

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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