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 FOR W.R. HUFF ASSET MANAGEMENT CO., L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

W.R. Huff Asset Management Co., L.L.C. ("Huff"), as *amicus curiae*, respectfully submits this brief in support of Petitioner Public Employees' Retirement System of Mississippi ("Petitioner") seeking reversal of the United States Court of Appeals for the Second Circuit's decision in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). The Court of Appeals held that the three-year limitation on suit provision in Section 13 of the Securities Act, 15 U.S.C. § 77m ("Section 13"), is not subject to tolling under *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974).[1]

In its opening brief, Petitioner has persuasively demonstrated (i) why the *American Pipe* rule is not a form of equitable tolling precluded by this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and (ii) why Section 13 is not a true "statute of repose" that provides defendants with "substantive" rights, which means its tolling under *American Pipe* does not raise any conflict with the Rules Enabling Act, 28 U.S.C. § 2072(b). Huff writes separately to explain why, even if the Court were to reject these arguments, *American Pipe* still applies to suspend the operation of Section 13's three-year limitations period for all

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[1] Letters from the Petitioner and Respondents consenting generally to the filing of briefs by *amici curiae* are on file with the Court. Pursuant to this Court's Rule 37.6, counsel for Huff represents that no part of this brief was authored by counsel for any party, and no person or entity other than Huff and its counsel made any monetary contribution to the preparation or submission of the brief.

absent members of a timely-filed class action.[2] The reason is that, by operation of Rule 23 as interpreted in *American Pipe*, all class members "brought" their claims within the meaning of Section 13 when the class filed suit, thereby satisfying both the one- and three-year time limitations contained in that statute for all class members. Hence, *Lampf* is not on point, and there is no Rules Enabling Act problem, regardless of whether one views the three-year period in Section 13 as a "statute of limitations" or a "statute of repose."

Huff is a registered investment adviser under the Investment Advisers Act of 1940, with an office in Morristown, New Jersey, that provides financial management services for institutional investors such as state, municipal and corporate pension funds, university endowments and charitable foundations. Huff manages investment accounts for these clients through contractual agreements and powers of attorney that provide Huff with discretionary authority to purchase and sell securities on its clients' behalf. In addition, Huff manages a number of investment funds that purchase and trade securities of all kinds.

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[2] Section 13 of the Securities Act of 1933 – titled "Limitation of actions" – prescribes a one-year-from discovery limitations period for claims under Sections 11 and 12(a)(2) of the Act, and further provides, in relevant part, that "[i]n no event shall" an action under Section 11 "be brought . . . 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.

As part of the services it provides, Huff often assists its clients in pursuing claims for losses suffered as a result of violations of the federal securities laws by the issuers of securities it has purchased, as well as the issuers' auditors, underwriters and other secondary actors. Huff retains counsel to represent its clients in such cases and manages the litigation on its clients' behalf under its powers of attorney. Huff also sometimes participates in the litigation as a named plaintiff. The investment funds that Huff manages, such as The Huff Alternative Income Fund, L.P., also have brought suits for securities fraud under state and federal law in various courts.

It is often the case that the claims Huff wishes to assert on behalf of its clients or managed funds are also the subject of class litigation in which the clients and managed funds are members of the putative class. In cases where Huff's clients and managed funds are dissatisfied with the settlement consideration offered to class members and possess claims that in the aggregate are sufficient to justify prosecuting individual litigation, Huff will request exclusion from (i.e., "opt out" of) the class on its clients' behalf. Consequently, Huff has a professional interest in advocating for legal principles that protect a class member's meaningful right to exclude itself from a class.

By holding that the commencement of a class action does not halt the running of a statute of repose that applies to absent class members' claims, the Court of Appeals' decision threatens effectively to eliminate post-certification opt out rights for class

members in cases where the repose period expires before class certification is decided. As a result, the Court of Appeals' decision here threatens to make it far more difficult for aggrieved investors like Huff's clients to vindicate their rights, have their day in court and obtain full compensation for their losses under the federal securities laws. Because the Court of Appeals' decision conforms to neither this Court's precedents nor Rule 23 of the Federal Rules of Civil Procedure, it should be reversed.

SUMMARY OF ARGUMENT

I. *American Pipe* held that, because absent class members are treated as if they were named plaintiffs in the class action for purposes of determining compliance with statutory time limits on bringing suit, a putative class representative's timely filing of a class action complaint commences a lawsuit on the claims of all class members. Thus, the class's filing suit has the same legal effect on existing statutes of limitations and repose as if the absent class members had each filed their own individual complaints at the same time against the same defendants. To the extent this rule can be considered "tolling" at all, it is a unique type of tolling that is fundamentally unlike the conventional forms of "equitable" and "legal" tolling on which the Court of Appeals focused. Claims of individual class members are "tolled" upon the filing of a class action because by operation of law each class member is deemed to have brought suit on his or her individual claim.

Contrary to the objections raised by Credit Suisse Securities (USA) LLC and the other underwriter respondents (the "Credit Suisse Respondents"),

treating class members as effective parties to a putative class action for timeliness purposes accords with the Court's jurisprudence in this area. The *American Pipe* rule is a direct consequence of the unique attributes of the class action as a procedural vehicle for adjudicating large numbers of factually-related claims, and, in particular, reflects the balance between competing objectives struck in Rule 23 (and especially in Rule 23(b)(3) "opt out" classes). On the one hand, Rule 23 encourages the aggregation of similar claims in a class action so as to minimize the burden on the federal courts from having to adjudicate a multitude of similar, related, individual suits. On the other hand, Rule 23(b)(3) (the rule governing class actions for damages under the federal securities laws) expressly preserves the constitutionally grounded rights of individual class members to receive notice and an opportunity to exclude themselves from the class. These rights give absent class members the ability, if they are dissatisfied with the progress of, or any proposed settlement in, the class case, to control the disposition of their own individual claims (whether by continuing to litigate them or settling them on different terms) without being bound by any judgment entered in the class action. As the Court's decisions indicate, this balance of competing objectives at the heart of Rule 23 results in absent class members being treated as "parties" or "non-parties" to the same class action at different times and for different legal purposes. Preserving this balance necessitates treating them as named plaintiffs for timeliness purposes in accord with *American Pipe*.

Given that under *American Pipe* the filing of a class case commences suit for everyone who is a member of the class, the legal effect on both statutes of limitations and so-called "statutes of repose" is the same: the filing of the suit stops the "limitations" or "repose" clock from running, just as it would if each class member filed his or her own individual complaint at the same time as the class. As it is beyond cavil that a statute of repose ceases to run when the plaintiff brings suit against the defendant, there is no justification for treating statutes of repose differently from statutes of limitations under *American Pipe*.

II. So understood, *American Pipe* does not violate the Rules Enabling Act when applied to Section 13, even if the three-year limitations period in that statute is construed as a statute of repose conferring substantive rights. *American Pipe*'s interpretation of Rule 23 does not alter the rules of decision governing Section 13's three-year limit on suit, but merely regulates the means of enforcing those rights by providing the federal courts with a way to determine procedurally whether a given plaintiff has brought suit within the prescribed statutory period, just as Rule 3 of the Federal Rules of Civil Procedure (which provides that a party commences a civil action in federal court by filing a complaint) does more generally.

American Pipe is also consonant with the overall legislative scheme of the Securities Act of 1933. The *American Pipe* rule does not deprive any defendant of the right not to be sued under that statute after the three-year period has lapsed. Rather, *American*

Pipe deems a plaintiff's claim under Sections 11 or 12 of the Securities Act to have been "brought" when a putative class of which that plaintiff is a member asserts such a claim. If that happens before the three-year period expires, then the defendant has been sued within the "repose" period and has received the benefit of the substantive right that Section 13 purportedly confers on him. Accordingly, applying *American Pipe* to Section 13 does not abridge, enlarge or modify any substantive right. This Court should reverse the Court of Appeals' contrary decision.

ARGUMENT

I. THE FILING OF A CLASS ACTION COMMENCES PROSECUTION OF EACH CLASS MEMBER'S CLAIM FOR PURPOSES OF A STATUTE OF REPOSE AS IF EACH CLASS MEMBER WERE SPECIFICALLY NAMED AS A PLAINTIFF IN THAT ACTION.

The Court of Appeals observed that the parties disagreed on whether the *American Pipe* rule is a form of "equitable" or "legal" tolling. *Police & Fire Ret. Sys.*, 721 F.3d at 107-08. Ultimately, however, the Court of Appeals held the distinction was irrelevant because, in its view, if *American Pipe*, as applied to what it called Section 13's "statute of repose," is a form of equitable tolling it is barred by *Lampf*, and if it is a form of legal tolling it is barred by the Rules Enabling Act. *Id.* at 108. In taking this approach, the Court of Appeals erred, as its reasoning is based on a misunderstanding of both the conceptual foundations and practical operation of the *American Pipe* rule. Even assuming the Court of Appeals was correct that Section 13's three-year

limitation on suit is a statute of repose, to determine whether that period is suspended under *American Pipe* during the pendency of a class action, the dispositive question is whether the individual plaintiff's claims are based on the same evidence, memories and witnesses as the subject matter of the suit brought on behalf of the class of which the plaintiff was a member and, hence, a party to the suit for timeliness purposes. *See* 414 U.S. at 550; *see also id.* at 562 (Blackmun, J., concurring).

A. Under American Pipe*, Absent Class Members Are Treated As Named Plaintiffs In The Class Action For Purposes Of Satisfying Statutory Time Periods For Bringing Suit.*

American Pipe holds 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). A class action under Rule 23 is "a truly representative suit" in which the absent class members stand "as parties to the suit" for statute of limitations purposes unless and until they receive notice of the action and choose to exclude themselves from the class, or until it is definitively determined that the action cannot lawfully proceed on a classwide basis. *See id.* at 550-51. The Court has reaffirmed this formulation of the *American Pipe* rule in two subsequent decisions. *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) ("Nonnamed class members are, for instance, parties [to the class action] in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." (citing *American Pipe*, 414 U.S. 538 (1974))); *Chardon v. Fumero Soto*, 462

U.S. 650, 659 (1983) (holding that in *American Pipe*, the "Court reasoned that, under the circumstances, the unnamed plaintiffs should be treated as though they had been named plaintiffs during the pendency of the class action"); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-54 (1983) (extending *American Pipe* rule to class members who file individual actions rather than motions to intervene in the class case).

Numerous lower courts also understood *American Pipe* as standing for the proposition that the filing of a class complaint commenced the action for all members of the putative class, who are treated for statute of limitations purposes as named plaintiffs to the suit. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1229 (10th Cir. 2008) ("Conceptually, *American Pipe* incarnates the principle that the class action is a representative creature. That is, members of a putative class are treated as if they were parties to the action itself 'until and unless they received notice thereof and chose not [to] continue.'" (citation omitted)); *In re WorldCom Sec. Litig.*, 496 F.3d 245, 252 (2d Cir. 2007) ("After considering the history of Rule 23, the Court [in *American Pipe*] noted that the present version of the Rule makes class actions 'truly representative suit[s]' in which the claims of class members are pressed by class representatives. As a result, the class members should be considered parties to the suit 'until and unless they received notice thereof and chose not to continue.'" (citation omitted)); *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000) (holding that *American Pipe* tolling doctrine really "does not involve 'tolling' at all"

because the plaintiff "has effectively been a party to an action against these defendants since a class action covering him was requested but never denied"). As the Tenth Circuit has explained:

> [T]he filing of a class action, in a classic legal fiction, causes the courts to treat "members of the asserted class" as if they 'hav[e] instituted their own actions, at least so long as they continue to be members of the class . . .' and they have "the benefit of tolling . . . for as long as the class action purports to assert their claims."

State Farm, 540 F.3d at 1229 (quoting *In re WorldCom*, 496 F.3d at 255).

Thus, under *American Pipe*, absent class members do not need to be excused from having to commence suit on their own claims within the prescribed limitations (or repose) period by some legal or equitable tolling mechanism, because by operation of law ***they already commenced suit*** on those claims when the class action was filed. *American Pipe*, 414 U.S. at 550-51; *see also In re WorldCom*, 496 F.3d at 252 ("Thus, just as the filing of the class action satisfied the State of Utah's [the lead class plaintiff in *American Pipe*] statute-of-limitations obligations, it also did so for class members, including the intervenors"); *Joseph*, 223 F.3d at 1168 (same); *State Farm*, 540 F.3d at 1232-33 (same). As the Second Circuit held in *Worldcom*, "[b]ecause members of the asserted class are treated for limitations purposes as having instituted their own actions, at least so long as they continue to be members of the class, the limitations period does not

run against them during that time." *In re WorldCom*, 496 F.3d at 255.

When a class member opts out of a class or is excluded from the class by the trial court's certification decision, she "ret[akes] the reins" on her claims from the lead class plaintiff, and the statute of limitations (or repose) consequently begins to run again on those claims. *See American Pipe*, 414 U.S. at 561 (holding that because class complaint was filed with eleven days remaining on the limitations period at issue, the intervenors had eleven days following entry of the order denying class certification to file their motions to intervene); *Chardon*, 462 U.S. at 661; *In re WorldCom*, 496 F.3d at 255*; State Farm*, 540 F.3d at 1233.

B. The American Pipe *Rule Is Fundamentally Different From Other Forms of Tolling As That Concept Has Traditionally Been Understood.*

The Court of Appeals in this case never addressed the argument that *American Pipe* deems suit on all class members' claims to have been brought for limitations purposes when the class files its complaint. Yet, this aspect of *American Pipe*'s holding undermines the Court of Appeals' entire analysis.

American Pipe's treatment of absent class members as named plaintiffs in the class action whose claims have been commenced (or, in the language of Section 13, "brought") for limitations purposes has prompted the Tenth Circuit to remark that American Pipe "does not involve 'tolling' at all." *Joseph*, 223 F.3d at 1168. Admittedly, that remark

appears hard to square with this Court's repeated characterization (including in *American Pipe* itself) of the *American Pipe* rule as "tolling" the statute of limitations for absent class members. *See, e.g.*, *Devlin*, 536 U.S. at 10 (under *American Pipe*, "the filing of an action on behalf of the class tolls a statute of limitations against them"). And, of course, in some sense the Court's characterization is correct, since under *American Pipe* the filing of a class action suspends the limitations period – i.e., causes the limitations clock to stop – until such time as class certification is denied or the individual class member is excluded from the class, at which time the clock starts running again.

What the Tenth Circuit was really getting at, however, is that the *American Pipe* rule is not like other forms of tolling as that concept has been traditionally understood. True tolling occurs when a plaintiff is excused by operation of law from having to commence a lawsuit to enforce its rights within the prescribed timeframe because of some other condition or factor that the law recognizes as sufficient to excuse compliance with the normally applicable deadline. The classic example is the fraudulent concealment rule, under which the statute of limitations "does not begin to run until discovery of the fraud 'where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part*.'" *Credit Suisse Secs. (USA) LLC v. Simmonds*, 132 S.Ct. 1414, 1420 (2012) (quoting *Lampf*, 501 U.S. at 363). In both its conceptual underpinnings and practical operation, this rule excuses a plaintiff from having to commence suit by the normally applicable deadline if, through

no fault of its own, the plaintiff has not yet discovered the factual basis for its claim.

Other forms of traditional equitable tolling are to like effect, excusing a plaintiff from filing suit within the limitations period where she has pursued her rights diligently but been prevented from enforcing them by "'extraordinary circumstances.'" *Id.* at 1419 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Thus, this Court has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (footnotes omitted). Additional circumstances that might warrant equitable tolling include physical or legal disabilities that prevent a plaintiff from commencing suit. *See Young v. United States*, 535 U.S. 43, 50 (2002) (tolling of claim due to Bankruptcy Code's automatic stay while Chapter 13 bankruptcy petition was pending); *United States v. Brockamp*, 519 U.S. 347, 348 (1997) (discussing, but denying, equitable tolling on grounds of senility and alcoholism).

American Pipe "tolling" does not operate in the same manner. The underlying theory of *American Pipe* is not that the absent class members are ***excused*** from filing suit against the defendants named in the class action, but that they have in fact ***filed suit*** against those defendants on the same causes of action asserted by the class. 414 U.S. at 550 (holding that the "filing of a timely class action

complaint commences the action for all members of the class as subsequently determined"). Absent class members are treated as if they were named plaintiffs in the class action, and are deemed to have sued on their own claims at the same time the class did. *Chardon*, 462 U.S. at 659 ("[T]he unnamed plaintiffs should be treated as though they had been named plaintiffs during the pendency of the class action.").

For this reason, *Lampf*, which held that the discovery rule inherent in Section 13's one-year limitations period is incompatible with *Bailey*-style equitable tolling of that statute's three-year period, is simply inapplicable to the *American Pipe* rule. *See Lampf*, 501 U.S. at 363. Whether one calls it "tolling" or not, *American Pipe* is nothing like *Bailey*'s fraudulent concealment principle, as it does not effectively extend the applicable limitations period or excuse a plaintiff's failure to comply with that period. Moreover, there is nothing in *Lampf* that speaks to the question of how to determine when suit is "brought" under either prong of Section 13 in a class action/opt out setting. *American Pipe* provides a mechanism for answering that question, and thus is perfectly consistent with the discovery rule embedded in that statute's one-year period.

Accordingly, when the class plaintiffs in the case at bar filed their complaints asserting causes of action under the Securities Act against the defendants below, Petitioner, as a member of the putative class, by operation of law is deemed to have "brought" the same claims against the same defendants – ***as if Petitioner had filed its own individual action asserting the same claims on the***

same filing date. The defendants were sued by Petitioner when the relevant class complaints were filed. Since that happened within three years of the relevant offerings and sales of the securities at issue, Section 13's three-year period for bringing suit – whether one calls it a statute of limitations or a statute of repose – was satisfied. At that point, Petitioner no longer needed to be excused from filing an action by a "tolling" doctrine because it had already filed its action.

C. Treating Absent Class Members As If They Were Named Plaintiffs For Statute Of Limitations And Repose Purposes Is Fully Consistent With This Court's Precedent.

In their brief in opposition to the petition for certiorari, the Credit Suisse Respondents called this argument "puzzling," "illogical" and "perplexing." (Brief in Op. for Resp. Credit Suisse Secs. (USA) LLC *et al*. at 28.) How can it be, they reasoned, that the filing of a class action suit satisfies limitations periods "for persons who, by definition, *are not parties*" to the suit? (*Id*. (citing *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2379 (2011), for the proposition that "putative members of uncertified class [are] not 'parties' to suit").)

The Court has already answered this question. In the class action context, 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." *Devlin*, 536 U.S. at 10. Absent class members "may be parties" to the class action "for some purposes and not for others." *Id*. For purposes of determining the

timeliness of their lawsuits, *American Pipe* says that absent class members are parties to the class action from the moment of filing, which means the filing of a class complaint commences litigation on the causes of action for all members of the class, whether named as plaintiffs in the caption of the class action or not. 414 U.S. at 550. Whether absent class members are, or are not, parties to the class action for other purposes is simply irrelevant to whether the filing of a class action satisfies their obligations under a statute of limitations or a statute of repose.

The flexible nature of "party" status for class actions – the notion that absent class members can be parties to a class action for different purposes and at different times – derives from the uniquely innovative nature and characteristics of the class action as a procedural vehicle. The modern class action under Rule 23 is a "truly representative suit" in which a named plaintiff asserts claims against a defendant on behalf of herself and all other persons encompassed by the class that she defines. *See id.* This "representative" suit is "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* Developed from equity jurisprudence, a class action allowed a court to "proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder" by binding the absent parties to the decree "so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985). Modern class actions serve the same objectives, by "permitting litigation of a suit

involving common questions when there are too many plaintiffs for proper joinder" and also allowing "plaintiffs to pool claims which would be uneconomical to litigate individually." *Id.* at 809.

As this Court has noted, the 1966 amendments to Rule 23 contained a further, yet "'most adventuresome,'" innovation designed to increase the utility of the class action vehicle – the Rule 23(b)(3) "opt out" class action. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (quoting Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969)). Rule 23(b)(3) was intended for damages classes "designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Id.* at 614-15. One of its distinctive features is that, upon a district court's granting a motion for class certification, class members have the right to receive "the best notice" of the class litigation, and any settlement thereof, "that is practicable under the circumstances" and "to withdraw from the class at their option." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2558 (2011) (citing Rule 23(b)(3)); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). This right to notice and self-exclusion is of constitutional dimension. *Wal-Mart Stores*, 131 S.Ct. at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process." (citing *Phillips Petroleum*, 472 U.S. at 812)). At the same time the Rule23(b)(3) class serves what this Court has described as "one of the major goals of class action litigation – to simplify litigation involving a large number of class members with similar claims." *See Devlin*, 536 U.S. at 10. Class

actions under the federal securities laws, which invariably seek monetary damages for class members, are the quintessential examples of Rule 23(b)(3) "opt out" classes.

The class action mechanism created by Rule 23(b)(3) thus reflects a carefully struck balance between competing objectives – (1) encouraging the aggregation of common claims in a single action to relieve the federal court system of the burden of conducting thousands of trials against the same defendant involving identical claims and issues, while (2) at the same time ensuring fairness and due process to individual class members by allowing them, if they wish, to exclude themselves from the class and pursue their own claims. The embodiment of these competing objectives in the Rule 23(b)(3) class action mechanism, along with the need to make class actions work at a practical level, ultimately explains why absent class members can be both "parties" and "nonparties" to the same class action at different times and for different purposes, and why even when they are "nonparties" they still possess some of the rights and benefits of being "parties" – including the satisfaction of any statutory limitations or repose periods upon the filing of the class complaint.

When a putative class is filed but not yet certified, "the claimed members of the class st[and] as parties to the suit unless and until they receive[] notice thereof and cho[o]se not to continue." *American Pipe*, 414 U.S. at 550-51. This is a straightforward consequence of the class action vehicle's nature as a "truly representative suit" in

which the named plaintiff brings suit for, and on behalf of, all class members. *Id.* at 550. As a result of applying this rule, the commencement of the suit satisfies any statutory limitations or repose period that is then running on the class members' respective claims, as if the absent class members had filed their own complaint on the same day. *Id.* at 551. Without this rule, the pro-aggregation purpose of the class action mechanism – indeed, its entire *raison d'etre* – would be defeated,

> because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties – precisely the multiplicity of activity which Rule 23 was designed to avoid . . . .

Id.; *see also Devlin*, 536 U.S. at 10 (explaining that under *American Pipe* absent class member are parties to the class suit for statute of limitations purposes because "[o]therwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation – to simplify litigation involving a large number of class members with similar claims – would be defeated").

Treating absent class members as parties to the class action for limitations/repose purposes is also necessary to protect the constitutionally grounded right of class members to "opt out" of the class. Until they receive notice of class certification, absent class

members can remain passive beneficiaries of a class action without "any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *American Pipe*, 414 U.S. at 552. Consequently, unless the limitations/repose period is treated as having been satisfied by the class filing, the absent "class member would be unable to 'press his claim separately' if the limitations period . . . expired while the class action was pending." *Crown, Cork*, 462 U.S. at 351.

In order to preserve their opt out rights, class members who are aware of the class and possess substantial individual claims will begin filing their own individual actions before the repose period has expired – even though they might have been inclined to remain in the class if it achieved an adequate result for class members. This result again produces exactly the multiplicity of individual suits that Rule 23(b)(3) was intended to discourage. *Id.* at 350-51. *American Pipe* solves this difficulty because "the right to opt out and press a separate claim remain[s] meaningful because the filing of the class action toll[s] the statute of limitations" and prevents class members from having to file separate suits before the limitations period expires. *Id.* at 351-52; *see also Eisen*, 417 U.S. at 176 n.13.

On the other hand, when the inquiry shifts from the commencement of suit and satisfaction of limitations periods to the preclusive effect of any judgment entered in the class action, the rules concerning "party" status are different. Indeed, they ***have to be different*** in order to preserve the Rule

23(b)(3) class action's unique characteristics and combination of objectives. It is now black-letter law that prior to the certification of a putative class, and especially if certification is denied, absent class members are not bound by any judgment entered in the class action. *Smith*, 131 S.Ct. at 2379-80. This is true both because (1) given the procedural protections accorded absent class members under Rule 23, members cannot be bound unless a court has concluded the case can validly proceed as a class action, and (2) in a Rule 23(b)(3) class, as a matter of constitutional due process, absent class members cannot be bound by a class judgment absent notice and an opportunity to exclude themselves from the class. Thus, for the purpose of determining the preclusive effect of the judgment, absent class members of an uncertified class are not considered parties to the class action. *Id.*

Similarly, because of the constitutionally grounded opt out right, absent class members, even in a case with a certified class, cannot be bound by a judgment if they exercised their right to exclude themselves from the class in a timely manner. Upon exercising her opt out right, a person ceases to be a member of the class for any reason (and any applicable limitations and repose clocks again start running on her individual claims). On the other hand, class members who do not timely exclude themselves from a certified class ***are bound*** by a subsequently entered judgment. "[P]otential class members retain the option to participate in or withdraw from the suit" only until the district court decides a class certification motion and the class representatives send notice of members' inclusion in

the now-certified class. *American Pipe*, 414 U.S. at 549. After receiving that notice, class members must either exercise their opt out right and become "nonparties to the suit" who are "ineligible to participate in a recovery" or else remain as "full members who must abide by the final judgment, whether favorable or adverse." *Id.* Should the case settle, such "full members" of the class who object to the settlement are considered parties to the litigation who may appeal the district court's disposition of those objections. *Devlin*, 536 U.S. at 10-11, 14.

The bottom line is that there is no logical problem, as the Credit Suisse Respondents would have it, with (1) treating absent class members as parties (or "nonparties with benefits") to an uncertified class action for purposes of determining whether statutory timeliness periods on the class members' claims have been satisfied, as *American Pipe* teaches, while also (2) refusing to treat those same absent class members as parties to the same uncertified class action for purposes of determining the preclusive effect of any judgment entered in that action, as *Smith* held. As explained above, the two rulings are reconciled – indeed, necessitated – by the unique procedural attributes of the modern class action under Rule 23(b)(3). That is why, in the class action context, the "label 'party' does not indicate an absolute characteristic." *Devlin*, 536 U.S. at 10. It is also why absent class members can both obtain the benefit of the putative class's filing suit for purposes of satisfying statutory limitations and repose periods, while also avoiding the burdens of being bound by a pre-certification judgment entered in that same action. *See Smith*, 131 S.Ct. at 2379 n.10

(noting that *American Pipe* was "specifically grounded in policies of judicial administration [and] demonstrate[s] only that a person not party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding[;]" said "result is consistent with a commonplace of preclusion law – that nonparties may sometimes benefit from, even though they cannot be bound by, former litigation" (citations omitted)); *American Pipe*, 414 U.S. at 555-56 (holding that the Court's interpretation of Rule 23 in the form of the tolling rule it adopted "is nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that [Rule 23] in its present form was designed to serve").

D. There Is No Justification For Treating Statutes Of Repose Differently From Statutes Of Limitations Under American Pipe.

Given the way in which the *American Pipe* doctrine was conceived in theory and operates in practice, there is no legal justification for treating so-called "statutes of repose" differently from statutes of limitations when applying that doctrine. It is self-evident that a statute of repose stops running against a plaintiff when that plaintiff files a complaint and commences a lawsuit. In the class litigation context, *American Pipe* teaches that the filing of a class action is deemed as a matter of law to constitute the commencement of suit by all members of the putative class, just as if each class member were named as a plaintiff in the caption of the class complaint. So long as the class case itself was filed before the expiration of the applicable statutes of

limitations and repose, then the absent class members' claims were also timely filed – meaning that the statute of repose stopped running against the entire putative class when the class action was commenced.

Moreover, statutes of repose present the same problem as statutes of limitations in their ability to thwart Rule 23's objectives unless they are deemed satisfied for all class members by the filing of the class complaint. The same need to prevent a multiplicity of separate actions by class members who wish to preserve their ability to pursue individual claims before a statute of repose expires – as well as the need to keep opt out rights meaningful – justifies the same result under *American Pipe* for statutes of repose as for statutes of limitations.

The Court of Appeals, therefore, made a conceptual mistake when it determined that, whether viewed as legal or equitable tolling, *American Pipe* cannot extend Section 13's "repose" period. *See Police & Fire Ret. Sys.*, 721 F.3d at 107-08. In so reasoning, the Court of Appeals overlooked the fact that if a plaintiff were a member of a putative class that asserted claims under Sections 11 and 12 in a class action filed before the expiration of the statute of repose, then by operation of law that plaintiff's Section 11 and Section 12 claims were also "brought" within the repose period. That is what *American Pipe* means, and that is why it does not matter whether *American Pipe* tolling is legal or equitable in nature.

II. APPLICATION OF THE AMERICAN PIPE *RULE TO SECTION 13'S THREE-YEAR LIMITATIONS PERIOD DOES NOT VIOLATE THE RULES ENABLING ACT, EVEN IF THAT PERIOD IS CONSIDERED A "STATUTE OF REPOSE".*

By virtue of the Rules Enabling Act, the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Construing Section 13's three-year limitations period as a statute of repose that conferred substantive rights, the Court of Appeals concluded, without any meaningful analysis, that "[p]ermitting a plaintiff to file a complaint or intervene after the repose period set forth in Section 13 . . . has run would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Police & Fire Ret. Sys.*, 721 F.3d at 109. Consequently, in the Court of Appeals' view, the *American Pipe* rule "does not extend the statute of repose in Section 13." *Id.*

The Court of Appeals' conceptual mistake in failing to grasp the true theoretical underpinnings and practical effect of the *American Pipe* rule led it astray when it analyzed how to apply the Rules Enabling Act. *American Pipe* did not hold that the filing of a class action "extends" a statute of limitations, let alone a statute of repose. Rather, *American Pipe* held that Rule 23 provides a mechanism for determining when suit has been commenced on an absent class member's claim for purposes of applying such statutes. In the specific context of Section 13 of the Securities Act, a plaintiff's claim under Sections 11 or 12 of that

statute is "brought" when a putative class of which that plaintiff is a member asserts such a claim. And, if such a claim is brought by the class before the defendant has legitimately become entitled to the repose provided for by that statute, the defendant has not been deprived of any substantive right that would trigger application of the Rules Enabling Act. *See American Pipe*, 414 U.S. at 556-58 (rejecting argument that tolling the intervenors' claims deprived defendants of substantive rights under the antitrust laws).

1. This Court's well-established test for determining if a federal rule violates the Rules Enabling Act is whether the rule in question "really regulates procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (opinion of Scalia, J.). As the *Shady Grove* plurality recently noted, the "test ***is not*** whether the rule ***affects*** a litigant's substantive rights; most procedural rules do." 559 U.S. at 407 (emphasis added); *see also Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 445 (1946) ("Undoubtedly most alterations of the rules of practice may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects . . . ."). If the federal rule at issue "does not operate to abridge, enlarge or modify the rules of decision" by which a court will adjudicate the litigant's rights, but "relates merely to 'the manner

and the means by which a right to recover . . . is enforced,'" then it complies with the Rules Enabling Act. *Miss. Pub. Corp.*, 326 U.S. at 446 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)); *see also Shady Grove*, 559 U.S. at 407-08 (opinion of Scalia, J.); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987) (upholding Rule 38 of the Federal Rules of Appellate Procedure against a Rules Enabling Act challenge because the rule "affects only the process of enforcing litigants' rights and not the rights themselves").

Faced with a Rules Enabling Act challenge to the *American Pipe* rule in *American Pipe* itself, the Court fashioned an alternative test for ascertaining Rule 23's consistency with the Rules Enabling Act. Under this test, regardless of whether "procedural" or "substantive" rights are at stake, the decisive factor is "whether tolling the limitation [period] in a given context is consonant with the legislative scheme." 414 U.S. at 557-58.

The Court of Appeals below did not purport to analyze the Rules Enabling Act issue in this case under either test, relying instead on its conclusion that "the statute of repose in Section 13 creates a *substantive right*" as dispositive of the case. *Police & Fire Ret. Sys.*, 721 F.3d at 109. That reasoning is indefensible under this Court's precedents. Simply concluding that Section 13's three-year limitations period provides defendants with substantive rights does not resolve the question of whether applying *American Pipe* to that period complies with the Rules Enabling Act under *Sibbach* and its progeny. To answer that question, the Court must analyze

whether Rule 23, as applied in the form of the *American Pipe* rule, alters the rules of decision governing defendants' purported substantive rights or merely imposes an incidental effect on those rights by regulating the procedural means by which they are enforced. *See Sibbach*, 312 U.S. at 15; *Miss. Pub. Corp.*, 326 U.S. at 446.

Similarly, merely labeling Section 13's three-year limitations period as a "substantive" "statute of repose" does not resolve the Rules Enabling Act issue under the *American Pipe* standard, since calling the particular limitations period being tolled "substantive" or "procedural" is irrelevant under that test. 414 U.S. at 557-58 ("The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."). As this Court has noted in a different context, "*all* limitations periods are 'substantive'" in the sense that they "*define* a subset of claims eligible for certain remedies." *Young*, 535 U.S. at 49. Yet, not even the Credit Suisse Respondents (nor, for that matter, the Second Circuit) question that the *American Pipe* rule applies to what they deem to be run-of-the-mill statutes of limitations, like the one-year time limitation in Section 13. For purposes of determining the *American Pipe* rule's conformity with the Rules Enabling Act, slapping the "substantive" label on Section 13's three-year time limitation does not meaningfully advance the analysis.

2. Under either test, the *American Pipe* rule can be applied to Section 13's three-year time limitation

in conformity with the Rules Enabling Act. Assuming for the sake of argument that Section 13 confers a "substantive" right on a defendant, that "right" consists of nothing more, nor less, than the right to not be sued by a plaintiff for violating Sections 11 or 12(a)(2) of the Securities Act of 1933 after three years have elapsed from when the plaintiff's securities were sold or bona fide offered to the public, as applicable. *See* 15 U.S.C. § 77m.

As explained above, applying the *American Pipe* rule does not abridge, enlarge or modify that right because, assuming the plaintiff is an absent member of a putative class that asserted the same claims against the defendant by filing a class complaint within the three-year period, then the defendant ***was sued by the plaintiff within that same three-year period***. The defendant has received exactly what Section 13's "statute of repose" accords to him – if he is to be sued at all, he must be sued within the three-year repose period. When the class sues him, it commences the case on all class members' claims.

A timely filed class complaint "'notifies the defendants 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.'" *Crown, Cork*, 462 U.S. at 353 (quoting *American Pipe*, 414 U.S. at 555). To take advantage of the *American Pipe* rule, the plaintiff must have been a member of the class on whose behalf the named plaintiff filed suit within the repose period. *American Pipe*, 414 U.S. at 553. Thus, the plaintiff's own claims are encompassed by, and asserted within, the case brought by the named

class representative. Whether the class will ultimately adjudicate the plaintiff's claim through trial or resolve them by settlement – or whether the plaintiff will re-take the reins of his claim and litigate it separately – depends on whether or not the district court certifies the class and, in turn, whether or not the plaintiff chooses to exercise his right to opt out of the class and regain control of his own claim. *Cf. id.* at 550 (rejecting the concept read into old Rule 23 "that one seeking to join a class after the running of the statutory period asserts a 'separate cause of action' that must individually meet the timeliness requirements" because "such a concept is simply inconsistent with Rule 23 as presently drafted").

Either way, however, the fact remains that the defendant was sued on the plaintiff's claim when the class complaint was filed. *See id.* at 555 (holding that when defendants are sued by a class "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors"); *Crown, Cork*, 462 U.S. at 353 ("Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification."). No defendant can rely on a right of "repose" embodied in a statutory time limitation when he knows he has been sued within the statutory period. *Cf. Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 429-30 (1965).

3. Applying *Sibbach*'s test, it is difficult to conceive of a more thoroughly procedural rule than one that determines when a plaintiff has commenced a suit to enforce his substantive rights and adjudicate the rights of the defendant. By providing that a "civil action" in federal court "is commenced by filing a complaint with the court," that is plainly what Rule 3 of the Federal Rules of Civil Procedure does. Fed. R. Civ. P. 3. Far from "modifying" the applicable rules of decision concerning statutes of limitation and repose, Rule 3 is what enables federal courts to apply those very rules of decision. Without a procedural rule declaring authoritatively when and how a civil lawsuit is commenced, courts could never determine whether, for example, plaintiffs "brought" suit within the meaning of either the one- or three-year limitation periods contained in Section 13. That is the very essence of regulating "the manner and means" by which a substantive right is enforced, which means Rule 3 clearly complies with the Rules Enabling Act (and, frankly, we cannot conceive that anyone would contend otherwise). *See Miss. Pub. Corp.*, 326 U.S. at 446.

In a class action, Rule 23, as interpreted by *American Pipe*, does exactly the same thing as Rule 3. It declares ***when*** a suit on the claims of absent class members has been commenced (and, therefore, "brought") for purposes of satisfying statutory timeliness periods, and sets that time as the date when the class files its complaint. It does not alter the rules of decision concerning Section 13's time periods, but (just like Rule 3) provides the means by which courts can apply those rules of decision to determine whether a class member's claim has, or

has not, been timely asserted. Since that function is quintessentially a regulation of procedure, the *American Pipe* rule does not violate the Rules Enabling Act when applied to Section 13 of the Securities Act.

By contrast, this Court's decision in *Wal-Mart* demonstrates what it means for a rule governing class action procedure to abridge substantive rights. 131 S.Ct. at 2560-61. Title VII of the Civil Rights Act provided the defendant in that case with a right to an individualized determination of each class member's eligibility for back pay in accordance with the applicable statutory criteria. *Id.* The Ninth Circuit purported to replace these individualized determinations with what this Court called "Trial by Formula," consisting of the adjudication of the claims of random samples of class members with the results extrapolated across the entire class. Such a procedure, this Court held, could only rest on an interpretation of Rule 23 that violates the Rules Enabling Act, because "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561.

Unlike in *Wal-Mart*, the defendants below have not been deprived of any statutory defenses under *American Pipe*. They at all times enjoyed the right not to be sued within the statutory time periods contained in Section 13. All *American Pipe* does is provide a procedural rule for determining whether the defendants in fact were sued within those statutory time periods. That rule provides that when a class brings suit under Section 13, all of the class

members are deemed to have brought suit on their own claims at the same time. In this case, that means that Petitioner sued the defendants within Section 13's three-year time period when the underlying class complaints were filed. This satisfied the only rights defendants could possibly have under Section 13. They have not been deprived of anything.

4. Applying *American Pipe*'s own test for Rules Enabling Act compliance, the *American Pipe* rule is consonant with the Securities Act's overall legislative scheme. By deeming an action commenced for all class members (but not other potential plaintiffs) by the filing of a class action, it appropriately maintains the balance reflected in the statute itself between providing strong remedies for misconduct in connection with the purchase and sale of securities, while also providing defendants the benefit of a short window of time within which litigation must be commenced against them. Just as in *American Pipe* itself, a defendant sued by a class under Sections 11 or 12 of the Securities Act receives notice of the claims on which he is being sued as well as the generic identities of all the plaintiffs, the potential size of the class and the extent of his likely total aggregate exposure to all class members (of which his exposure to individual class members will be a subset). Section 13 entitles the defendant to nothing more. *American Pipe* is fully consonant with Section 13 and its underlying purposes.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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