

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CALIFORNIA PUBLIC EMPLOYEES' :

4 RETIREMENT SYSTEM, :

5 Petitioner : No. 16-373

6 v. :

7 ANZ SECURITIES, INC., ET AL., :

8 Respondents. :

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10 Washington, D.C.

11 Monday, April 17, 2017

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 1:00 p.m.

16 APPEARANCES:

17 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of
18 the Petitioner.

19 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
20 the Respondents.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this afternoon in Case 16-373, the California Public
5 Employees' Retirement System v. ANZ Securities.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Mr. Chief Justice and may it
10 please the Court:

11 We ask you to hold that American Pipe
12 tolling applies to both of the time limits set forth in
13 Section 13 of the Securities Act, which is reproduced in
14 a number of places, including the blue brief at the top
15 of page 3.

16 The other side has a tendency to invoke the
17 phrase "statute of repose," which isn't really
18 self-defining in the phrase, in no event, when there's
19 more going on in the statute than that, so I thought I
20 would just start with the text, and it begins, "no
21 action" -- and action is going to be the important noun
22 here.

23 "No action shall be maintained to enforce
24 any liability created under Section 11 unless
25 brought" -- and that's going to be the operative thing

1 that has to happen -- "within one year after the
2 discovery of the untrue statement or the omission, or
3 after such discovery should have been made by the
4 exercise of reasonable diligence."

5 The three-year period will follow in the next sentence,
6 but we can pause here for just a second because it
7 teaches a lot.

8 We know that American Pipe tolling applies
9 to this sentence, and therefore, we know a few things,
10 and it's conceded and everyone agrees.

11 The action is brought on --

12 JUSTICE KENNEDY: You're -- you're just a
13 little fast for me.

14 MR. GOLDSTEIN: Sorry. I apologize. Yes.

15 JUSTICE KENNEDY: I don't want to interrupt
16 you. We know American toll -- American Pipe applies?

17 MR. GOLDSTEIN: To this sentence, that is,
18 if you do not -- if you file your action within one year
19 and class certification is denied, say, at year two, so
20 we haven't gotten to three years yet, if class
21 certification is denied two years afterwards, then
22 American Pipe tolling applies, and a class member can
23 opt out.

24 I apologize for moving through that so
25 quickly.

1 JUSTICE KENNEDY: I understand.

2 MR. GOLDSTEIN: And so what we know from
3 that, I think, is, as American Pipe tells us, that the
4 class action complaint commences the action on behalf of
5 each unnamed class member, and in the wording of Section
6 13, it brings the action on behalf of every unnamed
7 class member.

8 So the class complaint in our case, which
9 was filed within a year, brought the action on our
10 behalf.

11 Now, the second sentence says, and it's the
12 one at issue in the case before you, "in no event shall
13 any such action," referring to the one in the previous
14 sentence, "be brought to enforce a liability created
15 under Section 11 more than three years after the
16 security was bona fide offered to the public."

17 And so what happens, we believe, is that
18 just as the action was brought by the class action
19 complaint within one year, it was also brought within
20 necessarily three years. It was brought and it was
21 brought on our behalf.

22 And we don't think that there's anything in
23 this sentence that is concerned with the application of
24 something like American Pipe tolling, which is an
25 interpretation of Rule 23.

1 If it doesn't apply here, we think, then
2 Rule 23 doesn't work, and it's going to generate all
3 manner of satellite litigation over what is the statute
4 of repose and what isn't. And it will all be entirely
5 pointless.

6 As we understand --

7 JUSTICE ALITO: But the argument that you're
8 making is the one that you describe, I think -- or am I
9 correct, it's the one you say on page 38 of your brief
10 is the easiest way to decide this case?

11 MR. GOLDSTEIN: No, sir. This is
12 the straightforward argument --

13 JUSTICE ALITO: Statute of repose argument?

14 MR. GOLDSTEIN: This is -- well, I -- I
15 don't mean to confuse --

16 JUSTICE ALITO: The -- the argument relating
17 to the statute of repose.

18 MR. GOLDSTEIN: It has nothing to do with
19 whether the class action was still pending at the time,
20 which is the debate over what the scope of the second
21 question presented is. This is the argument that was
22 presented straightforwardly in IndyMac, and it is simply
23 the fact that under the text of Section 13, the class
24 action complaint brought the action on our behalf.
25 And the point that I was making is that, as I understand

1 the other side's rule, it amounts to amount -- a huge
2 amount of just pointless paperwork, because as the other
3 side understands how the statute should operate, and
4 that is, when the class action complaint is filed, then
5 what should happen is every class member ought to move
6 to intervene in the action or file their own individual
7 complaint then, to presage the possibility that,
8 hypothetically, some day later, they might opt out and
9 litigate on their behalf. Not necessarily that they
10 will, but that they might.

11 And the entire point of American Pipe, in
12 interpreting Rule 23, is to stop that from happening.

13 JUSTICE GINSBURG: Has it happened in the
14 Second Circuit?

15 MR. GOLDSTEIN: It has happened in the
16 Second Circuit. I will -- so there's the Petrobras case
17 is the best example. It was anticipated by American
18 Pipe. The other side does point to statistics and I've
19 continued to look into that.

20 The reason that the number of opt-out cases
21 is relatively small in comparison to the body of
22 securities litigation in the Second Circuit is twofold.
23 The first is there are very few recent Section 11 cases,
24 because Section 11 cases are only filed in declining
25 markets. If the market is increasing and the price of

1 securities is going up, then there's no point in
2 bringing Section 11 litigation at all, because it's
3 divined by -- you're -- you only get damages if the
4 price goes down.

5 And the second is, when the Second Circuit
6 announced this rule in the IndyMac case, this Court
7 immediately granted review. And so there is an amicus
8 brief by securities and civil procedure professors who
9 explain why it is that you haven't seen a ton of this
10 yet, but if you announce a rule that tells lawyers like
11 me, you will only protect your client's interest if
12 there's -- you are -- there's a class action lawsuit
13 under something that is a statute of repose, or looks
14 like it, you will only protect your client's interest if
15 you file your own lawsuit or you move to intervene. We
16 will do just that. It was --

17 CHIEF JUSTICE ROBERTS: Is -- is it -- you
18 said you only can bring -- bring a suit if the -- if the
19 price -- price goes down?

20 MR. GOLDSTEIN: You can only --

21 CHIEF JUSTICE ROBERTS: What if everybody
22 else's stock in -- in your sector is going up 50
23 percent, and your stock goes up 5 percent, and you think
24 it's because of a non-disclosure, you can't bring an
25 action?

1 MR. GOLDSTEIN: No, sir. The floor of
2 the -- the price has to go down in order for you to be
3 able to recover Section 11 damages -- section -- damages
4 under Section 11. And that is, there are a variety of
5 protections for defendants, but if the price hasn't gone
6 down, then you're not going to get damages under the
7 statute, and that's why there's almost -- in recent
8 years, there has been very little --

9 JUSTICE KAGAN: As a practical matter or as
10 a formal matter?

11 MR. GOLDSTEIN: I believe as a formal
12 matter. And that causes people as a practical matter
13 not to litigate. It's no surprise --

14 JUSTICE KENNEDY: But -- but under your --
15 this is an attack on statutes of repose generally. It
16 says, oh, if you have a statute of repose, everybody
17 will have to sue within three years. That's exactly the
18 point of the statute. That's the whole reason they
19 passed it.

20 (Laughter.)

21 MR. GOLDSTEIN: Sir, it is the case that the
22 purpose of the statute of repose, we quite agree, is so
23 that the -- all of the possible asserted liability is
24 filed within the period in question. And so that would
25 be true under a variety of provisions of the securities

1 laws, under ERISA, a lot of things.

2 What American Pipe holds is that the class
3 action complaint does do that. So it's very important,
4 I think, that my friend doesn't say that they were in
5 any way unaware that we had this claim against them.
6 What they want us to do is to move to intervene in the
7 litigation, and what American Pipe and Crown, Cork &
8 Seal, and United Airlines all tell us is that we don't
9 want to foist upon the district judges, and retired
10 district judges have filed an amicus brief, having to go
11 through, churn through this paperwork of
12 entirely unnecessary --

13 JUSTICE BREYER: That's clearly an argument
14 in your favor, practically, but I think the other side
15 has said that that second sentence is what's called a
16 statute of repose, whatever historically was the case.
17 In CTS, we made a big distinction, and said in such
18 statutes, you cannot toll them, et cetera.

19 And here we're not talking about the
20 action -- you may be right that -- that -- that when you
21 file a class action, if it's certified, that is the
22 action brought within the time, but here there's a
23 second action.

24 Your client leaves the first action. And
25 what does he do after three years? I guess he puts a

1 piece of paper called a complaint in a court and that
2 would seem to be bringing an action. And if the other
3 side says -- I'm just reminding you of these arguments,
4 because you seem to think that they haven't made
5 arguments, they have made arguments -- well, you think
6 they haven't made good arguments.

7 (Laughter.)

8 JUSTICE BREYER: All right. Now, look, they
9 say this is not -- this is a strict liability statute.
10 Underwriters, after all, have committed no sin. They
11 haven't the bright mental state. They've done nothing
12 wrong.

13 And in -- in that separate later action,
14 there might not just be a repetition, one, two, three,
15 of what's in the class action, but three new things,
16 four more sentences, maybe 20.

17 So years later, they could -- now, what do
18 you -- please, I -- at some point --

19 MR. GOLDSTEIN: Sure.

20 JUSTICE BREYER: -- I would like you to deal
21 with those actions --

22 MR. GOLDSTEIN: Of course. Right. So --

23 JUSTICE BREYER: -- those arguments.

24 MR. GOLDSTEIN: Right, so the question is,
25 is this a separate and distinct action within the

1 meaning of Section 13. And what American Pipe teaches
2 is that it is not. It is -- what American Pipe says --
3 and, remember, in American Pipe, you had the exact same
4 structure.

5 You have a time limit of one year, and then
6 says, if it's not brought within four years, it shall be
7 forever barred. The parallel is, we think, precise.
8 And this is not a new action in any sense of the word.
9 Justice Breyer, if the plaintiff in the subsequent
10 individual lawsuit brings a new allegation about other
11 securities, changes the nature of the lawsuit in any
12 way, but all we have done is opt out and
13 asserted precise --

14 JUSTICE BREYER: He just asks to amend the
15 complaint, which has now been filed 10 years later after
16 he left, opted out a month before, and in that
17 amendment, he says -- this was 1,000 pages, the
18 offering, and on page 463, there are five new sentences
19 which have false facts, we want to put them in too.

20 MR. GOLDSTEIN: You're not allowed to do
21 that under our rule or theirs. It has to be precisely
22 the same.

23 JUSTICE BREYER: Precisely.

24 MR. GOLDSTEIN: Just to return to the -- how
25 they understand the world will operate, and that is,

1 according to my friend, what will happen is on Day 1, as
 2 they understand the statute, a party like CalPERS will
 3 move to intervene in the class action, will file a piece
 4 of paper saying we are seeking either intervention as a
 5 matter of right or permissive intervention. Then
 6 nothing will happen. And, then, 4 years down the road,
 7 if class certification is denied, that case will start
 8 up again.

9 The only difference between our rule, it has
 10 no practical consequence, except for the fact that they
 11 add additional litigation for district courts to deal
 12 with on the front end. All the same amendments can
 13 happen --

14 JUSTICE GORSUCH: But, Mr. Goldstein, when I
 15 see the word "action," I think of lawsuit,
 16 traditionally, and "claim" as the claims within the
 17 lawsuit. And the laws often distinguish between actions
 18 and claims. The securities laws do, routinely.

19 MR. GOLDSTEIN: Right.

20 JUSTICE GORSUCH: Here, why -- why shouldn't
 21 we follow the plain language and the traditional
 22 understanding of the term "action"? Congress could have
 23 use "claims," which is what you're saying, it's the same
 24 claims, as Justice Breyer points out, but it's a
 25 different action.

1 MR. GOLDSTEIN: Well, I'll -- can I just say
2 first, I think we would win even if it was lawsuit,
3 because the lawsuit that matters, what American Pipe
4 teaches us in terms of putting the other side on notice
5 of the lawsuit, is the class complaint. But if you were
6 to disagree with that and if you were to say, look, if
7 you're going to say -- if we hold that it's a lawsuit,
8 you're going to lose, so it better not be a lawsuit.
9 The reason here is that what Congress was concerned
10 about was the assertion of liability. And if I could
11 just give you a couple of examples of why I think I have
12 to be right.

13 Imagine that in year 4, a new plaintiff
14 moves to intervene in an existing lawsuit. Okay. The
15 lawsuit is on file. I don't think the other side would
16 be willing to say, hey, you know, there's no new action
17 here. You're free to do it. Or, alternatively, imagine
18 an orderly -- ordinary bilateral litigation. I and my
19 friend sue -- we probably shouldn't do this -- but sue
20 Lehman Brothers under Section 11. Okay. We have a dual
21 complainant. And years into it, the district judge
22 says, look, you're actually suing over different
23 securities. I want to you break it up into two
24 different complaints. We're going to have two different
25 docket numbers. And so the second complaint is filed.

1 I don't think we would say it's a new action.

2 JUSTICE GORSUCH: Why not?

3 MR. GOLDSTEIN: Well, because it would --
4 because the ordinary --

5 JUSTICE GORSUCH: I mean, I don't like the
6 policy consequences, but as a matter of plain language,
7 why wouldn't we?

8 MR. GOLDSTEIN: Well, because it can be
9 either one. Jones v. Bock teaches us that in some
10 contexts it does mean the individual claim and in some
11 cases it means the actual --

12 JUSTICE GORSUCH: I just don't read Jones
13 that way, though. I read Jones as saying the action may
14 contain exhausted claims and unexhausted claims, but it
15 doesn't conflate the two claims.

16 MR. GOLDSTEIN: Well, the way I read it --
17 and I understand that Jones v. Bock does use the word in
18 a couple of different ways.

19 I think the bottom line is what you would
20 say, is that we try and be pragmatic about what it is
21 that Congress is attempting to accomplish when it's
22 talk -- using a phrase like "action" in a limitations
23 period. And so what I think you have to do is realize
24 that you have not only Section 13, but you have what is,
25 in effect, another Congressional enactment in Rule 23.

1 What you tried to do in American Pipe is to reconcile
2 two different things that are going on.

3 In the wake of 1933 and 1934 and lots of
4 other statutes as well, when we modified and got away
5 from Equity Rule 38 and Equity Rule 30 -- and 48 and
6 created this class action system, is we were trying for
7 the administration of the courts to come up with a -- a
8 regime in which we would have only representative
9 litigation and not these individual suits.

10 And the other thing I would point you to is
11 you're not just dealing with Section 13 in securities
12 cases in particular. And, Justice Breyer, also remember
13 that their rule has nothing to do with strict liability.
14 It's true about every statute of repose, which are
15 all -- if you can figure out what they are, they are all
16 over the place.

17 But we have the Private Securities
18 Litigation Reform Act as well. And it teaches, I think,
19 several important things about class and represented
20 litigation in securities cases. Number one, we want a
21 single representative plaintiff. We don't want all of
22 these litigants. Number two, we contemplate that the
23 absent class members will simply provide a notice if
24 they believe that they should be a named party. We will
25 not have them move to intervene, which is what we're

1 trying to avoid. And number three, and this is really
2 quite curious; within 90 days of the filing of the
3 complaint, a new named party can be named -- a named
4 party in the lead litigant without regard to whether
5 it's after three years.

6 The entire body of law involved -- and so
7 what I'm saying is you have to interpret this word
8 "action" in the context of all of the law. It doesn't
9 make any practical sense to believe that Congress would
10 want this kind of meaningless paperwork, just these
11 motions to intervene, in the teeth of these other
12 regimes that surround it --

13 JUSTICE SOTOMAYOR: Mr. Goldstein, as I
14 understand your adversary, and he'll speak for himself
15 when he gets up, but a motion to intervene doesn't save
16 you. Because according to him, it's only a separately
17 filed complaint that would be a separate action subject
18 to the three-year period of repose, correct?

19 MR. GOLDSTEIN: I -- I haven't been able --
20 I've been unable to determine exactly what they believe
21 is necessary.

22 JUSTICE SOTOMAYOR: That's why I said --
23 I'm -- I'm just wondering what happens to American Pipe,
24 in terms of not opting out --

25 MR. GOLDSTEIN: No.

1 JUSTICE SOTOMAYOR: -- meaning that the
2 Court just denies the class certification. What happens
3 to all of those cases? In normal parlance, the one
4 named plaintiff continues, but how about if there's 10
5 or 20?

6 MR. GOLDSTEIN: They would continue.

7 JUSTICE SOTOMAYOR: In that one case --

8 MR. GOLDSTEIN: In that one case.

9 JUSTICE SOTOMAYOR: -- or would they be spun
10 off into their own jurisdictions?

11 MR. GOLDSTEIN: If we had -- well, it
12 depends on exactly how it came to be. And there can be
13 very difficult questions about specific personal
14 jurisdiction, depending on where the plaintiff comes
15 from and those sorts of things.

16 Putting that to the side imagine, the
17 following hypothetical complaint. It is a nominal class
18 action with 10 named plaintiffs. If they are in the
19 complaint, then those 10 people will go on on their own.
20 I guess my principal belief --

21 JUSTICE SOTOMAYOR: If -- if class
22 certification --

23 MR. GOLDSTEIN: I apologize. In your
24 hypothetical, in which class certification --

25 JUSTICE SOTOMAYOR: Yes, class certification

1 is denied.

2 MR. GOLDSTEIN: Right.

3 JUSTICE SOTOMAYOR: What I'm asking, would
4 it be the same action or would they be spun off into
5 different cases? Because often, maybe common questions
6 are certified --

7 MR. GOLDSTEIN: Yes.

8 JUSTICE SOTOMAYOR: -- and the original
9 courts maintain jurisdiction.

10 MR. GOLDSTEIN: You can -- this particularly
11 will happen in the MDL context, in which a district
12 judge to administer the case in front of her, will
13 direct the filing of the consolidated complaint. But it
14 is MDL'ed. It's only there for pretrial purposes. It's
15 going to have to be spun off into separate complaints,
16 at which point, I take it, given the formalism of the
17 other side's rule, all of these actions are now
18 untimely, and nobody has any idea why.

19 What is it that we're trying to do here?
20 What we know --

21 JUSTICE KENNEDY: Your -- your idea -- the
22 why is that -- is that your theory stems from Rule 23,
23 correct?

24 MR. GOLDSTEIN: That American Pipe is an
25 interpretation of Rule 23, yes, sir.

1 JUSTICE KENNEDY: And your -- and your rule,
2 which is somewhat different from American Pipe, also
3 comes from Rule 23.

4 MR. GOLDSTEIN: I believe --

5 JUSTICE KENNEDY: Your principle.

6 MR. GOLDSTEIN: Yes. We have two
7 alternative theories. One, is that our action was
8 always on file. And I haven't discussed this.

9 JUSTICE KENNEDY: Right.

10 MR. GOLDSTEIN: This was the question of
11 Justice Alito, but American -- they are both
12 applications of Rule 23, yes, sir.

13 JUSTICE KENNEDY: My concern is that you're
14 using Rule 23 to create, in effect, a legal right, or
15 override a legal right, and it's very clear that Rules
16 of Civil Procedure do not do that.

17 MR. GOLDSTEIN: That is correct. If we were
18 to be violating the Rules Enabling Act, of course, our
19 interpretation could not stand, and so I should talk
20 about that for a moment.

21 American Pipe confronts a quite similar
22 argument, of course, where the other side argued -- and
23 remember, American Pipe has the parallel structure; the
24 1-year period and the 4-year period saying it shall be
25 forever barred.

1 And what this Court said in American Pipe,
2 and all of its Rules Enabling Act precedent is that,
3 look, obviously, there are rules of procedures that have
4 subsequent consequences. So you violate the rule, then
5 you have no more right.

6 That's not what the Rules Enabling Act is
7 talking about. It is not talking about a rule about
8 when or where or how you file your lawsuit, which is why
9 the limitations period and, equally, a repose period is
10 concerned with.

11 If I could just return to kind of the
12 question of whether or not it would have made sense for
13 Congress to have enacted this, and I -- I take the point
14 that maybe Congress -- if Congress enacts bad rules,
15 Congress enacts bad rules. But there is ambiguity in
16 the statute, and I'm --

17 JUSTICE GORSUCH: Where -- where is the
18 ambiguity in -- in no event?

19 MR. GOLDSTEIN: Well, it's in no event,
20 what?

21 JUSTICE GORSUCH: In no event.

22 MR. GOLDSTEIN: But, sir, if I could jut
23 take you to the text, sir, because it's very rare that
24 Congress just writes "in no event." And so what it says
25 is, in no event something. Okay? In no event, shall

1 any such action be brought to enforce liability, and
2 then the 3-year period.

3 And so my point is what CTS says and what
4 other precedents have said about Statute of Repose, is
5 that they prohibit the application of equitable tolling
6 to extend the filing of the action.

7 JUSTICE ALITO: Well, what does the term
8 "such action" mean?

9 MR. GOLDSTEIN: Okay. We --

10 JUSTICE ALITO: "In no event, shall any such
11 action."

12 MR. GOLDSTEIN: Yeah.

13 JUSTICE ALITO: What do you think the
14 action -- what is the definition of action --

15 MR. GOLDSTEIN: Well --

16 JUSTICE ALITO: -- in that statute?

17 MR. GOLDSTEIN: Okay. To take your first
18 question, which is "such action," we believe such action
19 is an action that is otherwise subject to the discovery
20 rule in the previous sentence. And that makes it make
21 perfect sense.

22 What Congress was doing here is saying --
23 and this is true throughout, wherever you have these
24 two-tiered statutes of limitation or repose. It says
25 I've got this thing in the first sentence that's going

1 to say there's a discovery rule. But then I'm going to
2 say, look, there's -- you can only have so much of this.
3 At some point, we're going to have to call a stop. And
4 so it says you're going to have an action that's subject
5 to the discovery rule, but in no event shall such
6 action, one that could otherwise be extended
7 indefinitely.

8 Remember the first sentence, if you leave it
9 alone, the discovery rule can go 5, 10, 15, 20 years.
10 So in no event shall such action be brought more than
11 three years after it's offered to the public. And what
12 this sentence does is it cuts off the discovery rule.
13 But even if you were to disagree with me about that and
14 just say, no, the phrase "such action" just refers to
15 any Section 11 lawsuit, we believe it refers to a claim
16 under Section 11. And what -- the reason I started with
17 the first sentence --

18 JUSTICE ALITO: So it's enough that it's the
19 same claim --

20 MR. GOLDSTEIN: Well --

21 JUSTICE ALITO: -- as in the class action?

22 MR. GOLDSTEIN: That is, it has to be the
23 entirety of the claim. So to be just clear, you can't
24 just intone Section 11. We are talking about the same
25 securities, the same misrepresentation --

1 JUSTICE ALITO: Right. Right.

2 MR. GOLDSTEIN: -- with respect to them.

3 What I have done when I have opted out is I have taken
4 control over an existing --

5 JUSTICE ALITO: So if -- if a plaintiff in
6 every single judicial district in the country had
7 brought exactly the same claim, those would all be the
8 same action, in your opinion?

9 MR. GOLDSTEIN: No. It's on behalf of that
10 person. Remember, it has to be not just the existence
11 of a legal claim in the abstract, but what American Pipe
12 does in interpreting this idea, we'd have this new Rule
13 23 so that we have collective litigations, it says it
14 brings the action on behalf of the individual unnamed
15 class member.

16 So, to be clear, if one party brings it, you
17 know, just an individual lawsuit is brought, a claim,
18 that doesn't bring the -- the action on behalf of
19 CalPERS, of course. It has to be we have to be a member
20 of the class involved --

21 JUSTICE ALITO: And you think Congress had
22 all of this in mind when it wrote, "In no event shall
23 any such action," but it thought it was also clear it
24 didn't need to spell it out.

25 MR. GOLDSTEIN: Oh, no, sir. The -- the

1 reason is this: Class action practice in 1934 was quite
2 different. Class action practice was a situation in
3 which a representative action would be brought and then
4 people would opt in at the very end. This was an
5 unresolved question --

6 JUSTICE ALITO: Yeah. So what did Congress
7 have in mind when it wrote this?

8 MR. GOLDSTEIN: Yes. What it had in mind
9 was letting the other side know that the claim had been
10 asserted against it, and that the class action does.
11 What it wanted was a party like ANZ or Lehman to know,
12 okay, here's the scope of your potential liability.

13 And what American Pipe says in terms is that
14 the classic complaint tells the other side everything it
15 needs to know, whether it's litigated on a collective
16 basis or instead on an individual basis. And what it
17 says is we are not going to generate all of these
18 unnecessary motions to intervene, all of these
19 unnecessary individual lawsuits because we're going to
20 interpret Rule 23 and these Federal statutes together.
21 And so if I can just give you an illustration from your
22 own docket. Imagine that you were presented with a -- a
23 Supreme -- a hypothetical Supreme Court Rule 100. And
24 you, as a docket management measure, are trying to
25 figure out how many cert petitions were going to be

1 filed. And the rule said if you want to be able to file
2 a cert petition within one month of the court of appeals
3 decision, you shall file a motion for leave to file a
4 cert petition.

5 Now, you're not promising to file a cert
6 petition. You know, you don't -- you don't have to file
7 a cert petition. All you're going to do is let us know
8 by making us act on this worthless motion. Nobody would
9 think that that was a sensible thing to do because it
10 would accomplish nothing other than giving you, just
11 like this would only give the district courts,
12 additional work.

13 JUSTICE KAGAN: Mr. Goldstein, could I ask
14 you to speak to this question of your alternative
15 theories, because in your briefing, the non-tolling
16 theory, if I can call it that, took pride of place. But
17 you haven't really spoken in those terms today. So what
18 am I to make of that?

19 MR. GOLDSTEIN: Nothing. I just think the
20 -- we have two very good arguments.

21 The other argument that we make and -- and
22 I've also just tried to avoid the complication of what's
23 in and out of Question 2. You all will know the answer
24 of what you intended when granting cert more than we
25 will.

1 But I think that if you were thinking in
2 terms of tolling, then there has to be a gap in time in
3 which there is a distance between when the first action
4 ended and the second action began. That is why you
5 would need to toll something, to fill in the gap. And
6 when you have a case like this one, when all we have
7 done is take control of our own action, it's very hard
8 to see why we need tolling at all.

9 The other thing that's quite important is
10 that here we do have something concrete in law that we
11 are exercising, and that is our Rule 23 right to opt
12 out. You don't have to wonder about this as a
13 constitutional matter or not. We do have the right to
14 opt out and take control of our lawsuit, which is what
15 we did.

16 And so I don't understand how it is unless
17 Justice Kennedy's argument were to be played out and we
18 were to violate the Rule 23, to everyone's surprise
19 violates the rules enabling act in its core application
20 of our opt-out right, in that situation, all that has
21 happened is that we have different lawyers. We are
22 going to litigate this on our own. Nothing more is
23 required in terms of tolling, and that seems a very
24 straight way -- forward way of resolving this case --

25 JUSTICE KENNEDY: It's not necessarily a

1 question of violating Rule 23. It's using Rule 23 to
2 create a new legal right. That's the difference.

3 MR. GOLDSTEIN: Well, if we were to do that,
4 I quite agree, Justice Kennedy. I have never resisted
5 the proposition that if Rule 23 were to be -- violate a
6 substantive right of theirs or create a new substantive
7 right, it could not be interpreted that way.

8 My point is this: You have, we think, at
9 the very least, statutory language that can be read
10 either way. And the way you deal with that problem is
11 to reconcile the two of them. There's no reason to
12 create a conflict between the opt-out right in Rule 23
13 or all of the policies --

14 JUSTICE BREYER: But you need tolling. You
15 don't need it, perhaps, on your second theory.

16 MR. GOLDSTEIN: Yes.

17 JUSTICE BREYER: If we take your second
18 theory, we have to read the words "be brought" to mean
19 something like deemed to have been brought when, but --
20 something like that -- but that won't solve the
21 practical problem you raised, because there will still
22 be cases in which class certification is denied after
23 three years, and all these practical problems will then
24 exist, won't they?

25 MR. GOLDSTEIN: They will, because --

1 JUSTICE BREYER: And we need tolling in
2 order to stop that.

3 MR. GOLDSTEIN: I don't believe so.

4 JUSTICE BREYER: Why?

5 MR. GOLDSTEIN: And let me just say that the
6 -- the --

7 JUSTICE BREYER: Why? Why?

8 MR. GOLDSTEIN: Because the phrase "tolling"
9 here is misleading. And if I could answer this question
10 and reserve the balance of my time.

11 Both United Airlines and the Chardon case
12 consider the question, does tolling mean suspend the
13 statute of limitations? And it says no. United
14 Airlines is a case in which the motion to intervene
15 didn't happen, not after class certification, but after
16 judgment at the end of the case. And the court said,
17 you don't have to just use up the remainder of the
18 limitations period.

19 And Chardon is a case in which it was a 1983
20 class action, and the court said, no, no, no, no.
21 Tolling here doesn't mean just suspend the running of
22 the limitations period. It just means you have
23 satisfied it and you're not going to be deemed untimely.
24 The tolling effect in the 1983 context is provided by
25 State law.

1 If I could reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Clement.

4 ORAL ARGUMENT OF PAUL D. CLEMENT

5 ON BEHALF OF THE RESPONDENTS

6 MR. CLEMENT: Mr. Chief Justice, and may it
7 please the Court:

8 Section 13 of the Securities Act, in its
9 three-year time limit, plainly provides a statute of
10 repose. This Court said as much in *Lampf*, and the
11 two-tiered structure and emphatic, in-no-event language,
12 admits of no other conclusion.

13 JUSTICE GINSBURG: How about the Clayton Act
14 that was at issue in *American Pipe*? That doesn't say
15 "in no event," but it did say -- what was the
16 language -- "forever barred." Forever barred
17 commence within 4 years.

18 MR. CLEMENT: That's right, Justice
19 Ginsburg, but there's three reasons why the three-year
20 time limit in Section 13 is a statute of repose. One is
21 the no-event language that is emphatic. Two is the
22 two-tiered structure. And three is the legislative
23 history.

24 Now, if you contrast that with the Clayton
25 Act at issue in *American Pipe*, there -- we can quibble

1 about whether the language was as emphatic, but
2 importantly, that language itself was -- was suspended
3 or tolled if there was a government enforcement action.

4 And what this Court held, at least as I read
5 American Pipe, is that we know that was a statute of
6 limitations because it was subject to tolling in at
7 least one circumstance.

8 And what this Court said in the Wallberger
9 case, of course, is, when you have a time limit that's
10 subject to tolling, that's a hint that it's a statute of
11 limitations because the defining feature of a statute of
12 repose that makes it different from a statute of
13 limitations is that it's not subject to tolling or
14 estoppel.

15 And since American Pipe was emphatically a
16 rule of tolling, the Court used the word "tolling rule,"
17 "toll," "tolling" at least a dozen times in the opinion.
18 That tolling rule simply does not apply to a statute of
19 repose like Section 13.

20 And I think --

21 JUSTICE GINSBURG: How does one know? When
22 one uses the language "forever barred," the other uses
23 "in no event," how do we know whether it's a statute of
24 repose?

25 MR. CLEMENT: Well, I think you have to

1 perhaps read beyond those particular words. And I think
2 if you read beyond those words in the Clayton Act, you
3 get a textual clue that this is a limitations period,
4 because it says that it's subject to tolling if there is
5 a government prosecution.

6 If you continue to read in the context of
7 Section 13, you would find the two-tiered structure of
8 the statute, which this Court in *Lampf* said could only
9 be explained with the longer time period being a statute
10 of repose.

11 JUSTICE SOTOMAYOR: But did you --

12 MR. CLEMENT: And then if you were --
13 please, just to finish the point.

14 If you were inclined to go further and look
15 at legislative history, then you would look at American
16 Pipe where this Court said the -- legislative history
17 was silent. And here, the legislative history strongly
18 supports the notion that the three-year time limit is a
19 statute of repose, because, as originally drafted, it
20 was a ten-year statute of repose. And Congress
21 specifically looked at it, specifically looked at the
22 two time periods, said that the second time period was
23 there to protect the defendants, and then shortened it
24 substantially in 1934.

25 JUSTICE KAGAN: The two-tiered structure can

1 be where the second tier just cuts off the discovery
2 rule. So that would perfectly well explain the
3 two-tiered structure just as that, and say, yeah,
4 usually it's one year after discovery, but if you
5 discover it five years later, that's too much. So it
6 just cuts off the discovery rule. And that's the only
7 thing that the two-tiered structure means perhaps.

8 MR. CLEMENT: I don't think that's right,
9 even if you were writing this opinion on a clean slate.
10 But, of course, you're not writing on a clean slate.
11 This Court looked at this specific provision, along with
12 some other provisions in the Exchange Act, in deciding
13 the Lampf case.

14 And it said that the three-year period was a
15 statute of repose, not that it just cut off the
16 discovery rule, a statute of repose. And we know that
17 because in Lampf itself, this Court considered an
18 equitable tolling argument. And it rejected the
19 equitable tolling argument precisely because the
20 three-year limit was a statute of repose.

21 Now, I suppose my friend on the other side
22 could quibble that there was multiple provisions at
23 issue in Lampf, but if you actually look at them,
24 there's Section 13, and then there were two provisions
25 from the 1934 Exchange Act. And the -- the -- the

1 language from the 1933 Act, Section 13 that's at issue
2 here, is the most emphatic. The other two have the
3 two-tiered structure, but don't say in no event --

4 JUSTICE KAGAN: I suppose one question is,
5 what exactly do -- have we meant when we say a statute
6 of repose? And we've certainly meant something
7 different from a statute of limitations. But I think
8 what we were talking about in *Lampf* was the cutoff of
9 the discovery rule. It -- it sort of didn't matter
10 whether your claim was going to accrue in the normal
11 way, consistent with the statute of limitations. At
12 some point, we were going to cut it off.

13 And that's what we meant when we said
14 statute of repose, as opposed to some term that cut off
15 a variety of claims that just weren't before us and that
16 we weren't thinking about.

17 MR. CLEMENT: Well, Justice Kagan, if I
18 could beg to differ. I think if you go back and read
19 the very last section of the *Lampf* decision, it's where
20 it specifically rejects an equitable tolling argument on
21 the basis that this -- the second tier of the statute is
22 the statute of repose. So it wasn't just talking about
23 a discovery rule.

24 And, frankly, if you go back and think about
25 the context of *Lampf*, it was a pretty decent equitable

1 tolling argument. Because up until that point,
 2 basically every federal court that looked at it thought
 3 that the state law provided the statute of limitations.
 4 And only very late in the game did this Court come
 5 around and say, no, actually, it's a federal statute of
 6 limitations, and it's much shorter than everybody
 7 expected.

8 So in the cosmic scheme of equitable tolling
 9 arguments, it seems like the parties that relied on the
 10 applicable state statute of limitations had a darn good
 11 equitable tolling argument, but this Court --

12 JUSTICE GINSBURG: This is --

13 MR. CLEMENT: -- would have none of it.

14 JUSTICE GINSBURG: This is -- American Pipe,
 15 at least as many interpret it, is not an equitable
 16 tolling provision.

17 MR. CLEMENT: Well, Justice Ginsburg, on at
 18 least two occasions --

19 JUSTICE GINSBURG: Doesn't -- it doesn't
 20 differ -- we don't ask about good faith, and -- and it's
 21 not tailored to the individual case. It says when you
 22 start the class action, that's it. That's -- that's the
 23 critical thing that must be timely.

24 MR. CLEMENT: Well, Justice Ginsburg, let me
 25 give you two responses to that.

1 First, on at least two occasions, when this
2 Court had a reason to label it one way or another, it --
3 this Court labeled the rule of American Pipe as the rule
4 of equitable tolling. So that's one way of answering
5 it.

6 But the second thing is, with all due
7 respect, I think that your effort to say that this is --
8 that American Pipe's not equitable tolling is built on a
9 mistaken premise, because -- and it follows directly
10 from the argument my friend on the other side made,
11 which seems to flow from the premise that in order for
12 it to be equitable tolling, it has to take into account
13 all the individual circumstances of the case.

14 And as this Court said in *Waldburger*, in
15 talking about equitable tolling, two of the classic
16 situations for equitable tolling are categorical rules:
17 infancy and, essentially, lack of mental competence.
18 Those are two equitable rules for when a statute of
19 limitations are tolled, and they're equitable rules.

20 I think the equitable rule that this Court
21 established in *American Pipe*, and why it was right on
22 two occasions to refer to it as a rule of equitable
23 tolling is that, if you were a member of a timely
24 commenced class action, you have an equitable basis to
25 toll the statute of limitations.

1 I think it's as simple as that. They didn't
2 look into other circumstances, because they didn't need
3 to. They had a sufficient basis for equitable tolling.

4 JUSTICE SOTOMAYOR: Mr. Clement, I'd like to
5 go through the practical consequences. Okay?

6 MR. CLEMENT: Sure.

7 JUSTICE SOTOMAYOR: So let me start with the
8 simplest one. Okay? A class action motion is filed.
9 The court dismisses it saying, wrong venue. This should
10 have been in California instead of New York. Under your
11 theory, because a new complaint is filed in California,
12 that statute of limitations or that statute of repose
13 starts to run from the filing of the new complaint, not
14 the old one?

15 MR. CLEMENT: I don't think so, Justice
16 Sotomayor, for the --

17 JUSTICE SOTOMAYOR: There is a rule that
18 says if you're in the wrong venue, there's an automatic
19 tolling. But you're saying that that rule would not
20 apply in that circumstance.

21 MR. CLEMENT: No, but as I understand the
22 federal procedure -- and, you know, this is based on
23 sort of background understanding, so I could have it
24 wrong. But as I understand it, in the federal system,
25 if you're in the wrong venue, you can transfer the

1 action.

2 JUSTICE SOTOMAYOR: But so could the judge.

3 MR. CLEMENT: You don't have to file a new
4 one.

5 JUSTICE SOTOMAYOR: You could -- you can ask
6 for it, but it's still within the judge's discretion
7 whether to transfer or dismiss and let you file anew.

8 MR. CLEMENT: Yeah, well, and so I would
9 think that certainly if there were adverse consequences
10 for part of the class in that situation --

11 JUSTICE SOTOMAYOR: So answer my question.

12 MR. CLEMENT: -- you would -- you would
13 transfer --

14 JUSTICE SOTOMAYOR: Under your theory --
15 under your theory, action means new complaint, new
16 complaint number?

17 MR. CLEMENT: Sure. A new complaint
18 initiated with a, you know --

19 JUSTICE SOTOMAYOR: Even though it's asking
20 for the same relief?

21 MR. CLEMENT: Absolutely, Your Honor.

22 JUSTICE SOTOMAYOR: By the same party?

23 MR. CLEMENT: Absolutely, Your Honor. And
24 this Court --

25 JUSTICE SOTOMAYOR: All right. So that

1 means motions to intervene won't help --

2 MR. CLEMENT: Well --

3 JUSTICE SOTOMAYOR: -- if the class is
4 ultimately denied.

5 MR. CLEMENT: I -- I don't take that
6 position, Your Honor. I think a motion to intervene --
7 and I think we know this from American Pipe -- the
8 motion to intervene makes it an individual action on
9 that party's behalf if it survives --

10 JUSTICE SOTOMAYOR: So what happens when the
11 complaint is denied?

12 MR. CLEMENT: Those individual --

13 JUSTICE SOTOMAYOR: All of those individual
14 complaints -- most of them are not transferred. They're
15 spun off into new complaints in where -- whatever
16 jurisdiction has venue over them.

17 MR. CLEMENT: Well, again, as long as -- I
18 think there is really a simple way to look at this that,
19 I think, answers all these questions.

20 You ask at the end, is the party seeking to
21 recover based on an action that was timely filed?
22 That's why this is a simple case, and it's why my friend
23 does need a rule of tolling or some kind of super strong
24 rule of relation --

25 JUSTICE SOTOMAYOR: So what's an opt-out?

1 Why couldn't --

2 MR. CLEMENT: What's that?

3 JUSTICE SOTOMAYOR: -- could the judge
4 have -- or can a judge, who has a class action and tells
5 people, if you opt out, just file a motion to intervene?
6 Under your theory, why can't they do that?

7 MR. CLEMENT: Because the motion to
8 intervene, if I'm following -- it -- they can file the
9 motion to intervene. Then the question is, is the
10 motion to intervene timely?

11 And so in American Pipe, for example, which
12 dealt with the statute of limitations, not a statute of
13 repose, there were those individual motions to
14 intervene. Now, importantly, the Court in American Pipe
15 did not say, all of those motions to intervene are
16 timely because the class action actually filed the
17 action for them. That's not what American Pipe held.

18 American Pipe held, all right, we're going
19 to examine the timeliness of those individual
20 intervention actions, and we are going to deem them
21 timely because we're going to apply a tolling rule. And
22 they were tolled for the period that there was a class
23 action that covered this -- that covered the claim, the
24 individual claim. That's why my friend, who desperately
25 doesn't want there to be a tolling rule, is absolutely

1 misreading American Pipe.

2 American Pipe was a tolling case. It looked
3 at the circumstances of the individual cases. It
4 focused on the fact that they were filed within five or
5 eight days of the denial of the class certification.
6 None of that would have been relevant --

7 JUSTICE SOTOMAYOR: So even --

8 MR. CLEMENT: -- if somehow
9 metaphysically --

10 JUSTICE SOTOMAYOR: Even if that's what
11 American tolling did, now that we're looking at the
12 language of the statute, and looking at Rule 23, and
13 what the substance of the statute is, why is his reading
14 irrational?

15 MR. CLEMENT: His -- his --

16 JUSTICE SOTOMAYOR: If you're not relying on
17 American tolling. He's not, he's relying on the
18 language of the statute and the language of Rule 23.

19 MR. CLEMENT: And -- and here's why his
20 argument doesn't work on the text of Section 13, and
21 it's very straightforward. If he's -- he is not seeking
22 to recover based on a timely filed class action. He is
23 seeking to recover millions of dollars from my client,
24 based on an action that they filed in the Northern
25 District of California in 2011, more than three years

1 after these securities were issued to the public.

2 That is the action they're seeking to
3 recover. That is the action to which you would apply
4 the plain text of Section 13. And, I'm sorry, 2011 is
5 too late under the plain terms of the statute, and it is
6 a statute of repose. And the case really is that
7 simple.

8 JUSTICE KAGAN: Well, you're suggesting
9 we -- there's only one view of the word "action," and --
10 and the case stops there. And perhaps that's right, but
11 let's say it's not right. Let's just suppose that
12 "action" is a word that sometimes it's used one way, and
13 sometimes it's used another way, and we should look a
14 little bit as to the practical consequences of what
15 you're doing.

16 And it seems as though -- and tell me if you
17 think this is wrong -- that the consequences go
18 something like this: If we go your way in this case,
19 any future suit like this, all large investors, the kind
20 of investors CalPERS -- CalPERS is not going to make
21 this mistake again. CalPERS is going to file a
22 protective action for itself, and then it can do what it
23 wants. Opt out, don't opt out, wait and see, whatever.

24 Well, small investors are not going to do
25 that. They're not going to have the faintest idea that

1 they should be doing that. So this is a rule that's
2 kind of guaranteed to create make-work for district
3 courts to be essentially irrelevant for large investors,
4 and for small investors to lose their claims.

5 MR. CLEMENT: Well -- so, Justice Kagan, I
6 mean, you know, let me just put a pin in the idea that I
7 don't think there's any way to get to the textual result
8 that action just --

9 JUSTICE KAGAN: I know you think that --

10 MR. CLEMENT: No. And -- and I think there
11 are good textual reasons for that, but let's put a pin
12 in that. Maybe I'll get back to it, maybe I won't.
13 To address sort of the -- the sort of parade of
14 horribles. I mean, there's -- there's a couple of
15 points I'd like to make about that. I mean, one is,
16 I -- I can imagine that where you might think that if
17 this were IndyMac and we had no experience with the
18 rule. But we've had, you know, almost 4 years of
19 experience with this rule in the Second Circuit.

20 Now, there might be some context where you'd
21 say 3 and a half, 4 years isn't that long, but there are
22 lots of securities class actions in the -- in -- in the
23 Second Circuit. And despite what my friend says, it's
24 not like every stock in the index has gone up over the
25 last five years. You know, some of them have gone down.

1 At the -- you know, the -- the rising tide hasn't lifted
2 every stock.

3 And also, this whole issue of IndyMac also
4 applies in 10b-5 actions where you can bring those
5 regardless of whether the market is rising or falling.
6 So take the year 2014 in isolation. There were 63 class
7 actions settled in the Second Circuit in the year 2014.
8 There were exactly zero opt-outs. Zero out of 63 class
9 actions --

10 JUSTICE BREYER: What will happen, what
11 you -- what you have to do to get to his -- I agree --
12 to get to his result, I agree with you this far. You
13 have to read those words, "any action be brought." And
14 what they mean is the action was brought. It was
15 brought when they filed the class action. Whether it
16 denied class certification or not, that's when it was
17 brought. And this is the same action. It is not a
18 different action. It is the same action. It is the
19 same action because, one, the same words, because, you
20 know, we go through a list, and moreover brought within
21 a reasonable time.

22 Why interpret those words in the way I just
23 said? The reason why is because it is the same action.
24 The other reason why is because you will, even if not so
25 far, discover that people do want to protect themselves

1 and will do so. Whether they are big or small, they
2 will. And, therefore, let's imagine a class action
3 involving 300,000 potential plaintiffs in the class, and
4 imagine you're the district judge, and imagine 300,000
5 pieces of paper coming across your desk. You'll have to
6 build a new clerk's office.

7 I mean, you see, that's the way their
8 argument goes, I think. I think.

9 MR. CLEMENT: I -- I think that's the way it
10 goes. Now, I'm a simple-minded person. I would not get
11 past the first step of that argument because I would say
12 they're seeking to recover on an action that they
13 voluntarily filed in California when the rest of this
14 class action was going on in the Southern District of
15 New York, and it's just not the same action. So you'd
16 lose me at step one.

17 But if you got to the policy arguments, I
18 would really -- if I were, you know, trying to like
19 really twist the statute in a way that I think doesn't
20 comport with its basic test, I would need different
21 empirical data than we've gotten from the Second
22 Circuit.

23 And to get back to Justice Kagan's point --

24 JUSTICE GINSBURG: And we do have -- we do
25 have two briefs, one by retired federal judges, one by

1 law professors, tell us that inevitably you are going to
2 have people filing to intervene.

3 And in -- in that respect, assuming that
4 you're right, so that the people who don't intervene
5 within the 3-year period are out, does lead counsel have
6 an obligation to inform everyone in the class, if you
7 don't file a separate action of your own or intervene in
8 this one, you are going to be out?

9 MR. CLEMENT: So, two things, Justice
10 Ginsburg. I'll answer your final question first, which
11 is to simply say I don't think lead counsel has that
12 obligation. But let me also, just in -- in specific
13 reference to the two briefs you've mentioned, it's worth
14 going back to the IndyMac docket and looking at the
15 amicus briefs filed there, because those same two amicus
16 briefs were filed -- some law professors, some retired
17 judges. And they made the same prediction back then.
18 And it turns out it's absolutely not borne out by the
19 experience in the Second Circuit.

20 Now, why is that? Well, as Justice Kagan
21 pointed out, the reason that lots of small investors
22 don't file their own intervention actions or separate
23 actions, is because it's just -- you know, for them it's
24 a class action or nothing. And -- and so, you know,
25 they have to essentially rely on the class action

1 device.

2 The reason that the institutional investors
3 haven't done it is because they're not that worried
4 about timeliness in lots of cases, though there are some
5 cases where they are worried about either the quality of
6 the class counsel or some other counsel has gotten to
7 them and convinced them that they're going to do better
8 if they file alone -- they file alone --

9 JUSTICE KENNEDY: You mean they're not
10 worried about timeliness because they're relying on the
11 class action?

12 MR. CLEMENT: Exactly. And if they stay in
13 the class action, there's no timeliness problem. They
14 get to recover.

15 JUSTICE KAGAN: But just to --

16 MR. CLEMENT: And so all -- all our rule
17 does is make somebody who wants to go it alone, they
18 have to make that decision within 3 years. It's --

19 JUSTICE KAGAN: It puts tremendous pressure
20 on the opt-out right, right? We're used to thinking
21 that the opt-out right is a very important part of class
22 actions; it's what saves them from a due process
23 problem, that people actually do get to say, I don't
24 want any part of this.

25 And you're saying they only get to say that

1 within 3 years, which may be not within 3 years of the
2 time the suit was brought; it may be 6 months of the
3 time the suit was brought, or 1 month or something like
4 that. And, you know, if -- if you haven't decided
5 within that month or 6 months that these lawyers are not
6 doing a good job, you've lost your ability forever to do
7 it for yourself.

8 MR. CLEMENT: Well, it -- I -- I guess I --
9 sort of there's a couple of points I'd want to say about
10 that. I mean, even if you don't opt out, you haven't
11 lost the ability if you think the class counsel aren't
12 doing a good job. You have the right to object to the
13 settlement, and if you really care about individual
14 investors --

15 JUSTICE KAGAN: All power to you, but, you
16 know, a lot of those settlement hearings are awfully
17 tough.

18 MR. CLEMENT: Well, they're tough, I
19 suppose, because everybody is all in the same team. But
20 if we create an incentive where the CalPERS of the world
21 are actually going in there and actually fighting for a
22 better settlement for the whole class, I mean, that's a
23 world where actually the small, individual investor is
24 going to benefit.

25 JUSTICE KAGAN: But Rule 23 did not want

1 that to happen. Rule 23 wanted to allow people to opt
2 out rather than to be confined in the suit for the
3 entire pendency of the suit and then to start fighting
4 the outcome at the -- at the last moment.

5 MR. CLEMENT: Well, two points, Justice
6 Kagan. First of all, whatever Rule 23 wanted, the PSLRA
7 actually wanted large institutional investors to stay in
8 the class. They actually have preferences for them as
9 the lead plaintiff, precisely on the theory that it's
10 going to rise -- that all boats will rise with the --
11 with the institutional investor. So whatever happened
12 in Rule 23, I think in light of the PSLRA, this is
13 actually a better result.

14 But as to the opt-out right, the opt-out
15 right gives you a right not to be bound by a judgment
16 that you had no business in procuring. It doesn't
17 guarantee that you're going to have a viable individual
18 action to opt into.

19 Now, there still may be reasons why an
20 individual investor or an institutional investor wants
21 to opt out.

22 JUSTICE KAGAN: It's not much of an opt-out
23 right. Go ahead, opt out, but -- but you can't bring
24 your own claim.

25 MR. CLEMENT: But -- but look at what

1 happened with the Petitioners in this case. I mean,
2 they opted out. I used air quotes because they filed
3 their individual action before class certification, so
4 they, like, pre-opted out.

5 But they opted out, but they still preserved
6 10b-5 claims, which have a longer statute of repose, and
7 they proposed -- they -- they pursued some other claims.
8 Other plaintiffs could pursue State law claims. So it
9 just -- if -- if you opt out of a claim that's subject
10 to a 3-year statute of repose and you haven't brought an
11 individual action before then, then you do not have a
12 timely action subject to that statute of repose. But
13 that's the purpose of a statute of repose.

14 And from the perspective of a defendant, if
15 you are facing just a class action, you know that --
16 it -- it -- and the time of repose passes, then you know
17 you're going to be able to get essentially global legal
18 peace if you settle the class action.

19 If, on the other hand, you face that big
20 class action and then two or three of the big
21 institutional investors opt out and file their own
22 individual actions, then you're going to know that you
23 can't get global legal peace in the class action; you're
24 going to have to pay sort of a hold-out premium to those
25 institutional investors.

1 Now, if those institutional investors file
2 before the statute of repose goes out, then that's
3 tough. That's life. But all of the policies of the
4 statute of repose are implicated when you're in a
5 situation where, after 3 years, you're no longer facing
6 just a class action where you can get global legal
7 peace, but you're also facing an opt-out right,
8 especially where the opt out is a big institutional
9 investor, and the whole reason they've opted out is to
10 get a better deal than the class. And that's why, you
11 know --

12 JUSTICE GINSBURG: I -- I would like you to
13 go back to the question I asked, because one of the
14 purposes of the Federal rules is that so litigants
15 should know what they're facing. And there's all kinds
16 of notices that have to be sent for class actions, and
17 yet you tell me that there's no obligation of lead
18 counsel, or the court, I assume, when the 3 years -- the
19 time is running, to tell everyone in the class, now
20 either you bring an individual action or intervene in
21 this one, otherwise, you'll never get a penny.

22 MR. CLEMENT: I -- I don't think there is
23 that obligation, Justice Ginsburg. I think it's based
24 on the theory of the class action, which is that you're
25 only going to have a class action if the class

1 representative is an adequate representative of the
2 entire class and you're only going to approve a
3 settlement under Rule 23(e), if it's fair and reasonable
4 for the entire class. I think that's where the
5 protections are built in for the class. And it bears
6 emphasis that nothing in the rule that we are proposing
7 is going to prevent anyone from recovering from a timely
8 filed class action.

9 It's only when somebody wants to go out of
10 the class action and get themselves a better deal, that
11 they have to have a timely action to get the better
12 deal. If they do, then my clients don't have a statute
13 of repose.

14 But if in a case like this, in 2011, even
15 before class certification decision is being made, they
16 decide you know what? We're going to be better off if
17 we file our own action in the Northern District of
18 California.

19 It's a bit rich for them to say okay, even
20 though we've decided to file our own action for our own
21 reasons because we think we're going to be better off,
22 we still get the benefit of the timeliness of the class
23 action that we're essentially pre-opting out of. And --
24 and magically, they think they get the benefit of that,
25 without even applying tolling or some kind of

1 relation-back doctrine.

2 Now, I don't think that works on the text of
3 the statute. I don't want to get into a debate about
4 what question presented 1 has and question presented 2
5 is, but it's worth remembering that even if you somehow
6 think you can maybe interpret Section 13 to encompass
7 this theory, I mean, there are other cases.

8 This case had -- this Court had four
9 petitions in front of it. None of the other three
10 petitions invoked this issue in the context of Section
11 13. The other -- two of them were 10b-5 actions, one
12 of them was an implied statute of repose provision.
13 So you're going to have to take one of those cases to
14 grant the question that I thought you granted this case
15 to decide, which is, as a general matter, can American
16 Pipe tolling override a statute of repose?

17 I think the answer to that question, the
18 question that my friend really doesn't want to spend
19 much time talking about, is no. A statute of repose
20 means repose. Its defining feature is that it's not
21 subject to tolling or estoppel rules

22 CHIEF JUSTICE ROBERTS: No. But, I mean,
23 there's different levels of repose. I mean, the --
24 the -- you have repose under his theory, in the sense
25 that you know what people are suing you about. You're

1 still facing a lawsuit in the other case. There aren't
2 going to be any more surprises. You know what's on the
3 table. That's repose.

4 Repose can also mean, in your -- your sense,
5 that everything is done. You're not going to owe
6 anybody anything. But we know that's not the reason,
7 because if you bring your claims within the period, that
8 can extend for 15 -- 15 years, however long these
9 litigations take.

10 MR. CLEMENT: Well, Mr. Chief Justice, I
11 think that both Waldburger and the text of Section 13
12 tell you what repose defendant gets. It gets no new
13 actions. That's the repose it gets. If an action is
14 filed before the time deadline, then, of course, it's
15 going to be subject to liability under that action, even
16 if it takes another couple of years for that to run its
17 course and be resolved. But you are not subject to
18 additional liability under actions that are filed after
19 the period of the statute of repose. And that seems like
20 a very reasonable compromise --

21 CHIEF JUSTICE ROBERTS: Yeah, but they're
22 put -- I'm not -- it seems uncertain whether you're
23 being subjected to new liability. I mean, the liability
24 is the same if you have the class action, including
25 CalPERS, and, as it is, if you then have -- you're

1 facing the class action without CalPERS, but another
2 CalPERS suit.

3 I'm not, you know, sure that that increases
4 your liability.

5 MR. CLEMENT: Well, I'm absolutely sure that
6 it increases my liability, and so are my clients,
7 Mr. Chief Justice. Because they know from experience
8 that the only thing worse than having a class action
9 against you is having a class action and some individual
10 actions against you. Because then you've got to pay to
11 settle the class action and then you have to pay --

12 CHIEF JUSTICE ROBERTS: But at least in -- I
13 mean, it -- it requires, perhaps, more management and
14 scrutiny by the district judges that is possible, but,
15 you know, theoretically, if a big chunk of the class is
16 out, you're not going to pay twice for that, right?

17 MR. CLEMENT: No. But typically, and
18 especially in securities class action, it's not a big
19 chunk that's out. It's a handful of institutional
20 investors who are able to use the fact that they've
21 opted out for additional leverage to get a better
22 settlement than they would get in the class. Now, that
23 works against the principles of Rule 23 and the PLSRA,
24 but there's nothing that my clients can do to stop it if
25 those individual actions are filed in a timely fashion.

1 But when those individual actions, new
2 actions are filed after three years has passed, I would
3 respectfully suggest that that fully implicates the
4 policies behind statutes of repose generally and the
5 text of this statute.

6 And then I do think that gives you a very
7 easy way to essentially decide this case, which is to
8 just ask the question: Is the action that they are
9 seeking to recover millions of dollars on one that was
10 filed within 3 years of the public offering of the
11 securities at issue here.

12 And it was most certainly not. It was filed
13 in the Northern District of California in 2011, more
14 than 3 years after the securities were issued. And the
15 only way they can make that action timely is to point to
16 something else that was timely filed.

17 Now, at the time that they opted out because
18 the class wasn't even certified, that action over in
19 New York, they weren't even a party to it under Smith v.
20 Bayer and Standard Fire. So maybe they can get the
21 benefit from some super tolling rule or some super
22 concept of relation back, but those are two things that
23 you don't get to use to impose new liability in the face
24 of a statute of repose.

25 I don't think ultimately whether you call it

1 equitable tolling or not matters much. This Court in
2 Waldburger said the defining feature of a statute of
3 repose is they're not subject to tolling or estoppel.
4 It didn't use equitable tolling as a modifier. And, of
5 course, as we've discussed, or as was discussed, if this
6 rule is something other than a rule of equitable tolling
7 and it's a legal rule, then the Rules Enabling Act
8 problem is front and center, because we have a defense
9 under Federal statutory law to substantive defense under
10 Waldburger to not have new liability, new actions filed
11 against us in over 3 years. If the only thing that
12 trumps that is a judicial construction of Rule 23,
13 there's a Rules Enabling Act problem.

14 At the end of the day, I think the path for
15 deciding this case is very clear. Section 13 is the
16 statute of repose. This Court said as much in Lampf.
17 Statutes of repose are not subject to tolling. This
18 Court said as much in Waldburger. There's simply no
19 basis to deviate from this Court's precedence.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Four minutes, Mr. Goldstein.

23 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

24 ON BEHALF OF THE PETITIONER

25 MR. GOLDSTEIN: Thank you. Two basic

1 points. The first is I don't believe that the statute
2 could be functioning as the Respondent suggests because
3 their point is look, as the Petitioners see it, after
4 the class certification is denied or there's an opt-out
5 period, then they'll have these individual lawsuits spin
6 up and whoa, we didn't expect that at all.

7 But the world that they want is exactly the
8 same; it just involves more paperwork. What they want
9 us to do is to intervene in the class action on day 1
10 and then do nothing and sit back. And when we
11 eventually would otherwise intervene, then spin up our
12 lawsuit. Nothing will have been gained. They won't be
13 on any more notice.

14 American Pipe explains, and particularly in
15 the context of Section 1, when you're talking about
16 bonds that they issued, they knew that we're out there.
17 All that we didn't do was to file our own complainant to
18 get stayed, or our own motion to intervene to just take
19 up the district judge's time, and then, later, we would
20 proceed on the exact same lawsuit.

21 So there's no additional surprise at all
22 under our rule. All there is, is, perhaps, a trap for
23 the unwary.

24 Then, if you are trying to understand what
25 "action" means -- and it can mean different things in

1 different context, we have to realize that we have a
2 body of law here. We have not just Section 13, but we
3 have Rule 23, which contemplates that we have the right
4 to notice and the opportunity to opt out, not into the
5 vacuum of space, but into our timely filed, initiated by
6 the class action and thus far meritorious action.

7 And, second is I do believe the other side
8 profoundly misunderstands the Private Securities
9 Litigation Reform Act, the entire point of which was to
10 not have a bunch of parties in there litigating on their
11 own. It doesn't contemplate that a bunch of
12 institutional investors will be out there. It
13 contemplates that there will be one, and he's called the
14 lead plaintiff.

15 It contemplates that other parties might try
16 and become the lead plaintiff by submitting a notice,
17 not by moving to intervene. It contemplates that a new
18 lead plaintiff could be named after the expiration of
19 three years

20 What happened here is this: The statute is
21 written in bilateral terms. Later on, 30 years later,
22 we get Rule 23. We have to figure out how to make the
23 two of them work together.

24 What we know is Section 13 wants them to be
25 on notice of the claims against them. American Pipe

1 says: Okay. You know that from the class action
2 complaint.

3 Rule 23, then, says we want a representative
4 party. We don't want to take up the district judge's
5 time. That's the whole point of the rule.
6 The way you put those together is to say that the class
7 action complaint, in the passive voice, brought the
8 action on our behalf, and then we just took control of
9 it when we opted out. Everything makes sense, and the
10 judiciary, which is what's being protected here, not any
11 equitable interest of us, but your district judges, all
12 their interests are furthered together.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 1:59 p.m., the case in the
17 above-entitled matter was submitted.)

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<p>A</p> <p>ability 48:6,11</p> <p>able 9:3 17:19 26:1 50:17 55:20</p> <p>above-entitled 1:13 60:17</p> <p>absent 16:23</p> <p>absolutely 38:21 38:23 40:25 46:18 55:5</p> <p>abstract 24:11</p> <p>accomplish 15:21 26:10</p> <p>account 36:12</p> <p>accrue 34:10</p> <p>act 3:13 16:18 20:18 21:2,6 26:8 27:19 30:8,13,25 32:2 33:12,25 34:1 57:7,13 59:9</p> <p>action 3:21,21 3:23 4:11,18 5:4,4,6,9,13,18 5:18 6:19,24 6:24 7:4,6 8:12 8:25 10:3,20 10:21,22,23,24 11:2,13,15,25 12:8 13:3,15 13:22,25 14:16 15:1,13,22 16:6 17:8,17 18:18 19:4 20:7 22:1,6,8 22:11,14,14,18 22:18,19 23:4 23:6,10,14,21 24:8,14,18,23 25:1,2,3,10 27:3,4,7 29:20 31:3 35:22 36:24 37:8 38:1,15 39:8</p>	<p>39:21 40:4,16 40:17,23 41:22 41:24 42:2,3,9 42:12,22 43:8 44:13,14,15,17 44:18,18,19,23 45:2,12,14,15 46:7,24,25 47:11,13 49:18 50:3,11,12,15 50:18,20,23 51:6,20,24,25 52:8,10,11,17 52:20,23 54:13 54:15,24 55:1 55:8,9,11,18 56:8,15,18 58:9,25 59:6,6 60:1,7,8</p> <p>actions 11:21 13:17 19:17 40:20 43:22 44:4,7,9 46:22 46:23 47:22 50:22 51:16 53:11 54:13,18 55:10,25 56:1 56:2 57:10</p> <p>actual 15:11</p> <p>add 13:11</p> <p>additional 13:11 26:12 54:18 55:21 58:21</p> <p>address 43:13</p> <p>adequate 52:1</p> <p>administer 19:12</p> <p>administration 16:7</p> <p>admits 30:12</p> <p>adversary 17:14</p> <p>adverse 38:9</p> <p>afternoon 3:4</p> <p>agree 9:22 28:4 44:11,12</p> <p>agrees 4:10</p> <p>ahead 49:23</p>	<p>air 50:2</p> <p>Airlines 10:8 29:11,14</p> <p>AL 1:7</p> <p>Alito 6:7,13,16 20:11 22:7,10 22:13,16 23:18 23:21 24:1,5 24:21 25:6</p> <p>allegation 12:10</p> <p>allow 49:1</p> <p>allowed 12:20</p> <p>alternative 20:7 26:14</p> <p>alternatively 14:17</p> <p>ambiguity 21:15 21:18</p> <p>amend 12:14</p> <p>amendment 12:17</p> <p>amendments 13:12</p> <p>American 3:11 4:8,16,16,22 5:3,24 7:11,17 10:2,7 12:1,2,3 14:3 16:1 17:23 19:24 20:2,11,21,23 21:1 24:11 25:13 30:14,25 31:5,15 32:15 35:14 36:3,8 36:21 39:7 40:11,14,17,18 41:1,2,11,17 53:15 58:14 59:25</p> <p>amicus 8:7 10:10 46:15,15</p> <p>amount 7:1,2</p> <p>amounts 7:1</p> <p>anew 38:7</p> <p>announce 8:10</p> <p>announced 8:6</p> <p>answer 26:23</p>	<p>29:9 38:11 46:10 53:17</p> <p>answering 36:4</p> <p>answers 39:19</p> <p>anticipated 7:17</p> <p>anybody 54:6</p> <p>ANZ 1:7 3:5 25:11</p> <p>apologize 4:14 4:24 18:23</p> <p>appeals 26:2</p> <p>APPEARAN... 1:16</p> <p>applicable 35:10</p> <p>application 5:23 22:5 27:19</p> <p>applications 20:12</p> <p>applies 3:12 4:8 4:16,22 44:4</p> <p>apply 6:1 31:18 37:20 40:21 42:3</p> <p>applying 52:25</p> <p>approve 52:2</p> <p>April 1:11</p> <p>argued 20:22</p> <p>argument 1:14 2:2,5,8 3:3,7 6:7,12,13,16 6:21 10:13 20:22 26:21 27:17 30:4 33:18,19 34:20 35:1,11 36:10 41:20 45:8,11 57:23</p> <p>arguments 11:3 11:5,5,6,23 26:20 35:9 45:17</p> <p>asked 51:13</p> <p>asking 19:3 38:19</p> <p>asks 12:14</p> <p>asserted 9:23 12:13 25:10</p>	<p>assertion 14:10</p> <p>assume 51:18</p> <p>assuming 46:3</p> <p>attack 9:15</p> <p>attempting 15:21</p> <p>automatic 37:18</p> <p>avoid 17:1 26:22</p> <p>awfully 48:16</p> <p>B</p> <p>back 34:18,24 43:12 45:23 46:14,17 51:13 56:22 58:10</p> <p>background 37:23</p> <p>bad 21:14,15</p> <p>balance 29:10 30:1</p> <p>barred 12:7 20:25 30:16,16 31:22</p> <p>based 37:22 39:21 41:22,24 51:23</p> <p>basic 45:20 57:25</p> <p>basically 35:2</p> <p>basis 25:16,16 34:21 36:24 37:3 57:19</p> <p>Bayer 56:20</p> <p>bears 52:5</p> <p>beg 34:18</p> <p>began 27:4</p> <p>begins 3:20</p> <p>behalf 1:17,19 2:4,7,10 3:8 5:4,6,10,21 6:24 7:9 24:9 24:14,18 30:5 39:9 57:24 60:8</p> <p>belief 18:20</p> <p>believe 5:17 9:11 16:24</p>
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