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

REPLY BRIEF FOR PETITIONER

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Respondents largely ignore the significant nationwide consequences of the question presented: whether the filing of a putative class action serves, under *American Pipe*, to satisfy the three-year time limitation in § 13 of the Securities Act with respect to the claims of putative class members. That question is critical to investors in federal securities cases, for which the Second Circuit is the leading circuit. Indeed, respondents embrace the disruption that will result from the decision below by endorsing the needless protective filings it will engender.

Respondents unpersuasively dispute the existence of a circuit conflict. They simply ignore the Fifth Circuit's explicit acknowledgement of the split. *See Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 n.5 (5th Cir. 2013). Instead, they offer a tortured reading of *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), but they cannot escape its *holding*, which directly conflicts with the judgment below. That divergence, coupled with the irreconcilable logic from Federal Circuit cases, *e.g.*, *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), will cause no end of trouble in lower federal courts, which are already at sea on this issue.

On the merits, respondents seek to defend the Second Circuit's reasoning regarding the Rules Enabling Act but have no good answer for the fact that *American Pipe* itself rejected an Enabling Act challenge. Respondents identify no textual basis for reading into § 13 the creation of a "substantive right"; nor do they show that applying *American Pipe* would affect any such right. Respondents' effort to conjure a vehicle problem lacks merit, because the supposed "standing" issue is a red herring.

ARGUMENT

I. AN ACKNOWLEDGED CIRCUIT SPLIT EXISTS ON THE APPLICATION OF *AMERICAN PIPE*

A. The Second Circuit's Decision Directly Conflicts With *Joseph*

1. The conflict between the Second Circuit's decision in this case and the Tenth Circuit's decision in *Joseph* could not be clearer. Pet. 8-12. The court below held, in no uncertain terms: "*American Pipe*'s tolling rule *does not apply* to the three-year statute of repose in Section 13." App. 4a (emphasis added). The Tenth Circuit held, in equally absolute terms: "*American Pipe* tolling *applies* to the statute of repose governing Mr. Joseph's action," *i.e.*, the three-year period in § 13. 223 F.3d at 1168 (emphasis added). The judgment below unquestionably would have come out differently in the Tenth Circuit.

Respondents seek to divert attention from that reality by noting (at 10-11) that *Joseph* did not discuss the Rules Enabling Act. That was presumably because the Tenth Circuit understood that this Court had *already rejected* such a challenge in *American Pipe* itself. The district court in *American Pipe* cited the Enabling Act as one reason for holding the claims at issue time-barred. *See Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99, 102-03 (C.D. Cal. 1970). Before this Court, the defendants argued that the Enabling Act "expressly prohibited the Court from promulgating rules which 'abridge, enlarge or modify any substantive right.'" Pet'rs Br. 12-13, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (No. 72-1195), 1973 WL 172291 (quoting 28 U.S.C. § 2072(b)). This Court addressed and rejected that argument. *See* 414 U.S. at 557-58. It is therefore

unsurprising that the Tenth Circuit did not revisit that argument 25 years later.

There is no reason to think the Tenth Circuit will reverse course from *Joseph*. While acknowledging the decision below, that court continues to cite *Joseph* as unquestioned circuit law. *See NCUA v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1255 n.12 (10th Cir. 2013) (citing *Joseph* and the decision below), *petition for cert. pending*, No. 13-576 (U.S. filed Nov. 8, 2013). Reconsidering the *Joseph* rule would require an en banc court, *see In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam), which is highly unlikely because the Tenth Circuit hears fewer than five such cases per year.*

2. Respondents also claim (at 12) that the Tenth Circuit would decide this case the same way because *Joseph* held, according to respondents, that application of *American Pipe* cannot "be based on a prior putative class action that was brought by named plaintiffs who themselves had never purchased the same securities."

Respondents mischaracterize *Joseph*. Joseph sought to bring § 11 claims based on debentures issued by the defendant. 223 F.3d at 1157. Several complaints regarding those debentures had been filed previously. One May 1989 complaint was filed by named plaintiffs who had not purchased debentures, *and that complaint was subsequently amended to omit all § 11 claims*. *Id.* Another complaint, filed in October 1989, named a debenture purchaser as a

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* *See* Federal Bar Council, Second Circuit Courts Committee, *En Banc Practices in the Second Circuit: Time for a Change?* 6 (July 2011), *available at* http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

plaintiff and at all times included claims under § 11. *Id.*

When applying *American Pipe* to Joseph's case, the Tenth Circuit had to determine whether to look to May or October 1989 as the appropriate filing date. *Id.* at 1168. Because the § 11 claims had been dropped from the May complaint, Joseph was not an "asserted member[] of the class who would have been [a] part[y] had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554. The Tenth Circuit accordingly chose the October complaint, because that complaint "was filed on behalf of both common stock and debenture purchasers, *asserting claims under both section 11* and section 10(b)." 223 F.3d at 1168 (emphasis added).

In the respects that matter here, the relevant class-action complaint in this case is no different from the October 1989 complaint on which *Joseph* relied. All the claims petitioner now pursues were brought (and remain) in that complaint. And the named plaintiff here sought to represent a class of investors of which petitioner was a member. App. 22a-23a. That the named plaintiff in the original complaint did not purchase the relevant securities is irrelevant for purposes of applying *American Pipe*.

Respondents cite no case interpreting *Joseph* to preclude applying *American Pipe* in such a situation. To the contrary, district courts in the Tenth Circuit have held that, under *Joseph*, the *American Pipe* rule applies even when the named plaintiff in the original suit did *not* purchase the same securities as the party claiming the benefit of *American Pipe*. *See NCUA v. Credit Suisse Sec. (USA) LLC*, 939 F. Supp. 2d 1113, 1127 (D. Kan. 2013) (observing that "the Tenth Circuit has not addressed that particular question"

and adopting the view endorsed in *Genesee County Employees' Retirement System v. Thornburg Mortgage Securities Trust 2006-3*, 825 F. Supp. 2d 1082, 1161-64 (D.N.M. 2011)).

B. The Decision Below Is Inconsistent With Federal Circuit Cases

Respondents also fail to reconcile the decision below with Federal Circuit law. Respondents' contention (at 14-18) that none of the Federal Circuit cases dealt with a "statute of repose" misses the point. In *Bright*, the statute at issue had been deemed "jurisdictional" by this Court in the sense that it "forbids a court to consider whether certain equitable considerations warrant extending a limitations period." 603 F.3d at 1287 (internal quotations omitted). Under respondents' reasoning, that made it the functional equivalent of § 13's three-year period, for respondents' principal submission is that *American Pipe* cannot apply to that period because this Court said in *Lampf* that § 13 is "'inconsistent with'" equitable tolling. Opp. 2 (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991)). *Bright* rejected that reasoning, concluding that *American Pipe* applies even to statutes impervious to equitable tolling. *See* 603 F.3d at 1287.

In addition, the Federal Circuit cases involved time limits on the government's waiver of sovereign immunity. *E.g.*, *id.* at 1280-81. When those time limits expire, the government's immunity is restored; the expiration reinstates the defendant's substantive right to be free from suit. That is indistinguishable from the Second Circuit's conception of a statute of repose. App. 14a. In short, whereas the Second Circuit holds that statutes of repose create "substantive

rights" and therefore are not subject to *American Pipe*, the Federal Circuit has applied *American Pipe* to time provisions affecting substantive rights.

II. THE QUESTION PRESENTED IS EXCEEDINGLY IMPORTANT

Respondents do not contest the importance of the question presented. They attempt (at 30) to dismiss the consequences of the decision below as "policy" arguments "properly addressed to Congress." That is a merits argument that lacks force at the certiorari stage, where this Court routinely considers a question's practical importance before deciding to review it. Before the federal courts are flooded with duplicative filings, this Court should first consider whether the decision requiring them is correct. Pet. 22-23.

Respondents' further argument (at 30) that plaintiffs' right to proceed independently will be cut off "*only if* they sleep on their claims" invites the very problem *American Pipe* sought to avoid. *American Pipe* held that absent class members may rely on the filing of putative class actions precisely so that courts are not bombarded with duplicative filings. 414 U.S. at 553-54. The question here is whether that principle applies in cases governed by § 13's three-year period.

The disruption spawned by the Second Circuit's rule is undeniable (and undisputed). Pet. 19-23. Respondents (at 31) misleadingly dismiss the professors' brief as mere "conjecture that the court of appeals' holding *might* have led to additional filings in fewer than 40 Section 11 and 12 cases over an eight-year span." But the professors conservatively estimated that if the decision below were applied to other provisions in the securities laws characterized as "statutes of repose" – and parties similarly situated to respon-

dents have urged, and will continue to urge, that it should, *e.g.*, *In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, No. 08 MDL 1963, 2014 WL 463582, at *9 (S.D.N.Y. Feb. 5, 2014) – "plaintiffs seeking to preserve their rights would have filed protective actions in as many as 750" securities cases since 1996. Professors Br. 10. "Had even a handful of potential class members in each case" taken protective action, the federal courts would have been faced with at least "thousands" of additional lawsuits and intervention motions. *Id.* Application of the decision below in cases outside the securities context will vastly increase that number. Pet. 21-22.

Such "needless duplication of motions" is not "consistent with federal class action procedure," *American Pipe*, 414 U.S. at 554, and places an unwarranted burden on public pension funds, which must now divert funds earmarked for retirees to monitoring costs and court filings, *see* Public Pension Funds Br. 6-9. Respondents' claim (at 30) that those considerations have no place before this Court merely shows their inability to reconcile the decision below with *American Pipe*, which relied on such considerations. *See* 414 U.S. at 552-56.

III. THE DECISION BELOW IS WRONG, AND THERE IS NO VEHICLE PROBLEM

A. The Court Below Erred

1. Respondents rely heavily on *Lampf* (at 20, 22), but ignore the relevant differences between the equitable tolling addressed in *Lampf* and the *American Pipe* rule. The tolling doctrine addressed in *Lampf* accords benefits to a "party injured by [a] fraud [who] remains in ignorance of it without any fault or want of diligence or care on his part." *Lampf*, 501 U.S. at 363 (internal quotations omitted). *American Pipe*,

however, does not require absent class members to show lack of "any fault or want of diligence or care on [their] part." *Id.* (internal quotations omitted); *see* Pet. 25-26. Regardless of whether *American Pipe* is labeled "equitable" or "legal," it is not the type of rule that *Lampf* said is inconsistent with § 13.

Although respondents claim (at 25) that this Court has characterized "*American Pipe* as an example of 'equitable tolling,'" they concede that the Court has left that issue open. *See* Opp. 25 n.7 (citing *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012) (reserving judgment on whether *American Pipe* is "legal tolling")).

2. Respondents formalistically claim (at 20) that *American Pipe* cannot be applied to § 13's three-year period because *American Pipe* addressed a "statute of limitations" as opposed to a "statute of repose." But respondents ignore that this Court has described the provision at issue in *American Pipe* as a statute of repose. Pet. 30-31.

Moreover, respondents incorrectly assert that the time limitation at issue in *American Pipe* "runs from the date the 'cause of action accrued.'" Opp. 29 (quoting 15 U.S.C. § 15b). That statute in fact provides that, if the government brings an antitrust case, a private plaintiff must bring suit within one year after the conclusion of the government's case. 15 U.S.C. § 16(i); Pet. 30. Under respondents' logic, because the period runs from a time unrelated to the accrual of the claim, that is a "telltale sign" it is a "statute of repose," Opp. 29, which further undermines respondents' effort to distinguish *American Pipe* as addressing only a "statute of limitations."

3. Respondents alternatively rely (at 23-26) on the Rules Enabling Act, but can muster no support

for the notion that § 13 governs substantive rights, aside from lower court cases articulating an "invented" and "artificial" (respondents' words) distinction between "statutes of limitation" and "statutes of repose." *Cf. Young v. United States*, 535 U.S. 43, 49 (2002) (three-year lookback period in Bankruptcy Code "is not distinctively 'substantive' merely because it commences on a date that may precede the date when the IRS discovers its claim").

"[T]he traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001). Respondents rely (at 21-22, 26-27) on *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), but that case in fact undermines their position. *Beach* confirms that § 13 is *not* the type of timing provision that departs from the "traditional rule." The statute in that case provided that the "'*right* of rescission [under the Act] *shall expire*' at the end of the time period." *Id.* at 417 (quoting 15 U.S.C. § 1635(f)) (emphases added; alteration in original). This Court read that language as governing "the life of the underlying right" because – unlike "a typical statute of limitation," which concerns "a suit's commencement" – § 1635(f) talks of "a right's duration." *Id.* at 416, 417.

Section 13 addresses a suit's commencement, not a right's duration. "In no event shall" an action under § 11 "*be brought* . . . more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m (emphasis added). *Beach* shows that Congress knows how to use language extinguishing the underlying right. Congress's decision not to speak

of rights in § 13 is powerful evidence that it did not mean to create or destroy them.

4. Even if § 13 created or limited a substantive right, respondents have not demonstrated that applying *American Pipe* would affect that right. *American Pipe* is a recognition that the filing of a putative class action satisfies § 13 for members of the putative class. Pet. 23-24.

Respondents argue that filing a class-action complaint "cannot possibly satisfy limitations periods for persons who, by definition, *are not parties* to the suit." Opp. 28 (citing *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011)). But *Smith* stated that *American Pipe* "demonstrate[s]" that "a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding." 131 S. Ct. at 2379 n.10. Under that reasoning, applying *American Pipe* to the three-year limitation in § 13 does not make putative class members parties; it merely secures them "certain benefits . . . related to that proceeding." *Id.*

B. Respondents' "Standing" Argument Lacks Merit And Poses No Barrier To Addressing The Question Presented

Respondents contend (at 31-33) that this case is not a "suitable vehicle" to decide the question presented because, they assert, *American Pipe* cannot apply when the original named plaintiff lacked standing to pursue certain claims on behalf of the putative class member who subsequently sues or intervenes. Respondents are incorrect.

Notably, respondents have not contested *petitioner's* standing; it purchased the very securities on which its claims rest. Nor is there any dispute that Wyo-

ming had standing to pursue at least *some* claims. Thus, the courts below undisputedly had jurisdiction to adjudicate petitioner's securities claims and to resolve petitioner's contention that its intervention is timely under *American Pipe*. This Court's jurisdiction likewise is not in doubt.

Respondents assert without support (at 31) that "[i]t cannot be the law" that *American Pipe* applies when the original named plaintiff lacked standing. But at least two circuits have concluded that *American Pipe* in fact applies in such cases. *See Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1097 (3d Cir. 1975); *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994). The district court below reached the same conclusion with respect to § 13's one-year period. App. 40a-41a.

Were the rule otherwise, class members uncertain of a named plaintiff's standing to assert claims on their behalf – "and there is much uncertainty in this area of the law – 'would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.'" *Griffin*, 17 F.3d at 360 (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983)); *accord* App. 41a.

In all events, this Court need not consider respondents' "standing" argument. If, on the merits, the Court finds that *American Pipe* does not apply to § 13's three-year limitation, then the "standing" issue would be mooted. And if, on the merits, the Court holds that *American Pipe does* apply to the three-year time limit, the Court would remand this case for

further proceedings, during which respondents could seek to press their argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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