SECURITIES LITIGATION: LAW, POLICY, AND PRACTICE

2019 Supplement

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Section 11 of the Securities Act

§ 3.04 Section 11 Affirmative Defenses

[C] The Statute of Limitations Defense

On page 131, add:

CALPERS v. ANZ SECURITIES, INC.

United States Supreme Court

____ U.S. ____, 137 S. Ct. 2042, 198 L. Ed. 2d 584 (2017)

JUSTICE KENNEDY delivered the opinion of the Court.

The suit giving rise to the case before the Court was filed by a plaintiff who was a member of a putative class in a class action but who later elected to withdraw and proceed in this separate suit, seeking recovery for the same illegalities that were alleged in the class suit. The class-action suit had been filed within the time permitted by statute. Whether the later, separate suit was also timely is the controlling question.

I

A

The Securities Act of 1933 "protects investors by ensuring that companies issuing securities . . . make a 'full and fair disclosure of information' relevant to a public offering." . . . Companies [ordinarily] may offer securities to the public only after filing a registration statement, which must contain information about the company and the security for sale. Section 11 of the Securities Act "promotes compliance with these disclosure provisions by giving purchasers a right of action against an issuer or designated individuals," including securities underwriters, for any material misstatements or omissions in a registration statement.

The Act provides time limits for § 11 suits. These time limits are set forth in a two-sentence section of the Act, § 13. It provides as follows:

> "No action shall be maintained to enforce any liability created under [§ 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 reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [§ 11] more than three years after the security was bona fide offered to the public . . . ."

So there are two time bars in the quoted provision; and the second one, the 3-year bar, is central to this case.

B

Lehman Brothers Holdings Inc. formerly was one of the largest investment banks in the United States. In 2007 and 2008, Lehman raised capital through a number of public securities offerings. Petitioner, California Public Employees' Retirement System (sometimes called CalPERS), is the largest public pension fund in the country. Petitioner purchased securities in some of these Lehman offerings; and it is alleged that respondents, various financial firms, are liable under the Act for their participation as underwriters in the transactions. . . .

In September 2008, Lehman filed for bankruptcy. Around the same time, a putative class action concerning Lehman securities was filed against respondents in the United States District Court for the Southern District of New York. The operative complaint raised claims under § 11, alleging that the registration statements for certain of Lehman's 2007 and 2008 securities offerings included material misstatements or omissions. The complaint was filed on behalf of all persons who purchased the identified securities, making petitioner a member of the putative class. Petitioner, however, was not one of the named plaintiffs in the suit. The class action was consolidated with other securities suits against Lehman in a single multidistrict litigation.

In February 2011, petitioner filed a separate complaint against respondents in the United States District Court for the Northern District of California. This suit was filed more than three years after the relevant transactions occurred. The complaint alleged identical securities law violations as the class-action complaint, but the claims were on petitioner's own behalf. The suit was transferred and consolidated with the multidistrict litigation in the Southern District of New York. Soon thereafter, a proposed settlement was reached in the putative class action. Petitioner, apparently convinced it could obtain a more favorable recovery in its separate suit, opted out of the class.

Respondents then moved to dismiss petitioner's individual suit alleging § 11 violations as untimely under the 3-year bar in the second sentence of § 13. Petitioner countered that its individual suit was timely because that 3-year period was tolled during the pendency of the class-action filing. The principal authority cited to support petitioner's argument that the 3-year period was tolled was *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

The District Court disagreed with petitioner's argument, holding that the 3-year bar in § 13 is not subject to tolling. The Court of Appeals for the Second Circuit affirmed. In agreement with the District Court, the Court of Appeals held that the tolling principle discussed in *American Pipe* is inapplicable to the 3-year time bar. . . .

II

The question then is whether § 13 permits the filing of an individual complaint more than three years after the relevant securities offering, when a class-action complaint was timely filed, and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it. The answer turns on the nature and purpose of the 3-year bar and of the tolling rule that petitioner seeks to invoke. Each will be addressed in turn.

A

As the Court explained in *CTS Corp. v. Waldburger*, [134 S.Ct. 2175] (2014), statutory time bars can be divided into two categories: statutes of limitations and statutes of repose. Both "are mechanisms used to limit the temporal extent or duration of liability for tortious acts," but "each has a distinct purpose."

Statutes of limitations are designed to encourage plaintiffs "to pursue diligent prosecution of known claims." In accord with that objective, limitations periods begin to run "when the cause of action accrues"—that is, "when the plaintiff can file suit and obtain relief." In a personal-injury or property-damage action, for example, more often than not this will be "'when the injury occurred or was discovered.'"

In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." For this reason, statutes of repose begin to run on "the date of the last culpable act or omission of the defendant."

The 3-year time bar in § 13 reflects the legislative objective to give a defendant a complete defense to any suit after a certain period. From the structure of § 13, and the language of its second sentence, it is evident that the 3-year bar is a statute of repose. In fact, this Court has already described the provision as establishing "a period of repose," which "'impose[s] an outside limit'" on temporal liability. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991).

The statute provides in clear terms that "[i]n no event" shall an action be brought more than three years after the securities offering on which it is based. This instruction admits of no exception and on its face creates a fixed bar against future liability. . . . The statute, furthermore, runs from the defendant's last culpable act (the offering of the securities), not from the accrual of the claim (the plaintiff's discovery of the defect in the registration statement). . . .

This view is confirmed by the two-sentence structure of § 13. In addition to the 3-year time bar, § 13 contains a 1-year statute of limitations. The limitations statute runs from the time when the plaintiff discovers (or should have discovered) the securities-law violation. The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. . . . The two periods work together: The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability. . . .

The history of the 3-year provision also supports its classification as a statute of repose. It is instructive to note that the statute was not enacted in its current form. The original version of the 1933 Securities Act featured a 2-year discovery period and a 10-year outside limit, see § 13, 48 Stat. 84, but Congress changed this framework just one year after its enactment. The discovery period was changed to one year and the outside limit to three years. See Securities Exchange Act of 1934, § 207, 48 Stat. 908. The evident design of the shortened statutory period was to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability.

B

The determination that the 3-year period is a statute of repose is critical in this case, for the question whether a tolling rule applies to a given statutory time bar is one "of statutory intent." The purpose of a statute of repose is to create "an absolute bar on a defendant's temporal liability," and that purpose informs the assessment of whether, and when, tolling rules may apply.

In light of the purpose of a statute of repose, the provision is in general not subject to tolling. Tolling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances.

For example, if the statute of repose itself contains an express exception, this demonstrates the requisite intent to alter the operation of the statutory period. See . . . 29 U.S.C. § 1113 (establishing a 6-year statute of repose, but stipulating that, in case of fraud, the 6-year period runs from the plaintiff's discovery of the violation). In contrast, where the legislature enacts a general tolling rule in a different part of the code—*e.g.*, a rule that suspends time limits until the plaintiff reaches the age of majority—courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls. In keeping with the statute-specific nature of that analysis, courts have reached different conclusions about whether general tolling statutes govern particular periods of repose.

Of course, not all tolling rules derive from legislative enactments. Some derive from the traditional power of the courts to "'apply the principles . . . of equity jurisprudence.'" The classic example is the doctrine of equitable tolling, which permits a court to pause a statutory time limit "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." . . .

The purpose and effect of a statute of repose, by contrast, is to override customary tolling rules arising from the equitable powers of courts. By establishing a fixed limit, a statute of repose implements a "'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" The unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. For this reason, the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling.

C

Petitioner contends that the 3-year provision is subject to tolling based on the rationale and holding in the Court's decision in *American Pipe*. The language of the 3-year statute does not refer to or impliedly authorize any exceptions for tolling. If *American Pipe* had itself been grounded in a legislative enactment, perhaps an argument could be made that the enactment expressed a legislative objective to modify the 3-year period. If, however, the tolling decision in *American Pipe* derived from equity principles, it cannot alter the unconditional language and purpose of the 3-year statute of repose.

In *American Pipe*, a timely class-action complaint was filed asserting violations of federal antitrust law. Class certification was denied because the class was not large enough, see Fed. Rule Civ. Proc. 23(a)(1), and individuals who otherwise would have been members of the class then filed motions to intervene as individual plaintiffs. The motions were denied on the grounds that the applicable 4-year time bar had expired. The Court of Appeals reversed, permitting intervention.

The Court affirmed. It held that individual plaintiffs' motions to intervene were timely because "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." The Court reasoned that this result was consistent "both with the procedures of Rule 23 and with the proper function of the limitations statute" at issue. First, the tolling furthered "the purposes of litigative efficiency and economy" served by Rule 23. Without the tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," which would "breed needless duplication of motions." Second, the tolling was in accord with "the functional operation of a statute of limitations." By filing a class complaint within the statutory period, the named plaintiff "notifie[d] 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."

As this discussion indicates, the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions. Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.

The Court's holding was instead grounded in the traditional equitable powers of the judiciary. The Court described its rule as authorized by the "judicial power to toll statutes of limitations." . . . The Court also relied on cases that are paradigm applications for equitable tolling principles, explaining with approval that tolling in one such case was based on "considerations 'deeply rooted in our jurisprudence.'" . . .

Perhaps for these reasons, this Court has referred to *American Pipe* as "equitable tolling." . . . It is true, however, that the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner. It did not analyze, for example, whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstances prevented them from intervening earlier; or whether the defendant engaged in misconduct. . . . The balance of the Court's reasoning nonetheless reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice.

D

This analysis shows that the *American Pipe* tolling rule does not apply to the 3-year bar mandated in § 13. As explained above, the 3-year limit is a statute of repose. And the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity. No feature of § 13 provides that deviation from its time limit is permissible in a case such as this one. To the contrary, the text, purpose, structure, and history of the statute all disclose the congressional purpose to offer defendants full and final security after three years.

Petitioner raises four counterarguments, but they are not persuasive. First, petitioner contends that this case is indistinguishable from *American Pipe* itself. If the 3-year bar here cannot be tolled, petitioner reasons, then there was no justification for the *American Pipe* Court's contrary decision to suspend the time bar in that case. *American Pipe*, however, is distinguishable. The statute in *American Pipe* was one of limitations, not of repose; it began to run when "'the cause of action accrued.'" The statute in the instant case, however, is a statute of repose. Consistent with the different purposes embodied in statutes of limitations and statutes of repose, it is reasonable that the former may be tolled by equitable considerations even though the latter in most circumstances may not.

Second, petitioner argues that the filing of a class-action complaint within three years fulfills the purposes of a statutory time limit with regard to later filed suits by individual members of the class. That is because, according to petitioner, the class complaint puts a defendant on notice as to the content of the claims against it and the set of potential plaintiffs who might assert those claims. It is true that the *American Pipe* Court, in permitting tolling, suggested that generic notice satisfied the purposes of the statute of limitations in that case. While this was deemed sufficient in balancing the equities to allow tolling under the antitrust statute, it must be noted that here the analysis differs because the purpose of a statute of repose is to give the defendant full protection after a certain time.

If the number and identity of individual suits, where they may be filed, and the litigation strategies they will use are unknown, a defendant cannot calculate its potential liability or set its own plans for litigation with much precision. The initiation of separate individual suits may thus increase a defendant's practical burdens. . . . The emergence of individual suits, furthermore, may increase a defendant's financial liability; for plaintiffs who opt out have considerable leverage and, as a result, may obtain outsized recoveries. . . . These uncertainties can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters. By permitting a class action to splinter into individual suits, the application of *American Pipe* tolling would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose. All this is not to suggest how best to further equity under these circumstances but simply to support the recognition that a statute of repose supersedes a court's equitable balancing powers by setting a fixed time period for claims to end.

Third, petitioner contends that dismissal of its individual suit as untimely would eviscerate its ability to opt out, an ability this Court has indicated should not be disregarded. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). It does not follow, however, from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits set by statute.

Fourth, petitioner argues that declining to apply *American Pipe* tolling to statutes of repose will create inefficiencies. It contends that nonnamed class members will inundate district courts with protective filings. Even if petitioner were correct, of course, this Court "lack[s] the authority to rewrite" the statute of repose or to ignore its plain import. . . .

And petitioner's concerns likely are overstated. Petitioner has not offered evidence of any recent influx of protective filings in the Second Circuit, where the rule affirmed here has been the law since 2013. This is not surprising. The very premise of class actions is that "'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" Many individual class members may have no interest in protecting their right to litigate on an individual basis. Even assuming that they do, the process is unlikely to be as onerous as petitioner claims. A simple motion to intervene or request to be included as a named plaintiff in the class-action complaint may well suffice. . . . District courts, furthermore, have ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion. . . .

III

Petitioner makes an alternative argument that does not depend on tolling. Petitioner submits its individual suit was timely in any event. Section 13 provides that an "action" must be "brought" within three years of the relevant securities offering. Petitioner argues that requirement is met here because the filing of the class-action complaint "brought" petitioner's individual "action" within the statutory time period.

This argument rests on the premise that an "action" is "brought" when substantive claims are presented to any court, rather than when a particular complaint is filed in a particular court. The term "action," however, refers to a judicial "proceeding," or perhaps to a "suit"—not to the general content of claims. . . . Whether or not petitioner's individual complaint alleged the same securities law violations as the class-action complaint, it defies ordinary understanding to suggest that its filing—in a separate forum, on a separate date, by a separate named party—was the same "action," "proceeding," or "suit."

The limitless nature of petitioner's argument, furthermore, reveals its implausibility. It appears that, in petitioner's view, the bringing of the class action would make any subsequent action raising the same claims timely. Taken to its logical limit, an individual action would be timely even if it were filed decades after the original securities offering—provided a class-action complaint had been filed at some point within the initial 3-year period. Congress would not have intended this result.

. . . .

Tolling may be of great value to allow injured persons to recover for injuries that, through no fault of their own, they did not discover because the injury or the perpetrator was not evident until the limitations period otherwise would have expired. This is of obvious utility in the securities market, where complex transactions and events can be obscure and difficult for a market participant to analyze or apprehend. In a similar way, tolling, as allowed in *American Pipe*, may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control.

The purpose of a statute of repose, on the other hand, is to allow more certainty and reliability. These ends, too, are a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors. The statute in this case reconciles these different ends by its two-tier structure: a conventional statute of limitations in the first clause and a statute of repose in the second.

The statute of repose transforms the analysis. In a hypothetical case with a different statutory scheme, consisting of a single limitations period without an additional outer limit, a court's equitable power under *American Pipe* in many cases would authorize the relief petitioner seeks. Here, however, the Court need not consider how equitable considerations should be formulated or balanced, for the mandate of the statute of repose takes the case outside the bounds of the *American Pipe* rule.

The final analysis, then, is straightforward. The 3-year time bar in § 13 of the Securities Act is a statute of repose. Its purpose and design are to protect defendants against future liability. The statute displaces the traditional power of courts to modify statutory time limits in the name of equity. Because the *American Pipe* tolling rule is rooted in those equitable powers, it cannot extend the 3-year period. Petitioner's untimely filing of its individual action is ground for dismissal.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

***

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

A class complaint was filed against respondents well within the three-year period of repose set out in § 13 of the Securities Act of 1933, 15 U.S.C. § 77m. That complaint informed respondents of the substance of the claims asserted against them and the identities of potential claimants. Respondents, in other words, received what § 13's repose period was designed to afford them: notice of their potential liability within a fixed time window.

The complaint also "commence[d] the action for all members of the class." *American Pipe*, 414 U.S., at 550. Thus, when petitioner California Public Employees' Retirement System (CalPERS) elected to exercise the right safeguarded by Federal Rule of Civil Procedure 23(c)(2)(B)(v), *i.e.*, the right to opt out of the class and proceed independently, CalPERS' claim remained timely. . . . Given the due process underpinning of the opt-out right, I resist rendering the right illusory for CalPERS and similarly situated class members. I would therefore reverse the judgment of the Second Circuit. Accordingly, I dissent from today's decision, under which opting out cuts off any chance for recovery.

I

CalPERS' claim against respondents was timely launched when the class representative filed a complaint pursuant to § 11 of the Securities Act, on behalf of all members of the described class, CalPERS among them. . . . Filing the class complaint within three years of the date the securities specified in that complaint were offered to the public also satisfied § 13's statute of repose. . . . [W]hether CalPERS stayed in the class or eventually filed separately, respondents would have known, within the repose period, of their potential liability to all putative class members.

A class 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." . . . quoting *American Pipe*. The class complaint filed against respondents provided that very notice: It identified "the essential information necessary to determine both the subject matter and size of the prospective litigation," the class of plaintiffs, the offering documents, and the alleged untrue statements and misleading omissions in those documents. "[A] defendant faced with [such] information about a potential liability to a class cannot be said to have reached a state of repose that should be protected."

When CalPERS elected to pursue individually the claims already stated in the class complaint against the same defendants, it simply took control of the piece of the action that had always belonged to it. CalPERS' statement of the same allegations in an individual complaint could not disturb anyone's repose, for respondents could hardly be at rest once notified of the potential claimants and the precise false or misleading statements alleged to infect the registration statements at issue. CalPERS' decision to opt out did change two things: (1) CalPERS positioned itself to exercise its constitutional right to go it alone, cutting loose from a monetary settlement it deemed insufficient; and (2) respondents had to deal with CalPERS and its attorneys in addition to the named plaintiff and class counsel. Although those changes may affect how litigation subsequently plays out, they do not implicate the concerns that prompted § 13's repose period: The class complaint disclosed the same information respondents would have received had each class member instead filed an individual complaint on the day the class complaint was filed.

II

Today's decision disserves the investing public that § 11 was designed to protect. The harshest consequences will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period. Absent a protective claim filed within that period, those members stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages. . . . Because critical stages of securities class actions, including the class-certification decision, often occur years after the filing of a class complaint, the risk is high that class members failing to file a protective claim will be saddled with inadequate representation or an inadequate judgment.

The majority's ruling will also gum up the works of class litigation. Defendants will have an incentive to slow walk discovery and other precertification proceedings so the clock will run on potential opt outs. Any class member with a material stake in a § 11 case, including every fiduciary who must safeguard investor assets, will have strong cause to file a protective claim, in a separate complaint or in a motion to intervene, before the three-year period expires. Such filings, by increasing the costs and complexity of the litigation, "substantially burden the courts."

Today's decision impels courts and class counsel to take on a more active role in protecting class members' opt-out rights. As the repose period nears expiration, it should be incumbent on class counsel, guided by district courts, to notify class members about the consequences of failing to file a timely protective claim. "At minimum, when notice goes out to a class beyond [§ 13's limitations period], a district court will need to assess whether the notice [should] alert class members that opting out . . . would end [their] chance for recovery." . . .

* * *

For the reasons stated, I would hold that the filing of the class complaint commenced CalPERS' action under § 11 of the Securities Act, thereby satisfying § 13's statute of repose. Accordingly, I would reverse the judgment of the Second Circuit.

Chapter 6

Secondary Liability and the Reach of Primary Liability Under Section 10(b)

§6.03 Distinguishing Primary from Secondary Conduct

[C] Primary Liability Under Rule 10b-5(a)(c)

On page 350, add:

LORENZO v. SECURITIES AND EXCHANGE COMMISSION

United States Supreme Court

____ U.S. ____, 139 S. Ct. 1094, 203 L. Ed. 2d 484 (2019)

JUSTICE BREYER delivered the opinion of the Court.

Securities and Exchange Commission Rule 10b-5 makes it unlawful:

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact . . . , or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit . . .

in connection with the purchase or sale of any security."

In *Janus Capital Groups, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), we examined the second of these provisions, Rule 10b-5(b), which forbids the "mak[ing]" of "any untrue statement of a material fact." We held that the "*maker* of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." We said that "[w]ithout control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." And we illustrated our holding with an analogy: "[W]hen a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said."

On the facts of *Janus*, this meant that an investment adviser who had merely "participat[ed] in the drafting of a false statement" "made" by another could not be held liable in a private action under subsection (b) of Rule 10b-5.

In this case, we consider whether those who do not "make" statements (as *Janus* defined "make"), but who disseminate false or misleading statements to potential investors with the intent to defraud, can be found to have violated the *other* parts of Rule 10b-5, subsections (a) and (c), as well as related provisions of the securities laws, § 10(b) of the Securities Exchange Act of 1934, and § 17(a)(1) of the Securities Act of 1933. . . . We believe that they can.

I

A

For our purposes, the relevant facts are not in dispute. Francis Lorenzo, the petitioner, was the director of investment banking at Charles Vista, LLC, a registered broker-dealer in Staten Island, New York. Lorenzo's only investment banking client at the time was Waste2Energy Holdings, Inc., a company developing technology to convert "solid waste" into "clean renewable energy."

In a June 2009 public filing, Waste2Energy stated that its total assets were worth about $14 million. This figure included intangible assets, namely, intellectual property, valued at more than $10 million. Lorenzo was skeptical of this valuation, later testifying that the intangibles were a "dead asset" because the technology "didn't really work."

During the summer and early fall of 2009, Waste2Energy hired Lorenzo's firm, Charles Vista, to sell to investors $15 million worth of debentures, a form of "debt secured only by the debtor's earning power, not by a lien on any specific asset," Black's Law Dictionary 486 (10th ed. 2014).

In early October 2009, Waste2Energy publicly disclosed, and Lorenzo was told, that its intellectual property was worthless, that it had "'w]rit[ten] off . . . all [of its] intangible assets,'" and that its total assets (as of March 31, 2009) amounted to $370,552.

Shortly thereafter, on October 14, 2009, Lorenzo sent two e-mails to prospective investors describing the debenture offering. According to later testimony by Lorenzo, he sent the e-mails at the direction of his boss, who supplied the content and "approved" the messages. The e-mails described the investment in Waste2Energy as having "3 layers of protection," including $10 million in "confirmed assets." The e-mails nowhere revealed the fact that Waste2Energy had publicly stated that its assets were in fact worth less than $400,000. Lorenzo signed the e-mails with his own name, he identified himself as "Vice President—Investment Banking," and he invited the recipients to "call with any questions."

B

In 2013, the Securities and Exchange Commission instituted proceedings against Lorenzo (along with his boss and Charles Vista). The Commission charged that Lorenzo had violated Rule 10b-5, § 10(b) of the Exchange Act, and § 17(a)(1) of the Securities Act. Ultimately, the Commission found that Lorenzo had run afoul of these provisions by sending false and misleading statements to investors with intent to defraud. As a sanction, it fined Lorenzo $15,000, ordered him to cease and desist from violating the securities laws, and barred him from working in the securities industry for life.

Lorenzo appealed, arguing primarily that in sending the e-mails he lacked the intent required to establish a violation of Rule 10b-5, § 10(b), and § 17(a)(1), which we have characterized as "'a mental state embracing intent to deceive, manipulate, or defraud.'" *Aaron v. SEC*, 446 U.S. 680, 686, and n. 5 (1980). With one judge dissenting [now Justice Kavanaugh], the Court of Appeals panel rejected Lorenzo's lack-of-intent argument. 872 F.3d 578, 583 (CADC 2017). Lorenzo does not challenge the panel's scienter finding.

Lorenzo also argued that, in light of *Janus*, he could not be held liable under subsection (b) of Rule 10b-5. The panel agreed. Because his boss "asked Lorenzo to send the emails, supplied the central content, and approved the messages for distribution," it was the boss that had "ultimate authority" over the content of the statement "and whether and how to communicate it." *Janus*, 563 U.S., at 142. (We took this case on the assumption that Lorenzo was not a "maker" under subsection (b) of Rule 10b-5, and do not revisit the court's decision on this point.)

The Court of Appeals nonetheless sustained (with one judge dissenting [Kavanaugh, J]) the Commission's finding that, by knowingly disseminating false information to prospective investors, Lorenzo had violated other parts of Rule 10b-5, subsections (a) and (c), as well as § 10(b) and §17(a)(1).

Lorenzo then filed a petition for certiorari in this Court. We granted review to resolve disagreement about whether someone who is not a "maker" of a misstatement under *Janus* can nevertheless be found to have violated the other subsections of Rule 10b-5 and related provisions of the securities laws, when the only conduct involved concerns a misstatement. . . .

II

A

At the outset, we review the relevant provisions of Rule 10b-5 and of the statutes. As we have said, subsection (a) of the Rule makes it unlawful to "employ any device, scheme, or artifice to defraud." Subsection (b) makes it unlawful to "make any untrue statement of a material fact." And subsection (c) makes it unlawful to "engage in any act, practice, or course of business" that "operates . . . as a fraud or deceit."

There are also two statutes at issue. Section 10b) makes it unlawful to "use or employ . . . any manipulative or deceptive device or contrivance" in contravention of Commission rules and regulations. By its authority under that section, the Commission promulgated Rule 10b-5. The second statutory provision is § 17(a), which, like Rule 10b-5, is organized into three subsections. Here, however, we consider only the first subsection, §17(a)(1), for this is the only subsection that the Commission charged Lorenzo with violating. Like Rule 10b-5(a), 17(a)(1) makes it unlawful to "employ any device, scheme, or artifice to defraud."

B

After examining the relevant language, precedent, and purpose, we conclude that (assuming other here-irrelevant legal requirements are met) dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5, as well as the relevant statutory provisions. In our view, that is so even if the disseminator did not "make" the statements and consequently falls outside subsection (b) of the Rule.

It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud. By sending emails he understood to contain material untruths, Lorenzo "employ[ed]" a "device," "scheme," and "artifice to defraud" within the meaning of subsection (a) of the Rule, § 10(b), and § 17(a)(1). By the same conduct, he "engage[d] in a[n] act, practice, or course of business" that "operate[d] . . . as a fraud or deceit" under subsection (c) of the Rule. Recall that Lorenzo does not challenge the appeals court's scienter finding, so we take for granted that he sent the emails with "intent to deceive, manipulate, or defraud" the recipients. Under the circumstances, it is difficult to see how his actions could escape the reach of those provisions.

Resort to dictionary definitions only strengthens this conclusion. A "'device,'" we have observed, is simply "'[t]hat which is devised, or formed by design'"; a "'scheme'" is a "'project,'" "'plan[,] or program of something to be done'"; and an "'artifice'" is "'an artful stratagem or trick.'" . . . (quoting Webster's International Dictionary . . .). By these lights, dissemination of false or misleading material is easily an "artful stratagem" or a "plan," "devised" to defraud an investor under subsection (a). See Rule 10b-5(a) (making it unlawful to "employ any device, scheme, or artifice to defraud")' § 17(a)(1) (same). The words "act" and "practice" in subsection (c) are similarly expansive. Webster's Second 25 (defining "act" as "a doing" or a "thing done")' *id.*, at 1937 (defining "practice" as an "action" or "deed")' see Rule 10b-5(c) (making it unlawful to "engage in a[n] act, practice, or course of business" that "operates . . . as a fraud or deceit").

These provisions capture a wide range of conduct. Applying them may present difficult problems of scope in borderline cases. Purpose, precedent, and circumstance could lead to narrowing their reach in other contexts. But we see nothing borderline about this case, where the relevant conduct (as found by the Commission) consists of disseminating false or misleading information to prospective investors with the intent to defraud. And while one can readily imagine other actors tangentially involved in dissemination—say, a mailroom clerk—for whom liability would typically be inappropriate, the petitioner in this case sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company.

C

Lorenzo argues that, despite the natural meaning of these provisions, they should not reach his conduct. This is so, he says, because the only way to be liable for false statements is through those provisions that refer *specifically* to false statements. Other provisions, he says, concern "scheme liability claims" and are violated only when conduct other than misstatements is involved. Thus, only those who "make" untrue statements under subsection (b) can violate Rule 10b-5 in connection with statements. (Similarly, § 17(a)(2) would be the sole route for finding liability for statements under § 17(a).) Holding to the contrary, he and the dissent insist, would render subsection (b) of Rule 10b-5 "superfluous." . . . .

The premise of this argument is that each of these provisions should be read as governing different, mutually exclusive, spheres of conduct. But this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws. . . . As we have explained, these laws marked the "first experiment in federal regulation of the securities industry." *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 198 (1963). It is "understandable, therefore," that "in declaring certain practices unlawful," it was thought prudent "to include both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific proscription against nondisclosure" even though "a specific proscription against nondisclosure" might in other circumstances be deemed "surplusage." "Each succeeding prohibition" was thus "meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." We have found "'no warrant for narrowing alternative provisions . . . adopted with the purpose of affording added safeguards.'". . . And since its earliest days, the Commission has not viewed these provisions as mutually exclusive. *See, e.g.*, *In re R. D. Bayly & Co.*, 19 S. E. C. 773 (1945) (finding violations of what would become Rules 10b-5(b) and (c) based on the same misrepresentations and omissions). . . .

The idea that each subsection of Rule 10b-5 governs a separate type of conduct is also difficult to reconcile with the language of subsections (a) and (c). It should go without saying that at least some conduct amounts to "employ[ing]" a "device, scheme, or artifice to defraud" under subsection (a) as well as "engag[ing] in a[n] act . . . which operates . . . as a fraud" under subsection (c). In *Affiliated Ute*, for instance, we described the "defendants' activities" as falling "within the very language of one or the other of those subparagraphs, a 'course of business' or a 'device, scheme, or artifice' that operated as a fraud." 406 U.S., at 153. (The dissent, for its part, offers no account of how the superfluity problems that motivate its interpretation can be avoided where subsections (a) and (c) are concerned.)

Coupled with the Rule's expansive language, which readily embraces the conduct before us, this considerable overlap suggests we should not hesitate to hold that Lorenzo's conduct ran afoul of subsections (a) and (c), as well as the related statutory provisions. Our conviction is strengthened by the fact that we here confront behavior that, though plainly fraudulent, might otherwise fall outside the scope of the Rule. Lorenzo's view that subsection (b), the making-false-statements provisions, *exclusively* regulates conduct involving false or misleading statements would mean those who disseminate false statements with the intent to cheat investors might escape liability under the Rule altogether. But using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud. We do not know why Congress or the Commission would have wanted to disarm enforcement in this way. And we cannot easily reconcile Lorenzo's approach with the basic purpose behind these laws: "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.”….

III

Lorenzo and the dissent make a few other important arguments. They contend that applying subsections (a) or (c) of Rule 10-5 to conduct like his would render our decision in *Janus* . . . . “a dead letter.” But we do not see how that is so. In *Janus*, we considered the language in subsection (b), which prohibits the “mak[ing]” of “any untrue statement of a material fact.” We held that the “maker” of a “statement” is the “person or entity with ultimate authority over the statement.” And we found that subsection (b) did not (under the circumstances) cover an investment adviser who helped *draft* misstatements issued by a *different* entity that controlled the statements’ content. We said nothing about the Rule’s application to the dissemination of false or misleading information. And we can assume that *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminate*s false information—provided, of course, that the individual is not involved in some other form of fraud.

Next, Lorenzo points to the statute’s “aiding and abetting” provision. 15 U.S.C. § 78t(e). This provision, enforceable only by the Commission (and not by private parties), makes it unlawful to “knowingly or recklessly . . . provid[e] substantial assistance to another person” who violates the Rule. . . . Lorenzo claims that imposing primary liability upon his conduct would erase or at least weaken what is otherwise a clear distinction between primary and secondary (*i.e.*, aiding and abetting) liability. He emphasizes that, under today’s holding, a disseminator might be a primary offender with respect to subsection (a) of Rule 10b-5 (by employing a “scheme” to “defraud”) and also secondarily liable as an aider and abettor with respect to subsection (b) (by providing substantial assistance to one who “makes” a false statement. . . .

We do not believe, however, that our decision creates a serious anomaly or otherwise weakens the distinction between primary and secondary liability. For one thing, it is hardly unusual for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another. John, for example, might sell Bill an unregistered firearm in order to help Bill rob a bank, under circumstances that make him primarily liable for the gun sale and secondarily liable for the bank robbery.

For another, the cases to which Lorenzo refers do not help his cause. Take *Central Bank*, where we held that Rule 10b-5's private right of action does not permit suits against secondary violators. The holding of *Central Bank*, we have said, suggests the need for a "clean line" between conduct that constitutes a primary violation of Rule 10b-5 and conduct that amounts to a secondary violation. Thus, in *Janus*, we sought an interpretation of "make" that could neatly divide primary violators and actors too far removed from the ultimate decision to communicate a statement. The line we adopt today is just as administrable: Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b-5(a) and (c), § 10(b), and § 17(a)(1), even if they are secondarily liable under Rule 10b-5(b). Lorenzo suggests that classifying dissemination as a primary violation would inappropriately subject peripheral players in fraud (including him, naturally) to substantial liability. We suspect the investors who received Lorenzo's e-mails would not view the deception so favorably. And as *Central Bank* itself made clear, even a bit participant in the securities markets "may be liable as a primary violator under [Rule] 10b-5" so long as "all of the requirements for primary liability . . . are met." . . .

Lorenzo's reliance on *Stoneridge* is even further afield. There, we held that private plaintiffs could not bring suit against certain securities defendants based on *undisclosed* deceptions upon which the plaintiffs could not have relied. 552 U.S., at 159. But the

Commission, unlike private parties, need not show reliance in its enforcement actions. And even supposing reliance were relevant here, Lorenzo's conduct involved the direct transmission of false statements to prospective investors intended to induce reliance—far from the kind of concealed fraud at issue in *Stoneridge*.

As for Lorenzo's suggestion that those like him ought to be held secondarily liable, this offer will, far too often, prove illusory. In instances where a "maker" of a false statement does *not* violate subsection (b) of the Rule (perhaps because he lacked the necessary intent), a disseminator of those statements, even one knowingly engaged in an egregious fraud, could not be held to have violated the "aiding and abetting" statute. That is because the statute insists that there be a primary violator to whom the secondary violator provided "substantial assistance." 15 U. S. C. § 78t(e). And the latter can be "deemed to be in violation" of the provision only "to the same extent as the person to whom such assistance is provided." In other words, if Acme Corp. could not be held liable under subsection (b) for a statement it made, then a knowing disseminator of those statements could not be held liable for aiding and abetting Acme under subsection (b). And if, as Lorenzo claims, the disseminator has not primarily violated other parts of Rule 10b-5, then such a fraud, whatever its intent or consequences, might escape liability altogether.

That is not what Congress intended. Rather, Congress intended to root out all manner of fraud in the securities industry. And it gave to the Commission the tools to accomplish that job.

* * *

For these reasons, the judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

In Janus Capital Group, Inc. v. First Derivative Traders, 564 U. S. 135 (2011), we drew a clear line between primary and secondary liability in fraudulent-misstatement cases: A person does not "make" a fraudulent misstatement within the meaning of Securities and Exchange Commission (SEC) Rule 10b-5(b)—and thus is not primarily liable for the statement—if the person lacks "ultimate authority over the statement." Such a person could, however, be liable as an aider and abettor under principles of secondary liability.

Today, the Court eviscerates this distinction by holding that a person who has not "made" a fraudulent misstatement can nevertheless be primarily liable for it. Because the majority misconstrues the securities laws and flouts our precedent in a way that is likely to have far-reaching consequences, I respectfully dissent.

. . . .

The majority's approach contradicts our precedent in two distinct ways.

First, the majority's opinion renders *Janus* a dead letter. In *Janus*, we held that liability under Rule 10b-5(b) was limited to the "make[r]" of the statement and that "[o]ne who *prepares* or *publishes* a statement on behalf of another is not its maker" within the meaning of Rule 10b-5(b). It is undisputed here that Lorenzo was not the maker of the fraudulent misstatements. The majority nevertheless finds primary liability under different provisions of Rule 10b-5, without any real effort to reconcile its decision with *Janus*. Although it "assume[s] that *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information," in the next breath the majority states that this would be true only if "the individual is not involved in some other form of fraud." Given that, under the majority's rule, administrative acts undertaken in connection with a fraudulent misstatement qualify as "other form[s] of fraud," the majority's supposed preservation of *Janus* is illusory.

Second, the majority fails to maintain a clear line between primary and secondary liability in fraudulent-misstatement cases. Maintaining this distinction is important because, as the majority notes, there is no private right of action against mere aiders and abettors. . . . Here, however, the majority does precisely what we declined to do in *Janus*: impose broad liability for fraudulent misstatements in a way that makes the category of aiders and abettors in these cases "almost nonexistent." If Lorenzo's conduct here qualifies for primary liability under § 10(b) and Rule 10b-5(a) or (c), then virtually any person who assists with the making of a fraudulent misstatement will be primarily liable and thereby subject not only to SEC enforcement, but private lawsuits.

. . . .

The Court attempts to cabin the implications of its holding by highlighting several facts that supposedly would distinguish this case from a case involving a secretary or other person "tangentially involved in disseminat[ing]" fraudulent misstatements. None of these distinctions withstands scrutiny. The fact that Lorenzo "sent false statements directly to investors" in e-mails that "invited [investors] to follow up with questions," puts him in precisely the same position as a secretary asked to send an identical message from her e-mail account. And under the unduly capacious interpretation that the majority gives to the securities laws, I do not see why it would matter whether the sender is the "vice president of an investment banking company" or a secretary—if the sender knowingly sent false statements, the sender apparently would be primarily liable. To be sure, I agree with the majority that liability would be "inappropriate" for a secretary put in a situation similar to Lorenzo's. But I can discern no legal principle in the majority opinion that would preclude the secretary from being pursued for primary violations of the securities laws.

* * *

Instead of blurring the distinction between primary and secondary liability, I would hold that Lorenzo's conduct did not amount to a primary violation of the securities laws and reverse the judgment of the Court of Appeals. Accordingly, I respectfully dissent.

Chapter 7

Insider Trading

§ 7.06 Tipper-Tippee Liability Under Section 10(b)

On page 419, add:

SALMAN v. UNITED STATES

United States Supreme Court

____ U.S. ____, 137 S. Ct. 420, 196 L. Ed. 2d 351 (2016)

JUSTICE ALITO delivered the opinion of the Court.

Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5 prohibit undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage. . . . Individuals under this duty may face criminal and civil liability for trading on inside information (unless they make appropriate disclosures ahead of time).

These persons also may not tip inside information to others for trading. The tippee acquires the tipper's duty to disclose or abstain from trading if the tippee knows the information was disclosed in breach of the tipper's duty, and the tippee may commit securities fraud by trading in disregard of that knowledge. In *Dirks v. SEC*, 463 U.S. 646 (1983), this Court explained that a tippee's liability for trading on inside information hinges on whether the tipper breached a fiduciary duty by disclosing the information. A tipper breaches such a fiduciary duty, we held, when the tipper discloses the inside information for a personal benefit. And, we went on to say, a jury can infer a personal benefit — and thus a breach of the tipper's duty — where the tipper receives something of value in exchange for the tip or "makes a gift of confidential information to a trading relative or friend.". . .

Petitioner Bassam Salman challenges his convictions for conspiracy and insider trading. Salman received lucrative trading tips from an extended family member, who had received the information from Salman's brother-in-law. Salman then traded on the information. He argues that he cannot be held liable as a tippee because the tipper (his brother-in-law) did not personally receive money or property in exchange for the tips and thus did not personally benefit from them. The Court of Appeals disagreed, holding that *Dirks* allowed the jury to infer that the tipper here breached a duty because he made a 'gift of confidential information to a trading relative.' 792 F.3d 1087, 1092 (CA9 2015). . . . Because the Court of Appeals properly applied *Dirks*, we affirm the judgment below.

I

Maher Kara was an investment banker in Citigroup's healthcare investment banking group. He dealt with highly confidential information about mergers and acquisitions involving Citigroup's clients. Maher enjoyed a close relationship with his older brother, Mounir Kara (known as Michael). After Maher started at Citigroup, he began discussing aspects of his job with Michael. At first he relied on Michael's chemistry background to help him grasp scientific concepts relevant to his new job. Then, while their father was battling cancer, the brothers discussed companies that dealt with innovative cancer treatment and pain management techniques. Michael began to trade on the information Maher shared with him. At first, Maher was unaware of his brother's trading activity, but eventually he began to suspect that it was taking place.

Ultimately, Maher began to assist Michael's trading by sharing inside information with his brother about pending mergers and acquisitions. Maher sometimes used code words to communicate corporate information to his brother. Other times, he shared inside information about deals he was not working on in order to avoid detection. Without his younger brother's knowledge, Michael fed the information to others — including Salman, Michael's friend and Maher's brother-in-law. By the time the authorities caught on, Salman had made over $1.5 million in profits that he split with another relative who executed trades via a brokerage account on Salman's behalf.

Salman was indicted on one count of conspiracy to commit securities fraud and four counts of securities fraud. . . . Facing charges of their own, both Maher and Michael pleaded guilty and testified at Salman's trial.

The evidence at trial established that Maher and Michael enjoyed a "very close relationship." Maher "love[d] [his] brother very much," Michael was like "a second father to Maher," and Michael was the best man at Maher's wedding to Salman's sister. Maher testified that he shared inside information with his brother to benefit him and with the expectation that his brother would trade on it. While Maher explained that he disclosed the information in large part to appease Michael (who pestered him incessantly for it), he also testified that he tipped his brother to "help him" and to "fulfil[l] whatever needs he had." For instance, Michael once called Maher and told him that "he needed a favor." Maher offered his brother money but Michael asked for information instead. Maher then disclosed an upcoming acquisition. Although he instantly regretted the tip and called his brother back to implore him not to trade, Maher expected his brother to do so anyway. . . .

For his part, Michael told the jury that his brother's tips gave him "timely information that the average person does not have access to" and "access to stocks, options, and what have you, that I can capitalize on, that the average person would never have or dream of." Michael testified that he became friends with Salman when Maher was courting Salman's sister and later began sharing Maher's tips with Salman. As he explained at trial, "any time a major deal came in, [Salman] was the first on my phone list." Michael also testified that he told Salman that the information was coming from Maher. . . .

After a jury trial in the Northern District of California, Salman was convicted on all counts. He was sentenced to 36 months of imprisonment, three years of supervised release, and over $750,000 in restitution. After his motion for a new trial was denied, Salman appealed to the Ninth Circuit. While his appeal was pending, the Second Circuit issued its opinion in *United States v. Newman*, 773 F.3d 438 (2014). . . . There, the Second Circuit reversed the convictions of two portfolio managers who traded on inside information. The *Newman* defendants were "several steps removed from the corporate insiders" and the court found that "there was no evidence that either was aware of the source of the inside information." The court acknowledged that *Dirks* and Second Circuit case law allow a factfinder to infer a personal benefit to the tipper from a gift of confidential information to a trading relative or friend. But the court concluded that, "[t]o the extent" *Dirks* permits "such an inference," the inference "is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." . . .

Pointing to *Newman*, Salman argued that his conviction should be reversed. While the evidence established that Maher made a gift of trading information to Michael and that Salman knew it, there was no evidence that Maher received anything of "a pecuniary or similarly valuable nature" in exchange — or that Salman knew of any such benefit. The Ninth Circuit disagreed and affirmed Salman's conviction. 792 F.3d 1087. The court reasoned that the case was governed by *Dirks*'s holding that a tipper benefits personally by making a gift of confidential information to a trading relative or friend. Indeed, Maher's disclosures to Michael were "precisely the gift of confidential information to a trading relative that *Dirks* envisioned." 792 F.3d at 1092. . . . To the extent *Newman* went further and required additional gain to the tipper in cases involving gifts of confidential information to family and friends, the Ninth Circuit "decline[d] to follow it." . . .

We granted certiorari to resolve the tension between the Second Circuit's *Newman* decision and the Ninth Circuit's decision in this case. . . .[1]

II

A

In this case, Salman contends that an insider's "gift of confidential information to a trading relative or friend," is not enough to establish securities fraud. Instead, Salman argues, a tipper does not personally benefit unless the tipper's goal in disclosing inside information is to obtain money, property, or something of tangible value. He claims that our insider-trading

[1] *Dirk's v. SEC*, 463 U.S. 646 (1983), established the personal-benefit framework in a case brought under the classical theory of insider-trading liability, which applies "when a corporate insider" or his tippee "trades in the securities of [the tipper's] corporation on the basis of material, nonpublic information." *United States v. O'Hagan*, 521 U. S. 642, 651-652 (1997). In such a case, the defendant breaches a duty to, and takes advantage of, the shareholders of his corporation. By contrast, the misappropriation theory holds that a person commits securities fraud "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information" such as an employer or client. *Id*., at 652. In such a case, the defendant breaches a duty to, and defrauds, the source of the information, as opposed to the shareholders of his corporation. The Court of Appeals observed that this is a misappropriation case, 792 F.3d, 1087, 1092, n. 4 (CA9 2015), while the Government represents that both theories apply on the facts of this case. . . . We need not resolve the question. The parties do not dispute that *Dirks*'s personal-benefit analysis applies in both classical and misappropriation cases, so we will proceed on the assumption that it does.

precedents, and the cases those precedents cite, involve situations in which the insider exploited confidential information for the insider's own "tangible monetary profit." He suggests that his position is reinforced by our criminal-fraud precedents outside of the insider-trading context, because those cases confirm that a fraudster must personally obtain money or property. More broadly, Salman urges that defining a gift as a personal benefit renders the insider-trading offense indeterminate and overbroad: indeterminate, because liability may turn on facts such as the closeness of the relationship between tipper and tippee and the tipper's purpose for disclosure; and overbroad, because the Government may avoid having to prove a concrete personal benefit by simply arguing that the tipper meant to give a gift to the tippee. He also argues that we should interpret *Dirks*'s standard narrowly so as to avoid constitutional concerns. Finally, Salman contends that gift situations create especially troubling problems for remote tippees —that is, tippees who receive inside information from another tippee, rather than the tipper — who may have no knowledge of the relationship between the original tipper and tippee and thus may not know why the tipper made the disclosure. . . .

The Government disagrees and argues that a gift of confidential information to anyone, not just a "trading relative or friend," is enough to prove securities fraud. . . . Under the Government's view, a tipper personally benefits whenever the tipper discloses confidential trading information for a noncorporate purpose. Accordingly, a gift to a friend, a family member, or anyone else would support the inference that the tipper exploited the trading value of inside information for personal purposes and thus personally benefited from the disclosure. The Government claims to find support for this reading in *Dirks* and the precedents on which *Dirks* relied. . . .

The Government also argues that Salman's concerns about unlimited and indeterminate liability for remote tippees are significantly alleviated by other statutory elements that prosecutors must satisfy to convict a tippee for insider trading. The Government observes that, in order to establish a defendant's criminal liability as a tippee, it must prove beyond a reasonable doubt that the tipper expected that the information being disclosed would be used in securities trading. The Government also notes that, to establish a defendant's criminal liability as a tippee, it must prove that the tippee knew that the tipper breached a duty — in other words, that the tippee knew that the tipper disclosed the information for a personal benefit and that the tipper expected trading to ensue. . . .

B

We adhere to *Dirks*, which easily resolves the narrow issue presented here.

In *Dirks*, we explained that a tippee is exposed to liability for trading on inside information only if the tippee participates in a breach of the tipper's fiduciary duty. Whether the tipper breached that duty depends "in large part on the purpose of the disclosure" to the tippee. "[T]he test," we explained, "is whether the insider personally will benefit, directly or indirectly, from his disclosure." Thus, the disclosure of confidential information without personal benefit is not enough. In determining whether a tipper derived a personal benefit, we instructed courts to "focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." This personal benefit can "often" be inferred "from objective facts and circumstances," we explained, such as "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." In particular, we held that "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist *when an insider makes a gift of confidential information to a trading relative or friend."* *Ibid*. (emphasis added). In such cases, "[t]he tip and trade resemble trading by the insider followed by a gift of the profits to the recipient." We then applied this gift-giving principle to resolve *Dirks* itself, finding it dispositive that the tippers "received no monetary or personal benefit" from their tips to Dirks, "*nor was their purpose to make a gift of valuable information to Dirks*."

Our discussion of gift giving resolves this case. Maher, the tipper, provided inside information to a close relative, his brother Michael. *Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to "a trading relative," and that rule is sufficient to resolve the case at hand. As Salman's counsel acknowledged at oral argument, Maher would have breached his duty had he personally traded on the information here himself then given the proceeds as a gift to his brother. It is obvious that Maher would personally benefit in that situation. But Maher effectively achieved the same result by disclosing the information to Michael, and allowing him to trade on it. *Dirks* appropriately prohibits that approach, as well. Cf. [*Dirks*] 463 U.S., at 659 (holding that "insiders [are] forbidden" both "from personally using undisclosed corporate information to their advantage" and from "giv[ing] such information to an outsider for the same improper purpose of exploiting the information for their personal gain"), *Dirks* specifies that when a tipper gives inside information to "a trading relative or friend," the jury can infer that the tipper meant to provide the equivalent of a cash gift. In such situations, the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds. Here, by disclosing confidential information as a gift to his brother with the expectation that he would trade on it, Maher breached his duty of trust and confidence to Citigroup and its clients — a duty Salman acquired, and breached himself, by trading on the information with full knowledge that it had been improperly disclosed.

To the extent the Second Circuit held that the tipper must also receive something of a "pecuniary or similarly valuable nature" in exchange for a gift to family or friends, *Newman* 773 F.3d, at 452, we agree with the Ninth Circuit that this requirement is inconsistent with *Dirks*.

C

Salman points out that many insider-trading cases — including several that *Dirks* cited — involved insiders who personally profited through the misuse of trading information. But this observation does not undermine the test *Dirks* articulated and applied. Salman also cites a sampling of our criminal-fraud decisions construing other federal fraud statutes, suggesting that they stand for the proposition that fraud is not consummated unless the defendant obtains money or property. . . . Assuming that these cases are relevant to our construction of § 10(b) (a proposition the Government forcefully disputes), nothing in them undermines the commonsense point we made in *Dirks*. Making a gift of inside information to a relative like Michael is little different from trading on the information, obtaining the profits, and doling them out to the trading relative. The tipper benefits either way. The facts of this case illustrate the point: In one of their tipper-tippee interactions, Michael asked Maher for a favor, declined Maher's offer of money, and instead requested and received lucrative trading information.

We reject Salman's argument that *Dirks*'s gift-giving standard is unconstitutionally vague as applied to this case. *Dirks* created a simple and clear "guiding principle" for determining tippee liability, and Salman has not demonstrated that either § 10(b) itself or the *Dirks* gift-giving standard "leav[e] grave uncertainty about how to estimate the risk posed by a crime" or are plagued by "hopeless indeterminacy." . . . At most, Salman shows that in some factual circumstances assessing liability for gift-giving will be difficult. That alone cannot render "shapeless" a federal criminal prohibition, for even clear rules "produce close cases." We also reject Salman's appeal to the rule of lenity, as he has shown "no grievous ambiguity or uncertainty that would trigger the rule's application." . . . To the contrary, Salman's conduct is in the heartland of *Dirks*'s rule concerning gifts. It remains the case that "[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts." But there is no need for us to address those difficult cases today, because this case involves "precisely the gift of confidential information to a trading relative" that *Dirks* envisioned. . . .

III

Salman's jury was properly instructed that a personal benefit includes "the benefit one would obtain from simply making a gift of confidential information to a trading relative." As the Court of Appeals noted, "the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information." And, as Salman conceded below, this evidence is sufficient to sustain his conviction under our reading of *Dirks*. . . . Accordingly, the

Ninth Circuit's judgment is affirmed.

Chapter 9

State Securities ("Blue Sky") Litigation

§ 9.02 SLUSA Preemption of State Law

On page 509, add:

CYAN, INC. v. BEAVER COUNTY EMPLOYEES RETIREMENT FUND

United States Supreme Court

____ U.S. ____, 138 S. Ct. 1061, 200 L. Ed. 2d 332 (2018)

Justice KAGAN delivered the opinion of the [unanimous] Court.

This case presents two questions about the Securities Litigation Uniform Standards Act of 1998 (SLUSA). . . . First, did SLUSA strip state courts of jurisdiction over class actions alleging violations of only the Securities Act of 1933 (1933 Act)? And second, even if not, did SLUSA empower defendants to remove such actions from state to federal court? We answer both questions no.

I

A

In the wake of the 1929 stock market crash, Congress enacted two laws, in successive years, to promote honest practices in the securities markets. The 1933 Act required companies offering securities to the public to make "full and fair disclosure" of relevant information. And to aid enforcement of those obligations, the statute created private rights of action. Congress authorized both federal and state courts to exercise jurisdiction over those private suits. . . . More unusually, Congress also barred the removal of such actions from state to federal court. . . .

So if a plaintiff chose to bring a 1933 Act suit in state court, the defendant could not change the forum.

Congress's next foray. The Securities Exchange Act of 1934 (1934 Act) operated differently. That statute regulated not the original issuance of securities but instead all their subsequent trading, most commonly on national stock exchanges. The 1934 Act, this Court held, could also be enforced through private rights of action. But Congress determined that all those suits should fall within the "exclusive jurisdiction" of the federal courts. So a plaintiff could never go to state court to litigate a 1934 Act claim.

In 1995, the Private Securities Litigation Reform Act (Reform Act) amended both the 1933 and the 1934 statutes in mostly identical ways. Congress passed the Reform Act principally to stem "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." . . . Some of the Reform Act's provisions made substantive changes to the 1933 and 1934 laws, and applied even when a 1933 Act suit was brought in state court. For instance, the statute created a "safe harbor" from federal liability for certain "forward-looking statements" made by company officials. . . . Other Reform Act provisions modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court. To take one example, the statute required a lead plaintiff in any class action brought under the Federal Rules of Civil Procedure to file a sworn certification stating, among other things, that he had not purchased the relevant securities "at the direction of plaintiff's counsel." . . .

But the Reform Act fell prey to the law of "unintended consequence[s]." . . . As this Court previously described the problem: "Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law." . . .

That "phenomenon was a novel one"—and an unwelcome one as well. . . . To prevent plaintiffs from circumventing the Reform Act, Congress again undertook to modify both securities laws.

The result was SLUSA, whose amendments to the 1933 Act are at issue in this case. Those amendments include, as relevant here, two operative provisions, two associated definitions, and two "conforming amendments" to the 1933 law's jurisdictional section. . . . The added material—now found in §§ 77p and 77v(a) and set out in full in this opinion's appendix—goes as follows.

First, § 77p(b) altogether prohibits certain securities class actions based on state law. That provision—which we sometimes (and somewhat prosaically) refer to as the state-law class-action bar—reads:

> "No covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party alleging—
>
> "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."

According to SLUSA's definitions, the term "covered class action" means a class action in which "damages are sought on behalf of more than 50 persons." . . . And the term "covered security" refers to a security listed on a national stock exchange. . . . So taken all in all, § 77p(b) completely disallows (in both state and federal courts) sizable class actions that are founded on state law and allege dishonest practices respecting a nationally traded security's purchase or sale.

Next, § 77p(c) provides for the removal of certain class actions to federal court, as well as for their subsequent disposition:

> "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section."

The first chunk of that provision identifies the removable cases, partly by way of a cross-reference ("as set forth in subsection (b)") to the just-described class-action bar. The final clause of the provision ("and shall be subject to subsection (b)") indicates what should happen to a barred class suit *after* it has been removed: The "proper course is to dismiss" the action. . . . As this Court has explained, § 77p(c) "avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought in state court, but of termination of the proceedings altogether." . . . The point of providing that option, everyone here agrees, was to ensure the dismissal of a prohibited state-law class action even when a state court "would not adequately enforce" § 77p(b)'s bar. . . .

Finally, the 1933 Act's jurisdictional provision, codified at § 77v(a), now includes two new phrases framed as exemptions—SLUSA's self-described "conforming amendments." The less significant of the pair, for our purposes, reflects the allowance for removing certain class actions described above. Against the backdrop of the 1933 Act's general removal bar that added (italicized) material reads:

> "*Except as provided in section 77p(c) of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

The more important of the conforming amendments in this case expresses a caveat to the general rule . . . that state and federal courts have concurrent jurisdiction over all claims to enforce the 1933 Act. As amended (again, with the new material in italics), the relevant sentence now reads:

> "The district courts of the United States . . . shall have jurisdiction[,] concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law bought to enforce any liability or duty created by this subchapter."

Throughout this opinion, we refer to the italicized words just above as the "except clause." Its meaning is at the heart of the parties' dispute in this Court.

B

The petitioners in this case are Cyan, a telecommunications company, and its officers and directors (together, Cyan). The respondents are three pension funds and an individual (together, Investors) who purchased shares of Cyan stock in an initial public offering. After the stock declined in value, the Investors brought a damages class action against Cyan in California Superior Court. Their complaint alleges that Cyan's offering documents contained material misstatements, in violation of the 1933 Act. It does not assert any claims based on state law.

Cyan moved to dismiss the Investors' suit for lack of subject matter jurisdiction. It argued that what we have termed SLUSA's "except clause"—*i.e.*, the amendment made to § 77v(a)'s concurrent-jurisdiction grant—stripped state courts of power to adjudicate 1933 Act claims in "covered class actions." The Investors did not dispute that their suit qualifies as such an action under SLUSA's definition, see § 77p(f)(2). But they maintained that SLUSA left intact state courts' jurisdiction over all suits—including "covered class actions"—alleging only 1933

Act claims. The California Superior Court agreed with the Investors and denied Cyan's motion to dismiss. The state appellate courts then denied review of that ruling. . . .

We granted Cyan's petition for certiorari to resolve a split among state and federal courts about whether SLUSA deprived state courts of jurisdiction over "covered class actions" asserting only 1933 Act claims.

In opposing Cyan's jurisdictional position here, the Federal Government as *amicus curiae* raised another question: whether SLUSA enabled defendants to remove 1933 Act class actions from state to federal court for adjudication. That question is not directly presented because Cyan never attempted to remove the Investors' suit. But the removal issue is related to the parties' jurisdictional arguments, and both Cyan and the Investors addressed it in briefing and argument. . . . Accordingly, we consider as well the scope of § 77p(c)'s removal authorization.

II

By its terms, § 77v(a)'s "except clause" does nothing to deprive state courts of their jurisdiction to decide class actions brought under the 1933 Act. And Cyan's various appeals to SLUSA's purposes and legislative history fail to overcome the clear statutory language. The statute says what it says—or perhaps better put here, does not say what it does not say. State-court jurisdiction over 1933 Act claims thus continues undisturbed.

A

SLUSA's text, read most straightforwardly, leaves in place state courts' jurisdiction over 1933 Act claims, including when brought in class actions. Recall that the background rule of § 77v(a)—in place since the 1933 Act's passage—gives state courts concurrent jurisdiction over all suits "brought to enforce any liability or duty created by" that statute. The except clause—once again, "except as provided in section 77p of this title with respect to covered class actions"—is drafted as a limitation on that rule: It ensures that in any case in which § 77v(a) and § 77p come into conflict, § 77p will control. The critical question for this case is therefore whether § 77p limits state-court jurisdiction over class actions brought under the 1933 Act. It does not. As earlier described, § 77p bars certain securities class actions based on *state* law. And as a corollary of that prohibition, it authorizes removal of those suits so that a federal court can dismiss them. But the section says nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on *federal* law. That means the background rule of § 77v(a)—under which a state court may hear the Investors' 1933 Act suit—continues to govern.

. . . .

. . . When Congress passed SLUSA, state courts had for 65 years adjudicated all manner of 1933 Act cases, including class actions. Indeed, defendants could not even remove those cases to federal court, as schemes of concurrent jurisdiction almost always allow. . . . State courts thus had as much or more power over the 1933 Act's enforcement as over any federal statute's. To think Cyan right, we would have to believe that Congress upended that entrenched practice not by any direct means, but instead by way of a conforming amendment to § 77v(a) (linked, in its view, with only a definition). But Congress does not make "radical—but entirely implicit—change[s]" through "technical and conforming amendments." . . . Or to use the more general (and snappier) formulation of that rule, relevant to all "ancillary provisions," Congress does not "hide elephants in mouseholes." . . . That is yet one more reason to reject Cyan's view of SLUSA's text.

B

Faced with such recalcitrant statutory language, Cyan stakes much of its case on legislative purpose and history. . . . Its claims come in two forms—one relating to the goals of

SLUSA as a whole and the other relating to the aims of the except clause. Even assuming clear text can ever give way to purpose, Cyan would need some monster arguments on this score to create doubts about SLUSA's meaning. The points Cyan raises come nowhere close to that level.

. . . .

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. . . SLUSA ensured that federal courts would play the principal role in adjudicating securities class actions by means of its revisions to the *1934* Act. As explained earlier, SLUSA amended that statute in the same main way it did the 1933 Act—by adding a state-law class-action bar. But there, the change had a double effect: Because federal courts have exclusive jurisdiction over 1934 Act claims, forcing plaintiffs to bring class actions under the 1934 statute instead of state law also forced them to file in federal court. That meant the bulk of securities class actions would proceed in federal court—because the 1934 Act regulates all trading of securities whereas the 1933 Act addresses only securities offerings. . . . So even without Cyan's contrived reading of the except clause, SLUSA largely accomplished the purpose articulated in its Conference Report: moving securities class actions to federal court.

To be sure, "largely" does not mean "entirely"—but then again, we do not generally expect statutes to fulfill 100% of all of their goals. . . . Under our reading of SLUSA, all covered securities class actions must proceed under federal law; most (*i.e.*, those alleging 1934 Act claims) must proceed in federal court; some (*i.e.*, those alleging 1933 Act claims) may proceed in state court. We do not know why Congress declined to require as well that 1933 Act class actions be brought in federal court; perhaps it was because of the long and unusually pronounced tradition of according authority to state courts over 1933 Act litigation. But in any event, we will not revise that legislative choice, by reading a conforming amendment and a definition in a most improbable way, in an effort to make the world of securities litigation more consistent or pure. . . .

2

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. . . [W]e doubt that the except clause was really necessary to address mixed class actions. Even without that clause, a competent state court faced with such a suit would understand that § 77p requires dismissal of the state-law claims—and that § 77v(a)'s jurisdictional grant over 1933 Act suits is not to the contrary. But on the other hand . . ., Congress may have thought that class-action lawyers would still try to circumvent SLUSA by tacking a 1933 Act claim onto a forbidden state-law class action, on the off chance of finding an error-prone judge. (After all, the worst that could happen was that the court would throw out the state-law claims, leaving the plaintiff with a permissible 1933 Act suit.) To prevent such gamesmanship—to make clear beyond peradventure that courts could not entertain the state-law half of mixed class actions—Congress might have added the except clause.

But even if Congress never specifically considered mixed suits, it could well have added the except clause in a more general excess of caution—to safeguard § 77p's class-action bar come whatever might. This Court has encountered many examples of Congress legislating in that hyper-vigilant way, to "remov[e] any doubt" as to things not particularly doubtful in the first instance. . . . Heedful of that history of machinations, Congress may have determined to eliminate any risk—even if unlikely or at the time unknown—that a pre-existing grant of power to state courts could be used to obstruct SLUSA's new limitation on what they could decide.

And so (this alternative explanation goes) Congress enacted the except clause—which, in insisting that the limitation prevailed, would function as the ultimate (though with any luck, unneeded) fail-safe device.

But the most important response to this purposive argument echoes what we have said before about the weaknesses of Cyan's own construction of the except clause. In the end, the uncertainty surrounding Congress's reasons for drafting that clause does not matter. Nor does the possibility that the risk Congress addressed (whether specific or inchoate) did not exist. Because irrespective of those points, we have no sound basis for giving the except clause a broader reading than its language can bear. And that is especially true in light of the dramatic change such an interpretation would work in the 1933 Act's jurisdictional framework. Whatever questions remain as to the except clause's precise purpose—and we do not gainsay there are some—they do not give us permission to devise a statute (and at that, a transformative one) of our own.

III

Our last task is to address the Federal Government's proposed halfway-house position. The Government rejects Cyan's view that SLUSA stripped state courts of jurisdiction over 1933 Act class actions, for roughly the same reasons we have given. But like Cyan, the Government believes that "Congress would not have been content to leave" such suits "stuck in state court," where the Reform Act's procedural protections do not apply. . . . So the Government offers a reading of SLUSA—in particular, of § 77p(c)—that would allow defendants to remove 1933 Act class actions to federal court, as long as they allege the kinds of misconduct listed in § 77p(b) (*e.g.*, false statements or deceptive devices in connection with a covered security's purchase or sale).

But most naturally read, § 77p(c)—SLUSA's exception to the 1933 Act's general bar on removal—refutes, not supports, the Government's view. Once again, § 77p(c) reads as follows:

> "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section."

In other words, the covered class actions described in § 77p(b) can be removed to federal court (and, once there, shall be subject to dismissal . . .). . . . [W]hich are the covered class actions described in § 77p(b)? By this point, no one should have to be reminded: They are *state-law* class actions alleging securities misconduct. See § 77p(b) (prohibiting "class action[s] based upon the statutory or common law of any State"). So those state-law suits are removable. But conversely, *federal-law* suits like this one—alleging only 1933 Act claims—are not "class action[s] . . . as set forth in subsection (b)." So they remain subject to the 1933 Act's removal ban.

. . . .

At bottom, the Government makes the same mistake as Cyan: It distorts SLUSA's text because it thinks Congress simply must have wanted 1933 Act class actions to be litigated in federal court. But this Court has no license to "disregard clear language" based on an intuition that "Congress must have intended something broader." . . . If further steps are needed, they are up to Congress.

IV

SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court. We accordingly affirm the judgment below.

It is so ordered.

Chapter 11

Securities Class Action Practice and Procedure

§ 11.08 Class Action Tolling

On page 602, add:

CHINA AGRITECH, INC. v. RESH

United States Supreme Court

___ U.S. ___, 138 S. Ct. 1800, 201 L. Ed. 2d 123

Justice GINSBURG delivered the opinion of the Court.

This case concerns the tolling rule first stated in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The Court held in *American Pipe* that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. Where class-action status has been denied, the Court further ruled, members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. Later, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court clarified *American Pipe*'s tolling rule: The rule is not dependent on intervening in or joining an existing suit; it applies as well to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene . . . once the economies of a class action [are] no longer available." . . .

The question presented in the case now before us: Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations? Our answer is no. *American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.

I

The instant suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging violations of the Securities Exchange Act of 1934. In short, the successive complaints each make materially identical allegations that China Agritech engaged in fraud and misleading business practices, causing the company's stock price to plummet when several reports brought the misconduct to light. The Exchange Act has a two-year statute of limitations that begins to run upon discovery of the facts constituting the violation. 28 U.S.C. § 1658(b). The Act also has a five-year statute of repose. The parties agree that the accrual date for purposes of the two-year limitation period is February 3, 2011, and for the five-year repose period, November 12, 2009.

Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011, at the start of the two-year limitation period. As required by the Private Securities Litigation Reform Act of 1995 (PSLRA), Dean's counsel posted notice of the action in two "widely circulated national business-oriented publication[s]," and invited any member of the purported class to move to serve as lead plaintiff. Six shareholders responded to the notice, seeking to be named lead plaintiffs; other shareholders who had filed their own class complaints dismissed them in view of the *Dean* action. On May 3, 2012, after several months of discovery and deferral of a lead-plaintiff ruling, the District Court denied class certification. The plaintiffs, the District Court determined, had failed to establish that China Agritech stock traded on an efficient market—a necessity for proving reliance on a classwide basis. Dean's counsel then published a notice informing shareholders of the certification denial and advising: "You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech." The *Dean* action settled in September 2012, occasioning dismissal of the suit. See 857 F.3d 994, 998 (C.A.9 2017).

On October 4, 2012—within the two-year statute of limitations—Dean's counsel filed a new complaint (*Smyth*) with a new set of plaintiffs and new efficient-market evidence. Eight shareholders responded to the PSLRA notice, seeking lead-plaintiff appointment. The District Court again denied class certification, this time on typicality and adequacy grounds. Thereafter, the *Smyth* plaintiffs settled their individual claims with the defendants and voluntarily dismissed their suit. Because the *Smyth* litigation was timely commenced, putative class members who promptly initiated *individual* suits in the wake of the class-action denial would have encountered no statute of limitations bar.

Respondent Michael Resh, who had not sought lead-plaintiff status in either the *Dean* or *Smyth* proceedings and was represented by counsel who had not appeared in the earlier actions, filed the present suit on June 30, 2014, styling it a class action—a year and a half after the statute of limitations expired. The other respondents moved to intervene, seeking designation as lead plaintiffs; together with Resh, they filed an amended complaint. The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time to initiate class claims.

The Court of Appeals for the Ninth Circuit reversed: "[P]ermitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling," the court reasoned, "would advance the policy objectives that led the Supreme Court to permit tolling in the first place." 857 F.3d, at 1004. Applying

American Pipe tolling to successive class actions, the Ninth Circuit added, would cause no unfair surprise to defendants and would promote economy of litigation by reducing incentives for filing protective class suits during the pendency of an initial certification motion.

We granted certiorari, in view of a division of authority among the Courts of Appeals over whether otherwise-untimely successive class claims may be salvaged by *American Pipe* tolling. . . .

II

A

American Pipe established that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." "A contrary rule," the Court reasoned in *American Pipe*, "would deprive [Federal Rule of Civil Procedure] 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." This is so, the Court explained, because without tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." In *Crown, Cork*, the Court further elaborated: Failure to extend the *American Pipe* rule "to class members filing separate actions," in addition to those who move to intervene, would result in "a needless multiplicity of actions" filed by class members preserving their individual claims—"precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." . . .

American Pipe and *Crown, Cork* addressed only putative class members who wish to sue individually after a class certification denial. . . .

What about a putative class representative, like Resh, who brings his claims as a new class action after the statute of limitations has expired? Neither decision so much as hints that tolling extends to otherwise time-barred class claims. We hold that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action. The "efficiency and economy of litigation" that support tolling of individual claims do not support maintenance of untimely successive class actions; any additional *class* filings should be made early on, soon after the commencement of the first action seeking class certification.

American Pipe tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.

With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option for the claims, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.

Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. . . .

The PSLRA, which governs this litigation, evinces a similar preference, this time embodied in legislation, for grouping class-representative filings at the outset of litigation. When the *Dean* and *Smyth* timely commenced actions were first filed, counsel put any shareholder who might wish to serve as lead plaintiff on notice of the action. Several heeded the call—six in *Dean* and eight in *Smyth*. The PSLRA, by requiring notice of the commencement of a class action, aims to draw all potential lead plaintiffs into the suit so that the district court will have the full roster of contenders before deciding which contender to appoint. . . . With notice and the opportunity to participate in the first (and second) round of class litigation, there is little reason to allow plaintiffs who passed up those opportunities to enter the fray several years after class proceedings first commenced.

Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims. . . . Even *American Pipe*, which did not analyze "criteria of the formal doctrine of equitable tolling in any direct manner," observed that tolling was permissible in the circumstances because plaintiffs who later intervened to pursue individual claims had not slept on their rights. . . . Those plaintiffs reasonably relied on the class representative, who sued timely, to protect their interests in their individual claims. A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting claims and pursuing relief. Her interest in representing the class as lead plaintiff, therefore, would not be preserved by the prior plaintiff's timely filed class suit.

Respondents' proposed reading would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. . . . This prospect points up a further distinction between the individual-claim tolling established by *American Pipe* and tolling for successive class actions. The time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless. Respondents' claims happen to be governed by 28 U.S.C. § 1658(b)(2)'s five-year statute of repose, so the time to file complaints has a finite end. Statutes of repose, however, are not ubiquitous. . . . Most statutory schemes provide for a single limitation period without any outer limit to safeguard against serial relitigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*.

B

. . . .

The watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose. The contrary rule, allowing no tolling for out-of-time class actions, will propel putative class representatives to file suit well within the limitation period and seek certification promptly. For all the above-stated reasons, it is the rule we adopt today: Time to file a class action falls outside the bounds of *American Pipe*.

Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with the Court that in cases governed by the Private Securities Litigation Reform Act of 1995 (PSLRA), like this one, a plaintiff who seeks to bring a successive class action may not rely on the tolling rule established by *American Pipe & Constr. Co. v. Utah*. I cannot, however, join the majority in going further by holding that the same is true for class actions not subject to the PSLRA.

. . . .

Although there is ample support for denying *American Pipe* tolling to successive class actions subject to the PSLRA, the majority's reasoning does not justify denying *American Pipe* tolling to other successive class actions. The majority could have avoided this error by limiting its decision to the issues presented by the facts of this case.

Despite the Court's misstep in adopting an unnecessarily broad rule, district courts can help mitigate the potential unfairness of denying *American Pipe* tolling to class claims not subject to the PSLRA. Where appropriate, district courts should liberally permit amendment of the pleadings or intervention of new plaintiffs and counsel.

Because I agree with the majority's conclusion just as applied to class actions governed by the PSLRA, like this one, I concur only in the judgment.

Chapter 13

Enforcement of the Securities Laws

§ 13.08 The Commission's Enforcement Tools

[A] Injunctions

On page 707, add:

KOKESH v. SECURITIES AND EXCHANGE COMMISSION

United States Supreme Court

____ U.S. ____, 137 S.Ct. 1635, 198 L. Ed. 2d 86 (2017)

Justice SOTOMAYOR delivered the opinion of the Court.

A 5-year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. This case presents the question whether § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law. The Court holds that it does. Disgorgement in the securities-enforcement context is a "penalty" within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.

I

A

After rampant abuses in the securities industry led to the 1929 stock market crash and the Great Depression, Congress enacted a series of laws to ensure that "the highest ethical standards prevail in every facet of the securities industry." The second in the series—the Securities Exchange Act of 1934—established the Securities and Exchange Commission (SEC or Commission) to enforce federal securities laws. Congress granted the Commission power to prescribe "'rules and regulations . . . as necessary or appropriate in the public interest or for the protection of investors.'" In addition to rulemaking, Congress vested the Commission with "broad authority to conduct investigations into possible violations of the federal securities laws." If an investigation uncovers evidence of wrongdoing, the Commission may initiate enforcement actions in federal district court.

Initially, the only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations of securities laws. In the absence of statutory authorization for monetary remedies, the Commission urged courts to order disgorgement as an exercise of their "inherent equity power to grant relief ancillary to an injunction." Generally, disgorgement is a form of "[r]estitution measured by the defendant's wrongful gain." Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment *a*, p. 204 (2010) (Restatement (Third)). Disgorgement requires that the defendant give up "those gains . . . properly attributable to the defendant's interference with the claimant's legally protected rights." Beginning in the 1970's, courts ordered disgorgement in SEC enforcement proceedings in order to "deprive . . . defendants of their profits in order to remove any monetary reward for violating" securities laws and to "protect the investing public by providing an effective deterrent to future violations." . . .

In 1990, as part of the Securities Enforcement Remedies and Penny Stock Reform Act, Congress authorized the Commission to seek monetary civil penalties. The Act left the Commission with a full panoply of enforcement tools: It may promulgate rules, investigate violations of those rules and the securities laws generally, and seek monetary penalties and injunctive relief for those violations. In the years since the Act, however, the Commission has continued its practice of seeking disgorgement in enforcement proceedings.

This Court has already held that the 5-year statute of limitations set forth in 28 U.S.C. § 2462 applies when the Commission seeks statutory monetary penalties. See *Gabelli v. SEC*, 568

U.S. 442 (2013). The question here is whether § 2462, which applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," also applies when the SEC seeks disgorgement.

B

Charles Kokesh owned two investment-adviser firms that provided investment advice to business-development companies. In late 2009, the Commission commenced an enforcement action in Federal District Court alleging that between 1995 and 2009, Kokesh, through his firms, misappropriated $34.9 million from four of those development companies. The Commission further alleged that, in order to conceal the misappropriation, Kokesh caused the filing of false and misleading SEC reports and proxy statements. The Commission sought civil monetary penalties, disgorgement, and an injunction barring Kokesh from violating securities laws in the future.

After a 5-day trial, a jury found that Kokesh's actions violated the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Securities Exchange Act of 1934. . . . The District Court then turned to the task of imposing penalties sought by the Commission. As to the civil monetary penalties, the District Court determined that § 2462's 5-year limitations period precluded any penalties for misappropriation occurring prior to October 27, 2004—that is, five years prior to the date the Commission filed the complaint. The court ordered Kokesh to pay a civil penalty of $2,354,593, which represented "the amount of funds that [Kokesh] himself received during the limitations period. Regarding the Commission's request for a $34.9 million disgorgement judgment—$29.9 million of which resulted from violations outside the limitations period—the court agreed with the Commission that because disgorgement is not a "penalty" within the meaning of § 2462, no limitations period applied. The court therefore entered a disgorgement judgment in the amount of $34.9 million and ordered Kokesh to pay an additional $18.1 million in prejudgment interest.

The Court of Appeals for the Tenth Circuit affirmed. It agreed with the District Court that disgorgement is not a penalty, and further found that disgorgement is not a forfeiture. The court thus concluded that the statute of limitations in § 2462 does not apply to SEC disgorgement claims.

This Court granted certiorari, to resolve disagreement among the Circuits over whether disgorgement claims in SEC proceedings are subject to the 5-year limitations period of § 2462.

Statutes of limitations "se[t] a fixed date when exposure to the specified Government enforcement efforts en[d]." Such limits are "'vital to the welfare of society'" and rest on the principle that "'even wrongdoers are entitled to assume that their sins may be forgotten.'" The statute of limitations at issue here—28 U.S.C. § 2462—finds its roots in a law enacted nearly two centuries ago. In its current form, § 2462 establishes a 5-year limitations period for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." This limitations period applies here if SEC disgorgement qualifies as either a fine, penalty, or forfeiture. *We hold that SEC disgorgement constitutes a penalty.*

[Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period. [Footnote moved to text — editor.]]

A "penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." This definition gives rise to two principles.

First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." Although statutes creating private causes of action against wrongdoers may appear — or even be labeled — penal, in many cases "neither the liability imposed nor the remedy given is strictly penal." This is because "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." Second, a pecuniary sanction operates as a penalty only if it is sought "for the purpose of punishment, and to deter others from offending in like manner"—as opposed to compensating a victim for his loss.

The Court has applied these principles in construing the term "penalty." In *Brady v. Daly*, 175 U.S. 148 (1899), for example, a playwright sued a defendant in Federal Circuit Court under a statute providing that copyright infringers "'shall be liable for damages . . . not less than one hundred dollars for the first [act of infringement], and fifty dollars for every subsequent performance, as to the court shall appear to be just.'" The defendant argued that the Circuit Court lacked jurisdiction on the ground that a separate statute vested district courts with exclusive jurisdiction over actions "to recover a penalty." To determine whether the statutory damages represented a penalty, this Court noted first that the statute provided "for a recovery of damages for an act which violates the rights of the plaintiff, and gives the right of action solely to him" rather than the public generally, and second, that "the whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person." By providing a compensatory remedy for a private wrong, the Court held the statute did not impose a "penalty."

Similarly, in construing the statutory ancestor of § 2462, the Court utilized the same principles. In *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412 (1915), the Interstate Commerce Commission, a now-defunct federal agency charged with regulating railroads, ordered a railroad company to refund and pay damages to a shipping company for excessive shipping rates. The railroad company argued that the action was barred by Rev. Stat. § 1047, Comp. Stat. 1913, § 1712 (now 28 U.S.C. § 2462), which imposed a 5-year limitations period upon any "'suit or prosecution for a penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States.'" The Court rejected that argument, reasoning that "the words 'penalty or forfeiture' in [the statute] refer to something imposed in a punitive way for an infraction of a public law." A penalty, the Court held, does "not include a liability imposed [solely] for the purpose of redressing a private injury." Because the liability imposed was compensatory and paid entirely to a private plaintiff, it was not a "penalty" within the meaning of the statute of limitations. See also *Gabelli*, 568 U.S., at 451-452 ("[P]enalties" in the context of § 2462 "go beyond compensation, are intended to punish, and label defendants wrongdoers").

B

Application of the foregoing principles readily demonstrates that SEC disgorgement constitutes a penalty within the meaning of § 2462.

First, SEC disgorgement is imposed by the courts as a consequence for violating what we described in *Meeker* as public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution. As the Government concedes, "[w]hen the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." Brief for United States 22. Courts agree. See, *e.g*., *SEC v. Rind*, 991 F.2d 1486, 1491 (C.A. 9 1993) ("[D]isgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets"); *SEC v. Teo*, 746

F.3d 90, 102 (C.A.3 2014) ("[T]he SEC pursues [disgorgement] 'independent of the claims of individual investors'" in order to "'promot[e] economic and social policies'").

Second, SEC disgorgement is imposed for punitive purposes. In *Texas Gulf*—one of the first cases requiring disgorgement in SEC proceedings—the court emphasized the need "to deprive the defendants of their profits in order to . . . protect the investing public by providing an effective deterrent to future violations." 312 F.Supp., at 92. In the years since, it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather, courts have consistently held that "[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because "deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e]." *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20 (1979).

Finally, in many cases, SEC disgorgement is not compensatory. As courts and the Government have employed the remedy, disgorged profits are paid to the district court, and it is "within the court's discretion to determine how and to whom the money will be distributed." Courts have required disgorgement "regardless of whether the disgorged funds will be paid to such investors as restitution." Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury. See, e.g., *Fishbach Corp*., 133 F.3d at 171 (affirming distribution of disgorged funds to Treasury where "no party before the court was entitled to the funds and . . . the persons who might have equitable claims were too dispersed for feasible identification and payment"); *SEC v. Lund*, 570 F.Supp. 1397, 1404-1405 (C.D.Cal. 1983) (ordering disgorgement and directing trustee to disperse funds to victims if "feasible" and to disperse any remaining money to the Treasury). Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so. When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.

SEC disgorgement thus bears all the hallmarks of a penalty. It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate. The 5-year statute of limitations in § 2462 therefore applies when the SEC seeks disgorgement.

C

The Government's primary response to all of this is that SEC disgorgement is not punitive but "remedial" in that it "lessen[s] the effects of a violation" by "'restor[ing] the status quo.'" As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation. Thus, for example, "an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." Individuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits. And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit. App. To Pet. for Cert. 43a; see Restatement (Third) § 51, Comment *h*, at 216 ("As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid"). In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial, sanction: Disgorgement, that court explained, is intended not only to "prevent the wrongdoer's unjust enrichment" but also "to deter others' violations of the securities laws." True, disgorgement serves compensatory goals in some cases; however, we have emphasized "the fact that sanctions frequently serve more than one purpose." "'A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Austin v. United States*, 509 U.S. at 621; cf. *Bajakajian*, 524 U.S., at 331, n. 6 ("[A] modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part"). Because disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers" as a consequence of violating public laws, they represent a penalty and thus fall within the 5-year statute of limitations of § 2462.

III

Disgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under § 2462. Accordingly, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued.

The judgment of the Court of Appeals for the Tenth Circuit is reversed.

[C] Other SEC Administrative Proceedings

On page 714, add:

LUCIA v. SECURITIES AND EXCHANGE COMMISSION

United States Supreme Court

___ U.S. ___, 138 S. Ct. 736, 199 L. Ed 2d 602 (2018)

JUSTICE KAGAN delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. Art. II, § 2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such "Officers." In keeping with *Freytag v. Commissioner*, 501 U.S. 868 (1991), we hold that they do.

I

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. But the Commission also may, and typically does, delegate that task to an ALJ. The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all.

An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding. Those powers "include, but are not limited to," supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally "[r]egulating the course of" the proceeding and the "conduct of the parties and their counsel"; and imposing sanctions for "[c]ontemptuous conduct" of violations of procedural requirements.

As that list suggests, an SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial.

After a hearing ends, the ALJ issues an "initial decision." That decision must set out "findings and conclusions" about all "material issues of fact [and] law"; it also must include the "appropriate order, sanction, relief, or denial thereof." The Commission can then review the ALJ's decision, either upon request or *sua sponte*. But if it opts against review, the Commission "issue[s] an order that the [ALJ's] decision has become final." At that point, the initial decision is "deemed the action of the Commission."

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. Lucia marketed a retirement savings strategy called "Buckets of Money." In the SEC's view, Lucia used misleading slideshow presentations to deceive prospective clients. The SEC charged Lucia under the Investment Advisers Act, § 80b-1 *et seq*., and assigned ALJ Cameron Elliot to adjudicate the case. After nine days of testimony and argument, Judge Elliot issued an initial decision concluding that Lucia had violated the Act and imposing sanctions, including civil penalties of $300,000 and a lifetime bar from the investment industry. In his decision, Judge Elliot made factual findings about only one of the four ways the SEC thought Lucia's slideshow misled investors. The Commission thus remanded for factfinding on the other three claims, explaining that an ALJ's "personal experience with the witnesses" places him "in the best position to make findings of fact" and "resolve any conflicts in the evidence." Judge Elliot then made additional findings of deception and issued a revised initial decision, with the same sanctions.

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. According to Lucia, the

Commission's ALJs are "Officers of the United States" and thus subject to the Appointments Clause. Under that Clause, Lucia noted, only the President, "Courts of Law," or "Heads of Departments" can appoint "Officers." See Art. II, § 2, cl. 2. And none of those actors had made Judge Elliot an ALJ. To be sure, the Commission itself counts as a "Head[] of Department[]." . . . But the Commission had left the task of appointing ALJs, including Judge Elliot, to SEC staff members. As a result, Lucia contended, Judge Elliot lacked constitutional authority to do his job.

The Commission rejected Lucia's argument. It held that the SEC's ALJs are not "Officers of the United States." Instead, they are "mere employees"—officials with lesser responsibilities who fall outside the Appointments Clause's ambit. The Commission reasoned that its ALJs do not "exercise significant authority independent of [its own] supervision." Because that is so (said the SEC), they need no special, high-level appointment.

Lucia's claim fared no better in the Court of Appeals for the D.C. Circuit. A panel of that court seconded the Commission's view that SEC ALJs are employees rather than officers, and so are not subject to the Appointments Clause. See 832 F. 3d 277, 283-289 (2016). Lucia then petitioned for rehearing en banc. The Court of Appeals granted that request and heard argument in the case. But the ten members of the en banc court divided evenly, resulting in a *per curiam* order denying Lucia's claim. See 868 F.3d 1021 (2017). That decision conflicted with one from the Court of Appeals for the Tenth Circuit. See *Bandimere v. SEC*, 844 F. 3d 1168, 1179 (2016).

Lucia asked us to resolve the split by deciding whether the Commission's ALJs are "Officers of the United States within the meaning of the Appointments Clause." Up to that point, the Federal Government (as represented by the Department of Justice) had defended the Commission's position that SEC ALJs are employees, not officers. But in responding to Lucia's petition, the Government switched sides. So when we granted the petition, we also appointed an *amicus curiae* to defend the judgment below. We now reverse.

II

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, § 2, cl. 2. And as all parties agree, none of those actors appointed Judge Elliot before he heard Lucia's case; instead, SEC staff members gave him an ALJ slot. So if the Commission's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of "lesser functionaries" in the Government's workforce. For if that is true, the Appointments Clause cares not a whit about who named them. . . .

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *United States v. Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." [99 U.S. 508 at 511-512 (1879).] Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercise[ed] significant authority pursuant to the laws of the United States." The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the *amicus* and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments. . . . And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one, because in *Freytag v. Commis*sioner, 501 U.S. 868 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In "comparatively narrow and minor matters," they could both hear and definitively resolve a case for the Tax Court. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to "prepare proposed findings and an opinion" for a regular Tax Court judge to consider. The proceeding challenged in *Freytag* was a major one, involving $1.5 billion in alleged tax deficiencies. After conducting a 14-week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ's work as the opinion of the Tax Court. The losing parties argued on appeal that the STJ was not constitutionally appointed.

This Court held that the Tax Court's STJs are officers, not mere employees. Citing *Germaine*, the Court first found that STJs hold a continuing office established by law. They serve on an ongoing, rather than a "temporary [or] episodic[,] basis"; and their "duties, salary, and means of appointment" are all specified in the Tax Code. The Court then considered, as *Buckley* demands, the "significance" of the "authority" STJs wield. In addressing that issue, the

Government had argued that STJs are employees, rather than officers, in all cases (like the one at issue) in which they could not "enter a final decision." But the Court thought the Government's focus on finality "ignore[d] the significance of the duties and discretion that [STJs] possess." Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." And the Court observed that "[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion." That fact meant they were officers, even when their decisions were not final.

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. Indeed, everyone here—Lucia, the Government, and the *amicus*—agrees on that point. . . . Far from serving temporarily or episodically, SEC ALJs "receive[ ] a career appointment." And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment."

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. . . . Second, the ALJs (like STJs) "conduct trials." As detailed earlier, they administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. Third, the ALJs (like STJs) "rule on the admissibility of evidence." They thus critically shape the administrative record (as they also do when issuing document subpoenas). And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." . . . That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.

The *amicus* offers up two distinctions to support the opposite conclusion. His main argument relates to "the power to enforce compliance with discovery orders"—the fourth of *Freytag*'s listed functions. The Tax Court's STJs, he states, had that power "because they had authority to punish contempt" (including discovery violations) through fines or imprisonment. . . . By contrast, he observes, the Commission's ALJs have less capacious power to sanction misconduct. The *amicus*'s secondary distinction involves how the Tax Court and Commission, respectively, review the factfinding of STJs and ALJs. The Tax Court's rules state that an STJ's finding of fact "shall be presumed" correct. In comparison, the *amicus* notes, the SEC's regulations include no such deferential standard.

But those distinctions make no difference for officer status. To start with the *amicus*'s primary point, *Freytag* referenced only the general "power to enforce compliance with discovery orders," not any particular method of doing so. True enough, the power to toss malefactors in jail is an especially muscular means of enforcement—the nuclear option of compliance tools. But just as armies can often enforce their will through conventional weapons, so too can administrative judges. As noted earlier, the Commission's ALJs can respond to discovery violations and other contemptuous conduct by excluding the wrongdoer (whether party or lawyer) from the proceedings—a powerful disincentive to resist a court order. Similarly, if the offender is an attorney, the ALJ can "[s]ummarily suspend" him from representing his client—not something the typical lawyer wants to invite. And finally, a judge who will, in the end, issue an opinion complete with factual findings, legal conclusions, and sanctions has substantial informal power to ensure the parties stay in line. Contrary to the *amicus*'s view, all that is enough to satisfy *Freytag*'s fourth item (even supposing, which we do not decide, that each of those items is necessary for someone conducting adversarial hearings to count as an officer).

And the *amicus*'s standard-of-review distinction fares just as badly. The *Freytag* Court never suggested that the deference given to STJs' factual findings mattered to its Appointments Clause analysis. Indeed, the relevant part of *Freytag* did not so much as mention the subject (even though it came up at oral argument). . . . And anyway, the Commission often accords a similar deference to its ALJs, even if not by regulation. The Commission has repeatedly stated, as it did below, that its ALJs are in the "best position to make findings of fact" and "resolve any conflicts in the evidence." . . . And when factfinding derives from credibility judgments, as it frequently does, acceptance is near-automatic. Recognizing ALJs' "personal experience with the witnesses," the Commission adopts their "credibility finding[s] absent overwhelming evidence to the contrary." . . . That practice erases the constitutional line the *amicus* proposes to draw.

The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.