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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 OF PUBLIC AND PRIVATE PENSION FUNDS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICI

Amici curiae are more than forty public and private pension funds from throughout the United States and internationally, including many of the largest public pension funds in the world.[1] Amici are

[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission

responsible for investing retirement, health, disability, and other funds on behalf of tens of millions of active and retired workers, their surviving spouses, and other beneficiaries. Amici collectively manage over $1.5 trillion in assets, a substantial portion of which is invested in U.S. publicly traded securities. A listing and description of each amicus joining this brief can be found in Appendix A, *infra*.

Amici have a strong interest in the effective enforcement of the securities laws, to deter fraud and to ensure compensation for those injured by violations of these laws. The *American Pipe* rule is part of a reasonable procedural framework for litigation of securities class actions. Amici are concerned that, if the *American Pipe* rule were held to be inapplicable to the three-year period under Section 13 of the Securities Act, 15 U.S.C. § 77m, and analogous statutes, amici would incur significant expenses and would have to involve themselves in wasteful and duplicative litigation as a protective measure whenever, as is often the case, the three-year period approaches with no decision on class certification. The result would be additional costs for all involved, including defendants and the courts, with no compensating benefits to any of the interests Congress was trying to protect in enacting Section 13.

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of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

STATUTE INVOLVED

Section 13 of the Securities Act, 15 U.S.C. § 77m, is reproduced in an appendix to this brief. App. B, *infra*, 7a.

SUMMARY OF ARGUMENT

I. The *American Pipe* rule is part of a sound structure of class and individual litigation, and it is particularly important to public and private pension funds. Because they are entrusted with the retirement savings of millions of people, such funds, like other institutional investors, frequently have substantial amounts at stake in securities class actions. They therefore have to be concerned with any rule that would put their claims in jeopardy, not for reasons related to their merits, but on the ground that the class certification motion may not be decided until after a limitations period has run. Under *American Pipe*, that possibility creates no problem, because such large investors may still preserve their claims; if class certification is denied after the limitations period, they may intervene or file their own claims at that time. But without the *American Pipe* rule, institutional investors would frequently have sufficient stakes in the claims to make it advisable for them to take expensive steps to preserve their claims in case the class is not ultimately certified.

Initially, without *American Pipe*, pension funds and other institutional investors would have to monitor and analyze a large number of pre-certification class actions in distant forums, to ensure that the limitations period does not run without a decision on

class certification. In addition to the costs of monitoring and analysis, such funds would frequently have to intervene or file their own claims in the many cases in which the limitations period ends with no decision on class certification. Even in cases in which class certification is granted within the limitations period, investors would still have to monitor, analyze, and perhaps intervene or file an action to protect themselves against the risk that a later *de*certification would make their claims time-barred.

Intervention itself can trigger an extra round of litigation on the intervention motion. If the intervention were successful, the ensuing litigation would become more complex and costly for all parties, as the intervenors (and multiple pension funds and other institutional investors may intervene) participate at each step of the litigation.

Alternatively, pension funds and other institutional investors could file their own actions, perhaps in distant forums. That too would impose costs on all parties, as each individual case proceeded separately through motion practice, discovery, summary judgment, and trial. Multiplying litigation in that way would be contrary to the purpose of Rule 23 and otherwise wasteful, since the separate actions would not reflect a desire to litigate separately but instead would serve simply to protect against the possibility that the class might ultimately not be certified. Thus, the *American Pipe* rule, which avoids unnecessary expenses and the multiplication of parties and lawsuits, is sound.

II. The rationales of the *American Pipe* rule are fully applicable to the three-year limitations period in

Section 13 of the Securities Act. *See* 15 U.S.C. § 77m. Indeed, the court of appeals did not suggest otherwise. But the court of appeals mistakenly ruled that application of *American Pipe* here would violate the Rules Enabling Act's mandate that no federal rule of procedure may "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

The court of appeals relied in part on the premise that the three-year period in Section 13 is a "statute of repose." Section 13 itself, however, does not use that term, and in any event this Court has frequently referred to *all* limitations periods as "statutes of repose." This label is of no importance. The court of appeals also relied on the proposition that, as a "statute of repose," Section 13 provides defendants with substantive rights, which the *American Pipe* rule would abridge. But both the one-year and the three-year limitations periods in Section 13 could be characterized as either imposing a "procedural" obligation on plaintiffs to file suit within these periods, or granting defendants a "substantive" right to be free of late-filed claims. Nothing turns on this characterization, and the three-year period in the statute serves the same function either way: to delimit when an action must be brought, a time that is defined in part by *American Pipe*.

Even if the "substantive" characterization were correct, the "substantive" right at issue would be one to be free of claims that were "brought," 15 U.S.C. § 77m, past the three-year period. Nothing in Section 13, however, purports to grant defendants a substantive or other right to a particular definition of when a claim is "brought." That definition is supplied in part

by the *American Pipe* rule, which specifies that a class action complaint commences a case for limitations purposes for all putative class members. Accordingly, *American Pipe* is consistent with Section 13, and in no way alters or abridges any substantive (or other) right granted by Section 13.

Finally, the *American Pipe* rule is not the kind of "equitable tolling" that the Court has held is precluded by Section 13. In equitable tolling cases, there is no question when the suit was commenced; the question instead is whether the plaintiff's delay in bringing the suit is excused. By contrast, in *American Pipe* cases, the time when the putative class members' cases commenced is precisely the issue. Moreover, in equitable tolling cases, defendants are not on legal notice of the claim, and for that reason the three-year period precludes suit. Under *American Pipe*, by contrast, the class action complaint puts the defendants fully on notice of the claims that are asserted and the scope of the class that is asserting them. Thus, the *American Pipe* rule is entirely consistent with the interests protected by Section 13: defendants' interests in being able to preserve evidence and to order their affairs after the limitations period in light of the liabilities of which they have been put on notice. The rule of *American Pipe* is not the kind of "equitable tolling" that is precluded by Section 13.

ARGUMENT

I. THE *AMERICAN PIPE* RULE AVOIDS WASTE AND MULTIPLICITY OF ACTIONS AND IS ESSENTIAL TO REALIZE THE EFFICIENCY BENEFITS OF CLASS ACTION PRACTICE

The *American Pipe* rule is part of a sound structure of class and individual litigation. The basic principle of class litigation is that those who bring class actions act on behalf of the class, and the putative class members need not appear or participate in the action to protect their legal rights. The *American Pipe* rule fulfills that principle by eliminating the need—which is particularly pressing for pension funds and other institutional investors that often have large stakes in the action—to engage in wasteful protective efforts and litigation that will prove unnecessary if class certification is granted. Accordingly, *American Pipe* saves the time and resources of putative class members, the other parties to the case, and the judicial system itself.

A. Pension Funds and Other Institutional Investors Have an Obligation to Protect the Assets with Which They Have Been Entrusted

Amici (as well as other institutional investors) invest hundreds of billions of dollars in the public securities markets, on behalf of tens of millions of beneficiaries. While most individual, nonprofessional investors do not have a large interest in any single security, the pools of funds invested by pension funds and other institutional investors are large enough that their holdings of a given security are often substantial. Therefore, when a securities fraud or other violation causes losses to those who hold a particular issuer's

securities, the loss suffered by a given fund can also be substantial.

Pension funds are stewards of the resources of their beneficiaries. In many cases, laws such as ERISA impose specific fiduciary duties on them to act "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A), and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," 29 U.S.C. § 1104(a)(1)(B).

Even aside from statutory obligations like these, pension funds are responsible for the assets they invest for their beneficiaries and take that responsibility seriously. Accordingly, they are necessarily involved in seeing to it that losses from illegal activity are recompensed when possible. While they would prefer to devote their time and resources to sound investment of the assets entrusted to them, they cannot disregard the losses caused to their funds by violations of the securities laws; they must consider whether action should be taken to recoup those losses through individual securities suits or class actions. Any rule that requires greater and unnecessary expense and wasteful participation in litigation in order to obtain compensation for the victims of securities violations will have a great impact on pension funds and other institutional investors.

B. Holding *American Pipe* Inapplicable Here Would Impose Wasteful and Unnecessary Nonlitigation Costs on Pension Funds and Other Institutional Investors

1. This case involves claims arising under Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*. These provisions prohibit materially untrue statements and omissions in registration statements and prospectuses issued in connection with the sale of securities. Section 13 of the Securities Act provides two time limits for bringing suit for violations of Sections 11 and 12. First, suit must be "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." 15 U.S.C. § 77m. Second, "[i]n no event shall any such action be brought to enforce a liability created under [Section 11 or Section 12(a)(1)] more than three years after the security was bona fide offered to the public, or under [Section 12(a)(2)] more than three years after the sale." 15 U.S.C. § 77m. The second time limit—three years after the offering or sale—is at issue in this case.

2. The untrue statements or omissions that are the basis of suits under Sections 11 and 12 are frequently not detected until some time after the subject offering or sale, and thus well into the three-year period. And litigation over class certification may move slowly. In a brief filed at the certiorari stage of this case, amici Civil Procedure and Securities Law Professors analyzed the time it takes for these cases, on average, to reach a class certification order. They concluded that in approximately half of the Section 11 and 12 cases, the three-year period would have expired before the

court reached a certification order. *See* Civ. Pro. Profs. Am. Br. at 8 (certiorari stage). Applying the same analysis, approximately one-fourth of Rule 10b-5 class actions, which also could be affected by the decision in this case, do not reach class certification before the five-year limitations period under 28 U.S.C. § 1658(b) expires. *See id*. at 9. For securities class actions as a whole, amici Professors estimate that at least one-fourth of the cases fail to reach class certification decisions before those or comparable limitations periods expire. *See id*. at 10. There is reason to believe that this estimate is conservative. *See id*. at 10-11.

While amici Professors based their analysis on data from 2002-2009, the length of time until a district court reaches a class certification decision has likely increased since then. Recent decisions of this Court have made class certification a more complex enterprise. In both *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Court emphasized the need for the plaintiff to prove facts necessary to establish that class certification satisfies the requirements of Rule 23, even when those facts overlap substantially with the merits of the underlying claim. *See Wal-Mart*, 131 S. Ct. at 2551-52; *Comcast*, 133 S. Ct. at 1432. Accordingly, both cases are likely to increase the complexity of class certification motions, and, hence, the amount of time it will take before the certification decision can be made.

3. Under the *American Pipe* rule, the frequent expiration of the limitations period before a class certification decision does not impose any special burden

on pension funds and other institutional investors. While their securities holdings frequently make them members of the putative classes at issue, such funds may rely on the commencement of a class action to satisfy the time limits in Section 13. To be sure, even under *American Pipe*, they may ultimately have to consider whether to bring their own cases raising similar claims, if class certification is denied. But they need not act speculatively and protectively *before* a class certification decision. They may instead rely on the filed class action unless and until there is a decision denying class certification, and take appropriate action then. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983).

Without the protection of *American Pipe*, however, pension funds and other institutional investors could not wait until class certification is denied to determine whether to intervene or file their own suit. The only way for them to protect their beneficiaries' interests would be to engage in ongoing monitoring in each case of the status of class certification and the nearness of the limitations date. They would also have to analyze each case at these early stages to determine the strength of their claims, the likelihood of prevailing, the potential damages recovery, and their stake in that recovery. Only in that way could they determine whether their interest in the case warrants taking protective action—intervention or filing a separate suit—as the three-year time limit approaches without class certification.

Indeed, without the *American Pipe* rule, a prudent fund may have to continue to monitor and analyze the proceedings even *after* a class is certified. "Even after

a certification order is entered, the judge remains free to modify it in the light of subsequent developments," *Gen. Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982), and such modification can include *de*certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *see* Newberg on Class Actions § 7.38 (5th ed.). Without the protection of *American Pipe*, unnamed members of even a certified class would risk losing their claims if the district court (or an appellate court perhaps years later) decertified the class after the three-year period had run. Thus, even if the class is certified before the three-year period expires, unnamed class members would have to consider the possibility that it might later be decertified and take steps if appropriate to intervene or file their own actions to protect their claims against the risk of a later decertification.

4. Since 1997, an average of slightly fewer than 190 securities class actions have been filed each year.[2] Most of these involve securities of large, publicly-traded companies in which many funds have substantial interests. Merely monitoring each case in which a fund might be interested, in order to ensure that the three-year (or other) limitations period does not expire before class certification, would impose a serious and costly burden. Keeping track of the progress of litigation in large numbers of distant cases is not an easy task in any event. It is particularly hard when

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[2] *See* Cornerstone Research, *Securities Class Action Filings: 2013 Year in Review* 3 (2013), *available at* securities.stanford.edu/research-reports/1996-2013/Cornerstone-Research-Securities-Class-Action-Filings-2013-YIR.pdf.

the fund, as a potential class member, is not a participant in the proceedings. *See American Pipe &Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974) ("Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it"). Keeping track of the expiration of the limitations period itself can be challenging, as complaints frequently charge a number of different events, each of which may be the triggering date for the limitations period, and each of which may have a different financial impact (or none at all) for a given investor. Moreover, complaints can be amended as litigation progresses, which can in turn affect the limitations period.

Aside from monitoring, funds would have to analyze each case in order to determine whether intervening in the class suit or filing an independent suit would be warranted. As a case progresses, the scope of the claims and the likelihood of success are frequently clarified—including, especially after *Wal-Mart* and *Comcast*, in the process of class certification. Yet funds would have to perform their analyses at the very early, precertification stage.

Indeed, some issues that may be decided at or before the class certification stage may be dispositive of the entire case. If, for example, the class certification proceedings establish that an asserted misstatement in a Rule 10b-5 case was not publicly known, *see Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011), that would likely doom even an individual action claiming that a fraudulent statement affected the market price at which the plaintiff bought

or sold the security. Or if a motion to dismiss or other dispositive motion in the class action were decided before class certification, *see, e.g., Maracich v. Spears,* 133 S. Ct. 2191 (2013) (vacating denial of pre-certification motion to dismiss); *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010) (affirming grant of pre-certification motion to dismiss), once again the investor would know that an individual case raising the same claim would likely fail. Without the *American Pipe* rule, funds would not have the benefit of these rulings in determining their stake in the case. Undertaking a continuing analysis of each of the possibly several hundred pending and not-yet-certified class actions in which the fund had a substantial interest would be very costly and, if class certification is ultimately granted, entirely unnecessary.

C. Holding *American Pipe* Inapplicable Here Would Impose Even More Wasteful and Unnecessary Litigation Costs on All Parties to the Litigation and on the Judicial System

If public pension funds and other institutional investors could not rely on the *American Pipe* rule, the increased and unnecessary costs would not consist merely in the increased expense of monitoring and analyzing pending class actions. The costs would also include increased and wasteful litigation. The costs of that litigation would be borne not merely by funds and their beneficiaries, but by all involved, including the other parties to the case and the judicial system itself.

1. As the Amici Professors' analysis demonstrates, class certification decisions frequently do not take

place until after the three-year or other relevant limitations period has passed. *See* p. 9-10, *supra*. Yet whenever that limitations period comes close to expiration (or the investor perceives a risk of eventual decertification), funds that want to preserve their interests will face significant pressure either to intervene in the class action or to file their own cases. Either alternative would require the funds to retain counsel to file the necessary papers and conduct the proceedings, which itself would be a needless expense in the large number of cases in which the class is ultimately certified.[3] Moreover, unnecessary intervention motions and the filing of unnecessary new cases, perhaps in distant forums, would themselves create new, wasteful, and duplicative tangles.

2. *Intervention*. Before a class is certified, putative class members who want to appear in the case must intervene under Rule 24. As this Court has explained, "[p]utative class members frequently are not entitled to intervene as of right under Fed. Rule Civ. Proc. 24(a), and permissive intervention under Fed. Rule Civ. Proc. 24(b) may be denied in the discretion of the District Court." *Crown, Cork & Seal*, 462 U.S. at 351 n.4. Specifically, although a court "*may* permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B) (emphasis added),

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[3] While class counsel frequently work on contingent fees, it is much less clear that counsel would be willing to work on a contingent-fee basis to file a protective motion to intervene or a new case, which the plaintiff may abandon if the class action is ultimately certified.

permitting intervention is discretionary. "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Courts also consider the length of time the prospective intervenor delayed after having notice of the litigation before seeking intervention. *See, e.g., In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003).

Defendants in securities cases are likely not to welcome intervention, which can only increase the cost and complexity of the litigation. The named plaintiffs too may not want to be joined by intervenors, who may well have different ideas from the named plaintiffs (and, perhaps, from each other) about how the litigation should be conducted. As a result, the bases for intervention may become fertile grounds for litigation. Parties may dispute how much delay is too much, *see, e.g., In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 234-36 (S.D.N.Y. 2012), and whether they will suffer prejudice, *see*, *e.g.*, *In re Bank of N.Y. Derivative Litig.*, 320 F.3d at 300.

Moreover, if intervention is granted, not only the intervenors, but the existing parties as well, will likely incur increased costs. The intervenors may decide to take discovery and will be subject to discovery from the other parties. Motion practice and timing will become more complicated, because there are more parties involved in the proceedings. Once the intervenors are full parties to the action, they may well have different strategic or substantive approaches than the named plaintiff; having invested the resources to become parties, the intervenors may decide to contend

vigorously for their own procedural and substantive preferences. Even if class certification is ultimately granted, parties that have intervened and litigated a case may well decide to stay in it even if they could cease intervention and become passive class members. The result can only be increased costs and complexity for all parties and the court.

This "multiplicity of activity," *American Pipe*, 414 U.S. at 551, may be particularly costly because there could easily be more than one intervenor in a case. Especially if the case involves a widely held security, many institutional investors are likely to have significant stakes in the litigation that warrant protection. Without the ability to rely on a class action to prevent claims from becoming time-barred, multiple interventions in a given case could easily occur.

3. *Filing independent actions.* Alternatively, pension funds and other institutional investors that are faced with a looming end to the limitations period and no decision on class certification (or a material risk of eventual decertification) may choose to file their own actions. But once a fund is faced with the expense of retaining counsel and litigating its own claim, it may well choose a more convenient forum than that chosen by class counsel, and it may also choose to frame its action in a way that differs from the class action. Each new complaint of course would trigger a new round of litigation: motions to dismiss, answers, discovery, *Daubert* hearings, summary judgment, etc. The result

could easily be a series of overlapping actions addressing the same or similar claims in a variety of different forums.[4]

Of course, it is true that institutional litigants in any case could always choose to file their own actions rather than remain members of a class, and there is therefore always some risk of duplicative litigation. Indeed, members of Rule 23(b)(3) classes have a right to opt out and, if they wish, pursue litigation on their own rather than as members of the class. *See* Fed. R. Civ. P. 23(c)(2)(B)(v). But eliminating the *American Pipe* rule for securities class actions would not only transform that choice into a necessity in many cases, it would effectively eliminate the opt-out right that class members may exercise after class certification in the large number of cases in which class certification (and the choice to opt out) occurs after the limitations period has run; no one would exercise an opt-out right if the alternative is to try to litigate an untimely claim on one's own. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974).

Moreover, the opt-out notice itself becomes highly misleading if *American Pipe* does not apply and the

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[4] Cases may be transferred "[f]or the convenience of parties and witnesses" and "in the interest of justice" under 28 U.S.C. § 1404(a), and multiple cases "involving one or more common questions of fact" may be transferred to a single district for pretrial proceedings under 28 U.S.C. § 1407(a). Nonetheless, the transfer itself involves further costs; the cases remain separate even after the transfer; and under Section 1407(a), the cases must ultimately be transferred back after pretrial proceedings are completed. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

certification decision is made after the limitations period has run. As the Advisory Committee explained when the opt-out provision was added, its purpose is to protect "the interests of the individuals in pursuing their own litigations." Advisory Committee's Notes on Fed. R. Civ. P. 23(c)(2), 28 U.S.C. App. p. 813 (1966). But while the notice thus carries the implication that class members may wish to opt out to pursue their own litigation, in fact that option is entirely illusory. Opting out in such a case would leave the class member the opportunity only to engage in a hopeless pursuit of a time-barred claim.

Instead of the post-certification opt-out provided for in Rule 23, there would be a perverse incentive for pension funds and other plaintiffs to file independent actions *before* a decision on class certification, in order to protect their claims from the possibility that the class will ultimately not be certified and the limitations period will have expired. And the decision to file separate suits would likely be a less informed one, simply because it would take place earlier in the litigation, when less is known about the case. All of this litigation would turn out to be unnecessary, if the class were ultimately certified (or even if the case were ultimately dismissed before certification on grounds that would preclude individual actions).

4. *Waste of Judicial and Party Resources.* The net result is that removing *American Pipe* protection would encourage costly, duplicative litigation, which, if class certification is ultimately granted, would be simply a waste of resources. This Court explained in *American Pipe* that a class action is "a truly repre-

sentative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550. Yet removing the protections of *American Pipe* in this important class of cases would have the opposite effect. It would "frustrate the principal function of a class suit" by encouraging "precisely the multiplicity of activity which Rule 23 was designed to avoid." 414 U.S. at 551. The "efficiency and economy of litigation," which this Court has termed "[t]he principal purposes of the class action procedure," would be frustrated. *Crown, Cork & Seal*, 462 U.S. at 349; *see* Advisory Committee's Notes on Fed. R. Civ. Proc. 23(b)(3), 28 U.S.C. App. p. 813 (1966) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.").

There has been a vigorous debate over the costs and benefits of securities class actions. Congress itself has responded to that debate twice in recent years. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress imposed a variety of procedural and substantive limitations. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013). In the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, Congress prevented securities plaintiffs from circumventing the PSLRA by filing class actions in state court instead of federal court. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-83 (2006). Although Congress in these reforms acted to address perceived abuses, it did not adopt proposals that were before it that would have eliminated or otherwise significantly disfavored

securities class actions. To the contrary, some of the new provisions, including the one giving preference to institutional investors as named plaintiffs, *see* 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I), were premised on the need "to improve[e] the quality of representation in securities class actions" and thereby improve the ability of these actions to serve their historic functions of compensating victims of securities-law violations and deterring future violations. H.R. Rep. No. 369, at 34, 104th Cong., 1st Sess. (1995).

Congress may choose to take further action in the future to address securities class actions. But simply adding wasteful and unnecessary costs to be borne by the parties and the judicial system is not a sound response to any perceived abuse. Removing the protection of *American Pipe* would have that effect and should be rejected.

II. THE *AMERICAN PIPE* RULE APPLIES TO THE THREE-YEAR PERIOD FOR BRINGING SUITS IN SECTION 13 OF THE SECURITIES ACT

A. The Rationales for the *American Pipe* Rule Apply Equally Here

All of the grounds for the *American Pipe* rule in other limitations contexts apply equally to the three-year time limit in Section 13. As the Court has explained, eliminating the *American Pipe* rule in this context, as in other contexts, "would frustrate the principal function of a class suit." 414 U.S. at 551. Without *American Pipe*, "[p]otential class members would be induced to file protective motions to intervene," *id*. at 553, and a putative class member "would have every incentive to file a separate action prior to

the expiration of his own period of limitations." *Crown, Cork & Seal*, 462 U.S. at 350-51. "The principal purposes of the class action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated." *Id.* at 349. Those conclusions are as true of the three-year period in Section 13 as they are of the one-year period in Section 13, the Clayton Act limitations period in *American Pipe*, or the Title VII limitations period in *Crown, Cork & Seal*. Given the class action mechanism, there is no reason for a sound procedural system to throw away its benefits by imposing higher costs on putative class members and ultimately requiring them to engage in wasteful and duplicative litigation in order to avoid the limitations bar while class certification is pending.

The court of appeals did not dispute that the rationales of *American Pipe* are as applicable to the three-year period in Section 13 of the Securities Act as to any other limitation period. Instead, the court of appeals' decision was based on three erroneous premises. First, the court stated that the three-year limitations period should be labelled a "statute of repose." *Police & Fire Ret. Sys. of The City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 107 (2d Cir. 2013). Second, the court held that statutes of repose "creates a substantive right, extinguishing claims after a three-year period." *Id.* at 109. Third, the court concluded that therefore "[p]ermitting a plaintiff to file a complaint or intervene after the repose period . . . would . . . necessarily enlarge or modify a substantive right and violate the Rules Enabling Act," *id.*, which precludes construing a federal rule to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b).

B. The Rules Enabling Act Does Not Preclude Application of *American Pipe* Here

For the reasons given in petitioner's brief, each of the premises on which the court of appeals' decision rests is mistaken. What is particularly clear, however, is that the court of appeals' conclusion is based on applying labels to Section 13 that Congress could not have been aware of, and then ascribing legal significance to those labels that Congress did not intend.

1. Initially, the court of appeals affixed the label "statute of repose" to the three-year period, relying on this Court's statement in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 (1991), that the second clause establishes a "3-year period of repose." *IndyMac*, 721 F.3d at 107. This Court, however, has frequently used the term "statute of limitations" interchangeably with "statute of repose," and it has never ascribed legal significance to the difference between the two (or to the term "period of repose" used in *Lampf*). *See*, *e.g.*, *Bd. of Regents of the Univ. of the State of N.Y. v. Tomanio*, 446 U.S. 478, (1980) (statutes of limitations are based on "policies of repose"); *United States v. Kubrick*, 444 U.S. 111, 116 (1979) ("Statutes of limitations . . . . are statutes of repose . . . ."); *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose"); *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299 (1922) (stating that statutes of limitations "are not only statutes of repose," but also supply a presumption to address loss of evidence); *Weber v. The Bd. of Harbor Comm'rs*, 85 U.S. 57, 70 (1873) ("Statutes of limitation . . . . become statutes of repose"); *see also* Pet. Br. 40-41 & Adden-

dum A. In *Lampf,* the Court did use the phrase "period of repose," 501 U.S. at 363, but it drew no conclusions from that phrase about the issues of consequence here: when the action was "brought" under Section 13, and whether the three-year limitation is "substantive" or "procedural."

2. The only question in *Lampf* was whether the three-year period in Section 13 barred the plaintiffs' action. Answering that question did not require any inquiry into the "substantive" or "procedural" nature of either time limitation in Section 13. Nor does anything in the language of Section 13 suggest that either provision is more "substantive" or more "procedural" than the other. Both bar claims that are untimely, measured from different starting points (discovery of the untrue statement or omission, or offering or sale of the security) and lasting different amounts of time (one year or three years). Both provisions could be described as imposing on plaintiffs the "procedural" obligation to bring suit within one year of discovery and three years of offering or sale, or as granting defendants a "substantive" right to be free of claims brought more than either one year after discovery or three years after offering or sale. Nothing in *Lampf* turned on either characterization, and there is no reason to believe that the Court in *Lampf* addressed the somewhat metaphysical distinction between them.

3. Even if the "substantive" characterization of the three-year period in Section 13 were correct, applying the *American Pipe* rule would not "abridge, enlarge or modify" any "substantive" right granted in Section 13. 28 U.S.C. § 2072(b). Section 13 establishes time periods within which a suit must be "brought," but it does

not purport to give defendants any substantive or other right to any particular definition of when that occurs. Accordingly, there is no substantive or other right granted by Section 13 that is in conflict with *American Pipe*'s rule that "the filing of a timely class action complaint *commences* the action for all members of the class as subsequently determined." 414 U.S. at 550 (emphasis added). Even if the three-year period is described as a "substantive" right to have any suit brought within three years of the first offering or sale, the *American Pipe* rule is entirely consistent with that right and merely defines the date, for limitations purposes, on which a suit "commences."

C. The *American Pipe* Rule Is Not A Rule of Equitable Tolling

The Court in *American Pipe* and subsequent cases has spoken of the *American Pipe* rule not only as one that determines when a case commences, but also as one that "tolls" or "suspends" the limitations period. 414 U.S. at 553-54. The variation in terminology, however, should not obscure the fundamental difference between the *American Pipe* rule and other instances of tolling.

1. The ordinary equitable tolling case involves the discovery rule, as in *Lampf*, in which "the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part" until he discovers the wrong. 501 U.S. at 363. Other equitable tolling cases involve claims brought by minors, incompetent persons, or others who had no capacity to bring suit. *See, e.g.*, Calvin Corman, *Limitation of Actions* §§ 10.2, 10.4 (1991); *Petrella v. Metro-*

Goldwyn-Mayer, Inc., No. 12-1315, 2014 WL 2011574, at *11 n.17 (U.S. May 19, 2014) ("a party's infancy or mental disability, absence of the defendant from the jurisdiction, fraudulent concealment"). In each of those instances, it is clear that the plaintiff did *not* commence the suit—and the defendant was *not* on legal notice of the suit—until after the limitations period had elapsed. Thus, the issue in discovery-rule or similar equitable tolling cases is not when the plaintiff commenced the suit. Instead, the issue is whether the plaintiff's failure to commence the suit in a timely manner is excused because some circumstance (*e.g.*, defendants' concealment of a fraud or plaintiff's minority) expands the period of time for bringing suit.

2. The *American Pipe* rule is not "equitable tolling" in that sense, because it has to do precisely with when a suit is brought. In *American Pipe*, the Court examined whether a later suit by putative class members "commence[s]" at the time the original suit was brought or at the later time, after class certification is denied, when the putative class members intervene or file their own complaint. 414 U.S. at 550. The Court concluded that, for timeliness purposes, the suit commences when the first class complaint is filed. *See* 414 U.S. at 550 ("the filing of a timely class action complaint commences the action for all members of the class as subsequently determined").

Moreover, unlike in an ordinary discovery-rule or other equitable tolling case, in an *American Pipe* case, the defendants *are* on legal notice that they must defend against liability to the putative class members. *American Pipe* itself relied on the fact that a "class action is . . . a truly representative suit." 414 U.S. at

550. The named plaintiffs who file the complaint thus do so on behalf of those they represent—*i.e.*, the absent members of the putative class. For that reason, the Court soundly concluded in A*merican Pipe* that, for purposes of limitations periods, the absent class members *have* commenced suit when the complaint is filed. For timeliness purposes, "the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." *Id*. at 551.

The Court emphasized this point in *Devlin v. Scardelletti,* 536 U.S. 1 (2002). "Nonnamed class members are . . . parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them," *id.* at 10 (citing *American Pipe*), and they are also parties for purposes of taking an appeal, *see id.* at 9-10. That does not mean that they are necessarily parties for all purposes. The Court in *Devlin* made clear that "[n]onnamed class members . . . may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id*. at 10. Thus, once class certification is denied, as occurred in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), unnamed members of the putative class are not parties and cannot be bound for res judicata purposes by a judgment in the case. *Id*. at 2379 n.10 ("the definition of the term 'party' can on no account be stretched so far as to cover a person . . . whom the plaintiff in a lawsuit was denied leave to represent"). But the sound holding of *American Pipe*, reaffirmed repeatedly by this Court, is that unnamed members of the putative class *are* parties for

timeliness purposes, and their suit is therefore commenced when the class action is filed. That conclusion applies as much to the three-year period in Section 13 as to any other limitations period.[5]

3. Moreover, the distinction between equitable tolling and the *American Pipe* rule respects the purposes of limitations periods. This Court has explained that the purpose of limitations periods is to "promote justice by preventing surprises through the revival of stale claims" and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Defendants must have legal notice of potential liabilities, so that they can act to preserve evidence and otherwise to order their affairs in light of that notice. Limitations periods, no matter how strict or "substantive," never do more than that; they do not guarantee that a defendant will know positively of all *actual* liabilities by the end of the limitations period, because

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[5] Even if an unnamed class member is viewed as a nonparty, the Court noted in *Smith* that "nonparties sometimes may benefit from, even though they cannot be bound by, former litigation." *Id.* (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-33 (1979), and *Blonder-Tongue Labs. Inc. v. Univ. of Ill. Found.,* 402 U.S. 313 (1971)). Under *American Pipe*, whether or not unnamed members of a putative class are technically parties for other purposes, they may similarly benefit from the filing of the former litigation for timeliness purposes, even though, absent intervention, they will not be bound by the judgment in the former case if class certification is denied. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393 (1977) (noting that "it does not . . . follow" from denial of class certification "that the case must be treated as if there never was an action brought on behalf of absent class members").

the actual determination of liability in a timely filed case may extend well beyond the termination of any limitations period.

The *American Pipe* rule generally satisfies those purposes, and it does so in this case. The filing of the original class action complaint in this case "notifie[d] [respondents] 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." *American Pipe*, 414 U.S. at 555. Respondents therefore "ha[d] the essential information necessary to determine both the subject matter and size of the prospective litigation." *Id*. They had the ability to preserve evidence and otherwise order their affairs in light of that information. To be sure, they did not know within the three-year limitations period what their *actual* liability, if any, would be. But no other time period for bringing litigation offers defendants that kind of "repose," and there is no reason to think that Section 13 guarantees it here.

4. This Court's recent decision in *Petrella v. Metro-Goldwyn-Mayer* reinforces that conclusion. The Court there distinguished between equitable tolling and laches, holding that, although these two equitable doctrines both concern timeliness, they may differ in whether they apply in a given statutory setting. 2014 WL 2011574, at *11. The *American Pipe* rule too is an independent rule whose application turns on its consistency with the statutory scheme, not on whether equitable tolling (or laches) applies. While the *American Pipe* rule also concerns the timeliness of suits, it is not an equitable rule at all; as explained above, its origins and rationale are entirely different from the

doctrine of equitable tolling. *See* Pet. Br. 35-38. The fact that Section 13's three-year time limit precludes equitable tolling is thus entirely consistent with application of the *American Pipe* rule.

Even under the view of the *Petrella* dissent, the *American Pipe* rule has full application to Section 13. Citing *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010), the dissent commented that periods of repose like that in Section 13 are "generally 'inconsistent with tolling' and similar equitable doctrines," and that for that reason laches too may not apply to such statutes. 2014 WL 2011574, at *20 (Breyer, J., dissenting). But the *American Pipe* rule is not based on equitable tolling, laches, or any "similar equitable doctrine[]" referred to by the dissent in *Petrella*, *see* pp. 25-28, *supra*, and its purposes are not those of equitable tolling or laches, *see* pp. 28-29, *supra*.

Unlike equitable tolling or laches, the *American Pipe* rule does not intrude on interests protected by limitations rules, because it applies only when the defendant is fully on notice—before the end of the one- or three-year periods—of the potential scope of liability the defendant faces. Unlike equitable tolling or laches, the *American Pipe* rule is based on the requirements of a sound procedural system that includes class actions, not any fault or lack of fault on the part of the plaintiff for any "failure" to file on time. *See* Pet. Br. 37-38. And unlike equitable tolling doctrines, the *American Pipe* rule determines when a suit commences (is "brought," under Section 13), not whether a failure to commence a suit on time should be excused. While Section 13 is "generally" inconsistent with equitable tolling rules, 2014 WL

2011574, at *20, it is entirely consistent with the *American Pipe* rule, which applies fully to both Section 13's one-year and three-year limitations periods.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

List of Amici Curiae

Alameda County Employees' Retirement Association is a California public pension that provides retirement, death, and disability benefits to active and retired public employees of Alameda County and other participating employers.

APG Asset Management N.V. ("APG") manages pension assets for approximately 4.5 million beneficiaries on behalf of its pension fund clients. APG manages pension assets for 20% of all families in the Netherlands.

Arkansas Public Employees Retirement System provides retirement income to state, county and municipal employees, college and university employees, non-teaching public school employees, and other non-state employees in the State of Arkansas.

Automotive Industries Pension Trust Fund provides retirement benefits to individuals working as machinists or in related crafts involved in the maintenance and repair of consumer vehicles, commercial transport and industrial transport, primarily in the Northern California area.

California Public Employees' Retirement System provides retirement, health and related financial programs and benefits to public employees, retirees and their families and to public employers in the State of California. It is the largest public pension system in the United States.

California State Teachers' Retirement System provides retirement, disability and survivor benefits for full-time and part-time public school educators and their families in the State of California. It is the largest teachers' retirement system and second largest public pension fund in the United States.

Cambridge Retirement System provides retirement, disability, and other benefits to employees of the City of Cambridge, Cambridge Housing Authority, Cambridge Public Health Commission and Cambridge Redevelopment Authority in the Commonwealth of Massachusetts.

Carpenters Pension Trust Fund for Northern California and Carpenters Annuity Trust Fund for Northern California provide retirement benefits to members of the United Brotherhood of Carpenters and Joiners of America within forty-six northern California counties.

City of Atlanta Firefighters' Pension Fund provides retirement, death, and disability benefits to firefighters and their beneficiaries in the City of Atlanta, Georgia.

City of Dania Beach Police & Firefighters' Retirement System provides retirement and other benefits for police officers, firefighters, and their beneficiaries in the City of Dania Beach, Florida.

Colorado Public Employees' Retirement Association provides retirement and other benefits to the employees of government agencies and public entities in the State of Colorado.

Dallas Police and Fire Pension System provides

retirement, death, and disability benefits for police officers, firefighters, pensioners, and their beneficiaries in the City of Dallas, Texas.

Denver Employees Retirement Plan provides retirement benefits to members of the City and County of Denver, Colorado, the Denver Employees Retirement Association and Denver Health and Hospital Authority.

Florida's State Board of Administration is responsible for investing the assets of the Florida Retirement System Trust Fund, one of the largest public retirement plans in the United States, as well as the assets of a variety of other state funds.

Government of Guam Retirement Fund provides retirement, health, disability, and other benefits to employees and their beneficiaries of the Government of Guam.

Houston Firefighters' Relief and Retirement Fund provides retirement, disability and survivor benefits for firefighters of the City of Houston, Texas.

Houston Municipal Employees Pension System provides retirement, disability and survivor benefits to employees of the City of Houston, Texas.

Illinois Municipal Retirement Fund provides retirement, disability, and death benefits to employees of local governments and school districts in the State of Illinois.

Maryland State Retirement and Pension System administers retirement, death, and disability benefits for employees, teachers, police, judges, law enforcement officers, correctional officers and legislators of

the State of Maryland, as well as employees and law enforcement personnel of participating local governments in Maryland.

Mn Services N.V. manages and administers pension assets for approximately 2 million people in the Netherlands and United Kingdom on behalf of its pension fund clients.

Montana Board of Investments is responsible for investing all state agency funds and local government funds under a unified investment program for the State of Montana.

The New York State Common Retirement Fund ("NYSCRF") provides service and disability retirement benefits, as well as death benefits to state and local government employees and employees of certain other participating employers in the State of New York. As one of the largest public pension funds in the United States, NYSCRF has more than one million members, beneficiaries, and retirees.

OMERS Administration Corporation is the administrator of the Ontario Municipal Employees Retirement System, which manages the retirement assets of nearly 1,000 Canadian employers and provides retirement benefits to approximately 440,000 local government employees, retirees, and their beneficiaries in the Canadian province of Ontario.

Operating Engineers Pension Trust provides retirement benefits to public and private construction workers and their survivors, including heavy equipment operators, mechanics, concrete pumpers, soil testers, inspectors, and surveyors.

Orange County Employees Retirement System

provides retirement, disability, and survivor benefits to employees of the County of Orange, California and special districts within the County.

The Pension Reserves Investment Management ("PRIM") Board of the Commonwealth of Massachusetts is the trustee of the Massachusetts Pension Reserves Investment Trust ("PRIT") Fund, a defined benefit public pension fund with 285,000 beneficiaries. PRIM works diligently on behalf of current and retired Massachusetts state employees and teachers, and also approximately 100 local municipal and county retirement systems throughout the Commonwealth of Massachusetts, to invest their pension assets in a manner that maximizes returns while mitigating risk.

PGGM Investments manages pension assets for approximately 2.5 million beneficiaries in the Netherlands on behalf of its pension fund clients.

Public School Teachers' Pension and Retirement Fund of Chicago administers a defined benefit plan that provides retirement, survivor, and disability benefits for teachers and employees of the Chicago public schools in Chicago, Illinois.

The Regents of the University of California ("the University") manages a portfolio of investments which provides benefits to current and retired employees and their beneficiaries. In addition, the University has a separate investment portfolio, its General Endowment Pool (est. 1933), which consists of over 5,000 individual endowed gift funds which support the University's mission of education, research and public service.

Rockledge Firefighters', Rockledge General Employees' & Rockledge Police Officers' Retirement Plans manage the retirement plans for fire department, police department, and general employees of the City of Rockledge, Florida.

Royal Mail Pension Plan provides pension benefits to employees of Royal Mail, the United Kingdom's universal postal service. It is one of the United Kingdom's largest pension systems.

Sacramento County Employees' Retirement System provides retirement, disability, and survivors' benefits to employees of the County of Sacramento, California, the Superior Court of the County of Sacramento, and eleven special districts with the Country of Sacramento.

San Diego City Employees' Retirement System administers the defined benefit plans for active and retired employees of the City of San Diego, San Diego Unified Port District, and San Diego County Regional Airport Authority, in California.

Santa Barbara County Employees' Retirement System is responsible for providing retirement, disability, death and survivor benefits for employees and contracting districts of the County of Santa Barbara, California.

State of Wisconsin Investment Board is responsible for managing the assets of the Wisconsin Retirement System, the State Investment Fund (SIF) and other trust funds of the State of Wisconsin.

Teacher Retirement System of Texas is a public pension plan providing retirement and related benefits for active and retired employees of the public

schools, colleges, and universities supported by the State of Texas.

Utah Retirement Systems provide retirement and insurance benefits to Utah public employees.

Virginia Retirement System administers pension plans and other benefits for public sector employees of the Commonwealth of Virginia.

Washington State Investment Board is responsible for managing investments for retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters and judges in Washington State, as well as investments for other public funds that support or benefit industrial insurance, colleges and universities, and developmental disability programs in Washington State.

APPENDIX B

Statutory Provision Involved

Section 77m of Title 15 of the United States Code provides:

> **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.