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

REPLY BRIEF FOR PETITIONER

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In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court unanimously held that "the commencement of a class action 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. Subsequent cases, including *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), confirm that the *American Pipe* rule applies generally to protect asserted class members from the running of statutory time bars.

Respondents do not dispute that, under *American Pipe* and *Crown, Cork & Seal*, petitioner's motion to intervene would be timely. They cannot evade the dispositive force of those precedents. Their request for an exception to *American Pipe* for claims subject to § 13's three-year period lacks support in the statute or this Court's cases. Accepting respondents' invitation would create widespread uncertainty, a flood of duplicative filings, and the needless inefficiencies this Court sought to prevent in *American Pipe*.

ARGUMENT

I. PETITIONER'S MOTION TO INTERVENE IS TIMELY UNDER *AMERICAN PIPE*

A. *American Pipe* Suspends The Running Of Time Bars When An Asserted Class Action Is Filed In Federal Court

1. *American Pipe* is a fundamental feature of federal civil procedure that presumptively applies to cases in federal court. Pet. Br. 22-28. In arguing (at 13-15, 28-29) that "tolling" instead requires a case-by-case, statute-by-statute inquiry, respondents rely on decisions addressing "equitable tolling," not the

American Pipe rule.[1] Respondents' effort to conflate equitable tolling and *American Pipe* ignores the doctrines' distinct foundations, operation, and purposes.

First, equitable tolling and the *American Pipe* rule derive from different sources. *American Pipe* is based on Rule 23. Pet. Br. 35-36; *infra* p. 4. Equitable tolling, by contrast, depends entirely on a background assumption about Congress's intent in enacting a statute of limitations; it does not rest on a generally applicable procedural rule. *See Lozano*, 134 S. Ct. at 1232. Accordingly, courts must be especially alert for textual and structural clues that Congress would not have intended equitable tolling to apply to a particular statute. This Court has not employed that kind of case-by-case inquiry for *American Pipe*, however, because *American Pipe* rests on a congressionally authorized procedural rule, not a judicial presumption regarding Congress's intent with respect to a particular statutory time bar.

Congress has the power to preclude the application of *American Pipe* to particular statutes (or, indeed, to abrogate the doctrine altogether by legislation or amendment to Rule 23). *Cf.* Resp. Br. 36-38. Notwithstanding frequent amendments to class-action procedure for securities cases (Pet. Br. 27), however,

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[1] *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) ("[s]tatutes of limitations, but not statutes of repose, are subject to equitable tolling"); *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014) ("[E]quitable tolling pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action."). Other cases cited by respondents (at 13-15) are to the same effect. *See also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (implied discovery rule for fraud claims); *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918) (same).

Congress has not enacted any provision stating in words or substance that the filing of a class-action complaint shall have no effect on the running of time limitations for the claims of asserted class members. Congress's silence reflects its acceptance of the *American Pipe* rule as it has operated for 40 years.[2]

Second, equitable tolling and *American Pipe* operate differently and serve distinct purposes. Equitable tolling applies when a plaintiff "pursued his rights diligently but some extraordinary circumstance prevent[ed] him from bringing a timely action." *CTS*, 134 S. Ct. at 2183 (internal quotation marks omitted). *American Pipe* applies regardless of "diligen[ce]" or "extraordinary circumstance[s]." *Id.*; *see American Pipe*, 414 U.S. at 551-52 & n.21. And *American Pipe* applies to promote judicial efficiency, not to achieve equity for individual claimants. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011) (*American Pipe* is "specifically grounded in policies of judicial administration").

In addition, equitable tolling excuses a plaintiff from providing a defendant timely notice of its claims. When that doctrine applies, a defendant can face liability on a claim first brought many years after the limitations period ordinarily would have expired, even if the defendant had no inkling of a potential claim during the statutory period. When *American Pipe* applies, however, the defendant already has received timely notice during the statutory

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[2] *Cf. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1202 (2013) ("We have no warrant to encumber securities-fraud litigation by adopting an atextual requirement of precertification proof of materiality that Congress, despite its extensive involvement in the securities field, has not sanctioned.").

period, through the original class-action complaint. *See American Pipe*, 414 U.S. at 555.[3]

2. Respondents' effort (at 29-33) to limit *American Pipe* to its facts fails. *American Pipe* described its holding as a general rule derived from a structural interpretation of Rule 23, not (as respondents posit) a case-specific interpretation of the Clayton Act. The Court engaged in a lengthy discussion of Rule 23's history and purposes, 414 U.S. at 545-50, and concluded that its "*interpretation of*" Rule 23 is "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve," *id.* at 555-56 (emphasis added). The Court's only discussion of the Clayton Act's time bar was a footnote observing that its legislative history was "consistent" with the Court's holding that suspending the time bar comported with the Rules Enabling Act. *Id.* at 558 n.29.[4]

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[3] Respondents do not dispute (at 33-35) that the citations to *American Pipe* in two equitable-tolling decisions (*Young v. United States*, 535 U.S. 43 (2002), and *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990)) were unnecessary to the result in those cases. Pet. Br. 36 n.13; *cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013) (the Court "having once written dicta calling a tomato a vegetable" is not "bound to deny that it is a fruit forever after").

[4] Respondents (at 31) incorrectly assert that "*American Pipe* did not and could not" have interpreted Rule 23 because the rule "says nothing regarding tolling." *American Pipe* refutes that argument. *See* 414 U.S. at 555-56 ("this interpretation of the Rule"). Respondents' criticism of the Court's interpretive methodology ignores *stare decisis*.

Respondents' reliance (at 31-32) on the advisory committee's note is misplaced. *American Pipe* noted the committee's view, *see* 414 U.S. at 554 n.24, but reached a different conclusion, holding that "the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations," *id.* at 554.

Crown, Cork & Seal confirmed that *American Pipe* established a general procedural rule. The defendants there argued that *American Pipe* should be limited to its facts (i.e., only to motions to intervene rather than separate lawsuits). The Court "conclude[d]," however, "that the holding of [*American Pipe*] is not to be read so narrowly." 462 U.S. at 350. The Court recognized that, if it were to start creating exceptions to *American Pipe*, "putative class member[s] . . . would have every incentive to file a separate action," creating "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." *Id.* at 350-51. As in *American Pipe*, the Court discussed the specific statutory time bar in a footnote, observing that the provision was not "jurisdictional." *Id.* at 349 n.3. It is implausible to read *Crown, Cork & Seal* as merely applying a statute-specific holding, as respondents do (at 36), rather than a general procedural doctrine under Rule 23.

Respondents (at 32-33) mischaracterize *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), as "reject[ing] the view that *American Pipe* announced a general tolling doctrine derived from Rule 23." *Chardon* recognized that *American Pipe* created a federal rule that filing a class-action complaint stops the running of time bars; it also held that, in a § 1983 action, *American Pipe* could produce a renewal of time (rather than mere suspension) to accommodate relevant state law. *See id.* at 661. Although the dissenting Justices in *Chardon* would have gone further and held that *American Pipe* requires suspension rather than renewal in all cases, *see id.* at 665 (Rehnquist, J., dissenting), they agreed with the majority that *American Pipe* "interpret[ed] Rule 23 to contain a

rule that, during the pendency of a class action, underlying statutes of limitations would be tolled as to individual class members," *id.*; *see id.* at 667-68. *Chardon* provides no support for creating exceptions to *American Pipe*.[5]

B. Section 13 Contains No Language Foreclosing *American Pipe*

1. Respondents erroneously contend (at 16-17) that an intent to preclude *American Pipe* should be inferred because § 13 states that "[i]n no event" shall any action be brought more than three years after sale or offering of a security. 15 U.S.C. § 77m. The three-year period's language is hardly unique. After all, "[t]he terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998).

American Pipe always has applied to statutory time bars with such categorical language. In *American Pipe* itself, the Clayton Act provided that "any" private suit initiated following a related government action "shall be forever barred unless commenced" within one year after the government action ended. *See* 414 U.S. at 541-42 & nn.2-3. Likewise, § 13's one-year period, to which respondents do not dispute *American Pipe* applies, states that "[n]o action shall be maintained . . . unless brought within" one year after discovery of a violation. 15 U.S.C. § 77m. No rational principle of textual interpretation supports

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[5] Although respondents assert (at 35) that this Court's other decisions applying or discussing *American Pipe* "prove nothing about *American Pipe*'s basis or breadth," those decisions in fact show a longstanding recognition that the *American Pipe* rule applies generally under Rule 23. *See* Pet. Br. 26 & n.7 (citing prominent treatises).

differentiating between "in no event" on one hand, and "forever barred" and "no action shall be maintained" on the other.

Respondents also improperly read "in no event" in isolation, rather than in the context of its companion one-year provision. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). "In no event," as used in § 13, reflects Congress's intent to cabin the effect of the one-year provision's built-in discovery rule. *Cf. Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013) ("statutes applying a discovery rule . . . often couple that rule with an absolute provision for repose"). Respondents (at 43) mischaracterize petitioner as claiming the two periods in § 13 are "fungible." Our position is that the different application of the discovery rule in § 13 says nothing about whether *American Pipe* applies to the three-year period, and respondents have not met their burden of showing otherwise.

2. Neither § 13's two-part structure nor the fact that § 13's three-year period runs from the offering or sale of a security (rather than from the accrual or discovery of a claim) precludes applying *American Pipe* to that provision. *Cf.* Resp. Br. 17-21. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), the Court reasoned that the two-part structure of the securities laws' time limitations demonstrates Congress's intent to foreclose "equitable tolling" of the longer periods that run from a specified event, rather than from discovery of a violation. *Id.* at 363. Thus, even when an investor "'remains in ignorance of [fraud] without any fault or want of diligence or care on his part,'" the longer period is not tolled "'until the fraud is discovered.'"

Id. (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875)).

The reason for that conclusion is obvious: if both periods ran from discovery of the violation, then the longer period would "have no significance." *Id.* (internal quotation marks omitted); *see* Pet. Br. 33-34. The longer period thus serves as "a period of repose" and "a cutoff," because it bars claims even when the investor did not discover the violation within the statutory period. *Lampf*, 501 U.S. at 363. In *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), the Court relied on that conclusion to reassure issuers and underwriters that, even though the shorter period for § 10(b) claims does not begin to run until discovery of facts relating to scienter, the longer period precludes investors from relying on the discovery rule to bring claims more than five years after the violation. *See id.* at 650 (citing *Lampf*).

American Pipe, however, does not toll a time bar until a diligent plaintiff "discover[s]" a fraud claim. *Lampf*, 501 U.S. at 363. It suspends a time bar while an asserted class action covering the plaintiff's claims remains pending. *Lampf*'s rejection of "equitable tolling" where the statute already incorporates a discovery rule therefore does not support the decision below, as respondents incorrectly assert (at 23-26).

3. Respondents correctly acknowledge that labeling § 13's three-year period a "statute of repose" does not advance their argument. *See* Resp. Br. 21 ("[w]hat ultimately matters is not the label attached to a time bar"). In *CTS*, the Court recognized a distinction – of relatively recent vintage – between statutes of limitations and repose. *See* 134 S. Ct. at 2185-86. The two types of provisions differ, the

Court explained, in that statutes of repose are not "subject to equitable tolling, a doctrine that 'pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" *Id.* at 2183 (quoting *Lozano*, 134 S. Ct. at 1231-32). Even if § 13's three-year period were deemed a statute of "repose," *American Pipe* is not equitable tolling as the Court described it in *CTS*. *American Pipe* therefore applies to petitioner's motion to intervene, regardless of the classification of § 13.

Further, *American Pipe* is fully consistent with the purposes respondents attribute to "statutes of repose" and to § 13. Respondents claim that statutes of repose aim to mitigate the "risk that the 'equity-minded judge [will] seek for ways of relief in individual cases'" and "ensure that courts do not upend [Congress's] judgment as to when permitting new claims would undermine its determination of the overriding public interest." Br. 19-20 (first alteration in original). But *American Pipe* neither permits judges to extend time bars with ad hoc equitable exceptions nor enables plaintiffs to bring "new claims" beyond statutory time limits. It allows putative class members to pursue claims that "concern the same evidence, memories, and witnesses" as those timely asserted in a class-action complaint. *American Pipe*, 414 U.S. at 561-62 (Blackmun, J., concurring).[6]

A potential defendant who has not been sued within the three-year period accordingly may "feel

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[6] That members of an uncertified class are not considered parties is irrelevant, *cf.* Resp. Br. 46-47, because those members may "receive certain benefits," such as the application of *American Pipe*, *Smith*, 131 S. Ct. at 2379 n.10.

safe . . . that he will not be disturbed" (Resp. Br. 23) (internal quotation marks omitted), thereby achieving repose. Unlike with equitable tolling, a defendant need not fear "lingering liabilities" (*id.* at 22) (internal quotation marks omitted) from stale or newly discovered claims. There is nothing "stale" (*id.* at 50) about claims asserted by class members that arise from the same evidence, memories, and witnesses as those asserted in the class complaint. The defendant is fully on notice of those claims and may preserve evidence and prepare its defense.

Nor does *American Pipe* "disrupt normal business" or "facilitate false claims." *Id.* at 22 (internal quotation marks omitted). It requires defendants to mount a defense against claims that are brought within the three-year period and of which they are put on legal notice. There is no possibility that false claims will be manufactured long after the fact and after the defendant's ability to mount a defense has been compromised. Having to defend against class members' claims after three years, therefore, does not disturb a defendant's "repose," because *American Pipe* applies only when a defendant's repose has already been disturbed by the timely filing of a class-action complaint.

C. Accepting Respondents' Position Would Impair The Federal Judicial System's Efficient Operation

Respondents' proposed exception to *American Pipe* "would deprive Rule 23 class actions" in cases subject to § 13 "of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. Because the Private Securities Litigation Reform Act of 1995 ("PSLRA") imposes a discovery stay pending resolution of motions to dismiss, *see*

15 U.S.C. § 77z-1(b), it often takes significant time after suit is filed for investors to develop evidence necessary to support a certification motion. Accordingly, it is no surprise that § 13's three-year period expires before a class-certification determination in approximately 73% of cases that reach such a decision. *See* Law Profs. Br. 6. And that figure does not include cases in which a class is later decertified or when class certification is reversed on appeal. *See* Pension Funds Br. 4, 12.[7]

Without *American Pipe*, institutional and individual investors alike would be forced to take duplicative action to protect their rights before the district court rules on class certification. They would face the burdensome and costly task of monitoring securities class actions across the country and analyzing when their individual stakes warrant intervention or a separate action. *See id.* at 11-13. Investors would thus have to duplicate the work that class representatives are already doing on their behalf. Successful motions to intervene would complicate discovery and engender disputes among plaintiffs, burdening

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[7] Even the study cited by the Business Roundtable (at 31) shows that more than one-third of securities class actions take more than three years from the complaint to a class-certification decision, leaving no time under the three-year period. *See* Renzo Comolli & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review* 20 (Jan. 21, 2014), *available at* http://www.nera.com/nera-files/PUB_2013_Year_End_Trends_1.2014.pdf. Another 31% take between two and three years, meaning the complaint would need to be filed within one year or less after the offering or sale to leave any time under the three-year period. *Id.* But it is often infeasible for investors to discover misstatements in offering materials, let alone file a complaint, within a year (which is why the one-year period contains a textual discovery rule).

parties and courts alike. *See id.* at 15-16; Fed. Judges Br. 10. And separate actions would produce duplicative discovery and motions practice – with potentially conflicting rulings – in forums distant from the class action. *See* Pension Funds Br. 17-18.[8]

Remarkably, respondents *welcome*, rather than deny, the negative consequences of their approach. They *encourage* any putative class member in a securities class action with a claim worth pursuing to file a separate lawsuit or motion to intervene. But this Court has rejected respondents' policy preferences, explaining that the multitudinous filings respondents deem (at 48) "affirmatively desirable" are actually inconsistent "with federal class action procedure," *American Pipe*, 414 U.S. at 554. Such filings constitute "needless duplication," *id.*, because the asserted class member's efforts to protect its rights are completely redundant of the class representative's efforts, and are entirely unnecessary if a class is certified. As this Court explained in *Crown, Cork & Seal*, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." 462 U.S. at 352-53. The alternative is wasteful and duplicative litigation that would impose high costs on the judicial system.[9]

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[8] Because many institutional investors owe fiduciary duties to their beneficiaries under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104(a)(1), duplicative filings are even more likely. If the *American Pipe* rule did not apply to securities class actions, ERISA plan fiduciaries could be accused of violating those duties by failing to intervene or file an individual action. *See* Pension Funds Br. 8.

[9] In claiming (at 25) such filings would be manageable because securities litigation "imposes a relatively light burden"

Respondents' approach also requires abrogating *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 159, 176 n.13 (1974), because it would preclude any investor from opting out of a certified class and pursuing her claims unless she "fil[ed] a complaint or [sought] intervention" within § 13's three-year period. Resp. Br. 49; *cf. Crown, Cork & Seal*, 462 U.S. at 351-52. Such a rule would prevent the opt-out procedure from serving its functions of ensuring adequate representation and procedural fairness for unnamed class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); Public Citizen Br. 11-14.

Accepting respondents' position also would disrupt operation of the PSLRA's lead-plaintiff provisions. *See* AARP Br. 23-25. That Act requires a district court presiding over a securities class action to select a lead plaintiff, which Congress expressly provided can be "a class member who is not individually named as a plaintiff in the complaint." 15 U.S.C. § 77z-1(a)(3)(B)(i); *id.* § 78u-4(a)(3)(B)(i). On respondents' view, unless the selection of a lead plaintiff occurs within three years of the offering or sale of the securities, an unnamed class member chosen as lead plaintiff cannot file an amended complaint (as is typical), and even the appointment itself could be challenged on the theory that the investor's claims have been "cut off." Given that *American Pipe* had been settled law for more than two decades when the

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on federal courts, SIFMA produces a graph (at 26) that misleadingly includes only the few categories of civil litigation that are even more burdensome than securities litigation. SIFMA's study actually shows that private securities litigation is among the most burdensome types of federal civil litigation. *See* Federal Judicial Center, *2003-2004 District Court Case-Weighting Study* 5 (2005), *available at* https://bulk.resource.org/courts.gov/fjc/CaseWts0.pdf.

PSLRA was enacted, it is inconceivable that Congress intended § 13's three-year period to have such a destabilizing effect on the congressionally sanctioned operation of securities class actions.

The upheaval generated by respondents' position would not be limited to securities litigation. The Business Roundtable (at 12) supports exempting from *American Pipe* an "entire spectrum of federal and state statutes" that it characterizes as "statutes of repose." Creating ad hoc exceptions to *American Pipe* might benefit respondents and their *amici* in certain pending cases by arbitrarily and unjustifiably limiting their liability for claims timely asserted in a class-action complaint. But it would disserve Rule 23's purposes and the federal judiciary's needs.

Taken to its logical extreme, respondents' approach would produce even more absurd results. If § 13 truly "negat[es] any reason for extending the statutory deadline beyond three years," Resp. Br. 43, then the enforceability of tolling agreements – which long have been viewed as a legitimate way for parties to "deal with their affairs as they wish," *United States v. Curtiss Aeroplane Co.*, 147 F.2d 639, 642 (2d Cir. 1945) (L. Hand, J.) – would be called into question. Although respondents do not acknowledge it, their extreme position also would cast doubt on the ability of members of a certified class to recover when, as is common (Law Profs. Br. 6-7, 11-14), class certification occurs more than three years after the securities' offering or sale. *American Pipe* rejected such an absurd result: "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. The utter lack of a limiting principle in respondents' position reinforces the wisdom of adhering to *American Pipe*.

D. *American Pipe*'s Interpretation Of Rule 23 Comports With The Rules Enabling Act

1. In *American Pipe*, the Court considered and rejected an argument that the rule it adopted violated the Rules Enabling Act ("REA") by modifying a "substantive" right. *See* 414 U.S. at 556-59. Respondents nonetheless contend (at 40) that applying *American Pipe* here would violate the REA because § 13's three-year period "directly affects litigants' substantive rights." But respondents ignore the Court's admonition that "[t]he proper test is *not* whether a time limitation is 'substantive' or 'procedural.'" *Id.* at 557-58 (emphasis added).

Respondents also disregard this Court's general standard for addressing the validity of a federal procedural rule under the REA. The test is whether the rule "really regulates procedure," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941), not whether the law with which the rule assertedly conflicts is "substantive," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010) (plurality). Respondents' contention (at 40) that *American Pipe* does not "really regulate[] procedure" in this case because § 13 governs "substantive rights" turns the *Sibbach* test on its head. Under the REA, "the substantive nature of [§ 13], or its substantive purpose, *makes no difference*" because a federal rule is not "valid in some cases and invalid in others" depending on "whether its effect is to frustrate" a law characterized as "substantive." *Shady Grove*, 559 U.S. at 409 (plurality).

American Pipe's interpretation of Rule 23 "really regulates procedure." *Sibbach*, 312 U.S. at 14; *see* Pet. Br. 46-47. It determines how the filing of a class-action complaint affects the running of statutory time provisions, much like Rule 3 determines how

the filing of an individual complaint affects statutory time provisions for certain federal-question actions filed in federal court. *See West v. Conrail*, 481 U.S. 35, 38-40 (1987). Thus, even if respondents were correct that *American Pipe* has an "incidental effect" upon substantive rights, the REA is not implicated. *See* AARP Br. 17-25.

2. Regardless, § 13 does not create or limit substantive rights; it is a procedural provision that determines when an action may be brought. Nothing in the text, structure, or history of § 13 indicates that the three-year period affects substantive rights. Both the one- and three-year prongs express when an action may be "maintained" or "brought"; neither delimits the scope of a substantive right. In short, § 13's three-year period refers to "a suit's commencement," not "a right's duration." *Beach*, 523 U.S. at 417. If Congress had intended to enact a time bar affecting substantive rights, it would have used much different language. *See id.* at 416-17 (statutes providing "that a cause of action may or must be brought within a certain period of time" do not "govern[] the life of the underlying right").[10]

CTS does not support respondents' REA argument. That case identified two tangible differences between statutes of limitations and statutes of repose: (1) statutes of limitations run from the accrual or discovery of a claim, whereas statutes of repose run from a defendant's last act and thus can expire before a claim accrues or is discovered, *see* 134 S. Ct. at 2182; and (2) statutes of limitations are subject

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[10] Respondents (at 42-43) mischaracterize petitioner's position as contending that a statute must contain "magic words" to affect substantive rights under the REA. Unlike the statute in *Beach*, § 13 contains *no* words indicating an effect on substantive rights.

to equitable tolling, whereas statutes of repose are not, *see id.* at 2183. Neither difference suggests that statutes of repose, unlike statutes of limitations, generally create substantive rights under the REA.[11]

Moreover, even if some modern state legislatures do intend statutes of repose to create or limit substantive rights, that would shed no light on the intent of the 1930s Congress that enacted and amended § 13. The *CTS* Court recognized the distinction between statutes of repose and statutes of limitations as a recent development. *See id.* at 2185-86 (citing sources demonstrating occasional distinction, starting in 1977). A leading treatise at the time of § 13's enactment and amendment declared that "[t]he statute of limitations is a statute of repose," 1 Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 4, at 8 (4th ed. 1916), and "[t]he weight of authority now is that the statute of limitations as to personal actions affects only the remedy, and does not extinguish the right," *id.* § 1, at 3. Regardless of the intent of some modern state legislatures, the Congress that enacted § 13 would not have thought that it was creating or limiting substantive rights.

3. Applying *American Pipe* is fully "consonant with the legislative scheme" of § 13. *American Pipe*, 414 U.S. at 557-58. In arguing (at 44-45) to the contrary, respondents rehash the same flawed arguments from earlier in their brief (at 13-38). But nothing in § 13 precludes the normal operation of the *American Pipe* rule. *See supra* Part I.B, Pet. Br. 28-38.

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[11] Similarly, the inapplicability of equitable tolling under *Lampf* does not transform § 13's three-year period into a provision governing substantive rights.

II. RESPONDENTS' STANDING ARGUMENT PROVIDES NO BASIS FOR AFFIRMING THE JUDGMENT BELOW

The Court should ignore or reject respondents' alternate contention (at 50-56) that *American Pipe* does not apply because Wyoming lacked standing to assert petitioner's claims. The Second Circuit did not address that argument, and it fails.

A. Respondents misconstrue this issue as one of Article III standing. Class actions inherently entail named plaintiffs litigating claims arising from injuries suffered by others – claims that the named plaintiffs would lack standing to pursue on their own behalf outside of the class-action context.[12] Respondents recognize as much, for they admit (at 51) that a named plaintiff can pursue claims that are not "the same as" her own, so long as those claims are "substantially similar." In *Gratz v. Bollinger*, 539 U.S. 244 (2003), this Court reserved judgment on whether a variation between the claims of a named plaintiff and those of unnamed class members "is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to" Rule 23(a). *Id.* at 263; *see id.* at 263 n.15.[13]

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[12] *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 769 (1st Cir. 2011) ("In a properly certified class action, the named plaintiffs regularly litigate not only their own claims but also claims of other class members based on transactions in which the named plaintiffs played no part.").

[13] Just two Terms ago, this Court declined review in a case involving the scope of a named plaintiff's standing to represent purchasers in related offerings of mortgage-backed securities. *See Goldman, Sachs & Co. v. NECA-IBEW Health & Welfare Fund*, 133 S. Ct. 1624 (2013).

Respondents ignore *Gratz*, even though it post-dates each case on which they rely (at 51).

Petitioner does not seek relief for a different "'kind'" of "'injurious conduct'" than does Wyoming. *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)). Wyoming alleged the same type of injury as petitioner (investment losses) stemming from the same injurious conduct (untrue statements and omissions in offering documents for mortgage-backed securities) involving securities issued under the same shelf registration statements, and it sought damages from the same defendants. *Compare* JA217-33 (Am. Consol. Compl. ¶¶ 1-50) *with* JA352-68 (Proposed Second Am. Consol. Compl. ¶¶ 1-55). Whether Wyoming could represent a class that included entities, such as petitioner, that bought certificates in different offerings implicates Rule 23(a), not Article III. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (Rule 23(a) "effectively limit[s] the class claims to those fairly encompassed by the named plaintiff's claims") (internal quotation marks omitted).[14]

Thus, although the district court mistakenly called its ruling a "[c]onstitutional standing" decision (App. 58a), the basis for ruling that Wyoming could not pursue a class action on petitioner's behalf is not relevantly different from the bases for declining to certify classes in cases in which this Court has applied *American Pipe*. *See Crown, Cork & Seal*, 462

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[14] *See also* 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1785.1, at 388-89 (3d ed. 2005) ("[W]hether [named plaintiffs] may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation."); 1 William B. Rubenstein, *Newberg on Class Actions* §§ 2:1, 2.6, at 59, 86 (5th ed. 2011).

U.S. at 347-48 (district court denied class certification for lack of typicality, adequacy, and numerosity).

B. Respondents' push for a "standing" exception to *American Pipe* also rests on a misunderstanding of the doctrine's operation. The decision whether to apply *American Pipe* comes when a former putative class member moves to intervene or files its own complaint. If the defendant raises a time bar as a reason to deny intervention or to dismiss the new complaint, the district court in which the intervention motion or new complaint was filed – a court that unquestionably has jurisdiction to rule on the motion to intervene or to dismiss – will decide what effect to give the prior filing of a class-action complaint in determining timeliness. Whether the district court handling the earlier class-action complaint had jurisdiction to adjudicate every allegation in that complaint has no bearing on that determination. *See* Public Citizen Br. 15-22.

American Pipe's rationale applies fully to cases in which the original named plaintiff is said to have lacked standing to pursue claims on behalf of certain putative class members. Limiting *American Pipe* as respondents propose would force class members uncertain of a named plaintiff's standing to make duplicative filings asserting their claims. Because "there is much uncertainty in this area of the law," respondents' position would "'result[] . . . [in] a needless multiplicity of actions – precisely the situation that'" Rule 23 and *American Pipe* "'were designed to avoid.'" *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (quoting *Crown, Cork & Seal*, 462 U.S. at 351). The district court below correctly recognized as much. App. 41a.

Respondents' contention (at 52-56) that Wyoming's complaint failed to provide them with notice of petitioner's claims rests on an empty formalism. Respondents do not and cannot dispute that Wyoming's complaint *in fact* apprised them "of the substantive claims being brought against them." *American Pipe*, 414 U.S. at 554-55. Apart from adding a brief section naming the intervenors as plaintiffs, JA361-62 (Proposed Second Am. Consol. Compl. ¶¶ 22-25), the allegations in the proposed complaint attached to petitioner's motion to intervene are substantively identical to the allegations in Wyoming's consolidated complaint. *Compare* JA351-460 (Proposed Second Am. Consol. Compl.) *with* JA217-322 (Am. Consol. Compl.). Thus, as the district court recognized, applying *American Pipe* would not "surprise defendants or force them to defend against stale claims" because "[t]he original class complaints notified defendants of the claims that [petitioner] now seek[s] to assert." App. 41a.

C. Ultimately, this case illustrates the wisdom of this Court's practice of declining to decide issues not first addressed by the court of appeals. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"). Any consideration by this Court of the issues implicated in respondents' standing argument should await a case in which those issues have been addressed first by the court of appeals and have been fully briefed by the parties in this Court. *See Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2120 (2014) (declining to consider issue not argued in petitioner's opening brief).

* * *

Since *American Pipe* 40 years ago, an unbroken line of this Court's cases has held that the filing of a class-action complaint in federal court stops the running of statutory time limitations for asserted class members' claims. Under those precedents, the Second Circuit's decision cannot stand. Respondents' bid to create a case-by-case exception to *American Pipe* for time limitations characterized as statutes of repose lacks support in this Court's cases and would unjustifiably burden the federal court system.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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