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 RESPONDENTS LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION AND GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), this Court 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." Section 13 of the Securities Act of 1933 – titled "Limitation of actions" – provides, in relevant part, that "[i]n no event shall" an action under § 11 of that Act "be brought . . . more than three years after the security was bona fide offered to the public, or under [§ 12](a)(2) . . . more than three years after the sale." 15 U.S.C. § 77m. The question presented is:

Does the filing of a putative class action serve, under the *American Pipe* rule, to suspend the three-year time limitation in § 13 of the Securities Act with respect to the claims of putative class members?

PARTIES TO THE PROCEEDINGS

Respondents Los Angeles County Employees Retirement Association ("LACERA") and General Retirement System of the City of Detroit ("Detroit Retirement") agree with Petitioner Public Employees' Retirement System of Mississippi's ("MissPERS") statement of the parties to the proceeding, but add the following: LACERA and Detroit Retirement were proposed intervenors in the district court proceedings and appellants in the court of appeals proceedings. LACERA and Detroit Retirement submitted letters in support of the petition for writ of certiorari and thus are authorized under Supreme Court Rule 12.6 to submit this brief in support of Petitioner.

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STATEMENT OF THE CASE

Los Angeles County Employees Retirement Association ("LACERA") and the General Retirement System of the City of Detroit ("Detroit Retirement") adopt Petitioner Public Employees' Retirement System of Mississippi's ("MissPERS") statement of the case but add the following facts:

LACERA is a California public pension fund that provides retirement benefits to Los Angeles County employees and participating agencies. It is the largest county retirement system in the United States. http://www.lacera.com/about_lacera/who_we_are.html (last visited on May 6, 2014). As of June 30, 2013, LACERA had 157,571 members, including 58,067 benefit recipients, and maintained $41.8 billion in net assets. http://www.lacera.com/investments/Annual_Report/pafr-2013/docs/pafr-2013.pdf at 2 (last visited on May 6, 2014).

Detroit Retirement is a pension plan and trust established by the Charter and Municipal Code of the City of Detroit, Michigan. As of June 30, 2013, Detroit Retirement had approximately 19,000 members and maintained $2.1 billion in total assets held in trust for the benefit of the employees of the City of Detroit. http://www.rscd.org/GRS%202013%20Independent%20Audit%20Report.pdf (last visited on May 20, 2014).

On May 14, 2009, a different Detroit entity, the Police and Fire Retirement System of the City of Detroit ("Detroit PFRS"), filed a putative class action (the "Detroit Action") against IndyMac MBS, Inc. ("IndyMac") and other defendants in the Southern District of New

York, asserting claims under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(a)(2), and 77o, respectively (the "Securities Act"). Joint Appendix ("JA") 91-145. The complaint purported to cover investors in mortgage pass-through certificates offered by IndyMac and expressly referenced 71 offerings, including four offerings purchased by LACERA and two offerings purchased by Detroit Retirement. JA 92, 96-108, 116 (Detroit Compl. ¶¶ 1-3, 24, 55); JA 14 (Decl. of Nicole Lavalee in Supp. of Mot. To Intervene (Dist. Ct. Dkt. 204) ("Lavallee Decl.") Ex. D (Decl. on behalf of LACERA listing offerings purchased)); Dist. Ct. Dkt. 221-2 (Decl. on behalf of Detroit Retirement listing offerings purchased). The Detroit Action was filed less than three years from those offerings and from LACERA and Detroit Retirement's purchases in those offerings.

Shortly thereafter, on June 29, 2009, the Wyoming State Treasurer and the Wyoming Retirement System (collectively, "Wyoming") filed a similar suit (the "Wyoming Action"), alleging violations of Sections 11, 12(a)(2) and 15, and expressly referencing an additional 15 offerings, including one offering purchased by LACERA. JA 146-194 (Wyoming Compl.); Lavallee Decl., Ex. D. On July 29, 2009, the district court (Hon. Lewis A. Kaplan) consolidated the two actions and, pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1(a)(3) ("PSLRA"), appointed Wyoming as Lead Plaintiff. JA 211-216.

Wyoming filed a consolidated class action complaint on October 9, 2009 and an amended consolidated complaint on October 30, 2009 ("Amended Complaint"), which alleged claims on behalf of a class of investors in 106 offerings,

including the offerings named in the Detroit and Wyoming Actions. JA 217-331 (Amended Complaint).

On November 23, 2009, the defendants moved to dismiss the Amended Complaint. On February 17, 2010, the district court held a hearing on defendants' motions to dismiss and indicated its intent to dismiss, for lack of standing, claims related to any offerings issued by IndyMac in which Wyoming had not purchased certificates.

On May 17, 2010, LACERA, together with MissPERS, Detroit PFRS, and the City of Philadelphia Board of Pensions and Retirement ("Philadelphia"), moved to intervene in order to assert Section 11, 12 and 15 claims as to certain offerings, given the district court's indication that it would likely rule that Wyoming lacked standing to assert such claims on behalf of the class. JA 332-348; *In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 641-42 (S.D.N.Y. 2011), *aff'd in part sub nom.*, *Police and Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 1515 (Mar. 10, 2014) (Mem.). By this time, more than three years had passed since the date of the offerings in which LACERA had purchased. 793 F. Supp. 2d at 645.

On June 21, 2010, the district court granted in part and denied in part defendants' motions to dismiss the Amended Complaint. The court also dismissed all claims based on any offering in which no named plaintiff had purchased securities. *In re IndyMac Mortgage-Backed Sec. Litig.*, 718 F. Supp. 2d 495, 501 (S.D.N.Y. 2010).

On July 6, 2010, Detroit Retirement moved to intervene in order to assert Section 11, 12 and 15 claims as to certain offerings that were dismissed by the district court on standing grounds. Dist. Ct. Dkt. 219.[1] By this time, more than three years had passed since the date of the offerings in which Detroit Retirement had purchased. 793 F. Supp. 2d at 645.

On June 21, 2011, the district court largely denied the motions to intervene, finding the claims barred under the applicable one-year and three-year limitations periods.[2] Relying on the March 16, 2011 decision of District Judge Castel in *Footbridge Ltd. Trust v. Countrywide Financial Corp.*, 770 F. Supp. 2d 618 (S.D.N.Y. 2011), Judge Kaplan rejected the proposed intervenors' contention that the filing of the class action complaint suspended Section 13's three-year time period pursuant to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), or related back to the filing of the initial complaint pursuant to Federal Rule of Civil Procedure 15(c). 793 F. Supp. 2d at 642-43.

On July 21, 2011, LACERA, MissPERS and Detroit Retirement appealed the district court's ruling that *American Pipe* does not apply to Section 13's three-year period. JA 34 (Dist. Ct. Dkt. 328-329).[3]

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1. Subsequently, the Iowa Public Employees' Retirement System filed a separate motion to intervene. Dist. Ct. Dkt. 237.

2. The court permitted intervention only as to certain claims brought by Detroit PFRS and Philadelphia, as well as limited claims asserted by LACERA and MissPERS, which were later voluntarily dismissed in order to preserve their appeal rights. 793 F. Supp. 2d at 643-47, 649, 651.

3. Philadelphia also appealed but later withdrew its appeal.

During the time that the motions to intervene and the subsequent appeal were pending, Wyoming pursued the litigation on behalf of purchasers for offerings that Wyoming had purchased. On December 10, 2010, Wyoming moved for certification of a class based on ten offerings. JA 26 (Dist. Ct. Dkt. 276).

On August 17, 2012, the district court granted Wyoming's motion for class certification as to nine offerings. *In re IndyMac Mortgage-Backed Sec. Litig.*, 286 F.R.D. 226, 229 n.1 (S.D.N.Y. 2012); JA 472-507. That decision came 19 months after Wyoming moved for class certification, three years and three months after the initial class action complaint was filed, six years after the earliest offering in which LACERA had purchased IndyMac certificates, and over six years after the earliest offering or purchase at issue in this litigation.

Also while that appeal was pending, the Second Circuit decided *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624 (2013), which effectively overruled the district court's decision in this case that Wyoming lacked standing to assert certain claims on behalf of the class. Explaining the difference between constitutional standing and class standing, the Second Circuit held in *Goldman Sachs* that a lead plaintiff satisfies constitutional standing for each claim against each defendant by properly alleging its own personal claim against each defendant. It further held that the question whether a plaintiff can assert claims on behalf of investors in securities offerings in which the plaintiff did not invest is not a standing issue but rather is an issue of whether, under Federal Rule of Civil Procedure 23, the class claims implicate the same set of concerns as plaintiff's claims. *Id.* at 149.

Acknowledging the Second Circuit's ruling, the district court subsequently granted reconsideration of its June 21, 2010 ruling on standing. By orders dated May 9, 2013 and July 23, 2013, the consolidated class action was expanded to include an additional 42 offerings. *See* JA 535-540 (Dist. Ct. Dkt. 430 (May 9, 2013)), and JA 541-545 (Dist. Ct. Dkt. 450 (July 23, 2013)). The only offerings not reinstated were those in which MissPERS, LACERA, Detroit Retirement and others had claims against defendants as to whom Wyoming had no claim. Due to the expansion of the class to include the additional offerings, Wyoming filed a second motion for class certification on August 30, 2013. That motion has been fully briefed and remains pending.

On June 27, 2013, the court of appeals affirmed Judge Kaplan's ruling that the *American Pipe* doctrine does not apply to Section 13's three-year period. *IndyMac*, 721 F.3d at 109-110. In direct conflict with *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), and the decisive majority of district courts that have held that *American Pipe* applies to Section 13's three-year limitations period, the Second Circuit, adopting the reasoning of *Footbridge*, held that if the *American Pipe* rule constitutes "equitable tolling," then under *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), that rule does not apply to Section 13. Alternatively, the Second Circuit held that if the *American Pipe* doctrine is legal or statutory rather than equitable in nature, its application to Section 13's three-year period would violate the Rules Enabling Act, 28 U.S.C. § 2072(b). 721 F.3d at 109.

This Court granted MissPERS' petition for writ of certiorari to review the Second Circuit's decision. 134

S. Ct. 1515. LACERA and Detroit Retirement submit this brief in support of Petitioner urging reversal on the ground that the Second Circuit erred in concluding that *American Pipe* does not apply to Section 13's three-year time limitation.

SUMMARY OF ARGUMENT

The Second Circuit erred as a matter of law in holding that the *American Pipe* rule does not apply to Section 13's three-year limitations period.

The decision is squarely at odds with *American Pipe*, as it resurrects arguments that were rejected by this Court in *American Pipe* and the clear majority of federal courts to consider the issue since *American Pipe* was decided. The Second Circuit ruled that *American Pipe* does not apply to a statute that has a cut-off date (sometimes characterized as a statute of repose) and that the Rules Enabling Act precludes application of *American Pipe* to such a statute, because that statute creates a "substantive right" of a defendant or potential defendant not to be sued after a certain time period.

However, like Section 13's three-year provision, which states that "in no event" may suit be brought after three years, the statute at issue in *American Pipe* provided that a plaintiff would be "forever barred" from bringing suit if suit were not brought within the time prescribed. Indeed, both the petitioners and the district court in *American Pipe* referred to the statute at issue as a statute of repose. This Court held in *American Pipe* that the timely filing of the class action complaint suspended that statutory time limitation and that the claims of putative class

members who sought to intervene after class certification was denied were not time-barred. And contrary to the Second Circuit's determination that the Rules Enabling Act precludes the suspension of a statutory limitations period where that statute creates a substantive right not to be sued after a certain point in time, *American Pipe* held that the issue is not whether the statutory limitations period is substantive or procedural but, rather, whether suspension of that limitations period would be consonant with the legislative scheme at issue.

Brushing aside that critical point, the Second Circuit failed to analyze whether suspension of the three-year period in Section 13 would be consonant with the Securities Act, the PSLRA and Rule 23. Had it done so, the court would have had no choice but to conclude that suspending Section 13's three-year period is indeed consonant with (i) the Securities Act, which was enacted to protect investors while also providing assurance to defendants that suit would be brought within a specified time; (ii) the PSLRA, which expressly supports the use of Rule 23 to aggregate investors' claims under the securities laws and provides a simple method of determining that one investor or group of investors alone should be appointed to pursue the Securities Act claims on behalf of a class; and (iii) Rule 23, the purpose of which is to promote judicial efficiency and the aggregation of claims and to avoid inconsistent adjudications and a multiplicity of individual actions.

Nothing has changed since *American Pipe* was decided 40 years ago that would call for a different result in this case. The Second Circuit's reliance on *Lampf*, which held that equitable tolling is inconsistent with Section 13's one- and three-year provisions, is misplaced, as *Lampf*

did not concern the effect of filing a class action based on *American Pipe* and Rule 23. Established precedents from this Court make plain that the *American Pipe* rule is not equitable in nature, as there is no balancing of equities, weighing of interests or need by the plaintiff to show that it relied on or was misled by the defendant and is thus entitled to tolling based on equitable principles. Nor was there any indication in *Lampf* that the Court intended to overrule *American Pipe*.

Accordingly, the Second Circuit erred in three ways. It erred in holding that the *American Pipe* rule, if equitable in nature, is barred by *Lampf*. It erred in holding that the *American Pipe* rule, if legal or statutory in nature, is barred by the Rules Enabling Act. And the court erred in dismissing out-of-hand the concern that (i) individual securities suits and motions for intervention will now flood the courts as a result of its ruling and (ii) investors will no longer be able to rely on the filing of a class action suit to protect their interests in seeking relief under the federal securities laws. The decision ignores the practical reality that because class certification determinations are rarely made within three years after a security is offered to the public, or even within three years after a class action is initiated, investors will have no choice but to file individual actions or move to intervene to avoid being time-barred, thus undoing everything that *American Pipe* and Rule 23 were designed to prevent. If the Second Circuit's decision is upheld, it will effect a sea change in class action litigation in general and in securities litigation in particular, and nothing good will emerge from such a change.

ARGUMENT

I. PRIOR TO THE SECOND CIRCUIT'S DECISION, A CLEAR MAJORITY OF FEDERAL COURTS TO CONSIDER THE ISSUE HAD HELD THAT *AMERICAN PIPE* APPLIES TO SECTION 13'S THREE-YEAR PERIOD

Section 13 of the Securities Act, 15 U.S.C. § 77m, provides that a claim under Sections 11 or 12(a)(2) of the Securities Act must be filed within one year from the time the violations are or should have been discovered, and "in no event" may a claim under Section 11 be brought more than three years after the security was offered to the public and, under Section 12(a)(2), more than three years after the sale.[4]

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4. Section 13 states in full:

> No action shall be maintained to enforce any liability created under section 77k [Section 11 of the Securities Act] or 77l(a)(2) [Section 12(a)(2) of the Securities Act] of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.

Prior to the Second Circuit's decision below, the majority of federal courts followed the Tenth Circuit's holding in *Joseph v. Wiles*, 223 F.3d at 1167-68, that *American Pipe* applies to Section 13's three-year limitations period. *See* MissPERS' Pet. for Writ of Cert., filed Nov. 11, 2013, at 10 n.4, 17 nn.7-12 (citing cases). Even before *Wiles*, federal district courts had held that *American Pipe* applied to Section 13's three-year period and that *Lampf* was inapplicable. *See, e.g., In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998); *Salkind v. Wang*, No. 93-10912-WGY, 1995 WL 170122, at * 3 (D. Mass. Mar. 30, 1995).

As the Ninth Circuit recognized in *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 538 (9th Cir. 2011), "the weight of federal authority favors the view that [the] *American Pipe* ... rule should be characterized as a rule of statutory tolling." *See also Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177-78 (D. Mass. 2009) (observing that "all lower federal courts[] ... to examine whether *American Pipe* tolling applies to statutes of repose ... have held that *American Pipe* requires the tolling of statutes of repose") (citing cases).

The only cases to hold otherwise were a handful of district court decisions from the Southern District of New York – based on Judge Castel's decision in *Footbridge*, 770 F. Supp. 2d 618 – including Judge Kaplan's decisions in this case and in *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477 (S.D.N.Y. 2011). *See John Hancock Life Ins. Co. (U.S.A.) v. JP Morgan Chase & Co.*, 938 F. Supp. 2d 440, 444 (S.D.N.Y. 2013) (citing cases). Even after *Footbridge*, and until the Second Circuit weighed in, most federal courts continued to follow *Wiles* as the

better reasoned decision and the one more consistent with *American Pipe*.[5]

The crux of *Wiles*, which the Second Circuit ignored, was that applying *American Pipe* to Section 13's three-

5. *See In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 767 (S.D.N.Y. 2012); *Int'l Fund Mgmt. S.A. v. Citigroup Inc.*, 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 667-68 (S.D.N.Y. 2011); *Plumbers' & Pipefitters' Local No. 562 Suppl. Plan & Trust v. J.P. Morgan Acceptance Corp.*, No. 08 CV 1713 (ERK) (WDW), 2011 WL 6182090, at *5 (E.D.N.Y. Dec. 13, 2011); *Public Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, Inc., 277 F.R.D. 97, 109 (S.D.N.Y. 2011); *Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1129 (D.N.M. 2011). *See also In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 159-60 (S.D.N.Y. 2012) (applying *American Pipe* to 28 U.S.C. § 1658(b)(2), the five-year limitations period applicable to claims under Section 10(b) of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("Exchange Act")); *In re Merck & Co., Inc. Sec., Deriv. & ERISA Litig.*, MDL No. 1658 (SRC), 2012 WL 6840532, at *5 (D.N.J. Dec. 20, 2012) (same). *But see John Hancock*, 938 F. Supp. 2d at 448; *Plumbers, Pipefitters & MES Local Union No. 392 Pension Fund v. Fairfax Fin. Holdings Ltd.*, 886 F. Supp. 2d 328, 333-35 (S.D.N.Y. 2012).

New Jersey Carpenters Health Fund v. Residential Capital, LLC, 288 F.R.D. 290 (S.D.N.Y. 2013), was one of the cases that rejected *Footbridge* and instead adopted the *Wiles* analysis. *Id.* at 293-95. The district court subsequently reconsidered that decision in light of the Second Circuit's decision here, which the district court found to be a "significant change in controlling law." *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, No. 08 CV 8781 (HB), 2013 WL 6669966, at *1 (S.D.N.Y. Dec. 18, 2013). The district court in *New Jersey Carpenters* declined to postpone reconsideration pending this Court's review of the petition for writ of certiorari. *Id.* at *2.

year period does not compromise or substantively alter the purpose of that provision, because the putative class members' claims are effectively "brought within this period" by the filing of the class action complaint. 223 F.3d at 1168 ("Indeed, in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all. Rather, Mr. Joseph has effectively been a party to an action against these defendants since a class action covering him was requested but never denied.").

The Second Circuit did not even address this obvious and critically important point – that the class members effectively brought their claims within the three-year period by the filing of the class action complaint, and therefore no substantive rights were affected. Instead, it simply opined that Section 13's three-year period confers upon the defendant a substantive right to be free from liability after a certain period, and because the running of the three-year period extinguishes that right, the statute is not subject to tolling. *IndyMac*, 721 F.3d at 109.

The Second Circuit acknowledged that in *American Pipe*, this Court "relied heavily" on Rule 23 in holding that the filing of a class action suspends the limitations period for members of the putative class. *Id.* at 104. The court further acknowledged this Court's statement that "a contrary holding would 'frustrate the principal function of a class action' and create a 'multiplicity of activity which Rule 23 was designed to avoid.'" *Id.* at 105 (quoting 414 U.S. at 551).

Nevertheless, the court of appeals opined that *American Pipe* "also seemed to rely on the equitable power

of the courts to toll statutes of limitations" by "recognizing judicial power to toll statutes of limitation." *Id.* (quoting 414 U.S. at 558) (emphasis omitted). It acknowledged on the other hand that exercise of the courts' equitable power is "traditionally used to 'relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules.'" *Id.* at 108 (quoting *Holland v. Florida*, 530 U.S. 631, 650 (2010)).

Declining to "try to divine any hidden meanings in *American Pipe*," the court concluded that if the *American Pipe* rule is a form of equitable tolling, then its application to Section 13 is barred by *Lampf*, which held equitable tolling to be "fundamentally inconsistent with the 1-and-3-year structure" of the federal securities laws. *Lampf*, 501 U.S. at 363. *See IndyMac*, 721 F.3d at 109 (citing *Lampf,* at 363).[6] Alternatively, the court of appeals held that even if the *American Pipe* doctrine is legal or statutory – *i.e.*,

6. The issue in *Lampf* was what statute of limitations applied to a private action under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b). The Court held that the one-year and three-year limitations period found in other provisions of the federal securities laws was the appropriate period to be used for Section 10(b). 501 U.S. at 362. (The statute of limitations for Section 10(b) claims has since been changed to a two-year/five-year period. 28 U.S.C. § 1658(b).) *Lampf* also addressed whether that period was subject to equitable tolling. 501 U.S. at 363. The plaintiffs argued that equitable tolling should apply to their securities fraud claim "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part." *Id.* (citation omitted). The Court ruled that the one-year period commences upon discovery of the facts constituting the violation, thus "making tolling unnecessary." *Id.* And "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff, … tolling principles do not apply to that period." *Id.*

based upon Rule 23[7] – rather than equitable, application of *American Pipe* to Section 13's three-year period is precluded by the Rules Enabling Act's mandate that the Federal Rules of Civil Procedure "not abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b). *IndyMac*, 721 F.3d at 109. The court reasoned that because "the statute of repose in Section 13 creates a *substantive* right, extinguishing claims after a three-year period [by] [p]ermitting a plaintiff to file a complaint or intervene after the repose period set forth in Section 13 … would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Id.*

In so holding, the court relegated to a footnote, *see id.* at n.17, the statement in *American Pipe* that "[t]he 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." 414 U.S. at 557-58. The court also gave short shrift to LACERA, Detroit Retirement and MissPERS' argument that a failure to extend *American Pipe* to the three-year limitations period in Section 13 would burden the courts and disrupt the functioning of class action litigation. *IndyMac*, 721 F.3d at 109.

A careful analysis of *American Pipe* and the arguments presented to the Court in that case demonstrates that the Second Circuit's decision must be reversed.

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7. *See IndyMac*, 721 F.3d at 107 n.14 (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941), and *Bright v. United States*, 603 F.3d 1273, 1279 (Fed. Cir. 2010)) (noting that the Federal Rules of Civil Procedure, including Rule 23, have the force and effect of a federal statute).

II. BECAUSE *AMERICAN PIPE* CONSIDERED AND REJECTED THE VERY ARGUMENTS ON WHICH THE COURT OF APPEALS' DECISION IS PREDICATED, THE DECISION BELOW SHOULD BE REVERSED

A. The Briefs in *American Pipe* and the Decision Itself Establish that this Court Already Considered and Rejected the Reasoning Adopted by the Second Circuit

One need only read the briefs submitted in *American Pipe* and the decision itself to appreciate that this Court considered and rejected the very reasoning on which the Second Circuit's decision is based. The Second Circuit therefore erred as a matter of law in holding that *American Pipe* does not apply to Section 13's three-year period. *See* Note, *Second Circuit Holds That American Pipe Class Action Tolling Doctrine Does Not Apply to Statute of Repose in Securities Act of 1933*, 127 Harv. L. Rev. 1501, 1505-07 (March 2014) [hereinafter, "Note"] (concluding that "[a] correct application of *American Pipe* would have produced the opposite holding" from the one reached by the Second Circuit).

As ably argued by *amici*, *see* Br. of *Amicus Curiae* Nat'l Assoc. of S'holder & Consumer Attorneys in Supp. of Pet., filed Dec. 26, 2013, at 9-10, the statute at issue in *American Pipe* operated in much the same way as Section 13's three-year provision.

American Pipe involved a Sherman Act antitrust suit by the federal government against sellers of steel and concrete pipe. Following entry of judgment and a

consent decree between the federal government and the defendants, the State of Utah brought a class action against the same defendants on behalf of various state and local agencies in Utah as end users of the pipe. 414 U.S. at 541. The applicable limitations periods were set forth in Sections 5(b) and 4B of the Clayton Act. Section 4B provides that "[a]ny action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. Section 5B, which applies where the government brings an antitrust suit, provides that a private claim must be brought within the four-year period set forth in Section 4B or within one year following the conclusion of the government's case. 15 U.S.C. § 16(i).[8] The issue in *American Pipe* was whether the proposed intervenors' claims were timely where Utah had instituted a class action on their behalf before the one-year period had run, but where the court subsequently denied class certification and the intervenors then sought intervention after the limitations period had expired. 414 U.S. at 543-44.

The limitations provisions at issue in *American Pipe* were similar to Section 13 of the Securities Act in that the antitrust claims had to be brought within four years of accrual but no later than one year after conclusion of the government's case or the plaintiff would be "forever barred," and the Securities Act claims must be brought within one year after discovery of the wrongdoing and "in no event" more than three years after the offering or sale. Thus, they each operated as "a statute of limitations framed by a statute of repose." *Wiles*, 223 F.3d at 1166.

8. At the time *American Pipe* was decided, this provision was contained in 15 U.S.C. § 16(b).

As noted in *Wiles*, "[s]tatutes of repose are intended to demarcate a period of time within which a plaintiff must bring claims or else the defendant's liability is extinguished." *Id.* at 1168. *See Morgan Stanley*, 810 F. Supp. 2d at 666, 667 (observing that the statute in *American Pipe* contained the same "inflexible statutory language" and was "in the style of a statute of repose, [as it] declared that suits brought outside a four-year period would be 'forever barred'" (quoting 15 U.S.C. § 16(b))).[9]

In fact, both the petitioners and the district court in *American Pipe* referred to the Clayton Act provision as a statute of repose. *See Utah v. Am. Pipe & Constr. Co.*, 50 F.R.D. 99, 103 (C.D. Cal. 1970), *reversed and remanded in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974); Pet. for Writ of Cert., *Am. Pipe & Constr. Co. v. Utah*, No. 72-1195 (U.S. Mar. 2, 1973), 1973 WL 346627, at *22; Br. for Pet'rs, *Am. Pipe & Constr. Co. v. Utah*, No. 72-1195 (U.S. June 20, 1973), 1973 WL 172291, at *26, *50.

Furthermore, in *Greyhound Corp. v. Mt. Hood Stages, Inc.*, this Court quoted with approval the statement in *Dungan v. Morgan Drive-Away, Inc.*, that "it is … true that [Section 5 of the Clayton Act] is a statute of repose." 437 U.S. 322, 334 (1978) (quoting 570 F.2d 867, 869 (9th Cir. 1978)).

Additionally, one of the questions presented in *American Pipe* was whether "the filing of an invalid class action abridges or modifies the *substantive barring provisions* of Section 5 of the Clayton Act." Br. for Pet'rs,

9. *Morgan Stanley* was abrogated in pertinent part by the Second Circuit's decision in this case.

Am. Pipe, supra, at *3 (emphasis added). The defendants' arguments in *American Pipe* were substantially the same as those made by the defendants here: that the statute at issue created a substantive right to be free from suit after a certain time period, and under the Rules Enabling Act, "Rule 23 cannot be employed to abridge or enlarge substantive rights." Pet. for Writ of Cert., *Am. Pipe, supra*, at *23; Br. for Pet'rs, *Am. Pipe, supra*, at *13, *22-23 (citing Rules Enabling Act). The defendants-petitioners in *American Pipe* also argued that suspending the limitations period based on the filing of the class action would "negate[] the *policy of repose* underlying Section 5(b) of the Clayton Act." Br. for Pet'rs, *Am. Pipe, supra*, at *51 (emphasis added).[10]

B. Rejecting the Argument that the Statute at Issue in *American Pipe* Created A Substantive Right, this Court Held in *American Pipe* that Suspension of the Statutory Period Based on the Filing of A Class Action Promotes Efficiency and Judicial Economy

Rejecting the petitioners' argument in *American Pipe* that the statute at issue was a statute of repose that created a substantive right that could not be limited under

10. "Forty years ago, the federal courts of appeal simply did not utilize the modern vocabulary drawing a strict linguistic distinction between substantive 'statutes of repose' and procedural 'statutes of limitations.' … [Y]et the *American Pipe* Court explicitly considered whether tolling would violate the [Rules Enabling Act] by modifying a substantive right—precisely the issue in *IndyMac*, and one that would not arise were the statute in question understood by all parties to be a statute of limitations in the modern parlance." Note, 127 Harv. L. Rev. at 1505-07.

the Rules Enabling Act, this Court held there 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." 414 U.S. at 554. *See Morgan Stanley*, 810 F. Supp. 2d at 666 ("The Supreme Court rejected this formalist position, holding that "[t]he 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." (quoting 414 U.S. at 557-58)).

This Court reasoned that a contrary holding would "frustrate the principal function of a class suit" and create a "multiplicity of activity which Rule 23 was designed to avoid." *American Pipe*, 414 U.S. at 551. Absent suspension of the limitations period, putative class members who wished to protect their rights "would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553. This "needless duplication of motions" would not be "consistent with federal class action procedure" and would undermine a principal purpose of Rule 23, which is to promote efficiency and economy of litigation. *Id.* at 553-54.

As clarified in *Crown, Cork & Seal Co. v. Parker*, without the application of *American Pipe*:

> class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification

> was denied.... [Absent *American Pipe* tolling, a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

462 U.S. 345, 350-51 (1983). *See Credit Suisse Sec. (USA) LLC v. Simmond*s, 132 S. Ct. 1414, 1419 n.6 (2012) ("efficiency and economy of litigation ... is a principal purpose" of Rule 23 class actions (quoting *American Pipe*, 414 U.S. at 553)).

Nevertheless, the court of appeals here dismissed the proposed intervenors' concern that a failure to apply *American Pipe* to Section 13's three-year period would burden the courts and disrupt the function of class action litigation: "Given the sophisticated, well-counseled litigants involved in securities fraud class actions, it is not apparent that such adverse consequences will inevitably follow our holding." *IndyMac*, 721 F.3d at 109. Sophisticated or not, investors who wish to ensure that their claims will not be dismissed as untimely will, if the Second Circuit's decision is upheld, have no choice but to file individual actions or 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 – [will] be defeated." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). As a result, courts will likely be inundated with numerous individual securities suits and motions to intervene, in

direct contravention of the express purpose of Rule 23 as interpreted in *American Pipe*. *See Morgan Stanley*, 810 F. Supp. 2d at 668 ("the risk that potential class members would flood the courts with duplicative motions is acute in the securities context"); *Citigroup*, 822 F. Supp. 2d at 380 ("Without tolling, class members content to remain in the class action would nevertheless need to bring their own suits within the three-year repose period to guard against the possible eventual denial of class certification."); Brian Lehman, *Does American Pipe Tolling Apply to Statutes of Repose?*, 8 Sec. Litig. Rep. 11 (Sept. 2011) [hereinafter, "Lehman"] (cautioning that if the *Footbridge* view is adopted, "plaintiffs' lawyers will have a significant incentive to file duplicative motions or complaints before the time limitation expires in order to protect claims").

Recently, this Court recognized in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011), that *American Pipe* was "grounded in policies of judicial administration" and establishes that one who is "not a party to a class suit may [nevertheless] receive certain benefits (such as the tolling of a limitations period) related to that proceeding…." As explained in *Crown, Cork & Seal*:

> Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but *these ends are met when a class action is commenced*. Class 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. And a 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." *American Pipe*, 414 U.S., at 555, 94 S.Ct., at 767; *see United Airlines, Inc. v. McDonald*, 432 U.S., at 395, 97 S. Ct., at 2470.

U.S. at 352-53 (emphasis added) (citations omitted).

III. THE *AMERICAN PIPE* DOCTRINE IS NOT A FORM OF EQUITABLE TOLLING, AS IT DOES NOT INVOLVE A WEIGHING OF THE EQUITIES

The Second Circuit held that if the *American Pipe* rule is equitable in nature, equitable tolling of Section 13 is barred by *Lampf. IndyMac*, 721 F.3d at 109. However, a review of equitable tolling principles establishes that the *American Pipe* rule is not equitable in nature but instead is based on the concept that a suit is commenced upon the filing of a class action complaint.

As stated in *Simmonds*, under "long-settled equitable-tolling principles," a litigant asserting equitable tolling generally must establish two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way. 132 S. Ct. at 1419 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Ryan v. Gonzales*, 133 S. Ct. 696, 704 n.6 (2013) ("The relevant questions for equitable tolling purposes are whether the petitioner has been pursuing his rights diligently and whether some extraordinary circumstance stood in his way.") (citations omitted) (internal quotation marks omitted); *Wallace v. Kato*, 549

U.S. 384, 396 (2007) ("Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.").

Exercise of the court's equitable tolling powers is "made on a case-by-case basis." *Holland v. Florida*, 560 U.S. 631, 649-50 (2010). It involves a weighing of equities and a consideration of the parties' individual circumstances. Courts have recognized equitable tolling where, for example, a plaintiff received inadequate notice, was misled by the court, was tricked by the defendant, filed suit in the wrong venue, filed a defective pleading within the statutory period, was lulled into inaction by defendant's misconduct, or was prevented by war from filing suit. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984); *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 428-29 (1965); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959); *Wiles*, 223 F.3d at 1166.

"Equitable tolling is rooted in common law principles and permits a court – after weighing the equities in the discrete case before it – to authorize plaintiffs to bring actions outside a limitations period." *Morgan Stanley*, 810 F. Supp. 2d at 667 (citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)).

The district court in *Morgan Stanley* cogently explained why equitable tolling principles were not at play in *American Pipe*:

> *American Pipe* tolling, by contrast, does not "extend equitable relief" based on an individualized assessment of fairness. Rather, the "theoretical basis on which *American*

> *Pipe* rests is the notion that class members are treated as parties to the class action" and that, "[b]ecause members of the asserted class are treated for limitations purposes as having instituted their own actions ... the limitations period does not run against them during that time."

Id. (quoting *In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007)) (alteration in original). *See Wiles*, 223 F.3d at 1168 ("in a sense, application of the *American Pipe* tolling doctrine ... does not involve 'tolling' at all .... [because the plaintiff] has effectively been a party to an action against the defendants since a class action covering him was requested but never denied"); *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 31-32 (S.D.N.Y. 2002) ("[P]utative class members ... have effectively [been] a party to an action against [Defendants] since a class action covering [them] was requested.") (citations omitted) (internal quotation marks omitted); Lehman, *supra*, at 11 ("because *American Pipe* held that 'claimed members of the class stood as parties to the suit,' federal courts have repeatedly concluded that the filing of a putative class action satisfies the statute of repose. Courts have reached this conclusion in cases involving the Securities Act of 1933, the Securities Exchange Act of 1934, ERISA, the Truth in Lending Act, and state law fraudulent conveyance laws.").

Nothing in *American Pipe* demonstrates that this Court engaged in a weighing of the equities or that extraordinary circumstances were involved in that case. As *amici* note, "given that the *American Pipe* rule is thoroughly entwined with Rule 23, as evidenced by

the Court's careful analysis of Rule 23's structure and purpose in *American Pipe* itself, its application to § 13's three-year limitations period cannot possibly be a judicial exercise of equitable discretion." Br. of Civil Proc. & Secs. Law Professors as *Amici Curiae* in Supp. of Pet. for Writ of Cert., filed Dec. 26, 2013, at 3 [hereinafter "Law Professors Brief"]. *See Wiles*, 223 F.3d at 1167 (observing that *Lampf* did not overrule or even mention *American Pipe* or *Crown, Cork & Seal*).[11]

Accordingly, the Second Circuit erred in ruling that application of *American Pipe* to Section 13's three-year period is barred by *Lampf.*

IV. BECAUSE THE *AMERICAN PIPE* RULE IS CONSONANT WITH THE LEGISLATIVE SCHEME OF THE SECURITIES ACTS AND RULE 23, IT DOES NOT VIOLATE THE RULES ENABLING ACT

As discussed, *American Pipe* holds that under the Rules Enabling Act, the issue is not whether the statute at issue is substantive or procedural. The issue is whether suspension of the statutory period based on the filing of a class action suit would be consonant with the legislative scheme. Application of *American Pipe* to Section 13's

11. This Court noted in *Simmonds*: "Although we did not employ the term 'legal tolling,' some federal courts have used that term to describe our holding on the ground that the [*American Pipe*] rule 'is derived from a statutory source,' ..." 132 S. Ct. at 1419 n.6 (citing *Arivella*, 623 F. Supp. 2d at 176). *See Morgan Stanley*, 810 F. Supp. 2d at 667 ("*American Pipe* tolling 'is a species of legal tolling, in that it is derived from a statutory source, in this case Rule 23'" (quoting *Arivella*, 623 F. Supp. 2d. at 176)).

three-year period is entirely compatible with the overall legislative scheme of Section 13, the securities laws and Rule 23.

A. Application of *American Pipe* Is Consonant With Section 13

Although *Wiles* did not specifically address the Rules Enabling Act, it nevertheless recognized that, consistent with the goals of Section 13, the filing of a class action provides defendants with notice of the substantive claims against them:

> Tolling the limitations period while class certification is pending does not compromise the purposes of statutes of limitation and repose. Statutes of limitation are intended to protect defendants from being unfairly surprised by the appearance of stale claims, and to prevent plaintiffs from sleeping on their rights. *See Crown, Cork*, 462 U.S. at 352…. "[T]hese ends are met when a class action is commenced." *Id.* In this case, because a class action complaint was filed, defendants were on notice of the substantive claim as well as the number and generic identities of potential plaintiffs. Defendants cannot assert Mr. Joseph's claim was stale or that he slept on his rights.

223 F.3d at 1167-68 (certain alterations in original). Thus, where, as here, the class action is commenced within the three-year period of Section 13, suspension of that period based on that class action does "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

B. Application of *American Pipe* Is Consonant With the Legislative Scheme of Private Securities Litigation and Rule 23

Suspension of Section 13's three-year limitations period based on the filing of a class action complaint is also in accord with the overall legislative scheme of private securities litigation. In enacting the federal securities laws and, more recently, the PSLRA in 1995, Congress recognized the role of private litigation in deterring and punishing securities fraud and other wrongdoing in the offering and sale of securities. H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730 (explaining that "[t]he private securities litigation system is too important to the integrity of American capital markets" and that "[s]uch private lawsuits ... help to deter wrongdoing...."). *See Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990) ("The fundamental purpose undergirding the Securities Acts is 'to eliminate serious abuses in a largely unregulated securities market.'" (quoting *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975))); *Pinter v. Dahl*, 486 U.S. 622, 638 (1988) ("The primary purpose of the Securities Act is to protect investors[, and l]iability under [§ 12 of the Securities Act] is a particularly important enforcement tool, because in many instances a private suit is the only effective means of detecting and deterring a seller's wrongful failure to register securities before offering them for sale.").

Congress recognized that most private securities litigation would be prosecuted through the vehicle of a class action. Indeed, the PSLRA expressly acknowledges that a class action under Rule 23 is an appropriate vehicle for enforcement of the Securities Act. *See* 15 U.S.C. §

77z-1(a) (entitled "Private class actions") and subsection (1) thereof: "The provisions of this subsection shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure."[12]

Thus, Congress provided in the PSLRA that the court must consolidate any related class actions and appoint a lead plaintiff to manage the litigation on behalf of the putative class pursuant to Rule 23. 15 U.S.C. §77z-1(a)(3). The presumption that the investor with the largest financial stake should serve as lead plaintiff is designed to encourage the efficient resolution of class claims, led by a single investor or group of investors and litigated by a single law firm. Note, 127 Harv. L. Rev. at 1507-08 (citing S. Rep. No. 104-98, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 690); Law Professors Brief, *supra*, at 18.

C. Both the PSLRA and Rule 23 Evince A Pro-Aggregation Policy

The aggregation of securities claims and claimants contemplated by Congress in the PSLRA as reflected in 15 U.S.C. § 77z-1(a) benefits all parties involved – the absent class members who might not otherwise obtain redress because their financial stake is too small to pursue individually; the defendants, who can obtain a judgment that binds most if not all class members and thereby avoid future lawsuits arising out of the same conduct; and the courts, which are not burdened by hundreds or potentially thousands of individual actions. *Id.*

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12. The PSLRA contains a comparable provision for claims under the Exchange Act. *See* 15 U.S.C. § 78u-4(a)(1).

Similarly, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 388, 344 (7th Cir. 1997)). As stated in *American Pipe*, "A federal class action is … a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

Thus, both the PSLRA and Rule 23 "evince[] a clear proaggregation agenda." Note, 127 Harv. L. Rev. at 1507 n.54; Law Professors Brief, *supra*, at 18. Suspension of Section 13's three-year period under the *American Pipe* rule is, therefore, entirely consonant with the legislative scheme. Accordingly, the Second Circuit's analysis is flawed not only because it failed to consider whether application of *American Pipe* to Section 13's three-year period was consonant with the legislative scheme; its decision is also starkly at odds with that scheme. *See* Law Professors Brief, *supra*, at 18 ("The Second Circuit's decision … stands in considerable tension with the pro-aggregative thrust of the federal securities laws."). "[I]nstead of encouraging efficient aggregation and resolution of claims in relatively few actions managed by relatively few sophisticated plaintiffs and counsel, the decision incentivizes precisely the rush to the courthouse that Rule 23 and the securities-litigation regime are designed to avoid." Note, 127 Harv. L. Rev. at 1508.

V. THE SECOND CIRCUIT'S RULING CONTRAVENES THE POLICIES UNDERLYING THE FEDERAL SECURITIES LAWS AND RULE 23

The Second Circuit's position, if adopted, would cripple the private enforcement of the securities laws through the vehicle of a class action and contravene the purpose of *American Pipe* and Rule 23. If allowed to stand, the result would be a flood of duplicative, protective filings that would increase costs for all parties concerned and burden the already overburdened federal court system. *See Morgan Stanley*, 810 F. Supp. 2d at 669 ("the purpose of *American Pipe* tolling is to disincentivize putative class members from undermining the efficiency and economy policies underlying Rule 23 by flooding the court with duplicative, protective motions").

What this Court stated 40 years ago in *American Pipe* is no less true today in the context of this case:

> To hold [that the filing of a class action does not satisfy the purpose of the limitation provision] would frustrate the principal function of a class suit, 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 in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3).

> . . . Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action. During the pendency of the District Court's determination in this regard, which is to be made "as soon as practicable after the commencement of an action," potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.

414 U.S. at 551-52. As argued by the *amici* Law Professors here:

> the Second Circuit's decision will create perverse incentives for litigants to delay pre-trial proceedings for as long as possible in order to extinguish the rights of potential class members who might seek to go it alone. In short, the Second Circuit's refusal to apply *American Pipe*'s protective rule to § 13's three-year limitations period achieves the worst of all worlds: a flurry of wasteful filings in district courts across the country by sophisticated investors with the capacity to know about and monitor the litigation, and lost rights for everyone else.

Law Professors Brief, *supra*, at 4. *See also id.* at 12; *Wiles*, 223 F.3d at 1167 (without tolling, "the notice and opt-out provision of Rule 23(c)(2) would be irrelevant" because "the limitations period for absent class members would most likely expire" before they received notice, "making the right to pursue individual claims meaningless") (citations omitted) (internal quotation marks omitted).

VI. WITHOUT THE *AMERICAN PIPE* RULE, MOST INVESTORS' CLAIMS WOULD BE EXTINGUISHED BEFORE CLASS CERTIFICATION COULD BE DECIDED

The Second Circuit, citing *Footbridge*, asserted that "many class actions are resolved or reach the certification stage within the repose period." *IndyMac*, 721 F.3d at 109-10 (citing 770 F. Supp. 2d at 627). However, the only authority *Footbridge* cited was 28 U.S.C. § 476(a)(3), which requires the Administrative Office of the United States Courts to file reports as to the number of cases (of any kind, not just class actions), for each federal judge, that have not been terminated within three years after filing. 770 F. Supp. 2d at 626-27. No actual figures were cited to support that assertion.

Amici's analysis demonstrates that the Second Circuit's assertion is incorrect. Using data from Stanford Securities Litigation Analytics, which tracks securities class actions, *amici* analyzed all securities class actions filed from 2002 to 2009 that asserted claims only under Sections 11 or 12 of the Securities Act. That analysis determined that Section 13's three-year period would have expired prior to a ruling on class certification in 83 percent (38 out of 46) of the cases that reached a certification

decision and in almost half (38 out of 80) of all filed cases. Law Professors Brief, *supra*, at 8 & n.6. Expanding the analysis to include Section 10(b) cases produced a similar result: "specifically, the five-year limitations period that applies to such claims expired prior to one or more orders on a certification motion in 41 of 65 cases reaching such an order and prior to an order preliminarily approving a settlement class in 94 of 109 cases reaching such an order." *Id.* at 9. The median number of days between the start of the class period and the last court order on certification in § 10(b) cases was 2,161 days – almost six years. *Id.* at 11.

These results are hardly surprising, given the complexity of securities litigation and the rounds of briefing needed to resolve appointment of lead plaintiff, motions to dismiss, class certification, and the attendant burden on plaintiff to satisfy Rule 23, which often requires the taking of discovery regarding class certification and the submission of expert reports or testimony. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552-53 (2011) (discussing evaluation of expert testimony at class certification and observing that "'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982), and citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993))); *New Jersey Carpenters*, 288 F.R.D. at 294 ("in a securities case, the risk that potential class members would flood the courts is particularly serious, since class certification is a lengthy, uncertain process"); *Citigroup*, 822 F. Supp. 2d at 380 ("The complexity of securities class actions often precludes resolution of the certification question within the three-year repose period.").

In view of the time required for resolving such matters, it would be rare indeed for a decision on class certification to be reached before expiration of Section 13's three-year time limit. As noted in *Morgan Stanley*, 810 F. Supp. 2d at 668,

> [i]f *American Pipe* did not apply to Section 77m's statute of repose, plaintiffs would have only three years in which to uncover the actionable conduct, file suit, and secure class certification. Offending conduct often comes to light years after the fact, class certification can be a lengthy process, and there is always a risk that certification would be denied. Thus, putative class members would have significant incentives to file protective motions to secure their claims.[13]

One need only examine what happened to LACERA and Detroit Retirement to appreciate the adverse consequences of the lower courts' decisions in this case. Until Judge Castel's decision in *Footbridge* on March 16, 2011, LACERA and Detroit Retirement had good reason to believe they could rely on the class action to safeguard their ability to seek relief under the Securities Act, as

13. *See Wiles*, 223 F.3d at 1168 ("Defendants' potential liability should not be extinguished simply because the district court left the class certification issue unresolved."); 7B Charles Alan Wright, et al., *Federal Practice and Procedure* § 1795, p. 325 (2d ed. 1986) ("If the [class certification] determination is delayed, members of a putative plaintiff class may be led by the very existence of the lawsuit to neglect their rights until after a negative ruling on this question—by which time it may be too late for the filing of independent actions.... [T]he possibility of unfairness is obvious.").

every court to consider the issue had held that *American Pipe* applied to Section 13's three-year limitations period. LACERA and Detroit Retirement's claims regarding the offerings for which they sought to intervene were timely when the initial class complaint was filed. But with the passage of time occasioned by the briefing of lead plaintiff appointment, the motions to dismiss and class certification, the majority of those claims became time-barred under the reasoning of the Second Circuit, long before the district court ruled on the motions to dismiss, let alone by the time the court decided whether to certify a class.

Had LACERA and General Retirement known that their claims would be extinguished based on the district court's adoption of a lone district judge's view that *American Pipe* did not apply, LACERA and Detroit Retirement could have moved to intervene or filed their own actions earlier to protect their interests. Instead, if the Second Circuit's decision is allowed to stand, LACERA, Detroit Retirement and numerous other class members would be punished for their considered and reasoned restraint in not rushing to file their own costly, duplicative and potentially unnecessary individual actions simply out of an abundance of caution, which is precisely what no one wants, but everyone would get.

Nothing has happened in the four decades since *American Pipe* was decided that warrants its evisceration. Adoption of the Second Circuit's ruling would do precisely that, representing a sea change in securities class action litigation and undoing all that Rule 23 and *American Pipe* were intended to accomplish. The same argument raised by the plaintiffs-respondents in *American Pipe* holds true here: the Second Circuit's decision is "bad law"

and, if adopted, "would be a backward step of appalling proportions." Br. for Resp'ts, *Am. Pipe & Constr. Co. v. Utah*, No. 72-1195 (U.S. July 25, 1973), 1973 WL 172292, at *28.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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