No. 09-0914 66

Supreme Court of the United States

METLAKATLA INDIAN COMMUNITY,
Petitioner,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Federal Circuit err when it ruled that the limitations period in Section 605(a) of the Contract Disputes Act (CDA) is not jurisdictional, but then also held that the timely filing of a claim and exhaustion under Section 605(a) is a jurisdictional requirement that has to be met before class action tolling may apply to that very same limitations period?

2. Did the Federal Circuit err in holding that a potential class member must take action to establish class action court jurisdiction over that potential class member's claim in order for that same class member to obtain the benefit of class action limitations tolling?

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

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PETITION FOR WRIT OF CERTIORARI

Petitioner Metlakatla Indian Community ("Community") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit opinion (Pet. App. 1a-26a) is reported at 583 F.3d 785. Petitioner's petition for rehearing and rehearing en banc (Pet. App. 27a-28a) was denied on March 10, 2010 and is unreported. The opinion of the Civilian Board of Contract Appeals (Pet. App. 29a-47a) is reported at C.B.C.A. No. 280-ISDA, 2008 WL 3052446 (July 28, 2008).

JURISDICTION

The Court of Appeals judgment was entered on September 29, 2009. Pet. App. 2a. The denial of rehearing was issued on March 10, 2010. Pet. App. 28a. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Indian Self Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450m-1(d) provides that:

> The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).[1]

The Contract Disputes Act (CDA), 41 U.S.C. § 605(a) (Pet. App. 48a) provides:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. * * * Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim. * * *.

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[1] The administrative appeal authority has been transferred to the Civilian Board of Contract Appeals (CBCA herein). *See* 41 U.S.C. § 438.

STATEMENT OF THE CASE

The CDA, 41 U.S.C. § 605(a), provides that contract claims be submitted to a contracting officer within six years of accrual of the claim.

In *American Pipe & Constr. Co. v. Utah*, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554 (1974).

This case turns on the relationship between this class action tolling rule and the limitations and claim submission requirement of Section 605(a). The Federal Circuit held that the limitations period in Section 605(a) is not jurisdictional and could be tolled. It then did an about face and held that the timely claim filing requirement was a prerequisite to court jurisdiction, and without the filing of a claim by a putative class member, the class action tolling rule could not be invoked. This created a circular analysis which results in a complete nullification of the class action tolling rule in an administrative claim setting. The Court did so by failing to properly interpret the nature of the claims processing rules of the CDA.[2]

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[2] The Community agrees with and also adopts as a basis for review the reasons set forth in the related petition for certiorari *Arctic Slope Native Association v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. Apr. 6, 2010) (No. 09-1172). Petitioner ASNA argues that the Federal Circuit issued a ruling in conflict with the controlling rule that "all" members of an asserted class benefit from tolling, not just a select few. *See also* argument below at III.

This Court has repeatedly stated that all courts must act with clarity in designating a statutory filing requirement as jurisdictional, confirming the view that "not all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." *Union Pacific Railroad Co., v. Brotherhood of Locomotive Engineers*, ___U.S.___, 130 S.Ct. 584, 596 (2009) quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006). This Court distinguishes between rules that define subject matter jurisdiction, which refer to "a tribunal's power to hear a case," *id.*, and claims processing rules, which do not "reduce the adjudicatory domain of a tribunal. . . ." *Id. See also Reed Elsevier, Inc. v. Muchnick*, ___U.S.___, 130 S.Ct. 1237, 1244 (2010) (citations omitted) ("In light of the important distinctions between jurisdictional prescriptions and claims processing rules, we have encouraged federal courts and litigants to 'facilitat[e]' clarity by using the term 'jurisdictional' only when it is apposite . . ."). The Federal Circuit's ruling did not facilitate clarity; instead it establishes a confusing and circular rule. The Court correctly concluded the limitations period for filing a claim is not jurisdictional generally, but then found that timely filing of an administrative claim with a contracting officer is a jurisdictional prerequisite and without it, class action tolling could not apply. This conclusion results in the designation of the Section 605(a) claim submission requirement as both jurisdictional and not jurisdictional in a single holding.

Referencing language from *American Pipe* which finds tolling applicable to "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," Pet. App. 18a-19a, (citing to 414 U.S. at 554), the Court focused not on whether the Community was within

the asserted class as defined in the complaint, but rather on whether the Community would otherwise have been within the class court's jurisdiction if the class had been certified. The Court of Appeals concluded that the Community would not have been a party to the class action because it had not met the CDA timely claim filing requirements. Therefore, the Community could not take advantage of class action tolling. This reasoning is contrary to many precedents of this Court and other Circuits. *See* below at III. A putative class member need not take any action or even know about the proposed class action to be a member of the class. *American Pipe*, 414 U.S. at 551. The Federal Circuit's ruling requires a putative class member not only to know about the case, but to take affirmative action by filing a claim.

Review is warranted by the Court of Appeals' failure to adhere to this Court's instructions for treating claims processing rules with clarity and consistency, and by the Court's imposition of claim filing requirements contrary to the tolling rule resulting in an incomprehensible and circular holding.

STATEMENT OF FACTS

1. The Metlakatla Indian Community is a federally recognized Indian Tribe located in Alaska. The Community operates health care facilities and provides health care services to its members and other beneficiaries pursuant to contracts with the IHS under the ISDEAA. For FY 1997 and FY 1998, the Community was a Co-Signer of the Alaska Tribal Health Compact, pursuant to which the Community entered annual funding agreements with the IHS under Title III of the ISDEAA.

2. The ISDEAA authorizes tribes to enter into agreements with the Secretary to assume responsibility to provide programs, functions, services and activities (PFSAs) that the Secretary would otherwise be obligated to provide to beneficiaries of various federal programs. As part of the agreement, the Secretary must provide two types of funding under the ISDEAA: (1) "program" funds, in the amount the Secretary would have provided for the PFSAs had the IHS retained responsibility for them, *see* 25 U.S.C. § 450j-1(a)(1); and (2) contract supports costs (CSC), which cover reasonable administrative and overhead costs associated with carrying out the PFSAs, *see* 25 U.S.C. §§ 450j-1(a)(2), (3), and (5). The latter category is the subject of the underlying dispute.

Under its ISDEAA agreement with the Community, the IHS agreed to provide CSC according to the requirements of the statute. The agency failed to fulfill that statutory and contractual obligation and the Community sought relief, first through participation in a putative class action and then, when class certification was denied, by making individual claims.

3. There has been a continuing controversy over the Secretary's duty to fully fund the ISDEAA CSC requirements. On March 5, 1999, the Cherokee Nation of Oklahoma filed a complaint for breach of contract for failure to fully fund CSC and a request for the certification of a class action in the federal District Court for the Eastern District of Oklahoma. The proposed class included "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts, or annual funding agreements authorized by the [ISDEAA] that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and

the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001). The Community fit within this definition and had the class been certified, the Community would have been bound by any judgment unless it opted out.

4. Almost two years later, on February 9, 2001, the district court denied class certification. *Id.* at 366. The district court and the Tenth Circuit then went on to rule on the merits. The Tenth Circuit held that the IHS's duty to pay CSC was limited to amounts identified in the committee reports accompanying the appropriations acts and the IHS had no duty to reprogram funds to meet its statutory or contractual obligations. *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002).

At the same time, another case concerning CSC was being prosecuted. In *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), the Federal Circuit affirmed a ruling by the former Interior Board of Contract Appeals (IBCA) upholding the right of tribal contractors to full CSC funding. The Federal Circuit stated its disagreement with the Tenth Circuit, holding that the Secretary had no valid excuse for failing to meet his contractual obligations "to pay full contract support." 334 F.3d at 1088.

In 2005 a unanimous Supreme Court affirmed the Federal Circuit's ruling and overturned the Tenth Circuit in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (the "*Cherokee* case"), holding that the IHS was obligated to reprogram funds from its unrestricted lump-sum appropriation to pay tribal contractors their full CSC.

5. Since the class certification had been denied, in *Cherokee Nation v. U.S.*, it was now up to the individual claimants to file claims for unpaid CSC and to enforce the duty this Court defined in the *Cherokee* case.

Under the ISDEAA, a dispute between a tribal contractor and the agency concerning its contract is governed by the CDA. 25 U.S.C. § 450m-1(d); *see also* 25 C.F.R. Part 900, Subpart N. On June 30, 2005, the Community filed requests for a contracting officer's decision on its claims for unpaid CSC in FYs 1995-1999. The Community's requests for contracting officer's decisions for fiscal years 1995 through 1997 stated claims identical to those presented in the class action and the *Cherokee* case—the failure of the Secretary to fully fund CSC. The Community's claim for FY 1998 was for full funding of CSC but based on a different legal theory. It is undisputed that if legal or equitable tolling were applied, the Community's claims were timely filed with the contracting officer. The contracting officer never ruled on any of the Community's requests for decisions. The decisions were deemed denied by operation of law, 41 U.S.C. § 605 (c)(5) (Pet. App. 49a) and on May 5, 2006, the Community filed its administrative appeal.

6. In the administrative proceeding, the Government argued that the CDA is a waiver of sovereign immunity and as such, the limitations period is a jurisdictional statute to be strictly construed. Because the Community's claims were not filed with the contracting officer within the six-year time limit of 41 U.S.C. § 605(a) (Pet. App. 48a) they were barred.

The Community argued that under this Court's precedents, Section 605(a) was more like a traditional

statute of limitations, not a jurisdictional prerequisite. As such, it was subject to tolling, both class action and equitable. The Community qualified for class action tolling under *American Pipe* and other Supreme Court precedents because it had been part of the putative class action asserted in the *Cherokee* case, which sought full payment of CSC for all similarly situated contractors and the limitations period was tolled under the class action tolling rule until certification was decided. The Community also established that the presumption of equitable tolling applied under *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) because Congress showed no intention by statutory language or legislative history that Section 605(a) should not be subject to tolling.

The CBCA disagreed. While it recognized that tolling applies to statutes of limitations generally, the Board concluded that, "Section 605(a) does not contain a statute of limitations that imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent established is a prerequisite to our jurisdiction." Pet. App. 43a. As such the time limit could not be tolled. Pet. App. 45a.

7. On appeal to the Federal Circuit, the Community argued that Section 605(a) was not a jurisdictional limitations period. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), this Court defined the distinction between a jurisdictional limitations period and a claims processing rule. A traditional statute of limitations protects a defendant against stale claims and is treated as an affirmative defense. A limitations period for filing an appeal or which delineates the subject matter jurisdiction of a court is jurisdictional. *Compare*, *John R. Sand &*

Gravel, 552 U.S. at 134 (2008) and *Bowles v. Russell*, 551 U.S. 205 (2007).

The language of Section 605(a) and its legislative history support a conclusion that the limitations period and the exhaustion requirement are not jurisdictional prerequisites that would preclude tolling. Most statutes of limitations are intended to protect defendants against stale claims. The law typically treats a limitations defense as an affirmative defense. *John R Sand*, 552 U.S. at 134. Section 605(a) presents just such a traditional claims processing statute with a limitations period that may be subject to tolling. *Id.*; *See also Day v. McDonough*, 547 U.S. 198, 205 (2006); *Diaz v. Kelly*, 515 F.3d 149, 153-54 (2d Cir. 2008) (most statutes of limitations are affirmative defenses subject to equitable tolling, as confirmed by Supreme Court in *John R. Sand*).

8. In addition, courts agree that *American Pipe* Rule 23 tolling applies in the administrative claim context until the court resolves class certification. *Sharpe v. American Express Co.*, 689 F. Supp. 294, 300-01 (S.D.N.Y. 1988) ("This Court concludes that the *American Pipe-Parker* analysis applies equally well to putative class members who have yet to file an administrative claim.") *cited with approval in Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *see also McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1092 (1st Cir. 1987); *Barrett v. United States Civil Service Comm'n*, 439 F. Supp. 216, 217 (D.D.C. 1977); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1392-1393 (11th Cir. 1998) (after class certification denied, court then resolved whether an excluded class member can proceed to exhaustion).

9. The Court of Appeals correctly concluded that the limitations period in Section 605(a) does not deprive a court of jurisdiction and that tolling, both equitable and class action tolling, may apply. As to class action tolling generally, the court stated: "We therefore reject the government's sweeping contention that any time limitation, such as the limitation in section 605(a), which defines the matters that a board or court may adjudicate, is not subject to class action tolling because it is "jurisdictional" in nature." Pet. App. 12a.

The Court of Appeals also found that Section 605 was subject to equitable tolling. In its analysis, it listed significant characteristics of the statute. "The statutory time limitation of section 605(a) is a simple provision and does not contain technical language. It provides in the simplest terms that each claim by a contractor 'shall be submitted within 6 years of the accrual of the claim.' . . . The language of the time limitation in section 605(a) is anything but emphatic; it simply states that the claim 'shall be submitted' within six years." Pet. App. 25a. The Court noted that "there is no long history of case law holding that the time limitation of section 605(a) is absolute." *Id.* at 24a. In distinguishing the limitations from other types of jurisdictional statutes, the Court concluded it was not a limitations period in the nature described by this Court in *Bowles*: "Section 605(a) is in the nature of a statute of limitations, not a statute that governs the timing of review." Pet. App. 26a, n.6.

Even so, these same factors did not rise to a level sufficient to allow class action tolling to apply to the Community's claims. The Federal Circuit's circular reasoning goes as follows: even though the Section 605(a) limitations period is not jurisdictional as

defined by this Court in *Bowles*, submitting a timely claim to the contracting officer is a jurisdictional prerequisite for the district court to exercise jurisdiction over a CDA claim. Pet. App. 43a. The Court then found that the class action tolling rule only applies to class members who *would have* been parties to the class action *if* it had been approved. Pet. App. 18a. Applying this hypothetical, retrospective, fact-based analysis, the Court found that the Community would not have been within the class court's jurisdiction and therefore it would not have been a member of the class because its claims had not been previously filed with the contracting officer. As such, the Community was not entitled to the benefit of class action tolling of the limitations period for its CDA claims. "[A] party's failure to exhaust mandatory administrative remedies bars the court from treating that party as a class member. In that setting, class action tolling does not apply because the party that failed to comply with the statutory requirement to present its claims to a contracting officer would not have satisfied the requirement, set forth in *American Pipe*, making class action tolling available 'to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.' 414 U.S. at 554, 94 S.Ct. 756." Pet. App. 18a-19a.

So, while the Federal Circuit ruled broadly that the limitations period was not jurisdictional, it ruled more narrowly that the limitations period was, in fact, jurisdictional by linking timeliness with the claims submission requirement. "Subject to any applicable tolling of the statutory time period, the *timely* submission of a claim to a contracting officer *is a necessary predicate to the exercise of jurisdiction by a court* or board of contract appeals over a contract

dispute governed by the CDA." Pet. App. 13a. (emphasis added). Importantly, it was the limitations period for that very same claim submission requirement that the Community sought to have tolled and which the court had already ruled was not jurisdictional. In this way, the Section 605(a) limitations period went from being a non-jurisdictional limitations period to a jurisdictional one. The Court found the Community could not benefit from class action tolling "*in these cases*" because they had not first submitted timely claims as required by Section 605(a). Pet. App. 22a.

The Court of Appeals ruling essentially renders class action tolling unavailable for the limitations applicable to the submission of administrative claims on the erroneous ground that a putative class member may only have access to tolling by first establishing the class court's jurisdiction, which can only be done by filing a timely claim.

The Community filed a motion for rehearing and rehearing en banc for the Court's ruling as to class action tolling, pointing out to the Court that its conclusion that timely presentment was a jurisdictional prerequisite was contrary not only to the class action tolling rules, but also to the language and legislative history of the CDA and the ISDEAA.[3] The request for rehearing was denied. Pet. App. 28a.

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[3] The Community filed a joint petition for rehearing and rehearing en banc with the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians.

REASONS FOR GRANTING THE WRIT

I. THE RULING BELOW TREATS THE CDA CLAIM PROCESSING RULE AS BOTH NON-JURISDICTIONAL AND JURISDICTIONAL, IN VIOLATION OF THIS COURT'S RECENT HOLDINGS THAT THE TEXT, CONTEXT, AND HISTORY OF A STATUTORY PROVISION MUST CLEARLY STATE THE JURISDICTIONAL NATURE OF THE STATUTE.

In holding that Section 605(a) of the CDA is not a sweeping jurisdictional limitations period, the Federal Circuit correctly adhered to this Court's clear guidance on distinguishing between jurisdictional and non-jurisdictional limitations periods. It rightly rejected the Government's contention that any statute waiving immunity was necessarily jurisdictional. But in an inexplicable twist, the Court then declined to allow class action tolling of that same limitations period because it found the timely submission of a claim is jurisdictional.

The reasoning of the Court of Appeals goes to the very heart of this court's repeated admonitions that all courts must be clear about what is and is not identified as jurisdictional. In *Arbaugh,* 546 U.S. at 510, this court stated that "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed 'jurisdictional,'" *citing to Scarborough,* 541 U.S. at 414. This Court has instructed that a statute's "text, context, and relevant

historical treatment" must be taken into account when deciding the nature of the statutory prerequisite. *Reed Elsevier*, 130 S.Ct. at 1246. The Court below failed not only to take into account the text and history of the CDA, it did not even reference its own examination of the CDA in which it found Section 605 was a simple statute containing no language suggesting it was jurisdictional. Pet. App. 25a. *See also* discussion above at 10.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), this Court recognized that a statutory requirement to take an action before filing a lawsuit is not automatically "a jurisdictional prerequisite to suit." More recently in both *Union Pacific Railroad*, 130 S.Ct. 584 and *Reed Elsevier*, 130 S.Ct. 1237, this Court reaffirmed the dichotomy between claims processing rules and jurisdictional prerequisites. In both cases, this Court cited to *Zipes*, *Arbaugh*, and *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) as examples where this Court clearly identified claims processing rules that, while seemingly jurisdictional, did not, in fact, deprive a court of jurisdiction to hear a claim. In *Reed Elsevier*, this court expressly cited to "threshold requirements that claimants must complete or exhaust before filing suit," as "nonjurisdictional." 130 S.Ct. at 1246-47.

In *Reed Elsevier*, the district court had approved a class action whose members were copyright holders that had failed to register their claims as required by statute. The statute at issue, 17 U.S.C. § 411, provided that "no civil action for infringement of the copyright . . . shall be instituted until . . . registration of the copyright claim has been made. . . ." 130 S.Ct. at 1241. Following several other Circuits, on appeal the appeals court had held that the registration

requirement was jurisdictional and found the lower court lacking jurisdiction to certify the class and the proposed settlement, *i.e.*, the class members could not be within the court's jurisdiction because they had not met the statutory precondition by registering their claims. *Id.* at 1243.

This Court looked to the following factors in establishing the text, context, and historical treatment of the statute: (1) the precondition was not clearly labeled jurisdictional, *id.* at 1247, (2) the precondition was located in a section separate from the section on the court's jurisdiction, *id.* at 1245-46, and (3) similar exhaustion requirements, like those found in Title VII, had been consistently found to be non-jurisdictional, *id.* at 1246-47. On this basis, this Court held that the statute did not "clearly state" that the registration requirement was a precondition that would impact a Court's subject matter jurisdiction.

These same factors apply equally to the CDA. The condition to file a timely claim with the contracting officer is not labeled jurisdictional in Section 605(a). The administrative board's jurisdiction is outlined in a separate provision of the CDA. Section 605(b) defines finality: "The contracting officer's decision on the claim shall be final and conclusive *and not subject to review in any forum . . . unless an appeal or suit is timely commenced. . . .*" (emphasis added) Pet. App. 49a. Section 606 specifies the timing of review: "Within ninety days from the date of receipt of a contracting officer's decision under Section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals. . . ." Neither the finality nor the timing of review provision requires, as a clearly stated jurisdictional prerequisite, the

timely filing of a claim for contracting officer's decision. In addition, the statute permits claims to be deemed denied, 41 U.S.C. § 605(c)(5), suggesting that a contracting officer's decision is not a jurisdictional key to board or court review of a contractor's claim.

The legislative history of the CDA is devoid of any statement of Congressional intention to impose an absolute jurisdictional requirement that would preclude tolling. As enacted in 1978, the CDA had no statute of limitations period for presenting claims to the contracting officer (CO).[4] The failure to place this limitations period in the original version of the law is significant.

In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which amended the CDA, 41 U.S.C. § 605(a), to include the six-year limitation. Pub. L. No. 103-355 § 2351, 108 Stat. 3243, 3322 (Oct. 13, 1994). Neither the FASA itself nor its legislative history discusses the reason for adding the six-year limitation to Section 605(a). That Congress added this time limitation without comment is significant. Since Congress did not impose any time limitation at all on the waiver of sovereign immunity for 16 years, it is very unlikely that it suddenly intended to impose a categorical "jurisdictional" six-year deadline for filing claims with no explanation.

Direct reference to the text and context of the statute has long been the foundation of this Court's jurisdictional analysis as applied to administrative statutory schemes. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court considered whether the Social Security Act (SSA) mandated

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[4] Contract Disputes Act of 1978, Pub. L. No. 95-563 § 6, 92 Stat. 2384 (Nov. 1, 1978).

jurisdictional exhaustion and whether it was subject to any exceptions. The Court noted that the doctrine of administrative exhaustion "should be applied with a regard for the particular administrative scheme." 422 U.S. at 765. The *Salfi* court found that the "sweeping and direct" nature of the statute's administrative review system mandated exhaustion. *Id.* at 757.

In *Avocado Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004), the D.C. Circuit adopted this test to determine whether exhaustion is "jurisdictional" or whether it is "non-jurisdictional" and subject to waiver. Citing to *Salfi*, the court stated, "In order to mandate exhaustion, a statute must contain "'[s]weeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." 370 F.3d at 1248. Both *Salfi* and *Avocado* make clear that the terms of the statute control a finding of whether exhaustion is jurisdictional and not subject to exception.

Rather than analyzing the CDA, the Court of Appeals concluded by analogy that the CDA was more like the SSA, mandating timely exhaustion. Pet. App. 15a.[5] This analogy is clearly incorrect. In *Salfi*, the statute absolutely precluded court jurisdiction absent a final decision. 422 U.S. at 757 ("no action shall be brought"). The *Avocado* court cited to language in the Federal Power Act that was equally sweeping and preclusive. 370 F.3d at 1248 ("No

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[5] The Federal Circuit cited to *Salfi* as support for its conclusion that exhaustion is required but only by analogy. The Court should have instead applied the *Salfi* standards to the CDA.

proceeding . . . shall be brought. . . . No objection . . . shall be considered. . . .").

The CDA has no such sweeping language. In its equitable tolling analysis, the Federal Circuit found that the limitations language is neither technical nor emphatic. Pet. App. 25a. So, too, the timely claim submission requirement simply says that a claim "shall be submitted," Section 605(a).

The application of the CDA to the ISDEAA is also relevant. The CDA has applied to ISDEAA disputes since 1988, long before this statute of limitations was added. *See* Pub. L. No. 100-472 § 206(a) (Oct. 5, 1988) (adding the current Section 110(d) of the ISDEAA, which incorporates by reference the CDA). When it extended the CDA remedy to ISDEAA contracting, Congress provided broad remedial assistance to tribal contractors. In 1988 Congress was addressing an issue identical to that being litigated here: the failure of agencies to fully fund CSC requirements under the statute. At the time, the BIA argued the tribal contractor had no remedy for this breach. Congress provided a remedy by expressly applying the CDA.

> Section 110(d) subjects self-determination contracts to the Contract Disputes Act, thereby affording self-determination contractors the procedural protections now given other federal contractors by that Act.
>
> * * * Not only does existing law make it virtually impossible for self-determination contractors to enforce their rights under the Act, but the Bureau of Indian Affairs has also taken to arguing that such contractors have no legal remedies at all by which to redress the Bureau's

> failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms."
>
> * * * The strong remedies provided in these amendments are required because of [IHS's and BIA's] consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs.

S. Rep. No. 100-274 at 36-38 (Dec. 21, 1987). The ISDEAA does not suggest any intention to restrict access to CDA remedies. Rather it supports a flexible, broad reading of the statute.[6]

Had the Circuit examined the "text, context, and relevant historical treatment" of the statute, *Reed Elvesier*, 130 S.Ct. at 1246, *citing Zipes*, 455 U.S. at 393-395, and applied the "sweeping and direct" test of *Salfi* to determine if the Section 605(a) claim submission and exhaustion requirement is "jurisdictional," it could only have concluded that timely presentment and exhaustion are not jurisdictional. Instead, the Court issued a two-headed ruling, finding that the limitations period in Section 605(a) was not absolutely jurisdictional but also finding that the submission of a claim had to be filed timely before a court could exercise jurisdiction over it. This inconsistency

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[6] Consistent with its remedial nature and the federal trust responsibility to tribes, the ISDEAA requires liberal interpretation in favor of tribes. 25 U.S.C. § 450*l*(c) (setting forth liberal construction rule in section 1(a)(2) of mandatory model contract); *id.* § 450n(2) (affirming "trust responsibility of the United States with respect to the Indian people").

is not only confusing, it is self-negating and renders class action tolling meaningless.

II. THE COURT OF APPEALS ERRED WHEN IT ANALOGIZED THE CDA TO OTHER STATUTES WITHOUT EXAMINING THE PRECISE TERMS OF THE CDA.

The Federal Circuit failed to follow the clear jurisdictional/non-jurisdictional dichotomy, rejecting cases likes *Zipes* and others which found class action tolling for administrative claims, on the ground that those cases were peculiar to the "specific language and legislative history of Title VII." Pet. App. 15a.

The Federal Circuit also equated the CDA to the Federal Torts Claims Act (FTCA) on the ground that like the FTCA, contract disputes are not "inherently class actions." Pet. App. 16a.[7]

The Court got these distinctions backwards and wrong. This Court has repeatedly cited to Title VII cases as appropriate examples of the non-jurisdictional nature of administrative claim processing rules. *See e.g., Union Pacific Railroad,*

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[7] The Federal Circuit also cites cases that have ruled on this CDA/ISDEAA question. Pet. App. 18a, citing to *Menominee Indian Tribe of Wis. v. United States*, 539 F.Supp.2d 152 (D.D.C. 2008)(*reconsideration denied* April 30, 2008); *Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099 (D.N.M. 2006); *Ramah Navajo School Bd., Inc., v. United States*, 83 Fed. Cl. 786 (2008). However, all of those cases are contrary to the Federal Circuit's own ruling since these courts all found that the CDA is a waiver of immunity, and as such, Section 605(a) is absolutely jurisdictional and cannot be tolled. *See e.g., Menominee*, 539 F.Supp.2d at 154 ("Statutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them [citing to *Bowles v. Russell*, 551 U.S. 205 (2007]").

130 S.Ct. at 596-597 (citing approvingly *Zipes* and *Arbaugh*, both Title VII cases that correctly applied the analysis). *See also Reed Elsevier* (same). This Court has not treated these cases as unique to the terms of Title VII, but the Federal Circuit considered them of limited precedential value. For example, the Federal Circuit, specifically distinguished *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), Pet. App. 14a, where this Court found that damages could be awarded to unnamed class members who had not filed administrative claims under Title VII of the Civil Rights Act. 422 U.S. at 414, n.8. *Albemarle Paper* has been cited as a general example of the rule that "to promote judicial economy, the Supreme Court has held that class members need not exhaust administrative remedies individually in order to participate as a member of the class." Newberg on Class Actions, § 1:3 (4th ed.).

Of the several cases that the Federal Circuit distinguished, Pet. App. 19a-20a, all agreed that *American Pipe* Rule 23 tolling applies in the administrative claim context until the court resolves class certification. The reasoning is compelling. "Applying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the EEOC and the respective state agencies in deferral states. . . . This Court concludes that the *American Pipe-Parker* analysis applies equally well to putative class members who have yet to file an administrative claim." *Sharpe v. American Express Co.*, 689 F. Supp. 294, 300-01 (S.D.N.Y. 1988); *cited with approval in Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *see also*

McDonald v. Sec'y of Health & Human Servs., 834 F.2d 1085, 1092 (1st Cir. 1987).

If a court declines to certify, or modifies the class to exclude certain members, then the excluded claimant has the right to proceed to pursue an individual claim, and at that time must meet the restarted applicable statute of limitations. *See* Wright, Miller & Kane, 7B Fed. Prac. & Proc., § 1795. For example, in *Armstrong*, 138 F.3d 1374 (11th Cir. 1998), the Court of Appeals held that the pendency of a class action tolled both the initial administrative charge period under the Age Discrimination in Employment Act (ADEA), which governs the initial presentment of a claim, and the 90-day period for filing suit in federal court after notice of dismissal of the charge. *Id.* at 1392-93. In fashioning the definition of the class members the court had to consider what to do about those excluded from the class. The court set forth specific orders as to who qualified to proceed to exhaust administrative remedies and who would be barred.

In *Barrett,* 439 F. Supp. at 217, the court considered "the effect of the decertification of the class on the running of the statute of limitations," in the context of an administrative class action. The Government argued that since the class was only conditionally certified, the statute was not tolled for those who were later declared to be excluded from the class. The court disagreed: "[T]he tolling rule protects all persons who were asserted to be members of the class, even if they later were removed." *Id.* at 218. The court allowed those excluded from the class to proceed administratively with individual claims and fashioned an order defining who could and could

not proceed individually based on the application of tolling. *Id.*

Distinguishing these numerous precedents, the Federal Circuit analogized the CDA to the FTCA to support its conclusion that timely claim submission and exhaustion are jurisdictional. Pet. App. 16a. But these cases are based on unique statutory requirements. As explained in Newberg:

> It is now settled that proceedings for judicial review of a governmental agency decision may be maintained as a class action. Some courts have held that certain statutes require each individual class member to exhaust administrative remedies, thus precluding a representative class suit. Because virtually all statutes that provide an administrative remedy that must be exhausted before judicial relief is available require individual exhaustion, *those decisions holding that administrative exhaustion precludes class actions either do not survive the ruling or are based on genuinely unique statutory requirements.*

Newberg on Class Actions, § 5:15 (emphasis added).

The FTCA cases that found exhaustion precludes tolling were all based on a specific regulation that required the claim be presented "by the injured person" or his authorized representative, 28 C.F.R § 14.3, thus precluding a class representative from fulfilling the administrative exhaustion requirement. *See e.g., Caidin v. United States*, 564 F.2d 284, 286 (9th Cir. 1977); *In Re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987). No such unique statutory or regulatory structure exists under the ISDEAA or the CDA that would justify an exception to the general rule.

Even under the ISDEAA, a court found that a class representative who had exhausted administrative remedies was sufficient to meet the exhaustion requirement for all class members in an ISDEA CSC class action. *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM, Order, (D.N.M. 1993) (holding exhaustion by the class representative sufficient because the class action challenged the legality of uniform agency policy)[8]; *see also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (holding for tribal class on merits). *But see Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007) (stating disagreement).

The Court of Appeals significantly erred by failing to interpret the CDA using its own language and history. Reference to other administrative claims processing rules, such as those that have been established in the Title VII and other statutory cases, provide valid points of reference and cohesive standards for assessing a statute's jurisdictional nature. The Circuit's failure to apply these standards to the CDA merits review.

III. TOLLING APPLIES TO ALL PUTATIVE CLASS MEMBERS, WHETHER OR NOT THEY ARE LATER FOUND TO BE ACTUAL MEMBERS OF THE CLASS.

This Court stated in *American Pipe* that all members of the putative class, that is, those members of the class *as defined in the complaint*, are to be given the benefit of tolling until the class certification and

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[8] This unpublished decision is included in the record below at Metlakatla Indian Community Rebuttal Brief, Exhibit A, *Metlakatla Indian Cmty. v. Dep't of Health & Human Servs.*, CBCA Dkt. No. 4767-71 2006, *filed* Dec. 29, 2006.

the definition of the class is resolved, which is to say, until the court addresses whatever grounds for class opposition are raised. 414 U.S. at 552.

But the Federal Circuit citing to *American Pipe*, emphasized not the definition of the class, but the possibility of court jurisdiction finding that class action tolling applies to "all asserted members of the class *who would have been parties had the suit been permitted to continue* [as a class action." Pet. App. 18a-19a. (emphasis added). Thus the Court of Appeals severely narrowed *American Pipe* to impose a requirement that a court must have personal and subject matter jurisdiction over a class member before class tolling may apply to a limitations period.[9]

This ruling is in direct conflict not only with *American Pipe* but also with this Court's decisions in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) and *Crown, Cork & Seal Co., Inc.*, 462 U.S. at 351. Both held that the *American Pipe* tolling extends to putative class members who could not be members of a certified class because they have opted out of the class. This rule springs from the principle that a putative class member is bound by what happens in the class, even if that putative member is later

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[9] In the factual context of *American Pipe*, the phrase is descriptive, not qualifying. *American Pipe* dealt with former class members who intervened in the same action after the denial of class certification, and who no doubt would have remained in the class if certified. The case did not involve two groups, only one of which "would have been parties had the suit been permitted to continue." There is no indication in *American Pipe* (or later decisions applying it) that the Court meant this phrase, by negative implication, to mean that tolling does not apply to asserted members who would not have been part of the class if certified—for example, if they opted out.

excluded. "[A]n issue litigated and resolved on a class-wide basis is conclusive as to all putative class members if the absent members were adequately represented by the named litigants and class counsel, *whether or not the court otherwise would have had personal or subject matter jurisdiction over them individually*." *Puffer v. Allstate Ins. Co.*, 614 F. Supp. 2d 905, 915-16 (N.D. Ill. 2009) (emphasis added) (*citing In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814 (1985) (unnamed class members have status of parties and are bound by decision whether or not court otherwise would have had personal jurisdiction over them).

By looking to whether the Community would have been a member of a certified class rather than whether it fit within the asserted class definition, the Federal Circuit's decision produces a result that nullifies class-action tolling. Rule 23 is simple: the statute is tolled for all *asserted* members of the class, even those unaware of the class action. *American Pipe*, 414 U.S. at 551. A class member has no duty to determine if a class will be certified or even if they might be part of the class. 414 U.S. at 552. A member of the class need not undertake a jurisdictional analysis of the action and the administrative scheme in order to get the benefit of tolling. In fact, putative class members don't have to do anything or even know about the class action. *Id.*; *Phillips*, 472 U.S. at 810. ("[A]n absent class-action plaintiff is not required to do anything."). The Circuit's ruling fatally undermines these fundamental class action tolling rules by requiring a class member not only to know about the class action but also to take action.

Once a class action is commenced the tolling period begins and applies until the class status is worked out. *See* Wright, Miller & Kane, 7B Fed. Prac. & Proc., § 1795; Newberg on Class Actions, § 7:28 ("[A] class complaint is presumed to state a class action for purposes of tolling the statute of limitations for absent class members, before a formal class ruling, even if the class is ultimately denied."). The tolling rule is based in the prior version of Rule 23 in which classes were spurious, essentially joinder actions. Courts were split on whether those joining could meet timeliness requirements based on the filing of the initial complaint or whether each individual claimant had to meet timeliness requirements as they filed to join the action. *American Pipe*, 414 U.S. at 550-51. This in turn raised the problem of what to do about the limitations period if the class certification was denied or if some class members did not qualify to be part of the class. Wright, Miller & Kane, § 1795. The Supreme Court answered, "the commencement of the action satisfied the purpose of the limitation provision as to all those who *might* subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit. . . ." 414 U.S. at 551 (emphasis added).

But the Federal Circuit ignored these many precedents. Instead the court created false distinctions in to the concept of a party being a potential class member by reasoning that class action tolling protects "parties who could potentially be included as class members but who are ultimately left outside the class, by a court's decision not to certify the class or to certify a narrow class that does not include them." Pet. App. 21a. But tolling does not protect parties,

the court concluded, "over whom the court may not exercise jurisdiction." *Id.*

In so ruling the Federal Circuit doomed not only class action tolling for administrative claims, but its reasoning could also preclude tolling in any instance where a class court narrows a class to exclude certain members on jurisdictional grounds. This is an entirely new perspective in class action tolling and it conflicts with a majority of circuits, which have held that proposed class members who opt out and file separate actions before the class certification decision, and who thus could not be parties to the class action even if certified, also benefit from class-action tolling. *See In re WorldCom Sec. Litig.*, 496 F.3d 245 (2d Cir. 2007); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986 (9th Cir. 2008); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223 (10th Cir. 2008). *But see Glater v. Eli Lilly & Co.*, 712 F.2d 735 (1st Cir. 1983); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005).

The Federal Circuit also created a vague rule, that is difficult to apply. The court's reasoning could require a court to enter a fictional alternative world ("would have . . . had the") in which, contrary to actual history, the class was certified. It then requires courts to speculate whether the class court would have permitted a particular class member to participate.[10] Such a hypothetical, retrospective rule

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[10] In the only real-world precedent involving a CSC class action, the Community *was* permitted to continue as a party. In *Ramah Navajo Chapter v. Lujan*, discussed above at 25, the federal district court held that since the class representative had exhausted its remedies, the other class members would not be required to exhaust. Exhaustion by the class representative

is illogical, unworkable, and unfair. The need for a clear and straightforward class action tolling rule in itself warrants review by this Court.

Because the Federal Circuit's ruling has the potential to significantly narrow the scope of class action tolling by redefining what is required of a potential class member in order to ensure the class court can exercise jurisdiction over that party's claim, this Court must grant review.

IV. CLASS TOLLING WORKED AS EXPECTED IN THIS CASE AND THE FEDERAL CIRCUIT RULING WOULD CREATE HAVOC IN PROCESSING ADMINISTRATIVE CLAIMS.

The purpose of tolling is to promote administrative and judicial economy and such was the case here. At the time the *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001) class action was filed, many, if not most, tribes probably never intended to litigate their CSC claims on their own, due to their relatively small amounts compared to the expense and risk of litigation but they had no problem with participating in a class. Had they not relied on the tolling rule, these tribes would have flooded the IHS with claims they may never have intended to litigate, but filed merely to preserve their rights to participate in the proposed class. As a result, the IHS, the board, and the courts would have been inundated with thousands of claims, appeals and actions.

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was held to be sufficient because the class action challenged the legality of uniform agency policy.

Reliance on tolling avoided this result, precisely as contemplated by Rule 23 and *American Pipe*. Tribes relied on the *Cherokee Nation* class action to vindicate their rights, as Rule 23 encouraged them to do, and both *American Pipe* and *Crown* assured them that the statute of limitations on their claims was tolled. Once class certification was denied, most tribes with CSC shortfalls never filed their own claims at all. Only those tribes with the greatest shortfalls—those for which the potential rewards most exceeded the risks—pursued their claims individually. As a result, significant tribal, agency, board, and court resources were conserved. This is the point of judicial economy and the point of the tolling rule.

Under the Federal Circuit's interpretation, the CDA in the class action context operates as a trap. Contractors must file a timely claim under 605(a), and then "would *presumably* be entitled to class action tolling with regard to the time limitations on any subsequent individual challenge to the contracting officer's decision." Pet. App. 20a. (emphasis added). However, this presumption may not prove true. Once the contracting officer decided, and in this case denied the claims, tribes would have to appeal to the CBCA or a federal court to preserve the claims since the IHS would surely have argued that the limitations periods in the CDA sections 606 (Pet. App. 49a.) and 609(a)(3) (Pet. App. 50a.) could not be tolled. These provisions are arguably requirements for timing of review like that in *Bowles*, 551 U.S. 205, 212-13, although the question has not been resolved.[11] The *Cherokee Nation* class court took two

[11] *See e.g.*, 41 U.S.C. § 606, which requires an appeal to a board to be filed within 90 days and 41 U.S.C. § 609(a)(3), which

years to decide certification. If the Federal Circuit's presumption that the CDA appeal limitations may be tolled was wrong, then contractors who filed claims, had them denied, and did not file timely individual appeals could be left with no remedy—*whether the class was certified or not.*

Tolling ensures that unsuspecting class members do not lose significant due process rights. Wright, Miller, & Kane, § 1795. As this Court stated in *Crown*, "unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights." 462 U.S. at 350. Yet, this very possibility is present here. If the Federal Circuit is correct, the Community may have lost its rights because it relied on the existence of a class action. And there was reason to wait.

In the class action, *Cherokee Nation*, 199 F.R.D. 357 (E.D. Okla. 2001), the Government argued that those tribes who had filed separate administrative actions should be *excluded* from the class. *Id.* at 362. Clearly, if the Government believed that the putative class members were jurisdictionally required to exhaust administrative remedies, it could have made that argument in that class action. Instead it sought to segregate out of the class those who had actually filed administrative claims.

With the Government taking this position, putative class members were caught in a catch-22. Was filing

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requires an appeal to court to be filed in 12 months. *Compare Janicki Logging Co. v. United States*, 36 Fed. Cl. 338, *aff'd*, 124 F.3d 226 (Fed. Cir. 1996) (limitations not equitably tolled) and *International Air Response v. United States*, 302 F.3d 1363 (Fed. Cir. 2002)(limitations subject to tolling).

an administrative claim necessary to participate in the class action (as the Federal Circuit eventually held) or fatal to participation (as the Government argued in *Cherokee* and as the case may be if tolling of sections 606 and 609(a)(3) is unavailable)? This underscores the need for a clear and inclusive tolling rule. As this Court noted in *American Pipe*, class members should not be forced into the position of having to determine independently the nature of the statute, whether the class will be certified, when it will be certified (if at all), the consequences of filing a claim before the certification decision, and the consequences of *not* filing a claim before the decision. 414 U.S. at 553-54. Those in the putative class are absent class members under the protection of the court and they are entitled to remain passive until the class issues are resolved. Newberg on Class Actions, § 1:3. The rule of *American Pipe* is simple: the statute is tolled for *all* asserted members of the class. *Id.* at 554; *Crown*, 462 U.S. at 350.

CONCLUSION

The Federal Circuit ruling punishes the Community, as a putative class member, for relying on these precedents and circumstances and from following class action tolling rules as they were known at the time of the case. For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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