American Bar Association
www.supremecourtpreview.org

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 PETITIONER

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)

May 21, 2014

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 suspend 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

LEGISLATIVE MATERIALS

OTHER MATERIALS

INTRODUCTION

This case concerns whether the filing of a class-action complaint under the federal securities laws suspends the running of limitations periods for members of the putative class or whether asserted class members instead must move to intervene in the case or commence their own individual actions to ensure that their claims do not become time-barred while the district court considers whether to certify a class that includes them. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court provided the answer: "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. As *American Pipe* and this Court's subsequent decisions reaffirming and expanding the *American Pipe* rule explain, a contrary rule would force putative class members to file duplicative motions to intervene or separate complaints, and thus "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.* at 553. At the same time, the *American Pipe* rule is completely consistent with the purposes of statutory time-for-suit provisions because a class-action complaint puts defendants on notice within the limitations period of both the claims against them and the potential claimants.

In the decision below, however, the Second Circuit concluded that *American Pipe* does not apply to the three-year limitations period in § 13 of the Securities Act of 1933, 15 U.S.C. § 77m. The court of appeals did not deny that, under *American Pipe*, a class-action complaint generally stops the running of statutes of limitations. But the court reasoned that

American Pipe does not apply to a "statute of repose," which it considered to be distinct from a "statute of limitations," and it concluded that § 13 is such a "statute of repose." The Second Circuit reasoned that, if the *American Pipe* rule is classified as "equitable tolling," then applying *American Pipe* to the supposed "statute of repose" in § 13 would conflict with *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). In the alternative, the court of appeals concluded that § 13 "creates a *substantive* right, extinguishing claims after a three-year period," and that applying *American Pipe* would "necessarily enlarge or modify [that] substantive right and violate the Rules Enabling Act." App. 20a.

The Second Circuit misconstrued this Court's precedents. *Lampf* concluded that the one- and three-year structure of the statute of limitations applicable to implied private actions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (which the Court adopted by reference to other limitations provisions in the federal securities laws), was textually incompatible with the equitable doctrine that excuses untimely filings when a diligent victim is unable to discover a fraud. Reading an equitable discovery rule into the three-year period would have been inconsistent with Congress's decisions to include an express textual discovery rule in the one-year period and to omit such language from the three-year period. No similar textual inconsistency renders § 13 incompatible with *American Pipe*, however. Respondents do not challenge the application of the *American Pipe* rule to § 13's one-year period, and there is no textual reason for treating that provision's three-year period differently.

Nor does the Rules Enabling Act preclude applying *American Pipe* here. In *American Pipe* itself, this

Court rejected an argument that the Rules Enabling Act precluded suspending the running of a time limitation characterized as "substantive." 414 U.S. at 556 & n.26 (internal quotation marks omitted). The Court explained that "[t]he 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." *Id.* at 557-58. Applying *American Pipe* is fully consonant with § 13's legislative scheme. Section 13's purpose is to ensure that defendants receive notice of the existence of potential claims within three years. As the Court recognized in *American Pipe*, a class-action complaint provides notice of the potential claims and claimants within the limitations period. In short, the Second Circuit erred in refusing to follow this Court's precedents.

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. The petition was filed on that date and was granted on March 10, 2014 (JA549). This Court's jurisdiction rests on 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. Relevant provisions of the Rules Enabling Act, 28 U.S.C. § 2072, are reproduced in Addendum B to this brief.

STATEMENT

A. Statutory Background

In the wake of a cataclysmic financial crisis that brought on the Great Depression and undermined confidence in the securities markets, Congress enacted the Securities Act of 1933 "to protect investors by requiring publication of material information thought necessary to allow them to make informed investment decisions concerning public offerings of securities in interstate commerce." *Pinter v. Dahl*, 486 U.S. 622, 638 (1988). To further the statute's aim of "draw[ing] out pertinent information usually withheld," Congress fashioned a regime in which "new liabilities were created and old ones enlarged, procedural difficulties were simplified, and the burden of proof shifted." John C. Doerfer, *The Federal Securities Act of 1933*, 18 Marq. L. Rev. 147, 162 (1934).

As part of that regime, § 11 and § 12(a)(2), 15 U.S.C. §§ 77k, 77*l*(a)(2), provide two statutory causes of action against persons responsible for untrue statements, or misleading omissions, of material fact in connection with public securities offerings. Section 11, titled "Civil liabilities on account of false registration statement," provides that, where "any part of" a registration statement, upon becoming effective, "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading," any person who acquires the security can bring an action against, among others, (i) "every person who signed the registration statement"; (ii) "every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration

statement with respect to which his liability is asserted"; and (iii) "every underwriter with respect to such security." 15 U.S.C. § 77k(a). Under § 11, the issuer is generally "held absolutely liable for any damages resulting from such misstatement or omission." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976). Those who sign the registration statement, as well as the issuer's directors and the underwriters of the security, can avoid liability by showing they "exercise[d] . . . reasonable investigation and [had] a reasonable belief that the registration statement was not misleading." *Id.* at 208 n.26.

Section 12, titled "Civil liabilities arising in connection with prospectuses and communications," subjects persons who offer or sell securities "by means of a prospectus or oral communication" to liability when the prospectus or communication "includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77*l*(a)(2).

Additionally, § 15 affords investors redress against "[e]very person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section[] 77k or 77*l* of this title." *Id.* § 77*o*(a). Such "controlling persons" are liable "jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable," unless the controlling persons "had no knowledge of or reasonable ground to believe in the existence of the facts by reason of

which the liability of the controlled person is alleged to exist." *Id*.

The Securities Act also includes, among several "procedural restrictions" applicable to those remedial measures, "a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale." *Ernst & Ernst*, 425 U.S. at 208-10. Specifically, § 13, titled "Limitation of actions," provides:

> **§ 77m. Limitation of actions**
>
> No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(a)(2) of this title more than three years after the sale.

15 U.S.C. § 77m.

B. Nature of the Action

This case arises from the widespread collapse of the U.S. market for mortgage-backed securities. Specifically, this case concerns securities known as mortgage pass-through certificates, which were created and sold through the efforts of several participants in connection with numerous offerings in 2006

and 2007. JA217-25, 227-56 (Am. Consol. Compl. ¶¶ 1-16, 21-105).

Each offering consisted of certificates backed by the revenue streams generated by mortgage loans originated or acquired by IndyMac Bank, F.S.B., which, until its collapse in 2008, was a major player in the market for residential-mortgage-backed securities. JA219-21, 237-38 (Am. Consol. Compl. ¶¶ 4-6, 60-63). IndyMac Bank transferred loans to a subsidiary, respondent IndyMac MBS, Inc., which then "pooled" them and securitized those pools so that the rights to cash flows from the loans could be sold as securities to investors. JA238 (Am. Consol. Compl. ¶ 63). Several underwriters, including respondents Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., Goldman, Sachs & Co., and Morgan Stanley & Co. LLC, directly provided input regarding structuring and securitizing the loan pools to obtain investment-grade ratings of the certificates from rating agencies Standard & Poor's, Moody's Investors Service, Inc., and Fitch, Inc. JA239-42 (Am. Consol. Compl. ¶¶ 64-72). After the mortgage loans were securitized, the certificates were marketed and sold to investors through approximately 106 public offerings in 2006 and 2007, pursuant to registration statements dated August 15, 2005, February 24, 2006, and February 14, 2007 (each of which was subsequently amended), as well as numerous corresponding prospectuses and prospectus supplements (referred to collectively as the offering documents). JA217-21 (Am. Consol. Compl. ¶¶ 1-6). In all, respondents and others solicited, sold, and distributed more than $61 billion worth of certificates. JA220-21 (Am. Consol. Compl. ¶ 6).

According to the amended consolidated class-action complaint, the certificates in question were backed by mortgage loans that were riskier than investors had been led to believe. JA221-25, 256-78, 307-08 (Am. Consol. Compl. ¶¶ 7-16, 106-142, 206-209). Specifically, while IndyMac Bank purportedly originated or acquired those loans in accordance with underwriting guidelines designed to ensure that borrowers could make their payments, IndyMac Bank in fact did not follow its stated guidelines, thereby increasing the volume of loans the Bank originated or acquired. *Id.* For these and other reasons, the loans were much riskier than they would have been had IndyMac Bank followed its stated guidelines. *Id.*

Only after the certificates were downgraded – many from investment-grade to "junk" status, and their value declined sharply – did investors discover that the certificates were far riskier than previously represented. JA225, 308-12, 316, 318 (Am. Consol. Compl. ¶¶ 16, 210-214, 228, 237).

Public revelations, including in a June 30, 2008 report issued by the Center for Responsible Lending and a February 26, 2009 report issued by the Office of Inspector General of the Treasury Department, cast serious doubt on the veracity of statements made in the offering documents. JA222-24, 267-71 (Am. Consol. Compl. ¶¶ 9-12, 118-124).

C. Proceedings Below

1. Following those disclosures, on May 14, 2009, the Police and Fire Retirement System of the City of Detroit ("DetroitPFRS") commenced a putative class action against IndyMac MBS, the underwriters, and other defendants based on alleged material untrue statements in, and omissions from, the offering documents for more than 70 offerings of the certificates.

App. 29a; JA92-95, 96-116 (Compl. ¶¶ 1-15, 22-54).[1] DetroitPFRS's complaint identified specific untrue statements in, and omissions from, the registration statements and prospectuses issued in connection with those offerings. JA122-32 (Compl. ¶¶ 71-83).

DetroitPFRS brought claims under §§ 11, 12(a)(2), and 15 of the Securities Act on behalf of itself and "a class consisting of all persons [except defendants and related individuals and entities] who purchased or acquired the Certificates (the 'Class') pursuant and/or traceable to the Offering Documents issued in connection with the Offerings from the effective date through the date of the filing of this action." JA116 (Compl. ¶ 55). DetroitPFRS's complaint encompassed petitioner's claims, including the claims as to which petitioner was later denied intervention.[2] The offerings and sales that gave rise to petitioner's claims occurred less than three years before DetroitPFRS filed its complaint. JA103 (Compl. ¶ 24) (showing, *inter alia*, dates of prospectus supplements for certificates identified in DetroitPFRS's complaint); JA462 (Decl. of George W. Neville in Supp. of Mot. To Intervene ¶ 5) (attesting that, "between June 2006 and

---

[1] IndyMac Bank was not named as a defendant, as it had filed for Chapter 7 bankruptcy protection in 2008. JA96 (Compl. ¶ 21).

[2] *Compare* JA339 (identifying certificates purchased by proposed intervenors) *with* JA100, 103 (Compl. ¶ 24) (identifying certificates as to which DetroitPFRS asserted claims). Petitioner also purchased IndyMac INDX Mortgage Loan Trust 2006-AR12 certificates, which were also included in DetroitPFRS's complaint. The district court permitted petitioner to intervene to assert claims under § 12(a)(2) and § 15 of the Securities Act based on those certificates, because petitioner purchased them less than three years before moving to intervene. App. 38a n.31. Petitioner later voluntarily dismissed those claims with prejudice. JA469-71.

November 2008, [petitioner] Miss PERS purchased a significant amount of certificates, and suffered a substantial loss"); JA464 (Ex. A to Neville Decl.) (showing petitioner's transactions in certificates, including dates of purchases and sales).

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 ("PSLRA"), the district court consolidated the two cases and appointed Wyoming the lead plaintiff. JA211, 214. In so ruling, the court deemed Wyoming the "most adequate plaintiff," as required by the PSLRA. JA214; *see also* 15 U.S.C. § 77z-1(a)(3)(B)(i) (providing that, after a statutorily specified time period, "the court shall consider any motion made by a purported class member . . . and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members").

On October 29, 2009, Wyoming filed an amended consolidated class-action complaint, asserting Securities Act claims on behalf of Wyoming and a proposed class consisting of "all persons or entities [except defendants and related individuals and entities] who purchased or otherwise acquired beneficial interests in the Certificates issued pursuant and/or traceable to IndyMac MBS's materially untrue registration statements dated August 15, 2005, February 14, 2007 and February 24, 2006, as amended, and who were damaged thereby." JA312 (Am. Consol. Compl. ¶ 215). The consolidated complaint, like DetroitPFRS's complaint, encompassed petitioner's claims. *See* JA217-19, 220-21, 312 (Am. Consol. Compl. ¶¶ 1-2, 6, 215); Am. Consol. Compl. Ex. D at

24, 28, 45, 51; *supra* note 2; *see also* App. 23a ("[Miss]PERS . . . [was], at all times, [a] member[] of the asserted class in the consolidated action").

2. On February 17, 2010, the district court heard argument on motions to dismiss the consolidated class-action complaint. During that hearing, the court "informed the parties of its intention to dismiss for lack of standing the claims relating to offerings in which Wyoming had not purchased Certificates." App. 45a n.56. Accordingly, on May 17, 2010, petitioner (among others) moved to intervene in the litigation to assert claims based on offerings in which it, but not Wyoming, had purchased certificates. JA332-33.

While the parties were briefing the motion to intervene, the district court, in a memorandum opinion dated June 21, 2010, granted in part and denied in part the motions to dismiss. App. 51a-84a. Consistent with its statements during the February 17, 2010 hearing, the court ruled that Wyoming could not pursue certain class claims arising from offerings in which it had not purchased certificates. App. 58a.

3. On June 21, 2011, the district court denied in large part petitioner's motion to intervene, solely on the ground that § 13 barred claims based on certificates offered or sold more than three years before the motion was filed. App. 32a-46a. The court reasoned that *American Pipe* did not apply to § 13's three-year period, and so that period continued running even after DetroitPFRS filed its putative class-action complaint on May 14, 2009. App. 33a. The court therefore concluded that the three-year period had run as to most of petitioner's claims before petitioner filed its motion. App. 37a-38a.

With respect to claims based on certificates purchased within three years of the filing of the intervention motion, however, the district court held that the *American Pipe* rule *did apply* to § 13's one-year time limitation. App. 38a-44a. The court rejected respondents' argument that "*American Pipe* does not apply where, as here, the putative class plaintiff did not have standing to assert the claims at issue." App. 40a. Holding the proposed intervenors' claims barred by the one-year provision, the court reasoned, "would undermine the policies of efficiency and economy served by Rule 23 and *American Pipe*," as "[p]utative class members in movants' position would be unable to rely on their purported representatives" and "instead would be forced to make protective filings to preserve their claims in the event that those representatives were determined not to have standing." App. 41a. Nor, the court added, would applying *American Pipe* "surprise defendants or force them to defend against stale claims," as "[t]he original class complaints notified defendants of the claims that movants now seek to assert"; accordingly, respondents "were apprised '[w]ithin the period set by the statute of limitations . . . [of] the essential information necessary to determine both the subject matter and the size of the prospective litigation.'" App. 41a-42a (quoting *American Pipe*, 414 U.S. at 555) (alterations and ellipsis in original).

After voluntarily dismissing the claims as to which the district court had permitted petitioner to intervene, petitioner appealed the district court's order to the extent it had denied intervention. App. 7a-9a.[3]

---

[3] While petitioner's appeal was pending in the Second Circuit, that court adopted a broader understanding than had the district court in this case regarding a securities purchaser's

4. On appeal, the Second Circuit affirmed. App. 9a-27a. The court of appeals concluded that § 13's three-year time limitation constitutes a "statute of repose" and that *American Pipe* does not apply to it.

If, the court of appeals reasoned, the *American Pipe* rule "is properly classified as 'equitable,'" its application to § 13's three-year time limitation "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). On the other hand, the court concluded, "assuming, *arguendo*, that the *American Pipe* tolling rule is 'legal' – based upon Rule 23, which governs class actions" – its application to the three-year limitation "would be barred" by the Rules Enabling Act's provision that Federal Rules of Civil Procedure "'shall not abridge, enlarge or modify any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)).

"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)). In *NECA-IBEW*, the court of appeals held that the named plaintiff had "class standing" to assert federal securities claims "of purchasers of certificates backed by mortgages originated by the same lenders that originated the mortgages backing plaintiff's certificates," as "such claims implicate 'the same set of concerns' as plaintiff's claims." 693 F.3d at 148-49. Wyoming subsequently moved for reconsideration of the district court's June 21, 2010 ruling as to Wyoming's standing to assert claims based on certificates it had not purchased. That motion sought to bring back into the case some, but not all, of the claims as to which petitioner had been denied intervention. The district court granted Wyoming's motion. JA541-44.

SUMMARY OF ARGUMENT

I. Under a straightforward application of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the judgment below should be reversed. This Court has held and reaffirmed in subsequent cases that the filing of a class-action complaint protects putative class members from time bars on claims encompassed by that complaint. Grounding its holding in Rule 23, the Court in *American Pipe* explained that a rule suspending the running of limitations periods was necessary to make the class-action procedure work, by obviating the need for putative class members to make duplicative protective filings. At the same time, the Court recognized that a timely class-action complaint satisfies the purpose of a statute of limitations by giving the defendant notice of the basic character of potential claims and the identities of claimants, whether those claims ultimately proceed individually or as a class action.

In the four decades since *American Pipe*, its doctrinal basis has only strengthened. The Court repeatedly has reaffirmed and expanded the *American Pipe* rule without once questioning its validity. Lower courts have cited *American Pipe* more than 1,600 times. And this Court and Congress have amended Rule 23 several times, and revamped class-action procedure in securities cases, without altering the *American Pipe* rule. *American Pipe* is settled law.

The three-year period in § 13's statute of limitations is neither exempt from nor inconsistent with the *American Pipe* rule. Section 13 is captioned as a statute of "[l]imitation," 15 U.S.C. § 77m, and the three-year limitations provision embodies no textual differences to distinguish it from other limitations

periods to which *American Pipe* undisputedly applies. *American Pipe* also comports with the purpose of the three-year period – to grant potential defendants repose if they have not been sued within three years of the offering or sale of a security. A class-action complaint suffices to give defendants effective notice of potential claims under §§ 11, 12(a)(2), and 15 of the Securities Act, particularly because these claims do not require individualized proof of fraud or reliance. *American Pipe*, and this Court's subsequent decisions applying it, thus fully dispose of this case.

II. The Second Circuit's proffered justifications for declining to apply *American Pipe* conflict with this Court's precedents and are unpersuasive.

A. The *American Pipe* rule is entirely unrelated to the type of equitable tolling this Court deemed inconsistent with the three-year limitations period at issue in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). *Lampf* addressed a specific equitable-tolling doctrine under which the statute of limitations does not begin to run against a fraud victim until he discovers (or exercising reasonable diligence should discover) the misconduct. This Court reasoned that such tolling could not apply to the three-year period because the accompanying one-year period already incorporated a discovery rule. The *American Pipe* rule, however, generates no such textual inconsistency.

Further, the rule is not properly classified as "equitable." It derives from Rule 23, is motivated by efficient judicial administration rather than by fairness to plaintiffs, and does not require plaintiffs to demonstrate diligence to qualify for the rule's benefit. *Lampf*, which did not mention *American Pipe* or class actions, has no bearing here.

B. Nor does the Rules Enabling Act preclude applying *American Pipe* in this type of federal securities action. This Court specifically rejected an Enabling Act challenge in *American Pipe*, and no distinction between § 13's three-year period and the limitations provision at issue in that case supports a different outcome here. The Second Circuit reasoned that applying *American Pipe* to § 13's three-year period would impermissibly abridge a defendant's "substantive right" to be free from liability under what the court of appeals characterized as a "statute of repose." This Court has never embraced a category of "statutes of repose" that create "substantive rights," as distinct from ordinary "statutes of limitations"; to the contrary, it has regularly used the phrase "statute of repose" as a general descriptor of statutes of limitations. To the extent any time-for-suit provision does create a substantive right, § 13 is not such a provision. Section 13 is captioned "Limitation of actions" and, like other statutes of limitations, refers only to the timeliness of actions and not to any underlying right.

ARGUMENT

I. UNDER *AMERICAN PIPE*, PETITIONER'S MOTION TO INTERVENE WAS TIMELY

A. *American Pipe* Held That The Filing Of A Class-Action Complaint Under Rule 23 Suspends The Limitations Period For Members Of The Putative Class

1. The Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), addressed "an aspect of the relationship between a statute of limitations and the provisions of [Rule] 23 regulating class actions in the federal courts." *Id.* at 540. In that case, the State of Utah had commenced a putative class action under the federal antitrust laws, alleging that several defendants had conspired to rig prices in the sale of concrete and steel pipe. *See id.* at 541. The district court deemed that private action to be timely under § 5(b) of the Clayton Act because it was filed within one year after the conclusion of a civil action brought by the United States. *See id.*[4] After the court granted the defendants' motion for an order that the suit could not be maintained as a class action, a group of municipalities and other local government entities that had been members of the putative class filed motions to intervene as plaintiffs in the case. *See id.* at 542-44. If the filing of Utah's class complaint stopped the running of § 5(b)'s one-

---

[4] Section 5(b) provided that the time for filing a private action under the antitrust laws was "'suspended'" during the pendency, and for one year after the conclusion, of any civil proceeding instituted by the United States; it also stated that, whenever the suspension provision applied, any private action "'shall be forever barred unless commenced . . . within the period of suspension.'" *American Pipe*, 414 U.S. at 541-42 & n.3 (quoting 15 U.S.C. § 16(b) (1970)).

year period for the time between that filing and the district court's order denying class certification, then the municipalities' motions to intervene were timely. If, however, the one-year period continued to run against the municipalities despite the filing of the class complaint, then the motions to intervene were time-barred. *See id.* at 544, 561.

In addressing this "seemingly important question affecting the administration of justice in the federal courts," *id.* at 545, this Court first considered the history of Rule 23, *see id.* at 545-50. In its original form, Rule 23 permitted "spurious" class actions binding only upon named parties; the spurious class action was "'merely an invitation to joinder'" that allowed class members to "await developments in the trial or even final judgment on the merits" to decide whether to intervene, so that the class members could "benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Id.* at 545-47 (quoting 3B James W. Moore, *Federal Practice* ¶ 23.10[1], at 23-2603 (2d ed.)). The 1966 amendments to Rule 23 "were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id.* at 547. Under Rule 23 as amended, the class action was transformed from "an invitation to joinder" into "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550.

The Court in *American Pipe* recognized that amended Rule 23 could not achieve that objective if putative class members needed to intervene or file separate actions to protect themselves from a time

bar. Holding that limitations periods continue to run for unnamed members of a putative class would "frustrate the principal function of a class suit" and "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.* at 551, 553. "Potential 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. That "would breed needless duplication of motions" and generate "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551, 553-54. The Court was thus "convinced that the rule most consistent with federal class action procedure must be 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. "[T]his interpretation of [Rule 23]," the Court concluded, is "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56.

The Court explained that its holding was fully consistent with "the purpose" and "the functional operation" of statutory time limitations. *Id.* at 551, 554. Such provisions "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 554 (internal quotation marks omitted). By notifying the defendants "of the substantive claims being brought against them" and "of the number and generic identities of the potential plaintiffs who may participate in the judgment," a

putative class-action complaint "satisfie[s]" the statutory purposes "of ensuring essential fairness to defendants and of barring a plaintiff who has slept on his rights." *Id.* at 554-55 (internal quotation marks omitted); *see also id.* at 555 ("Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.").

The Court also rejected the defendants' argument that it was "powerless" to adopt the rule in question because "the limitation period . . . is a 'substantive' element of the right conferred on antitrust plaintiffs and cannot be extended or restricted by judicial decision or by court rule," citing the Rules Enabling Act, 28 U.S.C. § 2072. 414 U.S. at 556 & n.26.[5] The Court explained that "[t]he 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." *Id.* at 557-58.

The Court further noted that "[i]n recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground." *Id.* at 558. The Court cited prior decisions holding that federal statutes of limitations were tolled where the plaintiff

---

[5] The defendants in *American Pipe* argued that the court of appeals' decision permitting the municipalities to intervene violated the Rules Enabling Act because it "abridge[d] the substantive rights of antitrust defendants to bar stale claims pursuant to Section 5(b) of the Clayton Act." Br. for Pet'rs at 23, *American Pipe*, *supra*, No. 72-1195 (U.S. filed June 20, 1973), 1973 WL 172291.

filed a suit in state court that was dismissed for improper venue, where the plaintiff was induced to refrain from commencing suit during the limitations period, and where the defendant fraudulently concealed the existence of a claim. *Id.* at 558-59 (citing cases). The Court concluded that "[t]hese cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559.

2. The Court in *American Pipe* described its holding in several different ways. It described the class-action complaint as "*suspend[ing]*" the applicable statute of limitations. 414 U.S. 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 (emphasis added). Together, the Court's statements convey the important point that the filing of a putative class action stops the running of the limitations period for putative class members for the duration of their membership in the asserted class.

B. *American Pipe* Is A Settled Principle Of Federal Civil Procedure

1. Subsequent decisions of this Court have reaffirmed and extended the rule announced in *American Pipe*. Just a few months after *American Pipe* was decided, this Court held in a federal antitrust and securities case that each member of a class certified under Rule 23(b)(3) who can be identified through reasonable effort must receive notice of the right to request exclusion from the suit. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 159, 173-77 (1974). In so holding, the Court rejected the argument that "class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than [the named plaintiff]." *Id.* at 176 n.13. It explained that the argument was "disposed of by our recent decision in" *American Pipe*, "which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.* The Court thus recognized the critical role *American Pipe* plays in ensuring the proper functioning of Rule 23's provisions affording unnamed class members rights to receive notice and to opt out. Without *American Pipe*, those provisions "would be irrelevant because the statute of limitations period for absent class members would, more often than not, have expired, making the right to pursue individual claims meaningless," as the Tenth Circuit has recognized. *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999).

Three Terms after *Eisen*, this Court held that an unnamed class member could intervene after final judgment in an employment-discrimination case to appeal a denial of class certification, even though the remaining time in the limitations period had run

between the denial of class certification and the filing of the motion to intervene. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392 n.11, 396 (1977). The Court relied on *American Pipe*, explaining that "[t]he lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with 'the essential information necessary to determine both the subject matter and size of the prospective litigation.'" *Id.* at 392-93 (quoting *American Pipe*, 414 U.S. at 555). The Court also reasoned that, although "the case was 'stripped of its character as a class action' upon denial of certification by the District Court," the case need not "be treated as if there never was an action brought on behalf of absent class members." *Id.* at 393 (internal quotation marks and citation omitted).

In 1983, the Court issued two decisions in which it again reaffirmed and elaborated on the *American Pipe* rule. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court held that *American Pipe* applies not only when members of a putative class move to intervene, but also when they file individual actions after a denial of class certification and "within the time that remains on the limitations period." *Id.* at 346-47. There, the original named plaintiffs filed a putative class action alleging employment discrimination; the district court denied class certification for lack of typicality, adequacy, and numerosity; and a member of the asserted class subsequently filed his own individual action. *See id.* at 347-48.

The Court explained that limiting the *American Pipe* rule to intervention would generate "[m]uch the same inefficiencies" as the Court sought to avoid in adopting the rule. *Id.* at 350. "There are many reasons why a class member, after the denial of class

certification, might prefer to bring an individual suit rather than intervene" – for example, "[t]he forum in which the class action is pending might be an inconvenient one" or "the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available." *Id.* In addition, "permission to intervene might be refused for reasons wholly unrelated to the merits of the claim." *Id.* at 350 & n.4. Accordingly, "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations," resulting in "a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 350-51.

The Court in *Crown, Cork & Seal* also observed that "[f]ailure to apply *American Pipe* to class members filing separate actions also would be inconsistent with the Court's reliance on *American Pipe* in *Eisen*." *Id.* at 351. In *Eisen*, the Court had "concluded that the right to opt out and press a separate claim remained meaningful" because the filing of the class action suspended the statute of limitations under the rule of *American Pipe*. *Id.* at 351-52.[6]

The same year it decided *Crown, Cork & Seal*, the Court applied *American Pipe* in a case where federal law created the cause of action, but state law sup-

---

[6] *Crown, Cork & Seal* also confirms that, when a federal statute supplies the applicable time limitation, the effect of applying *American Pipe* is to permit unnamed class members to intervene or file a separate action "within the time that remains on the limitations period" after class certification is denied. 462 U.S. at 346-47; *see also id.* at 348, 353-54.

plied the limitations period. *See Chardon v. Fumero Soto*, 462 U.S. 650 (1983). The plaintiffs' claims in *Chardon* arose under 42 U.S.C. § 1983, and the Court had interpreted 42 U.S.C. § 1988 to require courts to borrow both state statutes of limitations and state rules for tolling those statutes. *See* 462 U.S. at 657. The Court nevertheless recognized that *American Pipe* had adopted a "federal rule" that "the statute of limitations is tolled by the filing of an asserted class action." *Id.* at 658; *see also id.* at 654 (noting court of appeals' recognition that, in *American Pipe*, "this Court had interpreted the Federal Rules of Civil Procedure to permit a federal statute of limitations to be tolled between the filing of an asserted class action and the denial of class certification"). The Court concluded that *American Pipe* "asserts a federal interest in assuring the efficiency and economy of the class-action procedure" and that, in a § 1983 case, that interest "is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under" analogous state law. *Id.* at 661 (footnote omitted).

In sum, this Court's decisions in *Eisen*, *McDonald*, *Crown, Cork & Seal*, and *Chardon* reaffirmed, extended, and clarified the rule of *American Pipe*. In those cases, the Court recognized the rule's applicability in a wide variety of circumstances: (i) cases with different procedural postures – both motions to intervene (*American Pipe*) and separate complaints, whether filed after class certification has been denied (*Crown, Cork & Seal*) or granted (*Eisen*); (ii) cases subject to different federal limitations provisions – federal antitrust (*American Pipe* and *Eisen*), federal securities (*Eisen*), federal employment discrimination (*McDonald* and *Crown, Cork & Seal*), and even fed-

eral civil rights claims incorporating state limitations periods (*Chardon*); and (iii) cases where class certification has been denied for different reasons – lack of numerosity (*American Pipe* and *Chardon*) and lack of typicality, adequacy, and numerosity (*Crown, Cork & Seal*).

2. Today, the *American Pipe* rule remains an entrenched feature of federal civil procedure. In the four decades since this Court decided *American Pipe*, lower federal and state courts have cited the decision more than 1,600 times. The leading authority on federal procedure has explained that "[t]here is no problem with regard to the statute of limitations under the amended rule [23]" because "commencement of the action tolls the statute of limitations for all members of the class." Charles A. Wright, *Law of Federal Courts* 524 (5th ed. 1994).[7] That principle is recognized as a "key aspect of class action practice." *Newberg on Class Actions* § 9:53, at 565.

In addition, Congress and this Court have amended the Federal Rules of Civil Procedure 28 times since the *American Pipe* decision, and five of those

---

[7] The latest edition of Professor Wright's hornbook, published after his passing, repeats the foregoing as the still-applicable rule. *See* Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 523 (7th ed. 2011); *accord* 7B Charles A. Wright et al., *Federal Practice and Procedure* § 1795, at 46 (3d ed. 2005) ("absent class members can rely on the filing of a class suit to suspend the statute of limitations"); 3 William B. Rubenstein, *Newberg on Class Actions* § 9:53, at 565 (5th ed. 2013) ("As a general rule, the filing of a purported class action in federal court tolls – or suspends the running of – the statute of limitations applicable to the individual claims of all putative class members.") (footnote omitted).

amendments have affected Rule 23.[8] Congress also has comprehensively addressed class-action procedure through legislation, both generally (in the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4) and in securities laws in particular (in the PSLRA, Pub. L. No. 104-67, 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227). In none of those instances did Congress or the Court alter the *American Pipe* rule. *American Pipe* is therefore entitled to the highest respect under principles of statutory *stare decisis*.[9]

American Pipe has provided a stable and predictable rule for addressing the effect of a pending class-action complaint on the timeliness of asserted class members' claims. The basic operation of the *American Pipe* rule had become so well settled that, in the three decades between the 1983 decisions in *Crown, Cork & Seal* and *Chardon* and the Second Circuit's decision below, this Court did not address *American Pipe* in any substantive respect.

The Court's recent cases have recognized the rule's continuing validity and importance. In *Devlin v. Scardelletti*, 536 U.S. 1 (2002), the Court explained

---

[8] *See* 28 U.S.C. app. p. 154 (Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009)).

[9] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (force of statutory *stare decisis* is "enhanced" when Congress amends a statute "without providing any modification of [this Court's] holding"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation"); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (noting that "the doctrine of *stare decisis* weighs heavily against" overruling a precedent interpreting a Federal Rule of Civil Procedure).

that, without *American Pipe*, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation – to simplify litigation involving a large number of class members with similar claims – would be defeated." *Id.* at 10. In *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), the Court described *American Pipe* and *McDonald* as "two cases in which we held that a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit." *Id.* at 2379 n.10. Those cases, the Court explained, "were specifically grounded in policies of judicial administration" and show "that a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding." *Id.* And, in *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414 (2012), the Court reiterated that, "[i]n *American Pipe*, we held that '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 1419 n.6 (quoting *American Pipe*, 414 U.S. at 554). The Court in *Simmonds* also observed that *American Pipe*'s holding was based "on 'the efficiency and economy of litigation which is a principal purpose of [Fed. Rule Civ. Proc. 23 class actions].'" *Id.* (quoting *American Pipe*, 414 U.S. at 553) (alteration in *Simmonds*).

C. *American Pipe* Applies To The Three-Year Period In Securities Act § 13

Applying the *American Pipe* rule to § 13's three-year time limitation is fully "consonant with" § 13's "legislative scheme." *American Pipe*, 414 U.S. at 558.

Nothing in § 13's text precludes the application of *American Pipe*. *See* 15 U.S.C. § 77m; *supra* p. 6 (quoting § 13 in full). In fact, the language of the three-year limitation ("In no event shall any such action be brought") is no more absolute than the language of the one-year limitation ("No action shall be maintained"), which respondents (and the court below) do not dispute is a "conventional, one-year statute of limitations," Cert. Opp. 22, to which *American Pipe* can be applied. *See* App. 14a-15a; *see also infra* Part II.B.3 (explaining that both prongs of § 13 meet this Court's criteria for identifying a statute of limitations).[10] 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 § 13's text suggests that the second sentence precludes the application of rules such as *American Pipe* that all agree apply to the first sentence.

Further, applying *American Pipe* would in no way undermine the purpose of the three-year limitations provision. As enacted, § 13 contained a similar two-part structure, but with longer periods (two and ten years). *See* Securities Act of 1933, ch. 38, § 13, 48 Stat. 74, 84. When Congress enacted the Securities Exchange Act of 1934, it amended § 13 to shorten the periods to one and three years and enacted similar limitations provisions to apply to causes of action

---

[10] Section 13's three-year period is certainly no more absolute than the limitations provision at issue in *American Pipe*, which stated that an action "'shall be forever barred'" if not commenced within the applicable period. 414 U.S. at 542 n.3 (quoting 15 U.S.C. § 16(b) (1970)).

under the Securities Exchange Act. *See* Securities Exchange Act of 1934, ch. 404, §§ 9(e), 18(c), 207, 48 Stat. 881, 890-91, 898, 908. In the Senate floor debate, Senator Byrnes (one of the conferees, and later a Justice of this Court) explained that the purpose of the shortened limitations periods was to end directors' fear of a lawsuit if they have not been sued within three years of the offering or sale of a security.[11] In that sense, § 13's three-year period serves the same policies as any other statute of limitations: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Young v. United States*, 535 U.S. 43, 47 (2002) (internal quotation marks omitted).

Applying *American Pipe* to the three-year period would not disturb a defendant's repose. If no lawsuit has been filed within three years of the offering or sale of a security, § 13 affords potential defendants certainty that they will be free from liability. Yet if a class-action lawsuit has been filed within three years, that lawsuit itself will have already disturbed the defendants' repose. As this Court noted in *American Pipe*, the class-action lawsuit will "notif[y] the

---

[11] *See* 78 Cong. Rec. 8200 (1934) (statement of Sen. Byrnes) ("Looking at the matter from the standpoint of the director of a corporation, . . . we should bring to an end his fear, or the fear of his estate, of a suit."); *id.* at 10,186 (statement of Sen. Byrnes) ("[T]he amendments adopted today give greater assurance to the honest officials of a corporation. . . . It has been argued heretofore that a director would be uncertain as to the settlement of his estate in case of death because of the liability that would exist for a period of 10 years. Under the new law, a suit must be brought within 3 years."); *see also id.* at 8198 (statement of bill sponsor Sen. Fletcher) ("[T]he person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed.").

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." 414 U.S. at 555. Permitting putative class members to intervene or file a separate action simply provides them the opportunity to pursue claims the substance of which the defendant has already received notice within three years. Such a result does not offend the purposes of the three-year limitations provision, or any other limitations provision. *See Developments in the Law – Class Action*, 89 Harv. L. Rev. 1318, 1451 (1976) ("[A] defendant faced with information about a potential liability to a class cannot be said to have reached a state of repose that should be protected.").

The reasoning of *American Pipe* applies fully to class actions brought under § 11 or § 12(a)(2) of the Securities Act. Section 11 provides a cause of action for untrue statements or misleading omissions in a registration statement. 15 U.S.C. § 77k(a). "[T]he issuer of the securities is held absolutely liable," while a "negligence standard" applies to others involved in preparing the registration statement. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976). Section 12(a)(2) creates a cause of action for sales of securities by means of a prospectus containing an untrue statement or misleading omission, where the seller cannot prove a due-diligence defense. 15 U.S.C. § 77*l*(a)(2). Neither provision requires proof of fraud or investors' reliance on the untrue statements or omissions. *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 382 (1983) (§ 11); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 582 (1995) (§ 12(a)(2)). Rather, claims under § 11 or

§ 12(a)(2) typically turn on the defendants' conduct and not on circumstances unique to a plaintiff.

Accordingly, a class-action complaint specifying the actionable offering documents and alleging the nature of the untrue statements or misleading omissions gives defendants "the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors." *American Pipe*, 414 U.S. at 555. As the district court below concluded in applying *American Pipe* to § 13's one-year period, the class-action complaints in this case "notified defendants of the claims that movants now seek to assert." App. 41a.

Further, *American Pipe*'s concern about "needless duplication," 414 U.S. at 553-54, is especially acute in the field of securities class actions. Registration statements and prospectuses for public securities are often widely disseminated, and a securities class action may include thousands of putative class members. Given the complexity of these cases, it is common that a ruling on class certification does not occur before the running of the three-year period. *See* Professors Amicus Cert. Br. 8-10. Therefore, if *American Pipe* does not apply to securities class actions, courts will see a "needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal*, 462 U.S. at 351.

II. THE SECOND CIRCUIT'S REASONING CONFLICTS WITH THIS COURT'S PRECEDENTS

The Second Circuit gave two alternate reasons for not applying *American Pipe* to the three-year limitations period in § 13. *See* App. 19a-20a. Both are erroneous and contrary to this Court's precedents.

A. *Lampf* Does Not Preclude Applying *American Pipe* To § 13's Three-Year Period

The court of appeals first reasoned that, if the *American Pipe* 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, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991)). The Second Circuit misunderstood *Lampf*, which concluded that equitably tolling the three-year period pending discovery of the plaintiff's claim would be textually incompatible with the statute's incorporation of a discovery rule for the one-year period and its omission of such a rule for the three-year period. No similar textual inconsistency exists here. In any event, the *American Pipe* rule is not "properly classified as 'equitable,'" *id.*, and, even if it were, it plainly differs from the type of equitable tolling addressed in *Lampf*.

1. The question in *Lampf* was "which statute of limitations" should be applied to the implied private right of action under § 10(b) of the Securities Exchange Act of 1934. 501 U.S. at 352. The Court "select[ed] as the governing standard . . . the language of § 9(e) of the 1934 Act." *Id.* at 364 n.9. Like several other provisions of the federal securities laws (including § 13 of the Securities Act), § 9(e) had a

"1-and-3-year structure" – that is, "a 1-year period after discovery combined with a 3-year period of repose." *Id*. at 360, 363. The one-year period, "by its terms, begins [only] after discovery of the facts constituting the violation." *Id.* at 363. Because the text of the three-year period, unlike the one-year period, did not incorporate a discovery rule, the Court concluded that allowing equitable tolling of the three-year period "until the fraud is discovered" would be inconsistent with § 13's statutory text and structure. *See id.* (internal quotation marks omitted). Moreover, applying equitable tolling to the three-year period would render one of the periods a nullity, because a court would have to decide whether to afford a plaintiff one or three years after discovery to file an action – it could not give effect to both timing provisions.

No such inconsistency exists between § 13's text and the *American Pipe* rule. If § 13's one-year period incorporated a textual *American Pipe* rule, and the three-year period did not, then *Lampf*'s reasoning might be applicable. One might then infer, under the rationale of *Lampf*, that Congress did not intend to apply the *American Pipe* rule to § 13.[12] But that is not the statute Congress wrote. Section 13 contains no language inconsistent with the ordinary operation of *American Pipe*.

Indeed, although § 13's second sentence provides a time limit within which a suit must be "brought"

---

[12] Even then, however, the superfluity problem the Court confronted in *Lampf* would not exist. As noted, it was not possible to apply a discovery rule to both the one- and three-year periods; a plaintiff can be given either one year or three years after discovery to bring an action, but not both. There is no comparable practical obstacle to applying *American Pipe* to both time periods.

(within three years of offering or sale), the statute does not specify what it means for an action to be "brought." 15 U.S.C. § 77m. To make that determination, a court must look to procedural law. For a putative class action, Rule 23, as interpreted by *American Pipe*, supplies the governing standard: the action is "brought" for all putative members when the class-action complaint is filed, and the statutory time period stops running at that point. If the court denies class certification, asserted class members can intervene or file a separate action "within the time that remains on the limitations period." *Crown, Cork & Seal*, 462 U.S. at 346-47.

2. Moreover, the Second Circuit conceded below that it was relying on *Lampf* only insofar as the *American Pipe* rule "is properly classified as 'equitable.'" App. 19a. But *American Pipe*'s holding derives from statutory, not equitable, authority. *American Pipe* relied on a structural "interpretation" of Rule 23, 414 U.S. at 555, which is itself an exercise of this Court's rulemaking power under the Rules Enabling Act, 28 U.S.C. § 2072. The Court in *American Pipe* explored the history of Rule 23 in detail, comparing different versions of the rule and discussing key provisions. *See* 414 U.S. at 545-56 & n.11. It focused on the notice and opt-out procedures that Rule 23(c) requires for a class certified under Rule 23(b). *See id.* at 547-49. It concluded that those procedures removed any "conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id.* at 550. The Court 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 also was grounded in Rule 23's "principal purpose," which the Court described as "efficiency and economy of litigation." *Id.* at 553. The Court explained that its "interpretation of the Rule" was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56. It 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.* at 553. This "needless duplication of motions" would not be "consistent with federal class action procedure." *Id.* at 554. In addition, 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; *supra* note 5. Those features of the Court's analysis demonstrate that the *American Pipe* rule does not rest on general equitable principles.[13]

---

[13] The Second Circuit properly characterized as "*dicta*," App. 17a, and declined to place weight on, a passing reference in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), to *American Pipe* as a case in which the Court "allowed equitable tolling." *Id.* at 96 & n.3. *Irwin* cited *American Pipe* as a "situation[] where the claimant ha[d] actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Id.* But *American Pipe* expressly held that an unnamed class member who seeks to intervene need not have actively pursued his judicial remedies before that point. 414 U.S. at 551-52 & n.21.

In *Young v. United States*, 535 U.S. 43 (2002), the Court used a "see also" signal to cite *American Pipe* as authority for the

Finally, 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," *Lampf*, 501 U.S. at 363 (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.[14] 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; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809-11 (1985) ("[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course . . . ."); *Crown, Cork & Seal*, 462

---

proposition that "limitations periods are customarily subject to equitable tolling." *Id.* at 49 (internal quotation marks omitted). It cited to specific pages of the *American Pipe* opinion where the Court discussed *other* decisions of this Court applying tolling for equitable reasons such as fraudulent concealment. *See id.* (citing *American Pipe*, 414 U.S. at 558-59). It is thus far from clear that the reference was intended to refer to *American Pipe* itself, as opposed to the cases discussed in *American Pipe*, as "equitable tolling." In any event, no such characterization was necessary to the result in either *Young* or *Irwin*, and, for the reasons explained in the text, the *American Pipe* rule is not properly considered to be "equitable tolling," at least as this Court used that term in *Lampf*.

[14] This Court similarly has linked equitable tolling with diligence in the context of the limitations period for habeas actions, holding that equitable tolling is available only where the litigant can establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

U.S. at 352-53 ("Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."). Had equity been its source, the *American Pipe* rule would have been limited to those who reasonably relied on the class-action filing.

B. The Rules Enabling Act Does Not Preclude Applying *American Pipe* To § 13's Three-Year Period

1. The Second Circuit also reasoned 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. But, in *American Pipe* itself, this Court rejected an argument that the Rules Enabling Act precluded suspending the running of a time limitation characterized as "substantive." 414 U.S. at 556 & n.26 (internal quotation marks omitted). The Court explained that "[t]he 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." *Id.* at 557-58. Applying *American Pipe* is fully consonant with § 13's legislative scheme. *See supra* Part I.C.[15]

---

[15] Although under *American Pipe* the test is not whether a time limitation is "substantive" or "procedural," it is worth noting that, in the choice-of-law context, this Court has recognized that statutes of limitations are procedural in nature. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) ("the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right"). To be sure, state statutes of limitations are considered "substantive" for *Erie* purposes, and thus must be applied by federal courts in diversity cases. *See Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109-11

The Second Circuit disregarded this Court's instruction that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural.'" 414 U.S. at 558-59. The court below insisted 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 the timing provision. App. 20a n.17 (citing *American Pipe*, 414 U.S. at 558 n.29). But the 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)).[16] Indeed, because that period ran from

---

(1945) (discussing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). But that is because, under the test for *Erie* questions, the choice between two different limitations periods can "significantly affect the result of a litigation." *Id.* at 109. "That is not the test for . . . the statutory validity of a Federal Rule of Procedure" under the Rules Enabling Act. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) (plurality); *see also Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965) (rejecting as "incorrect" the "assumption" that "the rule of Erie R. Co. v. Tompkins constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure"). Nor, more significantly, is it the test that this Court applied in *American Pipe* itself.

[16] In fact, the provision at issue in *American Pipe* has been referred to 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 a writ of 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.

the conclusion of the government's action – a time unrelated to the accrual of the claim – it is, under respondents' logic, a "statute of repose." Cert. Opp. 29. In short, the court below erred in refusing to follow *American Pipe* on the ground that the time limitation at issue there was more "procedural" than is § 13's three-year period.

2. To support the notion that some federal statutes of limitations are "statutes of repose" that create substantive rights under the Rules Enabling Act, the court of appeals cited other circuit opinions drawing a distinction between "statutes of limitations" and "statutes of repose" in highly formalistic, metaphysical terms. App. 13a-14a. That artificial distinction finds no support in this Court's decisions.

The first time this Court used the phrase "statute of repose," in 1814, it stated "[n]ow the statute of limitations has been emphatically declared a statute of repose." *Beatty's Administrators v. Burnes's Administrators*, 12 U.S. (8 Cranch) 98, 108 (1814). Continuing from *Beatty's Administrators*, this Court consistently has repeated the mantra that statutes of limitations are statutes of repose. *See* Addendum A (listing 26 cases from this Court that have said so). By using the phrase "statute of repose" to describe a statute of limitations, this Court has not denoted a "statute of repose" as something distinct from a statute of limitations. As recently as 2007, the Court referred to the time limitation at issue as a statute

---

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)).

of repose and in the very next sentence called it a statute of limitations. *See Wallace v. Kato*, 549 U.S. 384, 391 (2007).

3. To be sure, Congress has the power to enact a statutory time-for-suit provision that affects substantive rights within the meaning of the Rules Enabling Act. But § 13 is not such a provision, any more than was the statute of limitations addressed in *American Pipe* itself.

Both sentences of § 13 provide a time within which claims under certain provisions of the Securities Act must be filed ("[n]o action shall be maintained . . . unless brought within one year"; "[i]n no event shall any such action be brought . . . more than three years after"). Thus, the three-year period, no less than the one-year period, meets the criteria to which this Court has looked to identify a statute of limitations: the three-year period "prescribes a period within which certain rights . . . may be enforced" and is therefore "a limitations period." *Young*, 535 U.S. at 47; *see also*, *e.g.*, *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 610 (2013) ("Statutes of limitations establish the period of time within which a claimant must bring an action."); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) ("The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time."). Indeed, this Court has recognized that "a limitation provision may be held to be nothing more than a bar to bringing suit," despite its ostensibly "ambitious" or "fierce-sounding" language. *Beach*, 523 U.S. at 417.[17]

---

[17] That § 13's three-year period runs from the offering or sale of the securities, rather than when the claim "accrues," does not alter the provision's character as a statute of limitations. *See*

Section 13's title – "Limitation of actions" – reinforces the conclusion that the provision, as a whole, is a statute of limitations.[18] It is therefore no surprise that this Court has referred to § 13, as a whole, as a "statute of limitations." *See Ernst & Ernst*, 425 U.S. at 210 ("Section 13 specifies a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale"); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 646 (2010) (referring to "limitations periods in the federal securities laws," including § 13).

Moreover, § 13's text says nothing about creating or extinguishing rights. When Congress has determined to "limit[] more than the time for bringing a suit, by governing the life of the underlying right as well," *Beach*, 523 U.S. at 417, it has said so. *See id.* (holding that 15 U.S.C. § 1635(f), which provides that the "right of rescission" under the Truth in Lending Act "shall expire" at the end of the relevant time period, did not permit borrower to assert right to rescind as an affirmative defense).

The court of appeals cited *Lampf* as support for its conclusion that the three-year period constitutes a

---

Heimeshoff, 134 S. Ct. at 610 ("[W]e have recognized that statutes of limitations do not inexorably commence upon accrual."); *Beach*, 523 U.S. at 417 (characterizing as a statute of limitations a provision stating that a defendant "'shall be discharged from all liability . . . unless suit is brought within one year after delivery of the goods'") (quoting 46 U.S.C. app. § 1303(6) (1994)).

[18] *See Mead Corp. v. Tilley*, 490 U.S. 714, 722-23 (1989) ("any possible ambiguity is resolved against respondents by the title of [the statute]"); *Maguire v. Commissioner*, 313 U.S. 1, 9 (1941) ("While the title of an act will not limit the plain meaning of the text, it may be of aid in resolving an ambiguity.") (citations omitted).

"statute of repose." App. 15a-16a. But *Lampf* said only 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. 501 U.S. at 363. As explained above in Part II.A, applying *American Pipe* to the three-year period does not conflict with that conclusion. In addition, the Court in *Lampf* referred to § 13 in its entirety as "the limitations provision of the 1933 Act," *id.* at 360, which further undermines the Second Circuit's reliance on *Lampf* to support its characterization of § 13's three-year period as a substantive "statute of repose." *See also id.* at 362 (referring to the time limitations for "the express causes of action contained in the 1933 and 1934 Acts," which includes § 13, as "statute[s] of limitations"). The Court in *Lampf* said nothing about § 13 creating a substantive right; nor did it even mention *American Pipe*.

Moreover, in the 1930s, when Congress enacted § 13, the concept of a statute of repose as distinct from a statute of limitations did not exist. By that time, this Court's opinions had already declared 21 times that statutes of limitations are statutes of repose. *See* Addendum A. Further, legal dictionaries available at the time defined a "statute of limitation" as a provision "fixing the period of time after a cause of action has accrued, within which an action thereon must be brought," and observed that such provisions "are often referred to as statutes of repose." *Ballentine's Law Dictionary* 1233 (2d ed. 1930); *see also* 2 *Pope's Legal Definitions* 1518 (1920) (equating statutes of limitations with statutes of repose). And the venerable *Black's Law Dictionary* did not have a separate entry for "statute of repose" in its 1933 edition; its description of "Statute of

limitations" (contained within the entry for "Limitation") stated: "Statutes of limitation are statutes of repose." *Black's Law Dictionary* 1120 (3d ed. 1933).[19]

Treatises available at the time also state that "[t]he statute of limitations is a statute of repose." 1 Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 4, at 8 (4th ed. 1916). The *Wood* treatise – which this Court has cited as authoritative[20] – also confirmed that "[t]he weight of authority now is that the statute of limitations as to personal actions affects only the remedy, and does not extinguish the right. . . . They only apply to the remedy, without canceling the obligation." *Id.* § 1, at 3.

Section 13's legislative history confirms that Congress did not view the three-year period as a statute of repose distinct from a statute of limitations. During the floor debates in the Senate on what was to become the Securities Exchange Act of 1934, Senator Norris expressed some confusion about why it was necessary to have two limitations periods. *See* 78 Cong. Rec. 8197-203 (1934). Senator Barkley explained, "The lapse of the [longer period] bars [the plaintiff] from bringing suit at all where he has made the discovery. But if within that time he makes discovery of fraud and damage, then he is required to bring his suit within 1 year after such discovery." *Id.* at 8198. The one-year period, Senator Barkley

---

[19] A separate entry for statutes of repose did not appear until the sixth edition of *Black's* (1990). *See Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 628 N.W.2d 893, 900-02 (Wis. 2001) (tracing the evolution of *Black's* treatment of "statute of repose").

[20] *See*, *e.g.*, *Wallace*, 549 U.S. at 389; *Beach*, 523 U.S. at 416; *Union Pac. Ry. Co. v. Wyler*, 158 U.S. 285, 297 (1895); *Amy v. City of Watertown*, 130 U.S. 320, 324-26 (1889).

added, "does not extend the real statute of limitations"; it "simply requires that within that statute of limitations, if he makes discovery of fraud, he must bring his suit within 1 year." *Id.* Those statements further undermine the Second Circuit's conclusion that § 13 has a one-year "statute of limitations" and a three-year "statute of repose."

In sum, the Second Circuit offered no reason to conclude that applying *American Pipe* in this case is any less "consonant with" § 13's "legislative scheme" than it was with respect to the Clayton Act provisions at issue in *American Pipe* itself. 414 U.S. at 557-58. Accordingly, the Rules Enabling Act does not preclude applying *American Pipe* here. *See id.* at 556-59.

4. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), which represents this Court's most recent sustained analysis of the Rules Enabling Act in the context of a diversity suit, reinforces that conclusion. *Shady Grove* involved an asserted conflict between Rule 23 and a state law, and therefore implicated federalism concerns not present here. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) (in diversity cases, "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies"). Even so, the result here is the same under the analysis adopted in the plurality opinion in *Shady Grove*.[21]

---

[21] The approaches advocated by the concurrence and dissent in *Shady Grove* likewise do not support a different result here, because those approaches are by their terms limited to cases involving asserted conflicts between federal rules and state law. *See* 559 U.S. at 416-17 (Stevens, J., concurring in part and concurring in the judgment) (articulating view that "some state

The plurality in *Shady Grove* explained that a Federal Rule of Civil Procedure is valid under the Rules Enabling Act so long as the rule "'really regulat[es] procedure.'" 559 U.S. at 407 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). A rule regulates procedure when it "governs only the manner and the means by which the litigants' rights are enforced," as opposed to "the rules of decision by which [the] court will adjudicate [those] rights." *Id.* (internal quotation marks omitted; alterations in original). That is so even if the rule "affects a litigant's substantive rights," as "most procedural rules do." *Id.* It also "*makes no difference*" whether the law being displaced by the federal rule is considered "substantive." *Id.* at 409. That is because "[a] Federal Rule of Procedure is not . . . valid in some cases and invalid in others." *Id.*[22]

American Pipe's interpretation of Rule 23 "really regulate[s] procedure." *Id.* at 407 (internal quotation marks omitted). The Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the

---

procedural rules" must be applied "in diversity cases because they function as a part of the State's definition of substantive rights and remedies"); *id.* at 437 (Ginsburg, J., dissenting) (asserting that Court erred in departing from practice of "interpret[ing] Federal Rules with awareness of, and sensitivity to, important state regulatory policies").

[22] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), is not to the contrary. There, the Court rejected a procedure in which the defendant would "not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561. That proposed interpretation of Rule 23 would have affected "the rules of decision by which [the] court will adjudicate [a litigant's] rights," *Shady Grove*, 559 U.S. at 407 (plurality) (internal quotation marks omitted; first alteration in original), and therefore would have run afoul of the Rules Enabling Act.

class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. That "interpretation of [Rule 23]," the Court explained, is "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56; *see also Smith*, 131 S. Ct. at 2379 n.10 (observing that *American Pipe* is "specifically grounded in policies of judicial administration"). *American Pipe* thus "governs only the manner and the means by which the litigants' rights are enforced"; it does not affect substantive law or "the rules of decision by which [the] court will adjudicate [those] rights." *Shady Grove*, 559 U.S. at 407 (plurality) (internal quotation marks omitted; alterations in original).

CONCLUSION

The court of appeals' judgment should be reversed.

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)

May 21, 2014

Addendum A

Supreme Court cases equating statutes of limitation and statutes of repose

- *Beatty's Administrators v. Burnes's Administrators*, 12 U.S. (8 Cranch) 98, 108 (1814) ("Now the statute of limitations has been emphatically declared a statute of repose . . . .")
- *Shipp v. Miller's Heirs*, 15 U.S. (2 Wheat.) 316, 324 (1817) ("The statute of limitations is emphatically termed a statute of repose . . . .")
- *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828) ("[T]he statute of limitations, . . . instead of being viewed in an unfavourable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose.")
- *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477 (1831) ("Statutes of limitations have been emphatically and justly denominated statutes of repose.")
- *Pillow v. Roberts*, 54 U.S. (13 How.) 472, 477 (1852) ("Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction.")
- *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 606 (1862) ("Statutes of Limitation are now regarded favorably in all Courts of Justice. They are 'Statu[t]es of Repose.'")

- *Croxall v. Shererd*, 72 U.S. (5 Wall.) 268, 289-90 (1867) ("Such statutes [of limitations] are now favorably regarded in all courts. They are 'statutes of repose,' and are to be construed and applied in a liberal spirit.")
- *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 538 (1868) ("Such statutes [of limitations] exist in all the States, and with few exceptions they have been copied from the one brought here in colonial times. They are statutes of repose to quiet titles, to suppress fraud, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions.")
- *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 389-90 (1869) ("The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the statute of limitations. . . . The lapse of years without any attempt to enforce a demand creates . . . a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose . . . .")
- *Levy v. Stewart*, 78 U.S. (11 Wall.) 244, 249 (1871) ("Statutes of limitations exist in all the States, and with few exceptions they have been copied from the one brought here by our ancestors in colonial times. They are regarded as statutes of repose . . . .")
- *United States v. Wiley*, 78 U.S. (11 Wall.) 508, 513 (1871) ("Statutes of limitations are indeed statutes of repose.")

- *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 70 (1873) ("Statutes of limitation . . . become statutes of repose . . . .")
- *Clarke v. Boorman's Executors*, 85 U.S. (18 Wall.) 493, 505, 508 (1874) ("Whether we look to the statutes of limitations of the State of New York . . . or to the more general and universal doctrines of courts of equity . . . , this suit cannot be maintained. . . . [The decedent's] children cannot now, twenty years after this, be heard to say that he was in such ignorance of his rights that the curative influence of statutes of repose shall not operate against him and them.")
- *Edwards v. Kearzey*, 96 U.S. 595, 603 (1878) ("Statutes of limitation are statutes of repose.")
- *Wood v. Carpenter*, 101 U.S. 135, 142 (1879) ("'The Statute of Limitations is a statute of repose . . . .'") (quoting the state court's decision)
- *City of Fort Scott v. Hickman*, 112 U.S. 150, 163 (1884) ("The settled doctrine in Kansas, and the weight of authority elsewhere, is, that statutes of limitation are statutes of repose, and not merely statutes of presumption of payment.")
- *Shepherd v. Thompson*, 122 U.S. 231, 234-35 (1887) ("The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose.")
- *Bauserman v. Blunt*, 147 U.S. 647, 659 (1893) ("'[T]o permit a long and indefinite postpone-

ment would tend to defeat the purpose of the statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote.'") (quoting the state court's decision)

- *Campbell v. City of Haverhill*, 155 U.S. 610, 617 (1895) ("Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court that they are to be treated as statutes of repose . . . .")
- *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902) ("Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no legal rights in the premises. Such a statute is a statute of repose.") (internal quotation marks omitted)
- *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299 (1922) ("The defense of the statute of limitations is not a technical defense but substantial and meritorious. . . . Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time, by raising a presumption which renders proof unnecessary.")
- *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious

claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.")

- *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("That statute, like other statutes of limitations, was a statute of repose.")
- *United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments are statutes of repose . . . .") (internal quotation marks and citations omitted)
- *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 663-64 (1987) ("As for the remainder of the *Chevron* factors, applying the 2-year personal injury statute, which is wholly consistent with *Wilson v. Garcia* and with the general purposes of statutes of repose, will not frustrate any federal law or result in inequity to the workers who are charged with knowledge that it was an unsettled question as to how far back from the date of filing their complaint the damages period would reach. Accordingly, the Court of Appeals properly applied the 2-year statute of limitations to the present case.")
- *Wallace v. Kato*, 549 U.S. 384, 391 (2007) ("Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands

of the party seeking relief. We conclude that the statute of limitations on petitioner's § 1983 claim commenced to run when he appeared before the examining magistrate and was bound over for trial.")

Addendum B

Statutory Provisions

The Rules Enabling Act provides in part:

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.