

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   CREDIT SUISSE SECURITIES (USA)       :

4   LLC, ET AL.,                               :

5                   Petitioners               :   No. 10-1261

6                   v.                               :

7   VANESSA SIMMONDS                               :

8   - - - - - x

9   Washington, D.C.

10    Tuesday, November 29, 2011

11

12                   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 11:04 a.m.

15   APPEARANCES:

16   CHRISTOPHER LANDAU, ESQ., Washington, D.C.; for

17   Petitioners.

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19   General, Department of Justice, Washington, D.C.; for

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21   JEFFREY I. TILDEN, ESQ., Seattle, Washington; for

22   Respondent.

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

2 (11:04 a.m.)

3 JUSTICE SCALIA: We'll hear argument next in  
4 Case Number 10-1261, Credit Suisse Securities v.  
5 Simmonds.

6 Mr. Landau, you may proceed.

7 ORAL ARGUMENT OF CHRISTOPHER LANDAU

8 ON BEHALF OF THE PETITIONERS

9 MR. LANDAU: Justice Scalia, and may it  
10 please the Court:

11 In section 16(b) of the 1934 Exchange Act,  
12 Congress created a cause of action to allow securities  
13 issuers to recover short-swing profits from certain  
14 covered persons, but specified that a lawsuit must be  
15 brought 2 years after the date the short-swing profit  
16 was realized. The statute doesn't say 2 years after the  
17 date the defendants filed a section 16(a) report, as the  
18 Ninth Circuit and Respondents would like to have it.  
19 Nor does the statute say 2 years after the date the  
20 plaintiff discovers the short-swing transaction, as the  
21 Government would like to rewrite it.

22 I'd like to make two basic points here  
23 today: First, as this Court recognized in *Lampf*, the  
24 2-year time limit in section 16(b) is best read as a  
25 period of repose that can't be extended at all; and,

1 second, even if section 16(b)'s 2-year time limit could  
2 be extended, the doctrine of equitable tolling wouldn't  
3 apply to extend the time limit here, where the plaintiff  
4 didn't act diligently to bring a claim and didn't prove  
5 that any extraordinary circumstances precluded her from  
6 filing. The upshot of these two points is that this  
7 Court should reverse the Ninth Circuit's decision and  
8 remand the case with directions to dismiss the complaint  
9 as untimely.

10 JUSTICE GINSBURG: On your first --

11 JUSTICE SOTOMAYOR: Counsel, would --

12 JUSTICE GINSBURG: On your first point, you  
13 cite *Lampf*, but *Lampf* had two limits. So, it said --  
14 what was it, 1 year from whatever, from discovery. And  
15 then it set an outer limit at 3 years, and it was the  
16 same thing in *Merck*. Here we just say -- it just has  
17 what seems to me a plain vanilla statute of limitations  
18 that is traditionally subject to waiver, equitable  
19 tolling. We don't have that special kind of statute  
20 that gives you one limit and then sets a further limit  
21 that will be the outer limit.

22 MR. LANDAU: Your Honor, with respect, it's  
23 certainly true that a two-pronged time limit underscores  
24 that the outer prong is a period of repose, but there's  
25 certainly no magic words that Congress has to use. It

1 doesn't have to use a two-pronged time limit to  
2 establish the outer limit as a period of repose. In  
3 fact, that's really the lesson of this Court's decision  
4 in TRW and in Beggerly and Brockamp, that the -- the  
5 background or the default rule, the background rule that  
6 equitable tolling applies, isn't some kind -- is just  
7 that. It's a background rule. And Congress, in the  
8 text or structure --

9 JUSTICE KAGAN: But what takes you out of  
10 that background rule in this case? You don't have the  
11 two-pronged structure, which really did, as Justice  
12 Ginsburg said, drive the analysis when we -- when we  
13 talked about those provisions. So, that's not there.  
14 So, what takes you out of the default position, which is  
15 equitable tolling applies?

16 MR. LANDAU: Sure, Your Honor. I think --

17 JUSTICE KAGAN: On the statute of  
18 limitations --

19 MR. LANDAU: The key point, Your Honor, is  
20 that this Congress in the 1934 Exchange Act was  
21 carefully attuned to the issue of time limits.  
22 Congress -- there was -- there was a lot of discussion  
23 of this. This is a not a situation where Congress  
24 established a liability and just didn't focus on this  
25 issue, as often happens, and left it to background

1 statute of limitations provisions or other background  
2 rules. Congress thought long and hard about this.

3 With respect to the two-prong provisions,  
4 those are the fraud provisions that were set at an outer  
5 limit of 3 years. And then they actually created a  
6 discovery rule that said we don't even want people to  
7 wait the whole 3 years; if they've discovered the facts  
8 underlying their claim, we want them to bring it within  
9 a year. So, they used discovery to shorten the time,  
10 not to extend it.

11 JUSTICE KAGAN: Right. But I guess I'm  
12 still not understanding why, if you look at this  
13 provision, you would think of this as anything other  
14 than an ordinary statute of limitations. What is it  
15 about this provision -- or, I don't mean to -- to -- I  
16 mean, you can -- you can make structural arguments. But  
17 -- but, you know, what factors do you think in this  
18 provision makes it a statute of repose?

19 MR. LANDAU: Two things, Your Honor. First,  
20 I'd like to just finish on the structural point; and we  
21 also have a textual argument.

22 With respect to the structure, this, let's  
23 not forget, was enacted at the same time and as part of  
24 the same statute as these other provisions that did use  
25 discovery provisions to shorten the time limit. What

1 Congress did with respect to 16(b), instead of having  
2 the 3-year outer limit plus a safety valve that would  
3 make you have to sue even sooner, Congress has brought  
4 in the outer limit. The -- instead of 3 years as in the  
5 two-prong provisions, said you've got to sue within 2  
6 years. Having said you've got to sue within 2 years,  
7 they decided you didn't need that safety valve  
8 provision. But it would be very --

9 JUSTICE GINSBURG: The problem is it reads  
10 like dozens of statutes of limitations. It says no suit  
11 more than 2 years and that -- I think that the general  
12 understanding is that that limitation, that kind of  
13 limitation -- there is a presumption that it is subject  
14 to equitable tolling, forfeiture, waiver. And why, if  
15 this one doesn't use any different words, why should --

16 MR. LANDAU: Two things, Your Honor. This  
17 legislation -- again, this section 16 is not a  
18 stand-alone statute. It was enacted as part of the '34  
19 Act. And so, I think you -- the same Congress that set  
20 a hard outer limit of repose for fraud claims in section  
21 9(e) and 18(c) wouldn't have wanted with respect to this  
22 prophylactic provision that it is, by definition, both  
23 under- and over-inclusive. It may be --

24 JUSTICE KAGAN: Well, I could turn the  
25 argument around on you. Congress surely knew how to

1 write a statute of repose because it did it in this  
2 statute, but it didn't do it with respect to these kinds  
3 of violations. This statute of limitations, I'm going  
4 to call it, reads very differently from the two-pronged  
5 positions that we've interpreted in the past.

6 MR. LANDAU: Again, Your Honor, I think one  
7 point, just to respond to that and as well to Justice  
8 Ginsburg's question, the -- the typical textual hook for  
9 a statute of repose is that it's keyed off of the  
10 defendant's conduct -- 2 years after the defendant does  
11 X, Y, or Z. That is -- as we quoted Black's Law  
12 Dictionary for this proposition in our brief. The  
13 Seventh Circuit, Justice Posner, had an opinion just  
14 last week underscoring this point, the Hy-Vee case, that  
15 said the typical statute of limitations actually says 2  
16 years after the cause of action accrued or after the  
17 plaintiff discovered, but when you're -- when -- again,  
18 we don't think -- in this case, we are not relying  
19 solely on the textual thing, but in terms of numbers of  
20 guideposts, this is not your classic statute of  
21 limitation. If you actually start looking at them, a  
22 lot of them key off of accrual.

23 JUSTICE ALITO: Is that -- is that true? If  
24 we were to look at all the statutes of limitations in  
25 the -- in the U.S. Code, we would find that they are



1 generally or exclusively drafted like section 1658, the  
2 general statute of limitations provisions, and are  
3 geared to or are triggered by the accrual of the action  
4 rather than some event?

5 MR. LANDAU: Your Honor, I think we can't  
6 say that there is a bright-line rule. Congress --  
7 again, I think the most we can say is that the classic  
8 formulation of a statute of repose is to key a time  
9 limit off of the defendant's conduct as opposed to the  
10 accrual. And, again --

11 JUSTICE SOTOMAYOR: Well, the problem is  
12 that the injury here is the defendant's conduct, meaning  
13 if the nature of the claim, as is here, that someone has  
14 received a profit they're not entitled to, then the  
15 injury is the same. The profit belonged to the  
16 shareholders or the corporation, not to the insider.  
17 So --

18 MR. LANDAU: Clearly to the -- yes.

19 JUSTICE SOTOMAYOR: -- textually the nature  
20 of the claim here is the very injury, plaintiff's  
21 injury.

22 MR. LANDAU: Well, Your Honor, again, one of  
23 the things about this statute that's kind of odd, it's a  
24 prophylactic statute that doesn't even require any  
25 injury. I mean, it just says there has got to be

1 disgorgement to the corporation. It's a little bit  
2 different --

3 JUSTICE SOTOMAYOR: Well, disgorgement is  
4 injury, meaning that it's something that -- that you're  
5 taking away from someone else.

6 MR. LANDAU: But it's taking it away from  
7 the defendant. It doesn't actually mean that actually  
8 somebody else would have earned that money.

9 JUSTICE SOTOMAYOR: Tell me what logic there  
10 is in reading this as a statute of repose, other than  
11 your argument about finality and its importance.

12 MR. LANDAU: I think --

13 JUSTICE SOTOMAYOR: If we take your  
14 adversary's position that this statute of limitations  
15 was geared under an understanding that an insider would  
16 in fact make the requirements -- would file the  
17 statements required by 16(a), then it makes absolute  
18 sense to think of it as a statute of repose. But if  
19 Congress understood that some wouldn't do the statutory  
20 requirement and file in a timely manner, why wouldn't  
21 equitable tolling be a more appropriate way to look at  
22 this?

23 MR. LANDAU: I think the key point, Your  
24 Honor, is to look at the 1934 Exchange Act as a whole,  
25 which includes not only this provision but also

1 out-and-out-fraud provisions that are for intentional,  
2 real hard-core insider trading. That would be sections  
3 9(e) and 18(c). There is no question that Congress  
4 provided a period of repose for those, the outer limit.

5 And then that raises the question that  
6 Justice Ginsburg started with, which is, do you have to  
7 have a two-prong limit? And the answer to that is no,  
8 you don't -- there's no magic words, as TRW, Beggerly,  
9 and Brockamp show us. You just have to try to make  
10 sense of the statute as a whole. And Congress would not  
11 have wanted to give repose to intentional fraudsters but  
12 not give repose to a defendant in a purely prophylactic  
13 section 16(b) action. I think that's the fundamental  
14 thing when you just step back and look at this.

15 JUSTICE GINSBURG: Well, it's -- it's not  
16 simply a prophylactic. I mean, there's an objective  
17 that 16(a) expresses; that is, Congress wanted these  
18 trades to be reported and to have the form filed, Form 4  
19 filed. So, it's a -- it's a disclosure-forcing  
20 provision, 16(a) is. Then, why would Congress mean for  
21 it to operate to immunize a defendant who has not made  
22 that filing and who has concealed what was supposed to  
23 be reported in 16 -- under 16(a)?

24 MR. LANDAU: Your Honor, for the same reason  
25 that Congress would have afforded repose even to

1 out-and-out fraudsters. Again, Congress was creating  
2 vast new liability here. A fraudster by definition, as  
3 somebody who would be liable under 18(c) or 9(e), has  
4 done kind of to conceal it. Yet, Congress still  
5 believed, because it was creating this vast new  
6 liability --

7 JUSTICE KAGAN: Judge Posner, Mr. Landau,  
8 has a theory for why it is that fraud is treated  
9 differently from the 16(b) offenses, and it's that it's  
10 much more important to prevent strategic behavior  
11 involving timing in fraud suits -- the stock price goes  
12 up, the stock price goes down -- whereas, in these  
13 suits, damages are fixed. It doesn't really matter  
14 where you bring them. So, it's not nearly as important  
15 to set a clear limit.

16 MR. LANDAU: Well, like many of Judge  
17 Posner's theories, it's -- it's a very clever theory,  
18 but in a sense, it misses the fundamental truth that  
19 when Congress is granting repose, it is trying to allow  
20 people to turn the page on something in their past. The  
21 idea that Congress would grant repose to more culpable  
22 people but not to less culpable people --

23 JUSTICE KAGAN: Well, you have one theory,  
24 which -- which deals with culpability; and he has  
25 another theory, which deals with strategic behavior.

1 And I don't know how to pick between those two theories,  
2 to tell you the truth. The text doesn't suggest which  
3 one Congress was thinking about. And that puts me back,  
4 and let's look at this provision, and this provision  
5 looks like an ordinary vanilla statute of limitations.

6 MR. LANDAU: Well, again, the only thing  
7 I'll say on repose before -- and I'd like to turn  
8 then -- because we certainly don't need repose to win  
9 this case, and -- and while we think it is best  
10 characterized, this Court in *Lampf* had occasion to look  
11 at all of the various time limits and see how they all  
12 worked together. And this Court characterized section  
13 16(b) as a statute of repose.

14 To be sure, that was dicta because *Lampf*,  
15 itself was not a 16(b) case. But it was -- it was -- it  
16 was a statement or it was a recognition that came after  
17 looking at all of these, and it would be strange now to  
18 say that, in fact, the 16(b) time period is  
19 potentially -- the Court said it was more restrictive,  
20 and both the majority and Justice Kennedy in dissent  
21 agreed that it was a statute of repose.

22 JUSTICE SCALIA: Of course, *Lampf* was a  
23 disaster, wasn't it? Congress had to try to patch up  
24 what we had done.

25 MR. LANDAU: Absolutely not, Your Honor.

1 (Laughter.)

2 MR. LANDAU: Lampf stands as a landmark.

3 But -- but let me make clear, Your Honor. Our position  
4 here today doesn't depend on this being a statute of  
5 repose, because even if this 2-year time limit --

6 JUSTICE ALITO: Before you turn away from  
7 the statute of repose, could I just ask you one more  
8 question --

9 MR. LANDAU: Absolutely.

10 JUSTICE ALITO: -- on -- on that? If -- if  
11 16(a) reports are not filed, how likely is it that a  
12 potential 16(b) plaintiff will find out within the  
13 2-year period that there were these trades?

14 MR. LANDAU: Your Honor, they can find out  
15 in many ways, the same ways that any other securities  
16 plaintiff, including a fraud securities plaintiff, can  
17 find out. There are corporate books and records that  
18 can be examined. There are other SEC filings and SEC  
19 investigations. There's other litigation. This could  
20 come up in an estate discovery -- estate or divorce  
21 proceedings. There are whistle blowers, confidential  
22 informers, brokers, counterparts -- counterparties.

23 Again, if Congress had wanted the section  
24 16(a) disclosure to be the trigger under section 16(b),  
25 it could have done so. And, in fact, as we noted in our

1     brief, there was an early draft in the House that  
2     created a two-prong provision and established for -- you  
3     know, it's an outer limit of 3 years and an inner limit  
4     of 6 months after the 16(a) disclosure.

5             JUSTICE ALITO:  What would -- what are the  
6     other filings that might disclose this?

7             MR. LANDAU:  Well, Your Honor, again,  
8     like -- this case is a good example.  In this very case,  
9     the contradiction at the heart of the plaintiff's case  
10    is that they say, well, it can't possibly be discovered  
11    without a 16(a) filing.  There was no section 16(a)  
12    filing.  To this day, they say the statute of limitation  
13    has not started to run.

14            JUSTICE SOTOMAYOR:  Is there a public  
15    document that a -- that a shareholder can look at to see  
16    whether an insider has traded within 6 months?

17            MR. LANDAU:  Well, Your Honor, there is not  
18    a -- there is not a Form 4, which is a public document.  
19    But not every securities filing requires a public  
20    document.  In --

21            JUSTICE SOTOMAYOR:  I didn't ask that.  I'm  
22    going back to Justice Alito's question, which is how  
23    easy is it to find out without the 16(a)?

24            MR. LANDAU:  Well, again, there may be SEC  
25    filings.  There are --

1 JUSTICE SOTOMAYOR: That's a big thing. I  
2 didn't ask maybe.

3 MR. LANDAU: Well, no, there -- there are  
4 SEC filings that companies are required to make. There  
5 are -- again, this is not a -- a -- selling -- buying  
6 and selling shares is not something that can be done  
7 alone in the dark of night. You need to have other  
8 people involved with you. You need to have brokers  
9 complicit. You -- it's a large amount of shares. The  
10 counterparties --

11 JUSTICE SOTOMAYOR: And so, what's the  
12 likelihood that a broker's going to turn you in?

13 MR. LANDAU: There are whistle blowers.  
14 That's the -- that's the --

15 JUSTICE SOTOMAYOR: That's a very nice  
16 thing, but what -- how likely is that?

17 MR. LANDAU: Your Honor, brokers have their  
18 own responsibilities. A broker could be held liable as  
19 an aider or abettor to a violation.

20 JUSTICE SOTOMAYOR: How would the broker  
21 know that the -- that his principal didn't file a form  
22 he was required to?

23 MR. LANDAU: Well, again, the broker may get  
24 suspicious if the -- a broker may actually be checking.  
25 If a -- if a -- if a CEO of a corporation is suddenly



1 selling all these things -- again, this is no different  
2 than the way -- a securities plaintiff in an out-and-out  
3 fraud case, and those are brought every day, Your Honor.

4 But, again, I think the point here is that,  
5 regardless of whether this is repose, even if you say  
6 that this can be extended, it certainly can't be  
7 extended in the way that the Ninth Circuit extended it.  
8 And we and the SEC, the Government, agree on this: That  
9 the Ninth Circuit adopted this absolute black-letter  
10 rule that says it is tolled -- it doesn't even start to  
11 run unless and until the section 16(a) report is filed.

12 JUSTICE GINSBURG: How about the Second  
13 Circuit rule?

14 MR. LANDAU: The Second Circuit rule is more  
15 of a notice approach that says that it -- but, again,  
16 Your Honor, the problem with the Second Circuit's  
17 approach is that it doesn't reflect traditional  
18 background norms of equitable tolling. Then, if you say  
19 it's not a statute of repose, then what do you do just  
20 to figure out what Congress would have wanted? You say  
21 Congress legislates against the -- the -- the backdrop  
22 of these kind of equitable doctrines. So, let's look at  
23 what equitable tolling consists of.

24 This Court in many cases over the years --  
25 it's been dealing with equitable tolling since almost

1 the first days of the Court, well into the 19th century.  
2 In the most recent cases, the Court has made clear, in  
3 the Holland case, for instance, just two terms ago, that  
4 equitable tolling traditionally has two minimum  
5 requirements.

6 First, there has to be diligence on the part  
7 of the plaintiff. And in this context that means does a  
8 reasonable -- did the plaintiff know or would a  
9 reasonably diligent shareholder have reason to know of  
10 the claim; and, second, extraordinary circumstances.

11 And so, with respect to the Second Circuit's  
12 decision in Litzler, Your Honor, that you mentioned, I  
13 think it departs from traditional equitable tolling  
14 in -- in a couple of ways. Most particularly, it limits  
15 it to actual knowledge. It doesn't say "know or should  
16 have known," which again is the background rule, as we  
17 and the Government agree.

18 The second thing with respect to Litzler  
19 where it departs from the background rule is it says  
20 that it is -- per se gives rise to equitable tolling not  
21 to file the section 16(a) and doesn't include any kind  
22 of culpability on the defendant's part. And Judge  
23 Jacobs, in footnote 5 of Litzler, dropped a footnote  
24 saying that he would prefer to announce a tolling rule  
25 that was more consonant with, again, background rules of

1 equitable tolling, that said only when the failure to  
2 file the section 16(a) was unreasonable or -- or  
3 intentional, because he would say otherwise you could  
4 have a purely technical or inadvertent violation that  
5 would give rise potentially to equitable tolling, and he  
6 didn't think that was right.

7 JUSTICE KAGAN: Mr. Landau, if we were to  
8 agree with you on one or both of those two things,  
9 wouldn't the normal course be to remand? And what's  
10 your best argument for why we should decide it?

11 MR. LANDAU: Our best argument, Your Honor,  
12 is that the district court in this case already decided  
13 the very issue here. The district court said it is  
14 undisputed, just on the pleadings, that -- that they  
15 knew or should have known.

16 This case is probably the most egregious  
17 kind of case that you can see for this proposition  
18 because everything here is a replay of the IPO  
19 litigation and even the Billing case that came all the  
20 way to this Court. This case was filed just a few  
21 months after this Court decided Billing. And in  
22 particular -- they have now -- the Respondents have come  
23 and said, well, what we didn't know here was group, and  
24 we didn't know that the -- the underwriters were in a  
25 conspiracy with the issuer insiders, and that was the

1 piece of the puzzle that we were missing. And --

2 JUSTICE GINSBURG: We have to accept the  
3 plaintiffs' allegations as true. You may well be right  
4 that they really knew or they should have known. But,  
5 at this stage, we can't make that judgment because we  
6 have to accept the plaintiffs' allegations as true.

7 MR. LANDAU: Correct, Your Honor, but you  
8 are entitled, in deciding that, to look at their own  
9 pleadings. And there's two important things from their  
10 own pleadings.

11 First, if you look at their complaint,  
12 it's -- it alleges lock-up as its theory of group. It  
13 says that the plaintiffs and the -- the underwriters and  
14 the issuer insiders formed a 16(a) group because they  
15 had these lock-up agreements. Well, those lock-up  
16 agreements were publicly known as early as the  
17 prospectus of these IPOs. So, the -- the lock-up  
18 agreement was no secret.

19 Second, they say, well, we -- even though,  
20 like, lock-up might have been out there, we didn't know  
21 there was this underpricing-based conspiracy. And even  
22 assuming they could try and slice and dice it like that  
23 according to the -- the legal theory, the fact is in  
24 their motion to dismiss in the district court, they  
25 cited -- this is docket 58 in the district court, pages

1 1 to 2 -- they go at length about the academic  
2 literature regarding a conspiracy between underwriters  
3 and issuer insiders that they say gives legitimacy to  
4 their substantive claim. But that includes lots of  
5 articles, including a 2004 article -- again, 2005 would  
6 be 2 years before they filed.

7 So, they are relying in their opposition to  
8 our motion to dismiss on an article -- there's a lengthy  
9 footnote that says there's a ton of academic research on  
10 this particular theory. So, basically, a remand is  
11 unnecessary because the -- the pleaded facts by the  
12 plaintiff themselves show this is untimely as a matter  
13 of law.

14 I'd like to reserve the balance of my time,  
15 if there's no further questions.

16 Thank you.

17 ORAL ARGUMENT OF JEFFREY B. WALL

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

19 MR. WALL: Justice Scalia, and may it please  
20 the Court:

21 I'd like to start where Justices Ginsburg  
22 and Kagan did, because if you picked up this statute, it  
23 would look for all intents and purposes like an ordinary  
24 statute of limitations. And the question then is, how  
25 has Congress rebutted that presumption of equitable

1 tolling either as a matter of text, context, or  
2 structure?

3           And as I understand it, Petitioners have two  
4 basic arguments, both of which are incorrect. The first  
5 is textual. They say, well, it runs from the time of  
6 the complained-of event. But the reason they can't put  
7 too much weight on that, Justice Alito, is because if  
8 they looked through the statutes and the Court's cases,  
9 they would come across cases like Exploration Company or  
10 Delaware State College, where the statute ran from the  
11 time of the complained-of event, and this Court treated  
12 it as an ordinary statute of limitations subject to  
13 equitable tolling; and they'd come across Beggerly,  
14 which ran from accrual. And yet, the Court said statute  
15 of repose not subject to equitable tolling.

16           JUSTICE ALITO: Well, if you were drafting a  
17 statute of repose, how would you phrase it other than  
18 the way this is phrased?

19           MR. WALL: I think normally what Congress  
20 does is it says there should be no jurisdiction after a  
21 particular time, because it's not trying to  
22 differentiate among the application of different  
23 equitable background principles.

24           But there are statutes --

25           JUSTICE SCALIA: Gee, but we've -- we've

1 said that, under our recent jurisprudence anyway, we  
2 would -- we would treat that as a statute of  
3 limitations. And I assume we'd treat it like a normal  
4 statute of limitations subject to tolling.

5 MR. WALL: Justice --

6 JUSTICE SCALIA: You think whenever --  
7 whenever we encounter a -- a statute of limitations that  
8 is -- is phrased in jurisdictional term, there can be no  
9 tolling?

10 MR. WALL: I think, Justice Scalia, that  
11 where you have statutes that say there shall be no  
12 jurisdiction after a particular time, this Court has  
13 read them to cut off equitable tolling after that time.  
14 But Congress could have written the statute to say the  
15 time limit shall not be tolled. And there are statutes  
16 like that. Now, most of those statutes say there shall  
17 be no tolling except in particular circumstances,  
18 because Congress has considered it more finely. But  
19 they could make the prohibition absolute.

20 And the second argument that I understand  
21 Petitioners to have is basically structural. They say,  
22 well, look, they borrowed the language from the outer  
23 prong of the two-prong limit.

24 JUSTICE ALITO: Before you get to that, do  
25 you have an example of a -- a classic statute of repose

1     that I could look at to see how they should be phrased,  
2     and not one that says that there shall be tolling --  
3     there shall not be tolling except in some circumstances,  
4     one that just says this is it; no tolling whatsoever?

5                 MR. WALL:   You mean other than statutes as  
6     in Merck and Lampf where there were tiered structures?

7                 JUSTICE ALITO:   Right.   Right.

8                 MR. WALL:   There --

9                 JUSTICE ALITO:   A stand-alone provision.

10                MR. WALL:   I think that the statute in  
11     Beggerly was an example where the Court said, even  
12     though it runs from accrual, it incorporates a discovery  
13     rule and it sets a 12-year limit.   And so, textually and  
14     contextually -- I mean, I don't think there is any  
15     classic formulation.   I think that's why Petitioners  
16     can't point you to anything, because the courts always  
17     look to all the indicia of statutory meaning:   text,  
18     context, and structure.   So, the same language can  
19     create a statute of limitations or repose.

20                So, in Lampf and Merck, if those statutes  
21     hadn't had a two-tiered structure, just the language of  
22     the outer prong as the statute alone, I think the Court  
23     would have treated it as a statute of limitations.   The  
24     Court didn't say in Lampf that language creates a  
25     statute of repose, full stop.   It drew a structural



1 inference by looking at both of the prongs and comparing  
2 them to each other.

3 So, when Petitioners say, whoa, but they  
4 borrowed the language of the outer limit and we know  
5 that's repose, well, we only know it's repose in the  
6 two-prong provisions because of their structure. And  
7 this provision doesn't have that structure.

8 So, I don't think I can point you to any  
9 classic formulation because the same words can be either  
10 a limitation or repose, depending on what else Congress  
11 does in that statute.

12 JUSTICE SCALIA: I don't -- I think you  
13 understate the -- the strength of Petitioners' argument  
14 in this regard. It seems to me where you say, you know,  
15 3 years unless the plaintiff knows sooner than that, and  
16 then you say 2 years unless the plaintiff knows earlier  
17 than that, and then you say 2 years -- it seems to me  
18 that the implication is 2 years, period. Whether the  
19 plaintiff knows earlier, later, doesn't matter.

20 MR. WALL: Justice Scalia, I don't know what  
21 else to say except that that would overrule Exploration  
22 Company and Delaware State College.

23 JUSTICE BREYER: That's what we said in  
24 Merck. I mean, wasn't Merck just like that? It says a  
25 cause of action can be or whatever -- may not be

1 brought -- may be brought not later than the earlier of  
2 2 years after the discovery of the facts or 5 years  
3 after the violation.

4 I take it that means 5 years after the  
5 violation. Forget about the discovery of the facts.

6 MR. WALL: Well, that's right, but the --  
7 the reason that that language created a period of  
8 repose --

9 JUSTICE BREYER: Because they were both --

10 MR. WALL: -- was because of the structural  
11 inference. I took Justice Scalia's hypothetical to be  
12 if the statute just said no suit shall be brought more  
13 than X years after the violation.

14 JUSTICE SCALIA: Well, but what if those  
15 three provisions had been -- you know, followed each  
16 other immediately? You know, 3 years unless, you  
17 know -- with a cutoff that would make it shorter, and  
18 2 years with a cutoff that would make it shorter, and  
19 then a third one just says 2 years. You think there  
20 would be no implication that the 2 years means 2 years,  
21 period?

22 MR. WALL: I think the implication would be  
23 that, in the others, Congress created a period of repose  
24 by using very specific language to do that. And in the  
25 third, it didn't. It wrote it like an ordinary statute

1 of limitations. Now, it could have written it  
2 differently, Justice Scalia. It could have said no suit  
3 shall be brought after X time, which is the ordinary  
4 language of statute of limitations, and that time shall  
5 not be tolled. And Congress has done that in other  
6 statutes.

7 JUSTICE GINSBURG: If you extinguish the  
8 claim -- the statute of limitations doesn't terminate  
9 the claim. It just says you can't get a remedy if you  
10 sue too late. But there are statutes that say you have  
11 no claim after X time, and that would certainly be a  
12 repose. You have no right anymore after that.

13 MR. WALL: No question. That's certainly  
14 true. If the Court --

15 JUSTICE SCALIA: Maybe -- maybe you'd better  
16 go -- well, go on. I think you'd better go to the other  
17 point because I want to know whether you differ from the  
18 Petitioner on the second point. As I understand the  
19 Petitioner, he does -- he does not think that you reach  
20 the same result if indeed the violation had been  
21 nonintentional. Now, do you take that position as well?

22 MR. WALL: No, Justice Scalia. I think that  
23 is the one place in everything Mr. Landau said where  
24 there is daylight between the Petitioners' position and  
25 ours. In the Government's view, the traditional

1 equitable rule is the statute is tolled until the  
2 plaintiff has actual or constructive notice of the facts  
3 underlying her claim. It doesn't matter whether the  
4 concealment of those facts by the defendant that gives  
5 rise to --

6 JUSTICE KAGAN: But is that right, Mr. Wall?  
7 I mean, don't we usually look when we're thinking about  
8 equitable doctrines as whether the defendant has clean  
9 hands? You know, whether the defendant is culpable or  
10 not seems to matter a good deal when we're thinking  
11 about considerations of equity.

12 MR. WALL: Absolutely. And I think in many  
13 fraud and concealment cases, where you are not talking  
14 about a duty of disclosure, either common law or  
15 statutorily, you do have affirmative misconduct. But  
16 it's a different question when Congress has come in and  
17 told the defendants by law what they have to do. For  
18 the defendant then to breach that statutory duty -- I  
19 think Congress has already told them what they have to  
20 do in this context.

21 JUSTICE KAGAN: But I think Mr. Landau's  
22 point -- it was a strong part of his brief, I think --  
23 was that there was no reason why his clients would have  
24 thought that they had a disclosure obligation in the  
25 first place. So, it wasn't like they were looking at

1 this disclosure obligation and saying we don't feel like  
2 it. They were saying we're not covered by it.

3 MR. WALL: That just goes to Justice  
4 Ginsburg's point, I think, which is that where a  
5 plaintiff can sufficiently plead a section 16(b) case at  
6 the motion to dismiss stage to survive dismissal under  
7 Iqbal and Twombly, everyone agrees that if you've got a  
8 16(b) potential violation, you've got a reporting duty  
9 under 16(a). You can't have liability for a trade under  
10 (b) that you weren't required to report under (a).

11 So, if the plaintiff can sufficiently plead  
12 a case at the motion to dismiss stage under 16(b), by  
13 definition the plaintiff has sufficiently pleaded that  
14 the defendant violated a reporting obligation under (a).

15 JUSTICE ALITO: Well, no. Why is that true?  
16 Somebody could be a -- an insider without knowing that  
17 the person was an insider.

18 MR. WALL: That's right. But section 16(a),  
19 except for the criminal sanctions, is a strict liability  
20 provision. If you're an insider and you fail to file,  
21 you've violated 16(a). Now, you know, it's a separate  
22 question on 16(b), but the -- I think everyone here  
23 agrees that if you have a violation of (b), you  
24 necessarily have a violation of (a). You can't be  
25 forced to disgorge the profits from a trade you weren't

1 required to report.

2 JUSTICE ALITO: No, I understand that, but I  
3 thought the point was -- I thought the question was  
4 whether there is the kind of concealment that would  
5 invoke equitable tolling when the concealment is not  
6 done knowingly, when it is not done in -- in knowing  
7 breach of a disclosure obligation.

8 MR. WALL: I think the -- the breach of a  
9 duty, a statutory or a common law duty, especially where  
10 that duty is designed to aid in the enforcement of a  
11 private right of action, is and has been considered by  
12 courts to be concealment. Without looking at whether  
13 the fiduciary just accidentally or inadvertently --

14 JUSTICE BREYER: There are two different  
15 doctrines, I gather. One is equitable -- equitable  
16 tolling. The other is sometimes called equitable  
17 estoppel or fraudulent concealment. But -- whatever you  
18 call them, if you take your position, a person who  
19 really thinks he doesn't have to file and so he doesn't  
20 file will be liable forever. There will be no statute  
21 of limitations because the plaintiff will never find  
22 out. Maybe 50 years later. All right?

23 If you take the opposite position, then you  
24 will prevent plaintiffs in borderline cases from  
25 bringing suits because they aren't going to find out

1     that somebody thinks it's a borderline case. I see one  
2     harm one way, one harm the other way. You're arguing  
3     that the second harm is the worst harm. Okay, why?  
4     What's the argument?

5                 MR. WALL: Justice Breyer, I just -- I want  
6     to fight the premise --

7                 JUSTICE BREYER: No, I'm making it for  
8     you -- I'm making your argument. I'm trying to.

9                 (Laughter.)

10                JUSTICE BREYER: I'm saying it's something  
11    on your side and something the other side. He's arguing  
12    you're wrong because if there's no bad conduct by the  
13    defendant, he honestly thinks he doesn't have to file,  
14    then the statute never runs. Okay?

15                MR. WALL: We have occupied the --

16                JUSTICE BREYER: But on the other hand, his  
17    position leads to the plaintiff never being able to sue  
18    in borderline cases. Which is worse?

19                MR. WALL: You're absolutely right. They  
20    are both bad. We've occupied the reasonable middle  
21    ground. Hope you like it.

22                (Laughter.)

23                JUSTICE SCALIA: Thank you, Mr. Wall.  
24    That's a nice note on which to end.

25                Mr. Tilden, we will hear from you.

1 ORAL ARGUMENT OF JEFFREY I. TILDEN

2 ON BEHALF OF THE RESPONDENT

3 MR. TILDEN: Justice Scalia, and may it  
4 please the Court:

5 The underwriters' argument, and the  
6 Government's for that matter, are founded on the notion  
7 that Congress wanted someone who violated 16(a) to  
8 receive the benefit of the statute of limitations or  
9 repose in 16(b).

10 16(b) is unique in the securities law and  
11 perhaps in the law generally, in that the plaintiff  
12 suffers no injury and recovers no damages. There is no  
13 triggering event, unlike a fraud case, your stock drops,  
14 to suggest that you've been harmed. 16(b) is 99 percent  
15 of the time irrelevant without a 16(a) filing. As a  
16 matter of logic, it makes no sense to provide that one  
17 who violates 16(b) can escape liability because they  
18 also violate 16(a).

19 JUSTICE ALITO: Well, what about as a matter  
20 of language, whether or not 16(b) is a -- whether it's a  
21 statute of repose or a statute of limitations, it tells  
22 you exactly when the time is supposed to begin to run,  
23 from the -- from the realization of the profit? And you  
24 want to say no, it doesn't begin to run from that point;  
25 it begins to run from the point when some other



1 completely different external event occurs, if it ever  
2 does occur, which is the filing of the 16(a) report.  
3 Textually, how do you get to that?

4 MR. TILDEN: We get here -- get there this  
5 way, Your Honor: The Court several times recognized  
6 that 16(b) and 16(a) were interrelated. The limitations  
7 period in (b) provides, in the second sentence, "such  
8 profit" and "no such suit for such profit." Well, what  
9 profit and what suit are those?

10 To answer that question, we must go to the  
11 first sentence which refers to the profit of such  
12 beneficial owner, director, and officer. Who are they?  
13 To know that, we must go to 16(a), which is a  
14 single-sentence statutory command that directs  
15 beneficial owners of more than 10 percent, directors,  
16 and officers to file the form provided for below. 16(b)  
17 is a statute of limitations for those who file the form.

18 There is no statute of limitations in 16(b)  
19 for those who do not. The statute of repose contended  
20 for by the underwriters here would have this unique  
21 feature: It would run invisibly to all but the  
22 defendant. No one else has any notice the clock is  
23 ticking but the defendant. This has a -- an  
24 attractiveness if you're the defendant, but it doesn't  
25 work well for the rest of us. No knowledge of a

1 triggering event and its running in the face of an  
2 affirmative statutory duty --

3 JUSTICE KAGAN: But I think you're arguing  
4 against the most extreme position. Another position is  
5 just, regardless whether there's been a filing, if the  
6 person knew or should have known, if a reasonable person  
7 would have known, even if there were no filing, that's  
8 enough.

9 MR. TILDEN: Your Honor, the -- there are  
10 several responses to that. 16(a) we believe is the  
11 discovery rule. Congress looked at this and commanded  
12 insiders to put the information in a particular location  
13 so that shareholders, who have the primary enforcement  
14 authority under 16(b), can go find it there.

15 In the face of that congressional dictate,  
16 can we graft an appendage onto the statute that says,  
17 notwithstanding the fact the shareholder was told that  
18 he or she could go look there and notwithstanding the  
19 fact that they went to look there and there was nothing  
20 there, they must nonetheless go elsewhere? Congress  
21 said: Shareholder, go look behind door number 16 to see  
22 if the information is there.

23 JUSTICE SCALIA: They need not go elsewhere,  
24 but when they have gone elsewhere and have found out --  
25 I mean, in this case, it's -- it was not just that you

1 reasonably should have known; it's you did know. Isn't  
2 -- am I right about that?

3 MR. TILDEN: No, sir, you're not right.

4 JUSTICE SCALIA: Oh. Okay.

5 MR. TILDEN: We alleged in the claim a -- a  
6 conscious agreement between the underwriters and key  
7 decisionmakers at the issuer to underprice the IPO.  
8 This is extraordinarily counterintuitive behavior. It  
9 is not listed, mentioned at all in the IPO filing in  
10 '02. Judge Scheindlin's opinion in '03 nowhere refers  
11 to "group," "agreement," "contract," "conspiracy."

12 JUSTICE SOTOMAYOR: So, that was the --

13 JUSTICE SCALIA: Is that necessary to your  
14 cause of action?

15 MR. TILDEN: A group plainly is. A group  
16 is. It's a footnote, Your Honor.

17 JUSTICE SOTOMAYOR: But tell me what was  
18 hidden from you in the prior filings in the academic  
19 literature that your adversary points to? All of the  
20 facts you've just recited have been written about  
21 extensively for years and years. So, what new  
22 information that you received told you that you should  
23 file a lawsuit?

24 MR. TILDEN: Your Honor, I disagree with the  
25 premise, but let me work backwards. First, if you -- if

1 we were to apply a vanilla form discovery rule like  
2 Merck, knowledge of the particular facts of the  
3 transaction, to this day no one has knowledge of the  
4 purchase and sales within six months and the profits.  
5 Those are elements of a 16 -- I'm sorry -- a 16(b)  
6 claim. We lack knowledge.

7 Two, whatever it is a reasonable shareholder  
8 ought to do to trigger a Merck-like plain vanilla  
9 discovery rule, we have gone far beyond that. We cannot  
10 impose on a shareholder the obligation to read the  
11 Journal of Financial Management or to follow a Harvard  
12 symposium. Three -- and this --

13 JUSTICE SOTOMAYOR: You mean to tell me that  
14 somebody's investing in the amounts that are invested  
15 here and they're not following the fact that this has  
16 been the center of securities litigation for years?

17 MR. TILDEN: Your Honor, this is a -- not a  
18 garden-variety 16(b) violation. I agree with you  
19 completely regarding our level of involvement, but I do  
20 not believe we present a standard 16(b) claim.

21 But to answer directly your question, the  
22 group allegation that underwriters and key  
23 decisionmakers of the issuer conspired together is not  
24 in the IPO -- in the IPO case. The allegation there was  
25 this: That the underwriters were getting unrevealed

1 compensation that should have been disclosed. Should  
2 have been disclosed and was not. Underwriter  
3 compensation. And the allegation against the insiders  
4 was that they knowingly or recklessly signed the  
5 prospectus. It's at page, I believe, 310 of Judge  
6 Scheindlin's opinion.

7               So, that is all that is alleged there.  
8 There is no group activity, no notion that this acted in  
9 concert -- or that they were acting in concert. The  
10 notion that someone would deliberately underprice their  
11 IPO first appeared in the scholarly research at a Spring  
12 of '09 Harvard symposium a year and a half after we  
13 filed our claim.

14               JUSTICE SOTOMAYOR: Could you answer what I  
15 consider a very strong argument on their side, which is  
16 Congress, who creates a statute of repose for  
17 intentional conduct like fraud, why would they not  
18 create a statute of repose for what is a strict  
19 liability statute?

20               MR. TILDEN: The fraud case is all about --  
21 involve, Your Honor, someone who has reason to know that  
22 they've been defrauded. It may only be that they bought  
23 their stock at X, and now it's selling for half of X,  
24 but they know something has happened. There is no  
25 equivalent here. The 16(b) plaintiff has suffered no

1 injury. It's critical to an understanding of what the  
2 Congress contemplated at the time.

3 JUSTICE SCALIA: One would think, if the  
4 16(b) plaintiff has really suffered no injury, it would  
5 be all the more likely that Congress would want a  
6 statute of repose.

7 MR. TILDEN: I don't believe, Your Honor --  
8 the 1934 legislative history made it clear -- makes it  
9 clear that Congress was extraordinarily concerned about  
10 a broad sweep of misconduct in the '20s. They intended  
11 a rule that in this Court's language in Reliance  
12 Electric would be flat, sweeping, and arbitrary. They  
13 intended to squeeze every penny of profit out of these  
14 transactions, and they did so in 16(b).

15 This is not a trap for the unwary. Congress  
16 has said you cannot be unwary. If you are an insider,  
17 you must be wary. You must be wary. That's what  
18 Congress has said.

19 If we are concerned about how this might  
20 work going forward -- and the underwriter has raised a  
21 parade of horrors: Oh, this is what will happen if  
22 the Court adopts our position. One thing we might do if  
23 we want to know what will occur in the next 64 or  
24 77 years is look backwards at the last 64 or 77 years.  
25 The Whittaker rule has been the rule in most of the

1 United States for virtually the entirety of the last  
2 77 years.

3 JUSTICE BREYER: It's worked out, but I  
4 don't understand it. I mean, why not just treat it like  
5 a special -- regular statute of limitations? You say  
6 that the profit is made on day one. It was made by an  
7 insider, and if your client finds out about it or  
8 reasonably should have found out about it, then the  
9 statute begins to run.

10 MR. TILDEN: Your Honor --

11 JUSTICE BREYER: Otherwise it's tolled,  
12 period. Simple, same as every other statute. What's  
13 wrong with that?

14 MR. TILDEN: Well, we don't believe the  
15 congressional design contemplated tolling. Congress  
16 told shareholders we could go look in a particular  
17 place. But here's one other problem with it.

18 JUSTICE BREYER: But there are people, you  
19 see, who don't know. There are always borderline cases.  
20 Some people, whether it's this one or not, think maybe  
21 they don't have to file. They think they're outside the  
22 statute. So, they don't. Okay?

23 You are protected. If they don't file, and  
24 you wouldn't reasonably find out about it, fine. But  
25 when you find out about it or should have, not fine.

1 It's very simple and makes everything logical. It seems  
2 to be fair to your client, certainly.

3 MR. TILDEN: It may be simple and fair, Your  
4 Honor. We -- we don't believe it's what the language of  
5 the statute provides for. It also suffers from this  
6 additional defect: Under the statute in this Court's  
7 opinion in *Gollust v. Mendell*, the standing requirement  
8 for 16(b) is that you own shares at the time of  
9 institution of the action. This can be years subsequent  
10 to the events themselves.

11 Can we adopt a statute of limitation, a  
12 discovery rule that runs against someone who has not yet  
13 acquired standing under *Gollust*? I wonder if we can.  
14 It seems to me to defeat the special standing that  
15 Congress intended 16(b) shareholders to have. You  
16 acquire standing on day 700 when you purchase your  
17 shares, only to find that you have no claim because you  
18 were having imputed to you something that a shareholder,  
19 which you were not, knew or should have known 3 years  
20 earlier. Could that be --

21 JUSTICE KAGAN: Mr. -- Mr. Tilden, is there  
22 any other context in which we would extend the  
23 statute -- or we have extended or any court has extended  
24 a statute of limitations without requiring that the  
25 plaintiff be reasonably diligent? Can you point to any



1 other example of that?

2 MR. TILDEN: I -- I cannot, Your Honor, but  
3 I can also not point to a statute of limitations such as  
4 this one that follows immediately on an affirmative  
5 disclosure obligation imposed on the defendant.

6 To answer a question Justice Alito raised in  
7 response to one of my colleagues, I believe the best  
8 analysis of the difference between a statute of  
9 limitations and a statute of repose by this Court  
10 recently is in the Beach v. Ocwen opinion. And in  
11 Beach, the Court analyzed the Truth in Lending Act and  
12 concluded the language that said 3 years after the  
13 transaction the right of rescission shall cease, was a  
14 statute of repose. It was completely clear. It did not  
15 rely on a discovery rule incorporated therein; it did  
16 not require a -- did not rely on a second prong. Beach  
17 cites the -- a prominent Harvard Law Review article at  
18 63 Harvard Law Review, and is a wonderful analysis of  
19 this Court's work on this subject.

20 A kernel of the motivation in the  
21 underwriters' briefing is the notion that liability  
22 under 16(b) is draconian, that there's -- that it's  
23 harsh. It's important to note that all you have to do  
24 under 16(b) is give back profit that never belonged to  
25 you. In the words of the statute, it inured to the

1 corporation; you weren't entitled to it. It's as if the  
2 penalty for bank robbery were that you merely had to  
3 give the money back. No attorneys' fees. You don't  
4 have to return your principal, you just give the money  
5 back.

6 Finally, I'd like to address a difference  
7 between the Whittaker decision and the Litzler decision,  
8 briefly. Both of these courts found that 16(b) only  
9 worked by virtue of 16(a). In Whittaker, the Ninth  
10 Circuit said only by full compliance with 16(a) do your  
11 16(b) rights mean anything. And in Litzler, the Second  
12 Circuit said 16(b) only works because of the absolute  
13 duty of disclosure placed on the defendant. We agree  
14 with that. We disagree with my buddy, Mr. Landau.

15 Most trading today occurs electronically in  
16 the dark of night; it is invisible to everyone else.  
17 But if the Court gets to the position where it is  
18 debating whether Whittaker or Litzler ought to be the  
19 rule --

20 JUSTICE SOTOMAYOR: Or the SG's.

21 MR. TILDEN: -- or the SG's, we'd offer  
22 this: There is no reported decision in which Whittaker  
23 and Litzler will yield different results in our view.  
24 Whittaker is a bright-line rule of the kind Congress  
25 intended. Litzler is a rule that in its own words

1 requires conceivably discovery and trial.

2 JUSTICE ALITO: And it requires actual -- is  
3 that right? It requires actual knowledge on the part of  
4 the plaintiff?

5 MR. TILDEN: Yes, sir.

6 JUSTICE ALITO: Does that make any sense,  
7 given the -- the class of individuals who are plaintiffs  
8 in 16(b) cases?

9 MR. TILDEN: We don't --

10 JUSTICE ALITO: Somebody who -- who is found  
11 for purposes of litigation very often to have purchased  
12 his stock long after all of this takes place. So, the  
13 lawyer who wants to bring this suit can just go out and  
14 find somebody who knows nothing? Isn't that right?

15 MR. TILDEN: The -- there's much I want to  
16 say in response to that. The underwriters contended in  
17 the lower courts for a subjective rule. No party before  
18 this Court contends for a subjective rule. We do not  
19 believe that -- Whittaker is not a subjective rule, and  
20 I do not believe that Judge Jacobs in Litzler was  
21 arguing for a subjective rule.

22 What he envisioned -- he -- the judge had a  
23 fair concern in the abstract. He said, look, if they  
24 don't file the form but the identical information is  
25 available to all the world everywhere else, what's wrong

1 with that? Well, there's nothing wrong with it, except  
2 that it's never available to all the world anywhere  
3 else. No other securities filings reveal this.  
4 Congress told us to go look in one place, and not  
5 anywhere else.

6 But the Litzler court I don't think  
7 envisioned an actual notice rule. When it said  
8 information as clear as 2 plus 2, I believe it was  
9 seeking an objective rule, Whittaker-like, looking for  
10 Whittaker-equivalent information. We don't believe such  
11 a thing exists. That said, the Litzler rule requires  
12 discovery in trial.

13 If the rules don't achieve different  
14 results, then we have the choice between applying a rule  
15 that is just, speedy, and efficient -- Whittaker -- and  
16 a rule that is just, slow, and costly -- Litzler. Some  
17 version of Occam's Razor, if nothing else, ought to  
18 support the application of the Whittaker rule and not  
19 the Litzler rule, should the Court find itself in that  
20 position.

21 Here's the last thing I'd say, and then I  
22 will be quiet. Today is the first time this Court has  
23 analyzed the issue before it, but it's come up  
24 repeatedly in the lower courts over the last 77 years,  
25 and with one exception, 1954, in the Middle District of

1 Pennsylvania, the courts have unanimously rejected the  
2 petition -- the position contended for by both the  
3 underwriters here and the Government. The rule has been  
4 Whittaker or a Litzler variant of it everywhere, all the  
5 time.

6 In 1934, the purchase or sale of a share of  
7 stock required the actual knowledge of some other  
8 people. Today it is an impersonal electronic  
9 transaction, often at home in the middle of the night,  
10 invisible to everyone. Insider trading was hard enough  
11 to uncover then; it's gotten harder now. We do not  
12 believe that Congress envisioned any additional burden  
13 would be placed on a shareholder by forcing them to  
14 learn this undetectable conduct within 2 years.

15 The most, in our view, famous pronouncement  
16 by this Court with respect to the interpretation of  
17 16(b) is out of the Reliance Electric opinion in 1962.  
18 In Reliance, the Court said, faced with a question, two  
19 competing interpretations of the statute, the Court  
20 should -- should select that interpretation that best  
21 serves the congressional purpose of curbing short-swing  
22 speculation by insiders.

23 JUSTICE SCALIA: The -- the problem I have  
24 with your argument is it's a very strange statute of  
25 limitations. Accepting that it is not a statute of

1    repose, it says, you know, you have 2 years after the --  
2    the transaction that was failed to be reported.

3                   And you want to say what it means is you  
4    have 2 years from the time it was reported. Congress  
5    would have said that. It's so easy to say that. Two  
6    years from the reporting.

7                   MR. TILDEN: I grant you it could have been  
8    said otherwise, Your Honor, but we --

9                   JUSTICE SCALIA: But I don't know any other  
10   statute of limitations that achieves the result that you  
11   want that puts it that way.

12                  MR. TILDEN: Every other statute of  
13   limitations we can think of, Your Honor, involves a  
14   plaintiff who has reason to know of some harm and,  
15   incidentally, recovers damages. The 16(b) plaintiff has  
16   no reason to know of harm and recovers no damages.  
17   Right?

18                  If I -- let's take a case that's seen every  
19   day and every month, probably in every State in the  
20   country. A lawnmower accident and a child or a teenager  
21   loses a toe. You may not know anything about lawnmower  
22   design. You may not know anything about your State's  
23   product liability act or ANSI standards or the litany of  
24   duty breach, causation, and damages, but you do know  
25   that you used to have ten toes and now you have nine.

1           There is no equivalent. The 16(b) plaintiff  
2 does not know insider trading has occurred and won't  
3 know unless he or she is told. They do not know if  
4 someone else somewhere has nine toes. As far as they  
5 know, everybody still has all of their toes.

6           No other statute of limitations will serve  
7 as an analogue here because of the unique character of  
8 16(b). The plaintiff has no injury and recovers no  
9 damages. We don't believe we can fairly look at other  
10 statutes of limitation as a model, given that  
11 distinction.

12           The Reliance Electric court concluded if --  
13 if you have a choice, you should select that  
14 interpretation that best serves the goal of curbing  
15 short-swing trading by insiders.

16           We believe the -- the case before the Court  
17 can and should be determined based on the wording of  
18 16(b) itself. The limitations period in (b) applies to  
19 those who file the form in (a). But if the Court  
20 believes that the textual analysis is less clear than we  
21 think, the Ninth Circuit should be affirmed based on the  
22 interpretive principles of Reliance Electric,  
23 nonetheless.

24           If there are no other questions, I'll sit  
25 down.

1 JUSTICE SCALIA: Thank you, Mr. Tilden.

2 Mr. Landau, you have 4 minutes.

3 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

4 ON BEHALF OF THE PETITIONERS

5 MR. LANDAU: Thank you, Your Honor. Very  
6 briefly, just on repose, two quick points.

7 If there's any one theme that runs through  
8 this Court's 16(b) jurisprudence, it's that precisely  
9 because the -- section 16(b) is prophylactic, it should  
10 be interpreted in a literal and mechanical way. I think  
11 the -- that argues for repose, because you don't get  
12 into a lot of these questions about who knew what when.  
13 And so, that certainly would be consistent with -- this  
14 case would fit well within that -- that tradition, if  
15 you were to go that way.

16 In addition on repose, let's not forget that  
17 Congress gave 2 years after the date the profits were  
18 realized. If those profits were in a report, you  
19 wouldn't need the whole 2 years, anyway. In fact, for  
20 the fraud provision, you only get 1 year after you  
21 discover it. So, in a sense, I think that helps show  
22 that even in a repose approach, 2 years is plenty of  
23 time.

24 Then -- but assuming that you go with  
25 equitable tolling, I think -- I'd like to emphasize that



1   there's really four approaches that have been brought  
2   forth.  There's the Ninth Circuit's rigid approach that  
3   it's -- they call it equitable tolling, but there's  
4   really nothing equitable about it.  It's -- it's we  
5   don't care about who knew what, when, or anything.  It  
6   is you have to file the 16(a).

7                   The district court actually struggled  
8   because the district court in this case said I'm  
9   supposed to be doing something called equitable tolling,  
10  and there's nothing equitable here at all, because I  
11  think everything here was plainly known to the -- to the  
12  plaintiffs or should have been known.

13                  Then you have the Litzler approach, which  
14  looks to actual knowledge.  And I think, as some of the  
15  questioning brought out, there is no background rule  
16  that distinguishes between actual knowledge and  
17  constructive knowledge for purposes of equitable  
18  tolling.

19                  Again, I think as some of the questions  
20  brought out, equitable tolling, because it's an  
21  equitable doctrine, looks to has the defendant behaved  
22  equitably and has the plaintiff behaved equitably?

23                  And we agree with the Government that  
24  diligence -- in other words, would a reasonable  
25  shareholder -- did a shareholder know or would a

1 reasonable shareholder should have known -- is a  
2 critical part of the inquiry that's missing in -- in the  
3 Ninth Circuit's analysis.

4           Where we disagree with the Government is  
5 with respect to their -- their view of fraudulent  
6 concealment to involve any violation -- any alleged  
7 violation of a statutory 16(a) duty. Under the  
8 Government's view, it would be considered fraudulent  
9 concealment and would -- would give rise to tolling if  
10 somebody were to come in today and say, gee, the  
11 Microsoft IPO back in 1986, there was actually a group  
12 in there, the underwriters conspired. And -- you know,  
13 the thing is the difference between this case and that  
14 one is this case happens to have involved this hugely  
15 prominent IPO litigation that really brought all these  
16 things to light, but the -- the defendant in that  
17 Microsoft hypothetical would not have the advantage of  
18 being able to point to the defendant's -- to the  
19 plaintiffs' lack of diligence, saying this is all out  
20 there.

21           So, you'd be creating a regime, if you go  
22 with the Government's approach, that really waters down  
23 the defendant's culpability on the fraudulent  
24 concealment side of equitable tolling. Essentially,  
25 they're asking you to take the fraud out of fraudulent

1 concealment.

2           The only last point I'd like to make is  
3 that, with respect to the specific facts here again,  
4 counsel said today that this was not known until a  
5 Harvard symposium in 2009. I would urge you, again, to  
6 look at their briefing below. Their -- docket 58 in the  
7 district court responds to our motion to dismiss by  
8 citing a 2004 article that they actually included in the  
9 joint appendix. You can look at joint appendix 80 to  
10 83. Their theory of underwriter conspiracy with issuer  
11 insiders is set forth right there on those pages of that  
12 2004 article, well before the 2 years.

13           And, again, in addition, the 2000 -- their  
14 complaint, which talks about lock-up, you can look  
15 specifically at joint appendix 59 to 61 to see how  
16 lock-up was alleged to be a critical part of their  
17 underlying theory.

18           Finally, it is not true, again, that the IPO  
19 litigation was only about underwriters. There were  
20 individual issuer defendants at issue in the IPO  
21 litigation. And, in fact, Judge Scheindlin's opinion  
22 goes into some detail about the -- the alleged  
23 conspiracy that they're saying -- the alleged group that  
24 they're saying they couldn't have found out.

25           In fact, she says -- this is -- pages 356

1 and 358 of the Judge Scheindlin opinion will provide  
2 quotations that show that their theory was very well  
3 known. Thank you.

4 JUSTICE SCALIA: Thank you, Mr. Landau.

5 The case is submitted.

6 (Whereupon, at 12:01 p.m., the case in the  
7 above-entitled matter was submitted.)

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