United States Court of Appeals

for the

Federal Circuit

EDWARD L. BRIGHT, II, FRED E. EVANS, NANCY A. EVANS, EARLEEN FAUVERGUE, CLARENCE FORKNER, RANDY W. FROEBE, DEBRA J. FROEBE, GENEVA GRUBBS, NORMA LOU HALL, HOMER E. HAMILTON, DEBBIE M. HAMILTON, SHIRLEY HENDRICKS, DAVID HOUSER, GAIL HOUSER, PATRICK J. O'BRYAN, TRUSTEE OF THE PATRICK J. O'BRYAN REVOCABLE LIVING TRUST UNDER AGREEMENT DATED 9/7/2001, LESTER ROARK, DONALD LEE ROPER, II, RICKY D. RUSSELL, B. LORENE SOPER, BRADY J. STUART, and ROSE M. STUART, for Themselves and As Representatives of a Class of Similarly Situated Persons,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-431, Judge Christine O.C. Miller.

RESPONSE OF PLAINTIFFS-APPELLANTS TO COMBINED PETITION OF THE UNITED STATES FOR PANEL REHEARING AND REHEARING *EN BANC*

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August 24, 2010

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Edward L. Bright, et al. v. United States

No. 2009-5048

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Appellants, Edward L. Bright, et al. certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Edward L. Bright, II; Fred E. and Nancy A. Evans; Earleen Fauvergue; Clarence Forkner; Randy W. and Debra J. Froebe; Geneva Grubbs; Norma Lou Hall; Homer E. and Debbie M. Hamilton; Shirley Hendricks; David and Gail Houser; Patrick J. O'Bryan, Trustee of the Patrick J. O'Bryan Revocable Living Trust Under Agreement dated 9/7/2001; Lester Roark; Donald Lee Roper, II; Ricky D. Russell; B. Lorene Soper; and Brady J. and Rose M. Stuart, for themselves and as representatives of a class of similarly situated persons.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

See above

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Arent Fox LLP, Mark F. (Thor) Hearne, II (partner); Meghan S. Largent (associate); and Lindsay S.C. Brinton (associate. All counsel represented the Appellants in the trial court.

8/24/10
Date

Signature of counsel

Mark F. (Thor) Hearne, II
Printed name of counsel

Please Note: All questions must be answered

cc: _____

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INTRODUCTION

In its pending petition for rehearing en banc (the "Pet. Rehearing"), the Government asks this Court to expend its scarce time and resources to entertain a highly dubious interpretation of statutory language—an interpretation that has already been considered and rejected in a carefully reasoned opinion unanimously issued by three distinguished members of this Court (the "Panel").

The Pet. Rehearing entirely fails to justify the extraordinary relief the Government seeks. On the contrary, it confirms on its face that the Government's position is without merit. Among other things, the Pet. Rehearing is conspicuously silent regarding several key points on which the Panel based its ruling, including the Panel's consideration of the relevant statutory policies and practical concerns regarding the efficient administration of justice. The Government does not address these points because it cannot.

Instead of addressing what the Panel actually said in its decision, the Government offers a grab-bag of arguments aimed at convincing this Court to re-write the statutory language of 28 U.S.C. § 2501 and to accept an unwarranted and facially overbroad view of the Supreme Court's ruling in *John R. Sand & Gravel*—an interpretation that is belied by the text of the ruling itself. The Court should decline the Government's invitation to climb out onto such a shaky limb.

At bottom, the Government's attempt to overturn the Panel's decision is not motivated by a lofty desire to vindicate the intention of Congress so much as by a desire to avoid paying United States citizens "just compensation" for land the Government took from them. When the Court of Federal Claims ("CFC") issued its opinion below, the Government trumpeted the decision, asserting that the DOJ had "successfully advocated . . . for a *new legal standard* in applying the statute of limitations to class actions" and stating that the decision would "help to limit the bringing of future claims and protect the United States from millions of dollars in liability."[1] In short, the Pet. Rehearing is a tactic designed to enable the Government to avoid its Constitutional duty to pay citizens for having taken their property. The Government seeks to accomplish this unseemly result through an outlandish and ultimately unpersuasive interpretation of Section 2501.

Neither Congress nor the Supreme Court intended the statute of limitations embodied in Section 2501 to be manipulated in this manner. As the Panel properly noted, the purpose of Section 2501 was satisfied when the named plaintiff in this action timely filed a complaint on behalf of herself and all others similarly situated and promptly moved for class certification. These citizens should be allowed their day in court. The Pet. Rehearing should be denied.

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[1] DOJ Accomplishments, available at: http://www.justice.gov/enrd/ENRDFiles/ENRD_FY2009_Accomplishments_Report_Text_Only.pdf at p. 31-32 (emphasis added).

ARGUMENT

I. The Government's Proffered "Interpretation" Re-Writes Section 2501 to Insert Phrases and Concepts Congress Never Intended.

A. The Government Attempts to Insert Its Own Made-Up Definition of the Term "Petition."

The Government begins its argument by engaging in a highly dubious exercise in statutory interpretation. In this way, the Government attempts to demonstrate that the result it urges is required by the "plain language" of Section 2501.[2]

Section 2501 states: "Every claim of which the [CFC] has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

In an attempt to assist this Court in understanding what Congress intended by the foregoing language, the Government generously amends the statute to provide its definition of the term "petition:"

> The term "petition" in Section 2501 may refer to a complaint, as it does in cases brought by individual plaintiffs against the United States. On the other hand, "petition" in Section 2501 may refer to other sorts of papers in which a "claim of which the [CFC] has jurisdiction" is "filed." [citation omitted]. *In the context of opt-in*

[2] While Appellants only address the arguments raised by the Government in its Pet. Rehearing, should this Court grant rehearing or rehearing *en banc*, Appellants reserve the right on rehearing to raise their argument that the timely filing of their class-action Complaint before the expiration of the statute of limitations satisfied the requirements of Section 2501 without the need for tolling.

> *class actions under RCFC 23, the term "petition" is best read to refer to the filing by which an individual indicates a desire to join the suit as a class membe*r.

(Pet. Rehearing, p. 5) (emphasis added). In this manner, the Government equates "petition" with an opt-in claim by an individual class member. Read thus, the statute is transformed into what the Government wants: a prohibition of all class actions in which the class members do not opt-in within six years.

The Government cites no authority for its newly-minted definition of "petition." That is not surprising. Federal law is precisely to the contrary. Specifically, courts have expressly held that submitting an "opt-in" claim is *not* the same thing as initiating a lawsuit. *See, e.g., Sperling v. Hoffman-LaRoche, Inc.*, 145 F.R.D. 357, 363 (D.N.J. 1992) ("The defendant mistakenly equates the filing of [opt-in] consent forms with the filing of individual lawsuits or motions to intervene."), *aff'd*, 24 F.3d 463 (3d Cir. 1994). Moreover, the Supreme Court long ago recognized that the mere assertion of a "claim" does not satisfy the requisites for a "petition" in the CFC because a petition, like a complaint, must contain factual allegations. *See Merritt v. United States*, 267 U.S. 338, 341 (1925).

In a class action such as the present case, the only possible "petition" to which Section 2501 can be read to refer is the complaint filed by the named class representative(s). There is simply no other viable construction of the term that does not require inserting definitions never contemplated by Congress.

B. The Government Cannot Demonstrate That Its Interpretation of Section 2501 Is Consistent With the Statutory Language.

Proceeding from the incorrect assumption that the term "petition" means "opt-in claim," the Government asserts that the "plain meaning" of Section 2501 requires dismissal of all claims by class members who opt-in after the six year bar:

> [T]he first sentence of Section 2501 states that "*[e]very claim* of which the [CFC] has jurisdiction *shall be barred* unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (emphases added). On its face, the statute categorically requires dismissal of claims filed more than six years after accrual.

(Pet. Rehearing, p. 9) (emphasis in original).

Of course, Section 2501 requires no such thing; it requires dismissal of *petitions*—not claims—filed more than six years after accrual. By substituting the word "claim" in place of the word "petition" in the last sentence of the above-quoted passage, the Government, in effect, deletes a part of the statutory language. *Cf. United States v. Fairfield Gloves*, 558 F.2d 1023, 1026 (C.C.P.A. 1977) (rejecting similar attempt by the Government to re-write a jurisdictional statute.).

The Government's approach runs afoul of basic canons of statutory construction which teach that every word in a statute must be given effect. 2A Singer, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 46:6 at 193-94 (6th ed. 2000) (courts should "not construe different terms within a statute to embody the same meaning"); *Wachovia Bank v. Schmidt*, 388 F.3d 414, 418-19 (4th Cir. 2004) (confirming the "principle of statutory interpretation that

different words used in the same statute should be assigned different meanings whenever possible") *rev'd on other grounds*, 546 U.S. 303 (2006); *see also Diamond v. U.S. Agency for Int'l Dev.*, 108 F.3d 312, 316 (Fed. Cir. 1997) ("[C]ourts should assume that Congress was aware of the distinctions it was making [in the statute] and that it intended to make those distinctions.").

The Government's attempt to re-write Section 2501 simply confirms the obvious: the statutory language is fundamentally inconsistent with the interpretation the Government urges. The Panel rightly rejected the Government's attempt to re-write Section 2501, holding instead that the class-action complaint filed by Ms. Fauvergue satisfied the statute's limitation period as to herself and other class members who subsequently might opt-in. *See Bright v. United States*, 603 F.3d 1273, 1290 (Fed. Cir. 2010). The Panel's ruling is correct. Not only is the Panel's conclusion consistent with the statutory language, but the Panel's decision is anchored by the compelling practical considerations (*See* Section II.B, below).

II. The Panel's Decision Is Perfectly Consistent With *John R. Sand & Gravel* and, Indeed, Advances the Policies Identified in That Case.

A. There Is No "Conflict" Between the Panel's Ruling and John R. Sand & Gravel.

Much of the Government's Pet. Rehearing is devoted to manufacturing a "conflict" which in fact does not exist. The Government's main basis for seeking

the extraordinary remedy of an en banc rehearing is the notion that the panel's decision is "contrary" to *John R. Sand & Gravel*. (Pet. Rehearing p., 1). Specifically, the Government asserts that the Panel's ruling "expanded" the statute of limitations set forth in Section 2501 based on "equitable considerations." (*Id.*).

In so arguing, the Government deliberately misconstrues the Panel's decision. Once one reads what the Panel actually held, and then compares that holding to the narrow (and very different) holding of *John R. Sand & Gravel*, it becomes clear that there is no conflict between the two at all.

It is important to note what *John R. Sand & Gravel* is not. The case:

- is not a class-action lawsuit;
- does not address prior Supreme Court rulings on the tolling effect of class-action complaints on subsequent claims by individual class members; and
- does not address the situation (present here) where a class-action complaint was timely filed in the period required by Section 2501.

Rather, *John R. Sand & Gravel* involved an *individual* plaintiff who first filed a complaint *after* the Section 2501 limitations period expired. The Government waived the limitations defense and, on appeal, this Court raised the issue *sua sponte*, ruling that the action was untimely. The claimant appealed, and the Supreme Court characterized the narrow issue before it as follows: "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." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132 (2008). As the Panel correctly noted:

> *John R. Sand & Gravel* did not address the question before us. That question is whether section 2501's limitations period is non-equitably tolled for putative class members under RCFC 23 when a class action complaint is filed, and class certification is sought, prior to the expiration of the limitations period.

Bright, 603 F.3d at 1287.

In reaching its decision, the Supreme Court ruled that the statute of limitations at issue (Section 2501) is "absolute," "jurisdictional," and not subject to extension based on "equitable considerations." *John R. Sand & Gravel*, 552 U.S. at 133-34. This, of course, is the language seized upon by the Government as the holding supposedly violated by the Panel's ruling.

However, the Government's analysis does not extend much further than repeating the words "absolute" and "jurisdictional" at every possible turn. Most notably, the Government fails to demonstrate that the "absolute," "jurisdictional" nature of Section 2501 is not satisfied by the timely filing of a class-action complaint within the "absolute" "jurisdictional" six year limitations period.

Instead of addressing this dispositive issue, the Government cites various cases holding that Section 2501 may not be extended or enlarged by the courts. *See, e.g.*, *Soriano v. United States*, 352 U.S. 270, 276 (1957) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly

observed and exceptions thereto are not to be implied."). Unfortunately for the Government, none of those cases involved the issue here—i.e., whether statutory class-action tolling is permissible under Section 2501.

Instead of citing authority that addresses the question at hand, the Government simply *assumes* that class-action tolling and Section 2501 are fundamentally incompatible. That assumption is incorrect, as the Panel persuasively demonstrated by citing *Barbieri v. United States*, 15 Cl. Ct. 747 (1988). As the Panel discussed, *Barbieri* applied the same "strict construction" view as *Soriano*—i.e., that Section 2501 is "jurisdictional." *Bright*, 603 F.3d at 1289-90. Nevertheless, the *Barbieri* court permitted class-action tolling and allowed thirteen claimants to file a suit that otherwise would have been time barred under Section 2501. *Barbieri*, 15 Cl. Ct. at 749-50. In support of its holding, the court made a distinction that the Government steadfastly refuses to acknowledge, namely that class-action tolling "does not involve the court's power to 'liberalize' the statute of limitations but rather its power to avoid a multiplicity of suits through a representative action." *Id.* at 752.

This principle is consistent with a long line of cases holding that class-action lawsuits do not "expand" the jurisdiction of the federal courts or otherwise intrude on the Government's limited waiver of sovereign immunity. *Collins v. Bolton*, 287 F. Supp. 393, 399 (N.D. Ill. 1968) (noting that while "the class action rule

necessarily affects certain other jurisdictional questions, [that] does not mean it expands or limits the court's jurisdiction"). Moreover, federal courts routinely allow class actions to proceed even though not every party would have independently satisfied the jurisdictional requirements. *See, e.g.*, *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 87 (2d Cir. 1990).

In sum, nothing in the Panel's decision violates the "absolute" "jurisdictional" nature of Section 2501. On the contrary, the Panel's decision, like this Court's recent decision in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), applies what has by now become the settled law of this Circuit, namely that class-action tolling does not violate the jurisdictional nature of statutes of limitations for claims against the Government.

B. The Panel's Decision Furthers the Interests Underlying Section 2501.

As the Government admits in its Pet. Rehearing, the *John R. Sand & Gravel* Court held that Section 2501 was designed to achieve broad, "system-related" goals, "such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *John R. Sand & Gravel*, 552 U.S. at 133 (citations omitted).

In order to make it appear that the Panel's decision somehow "contradicts" *John R. Sand & Gravel*, the Government focuses exclusively on the second goal

enumerated by the Supreme Court (limiting the scope of governmental waiver of sovereign immunity), while completely ignoring the other two (facilitating the administration of claims and promoting judicial efficiency).

However, even a cursory reading of the Panel's decision demonstrates that the Panel was guided by the very considerations cited by the Supreme Court in *John R. Sand & Gravel*. Among other things, the Panel noted the following difficulties that would ensue under the Government's interpretation of Section 2501:

- Potential class members would be required to predict whether and when class certification would occur in order to insure compliance with Section 2501;

- Courts would be tasked with "the burden of timing class certification and implementing opt-in procedures in such a way as to ensure that the limitations period was met"; and

- There would be an "anomalous difference" between the conduct of class-action litigation involving claims over which the federal courts and the CFC have concurrent jurisdiction. Specifically, the same putative class members would be treated differently depending on whether the claim was filed in federal court (which permits class-action tolling) or the CFC.

Bright, 603 F.3d at 1288-89.

Based on these considerations—none of which the Government rebuts—the Panel properly concluded that class-action tolling of opt-in claims would further the administration of claims and promote judicial efficiency—the very goals identified in *John R. Sand & Gravel* as central to Section 2501.

III. The Government's Attempt to Distinguish *American Pipe* Fails.

The Government next argues that the Panel's decision "is not supported" by *American Pipe v. Utah*, 414 U.S. 538 (1974). (*See* Pet. Rehearing, pp. 10-12). There, the Supreme Court held that "the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *American Pipe*, 414 U.S. at 551. Accordingly, the Supreme Court interpreted FRCP 23 to permit statutory tolling in class actions where purported members of the class made timely motions to intervene after the trial court denied class certification. Almost a decade later, the Supreme Court extended the rule of *American Pipe* to all members of an asserted class, because tolling properly allows class members to "rely on the existence of the suit to protect their rights." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983).

In its argument before the Panel, the Government advanced three arguments as to why statutory tolling pursuant to *American Pipe* is supposedly inapplicable to Section 2501. *See Bright*, 603 F.3d at 1282-83. Having failed to prevail on any of those arguments, the Government comes forward with two new ones in its Pet. Rehearing.

First, the Government attempts to draw a distinction between opt-out and opt-in class actions, arguing that, since *American Pipe* involved the former, it may

not be extended to also include the latter. (Pet. Rehearing, pp. 11-12). However, the Government fails to explain why this distinction should make any difference. It does not. The Government fails to articulate any principled reason why the rationale of *American Pipe* and *Crown, Cork & Seal* should not apply equally to opt-in class actions subject to Section 2501. Apparently realizing this, the Government makes only the most perfunctory attempt to defend the distinction, asserting that the opt-in procedure under RCFC 23 "resembles 'permissive joinder in that it requires affirmative action on the part of every potential plaintiff' in order to join the lawsuit." (Pet. Rehearing, p. 12). However, labeling a procedure akin to permissive joinder does not mean that the procedure therefore offends the "jurisdictional" nature of Section 2501. On the contrary, as Justice Black once observed, "[p]ermissable joinder of many plaintiffs as a matter of convenience and economy is not a means of enlarging the jurisdiction of the District Court." *Gibbs v. Buck*, 307 U.S. 66, 89 (1939) (Black, J. dissenting).

Second, the Government attempts to distinguish *American Pipe* on the grounds that "the late-added plaintiffs here had no excuse for their late filing." (Pet. Rehearing, p. 12). The Government argues that "the late filers were just tardy …. [T]hey were simply attempting to join an ongoing lawsuit as plaintiffs more than six years after their claims accrued." (*Id.*). The Supreme Court provided a ready rejoinder to that argument when, as stated above, it held that class members

were entitled to "rely on the existence of the suit to protect their rights." *Crown, Cork & Seal*, 462 U.S. at 350. In other words, the supposedly "tardy" plaintiffs of whom the Government complains were not tardy at all; their claims had already been asserted in a timely fashion by means of Ms. Fauvergue's class-action complaint, and they were justified in concluding that they had therefore individually satisfied the requirements of 2501 regardless of whether or not they had yet opted-in.

IV. The Panel's Decision Is Correct.

The Panel's decision lays out the entire framework of federal law relating to class-action tolling, harmonizing dozens of cases decided over many decades and carefully analyzing the purposes which Section 2501 (and limitations periods for claims against the Government in general) are meant to serve. The Panel reached a decision which strikes the right balance between giving the Government fair notice and protecting its limited waiver of sovereign immunity, on the one hand, while avoiding a wasteful and disorderly multiplicity of suits, on the other hand.

The Government complains that the Panel's decision "may result in considerable additional monetary liability" to the Government and further prejudices the Government by preventing it "from estimating its monetary liability until potentially long after the statute of limitations has run." (Pet. Rehearing, p. 14). But this argument ignores the reality of class-action litigation. It is not the

Government, but the class members, who are subjected to the greatest uncertainty. The Government can delay class certification almost indefinitely by filing delaying motions and massive discovery. *See e.g.*, *Quimby v. United States*, No. 02-101C (case which was transferred to the CFC in 2002 subject to extensive motion practice, delaying notice to the class until October 2009). In such cases (which are not uncommon), the Government's "damage" from delay is entirely self-inflicted. The Panel's ruling will provide all parties an incentive to efficiently and expeditiously litigate disputes. Plaintiffs already have such an incentive—they want to be paid. The Panel's decision will simply even the playing field.

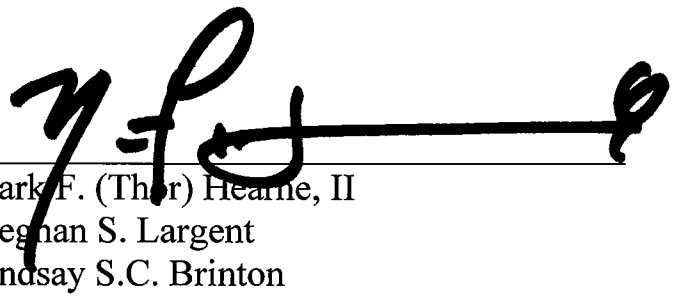
CONCLUSION

The Missouri and Kansas landowners whose property the Government has taken just want to be paid, as the Fifth Amendment guarantees. The Government took their property in 2002, and has denied them use of it ever since. These citizens timely filed a class-action complaint, thereby placing the Government on notice of their claims within the six-year limitations period of Section 2501.

Plaintiffs request this Court to treat the Government's petition to rehear the Panel's decision as what it in fact is: a tactic aimed at placing yet another obstacle in the path of these citizens, who simply want the compensation they are due under the Constitution. The Court should deny the petition in all respects.

Dated: August 25, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ARENT FOX LLP to print this document. I am an employee of Counsel Press.

On the **24th Day of August, 2010**, I served the within **Appellants' Response to Appellee's Petition for Panel Rehearing and En Banc Review** upon:

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August 24, 2010