No. 26-524

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, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE ESTHER JENKE, NINA NELSON, AND ARIANNA POLI IN SUPPORT OF PETITIONERS

L. Marc Zell
Counsel of Record
ZELL & ASSOCIATES INTERNATIONAL ADVOCATES LLC
800 Connecticut Avenue
Washington, D.C. 20006
(202) 733-4483
mzell@fandz.com

Noam Schreiber
Of Counsel
ZELL & ASSOCIATES INTERNATIONAL ADVOCATES LLC
800 Connecticut Avenue
Washington, D.C. 20006
(202) 733-4483
noam.schreiber@fandz.com

November 10, 2026 *Counsel for Amici Curiae*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether this Court should overrule *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), and hold that 28 U.S.C. § 2501 is non-jurisdictional and subject to equitable tolling.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

THE *JENKE* LITIGATION 4

ARGUMENT 6

I. The Opt-in Structure of Class Actions in the Court of Federal Claims Makes the Loss of *American Pipe* Tolling Particularly Severe 6

II. The Time that Class Actions Take is Largely Outside the Control of the Plaintiffs, and Without Tolling Every Delay Extinguishes Claims 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Construction Co. v. Utah,
414 U.S. 538 (1974) 2, 6, 7, 10, 12

Arnhold v. United States,
166 Fed. Cl. 499 (2023) 7

Bright v. United States,
603 F.3d 1273 (Fed. Cir. 2010) 2, 8

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 6

Fisher v. United States,
163 Fed. Cl. 178 (2022) 7

Geneva Rock Prods., Inc. v. United States,
100 Fed. Cl. 778 (2011) 8

Haggart v. United States,
89 Fed. Cl. 523 (2009) 7

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) ..... i, 2, 12

Kelly v. United States,
181 F.4th 1377 (Fed. Cir. 2026) 2, 8

L'Association des Américains Accidentels v. United States Department of State,
656 F. Supp. 3d 165 (D.D.C. 2023) 5

Toscano v. United States,
98 Fed. Cl. 152 (2011) 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 4

TABLE OF AUTHORITIES (Cont.)

Page

STATUTES

8 U.S.C. § 1481(a)(5) 4

28 U.S.C. § 1346(a)(2) 9

28 U.S.C. § 1402(a)(1) 9

28 U.S.C. § 1402(b) 9

28 U.S.C. § 2401(a) 9

28 U.S.C. § 2501 ..... i, 2, 9, 12

31 U.S.C. § 9701 ..... 1, 4

JUDICIAL RULES

Fed. R. Civ. P. 23 ..... 2, 7

Fed. R. Civ. P. 23(b)(3) 7

R. Ct. Fed. Cl. 23 ..... 2, 7, 8

R. Ct. Fed. Cl. 23(c)(2) 2, 7

R. Ct. Fed. Cl. 23(c)(3) 2

Sup. Ct. R. 37.2 1



INTEREST OF THE AMICI CURIAE

Amici are **ESTHER JENKE, NINA NELSON**, and **ARIANNA POLI**, the named plaintiffs and proposed class representatives in *Jenke v. United States*, No. 24-2005C (Fed. Cl.). Each paid the Department of State's $2,350 fee for processing a renunciation of United States citizenship. *Jenke* challenges that fee as an illegal exaction under the Independent Offices Appropriations Act, 31 U.S.C. § 9701. A motion for class certification has been filed, fully briefed and oral argument heard. It is currently under advisement. Amici's counsel also represent the putative class in *Jenke*.

Because class membership in the Court of Federal Claims requires an affirmative opt-in, the decision below directly determines how many members of the putative class in *Jenke* will survive the six-year statute of limitations if equitable tolling is not available. Let stand, the decision of the Federal Circuit will result in thousands of members of the putative class being denied their day in court. Amici, as representatives of the putative class, therefore, have a concrete interest in the Court's resolution of the question presented. They file this brief to explain how the rule adopted below operates in practice in class actions in that court.[1]

---

[1] No counsel for a party authored this brief in whole or in part, and no person made a monetary contribution intended to fund the preparation or submission of this brief. Amici informed the parties of their intent to file in accordance with Rule 37.2. Amici are the named plaintiffs in *Jenke*, a separate pending case, and their counsel represent them and the putative class there.

SUMMARY OF ARGUMENT

In the Court of Federal Claims, a class action does not bind absent members unless they opt in. *See* Rule 23(c)(2) and (3) of the Rules of the United States Court of Federal Claims, as amended through July 27, 2026 ("RCFC"). *Bright v. United States*, 603 F.3d 1273, 1277 n. 1 (Fed. Cir. 2010), *abrogated on different grounds by Kelly v. United States*, 181 F.4th 1377 (Fed. Cir. 2026). Until a member does, the six-year limitations period of 28 U.S.C. § 2501 keeps running against that member. For decades, *American Pipe* tolling kept that clock from running while a timely class action was pending. The Federal Circuit has now held that it does not. Petitioners explain why *John R. Sand* should be overruled, and Amici do not revisit that argument. Rather, Amici write to describe how the decision below severely impacts opt-in class actions in practice, and why it is critically important for the Court to review the question presented now.

First, as noted, class actions in the Court of Federal Claims proceed on an opt-in basis. Under RCFC 23, absent class members are not parties to the case unless and until they affirmatively join. That design makes *American Pipe* tolling not merely convenient but essential. Without it, the limitations period continues to run against a class member's claim during the entire time a class action is pending – through certification, through notice, and through the opt-in period. In an opt-out forum governed by Rule 23 of the Federal Rules of Civil Procedure, generally applicable in federal district courts, the loss of tolling has a bounded effect, because class members are generally included in the

class automatically unless they opt out. By contrast, in an opt-in forum, the loss of class members due to limitations is open-ended. The putative class diminishes with every day the case is pending until a putative plaintiff affirmatively elects to join the litigation.

Second, the time before putative members can opt in is substantially outside the control of the plaintiffs. Members cannot join until the court rules on certification, the class is identified, and notice reaches them. Courts need time to decide motions. Identifying and locating members often depends on information held by the government defendant. Events beyond the control of any party can pause a case altogether. In a regime without tolling, the six-year period keeps running throughout that interval, so every delay, however ordinary, permanently removes class members whose claims would otherwise be heard.

These consequences are not hypothetical, and they will recur in every class action against the government that is filed under the Tucker Act in the Court of Federal Claims. As the petition explains, putative class members can no longer safely await a ruling on certification and must sue or opt in early to protect themselves. Pet. 28. In an opt-in forum, that burden falls on every member of the class. These effects underscore the urgent need for the Court to review the question presented as it is impacting the Amici and others similarly situated both now and in the future.

THE *JENKE* LITIGATION

Jenke challenges the $2,350 fee that the Department of State charged to process voluntary renunciations of United States citizenship under 8 U.S.C. § 1481(a)(5). The plaintiffs allege that the fee exceeds what the Independent Offices Appropriations Act, 31 U.S.C. § 9701, permits and is therefore an illegal exaction. They also challenge the fee under the Due Process Clause of the Fifth Amendment. Dkt. nos. 35 and 50 at 1.[2] The putative class includes all persons who paid the fee on or after October 4, 2017, a group estimated to number in the tens of thousands. *Id.* at 1-2. Any class certified would be an opt-in class.

The procedural history of *Jenke* matters here for one reason. It shows how much time passes before members of an opt-in class can join. *Jenke* is not unique. The same pattern is likely to appear in most class actions filed in the Court of Federal Claims. Without tolling, that time counts against every putative member.

The plaintiffs filed their original complaint, which included class allegations, in the United States District Court for the District of Columbia on October 4, 2023. The Government moved to dismiss or transfer on December 4, 2023, Dkt. no. 10, and the district court ordered transfer on September 26, 2024. The case was docketed in the Court of Federal Claims on December

---

[2] Citations to "Dkt. no." are to the docket in *Jenke v. United States*, No. 24-2005C (Fed. Cl.), unless otherwise indicated. Entries filed before the case was transferred on December 6, 2024 keep the numbering of the district court docket, No. 23-cv-2950 (D.D.C.).

6, 2024. Plaintiffs moved for class certification on June 18, 2025.

The Government's response to the class certification motion, originally due July 2, 2025, was filed on September 18, 2025, following three unopposed extensions.[3]

On October 1, 2025, during a lapse in federal appropriations, the Government moved to stay the briefing schedule. The court granted the stay on October 3, 2025 (Dkt. no. 64) and lifted it on November 24, 2025 (Dkt. no. 68).

Argument on class certification was first set for March 11, 2026. On March 2, 2026, it was continued on the parties' consent in light of intervening world events that affected counsel's ability to travel to the United States. Then, on March 13, 2026, the Department of State published a final rule reducing the renunciation fee to $450.[4] Because the rule was expected to affect

---

[3] Two of those extensions also covered the Government's response to the complaint, which the Government filed on August 28, 2025 as a motion to dismiss. That motion required its own briefing and was later set for argument together with the certification motion.

[4] The fee reduction followed earlier litigation over the same fee. In *L'Association des Américains Accidentels v. United States Department of State*, 656 F. Supp. 3d 165 (D.D.C. 2023), a different group of plaintiffs challenged the $2,350 fee. On the eve of oral argument on the parties' summary judgment motions, the Department of State notified the district court that it intended to pursue rulemaking to reduce the fee. The district court nonetheless granted summary judgment to the Government, and the plaintiffs appealed. The D.C. Circuit held the appeal in abeyance pending the rulemaking. Once the final rule was issued and went into effect, the plaintiffs moved, without opposition, to vacate the judgment as moot, and the court of appeals granted the motion. *L'Association des Américains Accidentels v. United States*

the case, the court deferred rescheduling argument until the rule took effect, which occurred on April 17, 2026 (Dkts. 73, 77) and until the D.C. Circuit acted on a pending motion in a related case, which it did on May 29, 2026. Dkts. 78, 79. Argument was reset for September 8, 2026, about six months after it was first scheduled. Each step followed from events outside the case, and together they show how readily time accumulates.



ARGUMENT

I. The Opt-in Structure of Class Actions in the Court of Federal Claims Makes the Loss of *American Pipe* Tolling Particularly Severe

The petition correctly explains how *American Pipe* tolling protects the efficiency and economy that class actions are designed to achieve, by sparing putative class members from filing protective suits or motions to intervene. Pet. 3-4, 22-23 (citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551-552 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349, 353-354 (1983)). The policy underlying *American Pipe* tolling applies with special force in the Court of Federal Claims because of that court's class action opt-in rule.

Department of State, No. 23-5034, 2026 WL 1552282 (D.C. Cir. May 29, 2026), *vacating and remanding* 656 F. Supp. 3d 165. The Government had asserted *res judicata* in *Jenke* based on the district court's judgment, but it has since stated that the defense is moot. Dkt. 79.

Under RCFC 23, a person who falls within a certified class does not become a party unless that person affirmatively elects to join the class action. Until that happens, the person has no claim before the court. *See Arnhold v. United States*, 166 Fed. Cl. 499, 506 (2023) ("for an opt-in class action, each participating member of the class must act affirmatively to participate, which amounts to joinder in pragmatic terms") (quoting *Haggart v. United States*, 89 Fed. Cl. 523, 530 (2009)); *Fisher v. United States*, 163 Fed. Cl. 178, 182 n.3 (2022) (RCFC 23 differs from Federal Rule 23 in contemplating only opt-in classes); RCFC 23(c)(2).

That feature distinguishes class actions in the Court of Federal Claims from class actions under Federal Rule of Civil Procedure 23(b)(3) applicable in federal district courts, where putative members are treated as members of the class unless they opt out. In the Court of Federal Claims, by contrast, a putative member's claim remains outside the case until the member opts in. If the limitations period is not tolled while the class action is pending, then the period continues to run against every potential member throughout the pre-certification period, the notice period, and the opt-in period, and it expires for members one by one as the case proceeds until a putative class member affirmatively elects to join the class action.

The result is that, without *American Pipe* tolling, the size of the class in the Court of Federal Claims shrinks inexorably as the case goes on until opt-in. A putative plaintiff's claim that was timely when the class action was filed may be time-barred by the time the class has been certified and members receive notice. Members who would have joined, and who have the same claims as the members who did opt in, are excluded

solely because the limitations period kept running before the class was certified and they could reasonably have known that they had a right to join. Thus, many potential claimants will be denied their day in court through no fault of their own, no matter how diligent they may have been in asserting their rights.

Until the decision below, the Court of Federal Claims treated a timely class complaint as tolling the limitations period for opt-in members during the opt-in period. *See, e.g.*, *Geneva Rock Prods., Inc. v. United States*, 100 Fed. Cl. 778, 783-87 (2011); *Toscano v. United States*, 98 Fed. Cl. 152, 155 (2011); *see also Bright v. United States*, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010), *abrogated by Kelly v. United States*, 181 F.4th 1377 (Fed. Cir. 2026).[5]

The Petitioners observe that, without tolling, putative class members would have to file protective actions or move to intervene to guard against the time bar. Pet. 3-4, 22-23. In the Court of Federal Claims that is not a theoretical burden. It is the only way for a putative member to preserve a claim, and it must be done before the class is certified, before the member knows whether the class will be certified, and in many cases before the member knows the class action exists.

Jenke poignantly illustrates the problem. The class complaint was filed on October 4, 2023, the certification

---

[5] Amici describe the opt-in procedure of the Court of Federal Claims as it currently operates and do not ask this Court to address it. Amici's description is not a concession that RCFC 23's opt-in requirement is valid, is authorized by the statutes governing that court's rules, or can be given effect against the *Jenke* class. Amici reserve all arguments in *Jenke* on those questions, as well as on whether and how the decision below applies to that case.

motion on June 18, 2025, and argument on that motion was held on September 8, 2026. The motion remains under advisement. More than 1,100 days have now passed since the complaint was filed. Under the rule applied below, the six-year period measured back from the date of any opt-in moves forward with each of those days. As a result, payments made from October 2017 through about October 2020 now fall outside the period. By Amici's rough estimate, based on the Department of State's renunciation figures for those years, that is more than 11,000 members. Each day that passes removes more members' claims from the class's reach.

Jenke also shows how odd the current rule is. The plaintiffs challenge a fee of $2,350, and each member's claim is well under $10,000. Claims of that size may be brought either in the Court of Federal Claims or, under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), in district court. *See also* Pet. 30-31. District court suits are governed by 28 U.S.C. § 2401(a), which is worded identically to Section 2501 and which the courts of appeal have generally treated as non-jurisdictional and subject to equitable tolling. *Id.* But Little Tucker Act suits may be brought only in the judicial district where the plaintiff resides, 28 U.S.C. § 1402(a)(1).[6] The named plaintiffs in *Jenke* live abroad, as do many, if not most, members of the proposed class. For that reason, the district court transferred the case to the Court of Federal Claims. *Jenke v. United States*, No. 23-cv-2950 (D.D.C. Sept. 26, 2024), Dkt. no. 26. Had the plaintiffs lived in the United States, they could have sued in district court and would have had the

---

[6] The order cites § 1402(b); the residence provision is § 1402(a)(1).

benefit of a non-jurisdictional limitations period. Because they live abroad, the very same claim is subject to a jurisdictional bar. In that way, a venue rule, and nothing about the claim itself, decides which of two identically worded limitations periods applies and who is entitled to have his or her claim adjudicated. This is the very essence of arbitrariness.

II. The Time that Class Actions Take is Largely Outside the Control of the Plaintiffs, and Without Tolling Every Delay Extinguishes Claims

A class action against the government takes time. Motions to dismiss and motions for class certification must be briefed, argued, and decided. Class notice requires identifying class members and locating them, and in a case against a government agency the information needed for that task is often held by, or obtainable only with the assistance of, the agency. The plaintiffs must therefore rely on the defendant's cooperation, or on court orders compelling it, to send notice. Court calendars, scheduling, and interruptions all contribute. None of these causes of delay requires any party or court to have acted improperly. They are an inherent attribute of cases of this kind.

In a regime where *American Pipe* tolling is available, those features have no effect on the rights of putative class members, because the limitations period is suspended while the class action is pending. However, under the rule adopted below, they are decisive. Even a delay of a few months can cost the class the members whose claims reach the six-year period during that time.

The *Jenke* chronology shows how this happens, and the delay is not over. A decision on certification will not end it. If the Court certifies a class, further briefing and further issues are likely to follow, including how to identify the members, how to locate them, and what notice should say and how it should be sent. Each of these steps is part of ordinary case management. Yet without tolling, every month of that time moves the six-year line forward, and claims at the beginning of the class period age out along the way. In a class of tens of thousands, delays of this kind, which can last months or even years, can remove a large share of the claims before a single member has had the chance to join.

Jenke is not an outlier. The same dynamic is present in other pending class actions in the Court of Federal Claims, in which notice depends on information held by the government. *See, e.g.*, *Platero v. United States*, No. 25-782C (Fed. Cl.). There, the parties are working to identify and locate class members from federal personnel and pay records, and to resolve how notice should be given. Plaintiffs there have stressed that, if tolling is unavailable, the class diminishes while that work goes on, so notice should go out as soon as possible.

CONCLUSION

The Federal Circuit has now held that Section 2501 bars *American Pipe* tolling, and every class action filed under the Tucker Act is subject to that holding. The effects described above will be repeated each time. A rule that causes the membership of a class to decline with the passage of time, regardless of the merits of the claims and regardless of any fault of the class members, undermines the purpose of the class mechanism. This Court should grant the petition and resolve the question whether *John R. Sand* should remain the law.

Respectfully submitted,

/s/ L. Marc Zell

L. Marc Zell
Counsel of Record
Zell & Associates
International Advocates LLC
800 Connecticut Avenue
Washington, D.C. 20006
(202) 733-4483
mzell@fandz.com

/s/ Noam Schreiber

Noam Schreiber
Of Counsel
Zell & Associates
International Advocates LLC
800 Connecticut Avenue
Washington, D.C. 20006
(202) 733-4483
noam.schreiber@fandz.com

Counsel for Amici Curiae

November 10, 2026