NO. 16-372

In the
Supreme Court of the United States

SRM GLOBAL MASTER FUND LIMITED PARTNERSHIP,
Petitioner,
v.
THE BEAR STEARNS COMPANIES LLC, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), this Court held that the filing of a putative class action suspends applicable statutes of limitations for any party that would have been a member of the class. As a result, a later-filed individual action by a would-be class member is not time-barred even if it is filed after the applicable limitations period has run. Unlike statutes of *limitations*, however, statutes of *repose* "put[] an outer limit on the right to bring a civil action," and thus serve as an "absolute … bar" to the defendant's liability. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014). Since this Court decided *Waldburger*, every circuit court to consider the issue has held that *American Pipe* tolling does not apply to statutes of repose.

The question presented is:

Whether the tolling rule articulated in *American Pipe* should be extended to the statute of repose governing fraud claims under the Securities Exchange Act of 1934 despite this Court's holding in *Waldburger* that statutes of repose serve as an "absolute … bar" to a defendant's liability.

PARTIES TO THE PROCEEDING

Petitioner SRM Global Master Fund Limited Partnership was the plaintiff in the district court and the appellant in the Second Circuit.

Respondents The Bear Stearns Companies LLC (f/k/a Bear Stearns Companies Inc.), Alan D. Schwartz, Samuel L. Molinaro, Jr., James Cayne, Warren Spector, and Deloitte & Touche LLP were the defendants in the district court and the appellees in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Respondent The Bear Stearns Companies LLC is a wholly owned subsidiary of JPMorgan Chase & Co. JPMorgan Chase & Co. is a publicly held corporation with no corporate parent. No publicly traded corporation owns 10% or more of its stock.

Respondent Deloitte & Touche LLP is a limited liability partnership with its interests held by its partners and principals and by Deloitte LLP (with its interests held by its partners and principals). Deloitte & Touche LLP has no parent corporations and no publicly traded corporation owns 10% or more of its equity interests.

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INTRODUCTION

This case arises from the near-collapse of Bear Stearns, at the time a major global investment bank. Petitioner—a highly sophisticated, multi-billion-dollar investment fund that takes a contrarian approach to investing—invested in Bear Stearns securities before the financial crisis. Unlike many other investors in Bear Stearns, however, Petitioner sold *all* of its Bear Stearns common stock well before the stock's value plummeted in the spring of 2008. Yet in keeping with its contrarian streak, Petitioner chose not to follow the market—which was betting against Bear Stearns—but instead to replace its shares with equity swaps.

By March 2008, Bear Stearns stock was trading for pennies on the dollar. Investors that had held the bank's securities subsequently brought numerous class actions, which were later consolidated. Because it had owned Bear Stearns stock during the class period, Petitioner was a member of the class—but its losses derived mostly from its equity swaps, which were outside the class definition. After the parties to the consolidated class action reached a settlement, Petitioner received permission to opt out of the class action in November 2012. Petitioner then inexplicably did nothing for nearly 150 days. Despite being represented by skilled counsel at all times, Petitioner waited until late-April 2013 to file this individual action against Respondents, which asserts claims based on both its Bear Stearns shareholdings (on which its losses were minimal) and its equity swaps.

The wait was not worth it. The district court dismissed Petitioner's claims on several grounds: the claims based on Section 10(b) of the Securities Exchange Act of 1934 were untimely under the five-year statute of repose in 28 U.S.C. §1658(b), which expired in March 2013; the equity-swap-based claims had no proper statutory basis under Section 10(b); Petitioner's control-person claims failed in light of Petitioner's failure to state a primary violation under Section 10(b); and Petitioner's New York common-law claims were both time-barred and insufficiently pled. The Second Circuit affirmed.

Petitioner now asks this Court to grant certiorari to address whether the tolling doctrine articulated in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), applies to statutes of repose. The petition should be denied. *American Pipe* holds that the filing of a putative class action suspends applicable *statutes of limitations* for any party that would have been a member of the class. That reflects the basic reality that statutes of limitations are subject to at least some tolling rules. But there is no basis to extend that holding to the very different context of statutes of repose. Indeed, one of the principal differences between statutes of repose and limitations is that the former are not subject to tolling. As this Court recently clarified, statutes of repose "put[] an outer limit on the right to bring a civil action," and thus serve as an "*absolute … bar*" to the defendant's liability. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014) (emphasis added).

As Petitioner (repeatedly) notes, this Court granted certiorari three years ago to address whether

American Pipe applies to statutes of repose, only to dismiss the writ as improvidently granted. *See Pub. Emps.' Ret. Sys. of Mississippi v. IndyMac MBS, Inc.*, No. 13-640, *writ dismissed*, 135 S. Ct. 42 (2014) ("*IndyMac*"). Petitioner appears to assume that past performance is a guarantee of future results. But the legal landscape has changed materially since *IndyMac* was granted, and this Court's review is no longer warranted in light of a series of intervening developments. Most notably, this Court's decision in *Waldburger*—which was not handed down until after the grant of certiorari in *IndyMac*—provided courts with important guidance about the difference between statutes of repose and statutes of limitations, and clarified that the former provide true repose and are not subject to tolling. Since this Court decided *Waldburger*, the circuits have understood the teaching of that decision to apply to *American Pipe* tolling, and have uniformly agreed with the Second Circuit's decision in *IndyMac*. With an ever-expanding list of courts coalescing around the same interpretation of the *American Pipe* doctrine—and with this issue currently pending before the Third and Ninth Circuits—this Court's review at this juncture is unnecessary.

The only circuit case that even arguably conflicts with this unbroken line of authority is the Tenth Circuit's 16-year-old decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000). But the Tenth Circuit was deciding an issue of first impression and was without the benefit of *Waldburger* or the wealth of subsequent circuit precedents, including from courts that handle the bulk of the Nation's securities litigation. If the issue again reaches the Tenth

Circuit, it is entirely possible that court will reconsider its position in light of *Waldburger* and other intervening developments. And if the issue does not recur in the Tenth Circuit, that will only underscore that the courts handling the bulk of the Nation's securities litigation are applying a uniform and workable rule. It is also possible, although by no means likely, that the Third or Ninth Circuit will be the first post-*Waldburger* appellate court to extend *American Pipe* to a statute of repose. But, in the meantime, there is no need for this Court to grant certiorari to address a stale, lopsided split with a 16-year-old case that has been superseded by more recent developments.

Echoing the *IndyMac* petitioners, Petitioner insists that this issue must be addressed immediately in order to stem an explosion of protective opt-out litigation. Although there was little choice but to speculate about consequences at the time of the *IndyMac* grant, we now have the benefit of experience. *IndyMac* has governed the epicenter of nationwide securities litigation for three years, yet the predicted surge in opt-outs simply has not materialized.

In all events, *American Pipe*'s inapplicability to statutes of repose is far from the only barrier to Petitioner's claims. Despite having opted out of the class months before the statute of repose had expired, Petitioner waited until *after* the repose period had run to bring this suit. Petitioner has pointed to no extenuating circumstances that would justify that lack of diligence. Moreover, nearly all of Petitioner's alleged damages derived from claims relating to

equity swaps, which formed no part of the underlying class claims. Wholly apart from the question presented here, *American Pipe* tolling surely does not apply to claims that *nobody*, including the class, raised during the repose period. Finally, there was no private right of action under Section 10(b) for claims arising from the purchase of equity swaps at the time Petitioner's claims accrued. Petitioner's Section 10(b) claims—the only ones at issue before this Court—thus fail for a number of reasons regardless of how this Court would answer the question presented.

STATEMENT OF THE CASE

A. Petitioner's Sophisticated, Contrarian Investments in Bear Stearns

Petitioner SRM Global Master Fund Limited Partnership is, by its own description, a sophisticated and contrarian investor. *See* Brief for Plaintiff Appellant at 5, *SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos. L.L.C.*, No. 14-0507-cv (2d Cir. Nov. 5, 2014), ECF No. 86; *see also* Pet.App.12a ("SRM is a highly sophisticated 'multi-billion dollar hedge fund that takes 'a contrarian and long-term investment' approach in 'companies or sectors that have been through periods of stress and are out of favor with the market.'"). Petitioner owned common stock of Bear Stearns, a major global investment bank, "at least as early as March 2007." Pet.App.13a. Petitioner sold all of its Bear Stearns common stock on September 24, 2007, while the stock was trading only slightly below Petitioner's blended acquisition cost. Petitioner thus suffered only a *de minimis* loss on those transactions. *See*

Supplemental Affidavit Ex.1 at 26-30, *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, No. 08 M.D.L. 1963 (RWS) (S.D.N.Y. Sept. 12, 2012), ECF No. 320 ("SRM Opt-Out Notice") (showing that Petitioner had sold all of its Bear Stearns common stock by September 24, 2007, at prices close to its blended acquisition cost for those shares).

Yet rather than cash out with most of its principal intact, Petitioner decided to double down. In keeping with its contrarian strategy, Petitioner made a leveraged wager that the price of Bear Stearns common stock would go up at a time when the market was betting it would fall. Despite Bear Stearns' having issued several "partial corrective disclosures" about its financial condition, SRM Compl. ¶¶488-99, *SRM Global Master Fund Ltd P'ship v. Bear Stearns Cos. LLC et al.*, No. 13 Civ. 02692 (RWS) ("SRM Complaint") (S.D.N.Y. Apr. 24, 2013), ECF No. 1, Petitioner chose to replace its common stock with equity swaps representing an equivalent number of shares.[1] SRM Opt-Out Notice at 28. Indeed, Petitioner substantially increased its swap investment on March 11 and 12, 2008, just days before the company's near-collapse. *Id.*

[1] Under the swap agreements, at agreed intervals Petitioner was to pay its counterparty a fixed amount and to receive from its counterparty payments reflecting any increase in the value of Bear Stearns stock. Petitioner would profit from the swap if the increase in the stock price exceeded the fixed payment. Petitioner's equity swaps thus enabled it to receive the benefit of any increase in the value of Bear Stearns stock for a far smaller investment than holding the stock itself would require.

B. The Class-Action Litigation Following Bear Stearns' Near-Collapse

Unlike Petitioner, many other investors did not sell their Bear Stearns securities until it was too late. Beginning in March 2008, when Bear Stearns stock was trading for pennies on the dollar, purchasers of Bear Stearns common stock and stock options filed multiple securities fraud class-action complaints against the company. *See* Pet.App.11a, 14a. The complaints were later transferred to the United States District Court for the Southern District of New York for coordinated or consolidated pretrial proceedings, *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, No. 08 M.D.L. 1963 (RWS) (S.D.N.Y. Aug. 19, 2008), and were consolidated on January 5, 2009, *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, No. 08 M.D.L. 1963 (RWS), 2009 WL 50132 (S.D.N.Y. Jan. 5, 2009).

On February 27, 2009, the lead plaintiff filed a consolidated class action complaint against Bear Stearns, certain directors and officers of the company, and its independent outside auditor, Deloitte & Touche LLP, asserting claims on behalf of "all persons and entities that, between December 14, 2006 and March 14, 2008, … purchased or otherwise acquired the publicly traded *common stock or other equity securities*, or *call options* of or guaranteed by Bear Stearns, or sold Bear Stearns *put options* and were damaged thereby." Consolidated Class Action Complaint, *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, No. 08 M.D.L. 1963 (RWS), ECF No. 61 ("Class Action Complaint") ¶1

(S.D.N.Y. Feb. 27, 2009) (emphases added). The Class Action Complaint alleged that, between December 14, 2006, and March 12, 2008, defendants made a series of material misrepresentations about Bear Stearns' financial condition, in violation of Sections 10(b), 18, and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and SEC Rule 10b-5, and also asserted common-law fraud claims. *Id.* ¶¶813-34.

Because Petitioner held Bear Stearns common stock during the class period, it was an unnamed member of the putative class with respect to its stock holdings. But Petitioner was emphatically *not* a member of the putative class with respect to its swap transactions, because the class as defined clearly did not include holders of equity swaps, which were not even subject to Rule 10(b) at the time.

On January 19, 2011, the district court denied defendants' motion to dismiss the Class Action Complaint. *See In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 763 F. Supp. 2d 423, 510 (S.D.N.Y. 2011). The parties subsequently engaged in discovery for over 14 months, during which time defendants produced over nine million pages of documents. Pet.App.12a. Petitioner did not participate in any of that litigation. Pet.App.12a.

The parties announced a settlement of the class action on June 7, 2012, which the district court approved on November 28, 2012. *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, No. 08 M.D.L. 1963, ECF No. 279, Ex. 1; ECF Nos. 337-38. Like the complaint, the settlement defined the relevant class as including persons who transacted in

Bear Stearns common stock, other equity securities, call options, or put options. *Id.*, ECF No. 338, at 3. There was no mention of derivatives such as equity swaps. And stockholders who sold their shares before the precipitous decline in the share price of Bear Stearns common stock, as Petitioner did, were not entitled to recovery under the settlement agreement. *See id.*, ECF No. 302 Ex. 2-A at 12 (Notice of Pendency of Class Action defining "Recognized Loss" as zero for purchasers of common stock who sold before March 14, 2008); *see also In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259 (S.D.N.Y. 2012) (granting final approval of proposed settlement).

C. Petitioner's Belated Attempt To Initiate an Individual Suit

On August 24, 2012, Petitioner submitted a request to be excluded from the settlement class, which the district court approved on November 29, 2012. *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, No. 08 M.D.L. 1963 (RWS), ECF No. 338, Ex. A (S.D.N.Y. Nov. 29, 2012). Petitioner then inexplicably waited until April 24, 2013—more than a month after the five-year repose period in 28 U.S.C. §1658(b)(2) had expired—to file its own suit against Bear Stearns. Petitioner, which had been represented by the same highly skilled counsel since at least May 2009, *see* Pet.App.13a, has offered no meaningful justification for its delay.[2]

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[2] That delay is all the more puzzling given that the same counsel filed an individual action on behalf of another client before the statute of repose expired. *See Sherman v. Bear Stearns Cos.*, No. 09 Civ. 8161 (S.D.N.Y. Sept. 24, 2009).

Petitioner's complaint asserted claims under Sections 10(b), 18, and 20(a) of the Exchange Act, as well as claims for common-law fraud based on substantially the same alleged misrepresentations as those alleged in the Class Action Complaint. *See* SRM Compl. ¶¶519-48; *see also* Pet.App.13a ("The [SRM] Complaint contains many of the same factual allegations as the Class Action Complaint."). Unlike the Class Action Complaint, however, Petitioner's complaint asserted those claims with respect to both its Bear Stearns common stock holdings (as to which it suffered only *de minimis* losses) *and* its equity swap holdings. SRM Compl. ¶¶6-7, 12-13; *see also* Pet.App.13a-16a.

D. The District Court's Decision

Defendants (Respondents here) subsequently moved to dismiss Petitioner's complaint on several grounds, including that the securities fraud claims were untimely because the applicable five-year statute of repose had already run. On February 5, 2014, the district court granted Respondents' motion to dismiss, holding that all of Petitioner's Section 10(b) claims were untimely, and that the equity-swap-based claims were not actionable under the Exchange Act even if that time bar did not apply.

The alleged fraud, based on statements made between December 14, 2006, and March 12, 2008, had "revealed itself when Bear Stearns nearly collapsed in mid-March 2008." Pet.App.18a. Thus, under the applicable five-year statute of repose provided in §1658(b)(2), the district court concluded that "any Section 10(b) claims based on even the latest of [the alleged fraudulent] statements were

required to be brought before March 12, 2013," but Petitioner waited to file until more than a month later. Pet.App.18a. Petitioner sought to justify its untimely filing on the ground that, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the pendency of the consolidated class action tolled the statute of repose for its Section 10(b) claims. The district court rejected that argument based on the Second Circuit's decision in *IndyMac*, which held that that *American Pipe* tolling does not apply to a statute of repose. Pet.App.18a-22a.

The district court further concluded that even if *American Pipe* tolling could apply to a statute of repose, it would not apply to Petitioner's equity-swap-based claims because such claims were never raised in the consolidated class action. Pet.App.26a-27a. As the court explained, "*American Pipe* tolling can apply to a statute of limitations only when the earlier-filed class action 'involved *exactly the same cause of action subsequently asserted*.'" Pet.App.26a (quoting *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467 (1975)) (emphasis added).

Petitioner's Section 10(b) claims arising from the swap transactions were also dead on arrival because there was no private right of action under Section 10(b) for claims arising from the purchase of equity swaps until the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") in 2010, years after Petitioner's claims accrued. The district court thus concluded

that those claims would have failed as a matter of law even if they had been timely. Pet.App.28a-34a.[3]

E. The Second Circuit's Decision

The Second Circuit unanimously affirmed, holding that, under *IndyMac*, *American Pipe* tolling does not apply to §1658(b)(2)'s five-year statute of repose. As a statute of repose, §1658(b)(2) "creates a *substantive* right in defendants to be free from liability after five years—a right that *American Pipe* tolling cannot modify without running afoul of the Rules Enabling Act." Pet.App.6a-7a (citation omitted). The Second Circuit also rejected Petitioner's argument that textual differences between §1658(b)(2) and the statute of repose at issue in *IndyMac*, 15 U.S.C. §77m, required a different outcome here. Pet.App.7a. The minor differences between the two provisions did not "dissuade [the court] from concluding that *IndyMac* applies to §1658(b)(2)." *Id.*

REASONS FOR DENYING THE PETITION

I. Petitioner has not identified any meaningful division of authority that warrants this Court's

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[3] Because the Complaint failed to state a primary violation of the Exchange Act, the district court dismissed Petitioner's control person claims under Section 20(a). Pet.App.53a-54a. The district court also dismissed Petitioner's Section 18 claims as untimely and for failure to plead reliance. Pet.App.37a-40a. Finally, the district court held that Petitioner's common-law fraud claims were barred by the applicable six-year statute of limitations, and that Petitioner had failed to plead actual reliance on any particular misrepresentation or omission. Pet.App.40a-50a. The Second Circuit affirmed dismissal of the common-law claims for failure to allege reliance. Pet.App.8a-9a.

immediate intervention. Although this Court granted certiorari on a similar issue three years ago before dismissing the writ as improvidently granted, the circuits have subsequently coalesced around a uniform view of the law, with the Sixth and Eleventh Circuits joining the Second Circuit in holding that *American Pipe* tolling does not apply to statutes of repose. That coalescence is unsurprising in light of this Court's *Waldburger* decision, issued after the grant of certiorari in *IndyMac*, which clarified that statutes of repose are an "absolute … bar" to liability and "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Waldburger*, 134 S. Ct. at 2183. With the benefit of *Waldburger*, the circuits have had little difficulty understanding that statutes of repose provide true repose, and are not subject to *American Pipe* tolling.

The one court of appeals that even arguably takes a different view (the Tenth Circuit) did not have the benefit of *Waldburger* or the emerging consensus of courts handling the great volume of securities litigation. Instead, the Tenth Circuit addressed the issue as a matter of first impression 16 years ago, long before this Court provided critical guidance about the distinction between statutes of limitations and statutes of repose. The Tenth Circuit's decision also failed to consider (or even mention) the Rules Enabling Act, which this Court has emphasized in more recent decisions and numerous courts have found highly pertinent to the question presented. If this issue again reaches the Tenth Circuit, there is every reason to believe that court would harmonize its doctrine with *Waldburger*

and the uniform position of the other courts of appeals. And if the issue does not arise again in the Tenth Circuit, that will only confirm that the courts handling the bulk of the Nation's securities litigation have coalesced around a uniform and workable rule.

There is also no need for this Court's immediate review given that the issue is currently pending before the Third and Ninth Circuits. Those courts will likely join the modern, post-*Waldburger* consensus, but in the unlikely event one of those courts diverges from the consensus, there will be time enough to grant certiorari to consider an actual, non-stale split that better frames the issues for this Court's review. Either way, there is no need for this Court's *immediate* intervention.

II. The decision below is unequivocally correct, as *Waldburger* underscores. *American Pipe* tolling is inapplicable to §1658(b)(2) because statutes of repose are not subject to tolling, whether equitable or otherwise. As this Court has consistently held, equitable tolling principles "do not apply" to statutes of repose, which extinguish a plaintiff's claims after a specified period. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991).

American Pipe tolling is likewise inapplicable to statutes of repose even if that doctrine is characterized as "legal" tolling. As this Court emphasized in *Waldburger*, statutes of repose create *substantive* rights to be free from suit after a specified period. There is no question that in a purely individual action, where there is no parallel class action, a statute of repose brings true repose. Under the Rules Enabling Act, moreover, federal

courts may not apply the Federal Rules of Civil Procedure, including Rule 23, in a manner that would "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Allowing plaintiffs to bring an otherwise-untimely suit merely because a class action had previously been filed would allow Rule 23 to extinguish the defendant's substantive right to repose. Thus, regardless of whether the *American Pipe* doctrine is equitable or "legal" in nature, it simply does not apply to a statute of repose such as §1658(b)(2).

Petitioner also proffers a parade of horribles in which class members burden the courts with "protective" filings to preserve the timeliness of any potential individual claims. But *IndyMac* has been the law of the Second Circuit (where the bulk of securities class actions are filed) since 2013, yet Petitioner cites no evidence whatsoever suggesting that protective filings have increased in the wake of that decision. Moreover, in cases like this one—where plaintiffs like Petitioner have dubious claims to class membership or seek to assert claims outside the scope of the putative class—plaintiffs already have ample incentives to file protective and timely individual actions, whether or not statutes of repose are respected.

III. Finally, even if this Court were interested in deciding whether the *American Pipe* doctrine applies to statutes of repose, this would not be the case in which to do so. Petitioner, a sophisticated investor represented by highly skilled counsel, opted out of the class *before* the statute of repose expired. But Petitioner then inexplicably waited until after the

repose period had run to file an individual action—notwithstanding that most of its claims were never brought by the class in the first place and thus would not have been tolled even if *American Pipe* applied to statutes of repose. To the extent Petitioner failed to bring a timely individual action, it was not because the opt-out right had been rendered "meaningless," Pet.26-27, but because Petitioner failed to exercise appropriate diligence in bringing its claims.

I. There Is No Meaningful Circuit Conflict That Warrants This Court's Review.

Petitioner asserts that this Court should grant certiorari to address an "ever-deepening circuit split," Pet.10, but in fact the opposite is true. The only thing that has deepened since this Court dismissed the writ of certiorari in *IndyMac* is the consensus of circuit court decisions holding that tolling does not apply to statutes of repose. That consensus has been fueled by this Court's decision in *Waldburger*, which was issued after this Court granted certiorari in *IndyMac* and long after the Tenth Circuit waded into this issue as a matter of first impression 16 years ago. It is not at all clear that the Tenth Circuit would adhere to its position in light of intervening developments if the issue returns. It *is* clear that there is no compelling need for this Court's review at this juncture.

A. Since This Court Dismissed the *IndyMac* Petition, the Circuits Have Coalesced Around a Uniform View of the Law.

1. In *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), the

Second Circuit held that potential intervenors to a moribund securities fraud class action could not use the *American Pipe* doctrine to revive their claims after the repose period had run. *See id.* at 104-110. The court concluded that the statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C. §77m, was not subject to tolling under *American Pipe* regardless of whether that doctrine rested on "equitable" or "legal" principles. As the court explained, statutes of repose such as Section 13 create *substantive rights* to be free from suit after a specified period of time. *IndyMac*, 721 F.3d at 109. Allowing the repose period to be extended based on the mere filing of a class action would mean that Rule 23 had altered the parties' substantive rights, in violation of the Rules Enabling Act. *Id.* This Court initially granted certiorari in *IndyMac*, 134 S. Ct. 1515 (2014), but subsequently dismissed the writ as improvidently granted after the lead plaintiffs reached a proposed settlement with some of the defendants, 135 S. Ct. 42 (2014).

In the interim, the Court issued its decision in *Waldburger*, which provided critical clarification about the distinctions between statutes of limitations and statutes of repose. Unlike statutes of limitations, statutes of repose "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Waldburger*, 134 S. Ct. at 2183 (quoting 54 Corpus Juris Secundum, Limitations of Actions §7, at 24 (2010)). As the Court explained, statutes of repose are generally seen as an "absolute … bar" to liability, and they afford a potential defendant the *substantive*

right to "put past events behind him" after the specified period of time. *Id.*

2. In the two-plus years since this Court issued its decision in *Waldburger* and then dismissed the writ in *IndyMac*, the question whether *American Pipe* tolling applies to statutes of repose has been revisited by the Second Circuit and decided by the Sixth and Eleventh Circuits. With the benefit of *Waldburger*, *every single one* of those decisions has held that statutes of repose cannot be tolled under *American Pipe*. Indeed, that rule is sufficiently well-settled at this point that there was not a single dissenting (or even concurring) vote in any of those cases.

The Second Circuit has reaffirmed its holding in *IndyMac* at least five times since that court first issued its decision, including in the decision below. *See* Pet.App.5a-7a; *DeKalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 413-14 (2d Cir. 2016), *petition for cert. filed*, No. 16-206; *In re Lehman Bros. Sec. & ERISA Litig.*, No. 15-1879, 2016 WL 3648259, at *1-2 (2d Cir. July 8, 2016), *petition for cert. filed*, No. 16-373; *Freidus v. ING Groep, N.V.*, 543 F. App'x 92, 93 (2d Cir. 2013); *Caldwell v. Berlind*, 543 F. App'x 37, 39-40 & n.1 (2d Cir. 2013). That multitude of decisions underscores the volume of securities litigation in the Second Circuit. And while subsequent panels may be bound by *IndyMac*, not one Second Circuit judge on or off those five panels has suggested that en banc review might be appropriate in light of this Court's initial grant of certiorari. To the contrary, the Second Circuit has cited *Waldburger* as providing further support for its

earlier holding in *IndyMac*. *See In re Lehman Bros.*, 2016 WL 3648259, at *1 (citing *Waldburger*'s holding regarding the "critical" distinction between statutes of limitations and statutes of repose).

A unanimous panel of the Sixth Circuit recently agreed that the *American Pipe* doctrine does not apply to statutes of repose, finding the Second Circuit's reasoning in *IndyMac* to be "cogent and persuasive." *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 793 (6th Cir. 2016). The Sixth Circuit concluded that allowing tolling of a statute of repose would "overstep" the limitations in the Rules Enabling Act. *Id.* at 794. And the court further noted that its holding was "consistent with the Supreme Court's subsequent decision in [*Waldburger*]." *Id.* at 793.

The Eleventh Circuit unanimously reached the same result. The court started from the premise that statutes of repose "are distinct from statutes of limitations in that they are not subject to equitable tolling, 'even in cases of extraordinary circumstances beyond a plaintiff's control.'" *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1247 (11th Cir. 2016) (quoting *Waldburger*, 134 S. Ct. at 2183), *petition for cert. filed*, No. 16-389. Citing a long line of cases from this Court and other circuits, the Eleventh Circuit concluded that "the *American Pipe* rule [was] equitable, not 'legal,' tolling." *Id.* at 1248. The court accordingly held that "*American Pipe* tolling does not apply to the statute of repose at issue in this case." *Id.* at 1249.

B. The Tenth Circuit's Decision in *Joseph* Has Been Superseded by Intervening Developments.

Against that unbroken line of recent authority, Petitioner cites only a single case, *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), in which a circuit court has held that a statute of repose may be tolled under *American Pipe*. But developments over the 16 years since *Joseph* was decided, and especially in the three years since certiorari was granted in *IndyMac*, have significantly undermined the Tenth Circuit's reasoning to the point where it is entirely possible that court would reach a different result if the issue arose again today.

Most notably, the Tenth Circuit did not have the benefit of this Court's decision in *Waldburger*, which provides extensive guidance about the distinction between statutes of limitations and statutes of repose, emphasizing that the latter are "equivalent to 'a cutoff,' … in essence an 'absolute … bar' on a defendant's temporal liability." 134 S. Ct. at 2183. Indeed, at several points in its decision, the Tenth Circuit mistakenly referred to the repose period as the "limitations period," thereby underscoring that the court may have conflated those concepts or incorrectly viewed them as largely fungible. 223 F.3d at 1167. Other courts have emphasized that the Tenth Circuit did not have the benefit of *Waldburger* when it issued *Joseph*. The Sixth Circuit, for example, found the Tenth Circuit's reasoning in *Joseph* to be unpersuasive in large part because it was "expressed prior to [*Waldburger*]." *Stein*, 821 F.3d 780; *accord Hildes v. Arthur Andersen LLP*, No.

08CV0008 BEN (RBB), 2015 WL 11199825, at *4 n.7 (S.D. Cal. May 15, 2015) (noting that *Joseph*'s reasoning is inconsistent with *Waldburger*).

Moreover, the Tenth Circuit failed to consider (or even mention) the Rules Enabling Act, which this Court has repeatedly emphasized in recent decisions. As this Court has clarified in the years since *Joseph*, the Rules Enabling Act is important in interpreting both the Federal Rules of Civil Procedure generally, *see Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407-10 (2010), and Rule 23 in particular, *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). The Rules Enabling Act commands that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Rule 23 therefore cannot be interpreted in a manner that gives litigants different substantive rights from those they would enjoy in individual litigation just because a class action was filed. The right to be free from suit after a specified period is a substantive right protected against modification or abridgement by the Rules Enabling Act. A number of courts have found the Act highly pertinent to this issue. *See, e.g.*, *Stein*, 821 F.3d at 793-94; *IndyMac*, 721 F.3d at 109; *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618 (S.D.N.Y. 2011). Yet, perhaps because they did not have the benefit of this Court's recent decisions emphasizing the Act, no party briefed that issue in *Joseph*, and the Tenth Circuit did not even mention the Act.

In sum, the Tenth Circuit's 16-year-old decision in *Joseph* has been largely superseded by intervening

developments, and it is entirely possible that court would revisit its holding if the issue arose again within that jurisdiction. Indeed, if the purported split were really as consequential as Petitioner claims, one would expect to have seen some significant efforts by plaintiffs to take advantage of the Tenth Circuit rule by filing individual actions in that circuit. The apparent absence of such efforts suggests either that the issue is less important than Petitioner supposes or that very few securities litigants reside within the Tenth Circuit. Either way, the absence of such litigation underscores that the circuits handling the bulk of securities actions, including the circuit at the epicenter of the Nation's financial markets, have coalesced around the same rule. In all events, in the unlikely event the Tenth Circuit returns to this issue and reaffirms its position, there will be time enough for this Court to review the issue. For the time being, there is no imperative for review.

C. The Other Two Cases Petitioner Cites in Support of a Split Are Inapposite.

In an effort to exaggerate the alleged circuit split, Petitioner cites *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), and *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), as cases that purportedly bear on the question presented. But those decisions are inapposite, as neither involved a statute of repose at all. *See* Pet.i (Question Presented: "Whether the timely filing of a putative class action serves, under *American Pipe* … *to satisfy the five-year period of repose* in 28 U.S.C. §1658(b)(2)…") (emphasis added).

Bright and *Appleton* both hold that *American Pipe* tolling applies to statutes of limitations this Court had deemed "jurisdictional." *See Bright*, 603 F.3d at 1287-90; *Appleton*, 635 F.2d at 608-10. Petitioner notes that, like statutes of repose, those "jurisdictional" statutes of limitations are generally not subject to equitable tolling. Pet.14; *see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008). But jurisdictional limitations are not statutes of repose by another name, and decisions holding them subject to *American Pipe* tolling have no bearing on the question presented here, for several reasons.

First, statutes of repose and jurisdictional statutes of limitations serve distinct purposes. Statutes of repose "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Waldburger*, 134 S. Ct. at 2183 (citations omitted). Jurisdictional statutes of limitations serve a very different interest: They "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *John R. Sand*, 552 U.S. at 133 (citations omitted).

Second, unlike statutes of repose, jurisdictional statutes of limitations do not create substantive rights. *See Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 315 n.6 (S.D.N.Y. 2012) ("[A] jurisdictional statute of limitations … bars the Court from acting on the plaintiff's claim but … *does*

not alter her substantive rights.") (emphasis added), *aff'd*, 712 F.3d 136 (2d Cir. 2013). The Rules Enabling Act is accordingly inapplicable to such statutes, regardless of whether they are characterized as "jurisdictional." *See* 28 U.S.C. §2072. Decisions holding that a jurisdictional *statute of limitations* can be tolled under *American Pipe* are simply not in conflict with other decisions holding that a *statute of repose* cannot.

D. The Third and Ninth Circuits Will Soon Weigh in on the Question Presented Here.

In light of the recent convergence toward a uniform answer to the question presented, the best course is for this Court to deny the current round of petitions and allow additional circuits to address this issue. That course is particularly appropriate given that this issue is currently pending before the Third and Ninth Circuits. The Third Circuit heard oral argument on this issue just last month, *see N. Sound Capital LLC v. Merck & Co. Inc.*, *appeal docketed*, No. 16-01364 (3d Cir. Feb. 11, 2016), and briefing just concluded in a case in the Ninth Circuit posing the same question, *see Hildes v. Moores*, *appeal docketed*, No. 15-55937 (9th Cir. June 16, 2015).

It is very likely that those courts will follow the lead of every other circuit to consider the issue post-*Waldburger*, which will further underscore that this Court's intervention is unnecessary unless and until the Tenth Circuit revisits and reaffirms its dated and outlying *Joseph* decision. But in the unlikely event that the Third or Ninth Circuit unexpectedly breaks the string of unanimous rulings in the wake of

Waldburger, those decisions would sharpen the issues and better frame the dispute for this Court's potential review. Either way, there is no need for the Court to enter the fray at this time given that *no court* has found tolling of a statute of repose to be consistent with *Waldburger*.

II. The Decision Below Is Correct.

A. *American Pipe* Tolling Is a Form of Equitable Tolling, Which Does Not Apply to Statutes of Repose.

This Court has consistently recognized that *American Pipe* tolling is a form of equitable tolling. *See, e.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002) (citing *American Pipe* as an example of the "hornbook" principle that limitations periods "are customarily subject to equitable tolling"); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990) (characterizing *American Pipe* as a case in which this Court has "allowed equitable tolling"); *see also Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 338 n* (1978) (Burger, C.J., concurring) (citing *American Pipe* as an example of "[t]he authority of a federal court … to toll a statute of limitations on equitable grounds").

As this Court emphasized in *Waldburger*, "[s]tatutes of limitations, *but not statutes of repose*, are subject to equitable tolling…." 134 S. Ct. at 2183 (emphasis added). *Lampf* similarly holds that "the equitable tolling doctrine is fundamentally inconsistent" with a statute of repose. 501 U.S. at 363; *see* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §1056, at 240 (3d ed. 2002) ("[A] repose period is fixed and its expiration

will not be delayed by estoppel or tolling."). Petitioner does not argue otherwise.

Lest there be any lingering doubt, this Court's precedents illustrate that equitable tolling is fundamentally inconsistent with the text and structure of §1658(b)(2). *See American Pipe*, 414 U.S. at 557-58 ("The proper test is … whether tolling the limitation in a given context is consonant with the legislative scheme."). Section 1658(b) follows a familiar format.[4] It couples a discovery rule (which can be tolled) with an "absolute provision for repose" (which cannot). *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013); *see Stein*, 821 F.3d at 787. The first provision, §1658(b)(1), is a classic statute of limitations. It begins to run upon the plaintiff's discovery of the violation, *see Waldburger*, 134 S. Ct. at 2182, and it uses "fairly simple language," indicating no intention to depart from the background principle of equitable tolling, *see United States v. Brockamp*, 519 U.S. 347, 350 (1997).

In contrast, §1658(b)(2) acts as an "unqualified bar on actions instituted '5 years after such violation,' giving defendants total repose after five years." *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010) (citation omitted). Allowing §1658(b)(2) to be tolled would not only defeat the provision's central purpose, but also render the provision superfluous. If it can be extended for any reason, "even in cases of extraordinary circumstances," *Waldburger*, 134 S. Ct.

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[4] Section 1658(b) provides that private suits alleging fraud in violation of the Exchange Act "may be brought not later than the earlier of--(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

at 2183, then §1658(b)(2) does not establish an "outer limit on the right to bring" a fraud action under the Exchange Act, *id.* at 2182, as Congress plainly intended.

B. The Result Below Is Correct Regardless of Whether *American Pipe* Tolling Is Equitable or "Legal."

Even if this Court were to decide that *American Pipe* tolling is something other than equitable tolling, the decision below is still correct. Like all statutes of repose, §1658(b)(2) "vest[s] a substantive right in defendants to be free of liability" after a specified period. *Stein*, 821 F.3d at 794; *see Waldburger*, 134 S. Ct. at 2183. If the rule of *American Pipe* is not a judge-made rule of equitable tolling, then it is an interpretation of or extrapolation from Rule 23. Under the Rules Enabling Act, however, the Federal Rules of Civil Procedure may not be used to "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Applying *American Pipe* tolling to §1658(b)(2) would allow the filing of a class action under Rule 23 to "modify" (if not entirely "abridge") a defendant's substantive right under §1658(b)(2) to be free from suit after five years, and would conversely "enlarge" the plaintiff's substantive right to bring suit. That is true whether *American Pipe* tolling is characterized as equitable or "legal." *See IndyMac*, 721 F.3d at 108-09.

Petitioner contests that conclusion, asserting that *American Pipe* "rejected the premise that the Rules Enabling Act prohibits any application of a rule that can be said to affect substantive rights." Pet.20 (citing 414 U.S. at 557-58). But *American*

Pipe would have had no occasion to consider the application of §2072(b) to a statute conferring a substantive right, as the time period applicable to the Clayton Act claims at issue there is not a statute of repose. *See IndyMac*, 721 F.3d at 109 n.17. Indeed, this Court expressly stated in *American Pipe* that the statute at issue was "'strictly a procedural limitation and has nothing to do with substance.'" 414 U.S. at 558 n.29 (quoting 101 Cong. Rec. 5131 (1955) (remarks of Reps. Murray and Quigley)). *American Pipe* surely did not decide *sub silentio* an important issue about the scope of the Rules Enabling Act that was not even presented based on the facts of that case.

C. Petitioner's Speculative Policy Arguments Provide No Basis for Dramatically Expanding the *American Pipe* Doctrine.

Petitioner suggests that the rule applied below would inundate the courts with unnecessary filings and "dramatically augment[] the cost of class litigation." Pet.24-26. But *IndyMac* has been circuit law in the Nation's financial (and securities litigation) epicenter for more than three years, yet Petitioner cites no evidence whatsoever that their parade of horribles has actually come to pass in that jurisdiction.

In particular, Petitioner offers not one iota of evidence suggesting that individual plaintiffs within the Second Circuit are filing "duplicative actions" to preserve the timeliness of their claims in the event class certification is denied. To the contrary, a recent survey of Second Circuit decisions found that only

three out of 140 securities class actions (2.1%) filed in the Second Circuit since *IndyMac* have generated *any* opt-out litigation. *See* Brief of the Securities Industry and Financial Markets Association as *Amicus Curiae*, *N. Sound Capital LLC v. Merck & Co.*, No. 16-1364 (3d Cir. Apr. 13, 2016). That rate is basically unchanged from the years preceding the *IndyMac* decision. *See* Amir Rozen, Joshua B. Schaeffer & Christopher Harris, Opt-Out Cases in Securities Class Action Settlements, Cornerstone Research, 2 (2013) (finding that, between 1996 and 2011, approximately 3% of class-action settlements produced opt-out litigation).

Nor has Petitioner provided any evidence that the cost of class-action litigation has increased, or will increase, under the *IndyMac* regime. Petitioner raises the specter of spiraling discovery costs, but the federal judiciary has developed numerous means of streamlining (and thus reducing the cost of) discovery in opt-out situations since *American Pipe* was decided more than forty years ago. *See* Manual for Complex Litigation (Third) Preface (1995). Even if there were some *de minimis* increase in protective filings, there are ample tools under existing law to address any resulting discovery issues. There is no reason to believe that the *IndyMac* rule will have any impact on the bottom line for either the court system or the sophisticated investors that make up the disproportionate share of opt-out plaintiffs.

Finally, the incentives to file potentially duplicative litigation will hardly disappear if the Court ultimately adopts Petitioner's proposed rule. Whenever there are questions about whether a group

of potential litigants comes within the class definition or whether their claims mirror those raised by the class, there will be incentives for those litigants to file individual actions lest they later be deemed not to benefit from *American Pipe* tolling. *See*, *e.g.*, *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 860 F. Supp. 2d 1062, 1067-70 (C.D. Cal. 2012) (holding that *American Pipe* tolling does not apply to investors who purchased different tranches of securities than named class plaintiffs). Indeed, Petitioner would have been well-served to file timely individual claims here, given that its equity-swap-based claims were never covered by the class litigation and thus would not have benefitted from *American Pipe* tolling even if it were applicable to statutes of repose. *See supra* pp. 7-10. In sum, the possibility of duplicative, protective individual filings is an unavoidable byproduct of class litigation, and not a consideration that should skew this Court's analysis.

III. Petitioner's Claims Would Not Be Eligible For Tolling Even If *American Pipe* Applied To Statutes Of Repose.

Even if *American Pipe* tolling applied to statutes of repose in general, it still would not apply to *any* of Petitioner's claims. Petitioner, a highly sophisticated investor represented by skilled counsel, opted out of the class months *before* the statute of repose had expired—and thus could have filed a timely action without the need for tolling—but then inexplicably waited until *after* the period had run to file an individual action. This Court has never held that *American Pipe* tolling applies in such situations and

it should not do so now. Petitioner has pointed to no extenuating circumstances that would justify its lack of diligence in pursuing its claims, and it should not be allowed to benefit from a delay of its own making. *See Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.").

Moreover, even if this Court were to decide that case-specific issue *and* the question presented in Petitioner's favor, this would revive only a sliver (if any) of Petitioner's claims. Petitioner's case had little in common with the rest of the underlying class. Nearly all of Petitioner's alleged damages derived from claims relating to equity swaps, which neither the consolidated amended complaint nor the settlement class embraced. *See* Pet.App.14a-16a.[5] Indeed, from September 24, 2007 (when Bear Stearns stock was still trading only slightly below Petitioner's blended acquisition cost) until Bear Stearns' near-collapse in March 2008, Petitioner did not own *any* shares of Bear Stearns common stock. Unlike Petitioner's complaint, the consolidated class action complaint asserted *no* claims relating to equity swaps, nor did it allege losses arising from equity swaps. *American Pipe* tolling is thus inapplicable to these claims: This Court has made clear that

[5] For the same reason, Petitioner is flatly wrong to suggest that the class settlement "released SRM's claims based on its purchase of both Bear common stock and Bear swaps." Pet.5. The settlement release applied only to "publicly traded common stock or other *equity securities*." Pet.App.28a (emphasis added). A swap is a derivative contract, not an "equity security." *See supra* pp. 6-9 & n.1.

American Pipe tolling does not apply to claims that were *never advanced by the class* in the underlying litigation. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467 (1975) (*American Pipe* tolling applies only where the class action "involved exactly the same cause of action subsequently asserted").

Finally, Petitioner's equity-swap-based Section 10(b) claims have always been dead on arrival. There was no private right of action under Section 10(b) for claims arising from the purchase of equity swaps until 2010, when Congress passed the Dodd-Frank Act, Pub. L. 111-203, 124 Stat. 1376 (2010). *See* Pet.App.28a-31a. Petitioner's equity-swap-based claims accrued, at the very latest, *in 2008*.[6] *See* Pet.App.29a. And nothing in Dodd-Frank indicates a congressional intention for the statute's new definition of "security" to apply retroactively. *See* Pub. L. 111-203 §§774, 761(a)(2), 124 Stat. 1376, 1754-55, 1802 (2010) (the new definition "shall take effect … 360 days after the date of the enactment of this subtitle"). Reversal on the question presented would thus revive, at most, only a tiny fraction of Petitioner's claims.

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[6] Petitioner all but conceded this point in its briefing below. *See* Reply Brief for Plaintiff-Appellant, *SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos. LLC*, No. 14-0507-cv, ECF No. 113, at 17 (2d Cir. Dec. 24, 2014) ("SRM's 10(b) claims based on equity swaps were not within the definition of securities when the original Class Action Complaint was filed in 2008….").

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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