

No. _____

IN THE

Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF KANSAS CITY
WELFARE BENEFIT PLAN, ET AL.,
Petitioners.

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

MICHAEL E. KELLY, ET AL.,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *John R. Sand & Gravel Co. v. United States*, this Court held that 28 U.S.C. 2501, which governs suits against the United States for monetary relief over \$10,000 in the Court of Federal Claims, is jurisdictional and not subject to equitable tolling. 552 U.S. 130, 132 (2008). Subsequent decisions have made clear that *John R. Sand* is an outlier, the sole exception to the Court's modern jurisprudence holding that limitations periods are presumptively nonjurisdictional. In the decision below, the U.S. Court of Appeals for the Federal Circuit held for the first time that because Section 2501 is jurisdictional, putative class members may not avail themselves of the tolling doctrine of *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551-552 (1974). That doctrine tolls the limitations period upon the filing of a class-action complaint and spares courts the considerable administrative burdens that would result from forcing putative class plaintiffs to file multiplicitous protective actions to avoid a time bar.

The question presented is whether this Court should overrule *John R. Sand & Gravel Co. v. United States* and hold that Section 2501 is nonjurisdictional and subject to equitable tolling.

PARTIES TO THE PROCEEDINGS

Petitioners here, Plaintiffs-Appellants below, are: Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan, Louisiana Health Service & Indemnity Company Welfare Benefit Plan, Hospital and Medical Plan for BlueCross BlueShield of South Carolina, The CareFirst Flexible Benefits Plan, Cook Group Health Plan, Lester E. Cox Medical Center Welfare Benefit Group Insurance Plan, Humana Benefit Plans, UnitedHealth Group Employee Health Benefit Plan, Health Care Service Corporation Master Flexible Benefit Plan, Healthcare Service Corporation Employees Welfare Plan, Aetna Inc. Medical Dental Benefit Plan, UnitedHealth Group Post-Employment Medical Plan, Michael E. Kelly, FBOP Corporation, River Capital Advisors, Inc., Park National Bank, San Diego National Bank, Pacific National Bank, BankUSA, North Houston Bank, Madison State Bank, Community Bank of Lemont, Citizens National Bank, and California National Bank.

The Board of Trustees of the Carpenters Health and Welfare Trust Fund for California, The Carpenters Health and Welfare Trust Fund for California, and the Hyatt Corporation Welfare Plan were Plaintiffs-Appellants in *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan v. United States*, Nos. 24-2317, 25-1027 (Fed. Cir.), and are respondents here.

Respondent here, Defendant-Appellee in both cases below, is the United States of America.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Louisiana Health Service & Indemnity Company Welfare Benefit Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Hospital and Medical Plan for BlueCross BlueShield of South Carolina has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner The CareFirst Flexible Benefits Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Cook Group Health Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Lester E. Cox Medical Center Welfare Benefit Group Insurance Plan's parent corporation is CoxHealth. No publicly held corporation owns 10% or more of Lester E. Cox Medical Center Welfare Benefit Group Insurance Plan's stock.

Petitioner Humana Benefit Plans has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner UnitedHealth Group Employee Health Benefit Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Health Care Service Corporation Master Flexible Benefit Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Healthcare Service Corporation Employees Welfare Plan has no parent corporation,

and no publicly held corporation owns 10% or more of its stock.

Petitioner Aetna Inc. Medical Dental Benefit Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner UnitedHealth Group Post-Employment Medical Plan has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Michael E. Kelly is an individual.

Petitioner FBOP Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner River Capital Advisors, Inc.'s parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Park National Bank's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner San Diego National Bank's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Pacific National Bank's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner BankUSA's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner North Houston Bank's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Madison State Bank's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Community Bank of Lemont's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Citizens National Bank's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner California National Bank's parent corporation is FBOP Corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

- *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan v. United States*, Nos. 24-2317, 25-1027, United States Court of Appeals for the Federal Circuit. Judgment entered July 17, 2026.
- *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan v. United States*, No. 1:23-cv-00641-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Louisiana Health Service & Indemnity Company Welfare Benefit Plan v. United States*, No. 1:23-cv-00642-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Hospital and Medical Plan for BlueCross BlueShield of SC v. United States*, No. 1:23-cv-00643-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *The CareFirst Flexible Benefits Plan v. United States*, No. 1:23-cv-00644-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Cook Group Health Plan v. United States*, No. 1:23-cv-00645-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Lester E. Cox Medical Center Welfare Benefit Group Insurance Plan v. United States*, No. 1:23-cv-00647-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Humana Benefit Plans v. United States*, No. 1:23-cv-00648-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.

- *Hyatt Corporation Welfare Plan v. United States*, No. 1:23-cv-00650-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *UnitedHealth Group Employee Health Benefit Plan v. United States*, No. 1:23-cv-00651-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *The Board of Trustees of the Carpenters Health and Welfare Trust Fund for California, et al. v. United States*, No. 1:23-cv-01282-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Aetna Inc. Medical Dental Benefit Plan v. United States*, No. 1:23-cv-01455-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Health Care Service Corporation Master Flexible Benefit Plan, et al. v. United States*, No. 1:23-cv-01491-EMR, United States Court of Federal Claims. Judgment entered August 9, 2024.
- *Michael E. Kelly, et al. v. United States*, No. 24-2042, United States Court of Appeals for the Federal Circuit. Judgment entered July 17, 2026.
- *Michael E. Kelly, et al. v. United States*, No. 21-1949, United States Court of Federal Claims. Judgment entered May 8, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit in *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan v. United States*, Nos. 24-2317 and 25-1027 (App., *infra*, 1a) is available at 2026 WL 2070084. The opinion of the U.S. Court of Appeals for the Federal Circuit in *Kelly v. United States*, No. 24-2042 (App., *infra*, 13a) is available at 181 F.4th 1377. The decision of the U.S. Court of Federal Claims in *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan v. United States*, Nos. 23-641, 23-642, 23-643, 23-644, 23-645, 23-647, 23-648, 23-650, 23-651, 23-1455, 23-1491, and 23-1282 (App., *infra*, 27a) is reported at 173 Fed. Cl. 132. The decision of the U.S. Court of Federal Claims in *Kelly v. United States*, No. 21-1949 (App., *infra*, 89a) is reported at 171 Fed. Cl. 550.

JURISDICTION

The court of appeals entered its judgments on July 17, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 2501 provides in relevant part:

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

INTRODUCTION

This Court’s modern jurisprudence holds that time bars, including time bars governing suits against the United States, are presumptively nonjurisdictional and subject to equitable tolling. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). Over the past 20 years, this Court and the lower courts have applied that rule and unfailingly held that such time bars are nonjurisdictional.¹ Yet the Court has left in place a single anachronistic exception to the modern rule: in *John R. Sand & Gravel Co. v. United States*, this Court held that 28 U.S.C. 2501, which governs suits against the United States for monetary relief over \$10,000 in the Court of Federal Claims (CFC), is jurisdictional and not subject to equitable tolling. 552 U.S. 130, 132 (2008) (*John R. Sand*). *John R. Sand* was wrong when it was decided, and it is even more clearly wrong now in light of the Court’s more recent decisions. There is no coherent justification for leaving *John R. Sand* in place, and this Court should overrule it.

Every consideration that this Court employs to determine whether to overrule precedent—faulty reasoning, unworkable consequences, and lack of reliance—weighs strongly in favor of overruling *John R. Sand*. The decision’s reasoning is deeply flawed. *John R. Sand*’s holding did not rest on any construction of

¹ See, e.g., *United States v. Wong*, 575 U.S. 402 (2015) (28 U.S.C. 2401(b)); *Wilkins v. United States*, 598 U.S. 152 (2023) (28 U.S.C. 2409a(g)); *Riley v. Bondi*, 606 U.S. 259 (2025) (8 U.S.C. 1252(b)(1)); *Harrow v. Dep’t of Defense*, 601 U.S. 480 (2024) (deadline to petition Federal Circuit for review of Merit Systems Protection Board order); *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) (41 U.S.C. 605(a)); *Chance v. Zinke*, 898 F.3d 1025, 1033 (10th Cir. 2018) (28 U.S.C. 2401(a)).

Section 2501’s text, and indeed this Court acknowledged both then and in subsequent decisions that Section 2501 is textually indistinguishable from other statutes the Court has held to be nonjurisdictional. Instead, *John R. Sand* relied solely on stare decisis, adhering to two 150-year-old decisions that had treated Section 2501’s predecessor as jurisdictional on the ground that the time bar limited the scope of the United States’ waiver of sovereign immunity. *John R. Sand* failed to recognize, however, that this Court’s more recent decision in *Irwin* repudiated those nineteenth-century decisions’ approach, holding that such time bars are subject to equitable tolling notwithstanding the sovereign immunity context. *John R. Sand*’s reliance on since-discredited precedent has rendered *John R. Sand* an outlier, “[t]he one exception” to the Court’s modern limitations cases that this Court must distinguish in every case involving a limitations period. *Riley v. Bondi*, 606 U.S. 259, 275 (2025). Stare decisis does not require adherence to decisions that have been severely undermined by subsequent decisions—as is the case with both *John R. Sand* and the decisions on which it relied. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407, 410 (2024).

John R. Sand should be overruled for a second reason: it imposes unworkable consequences in class actions against the government, as the decisions below make crystal clear. The CFC is the exclusive forum for high-value class actions against the government—for instance, takings claims by landowners harmed by government land-use policies, backpay claims by veterans, and (as here) takings, illegal-exaction, and breach-of-contract claims arising out of federal regulatory programs. In class actions brought in any other forum, potential plaintiffs can rely on *American Pipe*

tolling, which tolls the limitations period when a class action complaint is filed and enables potential plaintiffs to wait until class certification to decide whether to file their own individual actions. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551-552 (1974). *American Pipe* tolling is designed to prevent the severe administrative burdens that would result if potential class plaintiffs had to file protective actions or motions to intervene in order to guard against the time bar in their individual cases. Previously, the Federal Circuit held that *American Pipe* tolling was statutory and therefore available despite Section 2501's jurisdictional character. But this Court recently held that *American Pipe* is equitable in nature, and so in the decisions below, the Federal Circuit reversed itself and held that *American Pipe* tolling is unavailable in actions governed by Section 2501. Now, the very consequences that *American Pipe* sought to avoid—multiplicitous actions that defeat the efficiency and economy that are the “principal purposes of the class action procedure”—will burden every class action in the CFC. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349, 353-354 (1983).

John R. Sand did not consider the implications of its jurisdictional holding for the availability of *American Pipe* tolling, or the importance of that tolling in the CFC in particular. Class actions brought in the CFC often involve hundreds or even thousands of plaintiffs, seeking hundreds of millions of dollars in compensation for injuries caused by broad-based government policies. The complexity and numerosity of such actions already represent a significant administrative burden for the CFC, which is the sole forum for high-value class actions (and an elective forum for all class actions) against the government. No possible

justification exists for permitting an anachronistic decision, already treated as a dead-end exception to the Court’s modern doctrine, to inflict the very unworkable burdens that this Court crafted *American Pipe* tolling to avoid. *John R. Sand* should be overruled.

STATEMENT OF THE CASE

I. Legal Background

A. The Tucker Act, 28 U.S.C. 1491, waives the sovereign immunity of the United States and provides the CFC with subject-matter jurisdiction over certain claims for money damages against the federal government. *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 322 (2020). The CFC has exclusive jurisdiction over suits seeking more than \$10,000 for “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. 1491(a); 28 U.S.C. 1346(a)(2). Claims brought under the Tucker Act are subject to the six-year statute of limitations in 28 U.S.C. 2501, which provides: “Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”

B. In *John R. Sand & Gravel Co. v. United States*, this Court held that Section 2501’s time bar could not be waived by the government. 552 U.S. 130, 132 (2008). The plaintiff had filed an action in the CFC asserting certain takings claims, and although the government initially raised a limitations defense under Section 2501, it later conceded the plaintiff’s claims were timely and declined to raise the issue on

appeal. *Id.* at 132. The Federal Circuit, however, considered itself obligated to address the limitations issue notwithstanding the government’s waiver and held the action untimely. *Id.* at 133. This Court affirmed. The Court concluded that Section 2501 was “more absolute” than a conventional limitations statute and noted that it had sometimes referred to such statutes as “jurisdictional,” a label it deemed a “convenient shorthand.” *Id.* at 134.

The Court’s reasoning rested not on any construction of Section 2501, but instead on *stare decisis*. *John R. Sand* identified two nineteenth-century decisions in which the Court had stated that the time bar in Section 2501’s predecessor was a condition on the waiver of sovereign immunity and therefore represented a limitation on the courts’ jurisdiction that had to be strictly enforced. *Kendall v. United States*, 107 U.S. 123, 125 (1883); *Finn v. United States*, 123 U.S. 227, 232-233 (1887). The Court also observed that subsequent decisions had “reiterated in various contexts” the *Kendall-Finn* holding. 552 U.S. at 135.

John R. Sand acknowledged that in more recent decisions—in particular, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990)—the Court had altered its approach to time bars governing suits against the government and established a rebuttable presumption that such provisions are *nonjurisdictional* and amenable to equitable tolling. *John R. Sand*, 552 U.S. at 136-137. But the Court concluded that its previous interpretation of Section 2501 had not been directly overruled and declined to reconsider it. *Id.* at 136-139.

C. More recent decisions have recognized expressly that the result reached in *John R. Sand* is irreconcilable with the Court’s modern approach to limitations statutes. Those decisions have required Congress to speak with exceptional clarity if it intends to imbue a

statute of limitations with jurisdictional consequences—and time after time, the Court has held that ordinary limitations provisions fail that test. In *United States v. Wong*, for example, the Court construed the Federal Tort Claims Act’s limitations statute—which uses language identical to Section 2501, see 28 U.S.C. 2401(b)—as nonjurisdictional and subject to equitable tolling. 575 U.S. 402, 405 (2015). Addressing *John R. Sand*, the Court noted that “[w]hat is special about the Tucker Act’s deadline * * * comes merely from this Court’s prior rulings, not from Congress’s choice of wording.” *Id.* at 416; see also *Riley v. Bondi*, 606 U.S. 259, 275 (2025) (noting that *John R. Sand* is “[t]he one exception” to the Court’s modern limitations cases).

II. Factual and Procedural History

A. *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan, et al. v. United States*

Petitioners in *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan, et al. v. United States* are self-insured and self-administered health plans. App.7a. They allege that the Department of Health and Human Services (HHS) unlawfully required them to contribute to the Patient Protection and Affordable Care Act’s Transitional Reinsurance Program, 42 U.S.C. 18061(b), in benefit year 2014. App.7a.

1. The Affordable Care Act created the Transitional Reinsurance Program to stabilize premiums in individual health-insurance markets during benefit years 2014 through 2016, the first three years of the Act’s implementation. App.2a-4a (citing 42 U.S.C. 18061(b)). The Act required health insurers and third-party benefits administrators to contribute to a rein-

surance pool that was used to reimburse insurers covering high-risk individuals. *Ibid.* In the implementing regulations, HHS initially defined the universe of contributing entities to include all self-insured group health plans, regardless of whether they used a third-party administrator. *Ibid.* Soon thereafter, however, HHS reversed course, clarifying that “the better reading” of the statute excluded self-insured plans that, like petitioners, administered their own benefits. *Ibid.* HHS exempted those plans from program contributions in benefit years 2015 and 2016; but “to avoid disruption,” HHS declined to implement the same exemption for benefit year 2014. *Ibid.*

2. In March 2019—well before petitioners’ six-year limitations period expired—the Electrical Welfare Trust Fund filed a class action complaint in the Court of Federal Claims. App.5a. The complaint sought recovery on behalf of a putative class of self-administered, self-insured health plans, asserting that HHS had exceeded its statutory authority by subjecting the putative class members to the 2014 reinsurance contributions. *Ibid.* The CFC denied the government’s motion to dismiss, agreeing with the plaintiffs that HHS had violated the statute by exacting reinsurance contributions from the class members in the 2014 benefit year. *Ibid.* The court certified the class in April 2022 and entered a \$185 million judgment for the plaintiffs in May 2023. App.6a. The government eventually agreed to settle the class claims. *Ibid.*

3. Petitioners are self-administered, self-insured health plans that declined to opt into the class and instead decided to pursue individual actions. App.7a. Between February and August 2023, they sued the government in the CFC to recover the illegal exactions. App.9a-10a.

Although petitioners filed more than six years after their claims had accrued, they relied on Federal Circuit precedent holding that they could take advantage of the tolling doctrine set forth in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551-552 (1974); see *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), *abrogated by Kelly v. United States*, 181 F.4th 1377 (Fed. Cir. 2026). Under *American Pipe*, a timely class complaint suspends the applicable limitations period for putative class members while class treatment remains unresolved. *American Pipe*, 414 U.S. at 551-552. The rule allows a putative class member to await the class certification decision before deciding whether to pursue his own action. Absent that tolling rule, “potential class members would be induced to file motions to intervene or to join in order to protect themselves against the possibility that certification would be denied,” and the “principal purposes of the class action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated.” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349, 353-354 (1983).

At the time petitioners filed their actions, the Federal Circuit’s decision in *Bright* permitted Section 2501’s six-year limitations period to be tolled under *American Pipe*—notwithstanding *John R. Sand*’s holding that Section 2501 is jurisdictional—on the theory that *American Pipe* tolling was statutory rather than equitable in nature. See *Bright*, 603 F.3d at 1287-1288. Petitioners believed, therefore, that the timely filing of the *Electrical Welfare* class complaint in March 2019 had tolled their filing deadline under Section 2501 while they were putative members of the class, and that their suits were therefore timely.

The government moved to dismiss for lack of subject-matter jurisdiction. It argued that *Bright* was

wrongly decided because, under this Court’s intervening precedent, *American Pipe* tolling is an equitable doctrine, not a rule rooted in statute. See *California Public Employees’ Retirement System v. ANZ Securities, Inc.*, 582 U.S. 497, 510 (2017) (*CalPERS*). And under *John R. Sand*, the government argued, Section 2501 imposes a jurisdictional limitation that cannot be equitably tolled.

The CFC granted the motion on that ground and dismissed the actions as untimely.² App.8a-9a.

B. *Kelly, et al. v. United States*

Petitioners in *Kelly, et al. v. United States* are Michael Kelly and a group of banking entities and one non-banking entity under his control. App.13a. They sued the government for a Fifth Amendment taking and breach of contract after Kelly and his banks lost significant assets during the 2008 financial crisis. App.13a.

1. In 2006, with the financial crisis looming, the government permitted banks to invest up to 100% of their mandatory reserves (known as “Tier 1 Capital”) in certain government-sponsored enterprises. App.14a. Those enterprises included Fannie Mae and Freddie Mac, which are for-profit corporations owned by private shareholders and operated under congressional charters. App.14a. Fannie Mae and Freddie Mac buy mortgages, package them into

² The CFC declined to address the government’s alternative argument that petitioners’ claims would be untimely even if Section 2501’s deadline were equitably tolled. App.50a. The government did not raise the argument on appeal as an alternative basis for affirmance. See App.50a & n.18; Brief for Defendant-Appellee, *Blue Cross & Blue Shield of Kan. City Welf. Benefit Plan, et al. v. United States*, Nos. 2024-2317, 2025-1027 (Fed. Cir. July 17, 2026), 2025 WL 4348377.

securities, and sell those securities to investors, relieving mortgage lenders of risk and freeing up capital for additional loans. App.15a. The government offered incentives, including tax benefits, to banks that invested their Tier 1 Capital in preferred shares of these and other government-sponsored enterprises. App.15a.

In late 2007 and early 2008, petitioners converted approximately \$900 million of their Tier 1 Capital into preferred shares of Fannie Mae and Freddie Mac. App.15a.

After the housing bubble burst in 2008, Congress acted to prevent Fannie Mae and Freddie Mac from failing. Through the Housing and Economic Recovery Act, Congress created the Federal Housing Finance Agency (FHFA) and authorized the agency to act as Fannie Mae and Freddie Mac's conservator or receiver. 12 U.S.C. 4501-4642; *Collins v. Yellen*, 594 U.S. 200, 228-229 (2021). On September 6, 2008, the enterprises were placed into a conservatorship. App.16a. The next day, the Treasury ultimately agreed to provide them with billions of dollars in capital in exchange for a newly created class of senior preferred stock, which caused a significant decline in the value of the enterprises' preferred shares. App.16a.

This decline wiped out the vast majority of petitioners' Tier 1 Capital. App.16a. The government then placed all of petitioners' subsidiary banks into receiverships, rendering them insolvent and forcing them to liquidate their assets. App.16a. Kelly lost his banks and nearly his entire net worth. App.16a.

2. On October 1, 2021, petitioners filed a lawsuit against the government in the CFC. App.16a. They alleged that the FHFA's decision to impose

conservatorships over Fannie Mae and Freddie Mac amounted to an unlawful taking of their property interests in the enterprises' stock and constituted a breach of an implied regulatory contract. App.16a.

Petitioners' complaint acknowledged that their lawsuit was filed more than six years after their claims had accrued—*i.e.*, when the conservatorships were imposed. App.17a. But the complaint alleged that Section 2501's statute of limitations was tolled between June 10, 2013—the date a related class action alleging similar claims, *Washington Federal v. United States*, was filed in the CFC—and July 16, 2020—when the class action was dismissed. App.17a. Like the petitioners in *Blue Cross*, the *Kelly* petitioners believed that under then-governing Federal Circuit precedent, the timely filing of the class complaint in *Washington Federal* had tolled their filing deadline under Section 2501 while they were putative members of the class.

The government moved to dismiss. It argued that, under *John R. Sand*, Section 2501 is a jurisdictional deadline and that the Federal Circuit's decision in *Bright* applying *American Pipe* class action tolling to the statute was no longer good law.

The CFC granted the motion and dismissed the action as untimely.³ App.90a.

³ The CFC also agreed with the government's alternative argument that, even if petitioners' action were timely, the complaint failed to state a claim. App.111a-124a. Petitioners challenged that aspect of the CFC's ruling on appeal. But because the court of appeals affirmed under Section 2501, it did not reach the merits. App.25a. Petitioners' appeal of that issue would remain to be decided on remand if the Court reverses.

C. The Federal Circuit's Decisions

The Federal Circuit affirmed in both cases, deciding them together on the same day. See App.1a (*Blue Cross*); App.13a (*Kelly*).

The court of appeals chose to explain its reasoning primarily in the *Kelly* case. The court first held that Section 2501 imposes a “jurisdictional” time bar that is not subject to equitable tolling. App.21a. That conclusion, the court reasoned, was compelled by *John R. Sand*. App.21a. The court rejected petitioners’ argument that *John R. Sand* had been implicitly overruled by the Court’s recent cases applying its modern clear-statement rule for claims-processing statutes. App.22a-23a. The court concluded that it was “bound” by this Court’s interpretation of Section 2501 and that any “conflict between” *John R. Sand* and more recent decisions was “for the Supreme Court, not this court, to resolve.” App.22a-23a.

The Federal Circuit then abrogated its own precedent in *Bright* holding that *American Pipe* tolling could be applied to Section 2501 despite its jurisdictional character. App.23a-25a. The court recognized that the distinction drawn by *Bright* between “equitable tolling” and “class action statutory tolling” under *American Pipe* was no longer tenable. *Ibid.* As this Court stated in *CalPERS*, “the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions.” 582 U.S. at 509.

The upshot, the Federal Circuit held, was that “the six-year statute of limitations found in § 2501 is jurisdictional and not subject to equitable tolling, such as *American Pipe* tolling.” App.25a.

In the *Blue Cross* case, the Federal Circuit affirmed in an unpublished decision. The court noted that the

issue presented was “identical” to the issue in *Kelly*, which “held that § 2501 is not subject to *American Pipe* tolling.” App.10a. The court accordingly held that petitioners’ actions “were untimely filed and that the Federal Claims Court properly dismissed the complaints for lack of subject-matter jurisdiction.” App.11a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to overrule *John R. Sand*’s holding that Section 2501’s time limit is jurisdictional. *John R. Sand* has left Section 2501 as the “one exception” among claims-processing rules—the *only* such statute that today is treated as jurisdictional, notwithstanding the Court’s modern doctrine holding that statutes are presumptively nonjurisdictional. *Riley v. Bondi*, 606 U.S. 259, 275 (2025). There is no sound reason for that special treatment—as the Court has recently reaffirmed, Section 2501’s text is materially indistinguishable from that of other limitations periods governing actions against the United States.

“Stare decisis is not an inexorable command,” and its force is weakest in a case like this one. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citation omitted). *John R. Sand* involves “procedural and evidentiary rules” that have not induced detrimental reliance, *ibid.*; the decision was wrong when it issued and even more clearly wrong today; and as the decisions below make clear, *John R. Sand* makes *American Pipe* tolling unavailable, thereby imposing unworkable burdens on class actions in the CFC, the exclusive forum for high-value class claims against the government. This Court’s review is warranted.

I. THIS COURT SHOULD GRANT CERTIORARI, OVERRULE *JOHN R. SAND*, AND HOLD THAT SECTION 2501 IS NOT JURISDICTIONAL.

Correctly construed under this Court’s modern approach to considering claims-processing rules, Section 2501 is a nonjurisdictional limitations period subject to equitable tolling, just like numerous other identically worded statutes governing the filing of suits against the government. *John R. Sand* deviated from that approach only because the Court long ago construed Section 2501’s predecessor to be jurisdictional. But those ancient decisions have been vitiated by more recent precedent, and they provide no sound justification for inflicting severe administrative burdens on the many class actions against the government that are filed in the CFC.

A. Correctly construed, Section 2501 is a nonjurisdictional limitations period subject to tolling.

1. As this Court has explained, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), “sets out the framework” for deciding whether a limitations period governing suits against the government is jurisdictional. *United States v. Wong*, 575 U.S. 402, 407 (2015). In *Irwin*, the Court held that limitations periods governing suits against the United States are—like claims-processing rules applicable to private parties—presumptively subject to equitable exceptions. For such a provision to be jurisdictional, the “traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.” *Id.* at 410 (discussing *Irwin*, 498 U.S. at 95).

John R. Sand, however, did not purport to construe Section 2501’s text, much less to discern a clear statement in favor of jurisdictional treatment. Quite the contrary. *John R. Sand* acknowledged that Section 2501’s text pointed the *other* way, toward the availability of equitable tolling. 552 U.S. at 137 (noting that statutes “similar to the present statute in language” had been held to be nonjurisdictional). Nonetheless, *John R. Sand* held that *Irwin*’s presumption was rebutted based solely on stare decisis. The Court refused to disturb two nineteenth-century decisions construing Section 2501’s predecessor and holding that because the statute governed suits against the United States, its time bar must be a jurisdictional limit on the waiver of sovereign immunity.

2. Putting aside that stare decisis holding—which was wrong when issued and is even more clearly wrong today, see p. 18, *infra*—and construing Section 2501 on a clean slate, there can be no question that the provision is a nonjurisdictional time bar subject to equitable exceptions.

Section 2501 states that “[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.” 28 U.S.C. 2501. As this Court has repeatedly acknowledged, the “shall be barred” formulation speaks only to the time limit for filing, not the court’s power. It therefore indicates a traditional limitations period, not a jurisdictional bar. *Wong*, 575 U.S. at 413-414 & n.7 (“The ‘shall be forever barred’ formulation was a commonplace in federal limitations statutes for many decades.”). Indeed, in the years since *John R. Sand*, this Court has twice held that identically worded statutes of limitations governing suits against the government are *not* jurisdictional. In *Wong*, the Court held that 28

U.S.C. 2401(b), which states that certain “tort claim[s] against the United States *shall be forever barred* unless * * * action is begun within six months” is nonjurisdictional. 575 U.S. at 410 (citation omitted). That language, the Court stated, “reads like an ordinary, run-of-the-mill statute of limitations, spelling out a litigant’s filing obligations without restricting a court’s authority.” *Id.* at 411 (citation omitted). And in *Wilkins v. United States*, the Court construed the Quiet Title Act, which provides that a quiet title action against the United States “*shall be barred* unless it is commenced within twelve years,” 28 U.S.C. 2409a(g), to be a nonjurisdictional limitations period. 598 U.S. 152, 159 (2023).

Notably, Section 2501’s text is even more definitively nonjurisdictional than the “ordinary” statute of limitations language construed in *Wong* and *Wilkins*. Section 2501 begins by stating that “[e]very claim of which the [CFC] has jurisdiction shall be barred.” 28 U.S.C. 2501 (emphasis added). The provision thus refers to an *antecedent* jurisdictional inquiry that is separate from the time bar—that is, the time bar acts upon claims that are already within the CFC’s jurisdiction by operation of *other* provisions. That antecedent jurisdictional inquiry is governed by the Tucker Act, 28 U.S.C. 1491(a), which confers “jurisdiction” on the CFC for certain claims against the United States, as well as other adjacent provisions that confer jurisdiction on the CFC for other types of claims. 28 U.S.C. 1491-1503. Thus, Section 2501 itself makes clear that the timeliness inquiry is separate from the jurisdictional inquiry.

As that analysis suggests, the statutory structure—another marker on which this Court has relied in construing limitations periods—strongly indicates

that Section 2501 is not jurisdictional. The jurisdictional grants to the CFC are in an entirely separate part of the statute, not in the same provision that governs timeliness. “Congress’s separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.” *Wong*, 575 U.S. at 411 (citing cases).

John R. Sand did not acknowledge any of this unmistakable textual evidence that Section 2501 is non-jurisdictional. But the upshot is crystal clear: construed according to its text and the Court’s modern approach to timeliness provisions, Section 2501 is a non-jurisdictional limitations period that bars untimely claims but is (like all “ordinary” limitations periods) subject to equitable exceptions. *Wong*, 575 U.S. at 411 (citation omitted).

B. *John R. Sand*’s holding that Section 2501 is jurisdictional should be overturned.

Disregarding Section 2501’s text, *John R. Sand* held that Section 2501 is jurisdictional based solely on stare decisis. That holding was deeply misguided at the time, and it is even more clearly wrong now. Every consideration relevant to whether to overrule a past decision—“the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, * * * and reliance on the decision”—“counsel[s] in favor of overruling” the decision. *Knick v. Scott Twp.*, 588 U.S. 180, 203 (2019) (citation omitted); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024).

Quality of the reasoning. *John R. Sand*’s reasoning was wrong when the decision was issued, and subsequent decisions have made its errors even more

clear. As discussed above, *John R. Sand* did not actually construe Section 2501, so overruling the decision would not involve repudiating a contemporary construction of the statute. Indeed, the Court's more recent decisions in *Wong* and *Wilkins* have reaffirmed that limitations periods governing suits against the government generally are not jurisdictional, leaving Section 2501 as a stark outlier even among statutes governing suits against the United States.

In relying solely on stare decisis, *John R. Sand* failed to recognize that the Court's earlier decision in *Irwin* had vitiated the very precedents that *John R. Sand* accorded stare decisis effect. The Court relied on two nineteenth-century decisions in which the Court stated that the time bar in Section 2501's predecessor was a condition on the waiver of sovereign immunity, and therefore it represented a limitation on the courts' jurisdiction that had to be strictly enforced. *Kendall v. United States*, 107 U.S. 123, 125 (1883); *Finn v. United States*, 123 U.S. 227, 232-233 (1887) (reasoning that because the statute "makes it a condition or qualification of the right to a judgment against the United States" that suit be brought within six years, the "duty" of the court was to enforce the limitations period regardless of waiver). The *John R. Sand* Court also relied on a later decision acknowledging *Kendall*'s holding that Section 2501's predecessor was jurisdictional. *Soriano v. United States*, 352 U.S. 270, 273 (1957).

In *Irwin*, however, this Court repudiated the doctrinal foundation of those decisions. There, the Court explained that once Congress has waived sovereign immunity by permitting suit against the government, "making the rule of equitable tolling applicable * * * in the same way that it is applicable to private suits,

amounts to little, if any, broadening of the congressional waiver.” 498 U.S. at 95. The Court acknowledged that it had previously held (including in *Soriano*) that government-related time bars were jurisdictional because they limited the waiver of sovereign immunity. But the Court nonetheless held that limitations periods against the United States should presumptively be subject to tolling (i.e., that they are presumptively nonjurisdictional) because excusing untimeliness in that manner would not materially broaden the sovereign immunity waiver. *Ibid.* That holding vitiates *Finn*’s and *Kendall*’s reasoning that the six-year limitations period must be enforced over a waiver because the court otherwise would be ignoring a “condition” limiting the waiver of sovereign immunity. *Finn*, 123 U.S. at 232.

John R. Sand dismissed *Irwin*’s impact on the precedential value of *Finn*, *Kendall*, and *Soriano* on the ground that *Irwin* involved a different statute and announced a “general prospective rule” rather than expressly overturning previous decisions. 552 U.S. at 137. But in focusing solely on whether *Irwin* expressly overturned earlier decisions construing Section 2501—*Irwin* had no occasion to do so, given that the case concerned a different statute—the *John R. Sand* Court missed the point. This Court’s decisions on stare decisis—especially its more recent ones—have considered whether subsequent decisions have *undermined* the precedent at issue, even without expressly overruling it. When that is the case, the Court has more readily overruled that precedent. See, e.g., *Nat’l Republican Senatorial Comm. v. FEC*, 146 S. Ct. 2404, 2426 (2026) (“*Colorado II*’s reasoning has been rejected by subsequent cases and is no longer good law in light of the Court’s more recent precedents.”); *Loper Bright En-*

ters., 603 U.S. at 410 (overruling *Chevron* after concluding that subsequent decisions had rendered its “continuing import * * * far from clear”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007) (overruling statutory precedent undermined by subsequent decisions).

Here, it is hard to imagine a more decisive repudiation of *Finn* and its progeny. *Irwin* rejected *Finn*’s very premise—that the sovereign-immunity context renders limitations periods jurisdictional. And its “general prospective rule” that time bars governing suits against the government are presumptively non-jurisdictional *reverses Finn*’s presumption that such claims-processing rules are not subject to equitable exceptions.

John R. Sand thus wrongly failed to acknowledge the extent to which *Irwin* abrogated the very premise of *Finn* and its progeny. Otherwise, the Court would have recognized that those anachronistic decisions should have been accorded little if any continuing precedential force. See *John R. Sand*, 552 U.S. at 146 (Ginsburg, J., dissenting). And by the same token, *John R. Sand* itself has been undermined by subsequent decisions. *Wong* and *Wilkins* leave no doubt that under *Irwin*’s modern approach, limitations periods governing suits against the United States will be construed as nonjurisdictional unless their text clearly indicates otherwise—leaving *John R. Sand* as the lone outlier. *Riley*, 606 U.S. at 275. There is no evident reason—other than dogged adherence to precedent—that Section 2501 alone among government-related limitations periods should be treated as jurisdictional, based solely on nineteenth-century precedents whose reasoning has long since been abrogated.

Unworkability. *John R. Sand*’s holding has also proven to be unworkable. The decision itself considered only one of the “harsh consequences” of holding that Section 2501 was jurisdictional: that courts would be obligated to enforce the limitations period despite the government’s waiver. *Wong*, 575 U.S. at 409. But another significant adverse consequence has now become clear: *American Pipe* tolling is unavailable in all cases in which classes of plaintiffs sue the government in the CFC under the Tucker Act. That far-reaching consequence will create unworkable effects in all of the putative class actions that are regularly brought against the government in the CFC.

American Pipe tolling is designed to “protect the policies behind the class action procedure.” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). It does so by holding that “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class,” pending a decision on certification. *American Pipe*, 414 U.S. at 554. In other words, potential class members may wait to see if a class is certified before deciding whether to bring their own action. Absent that rule, “[p]otential class members would be induced” preemptively “to file motions to intervene or to join,” or to file their own lawsuits, to guard against the possibility that their limitations periods might run before class certification is decided (or certification is ultimately denied). *Crown, Cork & Seal*, 462 U.S. at 349. That would “frustrate[]” the “principal purposes of the class action procedure—promotion of efficiency and economy of litigation”—by giving rise to the very “needless multiplicity of actions” that class-action rules are designed to prevent. *Id.* at 349, 351.

Those concerns are particularly pressing in the context of class actions brought against the government. Government policies often affect broad classes of hundreds or thousands of similarly situated persons or entities—for instance, landowners whose land has been flooded or appropriated pursuant to government land-use policies; veterans exposed to toxic materials; or contractual counterparties seeking reimbursement for underpayments. Such litigants regularly bring putative class actions seeking damages against the United States, and any class action in which plaintiffs have suffered more than \$10,000 in damages must be brought in the CFC and is subject to Section 2501. The absence of *American Pipe* tolling therefore would force innumerable plaintiffs to preemptively move to intervene or file their own actions in order to protect their rights, resulting in an unworkable deluge of individual motions and suits in connection with every class action in the CFC.

Until the decisions below, the Federal Circuit had forestalled those adverse consequences by holding that *American Pipe* tolling was a form of *statutory* tolling that applied despite *John R. Sand*'s holding that Section 2501 is jurisdictional. See *Bright v. United States*, 603 F.3d 1273, 1288 (Fed. Cir. 2010). But in 2017, this Court held that *American Pipe* tolling is a form of equitable tolling. See *CalPERS*, 582 U.S. at 510. That led the Federal Circuit to hold for the first time in the decision below that *American Pipe* tolling is not available to mitigate Section 2501's time bar. App.25a. Going forward, then, class actions in the CFC will be subject to the very perverse consequences that *American Pipe* sought to avoid.

John R. Sand did not consider the import of its holding on the availability of *American Pipe* tolling. When *Kendall* and *Finn* were decided, there was no

such thing as a class action, let alone a class action against the United States. *John R. Sand* was decided in 2008, not 1883, but nevertheless mechanically perpetuated *Kendall* and *Finn* without examining the contemporary importance of class actions against the government and the fact that the unavailability of tolling would undermine the important policies animating class-action rules. Of course, it was arguably unclear at the time whether *American Pipe* tolling was statutory or equitable—but *CalPERS* answered that question, and it is now clear that *American Pipe* tolling cannot apply so long as Section 2501 is jurisdictional. *John R. Sand*’s failure to consider the significant practical consequences of its holding weighs strongly in favor of overruling it. See *Knick*, 588 U.S. at 204 (“That significant consequence was not considered by the Court in *Williamson County*.”).

Reliance. No reliance interests counsel against overruling *John R. Sand*. Indeed, the *John R. Sand* Court acknowledged that “the Government cannot show detrimental reliance on our earlier cases.” 552 U.S. at 139; *id.* at 146 (Ginsburg, J., dissenting) (“the strongest reason to adhere to precedent provides no support for the *Kendall–Finn–Soriano* line. * * * The Government * * * makes no claim that either private citizens or Congress have relied upon the ‘jurisdictional’ status of § 2501.”). The same remains true today: *John R. Sand* itself did not give rise to any “meaningful reliance” interests. *Loper Bright*, 603 U.S. at 410. If the government did not claim reliance interests in *John R. Sand* itself, it cannot do so now.

Moreover, this is not a case in which *stare decisis* should have greater force solely because of the statutory context. “The Court has jettisoned many precedents that Congress likewise could have legislatively overruled.” *Loper Bright*, 603 U.S. at 411 (citing

cases); *John R. Sand*, 552 U.S. at 146 (Ginsburg, J., dissenting) (cataloguing “[s]everal times, in recent Terms, [when] the Court has discarded statutory decisions rendered infirm by what a majority considered to be better informed opinion”). Indeed, it would be particularly inappropriate to accord any weight to Congress’s failure to overrule *John R. Sand*, because the full consequences of that decision have only recently become clear: for the first time, the Federal Circuit has held that *American Pipe* tolling is unavailable under Section 2501, forcing innumerable litigants in the CFC to file duplicative actions to protect their rights against the time bar. Congress has had little opportunity to consider whether to statutorily overrule *John R. Sand* in light of that significant consequence. This Court therefore need not and should not “wait helplessly for Congress to correct [the Court’s] mistake.” *Loper Bright*, 603 U.S. at 411.

II. THIS CASE PRESENTS AN EXCEEDINGLY IMPORTANT QUESTION.

A. Whether Section 2501 is jurisdictional is a pressing question warranting this Court’s review.

1. The question presented is exceptionally important. Continuing to adhere to *John R. Sand*’s holding that Section 2501 is jurisdictional will create significant administrability problems for Tucker Act class litigation in the CFC.

The CFC is the primary forum for seeking monetary redress against the United States, and it therefore plays an “important role in the American structure of accountability as well as the protection of individual rights.” Hon. Loren A. Smith, *Why a Court of Federal Claims?*, 71 Geo. Wash. L. Rev. 773, 773 (2003). Under the Tucker Act, the CFC’s jurisdiction

extends to “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. 1491(a). The CFC is the *exclusive* forum for any such claims with a value exceeding \$10,000—meaning that Section 2501’s limitations period governs all monetary claims of significant value against the federal government.⁴

In the 2025 fiscal year alone, the Court of Federal Claims disposed of almost 1,000 cases seeking over \$230 billion in total compensation and rendered judgments for claimants totaling over \$500 million.⁵ The question whether Section 2501 is jurisdictional—or instead subject to equitable tolling—is therefore of critical importance in a wide range of cases having significant monetary value.

For the reasons stated above, the question presented is especially important in the numerous class actions filed in the CFC each year, because Section 2501’s jurisdictional force renders *American Pipe* tolling unavailable. Class actions challenging government policies that inflict more than \$10,000 in damages on each plaintiff must be brought in the CFC. Such suits raise a host of constitutional and statutory

⁴ Claims worth under \$10,000 may be brought in the Court of Federal Claims or in federal district courts. See 28 U.S.C. 1346(a)(2).

⁵ Statistical Report for FY2025 at 1–2, Reports and Statistics, United States Court of Federal Claims, available at <https://www.uscfc.uscourts.gov/reports-statistics> (last accessed Sept. 29, 2026).

issues that have national importance given their substantial impact and wide-ranging effects. For instance, claims by landowners alleging that government land-use policies have effected a taking are routinely brought as class actions. See, *e.g.*, *Arnhold v. United States*, 178 Fed. Cl. 703, 706 (2025). Claims by service members and veterans challenging military policies or seeking back pay are brought as class actions. See, *e.g.*, *Platero v. United States*, No. 25-1245, 2026 WL 2263787, at *1 (Fed. Cl. July 22, 2026); *Harkins v. United States*, 178 Fed. Cl. 563, 566 (2025). And class actions seeking reimbursement under government contracts or statutes are common. See, *e.g.*, *Ingham Reg'l Med. Ctr. v. United States*, 182 Fed. Cl. 1, 5 (2026).

Until the decisions below, *American Pipe* tolling was available in the myriad class actions filed in the CFC, enabling putative class members to rely on a timely class complaint to toll their own limitations periods pending class certification. See p. 23, *supra*. Now, for the first time, the Federal Circuit has categorically foreclosed that sensible rule by holding that, because *American Pipe* tolling is equitable in nature, the doctrine cannot be applied to extend Section 2501's jurisdictional time bar. App.20a-25a; App.9a-11a. As a result, putative class members in the CFC cannot safely await a ruling on class certification. Instead, they must file individual actions—or opt into the putative class—before their own limitations periods expire. That holding, if permitted to stand, “would deprive Rule 23 class actions” in the CFC “of the efficiency and economy of litigation which is a principal purpose of the procedure.” *American Pipe*, 414 U.S. at 553.

Indeed, these cases aptly demonstrate the unfairness and administrative burden that results from the

unavailability of *American Pipe* tolling. Take the *Blue Cross* case as an example: The underlying class action suit was filed in 2019, seeking reimbursement for the 2014 benefit year. In 2022, after the suit survived a motion to dismiss, the CFC certified a class of hundreds of self-administered, self-insured health plans. Petitioners decided not to opt in to the class, and instead brought their own suits in 2023, relying on *American Pipe* tolling under then-controlling Federal Circuit precedent. Shortly thereafter, the CFC entered judgment in the underlying class litigation for over \$185 million, and the federal government later settled the litigation for over 90% of that amount. App.37a-38a. Petitioners here have alleged the same illegal exaction as the class claimants—and their claims are obviously meritorious in light of the CFC’s judgment in the class action. App.42a-43a.

Yet petitioners’ claims were dismissed as untimely on the ground that Section 2501 is jurisdictional and *American Pipe* tolling does not apply. That result is deeply unfair in this case, given that the Federal Circuit in the decision below abrogated its precedent holding that *American Pipe* applied despite *John R. Sand*. It also demonstrates the administrative burdens that will arise in the absence of *American Pipe* tolling: had petitioners known that *American Pipe* would not be available, they would have had to preemptively intervene in the class action, or bring their own protective actions, shortly after the class action was filed in 2019. That would have imposed significant costs on the CFC, as that court would have had to manage numerous preemptive interventions or companion suits along with the class action. The Federal Circuit itself has described that outcome as “[s]o cumbersome and unwieldy in its operation that, * * * it frustrate[s] the purpose of avoiding [a] multiplicity of suits”—precisely

what this Court sought to avoid in *American Pipe. Bright*, 603 F.3d at 1289.

2. More generally, the question whether Section 2501 should continue to be treated as jurisdictional is important in its own right. This Court regularly grants review to correct lower courts' treatment of procedural requirements in federal statutes as jurisdictional. In recent years, it has done so nearly every Term.⁶

This case presents an even more pressing iteration of that recurring jurisdictional issue. In every other instance in which the Court has construed a claims-processing rule, it has applied its modern doctrine requiring that Congress speak clearly in order to imbue the rule with jurisdictional significance, and it “ha[s] almost uniformly found that the provisions at issue failed to meet this very demanding test.” *Riley*, 606 U.S. at 275. Section 2501 is now the *sole* ordinary claims-filing deadline that this Court treats as jurisdictional, even among statutes governing claims against the government. See p. 21, *supra*. This Court recognized in *John R. Sand* itself that there was no coherent statutory-construction rationale for this disparate treatment. 552 U.S. at 137. That is even more true today, in the wake of the Court's holdings in *Wong*, *Wilkins*, and *Riley* that various similarly worded government limitations statutes were not jurisdictional. See *Wong*, 575 U.S. at 416. And the

⁶ See, e.g., *Riley v. Bondi*, 606 U.S. 259, 274 (2025) (8 U.S.C. 1252(b)(1)); *Harrow v. Dep't of Defense*, 601 U.S. 480, 485 (2024) (deadline to petition Federal Circuit for review of Merit Systems Protection Board order nonjurisdictional); *Wilkins*, 598 U.S. 152 (2023) (28 U.S.C. 2409a(g)); *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 211 (2022) (deadline to petition Tax Court for review of collection-due-process determination nonjurisdictional); *Wong*, 575 U.S. 402 (28 U.S.C. 2401(b)).

Court has repudiated the reasoning of the nineteenth-century decisions that provided the sole basis for *John R. Sand*'s holding. There is no longer any plausible justification for continuing to treat Section 2501 as jurisdictional, particularly in light of the severe administrative difficulties that the unavailability of *American Pipe* tolling will cause in the CFC.

Adhering to *John R. Sand* today also creates an additional anomaly: there are now different limitations rules for claims against the government, depending solely on the amount in controversy and the forum. Claims seeking damages against the federal government of \$10,000 or less may be brought either in the CFC under the Tucker Act, 28 U.S.C. 1491(a)(1), or in federal district court under the Little Tucker Act, 28 U.S.C. 1346(a)(2). District court suits are governed by the six-year limitations period in Section 2401(a), which is identically worded to Section 2501. In the wake of *Wong*'s holding that the identically worded Section 2401(b) is not jurisdictional, the courts of appeals have generally held that Section 2401(a) is non-jurisdictional and subject to equitable tolling. See, e.g., *Desuze v. Ammon*, 990 F.3d 264, 269-270 (2d Cir. 2021); cf. *Wong*, 575 U.S. at 411.⁷ But if the same claimant asserts the same cause of action for the same relief in the CFC rather than federal district court, Section 2501 sets forth a jurisdictional time bar and makes equitable tolling—including *American Pipe* tolling—categorically unavailable.

No rational policy justifies that disparity. Congress could not have intended that identical actions be subject to considerably different limitations regimes simply by virtue of which court they were filed in. And

⁷ See also, e.g., *Jackson v. Modly*, 949 F.3d 763, 776 (D.C. Cir. 2020); *Chance v. Zinke*, 898 F.3d 1025, 1033 (10th Cir. 2018).

there is no evident reason that claimants seeking more than \$10,000—but asserting otherwise similar claims for money damages against the government—should be subject to a jurisdictional time bar while those with smaller claims are not. The result is that larger and more consequential takings, illegal exaction, contract, and other monetary claims receive harsher limitations treatment than otherwise identical claims seeking smaller amounts.

That anomaly was not an intended consequence of Congress’s claims-processing scheme. Sections 2401(a) and 2501 impose parallel six-year periods, and Congress authorized concurrent jurisdiction over Little Tucker Act claims. The divergent treatment exists only because *John R. Sand* preserved an obsolete jurisdictional characterization of Section 2501 while the Court’s modern cases treat ordinary statutes of limitations like Section 2401(a) as nonjurisdictional. The resulting regime defeats class-action efficiency, generates protective litigation, and makes timeliness turn on the forum and amount in controversy, thereby imposing different consequences on substantively identical claims. This Court should grant review to reconsider *John R. Sand* and bring Section 2501 into conformity with the Court’s modern jurisprudence.

B. These cases are ideal vehicles.

These cases are suitable vehicles for the Court’s review. In both cases, the CFC dismissed petitioners’ complaint based on its determination that Section 2501 is jurisdictional and that the statute of limitations therefore could not be equitably tolled under *American Pipe* during the pendency of the earlier-filed class action. App.50a; App.109a. The Federal Circuit likewise affirmed on that ground in each case. App.10a-11a. Section 2501’s jurisdictional status—and whether the Court should reconsider *John R.*

Sand—is thus squarely presented in each case for the Court’s review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

Opinion of the United States Court of
Appeals for the Federal Circuit,
*Blue Cross and Blue Shield of Kansas
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APPENDIX B

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APPENDIX C

Opinion of the United States Court of
Federal Claims, *Blue Cross and Blue
Shield of Kansas City Welfare Benefit
Plan v. United States*, Nos. 23-cv-641,
23-cv-642, 23-cv-643, 23-cv-644,
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Federal Claims, *Kelly v. United States*,
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Published at 171 Fed. Cl. 550 89a

APPENDIX A

Nos. 24-2317, 25-1027

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT.

BLUE CROSS AND BLUE SHIELD OF KANSAS
CITY WELFARE BENEFIT PLAN, LOUISIANA
HEALTH SERVICE & INDEMNITY COMPANY
WELFARE BENEFIT PLAN, HOSPITAL AND MED-
ICAL PLAN FOR BLUECROSS BLUESHIELD OF
SC, THE CAREFIRST FLEXIBLE BENEFITS
PLAN, COOK GROUP HEALTH PLAN, LESTER E.
COX MEDICAL CENTER WELFARE BENEFIT
GROUP INSURANCE PLAN, HUMANA BENEFIT
PLANS, HYATT CORPORATION WELFARE PLAN,
UNITEDHEALTH GROUP EMPLOYEE HEALTH
BENEFIT PLAN, HEALTH CARE SERVICE COR-
PORATION MASTER FLEXIBLE BENEFIT PLAN,
HEALTHCARE SERVICE CORPORATION EM-
PLOYEES WELFARE PLAN, AETNA INC. MEDI-
CAL DENTAL BENEFIT PLAN, UNITEDHEALTH
GROUP POST-EMPLOYMENT MEDICAL PLAN,
THE BOARD OF TRUSTEES OF THE CARPEN-
TERS HEALTH AND WELFARE TRUST FUND
FOR CALIFORNIA, THE CARPENTERS HEALTH
AND WELFARE TRUST FUND FOR CALIFORNIA,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

Decided: July 17, 2026

Appeals from the United States Court of Federal
Claims in Nos. 1:23-cv-00641-EMR, 1:23-cv-00642-
EMR, 1:23-cv-00643-EMR, 1:23-cv-00644-EMR, 1:23-
cv-00645-EMR, 1:23-cv-00647-EMR, 1:23-cv-00648-

EMR, 1:23-cv-00650-EMR, 1:23-cv-00651-EMR, 1:23-cv-01282-EMR, 1:23-cv-01455-EMR, 1:23-cv-01491-EMR, Judge Eleni M. Roumel

Before DYK, REYNA, and TARANTO,
Circuit Judges.

REYNA, Circuit Judge.

Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan and other self-insured group health plans sued the United States government alleging an illegal exaction in violation of the Fifth Amendment. The group health plans alleged that they were improperly required to contribute funds to the Patient Protection and Affordable Care Act's Transitional Reinsurance Program, 42 U.S.C. § 18061, and later were illegally denied a refund of those contributions. The United States Court of Federal Claims consolidated the cases and dismissed all the complaints for lack of subject-matter jurisdiction because their claims were time-barred under the applicable six-year statute of limitations, 28 U.S.C. § 2501. We affirm.

BACKGROUND

A. Transitional Reinsurance Program

Congress enacted the Patient Protection and Affordable Care Act ("Affordable Care Act") to increase the number of Americans covered by health insurance and decrease the cost of health care. This appeal focuses on section 1341 of the Affordable Care Act, known as the Transitional Reinsurance Program. *See generally* 42 U.S.C. § 18061. The Transitional Reinsurance Program was intended to stabilize healthcare premiums for individuals during the early years of the Affordable Care Act, specifically from 2014 to 2016.

Under the Transitional Reinsurance Program, “health insurance issuers,¹ and third party administrators² on behalf of group health plans,”³ were required to make payments to a reinsurance entity during a three-year period from 2014 to 2016. 42 U.S.C. § 18061(b)(1)(A). Reinsurance refers generally to a financial arrangement where an insurer transfers part of its risk to another entity, called the reinsurer or reinsurance entity. The reinsurance entity uses the collected funds to make reinsurance payments to health insurance issuers that cover high-risk patients. 42 U.S.C. § 18061(b)(1)(B), (b)(4).

Section 1341 did not specify the entity that would be responsible for contributing to the Transitional Reinsurance Program., i.e., the “contributing entity.” The Affordable Care Act authorized the U.S. Department of Health and Human Services (“HHS”) to promulgate regulations to carry out the Transitional Reinsurance Program. 42 U.S.C. § 18041(a). Under this authority, HHS promulgated a regulation defining “contributing entity” to clarify the entity required to make contributions under the Transitional Reinsurance Program.

In 2013, HHS defined “contributing entity” as “a health insurance issuer or self-insured group health plan” where a “self-insured group health plan is responsible for the reinsurance contributions, though it may elect to use a third party administrator or

¹ “Health insurance issuer” generally means an insurance company. *See* 42 U.S.C. § 300gg-91(b)(2).

² “Third party administrator” generally means an entity that provides administrative support, such as claims processing, to health insurance issuers.

³ “Group health plan” generally means an employee welfare benefit plan that provides medical care to employees or their dependents. *See* 42 U.S.C. § 300gg-91(a)(1).

administrative services only contractor for transfer of the reinsurance contributions.” Final Rule, 78 Fed. Reg. 15410, 15525 (Mar. 11, 2013).

In 2014, HHS modified the definition of “contributing entity” to exclude self-administered plans, i.e., a group health plan that does not use a third-party administrator. HHS explained that “the better reading of section 1341 is that a self-insured, self-administered plan should not be a contributing entity, but in order to avoid disruption to contributing entities, we proposed to retain the prior definition of contributing entity for the 2014 benefit year.” Final Rule, 79 Fed. Reg. 13744, 13773 (Mar. 11, 2014).

Both definitions were captured in the promulgated regulation. Final Rule, 79 Fed. Reg. 13744, 13834 (Mar. 11, 2014) (codified at 45 C.F.R. § 153.20). The regulation provided that a “contributing entity” means that for the 2014 benefit year, a self-insured group health plan whether or not it uses a third party administrator; and for the 2015 and 2016 benefit years, a self-insured group health plan that uses a third party administrator. *Id.* In other words, the definition required group health plans that were both self-insured and self-administered to make contributions for 2014 but not for 2015 and 2016.⁴

⁴ The regulation provides:

For the 2014 benefit year, a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage), whether or not it uses a third party administrator; and for the 2015 and 2016 benefit years, a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage) that uses a third party administrator

B. *Electrical Welfare* Litigation

In March 2019, a group of health plans filed a class action lawsuit in the United States Court of Federal Claims (“Federal Claims Court”) to recover contributions that they made to the Transitional Reinsurance Program during the 2014 benefit year. *Elec. Welfare Tr. Fund v. United States*, 155 Fed. Cl. 169, 173–74 (2021). The lead plaintiff, Electrical Welfare Trust Fund (“Electrical Welfare”), alleged that it was a self-insured, self-administered health plan, that it made contributions for the 2014 benefit year, and that the 2014 contributions constituted an illegal exaction because HHS’s definition in 45 C.F.R. § 153.20 of “contributing entity” exceeded statutory authority and was an unreasonable interpretation of 42 U.S.C. § 18061. *Id.* at 174, 180. Electrical Welfare alleged that, even if the regulation was permissible, it was entitled to recover, i.e., be refunded, the contributions as just compensation under the Takings Clause of the Fifth Amendment. *Id.* at 174. Only Electrical Welfare’s illegal exaction claim is relevant to this appeal because the pleadings here did not assert a takings claim.

The government moved to dismiss Electrical Welfare’s complaint for failure to state a claim or, alternatively, for summary judgment. With respect to the illegal exaction claim, the Federal Claims Court denied the government’s motions. As to the motion to dismiss, the Federal Claims Court reasoned that the plain language of § 1341 did not give HHS authority to require

in connection with claims processing or adjudication (including the management of internal appeals) or plan enrollment for services other than for pharmacy benefits or excepted benefits within the meaning of section 2791(c) of the [Public Health Service] Act.

45 C.F.R. § 153.20 (2014).

contributions from self-administered, self-insured health plans for the 2014 benefit year. *Id.* at 183–84. Since Electrical Welfare “clearly alleged that it is a self-funded, self-administered plan that does not use a third-party administrator,” the Federal Claims Court concluded that Electrical Welfare plausibly pled an illegal exaction claim. *Id.* On the alternative motion for summary judgment, the Federal Claims Court concluded that “there are genuine issues of material fact in dispute concerning the nature of the plaintiffs’ property interest and the effect the [Transitional Reinsurance Program] had on those alleged property interests.” *Id.* at 193 n.13.

In April 2022, Electrical Welfare moved to certify a class of entities eligible to recover under the illegal exaction claim. The Federal Claims Court granted the motion and certified the following class: “All self-administered, self-insured employee health and welfare benefit plans that are or were subject to the assessment and collection of the Transitional Reinsurance Contribution under Section 1341 of the Affordable Care Act for benefit year 2014 (the ‘Exaction Class’ or ‘Class’).” *Elec. Welfare Tr. Fund v. United States*, 160 Fed. Cl. 462, 465, 470 (2022). The Federal Claims Court set a December 2022 deadline for other group health plans to opt in to the class.

In May 2023, the Federal Claims Court entered partial judgment in favor of the Class on the illegal exaction claim and awarded just over \$185 million in damages. *Elec. Welfare Tr. Fund v. United States*, No. 19-cv-353, 2023 WL 3409608, at *2 (Fed. Cl. May 12, 2023). After the government filed a notice of appeal, the parties agreed to settle the illegal exaction claims brought by the Class. *Elec. Welfare Tr. Fund v. United States*, 171 Fed. Cl. 362, 373 (2024). In May 2024, the

Federal Claims Court granted a motion for final approval of the settlement. *Id.* at 392.

C. Instant Proceedings

The appellants in this action claim they are self-administered and self-insured group health plans that did not opt in the *Electrical Welfare* Class. Instead, appellants elected to file individual suits in the Federal Claims Court between February and August 2023. The individual cases were consolidated, and Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan (“Blue Cross”), No. 23-cv-641, was designated as the lead case. The complaints alleged that they were required to make contributions to the Transitional Reinsurance Program for the 2014 benefit year and that these contributions amounted to illegal exaction under the Fifth Amendment. J.A. 6–15; J.A. 252–62.

The government moved to dismiss the complaints for lack of subject-matter jurisdiction, arguing that the complaints were filed after the six-year filing deadline set forth in 28 U.S.C. § 2501 and that tolling was unavailable. Appellants recognized that their complaints were filed after the six-year statute of limitations and argued that their statutory deadline was tolled during the *Electrical Welfare* litigation. The dispute then centered on whether tolling was available under § 2501, such that the statute’s six-year deadline was tolled by the *Electrical Welfare* litigation.

The tolling relevant to this appeal is known as *American Pipe* tolling. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Generally, when a class action is filed, *American Pipe* tolls the statute of limitations for putative class members during the pendency of the putative class action. *China Agritech v. Resh*, 584 U.S. 732, 736 (2018). A putative class member is any entity who fits the description of the

proposed class, and a putative class action is an action in which the class has not yet been certified. This tolling permits, after the statute of limitations has expired, unnamed putative class members to join the action or, if the class fails, to file separate claims. *Id.* Here, appellants identified the *Electrical Welfare* class action as the basis for their *American Pipe* tolling claim, alleging that they were putative members of the *Electrical Welfare* Class.

Because the *Electrical Welfare* class was certified, and no longer putative, the Federal Claims Court ordered supplemental briefing on whether *American Pipe* tolling captured this situation. J.A. 18. In that supplemental briefing, the parties identified no “past decision in which *American Pipe* tolling was applied to an action in [the Federal Claims Court] after an opt-in class had been certified in an underlying class action.” J.A. 18. While the government’s position was that *American Pipe* tolling is unavailable under § 2501, it noted that, if *American Pipe* tolling was available, “no reason exists to treat class certification as a bar to class action tolling” in cases before the Federal Claims Court. J.A. 18–19; J.A. 25 n.21. Thus, the parties agreed before the Federal Claims Court that *American Pipe* tolling, if available under § 2501, applied to the putative class members from *Electrical Welfare* even though that class was certified.

On August 9, 2024, the Federal Claims Court granted the motion to dismiss, concluding that it lacked subject-matter jurisdiction. It first noted that “the parties agree that without tolling, Plaintiffs’ claims are untimely.” J.A. 23. It then concluded that “*American Pipe* tolling cannot toll the deadlines in 28 U.S.C. § 2501” and “the claims are time-barred.” J.A. 48.

On August 9, 2024, the Federal Claims Court entered judgment dismissing the complaints. J.A. 1. Blue Cross appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

We review de novo the Federal Claims Court’s dismissal for lack of subject-matter jurisdiction. *Walby v. United States*, 957 F.3d 1295, 1298 (Fed. Cir. 2020).

DISCUSSION

The Tucker Act, 28 U.S.C. § 1491, waives government sovereign immunity and provides the Federal Claims Court with subject-matter jurisdiction “for certain damages suits” brought against the government. *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 322 (2020). Claims brought under the Tucker Act are subject to the six-year statute of limitations in 28 U.S.C. § 2501, which provides that “[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.” A claim generally accrues “when all the events that have occurred that fix the alleged liability of the government and entitle the claimant to institute an action.” *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009).

I.

The parties do not dispute that appellants filed their complaints in the Federal Claims Court after the six-year filing deadline. Specifically, appellants do not challenge the Federal Claims Court’s determination that appellants’ claims accrued no later than January 15, 2015, the date appellants were required to make contributions to the Transitional Reinsurance Program for the 2014 benefit year. Given this accrual

date, the six-year deadline to file suit was January 15, 2021. Appellants sued between February and August 2023, more than two years after the deadline.

The fundamental dispute on appeal is whether appellants' late filings can be saved by *American Pipe* tolling. Appellants primary argument is that the Federal Claims Court "erred in holding that *American Pipe* tolling no longer applies to Section 2501's six-year statute of limitations for plaintiffs electing not to join class action lawsuits." Appellants' Br. 17. Appellants urge us to reverse the judgment of the Federal Claims Court and "remand with instructions to find that *American Pipe* tolling principles apply to Section 2501's statute of limitations." Appellants' Br. 53.

Appellants recognize that the sole issue on appeal here, whether 28 U.S.C. § 2501 is subject to *American Pipe* tolling, "appears identical" to the issue in *Kelly v. United States*, No. 24-2042, ___ F.4th ___ (Fed. Cir. 2026). Appellants' Br. 1 ("One of several legal issues presented in *Kelly* appears identical to the sole issue presented by this case: whether, in light of the Supreme Court's decisions in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), and *Cal. Pub. Emp. Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497 (2017) ('*CalPERS*'), '*American Pipe* tolling'—the well-established rule for suspending the running of statutes of limitation in class actions for putative class members—remains available to toll the six-year limitations period set forth in 28 U.S.C. § 2501.").

In *Kelly*, we resolved this issue and held that § 2501 is not subject to *American Pipe* tolling. We concluded that this outcome is compelled by the Supreme Court's decisions in *Sand*, which explained that § 2501 is jurisdictional and not subject to equitable tolling, and by *CalPERS*, which explained that *American Pipe* tolling is equitable. *Kelly*, slip op. at 7–13, ___ F.4th at

____ (first citing *Sand*, 552 U.S. at 135–39; then citing *CalPERS*, 582 U.S. at 509). Because we are bound by *Kelly*, we hold that appellants’ complaints in this action were untimely filed and that the Federal Claims Court properly dismissed the complaints for lack of subject-matter jurisdiction.

II.

Two appellants, Board of Trustees of the Carpenters Health and Welfare Trust Fund for California and the Carpenters Health and Welfare Fund for California (collectively, the “Carpenters”), make a separate argument. The Carpenters argue that the Federal Claims Court’s decision should be reversed as to them because, unlike the other appellants, they opted in the *Electrical Welfare* class action but their claims were dismissed without prejudice. Specifically, the Carpenters argue that the Federal Claims Court “improperly shifted the burden of proof to the Carpenters at the pleading stage” by not accepting as true the allegations that they were “putative class members” of the *Electrical Welfare* class action and wrongly dismissed from that action. Appellants’ Br. 51–52. The Carpenters argue that “[t]hese allegations, if accepted as true, show that the Plaintiff Carpenters filed a timely claim in the *Electrical Welfare* class action.” Appellants’ Br. 52.

The Carpenters’ distinct argument is without merit. First, the Carpenters fail to cite any authority that supports their position that, for purposes of *American Pipe* tolling, there is a meaningful difference between putative class members that joined the underlying class action suit, like the Carpenters, and those that elected not to join, like the rest of the appellants. We are unaware of any such authority and are not persuaded that we should establish such a rule in this appeal. Second, the Supreme Court suggests there is no

such difference: “The [*American Pipe*] rule is not dependent on intervening in or joining an existing suit’ ” *China Agritech*, 584 U.S. at 735 (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 353–54 (1983)). Third, we made no such distinction in *Kelly*.

The Carpenters’ claims are untimely in this case because *putative class members* from *Electrical Welfare*, whether or not they joined that Class, are not entitled to *American Pipe* equitable relief to toll the § 2501 statute of limitations because § 2501 is a jurisdictional statute of limitations. *Kelly*, slip op. at 13, ____ F.4th at _____. We therefore affirm the Federal Claims Court’s judgment that the Carpenters’ individual suits in this case were untimely filed.

CONCLUSION

We have considered appellants’ remaining arguments and find them without merit. For these reasons, we affirm the Federal Claims Court’s dismissal of appellants’ complaint as time-barred.

AFFIRMED

COSTS

No costs.

APPENDIX B

No. 24-2042

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Michael E. KELLY, FBOP Corp., River Capital
Advisors, Inc., Park National Bank, San Diego
National Bank, Pacific National Bank, BankUSA,
North Houston Bank, Madison State Bank,
Community Bank of Lemont, Citizens National Bank,
California National Bank, Plaintiffs-Appellants

v.

UNITED STATES, Defendant-Appellee

Decided: July 17, 2026

[Published at: 181 F.4th 1377]

Before Dyk, Reyna, and Taranto, Circuit Judges.

Opinion

Reyna, Circuit Judge.

[1378] Michael Kelly, and several entities under his control, sued the government for breach of contract and an unconstitutional Fifth Amendment taking after he and his banks lost significant assets during the 2008 financial crisis. The United States Court of Federal Claims dismissed the complaint for lack of subject-matter jurisdiction. It reasoned that the complaint was filed after the six-year statute of limitations set forth in 28 U.S.C. § 2501 expired and that the deadline was not subject to the tolling rule established in *American Pipe & Construction Company v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). We affirm and hold that 28 U.S.C. § 2501 is not subject to *American Pipe* tolling. In doing so, we recognize that a portion of our decision in *Bright v. United States*, 603 F.3d

1273 (Fed. Cir. 2010) has been implicitly overruled by *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U.S. 497, 137 S.Ct. 2042, 198 L.Ed.2d 584 (2017).

[1379] Background

A.

Appellants include Mr. Kelly and a group of banking entities and one non-banking entity under his control.¹ The government requires banks to have mandatory financial reserves, known as “Tier 1 Capital.” These reserves are “the minimum adequate funds determined to be needed by a bank to function on a regular basis.” J.A. 93–94 ¶ 36. A bank’s failure to maintain enough Tier 1 Capital can result in insolvency, receivership, and confiscation of assets.

Starting in 2006, the government permitted banks to invest up to 100% of their Tier 1 Capital in preferred shares from government-sponsored enterprises (“GSE”). The government offered incentives, such as tax benefits, to banks that invested their Tier 1 Capital in GSE preferred shares.

The GSEs relevant to this appeal are Fannie Mae and Freddie Mac,² referred to here as the “Enterprises.” The Enterprises were created by Congress to support the national home mortgage system, and they “operate under congressional charters as for-profit corporations owned by private shareholders.” *Collins v.*

¹ Mr. Kelly is the Chairman, Chief Executive Officer, and sole common shareholder of appellant, FBOP Corporation (“FBOP”). J.A. 87–88. FBOP is a privately owned bank holding company and the sole common shareholder of the other appellants—nine bank subsidiaries and one non-bank subsidiary. *Id.*

² Fannie Mae is the Federal National Mortgage Association. Freddie Mac is the Federal Home Loan Mortgage Corporation.

Yellen, 594 U.S. 220, 228, 141 S.Ct. 1761, 210 L.Ed.2d 432 (2021). The Enterprises buy mortgages, package them into mortgage-backed securities, and sell them to investors. *Id.* This process relieves mortgage lenders of risk and frees up their capital to make additional loans. *Id.* By 2007, the Enterprises amassed mortgage portfolios of approximately \$5 trillion, accounting for almost half of the nation’s mortgage market. *Id.*

In late 2007 and early 2008, appellants converted approximately \$898 million of their Tier 1 Capital into preferred shares of the Enterprises. These investments were a “substantial portion” of appellants’ Tier 1 Capital. J.A. 100 ¶ 50.

During this time, the mortgage crisis unfolded. “[W]hen the housing bubble burst in 2008, the [Enterprises] took a sizeable hit” and “lost more that year than they had earned in the previous 37 years combined.” *Collins*, 594 U.S. at 228, 141 S.Ct. 1761. “[M]any feared the [Enterprises] would eventually default and throw the housing market into a tailspin.” *Id.* at 229, 141 S.Ct. 1761.

In response to these concerns, Congress enacted the Housing and Economic Recovery Act (“HERA”) in July 2008. 12 U.S.C. §§ 4501–4642. In relevant part, HERA created the Federal Housing Finance Agency (“FHFA”) “to regulate the [Enterprises] and, in certain specified circumstances, step in as their conservator or receiver.” *Collins*, 594 U.S. at 229, 141 S.Ct. 1761 (citing 12 U.S.C. §§ 4502(20), 4511(b), 4617). The statute provides that the FHFA “has the authority to take control of the [Enterprises’] assets and operations, conduct business on their behalf, and transfer or sell any of their assets or liabilities.” *Id.* (citing 12 U.S.C. § 4617(b)(2)(B)–(C), (G)).

On September 6, 2008, FHFA exercised its authority and placed the Enterprises into a conservatorship.³ The next day, [1380] FHFA entered into an agreement with the United States Department of the Treasury (“Treasury”), whereby Treasury agreed to provide the Enterprises with billions of dollars in capital and, in exchange, Treasury “received 1 million shares of specially created senior preferred stock” in each Enterprise. *Id.* at 232, 141 S.Ct. 1761. The following day, the Enterprises’ preferred share prices dropped significantly.

The drop in the Enterprises’ share prices allegedly wiped out \$885 million in appellants’ Tier 1 Capital. Consequently, several of FBOP’s subsidiary banks fell out of compliance with their Tier 1 Capital requirements. The government placed all FBOP’s subsidiary banks into receiverships. This caused FBOP to become insolvent, forcing FBOP to liquidate its assets. Appellants alleged that they lost \$19.4 billion in combined assets. Mr. Kelly allegedly lost his banks and nearly his entire net worth.

B.

Appellants sued the government in the United States Court of Federal Claims (“Federal Claims Court”). J.A. 28–72. The complaint alleged an illegal exaction and an unlawful taking in violation of the Fifth Amendment, and a breach of an implied regulatory contract. The complaint maintained that “[w]hen the Government nationalized the GSEs, it confiscated Appellant Banks’ mandatory capital reserves, causing regulatory insolvency and the taking of all of

³ Generally, a conservatorship is a legal process in which a person or entity is appointed to establish control and oversight of a company to put it in a solvent condition. *See generally* 12 U.S.C. § 4617(b).

Appellant Banks’ property, *in toto*—leaving them utterly assetless.” Appellants’ Br. 2.

The complaint acknowledged that a “six-year statute of limitations [from 28 U.S.C. § 2501] governs the timeliness of Plaintiffs’ claims,” but it alleged that the statute of limitations was tolled between June 10, 2013 (the date a related class action, *Washington Federal v. United States*, was filed in the Federal Claims Court) and July 16, 2020 (the date the Federal Claims Court in *Washington Federal* unsealed its Opinion and Order dismissing that action). J.A. 63.

About two months after the complaint was filed, the parties jointly moved to stay the proceedings pending final disposition of *Washington Federal*, a case that was pending before our court. The parties’ joint motion explained that this court’s decision in the *Washington Federal* appeal would provide clarity on the “critical threshold issues” raised by the complaint—whether the Federal Claims Court has jurisdiction to hear shareholder challenges to the conservatorships that FHFA imposed on the Enterprises. J.A. 73. The Federal Claims Court granted the motion, and the case was stayed pending resolution of *Washington Federal*.

In *Washington Federal*, a group of Enterprise shareholders filed a class action before the Federal Claims Court alleging an illegal exaction and a taking under the Fifth Amendment. *Wash. Fed. v. United States*, 149 Fed. Cl. 281, 288–89 (2020). The putative class included persons or entities who held shares of stock in the Enterprises on or before September 5, 2008. *Id.* The shareholders argued that imposition of conservatorships over the Enterprises destroyed the rights and value of the property interests tied to the stock of the Enterprises held by plaintiffs. *Id.* The government moved to dismiss the complaint, arguing the Federal Claims Court lacked subject-matter jurisdiction, the

shareholders lacked standing to pursue their claims, and the shareholders failed to state a claim upon which relief may be granted. *Id.* at 285. The Federal Claims Court dismissed the complaint for lack of standing. *Id.* at 297.

[1381] On appeal, this court affirmed. *Wash. Fed. v. United States*, 26 F.4th 1253, 1270 (Fed. Cir. 2022). First, we explained that “an illegal exaction claim predicated on the alleged unlawfulness of the agency action is not plausible as a matter of law.” *Id.* at 1263–64. On the takings claim, we identified two independent grounds for dismissal: (1) plaintiffs failed to state a claim because there was no cognizable taking, i.e., shareholders did not retain “any investment-backed expectation that the value of their shares would not be diluted;” and (2) plaintiffs lacked standing because their “alleged injuries are not independent of the alleged harms” to the Enterprises. *Id.* at 1265–70.

After this court’s opinion in *Washington Federal*, appellants amended their complaint. The amended complaint omitted the illegal exaction claim, added facts to the contract claim, and aimed to bolster standing. The amended complaint included the same tolling allegation described in the original complaint, that the relevant statute of limitations was tolled during the *Washington Federal* litigation. J.A. 87.

The government moved to dismiss the amended complaint for lack of subject-matter jurisdiction and for failure to state a claim. In May 2024, the Federal Claims Court granted the motion and dismissed the complaint. The Federal Claims Court concluded that it lacked jurisdiction because the complaint was time-barred under the six-year statute of limitations set by 28 U.S.C. § 2501. J.A. 6. It reasoned that the § 2501 statute of limitations is not subject to equitable tolling, so it concluded the *Washington Federal* litigation did

not toll the deadline to file suit in this case. J.A. 6–11. The Federal Claims Court also explained that, even if the complaint was timely, it failed to state a claim. J.A. 11–18.

Mr. Kelly and his entities appeal. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

Standard of Review

We review de novo the Federal Claims Court’s dismissal for lack of subject-matter jurisdiction and for failure to state a claim. *Walby v. United States*, 957 F.3d 1295, 1298 (Fed. Cir. 2020).

Discussion

Generally, Federal Claims Court jurisdiction is provided in the Tucker Act, 28 U.S.C. § 1491. The Tucker Act waives government sovereign immunity and provides the Federal Claims Court with subject-matter jurisdiction “for certain damages suits” against the government. *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 322, 140 S.Ct. 1308, 206 L.Ed.2d 764 (2020).

Claims brought under the Tucker Act are subject to the six-year statute of limitations in 28 U.S.C. § 2501, which provides that “[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”

There is no dispute that appellants’ complaint was filed after the § 2501 six-year deadline. Appellants do not challenge on appeal the Federal Claims Court’s determination that appellants’ claims accrued on September 6, 2008, when the government placed the Enterprises into conservatorships. This means that the deadline to file was September 6, 2014. Appellants

sued on October 1, 2021—thirteen years after September 6, 2008.

Appellants argue that their complaint was timely because, as putative class members of the *Washington Federal* class, the § 2501 deadline was tolled while the *Washington Federal* litigation was pending. The [1382] complaint in *Washington Federal* was filed on June 10, 2013, which was prior to appellants’ deadline to file suit in this case. The *Washington Federal* litigation ended when the complaint was dismissed on July 16, 2020. Appellants contend that their filing deadline in this case was tolled for this period, between June 10, 2013, and July 16, 2020. With tolling, appellants contend that they had until October 3, 2021 to file suit, and they filed two days before that deadline.

Appellants rely on the tolling principles expressed in the Supreme Court’s decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) and its progeny. The Supreme Court has explained that “*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails.” *China Agritech v. Resh*, 584 U.S. 732, 736, 138 S.Ct. 1800, 201 L.Ed.2d 123 (2018). This class action tolling rule is generally known as *American Pipe* tolling.

The issue before us is whether 28 U.S.C. § 2501 is subject to *American Pipe* tolling—specifically, whether the applicable limitation period was tolled during the pendency of *Washington Federal*. We conclude that it was not.

A.

Appellants argue that their complaint was timely filed because § 2501 is not jurisdictional and thus subject to *American Pipe* tolling.

A determination that a filing deadline is “jurisdictional” poses significant consequences. If a jurisdictional deadline is missed, a court is “completely powerless to take any relevant action.” *McIntosh v. United States*, 601 U.S. 330, 337, 144 S.Ct. 980, 218 L.Ed.2d 307 (2024). “Put differently, noncompliance with a jurisdictional deadline cannot be excused.” *Id.*

The Supreme Court and this court have recognized that 28 U.S.C. § 2501 is jurisdictional and not subject to equitable tolling. In *Sand*, the Supreme Court described the § 2501 limitations period as “jurisdictional,” the type of time limit “forbidding a court to consider whether certain equitable considerations warrant extending a limitations period.” *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). The Supreme Court has since acknowledged *Sand*’s conclusion. *E.g.*, *United States v. Wong*, 575 U.S. 402, 413–16, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015) (“[T]his Court repeatedly held [§ 2501’s] 6-year limit to be jurisdictional and thus not subject to equitable tolling.”). So too has our precedent. *E.g.*, *Wyo. Tr. Co. v. United States*, 168 F.4th 1377, 1381 (Fed. Cir. 2026) (“Equitable tolling does not apply because 28 U.S.C. § 2501’s time-bar is jurisdictional.”); *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (“[T]he Supreme Court decided *Sand*, holding that the statute of limitations applicable to Tucker Act claims, 28 U.S.C. § 2501, is jurisdictional and not susceptible to equitable tolling.” (citation modified)).

Subsequent to *Sand*, the Supreme Court in *Harrow* explained that a filing deadline is “jurisdictional only if Congress ‘clearly states’ that it is.” *Harrow v. Dep’t*

of *Def.*, 601 U.S. 480, 484, 144 S.Ct. 1178, 218 L.Ed.2d 502 (2024) (quoting *Boechler v. Comm’r*, 596 U.S. 199, 203, 142 S.Ct. 1493, 212 L.Ed.2d 524 (2022)). The Court explained that for a statute to pass the clear-statement test, “traditional tools of statutory construction must plainly show that Congress imbued the rule with jurisdictional consequences.” *Id.* (citation modified). [1383] The Court explained that “most time bars are nonjurisdictional.” *Id.* (internal quotation omitted). It recognized one “exceptional” deadline that is jurisdictional—the deadline for filing an appeal from a district court’s decision in a civil case. *Id.* at 484, 488, 144 S.Ct. 1178 (citing *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)). The Court stated, “[a]s to all other time bars, we now demand a ‘clear statement.’” *Id.* at 489, 144 S.Ct. 1178.

Seizing on *Harrow*, appellants argue that the announcement of a clear-statement requirement supersedes the Supreme Court’s earlier statement in *Sand*, that § 2501 is jurisdictional. Specifically, appellants argue that because *Sand* did not apply the clear-statement test, “this Court must now do so in the first instance.” Appellants’ Br. 19. Appellants contend that because § 2501 fails the clear-statement test, the statute is not jurisdictional. We disagree.

While appellants are correct that *Sand* did not expressly examine § 2501 under the clear-statement test, we cannot turn a blind eye to the fact that *Sand* involved the same statute at issue here, § 2501. *Sand*, 552 U.S. at 137–39, 128 S.Ct. 750. In contrast, the Supreme Court in *Harrow* analyzed a different, unrelated statute.⁴ *Harrow*, 601 U.S. at 488–89, 144 S.Ct.

⁴ *Harrow* addressed 5 U.S.C. § 7703(b)(1), which sets a 60-day deadline for employees to appeal a decision from the U.S. Merit Systems Protection Board to this court.

1178. To the extent that there is a conflict between *Sand* and *Harrow*, it is for the Supreme Court, not this court, to resolve. See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023) (“As this Court has explained: If a precedent of this Court has direct application in a case ... a lower court should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” (citation modified)). Because *Sand* addressed the statute at issue here, we are bound to follow its direction that § 2501 is jurisdictional and not subject to equitable tolling. *Id.* We thus reject appellants’ contention that we disregard *Sand*.

B.

Appellants argue that, even if § 2501 is jurisdictional, *American Pipe* tolling is still available. In support, appellants point to *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), where we held “that the running of the six-year limitations period of 28 U.S.C. § 2501 was tolled” under *American Pipe*. *Bright*, 603 F.3d at 1290.

In *Bright*, we recognized two types of tolling: equitable tolling and class action statutory tolling. *Id.* at 1287–88. We explained that “the fact that equitable tolling is barred under section 2501 does not mean that class action statutory tolling also is barred” because the “two concepts are different.” *Id.* at 1287. We characterized *American Pipe* tolling as “class action statutory tolling” because it does not “turn on ‘equities’” and “is not triggered by equitable considerations” but rather “serves to facilitate the objectives of the class action procedure.” *Id.* at 1288 (citation modified). On this basis, we concluded that *American Pipe* tolling was available under § 2501. *Id.* at 1290.

After *Bright*, the Supreme Court clarified that *American Pipe* tolling is equitable tolling. *Calif. Pub. Emp. Ret. Sys. v. ANZ Sec.*, 582 U.S. 497, 509–10, 137 S.Ct. 2042, 198 L.Ed.2d 584 (2017) (“*CalPERS*”). In *CalPERS*, the Supreme Court concluded that a deadline set by the Securities Act of 1933, a statute of repose, could not be tolled under *American Pipe*. [1384] *Id.* at 504–06, 137 S.Ct. 2042. In reaching this conclusion, the Court explained that the “source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions.” *Id.* at 509, 137 S.Ct. 2042. The Court confirmed that a statute or federal rule was not the basis for the *American Pipe* tolling rule. *Id.* (“The central text at issue in *American Pipe* was [Federal Rule of Civil Procedure] 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.”). Thus, *CalPERS* established that *American Pipe* tolling is equitable.⁵

Appellants contend that “*CalPERS* did not abrogate *Bright*” because *CalPERS* dealt with a statute of repose rather than a statute of limitations. Appellants’ Br. 32. This distinction is immaterial. The relevant part of *CalPERS*—the declaration that *American Pipe* tolling is equitable—did not hinge on the type of

⁵ Since *CalPERS*, the Supreme Court and other circuits have reinforced *CalPERS*’s declaration that *American Pipe* tolling is equitable. *E.g.*, *China Agritech*, 584 U.S. at 745, 138 S.Ct. 1800 (noting “[t]he class action would be untimely unless saved by *American Pipe*’s equitable-tolling exception”); *Weitzner v. Sanofi Pasteur Inc.*, 909 F.3d 604, 609 (3d Cir. 2018) (noting “[t]he Supreme Court has since clarified that *American Pipe* tolling is an equitable remedy”); *Potter v. Comm’r of Soc. Sec.*, 9 F.4th 369, 371 (6th Cir. 2021) (noting “the Supreme Court has established *American Pipe* tolling, an equitable doctrine”).

statute being tolled. *CalPERS*, 582 U.S. at 509–10, 137 S.Ct. 2042.

Turning to the case at hand, we note that “a later panel can recognize that [this] court’s earlier decision has been implicitly overruled as inconsistent with intervening Supreme Court authority.” *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014). We do so here. The portion of *Bright* which concluded that *American Pipe* tolling is available under § 2501 because such tolling is not equitable is inconsistent with *CalPERS* which declared that *American Pipe* tolling is equitable. Compare *Bright*, 603 F.3d at 1288 (“such tolling is not triggered by equitable considerations”), with *CalPERS*, 582 U.S. at 509, 137 S.Ct. 2042 (“the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity”).

Accordingly, we hold that the six-year statute of limitations found in § 2501 is jurisdictional and not subject to equitable tolling, such as *American Pipe* tolling. *Sand*, 552 U.S. at 135–39, 128 S.Ct. 750; *CalPERS*, 582 U.S. at 509, 137 S.Ct. 2042. As a result, appellants’ complaint was untimely filed.

We need not reach the Federal Claims Court’s alternative ground of dismissal for failure to state a claim.

Conclusion

We have considered appellants’ remaining arguments and find them without merit. Because we hold that 28 U.S.C. § 2501 is jurisdictional and not subject to *American Pipe* tolling, appellants’ limitations period was not tolled during the pendency of the *Washington Federal* litigation. For these reasons, we affirm the Federal Claims Court’s dismissal of appellants’ complaint as time-barred.

AFFIRMED

26a

Costs

No costs.

APPENDIX C

Nos. 23-cv-641, 23-cv-642, 23-cv-643, 23-cv-644, 23-cv-645, 23-cv-647, 23-cv-648, 23-cv-650, 23-cv-651, 23-cv-1455, 23-cv-1491, 23-cv-1282

UNITED STATES COURT OF
FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF KANSAS
CITY WELFARE BENEFIT PLAN, et al.,
Plaintiffs,

v.

UNITED STATES,
Defendant.

Filed: August 9, 2024

[Before: ROUMEL, Judge]

MEMORANDUM AND ORDER

This case arises out of the Department of Health and Human Services' (HHS's) implementation of the Patient Protection and Affordable Care Act of 2010 and subsequent litigation before this Court in *Electrical Welfare Trust Fund v. United States*, 155 Fed. Cl. 169 (2021) (*EWTF*). Plaintiffs, alleged self-administered, self-insured health plans, filed actions between May and August 2023 to recover amounts paid to Defendant under HHS's former unlawful interpretation and application of section 1341 of the ACA. *See* 42 U.S.C. § 18061. As reflected in this Court's prior opinions in *EWTF*, HHS ignored the plain language of section 1341 in requiring self-administered, self-insured health plans to make TRP contributions for the 2014 benefit year. *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 183–84. However, none of the Plaintiffs in this action opted in to the *EWTF* class action. At issue in this case is whether Plaintiffs timely filed their actions within the

applicable six-year statute of limitations. Defendant contends that Plaintiffs' claims fall outside the statute of limitations and, accordingly, that this Court lacks subject matter jurisdiction. In contrast, Plaintiffs contend that this Court has jurisdiction because equitable tolling saves their otherwise untimely claims from dismissal.

Pending before this Court is Defendant's (Defendant's or Government's) Motion to Dismiss for lack of subject matter jurisdiction (Motion). ECF No. 8 (Def. Mot. Dismiss).¹ Defendant urges the Court to dismiss this consolidated action pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (Rules), citing the Court's six-year statute of limitations.² *Id.* at 6; *see* 28 U.S.C. § 2501. The Motion is fully briefed, and this Court conducted Oral Argument on January 31, 2024. The Court subsequently ordered supplemental briefing, which the parties completed on March 29, 2024. ECF Nos. 30, 31, 32, 33. Additionally, the parties filed additional notices and responses

¹ Citations throughout this Memorandum and Order reference the ECF-assigned page numbers, which do not always correspond to the pagination within the document.

² Following the filing of Government's Motion to Dismiss, three additional actions were consolidated under the lead case *Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan*, 23-cv-641 (Blue Cross Blue Shield or BCBS). On agreement of the parties, the Government's pending Motion also applies to these four plaintiffs: *Aetna Inc. Med. Dental Benefit Plan v. United States*, No. 23-cv-1455 (ECF No. 7) (Joint Status Report and Consent Motion for Consolidation) at 2; *Health Care Serv. Corp. Master Flexible Benefit Plan v. United States*, No. 23-cv-1491 (ECF No. 7) (Joint Status Report and Consent Motion for Consolidation) at 2; *Board of Trustees of the Carpenters Health & Welfare Tr. Fund for Cal. Et al. v. United States*, No. 23-cv-1282 (ECF No. 12) (Joint Status Report) at 2; *see also* Defendant's Reply in Support of its Motion to Dismiss (ECF No. 19) (Def. Reply) at 7 n.2.

concerning supplemental authority published after the conclusion of briefing. ECF Nos. 34, 35, 36.

Having considered the parties' briefs, arguments, and applicable law, this Court holds that Plaintiffs failed to timely file their actions, and consequently, that this Court lacks subject matter jurisdiction over their claims. Accordingly, this Court **GRANTS** the Government's Motion to Dismiss (ECF No. 8) pursuant to Rule 12(b)(1) and dismisses this action pursuant to Rule 12(h)(3).

BACKGROUND

I. Transitional Reinsurance Program

In 2010, Congress passed and President Obama signed into law the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively the ACA).³ The goal of the ACA was to extend healthcare coverage throughout the United States. *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 301, 140 S.Ct. 1308, 206 L.Ed.2d 764 (2020). The ACA requires all individuals to maintain "minimum essential" health insurance coverage, 26 U.S.C. § 5000A, and forbids health insurance providers from discriminating against individuals with pre-existing medical conditions by denying them coverage, 42 U.S.C. § 300gg-3. Accordingly, "Congress anticipated that the enrollment of a disproportionate number of previously uninsured, high-risk individuals into the health insurance market could cause premiums to rise for all insured individuals." *Elec. Welfare Tr. Fund*, 155

³ This Court previously discussed the ACA's Transitional Reinsurance Program (TRP) at length in *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 175–80.

Fed. Cl. at 175 (citing *King v. Burwell*, 576 U.S. 473, 479–81, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015)). Seeking to diminish the increased financial risk for health insurance insurers covering high-risk individuals, Congress created certain risk-mitigation programs. *Me. Cmty. Health Options*, 590 U.S. at 301–02, 140 S.Ct. 1308.

At issue here is one particular risk-mitigation program, the Transitional Reinsurance Program (TRP), “intended to stabilize premiums for coverage in the individual health insurance market during the early years of the ACA’s implementation—2014, 2015, and 2016.” *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 175–76 (citing 42 U.S.C. § 18061(c)(1)(A)). To fund the TRP, the ACA required each state to establish a program under which “health insurance issuers, and third party administrators on behalf of group health plans” pay into the appropriate reinsurance pool, whether state or federal, for the three-year period beginning January 1, 2014. 42 U.S.C. § 18061(b)(1)(A). The funds collected from the contributing entities were used to reimburse “health insurance issuers” for enrolling high-risk individuals in the individual marketplace. 42 U.S.C. § 18061(b)(1)(B).

The statutory language of the ACA directed HHS to promulgate regulations pertaining to TRP contributions. *See* 42 U.S.C. § 18061(b). HHS initially determined that contributors to the TRP included all self-insured group health plans and thus promulgated a regulation that required all self-administered, self-insured health plans (including purportedly, Plaintiffs) to make contributions to the TRP. HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,525 (Mar. 11, 2013) (2013 Final Rule) (defining “contributing entity”). Although self-administered, self-insured health plans were required under HHS

regulations to contribute to the TRP, self-administered, self-insured health plans were not included in those eligible to receive any contributions in the TRP program itself and were therefore unable to benefit from the TRP's risk mitigation purpose. *See Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 178.

In December 2013, HHS issued a Proposed Rule to modify the definition of "contributing entity" to exclude self-administered, self-insured health plans for the 2015 and 2016 plan years. HHS Notice of Benefit and Payment Parameters for 2015 (Proposed Rule), 78 Fed. Reg. 72,322, 72,340 (Dec. 2, 2013). In March 2014, HHS adopted this new interpretation as "the better reading of section 1341," determining "that a self-insured, self-administered plan should not be a contributing entity." HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744, 13,773 (Mar. 11, 2014) (2014 Final Rule). The practical result of this modification was to exclude self-administered, self-insured health plans from TRP contributions for the 2015 and 2016 benefit years; HHS, however, did not apply the new definition to the 2014 benefit year. Instead, citing administrative difficulties with reversing course "at this late stage," HHS collected 2014 TRP contributions from self-administered, self-insured health plans anyway, contrary to both the plain language of the statute and its own interpretation of the statute. *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 179 (quoting 2014 Final Rule at A4703) ("[In its Final Rule,] HHS justified its definitional distinguishment for the 2014 plan year by reasoning that 'making the proposed exemption effective for the 2014 benefit year at this late stage would be disruptive to plans and issuers that have already set contribution rates and premiums and could upset settled estimates with respect to expected reinsurance payments and contribution obligations.'").

II. Plaintiffs' Contributions to the Transitional Reinsurance Program

Defendant required self-administered, self-insured health plans to pay a contribution of \$63 per covered life for the 2014 benefit year—an amount that included both plan participants and their dependents. BCBS Compl. at 9 n.7 (citation omitted) (“For the 2014 benefit year, HHS offered contributing entities the option to pay: (1) the entire 2014 benefit year contribution in one payment no later than January 15, 2015 reflecting \$63.00 per covered life; or (2) in two separate payments for the 2014 benefit year, with the first remittance due by January 15, 2015 reflecting \$52.50 per covered life, and the second remittance due by November 15, 2015 reflecting \$10.50 per covered life.”); *see also Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 180. To remit payment, Defendant required: “(1) the contributing entity [] to submit an annual enrollment count of the number of covered lives of reinsurance contribution enrollees no later than November 15 of the applicable benefit year; (2) after submitting the annual enrollment count, HHS then notified the contributing entity of the amount of the reinsurance contribution allocated to reinsurance payments, administrative expenses, and the United States Treasury for the applicable benefit year; and (3) the contributing entity remitted reinsurance contributions to HHS.” *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 180 (citing 45 C.F.R. § 153.405).

Specifically, in this action, Plaintiffs allege they remitted TRP contributions to Defendant on the following dates:

Plaintiff	Date of TRP Payment(s)
Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan	December 30, 2014
Louisiana Health Service & Indemnity Company Welfare Benefit Plan	November 13, 2024
Hospital and Medical Plan for BlueCross BlueShield of South Carolina	December 29, 2014 (first payment) and November 12, 2015 (second payment)
The CareFirst Flexible Benefits Plan	December 30, 2014 (first payment) and September 14, 2015 (second payment)
Cook Group Health Plan	November 21, 2014
Lester E. Cox Medical Center Welfare Benefit Group Insurance Plan	November 11, 2014
Humana Benefit Plans	November 14, 2014 (first payment), December 23, 2014 (second payment), and November 12, 2015 (third payment)
Hyatt Corporation Welfare Plan	January 15, 2015
UnitedHealth Group Employee Health Benefit Plan	January 15, 2015 (first payment) and November 13, 2015 (second payment)

Health Care Service Corporation Master Flexible Benefit Plan <i>et al.</i>	December 17, 2014 (first payment) and August 11, 2015 (second payment)
Aetna Inc. Medical Dental Benefit Plan	December 31, 2014 (first payment) and September 4, 2015 (second payment)
The Board of Trustees of the Carpenter Health and Welfare Trust Fund for California <i>et al.</i>	January 9, 2015 (first payment) and November 6, 2015 (second payment)

See Plaintiffs' Notice, dated February 15, 2024 (ECF No. 27) (Table A) at 1–2.

III. *Electrical Welfare Trust Fund v. United States*

The facts outlined above prompted the filing of *EWTF* before this Court.⁴ *EWTF* has a lengthy history and only facts relevant to the present action are included here. *See, e.g., Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 169; *Elec. Welfare Tr. Fund v. United States*, 166 Fed. Cl. 709 (2023); *Elec. Welfare Tr. Fund v. United States*, 171 Fed. Cl. 362 (2024).

⁴ EWTF also filed prior suits in the Court of Federal Claims and other courts, all of which were dismissed. *See Elec. Welfare Tr. Fund v. United States*, No. 16-2186, 2017 WL 3116693, *2, *7 (D. Md. July 21, 2017), *aff'd*, 907 F.3d 165, 168–70 (4th Cir. 2018) (dismissing suit for lack of jurisdiction); *Operating Eng'rs Tr. Fund of Washington, D.C., et al. v. United States*, No. 17-cv-1732, ECF Nos. 1, 29 (EWTF, Stone Masons, and OETF filed suit in the United States Court of Federal Claims but thereafter the parties filed a stipulation of dismissal without prejudice pursuant to Rule 41(a)(1)(A)(ii)). *See also Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 181.

On March 8, 2019, self-insured group health plan plaintiffs filed a putative class action. *See generally Elec. Welfare Tr. Fund*, No. 19-cv-353, Complaint (ECF No. 1) (*EWTF* Compl.); Second Amended Class Action Complaint (ECF No. 59) ¶¶ 101–27.⁵ Plaintiff *EWTF* was a self-administered, self-insured health plan during the relevant time period and filed an action to recoup the TRP contributions made under the ACA for the 2014 benefit year that HHS had refused to refund, despite its changed interpretation of section 1341. *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 175, 181. *EWTF* asserted its contributions amounted to an illegal exaction under the Fifth Amendment’s Due Process Clause and a taking of property without just compensation under the Fifth Amendment’s Takings Clause. *EWTF* Compl. ¶¶ 89–111.

On May 7, 2019, Defendant moved to dismiss the *EWTF* plaintiffs’ complaint for lack of jurisdiction and for failure to state a claim, pursuant to Rules 12(b)(1) and 12(b)(6), and alternatively moved for summary judgment pursuant to Rule 56. *See Elec. Welfare Tr. Fund*, No. 19-cv-353, Defendant’s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (ECF No. 6). On July 30, 2021, the Court denied Defendant’s motion as it related to *EWTF*’s illegal

⁵ Plaintiffs Operating Engineers Trust Fund of Washington, D.C. (OETF) and Stone & Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund (Stone Masons) also filed suit. *Elec. Welfare Tr. Fund*, No. 19-cv-353, Compl. However, the Court granted Defendant’s Motion to Dismiss as related to OETF’s and Stone Mason’s illegal exaction claims. *See Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 193. Plaintiffs OETF and Stone Masons separately continued to pursue their Fifth Amendment Takings claims, which this Court dismissed on July 7, 2023. *Elec. Welfare Tr. Fund*, 166 Fed. Cl. at 723. Plaintiffs OETF and Stone Masons’ Takings claims remain on appeal to the U.S. Court of Appeals for the Federal Circuit.

exaction claim, finding that under the plain text of the ACA HHS lacked authority to collect TRP contributions for the 2014 benefit year from self-insured group health plans that did not use a third-party administrator. *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 181–84. The Court came to the opposite conclusion for third-party administrator plaintiffs alleging illegal exaction and granted the Government’s motion to dismiss the illegal exaction claims as it related to such entities. *Id.* at 188.

On April 8, 2022, EWTF moved to certify a class of entities eligible to recover under plaintiffs’ illegal exaction claims, which this Court granted on June 22, 2022. *See Elec. Welfare Tr. Fund*, No. 19-cv-353, Plaintiff EWTF’s Motion for Class Certification, Appointment as Class Representative, and Appointment of Class Counsel (ECF No. 53); *Elec. Welfare Tr. Fund v. United States*, 160 Fed. Cl. 462, 465 (2022). In granting plaintiff’s motion, the Court certified the following class:

All self-administered, self-insured employee health and welfare benefit plans that are or were subject to the assessment and collection of the Transitional Reinsurance Contribution under Section 1341 of the Affordable Care Act for benefit year 2014 (the “Exaction Class” or “Class”).

Id. at 470. Following class certification, Class Counsel sent Notice to approximately 650 plans identified by Government records as potential self-administered, self-insured putative members of the Exaction Class. *Elec. Welfare Tr. Fund*, No. 19-cv-353, Order Directing Entry of Judgment Pursuant to Rule 54(b) (ECF No. 123) (*EWTF* Order Directing 54(b) Judgment) at 2 (citing ECF Nos. 111, 92, 87-1). The deadline for class members to opt into the Exaction Class was December

19, 2022. *Elec. Welfare Tr. Fund*, No. 19-cv-353, Order, dated November 11, 2022 (ECF No. 92) (November 11, 2022 Order) at 5.⁶

On December 21, 2022, the Court granted EWTF's motion for summary judgment with respect to the Exaction Class's claims and stated its intent to direct entry of Judgment pursuant to Rule 54(b). *Elec. Welfare Tr. Fund*, No. 19-cv-353, Order, dated December 21, 2022 (ECF No. 97) at 1.

On February 2, 2023, class plaintiffs filed their initial Certification of Final Membership in the Exaction Class, and on February 10, 2023, class plaintiffs filed an unopposed Supplemented Certification of Final Membership in the Exaction Class. *Elec. Welfare Tr. Fund*, No. 19-cv-353, ECF Nos. 106, 111; *see also Elec. Welfare Tr. Fund*, No. 19-cv-353, November 11, 2022 Order at 5 (directing Class Counsel to "certify final membership in the Exaction Class by identifying the name of each member of the Exaction Class to the Court and providing, to the Court and Defendant, a copy of the opt-in form completed by each Exaction Class member and submitted to Class Counsel").

On May 12, 2023, the Court directed the Clerk of Court to enter partial Judgment pursuant to Rule 54(b) in favor of the Exaction Class in the total amount of \$185,230,024.42, or 100% of the Exaction Class's damages. *Elec. Welfare Tr. Fund*, No. 19-cv-353, *EWTF Order Directing 54(b) Judgment* at 4; *see also Elec. Welfare Tr. Fund*, No. 19-cv-353, Exhibit A to Supplemented Certification of Final Membership in the Exaction Class (ECF No. 111-1) (Final Certification List) (listing each Class Member and their respective

⁶ This deadline was extended from November 14, 2022, which the Court originally set in its July 27, 2022 Order. *Elec. Welfare Tr. Fund*, No. 19-cv-353 (ECF No. 77).

distribution of damages). In total, class counsel identified—and the Court accepted—357 self-administered, self-insured health plans group health plans that opted in as part of the class, none of which include the Plaintiffs now before the Court. *See* Final Certification List.

On June 26, 2023, Defendant filed a Notice of Appeal of the Court’s 54(b) Judgment in favor of the Exaction Class. *Elec. Welfare Tr. Fund*, No. 19-cv-353, Defendant’s Notice of Appeal (ECF No. 128); *Elec. Welfare Tr. Fund*, No. 19-cv-353, Rule 54(b) Judgment (ECF No. 124). Subsequently, the parties engaged in settlement discussions and resolved all claims brought by the Exaction Class. *See Elec. Welfare Tr. Fund*, No. 19-cv-353, Motion for Final Approval of Settlement and Plan for Allocating Net Settlement Fund to Exaction Class Members (ECF No. 144) at 11. Accordingly, on December 20, 2023, the United States Court of Appeals for the Federal Circuit remanded the action to this Court for finalization of the parties’ settlement agreement. *Elec. Welfare Tr. Fund*, No. 19-cv-353, Order, dated December 20, 2023 (ECF No. 138) at 2.

On February 16, 2024, Class Representative EWTF filed an Unopposed Motion for Preliminary Approval of Settlement and Authorization to Disseminate Notice of Settlement. *Elec. Welfare Tr. Fund*, No. 19-cv-353, ECF No. 142; *Elec. Welfare Tr. Fund*, No. 19-cv-353, Proposed Settlement Agreement, dated February 16, 2024 (ECF No. 142-1) (*EWTF Proposed Settlement Agreement*). On February 21, 2024, the Court preliminarily approved the proposed Settlement Agreement that awarded 91.25% of the Exaction Class’s recoverable damages, or \$169,022,397.28, as “fair, reasonable, and adequate and in the best interest of the Settlement Class.” *Elec. Welfare Tr. Fund*, No. 19-cv-353, Order, dated February 21, 2024 (ECF No. 143) (*EWTF*

February 21, 2024 Order) at 1; Proposed Settlement Agreement at 4.⁷

On March 27, 2024, Class Representative EWTF filed a Motion for Final Approval of the Settlement and Plan for Allocating Net Settlement Fund to Exaction Class Members (ECF No. 144), and Class Counsel filed a Motion for an Award of Attorneys' Fees, Expenses, and Case Contribution Award to Class Representative (ECF No. 145). *Elec. Welfare Tr. Fund*, No. 19-cv-353. On May 1, 2024, following the proper notice period, this Court conducted a public Fairness Hearing, at which no member of the Exaction Class or otherwise sought to participate. *See Elec. Welfare Tr. Fund*, No. 19-cv-353, February 21, 2024 Order at 2. Further, no member of the Exaction Class – or any other person or entity – lodged an objection to the Exaction Class Settlement Agreement. *Elec. Welfare Tr. Fund*, 171 Fed. Cl. at 374. The Plaintiffs in the present case neither opted into the Exaction Class nor objected to the Settlement Agreement.

On May 16, 2024, this Court issued a fulsome Memorandum and Order granting Class Representative EWTF's Motion for Final Approval of Settlement and Class Counsel's Motion for Attorney Fees, Expenses, and a Case Contribution Award. *Id.* at 392.

IV. Post-Electrical Welfare Trust Fund Developments

A. Plaintiffs' First Actions

Between February 3, 2023 and March 10, 2023 – several months before the Court entered its initial

⁷ The Settlement Agreement amount of \$169,022,397.28 is inclusive of all damages, attorneys' fees and out of pocket expenses, and all administrative fees and costs. *EWTF* February 21, 2024 Order at 1; *see also* Proposed Settlement Agreement at 4.

May 12, 2023 Judgment in *EWTF* – various plaintiff employers, which sponsor ten of the group health plans involved as Plaintiffs in the present action, filed nine separate actions.⁸ See Consolidation Order, dated May 15, 2023 (ECF No. 7); see also *Elec. Welfare Tr. Fund*, No. 19-cv-353, Rule 54(b) Judgment (ECF No. 124).

On April 19, 2023, this Court held a status conference in eight of the referenced cases,⁹ during which Plaintiffs’ counsel discussed potential plans to voluntarily dismiss and refile each case due to potential standing concerns raised by the Government.¹⁰ *Louisiana Health Service*, No. 23-cv-152, Transcript of Status Conference, dated April 19, 2023 (ECF No. 16) (April 19, 2023 Tr.) at 8:15–9:1, 9:18–10:9; *Louisiana Health Service*, No. 23-cv-152, Joint Status Report (ECF No. 11) at 3. At the conference, the Court also asked Plaintiffs’ counsel whether the Court should consolidate the present or potential re-filed cases. April 19, 2023 Tr. at 4:12–14. Seemingly misinterpreting the Court’s

⁸ See *Louisiana Health Service & Indemnity Company v. United States*, No. 23-cv-152; *Blue Cross and Blue Shield of South Carolina v. United States*, No. 23-cv-156; *CareFirst, Inc. v. United States*, No. 23-cv-157; *Cook Group, Inc. v. United States*, No. 23-cv-158; *Lester E. Cox Medical Centers v. United States*, No. 23-cv-159; *UnitedHealth Group Incorporated v. United States*, No. 23-cv-160; *Humana Inc. v. United States*, No. 23-cv-209; *Hyatt Corporation v. United States*, No. 23-cv-222; *Blue Cross and Blue Shield of Kansas City v. United States*, No. 23-cv-351.

⁹ *Hyatt Corporation v. United States*, No. 23-cv-222, was transferred to the undersigned Judge on April 19, 2023, following the conclusion of the status conference. See *Hyatt Corporation*, No. 23-cv-222, Order (ECF No. 6).

¹⁰ The Government contended that the employers lacked standing to pursue an illegal exaction claim because the employers themselves did not make contributions into the TRP. April 19, 2023 Tr. at 8:15–25, 9:18–25, 10:1–9; *Louisiana Health Service*, No. 23-cv-152, Joint Status Report (ECF No. 11) at 3.

question to reference the ongoing *EWTF* class action, Plaintiffs' counsel instead referenced *EWTF* in his response, noting:

In our view, each of the individual Plaintiffs who has filed their own case should have the ability to control their own case and that includes potentially participating in appeals in the case independently from the class action and from one another. That includes the potential to sit[] in settlement discussions independently of one another in the class action. And we think there is good precedent for this, Your Honor. This is the third large class action related to the Affordable Care Act . . . We were involved representing the individual Plaintiffs in each of those cases . . . [and], individual Plaintiffs played a very significant role on appeals at both the Federal Circuit and the Supreme Court and we think there's a significant value add to companies affirmatively electing not to opt in to a class action to be able to control their own destiny and litigation.

Id. at 4:20–5:13. Plaintiffs' counsel of record also indicated that “most” Plaintiffs had received notice of *EWTF*'s class action. *Id.* at 7:20–21 (“I believe that most of our clients did receive the class action notice.”).

On May 3, 2023, the parties in each of the nine actions timely filed Joint Status Reports. *See, e.g., Louisiana Health Service*, No. 23-cv-152, Joint Status Report (ECF No. 13). In their filings, each Plaintiff stated that “a new directly related case [will be filed] today” and indicated the parties' joint support for consolidating the nine newly filed cases. *See, e.g., id.* at 1.

Subsequently, the plaintiff employers of the group health plans voluntarily dismissed their actions. *See, e.g., Louisiana Health Service*, No. 23-cv-15, Notice of Voluntary Dismissal without prejudice, dated May 3, 2023 (ECF No. 14).

B. Plaintiffs' Present Complaints

On May 3, 2023, ten group health plans, identifying themselves as self-administered, self-insured health plans, filed nine actions in this Court alleging illegal exaction claims based on contributions they had paid into to the TRP for the 2014 benefit year. *See e.g., BCBS Complaint* (ECF No. 1) (Compl.) ¶ 35.¹¹ Thereafter, in August 2023, five additional plaintiffs filed related actions in this Court.¹² To date, the Court has

¹¹ Where Plaintiffs' factual and legal allegations are largely indistinguishable, the Court cites to the lead case, *Blue Cross Blue Shield*, 23-cv-641.

¹² *See Health Care Serv. Corp. Master Flexible Benefit Plan et al. v. United States*, No. 23-cv-1491; *Aetna Inc. Med. Dental Benefit Plan v. United States*, No. 23-cv-1455; *Board of Trustees of the Carpenters Health and Welfare Tr. Fund for Cal., et al. v. United States*, No. 23-cv-1282. After filing suit, the Plaintiffs in *Health Care Serv. Corp. Master Flexible Benefit Plan et al.* and *Aetna Inc. Med. Dental Benefit Plan*, represented by the same Plaintiffs' attorney as the original filing plaintiffs, filed consent motions for consolidation, providing that "[o]nce consolidated, the pending motion to dismiss in the consolidated case (No. 23-641) will apply to this case as well." *Aetna JSR* at 2; *Health Care Serv. Corp. JSR* at 1–2. These cases were consolidated with the present lead case on September 8, 2023. *Aetna Inc. Med. Dental Benefit Plan* (Consolidation Order) (ECF No. 8); *Health Care Serv. Corp. Master Flexible Benefit Plan et al.* (Consolidation Order) (ECF No. 8). *Board of Trustees of the Carpenters Health and Welfare Trust Fund for California*, which is represented by different lead counsel, was consolidated with the present lead case on October 13, 2023. *Board of Trustees of the Carpenters Health and Welfare Tr. Fund for Cal., et al.* (Consolidation Order) (ECF No. 16).

consolidated twelve (12) cases representing fifteen (15) Plaintiffs with *Blue Cross Blue Shield*, 23-cv-641 designated as the lead case. *See* Def. Reply at 7 n.2; *see also generally* Scheduling Order (ECF No. 17).

C. Defendant’s Motion to Dismiss

On June 30, 2023, the Government filed a Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. *See* Def. Mot. Dismiss at 6. As Plaintiffs’ claims lodged in this Court are subject to a six-year statute of limitations,¹³ Defendant argues “Plaintiffs’ failure to file their [illegal exaction] claims within the

Plaintiffs in *Board of Trustees of the Carpenters Health and Welfare Tr. Fund for Cal., et al.* thereafter filed a supplemental response to Defendant’s Motion to Dismiss separate from all other Plaintiffs in this case. *See* Scheduling Order (ECF No. 17) (directing Plaintiffs in *Board of Trustees of the Carpenters Health and Welfare Trust Fund for California, et al.* to file a Supplemental Response to Defendant’s Motion to Dismiss); Plaintiffs Board of Trustees of the Carpenters Health and Welfare Trust Fund for California and the Carpenters Health and Welfare Fund for California Response to Defendant’s Motion to Dismiss (ECF No. 18) (Board of Trustees’ Resp.). The Board of Trustees Plaintiffs “agree with their Co-Plaintiffs’ Response (ECF No. 14) and hereby adopt it.” Board of Trustee’s Resp. at 1. In their Response, the Board of Trustees Plaintiffs wrote separately to address only one issue. *See infra* note 14. Therefore, with the exception of note 14, all arguments in this Memorandum and Order refer to Plaintiffs’ arguments in their Opposition to Defendant’s Motion to Dismiss (ECF No. 14).

¹³ As Chief Judge Kimberly A. Moore noted in a recent, precedential Federal Circuit decision: “Section 2501’s six-year limitation is jurisdictional.” *Ideker Farms, Inc. v. United States*, 71 F.4th 964, 974 (Fed. Cir. 2023) (citing *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355 (Fed. Cir. 2006) (“[W]e are unwilling to disturb the well-settled law that section 2501 creates a jurisdictional condition precedent for suit in the Court of Federal Claims, which may not be waived by the parties.”), *aff’d*, 552 U.S. 130, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008)).

time prescribed by law divests this Court of subject matter jurisdiction over the alleged claims.” *Id.* at 7. In turn, Plaintiffs assert that the *EWTF* litigation tolled the statute of limitations making their claims in the present case timely. *See generally* Plaintiffs’ Opposition to Defendant’s Motion to Dismiss (ECF No. 14) (Pls. Resp.); Board of Trustees’ Resp.¹⁴

¹⁴ Plaintiffs Board of Trustees of the Carpenters Health and Welfare Trust Fund for California and the Carpenters Health and Welfare Fund for California allege that as a “self-insured self-administered plan,” they were putative class members of the *EWTF* class action, but because “class action counsel incorrectly informed the Court that Plaintiffs were not self-administered,” “the Plaintiffs were dismissed without prejudice.” No. 23-1282, Complaint (ECF No. 1) (Board of Trustees Compl.) at ¶¶ 9, 29, 30; *see also* ¶ 2 (citing *Elec. Welfare Tr. Fund*, No. 19-cv-353, Rule 54(b) Judgment (ECF No. 124)) (“This Court has previously determined that the [TRP] established under the Affordable Care Act was not intended to apply and should not have been applied to self-insured, self-administered health and welfare plans, like the Plaintiffs.”). The Court notes that these Plaintiffs neither objected to the *EWTF* settlement nor challenged its classification as “not self-administered” before this Court. At Oral Argument, Defendant alleged that Plaintiff Board of Trustees of the Carpenters Health is an improper plaintiff and ultimately would not be eligible to recover funds. OA Tr. at 81:24–82:5 (“[Regarding] the Carpenters Fund, there’s two Plaintiffs there, and one of the Plaintiffs is really not proper. One of the Plaintiffs is not the fund at all, but rather it’s the board of directors, so we would probably try and get those dismissed, either by stipulation or through a motion for some sort of judgment on the pleadings.”). Other than being raised at Oral Argument, Defendant did not brief or litigate the issue in this action. Because the Court finds Plaintiffs’ purported claims untimely, the Court need not rule on this issue.

Additionally, Plaintiffs Board of Trustees of the Carpenters Health and Welfare Trust Fund for California and the Carpenters Health and Welfare Fund for California further argue that as a multiemployer trust fund, another prior action in this Court, *Operating Eng’rs Trust Fund v. United States*, “provides an additional period of approximately 18 months of tolling.” Board of

On January 31, 2024, the Court conducted Oral Argument on Defendant’s Motion to Dismiss. *See* Minute Entry, dated January 31, 2024. The Court subsequently ordered Plaintiffs to provide the dates on which they each made contributions to the TRP for the 2014 benefit year as self-insured self-administered health plans. Order, dated January 31, 2024 (ECF No. 23) (January 31, 2024 Order) at 1; Table A (providing dates on which payment was remitted); *see also* OA Tr. at 54:16–19. The Court also directed Plaintiffs to state whether they received timely notice of the EWTF class action during the opt-in period. January 31, 2024 Order at 1. In response, Plaintiffs indicated that they either received timely notice, did not receive notice, or had no readily available record of receiving timely notice. Plaintiffs’ Notice, dated February 15, 2024 (ECF No. 27) (Plaintiffs’ February 15, 2024 Notice); Plaintiffs’ Notice, dated February 27, 2024 (ECF No. 29) (Plaintiffs’ February 27, 2024 Notice).¹⁵

Trustees’ Resp. at 1–2; *see also* Board of Trustees Compl. ¶ 30; OA Tr. at 71:2–22; *Operating Eng’rs Trust Fund v. United States*, No. 17-cv-01732 (in which EWTF was a plaintiff). Defendant disputes that action’s applicability. Def. Reply at 20–22 (citing Board of Trustees’ Resp. at 1–2) (“[W]ithout citing any legal authority whatsoever, the Carpenters Fund asserts that ‘[t]his *Operating Engineers* class action provides an additional period of approximately 18 months of tolling for the [p]laintiffs.’”). Defendant argues that the Court in *Operating Eng’rs Trust Fund* “did not have subject-matter jurisdiction to adjudicate any claims brought by EWTF,” Def. Reply at 21, because 28 U.S.C. § 1500 precluded the Court from exercising jurisdiction due to ongoing District Court litigation in which EWTF was the plaintiff. OA Tr. at 73:16–24. Because the Court concludes 28 U.S.C. § 2501’s six year statute of limitations cannot be tolled, the Court need not reach this issue concerning whether such Plaintiffs would be eligible for the identified, additional period of tolling. *See infra* Discussion, Section II.

¹⁵ In their Notice, Plaintiffs Louisiana Health Service & Indemnity Company Welfare Benefit Plan, Hospital and Medical Plan

D. Supplemental Briefing

On March 5, 2024, the Court ordered supplemental briefing on the following question: “Whether *American Pipe* tolling is available to an individual plaintiff where (i) such plaintiff received timely notice of a previously-filed, opt-in class action but affirmatively chose not to join or seek to join the action as a class member,

for BlueCross BlueShield of South Carolina, and Cook Group Health Plan confirm they received timely notice. Plaintiffs’ February 15, 2024 Notice; Plaintiffs’ February 27, 2024 Notice. Plaintiffs Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan, the Board of Trustees of the Carpenter Health and Welfare Trust Fund for California *et al.*, and the Care First Flexible Benefits Plan state they did not receive timely notice. Plaintiffs’ February 15, 2024 Notice. The remaining Plaintiffs state they have “no readily available record of receiving timely notice.” *Id.*

The parties have informed the Court that several Plaintiffs in this action were aware of the EWTF class action, whether by formal notice or other means. *See* April 19, 2023 Tr. at 7:20-21 (“I believe that most of our clients did receive the class action notice.”); *see also* Plaintiffs Board of Trustees of the Carpenters Health and Welfare Trust Fund for California and the Carpenters Health and Welfare Trust Fund for California Supplemental Brief (ECF No. 31) (Bd. Trustees Cal. Suppl. Brief) at 2 (“The Carpenter Plaintiffs did file a claim in the *Electrical Welfare* class action, as they became aware of its existence through means other than being served with a timely class action notice.”); Board of Trustees Compl. ¶ 30.

Regardless, no Plaintiff purports that their claims accrued within the last six years and accordingly, all parties agree that each Plaintiff must rely on tolling to avoid dismissal. OA Tr. 7:16–24; *id.* at 39:8–40:1; *id.* at 70:23–71:2. As explained *infra*, the Court plainly does not have jurisdiction over Plaintiffs’ claims. 28 U.S.C. § 2501 (“Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”); *see Campbell v. United States*, 932 F.3d 1331, 1336–37 (Fed. Cir. 2019); *Adera v. United States*, 155 Fed. Cl. 553, 558 (2021), *aff’d*, No. 2022-1074, 2023 WL 3768645 (Fed. Cir. June 2, 2023).

and (ii) class certification was *granted* in that action.” Order, dated March 5, 2024 (ECF No. 30) (Order Suppl. Briefing) at 2 (emphasis in original).¹⁶ Specifically, the Court ordered the parties to “identify any decisions issued by the United States Court of Federal Claims, the United States Court of Appeals for the Federal Circuit, or the Supreme Court of the United States and explain what, if any, impact such decisions or lack thereof have on the pending Motion [to Dismiss].” *Id.*

In supplemental briefing, no party was able to identify a past decision in which *American Pipe* tolling was applied to an action in this Court after an opt-in class had been certified in an underlying class action. Plaintiffs’ Supplemental Brief (ECF No. 33) (Pl. Suppl. Brief) at 2 (“Plaintiffs have been unable to identify an opt-in case that squarely addresses the question asked.”); Defendant’s Supplemental Brief (ECF No. 32) (Def. Suppl. Brief) at 1–2; *see generally* Bd. Trustees Cal. Suppl. Brief. Despite this, the Government asserts that “many courts addressing opt-out class actions have expressly held that *American Pipe* tolling is available to litigants who elected to opt out of a certified class.” Def. Suppl. Brief at 2. Defendant therefore states that should the Court hold that *American Pipe*

¹⁶ In its Order, the Court noted that *American Pipe* tolling has previously been available in specific circumstances to individual, putative class members where the original, underlying case was dismissed or where class certification was denied. Order Suppl. Briefing at 1; *see American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 542–43, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974); *Bright v. United States*, 603 F.3d 1273, 1274 (Fed. Cir. 2010) (underlying case dismissed); *Arctic Slope Native Ass’n, Ltd. v. Sebelius*, 583 F.3d 785, 790 (Fed. Cir. 2009) (class certification denied); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1348 (Fed. Cir. 2000) (class certification denied); Def. Mot. Dismiss at 16 (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349–50, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983)); Pls. Resp. at 8; Board of Trustees’ Resp. at 1.

tolling applies to section 2501 (contrary to the Government’s position), no reason exists to treat class certification as a bar to class action tolling in this Court, while the same is not true for opt-out class actions in other Courts. *Id.* at 3–4.¹⁷ Accordingly, Defendants do

¹⁷ Plaintiffs’ counsel indicated at a prior status conference and during Oral Argument that despite notice, at least some of the Plaintiffs in the present action affirmatively chose to not opt in to the *EWTF* class action. April 19, 2023 Tr. at 7:18–8:12 (The Court: “Let me ask you, [Plaintiffs’ Counsel], did your clients get the class notice that was sent out in *EWTF*?” Plaintiffs’ Counsel: “I believe that most of our clients did receive the class action notice . . . [A] number of them, such as Humana, we represented as an individual plaintiff in . . . other two prior Affordable Care Act cases as well.” The Court: “I see . . . So this is an affirmative choice it sounds like to – ” Plaintiffs’ Counsel: “Yes, Your Honor.” The Court: “-- to be separate. Okay.”); OA Tr. at 27:21–24 (The Court: “I’d like to know why not join -- why not opt in here? I already ruled for the Plaintiffs long before even the notice period began, right? You know your clients were going to get money, why not opt in?”). At Oral Argument, Plaintiffs’ counsel cited strategic reasons for Plaintiffs’ affirmative decision to not join *EWTF*’s class action, among them, that some of the Plaintiffs were longstanding clients of counsel’s firm and preferred to proceed with Plaintiffs’ counsel, concern regarding a delay in recovery from the Department of Treasury due to the nature of class actions, and other related “considerations where they might want to proceed with a case differently from a class action.” OA Tr. at 28:15–32:6.

In the present Motion, Plaintiffs allege they were putative members of the *EWTF* class action, which litigated the same illegal exaction claims as those presently before the Court. In the *EWTF* class action, this Court denied the Government’s motion to dismiss as it related to *EWTF*’s illegal exaction claim on July 30, 2021, and plainly stated that the text of the ACA did not grant HHS the authority to collect TRP contributions for the 2014 benefit year from self-insured group health plans that did not use a third-party administrator. *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 181–84. Subsequently, this Court granted summary judgment in favor of the Exaction Class and certified the class. *Elec. Welfare Tr. Fund*, 160 Fed. Cl. at 469–70; *Elec. Welfare Tr. Fund*, No. 19-

not argue that Plaintiffs’ decision to forgo joining the *EWTF* class action would bar Plaintiffs from bringing the present individual suits; it argues only that equitable tolling is unavailable to Plaintiffs here.

With this relevant background in place, the Court turns to the merits of Defendant’s Motion to Dismiss. At issue is whether tolling is available to Plaintiffs, and consequently, whether this Court possesses subject matter jurisdiction. As the Court concludes *American Pipe* tolling cannot be applied to toll the deadlines mandated by 28 U.S.C. § 2501, this Court need not reach the parties’ secondary arguments regarding claim accrual.

APPLICABLE LEGAL STANDARD

To withstand a motion to dismiss pursuant to Rule 12(b)(1), a “plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.” *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014) (citing *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)); *see also* Rule 12(b)(1). The court must accept as true all undisputed facts asserted in the complaint and draw reasonable inferences in favor of the plaintiff. *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016); *Estes Exp. Lines*, 739 F.3d at 692. The court however is not limited to the pleadings in its jurisdictional

cv-353, Order, dated December 21, 2022 (ECF No. 97) at 1. Accordingly, while pursuit of a separate action is generally permitted if timely filed, the practical fruitfulness of pursuing a separate action is questionable where, as here, Plaintiffs would likely have been members of the Exaction Class and entitled to damages for their respective illegal exaction claims. Indeed, the Court ultimately awarded judgment for 100% of the Exaction Class damages, and pursuant to a later settlement agreement, approved a distribution of 91.25% of that judgment. *See Elec. Welfare Tr. Fund*, 171 Fed. Cl. at 392.

inquiry; “it may ‘inquire into jurisdictional facts’ to confirm jurisdiction.” *Bitscopie, Inc. v. United States*, 166 Fed. Cl. 677, 696 (2023) (quoting *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)). This Court must dismiss all claims that do not fall within its subject matter jurisdiction. *See* Rule 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

DISCUSSION

Defendant’s Motion to Dismiss for lack of subject matter jurisdiction asserts two arguments in favor of dismissal. First, Defendant contends that Plaintiffs’ actions are untimely because the applicable statute of limitations, 28 U.S.C. § 2501, is not amenable to equitable tolling and is therefore unavailable to Plaintiffs. Def. Mot. Dismiss at 7. Second, Defendant argues that even if Plaintiffs were correct that equitable tolling is applicable here, Plaintiffs’ claims accrued over six years ago and are therefore still untimely under the applicable statute of limitations. *Id.*

In addressing Defendant’s Motion to Dismiss, the Court will first address the parties’ arguments regarding equitable – or *American Pipe* – tolling. As discussed below, this Court holds that 28 U.S.C. § 2501 cannot be tolled as a matter of law, and consequently that Plaintiffs’ claims are barred by the statute of limitations. Accordingly, as this Court lacks subject matter jurisdiction over Plaintiffs’ claims, it grants Defendant’s Motion to Dismiss.¹⁸

¹⁸ As this Court lacks jurisdiction over Plaintiffs’ actions, it refrains from addressing the parties’ arguments regarding claim accrual, as doing so would be advisory in nature.

I. The Court’s Jurisdiction and Applicable Statute of Limitations

The Tucker Act’s statute of limitations permits the Court of Federal Claims to exercise jurisdiction over claims filed within six years of the date of accrual. 28 U.S.C. § 2501 (“Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”); *Campbell*, 932 F.3d at 1336–37; *Adera*, 155 Fed. Cl. at 558, *aff’d*, No. 2022-1074, 2023 WL 3768645 (Fed. Cir. June 2, 2023). In *John R. Sand & Gravel Co. v. United States*, the Supreme Court held that this Court’s statute of limitations, 28 U.S.C. § 2501, is jurisdictional in nature and therefore not susceptible to equitable tolling. *See John R. Sand & Gravel Co.*, 552 U.S. 130, 134, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008); *Campbell*, 932 F.3d at 1336–37 (citing *John R. Sand & Gravel Co.*, 552 U.S. at 130, 128 S.Ct. 750); *United States v. Wong*, 575 U.S. 402, 412–13, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015) (internal citations omitted) (citing *Kendall v. United States*, 107 U.S. 123, 125–26, 2 S.Ct. 277, 27 L.Ed. 437 (1883); *Finn v. United States*, 123 U.S. 227, 232, 8 S.Ct. 82, 31 L.Ed. 128 (1887); *Soriano v. United States*, 352 U.S. 270, 273–74, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957)) (“[T]he statute of limitations governing contract (and some other non-tort) suits brought against the United States under the Tucker Act . . . [has] long provided that such suits ‘shall be forever barred’ if not filed within six years. And this Court repeatedly held that 6-year limit to be jurisdictional and thus not subject to equitable tolling.”).

Since *John R. Sand*, this Court and the United States Court of Appeals for the Federal Circuit have reiterated on several occasions, without qualification, that 28 U.S.C. § 2501 is impervious to equitable tolling.

Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (quoting *John R. Sand & Gravel Co.*, 552 U.S. at 133–34, 128 S.Ct. 750) (“[E]quitable tolling . . . is foreclosed by *John R. Sand & Gravel*, wherein the Court held that the Tucker Act’s statute of limitations is in the ‘more absolute’ category that cannot be waived or extended by equitable considerations.”); *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1264 (Fed. Cir. 2017) (referencing *John R. Sand* in stating that “[28 U.S.C. § 2501] may not be equitably tolled or waived.”); *Adera v. United States*, No. 2022-1074, 2023 WL 3768645, at *2 (Fed. Cir. June 2, 2023) (citing *John R. Sand & Gravel Co.*, 552 U.S. at 134, 128 S.Ct. 750) (describing *John R. Sand* as “holding that § 2501 sets forth a ‘more absolute, kind of limitations period’ and is not subject to equitable tolling”); *Jordan v. United States*, 158 Fed. Cl. 440, 445–46 (2022) (internal citations omitted) (citing *John R. Sand & Gravel Co.*, 552 U.S. at 133–39, 128 S.Ct. 750) (“[Because] [t]he Supreme Court has ‘long interpreted’ this Court’s limitations statute as ‘absolute’ and ‘jurisdictional[,]’ . . . the statute of limitations is not subject to equitable tolling.”).

Subject to 28 U.S.C. § 2501, the Tucker Act grants this Court jurisdiction over illegal exaction claims. 28 U.S.C. § 1491(a); *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 181–82 (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). An illegal exaction claim involves money “improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.” *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting *Eastport S.S. Corp.*, 372 F.2d at 1007); see also *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573–74 (Fed. Cir. 1996). Said differently, “[i]llegal exaction claims are those alleging that ‘the [g]overnment has the citizen’s money in its pocket.’” *Jordan*, 158 Fed. Cl.

at 453 (quoting *Eastport S.S. Corp.*, 372 F.2d at 1008). Such a claim “involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution.” *Norman*, 429 F.3d at 1095 (citing *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002)). In accordance with its jurisdictional nature, the Tucker Act’s statute of limitations, “makes no exceptions for illegal exaction claims even where otherwise properly pled.” *Jordan*, 158 Fed. Cl. at 454 (citing *Adera*, 155 Fed. Cl. at 558).

II. This Court Lacks Subject Matter Jurisdiction over Plaintiffs’ Claims

As a preliminary matter, the parties agree that without tolling, Plaintiffs’ claims are untimely. OA Tr. 7:16–24 (Defendant’s Counsel: “So a starting point for today, everyone agrees, that all of these complaints are untimely under 28 U.S.C. Section 2501. The only way for them to become timely is if 2501 can somehow be tolled to make their claims timely.”); *id.* at 39:9–40:1 (The Court: “If I rule against you on tolling . . . is the case over?” . . . Plaintiffs’ Counsel: “Yes, if tolling does not apply . . . yes, Your Honor, I agree with you.”); *see also* Pls. Resp. at 26.

Plaintiffs filed their complaints between May 3, 2023 and August 29, 2023. *See, e.g., Blue Cross and Blue Shield of Kansas City Welfare Benefit Plan*, No. 23-cv-641 (Complaint filed on May 3, 2023); *Health Care Serv. Corp. Master Flexible Benefit Plan*, No. 23-cv-1491 (Complaint filed on August 29, 2023). Thus, should tolling be unavailable, Plaintiffs’ claims must have accrued within six years prior to 2023 to be considered as timely filed. Although the parties dispute the precise date of accrual, under either scenario, it is undisputed that each of Plaintiffs’ claims accrued well-

before 2017.¹⁹ Moreover, the last of any payments remitted by Plaintiffs to HHS occurred in 2015. *See* Table A; Def. Mot. Dismiss at 16. As a result of this reality, the parties’ briefs recognize the integral nature of tolling to this action, and large portions of their respective briefs are dedicated to legal arguments regarding tolling. As such, the winding legal history on the topic of tolling merits discussion.

In its 1974 decision, *American Pipe & Construction Co. v. Utah*, the Supreme Court held that the commencement of a timely class action lawsuit pursuant to Federal Rule of Civil Procedure (FRCP) 23 tolled the applicable statute of limitations period for putative class members under the Clayton Act where class

¹⁹ Plaintiffs contend that the accrual date for Plaintiffs’ illegal exaction claims occurred, at the earliest, on January 15, 2015, “when Plaintiffs were required to make their TRP contributions for 2014 pursuant to the HHS rule.” Pls. Resp. at 26. Plaintiffs assert their position is accurate because “under this Court’s caselaw, an illegal exaction claim only begins to accrue from when the Government exacts the claimant’s monies, *i.e.*, when a disputed payment is made or monies are withheld from the plaintiff.” *Id.* at 25. According to Plaintiffs, “[t]his focus on the actual payment, or withholding, of the plaintiff’s money as giving rise to the cause of action makes sense in an illegal exaction case because it is based on the nature of the claim itself.” *Id.* In contrast, Defendant argues that Plaintiffs’ illegal exaction claims accrued “no later” than March 11, 2013. Def. Mot. Dismiss at 21. To determine this date, Defendant relies on decisions that determined the accrual date for Takings claims. *Id.* at 20–21. In accordance with such cases, Defendant contends that March 11, 2013 is the correct accrual date because it is the date on which HHS promulgated its final rule defining “contributing entity” to include self-administered, self-insured health plans. *Id.* at 21 (citing *Elec. Welfare Tr. Fund*, 155 Fed. Cl. at 177) (The final rule “established the contribution rate applicable to all ‘contributing entities,’ including plaintiffs, for the 2014 benefit year.” (citing HHS Notice of Benefit and Payment Parameters for 2014 (Final Rule), 78 Fed. Reg. at 15,460)).

certification was ultimately denied. 414 U.S. 538, 554, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). Specifically, the Court explained: “We are convinced that the rule most consistent with federal class action procedure must be 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.” *Id.*;²⁰ see also *Cal. Pub. Employees’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 508–09, 137 S.Ct. 2042, 198 L.Ed.2d 584 (2017) (*CalPERS*). Accordingly, from the date class certification is denied, “the statute-of-limitations clock begins to run again for the individual members of the failed class” and each member of the putative class “then has the remaining days under the limitations period to intervene as an individual plaintiff in the action.” *Kelly v. United States*, 171 Fed. Cl. 550, 560 (2024) (citing *American Pipe & Construction Co.*, 414 U.S. at 561, 94 S.Ct. 756).

Despite *American Pipe*’s narrow holding, the Supreme Court in *Crown, Cork & Seal Co., Inc. v. Parker*, extended the availability of *American Pipe* tolling to potential class members who opted to file individual suits rather than intervene in the original putative class action. 462 U.S. 345, 353–54, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). The Court reasoned that this

²⁰ The *American Pipe* Court qualified its holding, noting that “at least where class action status has been denied solely because of failure to demonstrate that ‘the class is so numerous that joinder of all members is impracticable,’ the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.” *American Pipe & Construction Co.*, 414 U.S. at 552–53, 94 S.Ct. 756.

holding aligned most closely with the principles set forth in *American Pipe*:

The *American Pipe* Court recognized that 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. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied. Much the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification. There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

Id. at 350–51, 103 S.Ct. 2392; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).²¹

²¹ Indeed, the Government agrees that subsequent Supreme Court precedent makes clear that *American Pipe* tolling is “equally available to putative class members who seek to intervene in the original class action and to putative class members who elect to file actions of their own.” Def. Mot. Dismiss at 16 (citing *Crown, Cork & Seal Co.*, 462 U.S. at 349–50, 103 S.Ct. 2392); *see also* Def. Suppl. Brief at 3–4 (“[W]e see no reason to treat class certification as a bar to class action tolling for opt-in class actions

Critical to understanding the Supreme Court’s jurisprudence on this issue is its 2008 decision in *John R. Sand & Gravel Co. v. United States*, which squarely addressed the Court of Federal Claims’ statute of limitations in Tucker Act actions, 28 U.S.C. § 2501. 552 U.S. at 134, 128 S.Ct. 750. Specifically, the Court considered “whether a court must raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government’s waiver of the issue.” *Id.* at 132, 128 S.Ct. 750. After explaining that 28 U.S.C. § 2501 is *jurisdictional* in nature, the Supreme Court held “that the special statute of limitations governing the Court of Federal Claims requires . . . *sua sponte* consideration.” *Id.* In its analysis, the Court specifically addressed the effect of section 2501’s jurisdictional status on equitable tolling. *Id.* at 133–34, 128 S.Ct. 750. The Supreme Court’s explanation of section 2501 is critical because the statute’s unequivocal status as jurisdictional in nature forecloses certain arguments regarding tolling. *Supra* Discussion, Section I. The Supreme Court specifically discussed such distinctions in *John R. Sand*, explaining:

Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver. Such statutes also typically

but not for opt-out class. We accordingly do not argue in this case that plaintiffs’ decision not to join a certified opt-in class, standing alone, bars them from bringing their individual suits.”). *See supra* Background, Section IV.

permit courts to toll the limitations period in light of special equitable considerations.

Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency. The Court has often read the time limits of these statutes *as more absolute*, say, as requiring a court to decide a timeliness question despite a waiver, *or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period*. As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as “jurisdictional.”

This Court has long interpreted the court of claims limitations statute as setting forth this *second*, more absolute, kind of limitations period.

552 U.S. at 133–34, 128 S.Ct. 750 (emphases added) (internal citations omitted)

In 2010, following the Supreme Court's decision in *John R. Sand*, the Federal Circuit decided *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010). In *Bright*, plaintiffs appealed the Court of Federal Claims' decision to grant the Government's motion to dismiss on the basis that plaintiffs had failed to opt in to a putative class action until after the expiry of section 2501's six-year statute of limitations period. *Id.* at 1277. In its

analysis regarding tolling, the Federal Circuit explained that “[b]ecause the Supreme Court chose to describe the appropriate statute of limitations as being ‘toll[ed],’ we have referred to ‘the tolling rule of *American Pipe*’ and have framed the question to be decided as ‘whether the limitations period was toll[ed].” *Id.* at 1284 (citing *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352, 1354 (Fed. Cir. 2000); *Arctic Slope Native Ass’n, Ltd. v. Sebelius*, 583 F.3d 785, 791–92 (Fed. Cir. 2009)). In finding that *American Pipe* tolling applied to this Court’s statute of limitations, the Federal Circuit held:

[W]hen a class action complaint is filed in the Court of Federal Claims and class certification is sought prior to expiration of the section 2501 limitations period, the limitations period is toll[ed]. The limitations period is toll[ed] during the period the court allows potential class members to opt in to the class.

Id. at 1274. In *Bright*, the Federal Circuit distinguished *John R. Sand’s* equitable tolling bar and, instead, determined that *American Pipe* tolling is applicable to section 2501 because it was a form of *statutory*, not equitable tolling. *Id.* at 1287–88. Accordingly, the Federal Circuit determined that *John R. Sand’s* explanation regarding equitable doctrines was irrelevant to the tolling directive in *American Pipe*. *See id.* In other words, and as Plaintiffs acknowledge, *Bright* “rested on the proposition that *American Pipe* tolling is not an equitable doctrine at all, but rather a statutory directive drawn from Rule 23.” Pls. Resp. at 9. Specifically, the Federal Circuit explained in *Bright*:

In our view, the fact that equitable tolling is barred under section 2501 does not mean that class action statutory tolling

also is barred. The two concepts are different. Equitable tolling is a principle that permits courts to modify a statutory time limit and “extend equitable relief” when appropriate. Class action statutory tolling, on the other hand, does not modify a statutory time limit or “extend equitable relief.” Rather, it is a procedure that suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations.

Bright, 603 F.3d at 1287–88 (internal citations and quotations omitted). As reflected above, in holding that *American Pipe* tolling was a form of statutory tolling, the Federal Circuit also reiterated that “equitable tolling is barred under section 2501.” *Id.* at 1287.

In 2017, the Supreme Court decided *CalPERS*, 582 U.S. at 497, 137 S.Ct. 2042. In *CalPERS*, plaintiff California Public Employees’ Retirement System filed suit alleging certain violations of section 11 of the Securities Act in connection with its purchase of public securities offerings in 2007 and 2008. *Id.* at 502, 137 S.Ct. 2042. Plaintiff was a putative member of a class action filed on behalf of purchasers of these securities, but plaintiff also filed a separate suit outside the time permitted by statute. *Id.* at 501, 137 S.Ct. 2042. The class action ultimately reached a proposed settlement, but plaintiff, “apparently convinced it could obtain a more favorable recovery in its separate suit, opted out of the class.” *Id.* at 503, 137 S.Ct. 2042.

Section 13 of the Securities Act requires Section 11 suits to be filed within three years of the relevant securities offering. *Id.* at 505, 137 S.Ct. 2042. Although the class-action suit was timely filed, plaintiff

CalPERS filed its separate suit more than three years after the relevant securities offerings. *Id.* at 501, 137 S.Ct. 2042. Accordingly, defendant moved to dismiss, alleging plaintiff’s claims were untimely. *Id.* at 503, 137 S.Ct. 2042. Relying on *American Pipe*, plaintiff argued “that the 3–year period was tolled during the pendency of the class-action filing.” The Supreme Court explained:

The question then is whether § 13 permits the filing of an individual complaint more than three years after the relevant securities offering, when a class-action complaint was timely filed, and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it. The answer turns on the *nature and purpose* of the 3–year bar and of the tolling rule that petitioner seeks to invoke.

Id. at 504, 137 S.Ct. 2042 (emphasis added). The Court first determined that Section 13’s 3-year bar was a statute of repose, not a statute of limitations. *Id.* at 505, 137 S.Ct. 2042. Its status as a statute of repose meant it would not be subject to any form of equitable tolling. *Id.* at 508, 137 S.Ct. 2042 (citing *CTS Corp. v. Waldburger*, 573 U.S. 1, 9–10, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991)) (“[T]he Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling.”). Thus, dispositive to the Court’s ultimate holding was whether *American Pipe* tolling, the form of tolling plaintiff sought to invoke, was a form of equitable tolling as opposed to a form of statutory tolling. The Court explained:

[T]he source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions. Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.

The Court's holding was instead grounded in the traditional equitable powers of the judiciary. The Court described its rule as authorized by the "judicial power to toll statutes of limitations." The Court also relied on cases that are paradigm applications of equitable tolling principles, explaining with approval that tolling in one such case was based on "considerations 'deeply rooted in our jurisprudence.'" . . .

Perhaps for these reasons, this Court has referred to *American Pipe* as "equitable tolling." It is true, however, that the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner. It did not analyze, for example, whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct. The balance of the Court's reasoning nonetheless reveals a

rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice.

This analysis shows that the *American Pipe* tolling rule does not apply to the 3-year bar mandated in § 13.

Id. at 509–10, 137 S.Ct. 2042 (internal citations omitted). Thus, in *CalPERS* the Supreme Court clarified unequivocally that *American Pipe* tolling is a form of equitable tolling. The Supreme Court’s holding directly contrasts with the Federal Circuit’s earlier decision in *Bright*, which had conversely reasoned *American Pipe* tolling is a form of statutory, not equitable tolling. *Bright*, 603 F.3d at 1287–88 (“Class action statutory tolling, on the other hand, does not modify a statutory time limit or ‘extend equitable relief.’ Rather, it is a procedure that suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced.”); *see also id.* at 1287 (“In our view, the fact that equitable tolling is barred under section 2501 does not mean that class action statutory tolling also is barred.”).

The Federal Circuit has not since had the occasion to address the validity of its holding in *Bright* in the context of the Supreme Court’s later – and directly contrary – holding in *CalPERS*. However, following *John R. Sand*, the Federal Circuit and the Court of Federal Claims have reiterated, without qualification, on several occasions that 28 U.S.C. § 2501 is impervious to equitable tolling. *Young*, 529 F.3d at 1384 (quoting *John R. Sand & Gravel Co.*, 552 U.S. at 133–34, 128 S.Ct. 750) (“[E]quitable tolling . . . is foreclosed by *John R. Sand & Gravel*, wherein the Court held that the Tucker Act’s statute of limitations is in the ‘more absolute’ category that cannot be waived or extended by

equitable considerations.”); *Reoforce, Inc.*, 853 F.3d at 1264 (citing *John R. Sand* in stating that “[28 U.S.C. § 2501] may not be equitably tolled or waived.”); *Adera*, 2023 WL 3768645, at *2 (citing *John R. Sand & Gravel Co.*, 552 U.S. at 134, 128 S.Ct. 750) (describing *John R. Sand* as “holding that § 2501 sets forth a ‘more absolute, kind of limitations period’ and is not subject to equitable tolling”); *Jordan*, 158 Fed. Cl. at 445–46 (citing *John R. Sand & Gravel Co.*, 552 U.S. at 133–39, 128 S.Ct. 750) (“[Because] [t]he Supreme Court has ‘long interpreted’ this Court’s limitations statute as ‘absolute’ and ‘jurisdictional[,]’ . . . the statute of limitations is not subject to equitable tolling.”).

Moreover, recently on May 8, 2024, another judge of the Court of Federal Claims examined *Bright* in light of *CalPERS* in *Kelly v. United States*, 171 Fed. Cl. at 561. In *Kelly*, plaintiff asserted that his Fifth Amendment Takings claim was timely despite being filed outside of this Court’s statute of limitations, contending that the limitations period was tolled during the pendency of a class action in which plaintiff was a putative member. *Id.* at 556; *see also id.* at 560. After analyzing the above-referenced cases, Judge Molly R. Silfen concluded that, following the Supreme Court’s ruling in *CalPERS*, “*American Pipe* tolling cannot be applied to section 2501.” *Id.* at 564 n.4; *see also id.* at 560 (“The government is correct: The Tucker Act’s statute of limitations is not subject to class-action tolling.”).²²

²² On June 4, 2024, Defendant filed a Notice of Additional Authority regarding *Kelly v. United States*. *See* Defendant’s Notice of Additional Authority (ECF No. 34) (citing *Kelly*, 171 Fed. Cl. at 550). Plaintiffs thereafter filed a Response, contending the Court in *Kelly* made “core errors in [its] analysis of the Tucker Act’s statute of limitations.” Plaintiffs’ Response to the Government’s Notice of Additional Authority (ECF No. 35) (Pls. Resp. Authority) at 1.

**A. The Supreme Court has Foreclosed
American Pipe Tolling of 28 U.S.C § 2501**

At the core, the parties fundamentally disagree whether *Bright*, and consequently tolling under this Court’s statute of limitations, remains viable and applicable in the Court of Federal Claims. Plaintiffs contend that *Bright* remains binding precedent on this Court and that even if given the opportunity, there is no clear indication that the Federal Circuit would overrule *Bright*. Pls. Resp. at 6. Said differently, Plaintiffs argue that although *Bright* has been undermined by the Supreme Court, it has not been directly overruled, and accordingly *Bright* remains binding on this Court. *Id.* at 10. In contrast, Defendant contends that *Bright* is unsalvageable considering intervening Supreme Court precedent, and further reasons that because the Federal Circuit has consistently held section 2501 is not subject to equitable tolling, the Supreme Court’s ruling in *CalPERS* is dispositive to the outcome of this action. Def. Mot. Dismiss at 7; OA Tr. at 11:14–22.

After extensive review of the relevant jurisprudence, and considering the Federal Circuit’s instruction that “the issues decided by the higher court need not be identical to be controlling,” the Court holds that that it must unquestionably follow intervening Supreme Court precedent in *CalPERS*, which has clearly “undercut the theory or reasoning underlying [*Bright*] in such a way that the cases are clearly irreconcilable.” *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)).

Each of Plaintiffs’ responsive arguments are addressed in the Court’s analysis below.

a. Plaintiffs’ Interpretation of *Bright* Fails to Support its Argument

According to Plaintiffs, *Bright* is “squarely on point and disposes of the Government’s motion to dismiss.” Pls. Resp. at 6.²³ Although Plaintiffs concede the reasoning of *Bright* has been “undermined” by the Supreme Court’s holding in *CalPERS*, Plaintiffs nevertheless contend that *Bright*’s now-inaccurate description of *American Pipe* tolling as statutory in nature is not dispositive to the outcome of the present actions. *Id.* at 12–14. To this end, Plaintiffs point to other portions of *Bright* that they contend support their position. *Id.* Plaintiffs further assert that Defendant’s reliance on *John R. Sand* and *CalPERS* misses the mark. *Id.* at 14–17.

Specifically, Plaintiffs argue that to the extent *CalPERS* undermines *Bright* in stating *American Pipe* tolling is equitable (and not statutory) in nature, *Bright* remains good law in part because the Federal Circuit provided multiple bases for its ruling. *Id.* at 12–14. At the outset, Plaintiffs concede that the reasoning of *Bright* rested on a statutory proposition that has since been undermined by the Supreme Court in *CalPERS*. *Id.* at 9–10 (“*Bright* rested on the proposition that *American Pipe* tolling is not an equitable doctrine at all, but rather a statutory directive drawn from Rule 23. And it is also true that this particular assertion has been undermined by the Supreme Court’s decision in *CalPERS*, 582 U.S. at 509, 137 S.Ct. 2042, which held that the statutory limitations period

²³ As discussed in Section II.B, Plaintiffs assert that *Bright* remains not only binding precedent for this Court, but also for any Federal Circuit panel. Pls. Resp. at 9 (citing *Deckers Corp. v. United States*, 752 F.3d 949, 965 (Fed. Cir. 2014)). See Discussion, Section II.B.

at issue in that case was a statute of repose and thus not amenable to equitable tolling, and in the course of so holding described *American Pipe* tolling as equitable, rather than statutory, in nature.”); *id.* at 13 (“To be sure, [in *Bright*] the Federal Circuit read *American Pipe* as resting on a statutory foundation and not as a form of equitable tolling, at least not in the sense discussed in *John R. Sand*.”); *id.* at 22 (“To be sure, *CalPERS* undermines *Bright*’s characterization of *American Pipe* as statutory rather than equitable in origins.”); *see also* Def Reply at 9 (noting Plaintiffs’ acknowledgements).

Plaintiffs note that the Federal Circuit’s reasoning in *Bright* also included a rejection of the Government’s claim that “permitting such tolling would constitute using procedural rules to impermissibly expand the Court of Federal Claims’ jurisdiction.” Pls. Resp. at 12. Instead, Plaintiffs note that the Federal Circuit explained that Rule 23 has the same force as a statute. *Bright*, 603 F.3d at 1279. Further, Plaintiffs argue that despite the Federal Circuit’s incorrect reading of *American Pipe* as a form of statutory – not equitable – tolling, *Bright* nonetheless also differentiated equitable tolling and *American Pipe* class action tolling. Pls. Resp. at 12–13 (Plaintiffs argue that “while acknowledging that *John R. Sand* held that § 2501’s limitation is ‘jurisdictional’ and ‘forbid[s] a court to consider whether *certain* equitable considerations warrant extending a limitations period,’ the Federal Circuit distinguished between the cases based on the form of equitable tolling at issue in *John R. Sand* and class action *American Pipe* tolling.”). Finally, Plaintiffs point to *Bright*’s favorable reference of *Barbieri v. United States*, a 1988 Claims Court decision, which applied *American Pipe* tolling to the Tucker Act’s statute of limitations. *Id.* at 13–14, 19 n.3.

These arguments fail to carry the weight Plaintiffs proffer. First, the Federal Circuit’s finding that Rule 23 has the same force as a statute is irrelevant to the issue at hand in light of the Supreme Court’s clear and contrary analysis in *CalPERS*. *CalPERS*, 582 U.S. at 509, 137 S.Ct. 2042 (“Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.”).

Second, Plaintiffs read *Bright* to distinguish equitable tolling from *American Pipe* tolling. While creative, Plaintiffs’ interpretation is plainly contrary to binding precedent. Specifically, though Plaintiffs make much of the phrase “certain”²⁴ in *John R. Sand*, this Court, the United States Court of Appeals for the Federal Circuit, and the Supreme Court have reiterated on several occasions that 28 U.S.C. § 2501 is impervious to equitable tolling *without qualification*.²⁵ *Wong*, 575 U.S. at 412–13, 135 S.Ct. 1625 (citing *Kendall*, 107

²⁴ *John R. Sand & Gravel Co.*, 552 U.S. at 133–34, 128 S.Ct. 750 (emphases added) (internal citations omitted) (“The Court has often read the time limits of these statutes as more absolute, say, as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether *certain* equitable considerations warrant extending a limitations period. As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as ‘jurisdictional.’”).

²⁵ For this reason, Plaintiffs’ contrary argument that the Supreme Court in *John R. Sand* somehow left open the possibility of equitable tolling, even for jurisdictional statutes of limitations, is unavailing. Pls. Resp. Authority at 1 (“Even where a statute of limitations has been described as ‘jurisdictional’ and thus ‘more absolute,’ the Court has been careful (as it was in *John R. Sand*), to limit the scope of such pronouncements.”).

U.S. at 125–126, 2 S.Ct. 277; *Finn*, 123 U.S. at 232, 8 S.Ct. 82; *Soriano*, 352 U.S. at 273–274, 77 S.Ct. 269) (“[T]he statute of limitations governing contract (and some other non-tort) suits brought against the United States under the Tucker Act. See § 2501 . . . [has] long provided that such suits ‘shall be forever barred’ if not filed within six years. And this Court repeatedly held that 6-year limit to be jurisdictional and thus not subject to equitable tolling.”); *Young*, 529 F.3d at 1384 (quoting *John R. Sand & Gravel Co.*, 552 U.S. at 133–34, 128 S.Ct. 750) (“[E]quitable tolling . . . is foreclosed by *John R. Sand & Gravel*, wherein the Court held that the Tucker Act’s statute of limitations is in the ‘more absolute’ category that cannot be waived or extended by equitable considerations.”); *Reoforce, Inc.*, 853 F.3d at 1264 (referencing *John R. Sand* in stating that “[28 U.S.C. § 2501] may not be equitably tolled or waived”); *Adera*, 2023 WL 3768645, at *2 (citing *John R. Sand & Gravel Co.*, 552 U.S. at 134, 128 S.Ct. 750); *Jordan*, 158 Fed. Cl. at 445–46 (citing *John R. Sand & Gravel Co.*, 552 U.S. at 133–39, 128 S.Ct. 750).

Further, Plaintiffs’ attempt to differentiate “traditional equitable tolling” from *American Pipe* tolling, which Plaintiffs assert could be described as a type of “statutory equitable tolling,” carries little, if any, weight in case law. Pls. Resp. at 12–13; Pls. Resp. Authority at 2; OA Tr. at 25:18–19. Plaintiffs lack support for their argument and instead primarily rely on a portion of *Bright*, which states:

Equitable tolling is a principle that permits courts to modify a statutory time limit and “extend equitable relief” when appropriate. *See Irwin*, 498 U.S. at 96, 111 S.Ct. 453 (describing the range of instances in which courts have applied the equitable tolling doctrine); *see also*,

Hallstrom v. Tillamook County, 493 U.S. 20, 27, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989) (a “traditional equitable tolling principle” should not be applied to a statutory limitations period when “the equities do not weigh in favor of modifying statutory requirements”). Class action statutory tolling, on the other hand, does not modify a statutory time limit or “extend equitable relief.” Rather, it is a procedure that suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations. *See Arctic Slope*, 583 F.3d at 791 (statutory class action tolling principles permit “the statute of limitations [to be] suspended during the pendency of the class action proceedings”).

603 F.3d at 1287–88; *see* Pls. Resp. at 13.

Plaintiffs read too far into these statements, which the Federal Circuit discussed in the pre-*CalPERS* context that *American Pipe* tolling was then-considered statutory, not equitable in nature. Nothing in *Bright*, or in any other precedent cited by Plaintiffs, provides support for reclassifying *American Pipe* tolling into a new category of “statutory equitable tolling.”²⁶ *See*

²⁶ At Oral Argument, Defendant likewise stressed this lack of distinction in case law.

Defendant’s Counsel: “And I want to stress again, we have seen no case making a distinction between what Plaintiffs call traditional forms of equitable tolling and *American Pipe*, which is equitable tolling. We’ve seen none of that. Courts treat

generally Pls. Resp.; see also *Kelly*, 171 Fed. Cl. at 561 (citing *Bright*, 603 F.3d at 1285–88) (rejecting plaintiff’s argument that “*Bright* characterized class-action tolling as distinct from either [equitable or statutory tolling],” and noting that “*Bright* held that *American Pipe* tolling is statutory, and its reasoning hinges on that categorization”). Moreover, *CalPERS* itself refers to *American Pipe* equitable tolling as grounded in traditional equitable powers. *CalPERS*, 582 U.S. at 509, 137 S.Ct. 2042 (quoting *American Pipe & Constr. Co.*, 414 U.S. at 558, 94 S.Ct. 756) (“The Court’s holding [in *American Pipe*] was [] grounded in the traditional equitable powers of the judiciary. The Court described its rule as authorized by the ‘judicial power to toll statutes of limitations.’ ”); *id.* at 510, 137 S.Ct. 2042 (“The balance of the Court’s reasoning nonetheless reveals a rule based on traditional equitable powers . . .”). Additionally, in *CalPERS*, *American Pipe*’s equitable tolling status made it impervious to the 3-year time bar at issue, without exception. Thus, the Supreme Court’s description of *American Pipe* tolling as equitable in

equitable tolling as one group. Equitable tolling is equitable tolling, no matter what kind of considerations the Court takes a look at. And the Supreme Court has made clear that equitable tolling, in any form, cannot apply to jurisdictional statutes of limitations.”

The Court: “And it hasn’t been dissected into . . . different types of equitable tolling?”

Defendant’s Counsel: “[W]e have not seen that done by any court in any jurisdiction. . . . There’s no traditional versus, I don’t know, modern forms of equitable tolling. There’s no dichotomy between them. Equitable tolling is equitable tolling. And none of it can apply to 2501.”

OA Tr. at 80:1–81:4.

nature, when paired with the Supreme Court and Federal Circuit's unqualified holdings that section 2501 does not permit equitable tolling, leaves no room for distinguishing away these clear guard rails.

Lastly, although Plaintiffs are correct that *Bright* favorably cites to the reasoning in *Barbieri*, its reference does not affect the Court's clear directive from the Supreme Court. *Bright* references *Barbieri*'s interpretation of *American Pipe* tolling *before* the Supreme Court in *CalPERS* made clear that *American Pipe* tolling is a form of equitable – not statutory – tolling. *CalPERS*, 582 U.S. at 509–10, 137 S.Ct. 2042; *see also Kelly*, 171 Fed. Cl. at 561 (citing *Bright*, 603 F.3d at 1279–80) (“Essential to *Bright*'s analysis is the presumption that *American Pipe* tolling is a statutory rule”). Notably, in holding that *American Pipe* tolling was statutory, not equitable, *Bright* itself also made clear that equitable tolling is barred under section 2501. *Bright*, 603 F.3d at 1287 (“In our view, the fact that equitable tolling is barred under section 2501 does not mean that class action statutory tolling also is barred. The two concepts are different.”); *see also Kelly*, 171 Fed. Cl. at 561 (quoting *Bright*, 603 F.3d at 1287) (“[*Bright*] was careful to differentiate between statutory tolling and equitable tolling, clarifying that it was addressing only ‘whether section 2501’s limitations period is *non-equitably tolled* [that is, statutorily tolled] for putative members under RCFC 23.’ ”) (emphasis added)). With this background in mind, *Bright*'s positive recitation of *Barbieri* is irreconcilable with intervening Supreme Court precedent holding *American Pipe* tolling is equitable in nature, and relevant Federal Circuit precedent unequivocally barring equitable tolling under the Tucker Act's statute of limitations. *CalPERS*, 582 U.S. at 509–10, 137 S.Ct. 2042; *Young*, 529 F.3d at 1384 (quoting *John R. Sand & Gravel Co.*,

552 U.S. at 133–34, 128 S.Ct. 750); *Reoforce, Inc.*, 853 F.3d at 1264.

Moreover, Plaintiffs also attempt to distinguish *CalPERS* from this action by noting that *CalPERS* discussed a statute of repose, not a statute of limitations. Pls. Resp. at 21–24. Indeed, the statute at issue in *CalPERS* was a three-year limitation period for class action claims under the Securities Act, which the Supreme Court instead found to be a statute of repose, not a statute of limitations, and therefore not susceptible to equitable tolling.²⁷ *Id.* at 10. This distinction, however, misses the point and fails to recognize the

²⁷ In *CalPERS*, the Supreme Court explained the difference between a statute of limitations and statute of repose:

[S]tatutory time bars can be divided into two categories: statutes of limitations and statutes of repose. Both “are mechanisms used to limit the temporal extent or duration of liability for tortious acts,” but “each has a distinct purpose.”

Statutes of limitations are designed to encourage plaintiffs “to pursue diligent prosecution of known claims.” In accord with that objective, limitations periods begin to run “when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief.”

In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes “effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.” For this reason, statutes of repose begin to run on “the date of the last culpable act or omission of the defendant.”

CalPERS, 582 U.S. at 504–05, 137 S.Ct. 2042 (internal citations omitted).

jurisdictional nature of this Court’s statute of limitations.

The Supreme Court has provided clear guidance on the difference between non-jurisdictional and jurisdictional statutes of limitations. The “usual rule” is that statutory time bars carry a “rebuttable presumption of equitable tolling.” *Wong*, 575 U.S. at 408, 135 S.Ct. 1625 (citing *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)). One way to rebut this presumption “is to show that Congress made the time bar at issue jurisdictional.” *Id.* This jurisdictional status forecloses the availability of equitable tolling, because:

[When] Congress made the time bar at issue jurisdictional . . . a litigant’s failure to comply with the bar deprives a court of all authority to hear a case. Hence, a court must enforce the limitation even if the other party has waived any timeliness objection. See *Gonzalez v. Thaler*, 565 U.S. 134, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012). And, more crucially here, a court must do so even if equitable considerations would support extending the prescribed time period. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–134, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). Given those harsh consequences, the Government must clear a high bar to establish that a statute of limitations is jurisdictional . . . and so prohibit a court from tolling it.

Id. at 408–10, 135 S.Ct. 1625. The Supreme Court recently reaffirmed the consequences of a jurisdictional time bar in *Boechler, P.C. v. Comm’r of Internal Revenue*, explaining “[j]urisdictional requirements cannot

be waived or forfeited, must be raised by courts *sua sponte*, and, as relevant to this case, do not allow for equitable exceptions.” 596 U.S. 199, 203, 142 S.Ct. 1493, 212 L.Ed.2d 524 (2022) (citing *Henderson v. Shinseki*, 562 U.S. 428, 434–35, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011); *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 154, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013)).

Relatedly, the Supreme Court has also explained that neither statutes of repose nor jurisdictional statutes of limitations allow for equitable tolling. *CalPERS*, 582 U.S. at 508, 137 S.Ct. 2042 (“[T]he Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling.”); *Boechler*, 596 U.S. at 203, 142 S.Ct. 1493 (explaining jurisdictional statutes of limitation are not subject equitable tolling); *Wong*, 575 U.S. at 408–10, 135 S.Ct. 1625 (same). There is no question that section 2501 is a jurisdictional statute of limitations. *John R. Sand & Gravel Co.*, 552 U.S. at 134, 128 S.Ct. 750. Moreover, in *CalPERS*, Plaintiff sought to invoke *American Pipe* tolling to preserve its claim. *CalPERS*, 582 U.S. at 508, 137 S.Ct. 2042. Thus, dispositive to the Court’s holding in *CalPERS* was whether *American Pipe* tolling was a form of equitable tolling. The Court concluded it was, and accordingly, held that *American Pipe* tolling could not alter the unconditional nature of the statutory time bar at issue. *Id.* at 508–09, 137 S.Ct. 2042 (“If . . . the tolling decision in *American Pipe* [is] derived from equity principles, it cannot alter the unconditional language and purpose of the 3–year statute of repose As this discussion indicates, the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions.”). Thus, relevant to the resolution of the present Motion is undoubtedly the Supreme

Court's holding that *American Pipe* tolling is equitable in nature, not whether the 3-year statutory bar was a statute of repose or statute of limitations. *See* Def. Reply at 12 (internal citation omitted) ("Plaintiffs are correct, of course, that *CalPERS* addressed the availability of *American Pipe* tolling to claims governed by statutes of repose, rather than claims governed by statutes of limitations. But this is a distinction without a difference where, as here, the statute of limitations is a jurisdictional provision that categorically forbids equitable tolling."). For this reason, Plaintiffs' attempt to shift the argument and characterize the analysis as requiring the Court to conclude section 2501 is a statute of repose, not a statute of limitations, is both incorrect and ineffective. Pls. Resp. at 10.

b. Defendant's Interpretation is Correct under Binding Precedent

Defendant argues that three principles from the Supreme Court lead to the inevitable conclusion that section 2501 is not subject to equitable tolling under *American Pipe*, and consequently, that Plaintiffs' claims are untimely:

Number one, the Supreme Court has unequivocally held that Section 2501 is a jurisdictional statute of limitations. The Supreme Court said so clearly and unambiguously in *John R. Sand & Gravel*.

Number two, the Supreme Court has held unequivocally that jurisdictional statutes of limitations are not subject to equitable tolling. It said so in *John R. Sand & Gravel*, and it has reiterated that principle in the year since. It said so in *Kwai Fun Wong* and in the *Boechler v. Commissioner* case just two terms ago

Number three, [in *CalPERS*], the Supreme Court has unequivocally held that *American Pipe* tolling -- class action tolling under *American Pipe & Construction Company v. Utah* is a form of equitable tolling. It's not statutory; it's not rules-based. It is simply equitable tolling.

OA Tr. at 8:3–21. A review of relevant jurisprudence reflects that each of Defendant's above statements are accurate. *See supra* Discussion, Section II. Moreover, in addition to Supreme Court precedent, Defendant points to Federal Circuit precedent unequivocally holding that section 2501 is not subject to equitable tolling. *See, e.g., id.*; Def. Reply at 13 ("Allowing plaintiffs to equitably toll 28 U.S.C. § 2501 would directly contradict binding Supreme Court and Federal Circuit precedents."). In other words, Defendant argues that in light of the relevant binding authorities, there is simply no path forward in which this Court can hold that section 2501 is amenable to class action tolling under *American Pipe*. This Court agrees.

B. The Court of Federal Claims Must Follow Intervening Supreme Court Precedent

In addition to the merits disputes addressed above, the parties also dispute whether the Court of Federal Claims has authority to determine that *American Pipe* tolling is inapplicable to the Tucker Act's statute of limitations, 28 U.S.C. § 2501. In their briefs, Plaintiffs contend that "in any event, this Court remains bound by *Bright* unless and until the Federal Circuit chooses to revisit that precedent." Pls. Resp. at 7. Defendant disagrees, arguing that, "[b]y holding that *American Pipe* tolling is a form of equitable tolling, the Supreme Court's intervening decision in *CalPERS* is inherently irreconcilable with the Federal Circuit's contrary

conclusion in *Bright*,” and accordingly, “[t]he Court must now follow *CalPERS*, without regard for the Federal Circuit’s pre-*CalPERS* interpretation of *American Pipe*.” Def. Reply at 15.

Ordinarily, it is without question that “a trial court may not disregard its reviewing court’s precedent.” *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005) (citing *Crowley v. United States*, 398 F.3d 1329, 1335 (Fed. Cir. 2005)). An exception exists, however, where “the circuit’s precedent is expressly overruled by . . . a subsequent Supreme Court decision.” *Id.* (citing *Bankers Tr. N.Y. Corp. v. United States*, 225 F.3d 1368, 1372 (Fed. Cir. 2000)). Moreover, the Federal Circuit has explained that “the issues decided by the higher court need not be identical to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.” *Troy*, 758 F.3d at 1326 (quoting *Miller*, 335 F.3d at 900). And, “lower courts are ‘bound not only by the holdings of higher courts’ decisions but also by their ‘mode of analysis.’” *Id.* (citing *Miller*, 335 F.3d at 900 (citing Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989))); *see also United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (“[W]e are an intermediate court within the federal system, and as such, we must take our cue from the Supreme Court. . . . Setting [a prior panel’s] holding aside for a moment, in our estimation the case’s *reasoning* has been fatally undercut by the Supreme Court.”) (emphasis in original)).

This same rule “must be true for a trial court looking at Federal Circuit and Supreme Court authority that interact in the same way.” *Kelly*, 171 Fed. Cl. at 561 n.3. Indeed, the Federal Circuit in *Troy* adopted the Ninth Circuit’s approach in *Miller v. Gammie* in

holding that a prior panel precedent was no longer viable in light of intervening Supreme Court precedent. *Troy*, 758 F.3d at 1326 (citing *Miller*, 335 F.3d at 899) (“It is established that a later panel can recognize that the court’s earlier decision has been implicitly overruled as inconsistent with intervening Supreme Court authority.”). Thus, although *Troy* determined a panel could overrule a prior panel, its explanation also makes clear that this Court must do the same should it determine *Bright* and its foundational underpinning is no longer viable after the Supreme Court’s decision in *CalPERS*. In fact, the Ninth Circuit’s *Miller* holding encompassed district courts as well. *Miller*, 335 F.3d at 899 (considering “when, if ever, a district court or a three-judge panel is free to reexamine the holding of a prior panel in light of an inconsistent decision by a court of last resort on a closely related, but not identical issue”). The Ninth Circuit’s guidance is similarly clear:

We hold that the issues decided by the higher court ***need not be identical*** in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are ***clearly irreconcilable***.

The present case is an example where intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority In future cases of such clear irreconcilability, a three-judge panel of this court ***and district courts*** should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled.

Id. at 900 (emphasis added).

The Federal Circuit itself has applied these same principles in several cases since the Federal Circuit in *Troy* adopted the Ninth Circuit’s approach in *Miller*. For example, in *California Institute of Technology v. Broadcom Ltd.*, the Federal Circuit held that a panel has the authority to overrule a prior Federal Circuit opinion without en banc action when the reasoning of that opinion is later rejected by the Supreme Court. 25 F.4th 976, 991 (Fed. Cir. 2022). In *California Institute of Technology*, a Supreme Court case implicitly overruled prior Federal Circuit precedent where the Federal Circuit holding had rested on an assumption that the Supreme Court later rejected:

The panel here has the authority to overrule [the Federal Circuit opinion] *Shaw* in light of [the Supreme Court’s decision in] *SAS*, without en banc action. To be sure, *SAS* did not explicitly overrule *Shaw* or address the scope of statutory estoppel under § 315(e)(2). But the reasoning of *Shaw* rests on the assumption that the Board need not institute on all grounds, an assumption that *SAS* rejected. Even in the Ninth Circuit, which has one of the stricter approaches to panel overruling, see Henry J. Dickman, *Conflicts of Precedent*, 106 Va. L. Rev. 1345, 1350–51 (2020), “the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable,” *Miller v. Gammie*, 335 F.3d 889, 900

(9th Cir. 2003) (en banc). We approved that higher standard in *Troy v. Samson Manufacturing Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014), and conclude that that standard is satisfied in this case.

Id. In fact, the Federal Circuit in *California Institute of Technology* describes *Miller* as having “one of the stricter approaches,” in this regard. *Id.* Yet even under that strict approach, the Ninth Circuit still directed district courts to recognize implicit overruling by subsequent Supreme Court decisions. *Miller*, 335 F.3d at 900 (“The present case is an example where intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority. . . . In future cases of such clear irreconcilability, a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled.”).

Moreover, recently in *Ideker Farms, Inc. v. United States*, the Federal Circuit stated this overruling principle remains true even if the Supreme Court does not reference the Federal Circuit precedent at issue, noting its reasoning, as is the case here, can still be “fatally undermined”:

The Government argues [Federal Circuit precedent] *Barnes* is still good law because [the Supreme Court in] *Arkansas Game & Fish II* never mentioned *Barnes* nor answered whether damages occurring during stabilization are compensable. While the Government is correct *Arkansas Game & Fish II* did not expressly cite *Barnes*, it nevertheless fatally undermined *Barnes*’ rationale. Precedent is not ironclad until the Supreme Court

explicitly says otherwise—“It is established that a later panel can recognize that the court’s earlier decision has been *implicitly* overruled as inconsistent with intervening Supreme Court authority.” *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014) (emphasis added).

71 F.4th 964, 988 n.11 (Fed. Cir. 2023) (select internal citations omitted); *see also ECC Int’l Constructors, LLC v. Sec’y of Army*, 79 F.4th 1364, 1372–73 (Fed. Cir. 2023).

Additionally, in *Lone Star Silicon Innovations LLC*, the Federal Circuit overruled a prior panel decision relying on its prior statements in *Troy* regarding implicit overruling:

Where intervening Supreme Court precedent makes clear that our earlier decisions mischaracterized the effects of § 281, we are bound to follow that precedent rather than our own prior panel decisions. *Cf. Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014) (“It is established that a later panel can recognize that the court’s earlier decision has been implicitly overruled as inconsistent with intervening Supreme Court authority.”).

Lone Star Silicon Innovations LLC v. Nanya Tech. Corp., 925 F.3d 1225, 1235 (Fed. Cir. 2019).

In their briefs, Plaintiffs primarily cite to two cases for support in arguing that neither this Court nor another Federal Circuit panel could disregard *Bright*. Pls. Resp. at 9 (citing *Deckers Corp. v. United States*, 752 F.3d 949, 965 (Fed. Cir. 2014); *LKQ Corp. v. GM Glob. Tech. Operations LLC*, No. 2021-2348, 2023 WL 328228 (Fed. Cir. Jan. 20, 2023), *reh’g en banc granted, opinion*

vacated, 71 F.4th 1383 (Fed. Cir. 2023), *aff'd in part, vacated in part*, 102 F.4th 1280 (Fed. Cir. 2024)).²⁸

The Federal Circuit’s opinion in *Deckers Corp.* stands for the proposition that panels are bound by prior panels unless overruled en banc or by intervening Supreme Court decisions. 752 F.3d at 964 (internal citations omitted) (“We have also adopted the rule that a panel of this court—which normally sits in panels of three, and not en banc—is bound by the precedential decisions of prior panels unless and until overruled by an intervening Supreme Court or en banc decision. Thus, we as a panel are bound by prior CCPA²⁹ decisions unless and until those CCPA decisions are overturned en banc or through Supreme Court intervention, just as we are bound by other panel decisions of this court.”). More recently, the Federal Circuit referenced *Deckers Corp.* in *LKQ Corp.*, to which Plaintiffs also cite. *LKQ* explained:

We, as a panel, cannot overrule [Federal Circuit precedent] *Rosen* or *Durling* without a clear directive from the Supreme Court. *Deckers Corp. v. United States*, 752 F.3d 949, 965 (Fed. Cir. 2014) (explaining panels are “bound by prior panel decisions until they are overruled by the court en banc or the Supreme Court”). *See*

²⁸ The Federal Circuit heard Oral Argument en banc on February 5, 2024. *See LKQ Corp. v. GM Glob. Tech. Operations LLC*, Case No. 21-cv-2348. Thereafter, the Federal Circuit affirmed in part and vacated the decision in part.

²⁹ The Federal Circuit has explained “[i]n our first published opinion, sitting en banc, we adopted the case law of the CCPA as our binding precedent.” *Deckers Corp.*, 752 F.3d at 964 (citing *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc)).

also California Inst. of Tech. v. Broadcom Ltd., 25 F.4th 976, 990–91 (Fed. Cir. 2022)³⁰ (explaining the panel only had authority to overrule circuit precedent without en banc action given the Supreme Court’s reasoning undermining said circuit precedent).

LKQ Corp., 2023 WL 328228, at *6.

Thus, *Decker Corp.* and the per curium decision in *LKQ* do not actually support Plaintiffs’ argument that the Supreme Court need explicitly overrule *Bright*.³¹

³⁰ *California Inst. of Tech.* relies on *Troy v. Samson Mfg. Corp.* 25 F.4th at 990–91 (citing *Troy*, 758 F.3d at 1326).

³¹ Moreover, Judge Stark’s concurrence in *LKQ* also serves as useful guidance:

I believe the Board—like a district court or a panel of our court—has the power, indeed an obligation, to recognize when the Supreme Court has overruled previously binding precedent, and in such an instance (which is likely to be exceedingly rare) all of us are bound to follow the Supreme Court, not the overruled circuit court caselaw. *See Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986) (“The separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action. In the absence of a controlling decision by the Supreme Court, the respective courts of appeals express the law of the circuit.”).

If [the Supreme Court in] *KSR* truly overruled [the Federal Circuit’s decision in] *Durling*, ***expressly or implicitly***, then the Board was bound to follow *KSR* as controlling Supreme Court precedent regardless of what our decisions said.

Id. at *12 (emphasis added). Although Judge Stark’s concurrence discusses a decision before an administrative agency, his

In fact, the logic in Plaintiffs’ argument quickly runs out. Plaintiffs contend that this Court must religiously follow *Bright* regardless, because they contend, incorrectly, a Federal Circuit panel would also have to blindly follow its own precedent. Pls. Resp. at 9. But as the Federal Circuit makes clear in the above cited case law and *LKQ*, a Federal Circuit panel can overrule a prior panel in the wake of Supreme Court precedent, and specifically provides a panel may do so when the “Supreme Court’s reasoning undermin[es] said circuit precedent.” *LKQ Corp.*, 2023 WL 328228, at *6 (citing *Cal. Inst. of Tech.*, 25 F.4th at 990–91); *see also CACI, Inc.-Fed. v. United States*, 67 F.4th 1145, 1151 (Fed. Cir. 2023). This may occur when a Federal Circuit’s panel decision “has been *implicitly* overruled as inconsistent with intervening Supreme Court authority.” *Troy*, 758 F.3d at 1326 (emphasis added). And this remains true whether or not the Supreme Court explicitly cites the Federal Circuit case at issue, as it may “nevertheless fatally undermine[]” the Federal Circuit panel’s “rationale.” *Ideker Farms, Inc.*, 71 F.4th at 988 n.11.

Relatedly, Plaintiffs also argue that vertical *stare decisis* mandates this Court to follow *Bright* unless the Federal Circuit chooses to overturn it en banc. Pls. Resp. Authority at 2. Plaintiffs further assert that under horizontal *stare decisis*, even the Federal Circuit itself could not overrule *Bright* without en banc action. However, this principle of horizontal *stare decisis* has no bearing on the issue now before the Court. Defendant addressed this point of confusion at Oral Argument:

Defendant’s Counsel: There is a difference between vertical and horizontal

statement is express that a district court must do the same when confronted with this rare circumstance.

stare decisis. That difference does not apply here. Horizontal *stare decisis* is when there is a Federal Circuit precedent and, at a later date, the Federal Circuit decides to reconsider that existing Federal Circuit precedent. That's horizontal. There is no higher court involved in that scenario. And, certainly, to do that, the Federal Circuit would have to sit en banc to overrule a prior Federal Circuit decision.

That's not the case when there is an intervening Supreme Court case, which is a higher court, that implicitly overrules or directly overrules an existing Circuit precedent. If that is the case, then that rule does not apply. *Troy* makes clear and as we cited subsequent cases applying *Troy* make clear, the Federal Circuit does not have to sit en banc. A panel of the Federal Circuit can decide that an intervening Supreme Court decision has implicitly overruled what the Federal Circuit has previously said.

And that same rule applies here The Supreme Court, just as it is a superior court to the Federal Circuit, is also a superior court to this Court. And, so, this Court must follow Supreme Court precedent as well. I think the disconnect between our point and the Plaintiffs' point is that they seem to think overruling has to be direct. In other words, there has to be a case that goes up from the Federal Circuit to the Supreme Court and the Supreme Court directly overrules it. And I

think the case law is fairly clear that that's not the only way to overrule Circuit precedent. Circuit precedent can also be implicitly overruled. And when that happens, the same rule applies as if the Circuit precedent was directly overruled by the Supreme Court.

OA Tr. at 44:25–46:10. In fact, Defendant's reasoning not only clarifies the inapplicability of horizontal *stare decisis* in this action, but also demonstrates how the fundamental nature of our judicial system necessitates this outcome. Vertical *stare decisis*, in fact, instructs this Court to follow the binding precedent of the Supreme Court.

After reviewing the parties' arguments, the Court finds that it has a duty to follow intervening Supreme Court precedent. *See Troy*, 758 F.3d at 1326. The Federal Circuit has clearly held on multiple occasions that a prior Federal Circuit panel decision is no longer viable in light of intervening Supreme Court precedent, even where the issues are not identical, but where the cases and their reasoning are clearly irreconcilable. *Id.* (quoting *Miller*, 335 F.3d at 900); *Cal. Inst. of Tech.*, 25 F.4th at 991; *Ideker Farms, Inc.*, 71 F.4th at 988 n.11; *ECC Int'l Constructors, LLC*, 79 F.4th at 1372–73; *Lone Star Silicon Innovations LLC*, 925 F.3d at 1235. That is the precise situation here; as noted, the Supreme Court's *CalPERS* decision struck a fatal blow to *Bright's* reasoning at it relates to tolling under section 2501. The very nature of our judicial system requires trial courts to be bound by the same intervening precedent and certainly by Supreme Court precedent. *See Kelly*, 171 Fed. Cl. at 561, 561 n.3 (assessing case law regarding *Bright* and *CalPERS* and reaching the same

conclusion as this Court that in light of *CalPERS*, section 2501 cannot be equitably tolled).³²

As this Court holds that *American Pipe* tolling cannot toll the deadlines in 28 U.S.C. § 2501, Plaintiffs' claims are time-barred and, accordingly, this Court must dismiss Plaintiffs' actions for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth above, this Court **GRANTS** Defendant's Motion to Dismiss (ECF No. 8) pursuant to Rules 12(b)(1) and 12(h)(3). The Clerk of Court is **DIRECTED** to enter Judgment accordingly.

IT IS SO ORDERED.

/s/

ELENI M. ROUMEL
Judge

Dated: August 9, 2024
Washington, D.C.

³² As noted and as the parties acknowledge, this Court need not reach the parties' secondary arguments regarding claim accrual as *American Pipe* tolling cannot be applied to toll the deadlines in 28 U.S.C. § 2501 as a matter of law, requiring this Court to grant Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) regardless of the parties' claim accrual contentions. *See* OA Tr. 7:16–24; *id.* at 39:8–40:1; *id.* at 52:6–8; *see also* Pls. Resp. at 26.

APPENDIX D

No. 21-1949 L

UNITED STATES COURT OF FEDERAL CLAIMS

Michael E. KELLY, et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

(Filed: May 8, 2024)

[Published at: 171 Fed.Cl. 550]

OPINION AND ORDER

**Granting the Government's Motion to Dismiss
the Amended Complaint**

SILFEN, Judge.

Michael E. Kelly, along with a bank holding company, nine bank subsidiaries, and one non-bank subsidiary, each of which he controls (collectively “Mr. Kelly”), seeks compensation under the Takings Clause of the Fifth Amendment. Mr. Kelly alleges that the government took his stock interests when two government-sponsored enterprises, Fannie Mae and Freddie Mac, were placed into conservatorships during the 2008 financial crisis. The government moves to dismiss the amended complaint for lack of jurisdiction [556] and for failure to state a claim, arguing that Mr. Kelly’s claims are barred by this court’s statute of limitations. Mr. Kelly argues that this court has jurisdiction because the Tucker Act’s statute of limitations was tolled during a related putative class action, *Washington Federal v. United States*, 149 Fed. Cl. 281 (2020), *aff’d*, 26 F.4th 1253 (Fed. Cir. 2022).

The government further argues that Mr. Kelly’s suit is precluded by the Federal Circuit’s decision in

Washington Federal, and Mr. Kelly responds that *Washington Federal* was different enough to not preclude his claims here. But *Washington Federal* has put Mr. Kelly in a bind. He would like his complaint to be similar enough to that in *Washington Federal* to warrant tolling, yet different enough to avoid any preclusion based on the Federal Circuit's decision in that case. That is too fine a line for him to walk. His claims are time barred because the statute of limitations, which is jurisdictional, cannot be tolled. And even if his complaint were timely, it fails to state a claim because *Washington Federal* and other binding Federal Circuit decisions have already decided the issues in this case. This court therefore **grants** the government's motion and **dismisses** Mr. Kelly's amended complaint.

I. Background

Congress created the government-sponsored enterprises, Fannie Mae and Freddie Mac, "to provide increased liquidity and stability to the security mortgage market by securitizing mortgage-backed securities." ECF No. 30 at 7-8 [¶¶24-25]; ECF No. 31 at 4.¹ The enterprises purchase mortgages, consolidate them into mortgage-backed securities, and then sell those securities to investors. *Collins v. Yellen*, 594 U.S. 220, 141 S. Ct. 1761, 1771, 210 L.Ed.2d 432 (2021). The enterprises raise funds from the market by issuing stock shares. ECF No. 30 at 8 [¶26]. This process alleviates mortgage lenders' risk of default and makes investors' money available to give out more loans. *Collins*, 141 S. Ct. at 1771. Operating as private, for-profit companies, the

¹ For purposes of this motion, the court accepts the allegations in Mr. Kelly's complaint as true. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

enterprises were publicly traded on the New York Stock Exchange until June 2010. ECF No. 30 at 7-8 [¶¶24-25]. But as congressionally chartered institutions, they benefited from the widespread perception that the federal government guaranteed their success and would step in if they experienced any financial hardship. *Washington Federal v. United States*, 26 F.4th 1253, 1260 (Fed. Cir. 2022); *see also* ECF No. 30 at 12 [¶¶38-39].

Given their distinctive status, the enterprises can “purchase more mortgages and mortgage-backed securities at cheaper rates than would otherwise prevail in the private market.” *Washington Federal*, 26 F.4th at 1260. One type of share the enterprises issue is preferred stock; preferred stocks have unique rights and benefits that are distinct from and superior to common stocks. ECF No. 30 at 8 [¶27], 30-31 [¶¶98-99]. For example, preferred stock shareholders have a right to receive a portion of the company’s assets if the company is dissolved and have priority in receiving dividend payments. *Id.*

In the early 1980s, Mr. Kelly acquired and became president and CEO of First Bank of Oak Park (FBOP). ECF No. 30 at 6 [¶18]. The bank grew to become a large multi-bank holding company with nine subsidiaries. *Id.* at 6-7 [¶20]. By the early 2000s, FBOP was the largest privately held bank holding company in the country. *Id.* at 7 [¶20]. The bank and its subsidiaries collectively owned \$19.4 billion in assets. *Id.*

In 2006, the Office of Federal Housing Enterprise Oversight, the enterprises’ chief regulator, increased the enterprises’ capital requirements, forcing the enterprises to issue additional preferred stocks. ECF No. 30 at 9 [¶32]. The government therefore added strong incentives for banks to invest in the

enterprises. *Id.* at 9-10 [¶¶33-34]. Banks were permitted to invest up to 100% of their tier one capital in the enterprises' preferred shares. *Id.* at 10 [¶36]. Tier one capital is a bank's core capital, the "minimum adequate funds determined to be needed by a bank to function on a regular basis." *Id.* at 10-11 [¶36]. This was a significant change; typically, a bank could invest at most 10% of its tier [557] one capital in those types of shares. *Id.* at 10-11 [¶¶36-37].

In late 2007 and early 2008, Mr. Kelly bought the enterprises' preferred stocks, enough to give him a total of approximately \$898 million in those preferred stocks. ECF No. 30 at 14 [¶46]. That investment was a substantial percentage of Mr. Kelly's tier one capital. *Id.* at 17 [¶50].

A. The 2008 financial crisis and the conservatorships

As the financial crisis loomed, Congress enacted the Housing and Economic Recovery Act, 12 U.S.C. §§ 4501-4642. ECF No. 30 at 20 [¶61]. The statute created the Federal Housing Finance Agency (FHFA) and gave it both supervisory and regulatory authority over the enterprises. 12 U.S.C. § 4511. Congress gave the FHFA discretion to appoint itself as conservator or receiver over the enterprises and specified the ways in which it could do that. 12 U.S.C. § 4617(a)(1)-(a)(3). The statute also included a judicial review provision for the enterprises to challenge the creation of a conservatorship or receivership in district court. *Id.* at (a)(5).

When the housing bubble burst, the enterprises suffered a massive loss. *See Collins*, 141 S. Ct. at 1771. On September 6, 2008, the FHFA exercised its authority under the Recovery Act and placed the enterprises into conservatorships. ECF No. 30 at 20

[¶63]. The board of directors for each enterprise consented to the conservatorship. *Washington Federal*, 149 Fed. Cl. at 287; *see also* ECF No. 30 at 22-23 [¶¶69-70] (asserting that the government “directed” the boards to consent, and otherwise the government “would seize them”).

The next day, the FHFA entered into senior preferred stock purchase agreements with the Treasury Department to help keep the enterprises afloat. ECF No. 30 at 28 [¶89]. Under the agreements, Treasury agreed to invest billions of dollars for one billion dollars’ worth of senior preferred shares in the enterprises. *Id.* Under the agreements, the FHFA gave Treasury exclusive control over the conservatorships. *Id.* at 28 [¶90].

The day after that, the value of the enterprises’ preferred shares nosedived. ECF No. 30 at 31 [¶101]. Like countless others who had invested a large percentage of their tier one capital in the enterprises’ preferred shares, Mr. Kelly lost substantial stock value. *Id.* at 31 [¶101] (FBOP lost \$885 million); *id.* at 35 [¶114] (Mr. Kelly’s tier one capital shares diminished by more than 98%). For Mr. Kelly this meant that seven of the nine FBOP subsidiaries had insufficient tier one capital to meet regulatory requirements, so the government placed them into receiverships. ECF No. 30 at 35 [¶114], 39 [¶127]. The remaining two subsidiaries were also put in receiverships under the government’s cross-guaranty authority. *Id.* at 39 [¶128]. By the end of 2008, FBOP became insolvent and was forced to liquidate its assets. *Id.* at 40 [¶132]. Ultimately Mr. Kelly alleges that he lost \$19.4 billion in combined assets, nearly his entire net worth. *Id.* at 42 [¶¶136-37].

B. Washington Federal

On June 10, 2013, some enterprise shareholders filed a putative class-action lawsuit, on behalf of themselves and others similarly situated, alleging that “the United States has expropriated all of their economic interests in Fannie and Freddie stock, along with any other property rights they had in their stock” by taking the enterprises into conservatorships and entering into agreements to purchase the enterprises’ preferred stock. *Washington Federal*, 149 Fed. Cl. at 288. The plaintiffs asserted that the conservatorships constituted a Fifth Amendment taking or, in the alternative, an illegal exaction of their property interests in their stock holdings. *Id.* at 288-89.

This court ultimately dismissed *Washington Federal*, holding that the plaintiffs lacked standing to allege direct takings claims (149 Fed. Cl. at 292-97), and on February 22, 2022, the Federal Circuit affirmed (26 F.4th at 1270). Although the *Washington Federal* plaintiffs pleaded their claims as direct takings, the Federal Circuit agreed with this court’s determination that the claims were in fact substantially derivative in nature, and that the plaintiffs lacked standing to litigate [558] those third-party claims as direct claims. 26 F.4th at 1267-68; *see* 149 Fed. Cl. at 292, 294.

The Federal Circuit explained that, under the “so-called shareholder standing rule,” injured shareholders may not bring a direct action to enforce the rights of the corporation; only the corporation may bring such a claim. *Washington Federal*, 26 F.4th at 1267. The plaintiffs’ allegation that the government violated their shareholder rights “depend[s] on an alleged injury to the Enterprises.” *Id.* at 1268; *see also id.* at 1269; 149 Fed. Cl. at 294-

95. As third parties, the *Washington Federal* plaintiffs did not have standing under the “prudential standing” doctrine and could not bring a direct takings claim. *Id.* at 1267-70; *see* 149 Fed. Cl at 294-95. They had at most a derivative action. *Id.*

The Federal Circuit further explained that shareholders, like the *Washington Federal* plaintiffs, may bring derivative actions, but only in the “extreme circumstances” that the enterprises’ management “refuse[s] to pursue an action enforcing the Enterprises’ rights for reasons other than good-faith business judgment,” or that there is a conflict of interest between the managers and the shareholders. *Washington Federal*, 26 F.4th at 1267-68; *see* 149 Fed. Cl at 296-97. The *Washington Federal* plaintiffs demonstrated neither circumstance. *Washington Federal*, 26 F.4th at 1267-68; *see* 149 Fed. Cl at 296-97. Thus, the plaintiffs also failed to establish standing to bring their derivative claim. *Washington Federal*, 26 F.4th at 1268.

The Federal Circuit also agreed with this court in rejecting the plaintiffs’ arguments that the claims were analogous to the direct breach-of-contract claim at issue in *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 603 (D.C. Cir. 2017) (*Perry II*), for which shareholders had standing. *Washington Federal*, 26 F.4th at 1266, 1268-69; *see* 149 Fed. Cl. at 295-96. Although the *Washington Federal* and *Perry II* claims arose from the same 2008 events and concerned similar agreements, the shareholders in *Perry II* sought to enforce the parties’ own shareholder contracts and sued their contracting partners—the enterprises—not the conservators. 26 F.4th at 1268-69; *see also* 149 Fed. Cl. at 296. The shareholders’ claims in *Perry II* could not plausibly belong to the enterprises, whereas the *Washington Federal* plaintiffs had tried to

“enforce the legal rights and interests of the Enterprises.” 26 F.4th at 1269. The two cases were not analogous. *Id.* at 1268.

Finally, the Federal Circuit gave an additional rationale not addressed by this court. The *Washington Federal* plaintiffs’ takings question had already been settled: Previous, binding cases had already established that enterprise shareholders “cannot assert a cognizable takings claim regarding actions taken in connection with the imposition of the conservatorships in 2008.” *Washington Federal*, 26 F.4th at 1265-66. According to the Court, enterprise shareholders do not retain the same degree of property interests in their shares as shareholders of other companies because Congress granted the FHFA unusually broad authority to act as conservator of the enterprises and to act against shareholders’ best interests. *Id.* at 1266. Given the exceptional status of the enterprises, enterprise shareholders had no investment-backed expectation that the value of their shares would not be diluted or used for the public’s benefit. *Id.* Because the *Washington Federal* plaintiffs could not establish that, as shareholders, they held property interests, they could not establish a taking. *Id.*

C. This action

On October 1, 2021, while the *Washington Federal* appeal was pending, Mr. Kelly filed his complaint in this court. ECF No. 1. Like the *Washington Federal* plaintiffs, Mr. Kelly alleged that the FHFA’s conservatorships over the enterprises amounted to a taking or illegal exaction of his financial property. *Id.* at 1 [¶1], 40 [¶B]. Mr. Kelly also alleged that the establishment of the conservatorships constituted a breach of a contract between himself and the government. *Id.* at 1 [¶1], 41 [¶C].

This court stayed Mr. Kelly's action pending a final decision in *Washington Federal*. ECF No. 8. Following the Federal Circuit's decision, the court lifted the stay, and Mr. Kelly filed an amended complaint. ECF No. 30. The amended complaint omits the illegal exaction claim and allegations related to the [559] illegality of the conservatorships, adds facts related to the contract claim, and is designed to better establish Mr. Kelly's standing. ECF No. 25 at 6; *compare* ECF No. 1 *with* ECF No. 30. The government then moved to dismiss the amended complaint. ECF No. 31.²

II. Discussion

Mr. Kelly seeks compensation for an alleged Fifth Amendment taking of his stock assets and shareholder property rights. ECF No. 30 at 43-57, 67. He also asserts that the government took his right to seek meaningful judicial review. *Id.* at 52 [¶168]. He asserts both direct and derivative takings claims. *Id.* at 4 [¶12]. He also requests damages for an alleged breach of the covenant of good faith and fair dealing and an alleged breach of an implied contract. *Id.* at 58-67. The government moves to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. ECF No. 31; *see* RCFC 12(b)(1), 12(b)(6).

On a motion to dismiss for lack of jurisdiction under this court's rule 12(b)(1), the "court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). If the court determines that it lacks

² The case was originally assigned to Judge Davis and was transferred to me soon after the government filed its motion to dismiss.

subject-matter jurisdiction, it must dismiss the action. RCFC 12(b)(1), (h)(3); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). A “plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.” *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014).

This court’s jurisdiction is primarily defined by the Tucker Act, which provides the court with exclusive jurisdiction to decide specific types of monetary claims against the United States. *Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir. 1994); 28 U.S.C. § 1491(a)(1). The Tucker Act provides the court with “jurisdiction to render judgment upon any claim against the United States founded ... upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States.” 28 U.S.C. § 1491(a)(1). The Takings Clause of the Fifth Amendment of the Constitution provides that “private property [shall not] be taken for public use, without just compensation.” A takings claim “is founded upon the Constitution and [is] within the jurisdiction of the Court of [Federal] Claims to hear and determine.” *Knick v. Township of Scott*, 588 U.S. 180, 190, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019) (quotation marks omitted).

A statute of limitations restricts this court’s jurisdiction. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (maintaining the Supreme Court’s longtime interpretation that this court’s statute of limitations is “jurisdictional”). “Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first

accrues.” 28 U.S.C. § 2501. For a Fifth Amendment taking, the claim accrues at the time of the taking. *Knick*, 588 U.S. at 190, 139 S.Ct. 2162.

On a motion to dismiss for failure to state a claim under rule 12(b)(6), the court must accept well-pleaded factual allegations as true and draw all reasonable inferences in the plaintiff’s favor. *Lindsay*, 295 F.3d at 1257. The court is not required to accept the parties’ legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). “A complaint must be dismissed under Rule 12(b)(6) when the facts asserted do not give rise to a legal remedy, or do not elevate a claim for relief to the realm of plausibility.” *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012). A complaint fails to state a claim when every claim, or an issue essential to judgment on each claim, has already been determined by a final judgment in a prior [560] case. *New Hampshire v. Maine*, 532 U.S. 742, 748-49, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

**A. Mr. Kelly’s complaint is barred because
Washington Federal cannot toll the statute
of limitations**

The parties do not dispute, for purposes of this motion, that Mr. Kelly’s takings claims accrued on September 6, 2008, when the government placed the enterprises into conservatorships. ECF No. 30 at 20 [¶63]; ECF No. 31 at 13-14; ECF No. 33 at 14 & n.3, 22. Under the Tucker Act’s statute of limitations, Mr. Kelly had six years, until September 6, 2014, to bring suit. *See* 28 U.S.C. § 2501. Mr. Kelly filed this suit on October 1, 2021, thirteen years after his claims accrued.

Mr. Kelly asserts that his complaint is timely because the limitations period was tolled while *Washington Federal* was pending; he was a putative member of the class of plaintiffs in that case; and thus he reasonably thought he could have his claims resolved there. *Washington Federal* was filed on June 10, 2013—within Mr. Kelly’s limitations period—and was dismissed on July 16, 2020. ECF No. 30 at 4. With tolling, he had until October 3, 2021, to file this suit. He filed this suit two days before that deadline. ECF No. 33 at 22.

The government argues that Mr. Kelly’s claims cannot be tolled by *Washington Federal*. ECF No. 31 at 13-17. The government asserts that the Supreme Court has clearly established that (1) class-action tolling is equitable in nature; and (2) equity cannot toll the Tucker Act’s statute of limitations. *Id.*; ECF No. 40 at 2-7. According to the government, class-action tolling is thus not available, and this court lacks subject-matter jurisdiction over Mr. Kelly’s complaint. *Id.*

The government is correct: The Tucker Act’s statute of limitations is not subject to class-action tolling. Mr. Kelly’s complaint was not tolled by *Washington Federal* and is time barred.

The Supreme Court first recognized class-action tolling in *American Pipe* in 1974. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). The Court held that a timely-filed class-action lawsuit can toll the limitations period for each putative class member’s individual claims. The Court reasoned that putative class members are only “passive beneficiaries” of the action until the class is certified. *Id.* at 551-52, 94 S.Ct. 756. Before that, putative class members cannot fully evaluate their own interests. *Id.* And the federal

class-action rule, rule 23, was “not designed to afford class action representation only to those who are active participants in or even aware of the proceedings” before a class certification decision. *Id.* at 552, 94 S.Ct. 756. To give meaning and effect to the federal class-action rule, and to preserve putative members’ interests, the 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,” from the date of filing until the day the court finds the suit inappropriate for class status. *Id.* at 554, 94 S.Ct. 756; *see id.* at 552-53, 94 S.Ct. 756. When class certification is denied, the statute-of-limitations clock begins to run again for the individual members of the failed class. Each person then has the remaining days under the limitations period to intervene as an individual plaintiff in the action. *Id.* at 561, 94 S.Ct. 756.

Almost a decade later, the Supreme Court extended the tolling rule to potential class members who bring separate individual lawsuits rather than intervening in the original action. *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). To preserve the spirit and objectives of the tolling rule, the Court held that *American Pipe* must also protect those who choose to file their own suits instead of intervening. *Id.* at 350-354, 103 S.Ct. 2392. “There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene,” and a court could deny intervention “for reasons wholly unrelated to the merits.” *Id.* at 350, 103 S.Ct. 2392. The Court therefore held that a putative class member may also

promptly bring an individual lawsuit after the denial of class certification, even where that claim would [561] otherwise be untimely filed. *Id.* That is the type of case Mr. Kelly tried to file.

Here, the parties disagree over whether *American Pipe* tolling—as extended by *Crown, Cork & Seal*—is statutory or equitable in nature and thus whether it is available to toll actions brought in this court. If statutory, yes. If equitable, no.

The Federal Circuit previously applied *American Pipe* tolling to the Tucker Act’s statute of limitations, 28 U.S.C. § 2501. In *Bright v. United States*, 603 F.3d 1273, 1274 (Fed. Cir. 2010), the Federal Circuit permitted the existence of a class action to toll section 2501, holding that “when a class action complaint is filed in the Court of Federal Claims and class certification is sought prior to expiration of the section 2501 limitations period, the limitations period is tolled ... during the period the court allows potential class members to opt in to the class.”

The government asserts, however, that the Supreme Court’s decision in *California Public Employees’ Retirement System v. ANZ Securities, Inc.*, 582 U.S. 497, 137 S.Ct. 2042, 198 L.Ed.2d 584 (2017) (*CalPERS*) has effectively overruled *Bright*. ECF No. 31 at 14-17; ECF No. 40 at 3-7. According to the government, *Bright* relied on the premise that *American Pipe* tolling was statutory and acknowledged that section 2501 is not subject to equitable tolling. ECF No. 31 at 16; ECF No. 40 at 5. In the government’s view, *CalPERS* later resolved that *American Pipe* tolling is in fact equitable. ECF No. 31 at 16-17. Because this court cannot alter the limitations period for equitable considerations, the government argues that no equitable tolling is available. *Id.*; ECF No. 40 at 7.

Mr. Kelly responds that *Bright* remains good law in spite of the *CalPERS* decision. ECF No. 33 at 15-17. He criticizes the government for disregarding *Bright's* “nuanced reasoning” and for creating a “bright-line rule prohibiting class action tolling ... on any Tucker Act claim.” *Id.* at 14, 16. Mr. Kelly argues that *American Pipe* tolling is a one-of-a-kind, neither statutory nor equitable, “common law device designed to effectuate Rule 23.” *Id.* at 16-17, 17 n.5. Mr. Kelly distinguishes *CalPERS* because it did not examine class-action tolling in the context of this court, its jurisdiction, and its rules.

Essential to *Bright's* analysis is the presumption that *American Pipe* tolling is a statutory rule. *Bright*, 603 F.3d at 1279-80, 1287-88. The Federal Circuit explained that *American Pipe* tolling is “not based on judge-made equitable tolling, but rather on the Court’s interpretation of [Federal Rule of Civil Procedure] 23.” *Id.* at 1279 (quotation marks omitted). “Having determined that Rule 23 tolling is statutory rather than equitable,” the Court explained, “it follows that the rule of *American Pipe* applies to the government just as it does to private parties.” *Id.* The opinion was careful to differentiate between statutory tolling and equitable tolling, clarifying that it was addressing only “whether section 2501’s limitations period is *non-equitably tolled* [that is, statutorily tolled] for putative members under RCFC 23.” *Id.* at 1287 (emphasis added). In contrast, the Federal Circuit reaffirmed that under *John R. Sand & Gravel*, “equitable tolling is barred under section 2501.” *Id.* at 1287.

Mr. Kelly is therefore correct that *Bright* distinguished the two forms of tolling—equitable and statutory—but he is incorrect that *Bright* characterized class-action tolling as distinct from

either category. Instead, *Bright* held that *American Pipe* tolling is statutory, and its reasoning hinges on that categorization. *Bright*, 603 F.3d at 1285-88. Because the Federal Circuit understood *American Pipe* tolling to be statutory, and not equitable, it held that a class action could toll section 2501. *Id.* at 1287-88.

But now the Supreme Court has held that *American Pipe* tolling is equitable, not statutory. *CalPERS*, 582 U.S. at 509-510, 137 S.Ct. 2042. “[T]he source of the tolling rules applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions.” *Id.* *CalPERS* thus undermines *Bright*’s logical premise. This court cannot toll the Tucker Act’s statute of limitations for a class action.³

[562] Earlier Supreme Court decisions, including *American Pipe* itself, were ambiguous on the statutory-versus-equitable question. *See CalPERS*, 582 U.S. at 510, 137 S.Ct. 2042; *see also American*

³ This court “may not disregard its reviewing court’s precedent,” such as *Bright*. *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005). But there is a narrow exception, when that “precedent is expressly overruled ... by a subsequent Supreme Court decision.” *Id.* The Federal Circuit follows the same rule when deciding whether a panel must follow an earlier panel decision. *Texas Am. Oil Corp. v. Dep’t of Energy*, 44 F.3d 1557, 1561 (Fed. Cir. 1995). If the Supreme Court has “undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable,” “[i]t is established that a later panel can recognize that the court’s earlier decision has been implicitly overruled as inconsistent with intervening Supreme Court authority.” *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014) (quotation marks omitted). The same must be true for a trial court looking at Federal Circuit and Supreme Court authority that interact in the same way.

Pipe, 414 U.S. at 558, 94 S.Ct. 756 (referring to the class-action tolling rule as arising from “judicial power,” which sounds more equitable than statutory, but not elaborating). But in *CalPERS*, the Supreme Court was clear: “Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of statute or federal rule. Nor could it have.” 582 U.S. at 509, 137 S.Ct. 2042. *American Pipe* tolling, the Court clarified, is firmly “grounded in the traditional equitable powers of the judiciary.” *Id.* at 508-10, 137 S.Ct. 2042. *American Pipe*’s “reasoning ... reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice.” *Id.* at 510, 137 S.Ct. 2042. Because *American Pipe* tolling is equitable, the Court concluded that it could not toll the time-bar statute at issue in *CalPERS* because “the text, purpose, structure, and history of [that] statute all disclose the congressional purpose to offer defendants full and final security” after a set number of years. 582 U.S. at 510-11, 137 S.Ct. 2042.

Since *CalPERS*, the Supreme Court has reaffirmed its understanding that *American Pipe* tolling is an equitable rule. See *China Agritech, Inc. v. Resh*, 584 U.S. 732, 743, 745, 138 S.Ct. 1800, 201 L.Ed.2d 123 (2018). Although the Federal Circuit has not had occasion to address the issue after *CalPERS*, other courts of appeals have followed the Supreme Court’s reasoning. See, e.g., *Testa v. Becker*, 910 F.3d 677, 683-84 (2d Cir. 2018); *Weitzner v. Sanofi Pasteur Inc.*, 909 F.3d 604, 609 (3d Cir. 2018); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 854 Fed. App’x 570, 572 (5th Cir. 2021) (unpublished); *Potter v. Comm’r of Soc. Sec.*, 9 F.4th 369, 371 (6th Cir. 2021); *Supreme Auto Transp., LLC v. Arcelor Mittal USA*,

Inc., 902 F.3d 735, 742 (7th Cir. 2018).

Mr. Kelly attempts to limit the *CalPERS* holding to statutes of repose, which are more absolute than statutes of limitations. ECF No. 33 at 17. He is correct that *CalPERS* addressed a statute of repose (582 U.S. at 516, 137 S.Ct. 2042) and that a statute of repose is more absolute, displacing “the traditional power of courts to modify statutory time limits in the name of equity” (*id.* at 510, 516, 137 S.Ct. 2042). And consistent “with the different purposes embodied in statutes of limitations and statutes of repose,” statutes of limitations are generally more amenable to equitable tolling than statutes of repose. *Id.* at 511-12, 137 S.Ct. 2042. Complicating the matter, “Congress has used the term ‘statute of limitations’ when enacting statutes of repose” and vice versa. *CTS Corp. v. Waldburger*, 573 U.S. 1, 13, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014).

To determine whether a tolling rule applies, the Supreme Court looks not at the label but instead at the statute’s “text, purpose, structure, and history” (*CalPERS*, 582 U.S. at 510-11, 137 S.Ct. 2042), and whether the statute is “fundamentally incompatible” with the principles of equitable tolling (*Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991)). Tolling is impermissible where Congress has indicated that the statutory period is an absolute bar. *CalPERS*, 582 U.S. at 507-508, 137 S.Ct. 2042; see also *CTS Corp.*, 573 U.S. at 8-9, 134 S.Ct. 2175; *Lampf*, 501 U.S. at 363, 111 S.Ct. 2773 (overruled in part by statute); *Weddel v. Sec’y of Health and Hum. Servs.*, 100 F.3d 929, 931-32 (Fed. Cir. 1996).

[563] The Supreme Court in *CalPERS* reviewed the terms, structure, and legislative history of the time bar at issue there and determined it to be an

absolute time bar, thus classifying it as a statute of repose. 582 U.S. at 505-06, 137 S.Ct. 2042. The Court then held the purpose of that statute to be incompatible with tolling principles. *Id.* at 510, 137 S.Ct. 2042.

While there are distinctions between statutes of limitations and statutes of repose, section 2501 is an unusual type of statute of limitations. As the Supreme Court held in *John R. Sand & Gravel*, it has long been established that section 2501 is “more absolute” than the typical statute of limitations. 552 U.S. at 133-36, 128 S.Ct. 750. Often referred to as a “jurisdictional” statute, section 2501 requires this “court to decide a timeliness question despite a waiver” and forbids it from considering “whether certain equitable considerations warrant extending a limitations period.” *Id.* at 133-34, 128 S.Ct. 750; see *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1382 (Fed. Cir. 2012). It is “not susceptible to equitable tolling.” *John R. Sand & Gravel*, 552 U.S. at 136, 128 S.Ct. 750.

In contrast to the typical statute of limitations, the primary goal of jurisdictional statutes is not to ensure the timeliness of claims. *John R. Sand & Gravel*, 552 U.S. at 133, 128 S.Ct. 750. Instead, these statutes are designed “to achieve a broader system-related goal, such as facilitating the administration of claims” and “limiting the scope of a governmental waiver of sovereign immunity.” *Id.* at 133, 128 S.Ct. 750; see generally *United States v. Wong*, 575 U.S. 402, 408-09, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015).

In essence, then, section 2501 is more akin to a statute of repose than a statute of limitations. See *Hart v. United States*, 910 F.2d 815, 817-19 (Fed. Cir. 1990) (categorizing the section 2501 “as a statute of repose” and holding that because it is “jurisdictional

in nature and, as an express limitation on the waiver of sovereign immunity,” it “may not be waived,” and courts “are not free to engraft exceptions” onto it). Like the statute of repose examined in *CalPERS*, section 2501 is thus an absolute bar that “supersedes the application of a tolling rule based in equity.” *CalPERS*, 582 U.S. at 510, 137 S.Ct. 2042.

It has long been settled that equitable considerations may not extend the statute of limitations for this court. *John R. Sand & Gravel*, 552 U.S. at 133-34, 128 S.Ct. 750. *Bright* affirms that holding, reiterating that “equitable tolling is barred under section 2501.” 603 F.3d at 1287. *Bright* was mistaken only as to the nature of *American Pipe* tolling. Now that the Supreme Court has resolved that *American Pipe* tolling is equitable, *Bright*, were it decided today, would have to come out the opposite way.

Mr. Kelly distinguishes *CalPERS* for examining the tolling question in the context of an opt-out, rather than opt-in, class action. ECF No. 33 at 16-17. He is correct that the rules of this court permit only opt-in class actions. See *Bright*, 603 F.3d at 1277 & n.1. Parties in other cases have argued a similar distinction, but neither *Bright* nor *CalPERS* distinguishes opt-in from opt-out class actions for purposes of whether class-action tolling applies to section 2501. *Bright*, 603 F.3d at 1284-85; see generally *CalPERS*, 582 U.S. at 512, 137 S.Ct. 2042. The distinction is irrelevant here.

Finally, Mr. Kelly raises this court’s 2022 decision in *Birdbear v. United States*, 162 Fed. Cl. 225 (2022), in which the court applied *American Pipe* tolling rule to section 2501. ECF No. 33 at 15. *Birdbear* does not undermine the court’s conclusion today. The parties in *Birdbear* did not argue that *Bright* might have

been overruled (*see Birdbear v. United States*, ECF No. 187 at 3, 35 and ECF No. 191 at 12-13), and *Birdbear* does not cite *CalPERS*, instead relying only on *American Pipe* and *Bright*. 162 Fed. Cl. at 242. The decision does not provide any guidance on how to reconcile *Bright* and *CalPERS*. Regardless, prior decisions of the Court of Federal Claims, “while persuasive, do not set binding precedent for separate and distinct cases.” *W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994).

In sum, the Supreme Court’s holding in *CalPERS* undermines *Bright*. [564] *American Pipe* tolling is equitable, not statutory, and equitable considerations cannot alter the statute of limitations in section 2501. Thus, *American Pipe* tolling is unavailable to Mr. Kelly here. Because the statute of limitations has not been tolled, Mr. Kelly’s complaint is time barred.⁴

**B. Even if Mr. Kelly’s complaint were timely,
it fails to state a claim**

Even if it were timely, Mr. Kelly’s complaint must alternatively be dismissed because it fails to state a claim on which relief may be granted for any of its five counts. *See* RCFC 12(b)(6). As a matter of law, as a shareholder, Mr. Kelly is precluded from bringing either the direct or derivative takings claims he

⁴ Because the court holds, as a general matter, that *American Pipe* tolling cannot be applied to section 2501, this decision need not address two of the government’s alternative arguments. ECF No. 31 at 17-23; ECF No. 40 at 7-12. The court need not address whether tolling would otherwise be prohibited because the plaintiffs in *Washington Federal* never moved to certify the class within the statutory window, a question that *Bright* left open (603 F.3d at 1290 n.9). And the court need not separately address whether Mr. Kelly’s breach-of-implied-covenant and breach-of-implied-contract claims could be tolled by *Washington Federal*.

asserts. In *Washington Federal*, the Federal Circuit already determined that nearly identical claims, brought by the same type of plaintiff, arising from the same transactional facts, failed on the merits. Even if Mr. Kelly's takings claims were not barred under the formal claim- and issue-preclusion doctrines, the same issues have already been decided in a Federal Circuit decision that is binding on this court. Mr. Kelly also fails to establish the existence of an implied covenant or implied contract with the government.

**1. Claim preclusion bars Mr.
Kelly's takings claims**

The government argues that, were this court to have jurisdiction over Mr. Kelly's claims, claim preclusion bars his takings claims. ECF No. 31 at 3-4; ECF No. 40 at 12-19; ECF No. 47 at 28:10-19 (hearing transcript, stating that both claim and issue preclusion apply to various aspects of Mr. Kelly's case but that claim preclusion bars the takings claims). According to the government, Mr. Kelly's case is substantially identical to *Washington Federal*: Both concern the same parties, enterprise shareholders; both arise from the same transactional set of facts, the government imposing conservatorships; and both allege that imposing the conservatorships diminished their stock value. ECF No. 31 at 29-31.

Mr. Kelly responds that his "is a very different case with very different claims," arising from different sets of transactional facts, than *Washington Federal*. ECF No. 33 at 4, 22-42. According to Mr. Kelly, his takings claims concern a compensable property interest: "the investment-backed expectations of banks that were induced to invest their critical Tier 1 Capital Reserves in the [enterprises] and then lost those reserves" (ECF No.

33 at 25) “when the conservatorship was imposed” (*id.* at 38). According to Mr. Kelly, *Washington Federal* concerned only the reduced stock value resulting from the government imposing the same conservatorships. *Id.* at 24. He also argues that *Washington Federal* relied on the idea that the government acted unlawfully when it imposed the conservatorships, whereas his claims are “agnostic” on the lawfulness of that conduct. *Id.* at 22-24; *see also* ECF No. 47 at 60:9-61:20. Finally, he argues that *Washington Federal* does not preclude his derivative takings claims because the plaintiffs in that case alleged only direct, not derivative, takings claims. ECF No. 33 at 39.

Mr. Kelly’s takings claims are precluded by *Washington Federal*. Under the doctrine of claim preclusion, a final judgment on the merits “forecloses successive litigation of the very same claim” by the same party or its privies, “whether or not relitigation of the claim raises the same issues as the earlier suit.” *New Hampshire*, 532 U.S. at 748, 121 S.Ct. 1808 (quotation marks omitted). To be precluded, the later claim must arise from the same set of transactional facts as the first, such that the later claim could have and should have already been litigated. *Bowers Inv. Co., LLC v. United States*, 695 F.3d 1380, 1384 (Fed. Cir. 2012). The *Washington Federal* decision and Mr. Kelly’s takings claims concern the same [565] set of transactional facts and involve the same parties.

Whether two claims involve the same transactional facts is determined “pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’

expectations or business understanding or usage.” *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1271 (Fed. Cir. 2008) (quoting Restatement (Second) of Judgments § 24(2) (1982)).

Mr. Kelly’s takings claims, like those in *Washington Federal*, arise from the government’s placing the enterprises into conservatorships and are based on his status as an enterprise stock shareholder. Compare ECF No. 30 at 2 [¶¶5-6] with *Washington Federal*, 26 F.4th at 1260-61, 1265. The plaintiffs in *Washington Federal* alleged that, by imposing the conservatorships during the 2008 financial crisis, the government destroyed the value of their enterprise stock shares and nullified the rights and benefits of those shares, which amounted to a taking. *Washington Federal*, 26 F.4th at 1260-62, 1265. Mr. Kelly likewise alleges that when the government put the enterprises into conservatorships during the 2008 financial crisis, the government “took for a public use the rights, protections, and duties that adhered to the ownership of the [enterprises’] preferred shares,” drastically devaluing shareholders’ investments, which amounted to a taking. ECF No. 30 at 2 [¶¶5-6], 34 [¶101]. Both are traceable to the FHFA’s imposing the conservatorships under the authority of the Recovery Act in 2008. Compare *Washington Federal*, 26 F.4th at 1262 with ECF No. 30 at 34 [¶101], 52 [¶171].

The court is unpersuaded by Mr. Kelly’s distinction between *Washington Federal*—which alleged that the FHFA’s conduct was unlawful—and his amended claims—which are “agnostic” on that lawfulness. See ECF No. 33 at 22-24. Although the *Washington Federal* plaintiffs alleged unlawfulness, the Federal Circuit analyzed the takings claims as if the government’s imposing the conservatorships had

been lawful (26 F.4th at 1266) because a valid takings claim requires that the taking “be premised upon a government action that is either expressly or impliedly authorized by a valid enactment of Congress” (*Dureiko v. United States*, 209 F.3d 1345, 1359 (Fed. Cir. 2000)). Because “an uncompensated taking and an unlawful agency action constitute separate wrongs that give rise to separate causes of action,” the *Washington Federal* plaintiffs could only litigate their takings claims “on the assumption that the FHFA’s appointment as conservator was lawful.” 26 F.4th at 1263-64, 1266. The court therefore determined only “whether, upon lawful imposition of the conservatorships, the shareholders retained any investment-backed expectation that the value of their shares would not be diluted and the rights otherwise attendant to share ownership would not be temporarily suspended.” *Id.* at 1266.

Mr. Kelly’s distinction between direct and derivative takings claims is also immaterial for claim-preclusion purposes. *See* ECF No. 33 at 39. Claim identity is not required for preclusion to apply; the claims need only concern the same operative facts. *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 316, 131 S.Ct. 1723, 179 L.Ed.2d 723 (2011); *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1567 (Fed. Cir. 1988). Irrespective of the label, the takings claims in *Washington Federal* “rest[ed] on the expropriation of the Washington Federal Plaintiffs’ economic interests and property rights as shareholders.” 26 F.4th at 1262. Same with Mr. Kelly’s takings claims. ECF No. 30 at 41 [¶135], 47-48 [¶152], 55 [¶154]; ECF No. 33 at 37. Mr. Kelly presents a different theory based on the same facts. ECF No. 33 at 36-39; *see generally* ECF No. 30. But the “bar to subsequent litigation applies ‘even though

the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action.’ Different legal theories do not create separate claims for res judicata purposes even though ‘the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.’” [566] *Resource Investments, Inc. v. United States*, 785 F.3d 660, 667 (Fed. Cir. 2015) (cleaned up, quoting Restatement (2d) of Judgments § 25, § 24 cmt. c (1982)); see *id.* at 664-668.

Regardless, *Washington Federal* addresses derivative claims. The *Washington Federal* plaintiffs called their takings claims “direct.” 26 F.4th at 1267. But the Federal Circuit reasoned that the so-called “direct” claims were substantively derivative because the “alleged injuries [were] not independent of alleged harms to the Enterprises,” as the shareholders’ injury of diminution in share value “flowed from the injury to the Enterprises” when the government established the conservatorships. *Id.* at 1268; see also *id.* at 1269. The Court then analyzed the takings claims as derivative claims, and its holding—that enterprise shareholders lack a cognizable property interest in enterprise stock and lack standing to bring derivative shareholder actions on behalf of the enterprises (*id.* at 1265-70)—is a judgment on the merits regarding derivative taking claims. See *id.* at 1267-68.

Regarding the same-party analysis, although Mr. Kelly was not a named plaintiff in *Washington Federal*, he was in privity with the *Washington Federal* plaintiffs for claim-preclusion purposes.

In shareholder derivative class actions and putative class actions like *Washington Federal*, courts

treat nonparty shareholders of the same corporation, and the corporation itself, as in privity for claim-preclusion purposes. Restatement (Second) of Judgments § 59(2) (1982) (“The judgment in an action to which the corporation is a party is binding under the rules of res judicata [or claim preclusion] in a subsequent action by its stockholders or members suing derivatively in behalf of the corporation, and the judgment in a derivative action by its stockholders or members is binding on the corporation.”); *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013) (“Under Delaware law, a judgment rendered in a shareholder-derivative lawsuit will preclude subsequent litigation by the corporation and its shareholders.”); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) (“parties and their privies include the corporation and all nonparty shareholders”); *Stella v. Kaiser*, 218 F.2d 64, 65, 68 (2d Cir. 1954). Because a derivative claim brought by a shareholder belongs not to that shareholder, but to the corporation, the corporation “is the real party in interest” and “is bound by the result of the suit.” *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970). The corporation and any shareholders wishing to bring a later derivative action are bound by the judgment “even if different shareholders prosecute the suits,” as long as the first shareholder “fairly and adequately represent[s] the corporation.” *In re Sonus Networks, Inc. Shareholder Derivative Litig.*, 499 F.3d 47, 64 (1st Cir. 2007). Thus, the real parties in interest in both this case and *Washington Federal* are the enterprises.

To avoid claim preclusion, Mr. Kelly argues that community banks that placed their tier one capital in the enterprises, like his, were not represented in *Washington Federal*. ECF No. 33 at 38. But for

purposes of his tolling argument, Mr. Kelly argued that he qualified as a putative class member in that same action. *Id.* at 14 (asserting that the *Washington Federal* class action tolled “a putative plaintiff’s,” meaning his, “individual claims”); *see also id.* at 11 (noting that the proposed classes in *Washington Federal* “included pre-conservatorship shareholders of both common and preferred stock of the” enterprises). It is hard to imagine a scenario in which Mr. Kelly could simultaneously be a putative class member to benefit from tolling and distinct enough from that putative class to avoid preclusion.

2. Binding precedent holds that Mr. Kelly fails to state a takings claim

Even if formal claim preclusion did not bar Mr. Kelly’s takings claims, the binding *Washington Federal* precedent would still require dismissing his case. To plead a taking, Mr. Kelly must establish (1) that he held a legally cognizable property interest at the time of the taking, and (2) that the government’s actions amounted to a compensable taking of that property interest. *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). Mr. Kelly cannot establish either element. First, *Washington Federal* held that enterprise shareholders, such as Mr. Kelly, do not have [567] a cognizable property interest in their shares of enterprise stock. 26 F.4th at 1266. Second, *Washington Federal* also held that the government’s imposing the conservatorships in 2008 did not amount to a taking. *Id.* Beyond those two defects, the Federal Circuit held that enterprise shareholders, like Mr. Kelly, lack standing under the prudential standing doctrine to bring takings claims. *Id.* 1267-70.

On the first prong, the Federal Circuit has

established that enterprise shareholders do not have cognizable investment-backed expectations and property rights under the Recovery Act. In *Washington Federal*, the Federal Circuit held that, given the unique nature of the enterprises and the unusually broad authority the Recovery Act granted the FHFA over the enterprises, enterprise shareholders did not retain “any investment-backed expectation that the value of their shares would not be diluted and rights otherwise attendant to share ownership would not be temporarily suspended” when the government imposed the conservatorship. *Washington Federal*, 26 F.4th at 1266 (citing *Collins*, 141 S. Ct. 1761 and *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022)). “Under [the Recovery Act], the FHFA may act in ways that are *not* in the best interests of the Enterprises or the shareholders, and, instead, are beneficial to the [agency] and the public it serves.” *Id.* “Where shareholders hold shares in such highly regulated entities—entities that the government has the authority to place into conservatorship—where the conservator’s powers are extremely broad, and where the entities were lawfully placed into such a conservatorship,” the Court reasoned, “shareholders lack a cognizable property interest in the context of a takings claim.” *Id.* at 1266; *see id.* at 1266 n.9. The same goes for Mr. Kelly. As a shareholder of the same highly regulated enterprises, Mr. Kelly does not have investment-backed expectations or property rights in the value of his shares in the enterprises.

On the second prong, the *Washington Federal* plaintiffs could not show that the government’s actions could amount to a taking. 26 F.4th at 1266 & n.9. As the Court explained, shareholders cannot allege takings “regarding actions taken in connection

with the imposition of the conservatorships in 2008.” *Id.* at 1266. Likewise for Mr. Kelly; given the government’s statutorily mandated authority, even if its actions were not in the best interests of the enterprises or its shareholders, the government’s actions cannot amount to a taking.

In addition, as in *Washington Federal*, Mr. Kelly is not in a position to bring his takings claims under the prudential standing doctrine. The “prudential standing rule ... normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.” *Warth v. Seldin*, 422 U.S. 490, 509, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Under the related shareholder standing rule, shareholders injured as a result of their ownership in a corporation generally lack standing to bring a direct action enforcing the rights of the corporation; only the corporation has a direct interest to enforce its own rights. *Washington Federal*, 26 F.4th at 1267 (relying on *Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336, 110 S.Ct. 661, 107 L.Ed.2d 696 (1990), and *Starr Int’l Co. v. United States*, 856 F.3d 953, 966 (Fed. Cir. 2017)). If a shareholder has suffered a harm independent of the harm to the corporation, he has distinct personal rights and may assert a direct claim, even if the corporation’s rights are also implicated. *Id.* at 1267-70; *cf. Franchise Tax Bd.*, 493 U.S. at 336-37, 110 S.Ct. 661 (determining that the plaintiffs’ claims fell within this exception, where they alleged injuries independent of their status as shareholders). But “when the alleged harm to the corporation and alleged harm to the shareholder are not independent, the claim is only substantively derivative in nature.” *Washington Federal*, 26 F.4th at 1269.

Mr. Kelly’s allegedly direct takings claims are

substantively identical to the allegedly direct takings claims in *Washington Federal*, which the Federal Circuit held to be derivative. *See supra* part II.B.1. Mr. Kelly alleges that the stock price of his investments in the enterprises “plummeted” as a direct result of the “nationalization” of the enterprises through the government’s imposing [568] the conservatorship. ECF No. 30 at 2 [¶6]. So too did the *Washington Federal* plaintiffs. 26 F.4th at 1268 (plaintiffs alleged, “as a result of the Government’s ... imposition of the conservatorships” the value of their shares to “plummet[ed], ... destroying all shareholder rights and property interests” and constituting a taking). Like the *Washington Federal* plaintiffs, whose injury “flowed from the injury to the Enterprises” when the government established the conservatorships (26 F.4th at 1268), Mr. Kelly alleges that his injury was the “direct result” of the government imposing the enterprise conservatorships (ECF No. 30). Those takings claims must be asserted derivatively. *Washington Federal*, 26 F.4th at 1267-68. Only the enterprises may litigate the enterprises’ harms, even if a shareholder like Mr. Kelly suffers a secondary harm resulting from the same government actions. *Id.* at 1267-70. Mr. Kelly thus lacks standing under the prudential standing doctrine to assert his allegedly direct takings claims.

Mr. Kelly also cannot, under the shareholder standing rule, assert any of his derivative takings claims. A shareholder may bring a derivative action only when the corporation refuses to enforce its own rights for reasons other than good-faith business judgment. *Washington Federal*, 26 F.4th at 1268; *Ross*, 396 U.S. at 534, 90 S.Ct. 733. Mr. Kelly does not allege that the enterprises used other than good-faith business judgment in declining to enforce their

own rights. *See generally* ECF No. 30. Like the *Washington Federal* plaintiffs, Mr. Kelly lacks standing under the prudential standing doctrine to assert his derivative takings claims.

There is a limited conflict-of-interest exception to the rule about derivative claims. *First Hartford Corp. Pension Plan & Trust v. U.S.*, 194 F.3d 1279, 1295 (Fed. Cir. 1999) (holding that where “a government contractor with a putative claim of breach by a federal agency was being operated by that very same federal agency,” there was a conflict of interest that warranted shareholder standing to bring a derivative action). But here, as the D.C. Circuit has explained, the Recovery Act’s succession clause (12 U.S.C. § 4617(b)(2)(A)(i)) does not allow for a conflict-of-interest exception. *Perry II*, 864 F.3d at 623-28; *accord Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 409-410 (7th Cir. 2018). While the Federal Circuit has not supplied any precedent on the conflict-of-interest exception in this situation, it briefly discussed the issue in *Fairholme Funds*, 26 F.4th at 1302-03 & n. 13. There, this court had relied on the conflict-of-interest exception. The Federal Circuit reversed on other grounds. But the Federal Circuit distinguished *Collins* and *Perry II*, on one hand, from *First Hartford*, on the other, noting that under both *Collins* and *Perry II*, the Recovery Act requires the government to consider the best interests of only the FHFA and the enterprises, not enterprise shareholders. The statute at issue in *First Hartford*, on the other hand, permitted the government to consider depositors’ interests in conservatorship judgments. Given that distinction, it makes sense that, as the D.C. Circuit held, there is no conflict-of-interest exception for claims under the

Recovery Act.⁵

3. Mr. Kelly fails to state a claim for breach of an implied covenant or implied contract

Mr. Kelly also has not established that he had implied contracts with the government, so his complaint does not state a claim for [569] breach of covenant or breach of implied regulatory contract.

To show that there was an implied-in-fact contract, Mr. Kelly must provide facts that clearly indicate (1) a mutual intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) in an alleged contract involving the government, a government representative whose conduct is relied upon who has actual authority to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). Implied contracts, “founded upon a meeting of minds,” require

⁵ Congress created a specific review process for challenging the FHFA’s conduct in imposing the conservatorships. *Washington Federal*, 26 F.4th at 1265-66. The Recovery Act gave the enterprises the authority to seek review in a district court within 30 days. 12 U.S.C. § 4617(a)(5). The Recovery Act governs the conservatorships that Mr. Kelly opposes. A party generally cannot circumvent a congressionally prescribed review process to challenge the government’s unlawful conduct by bringing a takings claim in this court. *See generally Washington Federal*, 26 F.4th at 1265-66. It may be that, even apart from his standing to sue, Mr. Kelly cannot circumvent the statutorily prescribed review scheme through a suit in this court. *See Pregis Corp. v. Kappos*, 700 F.3d 1348, 1358-59 (Fed. Cir. 2012) (“[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of certain persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded,” and allowing collateral attacks would “destroy the [statute’s] careful framework for judicial review at the behest of particular persons through particular procedures.” (quotation marks omitted)).

conduct “showing, in the light of the surrounding circumstances, [the parties’] tacit understanding.” *Baltimore & O.R. Co. v. United States*, 261 U.S. 592, 597, 43 S.Ct. 425, 67 L.Ed. 816 (1923). There is a particularly high bar to establish implied regulatory contracts with the government because the legislature’s principal function “is not to make contracts, but to make laws that establish the policy of the state.” *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 630 (Fed. Cir. 2012). Thus, there is a strong presumption against finding a contract absent clear legislative intent that the government wishes to bind itself. *Id.* An “agency’s performance of its regulatory or sovereign functions does not create contractual obligations.” *Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1378 (Fed. Cir. 2008).

Mr. Kelly argues that government incentives induced him to invest his tier one capital in the enterprises and that the government promised that those investments were secured and guaranteed by the government, amounting to an implied contract between him and the government. ECF No. 33 at 42-49; ECF No. 47 at 61:23-63:25. He also argues that an implied contract exists based on the enterprises’ bylaws and shareholders’ investments. ECF No. 30 at 58 [¶195]; ECF No. 33 at 42-46. The government became a party to this contract, he argues, when the FHFA took on the role as conservator, stepping into the shoes of the enterprise. ECF No. 30 at 58 [¶195]; ECF No. 33 at 42-49.

Regulatory incentives encouraging shareholders like Mr. Kelly to buy enterprise stock, and government statements that shareholders’ investments were safe, do not amount to contractual promises. Instead, they are the government acting as regulator. *Mola Dev. Corp.*, 516 F.3d at 1378. Those

statements embody government policies designed to encourage investment in the enterprises “to support and accomplish the recapitalization goals of the [enterprises] under the 2006 Consent Agreements.” ECF No. 30 at 9 [¶33]. Nothing shows a government intent to contract, an offer and acceptance, or any commitment to compensating shareholders if investment values decline. In fact, the Recovery Act disclaims any guarantees for shareholders’ investments in the enterprises. 12 U.S.C. § 4501(4) (“[N]either the enterprises ... nor any securities or obligations issued by the enterprises ... are backed by the full faith and credit of the United States.”); 12 U.S.C. § 4503 (“This chapter may not be construed as implying that any such enterprise ... or any obligations or securities of such an enterprise ... are backed by the full faith and credit of the United States.”). Mr. Kelly’s allegations do not establish an implied contract with the government.

Even if there were a contract, “[a]s a general rule, for purposes of Tucker Act jurisdiction, the government consents to be sued only by those with whom it has privity of contract.” *Fairholme Funds*, 26 F.4th at 1294. The government is correct that Mr. Kelly cannot show that the government is a party to any contract with him, as required. In *Fairholme Funds*, an enterprise shareholder argued that, when the FHFA imposed the conservatorships, the agency became a party to the contractual rights and obligations derived from enterprise stock certificates. 26 F.4th at 1294-95. Rejecting that theory, the Federal Circuit reasoned that, when the FHFA acted as a conservator, it was not engaged in government activity and thus lost its federal character. *Id.* at 1294-96. The FHFA therefore could not be held to be a party to that contract and could not be sued for

breach of contract. *Id.* at 1295-96; *see Perry II*, 864 F.3d 591.

Mr. Kelly's theory is nearly identical to that of the *Fairholme Funds* plaintiffs. He argues that by imposing the conservatorship, the government took over the enterprises' [570] rights and obligations, making the government a party to the contract. ECF No. 30 at 2-3 [¶7], 58-59 [¶¶195-97]. Like those plaintiffs, Mr. Kelly cannot establish that the government is a party to the alleged contract he seeks to enforce because the FHFA was not acting in its governmental capacity when it took over the enterprises' rights and obligations via the conservatorships.

In sum, Mr. Kelly fails to allege the facts necessary to assert his implied covenant or breach-of-contract claims against the government arising from the government imposing the conservatorships in 2008.

III. Conclusion

This court **grants** the government's motion to dismiss and **dismisses** Mr. Kelly's amended complaint.

IT IS SO ORDERED.