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 PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1988. NASCAT's member law firms represent both institutional and individual investors in securities fraud and shareholder derivative cases throughout the United States. NASCAT and its members are committed to representing victims of corporate abuse, fraud and white collar criminal activity in cases with the potential to advance the state of the law, educate the public, modify corporate behavior and improve access to justice and compensation for those who have suffered injury at the hands of corporate wrongdoers. NASCAT advocates the principled interpretation and application of the federal securities laws – including the Securities Act of 1933, 15 U.S.C. § 77a, *et seq*. ("Securities Act") – to protect investors from manipulative, deceptive and fraudulent practices and to ensure this nation's capital markets operate fairly and efficiently.

Composed of attorneys whose practice focuses in substantial part on the application of the federal securities laws, NASCAT has a deeply-rooted interest in the central issue this case presents:

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[1] In accordance with Supreme Court Rule 37.2(a), counsel for NASCAT represent that consel of record received timely notice of the intent to file this amicus brief and that written consent by all parties in this case to the filing of this *amicus curiae* brief has been filed with the Clerk. Additionally, pursuant to Rule 37.6, counsel for NASCAT represent that no counsel for a party authored this brief in whole or in part and no one other than NASCAT, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

Whether the doctrine adopted by this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), applies to the three-year period contained in Section 13 of the Securities Act, 15 U.S.C. § 77m.

NASCAT agrees with Petitioner's arguments. Additionally, this brief emphasizes the critical importance of this issue to NASCAT's members and the multitude of investors that such members represent in securities litigation. For decades, shareholders have been able to rely on the application of *American Pipe* in circumstances such as are presented in this case. Indeed, most of the positions taken by the Court of Appeals in its decision below were also advanced, and rejected, in *American Pipe*. By departing from the established rule and creating a conflict among the Circuits, the Court of Appeals' decision will create inefficiencies in securities litigation and jeopardize investors' ability to protect their rights. To rectify this situation, NASCAT urges the Court to grant the petition.

SUMMARY OF ARGUMENT

The doctrine enunciated in *American Pipe* allows investors to vindicate their rights under the federal securities laws. Because the Second Circuit's decision guts the protection of *American Pipe* and creates uncertainty for investors everywhere, this issue is of critical importance to NASCAT and the investors represented by NASCAT's members. By preserving the timeliness of the claims of putative class members during the pendency of a class action, *American Pipe* saves shareholders from filing duplicative individual suits out of concern that their claims will be time-barred if certification is denied. *American Pipe* thus has made securities litigation more effective and less costly for all parties and the courts. It is, therefore, respectfully submitted that the petition for certiorari should be granted so that this Court may resolve this question of vital importance to the efficient functioning of the federal securities laws.

In upsetting the rule on which shareholders have relied for decades, the decision of the Court of Appeals is particularly disturbing because it is fundamentally inconsistent with *American Pipe*. Careful analysis of the briefing in *American Pipe* and the decisions rendered by this Court and the lower courts in *American Pipe* reveal that most of the arguments accepted by the Second Circuit below were, in fact, rejected by this Court in *American Pipe*. Such circumstances weigh heavily in favor of granting certiorari to correct the Court of Appeals' error.

ARGUMENT

I. WHETHER *AMERICAN PIPE* APPLIES TO STATUTES OF REPOSE IS AN ISSUE OF CRITICAL IMPORTANCE TO SHAREHOLDERS

The federal securities laws were not enacted to protect issuers or to prevent investors from being able to exercise remedies where, as in this case, issuers file false and misleading registration statements. "[T]he Securities Act of 1933 was designed to protect investors." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 512 (1974) (internal quotations omitted); *see United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975). As stated in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983), "the interests of plaintiffs in [private securities cases] are significant [since] [d]efrauded investors are among the very individuals Congress sought to protect in the securities laws."

This Court's decision in *American Pipe* plays a critical role in making securities litigation an effective and efficient tool whereby shareholders can obtain relief when the securities laws are violated. "The Supreme Court decided *American Pipe* as it did in order to eliminate any need for members of the putative class to intervene in order to guard against an adverse outcome in the original case." *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 562 (7th Cir. 2011) (Easterbrook, J.). As this Court stated in *American Pipe*, class actions are "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550. But under the Second Circuit's decision,

unless the class certification issue is resolved promptly, investors must either file unnecessary, duplicative actions or risk losing their claims. This is "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551; *see also Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350-51 (1983). If the class certification determination "is delayed, members of a putative plaintiff class may be led by the very existence of the lawsuit to neglect their rights until after a negative ruling on this question – by which time it may be too late for the filing of independent actions." 7B C. Wright & A. Miller, FED. PRAC. & PROC. CIV. § 1795 (3d ed.).

It has become increasingly important for class members in a putative securities class action to know whether it is necessary to file an individual complaint prior to the expiration of the statute of repose. While, in the past, class certification motions in securities cases usually were decided early in the case, long before expiration of the statutes of repose, such motions have become much more complicated and complex, as recent case law requires a detailed evidentiary record on a class certification motion. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305 (3d Cir. 2008); *In re Initial Pub. Offering Sec. Litig.,* 471 F.3d 24 (2d Cir. 2006). The upshot is that "[t]he complexity of securities class actions often precludes resolution of the certification question within the three-year repose period." *Int'l Fund Mgmt. S.A. v. Citigroup Inc.*, 822 F. Supp. 2d 368, 380 (S.DN.Y. 2011). Therefore, absent definitive resolution of the issue in this case, shareholders will be unable to wait until the class motion is decided – after the statute of

repose has expired – and will need to file individual actions prior to that time.

The *American Pipe* rule is especially well-suited for securities cases, because such cases generally turn on information in the files of the defendants, and facts specific to individual class members usually have little significance. "[A] class action complaint 'notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of potential plaintiffs who may participate in the judgment.'" *Crown, Cork & Seal*, 462 U.S. at 353 (quoting *American Pipe*, 414 U.S. at 555). Thus, in securities cases, once a class action is pending, concern as to the prosecution of "stale" claims is only of minor significance.

This Court's decision in *American Pipe* has withstood the test of time. Commentators have recognized that its rule was "logical, coherent, adaptable to the purposes of the statute of limitations, and uniformly predictable." Kathleen L. Cerveny, Note: *Limitation Tolling When Class Status Is Denied: Chardon v. Fumero Soto and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 704 (1985). Indeed, recognizing the logic and wisdom of the *American Pipe* rule, numerous state courts have adopted and applied the rule with respect to state court class actions.[2] However,

[2] *See First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc.*, 409 So. 2d 727, 729 (Ala. 1982); *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1041 (Alaska 1981); *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522, 531 (Colo. Ct. App. 1994), *aff'd in part, rev'd in part*, 908 P.2d 1095 (Colo. 1995); *Campbell v. New Milford Bd. of Educ.*, 423 A.2d 900, 905 (Conn. Super. Ct. 1980); *Levi v. University of Hawaii*, 679 P.2d 129, 132 (Haw. 1984); *Pope v.*

given that state courts have tended to follow the federal lead in this area, state courts might now adopt the Second Circuit's approach. In that event, investors may find their efforts to seek relief in the state courts similarly thwarted.

Until recently, it appeared entirely clear that *American Pipe* applies to statutes of repose. The Tenth Circuit had explicitly so held in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), and in 2009 a District Court stated after "[c]opious research" that "all lower federal courts ... to examine whether *American Pipe* tolling applies to statutes of repose have found ... that *American Pipe* requires the tolling of statutes of repose." *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177-78 (D. Mass. 2009). Shareholders were, therefore, generally sanguine that they could wait and see if class certification is granted before filing individual actions. The Court of Appeals' decision has now created considerable unease, and shareholders will be reluctant to risk losing their claims by waiting to see if certification is granted.

Intermountain Gas Co., 646 P.2d 988, 1010 (Idaho 1982); *Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634, 645 (Ill. 1977); *Arnold v. Dirrim*, 398 N.E.2d 426, 439 (Ind. Ct. App. 1979); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 180 (Iowa 1977); *Warren Consol. Sch. v. W.R. Grace & Co.*, 518 N.W.2d 508, 511 (Mich. Ct. App. 1994); *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382, 389 (Mo. Ct. App. 1990); *Yollin v. Holland Am. Cruises, Inc.*, 468 N.Y.S.2d 873, 875 (N.Y. App. Div. 1983); *Bergquist v. Int'l Realty, Ltd.*, 537 P.2d 553, 561 (Or. 1975) (en banc); *Alessandro v. State Farm Mut. Auto. Ins. Co.*, 409 A.2d 347, 350 (Pa. 1979); *Blakeney v. Kassel*, 1991 Tenn. App. LEXIS 394, at *6 (Tenn. Ct. App. May 30, 1991); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 370 (Tex. Ct. App. 1987); *Am. Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 762 (Utah 1992).

The costs and burden thus imposed on shareholders and the court by the ruling below will be considerable. Investors will need to engage in extensive monitoring efforts to keep track of when the statute of repose will expire in each putative class action where they purchased shares of the subject company, in order to be ready to file protective cases or motions to intervene if the class certification issue is not resolved prior to such expiration. Where expiration of the statute of repose looms, the investors will need to retain counsel to prepare and litigate such motions or cases, in courts around the country. The courts in which such cases or motions are filed will then need to devote resources to adjudicate such motions and new cases and, if the new cases are filed in a forum other than that where the class action is pending, deal with likely transfer motions as well. Courts in circuits that have not addressed application of *American Pipe* to statutes of repose will need to grapple with and decide the issue, likely creating additional divergent results and adding to the uncertainty and disuniformity concerning this issue – a further unfortunate consequence for investors, issuers and the courts.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH *AMERICAN PIPE*

The Court of Appeals' decision is particularly unsettling to shareholders because it overlooks the history of what was argued and decided in *American Pipe*, which demonstrates that in departing from the precedent on which shareholders have relied for many years, the Court of Appeals' decision is fundamentally incompatible with *American Pipe*.

1. First, in seeking to distinguish *American Pipe* as involving a statute of limitations rather than a statute of repose, the Court of Appeals overlooked that the statute at issue in *American Pipe* was not a traditional statute of limitations but was much more akin to a statute of repose. *American Pipe* involved claims under the federal antitrust laws. The Clayton Act provides a four year statute of limitations: "Any action to enforce any cause of action ... shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. The Clayton Act also contains special provisions dealing with the situation where a governmental antitrust case is brought. In that situation, a private claim must be brought either within the four-year statute of limitations or within one year following the conclusion of the governmental case. 15 U.S.C. § 16(i).[3] *American Pipe* involved this latter provision, i.e., whether claims filed more than one year after conclusion of a governmental case were timely if there had been a class action encompassing the claims filed before the expiration of that period.

The section of the Clayton Act providing that claims must be brought within one year of the conclusion of a governmental case is essentially a statute of repose. The distinction between a statute of limitations and a statute of repose is that a statute of limitations runs from when the plaintiff's claim accrues, whereas a statute of repose is independent of the accrual of the particular plaintiff's claim. *See Stuart v. American*

[3] At the time of the *American Pipe* decision, this provision was contained in 15 U.S.C. § 16(b).

Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998). Because 15 U.S.C. § 16(i) sets a fixed deadline for bringing claims that does not depend on when the claim of a particular plaintiff accrued – one year after conclusion of a governmental case – it is akin to a statute of repose. Indeed, the language of 15 U.S.C. § 16(i) is just as mandatory as that of § 13 of the Securities Act; § 16(i) provides that claims are "forever barred" unless the private action is "commenced" within one year of the conclusion of the government case.

Thus, the statutory scheme under the Clayton Act resembles that under the Securities Act: while Securities Act claims must be brought within one year of discovery (the statute of limitations) and three years from the offering (the statute of repose), antitrust claims must be brought within four years of accrual (the statute of limitations) or one year after conclusion of the government's case (the statute of repose).

The parties and the courts in *American Pipe* understood that since the case involved a filing more than one year after the conclusion of the government's case, what was at issue was essentially a statute of repose. For example, the District Court in *American Pipe* specifically described the statute at issue in the case as the "antitrust statute of repose." *Utah v. American Pipe & Construction Co.*, 50 F.R.D. 99, 103 (C.D. Cal. 1970), *rev'd*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). In requesting that this Court grant certiorari, the defendants in *American Pipe*, after discussing what is now 15 U.S.C. § 16(i), argued that the decision of the Ninth Circuit upholding the timeliness of the plaintiffs' claims "is in square contradiction

to the foregoing statute of repose."[4] They urged this Court to take the case because the Ninth Circuit's decision "would make the time period of every statute of limitation open-ended with no discernable period of repose."[5] Similarly, in their brief in this Court, the defendants argued that the Court should reverse the Ninth Circuit because "[t]he congressional statute of repose has been violently wrenched, if not replaced, by the Ninth Circuit's interpretation of Rule 23."[6]

Subsequent to the *American Pipe* decision, this Court recognized that the provision at issue in *American Pipe* was a statute of repose. In *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978), the Court quoted with approval a court of appeals' statement that:

> "Although the plaintiff is correct in asserting that [15 U.S.C. § 16(i)] serves the broad and beneficent purpose of aiding private antitrust litigants ... it is also true that it is a statute of repose."

Id. at 334 (quoting *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 869 (9th Cir. 1978)) (ellipsis in original).

Thus, *American Pipe* cannot be distinguished on the ground that it did not involve a "statute of repose."

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[4] Petition for Certiorari at 22, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (No. 72-1195), 1973 WL 346627, at *22.

[5] *Id.* at *17.

[6] Brief for Petitioners at 26, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (No. 72-1195), 1973 WL 172291, at *26.

2. Second, in holding the claims of putative class members barred by the statute of repose, the Court of Appeals ignored that the claims of all putative class members are deemed brought upon the filing of a class action complaint. Any later filing of a new pleading asserting those claims, or an intervention motion to be a named plaintiff, does not implicate the statute of repose, as the claims were already timely filed; such new pleadings merely constitute a change in the procedural vehicle by which the claims are prosecuted.

Whether or not the filing of a class action effectively interposes the claims of all class members was the very issue presented to, and decided by, this Court in *American Pipe*. In *American Pipe*, a class action had been timely filed by the State of Utah eleven days prior to expiration of the statute of repose. The District Court ultimately denied class certification, and eight days later the plaintiffs moved to intervene. The District Court denied the motion but the Ninth Circuit reversed. Although the motion to intervene was filed long after the statute of repose had expired, the Ninth Circuit upheld the timeliness of the claims, explaining the basis for its decision as follows:

> [W]e hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits.

Utah v. American Pipe & Construction Co., 473 F.2d 580, 584 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974).

When the case reached this Court, the defendants argued that reversal was necessary "[t]o put an end to the fiction that purported class members are before the court automatically as of the time a complaint with class allegations is filed...."[7] They further stressed to this Court that "Rule 23 does not provide that absent parties are before the court"[8] and argued:

> Upon the filing of Utah's complaint, only one party was actually before the court by virtue of having undertaken to assert its alleged claims – Utah. The Ninth Circuit chose to treat the would-be class members as if they had filed suit.[9]

When this Court affirmed the Ninth Circuit, it addressed this issue directly. As the Court explained, the basis for its decision upholding the timeliness of the intervenors' claims was that:

> [T]he claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the [class] action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs.

American Pipe, 414 U.S. at 551.

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[7] Brief for Petitioners at 38, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (No. 72-1195), 1973 WL 172291, at *38.

[8] Reply Brief for Petitioners at 4, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (No. 72-1195), 1973 WL 172293, at *4.

[9] *Id.* at *6.

This Court later reaffirmed that this principle is at the core of *American Pipe*. In *Chardon v. Soto*, 462 U.S. 650, 659 (1983), the Court stated that in *American Pipe* the Court had "reasoned that, under the circumstances, the unnamed plaintiffs should be treated as though they had been named plaintiffs during the pendency of the class action."[10]

When the Tenth Circuit held in *Joseph v. Wiles* that *American Pipe* applies to statutes of repose, it stressed that under *American Pipe* the absent class members' claims are deemed "brought within this [repose] period." 223 F.3d at 1168. Absent class members were "effectively ... part[ies] to an action against the[] defendants since a class action covering [them] was requested but never denied." *Id*. Therefore, the Tenth Circuit concluded, debates as to whether *American Pipe* involves "equitable tolling" or "legal tolling" are beside the point; application of *American Pipe* "does not involve 'tolling' at all." *Id*.[11]

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[10] Prior to *IndyMac*, the Second Circuit itself had recognized this point. *See In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007):

> The theoretical basis on which *American Pipe* rests is the notion that class members are treated as parties to the class action "until and unless they received notice thereof and chose not to continue." *American Pipe*, 414 U.S. at 551. Because members of the asserted class are treated for limitations purposes as having instituted their own actions, at least so long as they continue to be members of the class, the limitations period does not run against them during that time.

[11] *See also State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1229 (10th Cir. 2008) ("the filing of a class action ... causes the courts to treat 'members of the

Thus, in *American Pipe*, this Court formulated a rule concerning when suit on an absent class member's claim is deemed to have been commenced: the suit is commenced when a putative class complaint encompassing the claim is filed. That rule applies whenever a court is trying to determine whether the class member's claim was brought within a statutory time period, and it does not depend on whether that period is characterized as a statute of limitations or a statute of repose. The Second Circuit's decision completely ignores this key aspect of *American Pipe*.

3. Third, the Court of Appeals stated that a statute of repose "creates a substantive right" and that to permit a complaint to be filed after the statute of repose had run would "modify a substantive right and violate the Rules Enabling Act." *Police & Fire Retirement System v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013). But *American Pipe* itself makes clear that the Enabling Act plays no role here. In *American Pipe*, the District Court had cited the Enabling Act as part of its rationale for holding the claims untimely in that case. *See Utah v. American Pipe & Constr. Co.*, 50 F.R.D. at 102-03. After the Ninth Circuit reversed and the case reached this Court, the defendants

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asserted class' as if they 'hav[e] instituted their own actions") (quoting *WorldCom*, 496 F.3d at 255); *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 32 (S.D.N.Y. 2002) ("the putative class members ... have 'effectively been a party ... since a class action ... was requested and never denied") (citation omitted); *In re Activision Sec. Litig.*, No. 83-cv-4639(A), 1986 U.S. Dist. LEXIS 18834, at *12 (N.D. Cal. Oct. 20, 1986) ("application of the *American Pipe* doctrine ... does not involve 'tolling' at all" because the class members "have been 'parties' to this action from its inception").

argued that reversal was required because the Enabling Act "expressly prohibited the Court from promulgating rules which 'abridge, enlarge or modify any substantive right.'"[12] This Court, however, explicitly rejected the argument. *American Pipe*, 414 U.S. at 556-58. In particular, this Court stated 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." *American Pipe*, 414 U.S. at 557-58.

[12] Brief for Petitioners at 12-13, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (No. 72-1195), 1973 WL 172291, at *12-13.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: December 26, 2013

Respectfully submitted,

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