No. 16-373

In the Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

MOODY INVESTORS SERVICE, INC., ET AL.,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 23, 2016

QUESTIONS PRESENTED

Section 13 of the Securities Act of 1933 establishes a one-year statute of limitations and an absolute three-year statute of repose for private actions commenced under its provisions. 15 U.S.C. § 77m. In *CTS Corporation v. Waldburger*, 134 S. Ct. 2175, 2183 (2014), the Court observed that a "central distinction between statutes of limitations and statutes of repose" is that "[s]tatutes of repose . . . generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control."

The questions presented here are:

1. Whether the United States Court of Appeals for the Second Circuit correctly held, in a ruling that has been adopted by every circuit to consider the issue since *CTS*, that the Securities Act's statute of repose is not subject to the "tolling rule" established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554–55 (1974), which provides that "the commencement of a class action suspends the applicable *statute of limitations* as to all asserted members of the class." (Emphasis added).

2. Whether the Court should adopt a novel interpretation of *American Pipe*'s tolling rule—by holding "no tolling [i]s required" where "claims" are "initially presented within the limitations period by the Class Action complaint and then maintained continuously thereafter," Pet. 26—notwithstanding that no circuit has so held and the plain text of Section 13's statute of repose requires an "action [to] be brought" within three years, rather than merely a "claim" to be "presented." 15 U.S.C. § 77m.

RULE 29.6 STATEMENT

Respondent ANZ Securities, Inc. is an indirectly wholly owned subsidiary of Australia and New Zealand Banking Group Limited ("ANZ"). Upon information and belief, ANZ has no parent company, and no publicly traded company owns 10% or more of its stock.

BFA Tenedora de Acciones, S.A.U. (formerly Banco Financiero y de Ahorros, S.A.U.) ("BFA") owns 50% or more of Respondent Bankia, S.A. and BFA is wholly owned by the Fondo de Reestructuración Ordenada Bancaria, an entity overseeing the recapitalization and restructuring of the Spanish banking system. No publicly traded company owns 10% or more of Bankia, S.A.

Respondent BBVA Securities Inc. is a wholly owned subsidiary of BBVA Compass Bancshares, Inc., which is a wholly owned subsidiary of Banco Bilbao Vizcaya Argentaria, S.A. No publicly held corporation owns 10% or more of Banco Bilbao Vizcaya Argentaria, S.A.

Respondent BMO Capital Markets Corp., formerly known as Harris Nesbitt Corp., is indirectly wholly owned by Bank of Montreal. No publicly held corporation owns 10% or more of Bank of Montreal.

On November 30, 2011, Fortis Securities LLC changed its name to BNP Paribas FS, LLC. Respondent BNP Paribas FS, LLC is a wholly-owned, indirect subsidiary of BNP Paribas. BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas

has no parent company and no publicly-held corporation owns 10% or more of its shares.

Respondent BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas has no parent company and no publicly-held corporation owns 10% or more of its shares.

Respondent BNY Mellon Capital Markets, LLC (which was formerly named Mellon Financial Markets, LLC and is the successor-in-interest to BNY Capital Markets, Inc.) is a wholly owned subsidiary of The Bank of New York Mellon Corporation. No publicly held corporation owns 10% or more of The Bank of New York Mellon Corporation.

Respondent CIBC World Markets Corp. is a wholly owned subsidiary of Canadian Imperial Bank of Commerce, which is a publicly traded company. No publicly held company owns 10% or more of Canadian Imperial Bank of Commerce's stock.

Respondent Citigroup Global Markets Inc. is wholly-owned by Citigroup Financial Products Inc., which is wholly-owned by Citigroup Global Markets Holdings Inc., which is wholly-owned by Citigroup Inc.

Respondent Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited) is a wholly owned subsidiary of Daiwa International Holdings Inc., which is a wholly owned subsidiary of Daiwa Securities Group Inc. No publicly traded company owns 10% or more of the stock of Daiwa Securities Group Inc.

Respondent DZ Financial Markets LLC is a wholly owned subsidiary of DZ Bank AG. DZ Bank AG does not have any corporate or other parent corporation or any publicly held corporation that owns 10% or more of its stock.

Respondent HSBC Securities (USA) Inc. is wholly owned by HSBC Markets (USA) Inc., which, in turn, is wholly owned by HSBC Investments (North America) Inc., which, in turn, is wholly owned by HSBC North America Holdings Inc., which, in turn, is indirectly held by HSBC Holdings plc. Upon information and belief, no publicly traded company owns more than 10% of the stock of HSBC Holdings plc.

Respondent ING Financial Markets LLC is wholly owned by ING Financial Holdings Corporation, which, in turn, is wholly owned by ING Bank N.V., which, in turn, is wholly owned by ING Groep N.V. No publicly traded company owns more than 10% of the shares of ING Groep N.V.

The parent company of Respondent Mizuho Securities USA Inc. is Mizuho Securities Co., Ltd.; the parent company of Mizuho Securities Co., Ltd., is Mizuho Financial Group, Inc.; no publicly held corporation owns 10% or more of Mizuho Securities USA Inc.'s stock.

Respondent Muriel Siebert & Co., Inc. is a wholly owned subsidiary of Siebert Financial Corp. No publicly traded corporation owns 10% or more of Siebert Financial Corp.

Respondent nabSecurities, LLC (f/k/a National Australia Capital Markets, LLC) is a wholly owned

subsidiary of National Australia Bank Limited, a publicly traded company on the Australian Stock Exchange. As of October 31, 2015, the companies that own 10% or more of National Australia Bank Limited's stock are HSBC Custody Nominees (Australia) Limited and JP Morgan Nominees Australia Limited.

Respondent Natixis Bleichroeder Inc., now known as Natixis Securities Americas LLC, is a wholly owned subsidiary of Natixis S.A., a French publicly traded corporation. No publicly traded corporation owns more than 10% of Natixis S.A.

Respondent RBC Capital Markets, LLC (f/k/a RBC Capital Markets Corporation) is an indirect wholly-owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

Respondent RBS Securities Inc. (formerly named Greenwich Capital Markets, Inc., incorrectly named herein as Greenwich Capital Markets a/k/a RBS Greenwich Capital) is a wholly owned subsidiary of RBS Holdings USA Inc. (formerly named Greenwich Capital Holdings, Inc.). No publicly held company owns 10% or more of RBS Securities Inc.'s stock. RBS Holdings USA Inc. is a privately held corporation that is an indirect but wholly owned subsidiary of The Royal Bank of Scotland Group plc ("RBS Group"). Other than RBS Group, no publicly held company owns 10% or more of RBS Holdings USA Inc.'s stock. No publicly held company owns 10% or more of RBS Group's stock.

Respondent RBS WCS Holding Company, the legal successor to defendant ABN AMRO Inc., is

wholly owned by The Royal Bank of Scotland N.V., which is wholly owned by RBS Holdings N.V., which is wholly owned by RFS Holdings B.V., which is approximately 97.7% owned by RBS Group. No publicly held corporation owns 10% or more of the stock of RBS Group.

Respondent Santander Investment Securities, Inc. is an indirect, wholly owned subsidiary of Banco Santander, S.A., which is a publicly traded corporation. There is no publicly traded corporation that owns more than 10% of the stock of Banco Santander, S.A.

Respondent Scotia Capital (USA) Inc. is a wholly owned subsidiary of Scotia Holdings (US) Inc. Scotia Holdings (US) Inc. is wholly owned by BNS Investments Inc., which is 100% owned by the Bank of Nova Scotia. No publicly traded company owns 10% or more of the Bank of Nova Scotia.

Respondent SG Americas Securities, LLC is a limited liability company and wholly owned by SG Americas Securities Holdings, LLC. SG Americas Securities Holdings, LLC is a wholly owned subsidiary of Société Générale, S.A., which is a publicly traded company. Upon information and belief, no other publicly held corporation owns 10% or more of Société Générale, S.A.

Respondent Sovereign Securities Corporation, LLC is a wholly owned subsidiary of Santander Bank, N.A. (formerly known as Sovereign Bank), which, in turn, is a wholly owned subsidiary of Santander Holdings USA, Inc. (formerly known as Sovereign Bancorp, Inc.), which, in turn, is wholly owned by Banco Santander, S.A., a publicly traded

corporation organized under the laws of the Kingdom of Spain. There is no publicly traded corporation that owns more than 10% of the stock of Banco Santander, S.A.

Respondent SunTrust Capital Markets Inc. (n/k/a SunTrust Robinson Humphrey, Inc.) is a wholly owned subsidiary of SunTrust Banks, Inc. As of June 10, 2015, BlackRock, Inc., a publicly traded company, beneficially owned 11.4% of the common stock of SunTrust Banks, Inc.

Respondent Utendahl Capital Partners, L.P. is a Delaware limited partnership and Utendahl Partners, L.P. is the general partner. Utendahl Partners, L.P. has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Utendahl Partners, L.P.

Respondent Wachovia Securities, LLC (n/k/a Wells Fargo Advisors, LLC) is a wholly owned indirect subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

Respondent Wells Fargo Securities, LLC, a limited liability company organized under the laws of Delaware, is a wholly-owned subsidiary of EVEREN Capital Corp. EVEREN Capital Corp. is a wholly owned subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

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INTRODUCTION

Section 13 of the Securities Act of 1933 (the "Securities Act") sets forth both a statute of limitations and, separately, a statute of repose for actions asserting Securities Act claims. With respect to actions (like this one) asserting claims under Section 11, the statute of repose mandates that "[i]n no event shall any . . . 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.

Here, Petitioner—a sophisticated institutional investor, and a frequent participant in securities litigation—filed this action more than three years after some of the relevant securities were offered to the public. It nonetheless argues that its action was timely because the statute of repose should be tolled under *American Pipe & Construction Co. v. Utah*, which 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. 538, 554–55 (1974) (emphasis added). The court below correctly rejected this argument based on its prior ruling in *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.* ("*IndyMac*"), which held that "*American Pipe*'s tolling rule does not apply to the three-year statute of repose in Section 13." 721 F.3d 95, 101 (2d Cir. 2013).

Petitioner now asks the Court to review that decision on two grounds, neither of which the Court should accept. *First*, Petitioner asks the Court to decide whether statutes of repose are subject to

American Pipe tolling, which is an issue the Court previously agreed to consider in *IndyMac* before dismissing the writ as improvidently granted. But Petitioner's assumption that the Court should review that question here because it agreed to do so before ignores the significant developments that have occurred since *IndyMac* was dismissed. Most importantly, the Court recently provided significant guidance on the "distinct purpose[s]" of statutes of limitations and statutes of repose, including that statutes of repose "will not be tolled for any reason." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). Since that decision, every circuit court that has considered the question presented here has reached the same conclusion as the Second Circuit. *See Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243 (11th Cir. 2016); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016).[1] In light of this emerging consensus—as well as the undermined rationale of the one potentially contrary Tenth Circuit decision from 16 years ago, the presence of pending appeals before other circuits raising the same issue, and the limited impact of the decision below—the Court should allow this question to continue to develop at the circuit level rather than intercede now.

Second, Petitioner asks the Court to grant review so that it can adopt a novel interpretation of

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[1] *Dusek* is also the subject of a pending petition. *See* Pet. for Cert., *Dusek v. JPMorgan Chase & Co.*, No. 16-389 (filed Sept. 26, 2016). Two additional petitions from other Second Circuit rulings are also pending. *See* Pet. for Cert., *SRM Glob. Master Fund v. The Bear Stearns Cos.*, No. 16-372 (filed Sept. 22, 2016); Pet. for Cert., *DeKalb Cty. Pension Fund v. Transocean Ltd.*, No. 16-206 (filed Aug. 12, 2016).

American Pipe by holding that *American Pipe*'s tolling rule does not involve tolling in certain circumstances. Petitioner claims that such a decision could resolve an ancillary circuit split concerning whether absent class members who file suit before a class certification decision are entitled to the benefit of *American Pipe* tolling. The Court should likewise decline to review this question for several reasons, including that no circuit court has adopted the interpretation of *American Pipe* that Petitioner proposes, the ancillary circuit split identified by Petitioner is shallow and poised to resolve itself, and the issue underlying that circuit split was not raised below (because the Second Circuit's position in fact favors Petitioner).

Finally, the presence of multiple, independent questions makes this case an improper vehicle to consider any of the issues presented.

Accordingly, the petition should be denied.

STATEMENT OF THE CASE

A. The Extensive Litigation Filed By Investors In Lehman Securities

In the months before the bankruptcy of Lehman Brothers Holdings Inc. ("Lehman"), the company's common stock declined in value. As a result, beginning on June 18, 2008, several class actions were filed by investors in Lehman's common stock asserting securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") against Lehman and certain of its officers and directors. Those class actions were consolidated into a multi-district litigation in the

Southern District of New York (the "Class Action"). *See* Dkt. No. 1 in 09-md-2017-LAK-GWG (S.D.N.Y. Jan. 9, 2009).

On September 15, 2008, Lehman filed for bankruptcy protection. Soon thereafter, several additional class actions asserting Securities Act claims were filed by investors in Lehman debt securities against additional defendants, including for the first time the entities that purportedly underwrote those offerings. These actions were consolidated with the Class Action. *See* Dkt. Nos. 1, 30 in 09-md-2017-LAK-GWG (S.D.N.Y.). Petitioner was a member of the putative class with respect to certain of the notes at issue, but did not move to be appointed lead plaintiff.

As early as November 2008, other investors in Lehman securities who were members of the putative class began filing individual actions. *See Zenith Ins. Co. v. Fuld*, No. 09-cv-1238-LAK (S.D.N.Y. Nov. 19, 2008). Over time, more than a dozen such individual actions were filed and coordinated with the Class Action.

B. Petitioner's Individual Action And Outsized Recoveries From Multiple Defendants On Its Timely Claims

On February 7, 2011, while the Class Action remained pending and before the class plaintiffs had even filed a class certification motion, Petitioner filed this individual action in the Northern District of California (even though the Class Action was pending in the Southern District of New York). In addition to bringing the claims at issue here—Securities Act claims concerning

several Lehman notes that were issued more than three years earlier (the "Untimely Claims")—Petitioner's complaint asserted Securities Act claims against other underwriter defendants about one offering of Lehman notes that took place less than three years before it brought this action, as well as Exchange Act claims, which are subject to a longer statute of repose, against other non-underwriter defendants concerning Petitioner's investments in Lehman's common stock (the "Timely Claims"). As to the Timely Claims, there was no dispute that Petitioner's complaint was timely filed, and Petitioner settled those claims.

Although Petitioner's decision to file this action prior to a class certification motion demonstrates it never had any interest in participating in the Class Action, Petitioner nonetheless sought to benefit from the Class Action by asserting that its action, insofar as it asserts the Untimely Claims, was timely under the Securities Act's three-year statute of repose because those claims were "tolled by the pending class action." Dkt. No. 1-1 at 52 in No. 11-cv-01281-LAK (S.D.N.Y. Feb. 7, 2011).

Petitioner's decision to pursue a separate individual action paid off handsomely with respect to the Timely Claims: it settled with Lehman's officers and directors for $11 million (in contrast to the class recovery of $90 million from those individuals) and with Lehman's auditor for $12.75 million (in contrast to the $99 million received by the class). In addition, Petitioner settled its Securities Act claims concerning the note offering that occurred less than three years before this action was filed for over $4.6 million. Indeed,

Petitioner itself touted in a press release that its recovery was "far larger than the recovery [it] would have obtained had it remained in the class action." Press Release, CalPERS, *CalPERS Achieves $12.75M Recovery from Ernst & Young LLP* (May 5, 2014), https://www.calpers.ca.gov/page/newsroom/calpers-news/2014/ernst-young.

C. Petitioner's Decision To Opt Out Of The Substantial Class Action Settlements While On Notice That The District Court Would Dismiss Its Untimely Claims

On April 13, 2011, the District Court overseeing the coordinated Lehman securities litigation issued a decision holding "that statutes of repose, including the three-year period established by Section 13 of the Securities Act, are not tolled by the pendency of putative class actions." *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 481 (S.D.N.Y. 2011). The District Court subsequently reaffirmed that holding in two later decisions issued in 2011. *See In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 310 (S.D.N.Y. 2011); *In re IndyMac Mortg.-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 642 (S.D.N.Y. 2011). Citing these decisions, on January 6, 2012, Respondents moved to dismiss the Untimely Claims.

As such, when Petitioner formally opted out of the underwriter defendants' $426 million class action settlement in March 2012 (by submitting the formal notice required by the District Court), it was on notice that the District Court would dismiss the claims at issue here as time-barred. Petitioner

nonetheless assumed that risk and gambled that the District Court's decision would be overturned, which would allow Petitioner to pursue an individual recovery in excess of what it would have received in the class.

D. The District Court's Dismissal Of Petitioner's Untimely Claims And The Second Circuit's Affirmance

On October 15, 2012, the District Court granted the motion to dismiss filed by one Respondent, HVB Capital Markets, Inc., after again reaffirming its prior holding "that *American Pipe* tolling does not apply to the statute of repose set forth in Section 13 of the Securities Act." Pet.App.11a. However, the District Court subsequently deferred ruling on the statute-of-repose arguments raised by the remaining Respondents because the tolling issue was then being considered by the Second Circuit.

On June 27, 2013, the Second Circuit issued its decision in *IndyMac*, holding that "*American Pipe*'s tolling rule does not apply to the three-year statute of repose in Section 13." 721 F.3d at 101. After considering supplemental briefing regarding *IndyMac*, the District Court dismissed Petitioner's Untimely Claims as time-barred. Pet.App.7a. Petitioner then appealed to the Second Circuit.

On appeal, Petitioner did not argue that *IndyMac* was wrongly decided, and instead attempted to distinguish *IndyMac* on the ground that, unlike in *IndyMac*, the named plaintiffs in the Class Action here had standing to assert Petitioner's claims. (In its petition, Petitioner has

abandoned this argument.) Petitioner further argued that applying *IndyMac* to plaintiffs pursuing individual claims would violate their due process rights to opt out of class actions.

On July 8, 2016, the Second Circuit affirmed the District Court's decisions, rejecting both of Petitioner's arguments. Pet.App.A. With respect to Petitioner's argument that *IndyMac* should not apply where the class plaintiffs possess standing, the Second Circuit stressed that *IndyMac* made no reference to the class plaintiffs' standing or lack thereof. Pet.App.3a. Rather, the Second Circuit recognized that *IndyMac*'s holding that *American Pipe* tolling does not apply to Section 13's repose period was based on "two longstanding principles" that had nothing to do with standing:

> First, if *American Pipe* is grounded in equity, its tolling rule cannot affect a legislatively enacted statute of repose. Second, if *American Pipe* establishes a "legal" tolling principle grounded in Rule 23, to apply it to a statute of repose would violate the Rules Enabling Act by permitting a procedural rule to abridge the substantive rights created by statutes of repose.

Pet.App.3a–4a. The Second Circuit supported this ruling, in part, by citing this Court's post-*IndyMac* decision in *CTS* for the proposition that "a repose period is fixed and its expiration will not be delayed by estoppel or tolling." Pet.App.4a.

Finally, with respect to Petitioner's argument that dismissing its action as untimely would violate the due-process principles underlying Rule 23's opt-out mechanism, the Second Circuit was "unpersuaded" because "[t]he due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent" and they "do[] not confer *extra* benefits to a plaintiff's independent action." Pet.App.5a. In other words, Petitioner's "right to initiate and pursue an individual action before, during, and after the putative class action was unchanged—including the necessity of instituting such an action within section 13's three-year statute of repose." *Id.*

At no point before the District Court or the Second Circuit did Petitioner (or any other party) argue that Petitioner's filing of this action prior to class certification was relevant to the issue of whether it was entitled to tolling, and neither the District Court nor the Second Circuit addressed that issue.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW REFUSING TO APPLY *AMERICAN PIPE* TOLLING TO A STATUTE OF REPOSE DOES NOT WARRANT REVIEW

Petitioner's central justification for granting review here is that the Court previously agreed in *IndyMac* to review the question of whether *American Pipe* tolling applies to statutes of repose. (Subsequently, however, the writ was dismissed as improvidently granted.)

Petitioner's assumption that this issue still merits review ignores the significant developments in this area since *IndyMac* was dismissed. These developments include: (1) the Court's subsequent decision in *CTS*, which provided important guidance on the distinctions between statutes of limitations and statutes of repose; (2) the unbroken string of post-*CTS* decisions at the circuit level holding that statutes of repose are not subject to *American Pipe* tolling; (3) a number of appeals pending before additional circuit courts that raise the same issue; and (4) the Second Circuit's three years of experience with *IndyMac*, which affirmatively dispel the alarmist predictions made by the *IndyMac* petitioners.

Rather than "increas[ing] the need" for review, Pet. 10, these developments demonstrate the opposite.[2] Since *CTS*, every circuit court to consider whether *American Pipe* tolls statutes of repose has agreed with *IndyMac* that it does not. These circuit court opinions, coupled with the additional circuits in which the issue has already been presented, include all circuits where securities class actions are regularly filed. Thus, any need for this Court to review the issue now—in order to avoid the much-hyped, but still phantom, negative consequences of the *IndyMac* decision—has been obviated.

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[2] In commenting that the statute-of-repose-tolling issue "may be ripe for resolution by the Supreme Court," Pet.App.5a, the court below did not consider these factors. Indeed, the Eleventh Circuit's decision in *Dusek* was released after the decision below, and the Sixth Circuit's decision in *Stein* was released after briefing was completed.

A. The Post-*CTS* Consensus At The Circuit Level Accords With The Decision Below

Shortly after dismissing *IndyMac*, the Court issued its decision in *CTS*, which was the first time that it discussed at length the significant differences between statutes of limitations and statutes of repose. After the guidance provided in *CTS*, every circuit court to address the issue raised in *IndyMac* has agreed with the Second Circuit's holding.

CTS addressed the question of whether a federal statute that "pre-empts statutes of limitations . . . also pre-empts state statutes of repose." 134 S. Ct. at 2180. In resolving that question, the Court noted that "[s]tatutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts." *Id.* at 2182. However, the Court recognized that "the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives." *Id.*

In contrast to a statute of limitations, which "creates a time limit for suing in a civil case, based on the date when the claim accrued," a statute of repose "puts an outer limit on the right to bring a civil action" that "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* This difference is driven by the "distinct purpose[s]" of the two types of statutes. *Id.* at 2183. While statutes of limitations are intended to "require plaintiffs to pursue diligent prosecution

of known claims" and to "promote justice by preventing surprises through plaintiffs' revival" of stale claims, statutes of repose "effect a legislative judgment that a defendant should be free from liability after a legislatively determined period of time." *Id.* In other words, unlike statutes of limitations, statutes of repose are "equivalent to a cutoff" and "can be said to provide a fresh start or freedom from liability." *Id.*

Perhaps most significantly for the issue presented here, the Court also specifically identified "[o]ne central distinction between statutes of limitations and statutes of repose [that] underscores their differing purposes": unlike statutes of limitations, which "are subject to equitable tolling," statutes of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* This is so because the "main thrust" of a statute of limitations "is to encourage the plaintiff to pursue his rights diligently, and when an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by the statute of limitations does not further the statute's purpose," whereas "a statute of repose is a judgment that defendants should be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason." *Id.*

As Petitioner admits, Pet. 15–16, since the Court dismissed *IndyMac* and decided *CTS*, both the Sixth and the Eleventh Circuits have joined with the Second Circuit in holding that *American Pipe* tolling does not apply to statutes of repose.

In *Stein*, the Sixth Circuit acknowledged the potentially conflicting pre-*CTS* decisions from the Second and Tenth Circuits on the statute-of-repose-tolling issue, and ultimately held that *IndyMac* presented "the more cogent and persuasive rule." 821 F.3d at 793. In reaching that result, *Stein* stressed that *CTS* "recently clarified the distinctions between" statutes of limitations and repose, and concluded that *IndyMac* was "more consistent with" *CTS*. *Id.* at 786, 793. *Stein* thus rejected the Tenth Circuit's nearly two-decade-old and arguably contrary holding, which the Sixth Circuit reiterated was "expressed prior to *CTS*." *Id.* at 794.

Subsequently, the Eleventh Circuit in *Dusek* held that the Exchange Act's statute of repose is not subject to *American Pipe* tolling. As in *Stein*, *Dusek* began its analysis by highlighting that *CTS* "discussed at length the difference between statutes of limitation and statutes of repose." 832 F.3d at 1247. The Eleventh Circuit also discussed the potentially conflicting Second and Tenth Circuit decisions, as well as *Stein*, and stated that the Sixth Circuit's interpretation of *CTS* "provided a well-reasoned discussion of why the Rules Enabling Act would prohibit tolling of a statute of repose." *Id.* at 1247–49. *Dusek* then joined with the Sixth and Second Circuits in rejecting the Tenth Circuit's pre-*CTS* holding.

As a result of this Court's decision in *CTS*, and the uniform adoption of the Second Circuit's holding by all of the circuits to subsequently address the issue, any limited circuit split that

existed when the Court accepted the petition in *IndyMac* has only become more shallow.

B. The Outdated Tenth Circuit Decision Cited By Petitioner Does Not Create A Circuit Split And Has Been Undermined By Subsequent Authority

The Tenth Circuit's decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), is the sole case involving a statute of repose that Petitioner identifies as conflicting with the Second, Sixth, and Eleventh Circuits' holdings. Even that decision, however, does not raise a direct conflict with the other circuit courts and, even if it did, it would be an outlier whose reasoning has been undermined by subsequent authority.

In *Joseph*, the Tenth Circuit held that this Court's statements prohibiting the equitable tolling of statutes of repose did not apply to *American Pipe* after reasoning that *American Pipe* tolling was so-called "legal tolling," apparently derived from a Rule 23 penumbra, rather than traditional equitable tolling. *Id.* at 1166–67. The Tenth Circuit went on to justify this decision by stating that, "in a sense, application of the *American Pipe* tolling doctrine does not involve 'tolling' at all" because an absent class member "has effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Id.* at 1168.

Critically, however, despite founding its holding on Rule 23, the Tenth Circuit did not consider whether Rule 23 could validly support that weight in light of the Rules Enabling Act's prohibition on

abridging or modifying substantive rights. *Id.* at 1166–68. Because *Joseph* did not squarely decide this issue, a party in a future appeal before the Tenth Circuit could raise that argument, which would allow the Tenth Circuit to reach the same conclusion as the other circuits that have considered this issue. *See Merrifield v. Bd. of Cty. Comm'rs for Cty. of Sante Fe*, 654 F.3d 1073, 1084 (10th Cir. 2011) ("It is elementary that an opinion is not binding precedent on an issue it did not address."). Until the Tenth Circuit (or another circuit) holds that *American Pipe* tolling can be applied to a statute of repose without violating the Rules Enabling Act, there is no true circuit split on this issue that requires the Court's intervention.

In any event, even if *Joseph* could be read as creating an actual conflict among the circuits, that outdated decision has been so undermined by subsequent authority that the Tenth Circuit may reconsider it without this Court further addressing the issue. As discussed above, the Tenth Circuit's decision predated by more than a decade this Court's decision in *CTS*, which clarified the differences between statutes of limitations and repose, and cast serious doubt on the Tenth Circuit's ruling. *See Stein*, 821 F.3d at 793. Since *Joseph* was decided, this Court has also undermined the Tenth Circuit's reasoning that an absent class member is "effectively . . . a party" to a class action upon filing, by bluntly characterizing the argument "that a nonnamed class member is a party to the class-action litigation before the class is certified" as "novel and surely erroneous." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011). And, since *Joseph*, this Court has also called into doubt the

Tenth Circuit's interpretation of *American Pipe* as "legal tolling," by stating that the Court "did not employ the term" in *American Pipe* and "[t]he label attached to [a tolling] rule does not matter" where (as here) tolling is inconsistent with the underlying statute. *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012).[3]

C. The Other Circuit Cases Cited By Petitioner Are Irrelevant

In a further attempt to foster the appearance of a circuit split, Petitioner suggests that the Second Circuit's refusal to apply *American Pipe* tolling to statutes of repose conflicts with two earlier decisions of the Seventh and Federal Circuits applying *American Pipe* to "jurisdictional" statutes of limitations. Pet. 12–15. This effort fails.

First, it is clear that both the Seventh and the Federal Circuits addressed statutes of limitations, not statutes of repose. *See Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 610 (7th Cir. 1980) (holding that "the statute of limitations" was "tolled as to all putative members of the defendant class"); *Bright v. United States*, 603 F.3d 1273, 1290 (Fed. Cir. 2010) (holding that "[t]he statute of limitations" was "tolled during the period the Court

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[3] The Court in *CTS* further called into question the purported distinction between "legal" and "equitable" tolling by referring to a statutory provision that tolled claims for minor or incompetent plaintiffs as "provid[ing] for equitable tolling," 134 S. Ct. at 2187, notwithstanding that courts following *Joseph* would conceive of it as "legal tolling . . . on the ground that the rule is derived from a statutory source." *Simmonds*, 132 S. Ct. at 1419 n.6.

of Federal Claims allows putative class members to opt in to the class"). Petitioner seeks to blur the distinctions between the "jurisdictional" statutes of limitations at issue in *Appleton* and *Bright* and Section 13's statute of repose on the basis that "jurisdictional" statutes of limitations (like statutes of repose) are not subject to equitable tolling and their expiration "not only bars the remedy but also destroys the liability." Pet. 13. But that is where any similarities between the two types of statutes end.

Importantly, the statutes of limitations in *Appleton* and *Bright* lack the two-tiered limitations/repose structure of Section 13, which demonstrates that "the purpose of the 3-year [repose period] is clearly to serve as a cutoff." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). Further, the statutes of limitations in *Appleton* and *Bright* both measure the time to bring an action from "accru[al]." *See* 49 U.S.C. § 14705; 28 U.S.C. § 2501. As the Court recognized in *CTS*, it is black-letter law that statutes of limitations, but not statutes of repose, run from accrual of the cause of action. 134 S. Ct. at 2182. Thus, *Appleton* and *Bright* stand at most for the uncontroversial proposition that *American Pipe* tolling can apply to statutes of limitations.[4]

Second, neither *Appleton* nor *Bright* suggested that, in contrast to Section 13's statute of repose,

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[4] Indeed, the Seventh Circuit in *Appleton* referred to the relevant statute of limitations as "jurisdictional" only in the sense that the defendant's failure to raise a limitations defense did not result in forfeiture. 635 F.2d at 608.

the limitations periods at issue in those cases vested any substantive rights in the defendants to be free of liability. As such, neither *Appleton* nor *Bright* addressed whether tolling a "jurisdictional" statute of limitations would be consistent with the Rules Enabling Act. In fact, the Rules Enabling Act did not even apply in *Bright*, which instead considered whether tolling was appropriate under Court of Federal Claims Rule 23, a rule that is not subject to the Rules Enabling Act's prohibition on abridging or modifying substantive rights. 603 F.3d at 1276–77, 1286.

For these reasons, the Seventh and Federal Circuits' holdings that *American Pipe* tolling can apply to "jurisdictional" statutes of limitations do not conflict with the Second, Sixth, and Eleventh Circuits' holdings that *American Pipe* tolling cannot apply to statutes of repose.

D. Given The Pendency Of Appeals In Additional Circuits Raising The Statute-Of-Repose-Tolling Issue, It Is Premature For This Court To Consider The Issue

As explained above, every circuit court to consider the issue since this Court's decision in *CTS* has held that statutes of repose are not subject to *American Pipe* tolling. The issue also is subject to at least three pending appeals in the Third and Ninth Circuits. *See N. Sound Capital LLC v. Merck & Co.*, 16-1364 (3d Cir.) (oral argument held Oct. 5, 2016); *Reese v. Malone*, 16-35009 (9th Cir.); *Hildes v. Moores*, 15-55937 (9th Cir.). Indeed, Petitioner submitted an amicus brief in one of these cases, in which it stated that the issues before the court are

"closely related" to those it is "currently litigating" here. Dkt. No. 32-2 at 1, *Hildes v. Moores*, 15-55937 (9th Cir. Aug. 4, 2016).

The Court should allow these circuit courts to weigh in on the question presented before agreeing to consider it here. Should those circuit courts agree with the post-*CTS* consensus reached by the Second, Sixth, and Eleventh Circuits, those decisions would further reduce any need for this Court's review and would increase the likelihood that the Tenth Circuit would reevaluate its holding in *Joseph*. On the other hand, should the Third or Ninth Circuits disagree with that consensus, the reasoning adopted in such a decision could clarify the issues for the Court. Thus, it would be premature for the Court to resolve the question presented unless and until a circuit court departs from the unbroken line of circuit decisions since *CTS* agreeing with the decision below.

E. The Second Circuit's Experience Post-*IndyMac* Dispels The Parade Of Horribles Predicted By Petitioner And Its Amici

Finally, the Second Circuit's experience since *IndyMac* demonstrates that the dire predictions about the decision's impact on judicial economy, which were raised in the *IndyMac* certiorari briefing and are repeated by Petitioner and its amici here, are unfounded. This experience further reduces the need for the Court to immediately review the question presented.

The Court initially granted review in *IndyMac* when faced with a petition that ominously argued "the disruptive effects of the decision below will be

substantial, and they will be felt immediately." Pet. for Cert. at 19, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640 (filed Nov. 22, 2013). In particular, the *IndyMac* petition warned that "investors that are members of a putative class can be expected immediately to begin filing protective (and duplicative) actions and motions to intervene to preserve their rights," which would lead "investors to flood district courts with thousands of unnecessary and duplicative filings." *Id.* at 20–21. Based on these dire predictions, the petition admonished that "[a] change of this magnitude in federal practice, with such significance for district court dockets and the rights of litigants, warrants this Court's full and immediate consideration." *Id.* at 22–23.

Years later, Petitioner parrots these warnings, arguing that "intolerable results . . . would arise if *American Pipe* did not apply to . . . statutes of repose" and speculating that investors "will burden the courts with duplicative pleadings and redundant briefing that serve no real-world purpose." Pet. 22, 35. Petitioner's amici raise similar concerns, stating that they "envision an increase in 'protective filings'" under *IndyMac*, Ret. Judges' Amicus Br. at 2, and that "the Second Circuit's decisions impose unnecessary and costly burdens" and "prompt wasteful and unnecessary litigation that burdens all parties and the courts." States' Amicus Br. at 2.

Neither Petitioner nor its amici cite any evidence supporting these speculative concerns, notwithstanding the years that have passed since the *IndyMac* decision. In fact, an analysis of opt-out

filings in securities class actions commenced after *IndyMac* demonstrates that these dire predictions have not come to pass. A review of the dockets in the 189 securities class actions filed in the Second Circuit since its June 2013 *IndyMac* decision, *see* Stanford Law School, *Filings Database*, Securities Class Action Clearinghouse, http://securities.stanford.edu/filings.html (last visited Nov. 21, 2016), shows that only three of those class actions (or 1.59%) are marked as related to opt-out actions.[5] Notably, this post-*IndyMac* opt-out rate is actually *lower* than the opt-out rate observed in securities class actions in the years before *IndyMac* was decided. *See* Amir Rozen, Joshua B. Schaeffer & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research, 2 (2013) (observing that opt-out cases were filed in three percent of securities-class-action settlements reached between 1996 and 2011). Moreover, a recently released study of opt-out cases from securities class actions, including actions filed after

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[5] *See Guevoura Fund Ltd. v. Sillerman*, No. 15-cv-07192 (CM) (S.D.N.Y. Sept. 11, 2015); *Ngo v. Petroleo Brasileiro S.A. – Petrobras*, No. 14-cv-09760 (JSR) (S.D.N.Y. Dec. 10, 2014); *In re Sanofi Sec. Litig.*, No. 13-cv-08806 (PAE) (S.D.N.Y. Dec. 11, 2013). While *Petrobras* has generated a significant number of opt-outs, those appear to be driven by the perceived value of the opt-out claims rather than a desire to preserve the timeliness of those claims. *See* Amir Rozen, Brendan Rudolph & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update*, Cornerstone Research, 1 (2016) (noting plaintiffs are "more likely to bring opt-out cases stemming from larger class action settlements"). An additional class action, *In re: SunEdison, Inc., Securities Litigation*, 16-md-02742-PKC (S.D.N.Y.) (transferred from E.D. Mo. Oct. 6, 2016), has related opt-outs that were filed before transfer to the Second Circuit.

IndyMac, "found no discernible increase in the preponderance of opt-outs over time." Amir Rozen, Brendan Rudolph & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update*, Cornerstone Research, 2 (2016). Thus, the "flood" of placeholder actions predicted in the wake of *IndyMac* has not yet even produced a trickle. And, given the three-year repose period in Section 13, if a flood were coming, it should have materialized by now.[6]

In light of this evidence, the speculative consequences envisioned by Petitioner and its amici are unfounded, and the Court can defer ruling on this issue unless and until a concrete circuit split develops.

II. THE DECISION BELOW CONCERNING THE INAPPLICABILITY OF *AMERICAN PIPE* TOLLING TO STATUTES OF REPOSE IS CORRECT

The petition should be denied for the additional reason that the decision below is correct. It is consistent with, and indeed compelled by, Section 13's plain text and this Court's decision in *CTS*, which made clear that statutes of repose may not be tolled. There is thus no basis for granting review.

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[6] In any event, courts possess well-developed mechanisms to reduce the burdens of protective filings. *See* Br. for the Secs. Indus. & Fin. Mkts. Assoc. as Amicus Curiae Supporting Resp'ts at 28–29, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640 (July 24, 2014) (identifying case management techniques, including staying individual actions, appointing liaison counsel, and permitting testimony to be admissible in related actions).

A. The Holding Below Is Compelled By Section 13's Text And Purpose, As Well As This Court's Precedent

By its plain terms, Section 13 bars "any . . . action" brought under Section 11 "more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m. This includes Petitioner's action here, which even Petitioner concedes was "file[d] . . . after the relevant statute of . . . repose [applicable to the Untimely Claims] ha[d] expired." Pet. 26. For the following reasons, the court below correctly rejected Petitioner's attempts to apply *American Pipe* tolling to Section 13's statute of repose.

First, Petitioner does not dispute that if *American Pipe* tolling is considered a form of equitable tolling, it cannot be applied to a statute of repose. *See* Pet. 17–18 (arguing only that *American Pipe* did not establish a rule of equitable tolling). As the Court recognized in *Lampf* and reaffirmed in *CTS*, statutes of repose, including the three-year period in Section 13, are not subject to equitable tolling. *See CTS*, 134 S. Ct. at 2183 ("Statutes of limitations, but not statutes of repose, are subject to equitable tolling."); *Lampf*, 501 U.S. at 363 ("[I]t is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure" of the federal securities laws.).[7]

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[7] Although the court below did not consider it necessary to resolve the issue, *American Pipe* tolling—which is a judicially crafted doctrine that is not set forth in any statute or rule, was motivated by considerations of "litigative efficiency and economy," and was supported by citations to cases applying

Second, even if *American Pipe* tolling were "derived not from equity, but from this Court's interpretation of Rule 23" and therefore could be considered a form of "legal" tolling, as Petitioner contends, Pet. 17, it still could not validly be applied to a statute of repose under the Rules Enabling Act.

As the Second Circuit correctly recognized, the Rules Enabling Act prohibits applying the federal rules in a way that would "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Indeed, in recent years, this Court has repeatedly declined to interpret Rule 23 in a way that would modify substantive rights. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).[8]

The Second Circuit also correctly recognized that statutes of repose, unlike statutes of limitations, grant defendants a substantive right to

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equitable tolling, 414 U.S. at 554–59—is properly considered a form of equitable tolling. Indeed, this Court has referred to *American Pipe* tolling as equitable tolling on multiple occasions. *See, e.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990).

[8] *Compare Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (holding that, for state law claims, Rule 3 "does not affect state statutes of limitations"), *with West v. Conrail*, 481 U.S. 35, 39 (1987) (holding that, for federal law claims, Rule 3 does affect limitations periods). *See also* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 546–68 (1996).

be free from liability. *See IndyMac*, 721 F.3d at 106. While Petitioner questions this ruling in a footnote, Pet. 19 n.4, the treatise that this Court heavily cited in *CTS* is in full accord with the Second Circuit on this point. *See* 54 C.J.S. Limitations of Actions § 7 (2010) (cited in *CTS*, 134 S. Ct. at 2182, 2183, 2187) ("A statute of repose creates a substantive right in those protected to be free from liability after the legislatively determined period of time."). Indeed, in drawing "analogies in *CTS* between statutes of repose and the ability to discharge debts in bankruptcy or to be free of double jeopardy in criminal proceedings," this Court itself "underscored" that "statutes of repose vest a substantive right in defendants to be free of liability." *Stein*, 821 F.3d at 794.

Thus, the court below correctly held that, even if *American Pipe* tolling were a form of "legal" tolling based on Rule 23, applying it to a statute of repose would be prohibited by the Rules Enabling Act.

Finally, even if Petitioner were correct that the proper test for determining whether *American Pipe* tolling is permissible under the Rules Enabling Act is whether tolling is "consistent with the legislative purpose," rather than whether the time limit is "substantive" or "procedural," Pet. 19, the decision below would still be correct.[9]

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[9] Petitioner draws this language from *American Pipe*, in which the Court was asked to hold that a statute of *limitations* could be considered "a 'substantive' element" of a claim, and therefore not subject to tolling, because Congress included the statute of limitations in the statute giving rise to the claim. 414 U.S. at 556. The Court also cited the legislative history of the statute of limitations at issue, which reflected

As this Court recognized in *CTS*, the "distinct purpose" of a statute of repose is to "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." 134 S. Ct. at 2183. A repose period accomplishes this objective by imposing a time limit "measured from the date of the last culpable act or omission of the defendant," which "embodies the idea that at some point a defendant should be able to put past events behind him." *Id.* at 2182–83. A statute of repose "is therefore equivalent to a cutoff, in essence an absolute bar on a defendant's temporal liability," which "will not be tolled for any reason." *Id.* at 2183.

As such, applying *American Pipe* tolling to a statute of repose is inconsistent with the legislative purposes behind such a statute for the same reasons that applying equitable tolling to a statute of repose is not permitted: doing so would undermine the certainty and finality that a statute of repose is intended to provide a defendant. *See, e.g.*, *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 104 & n.7 (2d Cir. 2004) (noting that the purpose of a statute of repose is "to achieve . . . certainty and finality" by "provid[ing] an easily ascertainable and certain date for the quieting of litigation"). In fact, the only state supreme court to directly consider the question presented here held that a statute of repose was not subject to *American Pipe* tolling for this very reason. *See*

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that the provision was not intended to affect substantive rights. *Id.* at 558 n.29. The Court did not indicate, however, that the same test should apply to a provision that did confer substantive rights, like a statute of repose.

Albano v. Shea Homes Ltd. P'ship, 254 P.3d 360, 366 (Ariz. 2011) (stating that applying *American Pipe* tolling to a state statute of repose "simply is not consonant with the legislative scheme").

Petitioner's outsized recoveries from the other defendants in this action demonstrate why applying *American Pipe* tolling to a statute of repose would be inconsistent with the purposes of such a statute. Under Section 13, defendants are entitled to the certainty and finality of knowing that no additional actions can be filed after the expiration of the repose period. This permits defendants to assess their exposure in all timely filed actions and settle those actions accordingly. Petitioner is thus wrong when it argues that "[w]hether that liability is resolved through a certified class action or through individual suits by class members is irrelevant as far as the policies underlying the statute of repose are concerned." Pet. 21. To the contrary, permitting sophisticated institutional investors like Petitioner to opt out of class settlements after the statute of repose has expired exposes defendants to the very type of additional, unpredictable liability that the repose period was intended to eliminate.[10]

[10] Nor is such a rule unfair to the well-counseled institutional investors who pursue opt-out litigation—such investors merely need to file an action within the repose period to preserve their claims, as Petitioner did here with respect to other securities it purchased. *See supra* at 5.

B. Enforcing The Statute Of Repose As Written Does Not Raise Any Constitutional Questions

The Second Circuit likewise correctly rejected Petitioner's argument, also raised here, Pet. 24–25, that refusing to apply *American Pipe* tolling to Section 13's statute of repose would violate its due-process rights to opt out of the class.

This argument rests on a fundamental misunderstanding of the nature of an absent class member's opt-out rights. Under this Court's precedent, due process only requires that absent class members not be bound by an action that they were unaware of and did not participate in. In other words, "[t]he due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet.App.5a (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175–76 (1974)). Thus, the Court in *Phillips Petroleum Co. v. Shutts* held that, in order for a class action to "bind an absent plaintiff," "it must provide minimal procedural due process protection," including that: (1) "[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation"; and (2) "an absent plaintiff [must] be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. 797, 811–12 (1985).

However, the Court has never held that absent class members have a *further* due-process right to individually pursue the same claims asserted in the

class action, regardless of any additional defenses that may be available in a separate action, as Petitioner argues here.[11] To the contrary, *American Pipe* and its progeny would be entirely unnecessary if due process itself guaranteed absent class members the ability to individually pursue all claims asserted in a class action regardless of their timeliness.

III. PETITIONER'S SECOND QUESTION DOES NOT MERIT THIS COURT'S REVIEW

In addition to seeking the Court's review of the issue it dismissed in *IndyMac*, Petitioner also presents a second question that asks the Court to hold that "no tolling was required" in this case since "petitioner's claims were timely asserted because they were initially presented within the limitations period by the Class Action complaint and then maintained continuously thereafter, first by the class representative on petitioner's behalf and later by petitioner itself in its own lawsuit." Pet. 26. Petitioner argues that such a holding would "resolve . . . proper application of Section 13 in a substantial portion of cases" (although, notably, it would not have resolved the issue in *IndyMac*), and could also resolve a purportedly

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[11] *Ortiz v. Fibreboard Corp.*, which Petitioner cites for the proposition that opt-out rights are based on the principle that "everyone should have his own day in court," Pet. 25, did not hold otherwise. Instead, *Ortiz* primarily addressed the validity of mandatory class actions, where absent class members have no right to opt out, and, with respect to non-mandatory class actions, reaffirmed *Shutts*'s holding that due process only requires notice and an opportunity to opt out "before an absent class member's right of action was extinguishable." 527 U.S. 815, 846–48 (1999).

"related" circuit split concerning whether *American Pipe* tolling applies to individual actions filed before class certification is decided. *Id.*

This question—which asks the Court to adopt a novel holding that has not been accepted by any circuit court and that is inconsistent with the plain text of Section 13, in order to resolve an ancillary and shallow circuit split that was not raised below—does not merit the Court's review.

A. The Holding Petitioner Asks The Court To Adopt Is Both Novel And Inconsistent With The Text Of Section 13

By its very terms, *American Pipe* established a "tolling rule." 414 U.S. at 555. In fact, the Court used the words "toll," "tolls," "tolling," or "tolled" no less than 19 times in *American Pipe*. It has likewise characterized *American Pipe* as establishing a tolling rule in a litany of subsequent cases. *See, e.g.*, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (referring to *American Pipe* as "class-action tolling"); *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1634 (2015) (stating *American Pipe* construed a statute of limitations "to be subject to tolling").[12] Petitioner nonetheless asks the Court to sweep aside this well-established understanding of *American Pipe*, and to instead reconceive of *American Pipe* as "a pragmatic understanding of what it means to

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[12] *See also Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (using a form of the word "toll" 41 times in discussing *American Pipe*); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (referring to *American Pipe* as establishing a "tolling rule" five times).

commence a suit for purposes of satisfying a limitations period in the special context of a class action," Pet. 27, except (of course) in other circumstances where "[t]olling may be required." *Id.* at 28 n.8. The Court should decline Petitioner's invitation to adopt such a novel rule, which, in any event, is inconsistent with the text of Section 13's statute of repose.

Notably, Petitioner does not identify any prior circuit court decisions that stand for the curious proposition that *American Pipe* tolling is not tolling (except when it is tolling), let alone identify any disagreement among the circuit courts on this issue. In fact, each of the circuit cases from which Petitioner presents quotations to support this argument explicitly recognized that *American Pipe* established a tolling rule. *See State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1228, 1233 (10th Cir. 2008) (stating a class action "in essence pre-file[s]" an absent class member's claim, but "hold[ing] that Colorado would apply the *American Pipe* doctrine to toll the statute of limitations"); *Joseph*, 223 F.3d at 1168 (stating that, "in a sense," *American Pipe* "does not involve 'tolling' at all," but nonetheless "conclud[ing] that *American Pipe* tolling applies" and discussing "the correct date to toll" the limitations period). [13]

[13] Another circuit court decision relied upon by Petitioner directly rejected this argument. *See Bright v. United States*, 603 F.3d 1273, 1283 (Fed. Cir. 2010) (cited in Pet. 14–15) (rejecting argument that "the filing of the original [class] complaint satisfied the limitations requirement . . . for all putative members of the class" because *American Pipe* "made clear . . . that the means by which the action 'satisfied' the limitation provision's purpose was by 'tolling' the running of the statute").

Petitioner presents no compelling reason for this Court to be the first to adopt this rule.

Moreover, Petitioner's proposed rule is particularly ill-suited to this case, where the applicable statute of repose states that no "action" can be filed after three years. 15 U.S.C. § 77m. It is therefore irrelevant whether "petitioner's *claims* were timely asserted" in the class action—as Petitioner contends, Pet. 26 (emphasis added)—because Section 13 required this "action" and not Petitioner's "claims" to be filed within the repose period.[14] Plainly, the Court should decline to review a question that would not resolve the issue presented under the applicable statute.

B. The Ancillary And Shallow Circuit Split Identified By Petitioner Does Not Warrant Review

Petitioner's argument that the Court should also review the second question presented because adopting a holding that *American Pipe* did not establish a tolling rule (except when it did) could resolve an ancillary circuit split—concerning whether *American Pipe* tolling applies to individual actions filed before a decision on class certification, Pet. 29–34—likewise fails.

Petitioner attempts to manufacture the appearance of a "multifaceted" circuit split on the issue of pre-class-certification tolling by referencing the separate issue of whether statutes of repose can

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[14] As Rule 3 makes clear, "[a] civil action is commenced by filing a complaint with the court," Fed. R. Civ. P. 3, not by presenting claims in a prior action.

be tolled. Pet. 26, 29–34. However, setting aside the unrelated statute-of-repose-tolling issue, each of the Second, Ninth, and Tenth Circuits agrees that *American Pipe* tolling can apply regardless of whether an individual action is filed before class certification. *See State Farm*, 40 F.3d at 1228–30; *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008–09 (9th Cir. 2007); *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007). The only conflicting circuit court identified by Petitioner is the Sixth Circuit, which has held that *American Pipe* tolling only applies to individual actions filed after a decision on class certification. *See Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005).[15] However, a more recent Sixth Circuit panel has recognized that "*Wyser-Pratte* now represents the minority rule" and expressed "doubts about its holding," *Stein*, 821 F.3d at 789, raising the possibility that the Sixth Circuit may reconsider its decision and resolve the existing, shallow circuit split.

It would thus be premature for the Court to grant review to resolve this ancillary issue, which the circuit courts are continuing to consider.[16]

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[15] The 30-year-old First Circuit case cited by Petitioner, Pet. 31–32, did not so hold. While the court in that case stated in *dicta* that permitting an absent class member to maintain a separate action before class certification would not serve the policies behind Rule 23 and *American Pipe*, that issue was not before the First Circuit. *See Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739–40 & n.3 (1st Cir. 1983).

[16] Notably, the Court has also previously declined to review this issue. *See* Pet. for Cert., *E.I. DuPont de Nemours & Co. v. Stanton*, No. 08-210 (filed Aug. 15, 2008) (presenting the question of whether "a putative class member who files an

C. The Issue Of Whether *American Pipe* Tolling Applies To Actions Filed Before Class Certification Was Not Raised Below

Even if the ancillary, pre-class-certification-tolling issue did present a significant circuit split, this appeal would be an inappropriate vehicle to consider the issue because it was not raised below. Moreover, even if it had been raised, Petitioner would have prevailed, and therefore would not be an appropriate party to raise the issue here.

In this case, Respondents moved to dismiss Petitioner's claims as time-barred under Section 13's statute of repose; they did not argue that Petitioner was not entitled to tolling because it filed this action before class certification. *See* Dkt. Nos. 558, 1265 in No. 09-md-02017-LAK-GWG (S.D.N.Y.). In opposing that motion, Petitioner also did not raise that issue. *See* Dkt. No. 705 in No. 09-md-02017-LAK-GWG (S.D.N.Y. Feb. 13, 2012). Nor did Petitioner raise the issue on appeal. *See* Dkt. No. 40 in 15-1879 (2d Cir. Sept. 17, 2015). Moreover, neither the District Court nor the Second Circuit ruled on the issue. Pet.App.B; Pet.App.A.

The pre-class-certification-tolling issue is therefore inappropriate to review here because, "[i]n the ordinary course," this Court "do[es] not decide questions neither raised nor resolved below," *Glover v. United States*, 531 U.S. 198, 205 (2001),

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individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling"), *cert. denied* 555 U.S. 1084 (2008). Petitioner does not identify any changed circumstances that merit the Court accepting the issue now.

decide issues on which the lower courts' decisions did not turn, *Smith v. Butler*, 366 U.S. 161 (1961) (per curiam), or entertain questions "that the record does not adequately present," *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971) (per curiam). Moreover, it is doubly inappropriate for Petitioner to seek review of this question here because it would have prevailed on the issue before the Second Circuit. *See WorldCom*, 496 F.3d at 256. Petitioner therefore is not the appropriate party to ask the Court to review that issue. *See California v. Rooney*, 483 U.S. 307, 310–11 (1987) (per curiam) (stating it is not "appropriate . . . for the prevailing party to request" review).

IV. THE PRESENCE OF MULTIPLE QUESTIONS IN THE PETITION MAKES THIS AN INAPPROPRIATE VEHICLE TO RESOLVE THOSE ISSUES

Finally, the presence of multiple, independent questions in the petition makes this case an inappropriate vehicle to resolve any of the issues presented. For example, if the Court were to adopt the novel rule that Petitioner's action was commenced by the filing of the class action and tolling was not necessary, the Court would not need to reach the issue of whether *American Pipe* tolling applies to statutes of repose. Similarly, if the Court were to hold that Petitioner was not entitled to *American Pipe* tolling because it filed suit before class certification, the decision below would be affirmed without needing to reach the issue of whether *American Pipe* tolling applies to statutes of repose. If the Court is inclined to review either issue, it should therefore wait for an appeal that more cleanly raises that issue.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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November 23, 2016