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

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

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

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

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

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

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

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

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

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

device.

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

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

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

JUSTICE KAGAN: But just to --

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

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

And you're saying they only get to say that

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

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

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

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

JUSTICE KAGAN: But Rule 23 did not want

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

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

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

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

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

MR. CLEMENT: But -- but look at what

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

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

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

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

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

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

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

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

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

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

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

relation-back doctrine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I don't think ultimately whether you call it

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Four minutes, Mr. Goldstein.

REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Thank you. Two basic

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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