No. 13-1075

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whenever Congress enacts a statute of limitations, it does so with a "presumption of equitable tolling" in mind. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Congress enacted the Federal Tort Claims Act ("FTCA") with the "broad and just purpose … to compensate the victims of negligence in the conduct of governmental activities." *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955). It provides a vehicle for such a victim to sue the government in federal court but requires that she first present her claim to the responsible federal agency.

The question presented is:

Did the court of appeals here correctly hold, consistent with every one of the eight other circuits to have decided the issue, that the FTCA's time limit for presenting administrative claims may be equitably tolled in appropriate cases?

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. It was Defendant in the district court and was Appellee in the court of appeals.

Respondent is Marlene June, in her capacity as conservator for A.K.B., a minor child entitled under Arizona law to seek relief for the wrongful death of Anthony Booth. June was Plaintiff in the district court and was Appellant in the court of appeals.

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The district court's opinion is unpublished. It is reprinted at Pet. App. 3a-12a.[1]

The opinion of the court of appeals is unpublished. It is available at 2013 U.S. App. LEXIS 25,657. And it is reprinted at Pet. App. 1a-2a.

JURISDICTION

The court of appeals issued its judgment on December 24, 2013. Pet. App. 1a. The United States filed a timely petition for a writ of certiorari on March 7, 2014. Accordingly, this Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act's statute of limitations provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing … of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

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[1] We use "Pet. App." for the Petition Appendix and "Dkt. __" for docket entries in the district court.

STATEMENT OF THE CASE

In enacting the Federal Tort Claims Act ("FTCA"), Congress provided a "broad and just" mechanism "to compensate the victims of negligence in the conduct of governmental activities." *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1953). Congress envisioned that the FTCA would be applied with "equity … to the claimants." H.R. Rep. No. 79-1675, at 25 (1945). And this Court has instructed lower courts not to act "as … self-constituted guardian[s] of the Treasury" by interpreting it in a way that unduly limits that compensatory purpose. *Indian Towing*, 350 U.S. at 69. Consistent with these precepts, the court of appeals unanimously held that, in appropriate circumstances, equity may operate to toll the FTCA's limit on the time that a victim has in which to initiate an FTCA case by presenting a claim for relief to the administrative agency responsible for his injury.

1. Before 1946, victims of torts committed by the federal government generally could not seek judicial relief. This Court had held that federal courts lacked subject-matter jurisdiction to entertain suits against the United States except in situations where Congress had so authorized, and Congress had not generally authorized tort actions. Alexander Holtzoff, *The Handling of Tort Claims against the Federal Government*, 9 L. & Contemp. Probs. 311, 311 (1942). As a result, tort victims had to petition Congress to enact "private bills": victim-specific "laws" individually tailored to provide case-specific compensation. *Id.*

Congress came to view the job of processing proposed private bills as a nuisance. After all, the legislature's role was to engage in "ample debate and consideration of matters of national and international importance." H.R. Rep. No. 79-1675, at 24. And "[p]rivate claims bills … take … congressional time from consideration of national affairs." *Id.* Also, on the merits, Congress believed that it was "poorly equipped to serve as a … tribunal for the settlement of private claims against the Government of the United States." *Id.* at 25.

Accordingly, to unburden itself and to better serve victims of governmental torts, in 1946, Congress enacted the FTCA. Pub. L. No. 79-601, §§ 401-24, 60 Stat. 812, 842-47 (1946). "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities." *Indian Towing*, 350 U.S. at 68.

The FTCA granted federal district courts exclusive jurisdiction to hear suits filed by victims of torts against the United States. Pub. L. No. 79-601, § 410(a), 60 Stat. at 843-44. The FTCA required victims to bring such suits within one year from the date on which their claims accrued. *Id.*, § 420, 60 Stat. at 845. But if the victim elected to first present an administrative claim for relief to the appropriate federal agency within one year from accrual, then he would have until six months after the agency's disposition (even if that date was later than one year from accrual) to begin an action in federal court. *Id.* Congress expected that this regime would be applied

with "equity … to the claimants." H.R. Rep. No. 79-1675, at 25.

In 1948, Congress decoupled the jurisdictional grant from the FTCA's time limitations. Congress made the jurisdictional grant "[s]ubject to the provisions of chapter 17[1] of [title 28 of the U.S. Code]."[2] Pub. L. No. 80-773, 62 Stat. 869, 933 (1948). And it placed only some of the FTCA's provisions in that chapter. It placed the section containing time limits in chapter 161. *Id.*, 62 Stat. at 971.

In 1949, Congress adopted new time limits. It granted victims two years from accrual in which to sue straightaway. Pub. L. No. 81-55, § 1, 63 Stat. 62, 62 (1949). And it provided that, if a victim chose to first present an administrative claim for relief, he would have until six months after the disposition of that claim so long as that claim was presented within two years of accrual. *Id.* Congress wanted these time limits to operate "in consonance with the practice prevailing in analogous departments of the law," *i.e.*, with the operation of state-law and federal-law time limits for filing negligence actions against private parties that "ha[d] been tested and found satisfactory in the laboratory of legal experience." H.R. Rep. No. 81-276, at 3-4 (1949).

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[2] Although the amendment itself purported to make the jurisdictional grant subject to the provisions of chapter "173," in reality there was no such chapter, and Congress quickly corrected the scrivener's error. Pub. L. No. 81-55, § 2(a), 63 Stat. 62, 62 (1949).

In 1966, Congress amended the FTCA again to require (rather than merely permit) victims to present administrative claims to the responsible federal agency before filing suit. Pub. L. No. 89-506, § 2(a), 80 Stat. 306, 306 (1966). Along with that, it enacted the statute of limitations that is in force today:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing … of notice of final denial of the claim by the agency to which it was presented.

Id., § 7, 80 Stat. at 307 (codified at 28 U.S.C. § 2401(b)).

2. This case involves a tort claim seeking recovery for the death of Anthony Booth. He died because the Federal Highway Administration ("FHWA") permitted a defective cable median barrier to be installed on a stretch of Arizona's Interstate 10 highway.

Cable median barriers are a vitally important component of highway safety. A cable median barrier consists of steel wire ropes mounted on flexible posts laid out along the median of a highway that divides traffic traveling in one direction from traffic traveling in the other. *See* FHWA, *Median Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/median_barriers/median_barriers.pdf (last visited May 7, 2014). The primary purpose of the barrier is to ensure that, if a

driver loses control of his vehicle, it will not stray into oncoming traffic in such a way as to cause a head-on collision. *See id.* The cable median barrier does this by flexibly redirecting the vehicle back into its lane and, short of that, by absorbing most of the energy of a crash and minimizing the forces on the vehicle. *See id.* Properly functioning cable median barriers are so effective that they have reduced cross-median crash fatalities by more than 90 percent. FHWA, *Cable Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/cable_barriers/cable_barriers.pdf (last visited May 7, 2014).

In 2000, however, the FHWA permitted the installation of a defective cable median barrier along a stretch of Interstate 10 in Phoenix. Dkt. 14 at 2. At the time of installation, the barrier had not passed the FHWA's required "crashworthiness" testing. *Id.* Indeed, it had not even been crash tested. *Id.* The FHWA knew this. *Id.* at 5.

On February 19, 2005, Laquitha Green was driving a car on Interstate 10, with Booth as a passenger. *Id.* at 3. Green lost control of the car, and the car veered toward oncoming traffic. *Id.* The cable median barrier, if properly functioning, would have redirected the car away or at the very least absorbed most of the energy of a crash so as to minimize the force felt by the occupants. *See id.* It did not. *Id.* The car crossed into oncoming traffic and collided with another vehicle. *Id.* Booth and Green both were killed. *Id.*

In August 2005, that same cable median barrier that failed to protect Booth and Green was crash tested. *Id.* at 5. It failed. *Id.* In September 2005, the FHWA issued a public memorandum representing that Interstate 10's cable median barrier had been approved as crashworthy. *Id.* It had not been. *Id.* The FHWA knew this. *Id.*

Shortly thereafter, Respondent Marlene June, as conservator for Booth's minor child A.K.B., filed a wrongful-death action against the state of Arizona. *Id.* During the course of that litigation, June's counsel sought to depose certain FHWA personnel in order to discover information relevant to the condition of the cable median barrier. *Id.* Beginning in early 2007, and continuing through a portion of 2009, Petitioner refused to make them available. *Id.*

3. It was not until April 2009 that Petitioner finally made those employees available for deposition. *Id.* For the first time, June's counsel learned, among other things, that Petitioner permitted the cable median barrier to be installed and remain in service despite never having passed the FHWA's crashworthiness testing. *Id.*

On December 20, 2010, June began the process of seeking relief against Petitioner pursuant to the FTCA by presenting a wrongful-death claim to the FHWA. *Id.* at 6. In March 2011, the FHWA denied June's administrative claim. *Id.* at 7. In May 2011, within six months of that final denial, she filed this lawsuit against Petitioner. Dkt. 1 at 1.

Petitioner moved to dismiss on the ground that the district court lacked subject-matter jurisdiction. Petitioner contended that the time limit for presenting administrative claims was jurisdictional and that June missed that deadline. Dkt. 10 at 3-9. Specifically, Petitioner argued that claim accrued on February 19, 2005, the date of Booth's fatal accident, but noted that June did not present her administrative claim to the FHWA until December 20, 2010. *Id.*

June contended that the two-year time limit should be equitably tolled in light of Petitioner's concealment of the defective condition of the cable median barrier contributed to Booth's death. Dkt. 15 at 1-8. She argued that her claim was timely presented because she presented it within two years of when she learned about Petitioner's negligence in April 2009. *Id.*

The district court granted Petitioner's motion. Pet. App. 3a-12a.[3]

4. The court of appeals reversed. *Id.* at 1a-2a. The court explained that, under governing circuit precedent, the FTCA's six-month time limit for filing suit in federal court may be equitably tolled in appropriate circumstances. *Id.* at 2a. On that basis, it held that the FTCA's two-year time limit for presenting administrative claims can be equitably tolled in

[3] The district court did not address Petitioner's alternative argument (Dkt. 10 at 9-11) that the court lacked jurisdiction because the Federal-Aid Highway Act did not allow June to pursue her action on the basis of the FHWA's negligent permission of the installation of the defective cable median barrier.

certain situations, as well, and remanded the case to the district court. *Id.*

REASONS FOR DENYING THE PETITION

The decision of the court of appeals in favor of recognizing the availability of equitable tolling of the time limit for the presentment of an administrative claim under the FTCA is correct and is consistent with rulings of eight other court of appeals that have reached the issue. The circuits that have not reached the issue have also supported tolling in this context. This unanimous view is amply supported by this Court's precedent establishing a presumption in favor of equitable tolling. Congress has not taken any steps to reject this long prevailing view of the FTCA. Thus, there is no need for this Court to address this statutory issue. The petition should be denied.

I. THE RULING OF THE COURT OF APPEALS IS CONSISTENT WITH THE UNIFORM VIEW OF THE EIGHT OTHER CIRCUITS THAT HAVE DECIDED THE ISSUE.

A. The Circuits Agree That Equity Can Toll The FTCA's Time Limit For Presenting An Administrative Claim To The Relevant Federal Agency.

In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), this Court held that, when Congress enacts a statutory cause of action, there is a "presumption of equitable tolling" of the statutory time

limit for asserting a claim. *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (explaining that statutes of limitations "typically permit courts to toll the limitations period in light of special equitable considerations"). This Court has held the "presumption of equitable tolling applicable … against the United States," because Congress is likely to view such tolling as "amount[ing] to little, if any, broadening of the congressional waiver" of the government's sovereign immunity. *Irwin*, 498 U.S. at 95-96. Thus, it comes as little surprise that all of the nine circuits that have reached the issue "explicitly agree or simply take it as given that equitable tolling defenses are applicable in the context of the FTCA" time limit for presenting administrative claims. *Rakes v. United States*, 442 F.3d 7, 25 (1st Cir. 2006); *see Ramirez-Carlo v. United States*, 496 F.3d 41, 49 (1st Cir. 2007) ("Courts of appeals that have addressed whether equitable estoppel is a defense to the FTCA's statute of limitations have assumed that it is.").

The government's petition asserts "widespread conflict and confusion" mandating this Court's resolution. Pet. 20. The reality, however, is that *every one* of the circuits that has ruled on the issue has held that, in appropriate circumstances, a court may employ its equitable powers to toll the FTCA's time limit for presenting administrative claims. The government's petition concedes as much. It admits that the Third, Seventh, and Ninth Circuits have "held that [the claim-presentment time limit] … [is] subject to equitable tolling." Pet. 20-21. Likewise, the petition states that the First, Fourth, Eighth, and Tenth Circuits "hold that [the claim-presentment

time limit is] … subject to equitable tolling." Pet. 21. The petition further concedes that the Fifth Circuit, too, has held the "two-year deadline … subject to equitable tolling." Pet. 22. And, finally, the petition recognizes that the Sixth Circuit has "h[e]ld[] th[e] two-year deadline … subject to equitable tolling," as well. *Id.*

That is it. All nine courts of appeals that have reached the issue have all held that the two-year statutory period is subject to equitable tolling. There is no conflict on the question presented.[4]

Petitioner suggests (Pet. 20-21) that review is needed because some of the nine unanimous circuits refer to the FTCA time limit as "jurisdictional" while others do not. All of those nine courts of appeals, however, read the FTCA as not to preclude equitable tolling. All of the courts have properly looked at whether its language, history, and purpose recognize a role for equitable tolling. They all answer the question presented "Yes." Thus, all nine circuits

[4] Indeed, even the circuits that have not formally reached the issue indicate that tolling is proper. The three circuits (the Second, Eleventh, and D.C. Circuits) that have encountered the issue but "have expressly declared the question open and declined to decide it" (Pet. 22) have assumed for the sake of argument that tolling applies. *See, e.g.*, *Phillips v. Generations Family Health Ctr.*, 723 F.3d 144, 149 (2d Cir. 2013); *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 846-47 (11th Cir. 2013); *Norman v. United States*, 467 F.3d 773, 776 (D.C. Cir. 2006). Further, the one circuit (the Federal Circuit) that has not encountered the issue has nevertheless suggested in a related context that the time limit "is … subject to equitable tolling in appropriate cases." *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 795 n.2 (Fed. Cir. 2009).

have reached the same conclusion, and there simply is no material conflict.

That Petitioner here is asking this Court to review and reject the uniform agreement of all of the circuits that have decided the question presented is unusual. It is doubly strange given that the petition presents only a statutory issue. Eugene Gressman et al., *Supreme Court Practice* 505 (9th ed. 2007). If the unanimous view of the nine circuits is contrary to what the legislature intended, Congress always "remains free to alter what [the lower courts] have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). There is simply no need for this Court to step into this statutory context and to disrupt the status quo.

Moreover, experience has shown that Congress pays close attention to the FTCA, and to the time limit for presenting administrative claims. As Petitioner recognizes (Pet. 8-10, 17-18), and as we have explained in detail (*supra* pp. 2-5), Congress has been more than willing to debate and revisit features of the presentment requirement. Following the FTCA's enactment, Congress enacted legislation relating to the presentment requirement at least five times. *See, e.g.*, Pub. L. No. 100-694, § 6, 102 Stat. 4563, 4564 (1988); Pub. L. No. 89-506, § 2(a), 80 Stat. at 306; Pub. L. No. 86-238, § 1(3), 73 Stat. 471, 472 (1959); Pub. L. No. 81-55, § 1, 63 Stat. at 62; Pub. L. No. 80-773, 62 Stat. at 933. In 1988, Congress acknowledged that the two-year limit is not absolute and inflexible by expressly recognizing an exception for a particular class of cases. Pub. L. No. 100-694, § 6, 102 Stat. at 4565 (codified at 28 U.S.C.

§ 2679(d)(5)). And as Petitioner implicitly acknowledges, Congress has been on notice for at least 20 years that the courts of appeals have been permitting equity to toll the claim-presentment period under certain circumstances. Pet. 22 (citing *Glarner v. United States*, 30 F.3d 697, 700-02 (6th Cir. 1994)).

Petitioner, unable to obtain this change through legislation for the past 20 years, now asks this Court to step in and do what it could not convince Congress to do: amend the FTCA to reject the unanimous view of the nine circuits that have reached the issue of tolling. In this context, review of this statutory issue is not warranted, and the petition should be denied.

B. Petitioner's Claim of Conflict Within The Fifth And Sixth Circuits Does Not Withstand Scrutiny And In Any Event Does Not Merit Review.

While every circuit in the country that has addressed the issue has ruled that equitable tolling applies to the FTCA's time limit for presenting administrative claims, Petitioner asserts that this Court's review is urgently needed because within the Fifth and Sixth Circuits there is "case law that is difficult to reconcile." Pet. 22.

Petitioner has not actually identified any problematic "conflicting case law" within those circuits. As Petitioner notes, the governing rule in the Fifth Circuit is set forth in *Perez v. United States*, 167 F.3d 913 (5th Cir. 1999). There, the court of appeals unambiguously held that equitable tolling applies. Pet. 22. The so-called "conflicting" precedents within

the Fifth Circuit cited by the petition are *Young v. United States*, 727 F.3d 444 (5th Cir. 2013) and *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 646 F.3d 185 (5th Cir. 2011). Neither, however, creates any sort of intra-circuit "conflict[]." *Young* did not decide the issue presented in this case. Instead, it addressed only the narrow question of "whether state law"—specifically Louisiana's "continuing tort" doctrine—"may indefinitely postpone the commencement of the running of prescription when the wrongful acts and damages are ongoing." 727 F.3d at 447. And in the end, *Young* "d[id] not reach" an answer even to that narrow question, because "the tortious acts that plaintiffs allege[d] d[id] not constitute a continuing tort under Louisiana law." *Id.* The Fifth Circuit's decision in *FEMA Trailer* does not conflict with *Perez*, either. While *Perez* dealt with whether equitable tolling applied to the time limit for presenting administrative claims after such claims had "accrue[d]" within the meaning of the FTCA, *FEMA Trailer* decided the antecedent issue of whether "the accrual of [the plaintiff's] claim was delayed or tolled" by various alleged impediments. 646 F.3d at 189.

Nor is there any meaningful friction within the Sixth Circuit. As Petitioner concedes, the governing rule in the Sixth Circuit as stated in *Glarner*, 30 F.3d at 702, is that the FTCA "two-year deadline is … subject to equitable tolling." Pet. 22. Petitioner claims that the Sixth Circuit's subsequent unpublished decision in *Bazzo v. United States*, 494 F. App'x 545 (6th Cir. 2012), identifies "conflicting precedents." Not so. The only so-called "precedent[]" (as opposed to unpublished opinions that do not bind

the Sixth Circuit's district courts) that *Bazzo* characterizes as "conflicting" is that court's per curiam ruling in *Rogers v. United States*, 675 F.2d 123 (6th Cir. 1982) (per curiam). *Bazzo*, 494 F. App'x at 546. *Rogers*, however, decided only whether equity can ever excuse a victim's failure to present any administrative claim at all prior to filing suit in court (and held that it cannot). 675 F.2d at 124. Accordingly, the Sixth Circuit has cited *Rogers* in a precedential opinion only where the plaintiff "concede[d] that he did not first present the claim to the appropriate federal agency" prior to suing. *Singleton v. United States*, 277 F.3d 864, 872 (6th Cir. 2002). In any event, to the extent that *Rogers* can be read as saying anything about equitable tolling of the time limit for presenting an administrative claim, *Rogers* did not have the benefit of this Court's landmark equitable-tolling decision in *Irwin*, which was not handed down until a full eight years later.

But even if substantiated, the claimed intra-circuit discord does not merit this Court's review of this statutory issue. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *see Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of certiorari in an earlier case despite acknowledged intra-circuit conflict concerning interpretation of criminal statute).

II. THE UNIFORM VIEW OF THE NINE CIRCUITS IS CORRECT.

A. The FTCA's Language, History, And Purpose Support The Presumption In Favor Of Permitting Equitable Tolling Of The Time Limit For The Presentation Of An Administrative Claim.

"It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted). Inconsistency with the text of the relevant statute requires more than just mere perceived or actual tension; this Court "will 'not construe a statute to displace courts' traditional equitable authority absent the clearest command.'" *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quoting *Miller v. French*, 530 U.S. 327, 340 (2000)). This understanding of time limits is so deeply embedded in the law that "Congress must be presumed to draft limitations periods in light of this background principle." *Young*, 535 U.S. at 49-50.

As all of the courts of appeals to have decided the question recognize, this presumption applies with full force to the FTCA's time limit for presenting administrative claims. *See, e.g.*, *Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013) (Posner, J.); *Santos v. United States*, 559 F.3d 189, 194 (3d Cir. 2009); *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006); *Kokotis v. U.S. Postal Serv.*, 223 F.3d 275, 280-81 (4th Cir. 2000) (Wilkinson, C.J.); *Perez*,

167 F.3d at 915-16; *Glarner*, 30 F.3d at 701. This Court has held that "the same rebuttable presumption of equitable tolling applicable … against private defendants should also apply … against the United States." *Irwin*, 498 U.S. at 95-96; *see Bowen v. City of New York*, 476 U.S. 467, 480 (1986); *Honda v. Clark*, 386 U.S. 484, 500 (1967). And the statute itself expressly provides that the government in an FTCA action "shall be liable … in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, "confirm[ing]" the presumption, *Arteaga*, 711 F.3d at 833. *See also Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957).

The fact that this case involves the context of administrative-claim process renders the presumption even stronger than in the context of a court action. "[T]he … presumption of equitable tolling … appl[ies] to *suits* against the United States" because Congress is likely to view such tolling as "amount[ing] to little, if any, broadening of the congressional waiver" of the government's sovereign immunity. *Irwin*, 498 U.S. at 95-96 (emphasis added). Congress certainly would view the equitable tolling of a time limit for presenting administrative claims even more favorably. This is because presenting a claim to an administrative agency does not directly and immediately result in the United States being brought into court, whereas filing a suit against the United States does.

Congress crafted the time limit on presenting administrative claims with equity in mind, as well. It specifically intended to make its time limit "con-

sonan[t] with the practice prevailing in analogous departments of the law," *i.e.*, with the operation of state-law and federal-law time limits for filing negligence actions against private parties that "ha[d] been tested and found satisfactory in the laboratory of legal experience." H.R. Rep. No. 81-276, at 3-4 (1949). Those time limits were overwhelmingly viewed as subject to equitable exceptions in certain situations.[5]

Only "the clearest command" can rebut the presumption in favor of equitable tolling, *Holland*, 560 U.S. at 646, and the FTCA's text, structure, and purpose all point to the conclusion that equitable tolling applies to the time limit for presenting administrative claims.

Language. By its terms, the FTCA does not purport to prohibit a court from equitable tolling of the time limit for presenting administrative claims. To the contrary, this Court has found that materially identical statutory language supports equitable tolling.

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[5] *See, e.g.*, *Pashley v. Pac. Elec. Co.*, Civ. 14,291, 1944 Cal. App. LEXIS 1376, at *5 (Cal. Ct. App. May 19, 1944) ("It is the general rule that a fraudulent concealment by defendant of the facts upon which a cause of action is based tolls the statute of limitations …."); *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944) ("It is generally held that fraudulent concealment stops the running of the statute." (emphasis omitted)); *Kurry v. Frost*, 162 S.W.2d 48, 51 (Ark. 1942) ("According to the majority rule, … fraudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, constitutes an implied exception to the statute of limitations …." (internal quotation marks omitted)).

Consider the Racketeer-Influenced Corrupt Organizations Act's ("RICO") provision for civil actions. RICO is primarily a criminal statute designed to help the government prosecute ongoing criminal enterprises. *See* 18 U.S.C. §§ 1961-62. A provision of the act, known colloquially as "civil RICO" also permits victims of such criminal enterprises to file civil suits against the "racketeers." *Id.* § 1964. Civil RICO's statute of limitations provides that "[a]ny action to enforce a cause of action under [civil RICO] shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b; *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (explaining that civil RICO incorporates the limitations period of the antitrust-related Clayton Act). This Court held that equity can toll the civil RICO time limit for filing suit. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-96 (1997). The key language of the FTCA's time limit for presenting administrative claims—that a tort claim "shall be forever barred unless" it is presented within two years of accrual—is identical to the key language of civil RICO's equitable time limit for filing suit, which this Court held does not preclude tolling.

This Court's interpretation of the Federal Employers Liability Act ("FELA") supports this conclusion, as well. FELA gives railroad workers a cause of action to sue their employers in order to recover damages caused by their employers' negligence. 45 U.S.C. § 51. Its statute of limitations provides that "[n]o action shall be maintained … unless commenced within three years from the day the cause of action accrued." *Id.* § 56. This Court has held that

equitable tolling applies to FELA's time limit for filing suit. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234-35 (1959). The FTCA's time limit for presenting administrative claims is materially identical. FELA's time limit on filing suit states a deadline by which a task must be done (three years in which to file an action), and it explains the consequences of failing to meet it ("[n]o action shall be maintained"). So does the FTCA's time limit on presenting administrative claims. It states a deadline by which a task must be done (two years in which to present a claim), and it explains the consequences of failing to meet it (the claim "shall be forever barred").

Structure. The FTCA's structure likewise supports case-appropriate tolling. This Court has stated that when it comes to time limits, the fact that "a separate provision … prescribes the jurisdiction of the … [c]ourt" "suggests Congress regard[s] the [time] limit as a claim-processing rule" of the sort routinely held subject to equitable tolling on a case-by-case basis. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011). This is especially true when the separate provisions are also located in separate chapters. That "Congress elected not to place the [time] limit in the … subchapter [relating to jurisdiction]" further suggests that the time limit is not one of the inflexible parts of the statutory scheme that rejects equitable considerations. *Id.*

That describes the FTCA. The FTCA separates the time limit for presenting administrative claims from the grant of jurisdiction. Congress placed them not only in different sections of title 28 (the former in

section 2401 and the latter in section 1346), but in different chapters (the former in chapter 161 and the latter in chapter 85, entitled "District courts; Jurisdiction"). And while the Congress made the FTCA's grant of jurisdiction "[s]ubject to" various other provisions, the time limit for presenting administrative claims is not one of them. 28 U.S.C. § 1346(b)(1). The grant of jurisdiction is "[s]ubject to" only "the provisions of chapter 171 of [title 28]." *Id.* As noted immediately above, however, the time limit for presenting administrative claims is contained in chapter 161. Moreover, the claim-presentment "limitation provision [is] separate from the waiver of sovereign immunity section," *i.e.*, section 2674, further confirming that the "freestanding" time limit readily incorporates equitable concerns. *Santos*, 559 F.3d at 197.

Purpose. The other evidence illuminating Congress's purpose in enacting the time limit for presenting administrative claims further supports that it intended equitable tolling to apply when appropriate circumstances called for it. Equity was part and parcel of the FTCA as a whole from Day One. From the outset, a clear goal of the FTCA generally was to ensure that the compensation regime it created would be applied "with justice and equity … to the claimants." H.R. Rep. No. 79-1675, at 25 (1945). And, as explained above (*supra* pp. 17-18 & n.5), Congress avowedly desired that the FTCA's time limits operate "in consonance with" limitations periods that readily accommodated equitable considerations.

Additionally, equity must play a role because Congress contemplated FTCA administrative claim presentment to be an informal process that "laymen, unassisted by trained lawyers, [could] initiate.'" *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). "[T]he claim does not have to be the equivalent of a fully drafted complaint." Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 17.09[2] (2013). The victim need only provide enough information to give the responsible agency enough notice to begin its own investigation. *Id.* Today, victims can meet this requirement by a completing a one-and-a-half page form, called an "SF-95," that "usually is available at most post offices." *Id.* As far as submission of the claim is concerned, the victim need not "file" or even "lodge" it with the responsible agency; he need only "present" it—a "textually weaker" requirement. *Perez*, 167 F.3d at 918 & n.2. And if he "presents" it to the wrong agency, that agency will "transfer it forthwith to the appropriate agency … and advise the claimant of the transfer." 28 C.F.R. § 14.2(b)(1). These "more informal agency procedures … make it easier for many claimants to file claims and secure relief without the assistance of an attorney." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing before Subcomm. No. 2 of the Comm. on the Judiciary*, 89th Cong. 14 (1966) (statement of Hon. John W. Douglas, Assistant Attorney General).

There is no reason to believe that Congress wanted to bar tolling in this informal administrative claim-processing context.

B. Petitioner's Counterarguments Fail To Establish A Clear Congressional Intent To Categorically Bar Equitable Tolling.

1. As noted above (*supra* pp. 18-20), this Court has on multiple occasions held that, in appropriate circumstances, equity can toll time limits materially identical to the FTCA's time limit for presenting administrative claims. Petitioner argues, however, that because this Court in *John R. Sand & Gravel* construed the similarly worded time limit of the Tucker Act (28 U.S.C. § 2501)—the statute authorizing non-tort actions against the government for money damages—not to permit tolling, the same result is required for the FTCA. Pet. 9, 11.

But this Court's sui generis treatment of the Tucker Act is not probative here. In the very case Petitioner cites, the Court went out of its way to make clear that the Tucker Act's time limit owes its jurisdictional status not to its language or purpose but to "[b]asic principles of *stare decisis*" relating to prior Tucker Act cases. *John R. Sand & Gravel*, 552 U.S. at 139. As Petitioner notes, in the late 1800s, this Court found the Tucker Act's time limit to be jurisdictional. Pet. 9 (citing *Kendall v. United States*, 107 U.S. 123, 125-26 (1883)). And going forward, rather than examining the issue anew, this Court has consistently relied upon that "previously provided … definitive interpretation" (rather than its own independent functional analysis) to sustain the Tucker Act time limit's jurisdictional status. *John R. Sand & Gravel*, 552 U.S. at 137. Indeed, the Court has explained that its 130-year-old interpretation carries so much force that it likely would prevent the Court

from changing course even if the Court came to "believe that decision is no longer 'right'" as an original matter. *Id.* at 139. As Petitioner recognizes, however, there is nothing even approximating such historical pedigree with respect to the FTCA, as "this Court has not considered whether the FTCA's time limits are jurisdictional." Pet. 13 n.5. Moreover, this Court has made clear that, as a matter of text, the "language" of the Tucker Act's time limit does not "manifest a … congressional intent … [against] the availability of equitable tolling." *Irwin*, 498 U.S. at 95. Accordingly, any linguistic similarity with the Tucker Act "is irrelevant to equitable tolling." *Perez*, 167 F.3d at 916.

2. Turning to the FTCA's structure, Petitioner cannot deny that the Act today belies any intent to render the time limit for presenting administrative claims "jurisdictional." As explained above (*supra* pp. 4, 21), that limit is not one of the aspects that the FTCA's grant of jurisdiction today is "[s]ubject to." Additionally, it is "separate from the [FTCA's] waiver of immunity." *Santos*, 559 F.3d. at 197. Petitioner, however, would have this Court ignore the current statutory framework and declare the time limit on presenting administrative claims jurisdictional based upon the structure of the statute as enacted in 1946. Pet. 9.

The structure of the statute in 1946 does not suggest that the time limit for presenting an administrative claim was jurisdictional then or today. Indeed, the 1946 Congress plainly did not intend the time limit for presenting administrative claims to be jurisdictional, because it did not even make claim-

presentment mandatory. Thus, the time limit was hardly jurisdictional.

3. As a matter of legislative purpose, Petitioner asserts that the time limit for presenting administrative claims never can yield to the forces of equity because it "'seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve … broader system-related goal[s].'" Pet. 13 (quoting *John R. Sand & Gravel*, 552 U.S. at 133). Petitioner proffers two such "goal[s]": "examin[ing] and adjudicat[ing] a vast multitude of FTCA claims," Pet. 19 (internal quotation marks omitted), and "'limit[ing] the scope of a governmental waiver of sovereign immunity,'" Pet. 13 (quoting *John R. Sand & Gravel*, 552 U.S. at 133).

That the FTCA claim-presentment process involves a sizeable amount of claims does not categorically prohibit equitable tolling. Consider employment-discrimination claims under Title VII. Before a victim of employment discrimination can sue his employer under Title VII, he first must submit an administrative charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the date on which the alleged discrimination occurred. 42 U.S.C. § 2000e-5(e). This gives the EEOC the opportunity to attempt to mediate the dispute and convince the parties to settle. The EEOC is just one agency. And it processes nearly 100,000 charges per year. EEOC, *Charge Statistics FY 1997 Through FY 2013*, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited May 7, 2014). Yet, in *Zipes*, 455 U.S. at 393, this Court held that equitable tolling applies

to Title VII's time limit on submitting an administrative charge. FTCA claims, by contrast, number around 30,000 per year.[6] And they are spread across a variety of federal agencies (namely, the agencies responsible for the tortious conduct that injured the victims) for resolution.

This is not even in the same universe as *United States v. Brockamp*, 519 U.S. 347 (1997), where the Court recognized that permitting equitable tolling of the time limit for filing tax refunds would cause the whole system to grind to a halt. As the Court explained there, because "[t]he IRS processes more than 200 million tax returns each year[,] … [t]o read an 'equitable tolling' exception into [the time limit] could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Id.* at 352. Accordingly, "allowing equitable tolling [does] not create an administrative nightmare for the FTCA regime, which encompasses far fewer claims than might be filed against the [IRS]." *Perez*, 167 F.3d at 917.

Finally, Petitioner is off-base to suggest that equity is banished from the FTCA's time limit for presenting administrative claims simply because the statute arises in actions against the United States.

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[6] This calculation comes from a leading treatise, which estimates the number of FTCA suits each year as about 1,500, and the number of administrative claims at 10 to 20 times that amount. Jayson & Longstreth, *supra*, at § 1.01.

This Court has made clear multiple times that time limits running against the government can be tolled under appropriate circumstances. *See, e.g.*, *Irwin*, 498 U.S. at 95-96; *Bowen*, 476 U.S. at 480; *Honda*, 386 U.S. at 500.

4. Petitioner tries to turn the rebuttable presumption in favor of tolling on its head by suggesting that because Congress could have enacted a "reasonable cause" exception and did not, equitable tolling should not be allowed. Pet. 17. But as this Court has repeatedly held, Congress enacts time limitations with the presumption that equitable tolling is allowed; Congress need not legislate it expressly. Thus, the failure to include such language is irrelevant. Further, "deductions from congressional inaction" regarding bills proposed years earlier "are notoriously unreliable" in discerning congressional intent. *Perez*, 167 F.3d at 917; *see Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng' rs*, 531 U.S. 159, 170 (2001).

Moreover, it is notable that Congress elected to tie the two-year period not to a readily objectively identifiable event (as it did with respect to the six-month suit-filing period), but rather to the "accru[al]" of the claim, 28 U.S.C. § 2401(b), an event that courts must apply fact-intensive "equitable" principles to ascertain, *Santos*, 559 F.3d at 200 n.6. That choice shows that Congress expected the judiciary to play an active role in interpreting and policing the time limit for presenting administrative claims.

5. Finally, Petitioner's argument that recognizing equitable tolling would create an intractable "dilemma" that the agencies have no experience navigating (Pet. 15) is without merit. Given the uniform approach of the courts of appeals over at least the past 20 years recognizing equitable tolling, agencies for years have been navigating the precise "dilemma" that Petitioner suggests they are incapable of handling. Namely, when confronted with a claim they have found to be time-barred, they have been deciding whether to "deny the claim outright because it is time barred," *id.*, knowing that "a court [could] later f[i]nd equitable tolling appropriate and then proceed[] to the merits of the claim," Pet. 16, or to "conduct [their] own evaluation of possible tolling" and "evaluate the merits … along with the tolling issue," Pet. 15-16, even though that arguably would "divert[] agency resources from the review of timely claims," Pet. 16. Moreover, agencies have been navigating essentially the same dilemma for even longer in the context of determining the antecedent question of when claims "accrue[]" within the meaning of section 2401(b).

If Petitioner believes that the current claim adjudication process is not optimal, it is free to ask Congress to amend the statute. Such concerns are not, however, grounds to ask this Court to disrupt the uniform view of the nine circuits that have decided the question presented that equity can toll the FTCA's time limit for presenting administrative claims.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR REVIEWING THE QUESTION PRESENTED.

This Court "generally await[s] final judgment in the lower courts [*i.e.*, the end of the case] before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). The interlocutory character of a case "of itself alone furnishe[s] sufficient ground for the denial" of plenary review. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Simply put, when "the Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *see Mt. Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., respecting the denial of certiorari).

That is exactly what happened here. The decision of the court of appeals holding that, in certain circumstances, equity can toll the FTCA's time limit for presenting administrative claims remanded the case to the district court for further proceedings. Those proceedings could be many: (1) determining whether equitable tolling is warranted on the facts of this case, (2) adjudicating the government's challenge to jurisdiction on the grounds that the Federal-Aid Highway Act precludes a private cause of action (which neither the district court nor the court of appeals has evaluated so far), (3) discovery, (4) summary judgment, (5) pre-trial motions, (6) trial, and (7) post-trial motions. Developments at any one of

those stages could render this Court's intervention here unnecessary.

The interlocutory nature of the ruling here thus renders this case an inappropriate vehicle for addressing the question presented.

IV. THIS CASE SHOULD NOT BE CONSOLIDATED WITH *UNITED STATES V. WONG*.

The government has also filed a petition for certiorari asking the Court to review *United States v. Wong*, 732 F.3d 1030 (9th Cir. 2013) (en banc). According to that petition, *Wong* presents the question of "[w]hether the [FTCA's] six-month time bar for filing suit in federal court … is subject to equitable tolling." Petition for a Writ of Certiorari at (I), *United States v. Wong* (2014) (No. 13-1074). "Because both time limits are codified in the same provision (28 U.S.C. 2401(b)), because there is substantial overlap in the arguments concerning equitable tolling, and because both questions are important, the United States recommends that the Court grant both petitions and consolidate the cases for briefing and argument." Pet. 6 n.2.

As this petition should be denied outright, there is no need to reach this issue. But consolidation would be inappropriate in any event. At the outset, Petitioner recognizes that the "overlap" is not so "substantial" that both cases must come out the same way. As the government has previously explained to this Court, "[a]lthough the FTCA's six-month limitations period and its two-year limita-

tions period are both contained in Section 2401(b), they are not identical." Brief for the Respondents in Opposition at 9, *Waltz v. United States*, 132 S. Ct. 107 (2011) (No. 10-1436). "In contrast" to the time limit on presenting administrative claims, "the six-month period is a *strict* limitation." *Id.* (emphasis added). Moreover, "[t]he six-month limitations period … is triggered by a specific notice denying the administrative claim, which sets a readily identifiable date for the filing of a suit," rendering the availability of equitable tolling less essential than in the context of the administrative claim-presentment period, which is triggered by a comparatively murky and fact-intensive "accru[al]" standard. *Id.* at 10. Accordingly, "even if the FTCA's two-year administrative filing deadline were subject to equitable tolling in certain circumstances, it would not follow that the six-month statutory time period for filing complaints in court would also be subject to equitable tolling." *Id.* As this opposition demonstrates, there are strong arguments in favor of equitable tolling of the time limit for presenting administrative claims—as evidenced by the uniform acceptance of such tolling by the courts of appeals—regardless of how this Court rules in *Wong*.

Petitioner has stressed these differences below, as well. It told the court of appeals that "[t]he different timing provisions were passed against different backgrounds and serve different functions." U.S. Ct. App. Supp. Br. 1-2. Moreover, "*Wong* did not address the historical, contextual, and structural features that are unique to the two-year time bar," which is important because the relevant "inquiries are highly contextual," *id.* at 6, and "the history and

context of that provision" are "distinct from the six-month filing deadline," *id.* at 8. Accordingly, it is no surprise that both Petitioner and June here make arguments that emphasize the unique nature of administrative review.

Given the distinct issues and contexts, consolidation would be improper.

CONCLUSION

This Court should deny the petition for a writ of certiorari. In any event, the Court should not consolidate this matter with *Wong*.

Respectfully submitted,

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May 7, 2014