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No. 13-1074

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KWAI FUN WONG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

(1) Is the six-month limit for filing suit under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), jurisdictional?

(2) If the six-month limit for filing suit under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is not jurisdictional, is it subject to equitable tolling?

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STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief. App. 1a-14a.

STATEMENT

(1) Respondent Kwai Fun Wong is the spiritual leader of the Wu-Wei Tien Tao Association ("the Association"), the Matriarch of the Tao Heritage. She was born in Hong Kong and was a citizen of the United Kingdom at all relevant times herein.

More than 30 years ago, the then Patriarch of the Association, Wu-Wei Lao Zhu (respectfully called Qian Ren), came to the United States and began to organize local religious organizations, known as alters, in several American cities. Over time Wu-Wei Tien Tao Associations were established in a number of areas, including Oregon and California, as well as in Canada, Australia, Hong Kong and Taiwan. Wong became a Tien Tao minister in the mid-1980's while in Hong Kong. In July 1982, Wong entered the United States with a B-2 visitor visa. Later that year, the Immigration and Naturalization Service granted a petition by the California Tien Tao Association to classify Wong as a religious worker/minister. In 1992 and again in 1994, Wong filed applications for permanent resident status; those applications were not acted on by INS. In 1998 Qian Ren designated Wong to become the Tao Matriarch after his death. Pet.App. 247a.

Qian Ren died in March, 1999. As a minister of the Association and Qian Ren's spiritual successor, Wong was obligated to accompany his body back to Hong Kong and arrange for his funeral. Before departing the United States, however, Wong failed to obtain an advance parole document permitting her to re-enter the United States. Upon completion of her religious obligations, Wong promptly returned to the United States 18 days later. She presented herself to federal immigration authorities and candidly disclosed the emergency which had required her brief absence from the United States. The INS paroled Wong into the United States. Pet.App. 247a-48a. In April 1999, Wong filed an application for parole and her attorney filed a new application for permanent resident status. Pet.App. 248a-49a. Wong's attorney wrote to the INS explaining Wong's situation, and offered to provide them with additional information, including a meeting with Wong herself. Pet.App. 249a.

In the wake of those applications, but unbeknownst to Wong or her attorney, local INS officials held a series of meetings about her status, retrieved her earlier applications for permanent resident status, and summarily denied the applications. The INS issued a "Determination of Inadmissibility," and ordered her removal from the United States; the existence of that determination and order were not disclosed to Wong until after her arrest a month later. Pet.App. 249a-52a. On June 10, 1999, the INS sent to Wong an "Employment Authorization" notice, explaining that she could pick up her Employment

Authorization Document from the local INS office. That notice was a sham, and directly violated INS policy prohibiting the use of such subterfuges to lure individuals to an INS office for the purposes of arrest and deportation. When Wong went to the INS office as requested, she was summarily arrested. Pet.App. 252a-53a.

INS policies prohibit strip searching individuals such as Wong while in detention. According to the complaint, INS knew at the time that it was the practice in the local Multnomah County jails to strip search every inmate entering or being transferred to one of the county jails. Despite that knowledge, Wong was transferred by INS to the Multnomah County jail system, where she was twice subjected to strip searches and body cavity searches. During both searches there were male guards in the room, separated from Wong by only a piece of fabric curtain. Pet.App. 256a-58a. Before Wong was taken to the Multnomah County jail, another Association official explained to the INS that Wong was a vegetarian, and that her religious vows forbad her to eat meat or animal products of any kind. For reasons that remain unclear, Federal officials did not take effective action to assure that jail officials would provide Wong with food that she could eat, and she never received a vegan meal. Wong contends that jail officials offered her "nothing I could eat" because "it all contained eggs, milk and animal product." Pet.App. 254a-56a. Within a few days Wong was transferred back to INS

custody and removed from the United States on a flight to Hong Kong. Pet.App. 258a.

The detention, strip searches and deportation of Wong had severe consequences for the Wu-Wei Tien Tao Association. In light of the manner in which federal officials had treated her, Association followers began to question Wong's authority and spiritual standing. There was an ensuing split in the religion and its organizations, and a decline in its membership and donations. Wong has remained outside the United States.

(2) On May 18, 2001, Wong presented a claim under the Federal Tort Claims Act (FTCA) to the INS. Pet.App. 5a, 110a-11a; J.A. 25-26. The claim included an allegation that federal officials had been negligent in connection with the conditions of Wong's confinement. That same day, Wong filed in federal court an action against several individual federal officials under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages based on her removal and the conditions of her detention. Pet.App. 5a, 110a-11a, 131a. Wong subsequently amended that complaint adding contentions not relevant here.

Under the terms of the FTCA, in the absence of a final agency decision on her administrative claim, Wong could not initiate a civil action against the United States until November 20, 2001, six months after the date on which she had submitted that claim. 28 U.S.C. § 2675(a). On November 9 and 14, 2001,

anticipating that impending date, counsel for Wong filed a motion for leave to amend her pending complaint, seeking to add a claim under the FTCA.[1] Pet.App. 5a-6a, 111a-12a; J.A. 8-9, 60-77. Wong filed with both of those motions a copy of her proposed second amended complaint. J.A. 63-77. The United States filed its response to these motions on November 30, 2001; by that point the six-month exhaustion period had been satisfied, and under the terms of the FTCA Wong was entitled to proceed in federal court. The government nonetheless objected to the motion, insisting that to proceed under the FTCA, Wong was required to file a second lawsuit. J.A. 78-83. On December 3, 2001, the INS issued a final denial of Wong's administrative complaint. Pet.App. 6a; J.A. 85-87. Respondent thus had six months, until June 3, 2002, to "beg[i]n" an "action" under the FTCA. 28 U.S.C. § 2401(b).

Wong continued to pursue her effort to amend her pending complaint. On December 10, 2001, Wong filed a Reply Memorandum in support of her motion for leave to amend. J.A. 10, 88-93. On December 17, 2001, the magistrate judge held a hearing on that and other pending motions. On April 5, 2002, the

[1] On November 14, the same day on which Wong filed a second motion for leave to amend, the district court granted her first motion. J.A. 8. Because the government had not responded to the first motion, but did reply to the second, the district court disregarded its November 14 order and treated the motion as pending and unresolved. See Doc. 53-1.

magistrate judge issued Findings and Recommendations, recommending that Wong be granted leave to file the proposed second amended complaint. Pet.App. 130a, 182a-85a. The magistrate judge's order also addressed a number of other pending motions. On April 26, 2002, the United States filed objections to some portions of the magistrate judge's recommendations; it did not, however, object to the recommendation regarding the second amended complaint. See Pet.App. 115a-17a. On June 25, 2003, the district judge adopted the magistrate judge's Findings and Recommendations, including the then unopposed motion for leave to file the second amended complaint. Pet.App. 128a-29a. The date of the district court's decision, however, was issued 22 days after the expiration of the six-month period to "beg[i]n" an action. On August 13, 2002, Wong filed a second amended complaint setting forth the FTCA allegations that had been contained in the amended complaints she had filed with her earlier motions of November 9 and November 14, 2001. J.A. 16.

After an interlocutory appeal on unrelated issues, the United States moved for summary judgment on Wong's FTCA claim in October 2005. The government argued that the district court lacked jurisdiction over the claim because it was not timely filed under 28 U.S.C. § 2401(b). The United States argued that Wong's motions (and amended complaints) filed on November 9 and 14, 2001, were filed 11 and 6 days too soon under the FTCA, and that her amended complaint of August 2002 was filed too late. Pet.App.

17a. The magistrate judge recommended denial of the government's motion, Pet.App. 112a-17a, and the district court adopted her findings and recommendation. Pet.App. 106a-07a. The judge stressed that "the 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, [and] had full notice of plaintiffs' intended FTCA claim just prior to the expiration of the six-month administrative review period...." Pet.App. 114a. "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." Pet.App. 117a. The judge explained that the plaintiffs had "appropriately waited" until a final ruling on the recommendations of the magistrate judge, and that final approval by the court of the motion for leave to amend had been delayed only because the government had appealed other recommendations. "Accepting 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." Pet.App. 115a. The court thus tolled the six-month limitations period for 81 days, the time between the date the magistrate judge had recommended that Wong be granted leave to amend and the date the district court granted such leave. Pet.App. 117a.

Several years later, while the case was still pending in the district court, the United States moved for reconsideration based on the Ninth Circuit's intervening decision in *Marley v. United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). Pet.App. 103a-05a. *Marley* held that Section 2401(b)'s six-month statute of limitations cannot be equitably tolled because the statutory deadlines for FTCA claims are jurisdictional. 567 F.3d at 1033-38. The district court granted the motion, holding that it lacked jurisdiction over Wong's FTCA claim. Pet.App. 103a-05a.

Wong appealed, arguing inter alia that her August 2002 amended complaint was timely under the relation-back provision of Rule 15 of the Federal Rules of Civil Procedure.[2] After oral argument, the court of appeals invited the parties to submit supplemental briefs regarding whether the case should be reheard en banc. J.A. 2. The court of appeals subsequently ordered rehearing en banc. J.A. 3.

A divided en banc panel reversed, holding that the FTCA's six-month statute of limitations is not jurisdictional, Pet.App. 4a-36a, and that equitable tolling is permitted under section 2401(b). Pet.App. 36a-40a. The majority concluded that equitable tolling was appropriate under the circumstances of

[2] Plaintiffs-Appellants Brief, pp. 31-33.

this case. Pet.App. 46a-47a. The panel did not reach two alternative possible grounds for reversal.[3]

Judge Kozinzki concurred in the judgment. Pet.App. 48a-52a. He agreed with the dissenters that Section 2401(b) is jurisdictional, but concluded that Wong's December 10, 2001 Reply Memorandum should be treated as having "begun" her FTCA action within the six-month limitation period. Pet.App. 50a. Judges Tashima and Bea dissented in separate opinions, both of which concluded that the FTCA statute of limitations is jurisdictional. App. 52a-102a.

SUMMARY OF ARGUMENT

A. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), governs disputes about equitable tolling of statutes of limitations applicable to claims against the United States. Prior to *Irwin*, this Court had issued conflicting decisions regarding whether such limitations periods could be tolled. *Irwin* held 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. That rule precludes the

[3] The court did not decide whether Wong's December 10, 2001, Reply Memorandum, filed *after* the expiration of the minimum six-month exhaustion period, could constitute "beg[i]n[ing]" an action, or whether the August 2002 second amended complaint was timely because of the relation-back provision of Rule 15. App. 44a.

government from objecting to tolling on the ground that statutes of limitations governing claims against the government are inherently jurisdictional; such an objection would invariably defeat the *Irwin* presumption. The government is free to argue that such a statute of limitations is jurisdictional, but only on grounds that could also be asserted by a private defendant.

The rule in *Irwin* should not be limited to statutes that were enacted after that 1990 decision. *Irwin* announced a principle of statutory construction, and application of such standards is not subject to such temporal restrictions. Doing so in this instance would largely codify the very drive-by jurisdictional rulings which this Court has properly sought to correct.

B. Statutes of limitations are presumptively non-jurisdictional. In a series of decisions dating from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), this Court has held that statutory requirements will be held jurisdictional only if Congress has clearly so stated. That clear statement requirement has particular force with regard to statutes of limitations, which are "quintessential claim-processing rules." *Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011).

C. The text of the Federal Tort Claim Act makes clear that the statute of limitations in section 2401(b) is not jurisdictional. The section 2401(b) statute of limitations is in a different section, and chapter, than the jurisdictional provision in section 1346(b)(1). The limitations provision in section 2401(b) does not refer

to or purport to limit the jurisdictional grant in section 1346(b)(1), and the jurisdictional provision does not refer to the statute of limitations.

The language of section 2401(b) "reads like an ordinary, run-of-the-mill statute of limitations." *Holland v. Florida*, 560 U.S. 631, 647 (2010). There is nothing exceptional about the terms of section 2401(b) stating that untimely claims shall be "forever barred." Every statute of limitations would be described as creating a "bar" to untimely claims. And the bar created by a statute of limitations is intended to be permanent.

This Court's Tucker Act decisions did not interpret the phrase "forever barred" to denote a jurisdictional statute of limitations. That phrase was not actually part of the 1887 Tucker Act, and is not in the Tucker Act today. Although the phrase was in the 1863 predecessor of the Tucker Act, and in the Tucker Act itself between 1911 and 1948, the decisions holding the variously worded statutes of limitations jurisdictional never turned on the language of that provision. Rather, in decisions such as *Finn v. United States*, 123 U.S. 227 (1887), the Court held that any statute of limitations applicable to a claim against the United States, however worded, would be jurisdictional because compliance with that statute of limitations is a condition of the United States consent to being sued. That was the interpretation of *Finn* advanced by the Solicitor General in *Bowen v. City of New York*, 476 U.S. 467 (1986).

D. Section 1346(b)(1) spells out six requirements which must be established to create jurisdiction over a tort claim against the United States. Where those elements are present, "the district court ... shall have ... jurisdiction." This mandatory language precludes reading into section 2401(b) any unspoken additional requirement. Doing so would be particularly inappropriate because other provisions, unlike section 2401(b), do expressly apply to and limit the scope of section 1346(b)(1).

E. The rules in *Irwin* and *Arbaugh* do not apply where this Court has consistently and deliberately held that a particular provision is jurisdictional. *John R. Sand & Gravel Co. v. United States*, 522 U.S. 130 (2008). But that exception does not apply in this case. No opinion of this Court ever decided that section 2401(b) of the Federal Tort Claims Act is jurisdictional. This Court's Tucker Act decisions did not establish a uniform rule that all statutes of limitations affecting actions against the United States are inherently jurisdictional; this Court's decisions under Title VII and the Social Security Act applied the opposite rule.

F. Limitations periods are presumptively subject to equitable tolling. There is nothing about the tort claims covered by the Federal Tort Claims act that militates against application of that usual rule. Those claims have none of the features that led this Court to hold that equitable tolling is unavailable under other statutes. The six-month filing period is not unusually long, case-by-case application of equitable tolling is normal, and tolling in this context

does not portend any of the practical problems of tolling claims under the Internal Revenue Code or in quiet title actions.

ARGUMENT

I. THE ISSUES IN THIS CASE ARE GOVERNED BY THE STANDARD IN *IRWIN v. DEPARTMENT OF VETERANS AFFAIRS*

For almost a quarter century, litigation about the availability of equitable tolling in actions against the United States have been governed by this Court's pivotal decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). *Irwin* significantly informs and to some degree limits the issues the Court must address in resolving the questions presented in this case.

Prior to *Irwin*, the decisions of this Court had taken conflicting approaches to equitable tolling in actions against the United States. *Soriano v. United States*, 352 U.S. 270 (1957), held in the context of a claim under the Tucker Act that "Congress ... gave the Government's consent to be sued [under the Tucker Act] only in certain classes of claims and that no others might be asserted against it, including 'claims which are barred if not asserted within the time limited by statute.'" 352 U.S. at 273 (quoting *Kendall v. United States*, 107 U.S. 123, 125 (1883)). Both before and after *Soriano*, the United States contended that all statutes of limitations regarding actions against

the government were jurisdictional, and thus precluded equitable tolling. In the years following *Soriano*, however, the Court repeatedly held that the statute of limitations applicable to Social Security claims was not jurisdictional, and could thus be tolled. Those decisions culminated in *Bowen v. City of New York*, 476 U.S. 467, 478 and n.10 (1986), where the government unsuccessfully urged the Court to apply the different approach in *Soriano*.[4]

The question in *Irwin* was whether the 30-day period for commencing a Title VII action against the United States is subject to equitable tolling. 42 U.S.C. § 2000e-16(c). The government insisted that the 30-day statute of limitations was jurisdictional,[5] relying

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[4] Brief for the Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *43 ("The conclusion that [the 60-day filing deadline] should be ... construed [as jurisdictional] is reinforced by the fact that ... other statutory limitations on bringing suit against the government uniformly have been understood to be conditions on the waiver of sovereign immunity and therefore jurisdictional prerequisites to suit.... *Soriano v. United States.*"), *44, *46.

[5] Brief for the Respondents, *Irwin v. Veterans Administration*, available at 1990 WL 511300 at *6 ("Statutory time limits on suits against the government limit the sovereign's consent to be sued and, hence, define the court's jurisdiction."), *8 ("Compliance with the thirty-day limit is ... a 'jurisdictional prerequisite' for judicial review of federal employment discrimination claims." (quoting *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 137 (1981) (Brennan, J., concurring in judgment))), *10 ("time limitations specified by Congress are conditions of the sovereign's consent to suit. As such, they define the extent of the court's jurisdiction...."), *19 ("because the statutory deadline ... constitutes one of the terms of the sovereign's consent to be sued and,

(Continued on following page)

on *Soriano*.[6] The rule established by *Soriano*, it argued, was that in actions against the United States courts may not "apply[ ] equitable principles that, in the private contest, might justify the waiver or tolling of statutes of limitations."[7] The plaintiff, on the other hand, relied on *Bowen*.[8] This Court, citing *Bowen* and *Soriano*, acknowledged that "our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent." 498 U.S. at 456.

The Court concluded that the point had come to resolve the inconsistencies.

> [A] continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the

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as such defines the district court's jurisdiction, ... the timely filing requirement ... is a jurisdictional prerequisite to district court consideration of a government employee's Title VII complaint.").

[6] *Id.* at *10 ("Time limitations specified by Congress are conditions of the sovereign's consent to suit. As such, they define the extent of the court's jurisdiction and, accordingly, must be strictly observed."), *14.

[7] *Id.* at *14.

[8] Reply Brief for Petitioner, *Irwin v. Veterans Administration*, available at 1990 WL 10013122 at 3-7, 13.

> applicability of equitable tolling in suits against the Government.

498 U.S. at 95. "We therefore hold 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.

> Once Congress has made ... a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

498 U.S. at 95. That "general rule" was dispositive in *Irwin*. The Court had previously held that statutory time limits applicable to lawsuit against private employers under Title VII are subject to equitable tolling. 498 U.S. at 95 and n.2. Irwin's claim was thus subject to "the equitable tolling doctrine [that was applied] as between private litigants." 498 U.S. at 96.

Irwin governs the questions that a court must decide when a plaintiff seeks to invoke equitable tolling in an action against the United States. The rule in *Irwin* was necessarily a rejection of the government's argument in that case that statutes of limitations are jurisdictional – and thus bar equitable tolling – whenever they concern a claim against the government itself. The "rule" in *Irwin*

would be meaningless if it could be overcome by that argument, which would defeat the *Irwin* presumption in every case in which the United States is a defendant. Continued judicial consideration of such sovereign-immunity-based contentions in tolling disputes would also be incompatible with the intent of *Irwin* to end the pattern of "ad hoc" case-by-case decisions regarding when claims tolling issues regarding the United States should be accorded different treatment than tolling issues regarding private defendants. The government is free to contend that other types of provisions should be deemed jurisdictional simply because they are conditions of a waiver of sovereign immunity, but *Irwin* precludes that type of government-only contention regarding a statute of limitations. And while the government may argue that a statute of limitations is jurisdictional, it may do so only by advancing the "same" types of contentions regarding text or other considerations that could be asserted by a private litigant.

In *Young v. United States*, 535 U.S. 43 (2002), where the United States as a plaintiff sought to invoke equitable tolling, it correctly recognized the significance of *Irwin*.

> [T]his Court has held that time limits in federal statutes for filing claims are presumptively subject to equitable tolling.... So venerable is the practice that even waivers of sovereign immunity are presumed to incorporate the practice. *Irwin*, 498 U.S. at 95. That is because the assumption that Congress intended equitable tolling to be available in a

> statute "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation" of statutes. *Ibid.*

Brief for the United States, *Young v. United States*, available at 2001 WL 1597747 at *33-*34. "The *Irwin* decision rests on this Court's determination that, when Congress waives sovereign immunity from suit, it generally intends that the government will be treated like a private litigant in the application of equitable tolling principles." Brief for the Respondent, *Scarborough v. Principi*, available at 2003 WL 23138393 at *39. Private litigants, of course, may not defeat equitable tolling by arguing that they have not consented to be sued after a given period of time.

In this case, however, the United States advances the very argument necessarily rejected in *Irwin*, that statutes of limitations in statutes authorizing claims against the United States are inherently jurisdictional, and thus incompatible with equitable tolling, because those limitations are a condition of the government's consent to being sued. Pet. Br. 32-35. The government's "categorical" *Soriano*-based argument, Pet. Br. 34, reprises the very contentions that the Solicitor General made, and that this Court rejected, in *Irwin* and *Bowen*. See nn.4-6, *supra*. The United States advances no compelling reason to abandon the principle of statutory interpretation that has prevailed for the decades since *Irwin*. See *Scarborough v. Principi*, 541 U.S. 401, 419-23 (2004) (applying *Irwin*). In announcing the rule in *Irwin*, this Court observed that "Congress, of course, may

provide otherwise if it wishes to do so." 498 U.S. at 96. Congress, however, has not chosen to do so, and there is no reason for this Court to revisit the issues resolved by *Irwin* or to reconsider the correctness of the decision in *Bowen*.

The government appears to suggest that, if this Court is unwilling to abandon *Irwin*, it should at least limit the application of that decision to statutes adopted after December 3, 1990, the date on which *Irwin* was decided. "It may be that after *Irwin*, this Court would not, without more, apply *Soriano*'s categorical rationale to any *new* statute waiving immunity for claims against the United States." Pet. Br. 34 (emphasis added). "In th[e] era [prior to *Irwin*] ... Congress did not expect its silence to be taken as implicit consent to equitable tolling." *Ibid.*; see *id.* at 29-30. But this Court has not applied rules of statutory construction on such a date-specific basis, and it should not do so here. *Irwin* itself necessarily rejected this approach; the Title VII provision at issue had been adopted 18 years prior to the decision in *Irwin*. Justice White specifically (and unsuccessfully) objected that the relevant Title VII section "was enacted in 1972 when the presumption was, as set forth in *Soriano*...., that statutes of limitations for suits against the Government were *not* subject to equitable tolling." 498 U.S. at 100 n.2 (dissenting opinion). The majority in *Irwin* concluded, to the contrary, that the rule it adopted was "likely to be a realistic assessment of legislative intent." 498 U.S. at 95. The Court also rejected this argument when it was advanced by

the United States in *Scarborough v. Principi*, 541 U.S. 401, 420-23 (2004),[9] and in *Bowen*.[10]

The task of interpreting statutes would become immeasurably more difficult if courts were required to determine which principles of statutory interpretation were prevalent when each statute, or portion thereof, was adopted or amended. Doing so in this area of the law would actually codify past drive-by jurisdictional rulings as the standards of construction

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[9] Brief for the Respondent, *Scarborough v. Principi*, available at 2003 WL 23138393 at *41 ("Congress drafted Section 2412(d) at a time, before *Irwin*, when the background presumption was that statutes of limitations in suits against the government were not subject to equitable tolling. See *Irwin*, 498 U.S. at 99 n.2 (White, J., concurring in part and in the judgment).").

[10] In its brief in *Bowen*, the government argued that decisions by this Court prior to the enactment of the provision at issue had held that statutes of limitations in laws authorizing suit against the United States were jurisdictional. Brief for the Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *41-*45.

> In 1938 the Court applied the same rule [in] ... *Munro v. United States*, 303 U.S. 36, 41 (1938). It was against this background that Congress in 1939 enacted Section 405(g) and thereby waived the government's immunity to suits arising under the Social Security Act. Because *Munro* had been decided only a year earlier ... , it is reasonable to assume that congress likewise intended the 60-day filing requirement in Section 405(g) to state a jurisdictional limitation.

Id. at *43.

controlling the meaning of all statutes adopted prior to the early years of the twenty-first century.[11]

II. THE SECTION 2401(b) STATUTE OF LIMITATIONS IS NOT JURISDICTIONAL

A. Statutes of Limitations Are Presumptively Non-Jurisdictional

Because a statutory requirement that is jurisdictional imposes special burdens on the courts and the parties, this Court has insisted that Congress must clearly indicate that a provision be treated as jurisdictional. "Characterizing a rule as jurisdictional renders it unique in our adversarial system. Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy. Tardy objections can therefore result in a waste of adjudicatory resources and disturbingly disarm litigants." *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, 824 (2013).

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[11] See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Reed Elsevier, Inc. v. Muchnick*, available at 2009 WL 1601031 at *19 n.9 ("The court of appeals based its ... decision primarily on decisions predating *Arbaugh* that characterize Section 411(a) in jurisdictional terms.... These 'drive-by jurisdictional rulings,' ... should be given little weight because they predate *Arbaugh* and did not apply the analytic approach that his Court articulated in that case." (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006))).

> Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system.... [F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.

Henderson v. Shinseki, 131 S.Ct. 1197, 1202 (2011). "Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety.... Courts, we have said, should not lightly attach those 'drastic' consequences to limits Congress has enacted." *Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012) (quoting *Henderson*, 131 S.Ct. at 1202).

"'Jurisdiction,' this Court has observed, 'is a word of man, too many, meanings.' ... This Court, no less than other courts, has sometimes been profligate in its use of the term.... We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90, 91 (1998)).

> Courts – including this Court – have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis.... Our recent cases evince a marked desire to curtail such "drive-by jurisdictional rulings," ....

Reed Elsevier v. Muchnik, 559 U.S. 154, 161 (2010) (quoting *Arbaugh*, 546 U.S. at 511-12). "Recognizing that the word 'jurisdiction' has been used by courts, including this Court, to convey 'many, too many meanings,' ... we have cautioned, in recent decisions, against profligate use of the term." *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 81 (2000) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998)).

"To ward off profligate use of the term 'jurisdiction,' [the Court has] adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional.... We inquire whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, we have cautioned, 'courts should treat the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Center*, 133 S.Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)).

> Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline

> to the use of this term.... Under *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.' ... This approach is suited to capture Congress' likely intent and also provides helpful guidance for courts and litigants....

Henderson, 131 S.Ct. at 1203 (quoting *Arbaugh*, 546 U.S. at 515-16). Courts must ascertain that "Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement ... 'courts should treat the restriction as nonjurisdictional in character.'" *Henderson*, 131 S.Ct. at 1203 (quoting *Arbaugh*, 546 U.S. at 515-16); see *Gonzalez*, 132 S.Ct. at 648-9 ("clear-statement principle"); *Reed Elsevier*, 559 U.S. at 163 ("clearly states").

"Among the types of rules that should *not* be described as jurisdictional are what we have called 'claim-processing rules.' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain times.... Filing deadlines ... are quintessential claim-processing rules." *Henderson*, 131 S.Ct. at 1203 (emphasis added). "[W]e have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as 'quintessential claim-processing rules.'" *Sebelius*, 133 S.Ct. at 825 (quoting *Henderson*, 131 S.Ct. at 1203).[12] Thus only a

[12] See *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (filing deadline for fee applications under Equal Access to Justice Act); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (filing deadlines for objecting to debtor's discharge in bankruptcy); *Honda v.*

(Continued on following page)

particularly compelling showing would be sufficient to demonstrate that a filing deadline is jurisdictional.

B. The Text of Section 2401(b) Makes Clear That The Statute of Limitations Is Not Jurisdictional

The text of sections 2401(b) and 1346, and the statutory context, make clear that the limitations period in section 2401(b) is not jurisdictional.

(1) The clear distinction between the jurisdiction conferred on district courts by the Federal Tort Claims Act ("FTCA"), and the FTCA's statute of limitations, is reflected in the fact that those provisions are, and always have been, in different sections of the law. The jurisdictional element of the statute is set out in section 1346, which specifies a number of distinct requirements that must be met for jurisdiction to exist. Section 1346 is located in chapter 85 of Title 28, "District Courts; Jurisdiction." The statute of limitations, on the other hand, is set out in section 2401(b), which is headed "Time for Commencing Action Against United States," and is located in chapter 161 of Title 28, "United States as Defendant." The FTCA jurisdiction provision contains no reference to the statute's limitations provision. See Pet.App. 24a ("[W]hile § 1346(b)(1) does cross-reference 'the provisions of chapter 171,' it does *not* cross reference

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Clerk, 386 U.S. 484, 498 (1967) (filing deadline for claims under Trading with the Enemy Act).

§ 2401(b), which is located in chapter 161, not 171.") (emphasis in original); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("The provision granting district courts jurisdiction ... contains no reference to the timely-filing requirement.") (footnote omitted). And the FTCA statute of limitations does not refer to the jurisdictional provision.

This Court has repeatedly explained that the separation of jurisdictional provisions from other requirements, such as statutes of limitations, is persuasive evidence that those other requirements are not jurisdictional.[13] The United States itself has pointed out the significance of a statutory scheme

[13] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) ("the provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."); *Reed Elsevier*, 559 U.S. at 164 ("§ 411(a)'s registration requirement is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [the] claims."); *Arbaugh*, 546 U.S. at 515)"the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.' ") (quoting *Zipes*, 455 U.S. at 394); *Union Pacific Railroad*, 558 U.S. at 83 ("the conference requirement is stated in the '[g]eneral duties' section of the [Railway Labor Act], § 152, a section that is not moored to the '[e]stablishment[,] ... powers[,] and duties' of the [National Railroad Adjustment Board], set out next in § 153."); *Gonzalez*, 132 S.Ct. at 651 ("Congress set off the requirements in distinct paragraphs....").

which separates jurisdictional provisions from other requirements.[14]

(2) The language of section 2401(b) "reads like an ordinary, run-of-the-mill statute of limitations." *Holland v. Florida*, 560 U.S. 631, 647 (2010). The section "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [court]." *Henderson*, 131 S.Ct. at 1204 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)); see *Arbaugh*, 546 U.S. at 515. "If Congress had wanted the [six-month] time to be treated as jurisdictional, it could have cast that provision in [jurisdictional] language...." *Henderson*, 131 S.Ct. at 1204-05; see *Gonzalez*, 132 S.Ct. at 649; 28 U.S.C. § 2342 ("Jurisdiction

[14] Brief for the United States as Amicus Curiae Supporting Petitioner, *Arbaugh v. Y & H Corp.*, available at 2005 WL 1811402, at *6-*7 ("the definition of 'employer' is structurally separate from the jurisdictional provision, which makes no reference to that definition."); Brief for the United States and EEOC as Amicus Curiae, *Zipes v. Trans World Airlines*, available at 1981 WL 389623, at *12 ("[The jurisdictional provision] is separate and distinct from the charge-filing section, ... contains no reference to the charge-filing requirement, and ... certainly does not purport to limit the jurisdiction of the federal courts to cases in which the plaintiff has complied with the charge-filing period. Neither does the charge-filing section purport to condition the jurisdiction of the federal courts upon compliance with this requirement. The two sections plainly deal with different subject matters and different purposes. While one deals with the jurisdiction of the federal courts, the other deals with proceedings before the Commission.... [There is no] evidence that Congress intended to merge the charge-filing requirement into the jurisdictional provision.... [I]f that had been Congress' intention, it could easily have been accomplished.") (footnote omitted).

is invoked by filing a petition as provided by section 2344 of this title."). Like the requirement in *Reed Elsevier*, the statute of limitations "is not located in a jurisdiction-granting provision...." 559 U.S. at 166. "That placement suggests Congress regarded the ... limit as a claim-processing rule...." *Henderson*, 131 S.Ct. at 1205.

There is nothing exceptional about the language of section 2401(b) stating that untimely claims will be "forever barred." Every statute of limitations would be described as creating a "bar" to untimely claims. And the bar created by a statute of limitations is intended to be permanent, not – like the automatic stay in bankruptcy – merely a temporary postponement of the time-barred action. "§ 2401(b) merely states what is ordinarily true of statutory filing deadlines: once the limitation period ends, whether extended by the application of tolling principles or not, a plaintiff is 'forever barred' from presenting his claim to the relevant adjudicatory body." Pet.App. 15a. "[C]alling a rule nonjurisdictional does not mean that it is not mandatory.... This Court has long 'rejected the notion that "all mandatory prescriptions, however, emphatic, are ... properly typed jurisdictional."'" *Gonzalez*, 132 S.Ct. at 651 (quoting *Henderson*, 131 S.Ct. at 1205).

The government argues that "[t]he ... text ... attaches a specific jurisdictional *consequence* to delayed filings, stating that untimely claims 'shall be forever barred.' 28 U.S.C. 2401(b). Unlike other statutes of limitations that simply authorize a claim

to be brought within a specific period, the FTCA provision does a step further by requiring dismissal of such claims." Pet. Br. 35. (emphasis in original) But dismissal of untimely claims is the normal consequence of a statute of limitations. "[A] time limitation may be emphatic, yet not jurisdictional." *Sebelius*, 133 S.Ct. at 825. In *Union Pacific Railroad*, the Court noted that a provision which precludes consideration of a matter which violates a statutory requirement is not for that reason jurisdictional.

> The Carrier points to the ... Circular One procedural regulations, ... which provide: "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the [Railway Labor Act]." 29 C.F.R. § 301.2(b). That provision ... is a claims-processing rule.

558 U.S. at 83.

In *Irwin* the Court declined to attach significance to the various ways in which statutes of limitations are worded.

> The phraseology of this particular statutory time limit [in Title VII] is probably very similar to some other statutory limitations on suits against the Government, but probably not to all of them. In the present statute, Congress said that "[w]ithin thirty days ... an employee ... may file a civil action...." In *Soriano* ... 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 congressional intent with respect to the availability of equitable tolling.

498 U.S. at 94-95. If that difference in phrasing is not sufficient to bar tolling, ipso facto it is not sufficient to render the arguably more stringent provision jurisdictional.

In *Irwin* one amicus brief supporting the plaintiff argued that the Title VII statute of limitations was non-jurisdictional because it was less stringent than the "forever barred" language of section 2401(b).[15] In response to a question from the Court, counsel for the United States specifically disagreed with that contention, insisting that this difference in the phrasing of

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[15] Brief Amicus Curiae National Treasury Employees Union in Support of Petitioner, No. 89-5867, available at 1990 WL 10013118, at *11 n.10 ("The permissive language of section 2000e-16(c) is ... materially different from the language used in other limitations statutes this Court has construed where suits have been brought against the government. *E.g.*, *United States v. Mottaz*, 476 U.S. 834 (1986) (28 U.S.C. § 2409a(f) – a civil action 'shall be barred less' commenced within twelve years); *United States v. Kubrick*, 444 U.S. 111 (1979) (28 U.S.C. § 2401(b) – 'a tort claim against the United States shall be forever barred unless' it is timely presented to the agency); *Soriano v. United States*, 352 U.S. 270 (1957) (28 U.S.C. § 2101(b) – 'every claim ... shall be barred' unless filed within six years).").

Title VII and section 2401(b) was not significant.[16] And in *Reed Elsevier* the government again disavowed that sort of semantic distinction.[17]

(3) The United States contends that when the FTCA was enacted in 1946, and indeed much earlier, the phrase "shall be forever barred" had been definitively

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[16] Oral Argument, *Irwin v. Veterans Administration*, available at 1990 WL 601331 *30-*31:

> Question: Well, in cases like Soriano and Mottaz 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 the legal rhetoric at the time the statute was passed. There are many statutes and rules that are unquestionably jurisdictional that don't have the shall be forever barred language.

[17] Oral Argument, *Reed Elsevier v. Muchnick*, available at 2009 WL 3197880 at *27:

> Chief Justice Roberts: There really are, in our recent decisions, it seems to me, two different lines of authority. There is Bowles and the John R. Sand and Gravel, which treats these sorts of things as jurisdictional, and the Arbaugh line that doesn't. And it does seem to me that the language here, 'No suit shall be instituted,' sounds an awful lot like 'suit shall be barred,' or the other language in – in Bowles.
>
> Ms. Anders: I think it's similar to a lot of language that's used in statutes of limitations, which are traditionally considered non-jurisdictional, that no statute – no suit shall be instituted.

interpreted by this Court to indicate that a statute of limitations is jurisdictional. The government's argument has far reaching implications, because a number of major federal statutes contain limitations provisions using this same phrase, including the Clayton Act, the Racketeer Influenced and Corrupt Organizations Act, and the Fair Labor Standards Act. Pet.App. 16a-18a; see App. 15a-16a. The Department of Labor's ability to enforce the Fair Labor Standards Act, which was adopted in the same era as the FTCA, is thus at issue in this case. And if this Court were to go even further and hold, as the government may be suggesting, that the language of section 2401(a) – "shall be barred" – is also jurisdictional, that would affect the statutes of limitations under an even larger group of major federal laws. For example, the general statute authorizing actions *by* the United States provides that any contract claim "shall be barred" if not commenced within six years, and that tort claims "shall be barred" if not brought within three years. 28 U.S.C. §§ 2415(a), 2415(b).

The decisions relied on by the government do not purport to interpret that phrase "shall be forever barred." That phrase was not in the Tucker Act of 1887, and it is not in the Tucker Act today. The phrase did appear in the 1863 Act that was the predecessor of the Tucker Act. Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767. But in 1887, when Congress adopted the Tucker Act, it did not use that wording, and instead provided that "no suit against the Government of the United States, shall be allowed under

this act unless the same shall have been brought within six years after the right accrued for which the claim is made. Act of March 3, 1887, ch. 359, 24 Stat. 505. When Congress amended the Tucker Act in 1911, it retained the 1887 language for claims under $10,000, which could also be brought in district court, but returned to the phrase "shall be forever barred" for other claims in the Court of Claims. Act of March 11, 1911, ch. 231, § 24, 36 Stat. 1091-93. And finally in 1948 Congress removed that phrase from the statute, and adopted the language that remains today in section 2401(a), providing that claims "shall be barred" unless filed with the Court of Claims within six years. Act of June 25, 1948, ch. 646, § 2501, 62 Stat. 976. Presumably because of this history, the brief for the United States often (but not invariably) refers to the language of the 1863 Act or the 1911 Amendment, rather than to the terms of the Tucker Act.

Although this Court has repeatedly held that the limitations period in the Tucker Act is jurisdictional, that conclusion was not based on the varying manner in which the limitations section itself has been worded. Because those decisions never turned on the particular language of the limitations section, they cannot fairly be characterized as stating that any variant of those provisions "speaks in jurisdictional terms." None of those cases attach jurisdictional significance to the word "barred" (in the 1887 and 1948 versions of the Tucker Act) or "forever barred" (in the 1863 Act and the 1911 Amendment). Rather,

the reasoning of this line of decisions has consistently been simply that in an action against the United States, *all* statutory requirements are limitations on the government's consent to be sued, and thus jurisdictional.

Kendall v. United States, 107 U.S. 123 (1883), rested on that ground:

> We [previously] said ... that the government could not be sued except with its consent, and that it may restrict the jurisdiction of the court of claims to certain classes of demands. The acts in question do contain restrictions which the court may not disregard. For instance, where it appears in the case that the claim is not one for which, consistently with the statute, a judgment can be given against the United States, it is the duty of the court to raise the question where it is done by plea or not. To that class may be referred claims which are declared barred if not asserted within the time limited by statute.

107 U.S. at 125.

The Court followed the same line of reasoning in *Finn v. United States*, 123 U.S. 227 (1887):

> [T]he statute ... makes it a condition or qualification of the right to a judgment against the United States that ... the claim must be put in suit by the voluntary action of the claimant ... within six years after suit

> could be commenced thereon against the government....
>
> The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making a defense must plead the statute if he wishes the benefit of its provision, has no application to suits in the court of claims against the United States. An individual may waive such a defense ... ; but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the court of claims.... [T]he government ... has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued....

123 U.S. at 232-33. *United States v. Seminole Nation*, 299 U.S. 417, 421 (1937), similarly held that "[a]s the United States may not be sued without its consent, causes of action not alleged within the [limitations] period allowed may not be enforced. *Finn v. United States*...."[18] The particular wording of the statute of limitations at issue was entirely irrelevant to the

[18] The other decisions relied on by the government contain no reasoning of their own, but merely cite or quote *Finn. De Arnaud v. United States*, 151 U.S. 483, 495-96 (1894); *United States v. New York*, 160 U.S. 598, 616-17 (1896); *United States v. Wardwell*, 172 U.S. 48, 52 (1898).

holding in these cases that the six-year limitations period in the various iterations of the Tucker Act, and its predecessor, were jurisdictional. It is thus incorrect to suggest, as the government does, that those decisions were an interpretation of the "language" or "formulation" in the limitations provision.[19]

The government's current position that decisions such as *Finn* rested on an interpretation of the phrase "forever barred" is at odds with the manner in which the United States in *Bowen* urged the Court to interpret those same opinions. The Social Security Act statute of limitations at issue in *Bowen* did not

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[19] Pet. Br. 20 ("Congress used the exact *language* that this Court had repeatedly construed as jurisdictional in the directly parallel context of Tucker Act suits.") (emphasis added, bold omitted), 21 ("When Congress drafted the FTCA time bar in 1946, it used the same unequivocal *text* ('shall be forever barred') that appeared in the parallel time bars applicable to monetary claims against the United States under the 1863 and 1911 Acts. This court had already interpreted that *language* – on at least six separate occasions – as imposing a jurisdictional requirement not subject to waiver or equitable tolling.") (emphasis added and omitted), 26-27 ("when Congress enacted the FTCA time bar in 1946, it adopted a *formulation* that this Court had already interpreted – multiple times, in the directly analogous context of the Tucker Act to limit the jurisdiction of federal courts to adjudicate claims against the United States.... [I]n 1946, as today, it was well settled that 'in adopting the *language* used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such *language*, and made it a part of the enactment.' *Hecht v. Malley*, 265 U.S. 144, 153 (1924). Congress's decision to borrow the *language* of the 1863 and 1911 Acts clearly manifested its intent to prohibit equitable tolling of FTCA claims.") (emphasis added, footnote omitted).

contain the phrase "forever barred." It provided, rather, that following a final decision by the Secretary, an individual "may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision." 42 U.S.C. § 405(g). In *Bowen* the Solicitor General insisted that the decision in *Finn* was controlling, an argument that would make no sense if – as the government now suggests – *Finn* was based on an interpretation of the phrase "forever barred." Instead, the United States argued in *Bowen* that *Finn* had held that *all* statutes of limitations governing actions against the United States are jurisdictional because they were a condition of the government's consent to being sued,[20] an account of

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[20] Brief for Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *40-44:

> The condition that a suit be filed within 60 days is an explicit limitation on the district court's jurisdiction under 42 U.S.C. 405(g).... This view of the 60-day filing requirement in 42 U.S.C. 405(g) is consistent with the interpretation of other statutes that waive the government's sovereign immunity but limit the time within which a suit may be brought. The seminal case is *Finn v. United States* ... in which the Court held ... that '[s]ince the Government is not liable to be sued, as of right, by any claimant, and since it has asserted to a judgment being rendered against it only in certain classes of cases brought within a prescribed period' ... it was the duty of the court to dismiss the action if it was untimely.... The conclusion that Section 405(g) should be so construed is reinforced by the fact that ... other statutory limitations on bringing suit against the government uniformly have been

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Finn that made irrelevant the wording of the particular statute of limitations at issue in that case.

(3) Like the jurisdictional provisions in *Henderson*, *Arbaugh*, *Zipes*, *Irwin*, and *Reed Elsevier*, the jurisdictional provision in section 1346(b)(1) regarding actions under the FTCA contains no reference to the separate requirement (here the statute of limitations) claimed to be jurisdictional.[21] The particularly detailed prerequisites set out in section 1346(b)(1) for the exercise of jurisdiction over an FTCA claim are

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> understood to be conditions on the waiver of sovereign immunity and therefore jurisdictional prerequisites to suit.... *Finn* ... [T]he Court ... h[e]ld[ ] in *Finn* ... that ... a [statute of limitations] prerequisite to suit is jurisdictional....

(Emphasis, capitalization and italics omitted).

[21] See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Reed Elsevier v. Muchnick*, available at 2009 WL 1601031 at *13 ("Congress broadly vested the federal district courts with original jurisdiction over copyright actions, without specifying that jurisdiction is in any way dependent on registration. Copyright actions are encompassed within the grant of federal-question jurisdiction in 28 U.S.C. 1331, ... and also within the independent grant of jurisdiction over copyright and patent actions in 28 U.S.C. 1338(a).... Neither Section 1338(a) nor Section 1331 is confined by its terms to actions involving works that have been registered by the Copyright Office."); Brief for the United States as Amicus Curiae Supporting Petitioner, *Arbaugh v. Y & H Corp.*, available at 2005 WL 1811402 at *15 ("nothing in Title VII's broad jurisdictional provision limits the court's subject matter based on *any* element of the cause of action, much less the number of a defendant's employees.... Title VII's jurisdictional provision [does not] make any reference to the term 'employer,'....").

inconsistent with the government's effort to read an *additional* jurisdictional requirement into the separate provision of section 2401(b). To establish jurisdiction under section 1346(b)(1), it is necessary, and sufficient, to assert a claim

> [1] against the United States, [2] for money damages, ... [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

FDIC v. Meyer, 510 U.S. 471, 477 (1994) (quoting 28 U.S.C. § 1346(b)(1). "A claim comes within this jurisdictional grant ... if it alleges the six elements...." *Id.* If a complaint contains all of the required elements, "the district courts ... *shall* have ... jurisdiction...." 28 U.S.C. § 1346(b)(1) (emphasis added). The government's contention that a district court nonetheless would lack jurisdiction over such a claim if it were untimely is inconsistent with the mandatory language of the statute.

The government's suggestion that section 2401(b) imposes an unstated additional requirement for the existence of jurisdiction under section 1346(b)(1) is further undermined by the fact that other provisions do impose express limitations on section 1346(b). Section 1346(d) provides that "[t]he district courts

shall not have jurisdiction under this section of any civil action or claim for a pension." 28 U.S.C. § 1346(d). Section 2671 defines the phrase "employee of the government" in section 1346(b). 28 U.S.C. § 2671. Section 2680, headed "Exceptions," provides that "[t]he provisions of this chapter and section 1346(b) shall not apply to" 13 categories of exclusions, such as actions involving the performance of a discretionary function (section 2680(a)), claims arising out of the transmission of letters or other postal matters (section 2680(b)), and claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680. It is not clear whether the provisions of sections 2671 and 2680 limit the jurisdiction of the district courts under section 1346(b)(1), or only limit the private cause of action implicit in that section. But it would surely be inconsistent with this highly detailed array of limitations, definitions and exceptions to read into section 2401(b) an additional, unstated restriction.

(4) Treating section 2401(b) as jurisdictional, and thus as a bar to equitable tolling, would be inconsistent as well with the provisions of the FTCA stating that the United States (except as otherwise specified) shall be liable in the same circumstances in which liability would be imposed on a private defendant. The jurisdictional grant and cause of action in section 1346(b)(1) applies "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or

omission occurred." Section 2674 similarly provides that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. § 2674. The state statutes of limitations that would determine whether a private defendant was "liable" for a tort are generally treated as non-jurisdictional and as subject to equitable tolling. The length of the limitations period in section 2401(b), and the FTCA exhaustion requirement, expressly impose federal standards that may deny liability where it would otherwise exist under state law. But in the absence of any express federal statute declaring the federal limitations period to be jurisdictional, a refusal to permit equitable tolling would result in a denial of liability in circumstances where "a private person ... would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

(5) The legislative history relied on by the government cannot provide the clear statement required by this Court's decisions. At least ordinarily a clear "statement" refers to a statement in the text of the statute, not a statement at a committee hearing or even on the floor of the House or Senate. The Court need not decide whether legislative history alone could ever satisfy a clear statement rule,[22] because

[22] See *Gonzalez*, 132 S.Ct. at 662 (Scalia, J., dissenting) ("I know of no precedent for the proposition that legislative

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the material relied on by the United States would in any event be insufficient to do so.

This case does not involve an unequivocal statement in a contemporaneous committee report, or by the sponsors of the FTCA, that the section 2401(b) statute of limitations is jurisdictional. Some of the legislative developments invoked by the government occurred decades before or after the 1946 enactment of the FTCA. *E.g.*, Pet. Br. 38 n.20 (legislation proposed in 1926 and 1928), 49 (legislation proposed in 1969), 50 (testimony in 1986). Pointing to bills introduced in 1932 and 1933 that would have expressly provided that the statute of limitations was jurisdictional, the government argues that those unenacted proposals somehow "confirm that Congress envisioned [in 1946] that the FTCA time limits would operate as jurisdictional constraints on the courts' power to adjudicate claims." Pet. Br. 26 n.11. On the other hand, the government insists that the introduction between 1949 and 1989 of other never-enacted proposals, which would have authorized various types of tolling in section 2401(b), demonstrates that the FTCA does not permit any such tolling. Pet. Br. 49 and n.30.[23] That selective parsing of the legislative

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history can satisfy a clear-statement requirement imposed by this Court's opinions.").

[23] The government argues that "[o]rdinarily, '[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.' *Russello v. United States*, 464 U.S. 16, 23-24 (1983)." Pet. Br. 38-39. But the proposals to which it

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history really does resemble Judge Harold Leventhal's comment that the use of legislative history is the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.

Piecing together scattered legislative references to the Tucker Act with its own citations to undeniably obscure decisions under the 1863 Act, and invoking the maxim that Congress is assumed to know the state of the law, the government asserts that Congress must have "intended" that section 2401(b) be jurisdictional. Whatever its value in other contexts, this reference to the presumed intent of Congress is insufficient to satisfy the clear statement rule. There is no indication that the Congress which enacted the FTCA actually gave that question any thought.[24]

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refers were not "earlier versions" of the actual bill which Congress enacted, but merely scattered proposals made over the two decades before dealing with the same issue.

[24] See Oral Argument, *Henderson v. Shinseki*, available at 2010 WL 4931033 at *32:

> Justice Scalia: Mr. Miller, do you really think Congress thought about this? Do you think the members of Congress who voted for this bill thought about this – this rather narrow point, about whether if you file too late it's jurisdictional?
>
> Mr. Miller: There is no indication that they did.
>
> Justice Scalia: So don't we pretty much have to go on what they wrote?
>
> Mr. Miller: Yes....

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C. Prior Decisions of This Court Do Not Hold That The Section 2401(b) Statute of Limitations Is Jurisdictional

The rule in *Irwin*, and the more circumspect delineation of jurisdictional provisions under *Arbaugh* and its progeny, do not require "revisiting past precedents." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008); see *Bowles v. Russell*, 551 U.S. 205 (2007). But the exception recognized in *John R. Sand & Gravel* and *Bowles* is a narrow one. In *John R. Sand* this Court had "long interpreted the ... limitations statute at issue as imposing a jurisdictional requirement." 552 U.S. at 134. The Court could only have held that statute non-jurisdictional by "reject[ing] or ... overturn[ing]" a series of decisions dating from the late nineteenth century, and disregarding "[b]asic principles of *stare decisis*." 552 U.S. at 138-39. Similarly, in *Bowles* a decision that the statute in question was non-jurisdictional would have required "overruling a century's worth of practice," 551 U.S. at 210 n.2, and overturning the Court's repeated "longstanding treatment of statutory limits for taking an appeal as jurisdictional." 551 U.S. at 210.

Justice Scalia: I get you a dollar to a donut that – that nobody thought about this narrow – narrow issue. So it – it ought to be a question of – of what this language ought to be taken to mean. What's its fairest reading?

The circumstances of this case do not come close to meeting that demanding standard. This Court has never held that the statute of limitations in section 2401(b) is jurisdictional. There is no "definitive earlier interpretation of the statute" in this Court. *John R. Sand & Gravel*, 552 U.S. at 138. At one time decisions like *Finn* and *Soriano* suggested that all statutes of limitations governing claims against the United States were jurisdictional. But this Court long ago abandoned that approach, first in a series of Social Security decisions culminating in *Bowen*[25] and then in *Irwin*. The question here is not whether to "revisit[ ]" prevailing precedents, but whether to resurrect a line of thinking this Court abandoned decades ago.

The government suggests that this case and decisions like *Finn* and *Soriano* present the same legal issue, whether a statute "proscribing a specific time limit as a condition of the waiver of sovereign immunity for suits against the United States for money" is jurisdictional. Pet. Br. 28. But the exception recognized in *John R. Sand & Gravel* and *Bowen* does not apply at that level of generality; after all, the limitations periods held subject to equitable tolling in *Bowen* and *Irwin* could as easily be characterized in just those terms. In *Bowen* the United States urged this Court, in terms not unlike its contention in this

[25] See *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975); *Mathews v. Eldridge*, 424 U.S. 319, 328 n.9 (1976).

case, to treat decisions like *Finn* and *Soriano* as establishing a universal rule applicable to any "suit against the government to recover money from the Treasury."[26] The Court rejected that argument in *Bowen*, and it manifestly cannot lay claim to the protection of *stare decisis*.

A decision that the limitations period in section 2401(b) is not jurisdictional would not create an irreconcilable conflict with the holdings in *Finn, Soriano* and *John R. Sand & Gravel* that the Tucker Act statute of limitations in section 2501 is jurisdictional. "[T]he earlier cases lead, at worst, to different interpretations of different, but similarly worded, statutes; they do not produce 'unworkable' law." *John R. Sand & Gravel*, 552 U.S. at 139 (quoting *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1998)). There are significant differences between

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[26] Brief for the Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *43 ("It was against this background that Congress in 1939 enacted Section 405(g) and thereby waived the government's immunity to suits arising under the Social Security Act. Because *Munro* had been decided only a year earlier and because Section 405(g) authorizes a suit against the government to recover money from the Treasury, it is reasonable to assume that Congress likewise intended the 60-day filing requirement in Section 405(g) to state a jurisdictional limitation."); Reply Brief for the Petitioners, *Bowen v. City of New York*, available at 1986 WL 728260 at *18 ("Principles of sovereign immunity – including the rule that conditions on Congress's waiver of that immunity may not be waived or extended by the courts in the absence of express congressional authorization – apply with particular force where a claim for money against the federal government is involved.").

the Tucker Act and the FTCA. Unlike the effect of the limitations period in the original 1863 Act, which created the very Court of Claims whose jurisdiction it limited, treating as jurisdictional the FTCA statute of limitations being applied in a district court – and thus precluding equitable tolling – would "displace [that] court's traditional equitable authority," a result which this Court seeks to avoid absent the "clearest command." *Holland v. Florida*, 560 U.S. at 646. When Congress in 1946 provided for adjudication of FTCA claims in district court, Rule 8(c) of the Federal Rules of Civil Procedure expressly treated the statute of limitations as an affirmative defense.

III. THE SECTION 2401(b) STATUTE OF LIMITATIONS IS SUBJECT TO EQUITABLE TOLLING

"It is hornbook law that limitations periods are 'customarily subject to "equitable tolling,"' .... unless tolling would be 'inconsistent with the text of the relevant statute'.... Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (quoting *Irwin*, 498 U.S. at 95, and *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). "We ... presume that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute." *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224, 1232 (2014). "We have previously made clear that a non-jurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'"

Holland v. Florida, 560 U.S. 631, 645-46 (2010) (quoting *Irwin*, 498 U.S. at 95-96) (emphasis in *Holland*). "[T]he assumption that Congress intended equitable tolling to be available in a statute 'is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation' of statutes. *Ibid.*" Brief for the United States, *Young v. United States*, No. 00-1567, at 33-34. "Time requirements in lawsuits between private litigants are customarily subject to equitable tolling...." *Irwin*, 498 U.S. at 95. That presumption applies with particular force to the FTCA, because section 2674 provides that the United States shall be liable for tort claims "to the same extent as a private individual under like circumstances."

The issue is whether "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original). There is nothing about the types of claims covered by the FTCA that militates against application of the usual equitable tolling rule. Unlike *Beggerly*, the statute does not concern quiet title actions where it is of "special importance that landowners know with certainty what their rights are." 524 U.S. at 49. The relatively brief six-month filing period in section 2401(b) is far different than the "unusually generous" 12-year period in *Beggerly*. See *Holland* 560 U.S. at 647 ("in contrast to the 12-year limitations period at issue in *Beggerly*, AEDPA's [one year] limitations period is not particularly long.") The FTCA does not have multiple iterations of the same limitations

period, as was the case in *Brockamp*, 519 U.S. 347, 350-51 (1997). Unlike the administration of the Internal Revenue Code, judicial consideration of limitations issues *is* "characterized by case-specific exceptions reflecting individual equities." 524 U.S. at 352. Equitable tolling in civil litigation does not portend the massive administrative problems at issue in *Brockamp*. And unlike the situation in *Sebelius*, this case concerns a traditional limitations period for the filing of a civil action, not the deadline for taking an administrative appeal. 133 S.Ct. at 827-29.

The government argues that

> Congress legislated against a background assumption that ... time bars would be strictly construed not to permit equitable tolling. This Court acknowledged that background rule in *Soriano*, ... where it explained that Congress enacted the Tucker Act and statutes allowing tort claims against the government on the "assum[ption] that the limitation period prescribed meant just that period and no more."

Pet. Br. 16.[27] This argument asks the Court to hold that the presumption announced in *Irwin* in favor of

[27] The government unsuccessfully advanced the same argument in *Irwin*. Oral Argument, *Irwin v. Veterans Administration*, available at 1990 WL 601331 at *36 ("Mr. Roberts: ... [T]he Court emphasized in the Soriano case ... that in this area as no other, Congress is entitled to assume when it set a time period, that it meant that time period and not a longer one.").

equitable tolling of claims against the United States will apply only to statutes enacted after the 1990 decision in *Irwin*; pre-*Irwin* statutes, the United States contends, should be governed by the opposite presumption. But such a rule would largely eviscerate *Irwin*. The government's proposed presumption against equitable tolling is not restricted to the original 1946 enactment of the FTCA. It insists that "Congress enacted the 1966 revision of the FTCA against the backdrop of this Court's 1957 analysis in *Soriano* ... [which] assured Congress of the settled doctrine that a statutory time limit with respect to suits against the government could not be tolled unless the statute said so expressly." Pet. Br. 42. But if that were right, *Irwin* itself would have to be overturned, because the Title VII provision at issue in that case was enacted in 1972, only 6 years after the FTCA amendment.

The United States insists that the language of section 2401(b) precludes equitable tolling.

> That text is straightforward and direct: It declares that "[e]very" untimely claim "shall be forever barred," and it contains no exceptions, caveats, or ambiguities. The "unusually emphatic form" Congress used to establish the time bar supports treating it as a strict requirement not subject to equitable tolling. *Brockamp*, 519 U.S. at 349-54.

Pet. Br. 35. But there is actually nothing particularly unusual about the language of this provision. Statutes of limitations always "bar" untimely claims, the

preclusion of such claims is ordinarily permanent, and statutes of limitations are often free of ambiguity. In this passage, the government insists that the original terms of section 2401(b) barred tolling because they did *not* include any exceptions. Fifteen pages later the government advances the opposite argument, insisting that section 2401(b) does not permit tolling because in 1988 Congress *did* adopt an "exception." Pet. Br. 50.[28]

In 1966[29] Congress adopted with regard to government initiated contact and tort actions a number

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[28] See Oral Argument, *Young v. United States*, No. 00-1567, available at 2002 WL 57250 at *28:

"Ms. Millett: ... [I]n virtually every case that I'm aware of, equitable tolling is applied when the statute is silent, and in fact when it may provide specifically for tolling in other circumstances, as occurred in Bowen v. City of New York and American Pipefitters v. Utah."

[29] The government also argues that the decision of Congress in 1949 to increase by one year the then-existing limitations period as the presumptively exclusive method of dealing with "hardship cases." Pet. Br. 41. But the primary purpose of this change was to bring the FTCA limitations period into line with other analogous limitations. H.R. Rep. 81-276 (1949) ("The committee feel that, in comparison to analogous State and Federal statutes of limitation, the existing 1-year period is too short and tends toward injustice in many instances. For example, an analysis of the limitation of the 48 States and the District of Columbia reveals that the.... over-all combined average is ... 2.92 years, and this over-all average is the one to which the Tort Claims Act limitation should be compared.... Federal statutes providing time limitations for the bringing of tort actions indicate an over-all average of 2.2 years.... [T]he existing limitation of 1 year in the Federal Tort Claims Act is manifestly

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of specific "Exclusions" expressly authorizing tolling of the applicable statutes of limitations. 28 U.S.C. § 2416. The United States contends "[t]hat separate law thus shows that when Congress wanted to authorize tolling of a statutory time limit, it did so explicitly by statute." Pet. Br. 46. On this view, the enactment of the section 2416 tolling provisions created a presumption against any non-statutory equitable tolling, a rule that would apply with particular force to bar any non-statutory equitable tolling of civil litigation by the United States itself. It is difficult to understand how these far reaching arguments can be reconciled with *Irwin* or the longstanding presumption in favor of equitable tolling.

The government contends that the Westfall Act was adopted in 1988 to create a tolling rule for certain FTCA cases, thus indicating that Congress did not intend that equitable tolling be otherwise available under the FTCA. Pet. Br. 50-52. The purpose of the Westfall Act, it argues, was to aid plaintiffs who sue individuals whom they did not know were federal employees, and who learn of that status only after the two-year limitation period has expired, when it was too late to present a claim under the FTCA. Pet. Br. 51. But the actual purpose of the Westfall Act was not to provide a new procedural benefit for plaintiffs, but to protect federal workers. The statute was adopted to overturn this Court's decision in *Westfall v. Erwin,*

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unjust and not in consonance with the practice prevailing in analogous departments of law.").

484 U.S. 292 (1988), which Congress believed had "dramatically changed the law which governs the personal tort liability of Federal employees." H.R. Rep. 100-700, 2 (1988). The pre-*Westfall* case law with which Congress was concerned was not about any unfairness to plaintiffs unaware that their injuries were caused by federal workers, but "the general rule applicable to Federal employees [who before *Westfall*] were absolutely immune from personal liability in State common law tort actions that resulted from activities within the scope of their employment." *Ibid.* The legislative history reflects solicitude for the legal plight of federal workers *after Westfall,*[30] not the problems of plaintiffs *before* that decision. The Westfall Act protects federal workers from "potentially ruinous personal liability," *id.* at 3, by providing that the United States can be substituted for federal employees in tort actions. The Westfall Act does nothing at all for plaintiffs so long as the individual federal employee remains the defendant. Section 2679(d)(5), the provision to which the government refers, applies only in cases where the United States is substituted for the individual defendant under the Act, and a court then dismisses the claim against the government for failure to first present a claim under section 2675(a). 28 U.S.C. § 2679(d)(5). The limited

[30] H.R. Rep. 100-700, 3 ("The potential increase in liability that results from the *Westfall* decision affects officers and employees of all three branches of government. The possible exposure of Federal employees to personal liability could lead to a substantial diminution in the vigor of Federal law enforcement and implementation.").

purpose of section 2679(d)(5) was not to improve the lot of plaintiffs, but only to assure that they were not worse off because of the substitution of parties permitted by the Westfall Act. "[S]ection [2679(d)(5)] ... contains provisions to ensure that no one is unfairly affected by the procedural ramifications of this provision.... [N]o one who previously had the right to initiate a lawsuit will lose that right." H.R. Rep. 100-700, at 7. Even if the Westfall Act had been adopted to affirmatively provide a form of tolling, that would not demonstrate that equitable tolling is otherwise unavailable under the FTCA. In the states, ordinary equitable tolling commonly exists alongside statutes that provide for tolling in particular situations.[31]

[31] Tolling takes two different forms. First, there is equitable tolling. Depending on the jurisdiction, courts recognize one or more equitable grounds of varying degrees of specificity for suspending the running of the limitations period. Courts have discretion to determine whether to apply equitable tolling in a given case, based on what they believe is a just result.

In addition to equitable tolling, specific statutes suspend the running of the limitations period under particular circumstances. For example, most states have a statute that tolls the limitations period with respect to claims against a defendant who is a resident of the state, for the amount of time the defendant is absent from the state.

Eli Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. 1015, 1040-41 (1997) (footnotes omitted).

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted

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Statutes Involved

1. 28 U.S.C. § 1346 provides:

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange

Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the

United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

2. 28 U.S.C. § 2401 provides:

Time for Commencing Action Against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

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

3. 28 U.S.C. § 2501 provides:

Time for filing suit

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

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

4. 28 U.S.C. § 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

5. 28 U.S.C. § 2674 provides:

Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise

to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

6. 28 U.S.C. § 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

7. 28 U.S.C. § 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

9. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767, provides in pertinent part:

Sec. 10. *And be it further enacted,* That 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 or transmitted to it under the provisions of this act within six years after the claim first accrues. . . .

10. Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887), provides in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of American in

Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. . . .

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

11. Act of March 11, 1911, ch. 231 § 24, 36 Stat. 1091-93, provides in pertinent part:

Sec. 24. The district courts shall have original jurisdiction as follows:

* * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. . . . *provided* . . . , That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. . . .

* * *

Sec. 156. Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability ceased; but no other disability than

those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

12. Act of June 25, 1948, ch. 646, § 2501, 62 Stat. 976, provides in pertinent part:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

Federal Statutes Providing That Claims or Actions Not Filed Within the Limitations Period Shall Be "Forever Barred"

7 U.S.C. § 2305(c) (limitations period for claims arising out of forbidden trade practices by producers of agricultural products)

12 U.S.C. § 1977(2) (limitations period regarding actions based on forbidden tying arrangements by banks)

15 U.S.C. § 15b (limitations period for actions under the Clayton Act)

15 U.S.C. § 16(i) (limitations period for actions under the Clayton Act)

15 U.S.C. § 1223 (limitations period regarding certain automobile suits against manufacturers)

18 U.S.C. § 2712(b)(1)(2) (limitations period for certain actions against the United States arising out of certain violations of the Foreign Intelligence Surveillance Act)

22 U.S.C. § 277d-20 (applications for reimbursement under 22 U.S.C. § 277d-19)

22 U.S.C. § 1642b (limitations period for certain claims related to seizure of property in Czechoslovakia)

22 U.S.C. § 4134(a) (claims related to certain grievances by members of the Foreign Service)

25 U.S.C. § 255(a) (limitations period for actions under the Fair Labor Standards Act)

25 U.S.C. § 565b (claims of members of Klamath tribe or their heirs)

25 U.S.C. § 833b (claims for per capita shares by heirs of Osage Indian blood)

25 U.S.C. § 993 (claims for per capita shares regarding tribal funds of Cherokee Nation)

25 U.S.C. § 1164 (claims for per capita shares regarding tribal funds of Cheyenne-Arapaho Indians)

25 U.S.C. § 1300i-11(b)(1) (claims related to partition of joint reservation)

28 U.S.C. § 2401(b) (limitations period under Federal Tort Claims Act)

42 U.S.C. § 5412(b) (limitations period regarding actions related to manufactured homes)

43 U.S.C. § 1619(c) (limitations period for certain Alaska Native Fund claims)

45 U.S.C. § 1206(1)(3)(B) (credit for prior Federal service under retirement system "shall be forever barred" by certain payments)

50 App. U.S.C. § 1982 (deadline for claims related to internment of Japanese Americans)