Nos. 13-1074 and 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Abdelmoneim v. *Department of the Army*, No. 12-cv-5268, 2014 WL 1277905 (E.D.N.Y. Mar. 27, 2014) 7

Adderson v. *United States*, No. 12-cv-395, 2013 WL 3717731 (N.D. Fla. July 16, 2013) 7

"Agent Orange" Prod. Liab. Litig., In re, 818 F.2d 210 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) 5

Alexander v. *United States*, No. 14-cv-0137, 2014 WL 1871859 (S.D. Cal. May 5, 2014) 7

Alvarez-Machain v. *United States*, 107 F.3d 696 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997) 6

Benge v. *United States*, 17 F.3d 1286 (10th Cir. 1994) 7

Burns v. *United States*, 764 F.2d 722 (9th Cir. 1985) 5

Carter v. *McHugh*, 869 F. Supp. 2d 784 (W.D. Tex. 2012) 3

Charlton v. *United States*, 743 F.2d 557 (7th Cir. 1984) 5

de Casenave v. *United States*, 991 F.2d 11 (1st Cir. 1993) 8

FEMA Trailer Formaldehyde Prods. Liab. Litig., In re, 646 F.3d 185 (5th Cir. 2011) 3

Gallardo v. *United States*, No. 12-55255, 2014 WL 1424469 (9th Cir. Apr. 15, 2014) 6, 8

Glarner v. *United States*, 30 F.3d 697 (6th Cir. 1994) 3

Goldblatt v. *National Credit Union Admin.*, 502 Fed. Appx. 53 (2d Cir. 2012) 8

Gonzalez-Bernal v. *United States*, 907 F.2d 246 (1st Cir. 1990) 5

Cases—Continued: Page

Gould v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) 5

Hall v. *United States*, No. 12-1387, 2013 WL 4047578 (D. Kan. Aug. 9, 2013) 7

Hart v. *United States*, 817 F.2d 78 (9th Cir. 1987) 5

Hill v. *United States*, No. 13-cv-307, 2014 WL 675498 (S.D. Ill. Feb. 21, 2014) 7

Hill v. *United States*, 296 Fed. Appx. 921 (11th Cir. 2008), cert. denied, 558 U.S. 874 (2009) 8

Houston v. *USPS*, 823 F.2d 896 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988) 5

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 4

Jackson v. *United States*, No. 13-1243, 2014 WL 1876240 (6th Cir. May 12, 2014) 4, 8

John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 2

Kendall v. *United States*, 107 U.S. 123 (1883) 9

Mann v. *United States*, 399 F.2d 672 (9th Cir. 1968) 5

Marley v. *United States*, 567 F.3d 1030 (9th Cir.), cert. denied, 558 U.S. 1076 (2009) 6, 8, 11

McNeil v. *United States*, 508 U.S. 106 (1993) 10

Perez v. *United States*, 167 F.3d 913 (5th Cir. 1999) 3

Reddick v. *United States*, No. 13-cv-1027, 2014 WL 87903 (W.D. Ark. Jan. 9, 2014) 7

Schmidt v. *United States*:

901 F.2d 680 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991) 4

933 F.2d 639 (8th Cir. 1991) 5

994 F.2d 843 (8th Cir. 1993), cert. denied, 510 U.S. 1071 (1994) 8

Cases—Continued: Page

Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) 2

T.L. v. *United States*, 443 F.3d 956 (8th Cir. 2006) 6

Thomas v. *United States Parole Comm'n*, No. 03-5289, 2004 WL 758966 (D.C. Cir. Apr. 7, 2004) 8

Toomey v. *United States*, No. 12-111, 2013 WL 495470 (E.D. Ky. Feb. 8, 2013) 7

Waltz v. *United States*, 415 Fed. Appx. 782 (9th Cir.), cert. denied, 132 S. Ct. 107 (2011) 8, 11

Wilson v. *United States Penitentiary Leavenworth*, 450 Fed. Appx. 397 (5th Cir. 2011) 8

Wong v. *Beebe*, 732 F.3d 1030 (9th Cir. 2013) 1

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2401(b) 1, 8

Tucker Act, ch. 359, 24 Stat. 505 .... 7, 10

Miscellaneous:

H.R. Rep. No. 276, 81st Cong., 1st Sess. (1949) 11

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In a one-two punch, the Ninth Circuit has over-ruled circuit precedent and held that both of the time bars in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), are nonjurisdictional limitations periods subject to equitable tolling. Those decisions are incorrect. The shifting treatment of the FTCA time bars within the Ninth Circuit and the fractured en banc decision in *Wong* v. *Beebe*, 732 F.3d 1030 (2013), exemplify the widespread confusion that has unfolded among and within the courts of appeals. This Court's

intervention would provide much needed clarity. Respondents' arguments to the contrary lack merit.

1. Respondents primarily contend (Wong Br. in Opp. 11-25; June Br. in Opp. 9-15) that this Court's review is not warranted because there is no circuit conflict on the questions presented. Respondents finely parse the courts of appeals' decisions and declare that the law is "settled" (Wong Br. in Opp. 15) and "uniform" (June Br. in Opp. 12). A fair reading of the numerous circuit decisions addressing the nature of the FTCA's time limits belies those assertions.

a. Respondents argue (Wong. Br. in Opp. 14; June Br. in Opp. 10-11) that at least seven courts of appeals now agree that the FTCA time limits are subject to equitable tolling. But respondents do not dispute that four of those courts have also held that the FTCA time limits are jurisdictional. See June Pet. 21. Those decisions squarely conflict with decisions of the Third, Seventh, and Ninth Circuits holding that the FTCA time limits are *not* jurisdictional. *Id.* at 20-21.

Respondents assert that the decisions are nevertheless "uniform" because the courts simply used "different legal reasoning to arrive at the same conclusion." Wong Br. in Opp. 15; see June Br. in Opp. 11-12. Respondents, however, do not dispute that this Court's recent case law renders any such "reasoning" fatally flawed. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (*Auburn Regional*) (if a time bar is "jurisdictional," there can "be no equitable tolling"); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-134 (2008). Although Wong suggests (at 16-17) that this Court should wait and see how those four circuits choose to reconcile their irreconcil-

able holdings, the current state of the law presents a square conflict warranting the Court's review.

June attempts (at 11) to group the Fifth and Sixth Circuits with the others discussed above but, as explained in the certiorari petitions, cases in those circuits go both ways.[1] See June Pet. 22. Respondents' attempts to reconcile the competing case law within those circuits are unpersuasive. June contends (at 13-14) that *Perez* v. *United States*, 167 F.3d 913 (1999), provides the "governing rule" in the Fifth Circuit and that *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185 (2011), decided only "the antecedent issue" of when the claim accrued. But immediately after discussing accrual, the court "also" rejected the plaintiff's "equitable tolling" claim. *Id.* at 190-191. District courts in the Fifth Circuit thus describe circuit law as "unsettled." *Carter* v. *McHugh*, 869 F. Supp. 2d 784, 787-788 (W.D. Tex. 2012).

Respondents also contend (Wong Br. in Opp. 18-20; June Br. in Opp. 14-15) that *Glarner* v. *United States*, 30 F.3d 697 (1994), is controlling precedent in the Sixth Circuit. But just this month the Sixth Circuit again acknowledged, in what will be a published decision, that the questions "whether equitable tolling applies to the FTCA's limitations period" and whether "the time limitations in the FTCA are jurisdictional in nature" have "prompted some variance within this

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[1] June goes further still and suggests (at 11 n.4) that "even the circuits that have not formally reached the issue indicate that tolling is proper." But those courts simply assumed *arguendo* that equitable tolling may be available, while expressly noting that the issue remained open and undecided. See June Pet. 22. That does not constitute tacit approval.

circuit." *Jackson* v. *United States*, No. 13-1243, 2014 WL 1876240, at *6 & n.4 (May 12, 2014).

b. As the government explains in its petitions, the courts of appeals uniformly treated the FTCA time limits as jurisdictional for decades after the statute's enactment. See June Pet. 13 n.5, 20. June ignores those cases entirely.[2] Wong acknowledges them, but argues that the courts did not hold that "*because* the [S]ection 2401(b) limitations periods were jurisdictional, equitable tolling was not available." Br. in Opp. 21 (emphasis added). Even if that were true, it is not clear why the courts' failure to link the two principles has any bearing on the questions presented here.

Contrary to Wong's suggestion (at 21 n.15), the "jurisdictional" label was not merely descriptive; it had real consequences. For example, in *Schmidt* v. *United States*, 901 F.2d 680, 682 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991), neither party could establish when the administrative notice denying plaintiffs' claim had been mailed. The court initially dismissed the FTCA claim because the plaintiffs had the "burden of establishing subject matter jurisdiction" and they failed to satisfy that burden. *Id.* at 683. When the panel later held that "the FTCA's statute of limitations is not jurisdictional," following this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), it reversed because the government now bore the burden of establishing the nonju-

[2] June's congressional acquiescence argument (at 9, 12-13) cannot be squared with that case law. When Congress amended the FTCA's "presentment requirement" (*id.* at 12), the courts of appeals had consistently held that the time limits were jurisdictional. That Congress did nothing to alter that understanding cuts strongly against respondents' position.

risdictional limitations defense. *Schmidt* v. *United States*, 933 F.2d 639, 640 (8th Cir. 1991); see also, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). Moreover, as Wong acknowledges (at 22 n.15), several courts of appeals *did* hold that equitable tolling of the FTCA time limits is unavailable. See also *Burns* v. *United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Houston* v. *USPS*, 823 F.2d 896, 902 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988).[3]

Wong dismisses those cases (at 20-21) because they were decided before *Irwin*. But this Court's intervening decisions are a significant reason why the law remains unsettled. The Ninth Circuit provides a prime example. For decades after the FTCA's enactment, the Ninth Circuit characterized the FTCA time limits as "jurisdictional," attached jurisdictional consequences to untimely claims, and held that equitable tolling was not available. See, *e.g.*, *Hart* v. *United States*, 817 F.2d 78, 80 (1987); *Burns*, 764 F.2d at 724; *Mann* v. *United States*, 399 F.2d 672, 673 (1968). After *Irwin*, the Ninth Circuit changed course and held that equitable tolling was available for FTCA

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[3] Contrary to Wong's contention (at 22 n.15), neither the First nor the Fourth Circuit actually "permitted tolling." The discussions of government misconduct were relevant only to determining the appropriate accrual date. See *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 248-250 (1st Cir. 1990); *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-747 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991). And Wong's discussion of *Charlton* v. *United States*, 743 F.2d 557 (7th Cir. 1984), ignores the plaintiff's "first count"—which involved the six-month statutory deadline, not a regulation governing exhaustion, and which resulted in a dismissal "for lack of subject matter jurisdiction." *Id.* at 558-559.

claims. *Alvarez-Machain* v. *United States*, 107 F.3d 696, 701 (1996), cert. denied, 522 U.S. 814 (1997). Then, after *John R. Sand & Gravel*, the Ninth Circuit reverted to its initial assessment and held (again) that the FTCA time limits are jurisdictional and are not subject to equitable tolling. *Marley* v. *United States*, 567 F.3d 1030, 1032, 1034-1038, cert. denied, 558 U.S. 1076 (2009). Now, just a few years later, the Ninth Circuit has reversed course yet again and held that the time limits are not jurisdictional and that they are subject to equitable tolling. Wong Pet. App. 1a-102a; June Pet. App. 1a-2a; *Gallardo* v. *United States*, No. 12-55255, 2014 WL 1424469, at *4 (9th Cir. Apr. 15, 2014).[4]

c. The longstanding confusion among and within the courts of appeals cannot be dismissed as mere intracircuit conflicts. Wong Br. in Opp. 18; June Br. in Opp. 15. That seriously understates the duration and magnitude of the problem. As the sheer number of published appellate decisions cited in the petition-stage briefs highlight, these issues have arisen with remarkable frequency. And as courts continue to consider the issues or reconsider circuit precedent in light of whatever might be the Court's most recent decision on the general subject, the questions presented will continue to burden the judiciary and the United States. The Court should definitively resolve the question whether the time bars for tort claims against the United States under the FTCA are jurisdictional and not subject to equitable tolling, just as it did in *John R. Sand & Gravel* with respect to the

[4] Such shifting (and, at times, incompatible) jurisprudence is not unique to the Ninth Circuit. See, *e.g.*, *T.L.* v. *United States*, 443 F.3d 956, 959-961 (8th Cir. 2006).

other general category of monetary claims against the United States, *non*-tort claims under the Tucker Act.[5]

2. Wong contends (at 11-13, 25-28) that most of the courts of appeals' decisions involve the two-year deadline for filing an administrative claim, not the six-month court filing deadline; that the United States has distinguished the two FTCA time limits in prior filings; and that "[d]isputes about tolling of the six-month limitations period" are "extremely uncommon." Those arguments are unavailing and do not counsel against further review of the decision in *Wong*.

As an initial matter, there has been no "paucity of tolling disputes" (Wong Br. in Opp. 27) involving the six-month deadline. In the last two years alone, dozens of district courts have adjudicated requests to toll the FTCA's six-month time bar in decisions that (while often unpublished) are readily available on Westlaw.[6] And the Tenth Circuit is not the only court of appeals to have addressed the issue. *Id.* at 11-12, 26-27 (discussing *Benge* v. *United States*, 17 F.3d 1286

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[5] Another petition for a writ of certiorari raising the question of equitable tolling of the FTCA's two-year time bar is currently pending before the Court. See *Sanchez* v. *United States*, No. 13-1249 (filed Apr. 14, 2014).

[6] See, *e.g.*, *Alexander* v. *United States*, No. 14-cv-0137, 2014 WL 1871859, at *2 (S.D. Cal. May 5, 2014); *Abdelmoneim* v. *Department of the Army*, No. 12-cv-5268, 2014 WL 1277905, at *3 (E.D.N.Y. Mar. 27, 2014); *Hill* v. *United States*, No. 13-cv-307, 2014 WL 675498, at *1 (S.D. Ill. Feb. 21, 2014); *Reddick* v. *United States*, No. 13-cv-1027, 2014 WL 87903, at *2 (W.D. Ark. Jan. 9, 2014); *Hall* v. *United States*, No. 12-1387, 2013 WL 4047578, at *2 (D. Kan. Aug. 9, 2013); *Adderson* v. *United States*, No. 12-cv-395, 2013 WL 3717731, at *2 (N.D. Fla. July 16, 2013); *Toomey* v. *United States*, No. 12-111, 2013 WL 495470, at *2 (E.D. Ky. Feb. 8, 2013).

(10th Cir. 1994)). As Wong appears to recognize (at 12-13), the Ninth Circuit has confronted requests to equitably toll the six-month time bar at least three times over the last four years. See Wong Pet. App. 1a-102a; *Waltz* v. *United States*, 415 Fed. Appx. 782 (9th Cir.), cert. denied, 132 S. Ct. 107 (2011); *Marley*, *supra*. And at least seven other courts of appeals have considered similar claims over the last two decades.[7]

As Wong correctly notes (at 8-11, 12-13), the United States did argue against the Court's review in two earlier cases involving the FTCA's six-month court filing deadline. The government noted that there was "no direct conflict that warrants this Court's intervention" because (i) the conflicting cases did not involve the "six-month limitations period," and (ii) the Court had only recently decided *John R. Sand & Gravel* and most courts had not had the opportunity to consider that decision. Br. in Opp. at 8-10, *Marley*, *supra* (No. 09-270); see Br. in Opp. at 9-10, *Waltz, supra* (No. 10-1436). In the ensuing years, however, no court has seen fit to distinguish between the six-month and the two-year time limits in Section 2401(b), and the Ninth Circuit has now expressly rejected any such distinction. See June Pet. App. 1a-2a; *Gallardo*,

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[7] See, *e.g.*, *de Casenave* v. *United States*, 991 F.2d 11, 12-14 (1st Cir. 1993); *Goldblatt* v. *National Credit Union Admin.*, 502 Fed. Appx. 53, 55-56 (2d Cir. 2012); *Wilson* v. *United States Penitentiary Leavenworth*, 450 Fed. Appx. 397, 399 (5th Cir. 2011) (per curiam); *Jackson*, 2014 WL 1876240, at *2, *5-*7 (6th Cir.); *Schmidt* v. *United States*, 994 F.2d 843, 843 (8th Cir. 1993) (per curiam), cert. denied, 510 U.S. 1071 (1994); *Hill* v. *United States*, 296 Fed. Appx. 921, 921 (11th Cir. 2008) (per curiam), cert. denied, 558 U.S. 874 (2009); *Thomas* v. *United States Parole Comm'n*, No. 03-5289, 2004 WL 758966, at *1 (D.C. Cir. Apr. 7, 2004) (per curiam).

2014 WL 1424469, at *4. Six years after this Court's decision in *John R. Sand & Gravel*, uncertainty remains. The Court now has the opportunity to resolve both questions and to bring much needed clarity to this area of the law.

3. The twin decisions of the Ninth Circuit holding that both of the FTCA time bars are nonjurisdictional limitations periods subject to equitable tolling are wrong. To the extent Wong addresses the merits at all (at 29-31), she focuses on the phrase "shall be forever barred" in isolation and ignores the historical and contextual significance of that specific language in statutes authorizing suits against the United States itself for money damages: "Section 2401(b) contains emphatic language ('shall be forever barred') that was patterned after the jurisdictional limitation on Tucker Act suits"—which this Court has consistently held to be jurisdictional in a line of cases beginning with *Kendall* v. *United States*, 107 U.S. 123 (1883), and reaffirmed in *John R. Sand & Gravel*—and that was "historically linked to the FTCA's jurisdiction-granting provision." Wong Pet. 17 (citations omitted).

June attempts a more extended defense of the decision below (at 16-28), but she too fails to acknowledge the weight of countervailing authorities. For example, June relies heavily on the presumption in favor of equitable tolling (arguing that the presumption is "even stronger" in the context of administrative filings than it is for "court action[s]"), *id.* at 9-10, 16-18, 27, without acknowledging this Court's recent decision in *Auburn Regional* rejecting that presumption, and equitable tolling, in the context of a filing with an administrative agency. See June Pet. 15. June then makes an argument concerning the text,

structure, and purposes of the two-year time limit for filing an administrative claim, Br. in Opp. 18-22, without appreciating the significance of the particular text Congress chose and without placing the text, structure, and purposes of the time bars in their proper statutory and historical contexts—which powerfully support their jurisdictional force. See June Pet. 7-13.

As for the close relationship between the FTCA and the Tucker Act, June dismisses *John R. Sand & Gravel* as "sui generis." Br. in Opp. 23. But that misses the fundamental point. Congress enacted and subsequently amended the FTCA time limits against the backdrop of this Court's precedents declaring the directly parallel Tucker Act time limit to be jurisdictional. And when June does turn to the statutory history, she does not dispute that the FTCA time limits *were* jurisdictional as enacted. Her only response is that the two-year deadline for filing an administrative claim did not exist at that time. *Id.* at 24-25. But the administrative claims-presentment and exhaustion requirements and accompanying two-year deadline were plugged into the FTCA's already existing framework, and indeed the claims-presentment and exhaustion requirements are treated as jurisdictional prerequisites to suit. See *McNeil* v. *United States*, 508 U.S. 106, 109-113 (1993); June Pet. 15-16. Understood in this broader context, Congress clearly intended to enact absolute, jurisdictional time bars for FTCA claims.[8]

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[8] June also contends that "Congress crafted the time limit on presenting administrative claims with equity in mind" (at 17-18), but the 1949 House Report on which she relies merely explains why Congress extended the suit-filing period from one year to two years—*i.e.*, because "the existing limitation of 1 year" was "not in

4. Finally, respondents both argue against consolidation. Wong Br. in Opp. 32-34; June Br. in Opp. 30-32. Respondents contend that the government's request for consolidation "is in some tension" with its "position in *Marley*," "*Waltz*" and *June*. Wong. Br. in Opp. 33; June Br. in Opp. 30-32. Not so. The government's primary argument then and now is that "both the two-year and the six-month limitations provisions of 28 U.S.C. 2401(b) are properly considered jurisdictional in nature, and thus are not subject to equitable tolling." Br. in Opp. at 9, *Marley*, *supra* (No. 09-270); Br. in Opp. at 10, *Waltz, supra* (No. 10-1436). The government has suggested, in the alternative, certain distinctions between the FTCA's two time limits—but no court of appeals has adopted those distinctions and the Ninth Circuit in *June* (and in a later published decision) expressly rejected them. See p. 8, *supra*. To be sure, the parties here may seek to highlight those differences if the Court grants review. But, as the government's petitions demonstrate, the arguments substantially overlap. And the Court could accommodate any differences between respondents by allowing division of their argument time.

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consonance with the practice prevailing in analogous departments of the law." H.R. Rep. No. 276, 81st Cong., 1st Sess. 3-4 (1949). The Report says nothing about equitable tolling, let alone equitable tolling of the not-yet-enacted two-year mandatory administrative filing deadline.

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For the foregoing reasons, and those stated in the petitions for a writ of certiorari, the petitions should be granted and the cases consolidated for briefing and argument.

Respectfully submitted.

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MAY 2014