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

BRIEF OF CIVIL PROCEDURE AND SECURITIES LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose scholarship and teaching focus on civil procedure and/or the federal securities laws. *Amici* have devoted substantial parts of their professional careers to studying those subjects, including conducting theoretical and empirical analyses of how different procedural orderings shape enforcement of the securities laws and other litigation and regulatory schemes.

This brief reflects the consensus of the *amici* that this Court should grant the petition, reverse the Second Circuit's decision, and hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), protects petitioners from the three-year time-bar in § 13 of the Securities Act. *Amici* are listed below in alphabetical order:

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief and/or have filed with the Court a blanket consent authorizing such a brief.

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SUMMARY OF THE ARGUMENT

At issue in this case is a procedural tool of vital importance to class action practice under Federal Rule of Civil Procedure 23: *American Pipe*'s rule that the filing of a class action complaint protects potential class members from the running of limitations periods. In *American Pipe*, this Court wisely rationalized class action law and policy under Rule 23, promoting judicial economy in the adjudication of class action claims while protecting the rights of putative class members. Because it would serve both of these crucial ends, *American Pipe*'s protective rule should be construed to apply to the three-year limitations period in § 13 of the Securities Act.

American Pipe variously described its protective rule as "commencing" the action on behalf of all potential class members; as "suspending" the limita-

tions period on their behalf; and as "tolling" that limitations period. Regardless of which of these labels attaches, it is plain what this Court did in *American Pipe* and why it did it. For Rule 23 to operate as designed, potential class members must be protected in their ability to make meaningful decisions about how to pursue their rights, including whether to intervene or file an independent action if class certification is denied. If absent class members did not enjoy protection under *American Pipe*, they would be compelled to take protective action, either intervening or filing independent lawsuits, in order to avoid being subsequently time-barred. The result would be wasteful and burdensome protective filings, a significant drain on federal court resources, and, most important of all, curtailment of rights.

As petitioner has ably explained, the Second Circuit's decision cannot be reconciled with either the Court's decision in *American Pipe* or the text and structure of § 13. There is no relevant semantic difference between § 13's one- and three-year limitations provisions. *See* Pet. at 28-30. And given that the *American Pipe* rule is thoroughly entwined with Rule 23, as evidenced by the Court's careful analysis of Rule 23's structure and purpose in *American Pipe* itself, its application to § 13's three-year limitations period cannot possibly be a judicial exercise of equitable discretion. *See* Pet. at 25-27. *Amici* endorse each of these plain textual and doctrinal grounds for reversing the Second Circuit's decision below.

Yet the Second Circuit also ignored on-the-ground litigation realities and, in particular, the efficiency costs of its refusal to apply *American Pipe* to § 13's three-year limitations period. Empirical evidence suggests these costs will be large – with estimates

reported below showing that the Second Circuit's position could yield protective filings in well more than half of securities class actions that reach a court order on class certification and at least one-quarter of all filed securities class actions. The Second Circuit's decision, if allowed to stand, will thus undermine "a principal purpose" of the *American Pipe* rule: to promote the "efficiency and economy of litigation." *Chardon v. Fumero Soto*, 462 U.S. 650, 659 (1983) (quoting *American Pipe*, 414 U.S. at 553).

The Second Circuit likewise ignored the disruptive and distortive effect of its decision limiting *American Pipe*'s reach on class action practice under the securities laws, particularly the suppression of Rule 23's vitally important opt-out mechanism. That threat is even deeper because the Second Circuit's decision will create perverse incentives for litigants to delay pre-trial proceedings for as long as possible in order to extinguish the rights of potential class members who might seek to go it alone. In short, the Second Circuit's refusal to apply *American Pipe*'s protective rule to § 13's three-year limitations period achieves the worst of all worlds: a flurry of wasteful filings in district courts across the country by sophisticated investors with the capacity to know about and monitor the litigation, and lost rights for everyone else.

Finally, the Second Circuit did not just ignore the policy implications of its decision. It also ignored the Court's instructions in *American Pipe* itself when it held, in the alternative and with no analysis beyond its prior conclusion that § 13's three-year limitations provision creates a "substantive" right, that applying *American Pipe*'s rule would violate the Rules Enabling Act. This is surprising, for the *American Pipe* Court rejected just such an argument and then spe-

cifically instructed that the validity of applying *American Pipe* cannot be assessed via a narrow-gauge focus on the limitations provision at issue or whether that provision embodies a "substantive" or "procedural" policy choice. Instead, the validity of applying *American Pipe*, the Court directed, turns on whether its application would be "consonant with the legislative scheme." 414 U.S. at 558. The Second Circuit's failure to heed this instruction – or, indeed, to engage in any recognizable inquiry at all in finding an Enabling Act violation – underscores the pressing need for this Court's guidance. In fact, had the court asked whether applying *American Pipe*'s protective rule would be "consonant" with Congress's securities litigation scheme, it could not have held the way it did.

For all of these reasons, the Court should act, and act now, to resolve the urgent question of *American Pipe*'s reach.

ARGUMENT

I. APPLYING *AMERICAN PIPE* TO § 13'S THREE-YEAR LIMITATIONS PERIOD WILL PROMOTE SOUND JUDICIAL ADMINISTRATION OF CLASS ACTION PRACTICE UNDER THE SECURITIES ACT

A. Empirical Evidence Shows The Efficiency Costs Of The Second Circuit's Decision Limiting *American Pipe*'s Reach Will Be Substantial

In *American Pipe*, the Court held that the filing of a class action complaint "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."[2] 414 U.S. at 554. The Court's reasoning was simple: Without protection from the running of a limitations period, a potential class member who wishes to proceed independently in the event class certification is denied will have to act to preserve its rights, whether moving to intervene or filing an entirely separate but essentially duplicative action. *American Pipe*'s protective rule, as a subsequent decision put it, is thus essential to promote "the efficiency and economy" of class action litigation. *Chardon*, 462 U.S. at 659 (quoting *American Pipe*, 414 U.S. at 553). An important question in this case, as the Second Circuit itself acknowledged, is thus the quantity of protective filings that can be expected if *American Pipe* does not apply to the three-year limitations period in § 13 of the Securities Act.[3]

Empirical analysis using the best available data suggests that the efficiency cost of the Second Circuit's decision limiting *American Pipe* will be substantial. More than 3,000 securities-fraud class ac-

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[2] The Court subsequently clarified that *American Pipe*'s protective rule applies not just to class members who intervene in the would-be class representative's original suit but to "all members of the putative class," including those who file individual lawsuits after certification is denied. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

[3] *See Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 103 (2d Cir. 2013) [Pet. App. 20a-21a] (asserting, without empirical support, that limiting *American Pipe*'s reach will not have "adverse consequences" and citing a district court decision for the proposition, also without empirical support or defining its key term "many," that "*many* class actions are resolved or reach the certification stage within the repose period") (emphasis added) (quoting *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 627 (S.D.N.Y. 2011)).

tions were filed between 1997 and 2012, an average of 200 per year, with one-quarter of those coming in the Second Circuit.[4] This alone suggests the potential for a large number of protective filings.

A more rigorous way to gain a sense of the efficiency costs of the Second Circuit's decision is to estimate the proportion of securities class actions producing an order on a motion for class certification in which the court's certification order – or, in cases producing multiple class certification orders, the last such order – came after § 13's three-year limitations period had expired. More specifically, one could calculate the elapsed number of days between the first day of the class period specified in the operative complaint during class certification proceedings and either the date of the court's order on a motion for certification (or, in multi-certification-order cases, the last certification order) or the date of the court's order preliminarily approving the settlement class.[5] This calculation would in turn permit an estimate of the number of cases in which one or more potential plaintiffs who wished to proceed independently but whose class or sub-class certification had yet to be adjudicated would have needed to take protective action, whether moving to intervene or filing separate lawsuits, in

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[4] *See* Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Filings: 2012 Year in Review* 3, 20 (2013), *available at* http://securities.stanford.edu/clearinghouse_research/2012_YIR/Cornerstone_Research_Securities_Class_Action_Filings_2012_YIR.pdf.

[5] Keying this calculation to the start of the class period would be consistent with § 13's language, which states that the limitations period begins to run when the security was "bona fide offered to the public" (§ 11 claims) or upon the security's "sale" (§ 12 claims). 15 U.S.C. § 77m.

order to preserve the right to proceed independently if class certification was subsequently denied.

Performing this analysis on a dataset of all securities class actions filed during 2002–2009 asserting, as did petitioner here, claims only under §§ 11 or 12 of the Securities Act, reveals that the three-year limitations period in § 13 would have expired prior to a court order on certification in 83 percent (38 out of 46) of the cases that reached a certification order and in roughly half (38 out of 80) of all filed cases.[6] More specifically, § 13's three-year limitations period expired before the district court's order on a motion for class certification (or, in cases producing multiple certification orders, the last such order) in 10 of the 14 cases that produced such an order and before the court's order preliminarily approving a proposed class settlement in 30 of the 34 cases that produced such an order.[7]

This same approach also permits characterization of the efficiency costs if the Second Circuit's position limiting *American Pipe*'s reach were to be applied not

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[6] The data used for this analysis were provided by Stanford Securities Litigation Analytics, which systematically tracks securities class action litigation. The year 2002 was used as the front-end of the study window because data were not readily available for cases filed earlier. The year 2009 was chosen as the window's back-end because it is the most recent year for which nearly the entire inventory of filed cases has been conclusively resolved, thus permitting a clean assessment of whether each sample case produced an order on certification beyond the limitations period.

[7] Two of the cases in the sample of § 11 and § 12 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the three-year limitations period, which explains why the numbers reported for cases falling into each category sum to 40 (10 + 30) rather than 38.

just to claims brought under §§ 11 and 12 of the Securities Act, as governed by § 13's three-year limitations period, but also to the more numerous claims brought under § 10(b) of the Securities Exchange Act and Rule 10b-5, as governed by the analogous five-year limitations period Congress has prescribed for such claims.[8]

Performing the same basic analysis as above on a random sample of 500 securities class actions asserting § 10(b) claims filed during 2002–2009 finds that potential class members who wished to preserve their right to proceed independently if class proceedings failed would have taken protective action in 76 percent (125 out of 164) of cases that reached a certification order and in 25 percent (125 out of 500) of all sample cases.[9] More specifically, the five-year limitations period that applies to such claims expired prior to one or more orders on a certification motion in 41 of 65 cases reaching such an order and prior to an order preliminarily approving a settlement class in 94 of 109 cases reaching such an order.[10]

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[8] *See* 28 U.S.C. § 1658(b) (requiring securities fraud cases brought under § 10 and Rule 10b-5 to be brought within "5 years after such violation").

[9] Keying the calculation of elapsed time to the start of the class period is consistent with the weight of authority among lower courts that § 1658(b)'s five-year limitations period is subject to an event-accrual rule – *i.e.*, the date of the misrepresentation or the completion of (or commitment to complete) the purchase or sale of the security. *See*, *e.g.*, *Arnold v. KPMG LLP*, 334 Fed. Appx. 349, 351 (2d Cir. 2009) (limitations period starts when parties commit to purchase or sell); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (3d Cir. 2007) (five-year limitations period starts upon misrepresentation); *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 932 (7th Cir. 2011) (same).

[10] Because 10 of the cases in the 500-case sample produced both an order on a motion for certification and a preliminary

Using these estimates and extrapolating out to the 3,000 securities class actions filed since 1996 provides a more general estimate, implying that plaintiffs seeking to preserve their rights would have filed protective actions in as many as 750 cases. Had even a handful of potential class members in each case done so as the end of the relevant three- or five-year limitations period approached, total filings, whether interventions or separate lawsuits, would have easily numbered in the thousands.

To be sure, an empirical analysis of this sort raises the concern that the sample of securities class actions analyzed is somehow idiosyncratic, or that a sea-change in the composition of the case pool going forward will render any backward-looking estimate an uncertain guide to the future. But two further points suggest that the above estimates are lower-bound measures – and that the efficiency toll is likely to be, if anything, *higher* than the estimates imply.

One reason the above estimates are conservative is that a potential class member's rights can be cut off by the relevant three- or five-year limitations period because of *any* defect that is fatal to a class claim, not just denial of certification. Petitioner's is a case in point, as the attempted intervention came after the district court dismissed some of a named plaintiff's claims on standing grounds because that plaintiff had not purchased some of the securities in question. *IndyMac*, 721 F.3d at 103 [Pet. App. 7a]. It follows that potential class members who wish to protect their rights must canvass all possible legal hurdles, from failure to meet Rule 23's criteria to consti-

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order approving a class settlement beyond the five-year limitations period, the reported numbers sum to 135 (41 + 94) rather than 125.

tutional and statutory standing defects and beyond, in order to be secure in not taking protective action. *See*, *e.g.*, *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (noting that a potential class member's concern about defects in the named representative's standing may also generate protective filings). Put more concretely, a putative class action can generate protective filings even if no motion for class certification is ultimately denied. Nor does successful certification guarantee the action will not subsequently fail on other grounds not binding on other class members. Neither possibility is captured in the above estimates.

Another reason, addressed at greater length in Part I.B, *infra*, is that the Second Circuit's position limiting *American Pipe*'s reach creates perverse incentives for the litigants to delay pre-trial proceedings to cut off potential class members' opt-out rights. Indeed, while the above analysis reveals that the median number of days between the start of the class period and the last court order on certification in cases asserting § 10(b) claims was, at 2,161 days, well beyond the five-year (*i.e.*, 1,825-day) limitations period, roughly one-quarter of cases that reached certification orders did so before that cut-off. Thus, strategic delay, which the Second Circuit's ruling encourages, could measurably boost the number of actions in which the looming expiration of the limitations period may necessitate protective action by potential class members.

B. Limiting *American Pipe*'s Reach Will, By Suppressing Rule 23's Opt-Out Mechanism, Disrupt And Distort Class Action Practice Under The Securities Act

Additional analysis of litigation realities in the wake of the Second Circuit's decision suggests a further threat to the sound administration of class action practice under the securities laws: Limiting *American Pipe*'s reach will disrupt and distort class action practice under the Securities Act by suppressing Rule 23's vitally important opt-out mechanism and curtailing the rights of potential class members who lack notice of the suit at the time the limitations period expires.

Rule 23 specifies that class members receive notice advising them of their right to appear through an attorney, the right to request exclusion from the class, and the time and manner in which to request exclusion. *See* Fed. R. Civ. P. 23(c)(2)(B). This bundle of notice and opt-out rights is, the Court has repeatedly noted, essential to preserve the due process rights of absent class members who wish to proceed outside the aggregated proceeding. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011); *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985).

The Second Circuit's position jeopardizes these vital notice and opt-out rights by depriving unwary potential class members of even a theoretical right to proceed and recover independently. As Part I.A's empirical analysis highlighted, the final day of § 13's three-year limitations period will function as the opt-out deadline for potential class members in as many as one-quarter of securities class actions. And that limitations provision will extinguish the opt-out rights of potential class members even where the po-

tential class members are unaware of the suit when the limitations period expires.

Yet the threat to Rule 23's opt-out mechanism is worse still, for the Second Circuit's decision also creates perverse litigation incentives that will work to expand the pool of cases in which potential class members risk having their right to proceed independently cut off. If the Second Circuit's position prevails, class action defendants can be expected to prolong pre-trial and certification proceedings as long as possible to extinguish any remaining live claims against them. After all, once § 13's three-year limitations period has run, a decision denying class certification will become a victory on the merits as to any potential class members who did not take protective action – or were unaware that the lawsuit had even been filed. Even lead plaintiffs might have a disincentive to hurry, since the running of § 13's three-year limitations period would leave absent class members who have not taken protective action with no further chance to opt out, thus preventing any class member who is dissatisfied with the course of the litigation or a proposed settlement from pursuing a separate action.

With respect to this latter concern, courts and commentators have long noted possible agency costs in representative actions and have also recognized the role Rule 23's opt-out mechanism plays in mitigating those costs. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *see also* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a) (2010); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 (2000). Viewed in this light, applying *Amer-*

ican Pipe to § 13's three-year limitations period will do more than safeguard the rights of potential class members who, upon concluding that they disagree with how class counsel is conducting the litigation, wish to proceed independently but have not taken protective action. Applying *American Pipe* will also, by upholding the exit rights of potential class members, promote closer alignment of the interests of class counsel and absent class members even where no independent action is ultimately filed.

II. THE SECOND CIRCUIT'S CURSORY ENABLING ACT ANALYSIS HIGHLIGHTS THE URGENT NEED FOR THE COURT'S GUIDANCE

A. The Second Circuit, In Holding That Applying *American Pipe* To § 13's Three-Year Limitations Period Would Violate The Rules Enabling Act, Did Not Ask The Question *American Pipe* Instructs It To Ask

The efficiency toll of the Second Circuit's position and its disruptive and distortive effect on class action practice underscore why the Court's attention is urgently needed to safeguard sound judicial administration of the federal securities laws. But the Second Circuit did not just ignore the policy implications of its decision. It also ignored this Court's instructions in *American Pipe* itself in holding, in the alternative, that applying *American Pipe*'s protective rule to § 13's three-year limitations period would violate the Enabling Act's mandate that Federal Rules of Civil Procedure "not abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b).

The Second Circuit's invocation of the Enabling Act is not necessarily problematic. The Court in *American Pipe* entertained a starkly similar argument that

a limitations period in the Clayton Act was a substantive right held by defendants that could not, under the Enabling Act's anti-modification mandate, be qualified by an interpretation of Rule 23. *American Pipe*, 414 U.S. at 556-57. The Court rejected that argument, however, explaining 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. A key question that overhangs this case is thus how to interpret the Court's instruction.

One possible reading is that the Court flatly rejected the position that interpreting Rule 23 to protect against the running of a limitations period would violate the Enabling Act. A second possibility is that the Court was specifying the inquiry to be performed in determining whether applying *American Pipe* to a limitations period violates the Enabling Act's anti-modification mandate. To that extent, the requirement that applying *American Pipe* must be "consonant" with the legislative scheme might be thought a stand-in for the more general test articulated by the Court in its Enabling Act jurisprudence that a rule "really regulate[] procedure." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). Still another reading, and one that enjoys some academic support, is that *American Pipe* did not interpret Rule 23, at least not directly, but rather announced a federal common-law rule implementing class action policies. *See*, *e.g.*, Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 49-50 (2010); Stephen B. Bur-

bank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1027-29.

The interpretive choice here is an important one. For instance, if *American Pipe* is understood as a limit on federal common-law extensions to the Federal Rules of Civil Procedure rather than a direct interpretation of Rule 23, the Enabling Act's limitation to procedure does not trigger at all. This would not mean that judicial power to interpret procedural rules is limitless. Rather, the validity of an application of *American Pipe* to a limitations period would instead turn, as the Court instructed, on a broader and more textured inquiry that takes account of the "legislative scheme," including the limitations provision in question, any Federal Rule of Civil Procedure potentially in conflict with that provision, and the statutory scheme governing the litigation, and asks whether applying *American Pipe* would be consonant with each.

The Second Circuit ignored all of these interpretive possibilities when it held, in the alternative and without any analysis, that applying the *American Pipe* rule to § 13's three-year limitations period would violate the Enabling Act. The Second Circuit did not, as *American Pipe* directs, ask whether applying *American Pipe*'s protective rule to § 13's three-year limitations period "is consonant with the legislative scheme." 414 U.S. at 558. Nor did the court inquire, as it might have based on its apparent conclusion that the *American Pipe* rule directly interprets Rule 23, whether the rule "really regulates procedure," *Shady Grove*, 559 U.S. at 407 (plurality opinion) (quoting *Sibbach*, 312 U.S. at 14). Instead, the court appeared to rest on its prior analysis con-

trasting § 13 with other statutory limitations periods and concluding, formalistically and with thin textual warrant, that "the statute of repose in Section 13 creates a *substantive* right." *IndyMac*, 721 F.3d at 109 [Pet. App. 20a] (emphasis in original).

The Second Circuit's failure to engage in any recognizable inquiry under this Court's past decisions, including *American Pipe* itself, suggests this is an area in which lower courts would greatly benefit from further Court guidance. This case provides an apt vehicle for such instruction.

B. Applying *American Pipe* To § 13's Three-Year Limitations Period Would Be "Consonant" With Congress's Securities Litigation Scheme

Such instruction might have proved especially valuable here. If the Second Circuit had asked whether applying *American Pipe*'s protective rule is "consonant" with Congress's securities litigation scheme, it could not have reached the conclusion it did.

First, applying *American Pipe*'s protective rule is fundamentally consonant with the purpose of § 13's three-year limitations period because of the nature of the right the limitations provision confers on a defendant: the right to notice of claims against it within a defined period of time following the alleged violation. *See American Pipe*, 414 U.S. at 554-55 (reviewing the notice-providing purposes underlying limitations periods) (citing *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944) and *Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1965)). Indeed, as the Tenth Circuit rightly noted in its contrary decision on *American Pipe*'s reach, the filing of a putative class action provides precisely this notice as to any would-be plaintiffs en-

compassed by the class definition in the complaint. *See Joseph v. Wiles*, 223 F.3d 1155, 1167-68 (10th Cir. 2000).

The Second Circuit's decision likewise stands in considerable tension with the pro-aggregative thrust of the federal securities laws. As the Court has recognized, a central congressional aim in the Private Securities Litigation Reform Act's ("PSLRA") overhaul of the securities litigation regime in 1996 was to encourage efficient resolution of claims in class action proceedings overseen by a single, institutional-investor plaintiff and litigated by a single law firm. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-21 (2007) (reviewing the policy purposes behind the PSLRA's "lead plaintiff" provisions); *see also* James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1588-89 (2006) (same). As Part I.A's empirical estimates suggest, the potential of the Second Circuit's decision limiting *American Pipe*'s reach to produce instead a multiplicity of competing actions makes applying *American Pipe*, as the Tenth Circuit did, the more legislatively "consonant" approach.

Finally, the disruptive and distortive effects of the Second Circuit's decision on class action practice and the likely suppression of Rule 23's vital opt-out mechanism make applying *American Pipe* to § 13's three-year limitations period more legislatively consonant with the federal securities laws as implemented by Rule 23. In particular, Part I.A's empirical analysis severely undercuts any suggestion that Congress, in creating and then reshaping the current securities litigation scheme over time, intended that potential class members would see their opt-out

rights extinguished in half or more cases reaching a certification order unless they received notice of the class action proceeding on their behalf and took wasteful and burdensome protective action.

In sum, the Second Circuit's failure to conduct any recognizable analysis in finding an Enabling Act problem not only suggests the urgent need for the Court's guidance. The threat the Second Circuit's decision poses to Rule 23's opt-out mechanism, when combined with its incompatibility with the pro-aggregative purposes underlying the PSLRA, also compels the conclusion that the Second Circuit, had it asked the "consonant" question the Court instructed it to ask in *American Pipe*, could not have held the way it did.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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