No. 10-1261

In the Supreme Court of the United States

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

v.

VANESSA SIMMONDS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether and under what circumstances the two-year time limit for bringing an action to recover insiders' short-swing trading profits pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), may be tolled for equitable reasons.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC), administers and enforces the federal securities laws. The question presented in this case is whether and under what circumstances the two-year time limit for filing suit to recover insiders' short-swing trading profits pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), may be tolled for equitable reasons. Because Section 16(b) protects against the misuse of inside information in the securities markets, the United States has a substantial interest in this Court's resolution of the question presented.

STATEMENT

1. In enacting the Securities Exchange Act of 1934 (1934 Act), "Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public." *Foremost-McKesson, Inc.* v. *Provident Sec. Co.*, 423 U.S. 232, 243 (1976). Congress further recognized that, "[b]y trading on this information," corporate insiders "could reap profits at the expense of less well informed investors." *Ibid.* Congress attempted to protect outside investors and the markets against such insider trading by (a) requiring insiders to report their transactions in the company's securities and (b) providing for disgorgement of short-swing profits from such transactions under specified circumstances.

a. Section 16(a) of the 1934 Act applies to "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security * * * , or who is a director or an officer of the issuer of such security." 15 U.S.C. 78p(a)(1). Those insiders must file a disclosure statement with the SEC on a report called Form 4 when they purchase or sell securities of the relevant issuer. See 15 U.S.C. 78p(a)(2)(C); 17 C.F.R. 240.16a-3(a). Because statements filed with the SEC pursuant to Section 16(a) are made available to the public, see 15 U.S.C. 78p(a)(4); 4 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 13.1, at 558-559 (6th ed. 2009) (Hazen), Section 16(a) alerts investors to transactions by beneficial owners, directors, and officers in the shares of their company.

b. In Section 16(b), Congress required the beneficial owners, directors, and officers subject to Section 16(a)'s reporting requirements to disgorge any profits they re-

ceived from "short-swing" transactions. Section 16(b) applies to "any profit realized by [an issuer's covered insider] from any purchase and sale, or any sale and purchase, of any equity security of such issuer * * * within any period of less than six months." 15 U.S.C. 78p(b). Section 16(b) "imposes a form of strict liability" on beneficial owners, directors, and officers, requiring them "to disgorge their profits even if they did not trade on inside information or intend to profit on the basis of such information." *Gollust* v. *Mendell*, 501 U.S. 115, 122 (1991).

Unlike most of the federal securities laws, Section 16(b) "rel[ies] solely on the issuers of stock and their security holders" and "does not confer enforcement authority on the [SEC]." *Gollust*, 501 U.S. at 122. Section 16(b) provides that a suit to recover short-swing profits "may be instituted at law or in equity * * * by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter." 15 U.S.C. 78p(b). Section 16(b) also limits the time period for bringing an action to recover short-swing profits. In the provision directly at issue in this case, Section 16(b) states that "no such suit shall be brought more than two years after the date such profit was realized." *Ibid.*

2. a. This case stems from Initial Public Offerings (IPOs) of equity securities during the stock market boom of 1998 to 2000. In 2001, after the bubble had burst, thousands of investors filed class actions against 55 underwriters (including petitioners here), 310 issuers, and hundreds of individual officers, alleging that the defendants had engaged in a scheme to defraud the in-

vesting public in violation of federal securities laws. See *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (*IPO*), clarifying decision on denial of reh'g, 483 F.3d 70 (2d Cir. 2007).

The *IPO* plaintiffs alleged that the underwriters had artificially inflated the price of the issuers' securities in three ways. First, the underwriters allegedly entered into "[t]ie-[i]n agreements" with customers—*i.e.*, agreements that required customers who received an allocation of shares in an IPO to purchase additional shares in the aftermarket, typically at progressively higher prices (a practice known as "laddering"). *IPO*, 471 F.3d at 27. Second, the underwriters allegedly required customers who received IPO allocations to pay various forms of undisclosed compensation, including inflated brokerage commissions on IPO securities, commissions on unnecessary transactions in unrelated securities, and purchases of other unwanted securities. *Ibid.* Third, the underwriters allegedly encouraged their analysts to manipulate the securities' prices. *Ibid.* The *IPO* plaintiffs claimed that these practices rendered the underwriters liable under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. 77k and 77*o*, as well as Sections 10(b) and 20(a) of the 1934 Act, 15 U.S.C. 78j and 78t. *Id.* at 28.

The underwriters' conduct also was challenged under the antitrust laws. In January 2002, a group of investors filed antitrust actions against ten investment banks (including some of the petitioners here), alleging that they had formed underwriting syndicates in order to impose harmful conditions on IPO customers. See *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264, 269 (2007). According to the antitrust plaintiffs, those conditions consisted of two of the types of conduct at issue in the

IPO securities litigation: tie-in or laddering agreements, and the extraction of undisclosed compensation in return for IPO allocations. *Id*. at 269-270. In *Billing*, however, this Court held that the securities laws impliedly precluded the imposition of antitrust liability for the underwriters' conduct. *Id*. at 284.

b. The plaintiff in this case (respondent in this Court) has asserted a different legal challenge to the underwriters' conduct. Respondent owns stock in 54 companies that conducted IPOs in 1999 or 2000, see Pet. App. 82a, and she brought 54 virtually identical actions under Section 16(b) of the 1934 Act. The complaints alleged that petitioners—the investment bank or banks that underwrote the IPO at issue in each action—had "created the opportunity for themselves to directly and indirectly profit or share in any profits derived from transactions" in the IPO allocation and aftermarket. See 2:07-cv-01549 Docket entry No. 11, at 4 (W.D. Wash. Feb. 25, 2008) (Onvia Compl.). According to respondent, petitioners had artificially inflated stock prices by underpricing the IPO securities, entering into laddering agreements with customers, and entering into lock-up agreements that prevented the sale of the securities for six months from the IPO date. *Id*. at 5-6.

Respondent alleged that, as a result of those practices, petitioners formed a "group" with the principal shareholders, directors, and officers of each company. Onvia Compl. 7; see 15 U.S.C. 78m(d) (establishing group ownership requirements); 17 C.F.R. 240.13d-5 (same). According to respondent, each group "beneficially owned in excess of 10 percent" of the relevant company's outstanding stock, which subjected the group to the requirements of Section 16(a) and (b). Onvia Compl. 7-8. Respondent contended that petitioners were liable

under Section 16(b) for profiting in various ways when their customers and other group members—*i.e.*, the shareholders, directors, and officers who received IPO shares—engaged in short-swing transactions. *Id.* at 8. Respondent further alleged that petitioners were liable under Section 16(a) for failing to report the short-swing transactions from which they had allegedly profited. *Id.* at 8-9.

3. The district court dismissed all 54 complaints. Pet. App. 78a-111a. As relevant here, the court dismissed 24 of the complaints on the ground that they were brought outside the two-year limitations period in Section 16(b). *Id.* at 105a-110a.[1] The court recognized that the limitations period could be equitably tolled. *Id.* at 105a. It held, however, that tolling was inappropriate here because "the Issuer Defendants' shareholders were fully advised of the facts giving rise to [respondent's] claim well over five years before [respondent] filed these actions." *Ibid.*; see *id.* at 107a ("The only recent development giving rise to these claims is [respondent's] acquisition of shares in the 54 Issuer Defendants' companies.").

4. a. The court of appeals reversed in relevant part. Pet. App. 1a-75a. The court held that, under its prior decision in *Whittaker* v. *Whittaker Corp.*, 639 F.2d 516 (9th Cir.), cert. denied, 454 U.S. 1031 (1981), the two-year limitations period in Section 16(b) "is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." Pet. App. 63a. Be-

[1] The district court dismissed the other 30 complaints on the ground that respondent's demand letters to the issuers were inadequate. Pet. App. 94a-102a; see 15 U.S.C. 78p(b) (requiring a security holder to request that the issuer bring suit before initiating an action).

cause "[respondent] alleges that [petitioners] did not file any Section 16(a) reports," the court concluded that "[respondent's] claims are not time-barred." *Id.* at 66a.

b. In addition to authoring the panel opinion, Judge Milan D. Smith, Jr. filed a separate concurring opinion. Pet. App. 72a-75a. He would have read Section 16(b) as establishing "a firm bar against Section 16(b) suits filed more than two years after the transaction is completed." *Id.* at 72a. He agreed with the other panel members, however, that respondent's suit was timely under the court's prior decision in *Whittaker*. *Id.* at 75a.

SUMMARY OF ARGUMENT

A. Section 16(b) of the Securities Exchange Act of 1934, which provides that a suit to recover certain short-swing trading profits shall be brought within two years of the date those profits are realized, is an ordinary statute of limitations. Like any such federal statute of limitations, it is "normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). That presumption is strengthened in this context, because Section 16(b) and related provisions of the securities laws expressly preserve room for the operation of traditional equitable doctrines.

B. This Court has long recognized that equity tolls a statute of limitations when the defendant has misrepresented or wrongfully concealed facts essential to the plaintiff's cause of action. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946). That rule applies where, as in this case, insiders are alleged to have concealed short-swing transactions by breaching an independent legal duty to report those transactions under

Section 16(a). In that circumstance, Section 16(b)'s limitations period should be tolled until a reasonably diligent security holder knows or should know the facts that would form the basis of a short-swing claim. Although a Section 16(a) report will usually provide the first public notice that a short-swing transaction has occurred, that information may come to light in other ways as well. The court of appeals therefore erred in holding that, as a matter of equity, the statute is invariably tolled until a Section 16(a) report is filed.

C. Petitioners' various arguments for treating Section 16(b) as a statute of repose do not overcome the background presumption that equitable tolling applies. First, the text of Section 16(b), like a typical federal statute of limitations, establishes a time period for bringing suit but does not address the operation of traditional equitable doctrines. Second, the text and structure of Section 16(b) are wholly different from other statutory time limits that this Court has found not to be subject to equitable tolling. Third, the unenacted version of Section 16(b) on which petitioners rely (Br. 25) only demonstrates that the House of Representatives declined to adopt the type of provision that is used elsewhere in the securities laws to create a period of repose. Finally, the core purposes of Section 16(b) would be defeated if its limitations period could run while insiders fail to file Section 16(a) reports, conceal their short-swing transactions, and thereby insulate themselves from liability.

ARGUMENT

SECTION 16(b)'S TWO-YEAR LIMITATIONS PERIOD IS EQUITABLY TOLLED UNTIL A REASONABLY DILIGENT SECURITY HOLDER KNOWS OR SHOULD KNOW THE FACTS UNDERLYING HIS CLAIM

Section 16(b) provides that no suit to recover profits from beneficial owners, directors, or officers who have engaged in short-swing transactions "shall be brought more than two years after the date such profit was realized." 15 U.S.C. 78p(b). Neither Section 16(b) itself nor the surrounding provisions of the 1934 Act establish an exception to the usual background rule that limitations periods for commencing suit are subject to equitable tolling. The court of appeals erred, however, in holding categorically that the limitations period could not begin to run until petitioners filed the disclosure statements allegedly required by Section 16(a). Although Section 16(a) statements perform an important role in alerting investors to transactions for which Section 16(b) requires disgorgement of profits, they are not the only potential source of such information. If other public disclosures adequately inform security holders that particular transactions have occurred, further tolling of the time for bringing suit to disgorge profits from those transactions is unwarranted, even if no Section 16(a) statement has been filed.

A. Section 16(b)'s Limitations Period Is Subject To Equitable Tolling

1. Section 16(b) states that "no * * * suit" to recover insider trading profits "shall be brought more than two years after the date such profit was realized." That requirement does not speak to the power of courts to entertain a Section 16(b) action, but instead is a tradi-

tional statute of limitations that establishes a nonjurisdictional affirmative defense. See *Day* v. *McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense * * * is not jurisdictional.") (internal quotation marks omitted); see also *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (explaining that 28 U.S.C. 2244(d)'s one-year time limit for state prisoners to file habeas petitions "does not set forth 'an inflexible rule requiring dismissal whenever' its 'clock has run'") (quoting *Day*, 547 U.S. at 208). Whereas federal courts "must raise and decide jurisdictional questions that the parties either overlook or elect not to press," *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011), statutes of limitations are generally "subject to rules of forfeiture and waiver," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008) (*John R. Sand*); see *Day*, 547 U.S. at 213 (Scalia, J., dissenting) ("[T]he enactment of time-limitations periods * * * , without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture.").

2. In addition to being waivable and forfeitable, "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 130 S. Ct. at 2560 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); see *John R. Sand*, 552 U.S. at 133 (explaining that statutes of limitations "typically permit courts to toll the limitations period in light of special equitable circumstances"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (noting that statutes of limitations are "traditionally subject to equitable tolling"); *Honda* v. *Clark*, 386 U.S. 484, 501 (1967) (applying a "traditional equitable tolling principle" to a statute of limitations contained in the Trading with the Enemy

Act, 50 U.S.C. App. § 34, at 1039); *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 349 (1875) (applying equitable tolling to a federal bankruptcy statute of limitations). Indeed, the Court has described it as "hornbook law that limitations periods are customarily subject to equitable tolling." *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks and citation omitted).

With respect to Section 16(b), "the presumption's strength is reinforced by the fact" that Congress preserved room for the operation of traditional equitable doctrines under the federal securities laws. *Holland*, 130 S. Ct. at 2560 (internal quotation marks omitted). "When Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934, it did not specifically indicate what effect the statutory scheme should have upon equitable defenses formerly available in securities actions." Alice R. Belair, *Securities Actions: Equitable Defenses and the Good Faith Defense for "Controlling Persons*," 44 Fordham L. Rev. 1173, 1173 (1976) (footnotes omitted). Congress did, however, provide that "the rights and remedies" supplied by the Acts "shall be in addition to any and all other rights and remedies that may exist at law or *in equity*." 15 U.S.C. 78bb(a) (emphasis added); accord 15 U.S.C. 77p. And Section 16(b) itself provides that a suit to recover an insider's short-swing profits "may be instituted at law or *in equity* in any court of competent jurisdiction." 15 U.S.C. 78p(b) (emphasis added). Thus, to the extent that Section 16(b) addresses the question, it reinforces the presumption of equitable tolling previously recognized at common law, see *Bailey*, *supra*.

B. Section 16(b)'s Limitations Period Is Equitably Tolled Until A Reasonably Diligent Security Holder Knows Or Should Know The Facts Underlying His Claim

This Court has long recognized that equity tolls a statute of limitations when the defendant misrepresents or wrongfully conceals facts essential to the plaintiff's cause of action. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 393, 397 (1946). That rule applies where, as in this case, insiders are alleged to have concealed their short-swing transactions by breaching an independent legal duty to file reports under Section 16(a). In that circumstance, Section 16(b)'s limitations period should be tolled until a reasonably diligent security holder knows or should know the facts that would form the basis of a short-swing claim. Although a report filed under Section 16(a) will usually provide the first public notice that a short-swing transaction has occurred, such transactions may come to light through other means as well. The court of appeals therefore erred in holding that, as a matter of equity, the statute is always tolled until the filing of a Section 16(a) report.

1. Equity tolls the limitations period until a reasonably diligent security holder knows or should know the facts underlying his short-swing claim

a. This Court has repeatedly recognized that "equity tolls the statute of limitations in cases of fraud and concealment." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001) (*TRW*); see *id.* at 37 (Scalia, J., concurring in the judgment) (recognizing "the historical exception for suits based on fraud"). More generally, the Court has "allowed equitable tolling in situations * * * where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to

pass." *Irwin*, 498 U.S. at 96. The principle that a limitations period is presumptively tolled when a defendant has wrongfully concealed his alleged misconduct from a potential plaintiff, or has otherwise improperly hindered a plaintiff's effort to commence suit in a timely manner, derives from the equitable maxim that a party should not be permitted to benefit from its own misconduct. See, *e.g.*, *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-233 (1959) ("[W]e need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.") (footnote omitted). This Court has long held as a matter of equity that a defendant cannot use his own misconduct as a defense, including by unfairly relying on a statute of limitations.

Section 16(b)'s disgorgement requirement does not depend on proof that the defendant acted with fraudulent or otherwise wrongful intent. But the principle that "equity tolls the statute of limitations in cases of fraud and concealment," *TRW*, 534 U.S. at 27, is not limited to suits in which the plaintiff's *underlying cause of action* is based on fraud. Rather, it applies more broadly to cases in which a defendant misrepresents or wrongfully conceals facts essential to the plaintiff's cause of action, regardless of the nature of the underlying claim. The Court in *TRW* relied (see *ibid.*) on its decision in *Holmberg*, which was a suit to recover for a bank's liability against a shareholder. See 327 U.S. at 393. The plaintiffs in *Holmberg* alleged that the defendant had concealed his ownership of stock, and had thereby avoided the statutory liability, by holding the stock in

the name of another person. See *ibid.* Although the Court held that the limitations period could be tolled in those circumstances, see *id.* at 396-397, its description of the plaintiffs' statutory cause of action (see *id.* at 393 & n.1) did not suggest that proof of fraud or deceit was an element of the underlying claim. Similarly in *Glus*, the Court applied equitable-tolling principles to a suit under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, based on the defendants' alleged use of deceit to induce the plaintiff to allow the statutory deadline to pass. See 359 U.S. at 232-235.

To be sure, tolling may often be applied in cases where the plaintiff's underlying claim is based on fraud, since the same misrepresentation that gives rise to the plaintiff's cause of action may also prevent the plaintiff from knowing that he has been defrauded. See, *e.g.*, *Exploration Co.* v. *United States*, 247 U.S. 435, 445-446 (1918) (suit to annul patents procured by fraud). The logic of the equitable-tolling doctrine, however, applies whenever a defendant misrepresents or wrongfully conceals facts essential to the plaintiff's cause of action. Whether or not the plaintiff's cause of action is based on fraud, permitting the defendant to obtain a statute-of-limitations dismissal in that manner would allow him to profit from his own misconduct.

In the limitations context, the Court has sometimes described the doctrine as one of "discovery"—*i.e.*, a rule that a cause of action does not accrue "until the plaintiff has 'discovered' it." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010). That doctrine arose in fraud and concealment cases "as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action.'" *Ibid.* (quoting *Bay Area Laundry & Dry Cleaning Pension*

Trust Fund v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). That discovery rule is best understood as an application of more general tolling principles to cases involving fraud or concealment. Courts have recognized various reasons for exercising their equitable authority to toll a limitations period, and they have recognized in particular that "a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Ibid.* "[T]he bar of the statute," this Court has therefore explained, "does not begin to run" until the deceptive conduct is discovered. *Holmberg*, 327 U.S. at 397 (quoting *Bailey*, 88 U.S. (21 Wall.) at 348). But whether the doctrine is described in terms of the running of the limitations period or of the accrual of the plaintiff's cause of action, its legal effect is the same. When a defendant has misrepresented or wrongfully concealed facts essential to the plaintiff's cause of action, a statutory time limit on bringing suit commences when the relevant information is discovered or should have been discovered by a reasonably diligent plaintiff.[2]

b. Such misrepresentation or concealment can occur, of course, through affirmative conduct that misstates material facts or conveys a misimpression regarding those facts. Tolling may also be appropriate, however, when a defendant breaches an independent legal duty of

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[2] Federal courts "generally apply a discovery accrual rule when a statute is silent on the issue." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). This Court has not decided, however, to what extent a discovery rule applies beyond cases in which a defendant has misrepresented or wrongfully concealed facts essential to the plaintiff's cause of action. See *TRW*, 534 U.S. at 27. This case presents no occasion to decide that question, because on any approach to the discovery rule, concealment of material information in violation of a statutory duty to disclose is sufficient to toll an applicable statute of limitations.

disclosure. See, *e.g.*, John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 887 (1933) (Dawson) ("The absence of direct misrepresentation is supplied by an affirmative obligation to make full disclosure."); *Chiarella* v. *United States*, 445 U.S. 222, 230 (1980) (holding that "silence in connection with the purchase or sale of securities may operate as a fraud actionable under [Section] 10(b)" of the 1934 Act, but "[s]uch liability is premised upon a duty to disclose"); American Law Inst., *Federal Securities Code* § 202(61)(B) (1980) ("Inaction or silence when there is a duty to act or speak may be a fraudulent act.").

When the law imposes a duty to disclose information, the defendant's breach of that duty ordinarily tolls an applicable statute of limitations if the breach prevents the plaintiff from learning facts necessary to the assertion of his claim. See Dawson 888-890 (noting that courts have recognized equitable tolling when a fiduciary breaches a disclosure obligation); see also *Sprint Commc'ns Co.* v. *FCC*, 76 F.3d 1221, 1226-1227 (D.C. Cir. 1996) ("Silence does toll the statute of limitations, however, if the defendant has an affirmative duty to disclose," including "a statutory duty to disclose the relevant information."); *Smith* v. *Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (holding that the government's breach of its statutory duty to disclose unauthorized wiretapping tolls the statute of limitations for damages claims), cert. denied, 453 U.S. 912 (1981); cf. *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336, 342, 343 (D.C. Cir. 1991) (R.B. Ginsburg, J.) ("[B]reach of the employers' contractual obligations to contribute and report seems likely to be a hidden injury, similar to the type of injury that has long triggered the discovery rule.").

An insider's failure to file a report in violation of Section 16(a) is the type of unlawful concealment that has traditionally tolled applicable limitations periods. Indeed, the case for tolling is particularly strong in this context because a core purpose of Section 16(a) is to "provid[e] information which will serve as the basis for a claim under section 16(b)." Michael J. Kaufman, *Securities Litigation: Damages* 8:7 (2001); see *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418, 426 (1972) (explaining that this Court has "[r]ecognized the interrelatedness of [Section] 16(a) and [Section] 16(b)"). Congress's objectives in enacting Section 16(b) "would be thwarted if insiders could escape liability by not reporting as required under [Section] 16(a)." *Whittaker* v. *Whittaker Corp.*, 639 F.2d 516, 528 (9th Cir.), cert. denied, 454 U.S. 1031 (1981). The rule that petitioners advocate thus would not simply allow violators of Section 16(a) to profit from their own wrongs; it would allow them to derive precisely the wrongful insulation from suit that Section 16(a) was intended to prevent.

In most instances, a potential Section 16(b) plaintiff will have no way of knowing that an insider has engaged in a short-swing transaction if no Section 16(a) report is filed. For that reason, courts and commentators have recognized that "[t]he failure to disclose in [Section] 16(a) reports, whether intentional or inadvertent, is deemed concealment, thus triggering the traditional equitable tolling doctrine of fraudulent concealment." *Whittaker*, 639 F.2d at 527 n.9; see *Litzler* v. *CC Invs., L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004) ("[T]he incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a) through failure to file a Form 4."); Donald C. Cook and Myer Feldman, *Insider Trading Under the*

Securities Exchange Act, 66 Harv. L. Rev. 385, 413 (1953) ("Concealment of [a short-swing transaction], whether intentional or inadvertent, effectively prevents suit and demands the mitigating construction of the statute of limitations given by courts in other contexts.") (internal quotation marks omitted).

Petitioners contend (Br. 35-36) that they had no duty to disclose the transactions at issue because they were not, "directly or indirectly, the beneficial owner[s] of more than 10 percent of" the relevant securities. 15 U.S.C. 78p(a). That argument is not relevant, however, to the proper application of Section 16(b)'s timing requirement at this stage of the case. Petitioners properly raised their statute-of-limitations defense in a motion to dismiss. See Pet. App. 40a-41a; Fed. R. Civ. P. 8(c)(1), 12(b)(6); *John R. Sand.*, 552 U.S. at 133. In ruling on petitioners' limitations defense, the district court therefore was required to take as true the facts alleged in respondent's complaints. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009). The court was thus required to assume, in determining whether Section 16(b)'s limitations period should be tolled, that petitioners were members of groups that "beneficially owned in excess of 10 percent" of various publicly traded securities, and that petitioners profited when their customers and other group members—*i.e.*, the shareholders, directors, and officers who received IPO shares—engaged in short-swing transactions. Onvia Compl. 7-8.

Respondent's allegations in support of her Section 16(b) claim for disgorgement thus encompassed all of the facts necessary to establish petitioners' obligation to disclose the transactions under Section 16(a). That overlap is not coincidental. Section 16(b)'s disgorge-

ment requirement applies to short-swing trades made by "*such* beneficial owner[s], director[s], or officer[s]," 15 U.S.C. 78p(b) (emphasis added)—*i.e.*, the same owners, directors, and officers who are described in Section 16(a). If the allegations in a Section 16(b) suit are sufficient to survive a motion to dismiss on the merits, they are sufficient to require the court to assume, at that threshold stage of the suit, that the defendant was obligated to disclose the transactions in a Section 16(a) report. Indeed, petitioners do not contend that an insider's short-swing trade can trigger Section 16(b)'s disgorgement obligation without triggering Section 16(a)'s reporting requirement. And it is undisputed that petitioners have never filed Section 16(a) reports with respect to the transactions at issue here.

2. Equity does not invariably toll the limitations period until the filing of a Section 16(a) report

a. For the foregoing reasons, respondent's complaints alleged facts sufficient to warrant some tolling of Section 16(b)'s limitations period. That equitable tolling ceases, however, "when the litigant first knows or with due diligence should know facts that will form the basis for an action." *Merck*, 130 S. Ct. at 1794 (quoting 2 Calvin Corman, *Limitation of Actions* § 11.1.1, at 134 (1991 & 1993 Supp.)). As this Court explained in *Merck*, the historical exception in equity for cases of fraud or concealment prevents the limitations period from running until the plaintiff actually discovers the relevant facts or until a reasonably diligent plaintiff should have discovered those facts. *Id.* at 1793-1794; see, *e.g.*, *Holmberg*, 327 U.S. at 397 (limitations period may be tolled "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of

diligence or care on his part") (internal quotation marks omitted).

Courts have long treated that principle as an integral feature of the discovery rule. This Court recognized in *Merck* that, "for more than a century, courts have understood that '[f]raud is deemed to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered." 130 S. Ct. at 1794 (quoting 2 Horace G. Wood, *Limitation of Actions* § 276b(11), at 1402 (4th ed. 1916)); see *Kirby* v. *Lake Shore & Mich. S. R.R. Co.*, 120 U.S. 130, 138 (1887) (stating that the discovery rule "regard[s] the cause of action as having accrued at the time the fraud was or should have been discovered"). State and federal courts have interpreted the discovery rule "to refer not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know." *Merck*, 130 S. Ct. at 1794. And as the *Merck* Court explained, commentators have understood the doctrine to operate in the same way. See *ibid.* (citing Corman, *supra*, § 11.1.1, at 134, and 37 Am. Jur. 2d, *Fraud and Deceit* § 347, at 354 (2001 & Supp. 2009)).

Accordingly, Section 16(b)'s two-year limitations period should be equitably tolled until a reasonably diligent security holder would have discovered the transaction that is alleged to trigger a disgorgement obligation. The filing of a Section 16(a) report that accurately discloses the transaction will preclude further tolling, whether or not a particular plaintiff had actual knowledge that the report was submitted. But even without a Section 16(a) disclosure, circumstances may arise in which a reasonably diligent security holder would be aware of the relevant transaction. At that point, the security holder is charged with knowing the facts that

would form the basis for his action, see *Merck*, 130 S. Ct. at 1794, and he has two years to bring an action to recover any short-swing profits. That approach balances the need for effective enforcement of the disgorgement obligation for short-swing profits with the need for finality on long-settled transactions, in a manner that comports with the background rules that have historically governed the application of statutory limitations periods.[3]

b. Relying on its previous decision in *Whittaker*, the court of appeals held that the two-year limitations period in Section 16(b) "is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." Pet. App. 63a. That approach is inconsistent with the background rules described above. In cases where a statute of limitations is tolled due to the defendant's wrongful concealment of facts essential to the plaintiff's cause of action, tolling traditionally continues not until the *defendant* abandons its efforts at concealment, but only until the *plaintiff* learns or reasonably should learn the relevant facts. When insiders' short-swing transactions are disclosed to the public

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[3] Because security holders have "the ultimate authority to sue for enforcement of [Section] 16(b)," *Gollust* v. *Mendell*, 501 U.S. 115, 122 (1991) it is their knowledge of facts, and not the issuer's knowledge, that determines the running of the limitations period. Security holders have the right to bring suit under Section 16(b) precisely to prevent "concerted action" between the issuer and the insiders whose profits are sought to be recovered. *Park & Tilford, Inc.* v. *Schulte*, 160 F.2d 984, 988 (2d Cir.), cert. denied, 332 U.S. 761 (1947). Looking to the issuer's knowledge would enable "[c]ollusion among insiders and, a more likely occurrence, the unarticulated acquiescence in or averting of gaze from a powerful insider's transactions." *Whittaker*, 639 F.2d at 529.

through some source other than a Section 16(a) report, neither traditional equitable principles nor common sense supports "permit[ting] plaintiffs who know of the defendant's pattern of activity simply to wait, 'sleeping on their rights,'" perhaps bringing suit long after the transactions at issue have been completed. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (quoting *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983)).

In *Whittaker*, the court of appeals rejected a standard of actual or constructive notice on the ground that such an inquiry would require "uncertain determinations of what knowledge" should be attributed to investors or issuers. 639 F.2d at 529. In applying various limitations periods, however, state and federal courts have long looked "not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know." *Merck*, 130 S. Ct. at 1794. Relying on that traditional understanding, the Court in *Merck* interpreted the statutory term "discovery" to extend beyond actual discovery, and to encompass "facts that a reasonably diligent plaintiff would have discovered." *Id.* at 1793. The Court specifically rejected the argument that "determining when a hypothetical reasonably diligent plaintiff would have 'discover[ed]' the necessary facts is too complicated for judges to undertake," explaining that "courts applying the traditional discovery rule have long had to ask what a reasonably diligent plaintiff would have known and done in myriad circumstances." *Id.* at 1798.[4]

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[4] The government has previously taken the position in this Court that Section 16(b)'s two-year limitations period is subject to a discovery rule, so that "a cause of action does not accrue until the plaintiff discovers, or reasonably should have discovered, the facts that form the basis for the action." Brief for the United States as Amicus Curiae at 7,

As respondent emphasizes (Br. in Opp. 25), Sections 16(a) and (b) are designed to operate together: the two provisions cover the same class of insiders, and Section 16(a)'s disclosure requirement serves in large part to bring to light the short-swing transactions covered by Section 16(b). See pp. 17-18, *supra*. Contrary to respondent's contention (*id*. at 25-26), however, allowing Section 16(b)'s limitations period to be triggered by public disclosures other than Section 16(a) statements would not sever the connection between the two provisions. Section 16(a)'s disclosure requirement is integral to the proper application of Section 16(b), since it is by virtue of that requirement that *non*-disclosure may properly be treated as a form of wrongful concealment. The two provisions may thus be read as a coherent whole without taking the further (and unwarranted) step of treating Section 16(a) statements as the *only* means by which shareholders may be placed on notice of insiders' short-swing transactions.

c. Petitioners argue (Br. 43-44) that this Court should reverse the judgment below because respon-

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Tristar Corp. v. *Freitas*, 521 U.S. 1118 (1997) (No. 96-577); see *id*. at 8 ("As applied to claims under Section 16(b), the discovery rule operates to ensure that the limitations period does not begin to run before a plaintiff discovers, or reasonably should have discovered, an insider's short-swing transactions."); *id*. at 10 ("[T]he date of accrual for a claim under Section 16(b) is the date on which the securities transactions were, or reasonably should have been, discovered."). The government's brief in *Tristar* suggested that adequate notice of an insider's short-swing transactions can be provided *only* by the filing of a Section 16(a) report. See *id*. at 11-12, 13 n.6. In *Tristar*, however, the defendant does not appear to have contended that security holders were on notice of the relevant short-swing transactions through other publicly available sources. This case squarely presents the question whether continued tolling is appropriate in that circumstance.

dent's complaints are based on information that was publicly available more than two years before the complaints were filed. As petitioners emphasize, there is substantial overlap between respondent's allegations and allegations in other complaints filed against petitioners under the securities and antitrust laws as early as 2001. See pp. 4-6, *supra*. The court of appeals, however, did not conduct the correct inquiry into when a reasonably diligent security holder would have discovered the information on which respondent's Section 16(b) claims are based. This Court has "recognize[d] the prudence, when faced with an 'equitable, often fact-intensive' inquiry, of allowing the lower courts 'to undertake it in the first instance.'" *Holland*, 130 S. Ct. at 2565 (quoting *Gonzalez* v. *Crosby*, 545 U.S. 524, 540 (2005) (Stevens, J., dissenting)). This Court therefore should vacate the judgment below and remand for the lower courts to determine when a reasonable security holder would have discovered the facts underlying respondent's claims.

C. Nothing In The Text Or Structure Of Section 16(b) Or Surrounding Provisions Is Sufficient To Overcome The Background Presumption That Equitable Tolling Applies

1. Petitioners contend that, by "its plain terms," Section 16(b) "is the classic formulation of a statute of repose" that "cannot be extended to account for a plaintiff's discovery of the facts underlying a claim." Br. 17; see Pet. 19 ("[T]olling is inconsistent with a 'straightforward textual reading' of Section 16(b).") (quoting Pet. App. 72a (M. Smith, J., specially concurring)). That is simply a refusal to accept that Section 16(b) establishes a limitations period on bringing disgorgement actions,

not a jurisdictional prerequisite to such actions. See pp. 9-11, *supra*. This Court has repeatedly recognized that statutes of limitations are generally "subject to rules of forfeiture and waiver" and "typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand*, 552 U.S. at 133; see *Holland*, 130 S. Ct. at 2560; *Day*, 547 U.S. at 213 (Scalia, J., dissenting). That Section 16(b) does not explicitly authorize equitable tolling does not distinguish it from the other limitations periods which this Court has held subject to tolling. See, *e.g.*, *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-259 (1980); *Exploration Co.*, 247 U.S. at 445-447.[5]

2. Petitioners rely (Br. 18-20 & n.3) on this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991) (*Lampf*), and *Merck*, *supra*, which held that *other* statutory time limits for commencing suit were not subject to equitable tolling. In each of those cases, however, this Court found sufficient textual or structural evidence that the provision at issue was a statute of repose. There is no such evidence in the text or structure of Section 16(b). Indeed, the text and structure of Section 16(b) are wholly different from the other statutory time limits that this Court has found not to be subject to equitable tolling.

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[5] Section 16(b)'s two-year deadline for filing suit likewise contains no express exception for cases in which the defendant fails to assert its limitations defense in a timely manner. The absence of such an express exception, however, does not cast doubt on the inference that Section 16(b)'s deadline (like statutes of limitations generally) "is subject to rules of forfeiture and waiver." *John R. Sand*, 552 U.S. at 133. Similarly with respect to equitable tolling, the crucial question is not whether tolling is explicitly authorized, but whether Congress has clearly displaced the usual rule that tolling is available.

In *Lampf*, this Court addressed the operation of a time limit in the 1934 Act, 15 U.S.C. 78i(e), for actions related to the willful manipulation of securities prices. 501 U.S. at 359-360 & n.6. In *Merck*, the Court discussed the time limit in 28 U.S.C. 1658(b) for private securities-fraud actions under the 1934 Act. 130 S. Ct. at 1790. In both cases, the Court found that the relevant provisions serve in part as statutes of repose that set outer boundaries on the periods for bringing suit. See *Lampf*, 501 U.S. at 363; *Merck*, 130 S. Ct. at 1797. Petitioners maintain (Pet. 21) that there is no meaningful distinction between those provisions and Section 16(b).

Both *Lampf* and *Merck*, however, involved time limits with a two-part structure that combines an express discovery rule with an absolute period of repose. The provision at issue in *Lampf* states that "[n]o action shall be maintained * * * unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. 78i(e). The provision at issue in *Merck* states that an action "may be brought not later than the earlier of * * * 2 years after the discovery of the facts constituting the violation; or * * * 5 years after such violation." 28 U.S.C. 1658(b). Under each of those provisions, the requirement that suit be filed within a specified period after the violation was *in addition to* a separate requirement that suit be filed within a (shorter) defined period after "discovery" of the relevant facts. In light of the two-part structure of those provisions, the Court concluded that the three- and five-year periods could "have no significance in this context other than to impose an outside limit." *Lampf*, 501 U.S. at 363; see *Merck*, 130 S. Ct. at 1797.

Section 16(b) does not contain a similar dual structure, but simply establishes a single period during which suits may be brought to recover short-swing profits. The Court in *Lampf* acknowledged that "[t]ime requirements in lawsuits . . . are customarily subject to equitable tolling," 501 U.S. at 363 (quoting *Irwin*, 498 U.S. at 95), and it did not suggest that this presumption is generally inapplicable to limitations periods contained in the securities laws. It instead relied on a structural inference that is wholly inapposite here. *Lampf* and *Merck* therefore provide no basis for declining to apply traditional background principles in determining whether Section 16(b) is subject to equitable tolling.[6]

In this respect, Section 16(b) is like Section 20A of the Securities Exchange Act, 15 U.S.C. 78t-1, which prohibits trading on the basis of material, nonpublic information, and which provides that "[n]o action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." That provision is not a "statute of repose," but an "ordinary statute of limitations" that is no "more potent than the usual variety." *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990) (Easterbrook, J.), cert. denied, 501 U.S. 1250 (1991); see *id.* at 1392 (contrasting Section 20A with the dual-structure

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[6] Petitioners observe (Br. 20-21) that the language of Section 16(b)'s two-year deadline is similar to the language that defined the outer limits for filing suit under the provisions at issue in *Lampf* and *Merck*. But this Court's conclusion that those outer limits defined absolute periods of repose was not based upon the language of those limits viewed in isolation; it was based instead on the evident function of those limits within the larger two-part provisions in which they appear. The structural evidence of Congress's intent that was critical to the Court's conclusion in both *Lampf* and *Merck* is wholly lacking here.

time limits found elsewhere in the securities laws). There is a good reason that Congress designed Sections 16(b) and 20A as statutes of limitations. Both statutes use "a measure of damages that the passage of time does not affect"—namely, the profits realized by the insider from the covered transaction. *Ibid*. Accordingly, the reasons for setting periods of repose with respect to other securities laws "are not present" with Section 16(b). *Ibid*.[7]

3. Petitioners also rely (Br. 25) on an earlier and unenacted version of Section 16(b) introduced in the House of Representatives, which provided that no suit to recover short-swing profits could "be brought more than six months after such profit was realized if the facts upon which such suit was based were disclosed by a statement filed pursuant to subsection (a), or more than three years after such profit was realized if the facts were not so disclosed." Staff of H. Comm. on Interstate and Foreign Commerce, 73d Cong., *Securities Exchange Bill: Showing the Changes made by Subcommittee in Committee Print of April 3,* 51 (Comm. Print 1934). This Court has declined, however, to attach significance to the absence from an enacted law of language previously contained in an unenacted bill, because "'mute intermediate legislative maneuvers' are not reli-

[7] Petitioners also rely (Br. 24) on the Court's passing statement in *Lampf* that Section 16(b) "sets a 2-year rather than a 3-year statute of repose." 501 U.S. at 360 n.5; see *id*. at 375 (Kennedy, J., dissenting) (referring to Section 16(b) as "a 2-year statute of repose"). Section 16(b) was not at issue in *Lampf*, and this Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006). That is particularly so because, as explained in the text, *Lampf*'s overall reasoning provides no basis for treating Section 16(b) as anything other than an ordinary statute of limitations.

able indicators of congressional intent." *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (quoting *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947)).

In any event, the unenacted version of Section 16(b) merely confirms what the text of the enacted version makes clear: Congress did not "link the time limit for a Section 16(b) action to a Section 16(a) disclosure." Pet. Br. 25. Section 16(b)'s limitations period commences when an insider's short-swing transaction is disclosed to the public, either through the filing of a Section 16(a) report or through other means. Indeed, if anything, the earlier version of Section 16(b) only demonstrates that the House of Representatives rejected a two-part structure that would have combined an express discovery rule with an absolute period of repose. The House thus declined to adopt the sort of dual structure that is used elsewhere in the securities laws to create a period of repose. See pp. 26-27, *supra*.

4. Finally, petitioners argue (Br. 23-24) that the purposes of Section 16(b) support treating its time limit as a statute of repose rather than a statute of limitations. Petitioners correctly observe that "Section 16(b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation." Pet. 21 (quoting *Reliance Elec. Co.*, 404 U.S. at 422). "Given the strict-liability nature of Section 16(b)," petitioners contend, this Court should treat the statutory time limit as an absolute bar to suit after two years, thus relieving insiders from "the specter of liability hanging over [them] in perpetuity." Pet. 22.

Petitioners draw the wrong inference from Congress's imposition of strict liability. Section 16(b) "was intended to be thoroughgoing, to squeeze all possible

profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of that duty." *Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943). To permit the two-year period to run—even when an insider has failed to file a Section 16(a) report and when the short-swing transaction has not been disclosed through some other publicly available source—would defeat Section 16(b)'s core purpose. On petitioners' view, "insiders could insulate their transactions from the scrutiny of outside shareholders by failing to file Section 16(a) reports and waiting for the two year time limit to pass," thus effectively nullifying the very purpose of Section 16(b). *Whittaker*, 639 F.2d at 528.

Petitioners' interpretation also ignores the interplay between Sections 16(a) and 16(b). When an insider purchases or sells securities of the relevant issuer, he has two business days to file his Form 4 with the SEC. See 15 U.S.C. 78p(a)(2)(C); see also 15 U.S.C. 78p(a) (2000) (previous reporting period of "within ten days after the close of [the] calendar month" in which the relevant security was purchased or sold). Section 16(b) then requires that a suit to recover short-swing profits be filed within two years after the profits were realized. Congress may sometimes adopt particular limitations periods to accommodate the likelihood that a plaintiff's investigation into the relevant facts will require a significant expenditure of time. The two-year limitations period at issue here, however, cannot plausibly be thought to reflect that expectation. So long as an insider complies with Section 16(a), a Section 16(b) plaintiff has virtually two years (two years minus two business days) to

file suit *after* the relevant transaction has been disclosed in a publicly available manner.

Under petitioners' theory, an insider's failure to file a Section 16(a) statement would often effectively preclude the filing of a Section 16(b) suit, because security holders would frequently have no alternative means of discovering the transaction before the two-year limitations period expired. But even in cases where a short-swing transaction is publicly disclosed through other means less than two years after it occurs, such information will virtually always enter the public domain after the two-day period for filing a Section 16(a) report. Thus, in cases where insiders breach their Section 16(a) obligations, petitioners' approach would routinely leave security holders with significantly less time than Congress intended in which to bring a Section 16(b) action. That is a classic example of defendants' benefitting from their own wrongful concealment—one that this Court need not and should not countenance. See *Reliance Elec. Co.*, 404 U.S. at 424 ("[W]here alternative constructions of the terms of Section 16(b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders.").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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