NO. 16-389

In the
# Supreme Court of the United States

RUSSELL DUSEK, et al.,

*Petitioners*,

v.

JPMORGAN CHASE & CO., et al.,

*Respondents*.

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

## BRIEF IN OPPOSITION


JOHN F. SAVARESE
EMIL A. KLEINHAUS
KEVIN S. SCHWARTZ
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd St.
NEW YORK, NY 10019
(212) 403-1000

PAUL D. CLEMENT
*Counsel of Record*
JEFFREY M. HARRIS
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

DAVID S. FLUGMAN
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

*Counsel for Respondents*


November 7, 2016

## 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—including the Eleventh Circuit in the decision below—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

Petitioners are the plaintiffs in this action and were appellants in the Eleventh Circuit: Russell Dusek, Marsha Peshkin, David Abel, Carol Difazio, as TIC, Ben Heller, Warren M. Heller, Norma Hill, JABA Associates, Carol Kamenstein, David Kamenstein, Peter Kamenstein, Tracy Kamenstein, Peerstate Equity Fund, LP, Robert Getz, RAR Entrepreneurial Fund, Ltd., Judith Rechler, Sage Associates, Jeffrey Shankman, Lori Sirotkin, Stony Brook Foundation, Yesod Trust, Melvin H. and Leona Gale Joint Revocable Living Trust, Frederick and Susan Konigsberg JTWROS, Edyne Gordon as Executrix of the Estate of Allen Gordon, Joel Busel Revocable Trust, Sandra Busel Revocable Trust, Robert Yaffe, Palmer Family Trust, Martin Lifton, Marlene Krauss, Sloan Kamenstein, Sylvan Associates Limited Partnership, Joan Roman, Wilenitz Trust U/Art Fourth o/w/o Israel Wilenitz, Robert Roman, Jerome Goodman, Frank & Carol Difazio as TIC, Eugene Kissinger Trust u/a/d 12/6/99, Nancy Dver-Cohen Rev TST DTD 11/20/00, Nancy Dver-Cohen and Ralph H. Cohen Tstees, and Donald A. Benjamin.

Respondents are the defendants in this action and were appellees in the Eleventh Circuit: JPMorgan Chase & Co., JPMorgan Chase Bank N.A., J.P. Morgan Securities LLC, J.P. Morgan Securities, Ltd., John Hogan, and Richard Cassa.

## CORPORATE DISCLOSURE STATEMENT

JPMorgan Chase & Co. is a publicly held corporation with no corporate parent. No other person or entity owns 10% or more of its stock.

JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co.

J.P. Morgan Securities PLC (formerly J.P. Morgan Securities, Ltd.) is a subsidiary of J.P.Morgan Chase International Holdings, the ultimate corporate parent of which is JPMorgan Chase & Co.

J.P.Morgan Securities LLC is the wholly owned subsidiary of J.P. Morgan Broker-Dealer Holdings Inc., the ultimate corporate parent of which is JPMorgan Chase & Co.

## TABLE OF CONTENTS

QUESTION PRESENTED .......... i
PARTIES TO THE PROCEEDING .......... ii
CORPORATE DISCLOSURE STATEMENT .......... iii
TABLE OF AUTHORITIES .......... vi
INTRODUCTION .......... 1
STATEMENT OF THE CASE .......... 5
A. The Madoff Fraud and the Settlement of Claims Brought by the "Net Losers" .......... 5
B. The Net Winners' Attempt to Recover Fictitious "Profits" on Their Madoff Accounts .......... 8
C. The Decisions Below .......... 9
REASONS FOR DENYING THE PETITION .......... 11
I. There Is No Meaningful Circuit Conflict That Warrants This Court's Review. .......... 14
A. Since This Court Dismissed the *IndyMac* Petition, the Circuits Have Coalesced Around a Uniform View of the Law .......... 14
B. The Tenth Circuit's Decision in *Joseph* Has Been Superseded by Intervening Developments. .......... 17
C. The Other Two Cases Petitioners Cite in Support of a Split Are Inapposite. .......... 20
D. The Third and Ninth Circuits Will Soon Weigh in on the Question Presented Here .......... 22
II. The Decision Below Is Correct. .......... 23

A. *American Pipe* Tolling Is a Form of Equitable Tolling, Which Does Not Apply to Statutes of Repose. ...................... 23

B. The Result Below Is Correct Regardless of Whether *American Pipe* Tolling Is Equitable or "Legal." .................................. 25

C. Petitioners' Speculative Policy Arguments Provide No Basis for Dramatically Expanding the *American Pipe* Doctrine. ............................................. 26

CONCLUSION ......................................................... 30

## TABLE OF AUTHORITIES

### Cases

*Am. Pipe & Constr. Co. v. Utah*,
414 U.S. 538 (1974)................................ 2, 24, 25, 26

*Appleton Elec. Co. v. Graves Truck Line, Inc.*,
635 F.2d 603 (7th Cir. 1980).................................. 20

*Bright v. United States*,
603 F.3d 1273 (Fed. Cir. 2010).............................. 20

*Caldwell v. Berlind*,
543 F. App'x 37 (2d Cir. 2013)............................... 16

*CTS Corp. v. Waldburger*,
134 S. Ct. 2175 (2014).................................... *passim*

*DeKalb Cty. Pension Fund v. Transocean Ltd. Inc.*,
817 F.3d 393 (2d Cir. 2016) .................................. 16

*Fed. Hous. Fin. Agency v. UBS Americas, Inc.*,
858 F. Supp. 2d 306 (S.D.N.Y. 2012) .................... 21

*Footbridge Ltd. Trust v. Countrywide Fin. Corp.*,
770 F. Supp. 2d 618 (S.D.N.Y. 2011) .................... 19

*Freidus v. ING Groep, N.V.*,
543 F. App'x 92 (2d Cir. 2013)............................... 16

*Friedman* v. *JP Morgan Chase & Co.*,
2016 WL 2903273 (S.D.N.Y. May 18, 2016) ......... 10

*Gabelli v. SEC*,
133 S. Ct. 1216 (2013)........................................... 24

*Greyhound Corp. v. Mt. Hood Stages, Inc.*,
437 U.S. 322 (1978)................................................ 23

*Hildes v. Arthur Andersen LLP*,
No. 08CV0008 BEN (RBB), 2015 WL
11199825 (S.D. Cal. May 15, 2015) ........................ 18

*Hildes v. Moores*,
No. 15-55937 (9th Cir. June 16, 2015) .................. 22

*In re Bernard L. Madoff Inv. Sec. LLC*,
424 B.R. 122 (Bankr. S.D.N.Y. 2010) ...................... 5

*In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*,
860 F. Supp. 2d 1062 (C.D. Cal. 2012) .................. 28

*In re Lehman Bros. Sec. & ERISA Litig.*,
No. 15-1879, 2016 WL 3648259
(2d Cir. July 8, 2016) ............................................ 16

*Irwin v. Dep't of Veterans Affairs*,
498 U.S. 89 (1990) .................................................. 23

*John R. Sand & Gravel Co. v. United States*,
552 U.S. 130 (2008) ......................................... 20, 21

*Joseph v. Wiles*,
223 F.3d 1155 (10th Cir. 2000) .................... 3, 17, 18

*Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,
501 U.S. 350 (1991) .......................................... 12, 23

*Merck & Co. v. Reynolds*,
559 U.S. 633 (2010) ................................................ 24

*N. Sound Capital LLC v. Merck & Co. Inc.*,
No. 16-01364 (3d Cir. Feb. 11, 2016) ..................... 22

*Picard v. JPMorgan Chase & Co.*,
460 B.R. 84 (S.D.N.Y. 2011) .................................... 6

*Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*,
721 F.3d 95 (2d Cir. 2013) ......................... 14, 15, 26

*Pub. Emps.' Ret. Sys. of Mississippi v. IndyMac MBS, Inc.*, No. 13-640, *writ dismissed*, 135 S. Ct. 42 (2014)........... 2, 15, 25

*SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. LLC*, 829 F.3d 173(2d Cir. 2016) .................................... 16

*Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016).......................... *passim*

*United States v. Brockamp*, 519 U.S. 347 (1997)................................................ 24

*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)................................................ 19

*Young v. United States*, 535 U.S. 43 (2002).................................................. 23

**Statutes**

15 U.S.C. §77m ........................................................ 14

15 U.S.C. §78bb(a) .................................................... 10

15 U.S.C. §78fff–2(c)(1)(b) .......................................... 5

15 U.S.C. §78fff–3....................................................... 5

15 U.S.C. §78t(a).......................................................... 8

28 U.S.C. §1658(b) ...................................................... 9

28 U.S.C. §1658(b)(2).................................................. 1

28 U.S.C. §2072 ....................................................... 21

28 U.S.C. §2072(b) ....................................... 13, 19, 25

**Other Authorities**

101 Cong. Rec. 5131 (1955) ..................................... 26

4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2002) .......... 23

54 Corpus Juris Secundum, Limitations of Actions (2010) .......... 15

Amended Memorandum Op., *Shapiro v. JPMorgan Chase & Co.*, 11-cv-8331 (CM) (S.D.N.Y. Mar. 24, 2014), ECF No. 67 .......... 7

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) .......... 27

Complaint, *Friedman v. JPMorgan Chase & Co.*, No. 15-cv-5899 (SDW) (SCM) (D.N.J. Mar. 28, 2014), ECF No. 1 .......... 8

Consolidated Amended Class Action Complaint, *Shapiro v. JPMorgan Chase & Co.*, No. 11-cv-8331 (CM) (MHD) (S.D.N.Y. Jan. 20, 2012), ECF No. 18 .......... 7

Manual for Complex Litigation (Third) Preface (1995) .......... 27

Pet. for Cert. *SRM Global Master Fund v. The Bear Stearns Cos.*, No. 16-372 (filed Sept. 22, 2016) .......... 29

Pet. for Cert., *Cal. Pub. Emps. Ret. Sys. v. Moody Inv'rs Serv.*, No. 16-373 (filed Sept. 22, 2016) .......... 29

Pet. for Cert., *DeKalb Cty. Pension Fund v. Transocean Ltd.*, No. 16-206 (filed Aug. 12, 2016) .......... 29

Redacted Complaint, *Picard v. JPMorgan Chase & Co.*, No. 10-4932 (BRL) (Bankr. S.D.N.Y. Apr. 14, 2011), ECF No. 18 .......... 6

Amir Rozen, Joshua B. Schaeffer & Christopher Harris, Opt-Out Cases in Sec. Class Action Settlements, Cornerstone Research (2013) .......... 27

Transcript, *Shapiro v. JPMorgan Chase & Co.*, 11-cv-8331 (CM) (S.D.N.Y. Mar. 26, 2014), ECF No. 68 .......... 8

## INTRODUCTION

This case arises from the Ponzi scheme orchestrated by Bernard Madoff and his company Bernard L. Madoff Investment Securities LLC ("BLMIS"). Petitioners invested money with Madoff and BLMIS but withdrew their initial investments and in some cases substantial profits before the Ponzi scheme collapsed. In other words, Petitioners were "net winners" and actually profited from their investments with Madoff. Many other investors—the "net losers"—were not as lucky, and lost some or all of their initial deposits as well as the fictitious "profits" they thought they had earned from investing with Madoff.

Unsurprisingly, the efforts to recover money on behalf of Madoff's many victims focused on compensating the net losers. For example, the liquidation trustee of BLMIS allowed only net losers to file claims, and a major class action settlement of Madoff-related claims similarly limited compensation to the net losers.

In this case, a group of net winners (Petitioners here) filed suit against JPMorgan Chase and two JPMorgan employees (collectively, Respondents), alleging that Respondents engaged in a banking relationship with Madoff and were thus liable as "control persons" under the federal securities laws. The district court dismissed those claims for several independent reasons: the claims were untimely under the five-year statute of repose in 28 U.S.C. §1658(b)(2); Petitioners failed to adequately plead that Respondents somehow "controlled" Madoff or BLMIS; and Petitioners, who actually *profited* from

their investments with Madoff, could not allege actual loss. The Eleventh Circuit affirmed, holding that the five-year statute of repose applied here and that there was no basis for tolling that deadline.

Petitioners now ask 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 Petitioners (repeatedly) note, 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*"). Petitioners appear 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.

Petitioners, echoing the *IndyMac* petitioners, insist 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, untimeliness is just the tip of the iceberg with respect to the legal flaws of Petitioners' claims. In addition to finding their claims barred by the statute of repose, the district court also concluded that Petitioners—who actually profited from their investments with Madoff—failed to allege actual losses and failed to adequately allege that Respondents somehow "controlled" BLMIS. Petitioners would also not be entitled to tolling even if *American Pipe* could apply to statutes of repose because they are seeking to raise *new* net-winner claims that were never advanced by the class in the underlying litigation. Petitioners' claims would thus fail regardless of how this Court answers the question presented.

## STATEMENT OF THE CASE

### A. The Madoff Fraud and the Settlement of Claims Brought by the "Net Losers"

On December 11, 2008, Bernard Madoff was arrested in New York. He subsequently pleaded guilty to securities fraud and admitted that he had operated a long-running Ponzi scheme through his firm BLMIS. On December 15, 2008, a Trustee was appointed to administer the liquidation of BLMIS under the Securities Investor Protection Act ("SIPA").

Under SIPA, a fund was established to help compensate Madoff's victims for their "net equity" at the time BLMIS collapsed. *See* 15 U.S.C. §78fff–2(c)(1)(b); 15 U.S.C. §78fff–3. The Trustee defined "net equity" as "the amount of cash deposited by the customer into his BLMIS customer account less any amounts already withdrawn by him." *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 125, 132 (Bankr. S.D.N.Y. 2010), *aff'd*, *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 235 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 24 (2012).

That net equity determination divided Madoff investors into two groups: (1) the net losers, who lost principal because they had invested more than they had withdrawn at the time the scheme was exposed; and (2) the net winners (including Petitioners), who had withdrawn more from their BLMIS accounts than they had invested at the time the scheme collapsed. Given that the net winners actually *profited* from their investments with Madoff, it is unsurprising that the Trustee chose not to seek additional compensation on their behalf. Under the Trustee's definition of "net equity" (which the courts

fully affirmed), net losers would have valid SIPA claims, but net winners would not.

On December 2, 2010, the Trustee filed a damages action against JPMorgan asserting New York common-law claims and seeking recovery of more than $19 billion, which allegedly represented the losses suffered by the net losers in the Ponzi scheme; nothing in that complaint purported to seek recovery on behalf of the net winners. The complaint was based in large part on the fact that BLMIS had maintained a conventional, commercial banking demand-deposit account at JPMorgan through which Madoff and his brokerage firm had moved the proceeds of Madoff's fraud. *See* Redacted Complaint, *Picard v. JPMorgan Chase & Co.*, No. 10-4932 (BRL) (Bankr. S.D.N.Y. Apr. 14, 2011), ECF No. 18. The Trustee's common-law claims were subsequently dismissed for lack of standing because the Trustee was empowered only to bring claims on behalf of the debtor (*i.e.*, BLMIS) and the common-law claims properly belonged to the creditors. *See Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 91, 106 (S.D.N.Y. 2011), *aff'd*, *In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 66-77 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2895 (2014).

After dismissal of the Trustee's common-law claims, several net losers filed class-action complaints against JPMorgan in the Southern District of New York. Those class actions, which were subsequently consolidated, largely mirrored the factual allegations in the Trustee's (dismissed) complaint and sought recovery of the same $19 billion in losses. *See* Consolidated Amended Class

Action Complaint ¶60, *Shapiro v. JPMorgan Chase & Co.*, No. 11-cv-8331 (CM) (MHD) (S.D.N.Y. Jan. 20, 2012), ECF No. 18. Nothing in that complaint purported to seek recovery on behalf of net winners who withdrew from their Madoff accounts more than they had originally invested.

On January 7, 2014, JPMorgan announced that it had reached a global settlement with the net-loser class action plaintiffs, as well as the U.S. Attorney's Office for the Southern District of New York, the Madoff Trustee, the Office of the Comptroller of the Currency, and the Financial Crimes Enforcement Network. D.E. 52, ¶¶86-89.[1]

At an approval hearing for that settlement, counsel for net winners attempted to "opt out." The district court flatly rejected that effort, observing that there was "nothing for [the net winners] to 'opt out' of, because any claims they might have against JP Morgan [were] by definition not compromised by the settlement." Amended Memorandum Opinion at 18, *Shapiro v. JPMorgan Chase & Co.*, 11-cv-8331 (CM) (S.D.N.Y. Mar. 24, 2014), ECF No. 67. The court further admonished counsel for net winners:

> Why didn't you bring your own lawsuit? … [Lead counsel] doesn't purport to represent you …. You could not possibly have been under an illusion that you had … no obligation to inquire as to whether [lead counsel] was purporting to represent you.

---

[1] References to "D.E." are to the district court's docket in No. 14-cv-00184 (JES) (CM).

Transcript at 8:2-23, *Shapiro v. JPMorgan Chase & Co.*, 11-cv-8331 (CM) (S.D.N.Y. Mar. 26, 2014), ECF No. 68.

### B. The Net Winners' Attempt to Recover Fictitious "Profits" on Their Madoff Accounts

After the district court approved the global settlement with JPMorgan discussed above, various net winners (all represented by the same law firm) brought a putative class action against JPMorgan in New Jersey as well as this mass action in Florida. *See* Complaint, *Friedman v. JPMorgan Chase & Co.*, No. 15-cv-5899 (SDW) (SCM) (D.N.J. Mar. 28, 2014), ECF No. 1; D.E. 1. In virtually identical complaints, Petitioners and the *Friedman* plaintiffs alleged that the JPMorgan defendants had the power to control, and did control, BLMIS and Madoff's Ponzi scheme. D.E. 52 ¶¶9, 345. Based on that allegation, the complaints asserted a Section 20(a) control-person claim under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78t(a), as well as claims under the federal RICO statute and state law.

Even though Petitioners had already withdrawn from their BLMIS accounts the amounts they had initially invested with Madoff *and more*, they sought to recover the full amounts of their (fictitious) balances on their BLMIS statements. *See* D.E. 52 ¶¶3, 30 (alleging that Madoff investors "lost $64.8 billion" representing the "*combined last statement values*, as of November 30, 2008") (emphasis added). They also sought to recover whatever market appreciation had accrued with respect to the

(fictitious) securities held in their BLMIS accounts since November 30, 2008. D.E. 52 ¶12.

### C. The Decisions Below

**1.** On September 17, 2015, the United States District Court for the Middle District of Florida dismissed Petitioners' federal causes of action for failure to state a claim, and declined to exercise supplemental jurisdiction over Petitioners' state-law claims. The court dismissed the control-person claim under Section 20(a) of the Exchange Act for three independent reasons.

*First*, the court concluded that Petitioners' control-person claim was untimely under the Exchange Act's five-year statute of repose, 28 U.S.C. §1658(b), because the final alleged violation occurred in December 2008 and Petitioners did not bring their claims until March 2014. The court rejected Petitioners' argument that the deadline for filing their control-person claim was tolled under *American Pipe* by the pendency of the net-loser class action, holding that *American Pipe* tolling applies only to statutes of limitations, not to statutes of repose such as §1658(b). Pet.App.47a-50a.

*Second*, the district court held that Petitioners' Section 20(a) claim must be dismissed because they failed to plead that JPMorgan "controlled" the Madoff Ponzi scheme, as required for a Section 20(a) claim. Pet.App.50a-52a. As the court explained, Petitioners alleged little beyond the fact that JPMorgan held a bank account for BLMIS, which was "insufficient to show that defendants had the power to control the general affairs of BLMIS." Pet.App.51a. Indeed, Petitioners alleged that Madoff *refused* to allow

JPMorgan to conduct due diligence on his operations, which "plainly contradict[s] any claim that [JPMorgan] controlled Madoff and BLMIS." Pet.App.51a-52a.

*Third*, the district court held that Petitioners, as net winners, did not suffer "actual damages," as required for liability under the Exchange Act, because they recovered all of their initial investments *plus* additional fictitious profits. Pet.App.52a-56a; 15 U.S.C. §78bb(a).[2]

**2.** The Eleventh Circuit unanimously affirmed on the first of these three grounds. Relying on *Waldburger*, which "discussed at length the difference between statutes of limitation and statutes of repose" and emphasized that a repose period is "equivalent to a cutoff, in essence an absolute bar on a defendant's temporal liability," Pet.App.6a-7a (quoting 134 S. Ct. at 2182-83), the Eleventh Circuit held that *American Pipe* announced a rule of "equitable" tolling that cannot overcome a statute of repose. Pet.App.11a. The court thus concluded that

---

[2] The net winners' virtually identical complaint in *Friedman v. JPMorgan* has also been dismissed by the Southern District of New York. *See Friedman* v. *JP Morgan Chase & Co.*, 2016 WL 2903273 (S.D.N.Y. May 18, 2016), *appeal docketed*, No. 16-1913 (June 15, 2016). In addition to holding that *American Pipe* cannot toll statutes of repose under well-established Second Circuit precedent, the court in that case found two further obstacles to an application of the tolling doctrine: (1) the net winners were never members of the net-loser class in the earlier class action; and (2) the earlier class action did not advance a Section 20(a) claim or otherwise assert that JPMorgan "controlled" BLMIS. That decision is currently pending on appeal before the Second Circuit.

*American Pipe* tolling did not apply and that Petitioners' claims "are time-barred and were properly dismissed." Pet.App.11a.

## REASONS FOR DENYING THE PETITION

**I.** Petitioners have not identified any meaningful division of authority that warrants this Court's 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 Eleventh Circuit's holding is 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. *See* Pet.App.10a-11a. 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).

Petitioners also proffer 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 Petitioners cite no evidence whatsoever suggesting that protective filings have increased in the wake of that decision. Moreover, in cases like this one—where plaintiffs like Petitioners 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.

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

Petitioners assert that this Court should grant certiorari to address an "expanding circuit conflict[]," Pet.26, but in fact the opposite is true. The only thing that has expanded 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. *See SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. LLC*, 829 F.3d 173, 176-77 (2d Cir. 2016), *petition for cert. filed*, No. 16-372; *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 Brothers*, 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 in the decision below. The court started from the premise that statutes of repose "are distinct from statutes of limitation in that they are not subject to equitable tolling, 'even in cases of extraordinary circumstances beyond a plaintiff's control.'" Pet.App.7a (quoting *Waldburger*, 134 S. Ct. at 2183). 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." Pet.App.10a-11a. The court accordingly held that "*American Pipe* tolling does not apply to the statute of repose at issue in this case." Pet.App.11a.

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

Against that unbroken line of recent authority, Petitioners cite 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 a "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 *5 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 Assocs., 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 Petitioners claim, 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 Petitioners suppose 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 Petitioners Cite in Support of a Split Are Inapposite.

In an effort to exaggerate their alleged circuit split, Petitioners cite *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 filing of a putative class action serves, under *American Pipe … to satisfy a statute of repose…*") (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. Petitioners note that, like statutes of repose, those "jurisdictional" statutes of limitations are generally not subject to equitable tolling. Pet.11; *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.

As the Eleventh Circuit correctly noted in the decision below, *see* Pet.App.10a, 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."). Petitioners do 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.[3] 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. 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.

---

[3] 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."

### 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.

Petitioners contest 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.19 (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. Petitioners' Speculative Policy Arguments Provide No Basis for Dramatically Expanding the *American Pipe* Doctrine.

Finally, Petitioners suggest that the rule applied below would inundate the courts with unnecessary filings and "dramatically augment[] the cost of class litigation." Pet.23. But *IndyMac* has been circuit law in the Nation's financial (and securities litigation) epicenter for more than three years, yet Petitioners cite no evidence whatsoever that their parade of horribles has actually come to pass in that jurisdiction.

In particular, Petitioners offer 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 have Petitioners provided any evidence that the cost of class-action litigation has increased, or will increase, under the *IndyMac* regime. Petitioners raise 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 Petitioners' 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, as the district court that oversaw the class litigation observed, Petitioners would have been well-served to file timely individual claims here, because "net-winners" were not within the class and thus might not benefit from *American Pipe* tolling even if it were applicable to statutes of repose. *See supra* pp. 7-8. 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.

* * *

For all these reasons, there is no imperative for this Court to grant plenary review to consider whether statutes of repose are subject to *American Pipe* tolling. The decision below is correct and in line with the decisions of every court of appeals to consider the issue since *Waldburger*.

If the Court is inclined to consider the issue at this time, however, this case is a suitable vehicle for its review. While the Eleventh Circuit had alternative grounds for affirming the dismissal of Petitioners' claims, it rested its decision solely on the ground that *American Pipe* tolling did not preclude the statute of repose from granting true repose. Moreover, if the Court is to consider this issue, there is much to be said for doing so in a case in which the statute of repose is express, rather than implied, *but*

*cf.* Pet. for Cert., *DeKalb Cty. Pension Fund v. Transocean Ltd.*, No. 16-206 (filed Aug. 12, 2016), there are no other extraneous questions for the Court's review, *but cf.* Pet. for Cert., *California Pub. Emps. Ret. Sys. v. Moody Investors Service*, No. 16-373 (filed Sept. 22, 2016), and where the petitioner did not inexplicably allow the statute of repose to expire by waiting months after opting out to re-file its individual claims, *but cf.* Pet. for Cert. *SRM Global Master Fund v. The Bear Stearns Cos.*, No. 16-372 (filed Sept. 22, 2016). That said, the far better course is to deny review of this issue altogether unless and until a court of appeals revives the circuit split by applying *American Pipe* to statutes of repose in the post-*Waldburger* era.

## CONCLUSION

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

Respectfully submitted,


PAUL D. CLEMENT
*Counsel of Record*
JEFFREY M. HARRIS
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

JOHN F. SAVARESE
EMIL A. KLEINHAUS
KEVIN S. SCHWARTZ
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd St.
NEW YORK, NY 10019
(212) 403-1000

DAVID S. FLUGMAN
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

*Counsel for Respondents*


November 7, 2016