No. 16-373

In The
Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioner,

v.

ANZ SECURITIES, INC. *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., *AS AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel S. Sommers
Counsel of Record
COHEN MILSTEIN
SELLERS & TOLL PLLC
1100 New York Avenue, NW
Suite 500
Washington, DC 20005
(202) 408-4600
dsommers@cohenmilstein.com

Laura H. Posner*
Michael Eisenkraft
COHEN MILSTEIN
SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005

A. Valerie Mirko
Zachary T. Knepper
Christopher Staley
Mark J. Stewart
NORTH AMERICAN SECURITIES
ADMINISTRATORS
ASSOCIATION, INC.
750 First Street, N.E.
Suite 1140
Washington, DC 20002

** Bureau Chief, New Jersey Bureau of Securities, 2014 - 2017*

Dated: March 6, 2017

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states,[2] the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's U.S. members are responsible for regulating transactions under state securities laws, commonly known as "Blue Sky Laws."[3] NASAA U.S. members' principal activities include: registering local securities offerings, licensing the brokers and investment advisers who sell securities or provide investment advice, and initiating enforcement actions to address fraud and other misconduct.

---

[1] Pursuant to U.S. Sup. Ct. Rule 37.6, counsel for *amicus* affirms that no party other than *amicus* and its counsel authored this brief, in whole or in any part, and that no person or entity other than *amicus* or *amicus's* counsel has made a monetary contribution to the preparation and submission of this brief. The parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

[2] Laura Posner, partner at Cohen Milstein Sellers & Toll PLLC and a co-author of this brief, served as the Bureau Chief of the New Jersey Bureau of Securities for approximately three years prior to January 2017.

[3] *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55-251 (5th ed. 2014).

NASAA's members are intimately familiar with the securities markets and the fraud and other abuses victimizing their state residents on a daily basis.

The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA supports the work of its members and the investing public by, among other things, promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemaking. NASAA also offers its legal analysis and policy perspective to state and federal courts as *amicus curiae* in important cases involving the interpretation of state and federal securities laws, securities regulation, and investor protection. This is one of those cases. NASAA and its members have an interest in this appeal because it will profoundly affect the ability of investors to obtain redress in cases where unscrupulous companies and individuals commit fraud. The resolution of this case will have a significant impact on the integrity of the securities markets and the remediation of securities fraud in those markets.

SUMMARY OF ARGUMENT

This Court's decision in *American Pipe* holds 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."[4] Once a class action has been filed, the purposes of the limitations period have been fulfilled, as "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation."[5]

Although *American Pipe* is colloquially described as equitable tolling, in fact, *American Pipe* "does not involve 'tolling' at all."[6] *American Pipe* interprets Rule 23 of the Federal Rules of Civil Procedure and defines what it means to "bring" an action under Rule 23 by treating absent class members as parties to the original action.[7]

---

[4] *Am. Pipe & Constr. Co. v. State of Utah*, 414 U.S. 538, 554 (1974).

[5] *Id.* at 555.

[6] *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1232 (10th Cir. 2008) (quotations omitted). *See also In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, No. 09 Civ. 02137(LTS), slip op., at 3 (S.D.N.Y. Apr. 24, 2012) ("casual characterizations of American Pipe tolling as equitable are neither binding nor instructive.").

[7] *See In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007) (under *American Pipe*, "members of the asserted class are treated for limitations purposes as having instituted their own actions . . . ."); *Boellstorff*, 540 F.3d at 1232-33 ("The class action mechanism's inherent representativeness means that each putative class member has effectively been a party to an action against the defendant since a class action covering him was filed." (internal quotations omitted)); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1353-54 (Fed. Cir. 2000) (the principle that an action is "commenced" upon the filing of a complaint extends to all members of the asserted class); *In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 667 (S.D.N.Y. 2011).

The Second Circuit's decisions in *California Public Employees' Retirement System v. ANZ Securities, Inc., et al.* ("*ANZ*")[8] and *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.* ("*IndyMac*")[9], vitiate the *American Pipe* rule. In holding that the filing of a class action no longer protects putative class member claims from the three-year repose period in Section 13 of the Securities Act of 1933 ("Securities Act"), the Second Circuit significantly undermined the efficacy of the class action device in securities litigation.

Securities fraud class action litigation initiated by private parties serves an essential means of protecting the integrity of the securities markets for investors, maintaining investor confidence in the markets, and compensating victims for losses suffered as the result of market participants engaging in violations of the securities laws.

ANZ and *IndyMac* impose significant burdens on institutional investors and the courts, and leave small, retail investors with reduced protections. Retail investors need class action lawsuits to protect themselves from fraud. For class actions to be robust, the interests of retail and institutional investors need to be aligned. Requiring investors to decide early-on whether to proceed with a class or opt-out and pursue an independent claim in order to

---

[8] The Second Circuit's decision below was unpublished but is available as *In re Lehman Bros. Secs. & ERISA Litig.*, No. 15 Civ.1879, 2016 WL 3648259 (2d Cir. July 8, 2016).

[9] *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).

avoid the running Section 13 of the Securities Act's statute of repose, undermines the continuing viability of class actions for all investors. Furthermore, the *ANZ and IndyMac* decisions undermine the ability of the courts to evaluate the superiority of class actions and state securities regulators to evaluate the reasonableness of potential class action settlements under the Class Action Fairness Act of 2005.

ARGUMENT

I. PRIVATE SECURITIES CLASS ACTION LITIGATION SERVES A CRUCIAL ROLE IN ENFORCING THE SECURITIES LAWS, MAINTAINING INVESTOR CONFIDENCE, AND COMPENSATING VICTIMS OF FRAUD.

A. Private Securities Class Action Litigation Provides Critical Investor Remedies and Promotes Confidence in the Markets.

Private securities fraud class actions "are 'a necessary supplement to [SEC] action.'"[10] Without such litigation, many instances of securities fraud would go unpunished because the volume of violations is too great for the U.S. Securities and

---

[10] *Bateman Eichler*, *Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.*, 377 U.S. 426, 432 (1964)); *accord Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

Exchange Commission ("SEC") and state securities regulators to detect and investigate all possible wrongdoing.[11] The SEC, charged by Congress with administering and enforcing federal securities laws, and state securities regulators, charged under Blue Sky laws with administering and enforcing state securities laws, do not have the budget or staffing necessary to enforce the securities laws on their own. According to former SEC Chair Mary Jo White, "additional funding [for the SEC] is imperative if we are to continue the agency's progress in fulfilling its responsibilities over our increasingly fast, complex, and growing markets."[12] But Congressional budget authorizations have not kept pace with the SEC's needs. For example, Congress appropriated approximately $1.6 billion for the agency's 2016 fiscal year, which was well short of the SEC's $1.72 billion request.[13] State securities regulators face similar budgetary constraints.[14]

---

[11] Brief of the United States as *Amicus Curiae* Supporting Respondents at 1, *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010); *See also* S. Rep. No. 98, 104th Cong. 1st Sess. (1995), at 8 as printed in 1995 U.S.C.C.A.N. 679 ("[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program.") (quoting SEC Chairman Arthur Levitt).

[12] Mary Jo White, SEC Chair, Testimony on the Fiscal Year 2017 Budget Request of the U.S. Securities and Exchange Commission (March 22, 2016), *available at* www.sec.gov/news/testimony/testimony-white-sec-fy-2017-budget-request.html.

[13] *See* U.S. Securities and Exchange Commission, Fiscal Year 2016 Agency Financial Report (Nov. 15. 2016), at p. 42, *available at* www.sec.gov/about/secafr2016.shtml; Mary Jo White, SEC Chair, Testimony on the Fiscal Year 2016 Budget Request of the U.S. Securities and Exchange Commission (May

Further, private securities fraud class action litigation is the primary mechanism for investor compensation. While the funds obtained by federal and state regulators may be substantial in some

---

5, 2015), *available at* www.sec.gov/news/testimony/testimony-fy-2016-sec-budget-request.html. For 2017, the SEC requested an appropriation of $1.781 billion. *See* Securities and Exchange Commission Fiscal Year 2017 Congressional Budget Justification Report, p. 22, *available at* https://www.sec.gov/about/reports/secfy17congbudgjust.pdf; Mary Jo White, SEC Chair, Testimony on the Fiscal Year 2017 Budget Request of the U.S. Securities and Exchange Commission (April 12, 2016), *available at* https://www.sec.gov/news/testimony/testimony-white-budget-request-2017-senate.html. The House Appropriations Committee voted to appropriate to the SEC only $1.5 billion. *See* Senate Appropriations Committee, Financial Services and 17 General Government Appropriations Act, 2017 http://appropriations.house.gov/uploadedfiles/bills-114hr-sc-ap-fy2017-fservices-subcommitteedraft.pdf. The Senate Appropriations Committee has yet to vote on its financial services funding bill. For 2018, the SEC preliminarily requested an appropriation of $2.227 billion. *See* Mary Jo White, SEC Chair, Testimony on Examining the SEC's Agenda, Operations, and FY 2018 Budget Request (Nov. 15, 2016), *available at* https://www.sec.gov/news/testimony/white-testimony-sec-agenda-fy2018-budget-request.html.

[14] Notably, there is little overlap between private litigation and governmental enforcement actions. *See* Cornerstone Research, Securities Class Action Filings 2016 Year in Review, p. 18 (finding that from 2011 to 2015, approximately 10% - 25% of private class action settlements had corresponding SEC enforcement actions) *available at* www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2015-Review-and-Analysis.

cases, the amounts collected pale in comparison to the amounts collected by private litigants.[15]

Private securities fraud class action litigation also serves a significant role in maintaining investor confidence by enforcing disclosure standards set forth in the securities laws.[16] As this Court has recognized, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."[17] Investors "need confidence that they are being treated fairly and that the full range of risks are transparently disclosed."[18]

B. Congress and the Courts Have Routinely Recognized the Importance of Private Securities Class Action Litigation.

The class action device has been subject to significant limitations in recent years. For example,

---

[15] John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1542-43 Tables 2 & 3 (2006). ("private enforcement . . . dwarf[s] public enforcement,")

[16] *See*, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

[17] *Id. at* 78 (2006).

[18] Mary Jo White, SEC Chair, Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative (Mar. 31, 2016), *available at* www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html; *See also Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1075 (2014)

the Private Securities Litigation Reform Act of 1995 significantly heightened plaintiffs' pleading standards [19] and the Securities Litigation Uniform Standards Act of 1998 severely cut back on the ability of plaintiffs to file claims in state court.[20]

Despite these limitations, this Court has "long recognized" that private securities fraud litigation is "an essential supplement" to government enforcement and regulation,[21] and that private litigation is "a prominent feature of federal securities regulation." Congress too recognizes the important role played by private securities class action litigation in deterring fraud and compensating victims: "[t]he SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws."[22] Congress also recognizes the important role such actions play in maintaining

---

[19] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

[20] *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

[21] *Tellabs, Inc.* 551 U.S. at 313 (2007); *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). *See also Bateman Eichler,* 472 U.S. at 310 (observing that "implied private actions provide a most effective weapon in the enforcement of the securities laws" (internal citations omitted)).

[22] S. Rep. No. 98, 104th Cong. 1st Sess., at 8 (1995). *See also Tellabs*, 551 U.S. at 321 n.4 ("Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation is an indispensable tool with which defrauded investors can recover their losses – a matter crucial to the integrity of domestic capital markets.'" (quoting *Dabit*, 547 U.S. at 81).

investor confidence in our markets and ensuring market integrity:

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.[23]

To the extent there are concerns about the class action process or the uses of class action litigation, such concerns are "more appropriately addressed by Congress" than by the judiciary.[24]

II. REJECTION OF THE *AMERICAN PIPE* RULE BURDENS INVESTORS' ACCESS TO JUSTICE.

A. The Class Action Device is Essential to Providing Justice to Investors.

Investors, particularly retail investors, face a collective action problem when privately seeking compensation from the perpetrator of a securities fraud. While each investor harmed by securities fraud could benefit from litigation, few have the

---

[23] H.R. Conf. Rep. No. 369, 104th Cong. 1st Sess. (1995), at 31 (Nov. 28, 1995).

[24] *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398, 2413 (2014).

incentive to investigate and bring claims because the costs of litigation often dwarf their individual expected returns.[25] The class action device solves this problem by permitting groups of investors to share litigation costs. The class action device also provides an incentive to plaintiffs' attorneys, who must devote significant time, financial resources, and human capital, to prosecute cases of fraud.[26] Without this incentive, most defrauded investors would not be able to afford representation or to take action to recover losses.

Failure to "toll" the statute of repose under Section 13 of the Securities Act during the pendency of a securities class action endangers the continued viability of the class action device as a tool for investor protection. Retail investors rely on class counsel to advance their interests in court and, if appropriate, obtain the best possible settlement with a defendant. It is generally not economical or practical for retail investors to opt-out of a potential settlement and seek their own remedies. Retail investors, accordingly, need the class to be as robust as possible. In particular, retail investors need to pursue their interests alongside institutional investors in order to leverage institutional investors' generally greater financial interests in, and ability to exercise oversight over, a case. Requiring institutional investors to decide early in any

---

[25] *See* Lisa L. Casey, *Class Action Criminality*, 34 IOWA J. CORP. L. 153, 163 (2008). *See also Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (*quoting Mace. v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

[26] Lisa L. Casey, *Class Action Criminality*, 34 IOWA J. CORP. L. at, 163.

litigation whether to proceed with a class or opt-out and pursue their own lawsuits would undermine the ability of the class to pursue common objectives and limit the viability of class actions for small, retail investors.

B. Rejection of the *American Pipe* Rule Results in Wasteful, Duplicative and Unnecessary Litigation.

Rejection of the *American Pipe* rule "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure," by causing potential class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable."[27] Initially, those institutional investors who have the means to do so will be forced to closely monitor and evaluate all pre-certification class actions pending in multiple forums in which they have a significant financial interest. Such monitoring and evaluation would be costly and time consuming, particularly for large institutional investors with broad and diversified portfolios. It would also be generally impossible to accomplish accurately, given that significant relevant information about both the merits of the case and the likelihood of class certification is not available to class members as it is held exclusively by the parties to the litigation behind confidentiality agreements insisted upon by defendants, as well as subject to complex expert and legal analysis.

---

[27] *See Am. Pipe & Constr. Co.,* 414 U.S. at 554.

In many cases, those institutional investors will then be forced to retain counsel to either intervene in the class case or file prophylactic individual actions in order to preserve their interests.[28] Such litigation significantly increases the complexity of the litigation, the costs and fees associated with the litigation, and the burden on the judicial system. Specifically, duplicative motions would be filed, discovery expanded and multiplied, and summary judgment would be briefed and trial conducted in multiple venues. These costs, fees and burdens would be borne not only by institutional investors, but by all parties to the litigation, all class members, and the judicial system itself.

Failure to either intervene or file an individual action could result in significant monetary losses for institutional investors and their beneficiaries, most typically police officers, public school teachers and administrators, firefighters, and other public employees and retirees, who could lose their right to recover for violations of the federal

---

[28] *Id.* at 553-54 ("a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions"); *see also WorldCom*, 496 F.3d at 256 (*American Pipe* tolling was created "to protect class members from being forced to file individual suits in order to preserve their claims"); *Boellstorff*, 540 F.3d at 1229 ("If not for a tolling doctrine, individuals would feel compelled to file placeholder lawsuits prior to the expiration of the statute of limitations, thereby clogging the channels of the court with suits already encompassed by the class action."); *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) (*American Pipe* tolling "would thus be seriously impaired by a rule that required all the class members to file separate, protective suits, . . . We want the class members to rely on the filing of the class action rather than to clutter the courts with a multitude of separate suits.").

securities laws if either the class is not certified or is certified after the applicable periods for asserting new claims has run.[29] As fiduciaries to their participants and beneficiaries, institutional investors have the statutory obligation to act "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries"[30] and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[31] Given these and other obligations, it would be difficult for any institutional investor to justify not taking at least certain of these steps to protect the interests of their beneficiaries.

---

[29] *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation*: 2015 Full-Year Review (2016), *available at* www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf (finding that ruling on class certification takes three years or longer in more than one-third of cases); Br. of Civil Procedure and Securities Law Professors as *Amici Curiae* in Supp. of Pet. for a Writ of Cert., *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13 Civ. 640, 2013 WL 8114524, at *8-11 (S.D.N.Y. Dec. 26, 2013) (finding that 25% of all Rule 10b-5 class actions and 76% of the actions that reached a certification order did not reach class certification before the five-year limitations period under 28 U.S.C. § 1658(b)(2) expired, and that 50% of all cases brought under Sections 11 and 12 of the Securities Act and 83% of the cases that reached a certification order had expired before the three-year limitations period).

[30] 29 U.S.C. § 1104(a)(1)(A)(i),

[31] 29 U.S.C. § 1104(a)(1)(B).

C. Rejection of the *American Pipe* Rule Leaves Small, Retail Investors Without Recourse.

While rejection of the *American Pipe* rule will incentivize large, sophisticated investors to file duplicative litigation, small investors will have no recourse. These small, typically retail, investors have neither the means nor financial incentive to monitor or evaluate pre-certification securities class actions. Indeed, until they receive a notice notifying them that they are eligible to be part of a securities class, many of these investors do not even know they held stock in a company that defrauded them. As a result, they are beholden to the class representatives and their counsel.

NASAA's U.S. members and their federal counterparts can attempt, at great effort and expense, to help fill this void by bringing duplicative regulatory enforcement actions to protect these small investors' interests where possible. However, as discussed above, regulators face significant budgetary constraints and competing demands for resources which will prevent them from being able to fill an *American Pipe* sized hole in the securities enforcement structure. Further, while both state and federal securities regulators have the expertise to bring such cases, their efforts are seldom directed at making securities fraud victims whole and they are often not well-equipped to handle the costly and time consuming process of providing restitution to fraud victims when they do so. Given these realities, without *American Pipe* and class actions, small investors will often have no recourse at all.

D. Rejection of the *American Pipe* Rule Renders The Essential Protections of Federal Rules of Civil Procedure 23(c)(2) and (b)(3) and the Notice Provisions of the Class Action Fairness Act of 2005 Meaningless.

Federal Rules of Civil Procedure 23(c)(2) and (b)(3) and the Notice Provisions of the Class Action Fairness Act of 2005 provide critical oversight over class actions. Rule 23(c)(2) requires courts to provide class members with an opportunity to opt-out of the class and pursue individual actions. By providing a mechanism for investors to opt-out, Rule 23(c)(2) helps to ensure that settlements are fair and reasonable to all class members and that class counsel are acting appropriately and in the best interest of the class. Accordingly, the ability to opt-out is important to the viability of class actions as a potential investor remedy. However, Rule 23(c)(2) becomes useless if individual class members' claims are time-barred.[32] No one would exercise an opt-out right if the alternative is to try to litigate an untimely claim on one's own. Without a realistic opportunity to opt-out, class members – and, in particular, small retail investors – will lose the only real check they have on ensuring that lead plaintiffs and class counsel represent their interests vigorously. Relatedly, lead plaintiffs and their class counsel will lose their incentive to act in the best

---

[32] *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351-52 (1983) (opt-out rights are only "meaningful" if *American Pipe* tolling applies); *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999) ("We agree with the [Supreme Court] that without tolling, [Rule 23(c)(2)] would be irrelevant . . . .").

interests of the class and, in particular, the interests of unnamed class members, since failure to do so will not result in opt-outs.

Similarly, Rule 23(b)(3) commands courts to determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It permits courts to not only assess the superiority of the class mechanism, but to appoint new lead plaintiffs or class representatives if appropriate and to create sub-classes to ensure the interests of all class members are protected. However, the Rule 23(b)(3) inquiry becomes meaningless if individual actions are time-barred. If the statute of repose has run, the class action will always be superior to individual actions, regardless of whether the interests of all class members are being protected or class counsel is acting in the best interest of the class. These concerns are particularly important in securities class actions, where class discovery is often delayed for years.[33] A toothless Rule 23(b)(3) inquiry again would disproportionately harm small investors who are unable to file individual actions to protect their own interests.

Rejection of the *American Pipe* rule also would neuter the notice provisions in the Class Action Fairness Act of 2005, Pub. L. No. 109-2 ("CAFA"). In passing CAFA, Congress was animated, at least in part, by concern that class members were unable "to

---

[33] *See Morgan Stanley*, 810 F. Supp. 2d at 668 (recognizing that securities cases in particular require the benefits of *American Pipe* tolling).

fully understand and effectively exercise their rights."[34]

To ameliorate those concerns, Section 3 of CAFA creates a "consumer class action bill of rights" to protect plaintiffs from unfair settlements via regulatory oversight (the "Bill of Rights"). The Bill of Rights provides that, "not later than 10 days after a proposed settlement of a class action is filed in court," each defendant participating in a proposed settlement of a federal class action must "serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official a notice of the proposed settlement."[35] The "appropriate State official" is defined as "the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person."[36] If no such official exists, or "if the matters alleged in the class action are not subject to regulation," then the State Attorney General is the "appropriate State official."[37] In securities class actions, a NASAA U.S. member, as the securities regulator of each state, is typically the "appropriate State official" under CAFA.

---

[34] *Class Action Fairness Act of 2005,* Pub. L. No. 109-2 at § 2(a)(3)(C), 119 Stat. 4 (2005).

[35] 28 U.S.C.A. § 1715(b).

[36] *Id*. at § 1715(a)(2).

[37] *Id*.

The Bill of Rights specifies the content of the notice as including: (1) a copy of the complaint and related materials; (2) notice of any scheduled hearings in the class action; (3) any proposed or final notification to class members regarding opt-out and settlement; (4) any proposed or final settlement; (5) any settlement or agreement made between class counsel and defense counsel; (6) any final judgment or notice of dismissal; (7) if feasible, the names of class members who reside in each state and the proportion of settlement proceeds by state; and (8) any written judicial opinions related to the other notice content.[38] A district court may not approve any proposed settlement until ninety days after proof of service of the required notice,[39] and a class member may refuse to be bound by the terms of the settlement if noticed is omitted.[40]

The Bill of Rights and its notice provisions were designed to ensure that "a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies."[41] Such state regulatory authorities are well situated to "voice concerns if they believe that the class action settlement is not in the best interest of their citizens."[42] The notice

---

[38] *Id.* at § 1715(b)(1)-(8).

[39] *Id.* § 1715(d).

[40] *Id.* § 1715(e)(1).

[41] S. Rep. No. 14, 109th Cong. 1st Sess. (2005), reprinted in 2005 U.S.C.C.A.N. at 32.

[42] *Id.* at 5, 2005 U.S.C.C.A.N. at 6.

provisions are thus designed to provide "a check against inequitable settlements in these cases," which could arise from "collusion between class counsel and defendants to craft settlements that do not benefit the injured parties."[43]

If the filing of a class action complaint does not "toll" the three-year repose period in Section 13 of the Securities Act, CAFA's notice provisions would be functionally meaningless in the large number of securities class actions that settle after the statute of repose has expired. When an "appropriate State official" objects to a settlement, the settlement is often rejected in its entirety, causing class members to lose whatever recovery was contemplated by the settlement. Class members could not then subsequently obtain a better or more valuable settlement through individual actions, since their claims would be immediately dismissed as untimely. And, defendants would have no incentive to increase the value of the class settlement since there is no risk of facing individual actions. Accordingly,

---

[43] *Id*. at 35, 2005 U.S.C.C.A.N. at 3, 34. *See also* 151 Cong. Rec. S450 (daily ed. Jan. 25, 2005) (statement of Sen. Kohl) ("The Attorney General review is an extra layer of security for the plaintiffs and is designed to ensure that abusive settlements are not approved without a critical review by one or more experts."); 147 Cong. Rec. 22740 (2001) (statement of Sen. Grassley) ("To address the problem where class members get nothing and attorneys get millions, the Class Action Fairness Act of 2001 provides that notification of any proposed settlements must be given to the State attorneys general or the primary regulatory or licensing agency of any State whose citizens are involved."); 143 Cong. Rec. 1292 (1997) (statement of Sen. Kohl) (exhorting officials to "intervene in cases where they think the settlements are unfair").

"appropriate State officials" will not object to any of the many settlements reached after the expiration of the statute of repose, since doing so would deprive investors of any recovery. This perverse result deprives class members and the courts of the oversight and input of state securities regulators over class action settlements as mandated by Congress in CAFA.

CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully submit that the Second Circuit's *ANZ* decision should be overturned.

Respectfully submitted,

Daniel Sommers
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave NW #500,
Washington, DC 20005
(202) 408-4600
dsommers@cohenmilstein.com

Laura H. Posner
Michael Eisenkraft
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005

A. Valerie Mirko
Zachary T. Knepper
Christopher Staley
Mark J. Stewart
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street, NE, Suite 1140
Washington, DC 20002

Dated: March 6, 2017