No. 13-640

IN THE
Supreme Court of the United States

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI,

Petitioner,

v.

INDYMAC MBS, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENTS CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., GOLDMAN, SACHS & CO., AND MORGAN STANLEY & CO. LLC

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QUESTION PRESENTED

Whether the judicial tolling principle articulated in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), is inapplicable to the absolute three-year statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m.

RULE 29.6 STATEMENT

The corporate-disclosure statement for respondents Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., Goldman, Sachs & Co., and Morgan Stanley & Co. LLC included in the Brief in Opposition filed on behalf of those respondents remains accurate.

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STATUTORY PROVISION INVOLVED

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, provides:

> **Limitation of actions**
>
> No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(a)(2) of this title more than three years after the sale.

Other pertinent statutes and rules are reprinted in the Appendix, *infra*.

INTRODUCTION

Under Section 13 of the Securities Act of 1933, ch. 38, 48 Stat. 74, 84 ("1933 Act"), certain private claims to enforce that Act must be brought within one year after discovery of the alleged misconduct, but "*[i]n no event* shall any such action be brought … more than three years after" the public offering or sale of the security at issue. 15 U.S.C. § 77m (emphasis added). This Court held in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), that Section 13's three-year bar "is a period of repose," which serves as an absolute "cutoff" of claims. *Id.* at 363. As "'a period of repose,'" this Court recently confirmed, that three-year bar "'is inconsistent with tolling.'" *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) (brackets omitted) (quoting *Lampf*, 501 U.S. at 363).

Petitioner, whose claims were extinguished when Section 13's three-year repose period expired, seeks to eviscerate that barrier. It urges the Court to expand the "tolling" principle articulated in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974)—under which "statutes of limitation" may be suspended during the pendency of a putative class action if it "is consonant with the legislative scheme" (*id.* at 558)—to trump Section 13's three-year repose period. Tolling of that repose period is antithetical to Section 13's text, structure, and purpose, and foreclosed by *Lampf* and *CTS*.

Petitioner's assertion that *Lampf* left open whether Section 13's "cutoff" can be circumvented by the particular equitable-tolling principle applied in *American Pipe* is refuted by *Lampf*'s categorical language and logic. And *CTS* confirms that repose periods—including Section 13—are simply not suscepti-

ble of tolling. Petitioner's fallback theory—that *American Pipe* invented a novel tolling doctrine rooted not in traditional equitable-tolling principles, but in Federal Rule of Civil Procedure 23—is both wrong and irrelevant. This Court has made clear that *American Pipe* applied equitable tolling, and that novel exceptions to time bars untethered to the statute are strongly disfavored. But even on petitioner's view, *American Pipe* tolling could not override Section 13's repose period without violating the Rules Enabling Act, 28 U.S.C. § 2072(b), which forbids construing Rule 23 to abridge, enlarge, or modify substantive rights. *American Pipe* tolling is independently irrelevant because it cannot apply where, as here, no named plaintiff in the putative class action on which tolling is premised had standing to assert the relevant claims.

Both courts below thus properly rejected petitioner's bid to nullify Section 13's repose period. That conclusion should be affirmed.

STATEMENT

1. The 1933 Act authorizes certain private actions alleging misrepresentations or omissions in the offering documents for federally registered securities. Section 11 permits claims against issuers, signatories, and underwriters for material misstatements or omissions in the registration statement for a security by one who "acquir[es] such security." 15 U.S.C. § 77k(a). Section 12(a)(2) permits "purchas[ers]" of a security to bring a claim against certain sellers based on false statements or omissions in a prospectus. *Id.* § 77*l*(a)(2). Section 15 imposes secondary liability on one who "controls any person liable under" Sections 11 or 12. *Id.* § 77*o*(a).

Private claims under these provisions have always been subject to a two-tiered time-bar framework, set forth in Section 13. 15 U.S.C. § 77m (reproduced at page 1, *supra*).

a. Originally, Section 13 imposed a two-year statute of limitations, running from the date the violation was or should have been discovered. 1933 Act, § 13, 48 Stat. at 84. The original Section 13 *also* imposed a longer, absolute time bar for claims under Section 11 and Section 12(a)(1)'s predecessor, cutting off claims ten years after the first public offering. *Ibid.*

This two-tiered structure reflected a deliberate choice by Congress, which considered but rejected several alternatives. The initial legislation contained *no* limitations periods. H.R. 4314, 73d Cong. (Mar. 29, 1933); S. 875, 73d Cong. (Mar. 29, 1933). Prompted by criticisms that this would allow "an unprincipled lawyer" to bring a suit based on events "20 years" in the past (*Federal Securities Act: Hearing on H.R. 4314 Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 169 (1933) (statement of William C. Breed)), the Senate adopted a bill containing a five-year limitations period that commenced on the day the cause of action arose. S. 875, 73d Cong. § 9 (Apr. 27, 1933). The House responded with the two-tiered structure that eventually was enacted. *See* H.R. 5480, 73d Cong. (May 5, 1933).

b. One year later, prompted in part by "criticisms and complaints" that the 1933 Act's provisions were "interfering with business," Congress considered several amendments "to meet these objections." 78 Cong. Rec. 8668 (1934). One amendment proposed shortening Section 13's two-year limitations period to one year and its ten-year outer limit to five

years (and making Section 13 applicable to claims under what is now Section 12(a)(2)). *Id*. at 8185. Congress adopted the amendment but shortened the outer time limit further, to three years. Securities Exchange Act of 1934 ("1934 Act"), ch. 404, § 207, 48 Stat. 881, 908. Congress recognized that the original ten-year cutoff could "deter men from serving on boards of directors," because a director "might die and his estate would be liable possibly 8 years after his death to a suit brought by an individual." 78 Cong. Rec. 8200. To "give greater assurance to the honest officials of a corporation" and reduce the risk "that a director would be uncertain as to the settlement of his estate," Congress required that, as an absolute outside limit, "a suit must be brought within 3 years." *Id.* at 10,186.

Congress chose, however, to retain Section 13's two-tiered structure. Indeed, it rejected a proposal to replace Section 13 with a single period running from the date of a misrepresentation or omission. *See* 78 Cong. Rec. 8198. Responding to the contention that "two limitations … will lead to … a great deal of uncertainty," Senator Barkley explained that Section 13 simply required a purchaser who "makes discovery of fraud" to "bring his suit within 1 year," whereas if the purchaser "makes no discovery of fraud within the [three-year] time limit of the statute then he cannot sue at all." *Ibid.*

This two-tiered framework was designed to "be just and fair to both sides." 78 Cong. Rec. 8200. Congress rejected a proposal to eliminate Section 13's built-in discovery rule, deeming it necessary "to preserve the right of a man who might not discover the falsity of a statement" within one year because fraud "may take years to discover." *Id.* at 8200-01.

"At the same time," however, Congress sought to ensure that a corporate officer would have a measure of repose by "bring[ing] to an end his fear, or the fear of his estate, of a suit." *Id.* at 8200. As Senator Fletcher explained, "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed." *Id.* at 8198. Congress thus retained an absolute cutoff point, after which a plaintiff could "not in any case" bring a claim. *Id.* at 8201.

2. Petitioner, a "'sophisticated'" investor in mortgage-backed securities (Pet. App. 26a), seeks to assert claims under the 1933 Act alleging untrue statements and omissions in the offering documents for certain separate offerings of mortgage pass-through certificates issued in 2006 and 2007 by IndyMac MBS, Inc., underwritten respectively by Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., Goldman, Sachs & Co., and Morgan Stanley & Co. LLC (collectively, "respondents"), among others. *Id.* at 4a-6a, 29a, 31a, 53a-54a; J.A. 338-40.

a. On May 14, 2009, the Police and Fire Retirement System of Detroit ("Detroit PFRS") filed a putative class action in the Southern District of New York concerning certain certificates issued by IndyMac. Pet. App. 29a; J.A. 91-145. On June 29, 2009, the Wyoming State Treasurer and Wyoming Retirement System (collectively, "Wyoming plaintiffs") filed their own putative class-action complaint concerning IndyMac certificates that they had purchased. Pet. App. 29a; J.A. 146-94. Both complaints alleged that the offering documents for the relevant certificates contained misrepresentations and omis-

sions regarding the underlying mortgages. Pet. App. 29a.

On July 29, 2009, pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4, the district court consolidated the suits and appointed the Wyoming plaintiffs as the sole lead plaintiffs. Pet. App. 29a-30a; J.A. 211-16. The Wyoming plaintiffs filed an amended consolidated complaint in which they were the "only plaintiff[s] named." Pet. App. 30a; J.A. 217-331. "Neither [Detroit PFRS] nor anyone else objected to lead counsel's naming of [the Wyoming plaintiffs] as the sole plaintiff[s]." Pet. App. 30a.

Respondents moved to dismiss the Wyoming plaintiffs' complaint on a variety of grounds, including their lack of standing to assert claims involving certificates in which they had not invested. Pet. App. 30a, 58a; D.C. Dkt. Nos. 158 & 159. The Wyoming plaintiffs' complaint purported to assert claims involving "106 different offerings pursuant to three registration statements," yet they had "purchased Certificates in [only] fifteen of [them]." Pet. App. 51a; *see* J.A. 220-21, 325-28. At a February 2010 hearing, the district court "informed the parties of its intention to dismiss for lack of standing the claims related to offerings in which [the Wyoming plaintiffs] had not purchased Certificates." Pet. App. 45a n.56.

On May 17, 2010, petitioner—which had invested in different certificates than the Wyoming plaintiffs—moved to intervene to assert such claims. Pet. App. 7a-8a; J.A. 332-36; *see* Fed. R. Civ. P. 24.

In June 2010, the district court dismissed for lack of standing those claims recited in the Wyoming plaintiffs' complaint that were based on certificates

that they had not purchased. Pet. App. 58a. The court later modified its ruling in light of the Second Circuit's subsequent decision in *NECA-IBEW Health & Welfare Fund* v. *Goldman, Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624 (2013), which crafted a new and unprecedented standard of "class standing," under which a named plaintiff may assert on behalf of a class not only claims concerning securities it purchased, but also any claims that "implicat[e] the same" or a "sufficiently similar set of concerns." *Id.* at 162, 164; *see* J.A. 541-45. The Wyoming plaintiffs lacked standing under *either* approach to assert the claims that petitioner seeks to assert here.

The district court then denied petitioner's motion to intervene. Pet. App. 8a, 32a-33a. Because the offerings or purchases underlying these claims "occurred more than three years before" petitioner moved to intervene, petitioner's claims were "barred by [Section 13's] three-year statute of repose." *Id.* at 37a-38a. The court rejected petitioner's argument that the Wyoming plaintiffs' complaint had tolled the statute of repose. *Id.* at 33a. As it observed, "neither *American Pipe* nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13." *Ibid.*

b. The Second Circuit affirmed. Pet. App. 4a. As it explained, "whether grounded in equitable authority or on Rule 23," *American Pipe* tolling could not trump "the statute of repose in Section 13." *Id.* at 20a. The Second Circuit reasoned that if *American Pipe*'s "tolling rule is properly classified as 'equitable,'" then *Lampf*, 501 U.S. 350—which concluded "that equitable 'tolling principles do not apply to that period'"—resolved this case against petitioner. Pet.

App. 19a (citation omitted). The Second Circuit further concluded that "[e]ven assuming, *arguendo*, that the *American Pipe* tolling rule is 'legal'—based upon Rule 23 … its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act, 28 U.S.C. § 2072(b)," which "forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right." *Ibid.* (internal quotation marks omitted). Because "the statute of repose in Section 13 creates a *substantive* right" to be free of "claims after a three-year period," overriding that time bar under Rule 23 would "modify a substantive right and violate the Rules Enabling Act." *Id.* at 20a.

The Second Circuit rejected petitioner's policy contention that applying the repose period would "disrupt the functioning of class action litigation." Pet. App. 20a. That argument was "not persua[sive]" given "the sophisticated, well-counseled litigants involved in securities fraud class actions," and moreover "judges may not deploy equity to avert the negative effects of statutes of repose." *Id.* at 20a-21a. Indeed, petitioner, "through minimal diligence, could have avoided the operation of the Section 13 statute of repose simply by making timely motions to intervene … or by filing [its] own timely actio[n]." *Id.* at 26a. Petitioner failed to do so, and so "may not circumvent Section 13's statute of repose by invoking *American Pipe*." *Id.* at 4a.[1]

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[1] The Second Circuit also rejected the contention that Federal Rules 15 or 24 permitted petitioner or others to intervene despite Section 13's statute of repose. Pet. App. 21a-27a. Petitioner does not challenge those rulings here. Pet. 8 n.3.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that Section 13's three-year period of repose cannot be tolled.

A. Whether a statutory time limit is subject to judicial tolling in particular circumstances always turns on interpreting the statute itself. Although courts presume that Congress intended to allow some statutory time limits to be subject to various types of judicial adjustment, Congress can always preclude such adjustments in a particular statute.

B. Section 13 itself and *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), establish beyond doubt that Congress intended Section 13's three-year period of repose to be impervious to judicial adjustment. *Lampf* held that Section 13 "is a period of repose" designed specifically "to serve as a cutoff" of claims. *Id.* at 363. As this Court recently reiterated, "[s]tatutes of repose" differ from ordinary limitations periods, and reflect "a legislative 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.'" *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation omitted). Consequently, "'period[s] of repose,'" including Section 13, are "'inconsistent with tolling'" or other equitable adjustment. *Ibid.* (quoting *Lampf*, 501 U.S. at 363). Much of petitioner's case proceeds from the premise that there is no difference between a statute of limitations and a statute of repose, and that both types of time bar are equally subject to equitable tolling. *Lampf* and *CTS* refute that premise.

II. Petitioner contends that Section 13 and *Lampf* preclude only *equitable* tolling, whereas *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), applied a novel, "statutory" tolling doctrine that neither Congress nor this Court foreclosed in this context. Petitioner's attempt to recharacterize *American Pipe* is unavailing.

A. Whether the Judiciary may extend a statutory time bar, for equitable or other reasons, is always a statutory inquiry. In every case, the critical question is whether Congress intended to permit a time bar to be suspended in a particular circumstance. That is exactly the analysis that *American Pipe* undertook. This Court has repeatedly recognized that *American Pipe* applied *equitable* tolling. Petitioner's suggestion that *American Pipe* derived from Rule 23 an automatic abrogation of every state and federal time limit, however expressed, cannot be reconciled with this Court's precedents. On the contrary, this Court has repeatedly admonished that unwritten exceptions to statutory time limits must be narrowly confined to well-established categories. *See Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013). Petitioner's approach would also effectively prevent Congress and the States from enacting categorical time bars.

B. Even if *American Pipe*'s tolling doctrine derived directly from Rule 23, it could not override Section 13's three-year bar without violating the Rules Enabling Act, 28 U.S.C. § 2072(b), which forbids procedural rules from abridging, enlarging, or modifying substantive rights. As *American Pipe* itself recognized, tolling is unavailable unless "consonant with the legislative scheme." 414 U.S. at 558. Construing Rule 23 to override Section 13's absolute three-year period of repose would transgress both of these limi-

tations. That repose period governs substantive rights of both plaintiffs and defendants, and cannot be overridden by (or through interpretation of) procedural Rule 23.

III. Affirmance is independently warranted because the Wyoming plaintiffs lacked standing to pursue the claims that petitioner seeks to press. Even if petitioner's reading of *American Pipe* were otherwise correct, a class-action complaint may toll claims of absent persons only if the putative class representative has standing to pursue such claims. Petitioner's claims are thus time-barred even if Section 13 could be tolled under *American Pipe*.

ARGUMENT

The claims petitioner seeks to assert under the 1933 Act are subject to Section 13's two-tiered time bar, which requires such claims to be "brought within one year after" the plaintiff should have discovered the alleged misstatement or omission, but "[i]n no event … more than three years" after the offer or sale. 15 U.S.C. § 77m. Petitioner undisputedly waited more than three years after purchasing the securities at issue before moving to intervene. Pet. App. 8a, 37a-38a. Petitioner's claims are therefore time-barred. The statutory barrier cannot be judicially overridden, under *American Pipe* or otherwise, because "[i]n no event" means "[i]n no event." *American Pipe* itself permits the suspension of a limitations period only if it "is consonant with the legislative scheme" (414 U.S. at 558); yet Section 13 flatly precludes *any* judicial extension of its three-year period. *Lampf*, 501 U.S. at 363; *cf. CTS*, 134 S. Ct. at 2182-83.

I. SECTION 13'S THREE-YEAR REPOSE PERIOD CANNOT BE JUDICIALLY TOLLED

Section 13's text, structure, and purpose and this Court's precedents make clear that Section 13's absolute three-year period of repose cannot be tolled, under *American Pipe* or otherwise. Because judicial adjustment of statutory time bars always depends on statutory intent, Congress may prohibit courts from excusing parties from a particular time limit. Congress did just that in Section 13, as this Court held in *Lampf*, 501 U.S. at 363. The statute's two-tiered approach—which pairs a flexible limitations period including a built-in discovery rule with a categorical cutoff—leaves no room for judge-made exceptions to the outer limit. Permitting claims to be brought after that outer bar expires would thwart its core purpose of providing defendants with absolute repose.

A. Courts May Toll Statutory Time Limits Only Where Doing So Is Consistent With The Statute

1. Whether a statutory time limit is subject to tolling, suspension, or other judicial adjustment is at bottom a question of statutory interpretation. When a court "pauses the running of, or 'tolls,'" a time limit in a federal statute, it "effectively extends an otherwise discrete limitations period set by Congress." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014). Unlike their forebears in England, however, Article III courts have no power "to disregard legislative intent in order to provide equitable relief in a particular situation." *Boehm* v. *Comm'r*, 326 U.S. 287, 295 (1945); *see also Elec. Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14 (1939); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 27-105 (2001). Rather, federal courts can

excuse a litigant from a statutory time limit only if the statute *itself*, properly construed, permits such adjustment. *See United States* v. *Beggerly*, 524 U.S. 38, 48 (1998). Whether "tolling" of a particular time limit "is available" thus "is fundamentally a question of statutory intent." *Lozano*, 134 S. Ct. at 1232.

To be sure, this Court "presume[s] that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute." *Lozano*, 134 S. Ct. at 1232; *accord Young* v. *United States*, 535 U.S. 43, 49-50 (2002). But that presumption itself is predicated on an understanding regarding Congress's intent. "Congress 'legislates against a background of common-law adjudicatory principles,'" and thus "is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law." *Lozano*, 134 S. Ct. at 1232 (citation omitted).

The "presumption" that statutory time limits can be tolled therefore "seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of instances." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008); *see also Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 (2014) ("[t]olling … is, in effect, a rule of interpretation tied to" a "statute of limitations"). Indeed, tolling of an ordinary limitations period is usually consistent with Congress's aims: Because the "main thrust" of a limitations period "is to encourage the plaintiff to 'pursu[e] his rights diligently,'" enforcing that time bar "when an 'extraordinary circumstance prevents him from bringing a timely action' … [would] not further the statute's purpose." *CTS*, 134 S. Ct. at 2183 (cita-

tion omitted). Background tolling principles are consequently "*read into*" statutory time bars, on the assumption that Congress intended to incorporate them. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (emphasis added); *see also Exploration Co.* v. *United States*, 247 U.S. 435, 449 (1918).

2. Because the presumption that statutory time bars may be tolled rests on congressional intent, it is rebutted if the statute indicates that Congress wanted to preclude judicial adjustment. *See Beggerly*, 524 U.S. at 48; *Young*, 535 U.S. at 49-50. Congress is always free to enact "[s]pecific statutory language" or a particular structure "demonstrating [its] intent" that tolling should not apply. *John R. Sand*, 552 U.S. at 137-38.

Consequently, if "[e]quitable tolling … is inconsistent with the text of the relevant statute," it is "not permissible." *Beggerly*, 524 U.S. at 48; *see*, *e.g.*, *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (statute "se[t] forth its time limitations in unusually emphatic form"); *Kendall* v. *United States*, 107 U.S. 123, 124-26 (1883). Nor may courts toll a time bar if the statute's structure or purpose shows that Congress did not intend to allow tolling. *See*, *e.g.*, *Brockamp*, 519 U.S. at 352 (statute's "explicit listing of exceptions" precluded "read[ing]" in "unmentioned, open-ended, 'equitable' exceptions"); *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-29 (2013); *Beggerly*, 524 U.S. at 48-49.

Thus, where tolling of a time bar is incompatible with the statute's text, structure, or purpose, courts have no basis to relieve litigants from the consequences of statutory deadlines. *Cf.* Pet. Br. 3 (tolling appropriate only if "'consonant with the legislative scheme'" (citation omitted)).

B. Tolling Of Section 13's Three-Year Bar Is Irreconcilable With The Statute's Text, Structure, And Purpose

Section 13's three-year bar is absolute and impervious to judicial adjustment. Congress provided that private suits to enforce the 1933 Act may "[i]n no event" be brought more than three years after the offer or sale of the securities at issue. The Judiciary has no warrant to permit claimants to initiate suit after the three-year deadline has passed. As *Lampf* expressly held, Section 13 provides an absolute "period of repose," designed as a "cutoff" of liability that is, by its very nature, "inconsistent with tolling." 501 U.S. at 363.

1. The text, structure, and purpose of Section 13 leave no room for tolling of its three-year repose period.

a. On its face, Section 13 forecloses the possibility of any judicial extension of its three-year period. When determining whether a statute permits the enforcement of a "federal right" after a statutory "period … has run," "[t]he 'ultimate question'" is "whether Congress intended that 'the right shall be enforceable in *any* event after the prescribed time.'" *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 416, 419 (1998) (emphasis added) (citation omitted). Congress unmistakably answered that question as to Section 13's three-year bar: "In *no* event," Congress provided, "shall" actions under Section 11 or 12(a) "be brought" after the three-year window has closed. 15 U.S.C. § 77m (emphasis added). That categorical language eliminates any basis for ignoring, abrogating, extending, or otherwise adjusting the three-year bar. Any "event" that might ordinarily suffice to extend a

limitations period—such as the claimant's incompetence or minority—is not sufficient under Section 13.

Section 13's structure reinforces this reading. Congress adopted a two-tiered time bar containing *both* a one-year period of limitations (with a built-in discovery rule) *and* an outer, three-year limit on private Section 11 and 12(a)(2) suits. The juxtaposition of those two time bars—one flexible and tied to the circumstances of a particular claim, the other inflexible and uniform—reflects a deliberate judgment to allow equitable doctrines to operate within prescribed limits, subject to an absolute cutoff of liability to protect defendants once and for all from stale claims. Indeed, if Section 13's three-year bar were flexible, like the one-year limitations period, the two time bars would be duplicative, rendering one or the other purposeless—a result courts must resist. *See*, *e.g.*, *Milner* v. *Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011).

b. This Court's precedents construing analogous time bars confirm what is plain from Section 13's text and structure. The three-year bar is not an ordinary "statute of limitations," but a distinct type of time bar, commonly known as a "statute of repose," that legislatures impose to achieve particular ends. *CTS*, 134 S. Ct. at 2182-83.

i. Statutes of repose and conventional limitations periods are different statutory devices designed "to attain different purposes and objectives." *CTS*, 134 S. Ct. at 2182. To be sure, "[b]oth types of statute can operate to bar a plaintiff's suit, and in each instance time is the controlling factor." *Ibid.* And the "policies underlying" them "overlap" to a certain extent, as both "'promote justice by preventing surprises through plaintiffs' revival of claims that have

been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* at 2182-83 (citation and brackets omitted). Petitioner and its *amici* err, however, by insisting that the two kinds of time bar are one and the same. *See* Pet. Br. 16, 40-41 & Add. A; Pension Funds Br. 23-24; *cf.* AARP Br. 13-16; Public Citizen Br. 5-8; W.R. Huff Br. 23-24.

As this Court recently emphasized, statutes of repose serve the "distinct," additional purpose of establishing an absolute, "outer limit on the right to bring a civil action"—"'a cutoff'" of liability that is immune to any judicial adjustment. *CTS*, 134 S. Ct. at 2182-83 (citation omitted). Repose periods are "targeted at a different actor"—the defendant—and "effect a legislative judgment that … at some point [the] defendant should be able to put past events behind him." *Id.* at 2183.

Because of their distinct purposes, repose periods operate differently than traditional limitations periods. Unlike statutes of limitations, which typically run from the date a claim accrues, repose periods are "'not related to the accrual of any cause of action,'" but usually run "from the date of the last culpable act or omission of the defendant." *CTS,* 134 S. Ct. at 2182. They thus bar claims regardless of whether the plaintiff's injury has even "'occurred, much less … been discovered.'" *Ibid.* (citation omitted). And repose periods, unlike ordinary limitations periods, are "'inconsistent with tolling,'" "even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* at 2183 (citation omitted).

Indeed, "absolute provision[s] for repose" are often established *in addition* to limitations periods—as in Section 13—to provide a backstop to liability pre-

cisely because of the flexibility inherent in most ordinary statutes of limitations. *Gabelli*, 133 S. Ct. at 1224. For example, private suits under Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, "may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). This "unqualified bar on actions instituted '5 years after such violation' giv[es] defendants total repose after five years," thus "diminish[ing] [the] fear" that its accompanying discovery-based limitations period "will give life to stale claims or subject defendants to liability for acts taken long ago." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1797 (2010) (citation omitted).[2]

Congress often establishes such an absolute cutoff where it seeks not only "to protect a defendant's case-specific interest in timeliness," but also "to achieve a broader system-related goal" that would be frustrated by case-by-case adjustment. *John R. Sand*, 552 U.S. at 133. Without a bright-line barrier to additional adjustment, there is always a risk that the "equity-minded judge [will] seek for ways of relief in individual cases," even when doing so "would seriously undermine" the statutory scheme. *Cf. Rothensies* v. *Elec. Storage Battery Co.*, 329 U.S. 296, 302 (1946). By placing an outer limit on liability, a statute of repose allows Congress to displace the background presumption of tolling in particular contexts,

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[2] The United States has consistently taken this same view of Section 13 and parallel provisions in the securities laws. *See*, *e.g.*, U.S. *Amicus* Br. 26, *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012) (No. 10-1261); SEC *Amicus* Br. 28, *Lampf*, 501 U.S. 350 (No. 90-333).

to prevent its systemic objectives from being thwarted. For instance, "statutes applying a discovery rule in the context of Government [civil-penalty] suits often couple that rule with an absolute provision for repose" so that defendants are not left "exposed to Government enforcement action" for an "uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223-24.

Other repose periods reflect a legislative judgment that uncertainty over rights and obligations created by judicial tolling would harm the broader economy. In *Beach*, for example, this Court held that the three-year bar on actions under the Truth in Lending Act to rescind loan agreements, 15 U.S.C. § 1635(f), "permits no federal right to rescind, defensively or otherwise, after the" three-year bar expires. 523 U.S. at 419. This absolute bar "makes perfectly good sense," as "Congress may well have chosen to circumscribe [the] risk" that "a statutory right of rescission could cloud a bank's title on foreclosure." *Id.* at 418-19; *see also Brockamp*, 519 U.S. at 352-53.

Congress thus establishes categorical periods of repose to ensure that courts do not upend its judgment as to when permitting new claims would undermine its determination of the overriding public interest. And when Congress does so, courts must faithfully give effect to that legislative determination. Indeed, where Congress imposes both a repose period and a limitations period, to operate in tandem, courts must presume that Congress understands the difference between the two (*see Russello* v. *United States*, 464 U.S. 16, 23 (1983)) and concluded that both were necessary.

That is precisely what Congress did in Section 13. It established, in addition to a one-year limita-

tions period, a repose period that categorically bars claims after three years—and which, like other repose periods, runs "from the date of the last culpable act or omission of the defendant" (*CTS*, 134 S. Ct. at 2182), *i.e.*, the offer or sale of the security, not from the accrual of the plaintiff's claim. Extension of that cutoff would be inherently inconsistent with congressional intent manifested in its text ("[i]n no event") and structure.

ii. Petitioner derides the distinction between statutes of "repose" and "limitations" as "artificial" and "formalistic." Pet. Br. 40-41. This Court, however, recently emphasized this very distinction. *CTS*, 134 S. Ct. at 2182-83. *CTS* eviscerates petitioner's attempt to conflate statutes of repose and statutes of limitations, and confirms the correctness of the decision below (Pet. App. 13a-21a).

Petitioner similarly contends that the distinction is insubstantial because courts have sometimes used the terms "repose" and "limitations" interchangeably. Pet. Br. 16, 40-41 & Add. A. That did not stop this Court from recognizing the distinction between the two types of time bars. *See CTS*, 134 S. Ct. at 2185-86. In any event, petitioner misperceives the significance of those terms. The phrases "statute of repose" and "statute of limitations" are convenient shorthand descriptors that reflect the distinct operation and function of common ways that legislatures craft time bars to achieve different ends. *See id.* at 2182-83. What ultimately matters is not the label attached to a time bar, but what it does and why. And it is the text, operation, and purpose of Section 13's three-year bar that led the court of appeals to describe that bar as a "'period of repose.'" Pet. App. 15a-16a (quoting *Lampf*, 501 U.S. at 363).

c. Section 13's history confirms that Congress deliberately designed the three-year bar to operate in precisely this way—as a "'period of repose'" that "'is inconsistent with tolling'" (*CTS*, 134 S. Ct. at 2182-83 (brackets and citation omitted)). "The legislative history in 1934 makes it pellucid that Congress included statutes of repose," and shortened them, "because of fear that lingering liabilities would disrupt normal business and facilitate false claims." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds by Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990).

Consistent with those objectives, "Congress did not intend equitable tolling to apply" to these newly shortened two-tier time bars. Comm. on Fed. Regulation of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 655 (1986). Even though tolling had by then become an "established doctrine of this court" (*Exploration Co.*, 247 U.S. at 449), throughout the "extensive debate over the proposed amendments" to the time limits in Section 13 and parallel provisions, "there was no mention of 'tolling.'" Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (Mar. 1985). Instead, "all the participants in the debate agreed that the limitation period was an absolute period." *Ibid.*; *see*, *e.g.*, 78 Cong. Rec. 8201 (1934); *see also Norris*, 818 F.2d at 1332.

The outer bar's inflexible nature was not an afterthought, but part and parcel of the legislative compromise embodied in Section 13. In Congress's judgment, the combination of a limitations period with a built-in discovery rule *plus* a repose period struck an appropriate balance: It protected "the

right of a man who might not discover the falsity of a statement" within a year—since fraud "may take years to discover"—but also enabled "the person who made the misrepresentation … to feel safe at some reasonable time that he will not be disturbed." 78 Cong. Rec. 8198, 8200-01. Congress unambiguously insisted on a "final limitation" after which "a suit may not be brought at all." *Id.* at 8198.

2. In *Lampf*, 501 U.S. 350, this Court unequivocally held that tolling of Section 13's three-year bar—for any reason—is entirely foreclosed by the statute's language, structure, and purpose.

a. After concluding that the appropriate time limitation for private suits under Section 10(b) and Rule 10b-5 was the two-tiered, one-and-three-year time bar reflected in Section 13 and other provisions of the federal securities laws (501 U.S. at 358-62), *Lampf* announced in clarion terms that "[t]he 3-year limit is a period of repose *inconsistent with tolling*." *Id.* at 363 (emphasis added). "Notwithstanding th[e] venerable principle" that statutory time bars are presumptively subject to tolling, *Lampf* held, "the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure" of Section 13. *Ibid.* The whole "purpose of the 3-year limitation," imposed in addition to the one-year bar, "is clearly to serve as a cutoff." *Ibid.* Indeed, "'[t]he inclusion of the three-year period can have no significance in this context *other* than to impose an outside limit.'" *Ibid.* (emphasis added) (citations omitted).

Nothing since *Lampf* casts any doubt on its construction of Section 13's three-year time bar as categorically "inconsistent" with "tolling principles." 501 U.S. at 363. This Court has consistently followed *Lampf*'s holding that Section 13's "'period of

repose is inconsistent with tolling.'" *See*, *e.g.*, *CTS*, 134 S. Ct. at 2183 (brackets and citation omitted).

Congress, too, has embraced *Lampf*'s interpretation of Section 13 and parallel time bars. A decade after *Lampf*, Congress enacted an express time-bar provision for private Section 10(b) claims, again adopting a similar two-tiered structure, only with slightly longer time limits—barring such claims "2 years after the discovery of the facts constituting the violation" *or* "5 years after such violation." 28 U.S.C. § 1658(b). Congress thereby ratified *Lampf*'s understanding of the essential nature of the outer limits established in Section 13 and parallel provisions governing other private securities suits. Indeed, this Court has since interpreted Section 1658(b)'s "unqualified bar" as "giving defendants total repose after five years" based on *Lampf*'s holding that a "comparable bar"—Section 13's three-year repose period—was "not subject to equitable tolling." *Merck*, 130 S. Ct. at 1797.

Lampf's holding thus squarely answers the question presented: Petitioner seeks tolling of Section 13's three-year bar, but that "period of repose" is "inconsistent with tolling." 501 U.S. at 363. That holding remains good law. *See CTS*, 134 S. Ct. at 2182-83.

b. Because *Lampf* by its own terms requires affirmance, petitioner advances an implausibly crabbed reading of it that would effectively overrule the Court's relevant holding. Pet. Br. 33-34. Petitioner contends that *Lampf* should be limited to the narrow conclusion that Congress's express inclusion of a discovery rule in the one-year limitations period precludes extending the three-year bar for reasons of

fraudulent concealment, but should not be understood as addressing tolling generally. *Id.* at 34.

Lampf itself refutes petitioner's novel reading of the decision as confined to a particular type of tolling in a particular circumstance. The Court framed the question broadly as whether the time bar applicable to Section 10(b) claims "must be subject to the doctrine of equitable tolling." 501 U.S. at 363. *Lampf*'s answer was equally broad: It "h[e]ld that tolling principles do not apply" to Section 13's three-year bar, and that "[t]he 3-year limit is a period of repose inconsistent with tolling." *Ibid.* *CTS* confirms this reading. Under *Lampf*, *CTS* explained, "statutes of repose" are not "subject to equitable tolling, a doctrine that … tolls … a statute of limitations when a litigant has pursued his rights diligently *but some extraordinary circumstance prevents him from bringing a timely action.*" 134 S. Ct. at 2183 (emphasis added) (internal quotation marks omitted); *cf. Petrella*, 134 S. Ct. at 1984 (Breyer, J., dissenting). *Lampf* thus categorically forecloses tolling of Section 13's three-year bar, and both *Lampf* and *CTS* squarely refute petitioner's effort to narrow that holding.

Petitioner argues (at 34) that *Lampf* rejected application of a discovery rule to the three-year bar because Congress expressly incorporated a discovery rule into the one-year bar but not into the three-year outer limit. That is incorrect. While the Court noted that Congress's inclusion of a discovery rule for Section 13's one-year period "ma[de] tolling" of *that* period "unnecessary" (501 U.S. at 363), *Lampf*'s stated reasons for rejecting "equitable tolling" of the *three*-year bar swept far more broadly, and apply to *all* forms of judicial adjustment. As *Lampf* explained,

"the purpose of the 3-year limitation is clearly to serve as a cutoff." *Ibid.* It drew that conclusion from its analysis of the provision's structure and history, which led to "'the inescapable conclusion that Congress did not intend equitable tolling to apply in actions under the securities laws.'" *Ibid.* (citation omitted).

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Far from leaving room for tolling principles to operate, Congress expressly foreclosed judicial adjustment of Section 13's three-year bar for any reason, as *Lampf* makes emphatically clear. But even if *Lampf* had not already settled the question, this Court has neither the authority nor the incentive to override the statute, as we explain next.

II. *AMERICAN PIPE* DOES NOT AND CANNOT ABROGATE SECTION 13'S REPOSE PERIOD

Notwithstanding Congress's directive that certain 1933 Act claims may "[i]n no event" be brought more than three years after the securities at issue are offered or sold, and *Lampf*'s conclusion that Section 13 means what it says, petitioner contends that there *is* an "event"—the filing of a class-action complaint—that indefinitely extends the time for filing claims under the 1933 Act. According to petitioner, "straightforward application" of the tolling doctrine announced in *American Pipe* permits plaintiffs to evade—and authorizes courts to ignore—Section 13's absolute repose period whenever a complaint is filed on behalf of a putative class that would encompass the claims at issue. Pet. Br. 14, 28-47.

Petitioner's submission is flawed on all levels. *American Pipe*'s "tolling rule" (414 U.S. at 555) is a type of *equitable* tolling that Section 13 and *Lampf*

flatly forbid with respect to the absolute repose period. Petitioner's contrary theory that *American Pipe* invented a novel "statutory" tolling doctrine permitting abrogation of statutory deadlines—based solely on Federal Rule of Civil Procedure 23—is foreclosed by this Court's precedents. But even if petitioner's characterization of *American Pipe* were correct, both the Rules Enabling Act and *American Pipe* itself would foreclose applying that doctrine to supersede Section 13's absolute three-year repose period.

Far from a "straightforward application" of *American Pipe*, petitioner thus seeks a radical expansion of it. It is petitioner's unprecedented and untested view, not the court of appeals' holding, that would contravene the clear pronouncements of Congress and this Court and "effect a sea change in class action litigation" (LACERA Br. 9), in the securities context and beyond. As this Court has made clear, only Congress, not this Court, may authorize a departure from settled law as it has always been applied in securities cases. *See*, *e.g.*, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014); *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

A. As A Species Of Equitable Tolling, *American Pipe* Cannot Override Section 13's Repose Period

Petitioner has previously conceded that Section 13's three-year repose period is not subject to equitable tolling. *See* Pet. 25; Cert. Reply 7-8; Pet. C.A. Br. 16, 25, 45, 49. And this Court has expressly held that Section 13's three-year bar is "inconsistent with tolling," full stop. *Lampf*, 501 U.S. at 363. Petitioner's invocation of *American Pipe*'s tolling rule—a type

of equitable tolling—to suspend that three-year bar is therefore squarely foreclosed.

Seeking to avoid its concession and this Court's precedent, petitioner contends that *American Pipe*'s tolling doctrine "derives from *statutory*, not equitable, authority." Pet. Br. 35 (emphasis added). The Tenth Circuit adopted a similar view in *Joseph* v. *Wiles*, 223 F.3d 1155 (10th Cir. 2000), describing *American Pipe* as "legal tolling," to which it deemed *Lampf* "not relevant." *Id.* at 1166-67. These characterizations are flatly contradicted by this Court's decisions, including *American Pipe* itself. Adopting petitioner's theory would upend this Court's tolling jurisprudence and undermine Congress's ability to craft time limits that achieve its objectives.

1. Petitioner's argument is premised on a dichotomy between equitable tolling and so-called "statutory" tolling. Pet. Br. 35; *cf.* LACERA Br. 23-26. This Court, however, has never embraced that empty distinction. In *Simmonds*, it observed that some *lower* courts had described *American Pipe* as applying "legal tolling," but *this* Court expressed no view on that characterization because "[t]he label attached" to the tolling rule at hand "d[id] not matter." 132 S. Ct. at 1419 n.6.

Indeed, petitioner's distinction is irreconcilable with this Court's precedents. As this Court has made clear, whether statutory time limits can be adjusted—for equitable reasons or otherwise—is *always* a statutory inquiry. *See*, *e.g.*, *Petrella*, 134 S. Ct. at 1975; *Lozano*, 134 S. Ct. at 1232; *see also supra* pp. 13-15. When courts conclude that a particular time bar is subject to traditional equitable tolling, they are not altering or overriding the time bar, but *interpreting* it to divine the "statutory in-

tent," *i.e.*, whether Congress intended to foreclose tolling principles that otherwise would apply. *Lozano*, 134 S. Ct. at 1232.

To be sure, Congress sometimes incorporates tolling doctrines in statutory limitations provisions. For example, Section 13's one-year bar and similar provisions of the securities laws provide an express discovery rule (*see* 15 U.S.C. § 77m; *see also Merck*, 130 S. Ct. at 1793-96), which ordinarily is a species of equitable tolling. *See*, *e.g.*, *Holmberg*, 327 U.S. at 397; *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348 (1875). But whether that explicit adjustment of the time bar can be considered "statutory" (or "legal") tolling makes no difference: Congress may choose to authorize tolling explicitly or implicitly, but this Court's inquiry remains one of interpreting the particular time bar.

2. *American Pipe* itself undertook precisely this type of statute-specific inquiry, which this Court has *always* required. The Court's decision addressed whether a *particular* statutory time bar—*i.e.*, the Clayton Act's four-year limitations period that runs from the "accru[al]" of a claim, 15 U.S.C. § 15b, and is suspended during the pendency of certain government suits, *id.* § 16(b) (1970), *recodified as amended at* 15 U.S.C. § 16(i)—was tolled during the pendency of a putative class action. *See* 414 U.S. at 552-61.

Petitioner disagrees, contending (at 17-21, 35-36) that *American Pipe* did not apply equitable-tolling principles in construing the Clayton Act, but rather distilled a universally applicable tolling doctrine from Rule 23 itself. That view cannot be reconciled with *American Pipe*, Rule 23, or this Court's later cases.

a. *American Pipe*'s conclusion that the Clayton Act's limitations period could be suspended rested on an analysis of that specific statute's text and purposes, construed in light of other federal policies. *See* 414 U.S. at 552-61. The Court reasoned that the limitations period could be tolled because rejecting the claims as untimely "would not in this circumstance promote the purposes of the statute of limitations" established by the Clayton Act. *Id.* at 555. That limitations period's core function, the Court explained, was to provide notice to antitrust defendants of the claims they would face. *See id.* at 554-55. But in the circumstances before the Court, the "defendants ha[d] the essential information necessary to determine both the subject matter and size of the prospective litigation." *Id.* at 555. Allowing the claims to proceed, moreover, would further federal policies, including those reflected in Rule 23. *See id.* at 552-54.

Unlike in Section 13, moreover, in the Clayton Act Congress had made clear that the limitations period was not absolute, but could be "suspended" by at least one event: the pendency of a government suit concerning the same subject matter. 15 U.S.C. § 16(i). Indeed, the legislative history examined by the Court indicated that the time bar at issue was "'simply a procedural change … with the thought of setting up a uniform statute of limitations'" that "'in no way affect[ed] the substantive rights of individual litigants.'" 414 U.S. at 558 n.29 (citation omitted). The Court thus had little difficulty concluding that suspending the limitations period during the pendency of a class action was consonant with Congress's intent in adding a four-year limitations period to the Clayton Act. *See id.* at 554-56, 558 n.29, 561.

b. *American Pipe* did not and could not derive a universal tolling principle from Rule 23. Rule 23 prescribes the circumstances in which "[a] class action may be *maintained*," and when putative class members "*may sue or be sued* as representative parties." Fed. R. Civ. P. 23(a), (b) (emphases added); *see Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). It says nothing regarding tolling of time limits applicable to the class action itself, let alone whether and when the pendency of a putative but never certified class action affects statutory time limits for commencing any *other* suits. *Cf. Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 750-71 (1980) (rejecting argument that Federal Rule 3 governed tolling of state limitations period because "[t]here is no indication that the Rule was intended to toll a state statute of limitations").

Moreover, as the *American Pipe* Court recognized, the Advisory Committee that proposed the first modern version of Rule 23 in 1966 *disclaimed* any intention to adopt an across-the-board tolling rule. *See* 414 U.S. at 554 n.24. The Advisory Committee explained that when a court denies class certification, putative class members may be able to intervene, but "whether the intervenors in the nonclass action shall be permitted to claim … the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] *to be decided by reference to the laws governing … limitations as they apply in particular contexts*." Fed. R. Civ. P. 23 advisory committee's note (1966) (emphasis added). *American Pipe*, which quoted this very language (414 U.S. at 554 n.24), could not have concluded that the Rule's authors intended to adopt *sub silentio* a categorical tolling rule applicable to every federal

and state time bar. Yet that is what petitioner is peddling in this case. *See* Pet. Br. 35-36.

Of course, the *American Pipe* Court considered the policies reflected in Rule 23 in determining that the Clayton Act's limitations period was amenable to suspension during the pendency of a class action. 414 U.S. at 545-56. That was hardly unusual; this Court routinely takes into account federal policies and practical realities in deciding whether a statute is susceptible to judicial adjustment. *See*, *e.g.*, *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 828; *Beggerly*, 524 U.S. at 49; *Brockamp*, 519 U.S. at 352. That the Court considered the practical import of Rule 23 in construing the Clayton Act in the context of a class action hardly transforms its holding that tolling that particular time bar was appropriate into a freestanding interpretation of Rule 23 as a statutory mandate applicable to every statutory time limit that can be litigated in federal court.

c. This Court's later decisions confirm that *American Pipe* did not announce a one-size-fits-all exception to statutory limitations periods, but rather applied ordinary equitable-tolling analysis to the specific statute at issue.

In *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983), the Court squarely rejected the view that *American Pipe* announced a general tolling doctrine derived from Rule 23 that applies categorically to all time bars. *See id.* at 656-61. The petitioners in *Chardon* contended that *American Pipe* "established a federal rule of decision" prescribing a uniform tolling doctrine, under which the limitations period is merely *suspended* while a putative class action is pending, and does not restart when the class action ends. *Id.* at 656. *Chardon* repudiated that view of *American*

Pipe, which "rea[d] more into … *American Pipe* than the Court actually decided." *Ibid*. "In *American Pipe*," *Chardon* explained, a specific "federal law"—*i.e.*, the Clayton Act's four-year bar—"defined the basic limitations period," and "federal procedural policies supported the tolling of the statute during the pendency of the class action." *Id.* at 660-61. And "a particular federal statute"—the Clayton Act's provision suspending the limitations period pending a government suit—"provided the basis for deciding" what "'precise effect the commencement of the class action had on the relevant limitation period.'" *Id.* at 659, 661. Tellingly, the *dissenters* in *Chardon* would have read *American Pipe* more broadly, as establishing a uniform tolling doctrine grounded directly in Rule 23. *See id.* at 663-64 (Rehnquist, J., dissenting). But that view did not prevail.

Subsequent cases confirm *Chardon*'s understanding that *American Pipe* applied ordinary equitable-tolling analysis to the specific statute before the Court. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), in determining whether equitable tolling was appropriate on the facts before it, the Court "examin[ed]" *American Pipe* and other "cases in which [it] ha[d] applied the equitable tolling doctrine." *Id.* at 96. As petitioner concedes (at 36 n.13), *Irwin* specifically classified *American Pipe* as involving the species of "equitable tolling" applicable "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." 498 U.S. at 96. Tolling based on a timely but "defective pleading" (*ibid.*) was neither novel nor "statutory." *See*, *e.g.*, *Burnett* v. *N.Y. Cent. R.R. Co.*, 380 U.S. 424, 425-26 (1965); *Herb* v. *Pitcairn*, 325 U.S. 77, 79 (1945). As *Irwin* explained, *American Pipe* simply applied that principle, treating

the "plaintiff's timely filing of a defective class action" as "toll[ing] the limitations period as to the individual claims of purported class members." 498 U.S. at 96 n.3. Contrasting *American Pipe* and other decisions with the case at hand, *Irwin* held that equitable tolling was unavailable. *See id.* at 96.

Likewise, in *Young*, 535 U.S. 43, the Court again offered *American Pipe* as authority for the "hornbook" principle "that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute." *Id.* at 49 (internal quotation marks and citation omitted). *American Pipe* tolling, in other words—like other equitable doctrines—is presumptively applicable to a statute of limitations. And, like other traditional grounds for tolling (such as a plaintiff's disability or minority), *American Pipe* simply reflects this Court's determination that, where Congress has not imposed an absolute repose period, but has left room for equitable principles to operate, the balance of equitable considerations in a particular category of cases—proposed class actions—generally weighs in favor of tolling. Where Congress *has* foreclosed judicial adjustment, however, such tolling is not permissible.

Petitioner's approach is flatly inconsistent with *Irwin* and *Young*, which is why it tries to dismiss these passages, incorrectly, as "dicta." Pet. Br. 36 n.13. *Irwin*, for example, cited *American Pipe* as precedent for the standard applicable to one species of "equitable tolling," and then held such tolling unavailable because, on the facts at hand, that standard was not satisfied. *See* 498 U.S. at 96 & n.3. Yet petitioner unabashedly argues that *Irwin* and *Young* were wrong to classify *American Pipe* as involving equitable tolling, because it "lacks the traditional

characteristics of equitable tolling." Pet. Br. 37-38. But it is this Court's characterization of its precedents, not petitioner's, that counts.

d. Petitioner offers various other decisions of this Court as evidence that *American Pipe*'s doctrine is now a "settled principle of federal civil procedure." Pet. Br. 22 (capitalization omitted); *see id.* at 22-28. But none shows that *American Pipe* established a novel, free-floating doctrine automatically applicable to every time bar. By petitioner's own description, most simply took for granted the continuing validity of *American Pipe*'s holding. *See id.* at 22-23, 27-28 (citing *Simmonds*, 132 S. Ct. 1414, *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011), *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002), *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974)). They prove nothing about *American Pipe*'s basis or breadth.

Petitioner's assertion (at 26-27) that neither Congress nor this Court has abrogated *American Pipe* is irrelevant for the same reason. The court below assumed *American Pipe*'s continuing validity (Pet. App. 9a-20a), as do respondents for present purposes.

Petitioner cites *Chardon* and *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983)—in which the Court upheld application of *American Pipe* tolling in the context of other statutes—as proof that its tolling rule is universal. Pet. Br. 23-25. But *Chardon* emphatically rejected the broad reading of *American Pipe* that petitioner now espouses. *See* 462 U.S. at 656-61. Moreover, that *American Pipe*'s doctrine has been applied in the context of certain other statutes hardly implies that it rests on Rule 23 and applies globally to *every* time bar under the sun. In each

case, the Court has analyzed whether tolling is "consonant with the legislative scheme" (414 U.S. at 558) at issue—whether Title VII (*see Crown, Cork*, 462 U.S. at 349-54 & n.3), Section 1983 (*see Chardon*, 462 U.S. 656-61), or any other. That analysis would have been unnecessary if Rule 23 dictated a universal tolling rule.

This Court's precedents thus demonstrate that *American Pipe* applied equitable tolling, and is therefore inapplicable to Section 13's repose period under *Lampf* and *CTS*. That *Lampf* did not "mention" *American Pipe* by name (*Joseph*, 223 F.3d at 1167) is irrelevant. *Lampf*'s categorical holding, since reiterated by *CTS*, 134 S. Ct. at 2183, that Section 13's repose period is immune to "equitable tolling" (501 U.S. at 363) is dispositive.

3. Petitioner's revisionist reading of *American Pipe* as adopting a theretofore-unheard-of "statutory" tolling doctrine also is contrary to this Court's repeated admonition that new, unwritten exceptions to statutory time bars are disfavored, and would make it far more difficult—if not impossible—for Congress to impose inflexible time bars in the future.

The Court has long held that "the cases in which 'a statute of limitation may be suspended by causes not mentioned in the statute itself … are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.'" *Gabelli*, 133 S. Ct. at 1224 (omission in original) (quoting *Amy* v. *Watertown (No. 2)*, 130 U.S. 320, 324 (1889)). The Court accordingly has confined judicial tolling for reasons not explicitly stated in a statute to a discrete set of well-established circumstances that Congress can fairly be presumed to have incorporated—such as

"when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action" (*Lozano*, 134 S. Ct. at 1231-32), or "where a defendant's deceptive conduct" precluded a plaintiff "from even *knowing* that he or she has been defrauded" (*Merck*, 130 S. Ct. at 1793).

Petitioner's unbounded theory throws such caution to the wind. Reading *American Pipe*, as petitioner proposes, as divining a novel tolling doctrine from the penumbra of a procedural rule that says nothing about time limits is the antithesis of the prudence and circumspection that the Court has consistently extolled.

Worse, were the Court to hold (as petitioner urges) that not even Section 13's categorical language can overcome the unprecedented tolling principle of petitioner's imagining (Pet. Br. 29), it is unclear whether and how Congress (or the States) could foreclose such implied exceptions in the future. Section 13's text is pellucid, barring claims without any exception once the three-year window has closed, providing explicitly that "[i]n no event" may that window be reopened. 15 U.S.C. § 77m. In the 1930s, Congress could not have enumerated and rejected by name a class-action tolling doctrine long before the appearance of modern class actions. But Congress could, and did, specify that *nothing* can justify permitting new claims once the period of repose has run.

If Section 13's text were insufficient to preclude courts from tinkering with the congressional determination as to the appropriate window within which suit must be commenced, then it seems unlikely that *any* statutory formula could prevent future judicial innovations from undermining time bars crafted precisely to provide litigants with certainty and predict-

ability. Indeed, although petitioner insists (at 41) that "Congress has the power to enact a statutory time-for-suit provision" that *American Pipe* could not override, it never identifies how (in petitioner's view) Congress could do so. As a practical matter, petitioner's tolling rule appears to trump every federal (and state) statutory time limit.

That would turn this Court's tolling doctrine upside-down: In lieu of more than a century of precedent recognizing that the rigidity of time bars is a matter of statutory construction, petitioner would substitute a new paradigm in which only courts could determine definitively whether an action is timely. On petitioner's view, even when Congress speaks with crystal clarity, it is effectively powerless to prevent courts from inventing new exceptions that override absolute time limits Congress has established. Our system of separated powers, however, does not admit of such a "Chancellor's foot" veto.

B. Even If *American Pipe* Tolling Were Not A Species Of Equitable Tolling, It Could Not Override Section 13's Absolute Repose Period

Petitioner's contention that *American Pipe* derived a "statutory" (as opposed to equitable) tolling doctrine from Rule 23 is not only wrong, but also futile: The Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear that a procedural rule, as enacted or as interpreted, cannot trump Section 13's absolute period of repose. As *American Pipe* itself recognized, its tolling principle can be applied only where doing so is "consonant with the legislative scheme." 414 U.S. at 558. Construing Rule 23 to override Section 13's categorical "cutoff" of liability (*Lampf*, 501 U.S. at 363) would plainly violate those commands. Peti-

tioner's efforts to square its theory with the Rules Enabling Act and *American Pipe* are meritless.

1. Rule 23 was promulgated by this Court pursuant to the Rules Enabling Act, which gives procedural rules "the force of a federal statute" only if they are "within the power delegated to this [C]ourt" by Congress. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 13 (1941). That delegation comes with a crucial caveat: Such rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). That prohibition also binds courts in construing the rules thus promulgated. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (Section 2072(b) "forbids" courts from "interpreting Rule 23" to abridge, enlarge, or modify substantive rights); *see also Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991). If a statute establishes a substantive right, this Court can neither adopt nor interpret a procedural rule to alter or abridge that right.

American Pipe itself, moreover, made clear that its "tolling rule" applies only where it is compatible with the statutory scheme that establishes the time bar. 414 U.S. at 555, 558-59. The Court described its holding as permitting "courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559. And it deemed the limitations period at issue tolled only *after* determining that, in the case at hand, tolling would be "consistent … with the proper function of the limitations statute." *Id.* at 555. The ultimate question, the Court underscored, is "whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 558. Where the statute precludes tolling, *American Pipe* requires courts to adhere to the statute.

2. These principles foreclose application of *American Pipe* tolling to Section 13's three-year bar. As this Court has held, the three-year bar—imposed in addition to Section 13's one-year limitations period—"'can have no significance … *other* than to impose an outside limit'" on claims. *Lampf*, 501 U.S. at 363 (emphasis added) (citation omitted). Permitting plaintiffs to evade that absolute "outside limit" fundamentally alters parties' substantive rights and severely distorts the statutory scheme. Construing Rule 23 to do so would cause it to rove beyond "'really regulat[ing] procedure'" (*Hanna* v. *Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach*, 312 U.S. at 14))—rendering the Rule, to that extent, invalid.

a. Section 13's three-year period does not, like a typical limitations period, "'merely … bar the *remedy*'" (*Beach*, 523 U.S. at 416 (emphasis added) (citation omitted)) a plaintiff may pursue. Rather, it is a "period of repose," the whole "purpose" of which "is clearly to serve as a cutoff" of claims. *Lampf*, 501 U.S. at 363; *see also id.* at 362 & n.8. As such, the three-year bar directly affects litigants' substantive rights. It "puts an outer limit on the *right* to bring a civil action." *CTS*, 134 S. Ct. at 2182 (emphasis added). And by creating an "absolute … bar on a defendant's temporal liability," it confers on defendants a correlative right to "be free from liability after the legislatively determined period of time." *Id.* at 2183 (omission in original) (internal quotation marks omitted); *see also* Pet. App. 14a.

Rule 23, therefore, cannot be read to excuse a claimant's noncompliance with or preclude a defendant's reliance on Section 13's absolute repose period. Doing so would abridge defendants' rights, by eliminating the right of repose Congress conferred. *See*

Dukes, 131 S. Ct. at 2561. And it would expand plaintiffs' rights, resuscitating claims that Congress has extinguished. *Cf. American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (construing Rule 23 to create entitlement to class arbitration would "likely" violate Rules Enabling Act). Reading Rule 23 to create an exception to Section 13's three-year bar thus would distort the carefully calibrated statutory scheme and thwart Congress's purpose of establishing an unqualified cutoff of claims. That is precisely what the Rules Enabling Act forbids.

b. Petitioner's attempt to square its radical approach with the Rules Enabling Act fails.

i. Petitioner contends (at 38-39) that *American Pipe* itself resolves any Rules Enabling Act challenge to tolling of Section 13's repose period. *American Pipe*, it says, "rejected an argument that the Rules Enabling Act precluded the running of a time limitation characterized as substantive," and therefore any objection to *American Pipe* tolling of other time bars is off-limits. *Id.* at 38; *see also* LACERA Br. 16-23; AARP Br. 5-13. *American Pipe* could hardly have been clearer, however, that its analysis turned on whether the application of judicial tolling was consistent with the statutory scheme before the Court *in that case*. *See* 414 U.S. at 555-56, 558-59. The Court's careful analysis of the specific structure, purpose, and even legislative history of the Clayton Act's time bar (*id.* at 554-56, 558 n.29) would be inexplicable if *American Pipe* concluded categorically that suspension of time bars based on the pendency of a class action is always appropriate.

Petitioner alternatively asserts (at 39) that, even if *American Pipe* does not preclude every Rules Ena-

bling Act challenge to the tolling of time bars, Section 13's repose period is "relevantly indistinguishable" from, and "no more absolute than," the Clayton Act's limitations period that *American Pipe* addressed. *Id.* at 29 n.10. But the Clayton Act's limitations period looks nothing like Section 13's three-year "cutoff." *Lampf*, 501 U.S. at 363. The Clayton Act's four-year limitations period, like typical statutes of limitations (*see CTS*, 134 S. Ct. at 2182), runs from the date the "cause of action accrued." 15 U.S.C. § 15b. Moreover, it is "suspended" during the pendency of a government suit and for one year thereafter. *Id.* § 16(i). Indeed, this Court has indicated—and other courts have held—that the Clayton Act's limitations period is subject to equitable tolling. *See Rotella* v. *Wood*, 528 U.S. 549, 552, 560-61 (2000) (addressing racketeering claims also governed by Clayton Act's limitations period); *see also*, *e.g.*, *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 616 F.2d 394, 396 (9th Cir. 1980). It thus cannot be viewed as "'[a] period of repose,'" which "'is inconsistent with tolling.'" *CTS*, 134 S. Ct. at 2183 (brackets and citation omitted).

Section 13's three-year bar, in contrast, categorically prohibits late claims—making clear that "no event" can justify extending the deadline. Its language and two-step structure, designed specifically to provide an outer, unalterable limit on liability, have no analogue in the Clayton Act's provision. The Rules Enabling Act and *American Pipe* require respecting those substantive differences and forbid evasion of Section 13's absolute repose period.

ii. Petitioner also asserts (at 42) that Section 13's three-year bar does not establish any substantive rights because it does not employ a particular

verbal formula, *i.e.*, it does not refer to a plaintiff's rights as "'expir[ing]'" on a specific date. This Court made clear in *Beach*, however, that what matters is not whether a statute contains magic words, but "whether Congress intended that the right shall be enforceable *in any event* after the prescribed time." 523 U.S. at 416 (emphasis added). Section 13's "*in no event*" language emphatically answers that question, and amply demonstrates Congress's intention not to permit claims covered by Section 13 to proceed in any circumstance once the period expires.

Petitioner rejoins (at 41-42) that Section 13's three-year bar cannot affect substantive rights any more than Section 13's one-year limitations period. There is no "operative textual differenc[e]" between the two time bars, petitioner says, besides "their length and the point at which they begin." *Id.* at 29. That assertion disregards crucial features of Section 13's text and structure, and amounts to a naked attack on *Lampf*, which sharply distinguished the two time bars. 501 U.S. at 363; *see also CTS*, 134 S. Ct. at 2182-83. Section 13's three-year period, unlike its one-year period, is unmistakably categorical, explicitly negating any reason for extending the statutory deadline beyond three years—and runs from the date of the defendant's last culpable act, not the claim's accrual. As *Lampf* held, this outer, three-year bar—imposed in addition to the one-year-after-discovery period—"'can have no significance … other than to impose an outside limit'" on claims. 501 U.S. at 363 (citation omitted). Indeed, under petitioner's view that the two time bars are fungible, Section 13 creates two separate, duplicative statutes of limitations,

with *no* outer limit on liability. To adopt that reading, the Court would have to overrule *Lampf*.[3]

3. Regardless how one characterizes the right of repose conferred by Section 13's three-year bar, suspending that bar for a reason with no foothold in the statute is foreclosed by *American Pipe* because it would not be remotely "consonant with the legislative scheme." *American Pipe*, 414 U.S. at 558. Petitioner's tolling rule flouts Congress's directive that "no event" (15 U.S.C. § 77m) can justify an exception to the absolute three-year time limit, and cannot be reconciled with the statute's structure. *Supra* pp. 16-26. Petitioner's contrary contentions are makeweights.

a. Petitioner asserts (at 30-31) that tolling "does not offend the purposes of" Section 13's repose period because defendants will "ha[ve] already received notice within three years" of the "substance" of the claims for which tolling is sought, and their repose will already have been "disturbed." *Cf. Joseph*, 223 F.3d at 1167-68. But that begs the question before the Court. Petitioner's argument, moreover, erroneously assumes that the sole (or even primary) purpose of Section 13's repose period—and of repose periods generally—is to ensure that defendants have timely notice of the claims they must defend. While repose and limitations periods have somewhat "overlap[ping]" aims, they ultimately serve "different purposes and objectives." *CTS*, 134 S. Ct. at 2182-83.

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[3] Petitioner also points (at 42) to Section 13's title ("Limitation of actions") as proof that it cannot be a repose period. Congress, however, "has used the term 'statute of limitations' when enacting statutes of repose." *CTS*, 134 S. Ct. at 2185.

The three-year repose period not only encourages "'diligent prosecution of known claims'" and protects defendants from unfair "'surprises,'" but it *also* "provide[s] a fresh start" based on a "legislative judgment" that, regardless of the reasons why a claim might not have been timely filed, at the specified time "a defendant should be able to put past events behind him." *CTS*, 134 S. Ct. at 2183 (citations omitted). *That* kind of repose does not exist simply to ensure notice, but "effect[s] a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Ibid.* (citation omitted).

Section 13's three-year bar exists to provide defendants with that type of repose, assuring them that any claims not properly asserted within the statutory window can never be brought, enabling defendants to plan their affairs with certainty. *Supra* pp. 22-23. Its purpose is to "bring to an end [a defendant's] fear, or the fear of his estate, of a suit," by establishing a "final limitation" after which "a suit may not be brought at all." 78 Cong. Rec. at 8198, 8200. Tolling based on a putative class-action complaint is antithetical to that aim and irreconcilable with the congressional design.

b. Petitioner contends (at 34-35) that applying *American Pipe* to Section 13's three-year bar does not nullify the deadline for bringing claims, but merely defines what it means for an action to be "brought." "Rule 23, as interpreted by *American Pipe*," petitioner asserts, means that "the action is 'brought' for all putative members when the class-action complaint is filed, and the statutory time period stops running at that point." *Id.* at 35; *cf. Joseph*, 223 F.3d at 1168. That construction is contradicted by *American Pipe*

itself. The Court did not hold that filing of a class action somehow commences the action for putative class members. Rather, as petitioner elsewhere concedes, the Court held that the class action "*toll[s]*" or "*suspends* the applicable statute of limitations as to all asserted members of the class" (414 U.S. at 554-55 (emphases added); *see also id.* at 552-53, 559, 561) and thus "stops the running of the limitations period" for those persons. Pet. Br. 21. Later cases confirm this understanding. *See Smith*, 131 S. Ct. at 2379-80 n.10; *Young*, 535 U.S. at 49; *Irwin*, 498 U.S. at 96 & n.3; *Chardon*, 462 U.S. at 660-61.

In any event, petitioner's theory makes no sense as an original matter. Doubtless, *a* civil action was "brought" when the putative class action was filed. A "suit is brought when in law it is commenced" (*Goldenberg* v. *Murphy*, 108 U.S. 162, 163 (1883)), and a "civil action is commenced" in federal court "by filing a complaint" (Fed. R. Civ. P. 3). What matters for present purposes, however, is not *when* a suit is brought, but *by whom*. An action is "brought," by definition, only by a *party* to the action. *See United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 932-33 (2009). But, as this Court has held, members of a putative class that is never (or not yet) certified—and who are not named as plaintiffs—are *not* "part[ies]" to the prior suit. *Smith*, 131 S. Ct. at 2379; *see also Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S. Ct. 736, 743 (2014) (construing "'plaintiffs'" to "'include both named and unnamed real parties in interest' … stretches the meaning of 'plaintiff' beyond recognition" (brackets and citation omitted)). Such persons "*would have been* parties had the suit been" certified as a class action. *American Pipe*, 414 U.S. at 554 (emphasis added). But *American Pipe* tolling applies only to claims of plain-

tiffs who do *not* become part of a certified class—either because a class is not certified, or the plaintiff opts out of the class action—and only during the period preceding the court's decision on whether or not the case can proceed as a class action. *See id.* at 552-53.[4]

That is why, once certification is denied (or the class is decertified), individuals who previously benefited from equitable tolling are required "to *file their own suits* or to *intervene* as plaintiffs in the pending action." *Crown, Cork*, 462 U.S. at 354 (emphases added); *see also American Pipe*, 414 U.S. at 552-53; *cf.* Pet. Br. 35. If it were true, as petitioner posits, that putative class members were in fact parties all along, and that actions were "brought" by them from the start, then there would be no need to institute their own actions or to intervene in pending cases—or indeed, for tolling the time bar. Put differently, "[n]onnamed class members are … parties *in the sense* that the filing of an action on behalf of the class *tolls a statute of limitations against them*" (*Devlin*, 536 U.S. at 10 (emphases added)), not in a sense that would make tolling—and the filing of subsequent actions or motions to intervene—entirely unnecessary.

4. Petitioner and its *amici* ultimately suggest that, the Rules Enabling Act aside, *American Pipe* should be extended to Section 13 to avert practical problems. Petitioner asserts that, if *American Pipe* tolling cannot extend Section 13's repose period, putative class members will have no choice but to file

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[4] *American Pipe* tolling also applies only to *individual* claims, as the Court has recognized (*see Smith*, 131 S. Ct. at 2379-80 n.10); it does not authorize the stacking of successive *class* claims.

"'protective'" complaints or motions to intervene in the pending case, undermining the efficiencies Rule 23 creates. Pet. Br. 19 (citation omitted); *see also*, *e.g.*, Professors Br. 3-10; Retired Judges Br. 7-13. Petitioner entirely fails, however, to explain why this would be problematic in the context of securities litigation, and neither petitioner nor its *amici* refute the Second Circuit's observation that petitioner could have avoided this problem by exercising "minimal diligence." Pet. App. 26a.

The very purpose and objective of a repose period is that some claims will be cut off if the claimants do not take timely action. There is no unfairness or injustice to investors such as petitioner in requiring each one who wishes to make sure its rights are protected to bring its own claim or to move to intervene. That is, after all, the way our civil justice system is designed to operate. And given advances in electronic-filing systems, such filings will hardly overwhelm the federal courts. Such filings, indeed, may be affirmatively desirable insofar as they may bring to light differences among class members' claims—including differences in the securities purchased—that will aid the court's determination whether the class action should proceed at all. In all events, even if the purported inefficiencies of protective filings could tip the balance in favor of tolling where Congress has not flatly foreclosed it, they cannot overcome Congress's express prohibition of tolling in Section 13.

Amici pension funds—which "invest hundreds of billions of dollars in the public securities markets"—also express concern that putative class members (themselves included) will have to "engage in ongoing monitoring in each case of the status of class certifi-

cation." Pension Funds Br. 7, 11. But to protect their rights, they need only file suit (or intervene) within the repose period, as many investors in mortgage-backed securities have done. "Monitoring" is needed only if putative class members choose to depend on *others* to protect their interests. Such investors, moreover, already engage in such monitoring—as petitioner did in this case (*cf.* Pet. C.A. Br. 9).

Of course, prospective plaintiffs must make a decision within the repose period whether filing suit or intervening is worthwhile—based on the "strength of their claims, the likelihood of prevailing," and their likely share of a "potential damages recovery." Pension Funds Br. 11. But that is a burden borne by every claimant. And Congress determined in Section 13 that requiring investors to make that decision and act within three years is perfectly appropriate.

Other *amici* relatedly worry that not extending *American Pipe* to override Section 13's repose period would "impair" putative class members' right to opt out of the class. Public Citizen Br. 10-15; *see also* AARP Br. 11-13. That fear, too, is unfounded. Enforcing Section 13 as written does not preclude a putative class member who has preserved its own rights, by filing a complaint or seeking intervention within the repose period, from deciding later to go it alone. Only those who fail to preserve their claims within the repose period—whether because they mistakenly "'assum[e]'" that "'the plaintiff will win and manna will fall on all members of the class'" (*Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982) (citation omitted)), or simply because they make no effort—forfeit the ability to choose, after the repose period has expired, to pursue claims independently. Putative class members who rely on the named

plaintiffs to protect their rights assume the risk that the class action will not effectively vindicate their interests. And those who for other reasons decline timely to assert their own claims have no basis to complain.[5]

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Petitioner's attempt to recast *American Pipe* as deriving a universal, automatic tolling principle from Rule 23 adds nothing to its argument. Even if *American Pipe* tolling flowed directly from a Federal Rule (and it does not), it could not override Section 13's repose period, and so could not revive petitioner's stale claims.

III. PETITIONER'S CLAIMS CANNOT BE RESUSCITATED BECAUSE NO NAMED PLAINTIFF HAD STANDING TO ASSERT THEM

Even if the Court were to agree with petitioner that Section 13's statute of repose is subject to *American Pipe* tolling, the judgment below should be affirmed for the independent reason that the Wyoming plaintiffs lacked standing to pursue the claims that petitioner belatedly sought to assert, and thus the class-action complaint did not toll the time for asserting those claims.

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[5] Under Federal Rule 23(d)(1)(B), a court concerned that absent members of a putative class might not be actively monitoring the action could require an adequate class representative—at its own expense (*see Eisen*, 417 U.S. at 177-79)—to notify putative class members of the impending expiration of the statute of repose and the options available to them, including filing their own complaints or seeking to intervene.

Article III requires every federal-court plaintiff to "demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006). That is equally true in class actions. *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) ("'That a suit may be a class action … adds nothing to the question of standing'" (citation omitted)). A plaintiff who lacks standing to assert a claim himself thus cannot pursue that claim on behalf of putative class members. *See id.* at 357-58 & n.6.

This bedrock requirement of Article III standing empowers a federal court to decide *only* those claims that are the same as, or substantially similar to, the named plaintiff's. *See*, *e.g.*, *Lewis*, 518 U.S. at 357-58 & n.6; *Blum* v. *Yaretsky*, 457 U.S. 991, 1001-02 (1982); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam). In the securities context, that means a single investor may represent a class of investors in the same security, provided that the requirements of Rule 23 are otherwise satisfied. *See generally*, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). Thus, for example, an individual who invested only in the common stock of Company X might have standing to sue on behalf of all persons who invested in that same stock during the relevant time period. But that plaintiff could *not* assert, and a federal court could not decide, claims on behalf of unnamed investors in *other* securities—*e.g.*, the preferred stock of Company X, or the common stock of Company Y, or the debentures of either company—because he lacks standing to assert such claims. *See*, *e.g.*, *Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768-71 (1st Cir. 2011).

For purposes of the *American Pipe* tolling doctrine, the inclusion in a class-action complaint of

claims that the named plaintiff lacks standing to assert—for example, where the plaintiff did not purchase the security at issue—is a nullity. Neither Congress, in crafting a time bar, nor this Court, in approving Rule 23, could plausibly have intended for the filing of a "placeholder" complaint containing claims that no federal court could decide to extend the statutory deadline Congress established for such claims. Even on petitioner's theory that an action is "brought" on behalf of all putative class members by the filing of a class complaint (Pet. Br. 35), an action cannot be deemed "brought" by persons whom the named plaintiff lacked Article III standing to represent. *Cf. Joseph*, 223 F.3d at 1168 (*American Pipe* tolling inapplicable where "no named plaintiffs" in class complaint purchased same securities as putative class members who later sought tolling).

American Pipe itself was careful to note that class certification had *not* been denied "'for lack of standing of the representative.'" 414 U.S. at 553 (citation omitted). The district court in that case had affirmatively "found that the named plaintiffs asserted claims that were 'typical of the claims'" of putative class members. *Id.* at 550 (citation omitted). That fact was crucial to *American Pipe*'s reasoning, and is essential to understanding the scope of its holding.

American Pipe deemed it critical that the putative class complaint provided notice of the claims that defendants would face and the scope of the class asserting them. *See* 414 U.S. at 554-55. If the named plaintiff "is found to be representative of a class," the Court explained, then the class complaint apprises the defendants "not only of the substantive claims … , but also of the number and generic identi-

ties of the potential plaintiffs." *Ibid.*; *cf. Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 467 (1975) (*American Pipe* "depended heavily on the fact that [the prior class complaint] involved exactly the same cause of action subsequently asserted" and so "operated to avoid the evil against which the statute of limitations was designed to protect"). Indeed, petitioner's arguments for extending *American Pipe* tolling to Section 13's repose period depend primarily on the premise that a putative class complaint provides defendants with such notice. *See*, *e.g.*, Pet. Br. 1, 3, 14-15, 19-20, 30-32.

A putative class complaint utterly fails to provide such notice, however—and *American Pipe*'s rationale has no application—where absent class members hold claims that the named plaintiff lacks standing to pursue. A putative class complaint might give notice of the claims that the named plaintiffs could pursue in their own right, but it does not (and cannot) provide notice that some unnamed class member might (or might not) have another claim against the defendant. With respect to claims the named plaintiff lacks standing to assert, a complaint cannot inform the defendant "of the substantive claims" *actually* "being brought against" the defendant, much less the "number and generic identities of the potential plaintiffs." 414 U.S. at 555.

That is the precise situation here. As this case comes to the Court, there is no dispute that the named plaintiffs in the putative class action lacked standing to assert the claims for which petitioner now seeks tolling. Following the consolidation of the suits filed by the Wyoming plaintiffs and Detroit PFRS, only the Wyoming plaintiffs remained as named plaintiffs. Pet. App. 29a-30a; J.A. 217-331.

No one (*including petitioner*) objected to the Wyoming plaintiffs' proceeding alone as the named plaintiffs. Pet. App. 30a. The district court subsequently found, however, that the Wyoming plaintiffs lacked standing over (*inter alia*) the claims for which petitioner now seeks tolling. *Id.* at 58a.

As to petitioner's claims, that determination that the Wyoming plaintiffs lacked standing is undisputed, even under the Second Circuit's erroneous decision in *NECA-IBEW Health & Welfare Fund* v. *Goldman, Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012). *NECA-IBEW* allows a plaintiff in a putative class action to assert not only claims for which he himself has Article III standing, but *also* any claims for which he lacks Article III standing but has so-called "class standing"—*i.e.*, claims that "implicat[e] the same" or even a "sufficiently similar set of concerns" as his own. *Id.* at 162, 164.[6]

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[6] *NECA-IBEW* "create[d] a circuit split with the First Circuit's opinion in [*Nomura*, 632 F.3d 762]" (*N.J. Carpenters Health Fund* v. *Residential Capital, LLC*, 288 F.R.D. 290, 295 (S.D.N.Y. 2013), *reconsideration granted in part on other grounds*, 2013 WL 6669966 (S.D.N.Y. Dec. 18, 2013)), and "has thrown the jurisprudence in this area into disarray." *FDIC* v. *Countrywide Fin. Corp.*, 2012 WL 5900973, at *10 (C.D. Cal. Nov. 21, 2012). *NECA-IBEW*'s "'class standing'" holding rests on a "misguided analysis of [this] Court's" precedent (*ibid.*) and drastically expanded the scope of securities (and other) class actions and defendants' potential exposure. *See*, *e.g.*, *Plumbers & Pipefitters Nat'l Pension Fund* v. *Burns*, 967 F. Supp. 2d 1143, 1164 (N.D. Ohio 2013) (holding, based on *NECA-IBEW*, that named plaintiffs who purchased defendants' *stock* had "'class standing'" to assert claims of holders of defendants' *bonds*).

Even applying that too-lenient standard, both courts below held that the Wyoming plaintiffs lacked standing to assert petitioner's claims. J.A. 541-45; Pet. App. 22a-23a n.19 ("[O]ur decision today implicates only those claims and defendants as to which [the Wyoming plaintiffs] would lack standing under *NECA-IBEW*"). The *only* claims for which petitioner now seeks *American Pipe* tolling in this Court, therefore, are claims over which the Wyoming plaintiffs lacked standing even under the Second Circuit's overbroad approach.

The Wyoming plaintiffs' amended consolidated complaint consequently failed to provide respondents with notice of the claims that petitioner now seeks to assert. The operative complaint contains allegations regarding certificates from 106 different offerings—all separate, distinct securities. Pet. App. 51a. Yet the Wyoming plaintiffs had only "purchased Certificates in *fifteen*." *Ibid.* (emphasis added). The filing of that complaint—concerning securities that the Wyoming plaintiffs did not purchase, and about which they could not sue at all—did not apprise respondents of the scope of the claims against which they would be forced to defend.

Indeed, the claims that petitioner belatedly seeks to assert against respondents do not even "implicate" a "sufficiently similar set of concerns" (*NECA-IBEW*, 693 F.3d at 162, 164) as those that the Wyoming plaintiffs could properly assert. *See* Pet. App. 22a-23a n.19. There is no basis, and petitioner identifies none, why the pendency of the operative complaint—in which the named plaintiffs indisputably could not have prosecuted these claims to judgment—should excuse petitioner from the absolute "cutoff" that Congress established.

Another theoretical underpinning of the *American Pipe* doctrine is that absent class members are on notice (actual or constructive) of a class-action complaint and may choose to allow the putative class representative to proceed in their behalf. *See* 414 U.S. at 550-51; *cf. Crown*, *Cork*, 462 U.S. at 352-53. But where, as here, the putative class member holds claims that the named plaintiff not only does not—but *cannot*—assert, that premise simply does not hold. Petitioner could not reasonably have relied on the Wyoming plaintiffs to protect its rights for the simple, yet dispositive, reason that the Wyoming plaintiffs themselves could not do so. Petitioner was thus required to assert its own rights within the time period provided by Congress.

American Pipe's tolling rule is already a "generous one, inviting abuse" by enterprising litigants. 462 U.S. at 354 (Powell, J., joined by Rehnquist and O'Connor, JJ., concurring). Courts should not encourage such "abus[e]" by permitting plaintiffs "to raise different or peripheral claims following denial of class status" than the named plaintiff alleged. *Id.* at 354-55. *American Pipe* assuredly should not be expanded to toll time bars for claims different from those that the named plaintiff *could* properly assert. The Court should reject petitioner's proposal to stretch *American Pipe* to the outer limits of Article III and to permit evasion of time bars based solely on prior suits involving different claims that no federal court could adjudicate.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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July 17, 2014

APPENDIX

APPENDIX

The Constitution of the United States, Article III, Section 2, Clause 1 provides:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

Section 13 of the Securities Act of 1933, ch. 38, 48 Stat. 74, 84, as originally enacted, provided:

LIMITATION OF ACTIONS

SEC. 13. No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to en-

force a liability created under section 12(1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than ten years after the security was bona fide offered to the public.

Section 207 of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 908, provides:

SEC. 207. Section 13 of such Act is amended (a) by striking out "two years" wherever it appears therein and inserting in lieu thereof "one year"; (b) by striking out "ten years" and inserting in lieu thereof "three years"; and (c) by inserting immediately before the period at the end thereof a comma and the following: "or under section 12(2) more than three years after the sale."

Section 15b of Title 15, United States Code (1970), provided:

§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Section 15b of Title 15, United States Code (2012), provides:

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

Section 16(b) of Title 15, United States Code (1970), provided:

§ 16. Judgment in favor of Government as evidence; suspension of limitations.

* * *

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

* * *

Section 16(i) of Title 15, United States Code (2012), provides:

§ 16. Judgments

* * *

(i) Suspension of limitations

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Section 77k of Title 15, United States Code, provides:

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration

statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be

responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such

part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant

proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2) (A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

Section 77*l* of Title 15, United States Code, provides:

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

Section 77m of Title 15, United States Code, provides:

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(a)(2) of this title more than three years after the sale.

Section 77*o* of Title 15, United States Code, provides:

§ 77*o*. Liability of controlling persons

(a) Controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 77t of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

Section 1635(f) of Title 15, United States Code, provides:

§ 1635. Right of rescission as to certain transactions

* * *

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

* * *

Section 1658 of Title 28, United States Codes, provides:

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

Section 2072 of Title 28, United States Code, provides:

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPE OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that

would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or

amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal

does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).