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

BRIEF IN OPPOSITION 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

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

Respondent Deutsche Bank Securities Inc. is a wholly owned subsidiary of DB U.S. Financial Markets Holding Corporation, which is in turn a wholly owned subsidiary of Taunus Corporation, which is in turn a wholly owned subsidiary of Deutsche Bank AG. No publicly held company owns 10% or more of the stock of Deutsche Bank AG.

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

Respondent Morgan Stanley & Co. LLC, formerly known as Morgan Stanley & Co. Incorporated, is a wholly owned subsidiary of Morgan Stanley, a pub-

licly held corporation whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondents Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., Goldman, Sachs & Co., and Morgan Stanley & Co. LLC ("respondents") respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-27a) is reported at 721 F.3d 95. The district court's relevant opinions (Pet. App. 28a-84a) are reported at 793 F. Supp. 2d 637 and 718 F. Supp. 2d 495.

JURISDICTION

The court of appeals entered its judgment on June 27, 2013. Justice Ginsburg extended the time for filing a petition for a writ of certiorari to November 22, 2013, No. 13A270 (Pet. App. 86a), and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

All pertinent constitutional and statutory provisions and rules are reprinted in the Appendix at 1a.

STATEMENT

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, erects an absolute bar to stale securities claims under Sections 11, 12(a)(2), and 15 of the Act. "In no event," Section 13 provides, "shall any such action be brought … more than three years after" the public offering or sale of the security at issue. *Ibid.* That prohibition, this Court has held, establishes a "period of repose" intended to "serve as a cutoff" of all liability. *Lampf, Pleva, Lipkind, Prupis*

& Petrigrow v. *Gilbertson*, 501 U.S. 350, 363 (1991). Unlike a conventional statute of limitations—which Section 13 also contains (requiring suit "within one year after discovery")—the three-year bar is, by its terms and by design, immune to judicially engrafted exceptions, and "inconsistent with tolling." *Ibid.*

Petitioner, whose claims were extinguished when Section 13's three-year period of repose ended, sought unsuccessfully to circumvent that absolute barrier here. It urged the court of appeals to stretch this Court's holding in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), from a narrow rule permitting the pendency of class actions to suspend certain traditional statutes of limitations, into a categorical exception to *any* statutory time limit—however emphatically prescribed by Congress. The court of appeals correctly rejected that sweeping claim, concluding that Section 13's statute of repose cannot be evaded.

The Second Circuit held that whether *American Pipe* tolling is viewed as "grounded in equitable authority or" in Federal Rule of Civil Procedure 23, it "does not extend to the statute of repose in Section 13." Pet. App. 20a. That statutory time bar confers "*substantive* right[s]" that neither principles of equitable tolling, which *Lampf* held do not apply to Section 13's statute of repose, nor Rule 23, which is limited by the Rules Enabling Act, 28 U.S.C. § 2072(b), can override. Pet. App. 20a. That "straightforward" conclusion (*ibid.*) following this Court's ruling in *Lampf* does not warrant this Court's review.

Petitioner's attempt to manufacture a circuit split is unfounded. The petition not only fails to identify any contrary court of appeals decision, but cannot muster a single appellate case that even

squarely confronted the same question. The solitary appellate ruling petitioner cites that even considered *American Pipe* tolling of Section 13 did not address the key barrier to such tolling on which the Second Circuit relied. Petitioner's other supposedly conflicting cases are even further afield.

There is no need for this Court's intervention, in short, either to provide guidance on the question presented, on which the circuits are not divided, or to correct any error in the court of appeals' ruling, which faithfully applied this Court's teachings.

The petition should be denied.

1. Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("1933 Act"), ch. 38, 48 Stat. 74, 82-84, 15 U.S.C. §§ 77k, 77*l*(a)(2), 77*o*, establish liability based on certain misrepresentations or omissions made 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), similarly, permits one who "purchas[es]" 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 liability on one who "controls any person liable under" Sections 11 or 12. *Id.* § 77*o*(a).

Claims under Sections 11, 12(a)(2), and 15 are subject to a two-tiered time-bar set forth in Section 13. As originally enacted, 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 precursor, cutting off any new claims after ten years from the date a security was first offered to the public. *Ibid.*

One year later, prompted in part by "objections and criticisms and complaints" that the 1933 Act's provisions were "too drastic, and [were] interfering with business," 78 Cong. Rec. 8668 (1934), Congress significantly shortened those time bars, but retained the two-tiered structure. The statute of limitations running from discovery was reduced to one year, and the outer, absolute limit was cut back to three years (and made applicable to claims under what is now Section 12(a)(2)). Securities Exchange Act of 1934, ch. 404, § 207, 48 Stat. 881, 908. "The legislative history in 1934 makes it pellucid that Congress included statutes of repose," and indeed 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). It thus "was understood that the three-year rule was to be absolute," and "that Congress did not intend equitable tolling to apply in actions under the securities laws.'" *Ibid.* (citation omitted).

2. This case involves claims under Sections 11, 12(a)(2), and 15 that petitioner seeks to assert against respondents as underwriters. The claims are based on allegedly untrue statements and omissions in the offering documents for a type of mortgage-backed securities—known as mortgage pass-through certificates—issued by IndyMac MBS, Inc. Pet. App. 4a-6a, 31a, 53a-54a; Pet. 3-5; D.C. Dkt. #203.

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. Pet. App. 29a; D.C. Dkt. #1. Six weeks later, on June 29, 2009, the Wyoming State Treasurer and Wyoming Retirement System (collectively, "Wyoming") filed their own putative class-action complaint concerning certificates that they had purchased. Pet. App. 29a; *see* Compl., No. 09-5933 (S.D.N.Y. June 29, 2009) (Dkt. #1). Both alleged generally that the offering documents for the certificates at issue in each complaint contained misrepresentations and omissions 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 brought by Detroit PFRS and Wyoming and appointed Wyoming the sole lead plaintiff. Pet. App. 29a-30a; D.C. Dkt. #58. "Neither [Detroit PFRS] nor anyone else objected to lead counsel's naming of Wyoming as the sole plaintiff." Pet. App. 30a. Wyoming filed an amended consolidated complaint several months later, in which it is "the sole named plaintiff." *Ibid.*

3. Respondents moved to dismiss Wyoming's class-action complaint on various grounds, including that Wyoming lacked standing to assert many of the putative class claims. Pet. App. 30a, 58a. At a hearing on February 17, 2010, the district court "informed the parties of its intention to dismiss for lack of standing the claims relating to offerings in which Wyoming had not purchased Certificates." *Id.* at 45a n.56. Three months later, on May 17, 2010, petitioner and several other putative class members moved to intervene under Federal Rule of Civil Procedure 24 to assert the affected claims themselves. *Id.* at 7a-8a; D.C. Dkt. #202, 203. In June 2010, the dis-

trict court, as it had indicated it would do, dismissed those of Wyoming's class claims based on certificates that Wyoming did not purchase. Pet. App. 58a.[1]

The district court proceeded to address petitioner's and other putative class members' motions to intervene to pursue claims that Wyoming could not. "[I]n a thorough and careful memorandum opinion," the district court denied petitioner's request to intervene, with exceptions not relevant here. Pet. App. 8a; *see id.* at 32a-38a. For all of these claims, "the three-year period of repose in Section 13 had run." *Id.* at 8a.

The court rejected petitioner's argument that the statute of repose was suspended while Wyoming's class-action complaint was pending with respect to those claims under this Court's decision in *American Pipe*, 414 U.S. 538. Pet. App. 33a. "[N]either *American Pipe*," which permits suspension of certain statutes of limitations while putative class actions are pending, "nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13." *Ibid*. Petitioner's pertinent claims were therefore time-barred, and petitioner could not intervene to pursue them. *See id.* at 33a-38a.

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[1] The district court later modified its ruling regarding Wyoming's standing to assert certain claims on behalf of the class, 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). *See* D.C. Dkt. #450, at 1-4. As discussed below, *infra* at 13 n.3, that modification is not relevant here.

4. The court of appeals affirmed. Pet. App. 4a. Although acknowledging that lower courts have variously described the legal basis of *American Pipe*'s tolling principle, the Second Circuit expressly reserved judgment on *American Pipe*'s theoretical foundation because the court concluded, in this instance, it makes no difference. *Id.* at 17a-20a. There was no "need" to "divine any hidden meanings in *American Pipe*" because, whether viewed as a species of equitable tolling, or as derived from Rule 23, it could not trump Section 13's statute of repose. *Id.* at 19a.

If the *American Pipe* "tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable 'tolling principles do not apply to that period.'" Pet. App. 19a (quoting 501 U.S. at 363). Alternatively, "[e]ven assuming, *arguendo*, that the *American Pipe* tolling rule is 'legal'—based upon Rule 23, which governs class actions— … 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.* (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011)). "[T]he statute of repose in Section 13 creates a *substantive* right, extinguishing claims after a three-year period." *Id.* at 20a. Overriding that time bar "would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Ibid.*

Accordingly, petitioner's claims were barred by Section 13's statute of repose.[2]

REASONS FOR DENYING THE PETITION

Petitioner's claim that review is needed to resolve a purported circuit conflict created or deepened by the decision below concerning *American Pipe*'s tolling principle (Pet. 8-18) is incorrect. The Second Circuit explicitly reserved judgment on the abstract question whether *American Pipe* applied conventional equitable tolling or a new type of "legal" tolling, recognizing that in this case the theoretical distinction does not matter. *See* Pet. App. 19a-20a. Petitioner identifies no appellate decision that contradicts the court of appeals' conclusion that, assuming *American Pipe* applied "legal" tolling, it cannot revive claims extinguished by Section 13's absolute statute of repose, in light of the Rules Enabling Act, 28 U.S.C. § 2072. The single circuit case petitioner cites that addressed application of *American Pipe* to Section 13 did not confront, or indeed even *mention*, that barrier to tolling, which the decision below deemed dispositive. Petitioner's other cases—all of which involved tolling of statutes of *limitations*, or were rendered by *district* courts, and none of which addressed the Rules Enabling Act's independent bar—do not remotely demonstrate a certworthy split.

Petitioner therefore seeks error correction, but it fails to identify any error in the court of appeals' conclusion that *American Pipe* does not override Section

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[2] 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.

13's statute of repose. By its terms, *American Pipe*'s rule applies only to "the statute of *limitations*," 414 U.S. at 554 (emphasis added), not statutes of repose. Indeed, this Court has held that Section 13's three-year bar is immune to tolling by design. *See Lampf*, 501 U.S. at 363. Petitioner's effort to evade *Lampf*'s holding by limiting it to equitable tolling—as distinct from so-called "legal" tolling—is unfounded, and ultimately futile. The distinction petitioner describes has no basis in principle or in this Court's case law. And even if *American Pipe*'s principle did flow, as petitioner claims, from Rule 23, the Rules Enabling Act would preclude tolling of Section 13's statute of repose, as the court of appeals held. That period of repose establishes substantive rights, which no Federal Rule may be construed to "abridge, enlarge or modify." 28 U.S.C. § 2072(b); *see Wal-Mart*, 131 S. Ct. at 2561.

Beyond the absence of a split or an error meriting review, this case is a poor vehicle to address the question presented. Petitioner cannot benefit from *American Pipe* tolling because the putative class representatives lacked standing to assert petitioner's claims. That threshold issue renders the question presented irrelevant to the outcome here, and at a minimum would greatly complicate—and likely frustrate—this Court's review in this case.

I. THE DECISION BELOW DOES NOT IMPLICATE ANY CIRCUIT CONFLICT THAT WARRANTS THIS COURT'S REVIEW.

A. Petitioner cites only one appellate case—the Tenth Circuit's decision in *Joseph* v. *Wiles*, 223 F.3d 1155 (10th Cir. 2000)—that it claims conflicts with the Second Circuit's holding that Section 13's statute of repose cannot be tolled under *American Pipe*. Pet. 8-12. Petitioner is wrong.

1. *Joseph* does not conflict with the decision below because the Tenth Circuit did not address the obstacle to *American Pipe* tolling of Section 13's statute of repose on which the decision below relied. The only tolling question that *Joseph* decided was whether application of *American Pipe*'s tolling principle to Section 13's three-year time bar is foreclosed by this Court's decision in *Lampf*. *See* 223 F.3d at 1166-68. The plaintiff in *Joseph* contended that under *American Pipe*, the filing of two prior class-action complaints "tolled the repose period" imposed by Section 13. *Id.* at 1166. The defendants objected, arguing only that *American Pipe* tolling was precluded by *Lampf* and circuit precedent applying it. *Ibid.*; *see* Brief for Appellees 14-19, *Joseph*, 223 F.3d 1155 (No. 99-1258). The Tenth Circuit rejected that argument, reasoning that *Lampf* applies only to equitable tolling—but not to "legal" tolling—and that *American Pipe* involves the latter because (in the court's view) it is grounded in Rule 23. 223 F.3d at 1166-67.

Joseph, however, did not confront the additional, *independent* barrier that the Second Circuit here held would prevent tolling of Section 13's statute of repose even if *American Pipe*'s principle derives from Rule 23. As the court of appeals explained, even assuming that *American Pipe* merely interpreted that

Rule, its tolling doctrine still could not supersede Section 13's three-year bar because the Rules Enabling Act "'forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right."'" Pet. App. 19a (citations omitted). Section 13's statute of repose creates just such a "substantive right," completely "extinguishing claims after a three-year period." *Id.* at 20a (emphasis omitted). If *American Pipe*'s tolling principle is merely a gloss on Rule 23, it cannot override Section 13's statute of repose, as that would "necessarily enlarge or modify" plaintiffs' rights while directly abridging the rights of defendants. *Ibid.*

The Tenth Circuit in *Joseph* did not consider this issue. The defendants did not invoke the Rules Enabling Act in opposing *American Pipe* tolling. *See* Brief for Appellees 14-19, *Joseph*, 223 F.3d 1155 (No. 99-1258). And the court's opinion nowhere mentioned it. *See* 223 F.3d at 1166-68.

The shallow split that petitioner alleges between this case and *Joseph* is thus nonexistent. In the Second Circuit, tolling of Section 13's statute of repose is barred by the Rules Enabling Act. In the Tenth Circuit, whether that statute limits *American Pipe* in this context is an open question. *Joseph* did not decide that issue, presumably because the defendants did not raise it. And its decision cannot fairly be read as resolving it; future litigants should not be precluded from vindicating their own rights under a federal statute merely because the *Joseph* defendants forfeited any Rules Enabling Act argument.

At a minimum, the absence of any explicit ruling on this issue by the Tenth Circuit—indeed, *any* other circuit—makes review premature. There is no need

for this Court to intervene to offer guidance on an issue that only a single circuit has considered.

2. Not only did *Joseph* not address the key legal question on which the decision below turned, but the Tenth Circuit's opinion also shows that it would have reached the same *result* as the Second Circuit on the facts of this case. *Joseph* expressly held that *American Pipe* tolling could *not* be based on a prior putative class action that was brought by named plaintiffs who themselves had never purchased the same securities as the piggy-back plaintiff who later sought tolling under *American Pipe*. *See* 223 F.3d at 1168. The plaintiff in *Joseph*, who had purchased certain debentures, asserted that Section 13's time bar was tolled by a class-action complaint filed on May 9, 1989. *See id.* at 1157, 1166. The Tenth Circuit refused to permit tolling based on that complaint, however, primarily because that complaint "contained no named plaintiffs who had purchased debentures"; they had bought only other investments. *Id.* at 1168. The court held that tolling was available based *only* on a later complaint brought by other representatives who *had* purchased the same debentures as the plaintiff in *Joseph*. *Ibid.*

Joseph's reasoning demonstrates that the Tenth Circuit would have refused to permit *American Pipe* tolling of Section 13's statute of repose for petitioner's relevant claims here. Under the Tenth Circuit's analysis, the putative class-action complaints could not support tolling of those claims because the named plaintiffs never purchased the securities on which those claims are premised. The district court found that Wyoming—the only named plaintiff in the consolidated class action, D.C. Dkt. #58, at 8; D.C. Dkt. #131, ¶¶ 19-20—never purchased those securi-

ties, and therefore lacked standing to assert claims based upon them on behalf of a class, *see* Pet. App. 58a; *see id.* at 7a.[3] Likewise, Detroit PFRS—briefly a named plaintiff before Wyoming became the sole lead plaintiff, *see* Pet. App. 35a-36a—never purported to have purchased the securities underlying petitioner's relevant claims. *Cf.* D.C. Dkt. #203, at 2. Under *Joseph*'s logic, neither of the class complaints here could have tolled Section 13's statute of repose for petitioner's relevant claims.

Petitioner is therefore incorrect that this case "would have come out differently in the Tenth Circuit." Pet. 12. To the contrary, *regardless* whether the Tenth Circuit would in some circumstances permit Section 13's statute of repose to be tolled despite the Rules Enabling Act—which *Joseph* did not address—*Joseph*'s holding nevertheless bars such tolling on the facts of this case. Even if *Joseph* did not clearly foreclose application of *American Pipe* here, it certainly does not prove, as petitioner claims, that the Tenth Circuit would decide this case differently.

B. Unable to demonstrate a circuit split regarding the only question presented in the petition—

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[3] As noted, *supra* at 6 n.1, the district court subsequently modified its ruling regarding Wyoming's standing. That modification is irrelevant, however, because it did not pertain to the securities underlying petitioner's claims now at issue. *Compare* D.C. Dkt. #450, at 4, *with* D.C. Dkt. #203, at 3. Moreover, the Second Circuit explained that its "decision … implicates *only* those claims and defendants as to which Wyoming would lack standing under *NECA-IBEW*." Pet. App. 22a-23a n.19 (emphasis added). The decision below thus affects only those of petitioner's claims that involved securities that the sole named plaintiff, Wyoming, never purchased and that it lacked standing to assert on behalf of the class.

which concerns only tolling of Section 13's statute of repose, Pet. i—petitioner contends that review is warranted because the decision below is "inconsistent with" Federal Circuit cases addressing tolling of *other* statutory time bars. *Id.* at 12-15; *see Bright* v. *United States*, 603 F.3d 1273 (Fed. Cir. 2010) (addressing 28 U.S.C. § 2501); *Arctic Slope Native Ass'n* v. *Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) (former 41 U.S.C. § 605(a)); *Stone Container Corp.* v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000) (28 U.S.C. § 2636(i)). Those cases add nothing to petitioner's claim of a certworthy circuit split. Like *Joseph*, none of those decisions addressed whether application of *American Pipe* would violate the Rules Enabling Act's prohibition on "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b). In any event, the Federal Circuit's conclusions regarding those other time limits—none of which were statutes of repose—are irrelevant.

1. Petitioner's Federal Circuit decisions do not conflict with the decision below because none of the statutes the Federal Circuit addressed in those cases—28 U.S.C. §§ 2501 and 2636(i), and former 41 U.S.C. § 605(a) (now codified, as amended, at 41 U.S.C. § 7103(a))—are statutes of repose. The Federal Circuit itself described each provision not as a statute of "repose," but rather as a "statute of *limitations*." *Bright*, 603 F.3d at 1290 (emphasis added); *Arctic Slope*, 583 F.3d at 800 n.6; *Stone Container*, 229 F.3d at 1347. Those characterizations are correct. Each provision measures the time to bring suit from the date the plaintiff's claim "*accrues*." 28 U.S.C. § 2501 (emphasis added); *see id.* § 2636(i) (same); 41 U.S.C. § 605(a) (2008) ("accrual"). That is a familiar formulation for statutes of limitations—which, "[u]nlike a statute of repose, … cannot begin

to run until the plaintiff's claim has accrued." *City of Pontiac Gen. Emps.' Ret. Sys.* v. *MBIA, Inc.*, 637 F.3d 169, 176 (2d Cir. 2011). But it would be a bizarre way to draft a "statute of repose, which begins to run from the defendant's violation," *whether or not* the plaintiff's claim has yet accrued. *Ibid.*; *see also Albillo-De Leon* v. *Gonzales*, 410 F.3d 1090, 1097 n.5 (9th Cir. 2005); Pet. App. 2a n.1.

The fact that none of petitioner's Federal Circuit cases concerned a statute of repose refutes any claim that those rulings conflict with the decision below. The Second Circuit did not dispute that some statutes of limitations may be tolled in certain circumstances under *American Pipe*. Pet. App. 9a-13a. It merely held that Section 13—as a statute of repose that "creates a substantive right"—is not subject to the same tolling principle. *Id.* at 20a (emphasis omitted); *see id.* at 13a-15a, 19a. That conclusion in no way contradicts the Federal Circuit's determinations that particular statutes of limitations can be suspended.

2. Petitioner claims that *Stone Container*, *Arctic Slope*, and *Bright* nevertheless conflict with the decision below because the statutes of limitations that those cases addressed were each in some sense "jurisdictional." Pet. 12; *see id.* at 12-15. But there is less to that label than meets the eye. "'Jurisdiction,' this Court has observed, 'is a word of many, too many, meanings,'" which past cases have often employed without precision. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510 (2006) (citation omitted). A court's characterization of a statute of limitations as "jurisdictional" does not necessarily imply anything of relevance, and certainly does not transform the time bar into a statute of repose.

Indeed, the Federal Circuit described the time bars at issue in two of petitioner's three cases—28 U.S.C. § 2636(i), and former 41 U.S.C. § 605(a)—as "jurisdictional" only in the narrow sense that they pertained to a waiver of federal sovereign immunity, because they applied to suits against the government. *See Arctic Slope*, 583 F.3d at 792-93; *see also Stone Container*, 229 F.3d at 1352. But statutes of limitations that affect the scope of sovereign immunity are not *ipso facto* statutes of repose. To the contrary, this Court has held that such limitations periods can be subject even to "equitable tolling," *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)—which statutes of repose, including Section 13's three-year bar, cannot, *see Lampf*, 501 U.S. at 360, 363.

Similarly, in petitioner's third case, *Bright*, 603 F.3d at 1284-90, the Federal Circuit deemed the limitations provision at issue, 28 U.S.C. § 2501, "jurisdictional" based only on this Court's holding in *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), that courts should raise that time bar *sua sponte* if the parties do not address it. *See id.* at 132; *Bright*, 603 F.3d at 1287. It does not follow from that holding that Section 2501 is therefore a statute of repose. Nor does this Court's much earlier holding in *Kendall* v. *United States*, 107 U.S. 123 (1883), which *John R. Sand & Gravel* noted, 552 U.S. at 134, that Section 2501's predecessor was not subject to equitable tolling for circumstances not stated in the statute make Section 2501 a period of repose. As this Court has made clear, although statutes of limitations are presumptively subject to an implied exception permitting equitable tolling, some statutes of limitations are *not*. *See Young* v. *United States*, 535 U.S. 43, 49 (2002). If inferring an unwritten equitable-tolling

exception to a statute of limitations would be "inconsistent with the text of the relevant statute," such tolling is foreclosed. *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998); *see United States* v. *Brockamp*, 519 U.S. 347, 350-54 (1997).

In short, even if appropriately classified as jurisdictional in some sense, the three statutes of limitations that the Federal Circuit considered in *Stone Container*, *Arctic Slope*, and *Bright* are not statutes of repose. Those decisions thus do not and cannot conflict with the Second Circuit's ruling here regarding tolling of Section 13's distinct three-year bar.

3. Even if the time bars that the Federal Circuit confronted could be viewed as statutes of repose, that court's conclusions that *American Pipe* tolling applies to those provisions still would not conflict with the Second Circuit's ruling here because the analysis of whether such tolling is applicable depends on the *particular* time bar at issue. As *American Pipe* itself made clear, the "proper test" in determining whether a time bar may be tolled is "whether tolling the limitation *in a given context is consonant with the legislative scheme*." 414 U.S. at 557-58 (emphasis added). *American Pipe* thus did not announce a one-size-fits-all standard—which would override *every* federal time bar, and for that matter *state*-law time limitations as well. Instead, its analysis turns on the *specific* statutory time limit at issue. *See also Chardon* v. *Fumero Soto*, 462 U.S. 650, 659-61 (1983) (*American Pipe* "'determine[d] the precise effect the commencement of the class action had on the relevant limitation period'" by "refer[ence] to the terms of the underlying statute of limitations," and did not establish a uniform tolling rule applicable to all statutory limitations periods (citation omitted)).

That case-by-case approach comports with the Advisory Committee's understanding in promulgating the first modern version of Rule 23. As *American Pipe* observed, the Committee did not understand Rule 23 as establishing an across-the-board tolling standard. Instead, the Committee explained that whether the pendency of a class action suspends the limitations period for putative class members is "'to be decided by reference to the laws governing … limitations as they apply *in particular contexts*.'" 414 U.S. at 554 n.24 (emphasis added) (quoting Fed. R. Civ. P. 23 advisory committee's note (1966)).

Because *American Pipe*'s principle is thus statute-specific, decisions holding that *other* time bars are subject to such tolling do not contradict the court of appeals' decision, which held only that Section 13's three-year bar is not. That is particularly true given the markedly different text of the provisions the Federal Circuit confronted, and the entirely different subject matter to which they pertain. *See* 28 U.S.C. § 2501 (suits within Court of Federal Claims' jurisdiction); *id.* § 2636(i) (actions within Court of International Trade's jurisdiction); 41 U.S.C. § 605(a) (2008) (submission of claims by government contractors). The Federal Circuit's determinations that tolling is "consonant with" those "legislative scheme[s]," *American Pipe*, 414 U.S. at 558, say nothing about whether tolling would undermine Congress's distinct purposes in enacting the 1933 Act.

C. The remaining decisions that petitioner offers as evidence of lower-court conflict—all rendered by *district* courts, Pet. 15-18—plainly do not demonstrate a certworthy split. *See* Sup. Ct. R. 10. By definition, those decisions lack any precedential force.

See Harzewski v. *Guidant Corp.*, 489 F.3d 799, 806 (7th Cir. 2007) ("district court cases … , as we tirelessly but futilely remind the bar, are not precedents"). Indeed, petitioner concedes that each case was issued in a "circui[t] with *no controlling precedent*." Pet. 17 (emphasis added). Far from demonstrating a deep and entrenched circuit conflict concerning the question presented, those decisions if anything show that the courts of appeals' consideration of the issue has only just begun.[4]

Moreover, none of petitioner's district court decisions directly conflicts with the decision below. Of the cases it cites outside the Second Circuit, none addressed the Rules Enabling Act.[5] And only half considered Section 13 or other securities-law statutes

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[4] Petitioner also cites *Albano* v. *Shea Homes Limited Partnership*, 634 F.3d 524 (9th Cir. 2011), but as petitioner concedes, Pet. 16 n.6, that case did not decide whether the (state-law) statute of repose at issue was tolled, but certified that question to the state courts. *See* 634 F.3d at 526, 540-41.

[5] *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, 2012 WL 6840532, at *5 (D.N.J. Dec. 20, 2012); *Hrdina* v. *World Sav. Bank, FSB*, 2012 WL 294447, at *3-4 (N.D. Cal. Jan. 31, 2012); *Me. State Ret. Sys.* v. *Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010); *Dickson* v. *Am. Airlines, Inc.*, 685 F. Supp. 2d 623, 627 (N.D. Tex. 2010); *Hildes* v. *Andersen*, 2010 WL 4811975, at *3-4 (S.D. Cal. Nov. 8, 2010); *Arivella* v. *Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177 (D. Mass. 2009); *McMillian* v. *AMC Mortg. Servs., Inc.*, 560 F. Supp. 2d 1210, 1215 (S.D. Ala. 2008); *Andrews* v. *Chevy Chase Bank, FSB*, 243 F.R.D. 313, 315-17 (E.D. Wis. 2007); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 465 F. Supp. 2d 687, 717 (S.D. Tex. 2006); *Ballard* v. *Tyco Int'l, Ltd.*, 2005 WL 1683598, at *7 (D.N.H. July 11, 2005); *In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998); *Salkind* v. *Wang*, 1995 WL 170122, at *2-3 (D. Mass. Mar. 30, 1995).

of repose. The rest, like petitioner's Federal Circuit cases, addressed entirely different legislative schemes—ranging from the Truth in Lending Act, *see Hrdina*, 2012 WL 294447, at *3-4; *McMillian*, 560 F. Supp. 2d at 1215; *Andrews*, 243 F.R.D. at 315-17, and the Employee Retirement Income Security Act, *see Arivella*, 623 F. Supp. 2d at 177, to time bars in various *state* statutes, *see In re Enron*, 465 F. Supp. 2d at 717, and even international *treaties*, *see Dickson*, 685 F. Supp. 2d at 627. Petitioner's district court authorities thus add nothing to its claim of a certworthy conflict.

II. THE DECISION BELOW IS CORRECT.

Petitioner's case for review thus boils down to a request for isolated error correction. That alone demonstrates that the petition thus does not merit any more of this Court's scarce resources. Sup. Ct. R. 10. In any event, there is no error to correct.

A. The court of appeals' conclusion that Section 13's three-year bar is not subject to tolling under *American Pipe* follows straightforwardly from this Court's precedent. *American Pipe* held that the "commencement of a class action suspends the applicable *statute of limitations* as to all asserted members of the class" while the putative class action is pending. 414 U.S. at 554 (emphasis added). That "tolling rule," *id.* at 555, however, has no application to Section 13's three-year bar because, as this Court has held, it is *not* a statute of limitations. *See Lampf*, 501 U.S. at 363. Section 13's three-year bar is instead "a period of *repose*." *Ibid.* (emphasis added).

That distinction between statutes of limitations and statutes of repose—which this Court and every

circuit have recognized[6]—is deeply rooted. And the "differences between" statutes of limitations and statutes of repose are "substantive, not merely semantic." *Burlington*, 419 F.3d at 362. "A statute of limitations" is merely "'a procedural device that operates as a defense to limit the remedy available from an existing cause of action.'" *Jones*, 537 F.3d at 326 (citation omitted). Such provisions are often subject to exceptions—such as a discovery rule, which starts the limitations period on the date the plaintiff discovers (or should have discovered) his claim. *See id.* at 326-27. And they are *presumed* to be subject to equitable tolling. *See Young*, 535 U.S. at 49-50.

A "statute of repose," in contrast, "creates a substantive right … to be free from liability" forever once the prescribed period expires—not merely barring a remedy, but eliminating the underlying cause of action. *Jones*, 537 F.3d at 327. They reflect the legislature's assessment of the "'economic best inter-

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[6] *See Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 416-18 (1998); *Umsted* v. *Umsted*, 446 F.3d 17, 22 n.4 (1st Cir. 2006); *Ma* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.4 (2d Cir. 2010); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199 (3d Cir. 2007); *Jones* v. *Saxon Mortg., Inc.*, 537 F.3d 320, 326-27 (4th Cir. 1998) (per curiam); *Burlington N. & Santa Fe Ry. Co.* v. *Poole Chem. Co.*, 419 F.3d 355, 362-63 (5th Cir. 2005); *Roskam Baking Co.* v. *Lanham Mach. Co.*, 288 F.3d 895, 903-04 (6th Cir. 2002); *McCann* v. *Hy-Vee, Inc.*, 663 F.3d 926, 930-31 (7th Cir. 2011); *Nesladek* v. *Ford Motor Co.*, 46 F.3d 734, 737 n.3 (8th Cir. 1995); *Balam-Chuc* v. *Mukasey*, 547 F.3d 1044, 1048-49 (9th Cir. 2008); *Waller* v. *Pittsburgh Corning Corp.*, 946 F.2d 1514, 1515 (10th Cir. 1991); *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1217-18 (11th Cir. 2001); *Wesley Theological Seminary of the United Methodist Church* v. *U.S. Gypsum Co.*, 876 F.2d 119, 122-23 (D.C. Cir. 1989).

est of the public as a whole,'" and are "'based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.'" *Ibid.* (citation omitted). Consistent with that purpose, statutes of repose are "not tolled for any reason," as tolling "would upset the economic best interests of the public" that the legislature carefully balanced. *Ibid.*; *see Beach*, 523 U.S. at 416-18; *Ma*, 597 F.3d at 88 n.4; *Burlington*, 419 F.3d at 363. They are often imposed, as in Section 13, in *addition* to a statute of limitations to provide an absolute end-point for claims. *See*, *e.g.*, *Merck & Co.* v. *Reynolds,* 130 S. Ct. 1784, 1797 (2010) ("unqualified bar" imposed by five-year statute of repose provided "total repose" and thus "diminish[ed] … fear" that tolling statute of *limitations* would "give life to stale claims"); *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013) (limitations periods for "Government suits often couple that rule with an absolute provision for repose").

Section 13's three-year bar, this Court has held, is the latter—a statute of repose, added on top of Section 13's conventional, one-year statute of limitations, "to serve as a cutoff" of liability. *Lampf*, 501 U.S. at 363. And as a statute of repose, it is flatly "*inconsistent with tolling*." *Ibid.* (emphasis added). *American Pipe*'s rule permitting tolling of "statute[s] of limitations," 414 U.S. at 554, is thus inapplicable by its own terms to Section 13's three-year bar. And if *American Pipe* left any doubt, *Lampf* eliminated it.

B. Petitioner insists that *American Pipe* nevertheless applies to Section 13's statute of repose because *Lampf* forecloses only *equitable* tolling, not so-called "legal" (or "statutory") tolling, and that *American Pipe* tolling is the latter because it is supposedly

derived from Federal Rule 23. Both of petitioner's premises are mistaken, and in any event its conclusion does not follow.

1. The distinction petitioner posits—never embraced by this Court—between equitable and "legal" tolling (Pet. 26-27) is entirely artificial. Determining whether an express limitations period is subject to tolling is *always* an exercise in statutory interpretation. Article III courts, unlike their English forebears, have no authority "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); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 27-105 (2001).

Instead, when federal courts apply equitable tolling to statutes of limitations that do not foreclose it, they are merely attempting to discern Congress's *intent*. *See Young*, 535 U.S. at 49-50. Limitations periods historically were understood to allow tolling for certain equitable reasons, and "Congress must be presumed to draft limitations periods in light of this background principle." *Ibid.*; *see also Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) ("equitable doctrine" permitting tolling in cases of fraudulent concealment is "read into" federal statutes of limitations); *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348-50 (1875) (same). The inquiry remains, however, whether Congress, in enacting a particular time bar, intended to permit such tolling. If "tolling would be 'inconsistent with the text of the relevant statute,'" it does not apply. *Young*, 535 U.S. at 49 (citation omitted); *see also Brockamp*, 519 U.S. at 354.

That, tellingly, is the *very same* test that *American Pipe* itself applied. *See* 414 U.S. at 558 (test is "whether tolling the limitation in a given context is consonant with the legislative scheme"); *see also Young*, 535 U.S. at 49 (citing *American Pipe* for this principle). Petitioner's contrived distinction between equitable and other types of tolling is simply a fiction.

2. Even if petitioner's invented distinction between equitable and "legal" tolling were real, it would not help petitioner because *American Pipe*, if anything, applied equitable tolling. *American Pipe* did not purport to derive its tolling principle from the text of Rule 23, which says nothing at all about tolling. *See* 414 U.S. at 552-59. Nor, contrary to petitioner's claim (Pet. 26), did the Court derive its tolling principle from Rule 23's history; as the Court noted, the Rule's drafters disclaimed any design to establish an across-the-board tolling principle. *See* 414 U.S. at 554 n.24. Instead, *American Pipe* construed the relevant *statute of limitations*: Section 4B of the Clayton Act, now codified at 15 U.S.C. § 15b. *See id.* at 554-56, 559. The Court examined whether tolling was consistent with *that* provision's aims, *see ibid.*—just as the Court typically does in determining whether the presumption of equitable tolling is rebutted, *cf. Young*, 535 U.S. at 49-50. That the Court considered the public policies underlying other federal laws, including Rule 23, does not transform the case's holding into an interpretation of the Rule untethered to its text.

This Court's subsequent cases confirm that *American Pipe* applied familiar equitable-tolling principles to the Clayton Act, and did not rest on a novel reading of the Federal Rules. In *Chardon*, 462

U.S. 650, the Court rejected a claim that *American Pipe* adopted a new, universal rule prescribing the tolling effect of class actions in all contexts. *Id.* at 656. In *American Pipe*, *Chardon* explained, a "particular federal statute"—the Clayton Act—"provided the basis for deciding" the tolling effects of a pending class action. *Id.* at 661. And "[i]n order to determine" that effect, *American Pipe* had "referred to the terms of the underlying statute of limitations." *Id.* at 659. It was the *dissent* in *Chardon*, not the Court, that would have read *American Pipe* as adopting a "broader" tolling rule whose "source" was Rule 23. *See id.* at 663-64 (Rehnquist, J., dissenting).

Later cases have echoed *Chardon*'s understanding, referring to *American Pipe* as an example of "equitable tolling." *Young*, 535 U.S. at 49; *Irwin*, 498 U.S. at 96 n.3. Petitioner dismisses these descriptions as dictum, Pet. 26 n.19, but this Court's reliance on *American Pipe* as authority for equitable-tolling principles assuredly reflects its considered determination that the case supports the principles for which it was cited. And against these cases, petitioner offers *no* case of this Court holding that *American Pipe* derived its tolling principle from Rule 23.[7]

3. In any event, as the court of appeals recognized, petitioner's revisionist reading of *American Pipe* avails it nothing: If *American Pipe*'s principle flowed from Rule 23, the Rules Enabling Act would

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[7] *Credit Suisse Securities (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012), noted that some lower courts had described *American Pipe* as applying "'legal tolling,'" but this Court explicitly reserved judgment on that issue, which "d[id] not matter." *Id.* at 1419 n.6 (citation omitted). The same is true here. *See infra* Part II.B.3.

preclude applying that principle to Section 13's statute of repose. Pet. App. 19a-20a.

a. The Rules Enabling Act provides that Federal Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). It thus "forbids *interpreting* Rule 23 to" do so. *Wal-Mart*, 131 S. Ct. at 2561 (emphasis added). Tolling Section 13's statute of repose would directly violate that command.

As the court of appeals recognized, Pet. App. 20a, Section 13's three-year bar directly affects the parties' substantive rights. Unlike statutes of limitations that "'merely … bar the *remedy*'" plaintiffs may pursue, statutes of repose "'extinguish the *right* which is the foundation for the claim.'" *Beach*, 523 U.S. at 416 (emphases added) (citation omitted); *see also Jones*, 537 F.3d at 326-27; *Burlington*, 419 F.3d at 363. And Section 13's three-year bar, this Court has held, is such a statute—creating a "period of repose," not merely a statute of limitations. *Lampf*, 501 U.S. at 363.

Allowing Section 13's absolute three-year bar to be suspended, therefore, would "abridge, enlarge or modify" the parties' substantive rights under Section 13. Permitting petitioner to pursue its untimely claims after the three-year repose period ends would "enlarge" or at minimum "modify" its rights; indeed, it would revive causes of action that no longer exist. And it would obliterate respondents' right to be absolutely immune to liability after the statutorily prescribed period expires. Pet. App. 20a. The Rules Enabling Act "forbids interpreting Rule 23" to have such an effect. *Wal-Mart*, 131 S. Ct. at 2561.

b. Petitioner's rejoinders are insubstantial, and boil down to attacks on this Court's case law. Its

claim (Pet. 28) that Section 13's three-year bar creates no substantive rights contravenes both *Beach*, which recognized that statutes of repose affect substantive rights, *see* 523 U.S. at 416-17, and *Lampf*, which held that Section 13's three-year bar is such a statute, *see* 501 U.S. at 363.

Likewise, petitioner's contention that Section 13's one-year and three-year bars are fungible (Pet. 28-29) is foreclosed by *Lampf*. *See* 501 U.S. at 363. Indeed, even petitioner's own leading circuit authority *agreed* that Section 13's three-year bar is a "statute of repose," thus distinct from the one-year "statute of limitations." *Joseph*, 223 F.3d at 1166. Petitioner's real dispute thus is not with the decision below, but with this Court's precedents and settled law. It offers no reason to revisit that law here. Accepting petitioner's invitation to overturn that established law, moreover, makes especially scant sense because it would not save petitioner's claims or cast doubt on the decision below: If petitioner were correct that Section 13's statute of limitations and its separate statute of repose are indistinguishable, then *American Pipe* could not supersede either time bar.

Similarly, petitioner's claim that applying *American Pipe* here would not abridge or enlarge substantive rights because *American Pipe*'s rule does not "*postpone* the start of the time for bringing suit"—but merely "defines when the claim is brought," Pet. 29 (emphasis added)—is directly contradicted by this Court's decisions. *American Pipe* itself described the rule it announced as a "*tolling* rule" that "*suspends* the applicable statute of limitations as to all asserted members of the class." 414 U.S. at 554-55 (emphases added); *id.* at 559 (under Court's holding, "statute of

limitations is tolled"); *see also Chardon*, 462 U.S. at 659-61.

Petitioner's puzzling view would mean that *American Pipe*'s "tolling rule" has nothing to do with tolling—and that the rule does not "suspend" limitations periods, but somehow deems them *satisfied* for persons within a putative class. That theory is utterly illogical. The filing of a suit cannot possibly satisfy limitations periods for persons who, by definition, *are not parties* to the suit. *Cf. Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (putative members of uncertified class not "parties" to suit); *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, __ U.S. __, 2014 WL 113485, at *6 (Jan. 14, 2014) (construing "'plaintiff'" to "'include both named and unnamed real parties in interest' … stretches the meaning of 'plaintiff' beyond recognition" (citation and alteration omitted)). Even the circuit authority relied upon by petitioner rejected this perplexing theory. *See Bright*, 603 F.3d at 1283-84 ("reject[ing]" claim that filing of class complaint "satisfied the limitations requirement of section 2501 outright for all putative members of the class").

Petitioner's suggestion that *American Pipe* itself somehow resolved the question presented (Pet. 30-31) is equally baseless. *American Pipe* addressed only whether tolling was "consonant with the legislative scheme" at issue, in light of the purposes and history of that particular statute of limitations. 414 U.S. at 556, 558-59 & n.29. Even if *American Pipe*'s tolling principle were grounded in Rule 23, the Court's holding assuredly did not, as petitioner's *amici* suggest, determine once for all that application of that principle to any statute can *never* violate the Rules Enabling Act. *Cf.* Nat'l Ass'n of Shareholder &

Consumer Att'ys ("NASCAT") *Amicus* Br. 15-16. The Court did just the opposite, applying a case-by-case, statute-specific test to determine if tolling was appropriate.

Nor was the time bar in *American Pipe* "relevantly indistinguishable" from Section 13's statute of repose. Pet. 30. Contrary to petitioner's claim, *ibid.*; *cf.* NASCAT *Amicus* Br. 9-11, the Clayton Act time bar is not a statute of repose, but a statute of limitations. *American Pipe* itself repeatedly described it as such. 414 U.S. at 540-41, 554-55, 558 n.29, 559-60. And rightly so: The bar runs from the date the "cause of action accrued," 15 U.S.C. § 15b, a telltale sign of a period of limitations, not repose. *See supra* at 14-15.

c. There is no merit, finally, to petitioner's assertion that the court of appeals contravened this Court's teaching by analyzing whether tolling Section 13's statute of repose would abridge or modify substantive rights. Pet. 30; *cf.* Professors *Amici* Br. 14-17; *see* Pet. App. 19a-20a. The Rules Enabling Act, after all, expressly prohibits Federal Rules from abridging, enlarging, or modifying "substantive right[s]." 28 U.S.C. § 2072(b). Courts applying Rule 23 therefore *must* discern whether construing it to resolve a particular legal question—here, whether the pendency of a putative class action overrides statutes of repose—would cause the Rule to rove beyond "really regulat[ing] procedure" to dictate the substance of the parties' rights. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 13-14 (1941); *see Wal-Mart*, 131 S. Ct. at 2561; *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

American Pipe did not reject this crucial inquiry. It merely explained that courts must look beyond la-

bels to examine carefully the specific statutory time bar sought to be tolled. *See* 414 U.S. at 557-58. Indeed, *American Pipe* itself relied in part on legislative history of the limitations period showing that it did not "'affect the substantive rights of individual litigants.'" *Id.* at 558 & n.29 (citation omitted).

In any event, *American Pipe*'s analysis leads to exactly the same result. As respondents demonstrated in detail in the court below, tolling of Section 13's statute of repose cannot be reconciled with that provision's structure, history, or purpose. *See* C.A. Credit Suisse et al. Appellee Br. 27-30. Tolling here thus would not be "consonant with the legislative scheme," *American Pipe*, 414 U.S. at 558, as *amici* claim, Professors *Amici* Br. 17-19, but at war with it.

C. Petitioner's and its *amici*'s arguments that the court of appeals' ruling is bad policy are directed to the wrong Branch. As the decision below recognized, to the extent those arguments have merit, they are properly addressed to Congress, not the courts. Pet. App. 21a. In any event, their policy attacks on the Second Circuit's ruling are meritless.

Petitioner's assertion, echoed by its *amici*, that the decision below somehow eviscerates Rule 23(c)'s opt-out procedures is baseless. *See* Pet. 10, 26; Professors *Amici* Br. 12-14; Public Pension Funds *Amici* Br. 8-9. The court of appeals' ruling does nothing to disparage the "due process rights of absent class members who wish to proceed outside the aggregated proceeding." Professors *Amici* Br. 12. Plaintiffs can preserve their own rights, as always, by timely asserting their own claims within the statutory window. Plaintiffs' "right to proceed independently" will be "cut off" (*id.* at 13) *only if* they sleep on their claims in the first place. That is not an evil to be

avoided; it is the policy Congress deliberately established eight decades ago in enacting Section 13.

Amici's doomsday predictions are equally unfounded. Complaints that requiring plaintiffs to file their own claims within the repose period, or at least to monitor pending class actions, would impose unbearable burdens on institutional investors with tens or even hundreds of billions of dollars in assets (Public Pension Funds *Amici* Br. 1-4, 6-9) deserve no credence. And conjecture that the court of appeals' holding *might* have led to additional filings in fewer than 40 Section 11 and 12 cases over an eight-year span (Professors *Amici* Br. 8) hardly shows that the sky will fall.

III. THIS CASE IS A POOR VEHICLE TO ADDRESS THE QUESTION PRESENTED.

Even if the question presented merited review, this case would not be a suitable vehicle to decide it. That question, in fact, *does not matter* here because petitioner cannot benefit from *American Pipe* tolling even if it applies to Section 13's statute of repose.

An essential prerequisite to application of *American Pipe* tolling is that the putative class representative must have standing to assert the class members' claims. As this Court has long held, Article III courts lack jurisdiction over class claims that no named plaintiff has standing to assert himself. *See*, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 357-58 & n.6 (1996); *Blum* v. *Yaretsky*, 457 U.S. 991, 1001-02 (1982). It cannot be the law that the pendency of a class action that federal courts cannot constitutionally entertain suspends statutes of repose for nonparties whom the named plaintiff lacks standing to represent. Expanding *American Pipe* to do so would

violate Article III—and, to the extent the case rested on Rule 23, the Rules Enabling Act. And it would "invit[e] abuse" by leaving plaintiffs "'who have slept on their rights' … free to raise different or peripheral claims" that the class representatives themselves could not have asserted. *Crown, Cork & Seal Co., Inc.* v. *Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring) (citation omitted).

American Pipe itself did not suggest that its tolling principle would apply in such a circumstance. Quite the opposite, the Court took care to note that class certification had been denied "'*not* for lack of standing of the representative,'" but on other grounds. 414 U.S. at 553 (emphasis added) (citation omitted). And, as noted, petitioner's own leading authority refused to apply *American Pipe* based on a complaint brought by named plaintiffs who had not purchased the investments at issue in the putatively tolled claims. *See Joseph*, 223 F.3d at 1168.

As explained above, and as respondents demonstrated in detail in the court below, that principle dooms petitioner's bid for tolling here because none of the putative class representatives had standing to assert the claims for which petitioner seeks to toll Section 13's time bar. *Supra* at 12-13; *see* C.A. Credit Suisse et al. Appellee Br. 40-50. The Second Circuit made clear that its decision "implicates *only* those claims and defendants as to which" the only named plaintiff "would *lack* standing" under circuit precedent. Pet. App. 22a-23a n.19 (emphases added). Petitioner did not dispute those named plaintiffs' lack of standing to assert the relevant claims in the court of appeals, and it does not challenge that determination here.

That independent obstacle to *American Pipe* tolling counsels strongly against review. Respondents would be entitled to urge affirmance of the decision below on this (or any other) ground supported by the record. *See United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). The Court thus would be forced to choose between deciding that threshold issue in the first instance—in which case the Court might well never reach the question presented—or bypassing it to resolve a question that is academic in the case at hand.

Consistent with its practice, the Court should not expend its already-taxed resources pursuing either potentially wasteful course. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 248-49 (10th ed. 2013). If the Court concludes that the question of *American Pipe*'s application to Section 13's statute of repose merits review, it should await a case that properly presents it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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January 27, 2014

APPENDIX

APPENDIX A

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.

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Section 15b of Title 15, United States Code, 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 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 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.

Section 2501 of Title 28, United States Code, provides:

§ 2501. Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based. A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases. A suit

for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

Section 2636 of Title 28, United States Code, provides:

§ 2636. Time for commencement of action

(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—

(1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act; or

(2) within one hundred and eighty days after the date of denial of a protest by operation of law under the provisions of section 515(b) of such Act.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of mailing of a notice pursuant to section 516(c) of such Act.

(c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 is barred unless commenced in accordance with

the rules of the Court of International Trade within the time specified in such section.

(d) A civil action contesting a final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or a final determination of the Secretary of Commerce under section 251 or section 271 of such Act is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of such determination.

(e) A civil action contesting a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of the publication of such determination in the Federal Register.

(f) A civil action involving an application for the issuance of an order making confidential information available under section 777(c)(2) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within ten days after the date of the denial of the request for such confidential information.

(g) A civil action contesting the denial or revocation by the Secretary of the Treasury of a customs broker's license or permit under subsection (b) or (c) of section 641 of the Tariff Act of 1930, or the revocation or suspension of such license or permit or the imposition of a monetary penalty in lieu thereof by such Secretary under section 641(d) of such Act, is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of the entry of the decision or order of such Secretary.

(h) A civil action contesting the denial, suspension, or revocation by the Customs Service of a private laboratory's accreditation under section 499(b) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within 60 days after the date of the decision or order of the Customs Service.

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)–(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

Section 605(a) of Title 41, United States Code (2008), provided:

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The con-

tracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

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Section 7103(a) of Title 41, United States Code, provides:

§ 7103. Decision by contracting officer

(a) CLAIMS GENERALLY.—

(1) SUBMISSION OF CONTRACTOR'S CLAIMS TO CONTRACTING OFFICER.—Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.

(2) CONTRACTOR'S CLAIMS IN WRITING.—Each claim by a contractor against the Federal Government relating to a contract shall be in writing.

(3) CONTRACTING OFFICER TO DECIDE FEDERAL GOVERNMENT'S CLAIMS.—Each claim by the Fed-

eral Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.

(4) TIME FOR SUBMITTING CLAIMS.—

(A) IN GENERAL.—Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

(B) EXCEPTION.—Subparagraph (A) of this paragraph does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

(5) APPLICABILITY.—The authority of this subsection and subsections (c)(1), (d), and (e) does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.

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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 au-

thorized 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).