No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (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." *Id.* at 554. The question presented is:

Whether the filing of a putative class action serves to suspend as to putative class members a period of repose such as the three-year period applicable to claims brought under Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a).

PARTIES TO THE PROCEEDINGS

Petitioner DeKalb County Pension Fund, on behalf of itself and all others similarly situated, was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Transocean Ltd., Robert L. Long, Jon A. Marshall, and Transocean Inc. were the defendants in the district court and the appellees in the court of appeals.

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DeKalb County Pension Fund, on behalf of itself and all others similarly situated, respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

INTRODUCTION

This case presents an important and recurring question about the scope of this Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. Conflict and uncertainty now prevail in the lower courts concerning whether that holding applies to the particular kind of limitations provision that is often called a statute or period of "repose." This Court granted certiorari on this question two Terms ago but dismissed the writ after the main parties to that case settled.

This case is a putative class action under Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78n(a), seeking recovery for false and misleading representations in a proxy statement. The Second Circuit has held that such actions are governed by a judicially recognized three-year repose period borrowed from other provisions of the Exchange Act. In this case, a would-be class representative filed a class action complaint within that three-year window, and petitioner moved to be appointed lead plaintiff shortly after the three years elapsed. The original filer turned out to be a flawed representative, and its claims were dismissed. Applying its previous holding in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*,

721 F.3d 95 (2d Cir. 2013), *cert. dismissed sub nom. Public Emps.' Ret. Sys. of Mississippi v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014), the Second Circuit held that the lapse of the three-year period barred petitioner's claims and that *American Pipe* could not save them. App. 36a-37a. As a result, the claims of the entire class are now time-barred.

The Second Circuit's 2013 *IndyMac* decision and its later decisions following *IndyMac*, including its decision here, are squarely in conflict with the Tenth Circuit's decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), which held that *American Pipe* suspends the running of the three-year repose period incorporated in 15 U.S.C. § 77m. The split has recently deepened, with the Sixth Circuit joining the Second Circuit in holding that *American Pipe* does not apply to repose periods. *See Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016). Numerous other courts have acknowledged the division; and another panel of the Second Circuit recently noted, in adhering to *IndyMac,* that the question presented here "may be ripe for resolution by the Supreme Court." *In re Lehman Bros. Sec. & ERISA Litig.*, --- F. App'x ---, 2016 WL 3648259, at *2 (2d Cir. July 8, 2016) (summary order).

Review is also warranted because the Second Circuit and the Sixth Circuit have unsettled long-standing class-action practice. Contrary to the core purpose of the *American Pipe* doctrine, those decisions confront putative class members with acute uncertainty about the steps they must take to preserve their claims. In this case, petitioner sought lead plaintiff status within the time period prescribed by the Private Securities Litigation Reform Act of 1995 ("PSLRA") and was appointed co-lead plaintiff. But

the court of appeals nonetheless held that the entire class action was untimely because the repose period expired between the filing of the complaint and petitioner's motion for lead plaintiff status. This holding disrupts the operation of the PSLRA as intended by Congress. A different Second Circuit panel recently has applied securities repose periods to prevent a member of a certified and timely class action from opting out and pursuing separate claims, contrary to the holding of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974), that *American Pipe* protects opt-out rights. *See SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos.*, --- F.3d ---, 2016 WL 3769735 (2d Cir. July 14, 2016).

This Court previously granted certiorari in *IndyMac* to resolve the same split at issue here. It then dismissed the writ on the eve of argument, shortly after the main parties to the case announced a settlement of a substantial part of that case. The present case presents the same question and is a good vehicle for resolving it: the Second Circuit's ruling wipes out not only petitioner's claims, but also those of every other class member, resulting in an across-the-board final judgment. This Court should now grant certiorari to reaffirm that *American Pipe* established a clear, nationwide rule governing the timeliness of putative class members' claims under the Securities Act of 1933 ("Securities Act") and the Exchange Act, and other statutes that contain repose periods.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-38a) is reported at 817 F.3d 393. The opinion and order of the district court (App. 39a-50a) is reported at 36 F. Supp. 3d 279.

JURISDICTION

The court of appeals entered its judgment on March 17, 2016. On June 1, 2016, Justice Ginsburg extended the time for filing a certiorari petition to and including August 12, 2016. App. 84a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and the Federal Rules of Civil Procedure are set forth at App. 51a-83a.

STATEMENT OF THE CASE

1. Respondent Transocean is an oil services company whose stock lost more than half its value after one of its oil rigs, the Deepwater Horizon, exploded in the Gulf of Mexico, causing a massive environmental disaster. App. 6a.[1] Petitioner is a former shareholder of GlobalSantaFe Corp. ("GSF"), an oil services company that agreed to merge with Transocean at a

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[1] In 2008, Transocean reorganized as a Swiss company. Second Am. Class Action Compl. ¶ 20, Doc. 63 (filed Apr. 16, 2012) ("SAC"). Before the reorganization, the publicly traded company was respondent Transocean Inc. *Id.* In the reorganization, Transocean, Inc. became a subsidiary of respondent Transocean Ltd., which has been the publicly traded company since the reorganization. *Id.* Except where specifically noted, this petition uses "Transocean" to refer to both entities.

References to "Doc. __" are to the district court's docket in No. 10-cv-7498.

November 9, 2007 shareholder meeting. *Id.* Pursuant to the merger, petitioner and other GSF shareholders exchanged their GSF shares for cash and Transocean shares, thereby becoming Transocean shareholders. *Id.*

On October 2, 2007, GSF and Transocean disseminated a proxy statement concerning the proposed merger signed by respondents Robert L. Long and Jon A. Marshall, the chief executive officers of Transocean and GSF. App. 5a-7a; SAC ¶ 7. Among other things, the proxy statement and incorporated materials represented that Transocean was "in compliance with all Environmental Laws" and had conducted "'extensive' training and safety programs." SAC ¶¶ 144-145.

In a complaint filed on behalf of a putative class of former GSF shareholders, petitioner alleged that these representations were false and misleading because Transocean frequently violated environmental laws and performed inadequate training and safety programs, which created risks that were realized in the Deepwater Horizon disaster. *Id.* ¶¶ 62-141, 147-148, 151-158. For example, Transocean disregarded a regulatory requirement to conduct regular major inspections of its oil rigs' blowout preventers because the required inspections would force Transocean to forgo profits by taking its oil rigs out of service. *Id.* ¶¶ 71-90. On April 20, 2010, Transocean's Deepwater Horizon rig exploded in the Gulf of Mexico, causing the largest oil spill in U.S. history. *Id.* ¶ 12. In the weeks and months following the explosion, the truth regarding Transocean's deficient environmental and safety practices was revealed in a series of news reports, governmental investigations, witness testimony, and lawsuits. *Id.* ¶¶ 159-174.

Petitioner alleged that it and other GSF shareholders received inadequate compensation in the merger because the purported value of Transocean's stock was inflated by the material misrepresentations and omissions in the proxy statement, which deprived GSF shareholders of their right to make an informed vote on the merger. *Id.* ¶¶ 5-8, 11. These shareholders were harmed when the truth was revealed following the Deepwater Horizon disaster, causing Transocean stock to lose more than half its value between April 20, 2010, and July 23, 2010. *Id.* ¶ 173.

2. On September 30, 2010, Bricklayers and Masons Local Union No. 5 Ohio Pension Fund ("Bricklayers") filed a putative Class Action Complaint ("Compl.") asserting claims under Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), and Securities and Exchange Commission ("SEC") Rule 14a-9, 17 C.F.R. § 240.14a-9, against Transocean Ltd., Long, and Marshall, based on alleged material misrepresentations and omissions in the proxy statement. App. 6a-7a; Compl. ¶¶ 55-60, Doc. 1.[2] The Complaint asserted claims on behalf of all former GSF shareholders who were harmed by the proxy statement, a class that included petitioner. Compl. ¶ 46.

On October 4, 2010, Bricklayers published notice of the action pursuant to the PSLRA, 15 U.S.C. § 78u-4(a)(3)(A)(i). *See* Doc. 22, ¶ 3. On December 3, 2010, Bricklayers and petitioner each filed motions for appointment as lead plaintiff within the time permitted by the PSLRA, 15 U.S.C. § 78u-4(a)(3)(B)(v). Docs. 23, 25. On January 7, 2011, the district court

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[2] The Complaint also asserted a claim under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), against Long for "controlling person" liability for the same misstatements. Compl. ¶¶ 61-62.

entered a stipulation appointing Bricklayers and petitioner co-lead plaintiffs. Doc. 36.

On April 7, 2011, Bricklayers and petitioner filed an Amended Class Action Complaint asserting the same claims against the same defendants as the original Complaint. Doc. 39. Respondents filed a motion to dismiss for lack of standing and failure to state a claim. Docs. 41-42.

On March 30, 2012, the district court dismissed Bricklayers for lack of standing but found that petitioner had standing. The district court held that petitioner, but not Bricklayers, had alleged that it was entitled to vote in the merger and retained its Transocean shares after the corrective disclosures began on April 20, 2010. *See Bricklayers & Masons Local Union No. 5 Ohio Pension Fund v. Transocean Ltd.*, 866 F. Supp. 2d 223, 237 (S.D.N.Y. 2012).[3] The district court otherwise denied the motion to dismiss, holding that petitioner had pleaded valid claims that it was injured by material misrepresentations and omissions in the proxy statement. *See id.* at 237-46.

On April 16, 2012, petitioner filed its Second Amended Class Action Complaint against all respondents. Respondents again filed a motion to dismiss for lack of standing, Docs. 65-66, which the district court denied on October 4, 2012, Doc. 90. On October 5, 2012, respondents filed a motion to stay pending the Second Circuit's decision in *IndyMac*. Doc. 91. In opposing, petitioner argued that its claims were timely under principles announced by this Court in *American Pipe*. Doc. 96, at 1. The

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[3] The district court dismissed the claims against Transocean Ltd., but allowed petitioner to amend the complaint to add Transocean Inc. and plead facts to hold Transocean Ltd. liable under the "de facto merger" doctrine. 866 F. Supp. 2d at 246-47.

district court granted the stay on February 15, 2013, Doc. 103, and lifted the stay on July 22, 2013, Doc. 122, following the Second Circuit's decision in *IndyMac*.

Respondents filed a motion to dismiss, arguing that petitioner's claims were untimely under a "three-year statute of repose" applicable to Section 14(a) claims. Docs. 126-127. The district court granted the motion. App. 39a. It first concluded that, under Second Circuit precedent, petitioner's claims were subject to a one-year limitations and three-year repose period borrowed from other provisions of the federal securities laws. App. 42a-50a.[4] It then concluded that, under *IndyMac*, *American Pipe* did not prevent the running of the three-year repose period. App. 41a. Under that reasoning, the repose period ran out on October 2, 2010, three years after the proxy statement. App. 50a. Because petitioner first appeared before the district court on December 3, 2010, when it sought lead plaintiff status, the district court dismissed petitioner's claims (and, with them, the entire class action) as untimely. *Id.*

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[4] *See Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 352 (2d Cir. 1990) (holding that claims under Sections 14(d) and 14(e) of the Exchange Act are subject to that one-and-three-year framework, which appears in other provisions of that Act); *see also* 15 U.S.C. § 78i(f) ("No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation."); *id.* § 78r(c) ("No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.").

3. On appeal, the Second Circuit affirmed. The court of appeals agreed with the district court that petitioner's claims were governed by the one-year limitations and three-year repose periods adopted in its earlier *Ceres* decision, rejecting petitioner's argument that the district court should instead have applied the two- and five-year periods created by 28 U.S.C. § 1658(b). App. 24a-28a. It further held that the three-year period begins to run on the date of the defendant's last culpable act or omission, which in this case was the issuance of the proxy statement on October 2, 2007. App. 28a-31a. The repose period therefore expired on October 2, 2010, and petitioner's claims were untimely because it first appeared on December 3, 2010. App. 31a-32a.

The court of appeals rejected petitioner's remaining arguments that its claims were timely. First, the court held that petitioner's lead plaintiff motion did not "relate back" to the date of Bricklayers' original complaint under Federal Rule of Civil Procedure 17(a)(3). App. 32a-34a. Second, the court held that the period under the PSLRA to move for lead plaintiff status did not toll the repose period. App. 34a-35a. Third, the court held that "so-called '*American Pipe* tolling'" did not apply to petitioner's claims. App. 35a-37a.

In refusing to apply *American Pipe*, the court of appeals relied on its prior decision in *IndyMac*. The court first noted that, in *IndyMac*, it had "reasoned that, if the [*American Pipe*] rule is equitable in nature, its extension to Section 13 [of the Securities Act, 15 U.S.C. § 77m]'s statute of repose is barred by *Lampf*[*, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991)], in which the Supreme Court stated that equitable 'tolling princi-

ples do not apply to that period.'" App. 36a. The court concluded that "this aspect of our holding in *IndyMac* . . . applies equally to the statutes of repose applicable to Section 14(a)." *Id.*

The court of appeals next noted that, "[i]n *IndyMac*, we also reasoned that, if the *American Pipe* tolling rule is legal in nature, its extension to Section 13's statute of repose is barred by the Rules Enabling Act." App. 37a. The court concluded that "this aspect of our holding in *IndyMac* . . . applies equally to the statutes of repose applicable to Section 14(a) as well." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED ON THE APPLICATION OF *AMERICAN PIPE*

A. The Second Circuit And Sixth Circuit Conflict With The Tenth Circuit Over Whether *American Pipe* Applies To Repose Periods

1. In *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), the Tenth Circuit held that *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies to the three-year time bar of Section 13 of the Securities Act, which it called a "statute of repose." 223 F.3d at 1166, 1168. There, Joseph purchased convertible debentures that were sold in a public offering. *Id.* at 1157. After the sale, the issuer announced that purchasers should not rely upon its prior financial statements because of irregular business practices. *Id.* A class action was filed within three years of the offering on behalf of common stock and debenture purchasers, a putative class that included Joseph. *Id.* After the district court provisionally declined to certify a class of debenture holders, Joseph filed his own class-action complaint asserting

a Securities Act claim subject to Section 13. *Id.* The district court dismissed Joseph's action, concluding that, because he filed suit more than three years after the debentures were offered to the public, Section 13 barred his claim. *Id.* at 1157-58.

On appeal, the Tenth Circuit reversed. It held that, because Joseph was covered by the previously (and timely) filed class action, Section 13 did not bar his later-filed action. *Id.* at 1168. The court explained that, under *American Pipe*, "'the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.'" *Id.* at 1167 (quoting *American Pipe*, 414 U.S. at 553). It further noted that, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court "expanded [the *American Pipe*] rule . . . to include putative class members who later seek to file independent actions." 223 F.3d at 1167.

The Tenth Circuit acknowledged that this Court had held in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), "that equitable tolling does not apply to statutes of repose," but it found that holding "not relevant . . . because the tolling that Mr. Joseph seeks is legal rather than equitable in nature," in that it "occurs any time an action is commenced and class certification is pending." 223 F.3d at 1166-67.

The Tenth Circuit also stated that *Lampf* is not "incompatible" with *American Pipe* and *Crown, Cork & Seal* because "*Lampf* states that the 'litigation . . . must be *commenced* . . . within three years after [a] violation.'" *Id.* at 1167 (quoting *Lampf*, 501 U.S. at 364) (emphasis supplied by *Joseph*; first ellipsis in

original). The court reasoned that, because "the claim was brought within this period on behalf of a class of which Mr. Joseph was a member," Joseph's claim was also commenced in accordance with *Lampf*'s command. *Id.* at 1168. Viewed in this way, "application of . . . *American Pipe* . . . does not involve 'tolling' at all," but rather a recognition that "Mr. Joseph ha[d] effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Id.*

The *Joseph* court added that applying *American Pipe* to Section 13's three-year period "serves the purposes of Rule 23." *Id.* at 1167. "If all class members were required to file claims in order to insure" that their claims do not become time-barred during the consideration of class certification, "the point of Rule 23 would be defeated." *Id.* In particular, "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." *Id.*

The Tenth Circuit made clear that its reasoning was not limited to Section 13 but applied generally to statutes of repose. *See id.* ("Tolling the limitations period while class certification is pending does not compromise the purposes of statutes of limitation and repose."). Accordingly, if this case had been brought in the Tenth Circuit, the repose period of Section 14(a) would have been suspended upon the filing of Bricklayers' complaint, and petitioner's claims would have been timely.

2. The Second Circuit has reached the opposite conclusion: that *American Pipe* does not apply to repose periods.

In *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), the Second Circuit held that *American Pipe* did not apply to the three-year time bar of Section 13 of the Securities Act. First, the Second Circuit reasoned that, "[i]f [*American Pipe*'s] tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable 'tolling principles do not apply to that period.'" *Id.* at 109 (quoting *Lampf*, 501 U.S. at 363). Second, the Second Circuit asserted that, if the *American Pipe* rule is "based upon Rule 23," "its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act." *Id.* According to the Second Circuit, "[p]ermitting a plaintiff to file a complaint or intervene after the repose period set forth in Section 13 of the Securities Act has run would . . . enlarge or modify a substantive right and violate the Rules Enabling Act." *Id.*[5]

In the decision below and in another recent decision, the Second Circuit has extended *IndyMac*'s reasoning to other repose periods. In the decision below, the Second Circuit relied on *IndyMac* to hold that *American Pipe* did not apply to the three-year repose period that it had borrowed for Section 14(a) claims, concluding that both aspects of the *IndyMac* holding "appl[y] equally to the statutes of repose applicable to Section 14(a)." App. 36a, 37a. In *SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos.*, --- F.3d

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[5] The Second Circuit has since reiterated in summary orders that, under *IndyMac*, *American Pipe* does not apply to Section 13's three-year period. *See, e.g.*, *In re Lehman Bros. Sec. & ERISA Litig.*, --- F. App'x ---, 2016 WL 3648259, at *1 (2d Cir. July 8, 2016).

---, 2016 WL 3769735 (2d Cir. July 14, 2016), the Second Circuit refused to apply *American Pipe* to the five-year "statute of repose" for securities fraud claims, 28 U.S.C. § 1658(b)(2), "[f]or the reasons we provided in *IndyMac*." 2016 WL 3769735, at *2.

3. The Sixth Circuit recently joined the Second Circuit in holding that *American Pipe* does not apply to repose periods. In *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016), that court considered the applicability of *American Pipe* to two repose periods in the securities laws, 15 U.S.C. § 77m and 28 U.S.C. § 1658(b)(2). 821 F.3d at 787. The Sixth Circuit noted: "Our fellow Circuits are split. The Tenth Circuit held that *American Pipe* tolled statutes of repose pending class certification in [*Joseph*], while the Second Circuit came to the opposite conclusion in [*IndyMac*]." *Id.* at 792-93. After discussing both cases, the Sixth Circuit "join[ed] the Second Circuit in holding that, regardless of whether *American Pipe* tolling is derived from courts' equity powers or from Rule 23, it does not apply to statutes of repose." *Id.* at 793-95.

B. The Second Circuit's Decision Is Inconsistent With Federal Circuit Decisions Applying *American Pipe* To Jurisdictional Time-For-Suit Provisions

The Second Circuit's decision is also inconsistent with Federal Circuit decisions that have applied *American Pipe* to "jurisdictional" provisions setting time limits for bringing claims against the United States.

In *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), a landowner filed a class-action complaint in the Court of Federal Claims, asserting takings claims on behalf of herself and similarly situated land-

owners. *Id.* at 1276. That complaint was filed within six years of the alleged taking, as required under 28 U.S.C. § 2501. *Id.* The Court of Federal Claims nevertheless dismissed the action as to all landowners except the original named plaintiff. It held that, notwithstanding the timely filing of a class-action complaint on behalf of all affected landowners, the claims of those landowners who had not either requested inclusion or filed their own complaint within six years were untimely under § 2501. *Id.* at 1277-78.[6] In rejecting the landowners' reliance on *American Pipe*, the court reasoned in part that § 2501 was viewed by this Court in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), "as being jurisdictional in nature and more absolute and rigid than other statutes of limitation." 603 F.3d at 1277-78.

On appeal, the Federal Circuit reversed. It acknowledged that, under *John R. Sand & Gravel*, "equitable tolling is barred under section 2501," but it concluded that did

> not mean that class action statutory tolling also is barred. The two concepts are different. Equitable tolling is a principle that permits courts to modify a statutory time limit and extend equitable relief when appropriate. Class action statutory tolling, on the other hand, does not modify a statutory time limit or "extend equitable relief." Rather, it is a procedure that suspends or tolls the running of the limitations period for all

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[6] Unlike Federal Rule of Civil Procedure 23, under which unnamed class members are bound unless they opt out, the corresponding Court of Federal Claims Rule provides that "an individual must affirmatively . . . 'opt in' by requesting inclusion in the action." *Bright*, 603 F.3d at 1277 n.1; *see* U.S. Ct. Fed. Cl. R. 23(c)(2)(B)(iv)-(v) & rules committee notes.

> purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations.

Id. at 1287-88 (citations omitted). The Federal Circuit has also applied *American Pipe* to jurisdictional time bars in previous cases.[7]

This case would have come out differently under the Federal Circuit's approach. The contention that the borrowed repose period for Section 14(a) is not subject to equitable tolling would not have mattered because class-action tolling is "different" from equitable tolling. *Bright*, 603 F.3d at 1287. Nor would that court have considered the Rules Enabling Act a bar to applying *American Pipe*, because the Federal Circuit recognizes that *American Pipe* does not involve "modify[ing] a statutory time limit." *Id.* at 1287-88.

C. District Courts Have Reached Disparate Conclusions Regarding The Application Of *American Pipe*

Until recently, district courts uniformly held that *American Pipe* applied to repose periods. *See Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177 (D. Mass. 2009) (collecting cases and concluding 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"). Although the district courts are no longer unanimous, the vast majority of district courts in circuits with no controlling precedent have

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[7] *See, e.g.*, *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352-54 (Fed. Cir. 2000) (noting uncertainty whether "judge-made equitable tolling doctrines" could be applied to claims "against the government," but reasoning that the *American Pipe* rule was "not based on judge-made equitable tolling, but rather on the Court's interpretation of Rule 23").

held that *American Pipe* applies to repose periods, including courts in the First,[8] Third,[9] Fifth,[10] Seventh,[11] and Ninth[12] Circuits.

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[8] *See Arivella*, 623 F. Supp. 2d at 177-78 (six-year statute of repose for Employee Retirement Income Security Act of 1974); *Ballard v. Tyco Int'l, Ltd.*, No. MDL 02-MD-1335-PB, 2005 WL 1683598, at *7 (D.N.H. July 11, 2005) (three-year period adopted in *Lampf* and Securities Act § 13); *Salkind v. Wang*, Civ. A. No. 93-10912-WGY, 1995 WL 170122, at *2-3 (D. Mass. Mar. 30, 1995) (three-year period adopted in *Lampf*).

[9] *See North Sound Capital LLC v. Merck & Co.*, Nos. 3:13-cv-7240 (FLW)(DEA) et al., 2015 WL 5055769, at *7-9 (D.N.J. Aug. 26, 2015) (five-year periods in 28 U.S.C. § 1658(b)(2) and 15 U.S.C. § 78t-1(b)(4)); *Prudential Ins. Co. of Am. v. Bank of Am., Nat'l Ass'n*, 14 F. Supp. 3d 591, 618 (D.N.J. 2014) (Securities Act § 13); *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, MDL No. 1658 (SRC), 2012 WL 6840532, at *5 (D.N.J. Dec. 20, 2012) (five-year period in 28 U.S.C. § 1658(b)(2)).

[10] *See In re BP p.l.c. Sec. Litig.*, No. 4:13-cv-1393, 2014 WL 4923749, at *4-5 (S.D. Tex. Sept. 30, 2014) (five-year period in 28 U.S.C. § 1658(b)(2)); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 465 F. Supp. 2d 687, 717 (S.D. Tex. 2006) (adopting *Joseph*).

[11] *See Andrews v. Chevy Chase Bank, FSB*, 243 F.R.D. 313, 315-17 (E.D. Wis. 2007) (three-year statute of repose for Truth in Lending Act); *In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998) (three-year period adopted in *Lampf*).

[12] *See Hrdina v. World Sav. Bank, FSB*, No. C 11-05173 WHA, 2012 WL 294447, at *3-4 (N.D. Cal. Jan. 31, 2012) (three-year statute of repose for Truth in Lending Act); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010) (Securities Act § 13); *Hildes v. Andersen*, No. 08-cv-0008-BEN (RBB), 2010 WL 4811975, at *3-4 (S.D. Cal. Nov. 8, 2010) (three-year period adopted in *Lampf*).

Other district courts in the Fifth[13] and Eleventh[14] Circuits have disagreed, holding that *American Pipe* does not apply to repose periods.

D. Many Courts Have Recognized The Circuit Conflict

Since *IndyMac*, many courts have explicitly acknowledged the circuit split regarding the application of *American Pipe* to repose periods. *See*, *e.g.*, *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 n.5 (5th Cir. 2013) (citing *Joseph* and *IndyMac* and noting that "there is some debate" about whether a "statute of repose can be extended by tolling"); *Stein*, 821 F.3d at 792 ("Our fellow Circuits are split."); *In re BP*, 2014 WL 4923749, at *4-5 ("[c]ase law supports both positions" on whether "the statute of repose is . . . subject to *American Pipe* tolling"); *Dusek*, 132 F. Supp. 3d at 1349 ("[f]ederal courts disagree" on the *American Pipe* rule's "application to a statute of repose"); *North Sound Capital*, 2015 WL 5055769, at *7-9 (describing split between *Joseph* and *IndyMac*). Of the courts to recognize the split, some (such as *BP* and *North Sound Capital*) have sided with the Tenth Circuit; others (such as *Stein* and *Dusek*) have sided with the Second Circuit; and *Hall* resolved the case on other grounds.

In sum, the conflict over the application of *American Pipe* to repose periods is clear, has percolated for

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[13] *See Dickson v. American Airlines, Inc.*, 685 F. Supp. 2d 623, 627 (N.D. Tex. 2010) ("[C]lass action tolling is not applicable to the Montreal Convention two-year repose provision.").

[14] *See Dusek v. JPMorgan Chase & Co.*, 132 F. Supp. 3d 1330, 1349-50 (M.D. Fla. 2015) (five-year period in 28 U.S.C. § 1658(b)(2)); *McMillian v. AMC Mortg. Servs., Inc.*, 560 F. Supp. 2d 1210, 1215 (S.D. Ala. 2008) (three-year statute of repose for Truth in Lending Act).

several years, and has been widely acknowledged and debated in the lower courts. The issue is ripe once again for this Court's review.

II. THE SECOND CIRCUIT'S DECISION IS INCORRECT

A. *American Pipe* Applies To Section 14(a)'s Implied Repose Period

In *American Pipe*, this Court concluded that the filing of a class action benefits putative class members for purposes of applying time bars. This Court held that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. Because a class action was a "truly representative suit," "the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate." *Id.* at 550-51.

Under *American Pipe*'s holding, putative class members benefit from the class action for as long as they are members of a putative class. Once they are removed from a putative class – for example, by the denial of class certification[15] – they have at least as much time remaining to file as they did at the time the class action was filed. *See id.* at 561 (holding that putative class members had 11 days from the denial of class certification to intervene because the class action had been filed with 11 days before the running of the applicable time bar). This Court referred to this effect as "suspend[ing] the applicable

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[15] This Court subsequently clarified that the *American Pipe* rule also applies when a class member removes herself from the class by opting out. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974).

statute of limitations as to all asserted members of the class." *Id.* at 554.

The *American Pipe* decision was issued before the terms "statute of limitations" and "statute of repose" attained their modern, distinctive usage. At the time, the phrases were frequently used interchangeably (as they still sometimes are today).[16] Yet the Court's reasoning demonstrated that its holding applied equally to what are now called repose periods. The *American Pipe* Court justified its holding as necessary to preserve "the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.* at 553. Without such a rule, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.*

Interpreting *American Pipe* to apply only to some time bars – those deemed "statutes of limitations" rather than "statutes of repose" under the modern usage of those terms – would be inconsistent with its purpose. Putative class members would still be induced to file protective motions or lawsuits to avoid

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[16] The "modern, more precise usage" of "statute of limitations" as referring only to a time bar that runs from accrual of a cause of action, and "statute of repose" as referring only to a time bar that runs from a defendant's last culpable act, was recognized by this Court in 2014. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182, 2186 (2014). The *CTS* court noted that, in 1981, a scholar "described multiple usages of the terms [statute of limitation and statute of repose], including . . . a usage in which the terms are equivalent." *Id.* at 2186. That scholar, quoting a 1979 legal dictionary, noted that, under one then-prevailing usage, "a statute of repose and a statute of limitation are identical—'legislative enactments prescribe the periods within which actions may be brought.'" Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 582 (1981) (quoting *Black's Law Dictionary* 835 (5th ed. 1979)).

the expiration of repose periods. Such a "needless multiplicity of actions [was] precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal*, 462 U.S. at 351 (holding that *American Pipe* tolling protects class members who file individual actions after class certification is denied, in addition to those who seek to intervene to serve as class plaintiffs).

B. The Second Circuit's Reasons For Refusing To Apply *American Pipe* Are Erroneous

The court of appeals gave two reasons for rejecting the straightforward analysis set forth above. *See* App. 36a-37a. Both are incorrect.

1. *American Pipe* is not a form of "equitable tolling" inapplicable to repose periods

The Second Circuit first relied on its holding in *IndyMac* that, "if the [*American Pipe*] rule is equitable in nature, its extension" to repose periods "is barred by *Lampf*, in which the Supreme Court stated that equitable 'tolling principles do not apply to that period.'" App. 36a (quoting *IndyMac*, 721 F.3d at 109).

But *American Pipe* is not an equitable tolling rule. It is an interpretation of Rule 23. The *American Pipe* Court explored the history of Rule 23 in detail, comparing different versions of the rule and discussing key provisions. *See* 414 U.S. at 545-56 & n.11. The Court was explicit that its rule followed from the text and structure of Rule 23. It found "simply inconsistent with Rule 23 as presently drafted" the alternative possibility that class members "must individually meet the timeliness requirements." *Id.* at 550. The Court concluded that its "*interpretation*

of [Rule 23] is . . . necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56 (emphasis added).

American Pipe also operates differently from "equitable tolling" as defined by this Court. Equitable tolling is "a doctrine that 'pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" *CTS*, 134 S. Ct. at 2183 (quoting *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014)). But *American Pipe* does not require "diligence" or "extraordinary circumstances." It applies to all putative class members, even those "who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)." 414 U.S. at 551.

Equitable tolling also serves different purposes from *American Pipe*. Equitable tolling promotes fairness to the plaintiff; the paradigmatic example of equitable tolling is the discovery rule, which benefits a diligent plaintiff, such as a fraud victim, who has failed to discover his injury during the limitations period. *See Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1875) (equitable discovery rule necessary to prevent "the law which was designed to prevent fraud" from becoming "the means by which it is made successful and secure"). But *American Pipe*'s interpretation of Rule 23 is designed to promote "the efficiency and economy of litigation which is a

principal purpose of the [Rule 23 class-action] procedure." 414 U.S. at 553.[17]

This Court held in *Lampf* that the equitable discovery rule could not apply to securities repose periods that are paired with a shorter limitations period with a textual discovery rule, because that would render the repose period superfluous. *See Lampf*, 501 U.S. at 363; *cf. CTS*, 134 S. Ct. at 2190 (Ginsburg, J., dissenting) ("What is a repose period, in essence, other than a limitations period unattended by a discovery rule?"). But applying *American Pipe*'s interpretation of Rule 23 to both limitations periods and repose periods causes no such inconsistency. Rather, it is necessary to achieve Rule 23's goals of litigative efficiency and economy.

Once *American Pipe* is properly understood as an interpretation of Rule 23, its application to repose periods is straightforward. The Federal Rules of Civil Procedure have "the force of a federal statute," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941), and apply to "all civil actions and proceedings in the United States district courts," Fed. R. Civ. P. 1. Nothing in any repose period, let alone the judicially created repose period applicable to Section 14(a)

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[17] It is true that this Court has from time to time referred in passing to *American Pipe* as a rule of "equitable tolling." *E.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990). But in no case of this Court has the characterization of *American Pipe* as "equitable tolling" been controlling. In *IndyMac*, the Second Circuit therefore correctly acknowledged that those statements were nonbinding "*dicta*." 721 F.3d at 108. Moreover, this Court has acknowledged that some federal courts have used the term "legal tolling" to describe the *American Pipe* rule. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012).

actions, precludes the application of Rule 23 as interpreted by *American Pipe*.

2. The Rules Enabling Act does not preclude applying *American Pipe* to Section 13's three-year period

The Second Circuit followed *IndyMac*'s reasoning that, if *American Pipe* derives from Rule 23, its application to repose periods "is barred by the Rules Enabling Act" because repose periods "'create[] a *substantive* right,' and because 'the Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge, or modify any substantive right.'" App. 37a (quoting *IndyMac*, 721 F.3d at 109). But, in *American Pipe*, this Court rejected the contention that the rule's application to a time bar widely characterized as a "statute of repose"[18] violated that Act. 414 U.S. at 556-59.

The Second Circuit disregarded not only *American Pipe*'s rejection of that challenge, but also this Court's general standard for addressing the validity of a federal procedural rule under the Rules Enabling Act. The test is whether the rule "really regulates procedure," *Sibbach*, 312 U.S. at 14, not whether the law with which the rule assertedly conflicts is

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[18] The district court in *American Pipe* called the time bar at issue an "antitrust statute of repose." *Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99, 103 (C.D. Cal. 1970), *remanded in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). In their petition for certiorari, the defendants called the provision a "statute of repose." Pet. for Cert. at 22, *American Pipe*, *supra*, No. 72-1195 (U.S. filed Mar. 2, 1973), 1973 WL 346627. And, four years after *American Pipe*, this Court quoted with approval the Ninth Circuit's description of the provision as "'a statute of repose.'" *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (quoting *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 869 (9th Cir. 1978)).

"substantive," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010) (plurality). To hold that Rule 23 (as interpreted by *American Pipe*) cannot be applied to repose periods because they create "substantive rights" turns the *Sibbach* test on its head. Under the correct approach, "the substantive nature of [an asserted right], or its substantive purpose, *makes no difference*" because a federal rule is not "valid in some cases and invalid in others" depending on "whether its effect is to frustrate" a law characterized as "substantive." *Id.*

American Pipe's interpretation of Rule 23 "really regulates procedure." *Sibbach*, 312 U.S. at 14. It determines how the filing of a class-action complaint affects the running of time-for-suit provisions, much like Rule 3 determines how the filing of an individual complaint affects time-for-suit provisions for certain federal-question actions filed in federal court. *See West v. Conrail*, 481 U.S. 35, 38-40 (1987).

Further, in *American Pipe* itself, this Court rejected the focus on the purportedly "substantive" nature of time bars when it concluded 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. Applying *American Pipe* is fully consonant with the legislative scheme of repose periods.[19] As this Court recently stated, repose periods embody a "judgment that a defendant should be free from liability" after the period expires.

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[19] In this case, there is no directly applicable "legislative scheme" – the application of a three-year repose period to petitioner's claims resulted from the Second Circuit's conclusion that borrowing such a period was the best way to serve Congress's purposes. *See* App. 24a-28a.

CTS, 134 S. Ct. at 2183. But repose periods do not totally cut off liability; a defendant may still be subject to liability after the repose period so long as a timely action has been brought within the repose period. *See*, *e.g.*, 15 U.S.C. § 77m ("[i]n no event shall any such action *be brought* . . . more than three years after" the offering or sale of the security) (emphasis added). *American Pipe* merely addressed when a claim has been brought by holding that, as a matter of procedure, "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *American Pipe*, 414 U.S. at 550.

American Pipe is also consistent with the purpose of repose periods. Repose periods are intended to ensure that the defendant has notice of all potential liability within the applicable period. *See*, *e.g.*, *American Pipe*, 414 U.S. at 554 ("[t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend"); *Arivella*, 623 F. Supp. 2d at 177 ("the purpose of a statute of repose is to demarcate a period in which a plaintiff must place a defendant on notice of his or her injury").

If a defendant has not been sued within the repose period, he receives a "fresh start" and may "put past events behind him," secure in the knowledge he will face no liability. *CTS*, 134 S. Ct. at 2183. But "a defendant faced with information about a potential liability to a class cannot be said to have reached a state of repose that should be protected." *Developments in the Law – Class Action*, 89 Harv. L. Rev. 1318, 1451 (1976). A repose period's "polic[y] of ensuring essential fairness to defendants . . . [is] satisfied" when a timely class action "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 554-55.

This case shows how a timely class-action complaint satisfies the purposes of repose periods. Bricklayers filed a class-action complaint, within the repose period, which put respondents on notice of their potential liability to a class of former GSF shareholders based on the allegedly false and misleading proxy statement. Petitioner then moved for lead plaintiff status pursuant to the PSLRA, and became a co-lead plaintiff, with Bricklayers, asserting the *same claims* on behalf of the *same class* based on the *same events*. When Bricklayers was dismissed, petitioner became the sole lead plaintiff. But petitioner's class action is otherwise the same class action that Bricklayers filed within the repose period, and petitioner would have participated in the judgment against respondents (as a class member) if Bricklayers had succeeded. As the Tenth Circuit recognized in *Joseph*, applying *American Pipe* here "does not involve 'tolling' at all," *Joseph*, 223 F.3d at 1168, but simply recognizes that Bricklayers' timely complaint commenced the action now being pursued by petitioner.

If this repose period or any other repose period creates a substantive right, it is the right to be free from liability as to which the defendant has not been put on notice by a timely lawsuit. Such a right is not modified or abridged by *American Pipe*.

III. THE APPLICABILITY OF *AMERICAN PIPE* TO REPOSE PERIODS IS A RECURRING QUESTION OF NATIONAL IMPORTANCE

Two years ago, this Court granted certiorari in *IndyMac*, which presented a circuit conflict regarding the application of *American Pipe* to repose periods. The Court then dismissed the writ shortly after the main parties entered into a proposed settlement agreement disposing of many of the claims at issue. *Public Emps.' Ret. Sys. of Mississippi v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014). Since then, the conflict has remained and deepened. The Second Circuit has extended *IndyMac*'s holding to other repose periods; the Sixth Circuit has joined the Second Circuit in endorsing the *IndyMac* rule, and other courts have confronted the circuit split and come to disparate conclusions. *See supra* pp. 13-14, 18-19.

As the Second Circuit has recognized, only this Court can provide clarity to this unsettled area of law. In a recent summary order, a Second Circuit panel "note[d] that the question whether *American Pipe* tolling applies to statutes of repose – and if so, when – may be ripe for resolution by the Supreme Court." *In re Lehman Bros.*, 2016 WL 3648259, at *2. The panel recognized that the existing circuit split "implicates the very nature of *American Pipe* tolling, a question the Supreme Court is in the best position to resolve." *Id.* Until the Second Circuit – which is one of the busiest circuits in the country for securities class actions[20] – receives corrective

[20] The Second Circuit had the most securities class actions filed from 2011 through 2014, and was second to the Ninth Circuit in 2015; together, the Second and Ninth Circuits account for the majority of all securities class actions. *See* Svetlana Starykh & Stefan Boettrich, NERA Economic Consulting,

guidance from this Court, it will continue to apply its *IndyMac* holding in cases involving repose periods. *See id.* ("[U]nless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit and its reasoning controls the outcome of this case."); *see also* App. 36a-37a (*IndyMac* "applies equally" to other statutes of repose).

The applicability of *American Pipe* to repose periods matters to courts and litigants throughout the country. In the past few years alone, more than a dozen cases have turned on whether *American Pipe* applies to "statutes of repose."[21] The decision below is binding precedent in the Second Circuit, whose courts hear roughly a quarter of the nation's securities class actions. *See Recent Trends* 9. And the Second Circuit's view has also been accepted by the Sixth Circuit and several district courts. *See supra* pp. 14, 18 & nn.13-14.

Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review 9 (Jan. 25, 2016) ("*Recent Trends*"), *available at* http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

[21] *See*, *e.g.*, *SRM Global*, 2016 WL 3769735, at *2-3; *In re Lehman Bros.*, 2016 WL 3648259, at *2; *Stein*, 821 F.3d at 792-95; *Friedman v. JP Morgan Chase & Co.*, No. 15-cv-5899 (JGK), 2016 WL 2903273, at *7 (S.D.N.Y. May 18, 2016), *appeal pending*, No. 16-1913 (2d Cir.); App. 36a-37a; *Dusek*, 132 F. Supp. 3d at 1349-50; *Kuwait Inv. Office v. American Int'l Grp., Inc.*, 128 F. Supp. 3d 792, 802-06 (S.D.N.Y. 2015); *North Sound Capital*, 2015 WL 5055769, at *7-9; *In re BP*, 2014 WL 4923749, at *4-5; *Prudential Ins.*, 14 F. Supp. 3d at 618; *NCUA v. Morgan Stanley & Co.*, No. 13 Civ. 6705 (DLC), 2014 WL 241739, at *6-7 (S.D.N.Y. Jan. 22, 2014); *Freidus v. ING Groep, N.V.*, 543 F. App'x 92, 93 (2d Cir. 2013); *Caldwell v. Berlind*, No. 13-156-cv, 2013 WL 5779021, at *2 (2d Cir. Oct. 28, 2013).

Defendants in securities suits and other suits involving repose periods have urged and will continue to urge courts all over the country to adopt the Second Circuit's reasoning from *IndyMac*. Although that reasoning is flawed, prudent investors seeking to preserve their rights must recognize that defendants may succeed. Thus, investors that are members of a putative class will need to file protective (and duplicative) actions or motions to intervene to preserve their rights in the event that a court denies class certification after a repose period has expired, or the original plaintiff is found to lack standing. Those who do not will risk having their rights extinguished, in contravention of *American Pipe*'s holding that putative class members are entitled to benefit from the filing of the class action.

Considering only securities litigation, the number of individuals and entities potentially affected by the Second Circuit's decision is substantial. Nationwide, more than 200 securities class actions are filed each year, representing thousands, if not millions, of investors, and well over $100 billion in losses. *See Recent Trends* 3, 8. If each putative class member with a claim subject to a repose period[22] desires to ensure that its claim is not held to be barred, it now must either file a motion to intervene or bring a separate suit. The decision below thus encourages investors to flood district courts with thousands of unnecessary and duplicative filings.

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[22] The vast majority of securities class actions nationwide allege violations of SEC Rule 10b-5 or Securities Act §§ 11 and 12, which are subject to repose periods. *See Recent Trends* 5; 28 U.S.C. § 1658(b)(2) (five-year repose period for Rule 10b-5 securities fraud claims); 15 U.S.C. § 77m (three-year repose period for Securities Act §§ 11 and 12 claims).

Recent decisions show that the Second Circuit's holding is already interfering with class-action procedure. In the instant case, the refusal to apply *American Pipe* disrupted the operation of the PSLRA as intended by Congress. Under the PSLRA, putative class members have 60 days after publication of notice of the lawsuit to move to become the lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(A). The district court then chooses the "most adequate plaintiff" to serve as lead, presumptively the plaintiff with "the largest financial interest in the relief sought by the class." *Id.* § 78u-4(a)(3)(B). The purpose of this procedure was "to increase the likelihood that institutional investors will serve as lead plaintiffs," based upon the belief that institutional investors (such as petitioner) would manage class actions prudently, which would "ultimately benefit the class and assist the courts." S. Rep. No. 104-98, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 690.

Petitioner moved to become lead plaintiff within the time period set forth under the PSLRA, and the district court chose petitioner as a co-lead plaintiff. Yet the courts below ultimately determined petitioner was barred from pursuing its claims on behalf of the class, because the repose period expired between the filing of the complaint and petitioner's motion for lead plaintiff status.

In crafting a procedure designed to ensure that securities class members were represented by the most adequate plaintiffs, Congress could not have intended that those plaintiffs would be barred by repose periods from assuming lead plaintiff status under a congressional policy to rationalize class-action suits. Rather, Congress assumed that the courts would continue to apply *American Pipe*, which

21 years earlier had held that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550.

The Second Circuit's rule also interferes with the rights of class members to opt out and file their own actions. In *Eisen*, this Court concluded that time bars would not prevent class members from opting out and pursuing separate claims because *American Pipe* "established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." 417 U.S. at 176 n.13. Yet, in *SRM Global*, the Second Circuit held to the contrary, concluding that a class member who opted out was barred from pursuing its own claim by 28 U.S.C. § 1658(b)(2), the applicable repose period. 2016 WL 3769735, at *1-3. Such a holding renders the opt-out right illusory and undermines a crucial due process protection for class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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