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

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Section 13 of the Securities Act provides that "in no event shall any action be brought" more than three years after the offering or sale at issue. 15 U.S.C. § 77m. This Court has held that this statute of repose is "absolute" (*CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014)) and "inconsistent with tolling." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). The question addressed by *amici* is whether the filing of a class action automatically tolls Section 13 such that a lawsuit can be brought more than three years after the offering being challenged.

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INTEREST OF *AMICI CURIAE*[*]

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of over 350 broker-dealers, banks, and asset managers. SIFMA's members and their nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets, and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans.

The Clearing House, established in 1853, is the oldest banking association and payments company in the U.S. It is owned by the world's largest commercial banks, which hold more than half the deposits and employ over one million people in the U.S. They have more than two million employees worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides safe and efficient

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[*] All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Certain respondents and their owners are members of SIFMA and owners of The Clearing House.

payment, clearing, and settlement services to financial institutions, and clears almost $2 trillion every day.

SIFMA and The Clearing House regularly file *amicus curiae* briefs in cases implicating issues of vital concern to participants in the securities industry. This case raises particularly significant concerns, as their members are routinely named in lawsuits brought under the provisions of the Securities Act at issue. In 2015, for example, underwriters were named as defendants in 76 percent of Section 11 cases. Cornerstone Research, *Securities Class Action Settlements: 2015 Review and Analysis* 15 (2016).

The interests of *amici* and their members are jeopardized by petitioner's argument that under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), Section 13's absolute cut-off for Section 11 suits may (or perhaps must) be "tolled" for years on end if a class action is filed. Congress meant what it said in Section 13—that "*[i]n no event* shall any … action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m (emphasis added).

Amici submit this brief to show that petitioner's argument cannot be squared with the Securities Act, as the Second Circuit recognized in the decision below and in *Police and Fire Retirement System of the City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. dismissed*, 135 S. Ct. 42 (2014). Moreover, allowing such tolling would have adverse consequences for both participants in the capital markets and the judicial system.

INTRODUCTION
AND
SUMMARY OF ARGUMENT

In Section 13 of the Securities Act, Congress enacted a "3-year limit [a]s a period of repose inconsistent with tolling" (*Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991)), which operates as an "unqualified bar on actions instituted [3] years after" the triggering event. *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 650 (2010). Petitioner asks the Court to override that legislative decision by holding that, under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the mere filing of a class action automatically tolls Section 13's statute of repose.

But *American Pipe* tolling is only available if it is "consonant with the legislative scheme." 414 U.S. at 558. Tolling is precluded where, as here, Congress has made the "legislative judgment" to create an "absolute bar … on a defendant's temporal liability." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation omitted; alteration original).

Congress specifically and affirmatively crafted Section 13 to balance the rights of plaintiffs with those of defendants. Reacting to concerns that open-ended liability would drive away qualified corporate board members, Congress chose a two-tiered structure with (as amended) a one-year statute of limitations coupled with a three-year statute of repose. The initial, shorter period may be subject to tolling; the longer period, however, serves as an outer limit on the filing of certain Securities Act suits and cannot be adjusted by the Judiciary. Petitioner's invocation of *American Pipe* tolling cannot be reconciled with the text, structure, or history of Section 13.

Nor can tolling be justified on policy grounds. Petitioner and its *amici* predict a deluge of protective filings under the plain language of the statute. Yet, tellingly, they cite no evidence of such an occurrence in the almost four years since the Second Circuit confirmed that Section 13 means what it says. *See Police and Fire Ret. Sys. of the City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). Petitioner's rule would only benefit large institutional investors—the overwhelming majority of class members that opt-out, and the ones least burdened by having to make a simple court filing within three years to protect their own rights. At the same time, petitioner's rule would harm most individual investors, who would end up subsidizing the disproportionally larger settlements with opt-out plaintiffs at the cost of their own recovery. It would also hamper capital formation by injecting unneeded uncertainty regarding potential liability for past offerings, and violate defendants' statutory right of repose.

ARGUMENT

I. THE ABSOLUTE TIME LIMITATION IN SECTION 13 CANNOT BE TOLLED.

Petitioner's entire submission rests on the premise that it is "an established feature of federal civil procedure" that tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), applies to all "limitations periods," regardless of whether Congress created a "statute of limitation or a statute of repose," and regardless of the rest of the statutory scheme at issue. Br. 15 (capitalization omitted). That premise, however, is false; and as a result petitioner's conclusion—that *American Pipe* tolling applies to Section 13's statute of repose—does not follow.

A. Tolling Must Be "Consonant With The Legislative Scheme."

American Pipe itself explained that "tolling the limitation in a given context" may be allowed only if it is "consonant with the legislative scheme." 414 U.S. at 558; *see also id.* at 559 (concluding courts can "hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose").

As the Court has since explained, it is a matter of "hornbook law" that tolling is unavailable if it is "'inconsistent with the text of the relevant statute.'" *Young* v. *United States*, 535 U.S. 43, 49 (2002) (quoting *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998)); *ibid.* (citing *American Pipe*, 414 U.S. at 558-59). Indeed, the Court has made this point over and over again since *American Pipe* was decided. *See*, *e.g.*, *Johnson* v. *Ry. Exp. Agency, Inc.*, 421 U.S. 454, 466 (1975) (*American Pipe* relied on "significant underlying federal policy" in the statute at issue); *Greyhound*

Corp. v. *Mount Hood Stages, Inc.*, 437 U.S. 322, 338 n.* (1978) (Burger, C.J., concurring) (explaining that tolling was "particularly appropriate" in *American Pipe* because "the addition of a federal limitations period in the [Clayton] Act was essentially a 'procedural' change in the statute" (quoting *American Pipe*, 414 U.S. at 558 n.29)); *Chardon* v. *Fumero Soto*, 462 U.S. 650, 660-61 (1983) ("In *American Pipe* … a particular federal statute provided the basis for deciding that the tolling had the effect of suspending the limitations period" in that law).

When Congress chooses to enact a statute of repose rather than a mere statute of limitations, the "legislative purpose" is clear (414 U.S. at 559), and the deadline "may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014). This rule enforces a "legislative judgment" to create an "absolute ... bar on a defendant's temporal liability." *Ibid.* (citation omitted). Unlike a statute of limitations, such a "repose period is fixed and its expiration will not be delayed by estoppel or tolling." *CTS*, 134 S. Ct. at 2187 (citation omitted). That is because, as the Court reiterated earlier this Term, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, No. 15-927, 2017 WL 1050978, at *5 (U.S. Mar. 21, 2017) (citation omitted).

B. Section 13 Is "Inconsistent With Tolling."

With respect to Section 13 of the Securities Act, this Court has categorically answered the question whether tolling "is consonant with the legislative scheme." *American Pipe*, 414 U.S. at 558. After considering how "Congress … balanced the policy considerations implicit in [the] limitations provision," the

Court decisively concluded that "[t]he 3-year limit is a period of repose inconsistent with tolling." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359, 363 (1991); *see id.* at 363 ("Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period"). This conclusion flows from both the structure and history of the statute.

1. The absolute nature of the three-year bar is clear from the two-tiered structure of the Securities Act's time-bar provision. It provides that an action must be "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 reasonable diligence," and then continues to provide that "*[i]n no event* shall any such action be brought to enforce a liability … more than three years after the security" was offered or sold. 15 U.S.C. § 77m (emphasis added).

As the Court has repeatedly held, this formulation creates an "unqualified bar on actions instituted [three] years after" the triggering event, and "giv[es] defendants total repose after [three] years." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 650 (2010) (citing analysis of the "comparable bar" in *Lampf*). Tolling beyond the outer limit is "fundamentally inconsistent" with the two-tiered structure because Congress has built in a (circumscribed) period of tolling by means of the inner limit. *Lampf*, 501 U.S. at 363. In that context, the "purpose of the 3-year limitation is clearly to serve as a cut-off." *Ibid.*

2. Congress's intent to create an "unqualified bar" is amply evidenced in the rich statutory and legislative history of Section 13—which bears no resem-

blance to the "scant legislative history … on the limitation and tolling provisions" at issue in *American Pipe*. 414 U.S. at 558 n.29. (All of the materials cited herein are reproduced in Federal Bar Association Securities Law Committee, *Federal Securities Laws: Legislative History 1933-1982*.)

In 1933 and 1934, Congress went from an initial proposal with no limitations period at all, to enacting a two-tiered structure with a bar of two years after discovery and ten years overall, to the present scheme: one year after discovery, and "in no event … more than three years" after the sale or offer.

Time and again, courts, practitioners, the Department of Justice, and the SEC have examined this "remarkably complete and helpful" material (*Anixter* v. *Home-Stake Prod. Co.*, 939 F.2d 1420, 1434 n.20 (10th Cir. 1991), *vacated on other grounds by Dennler* v. *Trippet*, 503 U.S. 978 (1992)), and found it "pellucid that … the three-year rule was to be absolute." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987) (Easterbrook, J.), *overruled on other grounds by Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990).

When the Securities Act was first proposed, it contained no limitations periods at all. *See* H.R. 4314, 73d Cong. (Mar. 29, 1933); S. 875, 73d Cong. (Mar. 29, 1933). This provoked immediate concern that, for example, responsible directors would resign *en masse* rather than face open-ended personal liability (*Securities Act: Hearings on S. 875 Before the S. Comm. on Banking and Currency*, 73d Cong. 120, 129, 205, 310 (1933)), and that an "unprincipled lawyer" would be able to bring suit based on events "10 or 20 years in the past." *Federal Securities Act: Hearings on H.R. 4314 Before the H. Comm. on Interstate and Foreign*

Commerce, 73d Cong. 169 (1933) (statement of William C. Breed). Among the commenters was the Investment Bankers Association of America (one of *amicus* SIFMA's forerunners) which proposed addressing these concerns by "limiting the time within which suits may be brought" to "within one year" of the offering. *Hearings on S. 875* at 339-40.

The Senate committee subsequently reported a bill with a five-year limit (S. 875 § 9, 73d Cong. (Apr. 17, 1933)), and the House committee a bill with a two-tiered limitation structure: two years from discovery, and "in no event" after ten years. H.R. 5480 § 13, 73d Cong. (May 5, 1933). The House version was enacted. Securities Act of 1933 § 13, ch. 38, 48 Stat. 74, 84.

This two-year/ten-year approach was the law for less than a year. When Congress passed the 1934 Exchange Act, it amended Section 13 to further restrict suits. This was one of several changes made in reaction to "criticisms and complaints" that the 1933 Act's provisions were "interfering with business." 78 Cong. Rec. 8668. The "greatest complaint[s]" were specifically about the 1933 Act's provisions on "the civil liability of underwriters and of offers and directors." *Id.* at 10,185. *See generally Report of the Special Committee on Amendments to the Securities Act of 1933*, *in Report of the 57th Annual Meeting of the Am. Bar Ass'n* 565, 568 (1934) ("[W]e believe the Act is a definite brake on [economic] recovery").

Based on this feedback, Congress concluded the original 10-year outer limit was so long it would "deter men from serving on boards of directors," because a director "might die and his estate would be liable possibly 8 years after his death to a suit brought by an individual." 78 Cong. Rec. 8200. To "give greater assurance to the honest officials of a corporation" and reduce the risk "that a director would be uncertain as to the settlement of his estate," it shortened the "ultimate period of limitation [to] bring suit" to three years. *Ibid.*

The decision to continue the two-tiered structure in the 1934 amendments was also specifically—and hotly—debated. Congress explicitly rejected a proposal to replace the original structure with a single limit running from the date of misrepresentation or omission. 78 Cong. Rec. 8198. Senator Barkley, a conferee for the 1934 Act, directly addressed a colleague's preference for a single limit based on the concern that a two-tiered structure "will lead to a great deal of difficulty and a great deal of uncertainty." *Ibid.* He carefully explained that a plaintiff "is required to bring suit within one year of … discover[ing] fraud," but that a "lapse of [three] years … bars him from bringing suit at all [even] where he has made the discovery." *Ibid.* That marked an "ultimate period of limitation [in which to] bring suit." *Id.* at 8200. This view carried the day and the objection was withdrawn. *Ibid*.

The record also shows Congress consciously decided that the two-tiered structure was "just and fair to both sides." 78 Cong. Rec. 8200 (statement of Sen. Byrnes, another of the conferees). On the one hand, Congress retained the discovery based rule in order "to preserve the right of a man who might not discover the falsity of a statement" before a one-year absolute deadline. *Ibid.* But as Senator Fletcher (the sponsor of the amendments) further explained, the outer limit addressed Congress's belief that "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed." *Id.* at 8198. Throughout this "extensive debate," "there was no mention of 'tolling'" of any kind. Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (1985).

Shortly thereafter, the Senate passed Senator Fletcher's amendments, continuing the two-tiered structure from the 1933 Act but halving the existing periods to one year from discovery and an absolute bar at five years. H.R. Rep. 73-1838 at 36 (Conf. Rep.) (1934). For its part, the House chose a single three-year limitation. *Ibid.* In conference, Congress settled on the Senate's (and 1933 Act's) two-tiered structure, but borrowed the House's three-year preference as the newly lowered absolute limit. *Ibid.*; *see* Securities Exchange Act of 1934 § 207, ch. 404, 48 Stat. 881, 908.

Petitioner makes only passing reference to this extensive history in arguing that the three-year period is a "statute of limitations" rather than a "statute of repose." Br. 45 n.8. But, as it concedes one page earlier (Br. 44), those terms were often used interchangeably until recently. The dispositive inquiry is whether tolling is "not inconsistent with the legislative purpose," without regard to the term used at the time. *American Pipe*, 414 U.S. at 559. The very colloquy between Senators Barkley and Norris that petitioner cites answers this question here: Congress intended a complete bar. Senator Barkley explained that the three-year deadline marked an "ultimate period of limitation [in which to] bring suit," separate and apart from the one-year clock starting on discovery. 78 Cong. Rec. 8200; *see also id.* at 8198 ("the lapse of [three] years bars him from bringing suit at all"). Satisfied with this answer to his concern, Senator Norris responded: "[T]here is no misunderstanding as to what it means. I agree to all that." *Id*. at 8198. Petitioner conveniently omits this part of the exchange.

Consistent with this Court's holdings in *CTS*, *Lampf*, and *Merck*, the Department of Justice and the SEC have also examined the statute and its history—and rejected petitioner's theory. The Solicitor General argued in *Credit Suisse* that the "two-part structure" in certain Securities Act provisions signals Congressional intent to create an "absolute period of repose." U.S. *Amicus* Br. 26, *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221 (2012) (No. 10-1261), 2011 WL 3780721. In the words of the SEC, "the outside period of repose in the 1933 and 1934 Act periods reflects a general congressional policy against tolling of securities claims." SEC *Amicus* Br. 28, *Lampf*, 501 U.S. 350 (No. 90-333), 1990 WL 10012716; *see also* SEC *Amicus* Br. 27 n.15, *Ceres Partners* v. *Gel Assocs.*, 918 F.2d 349 (2d Cir. 1990) (No. 89-7666), 1989 WL 1137586 ("Congress intended" Section 13's three-year deadline to be "absolute in order to ensure repose").

Commentators agree. For example, according to an ABA analysis, "[t]he express limitations periods provided by both the 1933 and 1934 Acts all contain an absolute cutoff." James W. Beasley, Jr., *ABA Report of the Task Force on Statute of Limitations for Implied Actions by the Committee on Federal Regulation of Securities*, 41 Bus. Law. 645, 655 (1986); *see also* Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (1985) (after "extensive debate … all the participants … agreed that the limitation period was an absolute period").

Petitioner disclaims (Br. 50 n.11) the argument "that Congress could not enact a time-limitations period extinguishing a defendant's liability," arguing instead that Congress has not done so *here*. But the "remarkably complete and helpful" record (*Anixter*, 939 F.2d at 1434 n.20) is "pellucid." *Norris*, 818 F.2d at 1332. "[T]he purpose of the 3-year limitation is clearly to serve as a cutoff." *Lampf*, 501 U.S. at 363.

II. PETITIONER'S POLICY ARGUMENTS ARE UNAVAILING.

Petitioner and its *amici* argue that the Second Circuit's rule will compromise investors' due process rights (Br. 25-29, 49) and create a "logistical and risk management nightmare for courts and defendants." Br. 22. Neither of these contentions holds up under scrutiny.

There has been no flood of "premature" opt-outs burdening the courts since the Second Circuit announced in *IndyMac* that Section 13 means what it says. Br. 9. In truth, it is petitioner's preferred rule—indefinite tolling—that would put a greater burden on the court system, and that would harm most participants in the securities markets.

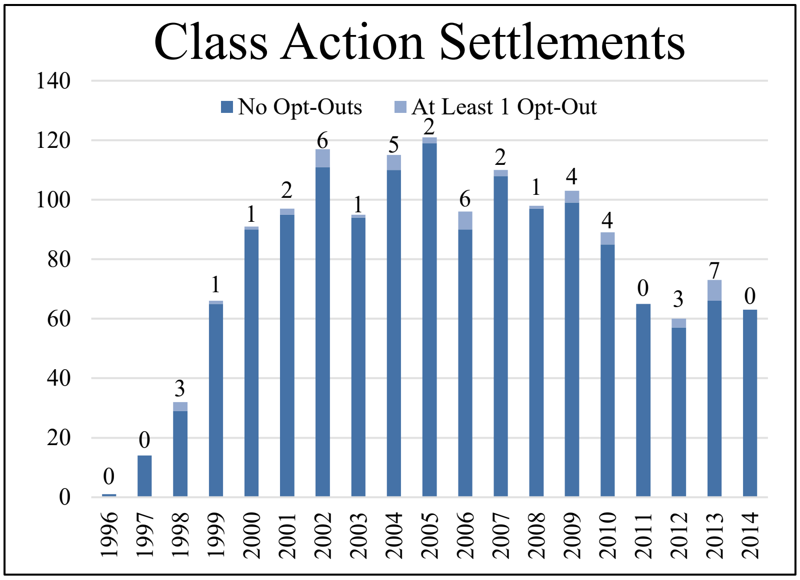
Further, there is no violation of investors' due process rights in requiring a minimal level of effort to protect one's claims before a three-year deadline expires. To the contrary, it is *defendants'* right to "total repose after [three] years" that would be jeopardized. *Merck*, 559 U.S. at 650; *see also CTS*, 134 S. Ct. at 2175 (statute of repose reflects a "legislative judgment" to create an "absolute ... bar on a defendant's temporal liability" (citation omitted)).

A. Protective Filings Are Not A Problem.

Petitioner and its *amici* predict that upholding the Second Circuit's rule will cause an avalanche of "premature opt-outs from class procedures that will impose massive costs on defendants and the courts alike." Br. 9; *see*, *e.g.*, Retired Fed. Judges *Amicus* Br. 9; N. Am. Sec. Adm'rs Ass'n Inc. *Amicus* Br. 13. That is exactly what the petitioner and its supporters argued three years ago in *IndyMac*. *See*, *e.g.*, L.A. Cty. Emps. Ret. Ass'n and Gen. Ret. Sys. of the City of Detroit Br. 21-22, *Pub. Emps. Ret. Sys. of Miss.* v. *IndyMac MBS, Inc.* (No. 13-640) (claiming "courts will likely be inundated"); Reply Br. 11-12, *IndyMac* (similar).

But it has been almost four years since the Second Circuit announced in *IndyMac* that Section 13 will be enforced as enacted, yet there is no evidence whatsoever of the foretold "logistical and risk management nightmare for courts and defendants." Br. 22. Given the large number of securities suits brought in the Second Circuit, this is proof positive that the parade of horribles predicted by petitioner and its *amici* is a figment of their collective imagination.

Indeed, quite to the contrary of these dire predictions, the most recent annual data available shows that there were zero opt-outs from the 63 securities class actions that settled in 2014, and "no discernable increase … over time." Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements: 2012-2014 Update* 2 (2016) (*Opt-Out Update*).



Source: Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements: 2012-2014 Update* 2 (2016)

Petitioner, its *amici*, and their counsel represent some of the most prolific class-action plaintiffs and law firms in the country, with knowledge of or involvement in virtually every securities case of consequence. And as the challengers to the status quo, they bear the burden of demonstrating the supposed flaws in the *IndyMac* rule. Yet they have only identified a *single* anecdotal example of the presaged avalanche of filings: the Petrobras securities litigation, which involves a grand total of 27 opt-outs, each an institutional investor "with sizable holdings in Petrobras securities." *In re Petrobras Sec. Litig.*, 193 F. Supp. 3d 313, 317 (S.D.N.Y. 2016); *see* Br. 24; Institutional Investors *Amicus* Br. 16; States *Amicus* Br. 13. And they ignore that the district court in that case has proved equal to the task before it, issuing a comprehensive order coordinating pre-trial proceedings (Order, No. 1:14-cv-

9662 (S.D.N.Y. Aug. 3, 2015), ECF No. 195), scheduling a "joint trial of the [class] action and the individual actions" (*In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 359 (S.D.N.Y. 2016)), and staying subsequently filed individual actions pending the outcome of that trial. Order, No. 1:14-cv-9662 (S.D.N.Y. Nov. 19, 2015), ECF No. 315.

One case with a few opt-outs in the last three-plus years is not a "nightmare." Br. 22. The problem petitioner and its *amici* portend simply does not exist in the real world.

In all events, and as demonstrated by *Petrobras*, the courts have a myriad of well-developed techniques to efficiently handle any influx of opt-outs caused by enforcing Section 13's statute of repose.

Motions to intervene impose minimal burdens on courts. This is clear from the Administrative Office of U.S. Courts's periodic reports on motions pending for longer than six months. The most recent report listed 5,003 such motions, 10 (0.2%) of which were motions to intervene. *March 2016 Civil Justice Reform Act Report* 2 & tbl. 8, http://www.uscourts.gov/statistics-reports/march-2016-civil-justice-reform-act.

Nor is the initial intake of an entirely new civil case particularly burdensome. That happens almost 300,000 times a year. *See* Chief Justice John G. Roberts, Jr., *2016 Year-End Report on the Federal Judiciary* 12.

Once a complaint is filed, a court has an arsenal of tools at its disposal to minimize the resulting burden, be it of separate cases or additional parties in an existing case. Most obviously, the court can stay the new case pending further progress in the class action, pursuant to its inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *see*, *e.g.*, *Bargas* v. *Rite Aid Corp.*, No. 2:13-cv-03865, 2014 WL 12538151, at *1 (C.D. Cal. Oct. 21, 2014) (staying "all the related single plaintiff cases until a class certification decision has been issued in related case"). Similarly, parties can postpone initial disclosures (*Manual for Complex Litigation (Fourth)* § 40.21) or stay counterclaims (*id.* § 40.53).

Should new plaintiffs wish to actively litigate instead (despite petitioner's assertion that they won't want to do anything at all), the court system is up to the task. *Petrobras*—petitioner's *worst-case* example—proves the point. There, Judge Rakoff consolidated pre-trial proceedings, ordered a joint trial of 28 cases (including 27 opt-outs), and stayed late-filed individual actions. That case also demonstrates how any potential burden is reduced by the "heav[y] concentrat[ion]" of securities cases in a single venue—the Southern District of New York—and the resulting expertise of its judges. Lex Machina, *Securities Litigation Report 2017* at 5. One quarter of all securities cases from 2009 through 2016 were filed there, and its bench includes 13 of the 15 judges handling the most securities cases nationwide. *Ibid.*; *see also* Stanford Law School, *Securities Class Action Clearinghouse*, http://securities.stanford.edu/filings.html (showing 1188 of 4424 securities class actions since 1995 were in S.D.N.Y.) (last visited Mar. 28, 2017). No other district comes close. *See also S.D.N.Y. Pilot Project Regarding Case Management Techniques for Complex Civil Cases* (2014), http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot_14.11.14.pdf (offering additional strategies).

Further, parties can agree to adopt, rather than re-brief, arguments across cases. *See*, *e.g.*, Stipulation and Order, *Wolf Opportunity Fund Ltd.* v. *McKinnell*, No. 1:12-cv-08379 (S.D.N.Y. Jan. 16, 2014), ECF No. 26. Similarly, discovery can be coordinated, staged, and shared across cases to avoid duplication. *Manual for Complex Litigation (Fourth)* § 11.455. Cases can even be coordinated across multiple districts (*id.* § 20.14), and the Judicial Panel on Multidistrict Litigation transfer process is available should there be a truly large number of cases scattered across districts. *Id.* § 20.13.

Not only do these tools alleviate any judicial burden from "premature" opt-outs—they actually reduce the overall burden by ensuring coordination across all cases from the outset.

B. Repose Serves The Interests Of All Participants In The Securities Markets.

1. Petitioner overreaches in complaining that applying Section 13 as written violates the "substantive due process right to opt out of the class action and supervise its own claims" (Br. 49) because "[m]any class members will not even be aware of the lawsuit from which they must opt-out until they receive the class notice after the three-year period has already expired." Br. 27. In fact, as explained below, there is no such notice issue in most private securities litigation, and the "right" being claimed does not exist. Moreover, what petitioner wants runs directly counter to Congress's intent in enacting the Private Securities Litigation Reform Act of 1995 (PSLRA).

a. As a preliminary matter, petitioner overstates the demands of due process. As the court below correctly explained, "[t]he due process protections of Rule

23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet. App. 5a. They stem from the requirement of "personal jurisdiction over the absent plaintiffs and their claims against petitioner" before a ruling can "bind [those] absent plaintiff[s]." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12, 814 (1985). That requirement is satisfied by Rule 23(b)(3), which ensures the right to opt-out of a proposed settlement, but which "does not confer extra benefits to [any] independent action." Pet. App. 5a.

Moreover, notice (Br. 27) is a non-issue in many securities class actions because the Private Securities Litigation Reform Act requires the first filer to provide "[e]arly notice to class members" within 20 days of filing the complaint. 15 U.S.C. § 77z–1(a)(3)(A)(i). Institutional plaintiffs like petitioner have another layer of protection in the free monitoring services plaintiff-side law firms routinely offer. *See*, *e.g.*, Judge Jed S. Rakoff, Confidential Informants and Securities Class Actions: Mixed Messages and Motives, Remarks Before the Third Annual Institute for Investor Protection Conference (Oct. 25, 2013), *in* 45 Loyola U. Chic. L.J. 571, 572 (2014); Michael J. Kaufman & John M. Wunderlich, *The Bromberg Balance: Proper Portfolio-Monitoring Agreements in Securities Class Actions*, 68 S. Methodist Univ. L. Rev. 771, 773 (2015).

From that point, a putative class member must expend only minimal effort to ensure it can later pursue individual action. Whether filed as a proposed complaint-in-intervention or as a stand-alone lawsuit, the pleadings are typically "materially the same" as one another and the complaint already filed by the named plaintiff(s). *See*, *e.g.*, *In re Citigroup Inc. Sec.*

Litig., 987 F. Supp. 2d 377, 387 (S.D.N.Y. 2013) (describing "approximately 200" such filings). Even those filed by institutional investors may simply "rehash" prior pleadings. Julie Triedman, *Heavy-Hitters Hit Pfizer with New Securities Suit, Highlighting Opt-Out Trend*, Am. Law. (Nov. 15, 2012), http://www.litigationdaily.com/id=1202578543315. Requiring a litigant to take this simple step within three years does not ask much.

Nor is the opt-out right a "nullity" (Br. 27) even if the federal statute of repose has run, contrary to petitioner's protestations. A plaintiff opting out at that stage is still free to pursue other unexpired state law or federal claims without any fear of issue or claim preclusion from the class action. *See*, *e.g.*, 28 U.S.C. § 1658 (four- and five-year deadlines for certain claims under Sarbanes-Oxley); Joseph C. Long, 12A *Blue Sky Law* § 9:118.40 (Nov. 2016) (surveying state statutes of limitation and repose).

b. Real-world experience also demonstrates opt-out plaintiffs are overwhelmingly pension funds and other institutional investors like petitioner. *Opt-Out Update* 6. Indeed, one of petitioner's *amici* expressly concedes that "[i]t is generally not economical or practical for retail investors to opt-out of a potential settlement and seek their own remedies." N. Am. Sec. Adm'rs Ass'n Inc. *Amicus* Br. 11. There is simply no support for the conjecture that "many" opt-outs are "likely to be *pro se*" individual investors. Retired Fed. Judges *Amicus* Br. 17. And these institutional investors—the ones likely to opt-out—are all more than able to take these minimal steps. They are highly sophisticated litigants with large in-house legal teams, stables of outside counsel, and their own trade association. *See*, *e.g.*, June D. Bell, *In-House Counsel Profile: California Public Employees' Retirement System's Matthew Jacobs*, Nat'l L.J. (Mar. 30, 2015) (describing CalPERS's team of more than 30 in-house attorneys and a cadre of outside litigation firms); Council of Institutional Investors, *About Us*, http://www.cii.org/about_us (last accessed Mar. 31, 2017).

In other words, these institutions are exactly the litigants Congress wants to control the litigation, not to opportunistically pace on the sidelines. In PSLRA, Congress enacted the "innovat[ive]" lead-plaintiff provision specifically "to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiff." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-21 (2007). Abrogating Section 13's statute of repose would run directly counter to this Congressional goal by incentivizing these same investors to *not* appear in court until a settlement is on the table.

Making matters worse, opt-outs are rarely actually seeking to "have [their] own day in court." Br. 25; *see also Opt-Out Update* 2 (explaining the goal is not "to bring their own lawsuit"). Rather, as the Southern District of New York presciently observed, "it is not uncommon for large institutions to opt-out of class actions simply so that they can improve their bargaining position if, as usually occurs, settlement discussions begin." *In re Petrobras Sec. Litig.*, 312 F.R.D. at 362. In doing so, they are actively undermining the class-action process.

2. At the same time, petitioner's request that this Court rewrite the statute would plainly violate defendants' statutorily guaranteed right of repose, as

well as impede capital formation by introducing uncertainty about open-ended liability into every offering. Moreover, it would increase the likelihood that non-institutional investors will be second-class citizens when it comes to settlement. Petitioner's preferred approach also has the potential to derail settlements entirely, burdening the courts and the remaining litigants with an expensive trial.

a. Congress specifically and deliberately created an "ultimate" (78 Cong. Rec. 8200) and "absolute ... bar" on bringing suit after three years. *CTS*, 134 S. Ct. at 2175. It is a "period of repose inconsistent with tolling" of any sort. *Lampf*, 501 U.S. at 363. Allowing new claims to be "brought" after three years directly and unavoidably violates that substantive, statutory right. Moreover, notwithstanding petitioner's grammatical acrobatics (Br. 31-38), any individual claim is "brought" with the filing of an opt-out complaint. *See*, *e.g.*, *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 (1983) ("There are many reasons why a class member … might prefer to *bring an individual suit* rather than intervene" (emphasis added)). Until that time, putative class members are not parties, nor are they in privity with the parties. In fact the entire point of the exercise is to separate from the original action.

Petitioner and its *amici* argue that the purposes of a statute of repose are satisfied by the filing of the class action alone, so it matters not if they file their own suit years after the statutory deadline. Br. 33-34, 40-42; Directors *Amicus* Br. 8-9; SRM *Amicus* Br. 16. They are incorrect.

As petitioner acknowledges, it is an essential predicate to any tolling of individual claims that defendants have "the essential information necessary to determine … the … size of the prospective litigation." Br. 33 (quoting *American Pipe*, 414 U.S. at 554-55). Allowing late opt-outs in securities suits runs directly counter to that requirement because of the well-established fact that "[w]hen institutional investors exit the class … they appear to do dramatically better—by an order of magnitude" in per-share recoveries. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 Cardozo L. Rev. 407, 417 (2008). Indeed, their entire purpose in opting out is usually "improv[ing] their bargaining position[s]" for settlement. *In re Petrobras Sec. Litig.*, 312 F.R.D. at 362. For example, petitioner boasted in a prior case that it recovered "approximately 17 times what [it] would have recovered if [it had] stayed in the class action." Gilbert Chan, *CalPERS' Time Strategy Pays Off: The State Pension Fund Gets $117.7 Million After Opting Out of Class-Action Suit Against Media Giant*, Sacramento Bee (Mar. 15, 2007). In fact, institutional opt-outs on occasion recover more than the entire class. *See* Joshua H. Vinik et al., *Why Institutional Investors Are Opting Out of Class-Action Litigation*, Pensions & Invs. (July 25, 2011).

Thus defendants cannot know the "size of the prospective litigation" (414 U.S. at 555) without knowing the identity of opt-outs and the general magnitude of their claims. And that requires individual complaints for two reasons.

First, it is generally impossible for a defendant to reliably identify institutional plaintiffs and their holdings. The overwhelming majority of institutional shares are held by brokers or banks for objecting beneficial owners, meaning that by definition the identity of the shareholder and its stake is unknowable to the issuer, let alone third-party defendants. Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42,982, 42,999 & n.153 (July 22, 2010); *see also* 17 C.F.R. § 240.13d-1(a) (only requiring disclosure of beneficial owners controlling 5% of a class of securities, a very high threshold for most issuers); 15 U.S.C. § 78m(f) (Section 13 end-of-quarter disclosure by managers of more than $100 million of certain assets). In contrast, PSLRA specifically requires exactly this information in a complaint, opt-out or otherwise. *See* 15 U.S.C. § 78u–4(a)(2)(A)(iv).

Second, even if a defendant knew the identities of *potential* opt-outs (*i.e.* institutional plaintiffs), it would still be impossible to know which of them actually *would* opt-out. Virtually all opt-outs will be institutional investors, but not all institutional investors will opt-out. A significant number will not for any number of reasons—they may not want the publicity, they may prefer a non-antagonistic relationship with management, they may simply not think it worth the trouble. Randall S. Thomas & Harwell Wells, *James D. Cox: The Shareholders' Best Advocate*, 66 Duke L.J. 467, 494-95 (2016).

So until opt-outs have made themselves and their holdings known, defendants do not have "the essential information necessary to determine … the … size of the prospective litigation." Br. 33 (quoting *American Pipe*, 414 U.S. at 554-55). Until their complaints have been filed, there is no repose.

b. Repose is also vital to the smooth functioning of the capital markets. Without it, market participants will face the very real possibility of large exposure to opt-out suits years beyond Section 13's three-year cutoff. Such uncertainty is detrimental to capital formation and fluidity. Thus, at the least, offerers and underwriters will be forced to reserve (or insure) against this increased risk and expend unnecessary resources on due diligence. As one prominent commentator explains, a "sizable portion of the underwriters' spread is a liability risk premium, and lawyer-disseminated fear of liability casts a harsh shadow over the due diligence process." Donald C. Langevoort, *Deconstructing Section 11: Public Offering Liability in a Continuous Disclosure Environment*, 63 L. & Contemp. Probs. 45, 45-46 (2000). Some deals with narrow profit margins will falter entirely due to increased costs, or be squashed by cautious boardrooms and attorneys worried about difficult-to-assess litigation exposure a decade out. *See* Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21,806, 21,871 (Apr. 20, 2015) (recognizing that compliance costs can make public offerings "too costly to be … viable").

c. Allowing this opportunistic approach also encourages "two-tiered settlement[s], in which smaller shareholders are significantly disadvantaged" as defendants shift settlement funds to the large opt-out plaintiffs. Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements* 5 (2013) (*Opt-Out Cases*).

The economic reality is that a defendant will pay less for a settlement that leaves some claims unresolved. The amount reserved for those future claims correlates directly with the potential size of the remaining exposure.

In a Section 11 case, a settling defendant must approach this settlement calculus with two facts in mind: First, as petitioner's *amici* acknowledge, institutional plaintiffs comprise the overwhelming majority of opt-outs because individual retail investors rarely have enough at stake to make any individual action worthwhile. *See* N. Am. Sec. Adm'rs Ass'n Inc. *Amicus* Br. 11; *see also Opt-Out Cases* 5; *Opt-Out Update* 3. Second, opt-outs "do dramatically better—by an order of magnitude." John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 Cardozo L. Rev. 407, 417 (2008). Those disproportionately large settlements for the opt-outs come at the expense of the per-share recovery by the retail "investors who most need the protection offered by the federal securities laws." Br. 25. Those class members are forced to "effectively subsidize opt-outs." Myriam Gilles & Gary B. Friedman, *Exploring the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 133 (2006).

In extreme cases, the same economic dynamics can result in the remainder of the class and the defendant being unable to reach a satisfactory settlement, and instead proceeding to an expensive trial. Relatedly, those forces pose the risk of triggering blow-up clauses, common provisions in "settlement agreement[s], which allo[w] the defendant to terminate the settlement if a predetermined number or proportion of the members of the class timely and validly" opt-out. 2 *McLaughlin on Class Actions* § 6:21 (13th ed.). That too creates an "increase[d] … likelihood of trials." *Opt-Out Update* 5. The resulting burden of a complex class action securities trial on a district court and the litigants is considerable. *See*, *e.g.*, Martin Arnold & Ben McLannahan, *HSBC Settles One of a Long List of Legal Issues*, Fin. Times (June 17, 2016) (noting six-week trial in 2009).

* * * * *

Congress made the considered decision to provide a substantive right in Section 13—a complete cut-off on Section 11 suits after three years. Petitioner may take issue with the strength or applicability of the "legislative judgment[s]" reflected in Section 13 (*CTS*, 134 S. Ct. at 2179), but the proper audience for any such complaint is Congress, not the courts. The Judiciary's role is to enforce the statutorily mandated limit, not abrogate it as petitioner requests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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