No. 01-455

In the Supreme Court of the United States

FRANCONIA ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

GRASS VALLEY TERRACE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a breach of contract claim accrues for purposes of 28 U.S.C. 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

2. Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

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OPINIONS BELOW

The opinion of the court of appeals in *Franconia Associates, et al.* v. *United States* (Pet. App. A1-A16) is reported at 240 F.3d 1358. The opinions of the Court of Federal Claims in *Franconia* (Pet. App. A17-A44) are reported at 43 Fed. Cl. 702 and 44 Fed. Cl. 315 (reconsideration). No opinion was issued by the court of appeals in *Grass Valley, et al.* v. *United States*. The opinion of the Court of Federal Claims in *Grass Valley* (Pet. App. A45-A68) is reported at 46 Fed. Cl. 629.

JURISDICTION

The judgment of the court of appeals in *Franconia* was entered on February 15, 2001. A petition for rehearing was denied on June 12, 2001 (Pet. App. A69-A70). The judgment of the court of appeals in *Grass Valley* was entered on May 17, 2001. On July 31, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari in *Grass Valley* to and including September 14, 2001. The petition for a writ of certiorari was filed on September 10, 2001. The petition was granted on January 4, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Sections 515 and 521 of the Housing Act of 1949, 42 U.S.C. 1485, 1490a (1994 & Supp. V 1999), the Farmers Home Administration (FmHA) makes direct loans to private, non-profit entities to develop and/or construct rural housing designed to serve the elderly and low- or middle-income individuals and families.[1] Section 515 loans require the borrower, *inter alia*, to execute various loan documents, including a loan agreement, a promissory note, and a real estate mortgage.

Before December 21, 1979, each petitioner entered into a loan agreement with the FmHA under Sections

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[1] Since 1994, the program has been entrusted to the Rural Housing Service. See Pet. App. A2 n.1. The Secretary of Agriculture was authorized to establish the Rural Housing and Community Development Service by the Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 233, 108 Stat. 3219; as amended by the Act of Apr. 4, 1996, Pub. L. No. 104-127, Tit. VII, §§ 747(b)(3), 753(b)(2), 110 Stat. 1128, 1131. See also 7 C.F.R. 2003.18 (functional organization of RHS). For convenience, references in this brief to the Farmers Home Administration should be understood to refer to that agency and its successor.

515 and 521, "in order to provide rental housing and related facilities for eligible occupants * * * in rural areas." Pet. App. A165. In the loan agreements, each petitioner certified that it was unable to obtain a comparable loan in the commercial market. See *id.* at A177. In addition, the loan agreements contained various provisions designed to ensure that the projects were affordable for persons and families with low incomes. Those provisions included restrictions as to eligible tenants, the rents petitioners could charge, and the rate of return petitioners could realize, as well as requirements regarding the maintenance and financial operations of each project. See *id.* at A165-A174. Each loan agreement also specified the length of the loan, which was generally 40 or 50 years. *Id.* at A3.

The promissory notes executed by petitioners specified that petitioners must pay the principal on the mortgage in scheduled installments, plus interest. See Pet. App. A176-177. Those notes also contained the prepayment provision that has been affected by the legislation in this case: "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." *Id.* at A176. No other provision of the loan documents addressed prepayment.

2. In 1979, Congress found that many Section 515 participants had prepaid their mortgages, thus threatening the continued availability of rural low- and moderate-income housing. Finding that it had been "the clear intent of Congress that these projects be available to low and moderate income families for the entire original term of the loan," Congress amended the National Housing Act to preclude the loss of low-cost rural housing due to prepayments. H.R. Rep. No. 154, 96th Cong., 1st Sess. 43 (1979). In the Housing and

Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, Congress prohibited the FmHA from accepting prepayment of any loan made before or after the date of enactment unless the owner agreed to maintain the low-income use of the rental housing for either a 15-year or 20-year period from the date of the loan. § 503(b), 93 Stat. 1134-1135. That requirement could be avoided if the FmHA determined that there was no longer a need for the low-cost housing or if Federal or other financial assistance provided to residents would no longer be provided. *Ibid.*

In 1980, Congress further amended the National Housing Act to eliminate retroactive application of the Section 515 prepayment changes enacted in the 1979 legislation. The Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614, provided that the prepayment restrictions included in the 1979 legislation would apply only to loans entered into after December 21, 1979, the date of enactment of that legislation. § 514, 94 Stat. 1671-1672. The 1980 Act also required the Secretary of Agriculture to report to Congress about any adverse effects of the repeal upon the availability of low-income housing. Pub. L. No. 96-399, § 514, 94 Stat. 1671-1672.

3. By 1987, Congress had again become concerned about the dwindling supply of low- and moderate-income rural housing in the face of increasing prepayments of mortgages under Section 515.[2] A House of Representatives Committee found that owners were

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[2] In 1986, Congress had passed a temporary moratorium that precluded Section 515 prepayments in most cases. The moratorium originally was to expire in 1987, but it was extended into 1988 by another temporary measure. See 42 U.S.C. 1437 note (citing and quoting temporary measures).

"prepay[ing] or * * * refinanc[ing] their FmHA loans, without regard to the low income and elderly tenants in these projects." H.R. Rep. No. 122, 100th Cong., 1st Sess. 53 (1987).

In response, Congress passed the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (ELIHPA), which amended the Housing Act of 1949 to impose permanent restrictions upon prepayment of Section 515 mortgages that were entered into before December 21, 1979. That legislation, enacted on February 5, 1988, requires that before FmHA can accept an offer to prepay a mortgage entered into before December 21, 1979,

> the [FmHA] shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed.

Pub. L. No. 100-242, § 241, 101 Stat. 1886. The legislation further provides that the FmHA may include incentives in such an agreement, including an increase in the rate of return on investment, reduction of the interest rate on the loan, and an additional loan to the borrower. § 241, 101 Stat. 1886-1887.

Under ELIHPA, if the FmHA determines after a "reasonable period" that an agreement cannot be reached, the FmHA must require the owner to offer to sell the housing to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." Pub. L. No. 100-242, § 241, 101 Stat. 1887. If an offer to buy is not made by a nonprofit organization or agency within 180 days, the

FmHA may accept the owner's offer to prepay or request refinancing. *Ibid.* The offer-for-sale requirement does not apply if the owner agrees to utilize the housing for the purposes set out in Section 515 for a period designated by the FmHA and then offer to sell the housing to a nonprofit organization or public agency. The offer-for-sale requirement also does not apply if the FmHA determines that housing opportunities for minorities "will not be materially affected" by prepayment and either (1) the tenants will not be displaced by prepayment or (2) there is an "adequate supply" of "affordable" housing in the market area and "sufficient actions have been taken to ensure" that such housing "will be made available" to displaced tenants. § 241, 101 Stat. 1889. After ELIHPA, the FmHA may not allow prepayments without following the detailed provisions of the Act.

The FmHA promulgated regulations to implement ELIHPA on April 22, 1988, and the regulations became effective on May 23, 1988. 53 Fed. Reg. 13,245 (1988), codified at 7 C.F.R. 1965.90 (1989).

In 1992, Congress passed the Housing and Community Development Act of 1992. Pub. L. No. 102-550, 106 Stat. 3672 (codified in relevant part at 42 U.S.C. 1472(c) (1994 & Supp. V. 1999)) (the "1992 legislation"). That legislation had no effect whatever on petitioners' loans. See Pet. App. A13. It did, however, extend ELIHPA's restrictions to loans that were made after those of petitioners, *i.e.*, loans made from December 21, 1979, through 1989. Pub. L. No. 102-550, § 712, 106 Stat. 3841.

Current regulations governing Section 515 prepayments establish a process by which the FmHA addresses prepayment requests, including detailed procedures and requirements regarding whether housing

opportunities for minorities will be affected by prepayment and whether other housing has been made available for tenants displaced by prepayment. 7 C.F.R. 1965.215. The regulations also provide that, with respect to "develop[ing] an incentive offer," that "[a] reasonable effort must be made to enter into an agreement with the borrower to maintain the housing for low-income use that takes into consideration the economic loss the borrower may suffer by foregoing prepayment." 7 C.F.R. 1965.210. In addition, the regulations clarify that the determinations required by 42 U.S.C. 1472(c)(5)(A) before prepayment can be accepted—regarding the effect on minority housing opportunities, the displacement of tenants, and the supply of affordable housing in the market—will not be made unless and until the FmHA is unable to reach an agreement with a borrower on extending the borrower's participation in the Section 515 program. 7 C.F.R. 1965.215(a).

4. Petitioners in *Franconia* filed this action in the Court of Federal Claims on May 30, 1997. Plaintiffs in the case included both petitioners—all of whom had entered into loan agreements before December 21, 1979, and were therefore subject to ELIHPA—and other plaintiffs, who had entered into loan agreements after December 21, 1979, and were therefore unaffected by ELIHPA. See Pet. App. A3 n.2. Petitioners' complaint in *Franconia* alleged that the prepayment provisions of their promissory notes gave them a "contractual right * * * to terminate their contracts by prepaying their [mortgages] at any time at their option." *Id.* at A126. They claimed that ELIHPA "repudiated the contractual right of [petitioners] to terminate their contracts at any time at their option." *Ibid.*

The Court of Federal Claims granted the government's motion to dismiss petitioners' claims, on the ground that they were barred by the six-year statute of limitations in 28 U.S.C. 2501. Pet. App. A17-A44. Section 2501 provides:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The court held that petitioners' contract claims accrued on May 23, 1988, the effective date of regulations implementing ELIHPA, and, because petitioners did not file their action until 1997, their claims did not fall within the six-year statute of limitations in 28 U.S.C. 2501. Pet. App. A34.

The court rejected petitioners' contention that the relevant legislation should be treated as merely an anticipatory repudiation, which does not trigger the commencement of the limitations period unless the owner chooses to treat it as a breach. Pet. App. A30. The court reasoned that the prepayment provision in the loan contracts by its terms promised petitioners an "*unfettered* prepayment right," that "[n]o conditions [were] attached to this promise," and that it "extend[s] throughout the life of the loan agreements." *Id.* at A31-A32 (emphasis in original). The court held that ELIHPA "withdrew this promise" so that "borrowers could no longer prepay their contracts without first going through lengthy and onerous procedures." *Id.* at A31. Because "[w]ith the 1988 legislation, the government broke its promise, ending its performance under the contract," the "breach * * * occurred at the time of the legislation." *Id.* at A32.

The court also, sua sponte, dismissed petitioners' taking claims. Pet. App. A34. The court noted that petitioners asserted that the "[government's] conduct constitutes a taking of their property." *Ibid.* The court observed that "[t]here is only one instance of [government] conduct at issue—Congress's change of the prepayment option." *Ibid.* Accordingly, "[a]s this action is alleged to have constituted a taking, the claim would have accrued at the time of the 1988 legislation, which * * * was when Congress by law changed the plaintiffs' prepayment rights." *Ibid.* The court explained that "[t]he discussion * * * relevant to the breach of contract claim * * * is equally applicable to the takings claim." *Ibid.*

5. The Federal Circuit affirmed the lower court's dismissal of the *Franconia* petitioners' claims. Pet. App. A1-A14. The court agreed with the Court of Federal Claims that the prepayment provision of petitioners' loan agreements "gave [petitioners] an unfettered right to prepay their loans at any time." *Id.* at A10. It "did not require any performance on the part of the government because it constituted an unconditional promise on the part of FmHA to allow borrowers to prepay their loans, an obligation which extended for the life of the loan." *Ibid.* Accordingly, "[i]f that continuing duty was breached, the breach occurred immediately upon enactment of ELIHPA because, by its terms, ELIHPA took away the borrowers' unfettered right of prepayment." *Ibid.* Although the court of appeals thus disagreed with the Court of Federal Claims' conclusion that petitioners' action accrued upon the effective date of the regulations implementing ELIHPA, see *id.* at A12 n.3, that disagreement was of no consequence, because petitioners' suit was time-barred when

measured against either ELIHPA's effective date or the effective date of the implementing regulations.

The court acknowledged the anticipatory breach doctrine and its application to the government. The court stated that "if the enactment of ELIHPA was not a breach, but simply an act of anticipatory repudiation, then [petitioners'] claims did not accrue until some subsequent action by the government brought about an actual breach, although [petitioners] had the right to bring suit immediately upon the government's repudiation of its obligation under the loan contracts." Pet. App. A10. The court held, however, that "[t]he doctrine of anticipatory repudiation does not apply in this case, * * * because * * * [t]he government contracted to allow borrowers the unfettered right to prepay their loans and breached that promise, if at all, through the enactment of ELIHPA." *Id.* at A10-A11.

The court also rejected petitioners' claim that the action accrued only upon the enactment of the 1992 legislation. Petitioners argued that "language in [ELIHPA] prohibits the 1988 legislation from serving as the date of breach because the elimination of prepayment rights was only temporary." Pet. App. A13. The court explained, however, that although "parts of ELIHPA were 'interim measures,' the section relating to FmHA loans was wholly permanent." *Ibid.* (quoting ELIHPA, Pub. L. No. 100-242, § 202, 101 Stat. 1878). The court noted that the 1992 legislation, on which petitioners sought to rely, "impacted only post December 21, 1979 borrowers," and thus had no effect on them. *Id.* at A13 n.4.

The court of appeals also affirmed the trial court's dismissal of petitioners' taking claims. Pet. App. A13-A14. The court stated that "[t]he government's liability for a takings claim becomes fixed when the property at

issue is taken," and that "[c]ontract rights are a form of property that may be appropriated by the government." *Id.* at A14. The court held, however, that "[b]ecause [petitioners] brought this suit in May of 1997, more than six years after ELIHPA effected an appropriation of their contract right, their takings claims are barred by the statute of limitations." *Ibid.*

6. On September 16, 1998, the *Grass Valley* petitioners—all of whom had entered into Section 515 loan agreements before December 21, 1979—and other plaintiffs filed an action in the Court of Federal Claims virtually identical to the *Franconia* action. On April 12, 2000, that court granted the government's motion to dismiss petitioners' claims, essentially for the same reasons that it had dismissed the claims of the *Franconia* petitioners. Pet. App. A45-A68. On May 17, 2001, the United States Court of Appeals for the Federal Circuit affirmed without opinion. Pet. App. A15-A16.

SUMMARY OF ARGUMENT

I. This case concerns the application of the statute of limitations in 28 U.S.C. 2501, which provides that any claim in the Court of Federal Claims must be filed "within six years after such claim first accrues," to petitioners' claims that ELIHPA restricted their prepayment rights in violation of their contracts. As a waiver of sovereign immunity, Section 2501 must be strictly construed in favor of the government. The emphasis on promptness conveyed by the terms of the statute ("*first* accrued") is supported not only by the need to avoid stale claims that supports any statute of limitations, but also by the particular need of Congress to have reasonably prompt notice if a statute breaches government contracts.

It is settled law that claims first accrue when plaintiffs are first able to file suit. Plaintiffs alleged that their loan documents gave them an *unfettered* right to prepay their loans at their option any time during the 40- or 50-year terms of their loans. The terms of ELIHPA, however, eliminated that unfettered right, replacing it with a substantially more limited and uncertain possibility of prepayment, subject to what petitioners describe as lengthy, cumbersome, and costly procedures. Accordingly, as the Federal Circuit recognized, the government breached its promise, if at all, when ELIHPA eliminated petitioners' unfettered prepayment right, and petitioners could have filed suit at any time after ELIHPA was enacted. Because petitioners instead waited nine or ten years after ELIHPA to file suit, their claims are time-barred.

Petitioners invoke the doctrine of "anticipatory repudiation," under which a party's mere statement of intent to commit a breach in the future does not start the statute of limitations running until such later time as an actual breach occurs. The anticipatory breach doctrine is inapplicable in this case, because ELIHPA is not a mere statement of intent to commit a breach by a private actor or government contracting officer. It is a duly enacted law that immediately and permanently prevented the FmHA from performing its alleged contractual obligations. Moreover, the purpose of the anticipatory breach doctrine is to permit the nonbreaching party to await the time of performance to file suit, thereby giving the repudiating party the opportunity to change its mind and comply with its contractual obligations in the end. Treating ELIHPA as merely an anticipatory breach would not serve that purpose. After ELIHPA, no federal official could simply decide to accept a tendered prepayment from petitioners.

Petitioners argue that *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), established that ELIHPA was merely an anticipatory repudiation, not an actual breach. That case, however, had nothing to do with either the distinction between an anticipatory repudiation and a present breach or the date of accrual of a claim under a statute of limitations. Accordingly, the Court in *Mobil* had no occasion to—and did not—examine the difference between an anticipatory repudiation and a present breach. To the contrary, the Court in *Mobil* referred to the statute at issue there both as an anticipatory statement of intent not to perform and as a present breach, and nothing turned on which characterization was correct.

More generally, petitioners err in asserting that the court of appeals' decision exempts the government from standard contract law principles applicable to private parties. An Act of Congress (such as ELIHPA) does not have the same effect as a mere statement of intent not to perform a contract. Moreover, an Act of Congress could not constitute an anticipatory repudiation of a non-government contract, so the search for an exact parallel in contracts solely between private parties is futile. In addition, the rules requiring strict construction of a statute of limitations that is a condition of a waiver of sovereign immunity do not apply to statutes of limitations governing private contracts. The court of appeals based its decision not on a principle that ordinary rules of contract law are inapplicable to the government, but rather on the resolution of the particular issues that arise in interpreting ELIHPA and applying Section 2501—a statute that has no application to claims against private parties—to petitioners' breach of contract claims.

II. The court of appeals correctly held that any taking claims petitioners may have under the Just Compensation Clause are time-barred for the same reasons as their contract claims. Petitioners' taking claims are not independently viable in any event, because damages for breach of their contracts would eliminate any taking claims by providing sufficient compensation for any property rights that could have been taken. But even if that were not true, their taking claims would be entirely parasitic on their contract claims, in the sense that if there was no breach of contract, there was also no taking; petitioners could not complain that the government had imposed restrictions on their properties that constituted a taking if they themselves had agreed to those restrictions and received (and continue to receive) consideration for that agreement.

Because petitioners' taking claims are, at best, completely dependent on petitioners' contract claims, the taking claims should be treated as having accrued at the same time as the contract claims. Otherwise, those in petitioners' position would be able to plead themselves out of the time bar imposed by Section 2501 simply by reformulating their contract claims as taking claims.

ARGUMENT

I. PETITIONERS' CONTRACT CLAIMS ACCRUED UPON ENACTMENT OF ELIHPA

A. Section 2501 Requires That Claims Be Brought Within Six Years After They First Accrued

Under 28 U.S.C. 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The

principles requiring a strict construction of Section 2501 in favor of the sovereign are not in doubt and have been repeatedly and recently reaffirmed by this Court.

Section 2501 "makes it a condition or qualification of the right to a judgment against the United States that * * * the claim must be put in suit * * * within six years after suit could be commenced thereon against the Government." *Finn* v. *United States*, 123 U.S. 227, 232 (1887). Such provisions are "'a central condition' of the sovereign's waiver of immunity." *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1005 (2002) (quoting *United States* v. *Mottaz*, 476 U.S. 834, 843 (1986)); see also *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). It is a fundamental principle that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); see also *United States* v. *Testan*, 424 U.S. 392, 399 (1976). Accordingly, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); see also *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 432 (1990) (noting "many precedents establishing that authorizations for suits against the Government must be strictly construed in its favor"); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (applying principle to statute of limitations). Almost fifty years ago, *Soriano* v. *United States*, 352 U.S. 270, 276 (1957), specifically applied that rule of construction to Section 2501, noting that the Court "has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed."

Two related textual features of Section 2501 reinforce the conclusion that its limitations period must

be strictly construed. First, Congress provided in Section 2501 for a generous six-year period in which to bring claims. That is ample time for even the most hesitant plaintiffs to learn of a governmental action that may lead to a claim and to commence an action. Moreover, extending suits beyond that period would defeat Congress's strong interest in protecting the government from stale claims, lost memories, and missing documents. See *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 415-416 (1998).

Extending the six-year period also would interfere with the government's distinctive interest in preserving its ability to have reasonably prompt notice of the fiscal implications of past enactments and to take into account the costs of those past actions in making future budgetary and programmatic decisions. In a case like this, in which the claim is that a *statute* has caused a breach of contract, the rule of strict construction of statutes of limitations has special force, because it serves the salutary purpose of ensuring that a Congress close to the one that enacted the statute—rather than a Congress serving perhaps many decades later—may and must address the consequences of the statute, by increasing taxes, reducing spending, or revisiting the wisdom of the enactment. A contrary rule in this case could delay the final reckoning of the fiscal impact of ELIHPA for 40 or more years. The government's interests in allowing a reasonably prompt accounting for the consequences of government action make it particularly important that limitations periods that are conditions on waivers of sovereign immunity, such as the six-year period in Section 2501, be strictly construed.

Second, the text of Section 2501 itself provides an indication that Congress intended a strict construction of its provisions. Section 2501 provides not merely that

a claim must be brought within six years of accrual, but that it must be brought within six years of when the claim "first" accrues. It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 449 (2001); *United States* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971); *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116 (1879). In Section 2501, the term "first" serves the function of emphasizing Congress's interest in seeing to it that the commencement of the generous six-year period for bringing claims must be the earliest possible date on which the claim accrued.

B. The Claims In This Case First Accrued When Congress Enacted ELIHPA

1. A claim accrues "when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997). "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Ibid.* For a breach of contract claim, that generally occurs at the time of the alleged breach. 1 C. Corman, *Limitation of Actions* § 7.2.1, at 485-486 (1991) ("The statute of limitations for a breach of contract begins to run at the time of such breach, even when the extent of actual damages is not then ascertainable."); see also *Kinsey* v. *United States*, 852 F.2d 556, 557 (Fed. Cir. 1988) (cause of action accrues under Section 2501 "when all the events have occurred which fix the liability of the Government"). Accordingly, to determine when petitioners' claims accrued, it must be determined when the alleged breach of contract occurred.

2. To determine when a breach of contract occurs, it is essential to identify the promise that was breached. For purposes of this case, it may be assumed that the allegations of petitioners' complaints—including the allegations regarding the promises contained in their contracts—are true. In ruling on claims of other plaintiffs in *Franconia*, the Court of Federal Claims found that the Section 515 loan documents, when read as a whole and in light of applicable canons of construction, cannot be construed to include a promise to permit other plaintiffs to prepay even in the face of a federal statute modifying prepayment rights. See Pet. App. A35-A43 (Franconia).[3] At least one other court of appeals has reached a similar conclusion. See, *e.g.*, *Parkridge Investors Ltd.* v. *Farmers Home Admin.*, 13 F.3d 1192, 1198 (8th Cir.), cert. denied, 511 U.S. 1142 (1994); but cf. *Kimberly Assoc.* v. *United States*, 261 F.3d 864, 869-870 (9th Cir. 2001) (disagreeing about applicable contract interpretation principles). If that is correct, then there was no breach of contract, and petitioners would not prevail on the merits. Nonetheless, for purposes of this case, it may be assumed that petitioners obtained precisely the promise that they allege —a promise that permits them an unfettered right to prepay.

3. The promise allegedly at issue in this case therefore is, in the terms used by both courts below, petitioners' "unfettered right to prepay their loans at any time" over the life of those loans. Pet. App. A10; see *id.* at A31, A55. The prepayment provisions of their

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[3] The Court of Federal Claims in *Grass Valley* initially reached the same conclusion. Pet. App. A58-A67. The court has subsequently reconsidered that ruling. *Grass Valley Terrace* v. *United States*, 51 Fed. Cl. 436 (2002).

documents provided that "[p]repayments of scheduled installments or any portion thereof, may be made at any time at the option of Borrower." *Id.* at A122 (*Franconia* complaint); see *id.* at A176 (loan document). Petitioners' complaints alleged that under those provisions, petitioners "were entitled * * * to terminate their contracts by prepaying their mortgages at any time at their option." *Id.* at A123; see *id.* at A112 ("optional termination rights could be exercised by [petitioners] 'at any time' prior to the termination of the forty (40) or fifty (50) year terms of their contracts"); A137 (same).

Petitioners thus alleged that, before ELIHPA, whenever a borrower tendered the total amount due on the loan, the encumbrance on that borrower's property had to be removed. In petitioners' terms, they were "contractually entitled to terminate their participation in the Government's housing program by exercising their option to prepay at any time." Pet. App. A112. To be sure, it is likely that the prepayment provision would have required the borrower in each case to submit to certain formalities designed to ensure that the correct amount was in fact paid. But, aside from those formalities, in petitioners' view, the prepayment provision gave the government no right whatever to refuse the prepayment or to refuse to take reasonable steps to remove the encumbrance on the borrower's property.

As the court of appeals held, "ELIHPA took away the borrowers' unfettered right of prepayment." Pet. App. A10. ELIHPA essentially precluded a borrower from prepaying the loan at any time at the borrower's option. As the complaints alleged, ELIHPA provided for "forced sales of * * * owners' properties" under "lengthy, cumbersome, and costly procedures" if the

owners wanted to prepay their loans. *Id.* at A127.[4] The complaints alleged that, when prepayments were tendered, "[t]he Government has in every instance refused to accept prepayment * * * pursuant to the provisions of [the] contracts." *Id.* at A129. As a result, petitioners "have suffered * * * diminutions in the fair market value of their properties as a * * * result of * * * the extended restrictions on the profitable use of their properties," "the costs associated with continuing to operate under and comply with rules and regulations associated with the Government's housing programs," and "the lost opportunity costs associated with investment and business opportunities [petitioners] have been foreclosed from pursuing." *Id.* at A131. Petitioners alleged that ELIHPA "has deprived and will deprive each [of petitioners] of its contractual right to terminate its contract at any time at its option." *Id.* at A132.

Those allegations are based on the plain terms of ELIHPA. Under ELIHPA, the FmHA cannot allow prepayment until it has "ma[d]e reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing" for at least 20 years. 42 U.S.C. 1472(c)(4)(A). Moreover, if

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[4] This and other allegations in the complaint referred to the 1992 legislation, not to ELIHPA itself, which was enacted in 1988. The court of appeals correctly held, however, that the 1992 legislation had no effect whatever on petitioners and imposed no new restrictions on their prepayment or other rights. See Pet. App. A13 n.4. Petitioners have not challenged that ruling before this Court. See p. 10, *supra*. Accordingly, for purposes of construing petitioners' complaint, this brief treats petitioners' allegations regarding the 1992 legislation as regarding ELIHPA, unless otherwise indicated.

"after a reasonable period," no such agreement is possible, FmHA must require the borrower "to offer to sell the assisted housing" to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." 42 U.S.C. 1472(c)(5)(A)(i). Finally, if no agency accepts that offer after 180 days, see 42 U.S.C. 1472(c)(5)(A)(ii), or if the FmHA determines "that housing opportunities of minorities will not be materially affected as a result of the prepayment," that "there is an adequate supply of safe, decent, and affordable rental housing within the market area," and that "sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement," 42 U.S.C. 1472(c)(5)(G)(ii)(II), it may accept the offer to prepay.

In short, before ELIHPA, petitioners had an unfettered legal right to prepay at any time, granted in their loan documents. After ELIHPA, petitioners no longer had that right, because Congress had eliminated it and substituted a far more limited and uncertain possibility of prepayment—subject to what petitioners describe as "lengthy, cumbersome, and costly procedures" and the possibility of losing their properties entirely through what they allege would have been a "forced sale" at less than a market-determined price. Accordingly, ELIHPA "took away the borrowers' unfettered right of prepayment," Pet. App. A10, and the government thus "breached [its] promise, if at all, through the enactment of ELIHPA." *Id.* at A11.

ELIHPA was enacted on February 5, 1988. See Pub. L. No. 100-242, § 241, 101 Stat. 1886. As petitioners themselves appear to concede (Br. 27), they could have filed their claims on that date. Under Section 2501, therefore, their claims "first accrued" on that date, and petitioners had six years thereafter in which to bring

suit. Instead they waited nine years (in *Franconia*) and ten years (in *Grass Valley*) to file their claims. Those claims were therefore barred by Section 2501.

C. ELIHPA Was Not An Anticipatory Repudiation

Petitioners invoke the doctrine of "anticipatory repudiation" to argue (Br. 27) that they had the option of filing their claims either when ELIHPA was enacted or at whatever later time each petitioner elected to tender prepayment and was denied the right to prepay its loan. The court of appeals, however, correctly held that the enactment of ELIHPA was not an anticipatory repudiation and did not therefore permit them to wait as long as they wished before filing suit.

1. The court of appeals recognized the doctrine of anticipatory repudiation and held that doctrine applicable to the government. The court explained that

> [a]n anticipatory repudiation occurs when an obligor communicates to an obligee that he will commit a breach in the future * * *. In such a situation, the normal rule is that the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation.

Pet. App. A10. The court further noted that

> if the enactment of ELIHPA was not a breach, but simply an act of anticipatory repudiation, then appellants' claims did not accrue until some subsequent action by the government brought about an actual breach, although [petitioners] had the right to bring suit immediately upon the government's repudiation of its obligation under the loan contracts.

Ibid.; see *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U.S. 581, 589 (1916). Petitioners do

not appear to disagree with that general statement of the doctrine, its effect on the statute of limitations, or its application to the government.

Petitioners may not take advantage of the anticipatory breach doctrine in this case, because ELIHPA effected a breach of their contract, not a mere repudiation. Pet. App. A10-A11. To paraphrase the court of appeals, ELIHPA did not merely "communicate[] that [the government] will commit a breach in the future." *Id.* at A10. Because ELIHPA was a statute duly enacted by Congress, it eliminated, as a matter of law, petitioners' unfettered contractual right to prepay their loans at any time. The answer to the question whether petitioners had an unfettered right to prepay was unambiguous immediately after ELIHPA's enactment. According to petitioners' own allegations, ELIHPA substituted for an unfettered right to prepay a much different and inferior ability to seek to obtain government permission to prepay under narrow conditions after a substantial waiting period and subject to numerous and burdensome conditions. Because it unambiguously eliminated their unfettered legal right to prepayment, ELIHPA was a breach of their contract, not a mere repudiation.

Petitioners attempt to rely (Br. 28) on the inapposite principle "that a party's statement that it will not honor the terms of an option contained in a contract constitutes an anticipatory repudiation, such that the optionholder need not bring suit until after it attempts to exercise the option and the repudiating party fails to perform by accepting the tender." The cases cited by petitioners (see Br. 28) for that proposition all concern private options contracts, in which one private party simply manifested its intent not to perform. Those cases presumably would apply in a government case as

well, if a contracting officer simply informed a private contracting party that the government did not intend to perform a future contractual obligation. Any such statement by the contracting officer could not alter the private party's *legal right* under the contract to continuing performance, and the private party accordingly could wait for the performance to come due before filing suit. In this case, however, it is an Act of Congress that affected (and allegedly eliminated) petitioners' contractual rights, not a mere statement by a private individual or even by a federal contracting officer. The law fundamentally altered the legal rights of the parties and, according to petitioners, eliminated their unfettered right to prepay at any time. Accordingly, under petitioners' view of the case, that law constituted a breach of contract, not a mere statement of intent not to perform in the future.

2. Petitioners argue extensively (Br. 32-37) that ELIHPA in fact preserved their prepayment right in some respects. Insofar as ELIHPA did so, that simply limits the scope of the alleged breach. Petitioners' complaints were based on the ways in which ELIHPA allegedly breached their contractual rights, not the fact that it honored their rights in some respects.[5] They

[5] In this regard, it is significant that petitioners did not allege that they went through the entire ELIHPA process to determine ultimately whether they would be permitted to prepay, and it is not known on this record whether any of them would ultimately have been permitted to prepay. Instead, petitioners simply alleged that some (but not all) of them tendered prepayment—without going through the ELIHPA process—and "[t]he Government has in every instance refused to accept prepayment." Pet. App. A129. Thus, the gravamen of their complaint is that the very act of being relegated to the process required by ELIHPA violates their contractual rights.

alleged that ELIHPA "provides for forced sales of said owners' properties" and "required" them to follow "lengthy, cumbersome, and costly procedures." Pet. App. A127. They also alleged that "[a]ll plaintiffs have suffered * * * damages," including "diminutions in the fair market value of their properties." *Id.* at A131. Thus, because the only breach of which petitioners complain is the requirement that they go through the ELIHPA procedures—and because ELIHPA unambiguously imposed those procedures and unambiguously eliminated any unfettered right to prepay—the fact that ELIHPA to some degree preserves their ability to prepay does not somehow make petitioners' claims timely.[6]

In their motion for reconsideration in the Court of Federal Claims, petitioners for the first time submitted the affidavit of Phoebe Perri, upon which petitioners rely in their brief here. See Pet. Br. 47-49. Neither court below adverted to that affidavit. Because it was not offered until petitioners' motion for reconsideration in the trial court, and there was no reason it could not have been offered earlier, it should not be considered. See *White Mountain Apache Tribe* v. *United States*, 9 Cl. Ct. 32, 34 (1985) ("Courts are particularly unreceptive to factual assertions * * * that were available during initial briefing, but which surface on reconsideration."); see also *Frietsch* v. *Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) (refusing to consider affidavit submitted for first time with motion for reconsideration of decision granting motion to dismiss). In any event, the affidavit simply states that the affiant tendered prepayment and that it was denied; it does not assert that the affiant went through the ELIHPA process, including offering the property to nonprofit organizations.

[6] Moreover, even the provision of ELIHPA permitting prepayment on which petitioners place their primary reliance (Br. 34) requires not merely that the FmHA make certain findings regarding the adequacy of the stock of low-income housing before permitting prepayment, but also that "sufficient actions have been taken to ensure that the rental housing will be made available to

D. The Court Of Appeals' Result Is Supported Both By The Purposes Of The Anticipatory Repudiation Doctrine And By Those Of Section 2501

1. The conclusion that petitioners' claim accrued when ELIHPA was enacted is reinforced by the underlying purposes of the anticipatory repudiation doctrine. Petitioners themselves explain (Pet. 23) that, in the ordinary case in which a statement by a private individual is treated as an anticipatory repudiation, "[a]llowing the obligee to defer suit until the time for performance arrives provides the obligor an opportunity to retract its wrongful repudiation and perform as promised, thereby eliminating the need for a lawsuit." Professor Corbin similarly explained that the doctrine is based on the principle that "[t]he plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately." 4 *Corbin on Contracts*, *supra*, § 989, at 967; see Pet. Br.

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each tenant upon displacement." 42 U.S.C. 1472(c)(5)(G)(ii)(II). See also 7 C.F.R. 1965.215 (detailing procedures). There is no provision of ELIHPA that gives petitioners an unfettered right to prepay. Moreover, even if ELIHPA is only a partial breach of the government's promise of unfettered prepayment rights, such a partial breach commences the statutory limitation period. See 2 C. Corman, *Limitation of Actions* § 6.1, at 376-377 (1991) ("Because a cause of action subsists when the right exists to demand compensation for injury done to person or property, no matter how slight that injury, it is reasoned that the suit can be instituted at once even though the full amount of damages is not yet apparent."); see also *Kinsey*, 852 F.2d at 558 (statute begins to run immediately if "the breach is not wholly anticipatory because it involves some contractual nonperformance") (citing 18 W. Jaeger, *Williston on Contracts* § 2027B, at 796 (3d ed. 1978)); 4 A. Corbin, *Corbin on Contracts* § 989, at 967 (1951)).

24 (quoting Corbin). That is the correct rationale for the doctrine.

That rationale, however, does not apply when Congress, as here, enacts a law that precludes performance. A repudiating party—whether a private individual or a federal contracting officer—may have an opportunity to reconsider when the alleged repudiation is simply a communicated intent not to perform a contractual obligation. Despite any such communication, the promisor on the contract, whether private or governmental, remains free to change its mind and render the requisite performance. But when an intervening Act of Congress precludes performance, the contracting officer is not free to reconsider. The breach is unequivocal.

The terms of ELIHPA at issue here illustrate that point. The provisions of ELIHPA applicable to FmHA loans are the law of the land; they are not open to reconsideration by FmHA. Nor are the provisions temporary. Indeed, the court of appeals rejected petitioners' argument—not renewed in this Court—that no final breach occurred until the 1992 legislation, because congressional findings at the time ELIHPA was enacted in 1988 referred to "interim measures." The court of appeals correctly explained that, "while this language indicates that parts of ELIHPA were 'interim measures,' the section relating to FmHA loans was *wholly permanent*." Pet. App. A13 (emphasis added). In this respect, the provisions applicable to FmHA loans contrasted with other ELIHPA provisions, applicable to HUD-insured loans, that had a two-year sunset provision. *Ibid.*; see *id.* at A5-A6 (discussing time limit on HUD-insured loans). The enactment of ELIHPA immediately and permanently prevented the FmHA

from performing its alleged obligations under the contractual language at issue.[7]

2. The conclusion that petitioners had six years from the enactment of ELIHPA in 1988 to file suit also is supported by the purposes of Section 2501 and this Court's cases First, Section 2501 provides plaintiffs with a generous six years from when the action "first accrues." Here, petitioners clearly could have sued immediately after the passage of ELIHPA. Whatever rights petitioners might have to sue long after an action *against a private party* based on a *non*-legislative statement of intent to repudiate would have "first accrued," the plain language of Section 2501 limits petitioners to six years after the passage of ELIHPA under the circumstances here.

The underlying purpose of Section 2501 and its role as a waiver of sovereign immunity further support the conclusion that petitioners had six years to bring their challenge to ELIHPA. When Section 2501 was enacted in 1863, see Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767, the House Report emphasized not merely the substantial importance of statutes of limitations generally, but also the centrality of a strictly construed limitations

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[7] Other cases in related areas confirm that a statutory limitations period may commence at the time a cause of action may first be brought, even if that would prevent the plaintiff from waiting to determine whether the defendant would change its mind before filing suit. In *Delaware State Coll.* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam), public employees were informed that they had been denied tenure and that their employment would terminate at a particular date in the future. The Court held in each case that the applicable limitation periods on the plaintiffs' civil rights claims ran from the date they had been informed of the challenged action, not the date on which their employment was actually to terminate.

period to the overall purpose of permitting claimants to sue the government. The Report stated:

> All claims against the government are barred unless prosecuted in six years. We think this provision highly important to the government. A man who neglects his business for six years cannot complain of the government for refusing his suit; and *there is no doubt that a statute of limitation is even more demanded in justice to the government than it is to private individuals*.

H.R. Rep. No. 34, 37th Cong., 2d Sess. 3 (1862) (emphasis added). That is fully in accord with this Court's historic recognition that conditions on waivers of sovereign immunity, specifically including those found in statutes of limitations, must be construed strictly. See p. 15, *supra*; *Soriano* v. *United States*, 352 U.S. 270, 276 (1957) (applying that principle to Section 2501). Petitioners had an ample six-year period in which to bring their claims. They waited, however, nine years or more to do so, and now claim that they could have waited decades longer. Having "neglected their business for six years," they "cannot complain of the government for refusing [their] suit." H.R. Rep. No. 34, *supra*, at 3.

Petitioners argue that they were entitled, at their sole discretion, to wait as long as they wished—perhaps for decades, until near the expiration of their 40-year or 50-year mortgages—to bring suit on their claim that ELIHPA constituted a breach of their contract. In *McMahon* v. *United States*, 342 U.S. 25 (1951), this Court rejected a similar claim in the context of an analogous statute of limitations applicable to actions against the government. Under the claimant's theory in that case, "he would have it in his power, by delaying

* * * filing, to postpone indefinitely commencement of the running of the statute of limitations and thus to delay indefinitely knowledge by the Government that a claim existed." *Id.* at 27. The Court rejected that theory, stating that it "cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States." *Ibid.* The same principle is applicable here. As in *McMahon*, adoption of petitioners' argument that their claims do not first accrue until they subjectively decide to prepay would effectively cede the jurisdiction of the Court of Federal Claims, and the extent of the congressional waiver of sovereign immunity, to petitioners.

E. This Court's Decision In *Mobil* Does Not Support Petitioners' Claim That ELIHPA Was An Anticipatory Repudiation

Contrary to petitioners' claims (Br. 24-28), this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), provides no support for their argument that ELIHPA was an anticipatory repudiation, rather than a breach. In *Mobil*, plaintiffs held leases with the government under which they possessed certain qualified rights to drill for oil and/or gas in the outer continental shelf. By their terms, the leases were subject to certain statutes and regulations requiring the lessees to obtain regulatory approvals before drilling. *Id.* at 609. After plaintiffs had executed the leases, Congress passed the Outer Banks Protection Act (OBPA), Pub. L. No. 101-380, § 6003, 104 Stat. 555, which added additional regulatory approval requirements beyond those set forth in the statutes and regulations to which the lessees agreed to be subject. 530 U.S. at 611. The Court accordingly

"conclude[d] that the Government violated the contracts." *Id.* at 618.

Mobil has no relevance to this case. First, neither the date of accrual of plaintiffs' claims nor the statute of limitations was at issue in *Mobil*. OBPA had been enacted in 1990, and the lawsuit was commenced in 1992. See 530 U.S. at 611, 612. Accordingly, the plaintiffs' claims were well within the statute of limitations, and the Court had no occasion to consider the date on which their action accrued or to apply the principle of strict construction of waivers of sovereign immunity.

Second, the Court in *Mobil* did not in fact determine whether there had been an anticipatory repudiation or a present breach in that case, but instead referred to the statute at issue disjunctively as either anticipatory or a present breach. See 530 U.S. at 608 ("[I]f the Government *said it would break*, or *did break*, an important contractual promise, * * * then * * * the Government must give the companies their money back [as restitution]."") (emphasis added); accord *id.* at 614 (noting that the government "concedes, as it must, that relevant contract law entitles a contracting party to restitution if the other party 'substantially' *breached a contract* or *communicated its intent to do so*") (emphasis added). The Court interchangeably labeled the statute a "violation," a "breach," and a "repudiation" throughout its opinion. See, *e.g.*, *id.* at 618 ("We conclude * * * that the Government violated the contracts."); *id.* at 621 ("The breach was 'substantia[l],' depriving the companies of the benefit of their bargain."); *id.* at 620 (referring to "repudiation").

Third, and related to the above, the Court in *Mobil* had no occasion to address the distinction between an anticipatory repudiation and a present breach because nothing in that case turned on the differences between

them. Petitioners argue in a footnote (Br. 25 n.29) that "[t]he Court's conclusion [in *Mobil*] that the legislation constituted a repudiation of the contracts at issue, as opposed to a full breach, was key to its holding that * * * restitution was available." That contention is wrong, because, as the Restatement of Contracts explains, restitution "is available [to the injured party] regardless of whether the breach is by non-performance or by repudiation." 3 Restatement (Second) of Contracts § 373, Cmt. a (1979). Indeed, on the very page of the *Mobil* opinion cited by petitioners, the Court gave a single example of the circumstances when restitution is available. That example—derived from the Restatement—is clearly an example of present breach, not repudiation; it provides that restitution is available if "A contracts to sell a tract of land to B for $100,000" and "[a]fter B has made a part payment of $20,000, A wrongfully refuses to transfer title." 530 U.S. at 608.

Because either repudiation or a present breach would support restitution, *Mobil* can be understood as concluding that because there was at least a repudiation, there was no reason to go further and inquire whether the OBPA effected an outright breach. In short, *Mobil* had to do with whether the government had fulfilled its contractual commitments; it had nothing to do with—and did not decide any question concerning —the date of accrual of a claim or whether the statute in that case was an actual breach or an anticipatory repudiation.

F. Petitioners' Other Arguments Should Be Rejected

1. Petitioners argue (Br. 29-30) that the court of appeals failed to recognize ELIHPA as an anticipatory breach because that court erroneously held that "FmHA's only duty under the contracts was to

"continue to allow petitioners to prepay," when, in fact, "FmHA's obligation was to accept prepayment requests made by owners." The court of appeals did not distinguish between a duty to allow petitioners to prepay and a duty to accept tendered prepayments, and any such distinction would be without significance. The language cited by petitioners, in context, simply made the point that the prepayment clause did not require any government performance besides permitting petitioners to prepay at any time; it nowhere stated that the government did not have a contractual duty to accept a properly tendered prepayment and thereafter take steps to remove any encumbrances on the borrowers' property.

In any event, petitioners' reliance upon a duty to accept prepayment misses the point. The language of petitioners' loan documents focused upon the borrowers' discretion, and the government's duty under this language was to allow that discretion throughout the term of the contract, which, of course, included permitting (and accepting) prepayment if tendered. By imposing restrictions upon the prepayment option, ELIHPA effected, under petitioners' theory, an immediate breach of the only relevant contractual term —regardless of whether that is phrased in terms of petitioners' unfettered right to prepay or the government's obligation to accept any prepayment tendered.

2. Finally, petitioners argue (Br. 21) that the court of appeals "exempted the government from standard contract law principles." For the reasons given above, that is not correct. This Court has never held that a statute enacted by Congress has the same effect as a statement by an individual—governmental or private —of an intent not to perform a contractual obligation.

Any such conclusion would be mistaken, for two reasons.

First, this Court has never suggested that a statute of limitations that is a condition of waiver of the government's sovereign immunity should be construed under precisely the same principles as a statute of limitations applicable to private parties. To the contrary, the Court has made quite clear that conditions on waivers of sovereign immunity—including the specific limitation provision found in Section 2501—must be strictly construed, to ensure that it is Congress rather than the courts that authorizes the government's liability.

Second, a statute simply cannot result in an anticipatory breach of a contract not involving the government. A statute can make performance of a private contract impossible, but it cannot embody a private party's intent to repudiate a contract. Accordingly, the search for an exact analogy in the law of private party contracting is futile. This is a special situation that arises only when the government is a contracting party. The special considerations that underlie sovereign immunity and the text of Section 2501 provide ample support for a rule that does not allow a party to challenge an Act of Congress at any time during a 40-50 year mortgage.

II. PETITIONERS' CLAIMS UNDER THE JUST COMPENSATION CLAUSE ALSO ACCRUED UPON ENACTMENT OF ELIHPA

Petitioners claim that the government has taken their property without just compensation, in violation of the Just Compensation Clause of the Fifth Amendment. It is highly doubtful that any such claims are viable, because such claims are not distinct from petitioners' contract claims and because compensation for

any breach would in any event provide sufficient "just compensation."[8] But, even if petitioners had viable claims for just compensation, those claims are at least entirely parasitic on their claims of breach of contract, in the sense that petitioners could show that there had been a taking only if they could show that there was a breach of contract as well. In those circumstances, the constitutional claims, if any, must have accrued on the same date as the contract claims. Both courts below therefore properly held that petitioners' taking claims are time-barred for the same reasons as are their contract claims.

1. Petitioners' claims under the Just Compensation Clause are entirely parasitic on their contract claims, in the sense that the government could not be found to have taken their property unless it breached their contracts. In their contracts with the government,

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[8] The government's failure to perform under a contract is a breach, not a taking, even if the contract has to do with real property. See, *e.g.*, *Sun Oil Co.* v. *United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("[I]nterference with * * * contractual rights generally gives rise to a breach claim not a taking claim."); *Transpace Carriers, Inc.* v. *United States*, 27 Fed. Cl. 269, 274 (1992) (same); *Marathon Oil Co.* v. *United States*, 16 Cl. Ct. 332, 338 (1989) ("The clear thrust of the authorities * * * is that where the government possesses property under the color of legal right, as by an express contract, there is seldom a taking in violation of the fifth amendment."). Even if that failure were a taking, however, the contract damages available in the Court of Claims for breach of contract would be sufficient to provide just compensation to petitioners. Cf., *e.g.*, *Lujan* v. *G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, * * * it is an interest * * * that can be fully protected by an ordinary breach-of-contract suit."); *Home Sav. of Am.* v. *United States*, 51 Fed. Cl. 487, 494-496 (2002).

petitioners agreed to encumber their property and to use it in certain ways for so long as their loans were outstanding. If the government did not breach their contracts, then petitioners could have no taking claim; they could not complain that the government has taken their property when they themselves agreed to the restrictions upon its use and received (and continue to receive) consideration for that agreement.[9] Thus, the only conceivable taking claim that petitioners could assert would be entirely dependent on a showing that the government had breached their contracts.

Because the validity of any taking claims would be entirely dependent on whether the government had breached its contracts with petitioners, any taking claim that was viable would have to accrue at the same time—and be time-barred at the same time—as the contract claim. Common sense and the interest in orderly proceedings support that result. To hold otherwise would, in petitioners' terms, create truly "unworkable and illogical rules." Pet. Br. 46. A plaintiff who failed to file a timely claim for breach of contract would be able to revive the claim simply by pleading it as a taking claim. In other words, petitioners are correct (Br. 47) that requiring two suits to be brought at two separate times "would generate immense judicial inefficiencies by requiring courts to address the same facts and issues in separate suits that could be brought years, even decades, apart." Thus, where a taking claim (if it

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[9] Petitioners suggest (Br. 6-7) that they received virtually no benefits from their participation in the Section 515 program. That contention has nothing to do with the statute of limitations question before the Court in this case. In addition, petitioners' contention is incorrect. Petitioners concede that their loans are at very low effective interest rates. See Pet. Br. 7 n.10. They also concede that they received substantial tax benefits. See Pet. Br. 5 n.8.

exists at all) is entirely parasitic on a contract claim, the two should be held to first accrue at the same time.

2. The court of appeals' holding that the contract and taking claims accrued at the same time is consistent with this Court's precedent. Petitioners rely (Br. 39) on regulatory taking cases in which this Court has held that a taking claim "based on a statute or regulation that allows for an agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders a decision." None of the cases on which petitioners rely, however, had anything to do with a taking claim that was parasitic upon —or, indeed, in any way related to—a breach of contract claim.

Petitioners cite (Br. 40), for example, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, the plaintiffs alleged that a federal statute, if construed to limit the use of their land, would constitute a taking. The Court stated that "[t]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking," because "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Id.* at 126, 127. In *Riverside Bayview*, however, the plaintiffs had never agreed, in a contract or otherwise, to the restrictions of which they complained, and the viability of their taking claim thus had nothing to do with any contract claim.

Similarly, in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), the Court rejected a claim by owners of coal mining lands that the mere enactment of a statute limiting their mining activities constituted a taking of their property. There was no allegation in *Hodel* that the plaintiffs had

ever agreed to the limitations embodied in the statute, and, again, the viability of their taking claim had nothing to do with any contract claim.

In short, each of the cases upon which petitioners rely involved alleged takings of real estate interests separate and apart from any contractual relationship with the government. The rules applicable to the accrual of such claims have little to do with the rules applicable to accrual of taking claims such as those at issue here, which—insofar as they are viable at all—are at least entirely dependent on the breach of the promises embodied in petitioners' contracts.

3. Petitioners contend (Br. 44-45) that they have distinct taking claims that could have accrued independently of their contract claims, because they did not claim a taking of their contractual rights, but a taking "of their state-created real estate interests." They identify (Br. 45 n.48) those "real estate interests" as "the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties." But the precise terms in which petitioners pleaded their claims make no difference for present purposes. Any limits on the use of their properties were granted by petitioners in their loan agreements. Thus, as noted above, if the government has not breached those agreements, there has been no taking. If the government has breached those agreements, then any taking claim remaining was likely eliminated by their opportunity to obtain damages for breach of contract. In any event, even if the taking claim were not eliminated, at the very least it had to have accrued at the time of the breach.

4. The court of appeals' decision does not conflict with its own prior decision in *Greenbrier* v. *United*

States, 193 F.3d 1348 (Fed. Cir. 1999), cert. denied, 530 U.S. 1274 (2000). In *Greenbrier*, the court held that the claims of owners of HUD-insured (but not HUD-financed) housing alleging that ELIHPA and other legislation effected a taking were not ripe because plaintiffs had not applied to the agency to prepay their loans. *Id.* at 1360. Unlike in this case, the plaintiffs in *Greenbrier* "were not in privity of contract with respect to the notes' prepayment," because the government was not a party to the prepayment provisions of the notes. *Id.* at 1355. Whatever private contracts they had signed concerning their prepayment rights were thus necessarily conditioned by the possibility of legislation that subjected their prepayment rights to some degree of government regulation. Because the plaintiffs claimed a "regulatory taking," see *id.* at 1357, their claim that their contract rights had been subject to a taking was not ripe until the precise restriction imposed upon their prepayment rights by the government regulation became clear.[10]

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[10] Even if petitioners had viable taking claims and those claims somehow did not have to be brought within six years of ELIHPA's enactment, they could not simply be brought at any time, without exhausting ELIHPA's procedures that may provide constitutionally just compensation. As petitioners themselves have emphasized (Br. 32-37), ELIHPA substitutes for an unfettered right to prepay a procedural mechanism that may result in the property owner receiving "fair market value" for the property, 42 U.S.C. 1472(c)(5)(A)(i), or being able to prepay. The procedures allegedly interfered with petitioners' alleged unfettered right to prepay, and petitioners' challenge therefore accrued upon enactment. But to the extent that petitioners try to base a taking claim on something beyond the very existence of those ELIHPA provisions, then under settled law they would have to exhaust the ELIHPA procedures before their claim is even ripe. Their complaints suggest

This case arises in the very different setting in which both petitioners and the government were parties to the contracts at issue, including the prepayment provisions. Unlike the plaintiffs in *Greenbrier*, petitioners obtained a clause in a loan agreement with the government granting them (in their view) an "unfettered right to prepay." That contract right differed substantially from the private contract right at issue in *Greenbrier*.[11] Accordingly, while the regulatory taking claim in *Greenbrier* was not ripe until the scope of the regulatory restriction on the private contract became clear, the taking claim in this case became ripe as soon as the government enacted ELIHPA, which itself eliminated petitioners' alleged contractual right to be free of government-imposed conditions upon their prepayments.

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that they have not done so. See Pet. App. A129, A152; see also note 4, *supra*.

[11] Petitioners' estoppel argument (see Pet. Br. 42 n.44) must be rejected, because the facts of *Greenbrier* (and therefore the government's argument in that case) were substantially different from those here. Judicial estoppel contemplates the existence of the same parties and facts as the case in which the previous argument was made. See *U.S. Phillips Corp.* v. *Sears Roebuck & Co.*, 55 F.3d 592, 596 (Fed. Cir.), cert. denied, 516 U.S. 1010 (1995). Petitioners do not cite a single case in which this theory has been applied against the government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[*] The Solicitor General is recused in this case.