No. 13-1074

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KWAI FUN WONG,

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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STATEMENT

The Federal Tort Claims Act (FTCA) provides an action against the United States for certain torts committed by federal officials. Section 2401(b) contains two separate statutes of limitations. First, a claim must be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). Second, any action must be "begun within six months after the date of mailing ... of final denial of the claim by the agency to which it was presented." *Id.* The question presented in the instant case is whether the six-month suit-filing limitations period is subject to equitable tolling. The petition in *United States v. June*, No. 13-1075, presents the distinct question of whether the two-year claim-presentation deadline is subject to such tolling.

(1) Respondent Kwai Fun Wong is a Tien Tao minister, and since 1999 has been the spiritual leader – the Matriarch – of the Wu-Wei Tien Tao Association, a religious organization with members in the United States, Canada, Australia, Hong Kong, and Taiwan. She was born in Hong Kong and is a citizen of the United Kingdom.

In July 1982, Wong entered the United States with a B-2 visitor visa. Subsequently the Immigration and Naturalization Service (INS) approved an I-360 petition filed by the California Tien Tao Association, permitting Wong to remain in the United States as a religious worker/minister. She continued in the

United States without incident from 1982 until 1999, performing a wide range of religious functions for the Wu-Wei Tien Tao Association, conducting ceremonies, evangelical meetings and memorial services, and providing counseling and spiritual guidance to members of her faith.

In March 1999, the then Patriarch of the Wu-Wei Tien Tao Association, Qian Rien, died. As a minister of the Association and as Qian Rien's spiritual successor as the leader of the group, Wong was obligated to accompany Qian Rien's body back to Hong Kong and to arrange for his funeral. Eighteen days later, upon completion of her religious obligations in Hong Kong, Wong returned to the United States; she presented herself to INS and disclosed the emergency which had required her to briefly leave the country. The INS paroled her into the United States. In April 1999, Wong filed a petition for an adjustment to permanent resident status.

On June 10, 1999, INS sent Wong an "Employment Authorization" notice, advising her to come to a designated INS office in Portland, Oregon to pick up an Employment Authorization Document. This notice was a sham, a trick that violated INS policy. (ER 325). Unbeknownst to Wong, the INS a few weeks earlier had issued a warrant for Wong's arrest, having determined that her reentry into the United States was unlawful. When Wong went to the INS office, she was interrogated about her recent return

from Hong Kong, summarily arrested, and taken to the Multnomah County jail.[1]

The INS has a written policy that prohibits subjecting detainees such as Wong to strip searches. Notwithstanding that policy, the complaint alleges that INS well knew that officials at the jail were strip searching INS detainees. Wong was subjected to three strip searches in the Multnomah County jails. The strip searches included visual body cavity inspections of Wong while she was unclothed. There were men in the room during the strip searches, separated from Wong only by a fabric curtain. On June 22, 1999, INS served Wong with a removal order and shortly thereafter she flew back to Hong Kong. Wong has not been permitted to return to the United States since that time, except to be deposed in the instant litigation.

The manner in which Wong was treated caused serious harm to the Wu-Wei Tien Tao Association. Followers of the Association began to doubt Wong's spiritual leadership. The President of the Association explained that some followers

> don't recognize [Wong] saying that if [Wong] was the real Matriarch why had she been treated by the United States government

[1] Multnomah County is the county in which the city of Portland, Oregon is located.

> this way, the detention, the strip search, and the deportation. I know many of them don't recognize [Wong] based on this. If you're the real Matriarch [you] will have been taken care of by heaven.

(ER 331-34). One of the Association's subsidiary organizations, Chong Hua Sheng Mu Gong, refused to recognize Wong's authority and leadership as a result of the manner in which Wong had been treated by the government. (ER 332-33, 422).

(2) On May 18, 2001, Wong and the Wu-Wei Tien Tao Association filed an action in federal court against various federal officials, seeking damages based on Wong's removal and the conditions of her confinement prior to removal. App. 5a, 110a-111a, 131a. That complaint did not assert any claim under the Federal Tort Claims Act (FTCA). On the same day, Wong also presented a claim to the Immigration and Naturalization Service (INS) pursuant to the FTCA. Under the terms of the FTCA, Wong could not commence a civil action under the FTCA until six months after the presentation of that administrative claim.

On November 14, 2001, anticipating that her administrative claim would be sufficiently exhausted on November 18, 2001, Wong filed a motion seeking leave to amend her complaint to add an FTCA claim against the United States. *Id.* at 5a-6a, 111a, 112a. Wong asked that the court grant her motion "on or after November 20, 2001," at which time she would be entitled to treat the agency's failure to act as a denial.

Id. at 51a-61a, 111a. The United States opposed the motion. On December 3, 2001, the INS issued a final denial of Wong's administrative claim. Respondent then had six months (until June 3, 2002), to bring an action in federal court under the FTCA. 28 U.S.C. § 2401(b). That would doubtless have occurred as a matter of course if the court had acted promptly on Wong's already pending motion to amend her complaint.

But final action on Wong's motion did not occur for another seven months. The motion to amend was referred to a magistrate judge along with several other more complex matters. On April 5, 2002, almost five months after Wong had filed her motion to amend, the magistrate judge recommended that the motion be granted. App. 130a, 182a-185a. The government did not object to that portion of the magistrate judge's findings and recommendations, but it did object to other parts; as a consequence, the district judge was required to review the findings and recommendations. *Id.* at 114a-115a. On June 25, 2002, three weeks after the six-month deadline had passed, the district court adopted the magistrate judge's findings and recommendation. *Id.* at 128a-129a. On August 13, 2002, Wong filed her amended complaint, adding a negligence claim against the United States under the FTCA.

The United States moved for summary judgment arguing, among other things, that the district court lacked jurisdiction over the FTCA claim because it was not timely filed. The magistrate judge disagreed, and the district court adopted her findings and

recommendation. *Id.* at 106a-107a, 112a-117a. The court stressed that

> [t]he government was not faced with the presentation of stale claims and has made no showing of any prejudice whatsoever. To the contrary, the government was fully apprised of plaintiffs' claims by their administrative filing, had full notice of plaintiffs' intended FTCA claim just prior to the expiration of the six-month administrative review period, and was aware that plaintiffs were seeking to add the FTCA claim to this case *after* expiration of the six-month administrative review period.

Id. at 114a (emphasis in original). The district court reasoned that

> [a]ccepting the position of the government on this issue would effectively impose on plaintiffs a court-created Catch-22 and make a mockery of this court's prior ruling allowing the filing of the FTCA claim in this action, while doing nothing to serve the intended purpose of the statute of limitations in preventing the assertion of stale claims.... In essence, the government seeks to deny plaintiffs an opportunity to present their FTCA claims due solely to the delay inherent in the Magistrate Judge system.... The government had notice of the intended FTCA claims with the filing of the motions to amend and now simply seeks to gain an unwarranted advantage.

Id. at 115a-117a. Accordingly, the district court concluded that the six-month limitations period for filing Wong's FTCA suit should be equitably tolled for the 81 days between April 5, 2002, when the magistrate judge issued her findings and recommendations, and June 25, 2002, when the district judge adopted those findings and recommendations. *Id.* at 117a.

Several years later, while the case was still pending in the district court, the Ninth Circuit decided *Marley v. United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). *Marley* held that the six-month suit-filing limitation period is not subject to equitable tolling. Relying on *Marley*, the United States moved for reconsideration. The district court granted the motion; it held in light of *Marley* that Wong's FTCA claim was untimely and that the court therefore lacked jurisdiction over that claim.

(3) On appeal the panel invited the parties to seek hearing en banc regarding whether *Marley* had been correctly decided. A majority of the en banc court held that the six-month time bar is not jurisdictional (App. 1a-36a), and that tolling is available in appropriate cases (*id.* at 36a-43a), including in Wong's circumstances. *Id.* at 43a-48a. Chief Judge Kozinski, in a concurring opinion, concluded that the six-month limitations period is jurisdictional, but held that Wong's district court reply memorandum, filed in December 2001 after the final agency action, was sufficient to satisfy the statutory requirement. *Id.* at

48a-52a.[2] Judges Tashima and Bea filed separate dissenting opinions, in which they both joined. *Id.* at 52a-102a.

INTRODUCTION

This Court has already twice denied review of the specific question presented in this case, whether the six-month suit-filing deadline in section 2401(b) is subject to equitable tolling. *Waltz v. United States*, 132 S.Ct. 107 (2011)[3]; *Marley v. United States*, 558 U.S. 1076 (2009).[4] In both cases the United States

[2] App. 50a ("but the court took more than seven months to act on this routine motion – a delay Wong didn't cause and couldn't have foreseen."), 50a ("The government suggests that, instead of waiting for the district court to act on her motion, Wong should have refiled it. Yeah, right. How many litigants have the nerve to vex a federal judge with a clone motion while the original is still pending?"), 52a ("The federal judiciary caused Wong's problem, and in good conscience we should use such powers as we have to make it up to her.").

[3] Brief for Respondents in Opposition, No. 10-1436, i, available at 2011 WL 3010264:

> Under the Federal Tort Claims Act, "[a] tort against the United States shall be forever barred" unless a suit "is begun within six months after the date of mailing ... of notice of final denial of the claim" by the relevant agency. 28 U.S.C. 2401(b). The question presented is whether the six-month deadline prescribed by Section 2401(b) for filing a complaint in district court is subject to equitable tolling.

[4] Petition for a Writ of Certiorari, No. 09-270, i, available at 2009 WL 2864363:

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successfully argued that certiorari should not be granted. In *Waltz* the government explained that "[t]his Court recently denied certiorari in an essentially identical case.... *Marley v. United States*, cert. denied, 130 S.Ct. 796 (2009). Further review is similarly unwarranted here." Brief for the Respondents in Opposition, *Waltz v. United States*, No. 10-1436, 3. Further review is also unwarranted in the instant essentially identical case.

In *Marley* and *Waltz* the private petitioners argued that the decision in *Marley*, which had held that the six-month suit-filing deadline is not subject to equitable tolling, conflicted with decisions in several other circuits which held that equitable tolling is available with regard to the two-year claim-presentment deadline in section 2401(b). In opposing review in *Marley* and *Waltz*, the United States insisted that the availability of tolling of the six-month

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28 U.S.C. § 2401(b) establishes a six-month statute of limitations for damage actions brought against the United States under the Federal Tort Claims Act. Is the statute of limitations:

(1) jurisdictional, and therefore a bar to the application of equitable limitations, as the Ninth Circuit has held;

(2) not jurisdictional, and therefore not a bar to the application of equitable limitations, as the First, Third, Fifth, and Sixth Circuits have held; or

(3) jurisdictional, but also not a bar to the application of equitable limitations, as the Eighth Circuit has held?

suit-filing deadline presents issues distinct from those raised by tolling the two-year claim-presentment deadline. For that reason, the government insisted, decisions permitting tolling of the two-year limitation period did not conflict with the Ninth Circuit decisions in *Marley* and *Waltz*, which had barred tolling of the six-month period.[5] The instant case, like *Marley* and *Waltz*, concerns only the six-month limitations period; the Ninth Circuit en banc decision in the instant case overturned that circuit's previous decision in *Marley*. Yet the government's petition in this case, like the petitions it successfully opposed in *Marley* and *Waltz*, now relies largely on decisions regarding the two-year limitations period, citing many of the same cases which it emphatically distinguished in the briefs in opposition which the United States filed in 2009 and 2011.

In *Marley* and *Waltz* the United States also argued that, even if the availability of tolling of the six-month period were indistinguishable from the availability of tolling of the two-year period, review by this Court would be premature.[6] At that point in time, the Ninth Circuit had rejected tolling of the six-month

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[5] Brief of the United States in Opposition, *Marley v. United States*, 8-10, available at 2009 WL 3614462; Brief for the Respondents in Opposition, *Waltz v. United States*, 3-4, 7-9, available at 2011 WL 3010264.

[6] Brief of the United States in Opposition, *Marley v. United States*, 10; Brief for the Respondents in Opposition, *Waltz v. United States,* 10.

period, while numerous other circuits had permitted tolling of the two-year period. The government argued that the disagreement might in time disappear; it suggested that the circuits permitting tolling of the two-year period might well reconsider that holding in light of *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130 (2008). The conflict that existed between these two lines of cases has indeed disappeared, but not for the reason anticipated by the government. The circuits that in 2009 and 2011 permitted tolling of the two-year limitations period continue to do so; none of those circuits have abandoned that rule in the wake of *John R. Sand & Gravel*. But the Ninth Circuit in the instant case overturned *Marley*, and now permits tolling of the six-month limitations period, thus eliminating the difference in approach that existed at the time of the petitions in *Marley* and *Waltz*.

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE AVAILABILITY OF EQUITABLE TOLLING OF THE SIX-MONTH SUIT-FILING LIMITATIONS PERIOD

The United States does not contend that there is any circuit conflict in decisions applying the six-month suit-filing deadline itself. The government refers to only a single 20-year old decision outside the Ninth Circuit which presented considered this specific issue. *Benge v. United States*, 17 F.3d 1286, 1288 (10th Cir. 1994). Petitioner describes the Tenth Circuit decision in *Benge* as "assuming arguendo that court[s] may equitably toll [the] six-month deadline."

Pet. 24.[7] The government does not suggest that the Tenth Circuit decision in *Benge* provides a basis for granting review in the instant case, which held that the six-month deadline is subject to such tolling.

The petition (like the unsuccessful petitions in *Marley* and *Waltz*) rests instead on decisions in other circuits regarding the distinct two-year claim-presentment deadline. But in *Marley* and *Waltz* the government insisted that the availability of tolling of the six-month period was so distinct from the availability of tolling of the two-year period that the Ninth Circuit decision rejecting the former was not inconsistent with decisions in several other circuits permitting the latter. In its brief in opposition in *Marley,* the United States asserted that "the decision of the [Ninth Circuit] court of appeals ... does not conflict with any decision ... of any other court of appeals." Brief of the United States in Opposition, *Marley v. United States*, 5.

> Petitioner asserts ... that this Court's review is warranted to resolve a conflict in authority on the question presented. But none of the cases petitioner cites involves the six-month limitations period here at issue ... ; all of the

[7] The government's description of *Benge* as only "assuming arguendo" that tolling was permissible seems unduly grudging. The Tenth Circuit held that "[it] is settled law that in a narrow range of situations a federal statute of limitations may be equitably tolled. *See Irwin v. Veterans Admin.,* 498 U.S. 89, 94-96 ... (1990)...." 17 F.3d at 1288.

> petitioner's cases instead involve the FTCA's two-year time limit for presenting a claim to the appropriate federal agency in the first instance.... Although the FTCA's six-month limitations period and the two-year limitations period are contained in the same section of 28 U.S.C. 2401, they are not identical. The two-year period is applicable to administrative claims, and is principally designed to provide the relevant agency an opportunity to consider and settle the claim before the claimant seeks judicial review. The FTCA imposes no time limits on an agency's disposition of an administrative claim.... In contrast, the six-month period is a strict limitation on the filing of a claim in federal court. It is designed, among other things, to serve a systematic interest in judicial efficiency.... The decision below, in short, creates no circuit conflict that warrants this Court's intervention.

Id. at 8-10. The government advanced the identical analysis in *Waltz*. Brief for the Respondents in Opposition, *Waltz v. United States*, 4, 7-9. Only six months ago, the United States asserted in a brief in *June v. United States*, 2013 WL 6773664 (9th Cir. Dec. 24, 2013), that the availability of tolling of the two-year period presents a legal question that is distinct from the availability of tolling of the six-month period.[8]

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[8] Supplemental Brief for Appellee, *June v. United States*, No. 11-17776 (9th Cir.), 5-6 ("*Wong* ... addressed the Federal Tort

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Even if the decision below regarding tolling of the six-month period is compared to decisions regarding tolling of the two-year period, there still is no reason for this Court to grant review. The government effectively acknowledges that at least seven circuits hold that the two-year limitation period is subject to equitable tolling. Pet. 23.[9] That is the rule in the First, Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits. *Id.* The United States does not contend that the established law in any of the remaining circuits bars equitable tolling of the two-year or six-month periods. The dissenting opinions in the court below did not claim that there were decisions in any other circuit holding that either of the section 2401(b) time limitations is not subject to tolling. App. 84a

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Claims Act's six-month deadline for filing suit once the government has issued an administrative decision.... *Wong* did not address the two-year deadline for initiating a tort against the United States. The two-year time bar was passed against a different background and serves different functions than the six-month provision. *Wong* did not address the historical, contextual, and structural features that are unique to the two-year time bar."), 7-8 ("nothing in *Wong* is 'clearly irreconcilable' with this court's prior holdings that the two-year time bar is jurisdictional. *Wong* concerned a different time limit passed against a different background that serves a different function.... [T]he history and context of [the two-year time bar] [i]s distinct from the six-month filing deadline...."). That brief was filed in November, 2013.

[9] "Three courts of appeals ... now hold that FTCA time limits are nonjurisdictional and are subject to equitable tolling.... Four other courts of appeals now hold or (perhaps) suggest that the FTCA time limits are jurisdictional, but are nevertheless subject to equitable tolling...."

n.21 (Bea, J., dissenting) (arguing that the "out of circuit authority ... for the proposition that § 2401(b) is subject to tolling ... [is] not persuasive"). The First Circuit has correctly observed that "[t]he other circuits generally explicitly agree or simply take it as given that equitable tolling defenses are applicable in the context of the FTCA." *Rakes v. United States,* 442 F.3d 7, 25 (1st Cir. 2006); see *T.L. v. United States,* 443 F.3d 956, 961 (8th Cir. 2006) ("[w]e ... align ourselves with several other circuits in holding that considerations of equitable tolling" may be considered by court). This is not, as the petition suggests, "an area ... mired in uncertainty" (Pet. 10), but an area of settled law.

The government suggests that there is "widespread conflict" (Pet. 22) because the courts of appeals that permit equitable tolling have articulated different rationales for arriving at that conclusion. The Third, Seventh and Ninth Circuits "hold that FTCA time limits are nonjurisdictional and are subject to equitable tolling." Pet. 23. On the other hand, according to the government, the First, Fourth, Eighth and Tenth Circuits apply equitable tolling even though they "hold or (perhaps) suggest that the FTCA time limits are jurisdictional." *Id*. But where the courts of appeals agree on the controlling legal standard, it is of no importance whether – as is often the case – those courts have employed different legal reasoning to arrive at the same conclusion. Where, as here, a particular issue is settled law in the lower courts, this Court does not grant review merely to decide which circuit court articulated the most cogent

justification for that consensus interpretation of the law.

Petitioner objects that if the First, Fourth, Eighth or Tenth Circuit held that the FTCA time limits are jurisdictional, but nonetheless permit tolling, that would be "inconsistent with this Court's decisions concerning the nature of a jurisdictional limitation." Pet. 23. (Of course, the government also objects that the decisions holding that the time limitations are not jurisdictional are also wrongly decided.) The United States may intend to suggest that a circuit that has held that the time limitations are jurisdictional and yet also subject to tolling would now reconsider that decision in light of *John R. Sand & Gravel.*[10] But even if such a circuit were in the future to conclude that under *John R. Sand & Gravel* a limitations period could not be both jurisdictional and subject to tolling, there is no way of knowing whether that court would resolve that inconsistency by abandoning its holding that the limitations are jurisdictional (thus preserving the consensus on

[10] At one time it was the position of the United States that the limitations periods in section 2401(b), although jurisdictional in nature, were nonetheless subject to equitable tolling. Brief for Defendant Appellee, *Marley v. United States*, No. 06-36006 (9th Cir.), 54 ("The United States submits that the Court should find that the FTCA's statute of limitations is jurisdictional but subject to equitable tolling in appropriate cases.... [T]he Eighth Circuit has recently found that the FTCA's statute of limitations is jurisdictional but that the rule of equitable tolling applies is one of the 'terms' of the government's consent to be sued. *T.L. v. United States*...."), available at 2007 WL 1308517.

tolling) or by repudiating its rule that tolling is available (thus creating a circuit conflict).[11] This Court grants review only to resolve existing circuit conflicts, not to address issues which might conceivably be the subject of such a conflict at some point in the future. In *Marley* and *Waltz* the government argued that it would be "premature" to grant review of any then-existing circuit conflict because it was possible that the circuits which permitted tolling might reconsider that holding in light of *John R. Sand & Gravel* and thus *eliminate* the then-existing circuit conflict. It would be even more premature to grant review in the absence of any current conflict because of the possibility that circuits which today permit tolling will reconsider that holding and *create* a conflict at some point in the future.

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[11] The First Circuit recently indicated that if this Court's decisions mean that a jurisdictional limitations period cannot be tolled, it would abandon its prior holding that the two-year limitations period is jurisdictional, and retain tolling.

> The Supreme Court's most recent guidance on what is "jurisdictional" suggests that we may have erred in presuming that subject matter jurisdiction hinged on compliance with the FTCA's deadlines for presenting claims.... If we did so err, however, it does not follow that we also erred in presuming that equitable tolling can stay the running of the FTCA's deadlines. To the contrary, classifying the deadlines as non-jurisdictional enhances the case for finding equitable tolling to be available.

Sanchez v. United States, 740 F.3d 47, 54 (1st Cir. 2014).

Petitioner notes that "[t]hree circuits have expressly declared the question open and declined to decide it." Pet. 24. "The state of the law is thus unsettled...." *Id*. But most legal issues have not been definitively addressed by all twelve geographical circuits, and there are countless issues which one or more courts of appeals have "declared open and declined to decide." The fact that a given question is still percolating in the lower courts is often a reason to deny review even when a circuit conflict has arisen; assuredly that same circumstance cannot provide a basis for review when no such circuit conflict yet exists.

With regard to decisions in the Fifth and Sixth Circuits, the petition comments that "[t]wo other circuits have conflicting case law that is difficult to reconcile." Pet. 24; see *id*. at 10-11 ("an area that has been mired in uncertainty"), 22 ("the current state of the law can best be described as widespread ... confusion"). But the existence of disagreements *within* a circuit is not a ground for review by this Court. "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). In the Sixth Circuit, the controlling precedent remains the decision in *Glarner v. U.S. Dep't of Veterans Admin.,* 30 F.3d 687 (6th Cir. 1994). Relying on this Court's opinion in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *Glarner* rejected as "incorrect" the government's contention that the two-year limitation period "is a

jurisdictional statute of limitations that cannot be equitably tolled." 30 F.3d at 701.[12] Although some unreported Sixth Circuit decisions since *Glarner* have assumed that the two-year limitation is jurisdictional, those unreported decisions have no precedential value; district courts in the Sixth Circuit continue to recognize *Glarner* as binding authority.[13] In *Bazzo v. United States*, 494 Fed.Appx. 545 (6th Cir. 2012), on which the petition relies, the Sixth Circuit expressly declined to act on the government's request [14] that it

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[12] Prior to *Irwin* the Sixth Circuit had rejected equitable tolling of the two-year limitation period on the ground that the courts "are not free to enlarge the consent to be sued...." *Rogers v. United States*, 675 F.2d 123, 124 (6th Cir. 1982). This Court's subsequent decision in *Irwin* expressly rejected that argument, holding that the effect of equitable tolling was too minor to be characterized as an enlargement of the scope of consent. 498 U.S. at 457.

[13] *Sykes v. United States*, 2011 WL 3739017 at *8 (S.D.Ohio July 22, 2011) ("In light of the precedent of *John R. Sand,* the United States ... asserts that the 'precedential value of the *Glarner* case is suspect and no longer good law.' ... The Sixth Circuit has not reexamined its holding in *Glarner* in light of the Supreme Court's decision in *John R. Sand*. Therefore, the *Glarner* decision remains the controlling authority in this Circuit which is binding on this Court.") (footnote omitted); *Bazzo v. United States*, 2011 WL 2601009 at *2 (E.D.Mich. June 30, 2011) ("the FTCA limitations period is susceptible to equitable tolling.... Absent a clear statement of law irreconcilably contrary to existing precedent, this Court is bound by *Glarner*"), *aff'd*, 494 Fed.Appx. 545 (6th Cir. 2012).

[14] See Brief for the United States, *Jackson v. United States*, No. 13-1243 (6th Cir.), 23 ("*Glarner* ... may no longer be good law on this point and should be re-examined in light of ... *John R. Sand & Gravel*...."), available at 2013 WL 3366400.

"reconsider *Glarner* in light of ... *John R. Sand & Gravel*." 494 Fed.Appx. at 546.

The United States also argues that review should be granted because "[t]he current state of the law is ... in a state of flux. The uncertainty has persisted for some time." Pet. 24-25. "For decades after the FTCA's enactment, the courts of appeals uniformly characterized the time bars in Section 2401(b) as jurisdictional and attached jurisdictional consequences to untimely filings. See note 5, *supra*." Pet. 22. "[R]ecently ... some courts of appeals have reconsidered ... that settled circuit precedent in light of intervening decisions of this court." *Id.* The cases cited in note 5 of the petition all predate this Court's 1990 decision in *Irwin*. The "recent[ ]" appellate decisions interpreting section 2401(b) to permit tolling include the 1994 decisions in *Glarner* and *Bechem*.

To the extent that the approach taken by the lower courts has evolved over the last quarter century, that development was a proper response to the decisions of this Court. Prior to *Irwin,* this Court had "decide[d] each case [about tolling] on an ad hoc basis." 498 U.S. at 95. *Irwin* disavowed that earlier approach because it had "the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* The holding in *Irwin* – "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," 498 U.S. at 95-96 – was an avowed departure from the Court's past practice.

See 498 U.S. at 98 (White, J., dissenting) ("the Court's holding [is] inconsistent with our traditional approach"). This Court's recent decisions in *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 515 (2006), and its progeny, disapproving the previous casual characterization of limitations periods and other rules as "jurisdictional," were even more emphatically intended to alter past practice. *Gonzalez v. Thaler*, 132 S.Ct. 641, 648-49 (2012); *Henderson v. Shinseki,* 131 S.Ct. 1197, 1202-03 (2011); *Kontrick v. Ryan,* 540 U.S. 443, 454-55 (2004); *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 160-62 (2010).

The government circumspectly does not assert that prior to *Irwin* it was settled law in the circuit courts that because the section 2401(b) limitations periods were jurisdictional, equitable tolling was not available. Although most of the pre-*Irwin* cases cited in note 5 of the petition characterized one or the other of the section 2401(b) limitations periods as jurisdictional, none of them held that denial of tolling was a "jurisdictional consequence."[15] The United States asks

[15] In most of the cases cited in note 5 of the petition, although the court characterized one of the section 2401(b) limitations requirements as "jurisdictional," there was no request for equitable tolling; generally the only "jurisdictional" consequence, if any, was that a case was dismissed for lack of jurisdiction rather than for failure to state a claim on which relief could be granted. *In re "Agent Orange" Product Liability Litigation v. Dow Chemical Co.,* 818 F.3d 210, 214 (2d Cir. 1987) (claim of one plaintiff dismissed because she had never filed an administrative claim at all); *Allgeier v. United States,* 909 F.2d 869, 871 (6th Cir. 1990) (amendment to complaint filed after

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limitations period did not relate back under Rule 15 because it was not received by the United States Attorney during time period required by Rule); *Charlton v. United States,* 743 F.2d 557, 558-59 (7th Cir. 1984) (compliance with regulation requiring claimant to provide information to agency is not jurisdictional); *Schmidt v. United States,* 901 F.2d 680, 683 (8th Cir. 1990) (burden of proof is on plaintiff to establish when letter mailed by agency); *Adkins v. United States,* 896 F.2d 1324, 1326 (11th Cir. 1990) (claim presentment requirement not met because claim did not state a sum certain); *Sexton v. United States,* 832 F.3d 629, 633 and n.4 (D.C.Cir. 1987) (applying discovery rule in *United States v. Kubrick,* 444 U.S. 111 (1979)).

Two of the cited decisions bar equitable tolling, but do not characterize either limitation period as jurisdictional. *Peterson v. United States,* 694 F.2d 943, 945 (3d Cir. 1982) (extension of limitations period for equitable reasons not permitted because there must be "strict observance of the limitations period"); *Anderberg v. United States,* 718 F.2d 976, 977 (10th Cir. 1983) (extension of limitations period for equitable reasons not permitted because conditions of government consent to suit must be "strictly observed").

Gonzalez-Bernal v. United States, 907 F.2d 246, 248, 250 (1st Cir. 1990), held that the six-month limitation period is jurisdictional, but permitted tolling of that period based on government misconduct. *Gould v. U.S. Dep't of Health & Human Services,* 905 F.2d 738, 741-42 (4th Cir. 1990), held that the two-year limitation requirement is jurisdictional, but still subject to the discovery rule in *Kubrick* and subject to tolling in the case of certain government misconduct.

Simon v. United States, 244 F.2d 703, 705 (5th Cir. 1957), characterized the two-year limitations period as jurisdictional, but held that tolling was not permissible regardless of whether a deadline was jurisdictional or merely a statute of limitations. *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968), held that the two-year limitation period is jurisdictional and that the deadline is not tolled during the minority of a claimant, but did not assert that the unavailability of tolling was due to the jurisdictional nature of the deadline.

the Court to grant review "to restore the mandatory and jurisdictional force of the FTCA's time bars" (Pet. 22); but there never was any pre-*Irwin* consensus that the jurisdictional nature of the section 2401(b) limitations periods barred equitable tolling.

What has indeed fluctuated over recent years is the position of the United States regarding whether equitable tolling is available regarding the six-month or two-year limitations periods in section 2401(b). In *Perez v. United States,* 167 F.3d 913 (5th Cir. 1999), and *Kokotis v. United States Postal Service,* 223 F.3d 275 (4th Cir. 2000), the government agreed that equitable tolling does apply to FTCA claims. Brief of Appellee, *Kokotis v. United States Postal Service,* 21 ("The doctrine of equitable tolling of statutes of limitations is applicable to suits against the United States. *Irwin v. Department of Veterans Affairs*...."); Brief of Appellee, *Perez v. United States*, 10-11 ("The Supreme Court confirmed the applicability of equitable tolling against the United States in *Irwin*...."). In briefs filed in *Santos v. United States,* 559 F.3d 189 (3d Cir. 2009), and in *T.L. v. United States,* 443 F.3d 956 (8th Cir. 2006), the government acknowledged that prior decisions in the Third and Eighth Circuits, respectively, had permitted tolling of the FTCA two-year limitations period, and did not indicate any disagreement with that rule.[16] In a 2007 brief the

[16] Brief for Defendant-Appellee United States of America, *Santos v. United States,* 19 ("[t]his Court has indicated that the doctrine of equitable tolling applies to FTCA suits under certain

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government took the position that although the time limitations in section 2401(b) are jurisdictional, tolling is nonetheless permitted.[17] In its brief in *Arteaga v. United States*, 711 F.3d 828 (7th Cir. 2013), the government stated only that it was "not clear that equitable tolling applies at all in FTCA cases."[18] On the other hand, in briefs filed in 2010-13, the Department of Justice has argued that those limitations are jurisdictional and, for that reason, do not permit equitable tolling.[19] The petition argues that *Perez*, *Kokotis*, *Santos*, *T.L.*, and *Arteaga* were all wrongly decided, and urges this Court to grant review to correct those errors; but the government to a significant degree invited the very circuit court decisions to which it now objects.

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circumstances") (citing *Hughes v. United States,* 263 F.3d 272, 278 (3d Cir. 2001) and *Hedges v. United States,* 404 U.S. 744, 748-49 (3d Cir. 2005)); Brief of Appellee, *T.L. v. United States,* 13 ("[t]he Government does not dispute that the Eighth Circuit has 'appl[ied] the doctrine of equitable tolling to FTCA claims against the government.' *Motley v. United States,* [295 F.3d 820,] 824 [(8th Cir. 2002)]"), available at 2005 WL 5628152.

[17] See *supra*, n.10.

[18] Brief of the United States, *Arteaga v. United States*, 14, available at 2012 WL 6800266; see *id.* at 16 (noting that in applying the controlling legal principles, federal courts have not always dismissed cases in which the plaintiffs did not present their claims within the two-year period).

[19] *E.g.,* Brief for Appellee United States, *In re FEMA Trailer Formaldehyde Products Liability Litigation,* 646 F.3d 185 (5th Cir. 2011), 36-38, available at 2010 WL 4619550; Brief for the United States, *Bazzo v. United States,* 494 Fed.Appx. 545 (6th Cir. 2012), at 11-24, available at 2011 WL 6146274.

The United States is entitled to change its position and to argue in the lower courts, as it has most recently, that current settled law permitting equitable tolling should be reconsidered in light of this Court's decision in *John R. Sand & Gravel*. But review by this Court would not be warranted until and unless the government is able create a circuit conflict by persuading one or more circuits to clearly hold that equitable tolling of the six-month or two-year limitations period is impermissible.

II. THE QUESTION PRESENTED IS NOT OF SUFFICIENT PRACTICAL IMPORTANCE TO WARRANT REVIEW BY THIS COURT

Disputes about tolling of the six-month limitations period in section 2401(b) are extremely uncommon. Even if a circuit split existed about that question, it would not be of sufficient importance to warrant review by this Court.

The six-month period provided for filing suit under the FTCA is of substantial length, and the period is commenced by written notification from the government. As the petition correctly observes, "[w]ith such a readily ascertainable triggering event, there should be few if any occasions for equitable tolling even if it were permitted." Pet. 21. The petition, however, asserts: "But that does not mean that plaintiffs would not routinely assert tolling to excuse a late filing. As the voluminous case law reveals (see Pt. B, *infra*), they will. Under the regime adopted by the

Ninth Circuit, numerous federal agencies would be forced 'to respond to, and [sometimes] litigate, large numbers of late claims, accompanied by requests for "equitable tolling" which, upon close inspection, ... turn out to lack sufficient equitable justification.' *Brockcamp*, 519 U.S. at 352." Pet. 21-22; see *id*. at 22 ("The issue has recurred with remarkable frequency.").

But the "voluminous case law" in Part B of the petition does not support this assertion. Pet. 22-25. Although that portion of the petition refers to seventeen FTCA cases, only two of those decisions actually involved the six-month limitations period: the instant case, and the 20-year old Tenth Circuit decision in *Benge*.[20] All the other decisions concerned disputes about equitable tolling of the two-year claim-presentation deadline. Cases in which plaintiffs seek tolling of the six-month limitations period are infrequent, and arise only out of uncommon, highly idiosyncratic circumstances. In the instant case, for example, a routine motion to amend a complaint was not resolved in the district court for an unusually lengthy seven months, and that seven-month period happened to coincide with and encompass the entire six-month suit-filing period. In *Benge* the original complaint had been dismissed for lack of service, and the six-month limitations period (unless tolled) would

[20] See Pet. 23 n.8 ("some of the courts of appeals' decisions involve the two-year deadline in 28 U.S.C. 2401(b) for presentation of a claim to the appropriate agency").

have run while that complaint was pending, precluding the plaintiff from initiating a second action. It is unlikely that the procedural situation in either the instant case or in *Benge* will arise again – assuredly not "routinely" – in future FTCA cases. The particular limitations problem in *Benge* was solved by the 1993 amendment to Rule 4 of the Federal Rules of Civil Procedure. See 1993 Advisory Committee Note, subdivision m.

Petitioner objects that merely having to litigate tolling disputes imposes a substantial burden on the government. The paucity of tolling disputes regarding the six-month limitations period largely undercuts that contention. Moreover, even in the absence of tolling, the United States often would still have to litigate other possible grounds for relief. For example, in the instant case Chief Judge Kozinski would have held that the reply memorandum filed by Wong in December 2001 satisfied the requirements of section 2401(b). App. 48a-52a. The majority agreed that it might be possible to rule for Wong on that basis, but preferred to solve the problem through equitable tolling. *Id.* at 43a-44a ("[w]e assume, without deciding, that Wong's FTCA claim was filed in the district court too late.... [T]here may be a defensible road through this thicket...."), 45a ("there is little difference in the underlying justification between applying traditional equitable tolling principles and devising a novel equitable solution to the filing date problem in this case."). Whatever litigation burden these uncommon disputes impose on the government and the

courts would not be significantly alleviated, if at all, by requiring the plaintiffs to search for and litigate an alternative solution in the Federal Rules of Civil Procedure or elsewhere in the law.

Although disputes about equitable tolling of the two-year limitation period are somewhat more common, here too a rejection of equitable tolling would not necessarily simplify litigation. Under *United States v. Kubrick*, 444 U.S. 111 (1979), FTCA claims are subject to a discovery rule; a claim does not "accrue[ ]" within the meaning of section 2401(b) so long as a plaintiff neither knows nor has reason to know of his injury or of the cause of that injury. If this Court were to hold that plaintiffs may invoke only that discovery rule, but not equitable tolling, parties and courts would be forced to grapple with the often elusive distinction between these two closely related doctrines; future litigation would also have to address whether equitable estoppel or fraudulent concealment can be invoked in an FTCA case. *Klehr v. A.O. Smith Corp.,* 521 U.S. 170, 192 (1997), recognized that the distinctions among a discovery rule, equitable tolling and equitable estoppel "may be subtle and difficult." See *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450-52 (7th Cir. 1991) (discussing differences among discovery rule, equitable tolling, equitable estoppel, and fraudulent concealment).

III. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THE SIX-MONTH SUIT-FILING DEADLINE IS SUBJECT TO EQUITABLE TOLLING

Most of the petition in this case is devoted, not to a contention that the question presented is the subject of a circuit conflict, but instead to an argument that the Ninth Circuit's "decision is wrong." Pet. 10. The petition spends thirteen pages on criticism of the Ninth Circuit's analysis of the text, structure, purpose and legislative history of the six-month limitations period, and less than three pages to the government's assertion that there is confusion and "conflict" – but not a circuit conflict – among the lower courts. The court of appeals' analysis (like that of the dissenting opinions) is well-reasoned and exhaustive. The government does not suggest that the conclusion of the en banc majority is so palpably and unusually misguided as to justify exercise of this Court's supervisory authority.

The government insists that "review of the decision of the divided en banc Ninth Circuit is warranted to restore the mandatory and jurisdictional force of the FTCA's time bars." Pet. 22. But that argument is only a particularly emphatic way of reiterating the government's contention that the court of appeals made a mistake in its interpretation of the statute. Whether the FTCA time bars have "jurisdictional force" is the very question in this case; the Court could not conclude that review was "warranted to restore the ... jurisdictional force of the

FTCA's time bars" without first deciding the merits of this case. Only after determining that the Ninth Circuit had erred could this Court assess whether "restor[ing] th[at] jurisdictional force" is of such importance as to warrant exercise of this Court's discretionary jurisdiction.

The merits arguments set out in the petition generally revisit the same issues of statutory construction already carefully considered by the majority (and dissents) below. A few issues raised in the petition warrant further comment.

The petition sets out two distinct merits arguments, that the six-month suit-filing deadline is jurisdictional (Pet. 11-18) and that this deadline, even if non-jurisdictional, still does not permit equitable tolling. Pet. 18-22. The government did not raise the second argument in the Ninth Circuit; its briefs in that court were limited to an assertion that the six-month limitation period is jurisdictional. The court of appeals nonetheless decided that second issue. App. 36a-43a. But a number of the specific arguments regarding that issue now advanced by the United States in this Court, such as its discussion of the early drafts of the FTCA and of the use of private bills under the Tucker Act (Pet. 19-20), were not raised by the government in the court below and thus were never considered by the court of appeals.

The government argues, as it did below, that the jurisdictional nature of the six-month limitations

period is demonstrated by the use of the phrase "forever barred" in section 2401(b).[21] This Court in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990), expressly refused to attach jurisdictional significance to this type of language.

> In [the provision of Title VII authorizing a civil action by federal employees] Congress said that "[w]ithin thirty days ... an employee ... may file a civil action...." In [the Tucker Act] Congress provided that "[E]very claim ... shall be barred unless the petition ... is filed ... within six years...." An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different

[21] Pet. 13 ("The text Congress chose for the FTCA's suit-filing bar is the same that it had long used to set deadlines for damages actions against the United States under the Tucker Act. See ... 12 Stat. 767 ... ('every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court ... within six years after the claim first accrues') ... And it is the same operative text this Court has repeatedly construed in Tucker Act suits against the United States as jurisdictional and not subject to equitable exceptions."), 17 ("Section 2401(b) contains emphatic language ('shall be forever barred') that was patterned after the jurisdictional limitation on Tucker Act suits...."), 19 ("Congress used particularly 'emphatic' language. [*United States v.*] *Brockamp*, 519 U.S. [347,] 350 [(1997)]; see 28 U.S.C. 2401(b) ('[A] tort claim against the United States ... shall be 'forever barred.')" (emphasis in petition).

> congressional intent with respect to the availability of equitable tolling.

498 U.S. at 95. In *Irwin* the United States correctly argued that the presence or absence of the phrase "shall be barred" was of no relevance in determining whether equitable tolling would be permitted:

> QUESTION: Well, in cases like Soriano ... you can point to the fact that the statute said something like suit shall be barred if not brought within so many days. There was something more than the mere time limit set for it here.
>
> MR. ROBERTS: Your honor, that distinction is there, but I don't think it's a distinction that makes a difference. I think that type of language has more to do with legal rhetoric at the time the statute was passed.

(1990 WL 601331 at *30-*31).[22] The decision of the Ninth Circuit in the instant case regarding this type of statutory language is consistent with the position of the government in *Irwin*.

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

Petitioner suggests that if certiorari is granted both in this case and in *United States v. June*, No.

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[22] The Court's question is referring to *Soriano v. United States*, 352 U.S. 270 (1957).

13-1075, the two cases should be consolidated for briefing and argument. Pet. 11 n.2.

The government's suggestion is in some tension with its position in *Marley* and *Waltz*, where it contended that the issue of whether the six-month suit-filing limitations period is subject to equitable tolling is quite distinct from the issue of whether such tolling is available with regard to the two-year claim-presentation limitations period. See *supra,* pp. 12-13.

More importantly, consolidation would pose an insolvable problem for arguing counsel. In *Marley* and *Waltz* the government suggested that, even if tolling is barred for the six-month limitation period, it still might be permissible for the two-year limitation period.[23] Counsel for respondent in *June* may wish to advance just such an argument. On the other hand, in its Ninth Circuit brief in *June*, the government took the opposite position, suggesting that tolling

[23] Brief of the United States in Opposition, *Marley v. United States*, 9-10 ("In the government's view, both the two-year and the six-month limitations provisions ... are properly considered jurisdictional in nature, and thus are not subject to equitable tolling. But even assuming the FTCA's two-year administrative filing deadline were subject to equitable tolling in appropriate circumstances, it would not follow that its six-month statutory time period for filing complaints in court would also be subject to equitable tolling. The latter limitations period is short, to ensure particular expedition, and it is triggered by a specific notice denying the administrative claim, which sets a readily identifiable date for the filing of a suit."). The same argument is contained in the Brief for the Respondents in Opposition, *Waltz v. United States*, 10.

should be precluded for the two-year limitations period, even though (under the Ninth Circuit decision in *Wong*) it was permitted for the six-month limitations period.[24] Counsel for respondent in *Wong* may wish to advance that contention. If, however, a single attorney were required at oral argument to represent both Ms. June and Ms. Wong, that attorney could not advance both – or either – of these inconsistent positions.

[24] Supplemental Brief for Appellee, *June v. United States*, No. 11-17776 (9th Cir.), 11-14 ("Congress' decision to tie the two-year time bar to a requirement of presenting an administrative claim underscores in a number of ways that the two-year time bar is jurisdictional. First, the requirement of presenting an administrative claim is incontrovertibly jurisdictional.... The requirement to file a claim within two years is part and parcel of the jurisdictional requirement to file the administrative claim.... In 1988, Congress added a further provision, 28 U.S.C. § 2679(d)(5), ... that ... again directly tied the jurisdictional requirement of filing an administrative claim to the two-year time period for doing so."), 13 ("The 'interest in assuring that agency officials have a full opportunity to investigate and consult internally with regard to claims for compensation,' *Wong* [App. 35a], would be greatly undermined if someone could file an administrative claim years after an event occurred when it was no longer possible 'to investigate and consult internally' with employees who had since left."), 16 ("[A]ny presumption in favor of equitable tolling ... 'generally involve[s] time limits for filing suit in federal court,' [*Sebelius v. Auburn Regional Medical Center,* 133 S.Ct. 817, 827 (2013)] and the Supreme Court has noted that the presumption has never applied to certain deadlines for filings before agencies.... The two-year time bar, unlike the six-month limitations period, is a deadline for filing administrative monetary claims with government agencies.").

CONCLUSION

The petition for a writ of certiorari should be denied. In any event, the Court should not consolidate this matter with *United States v. June*.

Respectfully submitted,

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