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IN THE SUPREME COURT OF THE UNITED STATES

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MENOMINEE INDIAN TRIBE OF :

WISCONSIN, :

Petitioner : No. 14-510

v. :

UNITED STATES, ET AL. :

- - - - - x

Washington, D.C.

Tuesday, December 1, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

GEOFFREY D. STROMMER, ESQ., Portland, Ore.; on behalf of Petitioner.

ILANA H. EISENSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-510, Menominee Indian Tribe of Wisconsin v. the United States.

Mr. Strommer.

ORAL ARGUMENT OF GEOFFREY D. STROMMER

ON BEHALF OF THE PETITIONER

MR. STROMMER: Mr. Chief Justice, may it please the Court:

The facts in this case are very complex, but the legal question that is presented to you today is relatively straightforward to state. And the legal question is whether or not an individual or an entity that reasonably relies on class-action tolling can, if tolling is found to be ineffective at a later date, then rely on the same facts to argue that equitable tolling under Holland should apply.

In the Irwin case, this Court specifically cross-referenced American Pipe as an example of a defective pleading that could satisfy equitable tolling. American Pipe obviously being a class-action tolling rule.

We read that cross-reference as a suggestion that, under the right circumstances, if somebody

1 reasonably relies on class-action tolling facts that
2 ultimately prove to be ineffective, that that individual
3 has the ability to ask the Court to find that equitable
4 tolling should apply.

5 If there is such a case, the facts of this
6 case really should satisfy this test.

7 The test is set forth in the Holland case.
8 Due diligence and extraordinary circumstances are the
9 two prongs that have to be satisfied. Both of them are
10 well-satisfied in this case.

11 First, the Menominee Tribe relied on a
12 preexisting class action which dealt with almost
13 identical substantive claims against the United States.

14 JUSTICE GINSBURG: Are you talking about the
15 Ramah?

16 MR. STROMMER: Yes. Correct, Justice
17 Ginsburg.

18 JUSTICE GINSBURG: And -- and that was a --
19 a decision, unpublished decision by a district court.
20 It never went any further.

21 MR. STROMMER: Well, it is still a certified
22 class, Justice Ginsburg, and the Menominee Tribe not
23 only is a member of that class but has, to date,
24 received a portion of several settlements that were
25 entered into in that class action and, in fact, is

1 poised to receive another large payment in a settlement
2 that the class and the United States --

3 JUSTICE SOTOMAYOR: The issue --

4 MR. STROMMER: -- has asked the Court to
5 approve.

6 JUSTICE SOTOMAYOR: The issue that that case
7 settled or addressed was whether exhaustion was required
8 at all. Minimal research would have shown that every
9 other court at that time who had addressed the issue had
10 required exhaustion.

11 Now, we'll go later to exhaustion-when.
12 That's a separate question.

13 So how could you reasonably rely on a lower
14 court decision that hasn't gone through the crucible of
15 appellate review without having done any research on
16 whether its premises were subject to dispute, reasonable
17 dispute, and rely on that?

18 MR. STROMMER: Well, Justice Sotomayor, I
19 have a couple of answers to your question.

20 First of all, the United States did not
21 challenge the certification of the class in the Ramah
22 case. Not when it was originally certified, based on
23 the claims that were then in the case, miscalculation
24 claims, nor later on with additional claims --

25 JUSTICE SOTOMAYOR: But they raised the

1 argument just lost. They raised the argument that the
2 exhaustion requirement didn't meet the commonality prong
3 of class certification. So they did make an argument
4 against it.

5 MR. STROMMER: Oh, they argued, but the
6 district court judge in the Ramah case reasonably, we
7 think, concluded that, because of the unique nature of
8 the claims that the Ramah class was seeking --

9 JUSTICE SOTOMAYOR: I know that's what you
10 believe, but every other court up until that time had
11 said no, you needed to exhaust.

12 Now, we can go to a separate question of
13 exhaust-when later. But how could you at that point
14 rely on that case to think that you didn't have to --

15 MR. STROMMER: Well, the Menominee Tribe
16 didn't rely just on that case. That case was an
17 important factor that it relied on, but there was also
18 other factors that it relied on.

19 In the Cherokee Nation certification
20 process, the United States did not raise presentment as
21 a defense. Instead, it raised Rule 23 grounds as a
22 basis not to certify the class.

23 And the district court judge in that case,
24 on garden-variety Rule 23 grounds, ruled that that case
25 could not be certified. Didn't say anything in his

1 order about presentment, jurisdiction. Did not talk
2 about that whatsoever. And in fact, in his ruling he
3 specifically said that, if a class had been certified,
4 it would have been easy to identify all of the tribes in
5 the country that would have been members because they
6 were all listed on the shortfall reports that the
7 United States produced at the same time as the years in
8 which the claims were -- arose.

9 JUSTICE SCALIA: Mr. Strommer --

10 MR. STROMMER: But then --

11 JUSTICE SCALIA: -- all of this goes to
12 deciding whether the legal advice they received was
13 reasonable legal advice. I find that quite irrelevant.
14 Do you have a single case in which legal advice has
15 qualified for equitable tolling?

16 MR. STROMMER: No, Your Honor. We can't
17 cite a single case for that, no.

18 JUSTICE SCALIA: So you're really -- you're
19 really arguing a -- a remarkable proposition, that if
20 you get bad legal advice, that justifies equitable
21 tolling.

22 MR. STROMMER: Well, that's --

23 JUSTICE SCALIA: You -- you mentioned
24 extraordinary circumstances, but our -- our cases refer
25 to extraordinary circumstances that stood in the way and

1 prevented timely filing.

2 I -- I would not qualify erroneous legal
3 advice as preventing time -- timely filing. I don't
4 care how reasonable it was. It didn't prevent it.

5 MR. STROMMER: Well, Your Honor, in the
6 context of class-action tolling, there is always a legal
7 judgment call made about whether or not class-action
8 tolling applies. And if equitable tolling is not
9 available as a fallback, if in fact that judgment was
10 not made correctly and discovered many years later, then
11 the whole premise of class-action tolling, I think, is
12 undercut because any member of a class -- for example,
13 in the Cherokee Nation case where the district court
14 judge said absolutely nothing about presentment, nothing
15 about jurisdiction, the government didn't raise that
16 defense, focused only on Rule 23 issues -- in any case
17 in which a district court judge declines to certify a
18 class, if equitable tolling isn't available as a
19 fallback, then the most you could --

20 JUSTICE SCALIA: You -- you want us to -- to
21 limit our principle of erroneous legal advice justifies
22 erroneous equitable tolling only in class-action cases?

23 MR. STROMMER: No. I would frame it
24 slightly differently, Your Honor. I would say that,
25 when a party reasonably relies on class-action tolling

1 that at a later date is found to be ineffective --

2 JUSTICE SCALIA: But you're limiting it to
3 class actions. You -- you don't want to -- why -- why
4 should it be limited to class actions? I mean, if --

5 MR. STROMMER: Because the party still has
6 to show the circumstances.

7 JUSTICE SCALIA: -- if erroneous legal
8 justifies equitable tolling, why should it be limited to
9 class actions?

10 MR. STROMMER: Well, the Holland test still
11 has to be satisfied, Your Honor. Have to show due
12 diligence.

13 JUSTICE SCALIA: Right.

14 MR. STROMMER: Have to show extraordinary
15 circumstances. We're not eliminating --

16 JUSTICE SCALIA: That prevent -- that
17 prevent the test prongs at all.

18 MR. STROMMER: Right.

19 JUSTICE SCALIA: But -- but if legal advice
20 prevents tiling -- timely filing in class-action
21 situations, I don't know why bad legal advice doesn't
22 prevent tile -- timely filing in every other situation
23 as well. I -- I just don't -- it -- it's sort of a
24 weird -- a weird rule. Just -- just for class actions?

25 MR. STROMMER: Well, Justice Scalia, the

1 circumstances in this case are extraordinary and are --
2 are very rare. It is very unlikely that you will find
3 another circumstance where a preexisting class action
4 dealing with the same substantive matter against the
5 same party, the United States, in which a court
6 specifically addressed the presentment issue and ruled
7 in favor of certifying the class is what was --

8 JUSTICE ALITO: What was the length of time
9 between the denial of class certification and -- and the
10 presentment? It was a long time, wasn't it?

11 MR. STROMMER: The total amount was 707
12 days, Your Honor.

13 JUSTICE GINSBURG: So why was that due
14 diligence -- I mean, I know that we're not arguing about
15 due diligence, but it seems to me that, when there
16 was -- certification was denied in the Cherokee case,
17 you had two years to present and you would have been
18 home free. You would not have encountered a time bar.
19 Two years. But you, in fact, didn't present until four
20 years after the denial in the -- in the Cherokee case.
21 So how was that due diligence?

22 MR. STROMMER: Well, in the context of
23 reliance on class-action tolling applying, Your Honor,
24 it is due diligence. And it's reasonable diligence. In
25 a class action environment, a party is not encouraged to

1 do anything and a party is entitled automatically --

2 JUSTICE GINSBURG: But the class action is
3 over. It's been denied.

4 MR. STROMMER: I'm sorry, Your Honor?

5 JUSTICE GINSBURG: The class action has been
6 denied.

7 MR. STROMMER: Correct.

8 JUSTICE GINSBURG: So at that point you know
9 you're on your own. You can't piggyback on the class.
10 You know you're on your own, and yet you let two years
11 go by. I don't understand that.

12 MR. STROMMER: Well, Your Honor, under
13 class-action tolling rules, you're entitled to the
14 entire period that the class-action certification was
15 pending. That's 707 days --

16 JUSTICE SOTOMAYOR: Actually --

17 MR. STROMMER: -- you're automatically
18 allowed.

19 JUSTICE SOTOMAYOR: -- that's not quite
20 true. There's a circuit split which hasn't been
21 addressed anywhere in the briefing. Some of the
22 circuits do it the way you say. They stop the clock and
23 restart the clock at the end of the tolled period. In
24 those circuits you would win. You could wait the entire
25 six years plus however long the other case was pending.

1 But another series of circuits looked to
2 diligence throughout the period. And so you'd be asking
3 us to make an assumption about which -- or make a
4 decision about which tolling applies.

5 You are taking a risk no matter what you
6 did.

7 MR. STROMMER: All right. There's certainly
8 in any class-action environment a risk in relying on
9 class-action tolling, particularly, as the facts of this
10 case demonstrate, if ultimately --

11 JUSTICE SOTOMAYOR: Well, let's go back to
12 Justice --

13 MR. STROMMER: -- reliance is found
14 ineffective because class-action tolling.

15 JUSTICE SOTOMAYOR: -- Scalia's question ask
16 you a question.

17 MR. STROMMER: I'm sorry.

18 JUSTICE SOTOMAYOR: All of these decisions,
19 were they made with the advice of a lawyer?

20 And I have a sense that the Tribe was
21 concerned about its resources and that they were just
22 getting together and talking about this and deciding,
23 we're not going to win under the law, so we're not going
24 to file. And it was only when Cherokee Nation was
25 decided by this Court that they realized they had a

1 viable claim.

2 So -- but answer my question: Was there
3 legal advice sought?

4 MR. STROMMER: They relied on legal advice
5 provided by class counsel, who communicated with all
6 putative class members, and made it clear that the
7 tolling period would apply during the pendency of the
8 certification. And they also made --

9 JUSTICE SOTOMAYOR: If we disagree that that
10 was -- if we think that was unreasonable, what -- your
11 reading of what class counsel said, what would happen?

12 MR. STROMMER: Well, we still think the
13 backdrop against which the Tribe was making the
14 decision -- which is as a member of a class that had
15 been certified where presentment had not been found to
16 be an obstacle because of the unique nature of the
17 claims at issue in the case -- should be an important
18 factor that this Court will factor into whether or not
19 equitable tolling should apply.

20 JUSTICE KAGAN: But it has not been found by
21 a single district court, right? I mean, you're saying
22 that that single district court should have had such
23 power in the Tribe's mind that they didn't do the
24 presentment. And that -- that seems an extraordinary
25 thing. It's just a single district court. A single

1 district court has no controlling authority over anyone
2 or anything other than that particular decision.

3 MR. STROMMER: That's true, Your Honor. And
4 that particular decision had a direct impact on the
5 Menominee Tribe because they were a member of the class.
6 They benefitted from that decision. They received
7 payments out of settlement that the United States and
8 class counsel had the court approve premised on the
9 court having jurisdiction to be able to approve them.
10 They will benefit shortly next spring from another
11 proposed settlement where the class counsel, as well as
12 the United States, have proposed that the claims that
13 will be signed by parties will serve as the presentment
14 to satisfy the jurisdictional requirement.

15 So yes, they did benefit, and that was not
16 an --

17 JUSTICE BREYER: They benefitted, but the
18 point is there is one court that says your Tribe can be
19 a member. Your -- your Tribe didn't present its claim
20 to the contracting officer.

21 And so why can they be a member? The judge
22 addresses that question, and he says, normally they
23 couldn't be a member, but they can here because this is
24 the kind of case that is attacking general practices of
25 the administration.

1 Then okay. Fine. You got that.

2 Then shortly after that or maybe a few years
3 after that, another case comes along. And the other
4 case doesn't involve the situation of attacking the
5 practices generally. It concerns the individual
6 contracts between the Tribe and the Indian Bureau,
7 what -- you know, in the government.

8 And there they say, you can't have a class
9 action.

10 So you'd think -- and this kind of case you
11 want to bring now is the second kind, not the first
12 kind. So you'd say, why is it fair to let you bring
13 this case? After all, if you'd read the opinion closely
14 in the first one, you wouldn't have thought you should
15 have waited. If you had any doubts about it, the second
16 one would have told you you should have waited. And
17 even beyond that, the administrator signs a piece of
18 paper where they ask him: Do you have any claims under
19 these contracts? And he says, none.

20 So it doesn't seem to me you're talking
21 about pure equities; you have very strong grounds.

22 Now what's your reply to that?

23 MR. STROMMER: Well, I -- I would not agree
24 with one of your premises.

25 JUSTICE BREYER: You probably wouldn't agree

1 with any of them. But -- but -- but --

2 MR. STROMMER: Not -- not your conclusion or
3 one of your premises.

4 But the premise that I disagree with -- that
5 I think is very important is that the Cherokee Nation
6 complaint alleged the same kinds of system-wide
7 short-fundings by the United States that were contained
8 in the Ramah complaint.

9 The Ramah complaint initially, when it was
10 certified, only included one category of claims, called
11 "miscalculation claims." But later on, during the
12 pendency of the Cherokee Nation case, additional claims
13 were added. And by the time the Cherokee Nation
14 certification decision was issued, the claims were, for
15 all intents and purposes, the same, and they challenged
16 a systemic underfunding and short-funding by the
17 United States that was based on -- we know now from your
18 Court's decision in the Cherokee case as well as the
19 Ramah case -- on an incorrect reading of the law. And
20 they implemented that, system-wide, the policies that
21 the Indian Health Service used to implement this
22 short-funding system were designed to short-fund tribes
23 because they were designed based off of the assumption
24 that they were not statutorily entitled to 100 percent
25 funding.

1 So the nature of the claims in the Cherokee
2 case, in my view, Your Honor, were the same as both were
3 included in the Ramah complaint initially and then as
4 the complaint was amended over the course of the years
5 by the time the Cherokee Nation cert --

6 JUSTICE BREYER: You're not making that kind
7 of claim here, are you? I mean, you're not challenging
8 the general practices of the government. Rather, you're
9 challenging the particular contracts and whether you got
10 enough money under them. Is that right?

11 MR. STROMMER: That's correct, Your Honor.
12 We're --

13 JUSTICE BREYER: If that's correct --

14 MR. STROMMER: Well --

15 JUSTICE BREYER: Well, then the fact that
16 the second case emphasized the general -- you know, the
17 general attack, which lacks in your case, is more reason
18 for thinking that we better file our claims quickly
19 because what had -- they held in those two cases are not
20 going to help us, who have an individual claim. We
21 better do what the statute says or the rules, and we
22 better file our presentment to the contracting officer
23 and certainly not write the words "none" when they ask
24 you if you have any claim; am I right?

25 MR. STROMMER: I would disagree with part of

1 what you're suggesting, Your Honor, which is that the
2 Tribe only had one option, which was to file,
3 essentially, after the Cherokee Nation's certification
4 decision was issued. In fact, there was nothing in that
5 decision that talked about presentment and jurisdiction.
6 The court ruled on garden-variety-Rule 23 reasons. And
7 ordinarily, those reasons are not a basis for class
8 action tolling not to apply. In fact, Crown Cork is
9 almost identical, the same kinds of garden-variety-Rule
10 23 reasons were found in that case to bar the
11 certification of a class, but class action tolling, in
12 fact, applied in that case.

13 So when you focus just on the Cherokee
14 Nation decision itself, I think there's every reasonable
15 reason to be able to rely on class action tolling.

16 JUSTICE SOTOMAYOR: But wait. I just want
17 to clarify one point. On this issue of -- that you were
18 a member of the class, you rely just on counsel's letter
19 in the first case, in Ramah, the letter that -- where
20 counsel described the class and said there would be --

21 MR. STROMMER: In Cherokee Nation?

22 JUSTICE SOTOMAYOR: No, in the prior case.

23 MR. STROMMER: No. In the Ramah case --

24 JUSTICE SOTOMAYOR: Yes.

25 MR. STROMMER: -- the Tribe is a member of

1 the class. It's received settlement --

2 JUSTICE SOTOMAYOR: No, no, no, no, no. You
3 said that the lawyers had told you that there would be
4 class action tolling. That was the general --

5 MR. STROMMER: That's in the second case.
6 That's in the Cherokee Nation case, Your Honor.

7 JUSTICE SOTOMAYOR: Yes.

8 MR. STROMMER: And they said that when they
9 filed the complaint. The complaint clearly included the
10 Tribe. It identified all tribes that had
11 self-determination contracts with the Union Health
12 Services. The Tribe clearly fell within that
13 definition. And when the court ultimately ruled and
14 chose not to certify the case, the court said, I could
15 have identified who would have been part of this case,
16 because the government's own shortfalls identify each
17 Tribe by name, and how much we actually short-funded
18 them in the given years.

19 JUSTICE SOTOMAYOR: But you haven't answered
20 my question. That's the only advice from a lawyer you
21 received.

22 MR. STROMMER: Yes, Your Honor, that's
23 correct, that's the only advice in the record.

24 I'd like to reserve the balance of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Eisenstein.

2 ORAL ARGUMENT OF ILANA H. EISENSTEIN

3 ON BEHALF OF THE RESPONDENTS

4 MS. EISENSTEIN: Mr. Chief Justice, and may
5 it please the Court:

6 Justice Sotomayor, you stated the Tribe
7 determined that it was not going to win on the law, and
8 so it decided not to file. Indeed, the Tribe made a
9 strategic calculation here to allow the six-year CDA
10 statute of limitations to pass, because it wanted to
11 monitor the litigation by other tribes, rather than file
12 and pursue its own action.

13 The miscalculation that it made about
14 whether the clear deadline could be extended by class
15 action tolling, that was a routine litigation mistake,
16 the kind that is far from the sort of extraordinary
17 circumstance that could warrant equitable relief. Nor
18 did that miscalculation prevent the Tribe from filing
19 earlier. To the extent that there was uncertainty as to
20 whether it was a member of the Cherokee Nation class,
21 and whether presentment was a jurisdictional bar to that
22 class membership, the prudent course, and any reasonably
23 diligent litigant would have filed under the clear
24 deadline, rather than wait for the uncertain application
25 of tolling and the potential forfeiture of its claims.

1 JUSTICE SOTOMAYOR: How did it know that, in
2 Cherokee Nation? He claims that the only decision was
3 on -- under Rule 23, and that presentment and tolling
4 was not at issue there.

5 MS. EISENSTEIN: Your Honor, the -- the
6 Tribe confuses the definition of the class and the class
7 certification decision with its own -- whether the --
8 the court's own jurisdiction over its claim. So the --
9 the Tribe itself was jurisdictionally barred from the
10 class membership, regardless of how the class was
11 defined. There was no need necessarily for the class to
12 be -- carve out those over whom the district court lacks
13 jurisdiction. The fact that the court lacked
14 jurisdiction flows from the fact that the Tribe failed
15 to meet the mandatory presentment requirement.

16 JUSTICE SOTOMAYOR: Well, let's talk about
17 the American Pipe tolling. It would seem to me, as has
18 happened in a number of litigations, that at the time
19 that the complaint is filed, it doesn't mean that every
20 member of the class has to have exhausted, because if
21 that's what it means, then there can never be a class
22 action.

23 MS. EISENSTEIN: I agree, Your Honor, that
24 they can present --

25 JUSTICE SOTOMAYOR: All right. So that

1 issue is still open under the law, because it would seem
2 to me, and I could be wrong, that if you still have time
3 on the clock when the complaint is filed, that you
4 can -- before you receive any remedy under the class
5 action suit, you can present -- exhaust then, and
6 recover, if you've done it during the period that -- the
7 six-year period plus tolling. That's what some courts
8 have done. They've defined the class as people who have
9 exhausted, or who still have time to exhaust.

10 MS. EISENSTEIN: That -- that's correct,
11 Your Honor. But if -- but if the Tribe exhausted while
12 it still had time during the pendency of the Cherokee
13 Nation class action, we wouldn't be sitting here today.

14 Secondly, if it exhausted, because -- let me
15 just be clear, that one of the problems with the class
16 action -- or a fundamental problem with the class action
17 tolling argument is the Tribe is trying to toll the
18 wrong deadline. Class action tolling doesn't apply to
19 the time to file administrative prerequisites to suit;
20 it applies to the time for filing a lawsuit in Federal
21 court. And there is a good reason for that. And that's
22 because the policy of class action tolling is to relieve
23 litigants of the difficult choice of whether to file an
24 individual lawsuit or to wait and participate in the
25 class and risk forfeiting their right to the lawsuit.

1 But that doesn't apply to an administrative
2 prerequisite that must be completed either way. Whether
3 the Tribe proceeded individually or as a class, the
4 first step and mandatory step it had to take was to
5 present its claim. And it failed to do that within the
6 requisite time frame.

7 JUSTICE SOTOMAYOR: Well, this is a slightly
8 different argument. You're saying they can't get
9 equitably tolled for exhaustion of the administrative
10 process.

11 MS. EISENSTEIN: Your Honor, I'm saying --

12 JUSTICE SOTOMAYOR: Even if they could get
13 tolled for filing a lawsuit.

14 MS. EISENSTEIN: Yes, Your Honor. They
15 can't get class action tolling for the time -- the
16 administrative period, because that's not what American
17 Pipe refers to. It refers to the time for filing a
18 lawsuit.

19 And -- and in any event, the -- the class
20 action rule under American Pipe -- American Pipe made
21 clear that it only applies to asserted class members who
22 would have been parties to the suit had it been
23 permitted to continue as a class action. And the Tribe
24 fails there, too, because it was jurisdictionally
25 barred, at the time the class decision was pending, from

1 participating in the suit. So even if Cherokee Nation
2 had been certified during the pendency of the class
3 certification determination, the Tribe was barred.

4 But importantly, the Cherokee Nation class
5 was not granted. It was denied. And it was denied, as
6 Justice Ginsburg pointed out, two years before the CDA
7 deadline would expire for the first claim. And the
8 Tribe waited more than four years after class denial to
9 present its claim.

10 There was no basis for waiting. At that
11 point, the Tribe knew it must pursue an individual
12 action, and the only reason it waited was to hope that
13 this Court would more conclusively reject, and did
14 eventually conclusively reject, the government's
15 affirmative defense that it was asserting in that case.

16 But the -- the idea that a -- a Tribe, or --
17 or any litigant, who could have acted earlier chooses to
18 delay for strategic reasons, and then could get tolling
19 when it finds out that it miscalculated the deadline,
20 would be unprecedented. And in fact, the fact that
21 equitable tolling is foreclosed follows directly from
22 this Court's cases.

23 It simply is a common litigation problem
24 that this Court has addressed time and again, where a
25 litigant believes the deadline is longer than it is,

1 believes their claim occurred later than it did,
2 believes that tolling applies, and in fact, it didn't.
3 That was the case in Lawrence; that was the case in
4 Pace; that was the case in Irwin. And in each of those
5 cases, the Court found equitable tolling did not apply.

6 JUSTICE GINSBURG: Can you explain something
7 in -- in your brief that would seem to make all of this
8 beside the point? You several times referred to a
9 release form that covered the years in question. And
10 it's in the appendix at Pages 240 to 242.

11 If the -- if there was a release covering
12 those years, then why does anything else matter? Why
13 isn't the release -- they release the claims for those
14 three years?

15 MS. EISENSTEIN: Well, Your Honor, certainly
16 on the merits, we agree with you, that the release would
17 foreclose the right of the Tribe to collect on these
18 particular years. But we're at the preliminary stage,
19 which is to say, whether we even get to the merits of
20 the claim. And certainly, we think it does have
21 relevance to the equitable tolling inquiry, and whether
22 the timeliness inquiry, which is -- first of all, it
23 goes to the diligence. This isn't just a litigant who
24 took no action. It took one affirmative step, and the
25 one affirmative step it took was to release the claims

1 at issue. That --

2 JUSTICE ALITO: Did the Indian Health
3 Service have the authority to require the Tribe to
4 release those claims during the contract closeout
5 process?

6 MS. EISENSTEIN: Your Honor, there's no
7 specific statutory authority. The Tribe argues in its
8 reply brief that the -- the Health Service was somehow
9 barred from seeking a release, but I don't believe that
10 there was any -- certainly in the government's view
11 there was no statutory prohibition on the type of
12 release that was issued here, which basically allows for
13 exceptions, provides a place in the release for
14 exceptions of claim, and the Tribe lists agreed to none.

15 So --

16 JUSTICE ALITO: What would have happened if
17 they refused to sign the release?

18 MS. EISENSTEIN: Well, the -- the
19 declaration of the contracting officer that's in the
20 record speaks to that point which said that there would
21 be no adverse consequences to a tribe that refused to
22 sign the release or that signed the release with
23 exceptions. It was an administrative process for the
24 agency to be able to close out the contract after a
25 requisite contracting period. But it certainly is

1 significant as to what the Tribe was thinking in its
2 diligence as to the pursuit of its claims, which is the
3 concern of equitable tolling.

4 CHIEF JUSTICE ROBERTS: So it turned out
5 there were consequences after all.

6 MS. EISENSTEIN: Well, there weren't
7 consequences in terms of its ability to contract with
8 his, or -- or the terms on which it could contract with
9 his going forward. I think that there are consequences
10 in equity when a party releases what -- releases a claim
11 affirmatively, whether or not that was something that
12 was required of it. It voluntarily signed that release.

13 But -- but ultimately, even without the
14 release, the -- the Tribe took no action to pursue its
15 claim during the statutory period. And counsel for the
16 Tribe suggests that we should equate the rules for
17 class-action tolling and equitable tolling, but equity
18 operates under different -- different rules. And the
19 diligence requirement is paramount among them.

20 Equitable tolling requires the party to
21 demonstrate diligence throughout the entire period it
22 seeks tolled, and it requires that the impediment to
23 suit actually prevent the timely filing. Neither of
24 those standards are met.

25 JUSTICE ALITO: Are there any circumstances

1 in which reliance on legal advice could constitute the
2 extraordinary circumstance required for equitable
3 tolling?

4 MS. EISENSTEIN: Your Honor, I think it's --
5 this Court has never recognized as such. In Holland, it
6 was the very unusual circumstance where it was mistakes
7 by counsel, but mistakes that really amounted to an
8 abandonment by counsel. It was certainly not advice of
9 counsel, so --

10 JUSTICE SOTOMAYOR: That it's settled in all
11 13 circuits. They've all ruled one way. You don't
12 think it's reasonable to give advice based on that
13 ruling, that that might be an exceptional circumstance?

14 MS. EISENSTEIN: Well, Your Honor, I think
15 in that -- in your hypothetical, it would be the
16 reliance on the binding circuit precedent, not the
17 reliance on counsel's advice per se, especially if
18 counsel's advice was -- was poor -- poorly rendered.

19 But in the case -- if you're asking if there
20 was a situation where binding precedent afforded more
21 time to a litigant but yet later was determined that
22 less time was available, that may be -- may be a
23 circumstance that could qualify for tolling, but only
24 where other factors are met. And for example, in --

25 JUSTICE SOTOMAYOR: So how about it's not

1 13, it's 12, but you're in a circuit that hasn't ruled.
2 You mean that it's -- it wouldn't be an extraordinary
3 circumstance in that situation?

4 MS. EISENSTEIN: Well, Your Honor, that was
5 the case in Pace, for example, where the litigant in
6 that case claimed that he was relying on then binding
7 and existing Third Circuit precedent in believing that
8 his time for filing a Federal habeas action was tolled.

9 JUSTICE SOTOMAYOR: That's one circuit. I'm
10 talking about the vast majority.

11 MS. EISENSTEIN: Right.

12 JUSTICE SOTOMAYOR: 12 out of 13.

13 MS. EISENSTEIN: And even in those cases,
14 like in Duncan, this Court overturned a large number of
15 circuits in terms of the tolling standard. And the
16 lower courts did examine whether that could be an
17 extraordinary circumstance. But it wasn't enough to
18 necessarily get tolling where the litigant failed to
19 otherwise exercise diligence in the pursuit of the
20 original claim. And here that would meet -- be --

21 JUSTICE SOTOMAYOR: Fair. Fair answer.

22 MS. EISENSTEIN: Yes. Exactly.

23 As this Court has -- and the questions have
24 already suggested, the Tribe's reliance on class-action
25 tolling in this case was not reasonable. But even if it

1 had some belief that the deadline for filing its
2 administrative claim could be extended, it was incumbent
3 upon it, under the diligence standard for Holland, the
4 diligence prong of Holland, to file within the clear
5 deadline.

6 After 2001, the Tribe knew that it had to
7 proceed individually. And the reason it waited, in the
8 words of the Waxhaw Declaration, was that it wanted
9 certainty over its -- over the substantive claim. And
10 what it amounts to, what this -- this case essentially
11 amounts to is the Tribe's determination that it was not
12 worth the effort to pursue a claim until after this
13 Court's decision in Cherokee Nation.

14 JUSTICE ALITO: Was the government harmed in
15 any way by the -- the lack of presentment?

16 MS. EISENSTEIN: Well, Your Honor, in some
17 respects it remains to be seen. But I believe that
18 prejudice may result from the failure to present in a
19 timely fashion.

20 First of all, putting aside the notice
21 requirement, this is a very records-intensive inquiry.
22 And in -- in Petitioner's brief they suggest that this
23 was just a matter of records that are already stored in
24 the government's possession. But many of the -- the
25 inquiry of what actually the contract support costs

1 would be required is a detailed and complex
2 determination.

3 And in fact, the -- the -- the experience in
4 Ramah highlights this where the settlement negotiations
5 have gone on for three years trying to determine what
6 the actual damages are through good-faith negotiations.

7 And so yes, I would believe that the
8 government may suffer prejudice as a result of now
9 nearly 20 years later having to determine actual
10 contract support costs if this were to go back on the
11 merits.

12 JUSTICE GINSBURG: The D.C. Circuit said
13 this is presentment, this is just paperwork, easy --
14 easy to do. But the Tribe couldn't -- if they had
15 presented to the contracting officer, they just couldn't
16 leave it at that. They would have to take an
17 administrative appeal within 90 days, or they'd have to
18 appeal to the Federal circuit within a year. So more
19 was at stake for this Tribe than simply filing a piece
20 of paper.

21 MS. EISENSTEIN: Your Honor, there's no
22 doubt that perhaps the D.C. Circuit's
23 envelope-and-a-stamp may have been a bit of hyperbole.
24 But that said, what the Tribe's argument, that it was
25 the subsequent deadlines that would have led it to

1 delay, is really an astounding proposition, which is
2 that their basis for tolling is the existence of the
3 statutes of limitation. And that really can't be the
4 case, that the fact that once they filed their claim, it
5 may then follow; that additional limitations periods may
6 kick in; that that could warrant delay in and of itself.

7 But even putting that aside, there were
8 other options that the Tribe could have pursued. For
9 example, having presented its claim, and if it did so
10 prior to -- it said it hoped to be a part of the
11 Cherokee Nation class action, if it did so prior to the
12 Cherokee Nation class action, and the Cherokee Nation
13 class action was in fact certified, then -- then it may
14 have an argument it's part of that class.

15 To the extent to which the Cherokee Nation
16 class was denied, then the only -- then the presentment
17 requirement was the necessary step to moving forward to
18 presenting its claim individually at the contract, Board
19 of Contract Appeals level or at the judicial level.

20 So I don't believe that the inevitability of
21 further litigation in any way is a basis for tolling in
22 this case.

23 If there are no further questions, thank
24 you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 You have nine minutes remaining, Mr.
2 Strommer.

3 REBUTTAL ARGUMENT OF GEOFFREY D. STROMMER
4 ON BEHALF OF THE PETITIONER

5 MR. STROMMER: Thank you, Your Honor.

6 I'll start with a few comments on the last
7 point that counsel made.

8 The stamp-and-an-envelope quote is more than
9 hyperbole; it's just flat wrong. There's costs incurred
10 by the Tribe to calculate the amount of claims. There's
11 costs in pulling together the letter that then goes into
12 the envelope that is the claim itself.

13 But more than that -- and your question
14 alluded to this, Justice Ginsburg -- the -- once -- once
15 the claim is filed, and the government, undoubtedly, as
16 it did during this period of time with all of the claims
17 that were filed, they would have denied the claim. That
18 triggers another statute of limitations, either 90 days
19 to appeal in the civilian board of contract appeals, or
20 one year to appeal in Federal district court. And that
21 deadline had been found by courts to be jurisdictional.

22 So in fact, what we're talking about here is
23 a conundrum, because the six-year statute of limitations
24 under the Contract Disputes Act had not been found to be
25 jurisdictional. It was later on found to be

1 jurisdictional as a result of the presentment
2 requirement, but the statute of limitations that would
3 have been triggered would, in fact, have been
4 jurisdictional, and the Tribe would have had no option
5 but to litigate. And if we place these facts on top of
6 what happened in Cherokee Nation, it perfectly
7 illustrates the conundrum. 707 days it took for the
8 certification process in that case.

9 If the Tribe had filed at the beginning of
10 that process and received a rejection of its claim
11 during the first 100, 150 days -- let's give the
12 government, you know, ample time to respond -- then it
13 would have triggered a statute of limitations that was
14 jurisdictional that the Tribe would have had to have
15 acted on, in order to make sure that its claim was, in
16 fact, going to still be alive.

17 And that would have happened before the end
18 of the 707 days.

19 So it's more than a stamp in an envelope.
20 It really is a jurisdictional conundrum that the Tribe
21 was aware of and concerned about, that partially
22 factored into the Tribe's decision not to file a claim.

23 JUSTICE SOTOMAYOR: There -- there are so
24 many people who don't have resources to pursue a
25 litigation. How do we differentiate you from those

1 millions of people with lack of resources who choose not
2 to pursue claims, either because they think, at least up
3 till then, they're going to lose, because that's the
4 state of the law, or for whatever other reason they're
5 waiting? How -- how do we -- how do we articulate an
6 equitable tolling principle that won't open a floodgate
7 to making a statute of limitations basically a nullity?

8 MR. STROMMER: Well, the -- the primary
9 basis, Your Honor, for the Tribe's position that
10 equitable tolling should apply is its reasonable
11 reliance on class-action tolling.

12 The other factors, such as the cost of
13 litigation, such as the United States' fiduciary
14 responsibility and trust responsibility towards the
15 Tribe --

16 JUSTICE SOTOMAYOR: If it was reasonable,
17 why didn't you litigate that?

18 MR. STROMMER: There was no --

19 JUSTICE SOTOMAYOR: Why didn't you take the
20 order of the -- the court below, that -- and appeal that
21 order?

22 MR. STROMMER: Well, there were two cases.
23 Both the Federal circuit and the D.C. Circuit ruled just
24 about the same time on that issue, and both concluded
25 the same, that class-action tolling was not available

1 because of the presentment requirement.

2 JUSTICE SOTOMAYOR: To seek cert. on that
3 question?

4 MR. STROMMER: The Arctic Slope, the other
5 case, did, so -- so there was no split in the circuits,
6 and the Arctic Slope case did, in fact, petition this
7 Court, and this Court didn't take the case.

8 So the Menominee Tribe chose not to throw
9 bad money after -- after a bad result, which was
10 guaranteed, by preparing a petition cert., which this
11 Court had already denied in the Arctic Slope Native
12 case.

13 JUSTICE SOTOMAYOR: When there was no split.
14 But you had a split.

15 MR. STROMMER: There was no split. No, Your
16 Honor.

17 JUSTICE SOTOMAYOR: When your decision came
18 up.

19 MR. STROMMER: No. Our decision on that
20 issue -- there were two rounds of litigation at the
21 court of appeals level. In the first round, both the
22 Federal circuit and the D.C. Circuit held that
23 class-action tolling was not available, and they both
24 remanded back to the trial courts to determine whether
25 or not equitable tolling applied.

1 And that first decision was appealed by
2 Arctic Slope Native -- or petitioned this Court to take
3 that case, and it was not taken. And Menominee did not
4 take those steps by filing a petition.

5 I -- I also want to address the prejudice
6 issue. There's -- if there's anything in the
7 government's briefs that strikes me as hyperbole, it's
8 that they were prejudiced. They have been settling
9 hundreds of these claims around the country.

10 These claims are very straightforward. The
11 contract, the methodology that's used to calculate the
12 entitlement for contract support costs, are well
13 established in policy. We know the government produced
14 shortfall reports, contemporaneous with the years in
15 which these claims accrued, in which they told Congress,
16 for each Tribe, how much they short-funded them.

17 So the -- the government would tell you that
18 they're prejudiced because they would have to go back
19 and look at the contract and look at the policy in place
20 at the time to calculate the amount due is just not --
21 just not credible, in my view.

22 I rest our case, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 11:51 a.m., the case in the

1 above-entitled matter was submitted.)
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<p style="text-align: center;">A</p> <p>a.m 1:14 3:2 37:25 abandonment 28:8 ability 4:3 27:7 able 14:9 18:15 26:24 above-entitled 1:12 38:1 absolutely 8:14 accrued 37:15 Act 33:24 acted 24:17 34:15 action 4:12,25 10:3 10:25 11:2,5 15:9 18:8,11,15 19:4 20:12,15 21:22 22:5,13,16,16,18 22:22 23:15,20,23 24:12 25:24 27:14 29:8 32:11,12,13 actions 9:3,4,9,24 actual 31:6,9 added 16:13 additional 5:24 16:12 32:5 address 37:5 addressed 5:7,9 10:6 11:21 24:24 addresses 14:22 administration 14:25 administrative 22:19 23:1,9,16 26:23 30:2 31:17 administrator 15:17 adverse 26:21 advice 7:12,13,14 7:20 8:3,21 9:19 9:21 12:19 13:3,4 19:20,23 28:1,8 28:12,17,18 affirmative 24:15 25:24,25 affirmatively 27:11 afforded 28:20</p>	<p>agency 26:24 agree 15:23,25 21:23 25:16 agreed 26:14 AL 1:7 ALITO 10:8 26:2 26:16 27:25 30:14 alive 34:16 alleged 16:6 allow 20:9 allowed 11:18 allows 26:12 alluded 33:14 amended 17:4 American 3:20,22 21:17 23:16,20,20 amount 10:11 33:10 37:20 amounted 28:7 amounts 30:10,11 ample 34:12 answer 13:2 29:21 answered 19:19 answers 5:19 appeal 31:17,18 33:19,20 35:20 appealed 37:1 appeals 32:19 33:19 36:21 APPEARANCES 1:15 appellate 5:15 appendix 25:10 application 20:24 applied 18:12 36:25 applies 8:8 12:4 22:20 23:21 25:2 apply 3:18 4:4 13:7 13:19 18:8 22:18 23:1 25:5 35:10 applying 10:23 approve 5:5 14:8,9 Arctic 36:4,6,11 37:2 argue 3:17</p>	<p>argued 6:5 argues 26:7 arguing 7:19 10:14 argument 1:13 2:2 2:5,8 3:3,7 6:1,1,3 20:2 22:17 23:8 31:24 32:14 33:3 arose 7:8 articulate 35:5 aside 30:20 32:7 asked 5:4 asking 12:2 28:19 asserted 23:21 asserting 24:15 Assistant 1:18 assumption 12:3 16:23 astounding 32:1 attack 17:17 attacking 14:24 15:4 authority 14:1 26:3 26:7 automatically 11:1 11:17 available 8:9,18 28:22 35:25 36:23 aware 34:21</p> <hr/> <p style="text-align: center;">B</p> <p>back 12:11 31:10 36:24 37:18 backdrop 13:13 bad 7:20 9:21 36:9 36:9 balance 19:24 bar 10:18 18:10 20:21 barred 21:9 23:25 24:3 26:9 based 5:22 16:17 16:23 28:12 basically 26:12 35:7 basis 6:22 18:7 24:10 32:2,21</p>	<p>35:9 beginning 34:9 behalf 1:16,20 2:4 2:7,10 3:8 20:3 33:4 belief 30:1 believe 6:10 26:9 30:17 31:7 32:20 believes 24:25 25:1 25:2 believing 29:7 benefit 14:10,15 benefitted 14:6,17 better 17:18,21,22 beyond 15:17 binding 28:16,20 29:6 bit 31:23 board 32:18 33:19 BREYER 14:17 15:25 17:6,13,15 brief 25:7 26:8 30:22 briefing 11:21 briefs 37:7 bring 15:11,12 Bureau 15:6</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 calculate 33:10 37:11,20 calculation 20:9 call 8:7 called 16:10 care 8:4 carve 21:12 case 3:4,11,19 4:5,6 4:7,10 5:6,22,23 6:6,14,16,16,23 6:24 7:14,17 8:13 8:16 10:1,16,20 11:25 12:10 13:17 14:24 15:3,4,10 15:13 16:12,18,19 17:2,16,17 18:10</p>	<p>18:12,19,22,23 19:5,6,14,15 24:15 25:3,3,4 28:19 29:5,6,25 30:10 32:4,22 34:8 36:5,6,7,12 37:3,22,24,25 cases 7:24 8:22 17:19 24:22 25:5 29:13 35:22 category 16:10 CDA 20:9 24:6 cert 17:5 36:2,10 certainly 12:7 17:23 25:15,20 26:10,25 28:8 certainty 30:9 certification 5:21 6:3,19 10:9,16 11:14 13:8 16:14 18:3,11 21:7 24:3 34:8 certified 4:21 5:22 6:25 7:3 13:15 16:10 24:2 32:13 certify 6:22 8:17 19:14 certifying 10:7 challenge 5:21 challenged 16:15 challenging 17:7,9 Cherokee 6:19 8:13 10:16,20 12:24 16:5,12,13,18 17:1,5 18:3,13,21 19:6 20:20 21:2 22:12 24:1,4 30:13 32:11,12,12 32:15 34:6 Chief 3:3,9 19:25 20:4 27:4 32:25 37:23 choice 22:23 choose 35:1 chooses 24:17 chose 19:14 36:8</p>
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