

No. 16-206

IN THE
Supreme Court of the United States

DEKALB COUNTY PENSION FUND, ON BEHALF OF ITSELF
AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

TRANSOCEAN LTD., ROBERT L. LONG, JON A.
MARSHALL, AND TRANSOCEAN INC.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**BRIEF OF CIVIL PROCEDURE AND
SECURITIES LAW PROFESSORS AS *AMICI
CURIAE* IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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OTHER MATERIALS

Alexander Aganin, Cornerstone Research, <i>Securities Class Action Filings: 2014 Year in Re-</i>	
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<i>view</i> (2015), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2014-Year-in-Review	12
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David Freeman Engstrom, <i>The Twiqbal Puzzle and Empirical Study of Civil Procedure</i> , 65 Stan. L. Rev. 1203 (2013)	16
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INTEREST OF *AMICI CURIAE*¹

Amici are law professors whose scholarship and teaching focus on civil procedure and/or the federal securities laws. *Amici* have devoted substantial parts of their professional careers to studying those subjects, including conducting theoretical and empirical analyses of how different procedural orderings shape enforcement of the securities laws and other litigation and regulatory schemes.

This brief reflects the consensus of the *amici* that this Court should grant the petition, reverse the Second Circuit's decision, and hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), protects petitioner from the three-year time-bar that the Second Circuit has held governs claims brought under § 14 of the Securities Exchange Act. *Amici* are as follows:

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¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Pursuant to Rule 37.3(a), counsel for *amici* further represents that all parties have consented to the filing of this brief and/or have filed with the Court a blanket consent authorizing such a brief.

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SUMMARY OF THE ARGUMENT

In *American Pipe* and its progeny, this Court wisely rationalized class action law and policy under Rule 23 by tolling applicable limitations periods and thus ensuring that asserted class members need not file protective actions to avoid being time-barred in the event class certification is subsequently denied or the original filer turns out to be a flawed class representative. Tolling thus avoids putting injured parties to an unnecessary and unfair Hobson's choice: file a costly and duplicative action or risk surrendering their rights.

The Court's wise approach is now under assault by a series of decisions in the Second Circuit, including the decision below, that threatens to undo the *American Pipe* rule across the waterfront of federal securities laws. Virtually all federal securities causes of action have a two-tiered time bar: a shorter statute of limitations period governed by a discovery rule, and a longer limitations period running from the violation that is sometimes referred to as a "statute of repose." The Second Circuit's approach, in contrast to the Tenth Circuit's, renders *American Pipe*'s protective rule inapplicable to "repose" periods in the federal securities laws, thus inviting a wave of wasteful and burdensome protective filings that will drain federal court resources without any countervailing benefit.

This brief offers an empirical portrait of the stakes of the split among the circuits on this critically important issue. More concretely, the empirical estimates (and accompanying graphical summaries) presented below show that the Second Circuit's approach restricting *American Pipe*'s reach could, if allowed to stand by this Court, induce putative class members to make protective filings in nearly *half* of securities class actions that reach a court order on class certification and at least *one-quarter* of all filed securities class actions. The Second Circuit's decision thus undermines the core purposes of the *American Pipe* rule: to promote the "efficiency and economy of litigation," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974), and to allow putative class members "to rely on the existence of the [class action] suit to protect their rights," *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

ARGUMENT

I. APPLYING *AMERICAN PIPE* TO STATUTORY REPOSE PERIODS WILL PROMOTE SOUND JUDICIAL ADMINISTRATION OF CLASS ACTION PRACTICE UNDER THE FEDERAL SECURITIES LAWS

A. Empirical Evidence Shows That Limiting *American Pipe*'s Reach Is Likely To Result in Substantial Numbers of Wasteful Protective Filings

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that the filing of a class action complaint “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.”² *Id.* at 554. A contrary rule, the Court warned, would impair the “efficiency and economy of litigation” by inducing potential class members who want to proceed independently if class certification is subsequently denied to move to intervene or file entirely separate but essentially duplicative actions. *Id.* at 553. In the decision below, the Second Circuit extended an earlier decision of that court to hold that *American Pipe* does not apply to the three-year limitations period the Second Circuit has

² The Court subsequently clarified that *American Pipe*'s protective rule applies not just to class members who intervene in the would-be class representative's original suit but to “all members of the putative class,” including those who file individual lawsuits after certification is denied. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

held governs claims brought under § 14 of the Securities Exchange Act.³ This decision and other recent decisions make clear that the Second Circuit will not apply *American Pipe* to any of the so-called “statutes of repose” in the securities laws.⁴ A key question in this case, as the Second Circuit itself has recognized, is thus the quantity of protective filings that can be expected if *American Pipe* does not apply to the repose periods in the federal securities laws.⁵

1. One way to begin to answer that question is to focus on cases that, like the case below, allege fraud in connection with proxy solicitations under § 14 of the Securities Exchange Act. Such claims have increased steadily in recent years, from roughly a dozen per year throughout the 2000s to a few dozen per year more recently, fueled by a rise in merger-objection suits.⁶

³ See Pet. App. 36a-37a (citing *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013)).

⁴ See, e.g., *SRM Global Master Fund Ltd. P’ship v. Bear Stearns Cos.*, --- F.3d ---, 2016 WL 3769735, at *2-*3 (2d Cir. July 14, 2016) (holding that *American Pipe* does not apply to the five-year repose period applicable to Rule 10b-5 claims in 28 U.S.C. § 1658(b)(2)).

⁵ See *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109-10 (2d Cir. 2013) (noting the concern about protective filings but asserting, without empirical support, that limiting *American Pipe* would not have “adverse consequences” and then citing a district court decision that itself lacks empirical support in claiming that “many class actions are resolved or reach the certification stage within the repose period” (quoting *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 627 (S.D.N.Y. 2011))).

⁶ See Svetlana Starykh & Stefan Boettrich, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 5 fig.4 (Jan. 25, 2016), available at http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

Even a casual review of this small set of cases suggests that the Second Circuit's decision will induce wasteful protective filings.

For instance, in *In re Hallwood Energy Partners L.P. Securities Litig.*, 1994 WL 132145 (S.D.N.Y. Apr. 12, 1994), the court denied class certification in a case asserting § 14(a) claims because the putative class representative did not meet the adequacy requirement. *Id.* at *2. Because the proxy solicitation and the class-certification decision were separated by more than three years—the repose period the Second Circuit has held applies to § 14 claims—absent class members who wished to continue the action would, under the Second Circuit's approach, have been out of luck. More recently, in *Bensinger v. Denbury Resources, Inc.*, 31 F. Supp. 3d 503 (E.D.N.Y. 2014), a plaintiff filed a § 14(a) claim but was held to lack standing after the repose period had expired. Applying the Second Circuit's earlier decision in *IndyMac*, the district court refused to permit a new plaintiff who had standing to assert claims instead. *Id.* at 511.

Both of these cases vividly show that, under the Second Circuit's approach, injured investors with § 14 claims who have any inkling that the original filer might turn out to be a flawed representative are well-advised to make protective filings, whether moving to intervene or filing a separate lawsuit in the same or a different court, prior to the expiration of the three-year limitations period to avoid having their rights cut off.

2. A more rigorous way to gauge the potential impact of the Second Circuit's decision restricting *American Pipe's* reach is to construct a systematic, quantitative estimate from the far more numerous claims brought under §§ 11 and 12 of the Securities Act, and § 10(b) of the Securities Exchange Act and SEC Rule 10b-5. Such

claims constitute the vast majority of federal securities class actions.⁷ From this heavier volume of cases, one could estimate the proportion of securities class actions producing an order on a motion for class certification in which the court’s order granting or denying certification—or, in cases producing multiple certification orders, the last such order—came after the applicable limitations period had expired. More specifically, one could calculate the elapsed number of days between the first day of the class period specified in the operative complaint during class certification proceedings and either: (i) the date of the district court’s order on a motion for certification (or, in multi-certification-order cases, the last certification order); or (ii) the date of the district court’s order preliminarily approving the settlement class.⁸ This calculation would in turn permit an estimate of the number of cases in which one or more putative class members whose class or sub-class certification had yet to be adjudicated would have needed to take protective action in order to preserve the right to proceed if class certification were later denied.

Amici presented to the Court just such an analysis in the *amicus* brief that they filed in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.* before the Court’s dismissal of the case as improvidently granted.⁹ The results of the analysis, reproduced

⁷ See *Recent Trends*, at 5.

⁸ Keying this calculation to the start of the class period is consistent with § 13’s language, which states that the limitations period begins to run when the security was “bona fide offered to the public” (§§ 11 and 12(a)(1) claims) or upon the security’s “sale” (§ 12(a)(2) claims). 15 U.S.C. § 77m.

⁹ 135 S. Ct. 42 (2014); Brief of Civil Procedure and Securities Law Professors as *Amici Curiae* in Support of Petitioner, *IndyMac*, 135 S. Ct. 42 (No. 13-640), 2014 WL 2361893 (filed May 28, 2014).

below, paint a vivid portrait of the potential impact of allowing the Second Circuit’s decision limiting *American Pipe*’s reach to stand.

FIGURE 1. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING ONLY §§ 11 OR 12 CLAIMS, 2002-2009

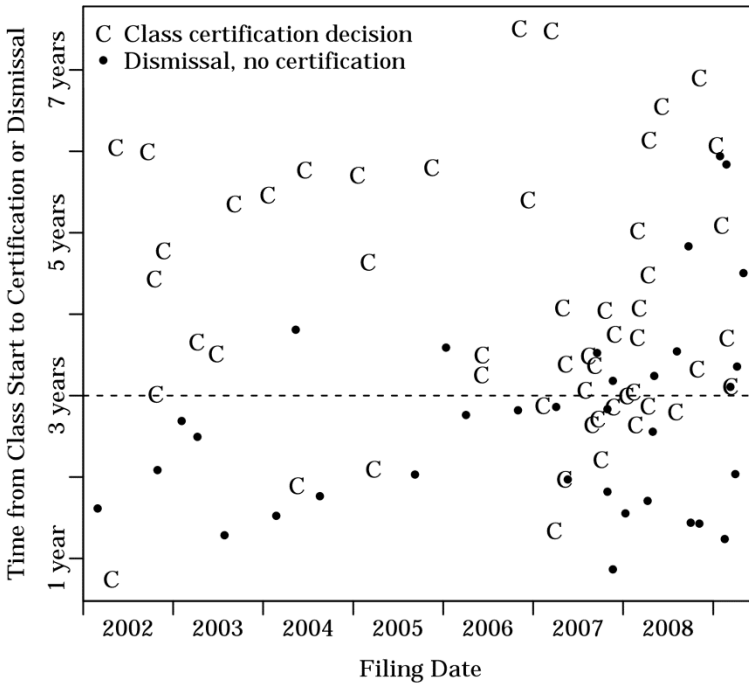


Figure 1 offers a graphical summary of the first part of the prior analysis, as performed on a dataset of all 86 securities class actions filed during 2002-2009 asserting claims only under §§ 11 or 12 of the Securities Act and thus subject to the three-year period of Securities Act § 13, 15 U.S.C. § 77m.¹⁰ The results are

¹⁰ The data were provided by Stanford Securities Litigation Analytics, which tracks securities class actions. The year 2002 was used as the front-end of the study window because data were

striking: § 13's three-year limitations period, denoted in the Figure as a horizontal dashed line, would have expired prior to a certification decision in 73 percent (38 of 52) of cases that reached a certification decision and prior to a certification decision in 44 percent (38 of 86) of all filed cases. To provide more detail on the 52 cases depicted in the Figure that reached a certification decision, § 13's three-year limitations period would have expired before an order on a motion for class certification in 11 of the 12 cases reaching such an order. And that period would have expired before an order preliminarily approving a proposed class settlement in 29 of the 42 cases reaching such an order.¹¹

This same approach also permits characterization of the efficiency costs of the Second Circuit's recent decision¹² to further limit *American Pipe's* reach in the context of claims brought under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5, as governed by the five-year limitations period Congress has prescribed for such claims.¹³

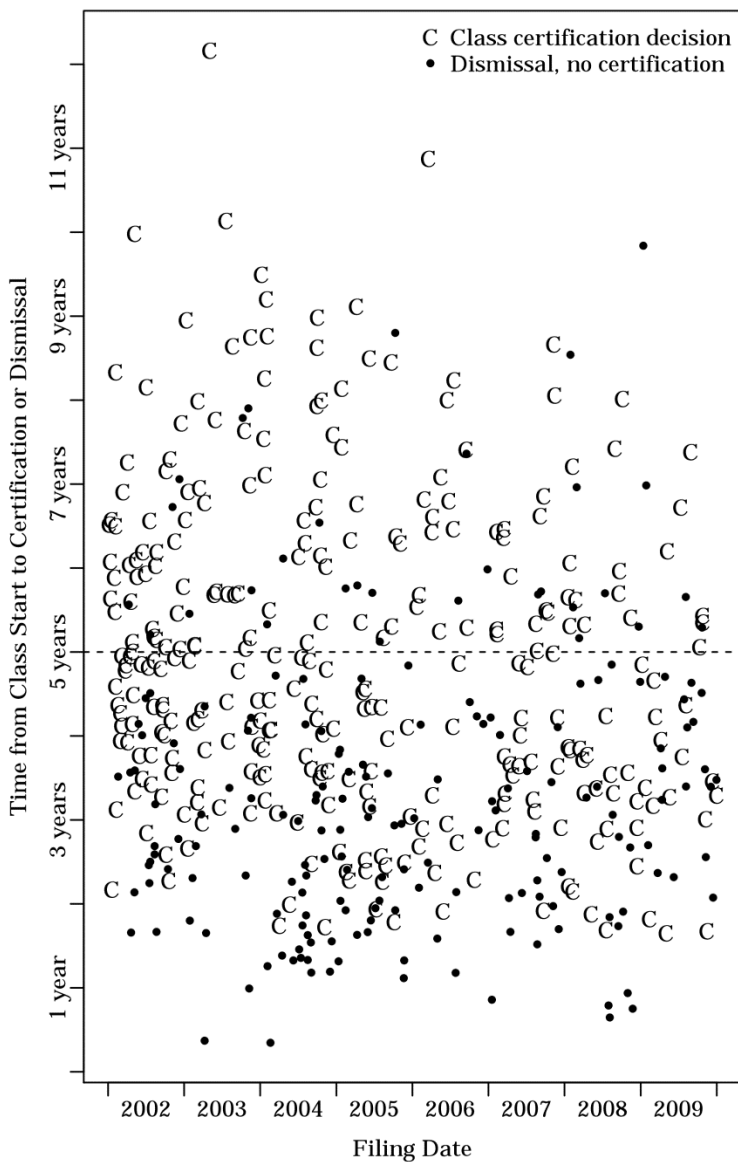
unavailable for cases filed earlier. The year 2009 was chosen as the window's back-end because it was the most recent year for which nearly all filed cases had been conclusively resolved, thus permitting a clean assessment of whether each sample case yielded a certification order beyond the limitations period.

¹¹ Two cases in the sample of §§ 11 and 12 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the three-year limitations period. This explains why the numbers reported for cases falling into each category sum to 40 (11 + 29) rather than 38.

¹² See *SRM Global*, 2016 WL 3769735, at *2-*3.

¹³ See 28 U.S.C. § 1658(b) (requiring securities fraud cases brought under § 10(b) and Rule 10b-5 to be brought within "5 years after such violation").

FIGURE 2. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING § 10(b) CLAIMS, 2002-2009



To that end, Figure 2 presents a graphical summary of the second part of the prior analysis, this time performed on a random sample of 500 cases drawn from the roughly 1,200 securities class actions asserting § 10(b) claims filed during 2002-2009.¹⁴ The results are again striking: The five-year limitations period that applies to § 10(b) claims would have expired prior to a certification decision in 44 percent (135 out of 307) of cases that reached a certification decision and prior to a certification decision in 27 percent (135 out of 500) of all filed cases in the sample.¹⁵ To provide more detail on the 307 cases depicted in Figure 2 that reached a certification decision, the five-year limitations period that applies to such claims would have expired prior to an order on a certification motion in 42 of 86 cases reaching such an order. And that period would have expired prior to an order preliminarily approving

¹⁴ As with the prior analysis, keying the calculation of elapsed time to the start of the class period is consistent with the weight of authority among lower courts that § 1658(b)'s five-year limitations period is subject to an event-accrual rule—*i.e.*, the date of the misrepresentation or the completion of (or commitment to complete) the purchase or sale of the security. *See, e.g., McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 932 (7th Cir. 2011) (holding that the five-year limitations period starts upon misrepresentation); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (3d Cir. 2007) (same); *see also Arnold v. KPMG LLP*, 334 Fed. App'x 349, 351 (2d Cir. 2009) (explaining that the limitations period starts when parties commit to purchase or sell).

¹⁵ The margin of error for these estimates, calculated at the standard 95 percent confidence level, is ± 5.5 percent for the first and ± 3.9 for the second. In other words, we can be 95 percent confident that the actual proportions lie somewhere between roughly 38 and 50 percent for the first estimate and between 23 and 31 percent for the second.

a settlement class in 97 of 227 cases reaching such an order.¹⁶

Using the above estimates and extrapolating to the roughly 3,400 securities class actions filed between 1997 and 2014 provides a more general estimate: Plaintiffs seeking to preserve their rights in the event of denial of class certification would have needed to file protective actions in more than 900 cases.¹⁷ Had even a handful of potential class members in each case done so as the end of the relevant three- or five-year limitations period approached, total filings, whether interventions or separate lawsuits, would have easily numbered in the thousands. Class members who did not do so would have forever lost their right to seek redress.

B. The Analysis Presented Herein Provides, If Anything, A Conservative Estimate Of The Efficiency Costs Of Limiting *American Pipe's* Reach

While the above empirical analyses might raise the concern that the analyzed sample of securities class

¹⁶ Four of the cases in the sample of § 10 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the five-year limitations period, which explains why the numbers reported for cases falling into each category sum to 139 (42 + 97) rather than 135.

¹⁷ See Alexander Aganin, Cornerstone Research, *Securities Class Action Filings: 2014 Year in Review* 4 fig.2 (2015), available at <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2014-Year-in-Review> (reporting 3,382 securities class action lawsuits between 1997 and 2014, an average of nearly 200 per year). The “900 cases” figure was derived by multiplying the 3,382 cases filed between 1997 and 2014 by the above-reported 27 percent estimate of the proportion of cases in the 500-case sample that reached a certification order after the five-year limitations period.

actions filed during 2002-2009 is somehow idiosyncratic, or that a sea-change in the composition of the case pool going forward will render any backward-looking estimate an uncertain guide to the future, several considerations suggest that the above estimates are actually lower-bound measures. That is, a decision by this Court restricting *American Pipe's* reach would impose an efficiency toll in the federal courts that is likely to be, if anything, *higher* than the estimates imply.

One reason is that the estimates do not account for the fact that a case that never produces a certification order, but is not dismissed until *after* the limitations period expires, can still generate protective filings. Figures 1 and 2 both suggest the existence of a non-trivial number of such cases, denoted as dots falling above the horizontal dashed line drawn at the relevant three- or five-year limitations period. In such cases, a motion for certification may have been filed but not yet adjudicated when the court granted a pending motion for judgment on the pleadings or summary judgment. An absent class member in such a case would have faced the expiration of the relevant repose period with class status uncertain, and would thus have needed to file a protective action in order to preserve the right to pursue a claim.

Nor do the above estimates account for the fact that, under the Second Circuit's approach, a potential class member's rights can be cut off by the relevant three- or five-year limitations period because of *any* defect that is fatal to a class claim, not just denial of certification. Petitioner's is a case in point: The original class representative's claims were dismissed for lack of standing; although petitioner had filed a timely mo-

tion for lead plaintiff status under the Private Securities Litigation Reform Act, the Second Circuit held that petitioner's claims were untimely because the repose period had expired before petitioner filed its lead-plaintiff motion. Pet. App. 7a-9a, 31a-32a; *see also Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (noting that a potential class member's concern about defects in the named representative's standing to pursue certain class claims may also generate protective filings). Without *American Pipe's* protective rule, absent class members who lack complete confidence that they have canvassed all possible legal hurdles to recovery may make protective filings even after class certification has been granted.¹⁸

A final reason the above estimates are likely to be conservative requires consideration of possible dynamic responses by litigants and judges to a decision by this Court limiting *American Pipe's* reach. On the one hand, a decision limiting *American Pipe* would create perverse incentives for litigants to delay pre-trial proceedings to cut off potential class members' opt-out rights. Class action defendants could be expected to prolong pre-trial and certification proceedings as long as possible to extinguish any remaining live claims against them. After all, once the relevant

¹⁸ It is also the case that putative class members, having made protective filings without *American Pipe's* assurance, may ultimately choose not to pursue their claims in cases in which class certification is later denied, perhaps because certification-related discovery or the court's order denying certification reveals weaknesses in the case that were not apparent at the time of the protective filing. This is important, for it shows that the efficiency costs of protective filings following a decision by this Court restricting *American Pipe's* reach will not be limited to cases in which the district court ultimately grants certification.

three- or five-year limitations period has lapsed, a decision denying class certification would become a victory on the merits as to any potential class members who did not take protective action. Even lead class counsel might have a disincentive to hurry, since the running of the limitations period would leave absent class members who have not taken protective action with no further chance to opt out, thus preventing any class member who is dissatisfied with the course of the litigation or a proposed settlement from pursuing a separate action.¹⁹ If litigants on either side of the “v.” slow-walk the proceedings, more cases could be expected to reach certification decisions beyond the relevant three- or five-year limitations period.

On the other hand, the Second Circuit’s approach limiting *American Pipe*’s reach might lead district judges to speed up their consideration of securities cases in an effort to preserve the ability of absent class members to make meaningful decisions about how to pursue their rights. To be sure, such prioritization of securities cases would not be costless. A judge could not move securities cases up in the queue without de-prioritizing other cases, thus causing other litigants to wait longer for justice. Accelerating pre-certification proceedings would also necessarily shorten the time devoted to briefing and decision on lead-plaintiff and Rule 12(b)(6) motions as well as certification-related

¹⁹ This aligns with the longstanding recognition by courts and commentators of possible agency costs in representative actions and the role Rule 23’s opt-out mechanism plays in mitigating those costs. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); see also Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 2.07(a) (2010); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 376-77 (2000).

discovery, thus potentially eroding the quality of judicial decision-making.²⁰ But in theory, judicial prioritization of securities cases could place countervailing, downward pressure on the volume of protective filings in the event of a decision limiting *American Pipe*'s reach.

Measuring the relative size of these competing effects is challenging. It is famously difficult, as empirical scholarship in civil procedure shows, to gauge behavioral responses to changes in procedural rules.²¹ Still, the graphical presentations provided above give good reason to conclude that the effect of the former (litigant) response will equal or even exceed the effect of the latter (judicial) response. Figure 1 provides especially strong evidence in this regard: Cases that reached a certification decision *before* § 13's three-year limitations period expired tend to cluster just below that cut-off, making strategic delay without *American Pipe* plausible. By contrast, cases that reached a certification decision *after* § 13's three-year limitations period tend to be more diffusely distributed above that cut-off. Indeed, in more than half (23 out of 38) of these cases, a judge would have needed to accelerate pre-certification proceedings by more than a full year in

²⁰ Shortening pre-certification proceedings might also come at the cost of less time for the litigants to negotiate a settlement in the shadow of the unknown outcome of a certification decision.

²¹ A recent example is debate over the effect of this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny. See, e.g., David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 Stan. L. Rev. 1203, 1223-29 (2013); Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 Stan. J. Complex Litig. 223, 229-37 (2014).

order to reach a certification decision before § 13's three-year limitations period expired.²²

II. LIMITING *AMERICAN PIPE'S* REACH WOULD NOT YIELD ANY COUNTERVAILING BENEFIT

A potential counter to the clear efficiency concerns raised above is that protective filings, though consuming substantial judicial and private resources, would nonetheless permit defendant entities to gauge their potential liability in the event certification is denied, thus justifying any efficiency cost. In reality, however, protective interventions and filings would offer defendant entities who wish to assess their potential liability if certification is denied strikingly little guidance. The reasons are two-fold.

First, the filing of the class complaint itself provides defendants with sufficient information about the substance of the claims against them and the identities of the claimants to satisfy the purpose of limitations periods of ensuring that defendants have notice of their potential liability within a defined time window. *Am. Pipe*, 414 U.S. at 554-55; *see also* Pet. 26-27.

²² A further reason to doubt district judges' ability to accelerate the certification process is what appears to be a trend toward substantial discovery prior to certification rulings and the resulting blurring of merits and non-merits discovery. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-54 (2011) (requiring "significant proof" of "a general policy of discrimination" in order to meet Rule 23's commonality requirement under Title VII); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (noting the need for district courts to "formulate some prediction as to how specific issues will play out" to assess Rule 23's predominance requirement (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008))).

Second, many defendants in securities class actions have additional, and even more precise, means of determining their potential legal liability. Large securities holders—who are also most likely to have independently marketable claims—are required by the federal securities laws to make annual, publicly available Form 13F filings describing their investment positions above a certain dollar threshold.²³ And the investor relations offices of larger issuers often track such information for a range of purposes.

But even if defendants do not track Form 13F data in the normal course of business, various free and publicly available online services do it for them. *See, e.g., Facebook, Inc. (FB): Major Holders*, Yahoo! Finance, <http://finance.yahoo.com/q/mh?s=FB+Major+Holders> (last visited Sept. 7, 2016) (cataloging “major holders” of Facebook stock); *Ownership & Insiders: FB*, Fidelity, <https://eresearch.fidelity.com/ere-search/evaluate/fundamentals/ownership.jhtml?stocks-page=ownership&symbols=FB> (last visited Sept. 7, 2016) (same). Thus, a defendant can, with only a few online clicks, learn which among its larger investors were net purchasers or sellers during the class period (*i.e.*, the period the alleged fraud was “live”). The result is an estimate of potential liability that is far more useful than a gross tally of interventions or separately filed actions.²⁴

²³ *See* 15 U.S.C. § 78m(f)(1).

²⁴ It is noteworthy that district judges regularly perform a somewhat similar analysis in determining which among the “lead plaintiff” candidates has the “largest financial interest,” as required under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). *See, e.g., Foley v. Transocean Ltd.*, 272 F.R.D. 126, 127-28 (S.D.N.Y. 2011) (discussing the methodology district judges employ, including, *inter alia*, examining the “net shares purchased” and “net funds expended” during the

In short, the efficiency toll of the Second Circuit's decision limiting *American Pipe*'s reach is not only likely to be significant. It is also entirely unnecessary.

CONCLUSION

The Court should grant the petition.

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class period by lead-plaintiff candidates). And consulting firms have long developed sophisticated models of exposure in securities fraud cases. *See, e.g.*, Kenneth R. Cone & James E. Laurence, *How Accurate Are Estimates of Aggregate Damages in Securities Fraud Cases?*, 49 Bus. Law. 505 (1994) (assessing such models as developed by litigation consultant Lexecon Inc.—now Compass Lexecon—and competitor consultancies).