

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

17:9,20 20:4 22:18 23:15 29:3 58:1 59:7 benefit 48:24 52:22,24 56:21 best 7:17 Bethesda 1:17 better 14:8 47:7 48:22 49:13 51:10 52:10,11 52:16,21 55:21 beyond 32:1,2 big 10:17 45:1 50:19,20 51:8 55:15,18 bilateral 14:18 59:21 bit 42:14 52:19 blue 3:14 boats 49:10 Bock 15:9,17 body 7:21 17:6 59:2 bona 5:16 bonds 58:16 borne 46:18 bottom 15:19 bound 49:15 break 14:23 Breyer 10:13 11:8,20,23 12:9,14,23 13:24 16:12 28:14,17 29:1 29:4,7 44:10 brief 3:14 6:9 8:8 10:10 briefing 26:15 briefs 45:25 46:13,15,16 bright 11:11 bring 8:18,18,24 24:18 44:4 49:23 51:20 54:7 bringing 8:2 11:2	brings 5:6 12:10 24:14,16 Brothers 14:20 brought 3:25 4:11 5:9,14,18 5:19,20,21 6:24 10:22 12:6 22:1 23:10 24:7,17 25:3 28:18,19 44:13,14,15,17 44:20 48:2,3 50:10 60:7 build 45:6 built 36:8 52:5 bunch 59:10,11 business 49:16 <hr/> C C 1:17 2:1,3,9 3:1,7 57:23 California 1:3 3:4 37:10,11 41:25 45:13 52:18 56:13 call 23:3 26:16 56:25 called 10:15 11:1 59:13 CalPERS 13:2 24:19 42:20,20 42:21 48:20 54:25 55:1,2 care 48:13 case 3:4 5:8,12 6:10 7:16 8:6 9:21 10:16 13:7 18:7,8 19:12 27:6,24 29:11,14,16,19 31:9 33:13 35:21 36:13 39:22 41:2 42:6,10,18 50:1 52:14 53:8,14 54:1 56:7 57:15	60:15,16 cases 7:20,23,24 15:11 16:12,20 18:3 19:5 28:22 41:3 47:4,5 53:7,13 categorical 36:16 causes 9:12 center 57:8 cert 25:25 26:2,4 26:5,7,24 certainly 34:6 38:9 56:12 certification 4:19,21 13:7 18:2,22,24,25 28:22 29:15 41:5 44:16 50:3 52:15 58:4 certified 10:21 19:6 56:18 cetera 10:18 changes 12:11 Chardon 29:11 29:19 Chief 3:3,9 8:17 8:21 30:2,6 53:22 54:10,21 55:7,12 57:21 60:14 chunk 55:15,19 churn 10:11 Circuit 7:14,16 7:22 8:5 43:19 43:23 44:7 45:22 46:19 circumstance 31:7 37:20 circumstances 36:13 37:2 41:3 civil 8:8 20:16 claim 10:5 13:16 15:10 23:15,19 23:23 24:7,11	24:17 25:9 34:10 40:23,24 49:24 50:9 claims 13:16,18 13:23,24 15:14 15:14,15 34:15 43:4 50:6,7,8 54:7 59:25 class 4:19,20,22 5:4,5,7,8,18 6:19,23 7:4,5 8:12 10:2,21 11:15 13:3,7 14:5 16:6,19 16:23 18:2,17 18:21,24,25 23:21 24:15,20 25:1,2,10 28:22 29:15,20 35:22 36:24 37:8 38:10 39:3 40:4,16 40:22 41:5,22 43:22 44:6,8 44:15,16 45:2 45:3,14 46:6 46:24,25 47:6 47:11,13,21 48:11,22 49:8 50:3,15,18,20 50:23 51:6,10 51:16,19,24,25 51:25 52:2,4,5 52:8,10,15,22 54:24 55:1,8,9 55:11,15,18,22 56:18 58:4,9 59:6 60:1,6 classic 25:14 36:15 Clayton 30:13 30:24 32:2 clean 33:9,10 clear 20:15 23:23 24:16,23 57:15 clearly 10:13	Clement 1:19 2:6 30:3,4,6,18 31:25 32:12 33:8 34:17 35:13,17,24 37:4,6,15,21 38:3,8,12,17 38:21,23 39:2 39:5,12,17 40:2,7 41:8,15 41:19 43:5,10 45:9 46:9 47:12,16 48:8 48:18 49:5,25 51:22 54:10 55:5,17 clerk's 45:6 client 10:24 41:23 client's 8:11,14 clients 52:12 55:6,24 clue 32:3 collective 24:13 25:15 come 16:7 35:4 comes 18:14 20:3 coming 45:5 commence 30:17 commenced 36:24 commences 5:4 committed 11:10 common 19:5 comparison 7:21 competence 36:17 complainant 14:21 58:17 complaint 5:4,8 5:19 6:24 7:4,7 10:3 11:1 12:15 14:5,25
---	---	--	--	--

17:3,17 18:17 18:19 19:13 25:14 37:11,13 38:15,16,17 39:11 60:2,7 complaints 14:24 19:15 39:14,15 complication 26:22 comport 45:20 compromise 54:20 conceded 4:10 concept 56:22 concern 20:13 concerned 5:23 14:9 21:10 conclusion 30:12 concrete 27:10 confined 49:2 conflate 15:15 conflict 28:12 confronts 20:21 confuse 6:15 Congress 13:22 14:9 15:21 17:9 21:13,14 21:14,15,24 22:22 24:21 25:6 32:20 Congressional 15:25 consequence 13:10 consequences 15:6 21:4 37:5 38:9 42:14,17 consider 29:12 considered 33:17 consistent 34:11 consolidated 19:13 constitutional 27:13	construction 57:12 contain 15:14 contemplate 16:22 59:11 contemplates 59:3,13,15,17 context 17:8 19:11 29:24 32:6 34:25 43:20 53:10 58:15 59:1 contexts 15:10 continue 18:6 32:6 continued 7:19 continues 18:4 contrast 30:24 control 24:4 27:7,14 60:8 convinced 47:7 core 27:19 Cork 10:7 correct 6:9 17:18 19:23 20:17 cosmic 35:8 counsel 30:2 46:5,11 47:6,6 48:11 51:18 57:21 60:14 country 24:6 couple 14:11 15:18 43:14 48:9 54:16 course 11:22 20:18,22 24:19 31:9 33:10 54:14,17 57:5 court 1:1,14 3:10 8:6 11:1 18:2 21:1 25:23 26:2 29:16,20 30:7 30:10 31:4,8 31:16 32:8,16 33:11,17 35:2	35:4,11 36:2,3 36:14,20 37:9 38:24 40:14 51:18 53:8 57:1,16,18 Court's 57:19 courts 13:11 16:7 19:9 26:11 43:3 covered 40:23 40:23 create 20:14 28:2,6,12 43:2 48:20 created 3:24 5:14 16:6 critical 35:23 Crown 10:7 CTS 10:17 22:3 curious 17:2 cut 33:15 34:12 34:14 cutoff 34:8 cuts 23:12 33:1 33:6 <hr/> D D 1:19 2:6 3:1 30:4 D.C 1:10,19 damages 8:3 9:3 9:3,6 darn 35:10 data 45:21 day 7:8 13:1 57:14 58:9 days 17:2 41:5 deadline 54:14 deal 11:20 13:11 28:10 51:10 52:10,12 dealing 16:11 dealt 40:12 debate 6:20 53:3 decent 34:25 decide 6:10 52:16 53:15	56:7 decided 48:4 52:20 deciding 33:12 57:15 decision 26:3 34:19 47:18 52:15 declining 7:24 deem 40:20 deemed 28:19 29:23 defendant 50:14 54:12 defendants 9:5 32:23 defense 57:8,9 defining 31:11 53:20 57:2 definition 22:14 denial 41:5 denied 4:19,21 13:7 19:1 28:22 39:4,11 44:16 58:4 denies 18:2 depending 18:14 depends 18:12 describe 6:8 desk 45:5 desperately 40:24 despite 43:23 determine 17:20 deviate 57:19 device 47:1 differ 34:18 35:20 difference 13:9 28:2 different 13:25 14:22,24,24 15:18 16:2 19:5 20:2 25:2 27:21 31:12 34:7 44:18	45:20 53:23 58:25 59:1 difficult 18:13 diligence 4:4 direct 19:13 directly 36:9 disagree 14:6 23:13 discover 33:5 44:25 discovery 4:2,3 22:19 23:1,5,9 23:12 33:1,4,6 33:16 34:9,23 discretion 38:6 discussed 20:8 57:5,5 dismiss 38:7 dismisses 37:9 distance 27:3 distinct 11:25 distinction 10:17 distinguish 13:17 district 10:9,10 13:11 14:21 19:11 24:6 26:11 41:25 43:2 45:4,14 52:17 55:14 56:13 58:19 60:4,11 divined 8:3 docket 14:25 25:22,24 46:14 doctrine 53:1 doing 22:22 42:15 43:1 48:6,12 dollars 41:23 56:9 dozen 31:17 drafted 32:19 dual 14:20 due 36:6 47:22
--	---	--	--	---

<p>E</p> <p>E 2:1 3:1,1 easiest 6:10 easy 56:7 effect 15:25 20:14 29:24 effort 36:7 eight 41:5 either 13:4 15:9 28:10 47:5 51:20 else's 8:22 emphasis 52:6 emphatic 30:11 30:21 31:1 34:2 emphatically 31:15 empirical 45:21 EMPLOYEES 1:3 Employees' 3:5 enabling 20:18 21:2,6 27:19 57:7,13 enacted 21:13 enactment 15:25 enacts 21:14,15 encompass 53:6 ended 27:4 enforce 3:23 5:14 22:1 enforcement 31:3 entire 7:11 17:6 49:3 52:2,4 59:9 entirely 6:4 10:12 entirety 23:23 equally 21:9 equitable 22:5 33:18,19 34:20 34:25 35:8,11 35:15 36:4,8 36:12,15,16,18</p>	<p>36:19,20,22,24 37:3 57:1,4,6 60:11 Equity 16:5,5 ERISA 10:1 especially 51:8 55:18 ESQ 1:17,19 2:3 2:6,9 essentially 36:17 43:3 46:25 50:17 52:23 56:7 established 36:21 estoppel 31:14 53:21 57:3 et 1:7 10:18 event 3:18 5:12 21:18,19,21,24 21:25,25 22:10 23:5,10 24:22 30:15 31:23 34:3 eventually 58:11 everybody 8:21 9:16 35:6 48:19 everyone's 27:18 exact 12:3 58:20 exactly 9:17 17:20 18:12 24:7 34:5 44:8 47:12 58:7 examine 40:19 example 7:17 40:11 examples 14:11 Exchange 33:12 33:25 exercise 4:4 exercising 27:11 exhausted 15:14 exist 28:24 existence 24:10 existing 14:14</p>	<p>24:4 expect 58:6 expected 35:7 experience 43:17,19 46:19 55:7 expiration 59:18 explain 8:9 33:2 explained 32:9 explains 58:14 extend 22:6 54:8 extended 23:6</p> <hr/> <p style="text-align: center;">F</p> <p>face 50:19 56:23 facing 50:15 51:5,7,15 54:1 55:1 fact 6:23 13:10 41:4 55:20 facts 12:19 faintest 42:25 fair 52:3 faith 35:20 falling 44:5 false 12:19 far 44:12,25 59:6 fashion 55:25 fast 4:13 favor 10:14 feature 31:11 53:20 57:2 federal 25:20 35:2,5 37:22 37:24 45:25 51:14 57:9 fide 5:16 fighting 48:21 49:3 figure 16:15 25:25 59:22 file 4:18 7:6 8:15 10:21 13:3 14:15 20:8 21:8 26:1,3,3,5 26:6 38:3,7</p>	<p>40:5,8 42:21 46:7,22 47:8,8 50:21 51:1 52:17,20 58:17 filed 5:9 7:4,24 9:24 10:10 12:15 14:25 17:17 26:1 37:8,11 39:21 40:16 41:4,22 41:24 44:15 45:13 46:15,16 50:2 52:8 54:14,18 55:25 56:2,10,12,16 57:10 59:5 filing 17:2 19:13 22:6 37:13 46:2 fill 27:5 final 46:10 find 32:7 finish 32:13 Fire 56:20 first 7:23 10:24 14:2 22:17,25 23:8,17 27:3 36:1 45:11 46:10 49:6 58:1 five 12:18 33:5 41:4 43:25 floor 9:1 flow 36:11 focused 41:4 foist 10:9 follow 4:5 13:21 following 18:17 40:8 follows 36:9 forever 12:7 20:25 30:16,16 31:22 48:6 formal 9:10,11 formalism 19:16 forth 3:12 forward 27:24</p>	<p>four 11:16 12:6 53:8 57:22 frankly 34:24 free 14:17 friend 10:4 13:1 14:19 33:21 36:10 39:22 40:24 43:23 53:18 front 13:12 19:12 53:9 57:8 fully 56:3 functioning 58:2 further 32:14 furthered 60:12 future 42:19</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 gained 58:12 game 35:4 gap 27:2,5 general 53:15 generally 9:15 56:4 generate 6:2 25:17 Ginsburg 7:13 30:13,19 31:21 35:12,14,17,19 35:24 45:24 46:10 51:12,23 give 14:11 25:21 26:11 35:25 given 19:16 gives 49:15 56:6 giving 26:10 global 50:17,23 51:6 go 9:2 10:10 18:19 23:9 32:14 34:18,24 37:5 42:17,18 44:20 47:17 49:23 51:13 52:9</p>
--	---	---	--	--

<p>goes 8:4,19,23 45:8,10 51:2 going 3:19,21,25 6:2 8:1,22 9:6 14:7,8,24 16:2 19:15 22:25 23:1,3,4 25:17 25:19,25 26:7 27:22 29:23 34:10,12 40:18 40:20,21 42:20 42:21,24,25 45:14 46:1,8 46:14 47:7 48:21,24 49:10 49:17 50:17,22 50:24 51:25 52:2,7,16,21 53:13 54:2,5 54:15 55:16 Goldstein 1:17 2:3,9 3:6,7,9 4:14,17 5:2 6:11,14,18 7:15 8:20 9:1 9:11,21 11:19 11:22,24 12:20 12:24 13:14,19 14:1 15:3,8,16 17:13,19,25 18:6,8,11,23 19:2,7,10,24 20:4,6,10,17 21:19,22 22:9 22:12,15,17 23:20,22 24:2 24:9,25 25:8 26:13,19 28:3 28:16,25 29:3 29:5,8 57:22 57:23,25 good 11:6 26:20 35:10,20 43:11 48:6,12 GORSUCH 13:14,20 15:2 15:5,12 21:17</p>	<p>21:21 gotten 4:20 45:21 47:6 government 31:3 32:5 grant 53:14 granted 8:7 53:14 granting 26:24 guarantee 49:17 guaranteed 43:2 guess 10:25 18:20 48:8</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 43:21 hand 50:19 handful 55:19 happen 4:1 7:5 13:1,6,13 19:11 29:15 44:10 49:1 happened 7:13 7:15 27:21 49:11 50:1 59:20 happening 7:12 happens 5:17 17:23 18:2 39:10 hard 27:7 he'll 17:14 hear 3:3 hearings 48:16 held 31:4 40:17 40:18 help 39:1 hey 14:16 hint 31:10 historically 10:16 history 30:23 32:15,16,17 hold 3:11 14:7 hold-out 50:24 holds 10:2 Honor 38:21,23</p>	<p>39:6 horribles 43:14 huge 7:1 hypothetical 18:17,24 25:23 hypothetically 7:8</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 19:18,21 24:12 42:25 43:6 illustration 25:21 imagine 14:13 14:17 18:16 25:22 43:16 45:2,4,4 immediately 8:7 implicated 51:4 implicates 56:3 implied 53:12 important 3:21 10:3 16:19 27:9 47:21 importantly 31:2 40:14 impose 56:23 in-no-event 30:11 incentive 48:20 inclined 32:14 including 3:14 54:24 increases 55:3,6 increasing 7:25 indefinitely 23:7 index 43:24 individual 7:6 12:10 15:10 16:9 24:14,17 25:16,19 35:21 36:13 39:8,12 39:13 40:13,19 40:24 41:3 48:13,23 49:17 49:20 50:3,11</p>	<p>50:22 51:20 55:9,25 56:1 58:5 IndyMac 6:22 8:6 43:17 44:3 46:14 inevitably 46:1 infancy 36:17 inform 46:6 initiated 38:18 59:5 institutional 47:2 49:7,11 49:20 50:21,25 51:1,8 55:19 59:12 intended 26:24 interest 8:11,14 60:11 interests 60:12 interpret 17:7 25:20 35:15 44:22 53:6 interpretation 5:25 19:25 20:19 interpreted 28:7 interpreting 7:12 24:12 interrupt 4:15 intervene 7:6 8:15 10:6 13:3 14:14 16:25 17:11,15 25:18 29:14 39:1,6,8 40:5,8,9,10,14 40:15 46:2,4,7 51:20 58:9,11 58:18 59:17 intervention 13:4,5 40:20 46:22 intone 23:24 investor 48:23 49:11,20,20 51:9 investors 42:19</p>	<p>42:20,24 43:3 43:4 46:21 47:2 48:14 49:7 50:21,25 51:1 55:20 59:12 invoke 3:16 invoked 53:10 involved 17:6 24:20 involves 58:8 involving 45:3 irrational 41:14 irrelevant 43:3 isolation 44:6 issue 5:12 30:14 30:25 33:23 34:1 44:3 53:10 56:11 issued 42:1 56:14 58:16</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>job 48:6,12 Jones 15:9,12,13 15:17 judge 14:21 19:12 38:2 40:3,4 45:4 judge's 38:6 58:19 60:4 judges 10:9,10 45:25 46:17 55:14 60:11 judgment 29:16 49:15 judicial 24:6 57:12 judiciary 60:10 jurisdiction 18:14 19:9 39:16 jurisdictions 18:10 Justice 3:3,9 4:12,15 5:1 6:7 6:13,16 7:13</p>
---	---	---	---	--

8:17,21 9:9,14 10:13 11:8,20 11:23 12:9,14 12:23 13:14,20 13:24 15:2,5 15:12 16:12 17:13,22 18:1 18:7,9,21,25 19:3,8,21 20:1 20:5,9,11,13 21:17,21 22:7 22:10,13,16 23:18,21 24:1 24:5,21 25:6 26:13 27:17,25 28:4,14,17 29:1,4,7 30:2,6 30:13,18 31:21 32:11,25 34:4 34:17 35:12,14 35:17,19,24 37:4,7,15,17 38:2,5,11,14 38:19,22,25 39:3,10,13,25 40:3 41:7,10 41:16 42:8 43:5,9 44:10 45:23,24 46:9 46:20 47:9,15 47:19 48:15,25 49:5,22 51:12 51:23 53:22 54:10,21 55:7 55:12 57:21 60:14 jut 21:22	4:15 5:1 9:14 19:21 20:1,5,9 20:13 27:25 28:4 47:9 Kennedy's 27:17 kind 17:10 21:11 39:23 42:19 43:2 52:25 kinds 51:15 knew 58:16 know 4:8,9,16 5:2 14:16 19:20 24:17 25:9,11,15 26:6,7,23 31:5 31:21,23 33:16 37:22 38:18 39:7 43:6,9,18 43:25 44:1,20 45:18 46:23,24 48:4,16 50:15 50:16,22 51:11 51:15 52:16 53:25 54:2,6 55:3,7,15 59:24 60:1	law 17:6,8 27:10 29:25 35:3 46:1,16 50:8 57:9 59:2 laws 10:1 13:17 13:18 lawsuit 8:12,15 12:10,11 13:15 13:17 14:2,3,5 14:7,8,14,15 21:8 23:15 24:17 27:14 54:1 58:12,20 lawsuits 25:19 58:5 lawyers 8:10 27:21 48:5 lead 17:4 46:5 46:11 49:9 51:17 59:14,16 59:18 leave 23:8 26:3 leaves 10:24 left 12:16 legal 20:14,15 24:11 28:2 50:17,23 51:6 57:7 legislative 30:22 32:15,16,17 Lehman 14:20 25:11 let's 42:11,11 43:11 45:2 letting 25:9 levels 53:23 leverage 55:21 liability 3:24 5:14 9:23 11:9 14:10 16:13 22:1 25:12 54:15,18,23,23 55:4,6 56:23 57:10 life 51:3 lifted 44:1 light 49:12	limit 12:5 30:9 30:20 31:9 32:18 33:20 limitation 22:24 limitations 15:22 21:9 29:13,18,22 31:6,11,13 32:3 34:7,11 35:3,6,10 36:19,25 37:12 40:12 limits 3:12 line 15:19 list 44:20 litigant 17:4 litigants 16:22 51:14 litigate 7:9 9:13 27:22 litigated 25:15 litigating 59:10 litigation 6:3 7:22 8:2 10:7 13:11 14:18 16:9,18,20 59:9 litigations 24:13 54:9 little 4:13 9:8 42:14 long 39:17 43:21 54:8 longer 32:9 50:6 51:5 look 7:19 11:8 14:6,22 21:3 23:2 32:14,15 33:23 37:2 39:18 42:13 49:25 58:3 looked 32:21,21 33:11 35:2 41:2 looking 41:11,12 46:14 looks 8:13	lose 14:8 43:4 45:16 lost 48:6,11 lot 4:7 10:1 48:16 lots 16:3 43:22 46:21 47:4
M				
Kagan 9:9 26:13 32:25 34:4,17 42:8 43:5,9 46:20 47:15,19 48:15,25 49:6 49:22 Kagan's 45:23 Kennedy 4:12	label 36:2 labeled 36:3 lack 36:17 Lampf 30:10 32:8 33:13,17 33:23 34:8,19 34:25 57:16 language 13:21 15:6 28:9 30:11,16,21 31:1,2,22 34:1 41:12,18,18 large 42:19 43:3 49:7 late 35:4 42:5 Laughter 9:20 11:7	leave 23:8 26:3 leaves 10:24 left 12:16 legal 20:14,15 24:11 28:2 50:17,23 51:6 57:7 legislative 30:22 32:15,16,17 Lehman 14:20 25:11 let's 42:11,11 43:11 45:2 letting 25:9 levels 53:23 leverage 55:21 liability 3:24 5:14 9:23 11:9 14:10 16:13 22:1 25:12 54:15,18,23,23 55:4,6 56:23 57:10 life 51:3 lifted 44:1 light 49:12	magically 52:24 maintain 19:9 maintained 3:23 make-work 43:2 making 6:8,25 26:8 management 25:24 55:13 manner 6:3 market 7:25 44:5 markets 7:25 matter 1:13 9:9 9:10,12,12 13:5 15:6 27:13 34:9 53:15 60:17 matters 14:3 57:1 Md 1:17 MDL 19:11 MDL'ed 19:14 mean 6:15 15:5 15:10 22:8 28:18 29:12,21 43:6,14,15 44:14 45:7 47:9 48:10,22 50:1 53:7,22 53:23 54:4,23 55:13 58:25 meaning 12:1 18:1 meaningless 17:10 means 15:11 29:22 33:7 38:15 39:1	

<p>53:20 58:25 meant 34:5,6,13 measure 25:24 member 4:22 5:5,7 7:5 24:15 24:19 36:23 members 16:23 mental 11:11 36:17 mentioned 46:13 meritorious 59:6 metaphysically 41:9 millions 41:23 56:9 mind 24:22 25:7 25:8 minutes 57:22 misleading 29:9 misreading 41:1 misrepresenta... 23:25 mistake 42:21 mistaken 36:9 misunderstands 59:8 modified 16:4 modifier 57:4 moment 20:20 49:4 Monday 1:11 month 12:16 26:2 48:3,5 months 48:2,5 motion 17:15 26:3,8 29:14 37:8 39:6,8 40:5,7,9,10 58:18 motions 17:11 25:18 39:1 40:13,15 move 7:5 8:15 10:6 13:3 16:25</p>	<p>moves 14:14 moving 4:24 59:17 multiple 33:22</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 named 16:24 17:3,3,3 18:4 18:18 59:18 nature 12:11 necessarily 5:20 7:9 27:25 necessary 17:21 need 24:24 27:5 27:8 28:14,15 29:1 37:2 39:23 45:20 needs 25:15 never 28:4 51:21 new 11:15 12:8 12:10,18 14:13 14:16 15:1 17:3 24:12 28:2,6 37:10 37:11,13 38:3 38:15,15,17 39:15 45:6,15 54:12,23 56:1 56:19,23 57:10 57:10 59:17 no-event 30:21 nominal 18:17 non-disclosure 8:24 non-tolling 26:15 normal 18:3 34:10 Northern 41:24 52:17 56:13 notice 14:4 16:23 58:13 59:4,16,25 notices 51:16 notion 32:18 noun 3:21</p>	<p>number 3:14 7:20 16:20,22 17:1 38:16 numbers 14:25</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 object 48:12 obligation 46:6 46:12 51:17,23 obviously 21:3 occasions 35:18 36:1,22 offered 5:16 23:11 offering 12:18 56:10 office 45:6 oh 9:16 24:25 okay 14:14,20 21:25 22:9,17 25:12 37:5,8 52:19 60:1 old 37:14 omission 4:2 operate 7:3 12:25 operative 3:25 opinion 24:8 31:17 33:9 opportunity 59:4 opposed 34:14 opt 4:23 7:8 12:12 25:4 27:11,14 40:5 42:23,23 48:10 49:1,18,21,23 50:9,21 51:8 59:4 opt-out 7:20 27:20 28:12 39:25 47:20,21 49:14,14,22 51:7 58:4 opt-outs 44:8 opted 12:16 24:3</p>	<p>50:2,5 51:9 55:21 56:17 60:9 opting 17:24 oral 1:13 2:2,5 3:7 30:4 order 9:2 29:2 36:11 orderly 14:18 ordinary 14:18 15:4 original 19:8 originally 32:19 ought 7:5 outcome 49:4 override 20:15 53:16 owe 54:5</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 p.m 1:15 3:2 60:16 page 2:2 3:15 6:9 12:18 pages 12:17 paper 11:1 13:4 45:5 paperwork 7:2 10:11 17:10 58:8 parade 43:13 parallel 12:7 20:23 parlance 18:3 part 38:10 47:21 47:24 particular 16:12 32:1 particularly 19:10 58:14 parties 35:9 59:10,15 party 13:2 16:24 17:3,4 24:16 25:11 38:22 39:20 56:19</p>	<p>60:4 party's 39:9 passed 9:19 56:2 passes 50:16 passive 60:7 path 57:14 PAUL 1:19 2:6 30:4 pause 4:6 pay 50:24 55:10 55:11,16 peace 50:18,23 51:7 pendency 49:3 pending 6:19 penny 51:21 people 9:12 18:19 25:4 40:5 44:25 46:2,4 47:23 49:1 53:25 percent 8:23,23 perfect 22:21 perfectly 33:2 period 4:5 9:24 15:23 17:18 20:24,24 21:9 21:9 22:2 29:18,22 32:3 32:9,22 33:14 40:22 46:5 54:7,19 58:5 periods 32:22 permissive 13:5 person 24:10 45:10 personal 18:13 perspective 50:14 petition 26:2,4,6 26:7 Petitioner 1:5,18 2:4,10 3:8 57:24 Petitioners 50:1 58:3 petitions 25:25</p>
--	--	--	---	--

<p>53:9,10 Petrobras 7:16 phrase 3:17,18 15:22 23:14 29:8 piece 11:1 13:3 pieces 45:5 pin 43:6,11 Pipe 3:11 4:8,16 4:22 5:3,24 7:11,18 10:2,7 12:1,2,3 14:3 16:1 17:23 19:24 20:2,21 20:23 21:1 24:11 25:13 30:14,25 31:5 31:15 32:16 35:14 36:3,21 39:7 40:11,14 40:17,18 41:1 41:2 53:16 58:14 59:25 Pipe's 36:8 place 16:16 26:16 places 3:14 plain 13:21 15:6 42:4,5 plainly 30:9 plaintiff 12:9 14:13 16:21 18:4,14 24:5 49:9 59:14,16 59:18 plaintiffs 18:18 45:3 50:8 played 27:17 please 3:10 11:18 30:7 32:13 PLSRA 55:23 point 6:25 7:11 7:18 8:1 9:18 11:18 16:10 19:16 21:13 22:3 23:3 28:8</p>	<p>32:13 34:12 35:1 45:23 56:15 58:3 59:9 60:5 pointed 46:21 pointless 6:5 7:2 points 13:24 43:15 48:9 49:5 58:1 policies 28:13 51:3 56:4 policy 15:6 45:17 position 39:6 possibility 7:7 possible 9:23 55:14 potential 25:12 45:3 power 48:15 practical 9:9,12 13:10 17:9 28:21,23 37:5 42:14 practically 10:14 practice 25:1,2 pragmatic 15:20 pre-opted 50:4 pre-opting 52:23 precedence 57:19 precedent 21:2 precedents 22:4 precise 12:7,13 precisely 12:21 12:23 33:19 49:9 prediction 46:17 preferences 49:8 premise 36:9,11 premium 50:24 presage 7:7 presented 6:21 6:22 25:22 53:4,4</p>	<p>preserved 50:5 pressure 47:19 pretrial 19:14 pretty 34:25 prevent 52:7 previous 5:13 22:20 price 7:25 8:4,19 8:19 9:2,5 pride 26:16 principal 18:20 principle 20:5 principles 55:23 Private 16:17 59:8 probably 14:19 problem 28:10 28:21 47:13,23 57:8,13 problems 28:23 procedure 8:8 20:16 37:22 procedures 21:3 proceed 58:20 process 47:22 procuring 49:16 professors 8:8 46:1,16 profoundly 59:8 prohibit 22:5 promising 26:5 proposed 50:7 proposing 52:6 proposition 28:5 prosecution 32:5 protect 8:11,14 32:23 44:25 protected 60:10 protections 9:5 52:5 protective 42:22 provide 16:23 provided 29:24 35:3 provides 30:9 provision 33:11</p>	<p>35:16 53:12 provisions 9:25 33:12,22,24 PSLRA 49:6,12 public 1:3 3:4 5:16 23:11 42:1 56:10 purpose 9:22 50:13 purposes 19:14 51:14 pursue 50:8 pursued 50:7 put 12:19 43:6 43:11 54:22 60:6 puts 10:25 47:19 putting 14:4 18:16</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 47:5 question 6:21 9:24 11:24 20:10 21:12 22:18 25:5 26:14,23 28:1 29:9,12 34:4 38:11 40:9 46:10 51:13 53:4,4,14,17 53:18 56:8 questions 18:13 19:5 39:19 quibble 30:25 33:22 quickly 4:25 quite 9:22 17:2 20:21 25:1 27:9 28:4 quotes 50:2</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raised 28:21 rare 21:23 read 15:12,13,16</p>	<p>28:9,18 31:4 32:1,2,6 34:18 44:13 reading 41:13 realize 15:23 59:1 really 3:17 17:1 26:17 39:18 42:6 45:18,19 48:13 53:18 reason 7:20 9:18 14:9 23:16 25:1 28:11 36:2 44:23,24 46:21 47:2 51:9 54:6 reasonable 4:4 44:21 52:3 54:20 reasons 30:19 43:11 49:19 52:21 REBUTTAL 2:8 57:23 reconcile 16:1 28:11 recover 9:3 39:21 41:22,23 42:3 45:12 47:14 56:9 recovering 52:7 refer 36:22 reference 46:13 referring 5:13 refers 23:14,15 Reform 16:18 59:9 regard 17:4 regardless 44:5 regime 16:8 regimes 17:12 rejected 33:18 rejects 34:20 relating 6:16 relation 39:24 56:22 relation-back</p>
--	---	---	--	--

<p>53:1 relatively 7:21 relevant 41:6 relied 35:9 relief 38:20 rely 46:25 relying 41:16,17 47:10 remainder 29:17 remember 12:3 16:12 20:23 23:8 24:10 remembering 53:5 reminding 11:3 repetition 11:14 repose 3:17 6:4 6:13,17 8:13 9:15,16,22 10:16 16:14 17:18 21:9 22:4,24 30:10 30:20 31:12,19 31:24 32:10,19 32:20 33:15,16 33:20 34:6,14 34:22 37:12 40:13 42:6 50:6,10,12,13 50:16 51:2,4 52:13 53:12,16 53:19,20,23,24 54:3,4,12,13 54:19 56:4,24 57:3,16,17 representative 16:8,21 25:3 52:1,1 60:3 represented 16:19 reproduced 3:13 required 27:23 requires 55:13 reserve 29:10 30:1 resisted 28:4</p>	<p>resolved 54:17 resolving 27:24 respect 24:2 36:7 46:3 respectfully 56:3 Respondent 58:2 Respondents 1:8 1:20 2:7 30:5 responses 35:25 rest 45:13 result 43:7 44:12 49:13 retired 10:9 45:25 46:16 Retirement 1:4 3:5 return 12:24 21:11 review 8:7 rich 52:19 right 10:20 11:8 11:22,24 13:5 13:19 14:12 19:2 20:9,14 20:15 21:5 24:1,1 27:11 27:13,20 28:2 28:6,7,12 30:18 33:8 36:21 38:25 40:18 42:10,11 46:4 47:20,20 47:21 48:12 49:14,15,15,23 51:7 55:16 59:3 rise 49:10,10 rising 44:1,5 road 13:6 ROBERTS 3:3 8:17,21 30:2 53:22 54:21 55:12 57:21 60:14 routinely 13:18</p>	<p>rule 5:25 6:2 7:1 7:12 8:6,10 12:21 13:9 15:25 16:5,5 16:13 19:17,22 19:25 20:1,3 20:12,14 21:4 21:7 22:20 23:1,5,9,12 24:12 25:20,23 26:1 27:11,18 28:1,1,5,12 31:16,16,18 33:2,6,16 34:9 34:23 36:3,3 36:20,22 37:17 37:19 39:23,24 40:21,25 41:12 41:18 43:1,18 43:19 47:16 48:25 49:1,6 49:12 52:3,6 55:23 56:21 57:6,6,7,12 58:22 59:3,22 60:3,5 rules 20:15,18 21:2,3,6,14,15 27:19 36:16,18 36:19 51:14 53:21 57:7,13 run 37:13 54:16 running 29:21 51:19</p>	<p>14:22 21:24 22:3,24 23:4 24:13 25:13,17 29:13 32:4 35:21 37:18 43:23 60:1,3 scheme 35:8 scope 6:20 25:12 scrutiny 55:14 Seal 10:8 second 4:6 5:11 6:20 7:14,16 7:22 8:5,5 10:15,23 14:25 27:4 28:15,17 32:22 33:1 34:21 36:6 43:19,23 44:7 45:21 46:19 59:7 section 3:13,24 5:5,15 6:23 7:23,24 8:2 9:3 9:3,4 12:1 14:20 15:24 16:11 23:15,16 23:24 30:8,20 31:19 32:7 33:24 34:1,19 41:20 42:4 53:6,10 54:11 57:15 58:15 59:2,24 sector 8:22 securities 1:7 3:5,13 7:22 8:1 8:8 9:25 12:11 13:18 14:23 16:11,17,20 23:25 30:8 42:1 43:22 55:18 56:11,14 59:8 security 5:16 see 13:15 27:8 42:23 45:7 58:3</p>	<p>seeking 13:4 39:20 41:21,23 42:2 45:12 56:9 seen 8:9 self-defining 3:18 sense 12:8 17:9 21:12 22:21 53:24 54:4 60:9 sensible 26:9 sent 51:16 sentence 4:5,9 4:17 5:11,14 5:23 10:15 22:20,25 23:8 23:12,17 sentences 11:16 12:18 separate 11:13 11:25 17:17 19:15 46:7,22 separately 17:16 set 3:12 settle 50:18 55:11 settled 44:7 settlement 48:13 48:16,22 52:3 55:22 shortened 32:23 shorter 35:6 side 3:16 7:3,18 10:14 11:3 14:4,15 18:16 20:22 25:9,14 33:21 36:10 59:7 side's 7:1 19:17 silent 32:17 similar 20:21 simple 37:1 39:18,22 42:7 simple-minded 45:10 simplest 37:8</p>
--	--	--	---	--

simply 6:22 16:23 31:18 46:11 57:18	spend 53:18 spin 58:5,11 spoken 26:17 spun 18:9 19:4 19:15 39:15	statutory 28:9 57:9 stay 47:12 49:7 stayed 58:18 stems 19:22 step 45:11,16 stock 8:22,23 43:24 44:2 stop 7:12 23:3 29:2 55:24 stops 42:10 straight 27:24 straightforward 6:12 41:21 straightforwa... 6:22 strict 11:9 16:13 strong 39:23 strongly 32:17 structure 12:4 20:23 30:11,22 32:7,25 33:3,7 34:3	suing 14:22 53:25 suit 8:18 42:19 48:2,3 49:2,3 55:2 suits 16:9 super 39:23 56:21,21 supports 32:18 suppose 33:21 34:4 42:11 48:19 Supreme 1:1,14 25:23,23 sure 11:19 37:6 38:17 55:3,5 surprise 9:13 27:18 58:21 surprises 54:2 surround 17:12 survives 39:9 suspend 29:12 29:21 suspended 31:2 system 1:4 3:5 16:6 37:24	16:18 team 48:19 teeth 17:11 tell 10:8 42:16 46:1 51:17,19 54:12 tells 5:3 8:10 25:14 40:4 ten-year 32:20 tendency 3:16 term 13:22 22:7 34:14 terms 14:4 17:24 25:13 26:17 27:2,23 42:5 59:21 test 45:20 text 3:20 6:23 21:23 41:20 42:4 53:2 54:11 56:5 textual 32:3 43:7,11 Thank 30:2 57:20,21,25 60:13,14 theirs 12:21 28:6 theoretically 55:15 theories 20:7 26:15 theory 19:22 26:16 28:15,18 37:11 38:14,15 40:6 49:9 51:24 53:7,24 thing 3:25 16:10 22:25 26:9 27:9 33:7 35:23 36:6 55:8 57:11 things 4:9 10:1 11:15 16:2,19 18:15 46:9 56:22 58:25 think 5:3,22 6:1
single 16:21 24:6 sir 6:11 9:1,21 19:25 20:12 21:22,23 24:25 sit 58:10 situation 25:2 27:20 38:10 51:5 situations 36:16 slate 33:9,10 small 7:21 42:24 43:4 45:1 46:21 48:23 Smith 56:19 solve 28:20 somebody 47:17 52:9 somewhat 20:2 sorry 4:14 42:4 sort 34:9 37:23 43:13,13 48:9 50:24 sorts 18:15 Sotomayor 17:13,22 18:1 18:7,9,21,25 19:3,8 32:11 37:4,7,16,17 38:2,5,11,14 38:19,22,25 39:3,10,13,25 40:3 41:7,10 41:16 Southern 45:14 space 59:5 speak 17:14 26:14 specific 18:13 33:11 46:12 specifically 32:21,21 34:20 spell 24:24	started 23:16 starts 37:13 state 11:11 29:25 35:3,10 50:8 statement 4:2 States 1:1,14 statistics 7:18 statute 3:17,19 6:3,13,17 7:3 8:13 9:7,16,18 9:22 10:16 11:9 13:2 16:14 21:16 22:4,16 29:13 30:9,20 31:5 31:10,11,12,18 31:23 32:8,9 32:19,20 33:15 33:16,20 34:5 34:7,11,14,21 34:22 35:3,5 35:10 36:18,25 37:12,12 40:12 40:12 41:12,13 41:18 42:5,6 45:19 50:6,10 50:12,13 51:2 51:4 52:12 53:3,12,16,19 54:19 56:5,24 57:2,16 58:1 59:20 statutes 9:15 10:18 16:4 22:24 25:20 56:4 57:17	subject 17:17 22:19 23:4 31:6,10,13 32:4 50:9,12 53:21 54:15,17 57:3,17 subjected 54:23 submitted 60:15 60:17 submitting 59:16 subsequent 12:9 21:4 substance 41:13 substantially 32:24 substantive 28:6 28:6 57:9 sue 9:17 14:19 14:19 sufficient 37:3 suggest 56:3 suggesting 42:8 suggests 58:2	sure 11:19 37:6 38:17 55:3,5 surprise 9:13 27:18 58:21 surprises 54:2 surround 17:12 survives 39:9 suspend 29:12 29:21 suspended 31:2 system 1:4 3:5 16:6 37:24	
T				
		T 2:1,1 table 54:3 tailed 35:21 take 19:16 21:13 21:23 22:17 27:7,14 28:17 36:12 39:5 44:6 53:13 54:9 58:18 60:4 taken 24:3 takes 54:16 talk 15:22 20:19 talking 10:19 21:7,7 23:24 34:8,22 36:15 53:19 58:15 teaches 4:7 12:1 14:4 15:9		

<p>6:8 8:23 10:4 10:14 11:4,5 12:7 13:15 14:2,11,15 15:1,19,23 16:18 22:13 24:21 26:9,19 27:1 28:8 31:20,25 32:1 33:8 34:7,18 34:24 36:7,20 37:1,15 38:9 39:6,7,18,19 42:17 43:7,9 43:10,16 45:8 45:8,9,19 46:11 48:11 49:12 51:22,23 52:4,21,24 53:2,6,17 54:11 56:6,25 57:14 thinking 27:1 34:16 47:20 THOMAS 1:17 2:3,9 3:7 57:23 thought 3:19 24:23 35:2 53:14 three 4:20 5:15 5:20 9:17 10:25 11:14,15 17:1,5 23:11 28:23 30:19,22 41:25 50:20 53:9 56:2 59:19 three-year 4:5 17:18 30:9,19 32:18 33:14,20 tide 44:1 tier 33:1 34:21 time 3:12 6:19 10:22 12:5 27:2 29:10 30:1,9,20 31:9 32:9,18,22,22</p>	<p>44:21 48:2,3 50:16 51:19 53:19 54:14 56:17 58:19 60:5 timeliness 40:19 47:4,10,13 52:22 timely 35:23 36:23 39:21 40:10,16,21 41:22 50:12 52:7,11 55:25 56:15,16 59:5 times 31:17 today 26:17 toll 4:16 10:18 27:5 31:17 36:25 tolled 31:3 36:19 40:22 tolling 3:12 4:8 4:22 5:24 22:5 27:2,8,23 28:14 29:1,8 29:12,21,24 31:6,10,13,16 31:16,17,18 32:4 33:18,19 34:20 35:1,8 35:11,16 36:4 36:8,12,15,16 36:23 37:3,19 39:23 40:21,25 41:2,11,17 52:25 53:16,21 56:21 57:1,3,4 57:6,17 ton 8:9 top 3:14 tough 48:17,18 51:3 traditional 13:21 traditionally 13:16 transfer 37:25</p>	<p>38:7,13 transferred 39:14 trap 58:22 tremendous 47:19 tried 16:1 26:22 true 9:25 16:14 22:23 trumps 57:12 try 15:20 59:15 trying 16:6 17:1 19:19 25:24 45:18 58:24 turns 46:18 twice 55:16 twist 45:19 two 4:19,21 11:14 14:23,24 15:15 16:2,22 20:6 26:20 28:11 30:21 32:22 33:24 34:2 35:18,25 36:1,15,18,22 45:25 46:9,13 46:15 49:5 50:20 53:11 56:22 57:25 59:23 two-tiered 22:24 30:11,22 32:7 32:25 33:3,7 34:3 twofold 7:22 typically 55:17</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 39:4 56:25 unable 17:20 unaware 10:5 uncertain 54:22 understand 5:1 6:6,25 12:25 13:2 15:17 17:14 27:16</p>	<p>37:21,24 58:24 understanding 13:22 37:23 understands 7:3 Underwriters 11:10 unexhausted 15:14 United 1:1,14 10:8 29:11,13 unnamed 5:5,6 24:14 unnecessary 10:12 25:18,19 unresolved 25:5 untimely 19:18 29:23 untrue 4:2 unwary 58:23 use 13:23 15:17 29:17 55:20 56:23 57:4 uses 31:22,22 usually 33:4</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6 3:5 15:9,17 56:19 vacuum 59:5 variety 9:4,25 34:15 venue 37:9,18 37:25 39:16 viable 49:17 view 42:9 violate 21:4 27:18 28:5 violates 27:19 violating 20:18 28:1 voice 60:7 voluntarily 45:13</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 42:23 wake 16:3</p>	<p>Waldburger 36:14 54:11 57:2,10,18 Wallberger 31:8 want 4:15 10:6,9 12:19 14:23 16:20,21 17:10 26:1 40:25 44:25 47:24 48:9,25 53:3 53:18 58:7,8 60:3,4 wanted 25:11 49:1,6,7 wants 42:23 47:17 49:20 52:9 59:24 Washington 1:10,19 wasn't 34:22 56:18 way 6:10 10:5 12:12 15:13,16 27:24,24 28:7 28:10,10 34:11 36:2,4 39:18 42:12,13,18 43:7 44:22 45:7,9,19 56:7 56:15 60:6 ways 15:18 We'll 3:3 we're 10:19 14:24 16:25 19:19 23:3 25:19 40:18,21 41:11 47:20 52:16,21,23 58:16 we've 34:6 43:18 45:21 52:20 57:5 weren't 34:15 34:16 56:19 whoa 58:6 willing 14:16 win 14:2</p>
---	---	--	---	---

wonder 27:12	14:21 17:5	1983 29:19,24	63 44:6,8
wondering 17:23	23:9,11 28:23 30:17 33:5	<hr/> 2 <hr/>	<hr/> 7 <hr/>
word 12:8 13:15 15:17 17:7 31:16 42:9,12	41:25 43:18,21 43:25 47:18 48:1,1 51:5,18 54:8,16 56:2	2 26:23 53:4 20 11:16 18:5 23:9	<hr/> 8 <hr/>
wording 5:5	56:10,14 57:11 59:19,21	2011 41:25 42:4 52:14 56:13	<hr/> 9 <hr/>
words 28:18 32:1,2 44:13 44:19,22	York 37:10 45:15 56:19	2014 44:6,7 2017 1:11	90 17:2
work 6:2 26:12 41:20 59:23	<hr/> Z <hr/>	23 5:25 6:2 7:12 15:25 19:22,25 20:3,12,14 24:13 25:20 27:11,18 28:1 28:1,5,12 41:12,18 48:25 49:1,6,12 55:23 57:12 59:3,22 60:3	
works 53:2 55:23	zero 44:8,8	23(e) 52:3	
world 12:25 48:20,23 58:7	<hr/> 0 <hr/>	<hr/> 3 <hr/>	
worried 47:3,5 47:10	<hr/> 1 <hr/>	3 2:4 3:15 43:21 47:18 48:1,1 51:5,18 56:10 56:14 57:11	
worse 55:8	1 13:1 48:3 53:4 58:9,15	3-year 22:2 46:5 50:10	
worth 46:13 53:5	1-year 20:24	30 2:7 16:5 59:21	
worthless 26:8	1,000 12:17	300,000 45:3,4	
wouldn't 15:7	1:00 1:15 3:2	38 6:9 16:5	
writes 21:24	1:59 60:16	<hr/> 4 <hr/>	
writing 33:9,10	10 12:15 18:4,18 18:19 23:9	4 13:6 14:13 30:17 43:18,21	
written 59:21	100 25:23	4-year 20:24	
wrong 11:12 37:9,18,24,25 42:17	10b-5 44:4 50:6 53:11	463 12:18	
wrote 24:22 25:7	11 3:24 5:15 7:23,24 8:2 9:3 9:4 14:20 23:15,16,24	48 16:5	
<hr/> X <hr/>	13 3:13 5:6 6:23 12:1 15:24	<hr/> 5 <hr/>	
x 1:2,9	16:11 30:8,20 31:19 32:7 33:24 34:1 41:20 42:4 53:6,11 54:11 57:15 59:2,24	5 8:23 23:9	
<hr/> Y <hr/>	15 23:9 54:8,8	50 8:22	
yeah 22:12 25:6 33:3 38:8 54:21	16-373 1:5 3:4	57 2:10	
year 4:1,18,19 5:9,19 12:5 14:13 33:4 44:6,7	17 1:11	<hr/> 6 <hr/>	
years 4:20,21 5:15,20 9:8,17 10:25 11:17 12:6,15 13:6	1933 16:3 34:1 1934 16:3 25:1 32:24 33:25	6 48:2,5	