No. 16-206

IN THE
Supreme Court of the United States

DEKALB COUNTY PENSION FUND, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

TRANSOCEAN LTD., ROBERT L. LONG, JON A. MARSHALL, AND TRANSOCEAN INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the rule established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)—that the commencement of a class action suspends the applicable statute of limitations as to putative class members—should be extended to statutes of repose under the Securities Exchange Act of 1934, despite this Court's holding in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014), that statutes of repose set an "outer limit on the right to bring a civil action" and "generally may not be tolled."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, (i) Respondent Transocean Ltd. states that it does not have a corporate parent, and there is no publicly held corporation that holds more than 10 percent of its stock; and (ii) Respondent Transocean Inc. states that it is a wholly owned subsidiary of its parent corporation Transocean Ltd.

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INTRODUCTION

Petitioner DeKalb County Pension Fund ("DeKalb") urges this Court to review whether *American Pipe*'s tolling rule for class action claims applies to statutes of repose in class actions under the Securities Exchange Act of 1934. DeKalb insists that review is warranted because the Court granted certiorari on this question three Terms ago in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), but then dismissed the writ as improvidently granted, 135 S. Ct. 42 (2014). *See* Pet. 3. That same Term, however, the Court provided guidance that dictates the answer to the question presented in this case and renders further review unnecessary.

In *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), this Court drew a sharp contrast between statutes of repose and statutes of limitations. Statutes of repose, *CTS* held, impose "an 'absolute . . . bar' on a defendant's temporal liability," and "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* at 2182-83. Since *CTS*, three Circuits—the Sixth Circuit, the Eleventh Circuit, and the Second Circuit in this case—have addressed the question presented, and all of them have agreed that *American Pipe* tolling is inapplicable to similar statutes of repose. Those courts have read *CTS* to support and validate the Second Circuit's reasoning in *IndyMac*. No Circuit has reached a contrary conclusion in the wake of *CTS*.

DeKalb's plea for review thus rests on a claimed conflict with a Tenth Circuit decision from 16 years ago, which reached a contrary result without the benefit of this Court's definitive guidance in *CTS*. The Tenth Circuit's weakly reasoned decision fails even to consider a critical aspect of *IndyMac*'s holding: that to the extent *American Pipe* tolling is grounded in Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), rather than in a court's equitable powers, the Rules Enabling Act bars tolling of a statute of repose, as opposed to a statute of limitations. Given *CTS*, there is every reason to expect that the Tenth Circuit will revisit its outlier decision and join its sister Circuits in recognizing that courts cannot invoke *American Pipe* tolling to override the congressional judgment reflected in a statute of repose. Until the Tenth Circuit reaffirms its decision or another Circuit chooses to join it, there is good reason for this Court to let the Circuits continue to coalesce around this rule.

No pressing practical concerns warrant intervening in the Circuits' interpretation of *CTS*. There is no evidence that securities plaintiffs are forum shopping to avoid the Second Circuit's precedent foreclosing *American Pipe* tolling for statutes of repose. It remains a popular forum for securities actions, while the Tenth Circuit continues to see relatively few filings. There is likewise no evidence that the Second Circuit's *IndyMac* decision has triggered a flood of protective filings.

This Court should deny the petition.

STATEMENT

1. Respondent Transocean Inc. is a subsidiary of Respondent Transocean Ltd. and a provider of offshore contract drilling services for oil and gas. In 2007, Transocean Inc. merged with another deepwater drilling company, GlobalSantaFe Corporation. Pet. App. 6a. The companies solicited shareholder approval for the merger through a joint proxy statement issued on October 2, 2007. *Id.* at 5a-6a. The proxy statement, which was signed by Respondents Robert L. Long and Jon A. Marshall, contained customary representations regarding the companies' compliance with various laws. *Id.* at 6a-7a. GlobalSantaFe's shareholders approved the merger in November 2007. *Id.* at 6a.

On April 20, 2010, the blowout of an exploratory oil well being drilled by the *Deepwater Horizon*, a rig owned by a Transocean subsidiary, resulted in an explosion and fire on the rig and an oil spill into the Gulf of Mexico. *See id.* at 6a, 39a. Transocean's stock price declined after the accident. *See id.* at 6a, 40a.

2. On September 30, 2010, Bricklayers and Masons Local Union No. 5 Ohio Pension Fund ("Bricklayers") filed a putative class action complaint against three of the Respondents: Transocean Ltd., Robert L. Long, and Jon A. Marshall. Doc. 1.[1] Bricklayers asserted that the October 2007 proxy statement contained mis-

[1] All references to "Doc." are to the district court's docket in No. 10-cv-7498.

statements about Transocean's safety practices. *See id.* ¶ 1. Bricklayers alleged violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78n(a), 78t(a), and Securities and Exchange Commission Rule 14a-9, 17 C.F.R. § 240.14a-9. *Id.* ¶¶ 55-62.

On December 3, 2010, more than three years after the proxy statement was issued, DeKalb made its first appearance in the case. *See* Pet. App. 7a. DeKalb did not file a complaint, but rather moved for appointment as lead plaintiff under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Doc. 25. The district court later appointed the "DeKalb-Bricklayers Group" as lead plaintiff in the putative class action. *See* Pet. App. 7a.

The district court subsequently dismissed Bricklayers for lack of standing because Bricklayers could not show it had been eligible to vote on the merger or retained Transocean stock after the oil spill. *See id.* at 8a.

On April 16, 2012, DeKalb, the sole surviving lead plaintiff, filed a second amended complaint against Transocean Ltd., Transocean Inc., Robert L. Long, and Jon A. Marshall (collectively, "Transocean" or "Respondents"). *Ibid.*; Doc. 63. That complaint, like its predecessors, asserted claims under Sections 14(a) and 20(a) and Rule 14a-9. Pet. App. 8a; Doc. 63 ¶¶ 184-92. The district court subsequently stayed the case pending the Second Circuit's decision in *IndyMac*. Pet. App. 40a; Doc. 103 at 3-4.

3. In *IndyMac*, the Second Circuit held that the tolling rule established in *American Pipe* does not apply to the statute of repose in Section 13 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77m. *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 100-01 (2d Cir. 2013).

The Second Circuit recognized that *American Pipe* "does not explicitly state whether the Court was recognizing" a form of legal tolling, derived from Rule 23, or of equitable tolling, derived from a court's equity power. *Id.* at 107-08. The Second Circuit held, however, that regardless of the source of the *American Pipe* tolling doctrine, tolling did not apply to the statute of repose in Section 13. *Id.* at 109. If *American Pipe* tolling "is properly classified as 'equitable,'" the Second Circuit held, tolling is barred by *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), "which states that equitable 'tolling principles do not apply'" to Section 13. *IndyMac*, 721 F.3d at 109 (quoting *Lampf*, 501 U.S. at 363). And if "the *American Pipe* tolling rule is 'legal,'" because it is derived from Rule 23, its "extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act, 28 U.S.C. § 2072(b)." *Ibid.* Relying on precedent establishing that statutes of repose create substantive rights, the Second Circuit concluded that permitting tolling would "necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Ibid.*

4. After the *IndyMac* decision, Transocean moved to dismiss DeKalb's complaint as untimely because

DeKalb had not appeared in the case until after the applicable repose period expired. Doc. 126.

The district court granted Transocean's motion. Pet. App. 39a. The court first found that an implied three-year repose period governed DeKalb's Section 14(a) claim.[2] *Id.* at 41a-42a. The court then determined that the repose period had commenced when the proxy statement issued, meaning the period ended on October 2, 2010. *Ibid.* Because DeKalb first appeared in the case on December 3, 2010, the court found that DeKalb's claims were untimely. *Id.* at 42a. Invoking *IndyMac*, the court explained that "*American Pipe* tolling does not apply to statutes of repose" and accordingly dismissed DeKalb's claims. *Id.* at 41a.

5. The Second Circuit unanimously affirmed. It held that an implied three-year repose period, drawn from statutes of repose applicable to certain other claims under the Exchange Act, applies to claims under Section 14(a). *Id.* at 5a. The court of appeals then held that the repose period begins to run "on 'the date of the [defendant's] last culpable act or omission.'" *Ibid.* Because DeKalb first appeared two months after the three-year repose period ended, its claims were untimely. *Ibid.*

Following its reasoning in *IndyMac*, the Second Circuit rejected DeKalb's argument for *American Pipe*

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[2] The district court determined that DeKalb's Section 20(a) claim rose or fell with its Section 14(a) claim and therefore did not analyze the Section 20(a) claim separately. Pet. App. 50a.

tolling. *Id.* at 37a. The court explained that "if the *American Pipe* tolling rule is equitable in nature," *Lampf* precluded its extension to "the statutes of repose applicable to Section 14(a)." *Id.* at 36a. Emphasizing that "*all* statutes of repose create a substantive right," the court reasoned further that if "the *American Pipe* tolling rule is legal in nature, the Rules Enabling Act precludes its extension" to the repose period governing claims under Section 14(a). *Id.* at 37a.

REASONS FOR DENYING THE PETITION

This Court's decision in *CTS* obviates the need for further review of whether *American Pipe* tolling applies to statutes of repose. *CTS* confirmed that statutes of repose are not subject to tolling, emphasizing that they are "equivalent to 'a cutoff'" or an "'absolute . . . bar' on a defendant's temporal liability." 134 S. Ct. at 2183. That holding directly supports *IndyMac*'s reasons for declining to apply *American Pipe* tolling to securities repose provisions. Both Circuits that have considered the issue after *CTS* have joined *IndyMac*. Because the Circuits are coalescing around *IndyMac*, allowing further development would entail none of the practical risks about which DeKalb speculates.

1. *CTS* has essentially answered the question that this Court set out to decide when it granted certiorari in *IndyMac*.

a. The Court decided *CTS* in 2014, soon before this Court dismissed *IndyMac*. *CTS* explained the differences between statutes of limitations, which are

pegged to accrual or the plaintiff's ability to bring an action, and statutes of repose, which fix a temporal limit on the defendant's liability and "provide a fresh start or freedom from liability." *Ibid.* That legislative judgment about when a "defendant should 'be free from liability'" applies regardless of the plaintiff's ability to discover and prosecute his claim, making tolling inapplicable. *Ibid.* (internal quotation marks omitted).

b. Since *CTS* was decided in 2014, the two Circuits that have considered whether federal securities statutes of repose are subject to *American Pipe* tolling have held that *IndyMac* correctly resolved that question. The Sixth Circuit construed *CTS* to confirm *both* of *IndyMac*'s grounds for rejecting *American Pipe* tolling—that neither equitable tolling nor legal tolling may apply to a statute of repose. *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 793 (6th Cir. 2016). The Eleventh Circuit likewise endorsed the majority view, treating *American Pipe* tolling as equitable and holding it inapplicable to a securities statute of repose. *Dusek v. JPMorgan Chase & Co.*, __ F.3d __, 2016 WL 4205857, at *5 (11th Cir. Aug. 10, 2016), *petition for cert. filed* (U.S. Sept. 26, 2016) (No. 16-389).

c. Because the Circuits are coalescing around an application of *CTS* that precludes tolling here, any intervention by the Court is unnecessary and, at a minimum, premature. The emerging consensus demonstrates that any tension in the Circuits that supported review in *IndyMac* is now well on its way to resolution, and that the lone outlier decision can,

should, and likely will be revisited. At the time the Court granted certiorari in *IndyMac*, only the Tenth Circuit had applied *American Pipe* tolling to a statute of repose, in its decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000). *Joseph* remains the only decision taking that position. And despite treating *American Pipe* as a corollary of Rule 23, the Tenth Circuit did not address the Rules Enabling Act analysis that led *IndyMac* and other recent cases to reject such tolling on a legal theory. What is more, the Tenth Circuit did not have the benefit of *CTS*, which underscores the substantive nature of repose provisions and thus casts considerable doubt on *Joseph*'s reasoning.

d. The Federal Circuit cases invoked by DeKalb (Pet. 14-16) do not create a split with the cases following *IndyMac* either. The Federal Circuit cases do not involve statutes of repose, and the distinction between repose and limitations provisions is critical for equitable tolling. Nor do those cases address, or have any occasion to examine, the Rules Enabling Act bar applied by *IndyMac*. That is because those cases apply *American Pipe* tolling on the basis of special rules that are authorized not by the Rules Enabling Act, but by separate statutes. *See Bright v. United States*, 603 F.3d 1273, 1286 (Fed. Cir. 2010); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000).

2. Because *CTS*'s analysis has already set the lower courts on a path toward a uniform *American Pipe* rule for statutes of repose, the better course is to await a decision—if a Circuit ever issues one—that squarely

rejects *IndyMac*'s reasoning. That is especially so because taking a wait-and-see approach is unlikely to produce the systemic confusion or burdens that DeKalb predicts.

The Tenth Circuit plays host to just 2% of securities class actions nationwide, while more than 25% of all such lawsuits are filed in the Second Circuit. *See* Svetlana Starykh & Stefan Boettrich, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 9 (Jan. 25, 2016) ("*Recent Trends*"), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf. Unsurprisingly, DeKalb is unable to show that the presence of an outlier decision in a Circuit with few securities lawsuits has engendered the rampant forum shopping it forecasts. Nor has it demonstrated that *IndyMac* has encouraged a flood of protective filings by individual securities plaintiffs.

These unsubstantiated concerns furnish no grounds for overriding Congress's clear intent in fixing the repose provisions here. As this Court has noted, Congress's decision to structure private securities claims with a short statute of limitations and a longer statute of repose evinces a clear intent to set a firm outside limit on liability. That structure is fundamentally inconsistent with *American Pipe* tolling.

3. The merits provide good reason to expect that the Circuits will continue to coalesce around *IndyMac* and confirm that this Court's intervention is unwarranted. *CTS* makes clear that statutes of repose are

not subject to equitable tolling, and this Court's precedents suggest strongly that *American Pipe* tolling sounds in equity. Even if the doctrine were grounded in Rule 23, *CTS* makes equally clear that statutes of repose give defendants a substantive right to "freedom from liability," 134 S. Ct. at 2183, one that would be abridged by tolling.

I. ANY SPLIT AMONG THE COURTS OF APPEALS IS SHALLOW AND DIMINISHING IN THE WAKE OF *CTS*

A. *CTS* Confirmed that Statutes of Repose Create Substantive Rights and Are Not Subject to Tolling

CTS confirms that the Second's Circuit's *IndyMac* decision is correct, and each Circuit to consider the issue since *CTS* has agreed with the Second Circuit's holding.

In *CTS*, this Court considered whether a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658, preempted state statutes of repose. *See* 134 S. Ct. at 2180. Section 9658 establishes a "discovery rule" that causes "statutes of limitations in covered actions" to "begin to run when a plaintiff discovers, or reasonably should have discovered," that the harm alleged was caused by the release of a contaminant into the environment. *Ibid.* Section 9658 indisputably "pre-empts state statutes of limitations that are in conflict with its terms." *Ibid.* But this Court held that Section 9658 did not preempt state statutes of repose. *See ibid.*

The Court explained that statutes of repose and statutes of limitations are different in several key respects. Statutes of limitations are triggered when a claim accrues, while statutes of repose are triggered by the defendant's actions and "put[] an outer limit on the right to bring a civil action," even if an injury has not yet been discovered—indeed, even if it has not yet occurred. *Id.* at 2182; *see also id.* at 2187 (explaining that a statute of repose "mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued"). Statutes of limitations, the Court held, "'prevent[] surprises'" by ensuring that plaintiffs do not sleep on their legal rights, while statutes of repose reflect "a legislative judgment" that creates "*an absolute bar* on a defendant's temporal liability." *Id.* at 2183 (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) & 54 C.J.S., Limitations of Actions § 7, p. 24 (2010)) (emphasis added); *see also id.* at 2187 ("A statute of repose can be said to define the scope of the cause of action, and therefore the liability of the defendant.").

This Court's explanation of repose periods in *CTS* supports the Second Circuit's holding in *IndyMac* and in the decision below that repose periods may not be tolled. As this Court explicitly stated, while statutes of limitations are subject to equitable tolling, statutes of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* at 2183. And this Court's recognition that statutes of repose "define the scope of . . . the liability of a defendant," *id.* at 2187, is consistent with the Second Circuit's determination that statutes of repose create

substantive rights and therefore may not be abridged or modified by the Federal Rules, specifically by any tolling doctrine grounded in Rule 23.

B. Each Circuit to Rule Since *CTS* Has Agreed with the Second Circuit that a Statute of Repose May Not Be Tolled

Each Circuit to consider the question presented after *CTS* has followed the Second Circuit and concluded that *American Pipe* does not toll statutes of repose pending class certification.

1. In *Stein*, the Sixth Circuit "join[ed] the Second Circuit in holding that, regardless of whether *American Pipe* tolling is derived from courts' equity powers or from Rule 23, it does not apply to statutes of repose." 821 F.3d at 794-95. *Stein* involved two statutes of repose that govern certain claims under the Securities Act and the Exchange Act. *See id.* at 792.

The Sixth Circuit first held that, assuming that the *American Pipe* rule is a form of equitable tolling, this Court's decisions in *Lampf* and *CTS* preclude tolling statutes of repose. *See id.* at 793-94 ("Like *Lampf* before it, *CTS* discussed at length the incompatibility of equitable tolling and statutes of repose.").

The Sixth Circuit alternatively held that, even if *American Pipe* were considered a form of legal tolling derived from Rule 23, it could not alter a statute of repose. Citing *CTS*, the Sixth Circuit held that "statutes of repose vest a substantive right in defendants to

be free of liability." *Id.* at 794. The Rules Enabling Act, however, "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" *ibid.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (quoting 28 US.C. § 2072(b))), which is precisely the effect of tolling a statute of repose, *id.* at 794-95.

2. Two days before DeKalb filed its petition for a writ of certiorari, the Eleventh Circuit reached the same conclusion in *Dusek*, 2016 WL 4205857, at *5. The plaintiffs in *Dusek* sought to bring an untimely claim under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), on the theory that the *American Pipe* rule tolled the applicable statute of repose, 28 U.S.C. § 1658(b). *See* 2016 WL 4205857, at *3. The Eleventh Circuit rejected that theory. *Id.* at *4-5. Citing numerous decisions of this Court, the Eleventh Circuit first determined that *American Pipe* is an equitable tolling rule. *See ibid.* The Eleventh Circuit then concluded that *CTS* precludes the extension of *American Pipe*'s tolling rule to statutes of repose. *See ibid.*

3. The weight of authority in support of the conclusion that the *American Pipe* doctrine does not toll statutes of repose is likely to grow. The Third Circuit is currently considering the issue. *N. Sound Capital LLC v. Merck & Co., Inc.*, No. 3:13-cv-7240 (FLW) (DEA), 2015 WL 5055769 (D.N.J. Aug. 26, 2015), *appeal docketed*, No. 16-1364 (3d Cir.). In light of *CTS* and the Sixth and Eleventh Circuits' recent holdings, there is every indication that the Third Circuit will adopt the majority rule that *American Pipe* does not toll statutes of repose. Whichever result the Third Circuit reaches,

however, this Court will likely have the opportunity to review that decision with the benefit of further development of the issues. There is accordingly no need for the Court to intervene in this case or any other recently filed petition.[3]

C. The Purported Division Among the Circuits Is Shallow and Likely to Resolve Itself

Of the courts of appeals to have considered the question presented, only one—the Tenth Circuit—has applied *American Pipe* to a statute of repose. *See Joseph*, 223 F.3d 1155. The Tenth Circuit decided *Joseph* 16 years ago, long before this Court's guidance in *CTS*; no court of appeals since then has followed the Tenth Circuit; this Court's subsequent decisions create substantial doubt about the continuing validity of *Joseph*; and *Joseph* does not squarely conflict with *IndyMac*'s majority rule.

1. In *Joseph*, the Tenth Circuit considered whether the pendency of two class actions tolled Section 13's statute of repose. *Id.* at 1166. The defendants argued that this Court's decision in *Lampf* precluded all tolling, but the court of appeals determined that *Lampf*

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[3] Three such petitions are pending: One from the Eleventh Circuit's decision in *Dusek*, *see Dusek v. JPMorgan Chase & Co.*, No. 16-389 (pet. filed Sept. 26, 2016), and two from Second Circuit decisions that have followed *IndyMac*, *see SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. LLC*, No. 16-372 (pet. filed Sept. 22, 2016); *Cal. Pub. Emps.' Ret. Sys. v. Moody Inv'rs Serv., Inc.*, No. 16-373 (pet. filed Sept. 22, 2016).

was inapplicable because the tolling sought by the plaintiff was "legal rather than equitable in nature." *Ibid.* Deeming the *American Pipe* rule a form of legal tolling grounded in Rule 23, the Tenth Circuit applied that rule to toll the statute of repose at issue. *Id.* at 1167-68. The court reasoned that tolling the statute of repose served Rule 23's purposes by encouraging judicial economy. *Id.* at 1167. The court also held that tolling did not "compromise the purposes of statutes of . . . repose." *Ibid.*

The court of appeals gave only limited consideration to the possibility that *American Pipe* is, in fact, an equitable tolling rule. When that court issued its opinion, it did not have the benefit of later decisions by this Court that have recognized tolling under *American Pipe* as equitable. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011) (describing *American Pipe* as "specifically grounded in policies of judicial administration"); *Young v. United States*, 535 U.S. 43, 49 (2002) (casting *American Pipe* as an example of "equitable tolling"). Nor had this Court decided *CTS*, which confirmed the distinction between statutes of limitations, which may be tolled, and statutes of repose, which may not. 134 S. Ct. at 2187-88.

2. *Joseph* did not address a critical basis for *IndyMac* and the decision below—that even assuming the *American Pipe* rule is a form of legal tolling, the Rules Enabling Act forecloses its application to statutes of repose. The Tenth Circuit held that the *American Pipe* rule derives from Rule 23, but it never questioned whether Rule 23 could be interpreted to alter

the substantive rights created by a statute of repose. Nor has the court since had occasion to consider that issue, although this Court's decision in *CTS* makes such review inevitable. Indeed, the Sixth Circuit has observed the Second Circuit's *IndyMac* decision "is also more consistent with the Supreme Court's subsequent decision in *CTS*" than *Joseph*. *Stein*, 821 F.3d at 793.

3. This Court's intervening decisions in *Smith*, *Young*, and *CTS* provide the Tenth Circuit an opportunity to revisit *Joseph*. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (holding that Tenth Circuit is bound by "precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court"). Given the uniform approach of other Circuits, there is every reason to conclude that the Tenth Circuit will correct its error without any further invention by this Court.

D. Federal Circuit Jurisdiction Cases Do Not Conflict with the Decision Below

DeKalb argues that the decision below is inconsistent with Federal Circuit decisions involving "'jurisdictional' provisions setting time limits for bringing claims against the United States." Pet. 14-16. But *Bright*, 603 F.3d 1273, the primary case DeKalb cites on that score, does not conflict with the decision below. *Bright* neither involved a statute of repose nor required the Federal Circuit to consider the restrictions imposed by the Rules Enabling Act.

In *Bright*, the Federal Circuit applied *American Pipe* tolling in the context of class action claims governed by 28 U.S.C. § 2501, a statute prescribing a six-year limitations period for claims against the United States brought in the Court of Federal Claims. *See Bright*, 603 F.3d at 1274. Treating *American Pipe* tolling as an example of legal tolling grounded in Rule 23, and not in a court's equitable powers, the Federal Circuit held that legal tolling was also available under the analogous Court of Federal Claims Rule 23 ("RCFC 23"). *Id.* at 1287-90. The Federal Circuit therefore reversed the dismissal of a timely filed class action as to all putative class members but the named plaintiff because the class members had not filed their own complaints before the time limit expired. *Id.* at 1290.

Neither *Bright* nor the kindred ruling in *Stone Container Corp.*, 229 F.3d 1345, conflicts with the decision below.

First, the time limit tolled by the Federal Circuit in *Bright* was not a statute of repose. It was a six-year statute of limitations, albeit one that the court regarded as "'jurisdictional in nature and more absolute and rigid than other statutes of limitation.'" *Bright*, 603 F.3d at 1277-78 (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008)); *see also Stone*, 229 F.3d at 1347. DeKalb offers no justification for why a jurisdictional statute of limitation should be treated as akin to a statute of repose. And there is no reason to analogize between the two. Unlike a statute of repose, which "can be said to define the scope of the cause of action, and therefore the liability of the defendant,"

CTS, 134 S. Ct. at 2187, jurisdiction delimits the power of a court to decide an issue, *see, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (defining jurisdiction as "the courts' statutory or constitutional *power* to adjudicate the case"); *see also* 5B Charles Allan Wright et al., Federal Practice & Procedure § 1350 (3d ed. 2016) (jurisdiction involves the judge's "authority or competence to hear and decide the case before it"). It does not vest substantive rights in one party or another.

Second, even assuming a jurisdictional statute vested some substantive right in a defendant, the Federal Circuit's rulemaking is not governed by the Rules Enabling Act. The controlling class action rule that served as the basis for tolling in *Bright* was not Rule 23, but RCFC 23. *See* 603 F.3d at 1276-77, 1286. The Court of Federal Claims promulgated RCFC 23 under 28 U.S.C. § 2503(b), which authorizes that court to prescribe its own procedural rules. Unlike the Rules Enabling Act, Section 2503(b) does not prohibit the authorized rules from altering substantive rights. *Compare* 28 U.S.C. § 2503(b) (authorizing the Court of Federal Claims to "prescribe" its "rules of practice and procedure"), *with* 28 U.S.C. § 2072(a), (b) (authorizing the Supreme Court to "prescribe general rules of practice and procedure" so long as such rules do "not abridge, enlarge or modify any substantive right"). *Bright* thus had no reason to address, and did not consider, a critical basis for *IndyMac*. *See also Stone*, 229 F.3d at 1347 (no analysis of Rules Enabling Act).

Because the Federal Circuit decisions address a different issue from the decision below, there is nothing to DeKalb's claim that this "case would have come out differently under the Federal Circuit's approach." Pet. 16.

E. The District Court Decisions DeKalb Cites Provide No Reason to Grant Review

DeKalb urges this Court to consider the differing views of "district courts in circuits with no controlling precedent." Pet. 16-18. But conflict in the district courts generally does not warrant a grant of certiorari by this Court. *See* Sup. Ct. R. 10. In all events, the vast majority of the district court decisions cited in the petition predate *IndyMac*, *Stein*, and *Dusek*, as well as *CTS*, and are thus of marginal relevance because they were decided without the benefit of the those decisions.[4] DeKalb cites just three district court cases that

[4] Pet. 16-18 (citing *Hrdina v. World Sav. Bank, FSB*, No. C 11-05173 WHA, 2012 WL 294447 (N.D. Cal. Jan. 31, 2012); *In re Merck & Co., Inc. Sec. Derivative & "ERISA" Litig.*, MDL No. 1658 (SRC), 2012 WL 6840532 (D.N.J. Dec. 20, 2012); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157 (C.D. Cal. 2010); *Hildes v. Anderson*, No. 08-cv-0008-BEN (RBB), 2010 WL 4811975 (S.D. Cal. Nov. 8, 2010); *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164 (D. Mass. 2009); *Andrews v. Chevy Chase Bank, FSB*, 243 F.R.D. 313 (E.D. Wis. 2007); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 465 F. Supp. 2d 687 (S.D. Tex. 2006); *Ballard v. Tyco Int'l, Ltd.*, No. MDL 02-MD-1335-PB, 2005 WL 1683598 (D.N.H. July 11, 2005); *In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582 (N.D. Ill. 1998); *Salkind v. Wang*, Civ. A. No. 93-10912-WGY, 1995 WL 170122 (D. Mass. Mar. 30, 1995)).

postdate the decision below. Two of those cases are in Third Circuit—one of which is currently pending on appeal. The third is in the Fifth Circuit—which has not yet had a chance to review the issue.[5] If anything, these cases support denying review now to allow the Circuits a chance to reach consensus around the Second, Sixth, and Eleventh Circuits' view.

II. THE QUESTION PRESENTED IS OF LIMITED SIGNIFICANCE BECAUSE THE CIRCUITS ARE COALESCING AROUND A SINGLE RULE

DeKalb's concerns about the importance of the tolling issue for securities class actions are overwrought. *See* Pet. 28-32.

1. The situation in the courts of appeals is not one of confusion but of emerging clarity and consensus. As noted (*see supra* pp. 13-14), the recent decisions by the Sixth and Eleventh Circuits refute DeKalb's contention that the "conflict [among the courts of appeals] has remained and deepened" since this Court dismissed the writ of certiorari in *IndyMac*. Pet. 28.

Nor is DeKalb correct in suggesting that the large volume of securities class actions filed within the Second Circuit justifies review. *Id.* at 28-29. If anything, the opposite is true because the Second Circuit's rule is

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[5] Pet. 16-18 (citing *N. Sound Capital*, 2015 WL 5055769; *Prudential Ins. Co. of Am. v. Bank of Am., Nat'l Ass'n*, 14 F. Supp. 3d 591 (D.N.J. 2014); *In re BP p.l.c. Sec. Litig.*, No. 4:13-cv-1393, 2014 WL 4923749 (S.D. Tex. Sept. 30, 2014)).

correct. As DeKalb accurately notes, the Second Circuit "is one of the busiest circuits in the country for securities class actions" and "hear[s] roughly a quarter of the nation's securities class actions." *Ibid.* (citing *Recent Trends* 9). Adding the Sixth and Eleventh Circuits, more than 30% of the securities class actions filed in 2015 were filed in Circuits that now follow the majority rule. In contrast, just 2% of securities class actions filed in 2015 were filed in the Tenth Circuit, the only Circuit to have extended *American Pipe* to toll statutes of repose. If the Tenth Circuit adheres to its incorrect rule in a future case, or if another Circuit adopts that incorrect rule, the Court can grant review at that time. In view of the developments since this Court granted *IndyMac*, however, there is no need to grant review now.

2. DeKalb and *amici* speculate about a potential "flood" of "unnecessary and duplicative filings" as a result of the decision below and *IndyMac*. *Id.* at 30. Reality refutes that speculation. DeKalb cites the more than 200 securities class actions filed each year and extrapolates from that number to "thousands" of expected protective filings by parties seeking to ensure that they comply with the applicable statute of repose. *See ibid.* Notably, DeKalb cites no evidence of widespread protective filings in the wake of *IndyMac*, although one might expect to have observed an increase in 2014 and 2015 if DeKalb's prognostications were correct. And DeKalb's math is, in any event, suspect, as the vast majority of the securities class actions filed each year settle or are dismissed long before protective filings would be necessary. *See Recent Trends* 19 (not-

ing that in 2015 74% of cases settled or were dismissed before a motion for class certification was even filed).[6] What is more, even if DeKalb had identified some uptick in protective filings, it has not pointed to any evidence that courts have been unable to manage those filings.

Relatedly, there is no sign of forum-shopping by securities class action plaintiffs, as one would expect if the majority rule were as undesirable as DeKalb asserts. Since the Second Circuit decided *IndyMac* in 2013, securities class action filings have remained steady in both the Second and Tenth Circuits. In 2013, 60 securities class actions were filed in the Second Circuit and 5 in the Tenth Circuit. *Id.* at 9. In 2015, 59 securities class actions were filed in the Second Circuit and 5 in the Tenth Circuit. *Id.*

3. The majority rule followed by the decision below does not, as DeKalb and *amici* argue, interfere with

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[6] *Amici* law professors echo DeKalb's view, speculating that the majority rule will "invit[e] a wave of wasteful and burdensome protective filings that will drain federal court resources." Brief of Civil Procedure & Securities Law Professors as *Amici Curiae* in Support of Petition for a Writ of Certiorari 3 (Sept. 14, 2016). In *IndyMac*, a related group of professors offered similar speculation as *amici curiae*. *See* Brief of Civil Procedure & Securities Law Professors as *Amici Curiae* in Support of Petition for a Writ of Certiorari 3, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640, 2013 WL 8114524 (Dec. 26, 2013). Notably, *amici*—like DeKalb—make no effort to demonstrate that their predictions have been borne out in the three years that have elapsed since the Second Circuit issued its opinion in *IndyMac*.

Congress's scheme for class-action procedure under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. Congress "legislates against the backdrop of existing law." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1934 n.3 (2013). When the PSLRA became law, no court of appeals had yet held that the rule in *American Pipe* operated to toll statutes of repose. The first, and only, court of appeals to do so was the Tenth Circuit in 2000. Thus, the decision below and *IndyMac* cannot be said to have upset Congress's expectations.

Indeed, it is the application of *American Pipe* tolling to the repose period here that would defeat congressional intent. The Exchange Act provisions that supply the three-year statute of repose here—a point that Petitioner no longer challenges—set forth a separate one-year statute of limitations. *See* Pet. App. 10a-28a (holding that a one-year statute of limitations and three-year statute of repose continue to apply to Section 14(a) claims). That Congress fixed a short limitations period alongside a longer repose period underscores that the latter was intended to cut off a defendant's temporal liability. *See Lampf*, 501 U.S. at 363. This Court has previously recognized that "the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure" adopted by Congress. *Ibid.* It is likewise inconsistent with that congressionally adopted structure to apply legal tolling to extend the

repose period for the absent members of a putative class.[7]

4. Nor does the majority rule prevent class members from exercising their right to opt out and file their own actions. DeKalb points to *SRM Global Master Fund Limited Partnership v. Bear Stearns Companies L.L.C.*, 829 F.3d 173 (2d Cir. 2016), *petition for cert. filed* (U.S. Sept. 22, 2016) (No. 16-372), in which the Second Circuit held that a party that had previously opted out of a class could not later file its own claim after the repose period had run. *See* Pet. 32. DeKalb suggests that the decision in *SRM Global* contravenes *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974), in which this Court noted that parties to a class action may opt out without fear of running afoul of the applicable statute of limitations in light of *American Pipe*. *See* Pet. 32. But there is no conflict between *SRM Global* and *Eisen*, which does not once mention statutes of repose. And *SRM Global* does not render the opt-out right "illusory" (*ibid.*); it merely conditions the exercise of that right on compliance with the applicable statute of repose.

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[7] In the trial court, DeKalb pressed the theory that the proper statute of repose was the five-year period applicable to Section 10(b) claims. *See* 28 U.S.C. § 1658(b) (creating a two-year statute of limitations and five-year statue of repose for securities actions involving a claim of fraud). DeKalb has now abandoned that theory, but the question presented still rests on a substantial threshold question of construction. By contrast, controlling statute of repose in the pending Third Circuit case is the statutory five-year period for Section 10(b) claims. *See N. Sound Capital*, 2015 WL 5055769, at *4.

5. At bottom, DeKalb urges this Court to adopt a rule that undercuts Congress's clear objective in establishing a statute of repose. That objective is to cut off liability, and Congress highlighted it by fixing a separate, shorter statute of limitations. The repose period gives Defendants a substantive right to be free from liability, and Plaintiffs' exaggerated concerns about protective filings should not defeat that legislatively conferred right.

III. THE DECISION BELOW IS CORRECT AND IS A POOR VEHICLE FOR REVIEW OF THE QUESTION PRESENTED

Although the lack of meaningful disagreement among the Circuits means that certiorari should be denied, DeKalb also contends that supposed errors in the decision below provide an independent basis for certiorari. The decision below, however, is consistent with this Court's precedent and is otherwise correct.

1. The Second Circuit properly interpreted *American Pipe* as inapplicable to statutes of repose.

As the court of appeals noted, *American Pipe* does not specify whether it rests on equitable tolling principles or on an interpretation of Rule 23. *American Pipe* does include some language that suggests it applied legal tolling. *See, e.g.*, 414 U.S. at 555 (referring to the Court's "interpretation of the Rule"). But the decision is replete with language supporting the view that it applied equitable tolling. *See, e.g.*, *id.* at 558 (referring to recognition of "judicial power to toll statutes of limitation in federal courts"). And this Court has, on at

least two occasions, described *American Pipe* as setting forth an equitable tolling rule. *See* Pet. 23 n.17 (conceding that fact).

Assuming that *American Pipe* applied equitable tolling, as this Court has indicated, the decision below is manifestly correct under both *Lampf*, which held that "equitable . . . 'tolling principles do not apply'" to the statute of repose in Section 13, 501 U.S. at 363, and *CTS*, which confirmed that "[s]tatutes of limitations, but not statutes of repose, are subject to equitable tolling," 134 S. Ct. at 2183.

Even assuming *American Pipe* applied legal tolling derived from Rule 23, the decision below is equally correct. A statute of repose, unlike a statute of limitations, creates a substantive right to be free of liability "after the legislatively determined period of time." *See ibid.* DeKalb does not contest that the repose period at issue here, like statutes of repose generally, establishes a substantive right. *See* Pet. 27 (acknowledging that repose periods may create a substantive right). Instead, DeKalb argues only that the substance of the right is irrelevant to the Rules Enabling Act determination. *See ibid.*

That is wrong. An interpretation of Rule 23 is only valid under the Rules Enabling Act if it does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see Wal-Mart Stores*, 564 U.S. at 367 (stating that Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right'"). Interpreting Rule 23 to permit tolling of Sec-

tion 14(a)'s repose period would "abridge, enlarge or modify" Transocean's substantive rights by abrogating its right to be free of liability after the three-year repose period ends. Rule 23 must instead be interpreted so as to respect the substantive rights conveyed by Section 14(a)'s repose period—that is, it must be understood to bar tolling of the repose period.

2. DeKalb also argues that the terms "statute of repose" and "statute of limitations" were historically ill-defined, and that *American Pipe* should therefore be read as governing the tolling of both statutes of repose and of limitations. Pet. 19-21, 24 n.18. It is true that the modern usage of the terms evolved from less precise origins. *See CTS*, 134 S. Ct. at 2185-86. Nevertheless, within a few years of this Court's decision in *American Pipe*, "the concept that statutes of repose and statutes of limitations are distinct" was already well established. *Id.* at 2186 (citing 1982 report distinguishing between the two types of time limits). There is no reason to suppose that this Court intended to ascribe an all-encompassing meaning to the term "statute of limitations," when it undoubtedly understood the distinction between the two concepts.

Moreover, the time bar at issue in *American Pipe* is, today, uniformly understood to be a statute of limitations. This Court would have had to reach beyond the confines of the case in *American Pipe* to hold that statutes of repose are tolled during the pendency of a class action.

DeKalb's foray into linguistic history thus casts no doubt on the conclusion that *American Pipe* was addressed only to statutes of limitation, as that term is understood today, rather than to statutes of repose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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