No. 13-1074

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

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

REPLY BRIEF FOR PETITIONER

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Congress's intent controls whether a particular statutory time limit is subject to equitable tolling. See, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137-138 (2008). Here, the text, context, and history of the time bar in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), demonstrate that Congress enacted an absolute deadline that cannot be tolled.

When Congress drafted the FTCA in 1946, it modeled the time bar on the virtually identical provision governing Tucker Act suits. This Court had repeatedly held that provision to be a jurisdictional limit not amenable to tolling. Congress's decision to borrow the same text using the same sentence structure when it enacted the FTCA demonstrates that equitable tolling is precluded under the FTCA as well.

Congress confirmed that intent repeatedly over the following decades. See U.S. Br. 40-52. In 1949, it addressed hardship caused by the FTCA's original one-year deadline—not by allowing equitable tolling, but by extending the deadline to two years. In 1966, it reenacted the time bar without material change—after the lower courts had held that Section 2401(b) was jurisdictional, and after *Soriano* v. *United States*, 352 U.S. 270, 275 (1957), had reaffirmed that the virtually identical time bar in 28 U.S.C. 2501 was not subject to tolling and had indicated that the same rule would apply to "tort actions" against the United States. From the 1950s through the 1980s, Congress enacted numerous private laws conferring "jurisdiction" on district courts "notwithstanding" the time bar, and it repeatedly rejected proposals to amend the FTCA to permit various types of equitable tolling. And in 1988, it enacted a narrow form of tolling applicable only in a single, carefully delineated circumstance not at issue here.

In short, the FTCA's history shows that—at every turn—Congress chose not to authorize the broad equitable tolling rule embraced by the court of appeals in this case. Respondent largely ignores this history, and her arguments in support of tolling lack merit. She urges the Court to disregard the textual and structural parallel between the time bars governing Tucker Act and FTCA suits on the ground that this Court's pre-1946 Tucker Act decisions did not focus on the text of the statute and were "obscure." Her approach disregards the rule that Congress is presumed to be aware of—and intends to incorporate—settled judicial interpretations of statutory language when it repeats that language in new legislation. That rule

has special force here, where Congress intended the FTCA to fill the gap created by the Tucker Act's exception for claims sounding in tort. Respondent's other textual arguments are similarly incompatible with the statutory text and this Court's precedent.

Respondent further attempts to short-circuit any serious inquiry into Congress's intent regarding the FTCA by arguing that *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) is dispositive here. Although *Irwin* adopted a presumption that statutory deadlines for suing the federal government are subject to equitable tolling, that presumption is "rebuttable" based on "a realistic assessment of legislative intent" with respect to the particular statute at issue. *Id.* at 95. Respondent errs in clinging to *Irwin*'s presumption in the face of the text, context, and history of the FTCA, which compel the conclusion that Section 2401(b) does not authorize courts to toll the time bar.[1]

A. Congress Fashioned The FTCA Time Bar To Mirror The Jurisdictional Time Bar Applicable To Tucker Act Suits

Our opening brief explains (Br. 4-5, 20-28) that Congress modeled the FTCA time bar on the statutory time bar governing damages actions under the Tucker Act and its predecessors. The FTCA filled the gap left when Congress carved out tort claims from the Tucker Act's authorization of suits against the

[1] Respondent makes (Br. 1-4) a variety of factual assertions relating to the merits of her FTCA claim that are contrary to evidence in the record. The government does not respond to those factual assertions—which are disputed—because they are not implicated in the question presented (U.S. Br. i).

United States for money damages. See S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946) ("The existing exemption in respect to common-law torts appears incongruous."). Following the Tucker Act model, Congress "extend[ed] to claimants against the Government for torts of negligence the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." S. Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942).

Consistent with this purpose to create a tort-law analogue to the Tucker Act, Congress used virtually identical language in the FTCA's time bar. See U.S. Br. 22 n.7 ("Every claim against the United States cognizable * * * shall be forever barred[,] unless"). In the Tucker Act context, this Court had repeatedly interpreted that language to set forth a jurisdictional limit not subject to equitable tolling. U.S. Br. 22-24 (discussing cases). In these circumstances—"[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional"—this Court "will presume" that Congress intended to enact a jurisdictional time limit that cannot be tolled. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks and citation omitted). That rule controls here.

1. Respondent is wrong to suggest (Br. 32-38) that this Court's pre-1946 decisions holding the deadline for filing suit in the Court of Claims to be jurisdictional "do not purport to interpret" the text of the provision. In its first opinion holding that the time bar was not subject to tolling, the Court emphasized the language declaring that untimely claims "shall be forever barred" and reasoned that "[t]he express words of the

statute leave no room for contention" that any claim could proceed outside the specified period. *Kendall* v. *United States*, 107 U.S. 123, 124, 125 (1883).[2] As the Court explained, "[*e*]*very* claim—except those specifically enumerated—is forever barred unless asserted within" the six-year period. *Id.* at 125. "[I]n view of the language of the statute," *Kendall* held that "courts cannot" toll the statute for equitable reasons. *Id.* at 126. See *Finn* v. *United States*, 123 U.S. 227, 229, 232 (1887) (emphasizing "express words of the act" deeming an untimely claim "forever barred" and holding that government cannot waive the time bar).[3]

Respondent correctly notes (Br. 33-38) that this Court's cases interpreting the time bar applicable to Tucker Act suits relied heavily on sovereign-immunity considerations. But that simply *strengthens* the argument for interpreting the FTCA—which rests on identical sovereign-immunity considerations—the same way. U.S. Br. 26-32.

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[2] Respondent notes (Br. 32-33) that the phrase "shall be forever barred" did not appear in the Tucker Act itself. That is beside the point: The language originated in 1863 and operated as a jurisdictional constraint on the authority of the Court of Claims to hear cases under the Tucker Act and its predecessors, both before and after the Tucker Act became law in 1887. See U.S. Br. 4-5 (discussing Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767, and Judicial Code (1911 Act), ch. 231, § 156, 36 Stat. 1139); see also S. Rep. No. 388, 61st Cong., 2d Sess. 61 (1910) (noting that 1911 Act's time bar made "no change whatever" in "[e]xisting law").

[3] See also *Munro* v. *United States*, 303 U.S. 36, 38 n.1, 41 (1938) (citing *Finn*); *United States* v. *Wardwell*, 172 U.S. 48, 49, 52 (1898) (same); *United States* v. *New York*, 160 U.S. 598, 616-619 (1896) (same); *de Arnaud* v. *United States*, 151 U.S. 483, 495 (1894) (same).

In any event, there is no doubt that this Court's Tucker Act decisions attached jurisdictional significance to the time bar and held that its text did not permit equitable tolling. That time bar, and the Court's decisions enforcing it, thereby provided Congress with a clear model of how to draft a jurisdictional bar that could not be tolled. Because Congress employed the very same operative language using the very same sentence structure when it drafted the FTCA time bar governing the tort claims that were carved out of the Tucker Act, Congress must be presumed to have intended that language to be interpreted the same way. It makes no sense to think that Congress borrowed the identical language and structure in this deliberately parallel context to achieve the *opposite* result and *allow* equitable tolling.

2. Respondent also errs in suggesting (Br. 43) that this Court should ignore the settled Tucker Act precedents because those decisions were "undeniably obscure" and therefore may have escaped Congress's notice. The decisions were *not* obscure. They were prominent holdings governing the jurisdiction of the Court of Claims over suits under the Tucker Act—the very law on which Congress modeled the FTCA. Between 1925 and 1946, as Congress was considering various proposals to abrogate sovereign immunity to allow tort suits against the government, one of the cases—*Finn*—was itself cited dozens of times by federal courts, including on eight separate occasions by this Court.

More fundamentally, this Court has never held that Congress legislates against the backdrop of only famous decisions. Congress legislates, rather, against the backdrop of decisions concerning the particular

subject before it.[4] Precedent examining whether a time bar is jurisdictional may not capture the public's attention, but it creates the context—and thus shapes the meaning—of Congress's future enactments on the same subject. That is especially true when Congress purposefully models a new time bar on one this Court has already interpreted. It is for this reason that the Court has repeatedly said that it "will presume" that Congress intended to make a time limit jurisdictional "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as 'jurisdictional.'" *Henderson*, 131 S. Ct. at 1203 (internal quotation marks and citation omitted); see, *e.g.*, *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824; *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010).

That rule applies here: The FTCA time bar restricts the government's waiver of sovereign immunity in the same way as the parallel time bar applicable to Tucker Act suits. And the text and sentence structure of the FTCA bar is not just similar but virtually *identical* to the Tucker Act provision. Because the respective time bars are so closely affiliated with one another, they should be interpreted to mean the same thing.[5]

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[4] See, *e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them.") (last three sets of brackets in original) (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979)).

[5] Respondent incorrectly asserts (Br. 31-32) that our argument has "far reaching implications" for other statutes of limitations

3. This Court's recent decision in *John R. Sand & Gravel*, which reaffirmed the jurisdictional status of the time limit governing Tucker Act suits, strongly supports our position here. See U.S. Br. 28. Respondent contends (Br. 44-47) that case is irrelevant because it confirmed that the Tucker Act time bar is jurisdictional based on *stare decisis*, while saying nothing about the FTCA. But one of the basic purposes of *stare decisis* is to enable Congress to legislate against a stable backdrop of law, and that doctrine "has added force when the legislature, in the public sphere, * * * ha[s] acted in reliance on a previous decision." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Here, Congress was entitled to rely on the settled meaning of the Tucker Act time bar when it incorporated the same language into the analogous provision of the FTCA.

B. Sovereign-Immunity Considerations Confirm That The FTCA Time Bar Precludes Equitable Tolling

Our opening brief explains (at 29-35, 42-45) that Congress intended to preclude tolling of the FTCA time bar in part because it conditioned Congress's waiver of sovereign immunity. Respondent contends

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that contain the phrase "shall be forever barred," such as those applicable to the Clayton Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Fair Labor Standards Act. But those statutes, unlike the FTCA, do not incorporate the same text and sentence structure of the 1863 Act's time bar ("[E]very claim against the United States, cognizable * * * , shall be forever barred unless"); there is no reason to believe that Congress drafted them to incorporate judicial interpretations of that time bar; and neither the Clayton Act nor RICO involve waivers of sovereign immunity from claims for money damages against the United States.

(Br. 17) that *Irwin* forecloses that argument. She is mistaken.

1. Irwin does not require courts to ignore sovereign-immunity principles when assessing Congress's intent

a. *Irwin* articulated a rebuttable presumption that statutory time limits for filing suit against the federal government are subject to equitable tolling. See U.S. Br. 18-20. The Court adopted that presumption not "as a matter of some independent [judicial] authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose," *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014), but rather out of deference to what it concluded was Congress's "likely meaning in the mine run of instances," *John R. Sand & Gravel*, 552 U.S. at 137.[6] The presumption is *rebutted*—and equitable tolling is *not* available—when there is "good reason to believe that Congress did *not* want the equitable tolling doctrine

[6] The government agrees with respondent (Br. 10, 19-21, 49-50) that the *Irwin* presumption applies at the threshold to pre-*Irwin* statutes. Nevertheless, courts may consider whether Congress legislated before or after *Irwin* when determining whether the presumption reflects a "realistic assessment of legislative intent," 498 U.S. at 95, in any particular case. See *Holland* v. *Florida*, 560 U.S. 631, 646 (2010) (presumption is stronger as applied to post-*Irwin* statutes because "Congress * * * was likely aware that courts, when interpreting [the statute's] timing provisions, would apply the presumption"); *Cannon*, 441 U.S. at 698-699 & nn.22-23 (even if intervening Supreme Court precedent suggests a different interpretive approach, "evaluation of congressional action" still "must take into account its contemporary legal context").

to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997).[7] That clearly is the case here.

b. Respondent seeks to artificially circumscribe the inquiry into Congress's intent by declaring sovereign-immunity considerations off limits. In her view (Br. 17), "while the government may argue that a statute of limitations is jurisdictional, it may do so [under *Irwin*] only by advancing the 'same' types of contentions regarding text or other considerations that could be asserted by a private litigant."

Respondent is wrong. *Irwin* holds that sovereign-immunity considerations—*without more*—do not establish that Congress intended to foreclose tolling. 498 U.S. at 95-96. But that does not mean that sovereign-immunity considerations are *irrelevant*. Respondent's restrictive rule violates *Irwin*'s own rationale: Whereas *Irwin* based the presumption on a "realistic assessment of legislative intent," *id.* at 95, respondent would disregard what Congress *actually* intended if the historical evidence showed that sovereign-immunity concerns shaped Congress's intent concerning a particular time bar. As this Court confirmed in *John R. Sand & Gravel*, even after *Irwin* it is proper to consider whether Congress intended to enact a jurisdictional time bar to "achieve a broader system-related goal, such as * * * limiting the scope of a governmental waiver of sovereign immuni-

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[7] See, *e.g.*, *Lozano*, 134 S. Ct. at 1232 (citing *Irwin* for proposition that "statutory intent" governs the tolling inquiry); *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827 (observing that *Irwin*'s presumption is "premise[d]" on congressional intent) *John R. Sand & Gravel*, 552 U.S. at 137-138 (emphasizing that *Irwin* presumption can be rebutted "by demonstrating Congress's intent to the contrary").

ty." 552 U.S. at 133-134 (citing *United States* v. *Dalm*, 494 U.S. 596 (1990)).

b. Respondent likewise errs in suggesting (Br. 20) that *Irwin* requires this Court to ignore "which principles of statutory interpretation were prevalent when [the FTCA] was adopted." Respondent appears to believe that, under *Irwin*, the Court must *allow* equitable tolling under the FTCA even if Congress understood and intended the FTCA bar—in accordance with the interpretive principles that prevailed at the time—to *prohibit* such tolling. That approach is both radical and wrong.

Irwin's presumption is a tool of construction. It does not extinguish the need to analyze the statute's text, structure, history, and purpose in circumstances where there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350. Even after *Irwin*, courts may not "apply a new background rule to previously enacted legislation" if doing so would "reverse prior congressional judgments." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment).

2. In 1946 and 1966, Congress understood the FTCA time bar to be a jurisdictional limit not subject to tolling

Respondent agrees with the government on a crucial historical point: When Congress enacted and reenacted the FTCA time bar in 1946 and 1966, this Court's precedent "suggested that all statutes of limitations governing claims against the United States were jurisdictional." Resp. Br. 45; see also *id.* at 34 (noting precedent "consistently" holding "that in an action against the United States, *all* statutory re-

quirements are limitations on the government's consent to be sued, and thus jurisdictional"); U.S. Br. 29-34. In refusing to acknowledge the relevance of that precedent to the proper interpretation of the FTCA, respondent urges a construction unmoored from any "realistic assessment of legislative intent." *Irwin*, 498 U.S. at 95.

First, it was well established in 1946 that the time bars applicable to parallel claims for money damages against the United States were jurisdictional and not subject to equitable tolling. See pp. 4-8, *supra* (discussing Tucker Act cases); U.S. Br. 30-32 (discussing precedent under Tucker Act and other statutes). Most of the relevant judicial decisions emphasized sovereign-immunity considerations, and they bear directly on how Congress would have understood the parallel time bar it enacted in the FTCA.

Second, this Court's 1957 decision in *Soriano* expressly recognized that the same sovereign-immunity principles that make the time limit for filing Tucker Act claims jurisdictional also govern the time limits for filing "tort actions." 352 U.S. at 275-276; see U.S. Br. 32-34. In *Soriano*, the government argued that allowing tolling of the time bar applicable to Tucker Act claims would imply the same result with respect to the FTCA time bar. See U.S. Br. 33 & n.17. The Court agreed with that analysis and rejected the availability of tolling in *both* contexts. *Soriano*, 352 U.S. at 275-276. It justified its conclusion on the ground that "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Id.* at 276.

Respondent denies (Br. 19-20, 45-47) that *Soriano* is relevant to the FTCA, but she ignores the Court's

clear statement that Congress intended the time limits applicable to "tort actions" to be "strictly observed" and not subject to "implied" exceptions. 352 U.S. at 276. Indeed, as Members of this Court have recognized, *Soriano*'s rule against "implied" exceptions to waivers of sovereign immunity "form[s] an important part of the background of settled legal principles upon which Congress relied in enacting * * * the Tucker Act * * * [and] the [FTCA]." *West* v. *Gibson*, 527 U.S. 212, 224 (1999) (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

Third, when Congress reenacted the operative language of the FTCA in 1966, all three Branches of government had endorsed the view that the time bar was jurisdictional and not subject to tolling. Congress had previously indicated that the time bar was a jurisdictional requirement by enacting private laws expressly "conferr[ing]" "jurisdiction" on district courts to hear FTCA claims "notwithstanding" the limitations period. U.S. Br. 47 n. 27. The Department of Justice—which drafted the bill reenacting the FTCA time bar—had consistently taken the position that the bar was jurisdictional and not subject to tolling because it operated as a condition on a waiver of sovereign immunity. *Id.* at 33 & n.17, 44-45 & n.25; see *Kosak* v. *United States*, 465 U.S. 848, 855-857 (1984) (relying on views of Justice Department official who drafted FTCA provision).

In addition, this Court had indicated in *Soriano* that the FTCA time bar could not be equitably tolled. See U.S. Br. 42-43; cf. *John R. Sand & Gravel*, 552 U.S. at 136-139 (rejecting argument that *Soriano* has been overruled). That was also the uniform view of

the lower courts in 1966. See U.S. Br. 43 & n.23 (citing cases). When "[t]he Courts of Appeals and the District Courts have read the law the same way, and * * * enjoyed virtually unanimous accord," the "very strength of th[e] consensus is enough to rule out any serious claim of ambiguity" regarding Congress's intent. *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 593-594 (2004).

Against all this, respondent suggests that the FTCA permits equitable tolling because this Court *later* held that *other* statutes waiving the government's sovereign immunity could be tolled. See Br. 45-46 (citing *Irwin*, *supra*, and *Bowen* v. *City of N.Y.*, 476 U.S. 467 (1986)). But this Court's assessment of a provision's jurisdictional scope has always turned on congressional intent with respect to the particular statute at issue. See *Irwin*, 498 U.S. at 95; *Bowen*, 476 U.S. at 479-480; see also *John R. Sand & Gravel*, 552 U.S. at 137 (emphasizing that "*Irwin* dealt with a different limitations statute"). Here there is compelling textual, contextual, and historical evidence that Congress intended the FTCA time bar to incorporate the rule that the time limit for filing suit against the United States is an absolute jurisdictional requirement.[8]

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[8] Although respondent invokes the "hornbook" principle that time bars ordinarily can be tolled (Br. 47), in fact "hornbook law" at the time recognized the important qualification that "'[g]enerally speaking the time requirement prescribed by a statute granting the right to sue the United States'" is "'jurisdictional'" and an "'indispensable condition of the liability and of the action which it permits.'" *Simon* v. *United States*, 244 F.2d 703, 705 (5th Cir. 1957) (emphasis omitted) (quoting 34 Am. Jur. *Limitation of Actions* § 7, at 17 (1941 & 1956 Supp.)).

C. Respondent's Textual Arguments Lack Merit

As our opening brief notes (Br. 36), this Court recognized in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), that the FTCA time bar's "shall be forever barred" formulation is "of a similar order" as two other statutory time limits that likewise "confine[] [a court's] review" and are therefore "jurisdictional." *Id.* at 452-453 & n.8; see also *Bowles* v. *Russell*, 551 U.S. 205, 211 (2007) (citing same language in holding that time limit in 28 U.S.C. 2107 is "jurisdictional"). Respondent ignores *Kontrick* and instead advances several textual arguments to support her claim that the FTCA time bar permits equitable tolling. None is persuasive.

1. Respondent emphasizes 28 U.S.C. 1346(b)(1), which confers jurisdiction on district courts to adjudicate FTCA claims. She observes that the heading of Chapter 85 of Title 28 of the United States Code, in which the provision appears, refers to "District Courts; Jurisdiction." And she argues that because Section 1346(b)(1) contains six requirements for establishing a district court's jurisdiction over an FTCA case—yet makes no mention of the FTCA time limit—that limit must not be jurisdictional. Br. 25, 38-39.

Respondent is mistaken. To begin with, Congress forbade courts from relying on Chapter 85's heading to interpret that provision. See Act of June 25, 1948 (1948 Act), ch. 646, § 33, 62 Stat. 991 (declaring that "[n]o inference of a legislative construction is to be drawn" from the "catchlines" used in a chapter title).

In addition, this Court has already made clear that Section 1346(b)(1) is not the *only* source of jurisdictional limits on FTCA suits. In *McNeil* v. *United States*, 508 U.S. 106 (1993), the Court strictly construed 28 U.S.C. 2675(a)'s administrative-exhaustion

requirement and affirmed the dismissal of an FTCA action—for lack of jurisdiction—where the claimant had not satisfied that requirement. 508 U.S. at 109-113.

Respondent is also wrong to invoke (Br. 39) *FDIC* v. *Meyer*, 510 U.S. 471 (1994), in asserting that a district court necessarily has jurisdiction whenever a claimant satisfies the requirements of Section 1346(b)(1). *Meyer* involved a statute providing that a federal agency's general authority to sue and be sued in its own name "shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)*." 28 U.S.C. 2679(a) (emphasis added). This Court interpreted the term "cognizable" to refer to a court's jurisdiction, and it held that the phrase "claims * * * cognizable under section 1346(b)" therefore referred to claims subject to "the jurisdictional grant provided by [Section] 1346(b)." *Meyer*, 510 U.S. at 476-477.

Crucially, however, the Court also made clear that asking "whether [a claim] is 'cognizable *under 1346(b)*'" is different from asking "whether a claim is cognizable *under the FTCA* generally." *Meyer*, 510 U.S. at 477 n.5 (citation omitted). It thus appeared to recognize that even if a claim *is* "cognizable" under Section 1346(b), it might nevertheless *not* be "cognizable" under the FTCA. *Id.* at 477. That point directly contradicts respondent's view that district courts necessarily have jurisdiction over any FTCA claim that satisfies the bare requirements of Section 1346(b)(1).

2. Respondent also emphasizes (Br. 25-28) that the FTCA time bar (1) does not explicitly refer to "jurisdiction," and (2) appears in a different chapter of Title

28 (Chapter 161) than Section 1346's jurisdictional grant (which appears in Chapter 85).

a. The lack of an express reference to jurisdiction is not significant. This Court has previously emphasized that a provision can "speak in jurisdictional terms"—and carry jurisdictional consequences—even without an express "'jurisdictional' label." *Reed*, 559 U.S. at 168; see *Henderson*, 131 S. Ct. at 1203 (noting that Congress "need not use magic words"); see also *Bowles*, 551 U.S. at 209-213 (holding time limit in 28 U.S.C. 2107(a) to be jurisdictional despite lack of reference to "jurisdiction"); *Dalm*, 494 U.S. at 601-602, 609-610 (similar). What is notable about the FTCA time bar is not the *absence* of the word "jurisdiction," but the *presence* in the original FTCA of the phrase "Every claim against the United States cognizable * * * shall be forever barred," which this Court had previously—and repeatedly—interpreted as a jurisdictional limitation in Tucker Act suits.

b. Respondent's reliance on the placement of the FTCA's limitations period in the 1948 recodification of Title 28 violates Congress's express instruction that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed." 1948 Act § 33, 62 Stat. 991. That statutory directive settles the matter—and distinguishes the FTCA time bar from deadlines the Court has deemed non-jurisdictional based on similar structural arguments. See Resp. Br. 26-27 (citing examples).

Respondent also ignores this Court's recognition that "some time limits are jurisdictional even though expressed in a separate statutory section from juris-

dictional grants." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003). The Court applied that principle in *John R. Sand & Gravel*, *Bowles*, and *Dalm*—holding in each case that a time limit was jurisdictional even though it did not appear in the statutory provision defining the "jurisdiction" of the court adjudicating suits governed by that limit.[9] Indeed, in *John R. Sand & Gravel*, the Court declined to accept the precise argument respondent makes here, in the directly parallel context of the time bar that governs Tucker Act claims, 28 U.S.C. 2501. See Pet. Br. at 19-24, *John R. Sand & Gravel*, *supra* (No. 06-1164). But if Congress did not intend Section 2501 to lose its jurisdictional character simply because, following the 1948 recodification, it is not located in the same chapter of Title 28 granting the Court of Claims jurisdiction over Tucker Act cases, there is no reason to presume any different intent with respect to the parallel FTCA time bar.

3. Even if this Court were persuaded that the FTCA's time bar is not jurisdictional, respondent cannot refute the powerful evidence that Congress nonetheless intended to preclude equitable tolling. Re-

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[9] See *John R. Sand & Gravel*, 552 U.S. at 133-139 (holding time limit in 28 U.S.C. 2501 jurisdictional even though it appears in Chapter 165, whereas provisions defining "jurisdiction" of Court of Federal Claims (previously Court of Claims) mainly appear in Chapter 91, 28 U.S.C. 1491); *Bowles*, 551 U.S. at 209-213 (holding time limit in 28 U.S.C. 2107(a) jurisdictional even though it appears in Chapter 133, whereas provisions defining "jurisdiction" of courts of appeals appear in Chapter 83, 28 U.S.C. 1291-1296); *Dalm*, 494 U.S. at 601-602, 609-610 (holding time limit in 26 U.S.C. 6511(a) jurisdictional even though it appears in Title 26, whereas provision defining "jurisdiction" of courts over tax-refund claims appears in 28 U.S.C. 1346(a)(1)).

spondent's sole textual argument to the contrary (Br. 40-41) relies on 28 U.S.C. 1346(b)(1) and 2674, which provide that the United States is liable under the FTCA to the same extent as a private person under state tort law. But a key purpose of the FTCA limitations provision is to ensure that the deadline for filing an FTCA action will *not* mirror private-party, state-law tort suits. As this Court emphasized in *Richards* v. *United States*, 369 U.S. 1 (1962), "Congress has been specific in those instances where it intended the federal courts [applying the FTCA] to depart completely from state law." *Id.* at 14. Indeed, *Richards* identified the FTCA time bar as a prime example of a provision in which Congress "specifically" indicated that "the liability of the United States is *not* co-extensive with that of a private person under state law." *Id.* at 13-14 & n.28 (emphasis added).[10] Because Section 2401(b) imposes uniform time limits that apply to all FTCA claims without regard to how private defendants are treated in analogous circumstances, Sections 1346(b)(1) and 2674 provide no support for equitable tolling.

D. Respondent Fails To Address Other Features Of The FTCA's Text And History Confirming That Tolling Is Prohibited

As discussed in our opening brief (Br. 37-41, 45-52) several other aspects of the FTCA's text and history confirm Congress's intent to enact a time bar that is

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[10] See also, *e.g.*, *Kossick* v. *United States*, 330 F.2d 933, 935-936 (2d Cir.) (Friendly, J.) (declining to apply state law postponing accrual because "[t]he general language of [Section] 2674 must yield to the specific provisions of [Section] 2401 dealing with time limitations."), cert. denied, 379 U.S. 837 (1964).

not subject to tolling. Respondent ignores many of those points, and the few counter-arguments she does offer are not persuasive.

1. Respondent has virtually no response to the statutory text demonstrating that when Congress wanted to permit equitable tolling in closely analogous contexts, it did so expressly. For example, the time bars in the 1863 and 1911 Acts governing Tucker Act suits expressly allow tolling in cases of legal disability. U.S. Br. 37. When Congress incorporated language from those statutes into the FTCA, it omitted even those exceptions. Similarly, when Congress reenacted the FTCA time bar in 1966, it simultaneously enacted a parallel time bar—28 U.S.C. 2416—applicable to suits filed *by* the United States. U.S. Br. 46. But whereas the latter provision expressly authorized certain types of tolling, the FTCA time bar codified no similar exception. Also, in 1988, Congress added a narrow tolling provision to the FTCA, but left untouched the absolute time bar in Section 2401(b). *Id.* at 50-52. The fact that Congress explicitly authorized tolling only in carefully specified circumstances confirms its intent otherwise to prohibit such tolling.[11]

Respondent's only response concerning Section 2416 is to argue (Br. 52) that Congress's decision to enact a specific tolling provision creates a general "presumption against any non-statutory equitable tolling" because that rationale cannot "be reconciled with *Irwin*." But the point is not that Section 2416 trumps *Irwin* as a general matter, but that it confirms that

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[11] Cf. H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947) (observing that 1948 recodification "omitted as superfluous" an express prohibition on tolling beyond specified disabilities in 28 U.S.C. 2401(a)).

when Congress reenacted the FTCA time bar—on the same day that it enacted Section 2416—it did not intend to allow equitable tolling of that bar. And although respondent attempts (Br. 52-54) to undermine the significance of the 1988 amendment to 28 U.S.C. 2679(d)(2) by pointing to the Westfall Act's general purpose of protecting federal employees, the purpose of that specific provision was to make tolling available for plaintiffs who might be adversely affected by the Act's new procedure for substituting an FTCA claim against the United States for a suit against an individual employee.

2. Respondent likewise gives short shrift to the history of the FTCA. In the deliberations that led up to the original FTCA, Congress rejected various proposals to allow tolling for "reasonable cause" or in cases of disability. U.S. Br. 38-39. Later—in 1949, 1965, 1967, 1969, 1971, 1986, and 1989—Congress rejected proposals to amend the FTCA to authorize equitable tolling in various circumstances. *Id.* at 41, 49-50 & n.30. Moreover, when Congress did pass legislation to address potential hardships associated with the FTCA time bar, it did not embrace the broad tolling rule respondent urges here. Instead, in 1949 Congress extended the one-year suit filing deadline by an additional year, and in 1988 it authorized a narrow exception to the time bar's otherwise-strict administrative-presentment requirement in response to the new procedures established by the Westfall Act. *Id.* at 41, 50-52.

Respondent broadly denies (Br. 41-42) that the FTCA's history is relevant to ascertaining Congress's intent. But this Court has regularly consulted that history—including the history of the unenacted tort-

claims bills considered between 1925 and 1946—in prior FTCA cases, and there is no reason to depart from that practice here. See generally *United States* v. *Muniz*, 374 U.S. 150, 153-158 (1963); *Dalehite* v. *United States*, 346 U.S. 15, 24-30, 33-34 (1953); see also *Reed*, 559 U.S. at 166 (emphasizing importance of "context" and "historical treatment" in assessing whether provision is jurisdictional). The FTCA's history is an important tool for interpreting the legally operative text of the time bar, for understanding the background principles against which Congress actually legislated, and thus for discerning "Congress' likely meaning." *John R. Sand & Gravel*, 552 U.S. at 137-138.

Respondent's only real effort to engage with the FTCA's legislative history is her assertion (Br. 51 n.29) that one reason that Congress extended the suit-filing deadline in 1949 was to more closely track similar federal and state statutes. That does not change the fact that some in Congress also indicated that the existing one-year period was unfair in certain "hardship" cases where the claimant had a "reasonable excuse" for not observing the time limit. U.S. Br. 41. That concern makes sense only if Congress did *not* presume that the original time bar would have implicitly authorized equitable tolling in such circumstances by its own force.

3. Finally, respondent simply ignores the numerous private laws that Congress enacted from the 1950s through the 1980s expressly conferring "jurisdiction" on district courts to hear FTCA claims "notwithstanding" a claimant's failure to comply with the time bar. See U.S. Br. 46-49 (discussing private laws in detail). Those laws confirm that Congress understood the

FTCA time bar to be a jurisdictional requirement not subject to tolling. *Ibid.*

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

DECEMBER 2014