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 FOR THE PETITIONER

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QUESTION PRESENTED

Does the timely filing of a valid class action satisfy or toll the three-year filing period set by Section 13 of the Securities Act of 1933 with respect to subsequent opt-out suits by individual class members?

PARTIES TO THE PROCEEDING BELOW

Petitioner California Public Employees' Retirement System was the appellant below.

The appellees below, who are respondents in this action, are:

1. ANZ Securities, Inc.
2. Bankia, S.A. (as successor to Caja de Ahorros y Monte de Piedad de Madrid)
3. BBVA Securities Inc.
4. BMO Capital Markets Corp. (f/k/a Harris Nesbitt Corp.)
5. BNP Paribas FS, LLC (f/k/a Fortis Securities LLC)
6. BNP Paribas S.A.
7. BNY Mellon Capital Markets, LLC (f/k/a BNY Capital Markets, Inc. and as successor to Mellon Financial Markets LLC)
8. CIBC World Markets Corp.
9. Citigroup Global Markets Inc.
10. Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited)
11. DZ Financial Markets LLC
12. HSBC Securities (USA) Inc.
13. HVB Capital Markets, Inc.
14. ING Financial Markets LLC
15. Mizuho Securities USA Inc.
16. M.R. Beal & Company
17. Muriel Siebert & Co. Inc.
18. nabSecurities LLC (f/k/a National Australia Capital Markets, LLC)
19. Natixis Securities Americas LLC (f/k/a Natixis Bleichroeder Inc.)
20. RBC Capital Markets LLC (f/k/a RBC Capital Markets Corp.)

21. RBS Securities, Inc. (f/k/a Greenwich Capital Markets, Inc.)
22. RBS WCS Holding Company (as successor to ABN AMRO Inc.)
23. Santander Investment Securities Inc.
24. Scotia Capital (USA) Inc.
25. SG Americas Securities, LLC
26. Sovereign Securities Corporation LLC
27. SunTrust Capital Markets, Inc.
28. Utendahi Capital Partners, L.P.
29. Wells Fargo Securities, LLC (on its own behalf and as successor to Wachovia Capital Markets, LLC)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner discloses that it has no parent corporation and no stock, and so no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

BRIEF FOR THE PETITIONER

Petitioner California Public Employees' Retirement System ("CalPERS") respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-6a) is unpublished but available at 2016 WL 3648259. The relevant opinions of the district court (Pet. App. 7a-13a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2016. Pet. App. 1a. A timely petition for a writ of certiorari was filed on September 22, 2016. The petition was granted on January 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 77m of Title 15 of the U.S. Code provides in relevant part:

> **Limitation of actions**
>
> No action shall be maintained to enforce any liability created under [Section 11 of the Securities Act of 1933] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

STATEMENT OF THE CASE

I. Legal Background.

"The Securities Act of 1933 protects investors by ensuring that companies issuing securities (known as 'issuers') make a full and fair disclosure of information relevant to a public offering. The linchpin of the Act is its registration requirement." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1323 (2015) (quotation marks and citations omitted). With very limited exceptions, every issuer must file with the SEC and publish a registration statement before offering securities to the public. *See id.*

Section 11 of the Securities Act ensures that issuers "tell[] the whole truth" to investors in registration statements. *Id*. at 1331 (quotation marks and citation omitted). If a registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading," any person who acquires the security can bring an action against certain persons involved in the statement's preparation and dissemination. 15 U.S.C. § 77k(a).

Claims under Section 11 are subject to the "procedural restrictions" in Section 13, which sets forth "a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208-10 (1976). Section 13, titled "Limitation of actions," provides:

> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

15 U.S.C. § 77m.

II. Factual Background.

At the turn of the century, Lehman Brothers was the fourth-largest investment bank in the United States. Between July 2007 and January 2008, Lehman raised over $31 billion from investors through debt offerings. Petitioner CalPERS, the nation's largest pension fund, purchased millions of dollars of those securities. But unbeknownst to CalPERS and other investors, Lehman was a colossus with feet of clay: the bank had invested heavily in subprime mortgage loans, while concealing its exposure thereto and using accounting gimmicks to mask its shaky financial condition. When the truth about Lehman's financial condition was revealed, the company collapsed.

Shortly before Lehman declared bankruptcy in 2008, a retirement fund filed a putative class action (the "Class Action") in the Southern District of New York. (Relevant excerpts of the operative complaint (the "Class Action Complaint") are reproduced at J.A. 50-66.) The Class Action Complaint asserted claims with respect to thirty different debt offerings. J.A. 58-66.

Among other claims, the Class Action Complaint stated a claim under Section 11 against respondents, who were involved in underwriting Lehman's debt offerings, alleging that the registration statements contained untrue statements and omitted material facts concerning Lehman's accounting practices. J.A. 51-54.

The Class Action Complaint was filed on behalf of a class of investors including "all persons and entities, except Defendants and their affiliates, who purchased or otherwise acquired the Lehman Brothers Holdings Inc. . . . securities identified" in appendices attached to the Class Action Complaint. J.A. 50. There is no dispute that the Class Action Complaint satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure. Nor is there any dispute that petitioner CalPERS was from the outset a member of the class defined by the Class Action Complaint.

For years, the Class Action did not materially advance. In February 2011, CalPERS elected to take charge of litigating the claims brought on its behalf in the Class Action by litigating those same claims in its own suit against respondents in the Northern District of California. Complaint, *Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 3:11-cv-00562-EDL (N.D. Cal. Feb. 7, 2011). (Relevant excerpts of "CalPERS's Complaint" are reproduced at J.A. 67-79.)

Each of CalPERS's claims embodies a claim previously set forth on behalf of it and other investors in the Class Action Complaint. As relevant here, CalPERS alleged that respondents had violated Section 11 with respect to six debt offerings—of the thirty specified by the Class Action Complaint—that

CalPERS had itself purchased. *Compare* J.A. 67 (listing the offerings CalPERS had purchased) *with* J.A. 58, 60, 61, 65 (each of those offerings also listed in the Class Action Complaint Appendix). Thus, CalPERS's Section 11 claims constituted a subset of the pending class claims. CalPERS's theory of liability was the same as the Class Action Complaint, the predicate facts were the same, and respondents were named as defendants in the Class Action Complaint. *Compare* J.A. 51-54 *with* J.A. 77-79 (both asserting Section 11 causes of action based on the same registration statements).

The litigation over CalPERS's Complaint was subsequently transferred to the Southern District of New York and consolidated with the Class Action for pretrial purposes by order of the U.S. Judicial Panel on Multidistrict Litigation. *See* J.A. 8.

Later that year, class counsel and the defendants reached a proposed settlement of the claims in the Class Action Complaint. At their request, the district court preliminarily certified a class for settlement purposes under Fed. R. Civ. P. 23(b)(3).

The court issued a notice of the settlement to the class. *See* J.A. 89-103 (excerpts from the notice). As required under Rule 23 and principles of due process (*see infra* at 25-30), the notice granted each class member, including CalPERS, the right to opt out of the settlement and pursue those same claims on its own.

J.A. 94-96. There is no dispute that CalPERS timely opted out in the form required by the opt-out notice.[1]

The district court nonetheless subsequently granted respondents' motion to dismiss CalPERS's Section 11 claims relating to five of the six debt securities ("CalPERS's claims") as untimely. Pet. App. 7a, 12a.[2] There is no dispute that the Class Action Complaint—which asserted the identical claims on behalf of a class that included CalPERS—had been timely filed. But by the time CalPERS filed its own individual complaint to litigate those same claims on its own behalf directly, more than three years had passed since the relevant debt securities were offered to the public.

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[1] The notice explained that "[u]nless you exclude yourself [from the settlement], you give up any right to sue the Settling Underwriter Defendants or any of the other released parties for the claims being released by the Underwriter Settlement." J.A. 95. "To exclude yourself from the Underwriter Class, you must send a letter by mail saying that you want to be excluded from the Underwriter Class in the *In re Lehman Brothers Equity/Debt Securities Litigation – Settling Underwriter Defendants Settlement*, Case No. 08-CV-5523 (LAK)." J.A. 95.

[2] CalPERS's Section 11 claims relating to one of the six debt securities proceeded, because that security had been offered to the public fewer than three years prior to the filing of CalPERS's Complaint. CalPERS also asserted claims under Section 10(b) of the Securities Exchange Act of 1934, which are subject to a five-year limitations period. That litigation resulted in various settlements. Those are not before the Court. After the final resolution of all its claims, CalPERS timely appealed the dismissal of its Section 11 claims with respect to the five other debt offerings.

The district court held that CalPERS's claims were barred by Section 13. The court rejected CalPERS's argument that the timely filing of the Class Action Complaint rendered CalPERS's claims timely under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)). Pet. App. 10a-13a. Consequently, with respect to the relevant debt securities, CalPERS was stripped of any recovery and respondents were absolved of liability to CalPERS, both in connection with the Class Action settlement (from which CalPERS had opted out) and CalPERS's Complaint (which was dismissed as untimely).

The Second Circuit affirmed. Pet. App. 6a. The court of appeals reasoned that the case was controlled by its prior ruling in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014). In *IndyMac*, retirement pension systems from Detroit and Wyoming filed separate putative class actions alleging that the defendant made false and misleading statements in multiple offerings of mortgage-backed securities. The cases were consolidated, with Wyoming appointed lead plaintiff and Detroit instead only an unnamed class member. *Id*. at 102-03.

Wyoming's amended complaint included allegations regarding certain securities that Detroit had purchased but Wyoming had not. The district court subsequently determined that Wyoming lacked standing to assert those claims. Detroit then moved to

intervene to assert those claims, but by that time three years had passed since the securities were offered to the public. *See id.*

The Second Circuit held in *IndyMac* that the claims were barred by Section 13. It reasoned that Section 13 is a statute of repose and, "while statutes of limitations are often subject to tolling principles, a statute of repose *extinguishes* a plaintiff's cause of action" and therefore is not subject to equitable tolling. *Id*. at 106 (quotation marks and citations omitted). The court of appeals further held that even if *American Pipe* tolling is not "equitable" in nature, the Rules Enabling Act precluded any tolling of Section 13's three-year period. *Id*. at 109.[3]

The Second Circuit held in this case that *IndyMac* required dismissal of CalPERS's claims, and that it made no difference that CalPERS had filed its complaint during the pendency of a properly filed class action that was ultimately certified. Pet. App. 4a-5a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The ruling below cannot be reconciled with *American Pipe*. In that decision, this Court unanimously interpreted Rule 23 of the Federal Rules of Civil Procedure to provide that the filing of a class action complaint (i) commences the action for all class members, whether named or not, and moreover (ii) tolls the limitations periods applicable to the underlying

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[3] This Court granted certiorari in *IndyMac* but dismissed the writ as improvidently granted in light of a settlement between the parties.

cause of action if the class action fails, leading unnamed class members to intervene in the suit. In reaching this conclusion, the Court recognized that the filing of a class action complaint simultaneously streamlines the process of litigation while putting defendants on notice of the claims against them. On the other hand, *American Pipe* and its progeny explain that forcing the unnamed class members to file protective pleadings—whether in the form of motions to intervene or individual complaints—early in a class action would scrap the efficiencies that Rule 23 seeks to achieve without providing any real benefit to defendants.

The Second Circuit's holdings in *IndyMac* and in this case cannot be reconciled with *American Pipe*. By creating an overwhelming incentive for unnamed class members to file individual pleadings early in class litigation, the Second Circuit's rule will—in the best-case scenario—generate tremendous waste and inefficiency for district courts. In the far more likely scenario, the Second Circuit's rule will generate even more waste and inefficiency by also precipitating premature opt-outs from class procedures that will impose massive costs on defendants and the courts alike. These problems will be acutely felt in securities cases, and cases under Section 11 in particular, which typically are brought as class actions, take a substantial amount of time to resolve, and often feature institutional plaintiffs that will likely feel compelled to file their own complaints under the Second Circuit's rule.

The *American Pipe* rule also upholds the constitutionally protected right to opt out of class

actions. This Court has recognized that it would violate due process to bind a putative class member in a Rule 23(b)(3) class against its will. Thus, all class members have a constitutional right to opt out to pursue their own claims with their own lawyers. In this case, all CalPERS did was attempt to exercise this right: it opted out of the class at the earliest practicable moment to pursue the same claims via its own complaint.

Plainly, the right to opt out would be illusory if it stood for nothing more than the right to have one's claims dismissed as time-barred. After all, no rational plaintiff would opt out under such circumstances. The Second Circuit's rule thus effectively strips the opt-out right from every class member that lacks the foresight or wherewithal to file its own complaint within the three-year limitations period. Without the ability to opt out, those class members will not only lose the ability to vindicate their own interests, but also lose the principal check they have to ensure that class counsel and the class representatives vigorously represent them. Representative plaintiffs and their counsel, in turn, will be less accountable to the unnamed class members, and may face their own perverse incentives to advance their own individual interests over those of the class as a whole. The harm would accrue most severely to smaller investors—a result that is not only constitutionally problematic, but at odds with the remedial purposes of the federal securities laws, and with the holding of *American Pipe*.

On the other hand, a judgment reversing the Second Circuit would validate and serve the purposes of efficiency and fairness that this Court sustained in

American Pipe. Here, the Court can achieve that result in one of two ways: (1) by holding that CalPERS's action was timely regardless of tolling because it was brought in the Class Action Complaint and then continuously maintained when CalPERS filed its own complaint and opted out of the settlement; or (2) by holding that the time for CalPERS to file its individual complaint was tolled by the timely filing of the Class Action Complaint.

II. The first argument is the easiest path to reversal. By its terms, Section 13 provides that no "action" may "be brought" more than three years after a security is offered to the public. 15 U.S.C. § 77m. In *American Pipe*, the Court explained that the filing of a class action brings the action for all members, whether named or not. In this case, the Class Action Complaint thus commenced all of CalPERS's claims against each respondent, and did so on CalPERS's behalf. CalPERS's "action," *i.e.*, its cause of action, was therefore "brought" within three years of the date that the relevant securities were offered to the public, and it was timely under Section 13. The fact that CalPERS then filed an individual complaint and opted out of the class did not "bring" its "action"—it merely transferred control over the existing action from the class representatives to CalPERS.

As the Court made clear in *American Pipe*, recognizing the timeliness of CalPERS's claims would not interfere with the purposes underlying Section 13. Because CalPERS only seeks to assert claims that were timely brought in the Class Action Complaint, respondents have no basis to plead surprise or disruption of their repose.

Against these considerations, respondents have argued that the word "action" in Section 13 refers to a lawsuit, and not to a cause of action—so that what matters is when CalPERS filed its individual complaint, and not when its claims were first brought. That interpretation is untenable because it is inconsistent with this Court's precedents, unduly formalistic, and unhinged from the purposes underlying Section 13. At bottom, the complaint is a mere vessel for the causes of action, and the fact that a class member places its causes of action into a new vessel does not alter when those claims were brought against the defendants.

For these reasons, CalPERS's action was timely brought—and because the action was continuously maintained, there is no need to consider tolling doctrine.

III. If this Court instead assesses this case through the lens of tolling, it should hold that CalPERS's action was timely because *American Pipe* tolling applies to the three-year period in Section 13. The Second Circuit reached a contrary result by determining that as a statute of repose, the three-year period is not subject to any tolling. While this Court's precedents hold that under a statute of repose, the time to *initiate* a claim cannot be *equitably* tolled, that reasoning does not apply to the distinct doctrine of *American Pipe* tolling, under which the claim is initiated by the timely filing of the class action complaint. Thus, the Second Circuit's reasoning is foreclosed by this Court's precedents.

The Second Circuit was in any event wrong to deem the three-year period a statute of repose. At the time Section 13 was enacted, Congress did not distinguish

between statutes of limitations and statutes of repose—and in fact, the three-year period has consistently been described by this Court and members of Congress as a statute of limitations. There is no compelling justification whatsoever to treat the three-year period differently from the one-year period, in light of the textual similarities between the two.

The Second Circuit relied heavily on this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and on the Rules Enabling Act, 28 U.S.C. § 2072(b). But neither supports the Second Circuit's holding.

Lampf determined the applicable limitations period for the implied right of action under Section 10(b) of the Exchange Act, not Section 11. In the process, the Court described the three-year period in a time-bar statute resembling Section 13 as a period of repose that is not subject to equitable tolling. But *Lampf* is inapposite because (1) the holding of the case actually supports the proposition that as long as litigation commences in a timely fashion, a plaintiff's claim is timely; and (2) the textual analysis the Court used in *Lampf* to hold that equitable tolling did not apply does not apply to *American Pipe* tolling, which is not a form of equitable tolling and not based on the discovery of injury.

The Rules Enabling Act likewise provides no support to respondents' position. The statute prohibits procedural rules from abridging substantive rights. But this Court has explained that in order to run afoul of the Act, a procedural rule must actually regulate substantive law, *i.e.*, the rules of decision. *American*

Pipe tolling does no such thing; instead, it only regulates how the claims of putative class members are presented—through either the class complaint or an individual complaint.

That point is especially clear in this case because if CalPERS had remained in the class, it would have received value for its claims in the settlement. Thus, respondents are not objecting to being held liable on CalPERS's claims; they are only objecting to CalPERS pursuing those claims individually with its own attorneys, instead of through the class representatives. That is a quintessentially procedural issue.

Moreover, Section 13 itself does not speak of creating substantive rights in defendants; it merely tells plaintiffs when they must bring their actions. That, too, is a procedural restriction. But even if Section 13 does create some substantive rights, it surely does not give respondents the right to force CalPERS to remain in the class on pain of losing its claims.

ARGUMENT

In this case, the Class Action Complaint timely commenced all of CalPERS's claims against each respondent, thus bringing CalPERS's action on its behalf. Subsequently, as the Class Action dragged on, CalPERS took control over its piece of the pending action. It did so by filing an individual complaint and opting out of the Class Action settlement. The Second Circuit, extending the flawed rule it adopted in *IndyMac*, held that CalPERS's claims were untimely because CalPERS's individual complaint was filed after the expiration of the three-year period in Section 13,

which it held constitutes a statute of repose. The Second Circuit's premise and conclusion were wrong in *IndyMac*, and they are doubly wrong here because under *American Pipe*, CalPERS's action was timely brought whether the three-year period constitutes a statute of repose or not. This Court should reverse.

I. *American Pipe* And Its Progeny Establish That CalPERS's Action Was Timely.

In *American Pipe*, this Court held that the timely filing of a class action complaint satisfies the relevant limitations periods for all class members—whether named or not—by initiating the claims of every member and putting the defendants on notice of those claims. That reasoning holds true whether the period in question is deemed a statute of limitations or a statute of repose: in either case, the timely filing of a class complaint informs the defendant of the "generic identities" of all plaintiffs and of their "substantive claims." *American Pipe*, 414 U.S. at 555. A contrary conclusion would not only fail to achieve the purposes of repose, but it would also sap the efficiencies that make class actions useful. *American Pipe*'s reasoning applies with full force in this case. A holding that CalPERS's complaint was timely would advance the purposes of the *American Pipe* rule; the contrary result would thwart them.

A. *American Pipe* Is An Established Feature Of Federal Civil Procedure.

1. In *American Pipe*, Utah filed a putative antitrust class action on the heels of a case brought by the United States. The district court denied class certification,

leading putative class members to move to intervene. Those motions were filed after the expiration of the Clayton Act's limitations provision (since amended), under which a private action "'shall be forever barred unless commenced . . . within'" one year after the conclusion of an antitrust suit brought by the United States. *American Pipe*, 414 U.S. at 541-42 & n.3 (quoting 15 U.S.C. § 16(b) (1970)). Because the putative class members were no longer parties to the case on the date their motions were filed, the question was whether the filing of the class complaint tolled the limitations period for the members until the date the class action failed through the denial of class certification.

This Court held that the answer was "yes" based on its interpretation of Rule 23. The Court opened by discussing the history and purpose of the rule. It explained that under the prior version of Rule 23, some courts had concluded that a class action was a device to permit joinder or intervention, and had therefore required such individual motions for joinder or intervention to satisfy the timeliness requirements applicable to the relevant cause of action. *American Pipe*, 414 U.S. at 549-50. But the 1966 amendments to Rule 23 transformed the class action from "an invitation to joinder" into "a truly representative suit." *Id*. at 550. This transformation removed all of the "conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id*. Thus, "[w]hatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a 'separate cause of action' which must individually meet the

timeliness requirements, such a concept is simply inconsistent with Rule 23." *Id*. Instead, the unnamed, putative "members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." *Id*. at 551.

Amended Rule 23 was "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id*. at 550. The rule could not accomplish this goal, however, if putative class members were "induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," because such filings would generate "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id*. at 551, 553. The Court was therefore "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. "[T]his interpretation" of Rule 23, the Court concluded, is "necessary to insure effectuation of the purposes of litigative efficiency and economy." 414 U.S. at 555-56. *See also Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (explaining that without *American Pipe*, "one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated").

The Court determined that tolling under these circumstances was also fully consistent with the purposes of limitations periods: to thwart the revival of stale claims and provide defendants with notice of their

potential exposure to liability. *American Pipe*, 414 U.S. at 554-55. Such provisions "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id*. at 554 (quotation marks and citation omitted). By notifying the defendants "of the substantive claims being brought against them" and "of the number and generic identities of the potential plaintiffs who may participate in the judgment," a putative class action complaint "satisfie[s]" these statutory purposes. *Id*. at 554-55 (quotation marks and citation omitted). "Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors." *Id*. at 555.

On the other hand, *American Pipe* disclaimed reliance on the equitable principle that tolling is only available for plaintiffs who exercise diligence. Instead, as the Court explained, "[w]e think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit." *Id*. at 551. That is because *American Pipe* tolling seeks to uphold the purposes of Rule 23, not some judge-made equitable principle. *See Chardon v. Fumero Soto*, 462 U.S. 650,

654, 661 (1983) (*American Pipe* "interpreted the Federal Rules of Civil Procedure to permit a federal statute of limitations to be tolled between the filing of an asserted class action and the denial of class certification" in order to achieve the "federal interest in assuring the efficiency and economy of the class action procedure").

2. In the ensuing decades, this Court has never questioned the wisdom of the *American Pipe* rule. In fact, the Court has repeatedly reaffirmed and extended it. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 & n.13 (1974), which arose in part under the securities laws, the Court recognized that *American Pipe* tolling was critical to ensuring that class members who received notice and an opportunity to opt out of the class could exercise that constitutional right.

In *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the Court held that absent class members seeking to appeal the denial of class certification may intervene after final judgment. The Court reasoned that "[t]he lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with 'the essential information necessary to determine both the subject matter and size of the prospective litigation.'" *Id.* at 392-93 (quoting *American Pipe*, 414 U.S. at 555).

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court held that *American Pipe* tolling applies to putative class members who choose to file their own complaints instead of intervening. *Id*. at 353-54. The Court recognized that limiting *American Pipe* to intervenors would produce the same "needless

multiplicity of actions" that it had previously sought to avoid. *Id*. at 351.

For decades after *Crown, Cork & Seal Co.*, this Court has never cast doubt on the reasoning of *American Pipe*. When this Court's recent cases have discussed *American Pipe*, they have likewise recognized the rule's continuing validity and importance. In *Devlin*, the Court held that unnamed class members need not intervene in order to appeal from the denial of their objection to a settlement's approval. The Court explained that "[n]onnamed class members are . . . parties [to a class action] in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them," citing *American Pipe* for the proposition. 536 U.S. at 10. It further reasoned that without such tolling, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated." *Id.* In *Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011), the Court described *American Pipe* and *McDonald* as "two cases in which we held that a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit." And, in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221 (2012), the Court reiterated that, "[i]n *American Pipe*, we held that 'commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" *Id.* at 1419 n.6 (quoting *American Pipe*, 414 U.S. at 554).

In addition to this Court's decisions, the lower courts have cited *American Pipe* more than 1800 times. Learned commentators have likewise confirmed that the *American Pipe* rule is an entrenched feature of federal civil procedure. The leading treatise has explained that "[t]here is no problem with regard to the statute of limitations under Rule 23" because "commencement of the action tolls the statute of limitations for all members of the class." Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 474 (8th ed. 2017). And that principle is recognized as a "key aspect of class action practice." 3 William B. Rubenstein et al., *Newberg on Class Actions* § 9:53, at 565 (5th ed. 2013).

Congress and this Court have also amended the Federal Rules of Civil Procedure thirty times since the *American Pipe* decision, and five of those amendments have affected Rule 23. *See* Staff of the H. Comm. on the Judiciary, 114th Cong., Federal Rules of Civil Procedure ix-xiii (2016) (historical notes to the Rules). Congress also has comprehensively addressed class action procedure through legislation, both generally (in the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4) and in securities laws in particular (in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227). In none of those instances did Congress or the Court alter the *American Pipe* rule. *American Pipe* is therefore entitled to the highest respect under principles of statutory *stare decisis*. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-11 (2015) (holding that only Congress

should alter this Court's statutory decisions unless their statutory and doctrinal underpinnings erode, or they prove unworkable); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (holding, with respect to securities laws, that "[t]he principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what we have done") (quotation marks and citation omitted)).

B. The Second Circuit's Decision Undermines The Interests This Court Sought To Protect In *American Pipe* And Its Progeny.

The Second Circuit's ruling in this case deals a grave blow to the interests this Court sought to protect in *American Pipe* and its progeny. That is because every single class member with any material stake in a Section 11 case—and certainly every fiduciary responsible for safeguarding investors' assets—will likely feel compelled to file a protective parallel individual complaint before the three-year period elapses, even if a timely filed class action is pending.

The Second Circuit's rule would produce a logistical and risk management nightmare for courts and defendants. The filing of individual complaints inevitably creates inertia: once a plaintiff with a substantial claim hires a lawyer, pays for the preparation of its own complaint, and files in its own name, it will naturally be more inclined to also want to participate in the management of the case, including motion practice, discovery, and settlement discussions. Even if the defendants succeed in such cases, courts will likely have to contend with multiple individual

plaintiffs pursuing their own appeals. *Cf., e.g.*, *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897 (2015) (holding that appeals in consolidated cases can proceed separately).

District courts would be placed in the unenviable position of managing these cacophonous litigants, addressing the disparate discovery requests of each plaintiff, and dealing with counsel for each plaintiff. And although a district court often may, as a formal matter, stay the parallel individual cases and attempt to channel the litigation through the lead plaintiff of the class action, requests for such stays will themselves produce costly collateral litigation, and the prospect that a substantial number of plaintiffs would later opt out of the class and go it alone will nevertheless hang over the class proceedings. Although that risk exists to some degree under any rule, the Second Circuit's rule will increase the number of opt-outs by creating an overwhelming incentive to file individual suits, and therefore make litigation and settlement more difficult and expensive for parties and courts.[4]

The filing of a large number of individual complaints is particularly likely and undesirable in securities cases, for three reasons. First, registration statements and prospectuses for public securities are

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[4] The *best*-case scenario is that all of the individual protective complaints will be meaningless: the plaintiffs will remain members of the class, recover (or not) through the class mechanism, and the individual complaints will become moot. But even in that best-case scenario, there would still be truly massive waste because in the interim the plaintiffs would have incurred the expense of individual filings for no benefit, while district courts will have had to manage them and defendants respond to them.

often widely disseminated, and a Section 11 class action may include *thousands* of members—making it highly likely that a large number of unnamed plaintiffs will have substantial claims that justify individual filings. For example, there are "[h]undreds of opt-outs," including twenty-seven very large institutional investors, from the class action in *In re: Petrobras Securities Litigation*, 312 F.R.D. 354, 359 (S.D.N.Y. 2016), where the *IndyMac* rule governs.

Second, given the complexity of these cases, it is common that a ruling on class certification does not occur before the expiration of the three-year period. *See infra* at 25-26. Class members will therefore feel compelled at the outset to protect themselves by filing their own complaints. But this proliferation of filings would run directly counter to the objectives of the PSLRA, which embodies Congress's desire that securities class actions be helmed by a sophisticated lead plaintiff—as opposed to myriad plaintiffs advancing a flotilla of complaints. *See* 15 U.S.C. § 78u-4(a)(3). The point of the PSLRA is to decrease the cost of litigation for defendants and the courts (which is why, for example, it institutes a stay of discovery until motions to dismiss are denied). But encouraging the filing of individual actions will have the opposite effect.

As bad as all of that is, the Second Circuit's rule produces an even worse result if plaintiffs do not respond by filing their own individual complaints within three years of the date the securities were offered. Any plaintiff who fails to do so effectively forfeits the right to opt out of the class and becomes beholden to the class representatives and their counsel,

who will therefore have one fewer check giving them an incentive to pursue the unnamed plaintiffs' interests in litigation or settlement. Thus, the unnamed plaintiff may be forced to accept inadequate representation or an inadequate judgment. That outcome will disproportionately harm smaller investors who lack the awareness or wherewithal to file protective individual complaints—*i.e.*, the investors who most need the protection offered by the federal securities laws.

C. *American Pipe* Upholds The Due Process Right To Opt Out Of Class Litigation.

Applying *American Pipe* in this case would also preserve class members' right to opt out of a class action and pursue their own causes of action individually. "In the context of a class action predominantly for money damages," this Court has "held that absence of notice and opt-out violates due process." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). Indeed, it is "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quotation marks omitted). The opt-out right upholds that tradition by preventing unwilling class members from being involuntarily bound by class action judgments that extinguish their individual claims—including by settlement—and by giving them autonomy over how their claims are litigated.

As *American Pipe* and its progeny explain, where possible, it is more efficient, and therefore preferable, for plaintiffs to remain in the class and rely on the class representatives and counsel. But it often takes a while

before a class member can determine whether the class action will vindicate its interests. More often than not, the developments that motivate class members to opt out—*e.g.*, the conclusion of dispositive motion practice and/or a proposed settlement—do not occur until well after the three-year period specified by Section 13 has expired. That is because the class complaint itself may not be filed until shortly before the expiration of the period.

Even when a class action is filed well before the three-year limitations period expires, the early stages of securities class litigation (including the lead plaintiff appointment process and the stay of discovery while dispositive motions are filed) can take years, especially if appeals are involved. This case is a good example: the first class complaint was filed in 2008, but when CalPERS filed its individual complaint in February 2011, class counsel had yet to even file a class certification motion. And this case is by no means unusual. For more than a decade, the time from the filing of a securities class action complaint to a class certification decision has exceeded two years in approximately 66% of cases. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* 23 (Jan. 23, 2017), http://tinyurl.com/huw5q8y. In those cases asserting Securities Act claims, it was likely that plaintiffs would not have had a chance to evaluate the settlement and opt out before Section 13's three-year period had expired. The time exceeded three years in 36% of cases. *Id*. In these cases, it was guaranteed that plaintiffs

would not have had the opportunity to opt out before the three-year period elapsed.[5]

To interpret a limitations period to bar the claims of timely opt-outs from a class action settlement would violate due process. Many class members will not even be aware of the lawsuit from which they must opt out until they receive the class notice after the three-year period has already expired. And the constitutionally conferred right to opt out would in practice be a nullity if it stood for nothing more than the right to opt out and file an individual claim that must then be dismissed as time-barred. *See Crown, Cork & Seal Co.*, 462 U.S. at 351-52 (recognizing the need for the opt-out right to remain meaningful even after the limitations period has run); *Eisen*, 417 U.S. at 176 & n.13 (same).

The due process problem is especially acute in the commonplace circumstance in which the complaint states multiple claims subject to different limitations periods. Take, for example, a class complaint that alleges claims under Section 11 of the Securities Act (subject to the three-year limitations period in Section 13) and Section 10(b) of the Exchange Act (subject to a five-year limitations period). *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983)

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[5] Some cases take far longer. In *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), for example, the class complaint was filed in 2002, but when the case most recently reached this Court more than a decade later, the class certification litigation still had not been resolved. *See also Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-90038, 2015 WL 10714013, at *1 (5th Cir. Nov. 4, 2015) (granting Halliburton's petition to appeal class certification yet again).

(noting that "conduct actionable under § 11 may also be actionable under § 10(b)"). Under the Second Circuit's rule, class members with multiple meritorious claims who are dissatisfied with the class representatives will find themselves in a pickle in year four because there is no mechanism by which they can opt out in part. *See, e.g.*, J.A. 94 (class notice, requiring opting out of the settlement altogether). Plaintiffs in such a case can either opt out to pursue their Exchange Act claims, at the cost of forfeiting their Section 11 claims (which will be deemed time-barred under the Second Circuit's rule), or they can remain in the class and accept sub-par representation as the price of maintaining all of their claims (including those that are not subject to Section 13's three-year period).

Again, this case provides an illustration. CalPERS had claims under both the Securities Act and the Exchange Act, and the underlying debt securities were offered to the public on different dates. Under the rule the Second Circuit adopted, CalPERS could either remain in the settlement and accept a lower value for all of its claims, or opt out and forfeit some of them altogether. But there is no sound reason why a limitations period should be interpreted to force a plaintiff to sacrifice some meritorious claims in order to pursue others. Or, to put it slightly differently, there is no reason to hold that, under Section 13, a plaintiff's timely decision to opt out of a class action somehow transforms a timely Securities Act claim into an untimely one.

Indeed, the fact that respondents were willing to pay value for CalPERS's claims in the Class Action

settlement proves that it is *only* CalPERS's decision to opt out and pursue its claims individually that, in the Second Circuit's view, prohibited CalPERS from recovering on those very same claims. If this Court adopts that view, membership in a class would effectively become mandatory for any class member that did not file its own opt-out complaint within the three-year limitations period. Under the doctrine of constitutional avoidance, this Court should eschew an interpretation of Section 13 that imposes such a severe burden on the exercise of well-established due process rights. *Cf. Ortiz*, 527 U.S. at 845-46 (applying constitutional avoidance to prevent the certification of a mandatory class to settle claims for money damages).

* * * * *

When this Court granted certiorari in *IndyMac*, it faced a series of doctrinal knots that it had to untie to determine whether *American Pipe* tolling applies to the three-year limitations period in Section 13. These included whether Section 13's three-year period is a statute of limitations or a statute of repose, whether *American Pipe* tolling is legal or equitable, and whether the Rules Enabling Act permits any tolling of Section 13's three-year period. The correct answer to those questions is that *American Pipe* tolling applies with equal force to both the one-year and the three-year limitations periods in Section 13. *See infra* Part III.

However, the Court can resolve this case more simply by holding that CalPERS's Complaint was timely without regard to tolling. "Tolling" of a deadline is only necessary during a period in which the plaintiff has no live claim. But as *American Pipe* makes clear,

CalPERS's causes of action were brought with the timely filing of the Class Action Complaint. CalPERS then seamlessly took control of its claims by filing an individual complaint while the class action was still pending, and then opting out of the class. Thus, the claims were timely brought, and continuously maintained. Because this argument is the easiest way to resolve the case, we address it next.

II. CalPERS's Action Was Timely Regardless Of Tolling.

When, as here, a class member files an individual complaint alleging a Section 11 cause of action while a properly filed class action asserting the same cause of action is pending, the individual complaint is timely. "[W]hen an unnamed, putative class member later files its own individual claim, it is not instituting a new action subject to the statute of limitations and statute of repose; it is simply taking over the prosecution of its individual claim from the putative class representative." *In re BP p.l.c. Sec. Litig.*, No. 4:13-CV-1393, 2014 WL 4923749, at *4 (S.D. Tex. Sept. 30, 2014). Therefore, the case does "not involve 'tolling' at all" because the plaintiff "has effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000).

A. The Text And Purpose Of Section 13, As Well As *American Pipe*'s Explanation Of When An Action Is Brought, Establish That CalPERS's Action Was Timely Without Regard To Tolling.

The text of Section 13, 15 U.S.C. § 77m, sets forth two straightforward time limitations. The first requires that the action be "brought" within one year of when the plaintiff knew or should have known of the false statement. This provides a "discovery" rule. The second requires that the action "be brought" within three years of the date that the security was offered to the public. This provides a superseding outer boundary from the date the particular security was offered to the public to bring the action, which does not depend on the plaintiff's diligence or knowledge of the claim. Both limitations periods specify when a Section 11 action must be "brought." It is settled that "'[b]rought' in this context means 'commenced.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016).

CalPERS's action was timely brought under Section 13 through the filing of the Class Action Complaint. The statute uses the passive phrase "be brought," indicating that individual plaintiffs need not bring their own actions to satisfy the time bar—instead, "actions" are timely as long as they are "brought" by somebody. In *American Pipe*, this Court held—wholly apart from the question of tolling—that under "Rule 23 . . . the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. Thus, the

filing of the Class Action Complaint timely "brought" the claims of every class member, including CalPERS.

That must be so. No other act "brings" the class member's claim. If the claim were instead deemed brought on some later date—such as the settlement date—no class member could recover through the class action process, except if the litigation miraculously concludes within three years of the date of the relevant registration statement. Plaintiffs would race to the courthouse without fairly assessing whether they have a valid claim. Defendants would attempt to run out the clock through arduous motions practice. No public purpose would be served, which is why no statutory time bar functions in that manner.

In this case, CalPERS's individual Section 11 action is entirely encompassed within the Class Action Complaint. CalPERS was a member of the class defined by that complaint. Thus, the timely filing of the Class Action timely "brought" CalPERS's claims. Even if it could be said that CalPERS also later "brought" the same claim a second time by filing its individual complaint, that would not change the fact that the claim was already "brought" by the Class Action Complaint—satisfying Section 13.

Moreover, no subsequent act "unbrought" CalPERS's claim; Section 13 does not indicate that such "unbringing" would even be possible, and it would serve no apparent purpose. But even if such a case could exist, this is not it. The Class Action Complaint was never dismissed as meritless. Nor (in contrast to the facts of *IndyMac*) did the district court find some flaw under Rule 23, such as that the class representative was

inadequate. To the contrary, the case settled and the district court certified a settlement class. By that time, CalPERS had already filed its individual complaint—and then as soon as practicable, it opted out of the class action to pursue its action through that complaint.

Recognizing the timeliness of CalPERS's Complaint is also fully consistent with the purposes underlying the federal securities laws, and Section 13 in particular. As this Court has explained:

> Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims. And a class complaint notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class.

Crown, Cork & Seal Co., 462 U.S. at 352-53 (quotation marks and citations omitted). When a class action is timely filed, "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action,

as a joint suit, or as a principal suit with additional intervenors." *American Pipe*, 414 U.S. at 554-55.

That reasoning applies fully to Section 13 as well. The statute provides that, once three years have passed since an offering, a new action cannot be brought. But this Court has emphasized that the securities laws should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quotation marks and citation omitted). As part of that body of law, limitations periods should be construed "consonant with the legislative scheme" they support. *American Pipe*, 414 U.S. at 558.

In this case, that necessarily means construing Section 13 to recognize that CalPERS's Section 11 action was first brought in the Class Action Complaint. That is because the number and identity of claims against respondents did not change when CalPERS took over its individual piece of the litigation by filing its own complaint and opting out of the Class Action. Only two things had changed: respondents had to deal with CalPERS and its attorneys instead of the lead plaintiff and counsel; and CalPERS was able to exercise its constitutional right not to accept a settlement of its own money claim that it deemed insufficient. But avoiding those outcomes is not an interest that Section 13 was designed to address, and so here, as in *American Pipe*, recognizing the timeliness of CalPERS's Complaint "is in no way inconsistent with the functional operation of a statute of limitations." 414 U.S. at 554.

B. Respondents' Contrary Position Is Untenable.

Respondents defend the ruling below as compelled by the text of Section 13. They argue that CalPERS's "action" was "brought" when it filed its individual complaint—and is therefore untimely—because an "action" refers to the formality of a separate lawsuit, and not to the substance of a plaintiff's claim. That argument is unpersuasive because in this context, the word "action" means a "cause of action," which refers to a claim for relief, and not the complaint as a document.

The Securities Act does not define "action." But the most instructive case is this Court's unanimous decision in *Jones v. Bock*, 549 U.S. 199 (2007), which dealt with the exhaustion requirement of the Prison Litigation Reform Act. In language quite similar to Section 13, that statute provides that "[n]o action shall be brought" absent exhaustion. 42 U.S.C. § 1997e(a). The question in *Jones* was whether the failure to exhaust a single *claim* required dismissal of the entire *complaint*. The Court held that it did not, reasoning that the statute's "boilerplate" language referring to "actions" means individual claims, and not entire complaints. 549 U.S. at 220. It supported its reasoning by citing statute-of-limitations cases, recognizing that such statutes frequently refer to "actions," but noting that "we have never heard of an entire complaint being thrown out simply because one of several discrete claims was barred by the statute of limitations, and it is hard to imagine what purpose such a rule would serve." *Id*.

There is no reason to read the word "action" in Section 13 any differently. Deeming the "action" to be

the plaintiff's complaint makes no sense in this context because Congress would not have been concerned whether a *complaint* was "brought" within a certain number of years after the offering of the securities. The complaint may contain a variety of claims that have nothing to do with the registration statement at all. Instead, Section 13 is obviously directed at when the *claim* that is subject to the three-year period—here, CalPERS's claim under Section 11—was brought, wholly apart from whether the complaint also includes other claims that are not governed by Section 13.

Reading the word "action" to mean a cause of action is also the most harmonious way to interpret the securities laws generally. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2535 (2015) ("One ordinarily assumes Congress means the same words in the same statute to mean the same thing.") (quotation marks and citation omitted)). Section 11, which Section 13 limits, refers to a "cause of action." 15 U.S.C. § 77k(a). Similarly, the time bars applicable to claims under Section 10 (fraud) and Section 20A (insider trading) of the Exchange Act use the word "action" to refer to a "private right of action" to enforce the securities fraud laws or the laws against insider trading. 28 U.S.C. § 1658(b); 15 U.S.C. § 78t-1(a), (b)(4). The term "private right of action" means an individual claim or cause of action within a complaint—not an entire lawsuit. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (using the phrases "private cause of action" and "private right of action" interchangeably).

Interpreting the word "action" to instead mean a complaint would produce nonsensical results. For example, if a plaintiff waited four years after a security was offered to the public to file a complaint stating multiple causes of action—all but one of which were timely—it would make no sense to dismiss the entire lawsuit on account of that claim alone.

Take the opposite example: imagine that within one year a plaintiff filed a complaint asserting a state law claim, but five years later amended that complaint to add a cause of action under Section 11. Respondents surely would not concede that the "action" was timely because the complaint was "brought" when it was filed.

Perhaps most tellingly, imagine that, more than three years after a security was offered to the public, a new plaintiff sought to *intervene* in a timely filed *pre-existing* individual suit. Respondents certainly would maintain that intervention "brought" a new "action," even if the new plaintiff's claim would proceed under the same civil case number as the prior, timely filed suit. That is because everybody understands that the word "action" in this context means a cause of action under Section 11, rather than the complaint.

Consider as well instances in which new complaints are filed for other reasons, including administrative ones. It is hard to understand how under respondents' reading class counsel can take the commonplace step of filing an amended complaint with the same claims outside the three-year period. Or take a complaint that originally named two plaintiffs, one of which severs its existing Section 11 claim into its own complaint for unrelated reasons, such as to add its own unique, timely

claim under another statutory provision, or to seek venue in a more convenient forum. It is nonsensical to say that Congress intended those plaintiffs to forfeit their Section 11 claims.

Another way to think about this issue is to acknowledge that opting out of a class action to assert the same claim individually does not, as a functional matter, bring a new claim because all the opt-out plaintiff does is take over the piece of the action that always belonged to it. True, the plaintiff files an individual complaint as part of the process. But the complaint is merely a new vessel for the plaintiff's piece of the existing cause of action. The cause of action itself is what subjects the defendant to liability. Because Section 13 is concerned with the defendant's liability, and not the vessel it comes in, the filing of the opt-out complaint cannot be the relevant event for purposes of the statute.

In sum, the easiest way to decide this case is to hold that when, as here, a class member files an individual complaint asserting the same claim as a timely filed still-pending class action complaint, the individual complaint is timely without regard to tolling because the claim was brought when the class action was filed, and then maintained by the individual plaintiff.

III. The Rule Of *American Pipe* Tolls The Three-Year Limitations Period In Section 13 Of The Securities Act.

If the Court instead determines that tolling is required in this case, or concludes it is best to resolve the case on tolling grounds, then it should hold that

under *American Pipe*, the three-year limitations period in Section 13 was tolled by the timely filing of the Class Action Complaint. CalPERS's Complaint was therefore timely filed as well.

American Pipe held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." 414 U.S. at 554. Section 13 provides that an "action . . . to enforce any liability created under" Section 11 may only be maintained if it is "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence," and that no such action may "be brought . . . more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m.

Nobody doubts that *American Pipe* tolling applies to the one-year limitations period. But the Second Circuit held in *IndyMac* that *American Pipe* does not apply to the three-year period because that period is a statute of repose, and therefore cannot be tolled *in any respect*. 721 F.3d at 107. The court reasoned that courts have no authority to equitably toll a statute of repose, and that even non-equitable tolling (*i.e.*, "legal" or "statutory" tolling) is prohibited under the Rules Enabling Act. *See id.* at 109. The Second Circuit's reasoning is incorrect.

A. *American Pipe* Tolling Applies Equally To Statutes Of Limitations And Statutes Of Repose.

1. At its core, the Second Circuit's error stems from its failure to apprehend the way that *American Pipe*

tolling accounts for the role of statutes of repose. "Statutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (quotation marks and citation omitted). They are triggered by some event other than the accrual of the plaintiff's claim—usually (but not always) by the misconduct itself. Thus, even if the plaintiff's claim has not accrued (*e.g.*, because there has been no injury), the statute of repose will protect the defendant from liability. *See id.* at 2182.

This Court has recognized that statutes of repose "generally may not be tolled." *Id*. at 2183. Specifically, such statutes are not subject to equitable tolling, which permits a plaintiff to file an action after a limitation period expires if he "has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Id*. (quotation marks and citation omitted). The focus of the equitable tolling inquiry is on the plaintiff's diligence. By contrast, a statute of repose prioritizes the defendant's peace. Because no amount of plaintiff diligence can provide a defendant with peace, there is no way to reconcile permitting a plaintiff to bring a new claim after the expiration of a statute of repose.

Obviously—but critically—the protection of the statute of repose relates only to *new* assertions of liability. For example, a timely filed lawsuit is not automatically dismissed if it is still pending on the day the repose period elapses. Similarly, the statute of repose does not bar every development that might

increase the amount of money that the defendant owes on a pending claim (for example, the belated discovery of evidence of intent, which might defeat a defense of good faith at trial). It only bars the plaintiff from bringing in new claims.

Statutes of repose thus may prohibit the *equitable* tolling of the time to *initiate* an action, but the mere fact that a time limitation is deemed a statute of repose does not foreclose tolling if the plaintiff's claim *was already timely filed* before the expiration of the repose period. As explained more fully in Part I, *supra*, *American Pipe* tolling in particular is fully consistent with the purpose of a statute of repose. As this Court explained, the filing of the class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555; *cf. id.* at 558 (explaining that the filing of a prior state lawsuit can "fulfill[] the policies of repose and certainty" served by a limitations period on a federal action). Because *American Pipe* only applies to claims that have already been timely asserted in a putative class action, there is no potential for surprise or for new liability. *See Developments in the Law—Class Action*, 89 Harv. L. Rev. 1391, 1451 (1976) ("[A] defendant faced with information about a potential liability to a class cannot be said to have reached a state of repose that should be protected."); *Crown, Cork & Seal Co.*, 462 U.S. at 353 (explaining that because the defendant "will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class," tolling "creates no potential for

unfair surprise, regardless of the method class members choose to enforce their rights").

2. That reasoning is particularly applicable here. Section 11 claims turn entirely on the veracity of the defendant's statements; they do not require proof of either intent to defraud or investors' reliance on the defendant's statements. *See Omnicare*, 135 S. Ct. at 1323.[6] Consequently, a class action complaint that identifies the class of plaintiffs, the offering documents, and the untrue statements or misleading omissions gives the defendants the same information they would have had if each individual plaintiff had filed its own complaint on that day, and the omission of the names of all of the plaintiffs from the class complaint changes nothing. With respect to the Section 11 claim in this case, respondents do not have a straight-faced argument that, once the Class Action Complaint was filed, they were in a state of repose vis-à-vis CalPERS's claim.

Consequently, even accepting the proposition that the three-year period in Section 13 constitutes a statute of repose, it nevertheless is subject to tolling under *American Pipe* because "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the

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[6] In certain limited circumstances, investors are required to show reliance if the issuer's earning statements covering at least twelve months from the date of the registration statement have been made available to investors. 15 U.S.C. § 77k(a). But "such reliance may be established without proof of the reading of the registration statement." *Id*.

statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose," *American Pipe*, 414 U.S. at 559—and this is such a circumstance.

On respondents' contrary view, *American Pipe* itself was seemingly wrongly decided, because the provision tolled in that case reads much like the three-year period of Section 13. The relevant provision of the Clayton Act provided that "any action to enforce such cause of action shall be forever barred unless commenced . . . within the period of suspension." *American Pipe*, 414 U.S. at 542 n.3 (quoting 15 U.S.C. § 16(b) (1970)). The "period of suspension" was the period "during the pendency" of a "civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws," and "one year thereafter." *Id*. at 541-42 (quotation marks and citation omitted). Thus, like the three-year period in Section 13, the relevant provision of the Clayton Act was triggered not by the accrual of the plaintiff's claim, but by an event over which the plaintiff had no control: the conclusion of a federal enforcement action. And just like the three-year provision in Section 13, the Clayton Act set forth the time bar using strong language. Nevertheless, *American Pipe* found that tolling was warranted.

B. In Any Event, Section 13 Is A Statute Of Limitations And On That Basis Is Subject To *American Pipe* Tolling.

The foregoing arguments all assume that the three-year period in Section 13 is a statute of repose. The better view, however, is that it is a statute of

limitations, necessarily subject to *American Pipe* tolling.

As this Court recognized in *CTS Corp.*, Congress and the courts have frequently used the terms "statute of limitations" and "statute of repose" interchangeably. 134 S. Ct. at 2186. As late as 1979—five years after *American Pipe* was decided—*Black's Law Dictionary* stated that "[s]tatutes of limitations are statutes of repose." *Id*. (quoting *Black's Law Dictionary* 835 (5th ed. 1979) (quotation marks omitted)). The same was true when Section 13 was enacted. *See Black's Law Dictionary* 1120 (3d ed. 1933). Indeed, dictionaries at that time stated that statutes of limitations "fix[] the period of time after a cause of action has accrued, within which an action thereon must be brought," and further stated that such limitations provisions "are often referred to as statutes of repose." *Ballentine's Law Dictionary* 1233 (2d ed. 1930).

It is unsurprising, then, that Congress and this Court have referred to Section 13, as a whole, as a "limitations" provision, not a statute of repose. *See* 15 U.S.C. § 77m (entitled "Limitations of actions")[7]; *see also Ernst & Ernst*, 425 U.S. at 210 ("Section 13 specifies a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer

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[7] "[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (quotation marks and citation omitted).

or sale"); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 646 (2010) (referring to "limitations periods in the federal securities laws," including Section 13).[8]

It also makes sense that this Court has grouped the two time periods together because they are merely two sentences in the same statutory paragraph, with remarkably similar texts. The one-year sentence provides that "[n]o action shall be maintained," and the three-year sentence provides "[i]n no event shall any such action be brought." 15 U.S.C. § 77m. Both use comparably strong language to achieve the same effect. Thus, it makes sense to treat both provisions as "statutes of limitations," both subject to *American Pipe* tolling.[9]

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[8] More broadly, this Court has used the terms interchangeably. As recently as 2007, the Court referred to a time limitation as a statute of repose and a statute of limitations (in the very next sentence of the opinion). *See Wallace v. Kato*, 549 U.S. 384, 391 (2007). And an addendum to the petitioner's brief in *IndyMac* highlighted 25 other instances in which the Court equated statutes of limitations and repose.

[9] The legislative history likewise supports the conclusion that the three-year period of Section 13 is a statute of limitations. During the floor debates in the Senate on what was to become the Securities Exchange Act of 1934 (which amended the time bars in Section 13), Senator Norris expressed some confusion about why it was necessary to have two limitations periods. *See* 78 Cong. Rec. 8198 (1934). Senator Barkley responded, "The lapse of the [longer period] bars [the plaintiff] from bringing suit at all where he has made the discovery. But if within that time he makes discovery of fraud and damage, then he is required to bring his suit within 1 year after such discovery." *Id.* The one-year period, Senator Barkley added, "does not extend *the real statute of limitations*"; it

C. Neither This Court's Decision In *Lampf* Nor The Rules Enabling Act Suggests That *American Pipe* Tolling Does Not Apply To The Three-Year Period In Section 13.

In *IndyMac*, the Second Circuit reached the opposite conclusion based on its reading of *Lampf*, which described multiple timing provisions in the securities laws, including Section 13, as "a 1-year period after discovery combined with a 3-year period of repose," and concluded that equitable tolling, under which "the bar of the statute does not begin to run until the fraud is discovered," was "unnecessary" for the one-year period because it already incorporates a discovery rule, and "inconsistent with" the three-year period of repose, which was designed "to serve as a cutoff." 501 U.S. at 360, 363 (quotation marks and citation omitted).

The Second Circuit's reliance on *Lampf* is misguided for three reasons. First, *Lampf*'s holding was that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 therefore *must be commenced* within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id*. at 364 (emphasis added) (footnote omitted). This holding actually supports CalPERS's argument because in this case, the "litigation"—*i.e.*, the Class Action—was "commenced . . . within three years" of the violation. *Lampf* does not say that an individual complaint must be filed within three years when the complaint merely

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"simply requires that within that statute of limitations, if he makes discovery of fraud, he must bring his suit within 1 year." *Id.* (emphasis added).

constitutes the continuation of that pre-existing litigation.

Second, the Court in *Lampf* concluded that it would make no sense to incorporate a discovery rule into both the one-year and three-year periods because Congress had already spoken directly to that question by expressly incorporating the discovery rule into the former, not the latter. But there is no comparable textual anomaly arising from applying *American Pipe* tolling to both time periods in Section 13.

Third, the holding of *Lampf* was limited to equitable tolling. But *American Pipe* is not an equitable tolling rule. *See Credit Suisse Sec. (USA) LLC*, 566 U.S. at 226 n.6 (noting a distinction between equitable tolling and "legal" tolling, and acknowledging that some federal courts have used the latter term to describe *American Pipe*); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 538 (9th Cir. 2011) (acknowledging that "the weight of federal authority favors the view that *American Pipe / Crown, Cork* rule should be characterized as a rule of statutory tolling"). Indeed, the Court in *American Pipe* disclaimed the equitable inquiry described in *Lampf* (*i.e.*, whether the plaintiff has been diligent) because *American Pipe* tolling extends even to those plaintiffs "who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)." 414 U.S. at 551. *See also* Part I, *supra*.

Instead, *American Pipe* tolling is either *sui generis*, or it is a form of legal tolling because it sets forth an "interpretation" of Rule 23 that the Court deemed "necessary to insure effectuation of the purposes of

litigative efficiency and economy that the Rule in its present form was designed to serve." *Id*. at 555-56. The Court explored the history of Rule 23 in detail, comparing different versions of the rule and discussing key provisions. *See id*. at 545-56 & n.11. It focused on the notice and opt-out procedures that Rule 23(c) requires for a class certified under Rule 23(b)(3). *See id.* at 547-49. It concluded that those procedures removed any "conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id*. at 550. The Court found "simply inconsistent with Rule 23 as presently drafted" the alternative possibility that "one seeking to join a class after the running of the statutory period asserts a separate cause of action which must individually meet the timeliness requirements." *Id*. (quotation marks and citation omitted).[10]

The Second Circuit reasoned that even if *American Pipe* tolling is derived from Rule 23, and therefore "legal" rather than "equitable," it cannot be used to toll a statute of repose because the Rules Enabling Act would prohibit that result. That statute provides that this Court may prescribe general rules of practice and procedure, but that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C.

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[10] On occasion, this Court has, in passing dictum, referred to *American Pipe* as a form of equitable tolling. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990); *Young v. United States*, 535 U.S. 43, 49 (2002). Aside from being dictum, the rationale for these references is unclear, and for the reasons stated above, they are incorrect.

§ 2072(b). The Second Circuit concluded that because a statute of repose gives the defendant a substantive right to be free from liability, no interpretation of the Federal Rules can modify it.

That is incorrect. As this Court has explained, "[t]he test is not whether the Rule affects a litigant's substantive rights; most procedural rules do." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion). Instead, "[w]hat 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." *Id*. (quotation marks and citation omitted). In this case, Rule 23 and *American Pipe* tolling purely regulate procedure: specifically, whether CalPERS must enforce its rights by remaining in the class action, or whether it may do so in the alternative by taking control over its own claim. Any suggestion that respondents' substantive rights are being abridged rings hollow because if CalPERS had remained in the class, respondents would have no grounds to challenge the timeliness of its claims. Thus, in reality, respondents are not objecting to an untimely action at all: they are objecting only to CalPERS pursuing its claim individually instead of through the class. There simply is no authority for the proposition that defendants have a "substantive right" to force plaintiffs to litigate their Section 11 claims through a class representative. If anything, CalPERS has a substantive due process right to opt out of the class action and supervise its own claims—not the other way around.

Section 13 itself likewise says nothing about creating or extinguishing substantive rights. It does not say, for example, that the right to recover will expire, or that the defendant's liability will be negated. Instead, it says only that an action may not be maintained or brought past a certain time—which is garden-variety statute of limitations language. *See Young*, 535 U.S. at 47; *see also*, *e.g.*, *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013) ("Statutes of limitations establish the period of time within which a claimant must bring an action."); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) ("The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time."). Such limitations are quintessentially procedural because they govern how and when plaintiffs must present their claims, not the parties' substantive rights.[11]

American Pipe itself rejected an indistinguishable argument. The defendant had argued that the limitations period in that case established a "substantive" statute of limitations that was "immune from extension by 'procedural' rules." 414 U.S. at 556. The Court explained, however, that "the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." *Id*. at 557 (quotation marks and citation omitted). It

[11] Of course, this is not to suggest that Congress could not enact a time-limitations period extinguishing a defendant's liability. But it is to say that Congress did not do so in 1933 and 1934, when it enacted and modified Section 13.

elaborated that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id*. at 557-58. Applying that test to its tolling rule, the Court recognized that tolling has a long pedigree in precedent. *See id*. at 558-59. And it held that because tolling was consistent with the purposes underlying the limitations period in the Clayton Act, the Rules Enabling Act did not pose any obstacle. *See id.* at 558 n.29.

The same, of course, is true with respect to Section 13, which in the relevant sense parallels the Clayton Act's limitations period. For the reasons explained more fully above, it is entirely consonant with the legislative purpose of the three-year period to toll it for putative class members asserting Section 11 claims that were originally brought in a timely filed class action.

CONCLUSION

The Second Circuit's decision should be reversed.

Respectfully submitted,

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