No. 10-1261

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

VANESSA SIMMONDS,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and, if so, whether tolling continues even after the receipt of notice of the facts giving rise to the action.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Citigroup Global Markets Inc. is a wholly owned subsidiary of Citigroup Financial Products Inc., which in turn is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc., which in turn is a wholly owned subsidiary of Citigroup, Inc., a publicly held corporation. No other publicly held company owns 10% or more of Citigroup Global Markets Inc.'s stock.

Petitioner Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse (USA) Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse Group AG Guernsey Branch, which is a branch of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares, and (2) Credit Suisse AG, which itself is a wholly owned subsidiary of Credit Suisse Group AG and which has certain publicly registered securities. No publicly held company owns 10% or more of Credit Suisse Group AG.

Petitioner Deutsche Bank Securities Inc. is a jointly owned subsidiary of Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. No other publicly held company owns 10% or more of its stock.

Petitioner Goldman, Sachs & Co. is an indirectly wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group"), which is a corporation organized under the laws of Delaware and whose shares are publicly traded on the New York Stock Exchange. To the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

Petitioner J.P. Morgan Securities Inc. is a wholly owned subsidiary of JPMorgan Chase & Co., a public company whose shares are traded on the New York Stock Exchange. J.P. Morgan Securities Inc. is the surviving entity in the October 1, 2008 merger between J.P. Morgan Securities Inc. and Bear, Stearns & Co Inc., a former U.S. broker-dealer subsidiary of The Bear Stearns Companies Inc. No other publicly held company owns 10% or more of J.P. Morgan Securities Inc.'s stock.

Petitioner Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc., which is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Co., Inc.

Petitioner Morgan Stanley & Co. LLC, formerly known as Morgan Stanley & Co. Incorporated, is a wholly owned subsidiary of Morgan Stanley, a publicly held corporation whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of its stock.

Petitioner Robertson Stephens, Inc. (now merged into a new entity called Robertson Stephens Group, Inc.) is a wholly-owned subsidiary of Bank of America Corporation. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case represents yet another attempt to repackage decade-old allegations of wrongdoing in connection with the initial public offerings (IPOs) of equity securities during the stock market boom of 1998-2000. In 2001, private plaintiffs filed more than one thousand securities class actions making such allegations against the IPO underwriters. Similarly, starting in 2002, the Securities and Exchange Commission (SEC) filed civil enforcement actions making the same allegations against various underwriters. And some private plaintiffs even made the same allegations in suing the underwriters under the federal antitrust laws—actions that this Court ultimately rejected in *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

Shortly after this Court's *Billing* decision, and more than six years after the last of the disputed IPOs, respondent filed the lawsuits at issue here. Respondent's complaints parroted the factual allegations of the earlier litigation, but for the first time characterized those allegations as violations of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). That provision allows a corporate issuer of securities (or, after adequate demand on the issuer, an owner of the issuer's securities) to bring a suit to recover "any profit" made by a covered person through a "short swing" purchase and sale of the issuer's securities within a six-month period.

Because Section 16(b) also specifies that "no such suit shall be brought more than two years after the date such profit was realized," 15 U.S.C. § 78p(b), petitioners moved as a threshold matter to dismiss these lawsuits as time-barred. The district court granted the motion, noting that "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. But the Ninth Circuit reversed, holding that the two-year time limit for bringing a Section 16(b) action "begins to run" only when the defendant discloses the relevant purchases or sales of securities in a filing with the SEC under Section 16(a), 15 U.S.C. § 78p(a), *regardless* of whether and when the plaintiff knew or should have known the facts underlying the action. Pet. App. 66a (relying on *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981)).

That holding has no basis in law or logic. Section 16(b) by its plain terms *specifies* when the two-year time limit begins to run: on "the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). By selecting the date the defendant engaged in challenged conduct, rather than the date the plaintiff discovered such conduct, as the trigger for the statutory time limit, Congress indicated that such discovery should not extend that limit. And Congress confirmed the point in companion provisions of the Exchange Act, which look to a plaintiff's discovery of the facts underlying a claim to *shorten*, not *lengthen*, statutory time limits. Indeed, by reference to these companion provisions, this Court already has characterized Section 16(b)'s time limit as a "period of repose" that cannot be extended. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991); *see also id.* at 375 (Kennedy, J., dissenting).

This Court should now confirm that it meant what it said in *Lampf*: "Section 16(b) … sets a 2-year … period of repose," which renders that provision "more restrictive" than companion provisions of the Exchange Act that set 3-year periods of repose. 501 U.S. at 360 & n.5. This approach reflects the statutory text and harmonizes companion provisions of the Exchange Act. Under this approach, this Court should reverse the decision below.

And this Court should reverse that decision even if it were inclined to allow an extra-textual extension of Section 16(b)'s two-year time limit. Under no circumstances is there any basis for extending that time limit beyond the point at which a reasonably diligent securities owner knew, or should have known, the facts underlying a Section 16(b) action. The Second Circuit adopted a variant of this "notice" approach in *Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 206-07 (2d Cir. 2004). Here, as noted above, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the [issuing companies] for at least five years before these cases were filed." Pet. App. 107a. Accordingly, regardless of whether this Court adopts either a "repose" approach or a "notice" approach, this Court should reverse the Ninth Circuit's judgment.

RELEVANT STATUTORY PROVISIONS

The full text of Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. § 78p, is reproduced at Pet. App. 112-15a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Securities Exchange Act of 1934 is a "landmark" statute, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994), enacted, among other things, "to insure the maintenance of fair and honest markets," Exchange Act § 2, 15 U.S.C. § 78b. To achieve that goal, the Act contains a number of requirements designed to promote transparency and oversight of securities transactions. *See*, *e.g.*, Exchange Act § 12(g), 15 U.S.C. § 78l(g) (requirement that an issuer with a certain number of shareholders and a certain amount of assets register securities with the Commission and make public disclosures); Exchange Act § 13(a), 15 U.S.C. § 78m(a) (requirement that securities issuers must file certain disclosure statements with the SEC).

As relevant here, Section 16(a) of the Exchange Act, 15 U.S.C. § 78p(a), requires "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of [a qualifying] equity security …, or who is a director or an officer of the issuer of such security," to disclose purchases and sales of the issuer's securities to the SEC. *Id.* § 78p(a)(1). The disclosure statement must set forth "the amount of all equity securities of such issuer" that the filer beneficially owns, and must be updated in the event of a change of ownership. *Id.* § 78p(a)(3).

A change of ownership disclosure is made by filing a so-called "Form 4." *See* 17 C.F.R. § 240.16a-3(a). That form sets forth the filer's name, the date of the transaction, the number of shares sold or bought, and the price per share. *See* Securities & Exch. Comm'n, *Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, 56 Fed. Reg. 7242, 7278-81 (Feb. 21, 1991); Pet. Opp. App. 1b (sample Form 4). The Government (through the SEC and the Department of Justice) has exclusive authority to enforce Section 16(a), and may pursue a variety of remedies—including injunctive relief, a bar on service as a director or officer, civil monetary penalties, *see* Exchange Act § 21(d)(1), (2), (3), 15 U.S.C. § 78u(d)(1), (2), (3), and even criminal sanctions, *see* Exchange Act § 32(a), 15 U.S.C. § 78ff(a).

In addition to the foregoing disclosure requirements, the Exchange Act also prohibits a number of unfair or deceptive practices. *See*, *e.g.*, Exchange Act § 9, 15 U.S.C. § 78i (prohibiting willful manipulation of securities prices); Exchange Act § 10, 15 U.S.C. § 78j (prohibiting the use of any manipulative or deceptive device in connection with the purchase or sale of any security); Exchange Act § 18, 15 U.S.C. § 78r (prohibiting misleading securities filings); *see generally Lampf*, 501 U.S. at 358-60 & nn. 4, 6 (describing these various statutory prohibitions).

In contrast to these provisions, Section 16(b)—the provision at issue here—does not prohibit any conduct. Rather, Section 16(b) authorizes an issuer of securities (or, after adequate demand on the issuer, an owner of such securities on the issuer's behalf) to file a lawsuit to recover "any profit" realized by a covered person "from any purchase and sale, or any sale and purchase, of any equity security of such issuer … within any period of less than six months." 15 U.S.C. § 78p(b). The statute authorizes such recovery "irrespective of any intention" on the defendant's part, *id.*: even the most innocent purchases or sales based solely on information known to the public can trigger the disgorgement of a short-swing profit. Of particular relevance here, the statute also specifies that "no such suit shall be brought more than two years after the date such profit was realized." *Id.*

Recognizing that not all short-swing profits by covered persons pose a risk of abuse, Section 16(b) exempts "any transaction or transactions which the [SEC] by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U.S.C. § 78p(b). Pursuant to this provision, the SEC has carved out an "underwriter exemption" to allow underwriters to keep profits from short-swing transactions in the context of public offerings of securities, even if Section 16(b) would otherwise cover the underwriting activity. *See* 17 C.F.R. § 240.16a-7(a) (creating underwriter exemption to Section 16(a)); *see also* 17 C.F.R. § 240.16a-10 (applying underwriter exemption to Section 16(b)).

Given that a Section 16(b) proceeding may be brought only by an issuer or (after an adequate demand upon the issuer) an owner of the issuer's securities on the issuer's behalf, any monies recovered through such a proceeding "inure to" the issuer. 15 U.S.C. § 78p(b). Although Section 16(b)—unlike other provisions of the Exchange Act, *see*, *e.g.*, Exchange Act § 9(e), now redesignated 15 U.S.C. § 78i(f); Exchange Act § 18(a), 15 U.S.C. § 78r(a)—does not authorize an award of attorneys' fees to the prevailing party, the lower courts have long awarded attorneys' fees to successful Section 16(b) plaintiffs, *see, e.g.*, *Smolowe v. Delendo Corp.*, 136 F.2d 231, 241 (2d Cir. 1943).

B. The IPO Litigation

The late 1990s witnessed intense investor interest in high technology and Internet-related stocks. In this "bubble" market, many companies sought to raise capital by selling shares to the public, and hired investment banks to underwrite IPOs. "An IPO presents an opportunity to raise capital for a new enterprise by selling shares to the investing public." *Billing*, 551 U.S. at 268.

In an IPO, the underwriter (or a syndicate of underwriters) estimates likely market demand for an issuer's shares and works with the issuer to determine the price and the number of shares to be issued. *See id.* at 268-69. Ultimately, in a firm commitment underwriting, the underwriter agrees to buy all of the newly issued shares on a fixed date at a fixed price filed with the SEC, which the underwriter then sells to the public at a slightly higher fixed price also filed with the SEC. *See id.*; *see also* SEC Regulation S-K, 17 C.F.R. § 229.10 *et seq*. (The spread between the fixed price at which the underwriter buys and sells the shares amounts to its commission, *see Billing*, 551 U.S. at 268; with certain exceptions, the underwriter is barred from buying shares in the IPO, *see* SEC Regulation M, 17 C.F.R. § 242.101.) In the overheated stock market of the late 1990s, the price of shares often increased appreciably after their initial sale, to the benefit of those investors who were able to purchase shares from the underwriters at the fixed IPO price.

After peaking in March 2000, the stock market bubble burst by the end of that year, leaving many investors with losses. Some of those investors set their sights on the investment banks that had underwritten the IPOs. Starting in January 2001, over one thousand securities class actions were filed in the U.S. District Court for the Southern District of New York against the underwriters in connection with more than three hundred IPOs of the late 1990s. That court transferred all of the actions to a single judge, who consolidated and presided over them. *See In re Initial Pub. Offering Sec. Litig. (IPO)*, 241 F. Supp. 2d 281, 293-94 (S.D.N.Y. 2003); *see also In re Initial Pub. Offering Sec. Litig. (Miles*), 471 F.3d 24, 27 (2d Cir. 2006), *clarified on denial of rehearing*, 483 F.3d 70 (2d Cir. 2007).

The *IPO* plaintiffs alleged that the underwriters unlawfully abused their power to allocate shares in an IPO to extract additional consideration from buyers above and beyond the fixed price filed with the SEC. In particular, the *IPO* plaintiffs alleged that the underwriters helped to foment a speculative frenzy by issuing overly optimistic research recommendations on IPO stocks, underpricing IPOs, and entering into "laddering" arrangements whereby their customers agreed to buy additional shares of an IPO stock at escalating prices in the aftermarket. Pet. App. 83-84a; *IPO*, 241 F. Supp. 2d at 294, 314-21; *Miles*, 471 F.3d at 43. The *IPO* plaintiffs further alleged that the underwriters received "kickbacks" from the customers to whom they allocated IPO shares through increased investment banking business, "tying" arrangements (*i.e.*, agreements to purchase less attractive securities), and inflated commissions on unrelated transactions. *See* Pet.

App. 84a; *IPO*, 241 F. Supp. 2d at 294, 320; *Miles*, 471 F.3d at 43. The *IPO* plaintiffs alleged that these practices violated various provisions of the federal securities laws, including Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a). *See IPO*, 241 F. Supp. 2d at 314, 392. Notably, however, the *IPO* plaintiffs did not allege that these practices violated Section 16 of the Exchange Act. The parties to the *IPO* litigation eventually agreed to a series of classwide settlements, which are now being challenged by a single remaining objector.

The SEC also filed (and promptly settled) civil enforcement actions against various underwriters arising out of the same alleged wrongdoing in connection with the same IPOs. *See, e.g.*, Compl., *SEC v. Credit Suisse First Boston Corp.*, No. 1:02-cv-00090 (D.D.C. filed Jan. 22, 2002), Joint Appendix (JA) 141-69. Like the private plaintiffs, the Commission alleged that the underwriters had violated various provisions of the federal securities laws. Notably, however, the SEC did not allege that these underwriters had violated Section 16 of the Exchange Act.

Some private plaintiffs even sued the underwriters under the federal antitrust laws for the very same alleged wrongdoing, and that litigation eventually reached this Court. *See Billing*, 551 U.S. 264. After carefully describing the plaintiffs' allegations—including "laddering," "tying," and excessive commissions, *id.* at 269-70—the *Billing* Court held that the antitrust laws do not encompass what are essentially securities claims, and that the plaintiffs' antitrust claims thus fail as a matter of law, *see id*. at 278-85.[1]

C. These Lawsuits

When this Court decided *Billing* in 2007, respondent Vanessa Simmonds was a college student and the daughter of "a securities lawyer with experience in Section 16(b) litigation." Pet. App. 82a, 107-08a. At that time, respondent's father—who is one of her attorneys in this case—bought her stock in 55 companies that had issued shares in the IPOs of the late 1990s that were challenged in the *IPO* litigation. Pet. App. 82-83a, 107-08a.

Shortly after the purchase of these securities, respondent filed 55 virtually identical complaints in the U.S. District Court for the Western District of Washington. (She subsequently voluntarily dismissed one of the complaints. Pet. App. 82a n.4.)

Each complaint parroted the factual allegations of wrongdoing that had been made by the private plaintiffs in the *IPO* and *Billing* litigation and by the SEC in its enforcement actions. Pet. App. 85a; *compare* JA 54-64 (sample complaint) *with* JA 141-69 (sample SEC complaint). In particular, the complaints alleged that petitioners, the IPO underwriters, "directly and indirectly … created the

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[1] Justice Stevens, concurring in the judgment, further explained that "[a]fter the initial purchase, the prices of newly issued stocks or bonds are determined by competition among the vast multitude of other securities traded in a free market," and dismissed as "frivolous" the suggestion "that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs." *Billing,* 551 U.S. at 286 (opinion concurring in the judgment).

opportunity for themselves to directly and indirectly profit or share in any profits derived from the transactions of their customers in [the IPO] stock." JA 58. The complaints also alleged underpricing and "laddering" arrangements with the objective of "inflating the aftermarket price of [IPO] stock to a level sufficiently above the IPO price to enable [the underwriters] to directly and indirectly reap substantial profits from the sale of [IPO] stock." JA 58-60.

Respondent's complaints, however, for the first time characterized the alleged IPO wrongdoing as a violation of Section 16(b) of the Exchange Act. *See*, *e.g.*, JA 63. In particular, the complaints alleged that petitioners qualified as "beneficial owners" of 10% or more of the issuers' stock (and hence were covered by Section 16(b)) by virtue of their relationships with the issuers' officers and directors as well as with their own customers, JA 61, and that they had "profited from Short-Swing Transactions in [IPO] stock by engaging in such transactions within periods of less than six months during the Relevant Period." JA 63. Each complaint alleged that petitioners were not covered by the "underwriter exemption," because they "lacked good faith in connection with their IPO underwriting and distribution activities." JA 58-59. And each complaint alleged that petitioners "failed to report the Short-Swing Transactions as required under … Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78p(a), thereby tolling the two-year statute of limitations set forth in Section 16(b)." JA 62.

Petitioners moved to dismiss the complaints on a variety of grounds, including Section 16(b)'s prohibition on suits "brought more than two years after the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). The district court (Robart, J.) granted the motions, and dismissed all 54 complaints. Pet. App. 78-111a. With respect to the 24 complaints on which the district court reached the timeliness issue, the court concluded that they were untimely as a matter of law. Pet. App. 103-10a.[2]

The district court recognized that, under the Ninth Circuit's decision in *Whittaker*, "an insider's failure to disclose covered transactions in the required Section 16(a) reports tolls the two-year limitations period" until "the transactions are disclosed in the insider's Section 16(a) report." Pet.

[2] The district court dismissed 30 of the complaints without prejudice on the alternate threshold ground that respondent had not made an adequate demand on the issuer under Delaware law before filing a Section 16(b) claim on the issuer's behalf. Pet. App. 92-102a. The Ninth Circuit affirmed the dismissal of those 30 complaints, but held that the dismissal should have been *with* prejudice. Pet. App. 66-70a. Respondent sought this Court's review of that aspect of the Ninth Circuit's decision, but this Court denied her petition for certiorari. *Simmonds v. Credit Suisse Securities (USA) LLC*, No. 10-1218, __ S. Ct. __, 2011 WL 1343555 (U.S. June 27, 2011). Accordingly, those 30 lawsuits are now over, and this case involves only the 24 lawsuits that the district court dismissed on timeliness grounds. None of these 24 lawsuits has been the subject of a motion to dismiss based on the inadequacy of respondent's demand; indeed, the demand letters in these cases are not in the record. *See* Pet. App. 68-70a. Moreover, four of these cases involve non-Delaware issuers, in which the adequacy of respondent's demands will not be governed by Delaware law. Pet. App. 68-69a.

App. 105-06a (citing *Whittaker*, 639 F.2d at 527). The court concluded, however, that *Whittaker* does not control this case. As the court explained, respondent's Section 16(b) actions are "based on the same set of facts as presented in *In re IPO*, albeit under a new theory of liability and almost six years later." Pet. App. 85a (emphasis added). Thus, "unlike *Whittaker* and other cases employing the equitable tolling doctrine in Section 16(b) cases, there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the [issuing companies] for at least five years before these cases were filed." Pet. App. 107a; *see also id.* at 108a ("[T]he only significant development occurring within the last two years was [respondent's] acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed.").

The Ninth Circuit reversed the district court's dismissal of the 24 complaints at issue here as time-barred. Pet. App. 61-66a. In particular, the court of appeals rejected the district court's attempt to distinguish *Whittaker* on factual grounds, declaring that "the central holding of our opinion in *Whittaker*—both in our legal analysis and our application of the law to the facts of that case—is that the Section 16(b) statute of limitations is tolled until the [defendant] discloses his transactions in a Section 16(a) filing, *regardless* of whether the plaintiff knew or should have known of the conduct at issue." Pet. App. 63a (emphasis added); *see also* Pet. App. 65a ("[O]ur decision in *Whittaker* created a blanket rule that applies in *all* Section 16(b) actions.") (emphasis in original); Pet. App. 66a

("[T]he fundamental holding of *Whittaker* is that Section 16(b)'s two-year statute of limitations begins to run from the time that the defendant files a Section 16(a) disclosure statement."). The Ninth Circuit thus concluded that the two-year time limit for filing a Section 16(b) action *had not even started to run*, because petitioners had not filed disclosure forms under Section 16(a). Pet. App. 66a.

Judge Milan Smith, who authored the Ninth Circuit's opinion, wrote a special concurrence to highlight his misgivings about *Whittaker*. Pet. App. 72-75a. Noting that "the statutory text and statutory structure clearly point toward the repose approach," Judge Smith explained that—"[w]ere it not for *Whittaker*"—he "would hold that Section 16(b) suits may not be brought more than two years after the short-swing trades take place." Pet. App. 75a.

The court of appeals, over Judge Smith's objection on this issue, denied panel rehearing and rehearing *en banc*. Pet. App. 76-77a. This Court granted certiorari.

SUMMARY OF ARGUMENT

By its plain terms, Section 16(b) authorizes a private lawsuit to recover short-swing profits realized by certain covered persons, but specifies that "no such suit shall be brought more than two years after the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). Because respondent brought these lawsuits more than two years after the date the short-swing profits she alleges were realized, these lawsuits are untimely, and the district court correctly dismissed them.

There is no basis for courts to extend Section 16(b)'s two-year time limit. Although courts generally construe federal statutes in light of certain background rules, including rules governing the accrual of a cause of action and the tolling of a time limit, such background rules do not apply indiscriminately to all federal statutes regardless of their text, structure, and history.

Here, statutory text, structure, and history combine to establish that Section 16(b)'s two-year time limit begins to run on the date a covered person realizes a short-swing profit, and is not thereafter subject to tolling. The language of Section 16(b) is classic language of repose: the two-year time limit starts to run from the date of the defendant's challenged conduct. Companion provisions of the Exchange Act underscore that Congress knew how to trigger a statutory time limit by reference to a plaintiff's discovery of the facts underlying a claim, and chose not to do so in Section 16(b). Particularly because the textual discovery provisions in these companion provisions *shorten* statutory time limits, courts cannot invoke extra-textual discovery rules to *lengthen* the time limit in Section 16(b). Thus, as this Court explained in *Lampf*, Section 16(b) establishes a two-year "period of repose" after which a defendant is no longer subject to suit.

But even if there were some extra-textual basis to extend Section 16(b)'s two-year time limit, it would not yield the Ninth Circuit's categorical rule that the time limit never begins to run until the defendant files a Section 16(a) disclosure form. The Ninth Circuit made up that rule—which potentially extends the time limit indefinitely—out of whole cloth. No background rule supports the Ninth Circuit's approach, and no background rule would render these lawsuits timely. The "discovery accrual" rule does not apply because Section 16(b) specifies when a Section 16(b) claim accrues—the date such [short-swing] profit was realized," 15 U.S.C. § 78p(b)—and in any event that rule is generally limited to fraud claims. And the equitable tolling doctrine cannot justify the Ninth Circuit's rule, or respondent's delay in filing these lawsuits, because that doctrine does not toll a time limit beyond the point at which a reasonably diligent plaintiff knew or should have known the facts underlying an action. Given that, as the district court noted, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed," Pet. App. 107a, equitable tolling—even if applicable to Section 16(b) in the first place—could not possibly render these lawsuits timely.

ARGUMENT

I. These Actions Are Untimely Because Section 16(b) Establishes A Two-Year Repose Period That Cannot Be Extended.

A. The Language Of Section 16(b) Establishes A Repose Period That Cannot Be Extended.

The analysis here "begin[s], as in any case of statutory interpretation, with the language of the statute." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 (2011). Section 16(b) authorizes a lawsuit to recover "short-swing" profits realized by certain covered persons, but specifies, without qualification, that "no such suit shall be brought more than two years after the date such profit was realized." 15 U.S.C. § 78p(b).

By its plain terms, the statute identifies the date on which the two-year time limit for bringing an action starts to run—"the date such profit was realized." *Id.* And the statute defines that date, in turn, solely by reference to the defendant's conduct.

That is the classic formulation of a statute of repose. *See Black's Law Dictionary* 1546 (9th ed. 2009) (defining "statute of repose" as "[a] statute barring any suit that is brought after a specified time since the defendant acted"); 54 C.J.S., *Limitation of Actions* § 5, at 22-23 (2005) (same; citing common-law cases); *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.4 (2d Cir. 2010) ("A statute of limitations creates an affirmative defense where plaintiff failed to bring suit within a specified period of time after his cause of action accrued, often subject to tolling principles. … By contrast, a statute of repose extinguishes a plaintiff's cause of action after the passage of a fixed period of time, usually measured from one of the defendant's acts.") (emphasis and internal citations omitted); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199-200 (3d Cir. 2007) (same).

And the whole point of a statute of repose—as well as what distinguishes it from a plain-vanilla statute of limitations—is that it cannot be extended to account for a plaintiff's discovery of the facts underlying a claim. *See, e.g.*, *Lampf*, 501 U.S. at 363; *see also* 4 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1056, at 239-40 (3d ed. 2002); Calvin W. Corman, *Limitations of Actions* § 1.1, at 4-

5 (1991). If a statute of repose could be extended, it would cease to be a statute of repose. *See*, *e.g.*, *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (noting that tolling does not apply to statutes of repose because "their very purpose is to set an outer limit unaffected by what the plaintiff knows").

Needless to say, Congress easily could have chosen a different trigger date for Section 16(b)'s two-year time limit, such as the date a plaintiff discovered, or should have discovered, the challenged conduct, or the date the defendant filed the disclosure forms required by Section 16(a). Indeed, as described in detail below, Congress *did* choose the plaintiff's discovery of the defendant's challenged conduct as the trigger date for other time limits in the very same statute.

B. The Structure Of The Exchange Act Confirms That Section 16(b) Establishes A Repose Period That Cannot Be Extended.

The structure of the Exchange Act confirms that Congress meant what it said when it established an unqualified two-year time limit for bringing a Section 16(b) action, and that the absence of a statutory extension mechanism was no oversight.

Section 16(b) is part of a comprehensive statute, the Securities Exchange Act of 1934. As this Court explained in *Lampf*, that statute created various causes of action and set various time limits for them. *See* 501 U.S. at 359-60 & n.6. Of particular relevance here, both Sections 9(e) and 18(c) of the Act establish dual time limits whereby an action must be brought "within one year after the discovery of the facts constituting" a Section 9 "violation" or a Section 18 "cause of action," and "within three years after" such "violation" or "such cause of action accrued." Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c).

The dual structure of these companion provisions underscores that Congress knew perfectly well how to link a time limit to a plaintiff's "discovery" of the facts underlying an action when it wanted to do so. Yet it did not do so in Section 16(b). Instead, as noted above, Congress designated the realization of a short-swing profit by a covered person as the relevant triggering event.

The juxtaposition of a "discovery" time limit with an outer time limit in Sections 9(e) and 18(c) also shows that the outer time limit of these dual-structure provisions is a period of repose that cannot be extended, regardless of when the plaintiff discovers a claim. *See Lampf*, 501 U.S. at 363 ("'The inclusion of the three-year period can have no significance in this context other than to impose an outside limit.'") (quoting Harold S. Bloomenthal, *The Statute of Limitations & Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. Colo. L. Rev. 235, 288 (1989)). *Lampf* adopted this dual structure for the cause of action implied under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. *See* 501 U.S. at 364 & n.9.[3]

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[3] This Court recently reaffirmed that the outer limit of the Exchange Act's dual-structure provisions cannot be extended. *See Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010) . That case, like *Lampf*, involved the time limit for filing the action implied under Section 10(b) of the Exchange Act, 15 U.S.C.

(cont'd ...)

Although the two-year time limit in Section 16(b) does not track the dual structure of the time limits in Sections 9(e) and 18(c), the latter provisions nonetheless shed substantial light on the former's meaning. It is hard to imagine a better guide to the meaning of a statutory provision than "contemporaneously enacted" provisions of the very same statute. *Lampf*, 501 U.S. at 359. Because the dual time limits in Sections 9(e) and 18(c) of the Exchange Act were enacted at the same time as the two-year time limit in Section 16(b) of the Act—all were part of the original Exchange Act, Pub. L. No. 73-291, 48 Stat. 881—they must be construed as a sensible whole.

A comparison of Section 16(b) with the dual-structure provisions underscores why the two-year time limit in Section 16(b) establishes a period of repose like the outer limit of those provisions. As an initial matter, the language of Section 16(b)'s two-year time limit is virtually identical to the language

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§ 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. By then, Congress had codified *Lampf* as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, but had extended the dual one- and three-year time limits to two and five years respectively, *see* 28 U.S.C. § 1658(b). Although *Merck* involved the two-year "discovery" prong of that dual-structure provision, the Court interpreted that provision in part by reference to its companion five-year outer limit. Thus, the Court rejected a concern that its interpretation of the two-year discovery prong "will give life to stale claims or subject defendants to liability for acts taken long ago" by noting that "Congress' inclusion in the statute of an unqualified bar on actions instituted '5 years after such violation' giv[es] defendants *total repose* after five years." 130 S. Ct. at 1797 (emphasis added; quoting 28 U.S.C. § 1658(b)).

of the outer limit of the companion dual-structure provisions. *Compare* Exchange Act § 16(b), 15 U.S.C. § 78p(b) ("[N]o such suit shall be brought more than two years after the date such profit was realized.") *with* Exchange Act § 9(e), 15 U.S.C. § 78i(f) ("No action shall be maintained to enforce any liability created under this section, unless brought … within three years after such violation.") *and* 28 U.S.C. § 1658(b) ("[A] private right of action … may be brought not later than … 5 years after such violation."); *see generally* Pet. App. 72-73a (M. Smith, J., specially concurring) (noting that "[t]here is little meaningful distinction between the language" of the outer limit of the dual-structure provisions and the time limit in Section 16(b)).

Even more telling, the companion dual-structure provisions of the Exchange Act use a plaintiff's discovery of the facts underlying his claims to *shorten*, not *lengthen*, a statutory time limit. *See* Bloomenthal, *Judicial Lassitude*, 60 U. Colo. L. Rev. at 288 ("The commencement of one of the periods of limitation with discovery of the violation reflected a consensus that one should not have the full statutory period to initiate an action after discovery of the alleged fraud."). Usually, of course, a "discovery" rule operates just the opposite way—to extend a time limit where the plaintiff did not know, or have reason to know, the facts underlying a claim. *See*, *e.g.*, 18 U.S.C. § 1030(g) ("No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage."); 18 U.S.C. § 2710(c)(3) ("No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.").

Where, as here, Congress enacted an explicit discovery rule to *shorten* a statutory time limit, Congress would not have relied on an unwritten discovery rule to *lengthen* another time limit in the same statute. The inclusion of a textual discovery rule shows that Congress did not "intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *United States v. Brockamp*, 519 U.S. 347, 352 (1997); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one."); *Carr-Consol. Biscuit Co. v. Moore*, 125 F. Supp. 423, 431-32 & n.24 (M.D. Pa. 1954) (concluding, in part by reference to the dual-structure time limits of Sections 9(e) and 18(c) of the Exchange Act, that Section 16(b)'s two-year time limit cannot be extended).

In addition, it would be anomalous to construe the companion dual-structure provisions, but not Section 16(b), to create a period of repose, given that the dual-structure provisions involve *intentional* wrongdoing—even insider-trading or securities fraud. *See*, *e.g.*, Exchange Act § 9(e), 15 U.S.C. § 78i(f) (creating a cause of action against any person who "willfully" participates in transactions involving manipulation of securities prices); Exchange Act § 18(a), 15 U.S.C. § 78r(a) (creating a cause of action against any person who makes a false or misleading statement in a document filed with the Commission, unless that person "acted in good faith and had no knowledge that such statement was false or misleading"); 28 U.S.C. § 1658(b) (creating dual-structure time limit for "a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws").

Section 16(b), in sharp contrast, contains no *scienter* requirement, and by its terms operates "irrespective of any intention" by the defendant. 15 U.S.C. § 78p(b); *see also Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972) ("Section 16(b) imposes *strict liability* upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation.") (emphasis added). Indeed, Section 16(b) does not even prohibit a covered person from engaging in "short-swing" securities transactions at all. Rather, the statute simply ensures that he may not "profit" from any such transactions—he may "'get out what he put in, but [must] give the corporation the profit.'" *Foremost-McKesson, Inc. v. Provident Secs. Co.*, 423 U.S. 232, 251 n.26 (1976) (quoting Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess. 6556-57 (1934)).

Congress would not have given repose to defendants who may have engaged in knowing securities violations—even insider-trading or fraud—but denied repose to defendants who may have realized entirely innocent short-swing profits subject to the "strict prophylactic rule" of Section 16(b). *Foremost-McKesson,* 423 U.S. at 251; *see also Reliance Elec.*, 404 U.S. at 422 (describing Section 16(b) as "prophylactic") (internal quotation omitted);

Blau v. Lehman, 368 U.S. 403, 413-14 (1962) (same). Precisely "[b]ecause [Section 16(b)] imposes liability without fault," this Court has long been "reluctant to exceed a literal, 'mechanical' application of the statutory text" in interpreting the provision's scope. *Gollust v. Mendell*, 501 U.S. 115, 122 (1991) (quoting *Reliance Elec.*, 404 U.S. at 425); *see also Foremost-McKesson,* 423 U.S. at 251 (cautioning against interpreting Section 16(b) beyond its "narrowly drawn limits"); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594-95 (1973) (cautioning against interpreting Section 16(b) beyond its "strict terms").

It is no accident, thus, that this Court has previously characterized the two-year time limit in Section 16(b) as a "period of repose." *Lampf*, 501 U.S. at 360 n.5. There, the majority compared Section 16(b)'s two-year time limit to the three-year period of repose in the Exchange Act's companion dual-structure provisions, and described it as a "more restrictive" period. *Id.* at 360 & n.5. Similarly, Justice Kennedy, in dissent, wrote that Section 16(b) establishes "a 2-year statute of repose." *Id.* at 375 (dissenting opinion). In short, the overall statutory structure of the Exchange Act confirms the statutory language of repose in Section 16(b).

C. The Legislative History Further Underscores That Section 16(b) Establishes A Repose Period That Cannot Be Extended.

The legislative history of the Exchange Act further underscores that Section 16(b)'s two-year time limit is a period of repose that cannot be extended. Although that time limit "was first inserted in the statute by the conference report," so that "[n]o debate preceded it and none followed," *Grossman v. Young*, 72 F. Supp. 375, 378 (S.D.N.Y. 1947), Congress actually did consider relating the time limit in Section 16(b) to the disclosure required by Section 16(a). In particular, a draft House bill provided that "No such suit may be brought more than six months after such profit was realized if the facts upon which such suit was based were disclosed by a statement filed pursuant to subsection (a), or more than three years after such profit was realized if the facts were not so disclosed." House Comm. on Interstate & Foreign Commerce, 73d Cong., Security Exchange Bill, at 51 (Comm. Print 1934).[4] But Congress did not adopt this approach, and instead adopted a repose approach that tied the time limit *solely* to the date the defendant realized short-swing profits. Congress thus knew perfectly well how to link the time limit for a Section 16(b) action to a Section 16(a) disclosure, but chose not to do so.

The "extensive legislative history" of the Exchange Act's companion time limits confirms the importance that Congress attached to "a policy of repose." Bloomenthal, *Judicial Lassitude*, 60 U. Colo. L. Rev. at 258-59, 262; *see also id.* at 254 ("[U]nder the securities acts, there is every evidence of a strong congressional policy in favor of a period of repose."). The Act, after all created expansive new liability, and Congress was "concern[ed] that directors who might incur liability … would be

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[4] This draft bill is not included in the Exchange Act's published legislative history, and has been jointly lodged by the parties with the Clerk of this Court.

reluctant to serve in that capacity without a short period of repose, which would give them some comfort that their estates would not be held liable several years later for their conduct in connection with the offering or sale of securities." *Id.* at 262.

During "an extensive debate" over the time limits in the Exchange Act, *id.* at 261, Congress recognized that the outer limit of the dual-structure provisions represented a period of repose that could not be extended, *see* 78 Cong. Rec. 8198 (1934) (statement of Sen. Fletcher) (even if the plaintiff has not discovered a fraud, "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed"); *see also* Bloomenthal, *Judicial Lassitude*, 60 U. Colo. L. Rev. at 261 & n.180 (observing that Senator Fletcher's views "are generally representative," and characterizing the quoted statement as "sum[ming] up the philosophy of what was being proposed"); *see also Ferguson v. Roberts*, 11 F.3d 696, 705 (7th Cir. 1993) ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year [outer limit] was to be absolute.") (internal quotation omitted); Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (Mar. 1985) (noting that, during debate over various time limits in the Exchange Act, "there was no mention of 'tolling,' and all the participants in the debate agreed that the limitation period was an absolute period"). There is nothing in the legislative history to suggest that this policy of repose applied with any less force to the two-year time limit for bringing an action under Section 16(b).

D. Statutory Text, Structure, And History Leave No Room For Background Rules To Extend Section 16(b)'s Two-Year Time Limit.

Because the text, structure, and history of the Exchange Act combine to establish that the two-year time limit in Section 16(b) is a period of repose that cannot be extended, Congress left no room for courts to extend that time limit by reference to background legal rules. Such background rules are just that—rules that courts may apply where Congress has been *silent* on a particular question. Where Congress has *not* been silent, courts may not invoke background rules to amend Congress' handiwork. *See*, *e.g.*, *TRW*, 534 U.S. at 27-33; *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *Brockamp*, 519 U.S. at 350-52; *Lampf*, 501 U.S. at 363; *cf. Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (background rules apply only "'in the absence of a contrary directive from Congress'") (quoting *Cada*, 920 F.2d at 450).

When it comes to extending statutory time limits, two related—but distinct—background rules potentially come into play. The first is the so-called "discovery accrual" rule, which provides that a fraud claim does not accrue "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part.'" *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)); *see also Exploration Co. v. United*

States, 247 U.S. 435, 447-49 (1918); *Sherwood v. Sutton*, 21 Fed. Cas. 1303, 1307 (C.C.D.N.H. 1828) (No. 12,782) (Story, J.); *see generally Merck*, 130 S. Ct. at 1793-94 (describing this rule). Although this Court has extended this background rule to cases of latent disease and medical malpractice, *see, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *United States v. Kubrick*, 444 U.S. 111, 120 & n.7 (1979); *Urie v. Thompson*, 337 U.S. 163, 169-71 (1949)), there is not—and never has been—a general background rule that a statutory time limit for bringing an action starts to run only when the plaintiff discovers the facts underlying such an action. *See, e.g.*, *TRW*, 534 U.S. at 27 (noting that this Court "ha[s] not adopted" any such general background rule); *see also id.* at 37-38 & n.2 (Scalia, J., concurring in the judgment) (rejecting any such general background rule).

The second background rule in this area is the doctrine of "equitable tolling," under which a time limit for bringing suit, having started to run, may nonetheless be suspended, or "tolled," under certain circumstances. *See*, *e.g.*, *Holland v. Florida*, 130 S. Ct. 2549, 2560-62 (2010); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-28 (1965). This doctrine, however, does not allow courts to extend statutory time limits at their whim. To the contrary, courts apply equitable tolling "only if [the plaintiff] shows '(1) that he has been pursuing his rights diligently, *and* (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 130 S. Ct. at 2562 (emphasis added; quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418

(2005)); *see also Irwin*, 498 U.S. at 96 (noting that courts apply equitable tolling "only sparingly," in situations such as "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.").

Not every statutory time limit, however, is subject to these background rules. Where—as in the Exchange Act—statutory text, structure, or history indicates that a particular time limit cannot be extended, these rules do not apply. Indeed, *Lampf* squarely rejected the suggestion that the outer limit of the Exchange Act's dual-structure provisions was subject to equitable tolling. *See* 501 U.S. at 363 ("[T]he 3-year limit is a period of repose inconsistent with tolling.").

And *Lampf* is merely one of many cases in which this Court has emphasized that courts must exercise caution before invoking background rules to extend statutory time limits. Indeed, in *TRW*, this Court unanimously rejected the Ninth Circuit's premise that "*all* federal statutes of limitations, *regardless of context*, incorporate a general discovery rule 'unless Congress has *expressly* legislated otherwise.'" 534 U.S. at 27 (emphasis added; quoting *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000)). Looking to "the text and structure" of the particular time limit at issue there, this Court concluded that Congress intended "to preclude judicial implication" of a more forgiving time limit. *Id.* at 28; *see also Beggerly*, 524 U.S. at 48 (refusing, in light of statutory text and structure, to resort to background rules to extend statutory time limit); *Brockamp*, 519 U.S. at 350-52 (same).

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Because Section 16(b) specifies the date on which its two-year time limit begins to run—"the date such [short swing] profit was realized," 15 U.S.C. § 78p(b)—and that two-year time limit establishes a period of repose that cannot be extended, it follows that these actions are untimely. There is no dispute that all of the short-swing profits alleged in these lawsuits were realized no later than 2001. *See*, *e.g.*, JA 61, 63. Because respondent filed these lawsuits more than two years after the alleged "profit was realized," 15 U.S.C. § 78p(b), the district court correctly dismissed the lawsuits as untimely, and the Ninth Circuit erred by reversing that dismissal. Accordingly, this Court should reverse the Ninth Circuit's judgment.

II. These Actions Are Untimely Even If Section 16(b)'s Two-Year Time Limit Could Be Extended.

The lower courts that have departed from the repose approach described above have failed to develop a consistent alternative approach as to when, and to what extent, it is appropriate to extend Section 16(b)'s two-year time limit. In particular, the Ninth Circuit has adopted an unyielding "disclosure" approach whereby the time limit does not begin to run as a matter of law unless and until the defendant files a Section 16(a) disclosure form, regardless of whether or when a reasonably diligent securities owner knew or should have known the facts underlying a Section 16(b) action. *See, e.g.*, *Whittaker*, 639 F.2d at 527-30; Pet. App. 63-64a. The

Second Circuit, in contrast, has embraced a "notice" approach whereby "tolling is triggered by noncompliance with the disclosure requirements of Section 16(a)," and continues "until the claimant or (depending on the circumstances) the [issuer] company gets *actual* notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing." *Litzler*, 362 F.3d at 208 (emphasis added).

These divergent approaches, by themselves, underscore the wisdom of the straightforward repose approach described above. Once a court strays from the statutory text, it necessarily embarks on an uncertain path. Such uncertainty is particularly undesirable in the context of a statute, like Section 16(b), that Congress sought to make "capable of easy administration." *Reliance Elec.*, 404 U.S. at 422 (internal quotation omitted). But even assuming that this Court were inclined to venture onto that path, it should not follow either the Ninth or Second Circuit approaches.

A. The Ninth Circuit's "Tolling" Rule Should Not Be Adopted.

The Ninth Circuit based its conclusion that Section 16(b)'s two-year time limit may be extended primarily on what the court described as Section 16's overall "purpose": "to curb insider trading abuses." *Whittaker*, 639 F.2d at 528. According to the Ninth Circuit, "this purpose would be thwarted if insiders could escape liability by not reporting as required under § 16(a)." *Id.* Thus, the Ninth Circuit concluded, Section 16(b)'s two-year time limit "begins to run" only when the defendant files a disclosure form under Section 16(a), *regardless* of the plaintiff's knowledge. *Whittaker*, 639 F.2d at 530; Pet. App. 63a.[5]

The Ninth Circuit thereby employed a fundamentally misguided approach to statutory interpretation. "Vague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). If Congress had wanted Section 16(b)'s two-year time limit to start running on the date the defendant filed a Section 16(a) disclosure form, it could and would have said so. In fact, Congress considered, but did not adopt, a proposal to link the time limit in Section 16(b) to the disclosure required by Section 16(a). *See supra* Part 1.C. Instead,

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[5] Although the Ninth Circuit purported to apply the doctrine of "equitable tolling," *Whittaker*, 639 F.2d at 527, the court actually appears to have applied an accrual rule, not a tolling rule. As noted above, the Ninth Circuit fixed the date on which the two-year time limit "begins to run," *id.* at 530, which is an accrual concept, not a tolling concept. *See, e.g.*, *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (*per curiam*) (distinguishing accrual from tolling); *Cada*, 920 F.2d at 450 (distinguishing accrual from tolling, and noting that "[a]ccrual is the date on which the statute of limitations begins to run," while "[t]olling doctrines stop the statute of limitations from running even if the accrual date has passed."); *see also SEC v. Gabelli*, No. 10-3581, __ F.3d __, 2011 WL 3250556, at *7-8 (2d Cir. Aug. 1, 2011) (distinguishing discovery accrual rule from equitable tolling). The Ninth Circuit's accrual rule—which is based on the defendant's *disclosure* of certain facts, not the plaintiff's *discovery* of those facts—bears no resemblance to the traditional discovery accrual rule, which applies ""'where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part.'"" *Merck*, 130 S. Ct. at 1794 (quoting *Holmberg*, 327 U.S. at 397, in turn quoting *Bailey*, 88 U.S. (21 Wall.) at 348).

Congress chose to link the time limit to "the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). The Ninth Circuit's "equitable tolling" rule is thus nothing more than a revision of the statute to alter the trigger date for the two-year time limit. "To attempt to decide whether some date other than the one set out in the statute is the date actually 'intended' by Congress is to set sail on an aimless journey." *United States v. Locke*, 471 U.S. 84, 93 (1985).

The Ninth Circuit further held that its "tolling" rule was justified by "the complementary nature of § 16(a) and § 16(b)." *Whittaker*, 639 F.2d at 528. In particular, the court declared, "[t]he disclosures and reports of § 16(a) are an *integral part* of the context of § 16 within which § 16(b) must be read." *Id.* (emphasis added). But these points are nothing more than reasons why Congress might have chosen to link the time limit for bringing a Section 16(b) action to the filing of a Section 16(a) disclosure form. As noted above, Congress did not make that choice.

To the contrary, Congress chose other means to ensure compliance with Section 16(a)'s disclosure requirements. It gave the Government (through the SEC and the Department of Justice) exclusive authority to enforce those requirements. *See*, *e.g.*, *Scientex Corp. v. Kay*, 689 F.2d 879, 882-83 (9th Cir. 1982) (no private right of action to enforce Section 16(a)). And Congress gave the Government a variety of enforcement tools, including authority to pursue injunctive relief, a bar on service as a director or officer, civil monetary penalties, *see* Exchange Act § 21(d)(1), (2), (3), 15 U.S.C. §§ 78u(d)(1), (2), (3), and even criminal sanctions, *see* Exchange Act § 32(a), 15

U.S.C. § 78ff(a); *see also* Exchange Act § 21(d)(5), 15 U.S.C. § 78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, *any equitable relief* that may be appropriate or necessary for the benefit of investors.") (emphasis added); *SEC v. DiBella*, 409 F. Supp. 2d 122, 130 (D. Conn. 2006) ("any equitable relief" under this provision includes disgorgement). Given these other means for enforcing the disclosures required by Section 16(a), there is no reason to toll the time limit for filing an action under Section 16(b) until a defendant files a Section 16(a) disclosure form. *See, e.g.*, *Carr*, 125 F. Supp. at 431-32; *cf. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (rejecting implication of private enforcement mechanism where Congress expressly created public enforcement mechanism); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (same).

Nor can the Ninth Circuit's "tolling" rule be justified on the ground that "individual security holders" are unlikely to know about short-swing profits subject to disgorgement under Section 16(b) in the absence of a disclosure form under Section 16(a). *Whittaker*, 639 F.2d at 528. The Ninth Circuit, after all, expressly *rejected* a tolling rule based on the plaintiff's knowledge in favor of a tolling rule based solely on the defendant's filing of a disclosure form, so that Section 16(b)'s time limit is tolled *regardless of* the plaintiff's knowledge. *See id.* at 528-30; Pet. App. 63a. The Ninth Circuit identified no authority to justify the continued operation of equitable tolling even past the point at which a reasonably diligent plaintiff knew or should have known the facts underlying a claim. That was no oversight, because no such authority exists. To the contrary, as the district court noted, it would be *inequitable* to extend a statutory time limit for filing an action past the point at which a reasonably diligent plaintiff knew or should have known the facts underlying that action. Pet. App. 108a, 110a.

The Ninth Circuit's novel "tolling" rule also would create a glaring anomaly in the operation of the Exchange Act. As noted above, other provisions of that Act targeting fraud and intentional wrongdoing require plaintiffs to sue within a fixed period of time after discovering the wrongdoing. *See Merck*, 130 S. Ct. at 1797; *Lampf*, 501 U.S. at 359-64. Congress would not have crafted a securities-law regime in which a plaintiff must file suit within a fixed time after discovering a fraud, but may sit on his hands for years before filing suit after discovering a violation of a strict-liability provision.

Finally, the Ninth Circuit's novel "tolling" rule implicitly assumes that a Section 16(b) defendant was required to file a Section 16(a) disclosure form in the first place. As these lawsuits underscore, that assumption is not always warranted: petitioners have not filed Section 16(a) disclosures because they believe that they are not required to do so. As underwriters, petitioners are generally *exempt* from both disclosure under Section 16(a) and disgorgement under Section 16(b). *See* 17 C.F.R. § 240.16a-7(a) (creating underwriter exemption to Section 16(a)); *see also* 17 C.F.R. § 240.16a-10 (extending underwriter exemption to Section 16(b));

see generally 15 U.S.C. § 78p(b) (authorizing SEC to create exemptions).

To be sure, that exemption applies only to "good faith" underwriting, *see* 17 C.F.R. § 240.16a-7(a), a term that the SEC has never authoritatively construed. Although the most natural reading of that term is that the underwriter exemption applies to all *bona fide* distributions of shares to the public, respondent advanced a far more expansive view of the "good faith" exception to the underwriter exemption. Thus, respondent attempted to "plead around" the underwriter exemption by alleging that petitioners "lacked good faith in connection with their IPO underwriting and distribution activities" at issue in each lawsuit because of the underlying misconduct alleged. *See*, *e.g.*, JA 58-59.

Because the time limit is a threshold issue, no court has yet resolved respondent's challenge to the applicability of the underwriter exemption. If petitioners must prove that they are covered by the underwriter exemption to invoke the statutory time limit, that limit would be effectively meaningless, because petitioners would have established that they are entitled to prevail on the merits.

As a practical matter, thus, the Ninth Circuit's "tolling" rule yields the perverse result that the *more* far-fetched a plaintiff's theory of Section 16 liability, the *less* likely a defendant will be entitled to invoke the benefit of the statutory time limit. Section 16(b) defendants, like petitioners, who have no reason to believe they are required to file Section 16(a) disclosure forms are effectively disabled from invoking the two-year time limit. *See* Pet. App. 109-10a ("[T]he novelty of [respondent's] theory neither gives [petitioners] sufficient notice of the possibility of having to file a Form 4 (*i.e.*, the underwriters should have known that allocating IPO shares to their best customers in return for more business could lead to Section 16(b) liability) nor does it provide any end date of liability for the issuing companies or the underwriters."); Pet. App. 110a n.15 ("Until such time as [petitioners] file a Form 4—essentially admitting liability—the statute is tolled forever.").[6] "Indeed," as the district court noted, "[respondent's] counsel acknowledged that under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock." Pet. App. 110a. The district court correctly perceived that "permitting shareholders to go back 20 years with novel claims for Section 16(b) liability" was consistent neither with the statute nor with any known form of equitable tolling. *Id.*

[6] It is no answer to assert, as respondent does, that a potential Section 16(b) defendant subject to an exemption could always file a prophylactic Section 16(a) disclosure out of an abundance of caution, without admitting liability under Section 16(b). *See* Pet. Opp. 19 n.7. Putting aside the fact that such a regime would essentially undo the exemption, and drown the SEC in useless filings, a potential Section 16(b) defendant could not possibly anticipate all of the various ways in which it might be alleged that he falls within the scope of the statute. Thus, even if a potential Section 16(b) defendant were inclined to file prophylactic Section 16(a) disclosures, a plaintiff could still "plead around" such disclosures by simply devising new and ever more fanciful theories of liability.

B. The Second Circuit's Tolling Rule Also Should Not Be Adopted.

Unlike the Ninth Circuit, the Second Circuit recognized that the two-year time limit for filing a Section 16(b) action starts to run on the date Congress said it starts to run—"the date such [short-swing] profit was realized," 15 U.S.C. § 78p(b). *See Litzler*, 362 F.3d at 206-07; *Tristar Corp. v. Freitas*, 84 F.3d 550, 553 (2d Cir. 1996). The Second Circuit, however, also invoked the doctrine of equitable tolling to extend that time limit. *See Litzler*, 361 F.3d at 207; *Tristar*, 84 F.3d at 553 (citing *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 264 (2d Cir. 1990)).

Even assuming *arguendo*—notwithstanding Section I of this brief—that it was appropriate for the Second Circuit to invoke the doctrine of equitable tolling to extend the two-year time limit in Section 16(b), the court did not correctly describe or apply that doctrine. Rather, the Second Circuit departed in material ways from established principles.

As noted above, the traditional rule is that a plaintiff may obtain the benefit of equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 130 S. Ct. at 2562 (quoting *Pace*, 544 U.S. at 418). The doctrine requires a fact-specific inquiry that '"must be made on a case-by-case basis."' *Holland*, 130 S. Ct. at 2562 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)). Under no circumstances is equitable tolling available where, on the specific facts of a case, the plaintiff failed to exercise reasonable diligence. *See id.* at

2562-63; *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007); *Pace*, 544 U.S. at 418-19; *Irwin*, 498 U.S. at 96; *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (*per curiam*).

The Second Circuit did not purport to apply this traditional rule, but instead fashioned its own equitable tolling doctrine uniquely applicable to Section 16(b). *See Litzler*, 362 F.3d at 207-08. According to the Second Circuit, "the incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a) through failure to file a Form 4," and "[s]uch tolling should continue … until the claimant or (depending on the circumstances) the company gets *actual* notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing." *Id.* at 208 (emphasis added). In the Second Circuit's view, "[t]he prophylaxis of Section 16 … would be impaired if the tolling triggered by non-compliance was ended or defeated by mere inquiry notice, or by circumstances in which a person would or should have realized the non-compliance, or by the ability of a shareholder or company to piece together the substance of a Form 4 from disparate sources of information." *Id.*

Given that the very premise underlying the application of a background rule is that Congress is presumed to legislate against the backdrop of such a rule, the Second Circuit had no license to craft this unique equitable tolling doctrine for Section 16(b). Congress obviously does not legislate against the backdrop of rules that courts develop on an *ad hoc*, *post hoc* basis. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 286 (2003) ("Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules.") (emphasis in original).

In particular, the Second Circuit erred by holding that an alleged failure to file a Section 16(a) disclosure form necessarily triggers equitable tolling under Section 16(b). *See Litzler*, 362 F.3d at 208. Judge Jacobs, the author of the Second Circuit's opinion, disagreed with the court on this score, noting in a footnote that he "would have preferred to say" that the two-year time limit in Section 16(b) "is equitably tolled only when the failure to file is intentional or unreasonable." *Id.* at 208 n.5. "This rule," Judge Jacobs stated, "would be consistent with the general principle that a federal statute of limitations may be equitably tolled when fraudulent or other conduct conceals the existence of a claim." *Id.* (internal quotations omitted). Judge Jacobs warned that "[o]ne possible effect of our holding in this case is that a claim that affects long-settled transactions might hang forever over honest persons." *Id.*

The Second Circuit also erred by drawing a distinction in the Section 16(b) context between actual and constructive knowledge, and holding that equitable tolling would continue "until the claimant or (depending on the circumstances) the company gets *actual* notice" of the facts underlying a Section 16(b) claim. *Id.* at 208 (emphasis added). The court identified no authority for the proposition that equitable tolling continues until a plaintiff has *actual* notice of the facts underlying a claim. To the contrary, the court acknowledged that "[o]rdinarily, inquiry notice is sufficient to defeat or end equitable tolling." *Id.* at 207 (citing cases); *see also Staehr v. The Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 426 (2d Cir. 2008) ("Equitable tolling will stay the running of the statute of limitations only so long as the plaintiff has exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud.") (internal quotation omitted); *Cantor v. Perelman*, 414 F.3d 430, 440 (3d Cir. 2005) (information that put plaintiffs "at least on inquiry notice … forecloses equitable tolling … as a matter of law").[7]

C. No Background Rule Would Render These Lawsuits Timely.

Under a proper application of the relevant background rules, even assuming *arguendo* they applied here in the first place, these lawsuits still would be untimely. As the Second Circuit correctly perceived, the discovery accrual rule has no bearing in the context of Section 16(b), because that provision specifies the date on which the two-year time limit begins to run—"the date such [short-swing] profit was realized," 15 U.S.C. § 78p(b). As noted above, a background rule obviously cannot trump a statute's

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[7] Although petitioners believe that the Second Circuit in *Litzler* misapplied equitable tolling principles, petitioners would prevail here even under the *Litzler* approach. As the district court noted, the factual allegations underlying respondent's complaints are drawn almost verbatim from the allegations made against petitioners and the issuing corporations in the *IPO* litigation brought in 2001. *See* Pet. App. 83a, 85a, 107-08a. Because the issuing corporations were defendants in the *IPO* litigation, they obviously had "actual notice" of those allegations. *Litzler*, 362 F.3d at 208.

plain language. Moreover, this Court has made clear that the discovery accrual rule is generally limited to fraud claims. *See*, *e.g.*, *Merck*, 130 S. Ct. at 1793-94; *TRW*, 534 U.S. at 27-28.

Nor does the equitable tolling doctrine save these lawsuits because (as the district court noted), "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a; *see also id.* at 108a ("The only significant development occurring within the last two years was [respondent's] acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed.").

The district court correctly focused on the knowledge of a reasonably diligent plaintiff, not respondent's actual knowledge. As noted above, equity demands reasonable diligence, assessed by what a plaintiff knew or *should have known*. *See*, *e.g.*, *Merck*, 130 S. Ct. at 1793-94. Thus, a Section 16(b) plaintiff is not entitled to the benefit of equitable tolling if she *should have known* certain facts, regardless of whether she *actually knew* those facts. Were the law otherwise, the two-year time limit would be meaningless, because (as respondent's counsel conceded below) an attorney could always "go out and find a plaintiff that was not on notice." Pet. App. 110a n.15.[8]

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[8] The knowledge issue is complicated somewhat by the fact that a Section 16(b) action may be brought either by a securities issuer or (after adequate demand on the issuer) by an owner of

(cont'd ...)

The district court also correctly focused on a reasonably diligent shareholder's knowledge of "the *facts* giving rise to [respondent's] complaints against [petitioners]." Pet. App. 107a (emphasis added). A plaintiff who fails to sue even after the point at which he knew or should have known the facts underlying his claim cannot possibly establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 130 S. Ct. at 2562 (internal quotation omitted).

Respondent cannot switch course now, and "dispute that all of the facts giving rise to [her] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. These complaints are based on the very same facts at issue in the high-profile *IPO* litigation. *See* Pet. App. 85a ("[Respondent] filed her complaints for short-swing transactions based on the same set of facts as presented in *In re IPO*, albeit under a new

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the issuer's securities on the issuer's behalf. *See* 15 U.S.C. § 78p(b). Because the statute does not link the operation of its two-year time limit to anyone's knowledge, the statute does not specify *whose* knowledge matters when an action is brought on the corporation's behalf. Notwithstanding *Litzler*, the general background rule in American corporate law is that, in assessing the timeliness of a derivative action on a corporation's behalf, what matters is the knowledge of a reasonably diligent shareholder, not the corporation's knowledge. *See, e.g.*, *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 276 (Del. Ch. 1993); *see generally* R. Franklin Balloti & Jesse A. Finkelstein, *Delaware Law of Corporations & Business Organizations* § 13.9, at 13-20 (3d ed. supp. 2011).

theory of liability and almost six years later."); *cf.* *Miles*, 471 F.3d at 43 (describing widespread publicity of alleged IPO abuses by underwriters). In her complaints, respondent simply superimposed the legal framework of Section 16(b) liability onto these facts: she alleged that the underwriters qualified as statutory insiders, and that the transactions related to the disputed IPOs amounted to short-swing purchases and sales from which petitioners profited. *See* JA 58-62. Dressing up these underlying facts in Section 16(b) garb required nothing more than a creative lawyer. Indeed, respondent can hardly claim that she lacked sufficient facts to bring these Section 16(b) actions absent Section 16(a) disclosures, given that she actually *did* bring these Section 16(b) actions absent Section 16(a) disclosures. Thus, even if this Court were to adopt a "notice" approach, no remand would be necessary.

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At the end of the day, these lawsuits are untimely regardless of whether Section 16(b)'s two-year time limit is construed as a statute of repose not subject to equitable tolling or as a statute of limitations subject to equitable tolling. Accordingly, the district court correctly dismissed these claims as time-barred, and the Ninth Circuit erred by reversing the district court's judgment on this score.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's judgment.

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