No. 09-1466

In the Supreme Court of the United States

METLAKATLA INDIAN COMMUNITY, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
DONALD E. KINNER
SAMEER YERAWADEKAR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MELISSA JAMISON
JAY FURTICK
SEAN DOOLEY
Attorneys
Department of Health & Human Services
Office of the General Counsel
Washington, D.C. 20201

QUESTION PRESENTED

Whether the filing of a putative class action involving claims under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, either tolled or excused the CDA's requirement that a federal contractor asserting a claim against the government for breach of contract present that claim to a contracting officer within six years of the claim's accrual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statute and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 583 F.3d 785. The opinion of the Civilian Board of Contract Appeals (Pet. App. 29a-47a) is unreported, but available at 2008 WL 3052446.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2009. A petition for rehearing was denied on March 10, 2010 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on June 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 450m-1 of Title 25 of the United States Code provides as follows:

> Contract disputes and claims
>
> (a) Civil action; concurrent jurisdiction; relief
>
> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Federal Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter.
>
> * * * * *
>
> (d) Application of Contract Disputes Act
>
> The Contract Disputes Act * * * shall apply to self-determination contracts.

25 U.S.C. 450m-1.

Section 605 of Title 41 of the United States Code provides as follows:

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

41 U.S.C. 605.

STATEMENT

1. a. Petitioner, a federally recognized Indian Tribe located in Alaska, provides health care services to American Indians and Alaska Natives under contracts with the Indian Health Service (IHS). Pet. App. 2a; Pet. 5. The contracts are authorized by the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, which was enacted to promote tribal autonomy by permitting Tribes to manage federally funded services previously administered by the federal government. Pet. App. 2a-3a. Responsibility for the provision of such services is transferred to participating Tribes through self-determination contracts. *Id.* at 3a. Although the ISDA requires the federal government to provide self-determination contractors with the same amount of funding that the federal agency would have expended for the tribal programs if the government had continued to administer them, 25 U.S.C. 450j-1(a)(1), the ISDA did not originally require the federal government to pay an additional amount to cover the administrative costs incurred by Tribes to operate the programs. In 1988, Congress amended the ISDA to require the government to provide contractors with funds to cover such costs. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285.

The 1988 amendments to the ISDA also provided that disputes regarding the performance of self-determination contracts are governed by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.* Pet. App. 4a; 25 U.S.C. 450m-1(d). In 1994, Congress amended the CDA to require that any contract claim against the government must be presented to a contracting officer within six years after the claim accrues. 41 U.S.C.

605(a); Pet. App. 34a. If a contracting officer denies a contract claim or does not act on it within a specified period, a self-determination contractor may appeal to the Civilian Board of Contract Appeals, see 41 U.S.C. 606, or to the Court of Federal Claims, see 41 U.S.C. 609(a)(1). Pet. App. 4a. The ISDA also permits a self-determination contractor to appeal an adverse decision from a contracting officer by filing suit in federal district court. See 25 U.S.C. 450m-1(a); Pet. App. 4a.

b. After the 1988 amendments to the ISDA took effect, various tribal entities filed putative class actions (one of which is relevant to this case), alleging that the federal government was not meeting its obligation to provide funds to cover administrative costs associated with implementing self-determination contracts. Pet. App. 4a-5a. The putative class action relevant to petitioner's case was never certified as a class but rather proceeded as an individual action. That suit ultimately resulted in a decision by this Court holding that the federal government could not avoid its contractual promise to pay administrative support costs by asserting that Congress had failed to appropriate sufficient funds specifically to cover those costs when Congress had appropriated sufficient unrestricted funds to pay those costs. See *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 636-647 (2005); Pet. App. 5a.

2. Petitioner Metlakatla Indian Community operates health-care facilities and provides health-care services pursuant to a self-determination contract. Pet. App. 6a. Petitioner claims to have been a member of the putative class in *Cherokee Nation*. *Ibid*. On June 30, 2005—after class certification had been denied and this Court had issued a decision in *Cherokee Nation*—petitioner filed CDA claims with an IHS contracting officer for

fiscal years 1995 through 1999. *Ibid.* Petitioner alleged that IHS had failed to pay the full amount of the administrative costs of its self-determination contracts for those years. *Ibid.*

At issue in the petition for a writ of certiorari are the claims for fiscal years 1997 and 1998, on which petitioner obtained no relief from the contracting officer. Pet. App. 6a-7a, 36a. Petitioner appealed to the Civilian Board of Contract Appeals, which held that it lacked jurisdiction to consider those claims because petitioner had not submitted them to a contracting officer within six years of their accrual, as required by the CDA. *Id.* at 7a; 41 U.S.C. 605(a). The Board rejected petitioner's argument that, because petitioner was a member of the putative class in *Cherokee Nation*, the six-year limitations period for filing its administrative claims had been tolled until the district court denied class certification. Pet. App. 7a.

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-26a.

a. The court of appeals held that the CDA's six-year period for presenting a claim to a contracting officer was not subject to class-action tolling under Federal Rule of Civil Procedure 23. Pet. App. 9a-22a. The court of appeals acknowledged this Court's holding in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), that the filing of a putative class action tolls a statutory limitations period for individual claims by members of the class until class certification is denied. Pet. App. 9a-12a. The court explained, however, that such tolling is available only to "asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 9a (citation omitted).

With respect to petitioner's claims regarding fiscal years 1997 and 1998, the court found that petitioner's failure to comply with the CDA's presentment requirement would have rendered those claims ineligible for inclusion in the *Cherokee Nation* class action if a class had been certified. *Id.* at 12a-18a. The court therefore concluded that the limitations periods applicable to those claims were not tolled by the filing of the *Cherokee Nation* putative class action. *Id.* at 18a-22a.

b. The court of appeals held that the six-year period for presenting claims to a contracting officer was subject to equitable (as opposed to class-action) tolling. Pet. App. 22a-26a. The court remanded the case to the Board for a determination of "whether, under the circumstances of these cases, the limitation period should be tolled." *Id.* at 26a.[1]

ARGUMENT

Petitioner seeks review of the court of appeals' determination that the filing of a class action pursuant to Federal Rule of Civil Procedure 23 does not toll the limitations period for presenting a claim under the Contract Disputes Act to a contracting officer. Further review of that question is not warranted at this time because the case is currently in an interlocutory posture. In any event, the court of appeals' resolution of the question presented is correct and does not conflict with any deci-

[1] The United States has not sought review of the portion of the court of appeals' interlocutory decision that held that the CDA's six-year time limit is subject to equitable tolling. The government's decision not to challenge that interlocutory ruling would not preclude the United States from seeking review of any future final order concluding that equitable tolling should in fact apply to petitioner's claims regarding fiscal years 1997 and 1998.

sion of this Court or any other court of appeals. This Court recently denied a petition for a writ of certiorari arising out of the same litigation and presenting the same question. *Arctic Slope Native Ass'n* v. *Sebelius*, No. 09-1172 (petition denied June 28, 2010). There is no reason for a different result here.

1. As an initial matter, review of the question presented is not warranted at this time because this case is in an interlocutory posture. Upon remand to the Civilian Board of Contract Appeals, petitioner will have an opportunity to argue that it is entitled to equitable tolling of the six-year presentment requirement with respect to its claims regarding fiscal years 1997 and 1998. If petitioner prevails on that issue, resolution of its claim to class-action tolling will have no effect on the outcome of the case. If petitioner is ultimately held not to be entitled to equitable tolling, it will be able to raise the class-action tolling argument—together with any other claims that may arise during subsequent proceedings in this case—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); see also *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari) (expressing preference for review after all proceedings have concluded below); see generally Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002).

2. The court of appeals correctly held that the filing of the *Cherokee Nation* class action in federal district court did not toll the statutory presentment period for filing an administrative claim with a contracting officer under the CDA. As the court of appeals explained (Pet. App. 12a-22a), class-action tolling applies only to parties

who were eligible to be included in the putative class had it been certified, and petitioner is not such a party.

a. Petitioner contends (Pet. 25-29) that the court of appeals' decision conflicts with this Court's decisions in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983) (*Crown*); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974); and *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) (*American Pipe*). That argument lacks merit. The Court held in those cases that class-action tolling applies to "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554; see *Crown*, 462 U.S. at 349 (same); *Eisen*, 417 U.S. at 176 n.13 (citing *American Pipe*). That is consistent with the court of appeals' decision, which held that class-action tolling does not apply to petitioner's claims for fiscal years 1997 and 1998 precisely because those claims could not have been resolved in the *Cherokee Nation* class action if the class in that case had been certified. See Pet. App. 12a-22a; see also *id.* at 21a (noting that the rationale of *American Pipe* "would protect any potential class member over whom the court could exercise jurisdiction by class certification, but not parties, such as those who have failed to exhaust mandatory administrative remedies, over whom the court may not exercise jurisdiction"). This Court's decisions therefore do not support petitioner's contention that the time for presenting its administrative claims to a contracting officer was tolled by the pendency of a putative class action in which those claims could not have been litigated.

Petitioner also asserts (Pet. 29) that the court of appeals' decision conflicts with decisions of the Second, Ninth, and Tenth Circuits. That is incorrect. None of

the decisions on which petitioner relies holds that the filing of a putative class action tolls a limitations period for filing an administrative claim when a litigant's failure to file such a claim would have precluded the litigant from being included in any class that might ultimately have been certified. Rather, those decisions all hold that an individual who would have been a member of a putative class is entitled to class-action tolling if the class is ultimately not certified, even when the member files a separate suit before class certification is denied. See *State Farm Mut. Auto. Ins. Co.* v. *Boellstorff*, 540 F.3d 1223, 1230-1234 (10th Cir.), cert. denied, 129 S. Ct. 762 (2008); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008-1009 (9th Cir. 2008); *In re WorldCom Sec. Litig.*, 496 F.3d 245, 252-256 (2d Cir. 2007). Those rulings do not conflict with the decision below because petitioner, unlike the plaintiffs in those cases, would not have been eligible for inclusion in the *Cherokee Nation* class even if the district court had allowed that suit to proceed as a class action.

b. Petitioner also contends (Pet. 14-25) that it is entitled to the benefit of class-action tolling under this Court's decision in *American Pipe* because the CDA's requirement that an entity present its claim to a contracting officer is not a jurisdictional prerequisite to filing suit in federal court. For that reason, petitioner argues, its failure to present its claim to a contracting officer would not have prevented it from being included in the *Cherokee Nation* class if such a class had been certified. That argument lacks merit. The court of appeals carefully considered the CDA's language and purposes, and it correctly concluded that presentment to a contracting officer is a prerequisite to participation

in a class action under the statute. Pet. App. 12a-17a & nn.1-2.

i. Relying on *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010), and on prior decisions of this Court construing other judicial-review provisions, petitioner argues (Pet. 14-21) that presentment of a claim to a contracting officer is not a jurisdictional prerequisite to the filing of an ISDA action. Petitioner's reliance on those decisions is misplaced. This Court has "previously recognized that the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975). The Court implemented that rule in *Reed Elsevier* by examining the "text, context, and relevant historical treatment" of the administrative filing condition imposed by the Copyright Act. 130 S. Ct. at 1246.[2] Consistent with those decisions, the court below focused its analysis on the specific judicial-review provision at issue in the case.

The ISDA's general grant of jurisdiction to federal district courts over disputes arising under the ISDA indicates that the courts' jurisdiction over contract claims is contingent on compliance with the CDA. 25 U.S.C. 450m-1(a) and (d). In relevant part, Section 450m-1(a) states:

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[2] In *Reed Elsevier*, which was decided after the court of appeals issued its decision in this case, the Court held that the requirement in 17 U.S.C. 411(a) (Supp. II 2008) that copyright holders register their copyrights was not a jurisdictional prerequisite to filing a copyright infringement suit in federal district court. The Court explained that the registration requirement "is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions" that permit unregistered copyright-holders to sue in district court. 130 S. Ct. at 1247.

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, *subject to the provisions of subsection (d) of this section* and concurrent with the United States Court of Claims, *over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter.*

25 U.S.C. 450m-1(a) (emphasis added). Subsection (d) in turn provides that "[t]he Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. 601 *et seq.*] shall apply to self-determination contracts." 25 U.S.C. 450m-1(d) (brackets in original). And the CDA requires that "[a]ll claims by a contractor against the government * * * shall be submitted to the contracting officer for a decision * * * within 6 years after the accrual of the claim." 41 U.S.C. 605(a). Congress has not enacted any exceptions that would permit ISDA contractors who have not met the CDA's presentment requirement to sue in district court, including as a member of a putative class action. Because the district court's jurisdiction over ISDA contract suits is "subject to" the CDA, compliance with the CDA's administrative-presentment requirement is a jurisdictional prerequisite to suit.

The court of appeals also acted properly in comparing the ISDA's review scheme to that of other federal statutes authorizing private suits against the federal government following administrative review. See Pet. App. 15a-17a & n.2. The court found that the ISDA's incorporation of the CDA's administrative-presentment requirement is similar to the administrative exhaustion requirement in the Social Security Act (SSA), 42 U.S.C.

405(g). Pet. App. 15a. This Court held in *Salfi* that satisfaction of the SSA's administrative exhaustion requirement is a jurisdictional prerequisite to a particular plaintiff's inclusion in a class action challenging decisions by the Social Security Administration. See 422 U.S. at 763-764. The court of appeals also found the CDA's presentment requirement to be akin to the administrative presentment requirement in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, which courts of appeals have found to be a jurisdictional prerequisite to filing suit under the FTCA. Pet. App. 16a-17a & n.2 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 198 (2d Cir. 1987); *Lunsford* v. *United States,* 570 F.2d 221, 224-227 (8th Cir. 1977); *Pennsylvania* v. *National Ass'n of Flood Insurers*, 520 F.2d 11, 23 (3d Cir. 1975)).

ii. Even if presentment of an administrative claim to a contracting officer were not a jurisdictional prerequisite to an ISDA suit, potential plaintiffs would still be required to satisfy that requirement in order to be included in a properly certified class. Even a non-jurisdictional prerequisite to suit, while subject to forfeiture "if the party asserting the rule waits too long to raise the point," may be "inflexible" and "unalterable on a party's application." *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004). Petitioner identifies no sound reason to conclude that a potential plaintiff who breaches a mandatory but non-jurisdictional requirement can nevertheless be included in a class action.

As petitioner observes (Pet. 22), this Court has held that, in a private-sector class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, unnamed class members who had not filed charges with the Equal Employment Opportunity Commission could be

awarded backpay. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). As the court of appeals recognized, however, "that principle derives from the specific language and legislative history of Title VII." Pet. App. 15a; see *Albemarle Paper*, 422 U.S. at 414 n.8 (explaining that courts of appeals had held that "backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members," and that Congress had "plainly ratified this construction of the Act" in subsequent anti-discrimination legislation). The Court in *Albemarle Paper* did not announce any general rule that persons who fail to satisfy mandatory but non-jurisdictional claim-processing requirements can obtain relief in a class action.

In the present case, the court of appeals properly considered the "particular administrative scheme" at issue, *Salfi*, 422 U.S. at 765, and correctly rejected petitioner's argument that *Albemarle Paper* was controlling. See Pet. App. 14a-19a. Whereas *Albemarle Paper* involved a suit between private parties, the ISDA/CDA requirement that an administrative claim be presented to a contracting officer is a condition on the United States' waiver of its sovereign immunity. And while Title VII gives the EEOC "only the authority to conciliate, not the authority to settle claims," the CDA gives agencies "broad settlement authority." *Id.* at 16a. As the court of appeals explained, "[t]he courts that have addressed the question have held that an ISDA claimant that has not presented its claim to a contracting officer pursuant to the CDA cannot be a class member in an

ISDA class action." *Id.* at 18a. Petitioner identifies no contrary holding.[3]

3. Petitioner is also incorrect in suggesting (Pet. 30-33) that the court of appeals' decision will undermine the purposes of Rule 23 and class-action tolling. As the court of appeals explained (Pet. App. 9a-10a), class-action tolling obviates the need for putative class members to protect their rights by filing individual complaints that will be rendered superfluous if a class is ultimately certified. That concern is not implicated in the present context, however, because any class action that might have gone forward would have been limited to claims that were timely presented to a contracting officer. Because presentment of petitioner's claims to a contracting officer would not have been a wasteful act even if the court in *Cherokee Nation* had certified a class, tolling those claims would not serve the purpose that the class-action tolling rule is intended to achieve.

On the contrary, applying class-action tolling here would undermine judicial efficiency. Because individual CDA claimants must present their claims to contracting officers before they can participate in class actions, tolling the presentment deadline would unnecessarily delay the filing of the administrative claims without avoiding the presentment requirement. And as the court of ap-

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[3] Contrary to petitioner's assertion (Pet. 29-30 n.10), the district court decision in *Ramah Navajo Chapter* v. *Lujan*, No. Civ. 90-0957 (D.N.M. Oct. 1, 1993) (included as an exhibit before the Civilian Board of Contract Appeals, see Pet. 25 n.8), does not recognize any such exception. As the court of appeals correctly noted, presentment was not required in that case because the court found that it would have been futile. Pet. App. 18a n.3. As the court of appeals noted, petitioner has not argued that any futility exception excuses its failure to present its claims to a contracting officer. *Ibid.*

peals noted, presentment in the circumstances of petitioner's case would have served the "useful function of apprising the government of the amount that is potentially at issue in the class action suit, which promotes the notice function that is part of the justification for the presentment requirement in the first place." Pet. App. 21a-22a. Notice to the federal government of damages claims is especially important in CDA cases because the CDA grants "agencies to which claims are presented * * * broad settlement authority," which can prevent litigation from occurring at all. *Id.* at 16a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
DONALD E. KINNER
SAMEER YERAWADEKAR
Attorneys

MELISSA JAMISON
JAY FURTICK
SEAN DOOLEY
Attorneys
Department of Health & Human Services
Office of the General Counsel

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