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 PUBLIC PENSION FUNDS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

This brief is filed by public pension systems that invest in publicly traded securities to fund obligations to their beneficiaries and, therefore, have a strong interest in the proper application of Federal Rule of Civil Procedure 23 to actions under the Securities Act of 1933. These public pension funds believe that Rule 23 and Section 13 of the Securities Act should be interpreted so as to protect investors' right to rely on class actions filed by other investors to prevent their claims from becoming time-barred.

Each year, these public pension funds invest billions of dollars in U.S. capital markets on behalf of millions of pensioners. The California Public Employees' Retirement System is the largest public pension system in the world, with over 1.6 million members and assets of more than $271 billion. The California State Teachers' Retirement System is the largest teachers' retirement system in the United States, with over 862,000 members and assets of more than $176 billion. The Regents of the University of California manages a portfolio of investments totaling over $82 billion, which provide benefits to current and retired employees and support the University's mission of education, research, and public service. The Colorado Public

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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* represent 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* represent that all parties have consented to the filing of this brief.

Employees' Retirement Association provides retirement and other benefits to employees of the Colorado state government, public school teachers, many university and college employees, judges, many employees of cities and towns, State Troopers, and employees of a number of other public entities and has over $40 billion in assets, approximately 200,000 active members, and approximately 100,000 benefit recipients. The Montana Board of Investments manages a unified investment program for the public funds of the State of Montana and has assets of approximately $13 billion. The Teacher Retirement System of Texas is the largest public retirement system in Texas in both membership and assets, serving 1.37 million participants and managing net assets of $117.4 billion. In the aggregate, state and local government pension plans such as these cover more than 19 million members and more than 8 million retirees and other beneficiaries and have assets of more than $3 trillion.[2]

The *amici*'s overriding responsibility is to invest for the retirement and long-term security of their millions of active and retired members. As major investors with long-term outlooks, the *amici* are vitally concerned with the proper and efficient functioning of U.S. capital markets, and are particularly concerned that investors not be harmed by illegal conduct of issuers and sellers of publicly traded securities. Many state and local governments are constitutionally obligated to guarantee defined-benefit retirement plans. Therefore, investment losses due to violations of the federal securities laws

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[2] *See* http://www.census.gov/govs/retire/ (last visited on December 19, 2013).

fall directly on state and local governments and ultimately on taxpayers.

The decision below would force public pension funds to incur significantly higher costs of monitoring class actions and either intervening or filing individual actions to prevent their claims from becoming time-barred. If public pension funds are prevented from recovering money lost to violations of the securities laws and forced to incur higher monitoring and litigation costs, their participants and beneficiaries and the taxpayers will suffer.

The *amici* strongly believe that investors' ability to redress corporate wrongdoing through class actions under the Securities Act is essential to deter improper conduct and to recoup losses caused by false registration statements and prospectuses. Indeed, Congress sought "to increase the likelihood that institutional investors will serve as lead plaintiffs," based on its belief "that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Rep. No. 104-369, at 34 (1995) (Conf. Rep.) *reprinted in* 1995 U.S.C.C.A.N. 730, 733, 1995 WL 709276.

The *amici*, as long-term investors, also have an interest in preventing meritless, lawyer-driven litigation. As one of many ways the Private Securities Litigation Reform Act of 1995 discourages meritless cases, the statute's "professional plaintiff" provision bars a plaintiff from serving as lead plaintiff in more than five actions filed within three years, except as permitted by the court. *See* 15 U.S.C. § 8u-4(a)(3)(B)(vi). Notably, Congress gave courts discretion to allow "[i]nstitutional investors seeking

to serve as lead plaintiff . . . to exceed this limitation [because they] do not represent the type of professional plaintiff this legislation seeks to restrict." H.R. Rep. No. 104-369, at 35 (1995).

Although the *amici* have served as lead plaintiffs in securities class actions under the PSLRA, they more frequently are members of classes in securities class actions without being named as plaintiffs. The *amici* have many responsibilities and limited personnel and other resources, and it would not be efficient or practical for them to seek to serve as lead plaintiffs or to file their own actions in every instance in which they suffer losses as a result of violations of the securities laws. Instead, they rely on class actions led by other investors in the vast majority of instances in which they are injured by securities-law violations, and they frequently file claims and receive recoveries from judgments or settlements in class actions in which they are not named plaintiffs or otherwise actively involved in the litigation. Thus, the *amici* have a vital interest in the continued ability of class actions to protect their claims from becoming time-barred without the need for them to move to intervene in the class actions or file their own individual actions before the three-year limitations period under Section 13 of the Securities Act expires.

SUMMARY OF ARGUMENT

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), 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." *Id.* at 554. Until the Second Circuit's decision in this case,

American Pipe was widely understood to apply to the three-year limitations period applicable to private actions under the Securities Act. Thus, the decision below works a dramatic change in the law, adversely affecting vital rights of institutional investors, which have relied for decades on the tolling of the limitations periods for securities-law claims by the filing of class actions by other investors.

The *amici* agree with Petitioner that the Second Circuit's decision in this case creates a conflict in the circuits, exacerbates confusion in the lower federal courts, and is contrary to the Court's decision in *American Pipe* and to the text and structure of Section 13.

The *amici* write separately to highlight the deleterious consequences for institutional investors of the Second Circuit's decision and the current division of authority in the courts of appeals. If allowed to stand, the Second Circuit's decision will force institutional investors to file hundreds of protective individual actions or seek to intervene in class actions, which would impose undue burden and expense on the investors and on the district courts. The Second Circuit's decision thus undermines "a principal purpose" of Rule 23, as interpreted by this Court in *American Pipe*: to promote the "efficiency and economy of litigation." *Chardon v. Fumero Soto*, 462 U.S. 650, 659 (1983).

For all of these reasons, the Court should grant the petition and resolve the urgent question of *American Pipe*'s application to Section 13 of the Securities Act.

ARGUMENT

THIS CASE AFFECTS RIGHTS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23 THAT ARE VITAL FOR INSTITUTIONAL INVESTORS

A. The Decision Below Would Force Investors to File Separate Actions or Intervene in Class Actions to Prevent Their Claims from Becoming Time-Barred and Would Impair Their Right to Opt out of Class Actions

The Second Circuit decision in this case, if left undisturbed, will force investors who lose money as a result of a false prospectus or registration statement to file their own individual actions or seek to intervene in the class action to ensure that their rights to recover their losses would not be lost if the class action were not certified before the running of the three-year limitations period under Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m. At a minimum, investors will have to closely monitor the class-action litigation to ensure that the class is certified before the limitations period runs out. The Second Circuit's decision also significantly impairs investors' important right under Rule 23 to opt out of class actions.

Investors will face pressure to move to intervene in class actions or to file their own individual actions in Securities Act cases in every circuit except the Tenth Circuit. As an initial matter, a large proportion of all securities class actions are filed in the Second Circuit. Thus, even if the decision below is not followed in other circuits (as defendants will urge that it should be), the erroneous Second Circuit ruling will deprive investors of their ability to rely on class actions filed by other investors in a large

number of cases, leading to hundreds of wasteful, duplicative protective filings. Investors will also face the risk that district courts in circuits with no controlling authority may follow the Second Circuit's decision, leading to still more wasteful individual filings.

The decision below will also encourage investors to file parallel actions in the Tenth Circuit when securities class actions are filed in the Second Circuit, in an attempt to preserve *American Pipe* tolling for class members other than the named plaintiffs in the Second Circuit actions. Duplicative litigation of this kind, while a rational response to the incentives created by the Second Circuit's decision in this case, would have higher costs for investors and the courts than limiting each case to a single class action. A single national rule established by this Court in this case would eliminate these incentives.

Investors will face these pressures not only in actions under the Securities Act, but also in securities-fraud cases under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, because investors will face the risk that district courts outside the Tenth Circuit may apply the Second Circuit's interpretation of Section 13 of the Securities Act to 28 U.S.C. § 1658(b), the five-year limitations period applicable to cases under Section 10(b) of the Exchange Act and Rule 10b-5.

As a result of these risks, the amici and other institutional investors will incur substantial costs in monitoring litigation throughout the country and filing protective complaints and motions to intervene. And if public pension funds have to devote more

resources and money to litigation and monitoring, that will result in lower returns for their beneficiaries. These additional litigation and monitoring expenses – as well as the loss of meritorious claims under the federal securities laws – will adversely affect the retirement benefits of millions of state and local government employees and thus will injure the taxpayers.

American Pipe tolling of securities claims is also vitally important because it protects absent class members' right to opt out of a class action and file their own individual actions if they believe that the class action has not adequately protected their interests. For any class certified under Rule 23(b)(3), which applies to securities class actions, class members must receive notice advising them of their right to appear through an attorney, their 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). These notice and opt-out rights are essential to preserve the Due Process rights of absent class members who wish to pursue their own actions. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

These notice and opt-out rights are also of great practical importance to institutional investors. While the amici have often achieved good recoveries of their losses to securities fraud as members of the classes in class actions, they have sometimes deemed it preferable to opt out of securities class actions and pursue their own actions. If the pendency of a class action does not toll the limitations periods under the Securities Act and perhaps under the Exchange Act, absent class members' claims may become time-

barred before there has been any notice to the class. Thus, investors in many cases would lose any meaningful right to opt out.

For all of the above reasons, the Court should act to restore investors' ability to rely on class actions filed by other investors to preserve their claims.

B. Investors Have Relied on *American Pipe* Tolling in Securities Actions for 40 Years

The court below erred in holding that the filing of a securities class action does not toll the three-year time limitation in Section 13 of the Securities Act, which applies to claims under Sections 11 and 12(a)(2) of the Act, 15 U.S.C. §§ 77k and 77*l*, based on false statements in registration statements and prospectuses. The decision below reverses the longstanding practice under Rule 23 of the Federal Rules of Civil Procedure, which has been understood for four decades to permit absent class members to rely on the filing of a class action to preserve their claims from becoming time-barred. Specifically, the Second Circuit's decision is contrary to this Court's decision in *American Pipe*, which held that the filing of a class action tolls the applicable statute of limitations for all asserted members of the class. *See* 414 U.S. at 554.

The Second Circuit's decision is also contrary to the Tenth Circuit's decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), which held that a class action complaint tolls Section 13's three-year limitations period under *American Pipe*. *See* 223 F.3d at 1167. Institutional investors have relied on *American Pipe* tolling to preserve their rights in many hundreds of cases in which they have ultimately filed claims and participated in class-wide recoveries without having had to file their own cases, intervene in the class

actions being prosecuted by other investors, or actively monitor the class actions. And this understanding of *American Pipe* has been acquiesced in by Congress. Since *American Pipe* was decided in 1974, Rule 23 has been amended five times, including extensive, substantive amendments in 1998 and 2003. Congress allowed these amendments to take effect without acting to abrogate or limit *American Pipe*. Thus, the doctrine of statutory *stare decisis* favors a review of this case by this Court to preserve the prevailing understanding of Rule 23's effect on securities actions that existed before the decision below. *See John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 139 (2008) ("*Stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" (quoting *Patterson v. McLean Credit Union,* 491 U.S. 164, 172–173 (1989)).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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