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 AMICI CURIAE PUBLIC CITIZEN, INC., AND PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Other:

INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of such laws frequently involves class actions as well as individual lawsuits. Public Citizen has a longstanding interest in preserving the viability of these mechanisms for protecting the rights of consumers and the general public.

Accordingly, Public Citizen has participated as amicus curiae, and its attorneys have served as counsel to parties or amici curiae, in many cases in this Court and other federal courts involving class action procedures, including: *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); and *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Public Citizen also filed a brief as amicus curiae when the issue presented by this case was previously before this

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to its preparation or submission. Written consents to filing from both parties are on file with the Clerk.

Court in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions. In its experience, the class action device is often the only meaningful way that individuals can vindicate important legal rights.

While firm in their support for class actions, both Public Citizen and Public Justice are also deeply concerned with protection of both substantive and procedural rights of absent class members in class actions. Public Citizen and Public Justice attorneys have, in many cases, represented class members who objected to a class settlement or otherwise sought to assert their individual due process rights. Of particular concern to amici have been cases where class counsel and defendants agreed to settlements under Federal Rule of Civil Procedure 23(b)(1) or (b)(2) to resolve substantial damages claims while eliminating the opt-out rights of absent class members that are provided for in Rule 23(b)(3) and that, in some circumstances, are required by due process. Those concerns are directly affected by this case because the decision below and the arguments of respondents would significantly impair opt-out rights of absent class members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class actions are essential tools for remedying violations of rights that affect large numbers of people. The rules governing class actions—including procedural rules concerning what filings suffice to stop the running of statutes of limitations for class members—must advance the fair and efficient functioning of the class mechanism. At the same time, the interests of individuals in the ability to assert substantial legal claims for themselves should they choose to do so, and the due-process protection of those interests provided by Federal Rule of Civil Procedure 23's opt-out mechanism, are also of critical importance and require consideration in any construction of Rule 23.

All these concerns are implicated here. The holdings of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)—establishing the principle that class action filings satisfy statutes of limitations for individual members of the putative class even if those individuals ultimately seek to litigate individually either because the class is not certified or because they are excluded from or opt out of the class—are critical both to the effective functioning of class actions and to the protection of the rights of individual class members. Those rights include class members' right to opt out of a class action and pursue their claims through individual actions if the conduct of the class action is not to their satisfaction. Adoption of the view taken by the Second Circuit below—that the *American Pipe* rule is inapplicable to "repose" limitations provisions in the federal securities laws—is not necessary to preserve substantive rights

of securities defendants or to fulfill the policy of the limitations statutes. It would, however, significantly impair the rights of class members.

The petitioners have demonstrated that application of the *American Pipe* tolling rule to the three-years-from-offering limitations or "repose" period in 15 U.S.C. § 77m is fully consistent with the requirements of the statute and is necessary for the same reasons that led the Court to adopt the rule in *American Pipe* and apply it in the subsequent decision in *Crown Cork*. We write not to repeat those arguments, but to elaborate on two important points.

First, although respondents assert that application of the *American Pipe* rule here would give a construction to Federal Rule of Civil Procedure 23 that would modify substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072, it is actually respondents' position that would make procedural determinations under Rule 23 determinative of class members' right to recover for the violations at issue. The application of *American Pipe* to section 77m is fully consistent with the Rules Enabling Act because section 77m establishes no substantive rights different from those of any other limitations statute, and because the *American Pipe* rule fully preserves the protections afforded by the statute. The *American Pipe* rule, like Rule 23 itself, regulates procedures and thus is fully consistent with the Rules Enabling Act.

Second, failing to apply *American Pipe* would mean that whether a particular class member had a claim that survived application of the limitations statute would depend on whether the class were certified and whether the class member remained in the class. That result is at odds with the fundamental no-

tion that the rights of class members are not supposed to vary depending on whether they are pursued within or outside of a class.

Moreover, depriving class members of the protections of *American Pipe* would render meaningless their right to opt out of the class—a right that serves to square class actions with the requirements of due process and that provides a critical check against abusive class settlements.

ARGUMENT

I. Applying the *American Pipe* rule to claims subject to 15 U.S.C. § 77m would not modify substantive rights in violation of the Rules Enabling Act.

The parties here do not contest that the timely filing of a class action asserting the securities claims at issue satisfied the applicable limitations periods for all members of the class who remained within the class and accepted the settlement. The Second Circuit, however, held that this Court's holdings in *American Pipe* and *Crown Cork* that the running of a limitations period is suspended for all class members during the pendency of a class action is inapplicable to claims subject to the so-called "repose" limitations periods set forth in the federal securities laws. Under the court of appeals' holding, members of a putative or certified class who seek to assert the same claims in an individual action cannot receive the benefit of a timely class-action filing if the class is not certified, or if they opt out of or are otherwise excluded from the scope of any class ultimately certified. Indeed, the court of appeals concluded that applying *American Pipe* here would violate the Rules Enabling Act by improperly modifying "substantive rights." 28 U.S.C.

§ 2072. Respondents echo that view here. *See* Br. in Opp. 24–25. The Rules Enabling Act argument, however, is deeply flawed.

"In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,' § 2072(b)." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07(2010). This Court has long held that whether a duly promulgated rule of civil procedure is valid under the Act depends on whether it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). As the plurality put it in *Shady Grove*, "What matters is what the rule itself regulates: If it governs only the 'manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." 559 U.S. at 406 (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

The *American Pipe* rule is a judicial construction of Rule 23, and there is no doubt, and no dispute, that Rule 23 itself is valid under the Rules Enabling Act. Unquestionably, Rule 23 really regulates procedure. *See Shady Grove*, 559 U.S. at 408 (plurality); *id*. at 431–32 (concurrence); *id*. at 446–47 (dissent); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 304 n.2 (2011) (citing *Shady Grove*); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–48 (2016).

This Court has indicated, however, that judicial interpretations of Rule 23, as well as the Rule itself, must conform to the limits of the Rules Enabling Act. Thus, the Court observed in *Wal-Mart Stores, Inc. v. Dukes* that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" 564 U.S. 338, 367 (2011). In *Tyson Foods*, the Court similarly noted that a judicial holding that would limit a plaintiff's substantive right to prove her case "merely because the claim is brought on behalf of a class" would "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge … any substantive right.'" 136 S. Ct. at 1046.

Application of the *American Pipe* rule to the three-years-from-violation limitations period at issue here would have no such improper effect, for two reasons. First, the limitations period is itself a regulation of the manner and means of enforcing substantive rights, not a substantive right itself within the meaning of the Rules Enabling Act. Second, even if the limitations period established a substantive right, applying *American Pipe*'s construction of Rule 23 to it would not limit, abridge, or modify it. Rather, *American Pipe*'s application would only regulate the manner and means of enforcing the limitations period by determining what forms of filing are sufficient to bring a claim within the required period. As *American Pipe* itself held, construing Rule 23 in that manner really regulates procedure, not substance.

A. This Court should not distinguish limitations and "repose" periods for Rules Enabling Act purposes.

The Second Circuit's Rules Enabling Act holding rests on the false premise that the three-year limitations period set forth in 15 U.S.C. § 77m establishes a substantive limit on the underlying rights at issue by extinguishing them rather than merely denying a remedy for their violation. The reasoning underlying that view of the statute, as stated by the court below in its earlier precedential ruling adopted by the panel in this case, goes as follows: The three-year limitations period in section 77m is a "statute of repose" because it is triggered by the defendant's conduct rather than the accrual of the plaintiff's right of action; a statute of repose, by definition, extinguishes the underlying right rather than limiting the remedy; therefore, section 77m must extinguish a plaintiff's substantive rights once three years have passed. *See Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106–07 (2d Cir. 2013).

That reasoning is incompatible with this Court's decisions, which teach that whether a statute limits rights or remedies is not dependent on the application of extra-statutory labels such as "statute of repose" but on the actual language enacted by Congress. As this Court explained in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), whether a statute extinguishes a right or merely bars a remedy is a matter of what "Congress intended"—an issue that, like all questions of statutory intent, depends in the first instance on the "plain language" of the relevant statute. *Id*. at 416.

In *Ocwen*, the Court explained that statutes whose terms provide that an action must be brought within a certain time, or that provide that it may not be brought after that time, are "typical statute[s] of limitation" that do not extinguish substantive rights. *Id*. The Court construed the statute at issue in *Ocwen* as extinguishing rights rather than limiting remedies because it "says nothing in terms of bringing an action but instead provides that the [underlying] 'right … shall expire' at the end of the time period." *Id*. at 417. That is, the statute "talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Id*.

Section 77m, by contrast, talks only of a suit's commencement and says nothing about a right's duration. Entitled "Limitation of Actions," it frames *both* the one-year-after-discovery limitations period and the three-years-from-offering "repose" period in terms of when an "action … to enforce a liability created under" other provisions of the securities laws may be "brought." 15 U.S.C. § 77m. Specifically, with respect to the three-year period, the statute provides: "In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale." *Id*. The statute says nothing about the extinguishment or expiration of the liabilities created by sections 77k, 77l(a)(1), and 77l(a)(2). To paraphrase *Ocwen*, the statute addresses a suit's commencement in terms so straightforward as to render any charac-

terization of it as addressing the expiration of the underlying rights untenable.

That the statute's language and structure are incompatible with the application of a discovery rule (or equitable tolling principles that have the same effect) to the three-year period, *see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), does not change the statute's fundamental character as a limit on the time for filing suit. Of course, insofar as the "statute of repose" label applies to any limitations period measured solely from the time of the defendant's conduct rather than from the discovery or accrual of the plaintiff's claim, it can be applied to the three-year period in section 77m. *See*, *e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) ("A statute of repose … puts an outer limit on the right to bring a civil action[,] … measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant."). But whether the label fits for that reason is an entirely different question from whether the three-year period functions to extinguish substantive rights rather than to limit the time for bringing an action. The conclusion that the statute must extinguish rights merely because it can be called a "statute of repose" on the basis of the events that trigger it is a non sequitur. What the limitations period *does* is a matter of what the statute *says*, and the plain language of the statute establishes that what it does is limit the time for bringing an action.

Moreover, this Court's decision in *CTS Corp*. does not indicate that statutes of repose are necessarily "substantive" limits on liability. Rather, this Court stated in *CTS Corp*. that, like statutes of limitations,

statutes of repose typically function by limiting "the right to *bring a civil action*." *Id*. (emphasis added). That is, in *Ocwen*'s terms, they function principally as a limit on the remedy. 523 U.S. at 417. As *CTS* explains, that limit is more categorical than a statute of limitations because, under a repose statute, the time in which an action can be brought is not triggered by "accrual," which depends on when the claim reasonably could have been discovered, but strictly on when underlying events occurred. *See* 134 S. Ct. at 2182. The legislative policy such a limit reflects is inconsistent with equitable tolling notions that excuse delays in suing if they do not reflect a lack of diligence on the part of the plaintiff. *See id.* at 2183; *see also Lampf*, 501 U.S. at 363. A repose period thus may function as the "equivalent" to a "cutoff" of the plaintiff's "temporal" ability to impose liability, *CTS*, 134 S. Ct. at 2183, but it remains fundamentally a remedial rather than substantive limit.[2]

B. The *American Pipe* rule does not modify substantive rights.

Even if the three-year "repose" period could be characterized as establishing "substantive rights" in some sense, however, it would not follow that Federal Rule of Civil Procedure 23 modifies substantive rights in violation of the Rules Enabling Act just because the

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[2] Of course, the nature of a particular statute of repose might indicate that it involves substantive rights. The state statute in *CTS*, for example, did not provide merely that a plaintiff's action could not be brought after a particular date, but that the action could not "accrue" after that date, and state decisional law indicated that such a statute constituted an "additional element of the claim." 134 S. Ct. at 2187 (citations omitted).

filing of a class action under the Rule helps determine the timeliness of the claims of class members. There is no question that Rule 23 satisfies the Rules Enabling Act's basic criterion that it "must 'really regulat[e] procedure'" by governing "'the manner and the means' by which the litigants' rights are 'enforced.'" *Shady Grove*, 559 U.S. at 407 (plurality). That proceedings under the Rule may have an effect on rights that are arguably substantive does not violate the Rules Enabling Act: "The test is not whether the rule affects a litigant's substantive rights; most procedural rules do." *Id*.

In particular, a federal procedural rule does not improperly modify substantive rights merely because it may affect the determination whether an action has been commenced on behalf of a litigant in satisfaction of relevant limitations periods. Rather, the determination of what filings satisfy, and halt the running of, a limitations period is procedural in nature. Thus, this Court held in *West v. Conrail*, 481 U.S. 35 (1987), that Federal Rule of Civil Procedure 3 determined whether an action had been timely commenced for purposes of federal limitations periods. *See id*. at 38–39. If federal procedural rules could not validly affect the determination of when a limitations period stops running, *West* would be inexplicable.[3]

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[3] In the context of the interplay of federal and state law implicated by federal diversity actions, the Court has held that Rule 3 does not by its terms control the question of satisfaction of a state statute of limitations when state law provides that the running of the statute is tolled only by service, as opposed to filing, of an action, because Rule 3 was not intended to address that subject. See *Walker v. Armco Steel Corp.,* 446 U.S. 740, 752–753 (1980). However, even when such state laws are at issue,

(*Footnote continued*)

In the class action context, no less than in *West*, recognizing that the Federal Rules may affect the determination of whether the relevant limitations periods have run does not modify substantive rights. By creating a procedural mechanism through which the claims of multiple class members may be brought in a single action by a representative plaintiff, Rule 23 creates a vehicle through which many individuals can simultaneously *satisfy* the relevant statute of limitations or repose by commencing an action within the time in which the statute provides that an action may be brought. *See American Pipe*, 414 U.S. at 550. But Rule 23 does not impair defendants' rights because it does not permit anyone to proceed with claims that were time-barred at the time the class action was commenced: It "neither change[s] plaintiffs' separate entitlements to relief nor abridge[s] defendants' rights," and it "leaves the parties' legal rights and duties intact." *Shady Grove*, 559 U.S. at 408. Thus, as *American Pipe* held, construing Rule 23 to provide that the filing of a class action satisfies a limitations statute for any class member even if the class is ultimately not certified or the class member is excluded from the class does not violate the Rules Enabling Act, regardless of "whether a time limitation is 'substantive' or 'procedural.'" 414 U.S. at 557–58.

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federal procedural law controls what forms of service are valid in an action in federal court, *see Hanna v. Plumer*, 380 U.S. 460 (1965), which in turn may determine whether an action has been timely served in satisfaction of state limitations laws. *See*, *e.g.*, *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1303–04 (2d Cir. 1990); *Morse v. Elmira Country Club*, 752 F.2d 35, 38 (2d Cir. 1984).

II. Not applying *American Pipe* would make class members' right to recover dependent on class certification and substantially impair the due-process protection provided by the right to opt out of a class action seeking monetary relief.

The Second Circuit held below, and respondents maintain in this Court, that the filing of a class action stops the running of the "repose" period only for class members who fall within the definition of a class that is ultimately certified and who remain in the class rather than opting out. A decision not to certify the class, or to exclude from the class as certified someone whose claims were encompassed by the complaint originally filed, would, under respondents' view, bar claims that could have been pursued had the class been certified or the claimant remained within the class. Respondents' view would thus have the anomalous effect of making the putative class members' legal entitlement to the recovery they seek, and the success of the defendants in asserting a statute of limitations defense, dependent on the outcome of the class certification decision and on whether a class member remains in or opts out of the class.

Respondents' position boils down to the assertion that an individual's entitlement to relief is different inside and outside of a class action. That proposition is, to say the least, in tension with the fundamental reason why class actions are permissible under the Rules Enabling Act: Class actions neither "change plaintiffs' separate entitlements to relief nor abridge defendants' substantive rights; they alter only how the claims are processed." *Shady Grove*, 559 U.S. at

408 (plurality).[4] Thus, a plaintiff's right to obtain recovery cannot depend on whether the plaintiff asserts it inside or outside of a class action. *Tyson Foods*, 136 S. Ct. at 1046.

As a practical matter, class actions undoubtedly increase the number of plaintiffs whose rights are asserted in court and provide efficiencies that may in some cases make possible the assertion of claims that would not be litigated individually. But class actions do not provide individuals with claims they would not otherwise have, nor do they affect defendants' "aggregate liability" because they do not permit assertion of the claims of any class member who could not (in theory, at least) "bring a freestanding suit asserting his individual claim." *Shady Grove*, 559 U.S. at 408. By seeking to supplant the *American Pipe* rule with a regime in which there will be outcome determinative legal differences between the claims available to plaintiffs depending on whether the class is certified or whether a member remains within the class, respondents' position runs "contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting).

Making the entitlement of plaintiffs to recover dependent on whether they are part of a class would substantially impair the efficacy of a key feature of

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[4] Although the quoted language is from the plurality portion of *Shady Grove*, it was subsequently endorsed in Justice Ginsburg's dissenting opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 696 (2010). Thus, five sitting Justices have explicitly endorsed it.

Rule 23—the right of class members to opt out of class actions seeking damages or other monetary relief under Rule 23(b)(3). This Court has held that because of the strong interest of individuals in controlling the prosecution of their own claims for damages, the opt-out right is necessary to ensure that class actions satisfy due-process norms. *Wal-Mart*, 564 U.S. at 363 (2011); *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846–48 (1999); *Amchem,* 521 U.S. at 614–15, 617; *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985).

The due process right to opt out of class litigation of substantial individual damages claims rests largely on what this Court has referred to as the "day-in-court ideal," *Ortiz*, 527 U.S. at 846—that is, the interest of an individual in controlling litigation primarily affecting his or her personal financial interests. As a general matter, due process does not permit a person to be bound by a judgment on a claim in a case in which she is not named as a party. *See Smith v. Bayer*, 564 U.S. at 312–13; *Taylor v. Sturgell*, 553 U.S. 880 (2008). The judgment in a "properly conducted" class action is an exception to this principle, *Smith*, 564 U.S. at 314, but the proper conduct of a class action must itself comport with due-process safeguards. One of those safeguards is that a person with a live, potentially meritorious, and substantial claim for damages—a form of property protected by the Due Process Clause—may not be deprived of the right to conduct her own litigation of that claim unless she is provided adequate notice of the pendency of the class action and an opportunity to remove herself from the class. *See Shutts*, 472 U.S. at 812; *Ortiz*, 527 U.S. at 848; *Wal-Mart*, 564 U.S. at 363.

The importance of the opt-out right has led this Court and the lower federal courts to give the benefit of the *American Pipe* rule not only to members of a putative class that is not certified, or is certified in a way that excludes them from the class definition, but also to class members who exclude themselves by opting out. *See Crown Cork*, 462 U.S. at 351–52; *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 176 n.13 (1974); *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999) (citing cases). A "consistent line of circuit court cases hold[s] that the *American Pipe* tolling doctrine applies to plaintiffs who opt out of a class action in federal district court." *Grispino v. New England Mut. Life Ins. Co.*, 358 F.3d 16, 19 (1st Cir. 2004).

Holding *American Pipe* inapplicable to actions subject to the three-year limitations period of section 77m would effectively negate the opt-out rights of class members who must rely on the timely filing by the class representative to satisfy the statute, as they would be barred from pursuing their claims individually if they were to opt out. Thus, "the notice and opt-out provision of Rule 23(c)(2) would be irrelevant without tolling because the limitations period for absent class members would most likely expire, 'making the right to pursue individual claims meaningless.'" *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000) (quoting *Realmonte*, 169 F.3d at 1284). As this Court put it in *Crown Cork*, the *American Pipe* tolling rule ensures that "the right to opt out and press a separate claims remain[s] meaningful." 462 U.S. at 351. Adoption of respondents' position, by contrast, would hold class members hostage to a class action unless they were willing to abandon their claims completely.

That result would not comport with due process. Class members in a timely filed damages class action undoubtedly have live and substantial interests in their individual damages claims. Permitting the claims' assertion only within the class action deprives class members of the entitlement to direct the litigation of their claims unless they have taken the otherwise pointless step of filing duplicative actions within the limitations period—actions that burden the judicial system and provide no genuine benefit to defendants' interests in repose. *See* Pet. Br. 22–24, 41–42. Requiring such needless and burdensome steps to protect the right to opt out is inconsistent with this Court's pragmatic, balancing approach to issues of due process. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

Negating opt-out rights would be particularly unfortunate in the context of settlement. Although most class settlements reflect a fairly negotiated compromise based on both sides' reasonable views of the potential value of the class's claims, that is not always the case: Class settlements also pose significant potential for abuse in circumstances where defendants' interests in extinguishing as many claims as possible as cheaply as possible may coincide with class counsel's interests in benefiting themselves (through fee awards) and small segments of the class at the expense of the class as a whole. *See*, *e.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173–74 (3d. Cir. 2013); *Staton v. Boeing Co.*, 327 F.3d 938, 952–53, 959–65 (9th Cir. 2003); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784–800 (3d Cir. 1995).

The ability of absent class members to opt out is an important check against such abuses, as it allows class members to reject inadequate settlements by withdrawing to pursue their claims through alternative means, whether individual or class actions. *See id.* at 792.[5] The possibility of opt-outs also provides significant incentives to defendants and class counsel to negotiate fair settlements: The benefit to defendants of settling will be lost if too many class members opt out, while class counsel may face cuts in their fees if large portions of the class walk away and thus receive no share of the settlement.

For these reasons, courts have, particularly since this Court's decisions in *Amchem* and *Ortiz*, been unwilling to accept settlements of class members' damages claims that involve certification on a non-opt-out basis or otherwise fail adequately to protect opt-out rights.[6] Indeed, this Court's due process holding in

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[5] In some cases, when a class action is certified for litigation and later settles, the initial opt-out deadline may have expired before a settlement is reached, though the opt-out period sometimes will still be open when a settlement is first announced. By contrast, class members *always* retain opt-out rights after the announcement of a settlement if, as happened here, the certification of the class occurs only as the result of the settlement. As the Advisory Committee Notes to the 1983 revision of Rule 23 note, when "the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement…, the basic opportunity to elect exclusion applies without further complication."

[6] *See*, *e.g.*, *In re Dry Max*, 724 F.3d at 717–18; *Hecht v. United Collection Bur., Inc.*, 691 F.3d 218, 222 (2d Cir. 2012); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 191–99 (5th Cir. 2010); *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.,* 195 F.3d 894, 897 (7th Cir. 1999).

Wal-Mart likely forecloses certification of a settlement class for substantial damages claims without providing absent class members the ability to opt out under Rule 23(b)(3). *See* 564 U.S. at 363.

Recent revisions to Rule 23 have underscored the importance of opt-out rights to a fair settlement process by allowing judges to order a second opt-out opportunity at the settlement stage even if the class was certified before settlement and an opt-out right was already provided at that time. *See* Fed. R. Civ. P. 23(e)(4). Both the judicial insistence that classwide damages claims be certified and settled through Rule 23(b)(3) opt-out classes and the rulemakers' addition of the second opt-out possibility reflect the importance of opt-out rights to prevent settlement abuses. They also embody the fundamental principle that the ability to opt out is essential to the legitimacy (and constitutionality) of a system in which the settlement of class members' claims is agreed to by other people—that is, class counsel and defendants. In particular, the addition of Rule 23(e)(4) reflects an explicit determination by the rulemakers that an opt-out opportunity following a settlement is in many cases fair because "[a] decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known." Fed. R. Civ. P. 23, Advisory Comm. Notes to 2003 Revision.

Abandoning the *American Pipe* rule in cases governed by section 77m and similar "repose" provisions elsewhere in the securities laws would mean that, when the time came for settlement, class members would have nowhere else to go: They would face the Hobson's choice of accepting whatever settlement class counsel negotiated with the defendants (unless

it were disapproved by the court) or taking nothing. That result would not only invite unfairness and abuse, but also significantly affect the balance of power in settlement negotiations conducted by class counsel in perfect good faith, as the price of settlement would necessarily be affected because class members, deprived of their ability to opt out, would be effectively "disarmed." *Amchem*, 521 U.S. at 621.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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