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No. 13-1074

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

KWAI FUN WONG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CLINIC FOR LEGAL ASSISTANCE TO SERVICEMEMBERS AND VETERANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The Clinic for Legal Assistance to Servicemembers and Veterans (CLASV) is dedicated to providing active-duty members of the armed forces, their families, and veterans with free legal representation in matters of clear injustice or where they cannot retain counsel without undue hardship. CLASV was established in 2004 at George Mason University School of Law, and has assisted hundreds of servicemembers, their families, and veterans in matters involving civil litigation, family law, landlord-tenant disputes, military law, contract issues, administrative law, and bankruptcy in federal and state forums. The services rendered by CLASV have a direct bearing on the readiness, quality of life, and morale of the armed forces and their families.

In 2006, CLASV students were *amici curiae* in the only brief from the law school community that supported, against constitutional attack, the Solomon Amendment. That Amendment provides an incentive for law schools to allow on campus recruiters from the military. It was upheld by a unanimous decision of this Court. *See Rumsfeld v.*

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief.

Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).

CLASV has received written support and recognition from the President of the United States, United States Senators, a United States Congressman, the General Counsel of the Department of Defense, the Judge Advocate General of the Army, the Staff Judge Advocate at Marine Corps Base Quantico, and all five legal assistance policy chiefs of the armed forces. CLASV has been featured in essays appearing in the *National Law Journal*, *Business Law Today*, and the *Richmond Times-Dispatch*, and in articles in the *Washington Post*, the *Fairfax Times*, the *Legal Times*, *Stars and Stripes*, and the *Los Angeles Daily Journal*.

Pursuant to its organizational mission, CLASV assists servicemembers, their families, and veterans in the presentation and litigation of claims under the Federal Tort Claims Act (FTCA). Based on its experience in providing that assistance, and given the challenges faced by military families in submitting administrative claims under the FTCA, CLASV has filed an *amicus curiae* brief in support of Respondent in *United States v. Marlene June, Conservator*, No. 13-1075. The issue in *June* concerns whether equitable tolling may be invoked with respect to the FTCA's two-year statutory limitations period for submitting an administrative claim.

This case presents a parallel issue concerning the application of equitable tolling in lawsuits under the FTCA. CLASV accordingly submits this brief in support of Respondent to describe the limited but impactful role that the equitable tolling doctrine plays in ensuring fairness for FTCA litigants, including military servicemembers, their families, and veterans.

SUMMARY OF ARGUMENT

The equitable tolling issue in this case concerns the applicability of the doctrine to the six-month period for bringing an FTCA action following the denial of an administrative claim. *See* 28 U.S.C. § 2401(b). Just as in the administrative claim context, the equitable tolling doctrine has been applied and currently is relied on by litigants pursuing FTCA claims, including servicemembers, their families, and veterans, to promote fairness and avoid injustice in those limited circumstances where the doctrine applies.

In the context of the FTCA, just as in private litigation, the application of equitable tolling mitigates the harsh consequences of a limitations bar, without undermining the purposes served by the statute of limitations. Here, just as in *June*, the question of whether equitable tolling can be applied under the FTCA is debated among the parties. But here, too, there is no debate about the utility of the doctrine in helping litigants who have acted

diligently but face the limitations bar. As a matter of fairness and in the interests of justice, CLASV urges this Court to continue the present practice and apply the doctrine to lawsuits brought under the FTCA.

ARGUMENT

A. Equitable Tolling Allows Courts To Mitigate Unfair Prejudice Resulting From An Inability To Meet A Statutory Limitations Period.

The FTCA provides that "[a] tort claim against the United States shall be forever barred . . . unless action is begun within six months after the . . . final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). This provision's "obvious purpose[] . . . is to encourage the prompt presentation of claims." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Like many statutes of limitations, the FTCA's provision is intended to "'protect defendants against stale or unduly delayed claims.'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008)).

In various circumstances, however, the application of a limitations bar can work a profound injustice by foreclosing litigation of meritorious claims. *See* Damon W. Taaffe, *Tolling the Deadline*

for Appealing in Absentia Deportation Orders Due to Ineffective Assistance of Counsel, 68 U. Chi. L. Rev. 1065, 1067 (2001) ("Statutes of limitations are inherently harsh because they cut off a person's rights without regard to the merits of the claim.") (citation and internal quotation marks omitted). Yet, as this Court has recognized, those harsh consequences should be avoided "where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). Application of equitable tolling, in turn, represents one of those instances where the interests of justice intercede to relieve a litigant from the harsh consequences of a statute of limitations.

To that end, the equitable tolling doctrine "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation and internal quotation marks omitted); *Jackson v. United States*, 751 F.3d 712, 718 (6th Cir. 2014) ("Equitable tolling allows a federal court 'to toll a statute of limitations when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.'") (citation omitted).

In applying equitable tolling, courts "follow[] a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise

from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Holland v. Florida*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). The equitable tolling doctrine thus "enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id.* (citation and internal quotation marks omitted).

As is relevant here, this Court has acknowledged the doctrine's utility and applicability in suits brought against the Government, just as in private litigation. Most notably, in *Irwin v. Department of Veterans Affairs*, this Court invoked the doctrine "presumptively" in suits against the United States in the same way as is done in suits against private defendants. 498 U.S. 89, 95-96 (1990). There, the Court emphasized that equitable tolling can be used to achieve fundamental fairness in appropriate situations, such as "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass[,]" but not where a plaintiff "failed to exercise due diligence in preserving his legal rights." *Id.* at 458.

Equitable tolling thus plays an important role in mitigating the unfair prejudice that can result

from a plaintiff's inability to meet a statutory limitations period. The doctrine, where applicable, is critical to the pursuit of lawsuits brought under the FTCA that would otherwise be barred by the controlling six-month limitations provision.

B. Courts Invoke Equitable Tolling With Respect To Section 2401(b)'s Six-Month Limitations Period To Promote Fairness And Avoid Injustice.

Following this Court's reasoning and rationale in *Irwin*, courts have equitably tolled § 2401(b)'s six-month limitations period where the facts warrant it to ensure fundamental fairness without prejudicing defendants or incentivizing a lack of diligence.

In that regard, *Hyatt v. United States* is illustrative of the circumstances where the doctrine is justly applied. There, a plaintiff brought an FTCA action in the district court around the same time that he presented an FTCA administrative claim to a federal agency. 968 F. Supp. 96 (E.D.N.Y. 1997). The administrative claim was quickly denied, but rather than re-file his complaint based on the denial, the plaintiff was induced by the Government's attorney to merely move forward with discovery in the district court until the court granted summary judgment based on the plaintiff's failure to exhaust his administrative remedies. *Id.* at 99. The court, however, allowed the plaintiff to file an amended complaint. *Id.* at 99-100. When the Government

argued that plaintiff's claim was barred under § 2401(b)'s six-month limitations period, the court invoked equitable tolling, finding that "plaintiff did actively pursue his judicial remedies by conducting discovery with his adversary during the statutory period, and . . . plaintiff was induced not to refile the complaint after the administrative denial." *Id.* at 101. Importantly, the court recognized that § 2401(b)'s "obvious purpose" of encouraging prompt presentation of claims was not undermined by equitable tolling because the Government was on notice to defend against the action and discovery was conducted within the statutory period—meaning that both the defendant and the court "were successfully protected from having to deal with a case in which the search for truth might otherwise have been seriously impaired by the loss of evidence." *Id.*

Also illustrative is *Stanfill v. United States*, 43 F. Supp. 2d 1304 (M.D. Ala. 1999). In that case, a military retiree, based on an injury suffered at a military hospital, submitted an FTCA administrative claim with Office of the Staff Judge Advocate. *Id.* at 1305-06. When the claim was denied, the plaintiff filed a timely suit in the district court. *Id.* at 1306. The Government, however, convinced the plaintiff to voluntarily dismiss his suit so that he could first present his claims to the Department of Labor. *Id.* When the Department of Labor denied his claims, the plaintiff brought

another FTCA action in the district court, more than six months after his original administrative claim was denied. *Id.* The court rejected the Government's argument that the plaintiff's claims were barred under § 2401(b), invoked equitable tolling, and held that "[c]learly, the more prudent course of action would have been to petition the court for a stay rather than agree to a voluntary dismissal," but that such an "error in judgment" did "not amount to a garden variety claim of excusable neglect in light of [his] active, aggressive pursuit of his claims." *Id.* at 1310. The court added that "section 2401(b) exists 'to encourage the prompt presentation of claims' against the federal government" and "does not exist to reward the United States for deft legal maneuvering." *Id.* (citation omitted). Also, because "[t]he Government was put on notice to defend against this action," the underlying purpose of the limitations period was not infringed on account of equitable tolling. *Id.* at 1311.

Yet another representative example is *McCaffrey v. Nylon, Inc.*, No. 95-3787, 1996 WL 122710 (E.D. Pa. Mar. 13, 1996). There, plaintiffs submitted an FTCA administrative claim to the Department of Interior after falling on federal property. *Id.* at *1. By certified mail, the Government denied the claim, but the plaintiffs never received the denial letter. *Id.* While the plaintiffs were waiting to hear about the claim, their attorney inquired about the claim's status and

received assurances that he would be duly informed on a decision. *Id.* When the plaintiffs finally commenced an action in the district court, more than six months after their administrative claim was denied, the court applied equitable tolling to § 2401(b)'s time period. *Id.* at *2. The court relied on the fact that there was "evidence of repeated contact with plaintiffs' attorney and a promise to notify that attorney of the agency's decision, coupled with evidence that plaintiffs received no actual notice of denial of their claims." *Id.* The court added that "[t]his is not a case in which a litigant 'failed to exercise due diligence in preserving his legal rights," but that "[o]n the contrary, the [plaintiffs] and their counsel made every effort to do so." *Id.*

In a similar fashion, courts have applied equitable tolling where fairness and justice compel it so that potentially meritorious claims can be pursued. *See, e.g.*, *Shankar v. United States Dep't of Homeland Sec.*, Nos. 13-cv-01490 NC & 13-cv-01490, 2014 WL 523960, at *13 (N.D. Cal. Feb. 6, 2014) (applying the doctrine where defendant was on notice of the action and plaintiff missed the statutory deadline due to "technical defects"); *Hoslett v. Dhaliwal*, No. 3:11-CV-00674-KI, 2013 WL 5947253, at *3 (D. Oregon Nov. 6, 2013) (applying the doctrine where "pro bono counsel created a roadblock to [the plaintiff's] ability to file the Amended Complaint" and plaintiff was only able to file the complaint due to court "intervention").

The fact patterns in these cases underscore that equitable tolling in FTCA litigation is reserved for those cases that plainly compel a lifting of the statutory bar. Concomitantly, federal courts do not hesitate to reject application of the doctrine where the record does not show extraordinary circumstances, a lack of prejudice to the Government, or sufficient diligence in bringing an action. *See, e.g.*, *Jackson v. United States*, 751 F.3d 712, 720 (6th Cir. 2014) (declining to apply equitable tolling in part because of "prejudice" to the Government and the "difficulty the [G]overnment would have in litigating a matter" that was filed well beyond the six-month limitations period); *Clark v. United States*, 226 F. App'x 337, 338 (5th Cir. 2007) ("[A]lthough his counsel's untimely filing mistake was unfortunate, such mistakes do not equitably toll the FTCA's limitations period."); *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998) ("The mere expression of 'some confidence' that the agency 'would be interested in trying to settle' the case later is not enough to excuse plaintiffs' letting the statute of limitations lapse.").

In short, equitable tolling applies in FTCA cases in the same balanced manner as in private litigation. Where there has been a lack of diligence or unexcused delay, the limitations bar is applied, just as it would be in private litigation. Where, however, the record provides sound reasons to toll the statute, equitable tolling is applied as a matter

of fairness and justice, just as it would be in a private lawsuit.

C. Equitable Tolling Should Be Applied Under The FTCA.

The FTCA was enacted to provide a fair and just process for preserving the rights of individuals who have meritorious claims against the Government. *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of government activities[.]"). The doctrine of equitable tolling furthers the purpose of having meritorious claims heard on their merits where the interests of justice warrant it. As the cases discussed previously underscore, the doctrine plays a vital role in a narrow range of fact patterns to help protect those who have valid claims and allow recovery where the FTCA provides for it.

While the Government argues that the FTCA's six-month limitations period needs to be applied absolutely, and without recognition of equitable tolling, CLASV strongly opposes the Government's position. There is no express indication in the FTCA's limitations provision that equitable tolling cannot be applied. The Government adopts that position only by implication and inference from language that does not refer to tolling at all.

Nor is there any perceptible or quantifiable reason that equitable tolling should not be applied. The doctrine aligns with the FTCA's protective goals. And, there is no indication that the application of the doctrine in those cases where it is warranted has led to any wholesale assault on the public fisc. On the contrary, the federal courts have applied the doctrine carefully, and only where the record unequivocally supports it.

By the same token, however, the equitable tolling doctrine, when applicable, is of material benefit to FTCA litigants, including servicemembers and their families, who, despite their best efforts, cannot bring a timely action. The case-by-case application of the doctrine thus should be retained to help servicemembers and their families receive the benefits of the FTCA, rather than being burdened with the hardships that denial of a meritorious cause of action portends.

CONCLUSION

For the reasons noted, *amicus* respectfully urges this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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