No. 16-373

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

There is no dispute that petitioner's claims under Section 11 of the Securities Act were brought by a class action complaint within the time limits set by Section 13. Petitioner's choice to then pursue those very same claims against the very same defendants on its own behalf did not retroactively render the claims untimely. This Court held as much in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

Respondents principally argue that Section 13's three-year time limit is a "statute of repose" that is not subject to equitable tolling. Even if that is so, petitioners prevail. The initial class complaint timely brings the claims of each class member, so they neither seek to defer the date for initiating their claims nor seek to invoke any equitable principle. The timeliness of the class members' individual claims is most obvious on facts like these, where the class action was certified. Not only did the class action complaint initiate the action, but the class claims therefore always remained pending, so there is no gap in time to toll *at all* prior to the filing of petitioner's own complaint.

Respondents argue that the Court purposefully directed the parties not to present that issue. Indeed, they accuse us of a "brazen" refusal to follow an Order of this Court. Because that is a serious claim that is also seriously inaccurate, we begin with it.

I. There Is No Merit To Respondents' Argument That This Court's Order Granting Certiorari Excludes Considering The Fact That The Class In This Case Was Certified.

Petitioner's Opening Brief advanced two related arguments for reversal. First, petitioner's complaint was timely filed under this Court's decision in *American Pipe* without resort to any form of tolling, because this is not a case in which the class action mechanism failed. Rather, petitioner simply took control of its own, still pending claim. *See* Br. 30-38. Second, in any event, "*American Pipe* tolling" applies to the three-year time limit of Section 13. *See id.* 38-50.

Respondents contend that this Court precluded consideration of the first argument in petitioner's Opening Brief by granting certiorari limited to Question One set forth in the Petition for Certiorari. Indeed, they make that claim in strident terms, repeatedly accusing us of a "brazen disregard" of this Court's Order and "explicit instructions"; conduct that respondents say the "Court should not tolerate." Br. 2, 16; *see also id.* 39-41. Those are serious claims. They are also wrong. It is surprising and unfortunate that otherwise able counsel would encourage the coarsening of the presentation of matters to the Court. It is worse when the allegations are not true.

The Petition advanced two Questions Presented:

> 1. Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of

> putative class members? (Question granted in *IndyMac*)
>
> 2. May a member of a timely filed putative class action file an individual suit on the same causes of action before class certification is decided, notwithstanding the expiration of the relevant time limitations?

Pet. i.

Question One thus broadly asks whether petitioner can "satisfy" the time limitation of Section 13 under *American Pipe*, not merely whether petitioner prevails under principles of "*American Pipe* tolling." Question Two raises a quite different issue: whether a class member can file its own complaint "before class certification is decided." There is no dispute that the merits argument in question – that tolling is unnecessary because the class was certified – fits easily within the terms of Question One.

The body of the Petition confirmed what the Questions Presented already made clear. It argued that the case implicated two separate circuit conflicts that track the two Questions Presented.

Question One addressed the application of *American Pipe* to Section 13. Directly contrary to the rule applied by the Second Circuit in this case, the Tenth Circuit holds that a class member's complaint is timely in these circumstances for *two* independent reasons: (i) *American Pipe* tolling applies to Section 13; and (ii) in a case in which the class is certified, the complaint is timely under *American Pipe* without resort

to tolling at all. *See* Pet. 10-12, 27. The latter holding is the merits argument now at issue.

Question Two addressed an entirely separate circuit conflict over whether a class member may file its own complaint prior to the district court's ruling on class certification. That conflict turns on a different legal issue: the class member's status as a party to the litigation. The Second Circuit permits that procedure – a rule that favors petitioner. The First and Sixth Circuits do not. *See* Pet. 31. The Petition urged the Court to grant Question Two to resolve this separate conflict. *See id.* 3 ("This case presents the opportunity to decide the question on which the Court granted certiorari in *IndyMac* and simultaneously resolve another circuit conflict over whether *American Pipe* applies when a class member files its individual suit before class certification is decided."); *id.* 9 ("The second Question Presented – whether *American Pipe* applies when a member of a timely filed putative class action files an individual suit *before class certification is decided* – has likewise fractured the circuits for years." (emphasis added)).

In their Brief in Opposition, respondents argued that certiorari should be denied with respect to Question Two because, *inter alia*, it was not properly presented by the case. They pointed out that petitioner had not presented the issue to the Second Circuit, which moreover had not passed on it; to the extent it arose in the case, the Second Circuit's rule favored petitioner. *See* BIO 34 ("Even if the ancillary, *pre-class-certification tolling issue* did present a significant circuit split, this appeal would be an inappropriate

vehicle to consider the issue because it was not raised below. Moreover, even if it had been raised, Petitioner would have prevailed, and therefore would not be an appropriate party to raise the issue here." (emphasis added)). In addition, respondents explained, that issue would be an independent basis for affirmance that would present an obstacle to resolving the principal conflict presented by Question One over the application of *American Pipe*. *See id.* 35.

This Court agreed with respondents. It granted certiorari limited to Question One (the application of *American Pipe*), denying review of Question Two (whether a class member may file its own complaint prior to the district court's ruling on class certification). In turn, petitioner's Opening Brief addressed only Question One, which as discussed encompasses two related theories.

Indeed, it would have made little sense for this Court to refuse to consider whether a class member's complaint is timely in cases in which the class is certified. As discussed, that issue is itself the subject of a direct conflict between the Second and Tenth Circuits. Refusing to consider it would leave the circuit split unresolved. That was presumably a consideration when this Court choose this case among the available pending vehicles to review.

Respondents' contrary characterization of the Questions Presented – and in turn this Court's Order granting certiorari – is not accurate. There is an easy way to know at the outset whether an argument lies outside the issues this Court has agreed to decide: the

objecting party will *accurately quote* the Questions Presented. Respondents do not. They represent that

> [t]he petition for certiorari presented two distinct questions: (1) "Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy" Section 13's three-year statute of repose with respect to putative class members' individual claims; and (2) whether, even if not, a member of a timely filed putative class action may bring an individual action asserting the same claims. Pet. i.

Br. 39. But respondents' choice to rewrite Question Two – which is strikingly unnecessary, given its brevity – does not accurately reflect the actual question. By its terms, Question Two addressed the distinct circuit conflict over whether a class member may file its own complaint "before class certification is decided." Pet. i.

Respondents then mischaracterize the body of the Petition. They represent that the Petition discussed the argument that a class member need not resort to tolling "in support of the non-granted QP2" because it appeared "in the QP2 portion of the petition." Br. 40. That is not so. The cited discussion occurs at pages 27 and 28 of the Petition, neither of which discusses Question Two *at all*. The discussion of "[g]ranting certiorari on the second Question Presented" appears

beginning on page 29 under a separate heading, which addresses that distinct circuit conflict. *See* Pet 29.[1]

But respondents' argument truly travels through the looking glass at pages 44 to 45 of their brief on the merits. There, respondents devote a distinct section (II.B.2) to the argument that the judgment should be affirmed on the alternative ground that petitioner filed its complaint prior to the certification of the class. *See* Br. 45 ("Unless and until a class certification order is issued, non-named class members are not parties to the class action *at all* and cannot be deemed to have 'brought' or 'commenced' any claims for purposes of determining whether a later-filed individual action is timely."). Yes, having just argued in the most strident terms that this Court precluded consideration of Question Two – and having accused us of improperly disregarding the Court's Order – respondents proceed to make exactly the argument this Court actually declined to consider (at respondents' own urging, no

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[1] We acknowledge that a sentence in the certiorari Reply Brief could be read to support respondents' reading of Question Two. Respondents themselves do not rely on it, and thus presumably agree it does not support their position. It states (at 8-9): "This case also presents a second question, which is whether CalPERS' claims are timely because it took over its causes of action before judgment was entered on the class complaint, so that CalPERS always had a live claim, and tolling—as that term ordinarily is used—was unnecessary." In that sentence, the phrase "a second question" refers to a second legal issue in the case, not Question Two presented by the Petition. As discussed above, the Petition itself is unambiguous.

less). We will leave rhetoric aside and simply point out without hyperbole that the issue is excluded by the Order granting certiorari. That seems a sufficient and appropriate way to make the point.

II. Petitioner's Complaint Was Timely Under Section 13.

In this case, the Class Action Complaint asserted claims against respondents under Section 11. The class was certified as part of a settlement. Petitioner is an unnamed class member. It filed its own complaint asserting the same claims against respondents and opted out of the class to litigate those claims on its own. Thus, petitioner's claims are wholly encompassed within the class complaint; they constitute merely the subset of the class claims that always belonged to petitioner.

A similar scenario arises when class certification is denied instead of granted. The class complaint asserting the claims remains pending, because it is not dismissed on the merits. But an individual member of the putative class must then file or join a new suit if she wants to vindicate the identical claims on her own behalf. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

The question is whether such an individual action is timely filed under Section 13. The statute provides:

> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the

> exercise of due diligence . . . . In no event shall any such action be brought to enforce any liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

15 U.S.C. § 77m.

The text can be read two ways. On petitioner's reading, the class action complaint "brought" the "action" for each class member. The individual class members' claims were therefore timely filed. Those claims cannot retroactively be deemed *untimely* by a class member's prompt submission of its own complaint setting forth the same cause of action.

To be sure, if class certification is denied (or granted and the plaintiff opts out), the plaintiff must then pursue her own claim. But having already *satisfied* the limitations period, the action remains timely so long as the class member continues to pursue the exact same "action." She simply must do so within whatever time remained in the limitations period when the class action complaint was filed. In that sense, the limitations period is "tolled" by the pendency of the class action. This is so-called "*American Pipe* tolling." *See American Pipe*, 414 U.S. at 553.

Respondents' contrary reading of Section 13 is that the class member's individual complaint starts a separate "action" that must itself independently satisfy the relevant time limitations. In addition, respondents argue, the statute's three-year time limit is not subject to equitable tolling. On that view, petitioner filed its individual complaint too late.

For several reasons, petitioner has the better interpretation of the statute.

1. Start with the text of Section 13. Properly understood, the class action complaint timely brings each class member's "action," which is the claim under Section 11. So long as the individual class member continues to assert the identical legal claim against the identical defendants, she is pursuing the same "action," which remains timely. The fact that the class member does so through a different pleading makes no difference to the timeliness of the action.

Critically, there actually is no dispute that – in the words of Section 13 – the class action complaint "brought" the "action" on behalf of each unnamed class member. That is the only way class members can recover if the class is certified and they do not opt out because the class action complaint is the *only* place their claims are asserted. Nor can that dilemma be avoided by characterizing the unnamed plaintiffs as "joining" the complaint upon class certification. Often that will not occur until the three-year time limit has long since run. *See* Pet. Br. 24, 26-27; Civ. Pro. & Sec. Scholars *Am.* Br. 5-11.

Recognizing as much, *American Pipe* squarely holds that that "the filing of a timely class action complaint commences the action for all members of the class." 414 U.S. at 550. That holding reads on the text of Section 13. In a case like this one, the class action complaint "brought" the "action" of every class member (including petitioner) within three years of the securities being offered to the public. 15 U.S.C. § 77m.

Respondents' reading cannot be reconciled with the statutory text. On their view, even though the class action "brought" the "action" for each class member, the filing of a subsequent individual complaint advancing a subset of that action somehow retroactively bars those claims. But respondents cite no authority for the proposition that a timely action can somehow become untimely upon the filing of a new pleading advancing exactly the same cause of action.

Respondents' understanding of how Section 13 functions is similarly implausible. On their view, Congress intended to require every single member of a class that asserts a claim under Section 11 to file her own individual suit, or at least participate by name in mass actions. That would be the only practical way for victims to pursue their rights, given the fact that class certification decisions frequently are not made until years after a class action complaint is filed. Pet. Br. 24, 26-27; Civ. Pro. & Sec. Scholars *Am*. Br. 5-11. In the context of Section 11 – which involves securities offerings – that could amount to *thousands* of separate complaints in every case.

Why would Congress want to require all that waste, with no corresponding benefit to *anyone*, including the defendants that are the beneficiaries of the repose period? It would not. Respondents' rule is directly contrary to the design of the securities laws and the Rules of Civil Procedure. The Private Securities Litigation Reform Act of 1995, in particular, has detailed procedures that place a lead plaintiff in charge of securities litigation. *See* Pet. Br. 24. The statute works hand in glove with Rule 23's procedures for the

appointment of a named plaintiff and lead counsel, with limited participation of unnamed class members. The very purpose of both the Act and the Rule is to limit the amount of independent litigation of common questions – the opposite of the regime respondents say Congress enacted.

The reasoning of *American Pipe* thus applies fully here. In *American Pipe*, the Court read Rule 23 in a fashion that would avoid inducing plaintiffs to file exactly the multiplicity of actions that the Rule was enacted to eliminate. If respondents prevail here, then in every later case the only responsible course is for individual class members to participate in the litigation. That is enormously wasteful for the judiciary and litigants, including defendants. *See* Pet. Br. 22-24; Corporate Directors *Am.* Br. 10-15.[2]

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[2] Respondents contrary view that those independent actions will not be filed, Br. 47-48, is irreconcilable with *American Pipe* and amounts to a prediction that plaintiffs just will not care about potentially losing their claims as untimely. The thousands of cases off all types filed every day within the statute of limitations are strong evidence to the contrary.

Respondents contend that the effects of the Second Circuit's rule have been limited so far. But those effects are already being seen. *See* Institutional Investor *Am.* Br. 15-16. A group of retired district judges has explained that a ruling in respondents' favor would inevitably disrupt the administration of these complicated cases. Retired Judges *Am.* Br. 7-20.

Respondents argue to the contrary that opt-out claims are deleterious and plaintiffs should simply be encouraged to participate in the class process. Br. 51-53. But that gets the effect of respondents' rule exactly backwards, and reduces to the assertion that *American Pipe* – which is driven by the desire to avoid independent litigation by class members – is wrongly decided. *American Pipe* explains that the inevitable effect of deeming such claims untimely is to induce individual class members to file and pursue their own lawsuits early in the litigation. *See* 414 U.S. at 553-54.

To be sure, in cases governed by Section 13, respondents' rule does make the opt-out process largely worthless once the three-year period has expired. But that is a result to be avoided, not embraced. The prospect that plaintiffs could opt out of an inadequate or otherwise unreasonable settlement is an important inducement for class counsel to represent the interests of the entire class fairly. *See* Pet. Br. 24-25.

The resulting impingement on the right to opt out also casts significant constitutional doubt on

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The *amicus* brief of Civil Procedure & Securities Scholars details why opt outs have not been even more widespread yet. *See* Civ. Pro. & Sec. Scholars *Am.* Br. 17-20. Among other things, this Court immediately cast doubt on the Second Circuit's rule by granting certiorari to review the first case to announce it, which is of relatively recent vintage in any event. A decision of *this* Court announcing a nationwide rule that plaintiffs must file their own independent actions to protect their rights under every statute that contains a statute of repose will – not surprisingly – produce exactly that bad result.

respondents' reading of the statute. Respondents assert that plaintiffs merely have the right to opt out of a class action – a right that they say is satisfied even if the plaintiffs will as a matter of certainty opt out into the nothingness of a claim that will be dismissed as untimely as a matter of law. Br. 54-55. Respondents contend that the Due Process Clause here is, in the words of Justice Jackson, "a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (concurring opinion).

That is incorrect. Indeed, respondents' argument is irreconcilable with the very existence of the opt-out right in these circumstances. What would be the point? *See* NASAA *Am.* Br. 15-16. A class member has the due process right to take control of her own claim for money damages if she becomes dissatisfied with the representation of class counsel, including because a class settlement is inadequate. *See Crown, Cork & Seal Co.*, 462 U.S. at 351-52; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974). *See also* Pet. Br. 25-27; Public Citizen *Am.* Br. 14-21.

The problem is especially acute when – as in this case – the suit asserts not just claims under provisions subject to Section 13's three-year period (such as claims under Section 11), but also other claims that are not (such as those under Section 10(b) of the Exchange Act). A plaintiff is not permitted to opt out of a class action "in part." By forcing class members to accept a class settlement with respect to claims subject to Section 13, respondents' rule creates an inappropriate dilemma. The class members must either (i) opt out of the class

and abandon those claims as untimely, or (ii) give up the right to opt out altogether and thereby lose the opportunity to pursue other claims individually. There is no reason to believe that Congress intended Section 13 to put class members in that untenable position. *See* Pet. Br. 27-28. Respondents strikingly do not argue otherwise.

2. Respondents do not actually dispute that petitioner did satisfy Section 13 when the Class Action Complaint was filed. Their theory must be that petitioner then somehow *unsatisfied* the limitations period by later filing its own independent lawsuit.

That is wrong, because the "action" that Section 13 requires to be brought within three years is the "cause of action," not the pleading. The Court's opinion in *Jones v. Bock*, 549 U.S. 199 (2007), surveys – in closely analogous circumstances – the meaning of "action" in the context of limitations periods and concludes that it refers to the party's claim. There is no reason a different result would follow here. *See* Pet. Br. 35. Respondents' answer to *Jones* (Br. 44-45) is uncompelling: they ignore the fact that *Jones* supported its holding by citing cases involving statutes of limitations. 549 U.S. at 220. Respondents also overlook that *Jones* rejected many of the arguments that they make here – for example, that Congress elsewhere distinguished between actions and claims, *see id*. at 222, and that policy concerns favored a restrictive reading of the statutory language, *id*. at 223.

In fact, respondents ignore all of the reasons that the "action" *must* be the "cause of action" in the specific context of Section 13. *See* Pet. Br. 36-38. Congress

would have been concerned with whether the plaintiff asserted the substance of her claim, not whether a new complaint was filed. Respondents' contrary position is pure formalism, because there is no practical reason that a class member needs to initiate a new lawsuit. Surely, a hypothetical Rule of Civil Procedure could authorize class members to submit a one-page notice that they intend to pursue the case on their own based on the allegations of the existing class complaint. On respondents' view, there would be no new judicial proceeding and thus no new "action," so Section 13 would not bar the suit as untimely. But in substance, the one-page filing under that hypothetical Rule is no different than petitioner's individual complaint in this case. Both do the same thing.

Respondents' contrary reading of "action" would produce still more nonsensical results in practice. For example, after the three-year period ran, one named plaintiff in a suit could not sever her individual claim into her own complaint with her own attorney, because that would be a new untimely judicial proceeding. Further, a complaint containing an untimely Section 11 claim but a timely claim under another provision (such as Section 10(b)) would have to be dismissed in its entirety, because the "action" was untimely. The consequence of not complying with Section 13 is thus that the "action" – which according to respondents is the judicial proceeding – may not "be maintained." 15 U.S.C. § 77m. The list goes on. Congress would not have intended the statute to produce those bizarre results, none of which arise if "action" is properly read to mean the "cause of action." *See* Pet. Br. 35-38.

Respondents note that in some other contexts Congress distinguished an "action" from a "claim," including in some other provisions of the securities laws – though notably not Section 13. *See* Resp. Br. 42-43. None of those are limitations periods, and *Jones* explains that in *that* context an "action" is generally the cause of action. Respondents also point to Federal Rule of Civil Procedure 3, which provides that "[a] civil action is commenced by filing a complaint with the court." *See* Br. 43 n.6. But the plain import of the Rule is that the "action" is *different* from the "complaint," which is instead the vehicle for asserting it. In a case like this one, the action was timely asserted by the class action complaint.

3. Respondents argue that Section 13's three-year time limit is written in the form of a "statute of repose," which they say cannot be tolled. Br. 26-27. That argument is no help to respondents in a case like this one, in which tolling is not necessary at all. There was *no gap in time* between the pursuit of petitioner's claim in the Class Action Complaint and CalPERS's parallel individual complaint. The Class Action Complaint remained pending at all times, and the class was in fact certified. *See* Pet. Br. 30.

Even in those cases in which the plaintiff opts out after class certification is denied, respondents' argument is not persuasive because it begs the question. Section 13 does not generically prohibit tolling of any kind. Rather, even on the reading most favorable to respondents, it specifies a single point in time that cannot be extended: when the "action" must be "brought." In other words, it is directed to the start

of the case, not what happens after the action commences. If the action was timely brought by the class action complaint, then the time limit is satisfied and nothing in the statute precludes the application of *American Pipe* tolling to require the plaintiff to file her separate complaint within whatever time remained when the class action complaint was filed.

There is no textual support for respondents' broader view that the three-year period bars equitable tolling *even after* the action is brought. Br. 26-27. On its face, the statute addresses only when the action is initiated. But in any event, "equitable tolling" is concerned with whether the individual circumstances of a particular case justify the plaintiff's delay in bringing suit in the first instance. *American Pipe* tolling is completely different. It is not concerned with the initial filing of the action and applies without regard to the equities of any plaintiff's case. Instead, it is an interpretation of Rule 23 that reconciles the fact that, although the class action complaint must initiate each plaintiff's claim, a class member cannot have an open-ended time to pursue her own action once the district court decides that the Rule precludes certification of the class. *American Pipe* tolling is moreover concerned with preserving the efficient functioning of the judiciary, as much or more than the interests of individual plaintiffs. *See* Pet. Br. 16-19; DeKalb *Am.* Br. 12-13.

Respondents' reading of Section 13 also is inconsistent with the purpose and function of a statute of repose. They argue that such a provision permanently cuts off the defendant's liability. Br. 19. That is true as far as it goes, which is not very far.

Section 13 provides that a defendant is not liable *only* if a *particular event* occurs: the plaintiff's claim is not timely asserted. If a claim is timely filed, a repose period is not a guarantee against the defendant later being held liable. It can take a decade or more to litigate cases, and in that time the plaintiff may change lawyers, legal strategies, damages theories, and many other aspects of her case – all of which might result in greater liability for the defendant. The statute of repose says nothing about those developments. It is instead a requirement that a claim be advanced within a fixed period of time so that the defendant can plan, because it knows it will not be subject to new assertions of liability later. *See* Pet. Br. 33-34.

Only petitioner's reading is consistent with this correct understanding of the functioning of a repose period. The class action complaint puts the defendants on notice of all the claims of each class member. *American Pipe* addresses that exact point, explaining that the class action complaint

> notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

American Pipe, 414 U.S. at 555.

Here, respondents unquestionably knew of petitioner's precise claims within the time limits set forth in Section 13. They do not even argue that they were subject to any surprise when petitioner filed its own complaint. Every claim pleaded against every defendant in the CalPERS Complaint appears in the timely filed Class Action Complaint. The only difference is that CalPERS pursued those claims with its own lawyers, as was its right.[3]

Respondents also never answer the point that, on their broad view that statutes of repose prohibit any form of tolling, *American Pipe* itself is wrongly decided. *See* Pet. Br. 43. The time limit in that case provided in absolute terms that a civil suit "shall be forever barred unless commenced . . . within" one year after the conclusion of an antitrust suit brought by the United States. 15 U.S.C. § 16(b) (1970). That wording is, if anything, even more categorical than the language Congress used in the three-year period of Section 13. Yet this Court concluded without difficulty in *American Pipe* that the class action complaint "commence[d]" the unnamed plaintiffs' actions, and moreover that the time

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[3] Respondents' only answer wildly overreads the role of a statute of repose. They argue that opt-out complaints like petitioner's produce greater recoveries. Br. 52-53. That is often untrue; opt-out plaintiffs frequently lose their cases on the merits. Respondents do not contend that those suits are therefore timely filed. In any event, Section 13 obviously does not provide an immunity against better advocacy by victims of defendants' wrongdoing, who have the right to opt out under both Rule 23 and the Due Process Clause.

to pursue an individual suit under that limitations period was tolled prior to the denial of class certification. *See* 414 U.S. at 550-51, 558.

Respondents argue to the contrary that the key to understanding that Section 13 bans tolling is the textual phrase "[i]n no event." Br. 21-22. But that is just another way of making the same argument. The statute says that "in no event" can the "action" be "brought" after three years. 17 U.S.C. § 77m. If the relevant action is set forth in the class action complaint, then it is timely brought.

The same is true of respondents' invocation of the Rules Enabling Act. Br. 37-38. Because a class action complaint timely asserts the claim of the unnamed class members, *American Pipe* tolling does not negate any substantive right provided by Section 13. But in any event, respondents' understanding of the Rules Enabling Act is seriously mistaken. *American Pipe* itself rejects an indistinguishable argument, explaining that time limits do not implicate the Act because they govern procedure, rather than substantive rights. *See* Pet. Br. 48-51; Public Citizen *Am.* Br. 5-14; SRM *Am.* Br. 6-11.

Furthermore, in context, that phrase only serves to cut off the statute's one-year discovery rule. Section 13 provides that "[i]n no event shall any such action be brought" after more than three years. 15 U.S.C. § 77m. The limited phrase "*[s]uch* action" is not *every* action under Section 13. Rather, it more narrowly refers back to the prior sentence of the statute, which provides an open-ended rule discovery rule that would otherwise indefinitely extend the limitations period if the

defendants' wrongdoing could not otherwise reasonably be identified.

Petitioner's understanding of Section 13 thus makes perfect sense. The one-year time limit provides a "discovery rule" to toll the time in which the action will be "brought." The further three-year limit does not. So, plaintiffs must sue within three years, even if they could not have reasonably discovered the defendants' wrongdoing by then. The statute thereby cuts off the time to initiate an action, giving defendants confidence that they will not later face new and unexpected claims more than three years after the security is offered to the public. Here, the action was timely commenced by the class action complaint.

CONCLUSION

The judgment of the Second Circuit should be reversed.

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