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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

REPLY BRIEF

It is undisputed that the Question Presented is the subject of a square circuit conflict on an important and recurring question of federal law, which was important enough for this Court to grant certiorari to resolve only two years ago. The need for this Court's review has not abated. To the contrary, the issue continues to arise frequently and to produce inconsistent rulings around the nation. The Second Circuit—from which this case arose, and which respondents rightly describe as "the epicenter of nationwide securities litigation," BIO 4—recently reaffirmed that the Question Presented is "ripe for resolution by the Supreme Court," noting that because this "issue implicates the very nature of *American Pipe* tolling," the "Supreme Court is in the best position to resolve" it. *In re Lehman Bros. Sec. & ERISA Litig.*, No. 15-1879, 2016 WL 3648259, at *2 (2d Cir. July 8, 2016), *petition for cert. filed*, No. 16-373.

This case presents an excellent vehicle to resolve the Question Presented because it directly implicates not only *American Pipe* tolling but also the constitutionally protected right of class action plaintiffs to opt out of class proceedings. Petitioner SRM suffered massive losses from respondent Bear Stearns' fraud. It was part of the timely-filed consolidated class actions and relied on the class representatives to pursue its rights. But the class representatives instead secured a settlement that would release all of SRM's claims in exchange for *no value at all*. This is quintessentially the circumstance for which the right to opt out of a class action exists. SRM promptly opted out and sought to file an individual complaint—but that complaint was deemed untimely. The Tenth Circuit and other courts would reach the opposite result.

Against those considerations, respondents' quibbles over the depth and durability of the split (BIO 16-24) and their merits arguments (BIO 25-32) fall flat.

I. The Circuit Split Is Durable And Its Resolution Is Overdue.

Respondents argue first that the circuit split is shallow and speculate that it may resolve itself in the hypothetical scenario that the Tenth Circuit revisits its decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000). These arguments are persuasively rebutted by the petitioner's reply brief in *DeKalb County Pension Fund v. Transocean Ltd.*, No. 16-206, which explains that the Tenth Circuit has reaffirmed *Joseph* both before and after this Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), demonstrating that it will not revisit its settled precedent. *DeKalb* Reply 3-4.

It is apparent that this Court believed the existing conflict is sufficient to warrant certiorari, because it previously granted review of this precise question. Indeed, it did so *after* granting review in *CTS Corp.*, indicating no expectation that *CTS Corp.* would control the Question Presented here.

In any event, contrary to respondents' suggestion, the split is not shallow. The decision below is also inconsistent with decisions from the Seventh and Federal Circuits, which have held that *American Pipe* tolling is available even vis-à-vis jurisdictional statutes of limitations that are not subject to equitable tolling. Respondents argue that statutes of repose are different because they serve different purposes and create

substantive rights. BIO 22-24. But the Seventh Circuit explained in *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 608 (7th Cir. 1980), that in its view the running of a jurisdictional statute of limitations "not only bars the remedy but also destroys the liability." The court of appeals nevertheless held that *American Pipe* tolling applies because "effectuation of the purposes of litigative efficiency and economy . . . transcends the policies of repose and certainty behind statutes of limitations." *Id*. at 609.

Similarly, in *Bright v. United States*, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010), the court recognized that jurisdictional statutes are not subject to equitable tolling, but it concluded that "class action statutory tolling" under *American Pipe* rests on a different footing—not because there is something inherently flexible about a jurisdictional statute of limitations, but instead because *American Pipe* tolling "does not modify a statutory time limit" at all, since the class complaint, which brings the action for all class members, must be timely filed for *American Pipe* to apply. For the same reasons, the *Bright* court also rejected an argument that is plainly analogous to respondents' Rules Enabling Act contention: that federal courts cannot use their procedural rules to enlarge their jurisdiction. *See id.* at 1286. That reasoning—like the reasoning of the Seventh Circuit—simply cannot be reconciled with the ruling below.

Respondents' attempts to distinguish the Seventh and Federal Circuits' decisions rest on the assumption that their merits arguments are correct, *i.e.*, that statutes of repose create a substantive right to prohibit

individual plaintiffs from pursuing their claims after a timely class complaint has been filed, such that the Rules Enabling Act forecloses tolling for the individual complaints. But that point clearly is not conceded, and respondents cite no cases from the Seventh or Federal Circuits accepting that proposition. The principal authority on which respondents rely, *CTS Corp.*, also never describes statutes of repose that way (indeed, the opinion never even uses the word "substantive")—and never suggests that the Rules Enabling Act would prohibit *American Pipe* tolling or any other legal tolling of repose periods; indeed, it never discusses the Rules Enabling Act at all.[1]

Thus, on the key questions: whether *American Pipe* tolling is legal or equitable, and whether the Rules Enabling Act prohibits tolling of the entire limitations periods in the Securities Act and Securities Exchange Act, the circuits remain unambiguously and intractably divided, and certiorari should be granted to resolve the conflict.

Respondents also note that the Third and Ninth Circuits are in the process of adjudicating cases involving the Question Presented. BIO 24. But that only proves that the issue continues to roil the lower courts, consuming judicial resources and disrupting the orderly administration of the securities laws. However those courts rule, the circuits and district courts will still be divided—and litigants in the other circuits that have

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[1] Moreover, as explained in the petition (at 20-21), *American Pipe* itself rejected a Rules Enabling Act challenge to its holding. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 557-58 (1974).

not addressed the question will still face uncertainty over what to do. Respondents also do not argue that either the Third or the Ninth Circuit cases would present a superior vehicle to address the question, so there is no reason to wait for them.

II. Respondents' Merits Arguments Provide No Reason To Deny Certiorari.

Respondents preview their merits argument, arguing the *American Pipe* tolling is equitable, that statutes of repose cannot be tolled, and that class members may not feel compelled to opt out. BIO 25-30. These concerns are all persuasively addressed in the *DeKalb* Reply (at 6-7, 9-11) and in the petitioner's merits briefs in *IndyMac*, and there is no need to address them at any length here. In any event, respondents' merits arguments do not relate to any of the Court's certiorari criteria, and therefore do not weigh against review.

Respondents also make specific merits arguments relating to this case. BIO 30-32. These arguments do not counsel against certiorari, and they also fail on their own terms.

Respondents argue first that SRM's complaint would be untimely even if *American Pipe* tolling applies to statutes of repose because SRM opted out of the class action before the repose period expired, but filed its complaint afterward. Respondents thus accuse SRM of a "lack of diligence," and cite *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), a case about equitable tolling, to argue that tolling should not be available to SRM. BIO 31. But SRM was entirely

justified in relying on the pendency of the class action. It filed its individual opt-out complaint well before the supposed repose period would have run, had tolling been allowed—and at the time, the only circuit that had addressed the question was the Tenth Circuit in *Joseph*, which had concluded emphatically that tolling was appropriate.

Irwin also is inapposite because *American Pipe* is a *legal* tolling rule that suspends applicable limitations periods (including so-called repose periods) beginning on the date the class action is filed and continuing until the individual plaintiff opts out of the class or the class action fails. The point of *American Pipe* is not to give effect to general equitable concerns; it is to advance the purposes of Rule 23 and prevent duplicative litigation. In this case, the class action was filed mere days after Bear Stearns collapsed—so that was the day that *American Pipe* tolling began. SRM opted out on November 29, 2012, when it became clear that it would receive no value from the class settlement. Under *American Pipe* and under *Joseph*, SRM would have had just under 5 years from that date to file. But SRM filed its individual complaint a mere five months later. There was nothing dilatory about that short delay, which merely reflects that it takes time to gather facts and then prepare and file a complaint in a complex securities case. Surely, respondents cannot plead that they were prejudiced in any way by the delay because SRM filed a timely opt-out notice flagging its intention to sue on its own.

Second, respondents argue that even if the Court rules in SRM's favor on the Question Presented, some

of SRM's claims may still fail because claims based on equity swaps were not encompassed by the complaint or the settlement class. The Second Circuit did not reach this argument, and this Court need not, either. Indeed, by making this argument, respondents implicitly concede that SRM's other claims (based on stock purchases) are unproblematic, and therefore concede the suitability of this case as a vehicle to address the Question Presented.

Respondents also are incorrect about equity swaps. By the time the class action settled in 2012, the definition of a "security" included "security-based swap[s]." *See* 15 U.S.C. § 78c(a)(10). By regulation, any "stock or similar security" is an "equity security." 17 C.F.R. § 240.3a11-1. Equity swaps function in the same way as common stock: they entitle the holder to gains or subject the holder to losses linearly, based on the performance of the common stock and nothing else. Independently, in 2011, the Securities and Exchange Commission adopted regulations confirming that the beneficial owner of a security-based swap is the beneficial owner of an equity security. SEC, *Beneficial Ownership Reporting Requirements and Security-Based Swaps*, 76 Fed. Reg. 34579, 34580 (June 14, 2011). Thus, under the statute and the applicable regulations, SRM's equity swaps were "equity securities"—and the settlement unambiguously released all claims with respect to those securities.

Moreover, even if equity swaps did not constitute "securities" when the original class complaint was filed, *American Pipe* tolling does not require complete identity of the causes of action. Instead, "*American Pipe*

tolling is properly extended to claims of absent class members that involve the same evidence, memories, and witnesses as were involved in the initial putative class action." *Cullen v. Margiotta*, 811 F.2d 698, 720 (2d Cir. 1987), *overruled on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987). That standard plainly describes SRM's claims relating to the equity swaps, which arose from the same misconduct as every other securities claim against Bear Stearns. And it is beyond dispute that SRM was a member of the class, and that it timely opted out for the express purpose of pursuing its individual claims—including its swap-based claims, which were both identified in its opt-out notice and clearly released as part of the class settlement. Thus, respondents cannot even pretend to be surprised that those claims were asserted.

Again, the most important point for present purposes is that whether petitioners have a valid Section 10(b) claim with respect to equity swaps is outside the scope of the Question Presented, was not passed upon below, and does not undermine the quality of this case as a vehicle because even if petitioners only have claims based on Bear common stock—which they concededly do, and which the settlement likewise sought to release for no value—they still were entitled to tolling. The Court can leave any other issues to the lower courts to resolve on remand.

III. This Case Is An Excellent Vehicle To Address The Question Presented.

This case provides an excellent vehicle to address the Question Presented. The petition presents a single question: the same one that the Court granted certiorari to decide in *IndyMac*. While respondents make weak arguments that some of SRM's claims (the swap claims) may not be eligible for *American Pipe* tolling, the only relevant point is that others (the stock claims) indisputably are. Any disagreement regarding the precise claims eligible for tolling would be resolved by the Second Circuit on remand. Thus, if the Court grants certiorari, it will have to decide the Question Presented, and no prior considerations will prevent it from doing so.

This case also presents an additional compelling consideration, which is that SRM filed its individual complaint as part of the process of opting out of an inequitable class settlement. This point is critically important because the right to opt out of a class action for monetary damages and pursue one's own claims is fundamental to due process. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). But for "the right to opt out and press a separate claim" to "remain[] meaningful" in many class cases, courts must apply "the rule of *American Pipe*." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351-52 (1983). Otherwise, class members like SRM—who rely on the class representatives to vindicate their rights only to find themselves thrown under the bus by an unfavorable settlement—will have no recourse

whatsoever. Because this factual scenario arises frequently, this Court should grant certiorari in a case that presents it, *i.e.*, this one.[2]

With respect to SRM's exercise of its right to opt out, this case presents a clean and simple vehicle in which to decide the Question Presented. Petitioner opted out after the opt-out notice was issued. There is no prospect that the Court could resolve the case on the alternative ground that SRM opted out too early in the case.

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[2] The petition in *DeKalb County* arises from different facts. There, the petitioner did not opt out of a class action; instead, the petitioner sought to be named the lead plaintiff after the original lead plaintiff was deemed inadequate. Because of the factual distinction, the Court may wish to consider hearing both cases—but because it is critical that the Court address the Question Presented as it applies to opt-outs, the Court should not pass over this case in favor of *DeKalb County*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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