No. 13-640

IN THE

Supreme Court of the United States

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI,

Petitioner,

v.

INDYMAC MBS, INC., *et al.*,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS 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 counsel to a party or as amicus curiae in many cases in this Court involving class action procedures, including: *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); and *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

In particular, while recognizing that class actions are often essential tools for remedying violations of class members' rights, Public Citizen has also been concerned with protection of both substantive and

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

procedural rights of absent class members in class actions. Public Citizen attorneys have, in many cases (including this Court's decisions in *Smith* and *Amchem*), represented class members who objected to a class settlement or otherwise sought to assert their individual due process rights. Of particular concern to Public Citizen have been cases where class counsel and defendants agreed to settlements under Rule 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.

These concerns are implicated here because 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 suspend statutes of limitations for individual members of the putative class even if those individuals are ultimately not included in a certified class—are critical both to the effective functioning of class actions and to the protection of the rights of individual class members, including their 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 pressed by the respondents in this case—that the *American Pipe* rule is inapplicable to the so-called "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, but would significantly impair the rights of class members.

SUMMARY OF ARGUMENT

The petitioners have demonstrated that application of the *American Pipe* tolling rule to the three-years-from-sale "repose" period in 15 U.S.C. § 77m is fully consistent with the requirements of the statute of limitations 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 add two further points.

First, although respondents assert that application of the *American Pipe* rule would result in the application of Federal Rule of Civil Procedure 23 to modify substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072, it is actually the 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.

Failing to apply *American Pipe*, however, would mean that whether a particular class member had a claim that survived application of the limitations statute would depend on whether the class was certified and whether the class member remained in the class. That result is at odds with the fundamental notion 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 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—meaningless.

Second, respondents have previously asserted in the alternative that even if the *American Pipe* rule applies to the three-year period in section 77m, the rule may not be applied in this case because the class representative on whose filing petitioners rely for the timeliness of the claims at issue lacked Article III standing. According to respondents, if the court lacked subject-matter jurisdiction over the initial class action filing, that filing cannot suspend the running of the statute of limitations under *American Pipe*.

Respondents' alternative argument—should the Court choose to consider it—is fundamentally misguided. Article III standing, like other questions of jurisdiction, is critical to the *adjudicatory power* of the court in which an action is filed. But whether a filing stops the running of a statute of limitations does not depend on an adjudication, or any action of any kind, by the court in which that filing is made. It is only when a court later addresses a limitations defense to a claim brought by a plaintiff who subsequently appears in a matter otherwise within the court's jurisdiction that the question of tolling is adjudicated. And that adjudication rests on whether the prior complaint satisfied the requirements of the limitations statute, not on the jurisdiction of the court in which it was filed. Here, because the filing otherwise fully satisfied the requirements of the limitations statute (as demonstrated by *American Pipe* and *Crown Cork*), the claimed absence of subject-matter jurisdiction over

the claims brought by the initial class representative is irrelevant.

ARGUMENT

I. Applying the *American Pipe* Rule Here Would Protect Class Members by Ensuring That Their Right to Recover Does Not Depend on Their Inclusion in a Certified Class.

A. Applying the *American Pipe* Rule to Claims Subject to 15 U.S.C. § 77m Would Not Modify Substantive Rights.

The parties here do not contest that the timely filing of a class action asserting the securities claims at issue would have satisfied the applicable limitations periods for all members of the proposed class if the class were certified. Respondents, however, contend 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 proposed class action is inapplicable to claims subject to the so-called "repose" limitations periods set forth in the federal securities laws. According to respondents, members of a putative class asserting such claims may not receive the benefit of a filing within that period if the class is not certified, or if they are otherwise excluded from the scope of any class ultimately certified. Indeed, respondents assert that applying *American Pipe* here would violate the Rules Enabling Act by improperly modifying "substantive rights." 28 U.S.C. § 2072.

Respondents' Rules Enabling Act argument is misguided in several respects. First, it 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, 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. Pet. App. 13a–16a.

That reasoning is incompatible with this Court's decisions, which teach that whether a statute limits rights or remedies is dependent not 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*. By contrast, 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-sale "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 characterization of it as addressing the expiration of the underlying rights untenable.

Of course, if 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. 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.

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 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 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. 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 fed-

eral 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.[2]

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, the rules create a vehicle through which many individuals can simultaneously stop the running of the limitations period. 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," but "leaves the parties' legal rights and duties intact[.]" *Shady Grove*, 559 U.S. at 408.

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[2] 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 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, 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.*, *Morse v. Elmira Country Club*, 752 F.2d 35, 38 (2d Cir. 1984).

B. 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.

Respondents contend that the filing of a class action stops the running of the "repose" period only for class members included in a class that is ultimately certified. A decision not to certify the class, or a decision to exclude from the class as certified someone whose claims were encompassed by the complaint as 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.

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: They do not enlarge the "plaintiffs' separate entitlements to relief." *Shady Grove*, 559 U.S. at 407 (plurality). Although class actions undoubtedly, as a practical matter, increase the number of plaintiffs whose rights are asserted in court, they do not affect the defendant's "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." *Id*. 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, 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*, 131 S. Ct. 1910, 1952 (2011) (Thomas, 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 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 Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (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 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 consequence 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 regrettably 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. 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.[3] Indeed, this Court's due process holding in

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[3] *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); *Richardson v. L'Oreal USA, Inc.*, __ F. Supp. 2d __, 2013 WL 5941486, at *8 (D.D.C. Nov. 6, 2013).

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* 131 S. Ct. at 2559.

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 as well as 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.

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.

II. Satisfaction of the Statute of Limitations Does Not Depend on Whether the Proposed Class Representative Who Filed Within the Limitations Period Had Standing.

Respondents contended in their brief in opposition to the petition for certiorari that even if *American Pipe* is otherwise applicable to claims subject to the three-year period in section 77m, it cannot be applied in this case because no class representative with Article III standing to pursue the class claims at issue filed within the limitations period. Respondents went so far as to assert that "[i]t cannot be the law" that a filing over which a court lacks subject matter jurisdiction can stop the running of a limitations period. Resps. Br. in Opp. 31. But it can be the law, and it is: Respondents' position is both groundless and foreclosed by decisions of this Court. As the majority of lower courts to address the issue have concluded, whether the filing of an action satisfies a statute of limitations has no necessary relationship to whether the action properly invoked the court's jurisdiction.[4]

Subject-matter jurisdiction determines the power of a court to adjudicate the merits of a case. Without subject-matter jurisdiction, the court has no "power to

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[4] *See*, *e.g.*, *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1097 (3d Cir. 1975); *Nat'l Credit Union Admin. Bd. v. Credit Suisse Sec. (USA) LLC*, 939 F. Supp. 2d 1113, 1127 (D. Kan. 2013); *Genesee County Employees' Ret. Sys. v. Thornburg Mortgage Sec. Trust 2006–3*, 825 F. Supp. 2d 1082, 1161–64 (D.N.M. 2011).

declare the law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Thus, a court must "satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 575 (1999). But beyond that, there is no special magic to subject-matter jurisdiction: "[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

The effect of a class-action filing on the timeliness of a class member's subsequently filed action does not depend on the court's subject-matter jurisdiction over the initial filing because it does not require an adjudication of a merits issue, or indeed any issue at all, by the court at the time of the initial filing. The issue of timeliness arises when the putative class member files his or her own action, or intervenes as a party in a pending action, and the issue is decided by the court where the subsequent filing occurs (which may or may not be the same court as the one where the original class action filing occurred, as it happened to be in this case). The court's jurisdiction to decide the limitations issue depends on its subject-matter jurisdiction over the *subsequent* filing by the class member, not the jurisdiction of the court over the original class action.

Moreover, the issue on which the limitations question turns is not the significance of anything *decided* by the court in the class action as originally filed, but the consequences that attach to the action taken by

the putative class representative in filing the case. *See American Pipe*, 414 U.S. at 554–55; *Crown Cork*, 462 U.S. at 352–53. What matters, in other words, is not anything the court does in the proposed class action, but what the class representative has done in filing it.[5] As the district court in this case correctly put it, "Tolling is not something that the Court 'does'—and for which it would need jurisdiction—during the pendency of the earlier complaint." Pet. App. 43a–44a.

Moreover, the facts on which tolling depends—that the original action was filed and the length of time it was pending—are not altered by a court's subsequent decision that the class representative lacked standing. That a court may lack subject-matter jurisdiction over an action is not a reason for pretending that it never existed, nor of denying consequences that may attach to the facts of its filing and pendency.

As in any case where the question is whether particular acts are sufficient to toll a statutory limitations period, the issue whether a filing by a purported class representative who lacked standing to assert the class's claims satisfies the statute of limitation for a class member with standing who later appears depends on whether giving that effect to the first filing adequately serves the purposes of the limitations period. The Court emphasized the centrality of this inquiry in *Burnett v. New York Central Railroad Co.*,

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[5] That is why, even though class members are not bound by *decisions* made in an uncertified class action (*see Smith v. Bayer Corp.*, 131 S. Ct. at 2379–81), their claims may be rendered timely by the putative class representative's filing of an action, the effect of which does not in any way depend on any decisions made in the uncertified action. *See id.* at 2379 n.10.

380 U.S. 424 (1965). There, the Court held that a filing in an improper venue tolled the statute of limitations applicable to a Federal Employers' Liability Act claim. As the Court explained, "the basic inquiry [in such a case] is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427. Later, in *American Pipe*, the Court engaged in the same inquiry into "whether tolling the limitation in a given context is consonant with the legislative scheme," 414 U.S. at 558, when it devised the rule that the filing of a class action suspends the running of limitations periods for all class members. Indeed, *American Pipe* cited *Burnett* immediately after the passage just quoted. *See id*.

Just as *American Pipe* explained how class-action filings satisfy the policies of limitations statutes, *see id.* at 554–55, *Burnett* spelled out how the purposes of a limitations period are fully served by a rule that a filing in an improper venue stops the running of the statute. As the Court observed, "[s]tatutes of limitations are primarily designed to assure fairness to defendants." 380 U.S. at 428. But the Court concluded that the "policy of repose, designed to protect defendants," *id.*, would not be served and would be outweighed by other considerations in circumstances where a timely, albeit defective, action had been brought. The Court emphasized that the plaintiff in such a case "did not sleep on his rights but brought an action within the statutory period," *id.* at 429, and that the defendant had received service of process "notifying him that [the plaintiff] was asserting his cause of action." *Id*. Thus, the defendant "could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that [the plaintiff] was actively pursuing his … remedy." *Id*. at 430.

Exactly the same considerations apply here. As *American Pipe* pointed out, the initiation of a class action, even if it is never certified, fulfills the statutory policies of repose just as fully as the filing in the wrong court that was at issue in *Burnett*. *See* 414 U.S. at 558–59. That is equally true whether the denial of class treatment rests on a failure to satisfy the terms of Rule 23 or on the putative class representative's lack of Article III standing. In both cases, the policy of repose has been served because the action unambiguously informed the defendant that the claims of the entire class were being asserted in court.

Moreover, nothing in *Burnett*'s reasoning is dependent on whether the court where an action was first filed had jurisdiction. Indeed, another decision of this Court that predated and foreshadowed *Burnett* confirms that satisfaction of a limitations statute does not depend on filing in a court that possesses adjudicatory power. In *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962), the Court considered whether a federal district court without personal jurisdiction could transfer an action to another district court under 28 U.S.C. § 1406. The Court's affirmative answer was based in part on the Court's holding that the initial filing tolled the statute of limitations and, hence, that allowing the action to proceed in a court that had jurisdiction would not prejudice the defendant. The Court's reason for reaching that conclusion was exactly the same as that underlying *Burnett* and *American Pipe*:

> When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the

> proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure.

Id. at 467.

Personal jurisdiction, like subject-matter jurisdiction, "is 'an essential element of the jurisdiction of a district ... court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas,* 526 U.S. at 584. Thus, *Goldlawr* reflects this Court's recognition that whether the court in which an action is filed has adjudicatory power has nothing to do with whether a filing in that court stops the running of a limitations statute. Because a class representative's lack of standing, like any other circumstance that may deprive a court of jurisdiction, goes only to the court's adjudicatory power, it does not determine whether his filing provides a basis for invoking *American Pipe* (assuming it is otherwise applicable).

Holding otherwise would significantly impair the efficacy of the *American Pipe* rule. One of the principal benefits of the rule is that it obviates the need for individual class members who desire to preserve their claims to intervene in class actions to avoid the possibility that their claims will be deemed untimely if the class is not certified. The rule thus serves to "avoid, rather than encourage, unnecessary filing of repetitious papers and motions" and prevent "the multiplicity of activity" that would "frustrate the principal function of the class suit." *American Pipe*, 414 U.S. at 550–51; *accord Crown Cork*, 462 U.S. at 350.

If the rule were inapplicable when a putative class representative has been found to lack standing, absent class members would never be able to rely on the assurance that a class action filing would satisfy a lim-

itations period for them. Not only is the *law* of standing plagued by "much uncertainty," *Griffin v. Singletary*, 17 F.3d at 360, but standing determinations rest on *facts* about a particular plaintiff's circumstances that are unlikely to be known by other class members. Moreover, standing objections can be raised at any time, even on appeal, and their ultimate resolution does not depend merely on the adequacy of the plaintiff's *allegations*, but on his ability to prove those allegations at trial. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

These features of standing make it particularly difficult for class members (and their lawyers) to have confidence that any particular class representative's standing is unimpeachable. Even after a class has been certified, and even after a trial on the merits, the class can be decertified in whole or in part, and the action (or particular claims) dismissed, based on, for example, a factual finding that a class representative whose standing appeared solid on the basis of the complaint had not in fact purchased specific securities as to which the class asserted claims. Thus, holding *American Pipe* inapplicable where a class representative lacks standing would mean that in virtually any case, class members who desired to ensure that their own claims would remain timely regardless of the fate of the class action would have to intervene or file their own actions, resulting in the kind of "increase in protective filings in all class actions" that led this Court to reject limits on the scope of the *American Pipe* rule in *Crown Cork*. 462 U.S. at 353. And because, as explained above, holding *American Pipe* inapplicable to cases where a class representative lacked standing would not even advance the legitimate interests in repose that limitations periods serve, the Court should

not restrict its application in a way that would so substantially undermine, if not eliminate, its benefits. *See id*. at 352–53.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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