IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL E. KELLY, et al.,)
Plaintiffs,) Case No.
vs.) 21-1949C
THE UNITED STATES OF AMERICA,)
Defendant.)

Courtroom 6
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Monday, March 11, 2024
9:30 a.m.
Oral Argument

BEFORE: THE HONORABLE MOLLY R. SILFEN

Reported by: Karen G. Willoughby, CER

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ALSO PRESENT:
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P R O C E E D I N G S

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(Proceedings called to order, at 9:35 a.m.)

THE CLERK: Please all rise. The Honorable Molly R. Silfen now presiding.

THE COURT: You can be seated. Thanks. Good morning.

COUNSEL: Good morning.

THE COURT: So let's see, so we're here for argument on the motion to dismiss in Kelly versus United States, Number 21-1949. And I thought we would -- I'm not too worried about the sort of time, but I figured just nominally like 30 minutes per side, the Government going first, and you can reserve some time for rebuttal.

Is there anything we should discuss before we get started?

MR. SCHIAVETTI: No, Your Honor.

MR. DIAMOND: No, Your Honor.

THE COURT: Sounds good. All right. Then we can hear from the Government.

MR. SCHIAVETTI: Thank you, Your Honor.

Good morning, Your Honor, Anthony Schiavetti, Department of Justice, for the United States I'm joined at counsel table by Elizabeth Hosford, Department of Justice, as well as Jason Morrow, Department of the

Treasury. Asim Varma, Arnold & Porter, is here, as well, on behalf of the Federal Housing Finance Agency.

May it please the Court. The Court should dismiss Plaintiffs' amended complaint for six independent reasons. First, all of Plaintiffs' claims are barred by this Court's jurisdictional statute of limitations. Second, Plaintiffs' takings claims are precluded by the Federal Circuit's dismissal of substantively identical takings claims in Washington Federal. Third, Washington Federal clearly establishes that Plaintiffs fail to allege a cognizable takings claim.

Fourth, the two takings claims that Plaintiffs purport to bring directly are, in substance, derivative claims and Plaintiffs lack standing to bring them directly. Fifth, Plaintiffs lack standing to assert a derivative takings claim and, finally, Plaintiffs' contract claims fail as a matter of law because Plaintiffs fail to plausibly allege the existence of a contract between themselves and the United States.

For these reasons, and those explained in our briefing, we respectfully request that the Court dismiss the amended complaint.

THE COURT: Can I -- just a sort of overarching question on those different grounds.

MR. SCHIAVETTI: Yes, Your Honor.

THE COURT: You said they're independent grounds. So does that mean that they each cover all of the claims and that they each would be an independent basis for dismissing? I just wanted to make sure I understand the sort of --

MR. SCHIAVETTI: They are not dependent on each other, so they don't need to overlap. They each have at least one independent basis for dismissing some of the claims. Some of the arguments, though, do apply to only some of the claims. So for example, the last is about the contract claims only and some of the preclusion, for example, is only about the takings claims, and that also applies to the standing on the derivative claims, which is -- of which there is only one pled directly and then there are two that are substantively derivative.

So there are some that apply to only some portion of the claims, but none of them depend on each other, although certainly the preclusion and some of the other binding aspects of Washington Federal apply to several of the claims because of different aspects and different legal effects of the same Federal Circuit binding judgment that both precludes Plaintiffs' takings claims here and also provides binding guidance to the Court on exactly those substantively identical claims.

THE COURT: On preclusion, just -- you call it

preclusion. Is it claim preclusion, issue preclusion? What precisely are we looking at?

MR. SCHIAVETTI: It's both, Your Honor. There's both claim and issue preclusion here. And the one piece there that may seem a bit odd, because we do have certainly a different nominal plaintiff, but the -- because the claims are substantively derivative, they belong to the enterprises and not to individual shareholders. So it doesn't matter whether it's these shareholders or the shareholders in Washington Federal asserting these claims, they are substantively derivative, as the Court found, so they belong to the enterprises. So it's the same party, again, asserting these same claims because it's the enterprises that are the real party in interest here.

THE COURT: And if the enterprises weren't the real party in interest, do the preclusion principles apply or is there a problem with them not being the same party?

MR. SCHIAVETTI: If it weren't that the enterprises were the real party in interest, then, yes, you have different shareholders. So the preclusion may not apply there, but you'd still have binding guidance on exactly the same issue from the Federal Circuit because the issues are substantively indistinguishable.

I can start, Your Honor, wherever you'd prefer, but because the statute of limitations in this Court is jurisdictional, it's really a threshold jurisdictional issue that the Court has to resolve as to whether the claims are timely under the Court's statute of limitations in 28 U.S.C. Section 2501. Plaintiffs acknowledge, at least for the purposes of this motion, that their claims accrued on September 6th, 2008, and thus that their claims needed to be filed within six years of that date, unless it was tolled.

Plaintiffs rely, however, on tolling based on the purported class action in Washington Federal, even though for other purposes, they call this a very different case with very different claims. Plaintiffs' reliance on Washington Federal to toll the statute of limitations is misplaced, however, for three principal reasons.

First, class action tolling is equitable in nature, as the Supreme Court has determined in its decision in CALPERS and thus it's unavailable to toll Section 2501, which is not susceptible to tolling that's equitable in nature.

Second, class action tolling, in this Court, requires the filing of a motion for class certification prior to the expiration of the statute of limitations,

but the Washington Federal plaintiffs filed no such motion in their case.

And, third, even if the Plaintiffs could rely on Washington Federal to toll the statute of limitations for their takings claims, Plaintiffs' contract claims depend on factual allegations that are dissimilar to any that were asserted by the Washington Federal plaintiffs and those are, nevertheless, barred and cannot depend on any class action tolling.

So for the first argument, equitable tolling, including class action tolling, is not available to toll Section 2501. That's been clearly stated by the Supreme Court in John R. Sand & Gravel and by the Federal Circuit in Floor Pro vs. United States. The Federal Circuit first considered the question of the availability of American Pipe class action tolling in Bright vs. United States and it grappled with exactly this issue. It knew that class action tolling could not toll the Section 2501 statute of limitations if it were equitable in nature. It engaged in an extensive analysis to determine whether it were equitable in nature or statutory in nature.

There was also another issue there where the Rule -- Rule of -- for the Court of Federal Claims 23, as opposed to Federal Rule of Civil Procedure 23, which is clearly statutory, there was some analysis as to whether,

because it has the force and effect of law, RCFC 23 was also statutory. The Court found it was, or ultimately found that because it grounded -- it found class action tolling under American Pipe to be statutory in nature, then it was available to toll Section 2501. That's what the Federal Circuit held in Bright.

After that, years later, the Federal -- excuse me, the Supreme Court, in CALPERS, California Public Employees Retirement System, vs. ANZ Securities, looked at exactly that same legal question. It looked at what is the nature of American Pipe tolling. Is it statutory or is it equitable in nature? The Supreme Court concluded looking at exactly that same question, that American Pipe tolling is equitable in nature and, thus, it was found that it was unable -- unavailable to toll the statute of repose there.

Now, the Supreme Court, in CALPERS, talked about the two different types of statutory timelines. I would submit they were trying to draw the distinction there between a typical statute of limitations and a statute of repose, which is supposed to give defendants certainty. The statute of limitations is usually more based on equitable ideas of having -- encouraging plaintiffs to bring their claims quickly.

But as the Supreme Court explained in John R.

Sand & Gravel, there are two types of statutes of limitations, the jurisdictional type, like the one that applies to our court, which sets -- doesn't have that same character of the statutes of limitations that it mentioned in CALPERS, but instead set a right bound on the waiver of sovereign immunity, which is what the Tucker Act statute of limitations does. So because that is a harder statute of limitations, it cannot be tolled equitably in the same way that a statute of repose cannot.

So now we have the Supreme Court that has clarified for this Court and every other court that class action tolling under American Pipe is equitable in nature and we know from the Supreme Court and the Federal Circuit that equitable tolling cannot be used to toll Section 2501, and so putting the two together, it's clear that American Pipe tolling, class action tolling, is not available to toll 2501, the statute of limitations in this Court. And, therefore, because class action tolling is not available, these claims, which were filed well after the six-year statute of limitations expired, are untimely and there's no jurisdiction in the Court for those claims.

THE COURT: I have some questions about those, if you were about to move on to the other issues.

MR. SCHIAVETTI: No, please, Your Honor.

THE COURT: So one is about the -- the Plaintiffs raise a distinction between opt-in and opt-out classes for purposes of CALPERS and it sounds like -- I guess the question is why isn't that relevant where Bright was specifically about opt-in classes and CALPERS was about an opt-out class?

MR. SCHIAVETTI: Actually, Your Honor, so the -- that is an important distinction for a number of reasons. So all of the cases that involve District Courts, which are most of the cases that Plaintiffs rely on, including American Pipe, Crown Cork & Seal, and some of the 7th and 11th Circuit cases that they have cited in their briefing, are about opt-in -- opt-out classes, excuse me, in the District Court, which are different in nature, which is why, in our briefing, we went directly to Bright, because one of the other questions in Bright was whether because the Court of Federal Claims has an opt-in class procedure, whether class action tolling was even going to be applicable in such a court.

And the Federal Circuit acknowledged there had been a split in the Circuits among -- on that question as to whether, in the narrow instances where you have an opt-in class, whether you can have class action tolling. One Circuit had said no; another Circuit had said yes.

The Federal Circuit answered that question with yes, deciding that even in an opt-in class, you could have that.

However, an opt-in class, of course, is narrower and the opt-out class procedure in the District Court, even before the filing of a motion for class certification and a motion by a particular party to join that class, all those class members are essentially purportedly part of that class right from the beginning. The default is they're in the class, whereas in an opt-in class procedure, like the one in this Court, the default is they're not in the class unless they ask to join it.

So that really also applies in -- to the second argument regarding Big Oak Farms where you have the need for the Court that -- recognized to incentivize plaintiffs and this Court to use that motion for class certification to start that process going so there can be some additional certainty as to who is part of that class. There's more necessity for that here in this Court versus the District Court with an opt-out class procedure where the default is that every member of that class you could qualify would be part of that class as a default position.

THE COURT: Okay. So you're fundamentally just saying that Bright sort of reasoned it wrong, even though

it was about opt-in rather than an opt-out.

MR. SCHIAVETTI: Yeah, well, we certainly don't challenge that aspect of the decision, the opt-in class part of the decision. The problem is the conclusion that they made on the nature of the tolling, whether it's statutory or equitable. They concluded that it was statutory in nature and the Supreme Court has undermined and really eviscerated that portion of the opinion by stating clearly on exactly the same question that it's equitable in nature.

THE COURT: So you don't see sort of an interaction between the opt-in nature of it and the equitable nature of this?

MR. SCHIAVETTI: I think they're two separate questions, Your Honor.

THE COURT: Okay.

MR. SCHIAVETTI: I don't think that there's -- that part of the question overlaps with the question of whether it's based in equity or based on the statute.

THE COURT: Then in Bright, the statute of limitations was tolled only for class members to join that suit rather than to bring a separate suit. And in Crown Cork & Seal, this Supreme Court held that there wasn't a distinction between Plaintiffs who want to join the original suit and those who want to bring a separate

suit.

MR. SCHIAVETTI: Correct.

THE COURT: But that wasn't under Section 2501.

MR. SCHIAVETTI: Right.

THE COURT: So does Section 2501 make a difference in that analysis?

MR. SCHIAVETTI: I don't think so, Your Honor. I don't think it makes a difference whether the Plaintiffs are seeking to join the same class after the expiration or whether they're trying to file separately. It's the same analysis either way.

THE COURT: Okay. And then in Bright, the Federal Circuit had some comments about similarly restrictive or jurisdictional statutes of limitation that have been subject to American Pipe tolling. So they cite Stone Container Corporation and Arctic Slope Native Association.

MR. SCHIAVETTI: Right.

THE COURT: Does CALPERS also call those cases into question?

MR. SCHIAVETTI: That's a good question, Your Honor. I haven't thought through that entirely. I'd have to reread those cases to be sure, but to the extent that they are dependent on the idea that an equitable tolling can apply to 2501, then, yes, because the Supreme

Court has made clear that equitable tolling cannot apply to 2501, and now the Supreme Court has been additionally clear that class action tolling is equitable in nature. So therefore, any case that would have applied class action tolling to 2501 would be called into question.

THE COURT: And then the Federal Circuit also focused on, in Bright, this sort of anomaly if 2501 couldn't be tolled, between the conduct of class action litigation under the Tucker Act and the Little Tucker Act.

MR. SCHIAVETTI: Right.

THE COURT: And the quote -- or at least sort of a slightly shortened version of the quote is that one class action filed in Federal District Court under the Little Tucker Act can cover the putative class while the same class action complaint filed in the Court of Federal Claims cannot provide jurisdiction over the identical putative class members. In this respect, we would be creating a regime in which the class action process in the Court of Federal Claims was not just different from the class action process in the Federal District Court, opt-in versus opt-out, but was also so cumbersome and unwieldy in its operation that unlike the process in District Court, it frustrated the purpose of avoiding multiplicity of suits.

So how -- under your theory that Bright is wrong, how do you address that concern of the Federal Circuit's?

MR. SCHIAVETTI: It seems to me, Your Honor, that that depended again on the difference between the opt-in versus opt-out class. I will acknowledge that I'm not an expert on the Little Tucker Act, but to the extent that it's subject to the same statute of limitations, then it would have the same problem with equitable tolling not being available there. But in either instance, even if those tensions are present, it simply is not available regardless of the equities.

So again, that's really almost akin to an equitable consideration or a consideration as to the administration based on the Courts. But the Court -- the Supreme Court has been clear that none of those considerations are available to look at the jurisdictional time limit that's imposed by the Tucker Act that provides a limitation on the waiver of sovereign immunity that's contained there. So even if those tensions would be present, they really wouldn't affect the analysis here where -- because class action tolling is equitable in nature and such concerns are not available to toll the Tucker Act statute of limitations, you would have that result, at least in this Court.

THE COURT: Okay. And then one other question about the fact that Plaintiffs never filed a motion for class certification in Washington Federal and the Plaintiffs here are arguing that Washington Federal never got to that point and the Plaintiffs clearly intended to make it a class action. So I guess the question is like, when should they have filed the motion for class certification?

MR. SCHIAVETTI: It's almost -- I mean, these are really equitable concerns that they're mentioning. It was almost unfair because they didn't have the chance to file the motion for class certification. I will say, I mean, there were months of litigation before that case was stayed so it's certainly not impossible that they could have done so, but it's really besides the point to say we're not faulting the Washington Federal plaintiffs, we're not doing that. To the extent that there's any sort of analysis to that, as we mentioned, in their briefings, the question is about whether these Plaintiffs were entitled to continue to rely on Washington Federal to toll the statute of limitations or not. Even that is really an equitable consideration that's just not part of what the Court's analysis can encompass when looking at 2501 statute of limitations.

So the question really isn't was it Washington

Federal's fault. Can we look at whether that's fair to them because there was this stay in place? Certainly, there was an opportunity, given the time period that elapsed that the case was pending for -- do I have the entire timeline here? Actually, I do. That case was filed in June of 2013 and it wasn't dismissed until 2020 -- July 2020. So there was quite a bit of time in there, including almost from June 2013 until February 2014, before Washington Federal was stayed. So there was certainly an opportunity for the filing of a class certification motion.

THE COURT: But, I mean, that seems like that would be an odd order of things to file a class certification. Like it would sort of be out of the normal process, right?

MR. SCHIAVETTI: That may be, Your Honor. But, again, these questions are really questions of equity which don't apply in the analysis of the tolling of 2501.

THE COURT: And I guess under your argument, you would also have to -- they would probably have had to have done it significantly earlier to the case before the original limitations period ran, I guess if it -- sort of putting aside your argument for the moment --

MR. SCHIAVETTI: Correct.

THE COURT: -- that tolling is unavailable,

period.

MR. SCHIAVETTI: Yes, they would have had to file before the original statute of limitations ran, which would have been six years from September of 2008. So 2014, if my math is correct, September 2014. So yeah, it would have had to -- they would have had something over a year after they initially filed their complaint, but would have had to file before the expiration of the statute of limitations. That's correct, Your Honor.

THE COURT: Okay.

MR. SCHIAVETTI: And that, of course, stems from the Court's decision -- this Court's decision in Big Oak Farms. And one of the key considerations that the Court looked at there is if we -- if the Court were to provide all of the benefits of filing a class certification motion just by nature of filing the complaint, which contains class action allegations, then why would any party even bother to file a class certification motion?

Well, certainly, they wouldn't be incentivized to do so. So that was one of the things that weighed heavily on, I believe, Judge Firestone in that case.

THE COURT: And then quickly, before you move on to the other, I guess, five independent grounds, I guess -- well, two things. One is you mentioned in your

opening brief that Congress provided a specific and exclusive means for the enterprises to challenge FHFA's appointment as conservator --

MR. SCHIAVETTI: Correct.

THE COURT: -- in an action in District Court within 30 days of the appointment. And, like, based on that statement -- and I was sort of expecting to see an argument about sort of effectively undermining the statutory scheme by bringing a separate case here, and I didn't really see making that argument.

MR. SCHIAVETTI: We have made that argument in the past, Your Honor, and the Federal Circuit was not convinced by that argument in its analysis. So we don't repeat that argument here. However, these -- the Federal Circuit was clear that the applicable statute of limitations for a takings claim is the Tucker Act statute of limitations. Now, a challenge to the conservatorship still under HERA has to be filed in District Court within 30 days and it was not done so. The Federal Circuit found that that doesn't mean that Plaintiffs can't file a takings claim to the extent that they have one. Of course, the Federal Circuit found that plaintiffs there did not have one for a variety of reasons that we'll get into.

THE COURT: So that was in Washington Federal

that they --

MR. SCHIAVETTI: Correct, Your Honor.

THE COURT: Okay, got it.

MR. SCHIAVETTI: Actually, I should say it was either in Washington Federal or Fairholme.

THE COURT: Okay.

MR. SCHIAVETTI: But it was -- the analysis was the same either way. The Federal Circuit issued both of those decisions on the same day, but it separated out the Washington Federal analysis and decision because that case focused mostly on the decision to impose -- to place the enterprises into conservatorships rather than the cases that were bundled in the Fairholme decision that were decided there were focused mostly on the third amendment to the PSPAs, which was in 2012. So it was the actions of conservator later in the conservatorship process rather than the decision to place the enterprises into conservatorship in the first place.

THE COURT: Okay.

MR. SCHIAVETTI: One more aspect on the tolling -- the statute of limitations piece, Your Honor -- I'm certainly happy to answer any further questions on the issue -- is that the contract claims, of course, even if the takings claims could benefit from class action tolling under American Pipe, which they cannot as we've

described, however, even if they could, the contract claims are not similar to any that the Washington Federal plaintiffs raised and, thus, they cannot benefit from such tolling. So the Washington Federal plaintiffs did not bring any contract claims.

Plaintiffs note that there is significant overlap overall in the allegations in Washington Federal and in this case, and we certainly agree with that. As we've said many times, the takings claims here are substantively indistinguishable from the ones that were raised in Washington Federal.

However, that's not true of the contract claims, and the contract claims include some allegations about the existence of a contract, not much in terms of allegations, but which particular officials issued particular statements that Plaintiffs assert constituted a contract. None of those allegations were present in Washington Federal and because of that, those contract claims cannot benefit from class action tolling.

Now, there are several courts -- a number of courts in the country that require claim identity for class action tolling. Other courts have looked to the standard that Plaintiffs rely on from Justice Powell's concurring opinion in Crown Cork & Seal. This Court has not resolved the issue of which of those is applicable.

However, under either standard, the claims do not overlap and do not benefit from that class action tolling because there was no -- they do not share a common factual basis and legal nexus so that Defendant would rely on the same evidence and witnesses in his defense.

The evidence and witnesses that would be used to defend the contract claim are just different from those that would potentially defend any takings claim.

THE COURT: I mean, there's some tension there and it's -- I see it in obviously both sides' arguments on -- you know, on one hand, it's close -- I guess, from your perspective on one hand, they're close enough to -- I think you're arguing both have this preclusion problem, but then, on the other hand, it's like too different to allow for tolling. And so I guess with -- I don't know, it just --

MR. SCHIAVETTI: I understand, Your Honor, that there -- at the high level, there's tension in both, but really their claims -- their arguments are fundamentally incompatible and that's not true of ours. So we have consistently said that the takings claims are substantively indistinguishable from Washington Federal. It's exactly the same claim that the Federal Circuit has already resolved. It's not true of the contract claims.

They, on the other hand, are trying to mush

them all together to say, no, no, we're the same as Washington Federal for the tolling piece, but then, no, no, Washington Federal is totally different for preclusion and for the binding nature of the Federal Circuit's decision regarding a lack of a cognizable property interest for it to base a takings claim on. So their positions are fundamentally incompatible where ours are perfectly compatible and that was acknowledged that the takings claims are exactly the same, the contract claims are different.

THE COURT: And then one other question on the -- jumping back to the class certification question. So again, sort of putting aside whether tolling applies, would Mr. Kelly have had to file his case before the statute of limitations ran out when he saw that the Washington Federal plaintiffs were not moving for faster certification and time was running out?

MR. SCHIAVETTI: Yes, Your Honor, that's correct.

THE COURT: Okay. And then -- but that feels like a little bit intentioned with the purpose of tolling, which is to sort of reduce the number of unnecessary filings.

MR. SCHIAVETTI: That's true. But as we mentioned in our brief -- and perhaps I should have

listed the cases. Plaintiff mentioned that we didn't do that. But we saw that procedure unfold in other litigation in exactly this Fannie Mae/Freddie Mac litigation mostly focused on the third amendment. But we did see that there were pending class actions -- purported class actions filed regarding the 2012 amendment to the PSPAs, that then we saw a number of -- and those cases had been filed in 2013, for example. And then we saw a number of additional filings in 2018 right before that statute of limitations would have run out because of exactly this issue. There was concern, presumably, by those Plaintiffs as to whether they might have a statute of limitations issue.

So there were a number of cases, including Owl Creek, Mason Capital, Akanthos, Appaloosa, CSS, 683 Capital, Wazee (phonetic) Street -- I mean, there were quite a few cases filed in 2018 right before that statute of limitations would have expired. So there's no reason that the Plaintiffs here couldn't have done the same thing. They wouldn't have had until 2018; they would have had to do something in 2014, but they could have taken that same precautionary measure.

THE COURT: Okay. Now, I'll let you move on to the other grounds.

MR. SCHIAVETTI: Certainly, Your Honor. I'm

happy to focus on whichever parts you have questions on. I'm happy to jump around. Otherwise, I'll be happy to turn to preclusion.

Because the Federal Circuit has already held that substantively derivative takings claims identical to those that the Plaintiffs present here, presented by shareholders holding the same enterprise preferred shares that are the -- upon which Plaintiffs ground their claims fail on the merits as a matter of law, those claims are precluded here. Plaintiffs attempt to escape that preclusion argument by, again, turning 180 degrees from their arguments on statute of limitations and are now distancing themselves from the Washington Federal case saying it's a very different case with very different claims.

It's just not true, however. First of all, if you just look at the two complaints, the allegations that underlie the takings claims asserted here and the takings claims asserted there are nearly identical. It's true that in the original complaint filed here, there were illegal exaction allegations that have now been reframed in the amended complaint, but the substance of the claims is still exactly the same in both cases.

The idea is that there were certain limitations that were placed by HERA as to when a conservator could

be appointed over the enterprises and both the Washington Federal plaintiffs and the Plaintiffs here alleged that those conditions were not met. They allege that although consent was one of the conditions under which conservatorships could be imposed, there was no real consent because the consent was coerced. So it's the same allegations in both cases.

Moreover, that wasn't even the basis of one of the critical points of the Federal Circuit's analysis in Washington Federal. First, in Washington Federal, it said that the first part of that -- the takings analysis dealt with the fact that the Washington Federal Plaintiffs were alleging illegality and it said under Rith Energy, you cannot allege illegality in a takings claim and you can't do it an illegal exaction claim either when you have this other avenue to challenge a conservatorship in District Court within 30 days. So we have to analyze this -- your takings claim, plaintiffs in Washington Federal, as one challenging the imposition of the conservatorships legally as a taking.

Then the Federal Circuit looked at exactly that claim, which is the claim that Plaintiffs allege here, and found that that failed as a matter of law, as well, because there's no cognizable property interest that was possessed by the enterprise preferred shareholders, the

shareholders -- actually common and preferred shareholders in the enterprises possess no cognizable property interest and, therefore, they could not base a takings claim on that. So that both is a binding analysis for this Court in substantively analyzing the takings claims were to do so; however, the Court should never get there because preclusion principles bar the relitigation of that same issue here. It's exactly the same issue.

THE COURT: And it -- so okay. You said both versions of preclusion apply and, I guess, just quickly running -- do you mind just running through the factors of whichever one you think is --

MR. SCHIAVETTI: Both apply here --

THE COURT: -- stronger?

MR. SCHIAVETTI: -- for different aspects.

THE COURT: Okay.

MR. SCHIAVETTI: These are claim precluded, though. These takings claims are the same claim. And so factors of a -- on the claim preclusion -- I'm sorry, I don't have that in front of me, Your Honor, because I wanted to quote for you the factors. But essentially because the -- it's the same identity of the parties because, again, these belong to the enterprises. So both claims belong to the same party and they are based on the

same set of transactional facts and they've already been litigated on the merits and cited on the merits by the Federal Circuit. That decision is binding on the same Plaintiff here, which again is the same Plaintiff because it's the enterprises that are the real party-in-interest here.

So again, the --

THE COURT: And under issue preclusion -- sorry, that just --

MR. SCHIAVETTI: Under issue preclusion -- so this is a claim preclusion argument here. There are some issue preclusion arguments to be made, for example, on the derivative standing to assert derivative takings claim, there's an issue preclusion argument there that's based not on Washington Federal, but on Perry Capital, and there's issue preclusion that could potentially apply under the same -- you know, there are situations where either claim or issue preclusion could apply at the same time. Claim preclusion is the better way to analyze those when we're looking at the same claim as we are for these takings claims.

THE COURT: And then on the -- so then sort of -- well, I'll let you go wherever you want to go next.

MR. SCHIAVETTI: Sure. So the first -- and I've mentioned this, but it's simply not true that

Plaintiffs' amendment complaint does not allege that the government action that they claim constitutes a taking, was unlawful. First of all, the complaint still uses the word "unlawful" twice, the amended complaint. But even that aside, again, the argument is that the consent by the enterprises was coerced and consent was the justification for placing the enterprises in conservatorship. So if it was coerced, then there was no effective consent and, therefore, placing them into conservatorship would be unlawful.

So they're making the same argument that the Washington Federal plaintiffs were making alleging that the imposition of the conservatorships was unlawful and the Federal Circuit clearly stated that they could not do so having not availed themselves of the statutory option to take such a claim to District Court within 30 days of the conservatorship decision. They could not do so under the guise of a takings or illegal exaction claim in the Court of Federal Claims under the Federal Circuit's prior decision in Rith Energy.

Second, even if the Plaintiffs had successfully exercised all of the allegations of illegality from their amended complaint, the takings claim would still be precluded by the Federal Circuit quashing a federal decision for two reasons. First, even if they were

distinct, the claims are based on the same set of transactional facts. Second, in analyzing the Washington Federal takings claim, the Federal Circuit examined it as if the plaintiffs had accepted the legality.

So the Federal Circuit analyzed and it said that it had to analyze, so therefore it was not dicta. It said that it had to analyze the same claim that Plaintiffs allege that they are bringing here, accepting the legality of the imposition of the conservatorship and then, again, looking at whether that could constitute a taking. The Federal Circuit determined that it could not because there was no cognizable property interest which, as we'll get into with the takings aspect of it, applies regardless of what type of taking it is, whether physical or an ad hoc analysis, a regulatory taking.

In any of those cases, the Plaintiff is required to rely on a cognizable property interest, that aspect of the bundle of sticks, the Federal Circuit found that the Washington Federal plaintiffs, who hold exactly the same asset that the Plaintiffs here hold, did not possess that bundle -- that stick in that bundle of sticks and, therefore, didn't have a cognizable property interest on which it could base a takings claim.

So a lot of this -- whether it's the preclusion analysis or the takings analysis comes down to

Plaintiffs' assertion here that their claim is fundamentally different than that in Washington Federal. And they essentially make this argument based on the idea that what the Government took from the Plaintiffs here was Tier 1 capital. It's simply not accurate. It's a misdirection, Your Honor. The claim here is the same as the claim in Washington Federal. What the plaintiffs held was shares in Fannie Mae and Freddie Mac. That's the same asset that the Washington Federal plaintiffs held.

The claim is not that the Government took those shares. The Government did not physically take stock certificates. It didn't even take the shares in any aspect. In fact, the amended complaint pleads clearly that plaintiffs retained those shares and were -- had to sell them at a discount. So they retained them, sold them, received some value for their property. So the Government did not take them. The Government did not receive that final remuneration from the sale of the shares; the plaintiffs did. So the Government did not take their shares.

What it comes down to is that those shares declined in value and then, as a consequence, Plaintiffs claim they fell below the Tier 1 capital requirements and thus became insolvent. But that's a consequential result

of the diminution in value. It's not the Government taking the shares. And the Plaintiffs state, well, then the Government took our banks because they went bankrupt, but the Federal Circuit has been clear in Branch vs. United States, California Housing, Golden Pacific Bancorp, that placing a bank into receivership as a result of them not meeting capital requirements cannot be the basis of a takings claim.

So Plaintiffs have no way to get around this issue. They're trying to link two things that aren't linked. The basis of their takings claim is the same as the basis of the Washington Federal plaintiffs' takings claim, which is that their shares didn't -- that there was a diminution in share value of their shares. And we can see that in the amended complaint. In our reply brief, I believe we listed a half-dozen or more paragraphs in the complaint that clearly base the claim on the diminution in value of the share.

And that's exactly what the claim is, is that they bought shares, whether encouraged by the Government or not, they bought an asset, that asset declined in value. The result of that decline in value was that they fell below the Tier 1 capital requirements and became insolvent and, thus, were placed into receivership. That cannot be the basis of a takings claim. Under binding

Federal Circuit precedent, it was the same finding that the Court has made in Washington Federal and in these other cases that we've listed.

Also, we cited Georgia Pacific Corporation from the Court of Claims establishing that it's long been established that consequential damages from a taking cannot be recovered by a plaintiff.

Now, again, aside from preclusion, the Federal Circuit decided that plaintiffs could not -- in Washington Federal, could not assert a cognizable takings claim because they did not have a historically rooted expectation of compensation because they were shareholders in the highly regulated banking industry and, thus, they don't have a cognizable property right when the Government exercises its legal authority to place a financial institution in conservatorship or receivership. That was the Washington Federal Court relying on Golden Pacific Bancorp and California Housing.

Plaintiffs attempt to escape this conclusion, but argue in their amended complaint -- again, takes this Tier 1 capital, but even the way they define that, it's a limitation, it's a requirement on the amount of capital that Plaintiffs have to -- that a bank has to hold in order to not fall under -- below those requirements and become insolvent. What they held is that Tier 1 capital

was exactly the same asset that the plaintiffs in Washington Federal held, which is shares in the enterprises.

Again, it's irrelevant whether the Plaintiffs' amended complaint pleads a physical or a regulatory taking because in either instance, the Plaintiffs would need to plead a cognizable property interest that they allege was taken, and the Washington Federal Court found that the Washington Federal plaintiffs who held the same asset did not have a cognizable property interest.

But, second, Plaintiffs don't allege a physical taking. Again, the Government did not take their shares, did not take the financial value of their shares. If anything, there was a diminution in share value, which the Court in Washington Federal held could not form the basis of a takings claim.

As I've mentioned, to the extent the Plaintiffs suggest that their bankruptcy constituted a taking, they're wrong. The Court rejected -- the Federal Circuit rejected such assertions in Branch vs. United States, California Housing, and Golden Pacific Bancorp.

Next, Your Honor, the Plaintiffs' takings claims are derivative in nature and they lack standing to bring them directly. This was an alternative holding of the Federal Circuit in Washington Federal. Found that

the claims that the Washington Federal plaintiffs asserted were direct in nature were actually derivative, belonged to the enterprises and, thus, under third-party prudential standing principles, the shareholders could not assert them on behalf of the enterprises directly. They would have to be only a derivative claim. That same analysis applies here to the claims that are asserted here, Your Honor.

Also, as we've explained in our briefing, the Plaintiffs lack standing to assert derivative claims.

And, finally, if I may turn to the Plaintiffs' contract claims. Those fail because they fail to plausibly allege the existence of a contract with the United States.

Plaintiffs chiefly rely on factual allegations for these claims that may, if proven, demonstrate that the Plaintiffs believe that their investment in the enterprise's preferred shares was a safe investment and that this belief was reasonable in light of government policy. But the problem for Plaintiffs is even if they're correct, that's not nearly enough to establish the elements of an implied-in-fact contract, which is what they're alleging here.

That government policy permitted the banks to count investment in enterprise preferred shares for their

Tier 1 capital requirements does not plausibly allege that the Government guaranteed these investments. Instead, these were investments in private companies that the federal statute had, for decades, emphasized were not guaranteed by the Government, and this was noted by the Federal Circuit in Fairholme and also by this Court in a variety of its decisions on similar grounds. In fact, the Angel decision by Judge Sweeney last year dealt with somewhat similar allegations in another case involving Fannie Mae and Freddie Mac.

That case is -- I don't believe cited in our briefing. I have a citation for you on that one if you'd like, Your Honor. That was 165 Fed. Cl. 453, Angel vs. United States, in 2023. It looked at some similar claims of an implied-in-fact contract and found that there could be no plausible implied-in-fact contract because the Government, through the statutory law, had made clear that these investments were not guaranteed by the United States.

Moreover, in attempting to address their failure to allege that any official with authority to bind the Government in contract entered into the agreement with them, Plaintiffs here assert that -- there are allegations the government regulators approved or encouraged these particular investments solves this

problem, but it clearly does not. They didn't even allege that these officials had authority to bind the Government in contract, which not all government officials do.

So it's not enough to say there was somebody working for the Government who told us this was okay or was a good idea to invest in enterprise shares. They have to allege that that official had the authority to bind the Government in a contract to guarantee that investment, which is what they're alleging. And they don't even allege that that's the case and that's a fatal failure for that pleading.

Authority aside, merely encouraging or approving Plaintiffs' investments falls far short of committing the Government to compensate Plaintiffs if the investments decline in value.

This is the missing element. Although Plaintiffs claim that the Government breached its promise to guarantee the value of Tier 1 capital in the GSE investments, they make no clear allegation that any government official, let alone one with contracting authority made any such promise to Plaintiffs. Because the Government was not in privity of contract with shareholders, its action cannot breach any contract with them.

THE COURT: Could I -- just going back to the first question I asked, just to sort of understand how things fit together. So let's assume there's no -- assume there's tolling, right, and we're looking at the rest of your arguments. So does preclusion apply to everything? Would that sort of address all of the issues in the case or not necessarily?

MR. SCHIAVETTI: Only the takings claims, Your Honor.

THE COURT: Only the takings claims.

MR. SCHIAVETTI: That would be the first three counts. The two contract counts are only addressed by the statute of limitations issue and then this last issue that I've been discussing with the lack of privity, lack of the existence of a contract with the United States.

The other issues, the preclusion issue, the standing issues and the substantive merits issues on whether there's a takings claim to be asserted here only apply to those first three counts of the takings claims.

I'm certainly happy to address any other questions you might have, Your Honor. Otherwise, for these reasons and those explained in our briefing, we respectfully request that the Court grant our motion and dismiss the amended complaint.

THE COURT: Okay. We'll reserve some time for

rebuttal.

MR. SCHIAVETTI: Thank you, Your Honor.

THE COURT: We'll hear from Plaintiffs.

(Pause in the proceedings.)

MR. RUYAK: So, Your Honor, a lot of positions have been taken by the Government, so I think what we're going to try and do is put them in context. And we thought that rather than talking about the statute of limitations first, we think that we have to talk about it, as the Government suggested, in light of the actual claims we've made, because what he wants to say is that statute of limitations doesn't apply because the claims are too different from what was in Washington Federal and that's -- they are different, but not different enough that they cause the statute of limitations not to be tolled.

So I think what we want to do is kind of go back to the beginning and I think the beginning is taking our claims and looking at them as we made them so we can see where they actually fit in.

And the other thing I wanted to say at the beginning -- and I know we all know this; I know what the standards are -- that the facts in the complaint should be taken as true and there are inferences to be drawn in our favor and our claims have to be plausible on their

face. But I'm finding what the Government did in this response to our complaint was not to do that. They want you to draw inferences favored to the Government and they do it over and over again, and I think we've got to be cautious of that issue when we do this.

And the other thing I think we need to be aware of is what Justice Ginsburg said in the Arkansas Game & Fish Commission case. The other standard of consideration in a takings case is that because the Government takes property, there's a categorical duty to compensate. And there's no set magical formula because there's nearly an infinite amount of ways that the Government can take property. And so we can't just, as the Government is trying to do, mash it all in and hold it under one umbrella of Washington Federal. It does not work. And that's why I think if we look at the claims first and what we're claiming, we can show that that's the case.

So let's look at the main claim, which is our constitutional taking claim. There's four elements of that. We know what they are, the taking of the ownership by control or destruction, government action, public purpose, compensation. Three of those we're not talking about here because the Government didn't dispute them in this motion. What the Government disputes is the

destruction of private property, the taking of private property, and whether it's compensable under the 5th Amendment.

The Supreme Court -- Justice Ginsburg also said that the compensable property is the bedrock of it. And why? Because it's a constitutional claim. We're not making a statutory claim; we're making a constitutional claim. And under the Constitution, it doesn't say how the Government acted, it's not limited in what they did to take the property, it's what was taken. That's the issue that you have to go to, the nature and character of the property taken.

Did the owner have that bundle of sticks, the right to exclude, the right to use, to exclude others? Was it direct? Did the Government action directly take the property? And in the case, was it a seeable or intended result by the Government?

And I think when we go through our complaint, it's very clear that that's the case. The property that we're seeing is taken was not the GSE stock, per se. What was taken in this case was assets of the banks. That's what our complaint is about. And not all the shareholders in Washington Federal had that claim because they had foreign governments, private individuals, venture capital funds. They didn't have this thing

called Tier 1 capital.

Now, that's essential because the regulators who took the banks in the beginning set up this whole scheme for Tier 1 capital. It's the amount that's required for solvency in a bank. And for generations of time, it could have only been two things, U.S. Treasury Bonds and cash. Why? Because those were the most secure things in the world. And the purpose of the regulators was to say, you've got to have this capital because we, as the Government, don't want to have to back you up with our FDIC insurance that we all have when we make bank deposits. So you have to have this. It's sacrosanct. Failure to maintain means immediately we put you into insolvency and insolvency means we put it in a receivership and we take our bank completely. It's gone. That's how important it was.

The analogy I use is like the heart, okay? You can take off a toe or an ear or even an arm, right? But if you take the heart out, you grab and take that heart out of a person, the body dies. And that's what Tier 1 capital was for the banks, plain and simple.

So what happens? Okay. Around 2006 and '07, they wanted to put more money into Fannie Mae and Freddie Mac. So they went out in the market and they got some money from people, but they didn't get enough. And this

is in our complaint. So what did they do? Five agencies, not one, Treasury, the Fed, the FDIC and OCC and IRS got together and said, you know these banks have all this money that we made them keep there in bonds and cash, it's sitting there for us, let's get that money and put it into Fannie Mae and Freddie Mac. Let's get the banks to take it and convert it for us for our benefit.

So they created this creature, this new asset class called GSE stock, Tier 1 capital. That's what they created and that's in our complaint. And this is not just supposition by lawyers, it's all documents in our complaint by government documents and regulations. Only the banks have this, no one else. And they induced the banks to do it by giving them all kinds of special tax benefits, by telling them that if they sold it, they would only have to get taxed on a certain amount of it, they'd get these big dividends, 11 percent, and the assurance and promise that this new asset was just as safe and secure as U.S. Treasury Bonds and cash.

Because for truth -- and we have evidence in the complaint, testimony -- no bank would have done it without that guarantee and the regulators would not have done it because the regulators were supposed to make sure that the banks were secure. So they came up with this new creature and this new creature was capital.

But what were the assurances that the Government gave? A lot of them. They said that this satisfied the Tier 1 solvency mandates. You can take up to 100 percent of your Treasury Bonds and your cash, give it to us, and we will give you this other asset called GSE Tier 1 capital and it's just as good, just as good. And they said it would not risk the bank's solvency. And multiple government agencies supported it, not one, all of them together supported it.

And so when the Government says that these banks didn't have a reasonable investment expectation. They certainly did. And what was that expectation? It's in our complaint. That the Government would not take any action to destroy the value of that GSE 1 capital. The bank gave it. The bank can't just take it away. And that applies to what this was. This is the property that we're saying under the 5th Amendment was taken.

So what are the issues in this motion? I think it really comes down to this property issue, Your Honor. I think the only thing the Government really complains about is that they don't want to accept the fact that the Government took this particular kind of property of the bank, this asset of the bank, together with all the others, because once they took that, solvency, receivership, taking of everything else. Direct and

certain.

They argue that it's consequential. It's not consequential. And we have all the cases that say that and we'll go through it. They say that the property is irrelevant and illusory. How can it be irrelevant? It's -- 100 paragraphs in the complaint describe this whole process, backed up by government documents and admissions by the highest people in the Government.

Direct taking allegations. This is what happened in this case. The Bush Administration -- and I say that because it's very clear, you know, Henry Paulson wrote it in his book. We don't need to ask him again. He wrote -- he met with the President of the United States, with the Secretary -- he was the Secretary of Treasury, the Federal Reserve Chairman, the head of the FDIC. They put this plan together because the financial system was going down the tubes at that point. Not because of what our bank planners did. They were save and secure. They didn't have some subprime mortgages. They were fine.

Matter of fact, if the Government hadn't created this GSE 1 capital thing and suggested that it was just as good and made it just as good, we wouldn't even be here today. You know what? Because Mr, Kelly and his banks would be still operating with U.S. Treasury

Bonds and cash and none of this would have happened.

But the administration decided we've got to take over the GSEs, it's the best way to do it. We've got to seize them. And we're not complaining about that. Our claim doesn't depend on what was legal or illegal by HERA. HERA is irrelevant to us. The Government could have taken it by Executive Order, by act of Congress. The Government could have taken any way to do this. They used it as a tool to take. And it wasn't illegal. We don't claim it's illegal.

THE COURT: Do you have any cases -- I'm curious about the act of Congress thing because I --

MR. RUYAK: Yes, Your Honor.

THE COURT: Do you have cases that -- where there was a taking that was affected by a statute and that -- where Congress is sort of implicitly the sovereign immunity to sue for it?

MR. RUYAK: Well, I don't think this is a question of waiving sovereign immunity because the Constitution gives us the right, as the 5th Amendment, to sue the Government for this because the Government's required to give us compensation. But, yes, a good example is the last financial crisis before this one when the savings and loans were in trouble, right?

And the savings and loans were in trouble and

so the FDIC took a very healthy savings and loan, Winstar, and they said, we want you to take over this failing savings and loan because we don't want to back it up. We want you to take it over. And they said, you know, you have this thing, Tier 1 capital, but tell you what, there's no capital coming in, so we'll let you take things like goodwill and count that as Tier 1 capital. That's what happened in that case.

And so Winstar did it. They took on the failing savings and loan. They rearranged their -- they said, oh, well, we've got goodwill, whatever that is, you know, that's counted as their capital. A year later, the legislature passed a law to say, savings and loans can't count goodwill. It has to be hard cash or Treasury Bonds. And so immediately the savings and loans went insolvent, right? That doesn't -- that's still -- that's an example of where government action creates a taking, right? It doesn't matter whether it's by statute, by Executive Branch of the Government. As a matter of fact, the Constitution doesn't say that.

It says, taking by the Government for public purpose requires compensation. There's no -- in the law over the years, there's no government legislative action can compromise a bridge or a limit of that constitutional provision. Statute can't do it. Because, you know, that

same -- in that same 5th Amendment paragraph, it protects us against double jeopardy, self-incrimination, ensures due process, and it says the Government can't take private property without just compensation. It's rooted in the very -- the Bill of Rights.

Why is that important? Because without the Bill of Rights, we wouldn't have a Constitution. It would have never been ratified. But when you look at the Constitution in the cases, even Arkansas Game with Justice Ginsburg saying, this is a mandatory thing, you can't throw statutes like HERA in front of it to trip over that right and take it away. No way. If there was a taking, if it was a direct taking, then the Government must compensate. And, of course, compensation is a different issue here. We're just at the first stages of this.

THE COURT: May I ask about -- so you were talking about the Tier 1 capital as being kind of unique --

MR. RUYAK: Mm-hmm.

THE COURT: -- and not addressed in Washington Federal.

MR. RUYAK: Right.

THE COURT: So then why wouldn't Mr. Kelly have filed his own case before the statute of limitations ran

out, because it sounds like he was relying on that case for tolling as a putative class member there.

MR. RUYAK: Yeah, yes, Your Honor. I think this gets back to that very basic issue here of how this works. And how it works is, the purpose of class action tolling is very simple. We don't want to have a million cases filed. So we allow people to have a -- make a class complaint. Lawyers do that on behalf of a class. They define the class. Mr. Kelly was in that class. All the banks technically were shareholders in the GSE stock.

He didn't know for sure what claims would come out of that and he certainly didn't know whether, in the end, when a judge finally decided what the class was, whether there would be subclasses, which often is the case, and whether he'd be excluded from the class because his claims were a little bit different. But the whole purpose of the class action vehicle and tolling is to keep everybody in the tent until those decisions are made.

In this case, we never got to that point, but it would be totally unjust to say, look, you're in a class, you're one of the people that's directly affected under this complaint, but in case, you know, you're not in it, you're done. You'd have to -- because then we would say, I'd have to revise every client in a class and

say you're going to have to file your own claim because we don't know what these class action lawyers are going to do. They might make your claim; they might make another claim. They might not properly get the subclasses in place. You can't -- there's no privity between that lawyer and a class member.

But this happens all the time, and I think that tells you why statute of limitations doesn't apply here. It doesn't apply because class members can have a different theory on which they're harmed and can have different harm.

A good example is the General Motors case. I've used that as an example. That's another takings case when -- during World War II, the Government was taking all kinds of warehouses. All over the country, they were taking warehouses. And one of them was the General Motors warehouse. And some of these warehouses didn't have anything in them. They were empty, not being used. Others had equipment, machinery, materials, and all that. And the Government said, no, to General Motors, we took yours and you had all that other stuff, but we only owe you for the warehouse, that's all we owe you for.

Well, if that were a class action, where would you be? Does that mean that General Motors can't claim

that other loss of government property? The Government took it and disposed of it, destroyed it. The Supreme Court said in General Motors, no, that's a loss, too. Yes, they intended to take the warehouse, but then when they took it and they found the stuff in it, they threw it out and destroyed it, that's property, too, under the 5th Amendment.

So you can have people with different claims and that's the way it works. And until you get to the point where you're defining the class and saying what it is, you may have subclasses. I think the bank here would have been a subclass because the bank -- what was taken from the banks was so much more than was taken from shareholders.

Remember, in Washington Federal, that case turned on the fact -- on two facts. One, the only claim that the Federal Circuit looked at was one of an illegal application of the statute. And for some reason, in that case -- and I don't know why -- they relied upon that statutory basis as a taking and they wanted -- and they said it was a legal taking. But the only thing that they said was taken there was -- they kept their stock. The shareholders still had their stock. The value went down and then later, a year and a half later, they weren't paid dividends they said they should get. And the

Federal Circuit said, no, that's not -- and by the way, the Government made a total misstatement of our complaint, which is not true. He said that we still held our stock. Not true.

For every one of our banks, when they went insolvent and the Government took it, they took all the assets including the stock and the stock shares. The only plaintiff we have in the complaint where we said we had to sell the stock was River Capital, which is a different plaintiff. We have to talk about them differently because they were not a bank and they maintained their stock because the Government didn't take them over.

But each one of these nine banks, when they were taken over, the stock went with it. They didn't have it anymore. The other -- and there were a number of reserves these banks had. They had reserves for loans; they had reserves for mortgages; they had general reserves; all kinds of assets. And the Government didn't just take the Tier 1 capital, they took all those reserves in the taking. But, more importantly, Your Honor, the Government has certainly admitted that this was a taking.

And I want to raise this issue because this is the most recent Federal Circuit authority, I think, for

the proposition that what we've alleged as compensable property is, in fact, compensable property. It's by Judge Moore. It came out the day after we filed our opposition, so we didn't have it at the time. But Judge Moore really -- and this case, Ideker Farms vs. U.S., 72 F.4d 964, she went through the whole ramification of this because this was a situation where direct versus consequential was involved and it dealt with the Government flooding lands and they didn't want to pay for the crops they destroyed, just the land, the value of the land.

And so Judge Moore did a good thing of she went through all the Supreme Court cases. She significantly summarized things in a good way and she said, look, direct is the appropriation of the owner's distinct property interest. And these banks had a distinct property interest in this Tier 1 capital because without it, they were dead. And they also had a distinct property interest in all the other assets that were taken when that went dead.

More importantly, she decided what's consequential, and that also comes out of other cases like even back in Monongahela River in the 1890s. General Motors clearly did this. Armstrong -- Armstrong, a case we rely upon, a very similar thing.

Consequential doesn't mean the vernacular. It's a consequence. Consequential is a defined term of art in the law. It talks about things like lost profits, lost goodwill, having to reposition the business, all those things that are remote and indirect. Now, in a contract case, you could probably claim those, but under the 5th Amendment law it says, no, it's got to be an actual taking, a direct taking. But we haven't alleged any of those things. We're alleging only assets of the banks.

And she also says -- and the Government loses this -- well, they didn't happen all at the same time, but Judge Moore says, well, that doesn't matter under the Constitution. Past, present, and future damages are all recoverable as long as they're a taking and a direct taking. And, most importantly, and it's applicable here, is that a property of a business is compensable if taken or destroyed by government action. That is critical and that's what happened here.

But I think, Your Honor, the main reason that I think this all comes back to roost is the fact that in our complaint -- as I said before, we're not relying on legal theories of lawyers writing supposed things. This is a key element and this is a key thing I wanted to talk about.

THE COURT: Can I --
MR. RUYAK: Okay.
THE COURT: After that, can we talk about tolling and all of these things?
MR. RUYAK: Yes, yes, Your Honor, yes.
THE COURT: Okay, thank you.
MR. RUYAK: For this reason alone, this motion should be denied, because when you read our complaint and go to these four things, these are admissions by all of the people that were involved in creating this GSE capital, the Tier 1 concept, and they were the people that ultimately forced the insolvency and took over the banks and all their assets. Isaac, the FDIC Chairman, he said that what happened here was because of the taking of the conservatorship of the GSEs, that it was an ambush to make the banks fail because they created that property.
Paulson, on the morning -- on the morning that the conservatorship went in place of the GSEs, he issued a statement saying, we know what this is doing and so the banks who are going insolvent need to get in touch with their regulators right away. What could be more direct?
Later, in a book written by two of the Board Governors of the Federal Reserve, Rice and Rose, they said that the -- these banks -- they even mention Mr.

Kelly's banks -- they failed solely due to the GSEs' T1 capital takings in the seizure.

And testifying before Congress, the OCC regulator, I think it was Mr. Dugan, said that -- he agreed that it was a direct taking by -- these banks were directly taken by that seizure. And even in the case of the U.S. Attorney in the Southern District of New York said the same thing.

It can't be more direct. And particularly in this case, Your Honor, given the standards for a motion to dismiss, we need to be able to go forward on this, we need to be able to go forward on this case. But you can see why preclusion either claim or issue doesn't work here. The Government argues that it's the same violation. It's not. We're not alleging a statutory basis for the taking. It's a direct constitutional basis. It's not the same compensable property. We're not asking for the loss in value of the stock and dividends. That's not what we're seeking here.

We, frankly, could care less about that because what happened here was the Government took all of the Tier 1 capital that was previously in U.S. Treasuries and cash, but the Government, you can say, lured, induced, promised, whatever, and all the other assets of the banks. And it's certainly not derivative because the

GSEs had no ownership whatsoever over the bank's capital or its assets, any of it.

So we have -- we just have another slide that just -- I'm showing the differences. But there's no -- there's not possibly any claim identity here. It doesn't exist. We have a different theory upon which a liability is based. We have different compensable property that was taken.

THE COURT: Which of these bases do you think is the sort of most persuasive or strongest one?

MR. RUYAK: Well, I think they actually vie for two. The one is that we didn't bring a legal extraction claim here. We didn't -- our taking isn't dependent upon a particular statute. We certainly didn't allege HERA. We didn't allege -- he says the word "coercion," but the reason we used the word "coercion" -- and we explained this in our brief -- is that you've got to show government action. It can't be a gift to the Government. It can't be -- for example, if the GSE board had just said, oh, we're going to just give everything to the Government, we'd have a problem here, because we're saying it had to be government action.

Government action means you take the property against the will of the owner and so you have to show force or coercion as an allegation, and we had it here.

Because it wasn't the GSEs themselves that did this, it was the Government stepping in and seizing it. As Mr. Paulson said in his book, we were going to seize them one way or another, we had to do it. No one was saying that they were voluntarily doing this. And that's what the coercion is. It's not illegality. It has nothing to do with illegality. It's that the Government did it.

But I think that, you know, we're not using the statutory basis, but also the property we're claiming is different property. That doesn't mean we're not under the statute of limitations. Different people that are -- this was the largest seizure of private property that ever occurred in this country in the 200 years of its existence at that time. The largest seizure that ever occurred. And there were a bunch of people hurt by that. Some couldn't collect based upon the Constitution, like we can, but a lot of people were hurt and not everybody was hurt the same way.

And so the property interest that they claimed in Washington Federal, in which, most importantly, you can't be precluded by a ruling by the Federal Circuit unless they address the issue, they deal with that issue, they deal with that claim. And it wasn't even alleged or considered by the Federal Circuit, what we're talking about in terms of the property taken from these banks.

THE COURT: Well, I guess the -- I mean, the rules of preclusion are sort of designed to prevent plaintiffs from kind of taking the same set of underlying facts and repleading them as different types of claims.

MR. RUYAK: Mm-hmm, yeah, right.

THE COURT: So I guess the question is what precise set of facts here is different than that in Washington Federal?

MR. RUYAK: Okay. I think that a lot of the facts are similar because it arose from the same transactional facts, that the Government found -- you know, had a problem. They sold the stock, they had the GSEs. They were independent companies. They weren't government entities; they were independent companies. And so when the financial crisis hit, they had to do something and they did it. And nobody questions that. Those are the facts. They took over these GSEs. But when they did that, what did they take of private property of individuals? And that's where things go in different directions.

In the Washington Federal case, the lawyers who brought that case for the class, maybe because they had so many different kinds of class members, they limited their claims to alleging a statutory claim -- a statutory claim that the Government created this HERA statute and

they used it improperly and illegally to take over the GSEs. That was their claim. And because they also had people who still held all this stock and didn't lose it by what happened to the banks, by insolvency and receivership, they still had stock and what they were complaining about is, gee, my stock value went down and I didn't get my dividends that I was promised. That's all they claimed.

But, here, the property taken here was something entirely different. It was this category of an asset category created by the Government for their own benefit. To get the money from these banks, they created this safe and secure asset and then not -- maybe not intending to do it from a bad point of view. We're not alleging fraud or anything. But when the Government destroyed that value by taking the GSEs, they destroyed the very thing they created for the banks that kept them safe and secure, which meant immediate insolvency, receivership, and taking everything. And that's the difference. That's the difference in the claims.

I would like to address -- did you have any other questions on that, Your Honor, or --

THE COURT: No. I guess going back a little earlier, you were talking about the incentives that were offered for banks investing in enterprise stock --

MR. RUYAK: Yes.

THE COURT: -- and, I mean, I guess, should banks have naturally assumed there was at least some downside risk in doing that if there's a bunch of incentives?

MR. RUYAK: No, Your Honor, because -- because the reasonable expectation is not that the stock might fluctuate, but, of course, it might, right? Of course, it might fluctuate some. But the expectation here was that the Government wouldn't do anything to destroy the value of it. That's a different thing.

I come to you and I say, you know what, you've got a nice house, you don't have a mortgage, let me give you a mortgage on your house. I'll give you some money; I'll take your mortgage. And as long as you pay the mortgage, I won't come and try to take your house. And then I ignore it and I go to court and I try to take the house because you owe me -- 80 percent of your house is in -- you know, under my mortgage. That's the kind of thing that happened here.

The Government made a commitment, they made a -- whatever you want to call it, they made this thing. It wasn't just -- it was a thing. It was Tier 1 capital. And the bad part about this, Your Honor -- and that's why we have the implied contract claim as sort of another

alternative to look at the same thing, is that there were all these promises made that, you know, take what is so safe and secure, there's no risk in it, and we're going to give something that's just as safe and secure and no risk. They were guaranteeing it. I'm sorry, they were guaranteeing it. They were at least guaranteeing that they would not do something to take it away.

THE COURT: Is it -- I guess another question is -- and I'm trying to sort of understand the distinction between it becoming -- creating a contract or being a taking versus sort of a tort that there was some, you know, misstatement that there was zero risk and then it turns out there's risk.

MR. RUYAK: No, I don't think -- I think the government regulators believed it. I think they really thought because they were backing up -- the GSEs had government support in it, right, that I think that the regulators came to the banks and said, gee, this is a great idea, it's just as good as Treasury Bonds and cash because the Government is backing up the GSEs, what could go wrong? And we can put more money in and it's all -- so I think the regulators believed it. I don't think there's any fraud here. I think the Government intended to support that and to not destroy it.

But what happened was something unprecedented.

There was this financial crisis that needed a resolution and, unfortunately, the resolution became, we've got to do what we don't want to do, but we're going to take over these -- this Fannie Mae and Freddie Mac because that's our best solution.

I don't think there's a fraud here. I don't think there's a tort here. I think it's the fact that they really -- and I think if you look at -- I mean, I have a slide on this. What's the one on the -- is it the next one? What's the one on the contract?

Oh, here. I think it's all there, you know. The Government created this thing and made an offer to the banks. It's a typical contract. There was privity here. The Government said, we'll create this, you'll do it. The banks accepted it. The consideration was the bank gave $900 million to the -- for the GSEs, $900 million. The banks' consideration, they got the tax and financial incentives and this guarantee of safety that the Government wouldn't destroy it. And the breach was simply not intentional, as I say, but they had to do it. If they have to do it, it's a breach. Even if it's -- it doesn't have to be malicious, it doesn't have to be intended to be bad.

But I want to talk about the privity, too, because one thing that the Government said is there's no

privity here. Oh my God, how can there not be privity? The four entities that created this thing and made the offer were the Federal Reserve, the Treasury, the FDIC, the OCC, and the IRS. If they didn't have authority to bind the Government to what they were doing, then there is no authority. The President of the United States didn't have to come visit the bank and say, oh, I'm committing to this. That was the authority.

And to say there wasn't a privity of contract, that this wasn't an offer and acceptance and massive consideration given both ways, and then the Government steps in, the very thing it created, unintentionally, but it had to, it destroyed and breached that. So now the banks are left with --

THE COURT: But can you talk about --

MR. RUYAK: -- absolutely nothing, goes into insolvency and loses everything. That's the government act that created it. So I do think we have -- for purposes of a motion to dismiss, for sure, we have a claim for implied contract that is very plausible on its face.

THE COURT: Can you talk about the tolling question?

MR. RUYAK: The statute of limitations tolling?

THE COURT: Yeah.

MR. RUYAK: Yeah, I'd like -- I'd also -- I'd like to have -- Mr. Diamond is prepared. I don't want to deny him his ability to talk to you. So I think he's going to address the tolling issue if that's okay.

THE COURT: Okay.

MR. RUYAK: Is that okay?

THE COURT: Sure.

MR. RUYAK: Okay. And then I think -- let's see if there's anything else that we have left. Is that the last piece?

MR. DIAMOND: Yes.

MR. RUYAK: That's the last piece. Okay.

THE COURT: Thank you.

MR. DIAMOND: Thank you, Your Honor. Allan Diamond on behalf of the Plaintiffs. I appreciate the accommodation. I'm going to be prepared, hopefully, to address all your questions with respect to tolling, jurisdiction, limitations.

I'll start with the complaint in this case absolutely was timely filed. I don't think there's even any dispute about it, subject to whether the class action tolling applies. So that we're all clear as to what those dates are, the -- well, the Plaintiffs are entitled to class action tolling as a matter of law, which we submit is absolutely the case here, but there's no doubt

by anyone that Plaintiffs' complaint in this case was otherwise timely filed. Why is that?

Let's take a look first -- and I have a chart if we could pull that up. Everyone understands that the Tucker Act has a six-year statute of limitations. The Government unilaterally pinpoints September 6, 2008, the date on which the FHFA director decided to place the GSEs into conservatorship as the triggering date for purposes of accrual of the statute of limitations.

I just want to say that we don't necessarily agree with that. I actually think that the triggering of the statute of limitations probably didn't happen until much later. But for purposes of this motion, we're willing to concede and accept that even if you take September 6, 2008, which is the earliest, earliest date that that triggering event could possibly have happened, we're still timely filed.

If you take the six-year statute of limitations, which is 2,190 days, and you look at when Washington Federal filed its case on June 10, 2013, that's 1,739 days out of that six-year 2,190 days, and then you see the date on July 9, 2020, when Washington Federal was dismissed. So if you take the 1,739 days during the period in which Washington Federal was in existence, subtract it from the six-year statute, you're

left with 451 days. If you tack on 451 days to July 9 of 2020, the dismissal date on Washington Federal, you get October 3rd, 2021. This case was filed on October 1st, 2021, two days before that date.

Like I said, I think there's arguments I can make -- that I don't think we need to -- relevant here as to why the statute of limitations didn't start running until later, but even if we take this earliest date, it's timely.

So then we get to the issue of the day, which is does class action tolling apply? And I will just make one comment that, glaringly, I think the Government's own arguments or the Government's own actions, I should say, belie their arguments here. Because in late 2021, the Government agreed to stay proceedings in this case, pending the disposition of the Washington Federal appeal, jointly starting to this Court, the Federal Circuit's -- this quote, "The Federal Circuit's rulings in Washington Federal may provide binding guidance in this case given the overlapping issues in claims."

Well, if this case was so clearly untimely as the Government now wants to say and the contract claims are so far afield of Washington Federal, why did the Government not move to dismiss this case on limitations back in 2021, rather than agreeing to stay this case so

we can all address it in 2024? But --

THE COURT: Well, I wanted to ask you about those statements, too, because that was a joint motion. And so you were arguing that the Washington Federal Plaintiffs allege that FHFA, as conservator, exceeded its authority and that the -- there's a -- just like in Washington Federal, a direct claim that the FHFA's imposition of the conservatorship was not authorized by HERA and does constitute a takings or illegal -- and/or illegal exactions.

So now, you're saying, here, that it's unlike other enterprise shareholder cases. So for purposes -- well, I guess for some purposes and not for others. So I'm trying to figure out what's so different about this case for the sort of preclusion purposes and then, you know, I kind of want to address that same tension that I asked the Government about earlier, where you're trying to say for some purposes, we're just like Washington Federal and we should be tolled, and then for other purposes, we're very different and we shouldn't be precluded.

MR. DIAMOND: Well, I think when we get to the Government's last argument about -- that somehow the implied contract claims should be treated separately and not applied, you get to what is the challenged conduct in

both cases, and that's where we say the challenged conduct is one and the same. The underlying facts are the same. The conservatorship that was -- that the GSEs were placed into, that happened. That happened in Washington Federal; it happened here. That fact is not different.

The allegations that we've made in our complaint with respect to the taking and the GSE Tier 1 capital, they're also going to be the same. What's different is this is a completely utterly different set of legal causes of action between what's being alleged here and what's being alleged in Washington Federal.

As Mr. Ruyak pointed out with respect to the preclusion arguments, we're not arguing that the taking by the Government here was somehow an illegal taking. That's what we argued in Washington Federal in terms of a legal cause of action. We actually take the opposition position. We think the Government had every right to do what it did in placing the GSEs into conservatorship, but it constitutes a taking. And for that, under the 5th Amendment, we're entitled to just compensation.

But for purposes of equitable tolling here, let me go back to that because I think this really starts with the bedrock. And I know the Court is familiar with obviously American Pipe and Crown Cork, but I think it's

worth, if you'll indulge me, to take a couple of minutes, because the teachings from those United States Supreme Court cases are, if not controlling here, certainly extremely persuasive.

And I'll start with one proposition at the outset. The Government asserts no case here, none whatsoever, to you in their briefing or otherwise today in which there is class action tolling involving the Tucker Act. There's only one case that addresses that, Your Honor, and that's the Bright case. It's the only case cited by anybody that involves the Tucker Act and involves class action tolling. And we know what -- the Federal Circuit came out saying that the class action tolling should apply.

But hold that thought for one moment because I do want to go back to American Pipe and to Crown Cork for a moment. American Pipe is the grandfather or the grandmother, if you will, of all the line of cases, the genesis of class action tolling. And the holding there is 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 class action proceeded and the class action requirements been met.

Mr. Justice Stewart, in that case, went to

great lengths to trace the history and the purpose of the class action statute and Rule 23. At page 551 of that opinion, Mr. Justice Stewart said, "The commencement of the action satisfied the purpose of the limitation provisions as to all those who might subsequently participate in the suit, as well as the named plaintiffs in the class action.

"To hold contrary would frustrate the principal function of a class suit because then the sole means by which members of the class could assure their participation in any judgment, if notice of the suit did not reach them until after the running of the limitation period, would be to file earlier individual motions," precisely the multiplicity of activity that we've been talking about here today under Rule 23 is designed to avoid, having everybody just start filing lawsuits all over the place, clogging the courts, a waste of judicial resources, and not even knowing how any of it's going to come out, which is why you have a class action procedure.

But two more very important propositions that came out of American Pipe. The Court said, "Not until the existence and limits of the class have been established and notice of the membership has been sent does a class member have any duty to take on the filing of any lawsuit or exercise any responsibility with

respect to it in order to" --

THE COURT: Is there any question that these Plaintiffs are class members or were putative class members?

MR. DIAMOND: None whatsoever, and I'm glad you raised that. So if we take a look in Washington Federal, paragraph 209 of the complaint, it says, "Pursuant to Rule 23, with respect to Fannie Mae, Plaintiff, City of Austin Police Retirement System, brings this action on behalf of all persons or entities who held shares of Fannie Mae common stock on or before September 5th, 2008." That's not us.

Well, where we come in is the very next, subparagraph 2 on paragraph 209 says, "Plaintiffs, Washington Federal and Michael McCready Baker (phonetic) bring this action on behalf of all persons or entities who held shares of Fannie Mae preferred stock on or before September 5th, 2008." That is the Plaintiffs in this case, Your Honor. They were effectively class members.

And as Mr. Ruyak alluded to earlier, until that case and a class action proceeded, there was no way, of Mr. Kelly or any of the banks here, of knowing exactly where the juxtaposition would be, how they fit into some kind of -- perhaps a subclass. And we submit and Mr.

Ruyak said -- suggested earlier that -- and this is a little bit of forecasting admittedly, had that class action proceeded forward, I think it's overwhelmingly likely that the banks here, our clients, who held the Tier 1 GSE stock, probably would have been a subclass of those classes of shareholders that held preferred stock that I just mentioned to you that were part of that Washington Federal suit.

But there was no way to know that, obviously, unless and until the class action proceeded and then ultimately there would be determinations as to what subclasses should be appropriate and the Court would have made those determinations. But to your point, there's no question that the Plaintiffs here were members of that Washington Federal class action.

Let me just -- let me jump to Crown Cork for a moment and Mr. Justice Blackman speaking for the Court there said, "The commencement of a class action suspends the applicable limitations as to all asserted members of the class who would have been parties to the suit had the suit been permitted to continue as a class action."

And, importantly, once the statute of limitations is tolled, it remains tolled for all members of the putative class until that class action ceases or certification is denied. At that point, Justice Blackman

said, "Class members may choose to file their own suits." Only at that point. "Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights." That's the whole purpose of Rule 23. It permits and encourages class members to rely on the named class plaintiffs to press their claims. And, again, tolling the statute of limitations creates no potential unfair surprise.

Now, those are the two United States Supreme Court opinions that I think are the guiding principles here on class action tolling. They're the only ones really. Now, admittedly, neither of those cases involved the Tucker Act and Section 2501. So let me come to the Bright case because it is the only case, as I had mentioned, that addresses class action tolling and the Tucker Act.

The Government likes to say -- take the position that all these claims, nevertheless, should be denied tolling because somehow the class action tolling is a form of equitable tolling. It's equitable in nature. The American Pipe and the Cork case are all cases that are equitable in nature and the Tucker Act is jurisdictional and it's different. Well, first off, that was completely rejected by the Federal Circuit in Bright, that proposition.

THE COURT: But how much was that affected by the Supreme Court CALPERS decision later?

MR. DIAMOND: So let me jump to that, Your Honor, because every single case that the Government cites, led by the CALPERS case, is completely utterly inapposite and it is for the following reason. CALPERS is really simple. It's a -- it was a securities case, not a Tucker Act case, in which it involved statute of repose. And the United States Supreme Court, explicitly in that case, went through all of the analyses to show why tolling should not be applicable there because it is, in fact, a statute of repose.

And let me -- let me just grab a note here on that. So if one looks at every single argument that was advanced by the petitioners in the CALPERS case, there's basically four and the Supreme Court rejected all four on essentially the same identical ground. This is the statute of repose. But it's important to dissect that a bit.

The first holding in CALPERS, American Pipe was inapplicable because that was a statute of limitations subject to equitable and class action tolling and the statute here was the statute of repose.

Second argument, permitting a class action to splinter into individual suits, the application of

American Pipe tolling here would threaten to alter and expand a defendant's accountability contradicting the substance of a statute of repose. These are all quotes from CALPERS.

The third quote from CALPERS, "The privilege of a class member to opt out is not given without regard to mandatory time limits set by a statute of repose."

Four, While the petitioner argues that declining to apply American Pipe to toll the statutes of repose will create inefficiencies, this Court simply "lacks the authority to rewrite the statute of repose or ignore its plain import." And I would just say, in short, that statutes of repose, Your Honor, are transformatively different animals than statutes of limitation. No court has the authority -- no court has the authority to change -- not the United States Supreme Court or anyone else -- to change or toll time periods set out by Congress in statutes of repose.

And, you know, there's -- it's so logically simple. I mean, take -- where do you see statutes of repose? In CALPERS, you saw it in some of the securities laws. Most every state in the country has a statute of repose, for example, with respect to construction cases and construction defects. Why do they do that? They say, well, look, if you're going to build a building,

you're going to build a bridge, you're going to build whatever it is and it's -- it may last not 10 years, not 20 years, not 50 years, maybe it's 100 years, and then it collapses, it breaks, something happens and you say, well, who are the original architects and the engineers that built that darn thing 100 years ago.

Congress just -- the state statutes and Congress says, wait a minute, there has to be some limit on going after people that were engineering, architecting, constructing buildings 100 years ago, and they artificially said it's ten years. You can look at every statute in the country and I think you'll find that there's ten years statutes of repose. You can't change them. So if the building does collapse in year 11 or year 50, you're out of luck going after those people. But that's the difference between statute of repose and statute of limitations.

THE COURT: Well, I mean, I understand that the terms are different, but I guess for -- I mean, the words are different.

MR. DIAMOND: Yes.

THE COURT: But for the Tucker Act, in particular, it's also jurisdictional under Supreme Court precedent.

MR. DIAMOND: It's absolutely not a statute of

repose. I don't think anybody in this courtroom is going to argue to you --

THE COURT: Well, nobody --

MR. DIAMOND: -- that the Tucker Act is a statute of repose.

THE COURT: Right. Nobody's going to call it a statute of repose, but it's a statute of limitations with characteristics that are similar in that the -- Congress, in waiving sovereign immunity, was pretty, you know, clear that there's a six-year statute of limitations.

MR. DIAMOND: But it's still a statute of limitations. The Federal Circuit in Bright clearly spelled out that it is a statute of limitations and that it is subject to class action tolling. The difference between the cases -- what the Government wants to argue is that somehow all of this is equitable in nature, and if it's just equitable in nature, that's not enough. But that is not the teachings of American Pipe, of Crown Cork, of Bright. In all of those cases, they are distinguishing tolling a statute of limitations because of equities and saying it's being tolled because we have a statutory basis and purpose for tolling.

Now, admittedly, there's some equitable considerations in Rule 23. The whole concept is to avoid a multiplicity of litigation for the courts and clog

them. That's an equitable concept. But the statute is -- it's a statute.

Unlike in American Pipe, you weren't talking about there a -- you know, a class action statute. And so 2501 -- but there's no precedent of any kind, Your Honor, that says that 2501 operates like a statute of repose and that it can't be subject to class action tolling and the contrary is Bright -- is the Bright case, where they said, no, it absolutely is a statute of limitations, and for those people that wanted to opt in after the period of limitations otherwise ran, they were allowed to do so because the class action was tolled.

I really think it's that simple. We have a weight of authority here from the United States Supreme Court, as well as the Federal Circuit, that says class action tolling works to suspend tolling in these circumstances and including the Tucker Act. There is nothing to the contrary, not a single case. It's not just CALPERS. Every single case the Government cites is either a true statute of repose in which the Court has said we're not messing with it, or, for example, in the Big Oak Farms case that the Government relies upon, that's a case in which the plaintiffs -- and that came here out of the Court of Federal Claims. It's not an appellate decision. But it was totally logical.

What the plaintiffs did in Big Oak Farms is they had a choice. They initially filed for class action status and then before they proceeded forward with it, they made a decision that they were abandoning class action status completely and instead, once they abandoned the class -- pursuit of the class action, they filed a motion to amend their complaint and the Court said, well, wait a minute, if you're going to do that, then now I need to look and see whether your amended complaint relates back to the original complaint so that you can get past the statute of limitations and found that it didn't relate back.

But the point is Big Oak Farms doesn't stand for anything in terms of relevance to this case here. That was a case in which the plaintiffs didn't pursue class action status. Here, we're talking about our clients relying upon the class action pursuit in Washington Federal and obtaining the benefit of that class action tolling until decision -- now, obviously, you know, the Government says, oh, well, class action certification wasn't actually ultimately sought in Washington Federal. Well, that's -- at least a motion to certify the class, I should say.

It's true. And I think the Court pointed out earlier this morning it's because they never got there.

I mean, the case was dismissed on standing grounds and on the merits. It had nothing to do with the plaintiffs pursuing class action certification status.

And to something that you said earlier this morning, Your Honor. Talking about whether, wouldn't that be a little bit bizarre, out of order? Absolutely. For the plaintiffs in Washington Federal to file a motion to certify the class and trying to determine who fits into what class and what subclasses you have, how could you do that before the Court made its decision on the merits on standing? I mean, the Court would never even have entertained a motion to certify the class. It was just not ripe.

But what's clear is that class action status was sought in Washington Federal from the beginning and no doubt would have been through the end had they not been dismissed on other grounds.

THE COURT: Can I ask a question? It's one that I asked the Government, as well.

MR. DIAMOND: Sure.

THE COURT: Or two questions. One is the -- whether there's a distinction between Plaintiffs who might want to join the original suit and those who want to join a separate suit. The Supreme Court in Crown Cork & Seal said there's no distinction, but that wasn't about

Section 2501. So I'm just wondering if you think that Section 2501 makes any difference in that analysis.

MR. DIAMOND: I don't think so at all, Your Honor. I think Justice Powell's concurring opinion in Crown Cork set it out that if you have -- the purpose of the class action tolling is to avoid the multiplicity of suits and to the extent you're going to have a separate suit brought later at whatever appropriate time, once they're either -- the class action issues have been resolved, those parties to the separate suit get the full benefit of that tolling period. And I don't think 2501 has anything to do with that whatsoever.

THE COURT: And then on the opt-in versus opt-out classes, if that distinction were -- for the CALPERS decision, I wanted to see what you think about the Government's argument that the -- in the Big Oak case that there is a distinction between opt-in and opt-out classes for purposes of meeting class certification as a prerequisite for tolling.

MR. DIAMOND: Well, I do -- one thing I do agree with my learned counsel over there when we are talking about opt-in/opt-out, I mean, you are going to have in the District Courts -- those are all going to be opt-out cases and, of course, here in the Court of Claims, they're going to be opt-in cases. I'm not sure

that that distinction between opt-out and opt-in impacts the efficacy of whether class action tolling is applicable. I think it could be applicable in either circumstance if you meet the test.

THE COURT: Okay. And you cited -- also in your brief, you cited the Birdbear case which doesn't mention the CALPERS decision. I'm wondering what you think of that omission and if it helps or hurts your argument.

MR. DIAMOND: I'm sorry, Your Honor, which case were you referring to?

THE COURT: It's Birdbear. Let me see if I can find the citation.

MR. DIAMOND: Excuse me one second, Your Honor.

THE COURT: Of course.

(Pause in the proceedings.)

MR. DIAMOND: I'm just trying to refresh my recollection, Your Honor, on that particular case. I think that just stands for the proposition that it supports the long line of authority starting with American Pipe and it's just further, you know, citation along those lines as to why class action certification should apply. It's not a Tucker Act case.

In conclusion, Your Honor, I'd like to wrap up by saying that -- well, I guess the one last issue we

really haven't addressed is the Government's position that the implied contract claim should be denied tolling. If I may, let me just take a couple of minutes to address that.

The Government posits that not only does there need to be claim identity as between the original class action and the subsequent individual one, but that each and every factual and legal predicate -- I believe that's the language they use in their briefing -- must be identical. And I submit respectfully, Your Honor, that that is simply not the law.

The issue fundamentally is one of notice to the Defendant. Did the class action allegations put the Government on notice as to the nature of the facts and the claims that the Kelly Plaintiffs here in this suit would be bringing. And as the Court's familiar, in that specially concurring opinion in Crown Cork, Justice Powell set out when a plaintiff invokes American Pipe in support of a separate lawsuit, just as the Kelly Plaintiffs did here, the Court should take care to ensure that the suit raises claims that concern the same evidence, same memories, same witnesses, as the subject matter of the original class suit so the defendant is not prejudice. So it's a question of notice.

And the overwhelming majority of U.S. Circuit

Courts have since followed Judge Powell's reasoning over and over again, finding that subsequent individual claims need not be identical for tolling to apply, so long as they share a common factual basis and a legal nexus so that the defendant would rely on the same evidence and the same witnesses for its defense.

As an example, the 3rd Circuit in the Community Bank of Northern Virginia case put it this way. "We find no persuasive authority for a rule which would require that the individual suit" -- our suit here -- "must be identical in every respect to the class suit in order for the statute to be tolled."

And there's a 2nd Circuit case that I think is particularly persuasive here, as well. It's called Cullen vs. Margiotta. And the 2nd Circuit went to great lengths -- by the way, it's not a Tucker Act case, but it is a class action tolling case and it involved a RICO action in the Federal Courts and a State Court action. And they talk about the concept of what is the challenged conduct.

The 2nd Circuit said, "The challenged conduct is what is common to both the RICO and the state law claims and that is what the defendant must be alerted to in order to preserve its evidence, record its recollections, and keep track of its witnesses." The

Circuit went on to say, "We would be hard-pressed to conclude that the complaint was not sufficient to alert the defendant sued there to preserve the evidence regarding the conduct. Indeed, limiting American Pipe tolling to the identical causes of action asserted in the initial class action would encourage and require absent class members to file protective motions to intervene and assert their 'new legal theories' prior to class certification, thereby producing the very results that the New York Courts seek to prevent by tolling, court congestion, wasted paperwork, and expense." This is exactly what Justice Powell was talking about in his concurring opinion.

The challenged conduct, Your Honor, in Washington Federal here, okay, is indeed the same as it is in this case here. The imposition of the conservatorship, the actions by the regulators to eviscerate the Tier 1 GSE capital treatment. And I will say that, you know, I think the Government all but concedes in its briefing that the facts in Washington Federal are the same as those alleged in this case.

In its reply brief on page 14, the Government states the claims here are based on the same transactional facts as Washington Federal. Then it goes -- the Government goes on to say, it could scarcely be

plainer that the takings claim, in our amended complaint here, are based on the same transactional facts as the takings claims in Washington Federal.

And I heard counsel this morning say, well, but maybe the implied contract claims are different, but, fundamentally, the underlying transactional facts in both Washington Federal and in this case are the same. What's different is that we have completely -- as the 2nd Circuit alluded to, completely different legal causes of action, which was the case in the Margiotta case in the 2nd Circuit where they said you can't make the plaintiffs in this subsequent lawsuit, who would otherwise have gotten the benefit of class action tolling, put forth necessarily all their new legal causes of action and bring that to clog the courts. They got the benefit of class action tolling in Margiotta because the same transactional facts were present. And that's what we have here.

And so I would just conclude, Your Honor, by saying that the overwhelming weight of legal authority from the U.S. Supreme Court to this Circuit here dictates that the class action tolling apply here. And if it does, the filing of this complaint was absolutely timely.

THE COURT: Okay.

MR. DIAMOND: Thank you, Your Honor.

THE COURT: Thank you, Mr. Diamond.

So I'd like to hear rebuttal from the Government, but before we do, I wanted to just take like a five-minute break, if that's okay with everybody. So we'll come back -- I have 11:36, so we'll come back at 11:41.

(Court in recess at 11:36 a.m.)

(11:42 a.m.)

THE CLERK: Please all rise.

THE COURT: You can be seated.

We can hear from Mr. Schiavetti again. Thank you.

MR. SCHIAVETTI: Thank you, Your Honor. A few points that I'd like to make. To start with the statute of limitations issue, opposing counsel mentioned a few times that the challenged conduct is the same. That's their allegation here. The problem for Plaintiffs is that, while that may be true for the takings allegations and possibly even for the breach aspect of the contract claims, it is not true for the formation of the contract, which is a critical aspect of those contract claims.

And so as we have stated in our briefing and today, many courts require claim identity to apply class action tolling and, certainly, if claim identity is required, then Plaintiffs do not have claim identity

because there were no contract claims in Washington Federal. But even if claim identity were not required -- and Plaintiffs misrepresented our position saying that we said they have to have identical factual and legal allegations between the two. That's not what we said at all in our briefing or today.

What we've said is we've used the standard that Plaintiffs have relied on from Justice Powell's concurring opinion in Crown Cork & Seal, which says common factual basis and legal nexus so the Defendant will rely on the same evidence and witnesses. Plaintiffs, in their slides today, have talked about these are the allegations that we've made. The OCC examiners told us this and that. The FDIC made these representations. Those witnesses wouldn't have been involved at all in the Washington Federal claims because there were not claims of the formation of an implied contract between the United States and a bank that was being regulated, bank regulators. Those were part of the allegations there.

So different witnesses, those aspects, those claims are different. They don't have a common factual basis, legal nexus. They wouldn't rely on the same witnesses. Contract claims could not benefit from the class action tolling under either standard, claim

identity or the ones the Plaintiffs rely on from Justice Powell's decision in Crown Cork & Seal.

Additionally, on the statute of limitations, Mr. Diamond mentioned that -- he's talking about the commonality between their takings claims and Washington Federal and highlights, again, for the Court, leading into the other aspects I want to talk about, that they held the same asset as the Washington Federal plaintiffs, the preferred shares in Fannie Mae and Freddie Mac. What they didn't say is we held Tier 1 capital, some other different thing, because it's not a different thing. What they held was enterprise preferred shares, the same asset that was held by the plaintiffs in Washington Federal, notably including Washington Federal who was a bank, same as the Plaintiffs here.

There were different plaintiffs that were not banks, but that's -- but the commonality among all of them and the class allegations that were contained in the complaint had to do with the ownership of preferred shares in the GSEs and that's what the Plaintiffs owned here.

Turning to the other issues in this case, Plaintiffs continue again to talk about Tier 1 capital as if it's some distinct asset class, something different. The asset that the Plaintiffs held here was enterprise

shares. That's what they acknowledged in a briefing, today, and it's clear from the amended complaint. This is the same as the asset that was held by the Plaintiffs in Washington Federal.

There was no -- they talked about consideration, as well, as if they gave nearly $900 million to the Government. That's not the case. They purchased preferred shared from Fannie Mae and Freddie Mac, private corporations, that, at that time, when they were purchased, were not in conservatorship. They were not part of the United States Government in any way, under any conception.

Now, the other thing that the Plaintiffs have continued to say is that the Government did take their shares. They say, you know, we're getting it wrong, the Government took our shares. The critical aspect to be aware of there is that they're saying this -- in the bankruptcy when the banks were placed into receivership, those assets were liquidated in the receivership. But the Court -- the Federal Circuit could not have been more clear in Branch and California Housing and Golden Pacific Bancorp and in other cases that placing a bank into receivership cannot be the basis for a takings claim.

So they're trying to link two things here in a consequential manner that just cannot be linked. The

triggering event, the government action that they rely on, is the decision to place the enterprises into conservatorship. That caused the value of the asset that they held, the preferred shares in the GSEs, to decline in value. That put them below the Tier 1 capital requirement that makes them a solvent bank and that led to a receivership for the banks, a bankruptcy, that cannot itself constitute a taking.

This was the same problem in Branch. The Federal Circuit said the plaintiffs have failed to identify what it was that led to the bankruptcy that constituted a taking. Plaintiffs here have identified the placing of the enterprises into conservatorships, but that was the same exact claim that the Federal Circuit has already rejected in Washington Federal.

Plaintiffs relied on Ideker Farms. This is a totally inapposite case. It has to do with the flooding of land. And what the Federal Circuit found there was that not only was the flooding of land a taking, but if the crops sitting on the land, the personal property, is also physically destroyed by the same flooding, that's also a taking. It's not consequential. That's not the case here. The bankruptcy was, indeed, a consequence of the declination in value of the GSE preferred shares that were held as the asset here.

On our preclusion -- on the preclusion issue, opposing counsel has acknowledged that their claims -- their takings claims arise from the same transactional facts. Again, they're trying to muddy -- our briefing I believe is clear, but to the extent that it isn't, the takings claims undoubtedly arise from the same transactional facts as the takings claims in Washington Federal. The contract claims, however, do not arise from the same transactional facts. There are different facts involved in the formation of the alleged contract that were not at issue in Washington Federal.

Plaintiffs also have mentioned today that the Washington Federal claim was a statutory claim. That's not correct. The Washington Federal claim was a constitutional takings/illegal exaction claim. It was analyzed by the Federal Circuit as such. It had some basis -- of course, there's an interaction with HERA, the statute, which is the same as Plaintiffs claim today. The government action they're alleging is placing, under the authority provided by HERA, the GSEs into conservatorships by decision of the FHFA director.

I noted down in my notes here Plaintiffs stated today when the Government took the banks, they destroyed the value of the asset which led to bankruptcy, and that's exactly what we've been saying. When they placed

the enterprises into conservatorship, that caused the value of the shares to decline and put them below their Tier 1 capital requirements, leading to the bankruptcy, which is both a consequence -- not only that, but the Federal Circuit law could not be more clear that a bankruptcy itself cannot constitute a taking.

Finally, on the question of authority, with the contract questions, the Plaintiffs have stated that there's no question that the individuals that they're talking about had authority to bind the Government to what they're doing. It's just a very vague statement. What they didn't allege was that any individual who they allege engaged in offer and acceptance with the Plaintiffs, had authority to bind the Government in contract. It's a different question. So we've cited Mola Dev Corp, among other cases, D&N Bank, in our briefing, that says -- that stand for the proposition that regulatory action or other policy actions by the Government do not lead to contracts unless that's expressly implicit that the intent by the Government is to enter into a contract.

And that's what's absent here, both that offer acceptance, that clear unambiguous intent to enter into a contract, and then on top of that, any allegation that the individuals who are engaging in these communications

with Plaintiffs had authority to bind the Government in contract.

I'm certainly happy to answer any questions that you have, as well, Your Honor.

THE COURT: Yeah, I have one question from your principal argument earlier, which -- when you were talking about standing to bring derivative claims. I just wanted to see if you had any thoughts on why the conflict of interest exception isn't applicable here.

MR. SCHIAVETTI: Certainly, Your Honor. We will note, as we noted in our brief there, that the -- Judge Sweeney of this Court did find that the conflict of interest exception was applicable. The Federal Circuit did not address that issue on the merits. It found for other grounds that the -- because the plaintiffs didn't have a cognizable property interest that either way -- that they wouldn't be able to succeed on that claim, so they didn't actually resolve that issue.

But as we explained in our briefing, HERA provides that FHFA's shall, as conservators or by receiver and by operation of law, immediately succeed to all rights, titles, powers, and privileges of the regulated entity and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and access to the regulated entity.

That's the succession clause in HERA.

The right to bring a derivative suit on behalf of a corporation in appropriate circumstances is a well established right of corporate shareholders. We have a citation to that in our brief. The succession clause, therefore, plainly transfer to the FHFA the shareholders' ability to bring derivative suits.

The Court found that the conflict -- the Court of Federal Claims found the conflict of interest exception applies there. Respectfully, we disagree because the broad unqualified language of the succession clause leaves no room for an implied conflict of interest exception. It states categorically that FHFA's conservator immediately succeeds to all rights, types of powers and privileges of any stockholder with respect to the enterprise. Moreover, it includes an express exception under which the enterprises may challenge an agency's appointment as conservator in the District Court within 30 days.

Another narrow exception permits shareholder participation in the statutory claims process in the event of the enterprise's liquidation. So the presence of these express exceptions generally precludes the recognition of an additional implicit exception. We have a citation for that in our brief, as well, the Jennings

vs. Rodriguez in the Supreme Court.

That Congress expressly granted shareholders and the enterprises -- shareholders these narrow post-conservatorship rights only underscores that the enterprises and the shareholders do not otherwise retain the right to bring suit on behalf of the enterprises during a conservatorship.

Does that answer your question on that, Your Honor?

THE COURT: Yes, thank you.

MR. SCHIAVETTI: Any other questions that you'd like me to address on any of the issues today?

THE COURT: I don't think so.

MR. SCHIAVETTI: Thank you for your time, Your Honor. I very much appreciate it. And, again, for these reasons and those explained in our briefing, we respectfully request that the Court grant the motion to dismiss and dismiss the complaint. Thank you, Your Honor.

THE COURT: Thank you to the parties for your time.

MR. RUYAK: Could I just make a couple comments in response to new things that he raised?

THE COURT: Quick comments, sure.

MR. RUYAK: Yeah, there's two things that just

are not true. The Government cites cases for the proposition that when a bank goes into solvency, it's not a taking. Those are not this case. Those are situations where the bank itself caused the insolvency. Every case the Government cites in a situation in which because the bank mismanages itself, does something like that, the bank goes into solvency. Obviously, that's not a government taking because the bank took it.

Here, what we're saying is that these banks were solvent, they were profitable. The Government forced them into insolvency by what they did by taking the value out of the kind of asset they created. That's an entirely different situation that is not covered by those cases. Those cases really deal with where the bank itself has caused the problem.

Here, the Government forced the insolvency directly. And as to Ideker Farms, it is exactly this case. The Government flooded the land and the Government said, well, we're not liable for the crops. That was direct. It's the consequential -- consequential doesn't mean, oh, it happened later. That is direct and proximate. Under the law, consequential means indirect and remote results. In this case, if I take all the cases, Armstrong -- all these cases where the Government dealt with direct versus consequential, the Courts have

always said that you look at the direct and proximate causes of the government taking, those are included as have to be compensable.

In this case, the Government took the GSEs, destroyed the value of that stock holding, which was different for the banks and other shareholders. When that was destroyed, immediate insolvency and immediate taking. That's a direct and proximate result of the Government's action.

Thank you.

MR. DIAMOND: Your Honor, if I can indulge you, can I have 30 seconds?

THE COURT: Yes.

MR. DIAMOND: Thank you. I'm going to keep to it as close as I can.

So very quickly, the Government had mentioned earlier this morning that there was a rash of other lawsuits filed in 2018, and why couldn't Mr. Kelly have filed then, although he would have had to have filed prior to 2014, under the Government's theory, to fall within the six-year Tucker Act statute of limitations.

For those lawsuits -- I just want to make clear for the Court, those lawsuits that were filed in 2018, they have absolutely nothing to do with our case. Those were post-conservatorship lawsuits file by those parties

that felt they were harmed after the conservatorship for things that were done by the regulators later. It had nothing to do with the conservatorship itself.

And with respect to -- this is -- the point I want to make right now, I want to mention to the Court that it's not in the briefing, but there's something called the forfeiture rule. And there's a split of authority in the lower courts. It hasn't been addressed in the appellate courts yet. But when Mr. Kelly was having to decide whether to file and when, there is a rule that says if you do file your separate lawsuit while the class action is pending, you may no longer get the benefit of class action tolling once you take that step. And that was something that was considered here by Mr. Kelly in not filing earlier. Not that his claims weren't timely filed because we submit they were. But in addressing the Government's position, well, he could have filed so much earlier, I would submit that that's really not the case.

And I'll just end with that on the Court asking me a lot of questions about 2501 and statutes of repose that if Section 2501 being jurisdictional is somehow turned into a statute of repose, meaning that it cannot be statutorily class action tolled, it would fly on the face of the Circuit Court's opinion in Bright and it

would fly in the face of all the line of cases that deal with the issue on class action tolling. And I submit that that would be -- that would not be a correct application of the law in 2501.

Thank you very much.

THE COURT: Thank you. Okay. Thank you. I'll try and issue a decision as soon as I can on this. I appreciate everybody's time today and -- does anybody have anything else that we need to deal with before we finish?

MR. RUYAK: Nothing from us, Your Honor. Thank you very much for your time this morning. You gave us quite a bit.

MR. DIAMOND: Thank you so much.

MR. SCHIAVETTI: Nothing from the Government, Your Honor. Thank you.

THE COURT: All right. Then we can adjourn.

(Whereupon, at 12:00 p.m., the hearing was adjourned.)

CERTIFICATE OF TRANSCRIBER

I, Elizabeth M. Farrell, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-titled matter.

DATE: 3/28/2024 S/Elizabeth M. Farrell
ELIZABETH M. FARRELL, CERT