Civil Procedure 23, under which unnamed class members are bound unless they opt out, the corresponding Court of Federal Claims Rule provides that "an individual must affirmatively . . . 'opt in' by requesting inclusion in the action." *Bright*, 603 F.3d at 1277 n.1; *see* U.S. Ct. Fed. Cl. R. 23(c)(2)(B)(iv)-(v) & rules committee notes.

held that *American Pipe* applies to the statutory time limitation on filing tax-refund suits against the government in the Court of International Trade. The *Stone Container* court noted uncertainty as to whether "judge-made equitable tolling doctrines" could be applied "against the government," but reasoned that it did not matter because "*American Pipe* and *Crown, Cork & Seal* were not based on judge-made equitable tolling, but rather on the Court's interpretation of Rule 23," and thus articulate a rule that is "statutory rather than equitable." 229 F.3d at 1352-54. Similarly, in *Arctic Slope*, the Federal Circuit had held that, under *Stone Container*, the *American Pipe* rule applies equally to the "jurisdictional statute" governing the time for filing claims against the government under the Contract Disputes Act of 1978. *See* 583 F.3d at 792 ("The government contends that because the six-year time limit in [41 U.S.C. §] 605(a) [(2006)] is a condition on the waiver of sovereign immunity, it is a 'jurisdictional statute [that is] not subject to judge-made class action tolling.' Our decision in *Stone Container*, however, closes the door on that argument.") (third alteration in original).

Turning to the case before it, the *Bright* court rejected the Court of Federal Claims' conclusion that this Court's characterization of § 2501 as "jurisdictional" and therefore "not susceptible to equitable tolling," *John R. Sand & Gravel*, 552 U.S. at 134, 136, precluded the application of *American Pipe*. The Federal Circuit reasoned that "the fact that equitable tolling is barred under section 2501 does not mean that class action statutory tolling also is barred. The two concepts are different." *Bright*, 603 F.3d at 1287. The court explained that, whereas equitable tolling "permits courts to modify a statutory time limit and

'extend equitable relief,'" *id.* (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)), "[c]lass action statutory tolling . . . does not modify a statutory time limit or 'extend equitable relief,'" *id.* at 1287-88. Instead, the court stated, statutory tolling "suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations." *Id.* at 1288. Thus, the court was "not persuaded by the government's argument that allowing class action tolling in this case would be contrary" to *John R. Sand & Gravel*'s treatment of § 2501 as "jurisdictional." *Id.*

The Federal Circuit's approach in *Bright*, *Arctic Slope*, and *Stone Container* is inconsistent with the Second Circuit's reasoning in this case. This case would have come out differently in the Federal Circuit because the fact that § 13's three-year period is not subject to equitable tolling would not have precluded the application of *American Pipe*. Nor would the Rules Enabling Act have been considered a bar to applying *American Pipe*, because the Federal Circuit does not view doing so as "modify[ing] a statutory time limit." *Bright*, 603 F.3d at 1288.

C. Other Lower Federal Courts Have Reached Disparate Conclusions Regarding The Application Of *American Pipe*

For years following the Tenth Circuit's decision in *Joseph*, a general consensus existed in the federal district courts that *American Pipe* applied to § 13 and other time-for-suit provisions characterized as statutes of repose. *See Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177 (D. Mass. 2009) (collecting cases and concluding that "all lower federal courts . . . to examine whether *American Pipe* tolling applies

to statutes of repose . . . have held that *American Pipe* requires the tolling of statutes of repose").

Even before the decision below, however, that consensus had begun to erode. In *Albano v. Shea Homes Ltd. Partnership*, 634 F.3d 524 (9th Cir. 2011), the Ninth Circuit asserted that "there is no consensus . . . whether *American Pipe* tolling should be characterized as a legal tolling doctrine or as an equitable one" – a question that, the court observed, "takes on special importance in the context of a statute of repose" because "it is generally accepted that statutes of repose are not subject to equitable tolling." *Id.* at 535 (internal quotation marks and brackets omitted). As "support for the . . . proposition . . . that *American Pipe* tolling is equitable," the *Albano* court pointed to language in *American Pipe* and subsequent decisions of this Court, *see id.* at 537 & n.10, and observed that, "in circumstances where the distinction between legal and equitable tolling was not dispositive, courts regularly have referred to *American Pipe* tolling as 'equitable,'" *id.* at 537-38.[6]

Shortly after *Albano*, a district court in the Second Circuit held that *American Pipe* was inapplicable to § 13's three-year period. *See Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 624-27 (S.D.N.Y. 2011) (citing *Albano* and holding that "plaintiffs' Complaint is barred by the running of section 13's three-year statute of repose, which is not subject to tolling under *American Pipe*"). After *Footbridge* and before the decision below, most other courts in the Second Circuit continued to adhere to

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[6] The issue in *Albano* was whether *American Pipe* applied to an Arizona statute of repose; the Ninth Circuit ultimately certified that question to the Supreme Court of Arizona. *See Albano*, 634 F.3d at 526, 540-41.

the majority approach in *Joseph*, but some courts followed *Footbridge*, including the district court in this case. *See* App. 33a & n.18; App. 18a n.16 (collecting conflicting district court decisions in the Second Circuit).[7]

In circuits with no controlling precedent, district courts have reached conflicting conclusions regarding the application of *American Pipe* to time-for-suit provisions characterized as "statutes of repose." Courts in the First,[8] Third,[9] Fifth,[10] Seventh,[11] and Ninth[12] Circuits have held that *American Pipe* applies.

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[7] *See also Public Emps.' Ret. Sys. of Mississippi v. Merrill Lynch & Co.*, 277 F.R.D. 97, 109 (S.D.N.Y. 2011) (applying *American Pipe* to Securities Act § 13); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 455-56 & n.19 (S.D.N.Y. 2005) (same); *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 31 (S.D.N.Y. 2002) (applying *American Pipe* to state-law fraudulent conveyance claims).

[8] *See Arivella*, 623 F. Supp. 2d at 177-78 (six-year statute of repose for Employee Retirement Income Security Act of 1974); *Ballard v. Tyco Int'l, Ltd.*, No. MDL 02-MD-1335-PB, 2005 WL 1683598, at *7 (D.N.H. July 11, 2005) (three-year period adopted in *Lampf* and Securities Act § 13); *Salkind v. Wang*, Civ. A. No. 93-10912-WGY, 1995 WL 170122, at *2-3 (D. Mass. Mar. 30, 1995) (three-year period adopted in *Lampf*).

[9] *See In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, MDL No. 1658 (SRC), 2012 WL 6840532, at *5 (D.N.J. Dec. 20, 2012) (five-year period in 28 U.S.C. § 1658(b)(2)).

[10] *See In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 465 F. Supp. 2d 687, 717 (S.D. Tex. 2006) (adopting *Joseph*).

[11] *See Andrews v. Chevy Chase Bank, FSB*, 243 F.R.D. 313, 315-17 (E.D. Wis. 2007) (three-year statute of repose for Truth in Lending Act); *In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998) (three-year period adopted in *Lampf*).

[12] *See Hrdina v. World Sav. Bank, FSB*, No. C 11-05173 WHA, 2012 WL 294447, at *3-4 (N.D. Cal. Jan. 31, 2012) (three-

Other district courts have disagreed. A district court in Texas has held that "class action tolling is not applicable to the Montreal Convention two-year repose provision." *Dickson v. American Airlines, Inc.*, 685 F. Supp. 2d 623, 627 (N.D. Tex. 2010). And an Alabama district court has concluded that *American Pipe* does not apply to the three-year rescission period under the Truth in Lending Act "because the three-year rescission period . . . is emphatically *not* a statute of limitations that is subject to tolling." *McMillian v. AMC Mortg. Servs., Inc.*, 560 F. Supp. 2d 1210, 1215 (S.D. Ala. 2008).[13]

The Ninth Circuit's comments in *Albano*, the vigorous split among district courts in the Second Circuit before the decision below, and the conflicting decisions among district courts in other circuits all underscore the confusion in the lower federal courts regarding the application of *American Pipe* to time-for-suit provisions characterized as statutes of repose. By creating a square split with the Tenth Circuit – and departing from the reasoning of the Federal Circuit – on that question, the Second Circuit has dramatically escalated the uncertainty regarding the application of *American Pipe*, as well as the need for this Court's intervention.

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year statute of repose for Truth in Lending Act); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010) (Securities Act § 13); *Hildes v. Andersen*, No. 08-cv-0008-BEN (RBB), 2010 WL 4811975, at *3-4 (S.D. Cal. Nov. 8, 2010) (three-year period adopted in *Lampf*).

[13] A different district court in Alabama has opined that *American Pipe* applies to the three-year period adopted in *Lampf*. *See Champion v. Homa*, No. 3:03-cv-275-MEF, 2008 WL 900967, at *10-11 (M.D. Ala. Mar. 31, 2008) (dictum).

II. WHETHER *AMERICAN PIPE* APPLIES TO STATUTES OF REPOSE IS A RECURRING QUESTION OF NATIONAL IMPORTANCE

The applicability of *American Pipe* to § 13's three-year time limitation (as well as to other time limitations characterized as statutes of repose) matters to courts and litigants throughout the country. In the past few years alone, no fewer than a dozen cases have turned on whether *American Pipe* applies to "statutes of repose."[14] This Court's intervention to answer that question is warranted now, because the disruptive effects of the decision below will be substantial, and they will be felt immediately.

The decision below is binding precedent throughout the Second Circuit, whose courts hear the lion's share of the nation's securities class actions. Last year, courts in that circuit heard nearly double the number of securities class actions as the next highest

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[14] *See*, *e.g.*, *Caldwell v. Berlind*, No. 13-156-cv, 2013 WL 5779021, at *2 (2d Cir. Oct. 28, 2013) (unpublished); App. 1a-2a; *John Hancock Life Ins. Co. (U.S.A.) v. JP Morgan Chase & Co.*, 938 F. Supp. 2d 440, 445-47 (S.D.N.Y. 2013); *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, 288 F.R.D. 290, 294-95 (S.D.N.Y. 2013); *Merck*, 2012 WL 6840532, at *4-5; *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 159-60 (S.D.N.Y. 2012); *Hrdina*, 2012 WL 294447, at *3-4; *Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I*, No. 08 CV 1713 (ERK)(WDW), 2011 WL 6182090, at *5 (E.D.N.Y. Dec. 13, 2011); *Genesee Cnty. Emps.' Ret. Sys.*, 825 F. Supp. 2d at 1128-29; *International Fund Mgmt. S.A. v. Citigroup Inc.*, 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 666-68 (S.D.N.Y. 2011); *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 481-83 (S.D.N.Y. 2011); *Footbridge*, 770 F. Supp. 2d at 625-26; *Hildes*, 2010 WL 4811975, at *3-4; *Maine State Ret. Sys.*, 722 F. Supp. 2d at 1166.

circuit.[15] And there is no reasonable prospect that the Second Circuit will reconsider the decision below in a future appeal. From 2000 to 2010, the Second Circuit granted rehearing *en banc* in only 0.029% of its cases.[16] Panels of the Second Circuit are already applying the decision below to pending cases. *See Caldwell*, 2013 WL 5779021, at *2.

Defendants in securities suits will predictably urge courts all over the country to adopt the Second Circuit's reasoning in this case. Although that reasoning is flawed, prudent investors seeking to preserve their rights will have to recognize the possibility that other courts will follow the Second Circuit. Thus, investors that are members of a putative class can be expected immediately to begin filing protective (and duplicative) actions and motions to intervene to preserve their rights in the event that a court denies class certification after a "repose" period has expired.

Considering only securities litigation, the number of individuals and entities potentially affected by the Second Circuit's decision is substantial. Nationwide, more than 200 securities class actions are filed each year, representing thousands, if not millions, of investors, and more than $200 billion in losses. *See Recent Trends* 3, 7. If each putative class member with a claim subject to § 13 desires to ensure that its

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[15] *See* Renzo Comolli et al., NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* 9 (Jan. 29, 2013) ("*Recent Trends*"), *available at* http://www.nera.com/nera-files/PUB_Year_End_Trends_01.2013.pdf (last visited Nov. 15, 2013).

[16] *See* Federal Bar Council, Second Circuit Courts Committee, *En Banc Practices in the Second Circuit: Time for a Change?* 5 (July 2011), *available at* http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

claim is not held to be barred by that section's three-year time limitation, it now must either file a motion to intervene or bring a separate suit. The decision below thus encourages investors to flood district courts with thousands of unnecessary and duplicative filings.

Moreover, the disruptive effects of the Second Circuit's ruling will not necessarily be limited to the securities context. As noted above, several courts have already wrestled with whether to apply *American Pipe* to other time-for-suit provisions characterized as "statutes of repose," with inconsistent results. *See supra* Part I.B-C.[17] According to counsel for several of the respondents, the court of appeals' "reasoning" in this case "would apply to other statutes of repose as well."[18] The United States Code is filled with time limitations that run from the occurrence of a certain event, rather than from the accrual or discovery of a cause of action, and that accordingly could be characterized as "statutes of repose" under the rubric endorsed by the Second Circuit. *See* App. 13a. If the decision below is permitted to stand, no member of a putative class that is potentially subject to such a time bar could be secure in relying on the filing of a class-action complaint to protect its rights.

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[17] *Compare*, *e.g.*, *Andrews*, 243 F.R.D. at 315-17 (applying *American Pipe*), *and Arivella*, 623 F. Supp. 2d at 177-78 (same), *with Dickson*, 685 F. Supp. 2d at 627 (refusing to apply *American Pipe*).

[18] Gibson Dunn, *U.S. Court of Appeals for the Second Circuit Addresses "Unsettled Question" of Whether American Pipe Tolling Applies to the Statute of Repose for Securities Act Claims* 3 (July 8, 2013), *available at* http://www.gibsondunn.com/publications/Documents/Second-Circuit-Addresses-Unsettled-Question-American-Pipe-Tolling-Applies-Statue-of-Repose.pdf.

Instead, it, and all other similarly situated putative class members, will be encouraged to inundate district courts with separate suits or motions to intervene to protect against the application of a time bar.

Even state courts may be influenced by the decision below. A majority of States has a rule that is materially identical to Federal Rule 23. *See* H.R. Rep. No. 108-144, at 9 (2003) ("Thirty-six states have adopted [Rule 23 as their state rule], some with minor revisions."); *see also*, *e.g.*, *CIT Communication Fin. Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So. 3d 114, 123 (Ala. 2009) (per curiam) ("Rule 23 of the Alabama Rules of Civil Procedure reads the same as Rule 23 of the Federal Rules, and we consider federal case law on class actions to be persuasive authority for the interpretation of our own Rule 23.") (internal quotation marks omitted). Many state courts have looked to *American Pipe* when considering the tolling of limitations periods in the class-action context. *See*, *e.g.*, *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 251-52 (Mont. 2010).

In short, the decision below will spawn significant numbers of protective lawsuits and motions to intervene in federal (and likely state) courts throughout the country. That result is precisely what this Court sought to avoid when it promulgated Rule 23 and interpreted that rule in *American Pipe*. *See American Pipe*, 414 U.S. at 553-54. As the Seventh Circuit has recognized, "[t]he Supreme Court decided *American Pipe* as it did in order to eliminate any need for members of the putative class to intervene in order to guard against an adverse outcome in the original case." *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 562 (7th Cir. 2011) (Easterbrook, C.J.). A change of this magnitude in federal practice,

with such significance for district court dockets and the rights of litigants, warrants this Court's full and immediate consideration.

III. THE SECOND CIRCUIT'S DECISION IS INCORRECT

A. *American Pipe* Applies To § 13's Three-Year Time-For-Suit Provision

In *American Pipe*, this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. A "contrary rule . . . would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure," because "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553.

The *American Pipe* Court described its holding in several different ways. As quoted, it described the class action as "*suspend[ing]*" the applicable statute of limitations. *Id.* at 554 (emphasis added). It said that "the filing of a timely class action complaint *commences* the action for all members of the class as subsequently determined," because "[a] federal class action is . . . a truly representative suit." *Id.* at 550 (emphasis added). And it stated that "the commencement of the original class suit *tolls* the running of the statute for all *purported* members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553 (emphases added). A fair reading of *American Pipe* shows that the Court did not view any distinction between "commenc[ing] the action,"

"suspend[ing] the applicable statute of limitations," and "toll[ing] the running of the statute" as important to its holding.

When *American Pipe* is properly understood as determining when a putative class member's action commences, its application to the three-year repose period of § 13 is straightforward. That section provides that "[i]n no event shall any . . . action be brought to enforce a liability created under [§ 11] or [§ 12](a)(1) . . . more than three years after the security was bona fide offered to the public, or under [§ 12](a)(2) . . . more than three years after the sale." 15 U.S.C. § 77m. Section 13 does not specify what it means for an action to be "brought." To make that determination, a court must look to procedural law. For a putative class action, the governing standard is found in Rule 23 as interpreted by *American Pipe*: the action is "brought" for all putative members when the class complaint is filed.

Therefore, in this case, the filing of a timely complaint on behalf of a putative class of which petitioner was a member satisfied § 13's three-year time-for-suit provision. The lower courts accordingly erred in largely denying as untimely petitioner's motion to intervene, which was filed shortly after the district court indicated its unwillingness to permit Wyoming to represent fully petitioner and other similarly situated putative class members (and before the court had actually issued an order to that effect).

B. The Second Circuit's Reasons For Refusing To Apply *American Pipe* Are Erroneous

The court of appeals gave two reasons for rejecting the straightforward analysis set forth above. *See* App. 19a-20a. Both are incorrect.

1. *Lampf* does not preclude applying *American Pipe* to § 13's three-year period

The Second Circuit first stated that, "[i]f [*American Pipe*'s] tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable 'tolling principles do not apply to that period.'" App. 19a (quoting *Lampf*, 501 U.S. at 363). But *American Pipe*'s rule is not properly understood as "equitable tolling," certainly not in the sense used by the Court in *Lampf*. In *Lampf*, this Court described the "3-year limit" included in § 13 and in other provisions of the federal securities laws as "a period of repose inconsistent with tolling." 501 U.S. at 363. That statement discussed traditional equitable tolling – the "venerable principle" under which courts aid a "'party injured by [a] fraud [who] remains in ignorance of it without any fault or want of diligence or care on his part.'" *Id*. (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875)). *American Pipe* is different from that type of tolling for at least two reasons.

First, the *American Pipe* rule lacks the traditional characteristics of equitable tolling. Far from requiring the unnamed class members to show lack of "any fault or want of diligence or care on [their] part," *id*. (internal quotation marks omitted), the Court in *American Pipe* expressly refused to apply a "different . . . standard . . . to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)," 414 U.S. at 551. It explained that class members need not "take note of the suit or . . . exercise any responsibility with respect to it" before "the

existence and limits of the class have been established and notice of membership has been sent." *Id.* at 552. Had equity been its source, the *American Pipe* rule would have been limited to those who reasonably relied on the class-action filing.[19]

Second, *American Pipe*'s holding derives from statutory, not equitable, authority. *American Pipe* interpreted Rule 23, which is an exercise of this Court's rulemaking power under the Rules Enabling Act, 28 U.S.C. § 2072. *See generally Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-10 (2010) (plurality) (discussing the Court's Rules Enabling Act authority and upholding Rule 23 under that authority). The *American Pipe* Court explored the history of Rule 23 in detail, comparing different versions of the rule and discussing key provisions. *See* 414 U.S. at 545-58 & n.11. It focused on the notice and opt-out procedures that Rule 23(c) requires for a class that is certified under Rule 23(b). *See id.* at 550. It concluded that those procedures removed any "conceptual or practical obstacles in the path of holding that the filing of a timely class action com-

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[19] It is true that this Court has from time to time referred in passing to *American Pipe* as a rule of "equitable tolling." *E.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin*, 498 U.S. at 96 n.3. But in no case of this Court has the characterization of *American Pipe* as "equitable tolling" been controlling. *See Albano*, 634 F.3d at 537-38 & n.10 (observing that, "in circumstances where the distinction between legal and equitable tolling was not dispositive," this and other courts "have referred to *American Pipe* tolling as 'equitable'"). The Second Circuit therefore correctly acknowledged that those statements were nonbinding "*dicta*." App. 17a. Moreover, this Court recently acknowledged that some federal courts have used the term "legal tolling" to describe the *American Pipe* rule. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012).

plaint commences the action for all members of the class as subsequently determined." *Id.* The Court was explicit that its rule followed from the text and structure of Rule 23. It found "simply inconsistent with Rule 23 as presently drafted" the alternative possibility that "one seeking to join a class after the running of the statutory period asserts a 'separate cause of action' which must individually meet the timeliness requirements." *Id.*

American Pipe's holding was also grounded in Rule 23's "principal purpose," which the Court described as "efficiency and economy of litigation." *Id.* at 553. The Court noted that class certification may turn on "subtle factors" that putative members cannot easily predict, so that those who wished to protect their rights "would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* This "needless duplication of motions" would not be "consistent with federal class action procedure." *Id.* at 554. Finally, the Court considered and rejected an argument that its holding exceeded the Court's authority under the Rules Enabling Act. *See id.* at 556 & n.26. Those features of the Court's analysis demonstrate that its holding did not rest on general equitable principles.

2. The Rules Enabling Act does not preclude applying *American Pipe* to § 13's three-year period

a. The court of appeals also stated that, "[e]ven assuming, *arguendo*, that the *American Pipe* tolling rule is 'legal' – based upon Rule 23, which governs class actions – we nonetheless hold that its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act." App. 19a. That reasoning rests on the premises that § 13's three-year time-

for-suit provision actually *is* a "statute of repose" and that, if it is one, it "creates a *substantive* right" to be free from claims after three years. *Id.* To support those premises, the court cited circuit court opinions describing a distinction between "statutes of limitations" and "statutes of repose" in highly formalistic, metaphysical terms. App. 13a-14a. According to those lower courts, a statute of repose "*extinguishes* a plaintiff's cause of action" and "create[s] a *substantive* right in those protected to be free from liability" after a certain period of time. *Id.* (internal quotation marks omitted).

The Second Circuit cited no decision of this Court to support the notion that "statutes of repose" create "substantive rights." More fundamentally, whatever may be true about some "statutes of repose," nothing in § 13 suggests that Congress "create[d] a substantive right" (App. 20a) when it enacted that provision. Section 13 contains no language suggesting the creation (or extinction) of underlying substantive rights. *Cf. Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416, 417 (1998) (explaining that "[t]he terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time," whereas a statute providing that "the 'right of rescission [under the Act] shall expire' at the end of the time period" was a provision that "govern[ed] the life of the underlying right as well") (second alteration in original).

Moreover, the court of appeals' statutory analysis rests on an unfounded distinction between the first and second sentences of § 13. According to the court of appeals, the first sentence of § 13 is "a statute of limitations" that merely "limit[s] the availability of remedies" and therefore "may be subject to equitable

considerations, such as tolling, or a discovery rule." App. 13a, 14a-15a (internal quotation marks omitted). The second sentence, in the court's view, is "a statute of repose" that supposedly "create[s] a *substantive* right." App. 14a, 15a. But § 13's language provides no support for that distinction. Both sentences begin with mandatory language ("[n]o action shall be maintained" and "[i]n no event shall any such action be brought"). The only operative textual differences between the two time periods are their length and the point at which they begin – the one-year period runs from the discovery of the misconduct, whereas the three-year period runs from the offering or sale of the securities. *See* 15 U.S.C. § 77m. Nothing in the text of § 13 suggests that the second sentence precludes the application of rules such as *American Pipe* that even the court of appeals acknowledged apply to the first sentence.

The court of appeals cited *Lampf* to support its characterization of § 13's three-year period as substantive. App. 15a-16a. But the Court there said only that the "purpose" of the securities laws' three-year time limitation is "to serve as a cutoff" and that the three-year period is "a period of repose inconsistent with tolling" based on a plaintiff's failure to discover a violation within three years. *Lampf*, 501 U.S. at 363. *Lampf* said nothing about § 13 creating a substantive right or any rule foreclosing the application of *American Pipe*.

b. Regardless, even assuming that § 13's three-year time limitation creates a substantive right, applying *American Pipe* does not "abridge" that right. Unlike traditional equitable tolling, *American Pipe* does not postpone the start of the time for bringing suit. Instead, it defines when the claim is brought.

See supra Part III.A. Because, under *American Pipe*, the action is "brought" for all putative class members when the class complaint is filed, permitting those class members subsequently to intervene or to file their own complaints does not abridge any right of a defendant to be free from suit after three years (nor does it enlarge any claimant's substantive right to pursue claims under the Securities Act).

Moreover, *American Pipe* rejected an argument that the Rules Enabling Act precluded the rule it adopted. *See* 414 U.S. at 557-58 ("The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."). The Second Circuit disregarded this Court's instruction that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,'" *id.*, by insisting that the time limitation at issue in *American Pipe* was actually "procedural," relying on a footnote in which this Court cited floor statements discussing the bill containing that provision, App. 20a n.17 (citing *American Pipe*, 414 U.S. at 558 n.29). But, from a textual perspective, the timing provision at issue in *American Pipe* was relevantly indistinguishable from § 13: it contained similar mandatory language, providing that, unless a private antitrust action was "'commenced'" within one year of the conclusion of a government suit, it would be "'forever barred,'" 414 U.S. at 542 n.3 (quoting 15 U.S.C. § 16(b) (1970) (now codified at 15 U.S.C. § 16(i)).

In fact, the provision at issue in *American Pipe* was widely characterized as a "statute of repose." The district court in *American Pipe* called it an "antitrust statute of repose." *Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99, 103 (C.D. Cal. 1970), *remanded in*

part, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). In their petition for certiorari, the defendants in that case referred to the provision as a "statute of repose." Pet. for Cert. at 22, *American Pipe*, *supra*, No. 72-1195 (U.S. filed Mar. 2, 1973), 1973 WL 346627. And, four years after *American Pipe*, this Court quoted with approval the Ninth Circuit's description of the provision as "'a statute of repose.'" *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (quoting *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 869 (9th Cir. 1978)). In short, the court below erred in dismissing *American Pipe* on the ground that the time limitation at issue there was more "procedural" or less "substantive" than § 13's three-year period.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIZABETH J. CABRASER
JOY A. KRUSE
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111
(415) 956-1000

MICHAEL J. MIARMI
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
250 Hudson Street
8th Floor
New York, NY 10013
(212) 355-9500

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

November 22, 2013