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No. 10-1261

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

VANESSA SIMMONDS,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondent's brief is essentially a plea for this Court to rewrite the statute. Section 16(b) specifies the date on which the two-year time limit for suing begins to run: "the date [an alleged short-swing] profit was realized." 15 U.S.C. § 78p(b). Respondent asks this Court to substitute a different date: the date the defendant files a disclosure form allegedly required by Section 16(a). According to respondent, the latter date would better fulfill Section 16(b)'s "purpose." But invocation of alleged statutory "purpose" provides no license to ignore actual statutory text and structure. And that point is particularly compelling here, because Congress considered, and rejected, a proposal to use the very date that respondent proposes. Looking to statutory text, structure, and history, it is clear—as this Court has recognized—that Section 16(b) establishes a "period of repose" that is "more restrictive" than the repose periods in companion provisions of the Exchange Act. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 & n.5 (1991).

Indeed, these very lawsuits rebut respondent's basic premise. She insists that a plaintiff cannot possibly know enough to file a Section 16(b) lawsuit where the defendant has not filed a Section 16(a) disclosure, but she filed these lawsuits even though petitioners have not filed such disclosures. Nothing in law or logic authorizes courts to extend a statutory time limit under these circumstances, and nothing in respondent's brief addresses this contradiction at the very heart of her case.

ARGUMENT

I. These Actions Are Untimely Because Section 16(b) Establishes A Two-Year Repose Period That Cannot Be Extended.

Both respondent and the United States argue that the Exchange Act's text, structure, and history support characterizing Section 16(b)'s two-year time limit as a statute of limitations that can be extended, as opposed to a statute of repose that cannot. *See* Resp. Br. 17-57; U.S. Br. 9-11, 24-31. These arguments are unavailing.

A. Statutory Text Supports Repose.

Respondent is an unlikely champion of textualism, given that she is asking this Court to replace the trigger date that is actually in the statute with a different date that is not. Nonetheless, she asserts that "'typical statutes of limitations' read 'no action shall be brought …,'" and Section 16(b) must be a statute of limitations because it uses these words. Resp. Br. 18 (quoting *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1186 (1950); brackets omitted). But "no action shall be brought" is "boilerplate language," *Jones v. Bock*, 549 U.S. 199, 200 (2007), that provides no basis for distinguishing a statute of limitations from a statute of repose. Much more telling is the nature of the *event* that triggers the statutory time limit. As the very source cited by respondent explains, "most statutes [of limitations] provide either that 'all actions … shall be brought within' or 'no action … shall be brought more than' so many years after '*the cause thereof accrued*.'" *Statutes of Limitations*, 63 Harv. L. Rev. at 1179 (emphasis added); *see also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998).

Section 16(b)'s time limit, in sharp contrast, is triggered by the defendant's conduct—the classic trigger for repose. *See* Pet'rs Br. 17; *see also* Br. for U.S. as *Amicus Curiae* at 29, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (No. 90-333), 1990 WL 10012716, at *29 (distinguishing between "statutes in which the limitations period runs from the time the cause of action accrued," characterized as typical limitations language, from statutes "that run[] from the date of [a] violation,'" characterized as typical repose language) (internal quotations omitted).

Respondent also argues that the statutory text negates repose because it limits the time to sue as a *remedy* for the alleged violation of a right, not the duration of the underlying *right* itself. *See* Resp. Br. 15, 17-19. But this Court has never endorsed any such rigid right/remedy distinction in this context. To the contrary, this Court has characterized various limitations on the time to sue in the Exchange Act as periods of repose. *See Lampf,* 501 U.S. at 360 & n.6. And this Court has long embraced "the rule that the creation of a right *in the same statute* that provides a limitation is some evidence that the right was meant to be limited, not just the remedy." *Beach*, 523 U.S. at 417 (citing cases). Here, the right and the limitation are not only set forth in the same statute, but in the very same subsection of Section 16(b).

The United States, for its part, argues that Section 16(b)'s text supports tolling because that provision "does not speak to the power of courts to entertain a Section 16(b) action, but instead is a traditional statute of limitations that establishes a nonjurisdictional affirmative defense." U.S. Br. 9-10.

That argument is based on a logical fallacy: just because "'a statute of limitations … is *not* jurisdictional,'" U.S. Br. 10 (emphasis added; quoting *Day v. McDonough*, 547 U.S. 198, 205 (2006)), does not mean that a statute of repose *is* jurisdictional. A statute of repose provides a defendant immunity from suit, but need not (and typically does not) strip a court of its subject-matter jurisdiction over such a suit. Indeed, *none* of the various repose provisions in the Exchange Act, *see, e.g.*, Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c); *see also* 28 U.S.C. § 1658(b), is jurisdictional in nature.

Finally, the United States contends that the statutory text supports tolling because the word "equity" appears in both the Exchange Act's saving clause and in Section 16(b) itself. *See* U.S. Br. 11 (citing 15 U.S.C. § 78bb(a) ("the rights and remedies" under the Exchange Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity"); 15 U.S.C. § 78p(b) (Section 16(b) action "may be instituted at law or in equity in any court of competent jurisdiction"). Neither of these references, however, relates to Section 16(b)'s time limit or negates repose. To the contrary, provisions of the Act that indisputably establish repose periods are subject to the *same* saving clause and contain the *same* references to a suit "at law or in equity." *See* Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c)); *see generally Lampf*, 501 U.S. at 360 & n.6.

B. Statutory Structure Supports Repose.

Both respondent and the United States argue that the structural inference that this Court found compelling in *Lampf* and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010)—that the Exchange Act's two-prong time limits create periods of repose—has no bearing here, because Section 16(b) is not a two-prong time limit. *See* Resp. Br. 28-31; U.S. Br. 26-27. But the two-prong time limits enacted at the same time in the same statute shed substantial light on the proper interpretation of Section 16(b).

As an initial matter, the two-prong time limits underscore that the Congress that enacted Section 16(b) "knew perfectly well" how to trigger a time limit by reference to a plaintiff's discovery of the facts underlying her claim, *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 153 (1989), but did not do so in Section 16(b). Indeed, Congress considered and *rejected* a proposal to link the time limit for bringing a Section 16(b) claim to the filing of a Section 16(a) disclosure form. *See* Pet'rs Br. 25.

Even more telling is that the "discovery" prongs of the Exchange Act's two-prong time limits *shorten*, not *lengthen*, the time to sue. *See* Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c); *see also* 28 U.S.C. § 1658(b). Congress thereby underscored its desire to provide Exchange Act defendants with a finite end date to potential liability. *See, e.g.*, Pet'rs Br. 21-22; *see also* U.S. *Lampf* Br. 28, 1990 WL 10012716, at *28 ("[T]he fixing of a defined point of repose is an important structural component of Congress's plan for private securities law actions."). Given that Congress used a

textual discovery rule to *shorten* the time to sue under the Exchange Act, the same Congress in the same statute would not have left courts free to invoke an extra-textual discovery rule to *lengthen* the time to sue under that Act.

Indeed, such an assumption would be particularly far-fetched where, as here, the two-prong provisions involve *fraud* liability, whereas Section 16(b) involves *strict* liability. The same Congress that insisted on repose for fraud claims—which by their nature involve intentional deceptive conduct—would hardly have denied repose for strict-liability claims.

The United States asserts that this Court's interpretation of Section 16(b) should be guided not by the provisions enacted at the same time in the same statute, but by Section 20A, a provision added to the Exchange Act over half a century later. *See* U.S. Br. 27-28 (citing Exchange Act § 20A, 15 U.S.C. § 78t-1, enacted as part of the Insider Trading & Securities Fraud Enforcement Act of 1988, Pub. L. 100-704, 102 Stat. 4677, 4680-81 (1988)). According to the United States, Section 20A's single-prong time limit "is not a 'statute of repose,' but an 'ordinary statute of limitations' that is no 'more potent than the usual variety,'" *id.* at 27 (quoting *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990)), and this Court should construe Section 16(b) the same way. That argument fails on at least two levels.

For one thing, the Seventh Circuit decision on which the United States bases the argument, *Short*, rejected the very analogy between Section 20A and Section 16(b) that the United States now proposes. *Short* recognized that "*[a]ll* of the express provisions

in the '33 and '34 Acts (other than § 20A) are drawn as statutes of repose, and deliberately so." 908 F.2d at 1392; *see also id.* (refusing to apply § 20A time limit to implied cause of action under Rule 10b-5 in part because "Rule 10b-5 should be governed by the statute in force when Rule 10b-5 came into being").

In any event, *Short* preceded *Lampf*, in which the United States urged this Court to repudiate *Short* to the extent that decision suggested that courts could extend Section 20A's time limit. *See* U.S. *Lampf* Br. 28-30, 1990 WL 10012716, at *28-30. Based on statutory text, structure, and purpose, the United States argued in *Lampf* that Section 20A established a repose period not subject to tolling. *See id.*; *see also* Br. for U.S. as *Amicus Curiae* at 14 n.17, *Lebman v. Aktiebolaget Electrolux*, *cert. denied*, 492 U.S. 905 (1989) (No. 88-1114) ("An important component of Section 20A is its ability to guarantee repose at a predictable time."). Like the Seventh Circuit in *Short*, this Court in *Lampf* rejected the United States' invitation to look to Section 20A to interpret statutory provisions enacted over half a century earlier. *See* 501 U.S. at 361. The *Lampf* Court did not, however, dispute the United States' characterization of Section 20A as a statute of repose. *See id.* at 355 ("The Solicitor General, appearing on behalf of the Securities and Exchange Commission … urges the application of the 5-year *statute of repose* specified in § 20A of the 1934 Act.") (emphasis added).

Rather than engaging in any real structural analysis of the Exchange Act as a whole, both respondent and the United States focus on Section 16 in isolation, and advance "purpose" arguments

under the guise of "structural" arguments. In particular, they argue that tolling is necessary (1) to fulfill the purpose of Section 16(a), on the theory that otherwise a defendant would have no incentive to comply with that provision's disclosure requirements, Resp. Br. 26-27, and (2) to fulfill the purpose of Section 16(b), on the theory that otherwise a plaintiff would lack sufficient information to sue under that provision, *id.* at 19-31, 45-47; U.S. Br. 17-18, 29-31. Neither argument has merit.

First, Congress did not rely on Section 16(b) to enforce Section 16(a)'s disclosure requirements. To the contrary, Congress crafted a detailed enforcement scheme involving the Securities and Exchange Commission (SEC) and the Department of Justice. *See* Exchange Act § 21(d)(1), (2), (3), 15 U.S.C. § 78u(d)(1), (2), (3); Exchange Act § 32(a), 15 U.S.C. § 78ff(a). And intentional failures to disclose for the purpose of insider trading are violations of Rule 10b-5, subject to both private and official enforcement. *See* Pet. App. 75a (M. Smith, J., specially concurring). But Congress created no private right of action under Section 16(a), and the courts have refused to imply one. *See*, *e.g.*, *Scientex Corp. v. Kay*, 689 F.2d 879, 882-83 (9th Cir. 1982). Had Congress intended private enforcement to ensure compliance with Section 16(a), it could and would have authorized such enforcement directly, not through the roundabout means of Section 16(b) tolling.

Second, Congress did not rely on Section 16(a) to ensure that a Section 16(b) plaintiff would have enough information to sue. Had Congress wanted to

do so, it could and would have linked the trigger date for suing under Section 16(b) to disclosure under Section 16(a). Instead, Congress specified that the two-year time limit for suing under Section 16(b) begins to run on "the date [an alleged short-swing] profit was realized." 15 U.S.C. § 78p(b). Because statutory text is the best indicator of statutory purpose, *see, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), it is ironic for respondent to claim that she seeks to effectuate Section 16(b)'s "purpose" by replacing the trigger date that is actually in the statute with a different date that is not.

At bottom, the "purpose" arguments advanced by respondent and the United States boil down to the policy argument that it makes sense to use the filing date of a Section 16(a) disclosure form as the trigger date for the two-year time limit for suing under Section 16(b). But this very case highlights a central flaw in that argument: there will always be cases, like this one, where there is (to say the least) a substantial dispute over whether a Section 16(b) defendant was required to file a Section 16(a) disclosure form at all. If the two-year time limit in Section 16(b) only began to run upon the filing of such a form, that time limit would be nullified in such cases. Indeed, under this view, the two-year time limit *still* would not have started to run in this very case, and respondent (by her own admission) *still* "could buy stocks in companies [that] had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock." Pet. App. 110a. In short, the *more* far-fetched a plaintiff's theory of Section 16 liability, the *less* likely a defendant would be entitled to invoke

the benefit of the statutory time limit. Neither respondent nor the United States offers any real response to this point.[1]

In any event, whatever the merits of the foregoing policy argument, it is directed to the wrong forum. Congress chose "the date [an alleged short-swing] profit was realized" to trigger the two-year time limit for suing under Section 16(b), 15 U.S.C. § 78p(b), and if respondent and the United States disagree with that choice, they are free to raise that disagreement with Congress. By choosing a repose approach with a finite date to trigger and end potential liability, Congress undoubtedly created the possibility that the time for filing a claim might lapse before a potential plaintiff learned the facts underlying such a claim. But that possibility is inherent in *any* statute of repose—including the various repose periods in the Exchange Act's fraud provisions, each of which proscribes intentional deceptive conduct. *See, e.g.*, Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c); 28 U.S.C. § 1658(b). If tolling is not necessary to fulfill the

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[1] Respondent's suggestion that petitioners could have filed protective Section 16(a) disclosure forms, *see* Resp. Br. 49, is baseless for the reasons noted in petitioners' opening brief, *see* Pet'rs Br. 37 n.6. This very case underscores the point. Respondent alleges (among multiple theories of liability) that petitioners allocated risk-free profits to issuer insiders in exchange for *future* business. *See* Resp. Br. 9-14 & 48 n.12. Given this theory of liability, it is a mystery how petitioners could have filed disclosure forms indicating that they had "realized" "any profit" "from any purchase and sale" of securities, much less specified any such "profit." 15 U.S.C. § 78p(b); *see also* Cert. Opp. App. (sample disclosure form).

"purpose" of these fraud provisions, it hardly can be deemed necessary to fulfill the "purpose" of Section 16(b). In all of these Exchange Act provisions, Congress simply balanced the costs and benefits of potentially indefinite liability, and made a classic legislative decision to extinguish liability after a finite end date *regardless* of the plaintiff's knowledge of the facts underlying a claim. While Congress could have struck a different balance, courts have no warrant to override the balance that it did strike under the guise of effectuating legislative "purpose."

C. Statutory History Supports Repose.

Although the Members of this Court have not always spoken with one voice on the proper role of legislative history in statutory interpretation, the Court has never suggested that history *rejecting* statutory language actually proves that Congress *endorsed* that language. To the contrary, as respondent herself acknowledges, "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" Resp. Br. 30-31 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987)).

Here, respondent concedes that Congress considered, and rejected, a proposal to link the time for suing under Section 16(b) to the date on which the defendant filed a Section 16(a) disclosure form. *See* Resp. Br. 29-30. Nonetheless, respondent insists that this legislative history actually *supports* her position that Congress "intended" to link the time for suing under Section 16(b) to the date on which the defendant filed a Section 16(a) disclosure form. *See*

id. That is so, respondent asserts, because the rejected proposal involved a two-prong time limit. *See id.* at 29. According to respondent, "the two-prong limitations language *was* Congress' 'repose approach,'" so that by rejecting a two-prong time limit in Section 16(b) Congress negated any intent to establish a repose period. *Id.* at 30 (emphasis in original).

That is an unreasonable inference. Although Congress *may* adopt a two-prong time limit to preclude tolling, Congress *need* not adopt a two-prong time limit to do so. Rather, whether Congress intended to preclude tolling depends on "the text of the relevant statute," subject to ordinary canons of statutory interpretation. *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *see also United States v. Brockamp*, 519 U.S. 347, 350-51 (1997). Indeed, neither *Beggerly* nor *Brockamp*, in which this Court held that courts could not extend particular statutory time limits, involved a two-prong time limit. *See* 524 U.S. at 48-49; 519 U.S. at 350-51.

Undeterred, respondent insists that the history of judicial interpretation of Section 16(b), coupled with post-enactment congressional action and inaction, supports her interpretation. *See* Resp. Br. 23, 31-36. In particular, respondent notes that most lower courts have interpreted Section 16(b)'s time limit as subject to tolling, and argues that Congress has acquiesced in this interpretation. *See id.* at 16, 32. Again, this argument is unavailing.

As a general matter, this Court has approached such "legislative acquiescence" arguments with skepticism, because there are myriad reasons why Congress may not legislate besides agreement with

judicial interpretation of past legislation. *See, e.g.*, *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). Such skepticism is particularly warranted where, as here, lower-court decisions are at issue—it is one thing to posit that Congress keeps abreast of this Court's jurisprudence, and another thing altogether to posit that Congress keeps abreast of every last published and unpublished lower-court decision. *See, e.g.*, *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947) ("We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."). Thus, this Court has not hesitated to rectify the lower courts' longstanding statutory-interpretation errors, *see, e.g., McNally v. United States*, 483 U.S. 350, 358-59 (1987)—even where Congress reenacted the statute against the backdrop of such errors, *see, e.g. Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Respondent's assertion that the Ninth Circuit's decision in *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981), "has achieved landmark status," Resp. Br. 31, reveals at most a lack of perspective.

Although, as respondent notes, Congress has amended Section 16(b) in the thirty years since *Whittaker* (in 2000, 2002, and 2010), *see* Resp. Br. 32, none of those amendments had anything to do with the time limit for suing. Respondent makes much of the fact that one of the amendments referred to "'judicial precedents.'" Resp. Br. 34-36 (quoting 15 U.S.C. § 78j) (added as part of the Commodity Futures Modernization Act of 2000, Pub. L. 106-554, 114 Stat. 2763A, 2763A-454 (2000)). But that

amendment did not endorse the substance of any particular precedent; rather, that amendment (enacted when the Exchange Act was extended to cover swaps as well as securities) provided only that "judicial precedents" involving securities should also apply to swaps. 15 U.S.C. § 78j. The recent statutes cited by respondent are at most a species of "[p]ost-enactment legislative history," which this Court has denounced as "a contradiction in terms" that is "not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 (2011).

Indeed, respondent's "legislative acquiescence" argument fails on its own terms. If there were any judicial precedent in this area with which Congress is familiar, it is *Lampf*. And that decision left no doubt that Section 16(b) establishes a "period of repose" that is "more restrictive" than the repose periods in companion provisions of the Exchange Act. 501 U.S. at 360 & n.5.

* * *

Because the traditional tools of statutory interpretation—text, structure, and history—all point in the direction of repose, and thus confirm what this Court said in *Lampf*, it follows that Congress left no room for courts to extend Section 16(b)'s two-year time limit. Accordingly, the United States errs by arguing that background tolling rules allow courts to do just that. *See* U.S. Br. 7-11, 24-31. In essence, the United States advocates a "clear statement" rule that would allow courts to extend statutory time limits unless there were no other conceivable reading of the statute. But this Court rejected precisely that rule in *TRW Inc. v. Andrews*.

See 534 U.S. 19, 27-28 (2001); *see also Beggerly*, 524 U.S. at 48-49; *Brockamp*, 519 U.S. at 350-52; *Lampf*, 501 U.S. at 363. Background rules, after all, apply only "in the absence of a contrary directive from Congress," *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (internal quotation omitted), and do not alter traditional canons of statutory interpretation.

Respondent goes further, arguing that courts may extend Section 16(b)'s two-year time limit *even if* that time limit is deemed to be a statute of repose. *See* Resp. Br. 36-51. But the whole point of a statute of repose, and what distinguishes it from a statute of limitations, is that it is *not* subject to extension. *See* Pet'rs Br. 17-18. It is a contradiction in terms to speak of a statute of repose that can be extended.

Respondent nonetheless insists that courts are free to extend a statute of repose if they affix the right *label* to their action. Respondent concedes, as she must, that equitable tolling does not allow courts to extend a statute of repose. *See* Resp. Br. 36-37; *see generally Lampf*, 501 U.S. at 363. But respondent posits the existence of an entirely different kind of tolling—"legal tolling"—which, in her view, allows courts to override a statute of repose. *See* Resp. Br. 36-51. Again, respondent is wrong.

Each of the cases on which respondent bases her "legal tolling" theory involves the question whether a timely filed class action tolls a statutory time limit for filing individual claims. *See* Resp. Br. 38. This Court has held that a timely filed class action tolls statutes of limitations for individual claims. *See, e.g.*, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983); *American Pipe & Constr. Co. v. Utah,* 414

U.S. 538, 556-59 (1974). The lower courts are divided, however, on whether such tolling applies to statutes of repose. *Compare*, *e.g.*, *Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000), *and Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176-78 (D. Mass. 2009), *with Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 624-25 (S.D.N.Y. 2011), *and In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 02017, __ F. Supp. 2d __, 2011 WL 1453790, at *2-3 (S.D.N.Y. Apr. 13, 2011).

Although this Court has characterized *American Pipe* tolling as judge-made "equitable tolling," *see, e.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990), some of the lower courts that have applied *American Pipe* tolling to statutes of repose have recharacterized it as "legal tolling." *See, e.g.*, *Joseph*, 223 F.3d at 1167; *Arivella*, 623 F. Supp. 2d at 176. According to these courts, such tolling does not involve the application of a judge-made rule, but instead the enforcement of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g.*, *Joseph*, 223 F.3d at 1167; *Arivella*, 623 F. Supp. 2d at 176. Under this view, Rule 23 is a specific (quasi)statutory command that trumps a more general statute of repose in another statute. *See Joseph*, 223 F.3d at 1167; *Arivella*, 623 F. Supp. 2d at 176. These courts, moreover, have emphasized that *American Pipe* tolling is not inconsistent with a statute of repose, because the individual plaintiff "has effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Joseph*, 223 F.3d at 1168; *see also Arivella*, 623 F. Supp. 2d at 177.

Whatever the merits of respondent's "legal tolling" theory in the class-action context, that theory has no bearing here. Although respondent asserts that "Section 16 legal tolling is not 'extra-textual' or based on 'background rules,'" Resp. Br. 44, she identifies nothing in the statute itself that either directs or authorizes tolling. *Cf.* 28 U.S.C. § 2244(d)(2) (tolling mandated by statute); 50 App. U.S.C. § 526(a) (same). Indeed, even the Ninth Circuit's *Whittaker* decision justified Section 16(b) tolling as an application of "the traditional *equitable tolling* doctrine of fraudulent concealment." 639 F.2d at 527 n.9 (emphasis added). In contrast to the class-action situation, moreover, no action was timely filed encompassing respondent's claim. Respondent's "legal tolling" argument thus adds nothing to her overall argument that Section 16(b)'s time limit should be construed as a statute of limitations rather than a statute of repose in the first place.

II. These Actions Are Untimely Even If Section 16(b)'s Two-Year Time Limit Could Be Extended.

Even if courts had authority to extend Section 16(b)'s two-year time limit, there would be no basis to do so here. Respondent's claims accrued on "the date [an alleged short-swing] profit was realized," 15 U.S.C. § 78p(b), more than six years before she filed these actions, and no recognized tolling doctrine applies to render them timely.

As a threshold matter, the United States errs by asserting that equitable tolling applies in *any* case in which the plaintiff alleges that the defendant violated a statutory disclosure duty. And even assuming *arguendo* that tolling had any conceivable

application here, respondent errs by asserting that she neither knew nor had reason to know the facts underlying her Section 16(b) claims more than two years before filing these actions. Each point is addressed in turn below.

A. Equitable Tolling Does Not Apply Here At All.

This Court has described equitable tolling as "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007); *see also Irwin*, 498 U.S. at 96 (courts apply equitable tolling "only sparingly"). Thus, equitable tolling is available "only if [the plaintiff] shows (1) that he has been pursuing his rights diligently, *and* (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (emphasis added; internal quotation omitted). The doctrine requires a fact-specific inquiry that "'must be made on a case-by-case basis.'" *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)).

The United States ignores the foregoing limitations, and instead argues that equitable tolling *categorically applies* whenever a plaintiff alleges that a defendant violated a statutory disclosure duty, *regardless* of the defendant's culpability or other relevant circumstances (although the United States acknowledges that such tolling must end when the plaintiff knew or should have known the facts underlying her claim). *See* U.S. Br. 7-8, 12-23 & n.2. Under this view, every alleged violation of a statutory disclosure duty invariably qualifies as an "extraordinary circumstance" warranting equitable

tolling—regardless of whether the defendant *actually* violated such a duty, or whether any such violation was intentional. "'[T]he failure to disclose in [Section] 16(a) reports, whether intentional or inadvertent, is deemed concealment, thus triggering the traditional equitable tolling doctrine of fraudulent concealment.'" U.S. Br. 17 (quoting *Whittaker*, 639 F.2d at 527 n.9).

This approach, which would have far-reaching implications across all areas of the law, is baseless. While fraudulent concealment may qualify as an extraordinary circumstance warranting equitable tolling, *see, e.g.*, *SEC v. Gabelli*, 653 F.3d 49, 59-60 (2d Cir. 2011), not every violation of a statutory disclosure duty invariably qualifies as fraudulent concealment. Rather, as its name suggests, fraudulent concealment applies only "where the plaintiff is able to establish that the defendant took affirmative steps beyond the allegedly wrongful activity itself to conceal her activity from the plaintiff." *Id.*; *see also Wood v. Carpenter*, 101 U.S. 135, 143 (1879) ("Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."); *Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93, 98-99 (1875) ("A fraudulent concealment is the suppression of something which the party is bound to disclose.... The concealment must be wilful and intentional."); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (fraudulent concealment "denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time").

The United States thus errs by arguing that the alleged violation of any statutory disclosure duty invariably triggers equitable tolling. With the notable exception of the Ninth Circuit's decision in *Whittaker*, none of the authorities cited by the United States supports that sweeping proposition. To the contrary, those authorities stand only for the proposition that—notwithstanding this Court's decision in *Wood*—"mere silence" *may* be enough to establish fraudulent concealment under certain circumstances where the defendant had a duty to reveal information to the plaintiff. Thus, "courts have recognized equitable tolling when a *fiduciary* breaches a disclosure obligation." U.S. Br. 16 (emphasis added; citing John P. Dawson, *Fraudulent Concealment & Statutes of Limitation*, 31 Mich. L. Rev. 875, 888-90 (1933)). Similarly, the D.C. Circuit has applied fraudulent concealment where a statute imposed on the defendant a duty of disclosure "to the plaintiff," as opposed to the world at large. *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996); *Smith v. Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979). The United States identifies no case other than *Whittaker* holding that the alleged violation of a statutory disclosure duty to the world at large invariably triggers fraudulent concealment.

B. Even If Equitable Tolling Applied Here, Respondent Knew Or Should Have Known The Facts Underlying Her Claims More Than Two Years Before Filing.

Finally, even if courts had authority to extend Section 16(b)'s two-year time limit, and even if there were some basis for invoking tolling here,

respondent's claims still would be untimely because, as the district court noted, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. As the United States recognizes, courts have no authority to toll a statutory time limit after a plaintiff knows or should have known the facts underlying her claim. *See* U.S. Br. 12-23.

Respondent now denies that she knew all of the facts giving rise to her Section 16(b) claims more than two years before filing these lawsuits. *See* Resp. Br. 52-60. While respondent does not deny that the allegations of underwriter wrongdoing in the *IPO* litigation were matters of public record, she asserts that she was unaware of the facts underlying one specific element of Section 16(b) liability—that underwriters allegedly conspired with issuer insiders (and thereby formed a "group") to underprice IPO shares to allow the insiders to reap substantial profits, a portion of which they would later kick back to the underwriters in the form of additional business. *See id.* at 12. That particular element of liability, respondent argues, was unknown until her attorneys "pieced it together" less than two years before filing these lawsuits. *Id.* at 12-13. That argument fails on at least two levels.

First, the theory that underwriters conspired with issuer insiders to underprice IPO shares was at the very *heart* of the *IPO* litigation, which (unlike this case) involved claims against *both* underwriters and issuer insiders. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 300-14 (S.D.N.Y. 2003).

In addition, the academic literature addressed this theory before 2005: respondent herself presented the district court with a 2004 article that advanced this theory, and formed the basis for the later articles that respondent cites in her brief. *See* Tim Loughran & Jay Ritter, *Why Has IPO Underpricing Changed Over Time?*, 33 Fin. Mgmt. 5 (Autumn 2004), JA68-140.

Second, even if the alleged underpricing conspiracy between underwriters and issuer insiders were reasonably unknowable before 2005, many of the *other* theories on which respondent based these Section 16(b) actions (*e.g.*, "lock-up," "laddering," *see* JA58-62) were not. Respondent seems to think that if she can identify just *one* new theory underlying an element of liability in her complaint, that would justify her delay in filing the entire action. The law, however, is precisely the opposite. As long as a plaintiff knows, or should know, that she has been injured (regardless of the *legal theory* of liability), she may not sleep on her rights. *See*, *e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555-56 (2000).

At the end of the day, this Court need not second-guess the district court's observation that "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. The United States does not challenge the district court's conclusion regarding shareholder knowledge, but suggests that a remand is warranted because "[t]he *court of appeals* … did not conduct the correct inquiry into when a reasonably diligent security holder would have

discovered the information on which respondent's Section 16(b) claims are based." U.S. Br. 24 (emphasis added). But a remand would be pointless where, as here, the district court already considered that very question, and correctly concluded that petitioners are entitled to judgment as a matter of law on the undisputed facts.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

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Respectfully submitted,

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