No. 13-1075

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR,

Respondent.

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

BRIEF FOR RESPONDENT MARLENE JUNE

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QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") permits a person injured by the negligence of a government employee to sue the government for damages in district court. It generally renders the government liable to the same extent that a similarly situated private party would be liable under relevant state law. From its outset, the FTCA has contained a time limit on filing suit. A 1966 amendment added a new prerequisite: Before filing suit, the victim must present her claim to the responsible federal agency within a certain period of time after it accrues, in order to allow the parties to explore informal settlement.

The question presented is:

In light of the presumption that Congress does not intend to disturb a district court's equitable power to toll the running of a statute of limitations, and given the lack of proof that Congress clearly intended to deprive district courts of this power with respect to the FTCA, whether a district court may under appropriate circumstances toll the FTCA's time limit on presenting administrative claims?

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. It was Defendant in the district court and was Appellee in the court of appeals.

Respondent is Marlene June, in her capacity as conservator for A.K.B., a minor child entitled under Arizona law to seek relief for the wrongful death of his father Anthony Booth. June was Plaintiff in the district court and was Appellant in the court of appeals.

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The opinion of the court of appeals is unpublished. It is available at 2013 U.S. App. LEXIS 25,657 and is reprinted at Pet. App. 1a-2a.

JURISDICTION

The court of appeals issued its judgment on December 24, 2013. Pet. App. 1a. The government filed a timely petition for a writ of certiorari on March 7, 2014. That petition was granted on June 30, 2014. Accordingly, this Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act is spread across multiple chapters of Title 28 of the U.S. Code. One such provision, § 1346(b)(1), "United States as Defendant," located in Chapter 85, "District Courts; Jurisdiction," provides:

> 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.

Section 2674, "Liability of the United States," located in Chapter 171, "Tort Claims Procedure," provides, in relevant part:

> 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.

Section 2401(b), "Time for Commencing Action Against United States," located in Chapter 161, "United States as Party Generally," provides:

> 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.

STATEMENT OF THE CASE

A. Congress Enacts the Federal Tort Claims Act to Permit Victims to Sue the Government for Its Employees' Tortious Conduct.

In 1946, Congress enacted the Federal Tort Claims Act ("FTCA" or "Act"). *See* Legislative Reorganization Act of 1946, ch. 753, tit. IV, 60 Stat. 842 ("1946 Act"). Before the passage of the Act, the government generally enjoyed "sovereign immunity" from tort suits. The FTCA, however, "waive[d] the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951). It granted the federal district courts exclusive jurisdiction to adjudicate tort claims against the government "under circumstances where the United States, if a private person, would be liable … in accordance with the law of the place where the [tortious] act or omission occurred." 1946 Act § 410(a), 60 Stat. at 843-44. And it directed courts to impose tort liability upon the government "in the same manner, and to the same extent as a private individual under like circumstances." *Id.* at 844. Thus, while matters of practice and procedure would be determined by the Federal Rules of Civil Procedure, 1946 Act § 411, 60 Stat. at 844, in nearly all other respects, the government would be treated as if it were a private party sued under relevant state law.

That general rule yielded only to a collection of highly particularized express exceptions, *see, e.g.*, 1946 Act § 421(a)-(l), 60 Stat. at 845-46, as well as

certain conditions, including a federal statute of limitations. In a section entitled "One-Year Statute of Limitations," Congress provided that "[e]very claim against the United States cognizable under [the FTCA] shall be forever barred … unless within one year after such claim accrued … an action is begun." *Id.* § 420, 60 Stat. at 845. Additionally, if the claim did not exceed $1000, a plaintiff could extend that time by first presenting her claim to the responsible agency within one year so that she and the agency could attempt to informally negotiate a settlement. *Id.* § 403(a), 60 Stat. at 843. If she did so, she then would have until six months after the conclusion of the informal administrative process (even if later than one year from accrual) in which to begin a court action. *Id.* § 420, 60 Stat. at 845.

Congress enacted this time limit against the backdrop of the "hornbook law" presumption that Congress does not intend to deprive a district court of its equitable power to toll the running of a statute of limitations in extraordinary circumstances. *Young v. United States*, 535 U.S. 43, 49 (2002) (citations omitted); *see infra* § I.A-B. Indeed, less than six months before Congress passed the FTCA, this Court repeated that unless Congress specifically prohibits equitable tolling, "[t]his equitable doctrine is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946). The *Holmberg* case itself addressed tolling where "fraudulent conduct on the part of the defendant"—specifically, concealment of critical information from the plaintiff—"ma[d]e it unfair to [fault the plaintiff] because of mere lapse of time." *Id.* at 396. Significantly, Congress in the FTCA did not add any lan-

guage prohibiting equitable tolling of the statutory time limit in the case of concealment, or in any other extraordinary cases.

In 1948, two years into the life of the FTCA, Congress revised all of Title 28, which housed (and still houses) the FTCA. Act of June 25, 1948, ch. 646, 62 Stat. 869 ("1948 Act"). It was a "thorough revision." H.R. Rep. No. 80-808, at 4 (1947); S. Rep. No. 80-1559, at 1 (1948). In doing so, Congress carefully differentiated "provisions on jurisdiction" from those that instead "deal[t] with procedure." H.R. Rep. No. 80-808, at 5.

Substantively, the FTCA remained largely the same. It still gave the federal district courts exclusive jurisdiction to adjudicate tort claims against the government whenever a similarly situated private party would be liable under state law. 1948 Act, sec. 1, Ch. 85, § 1346(b), 62 Stat. at 933. It still directed those courts to impose liability upon the government to that same extent. *Id.*, Ch. 171, § 2674, 62 Stat. at 983. And it still contained the same statute of limitations. *Id.*, Ch. 161, § 2401(b), 62 Stat. at 971.

But, the revision clarified the FTCA considerably. Before the overhaul, all of the FTCA's various provisions, regardless of function, were placed together into Chapter 20 of Title 28 entitled "Federal Tort Claims." 9 U.S.C. ch. 20 (1946). The revision separated the provision granting district courts exclusive jurisdiction from the rest of the Act. Congress placed it in the newly created Chapter 85, entitled "District Courts; Jurisdiction." 1948 Act, ch. 646, sec. 1, Ch. 85, § 1346(b), 62 Stat. at 933. Con-

gress located the remaining provisions in new chapters 161, entitled "United States as Party Generally," and 171, entitled "Tort Claims Procedure." Congress clarified that the courts' exclusive jurisdiction was "subject to" only the provisions in Chapter 171.[1] *Id.* The FTCA's statute of limitations, however, was contained in Chapter 161. 1948 Act, Ch. 161, § 2401(b), 62 Stat. at 971.

Much of the FTCA has remained essentially constant since the 1948 overhaul. For example, the Act still grants district courts exclusive jurisdiction to hear tort suits against the government whenever a private party would be liable under state law in like circumstances. 28 U.S.C. § 1346(b)(1). And the Act still renders the government liable as if it were a private party under state law, as well. *Id.* § 2674.

Congress, however, tinkered with the administrative claims process and the statute of limitations several times. In 1949, it granted victims an extra year from accrual (two rather than one) in which to sue straightaway. Act of Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62, 62. It also permitted (but did not require) the victim to seek informal administrative recourse within two years for claims of up to $1000, and gave the victim until six months after the disposition of that claim to sue. *Id.* In 1959, Congress

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[1] Although the 1948 Act purported to make the grant of exclusive jurisdiction subject to the provisions of chapter "173," in reality there was no such chapter, and Congress quickly corrected the scrivener's error. Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62, 62.

raised that $1000 cap, allowing that extra time to sue when victims presented timely administrative claims of up to $2500. Act of Sept. 8, 1959, Pub. L. No. 86-238, 73 Stat. 471, 472.

B. Congress Amends the FTCA to Require That a Victim Present an Administrative Claim Before Suing.

In the mid-1960s, Congress enacted a series of remedial statutes requiring victims of certain unlawful conduct to seek informal administrative relief before filing suit in district court. One example was Title VII of the Civil Rights Act of 1964. Pub. L. No. 88-352, 78 Stat. 259. It permitted victims of employment discrimination to sue their employers in federal court. *Id.* § 706(e)-(f), 78 Stat. at 260-61. But it required them to first pursue informal administrative relief within a certain time after the discrimination occurred. *Id.* § 706(d), (e), 78 Stat. at 260. After that, they would have a fixed window of time in which to sue. *Id.* § 706(e), 78 Stat. at 260. Title VII did not expressly authorize a district court to grant case-specific equitable tolling of either time limit, but nothing in the statute prohibited it either. Consistent with the longstanding presumption that Congress does not lightly interfere with a district court's equitable tolling powers, this Court has explained that both time limits associated with Title VII suits permit equitable tolling. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (suit-filing time limit); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (administrative charge-filing time limit).

In 1966, Congress likewise amended the FTCA to create a structurally similar regime. No longer could victims sue straightaway within two years of accrual. As with Title VII, they had to pursue informal administrative resolution in the first instance for all claims (regardless of amount sought). Act of July 18, 1966, Pub. L. No. 89-506, § 2(a), 80 Stat. 306, 306. But, also as with Title VII, the lawsuit would be plenary in nature. It would not be an "appeal" of the resolution of the administrative process.

Congress revised the statute of limitations to account for this new administrative requirement:

> 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 … of notice of final denial of the claim by the agency to which it was presented.

Id. § 7, 80 Stat. at 307.

These 1966 amendments remain in force today. 28 U.S.C. § 2401(b).

C. The Government Prevents June from Presenting a Timely Administrative Claim.

This case involves a tort claim seeking recovery for the death of Anthony Booth. He died because the Federal Highway Administration ("FHWA"), an agency within the U.S. Department of Transporta-

tion, permitted a defective cable median barrier to be installed on a stretch of Interstate 10 in Arizona.

Cable median barriers are a vitally important component of highway safety. A cable median barrier consists of steel wire ropes mounted on flexible posts laid out along the median of a highway that divides traffic traveling in one direction from traffic traveling in the other. *See* FHWA, *Median Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/median_barriers/median_barriers.pdf (last visited Nov. 4, 2014). When properly installed, the barrier is expected to prevent a vehicle that loses control from straying into oncoming traffic and causing a head-on collision or at least diminish the force of a collision. *See id.* The cable median barrier does this by flexibly redirecting the vehicle back into its lane or at least absorbing most of the energy of a crash. *See id.* Properly functioning cable median barriers are so effective that they have reduced cross-median crash fatalities by more than 90 percent. *See* FHWA, *Cable Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/cable_barriers/cable_barriers.pdf (last visited Nov. 4, 2014).

In 2000, the FHWA permitted the installation of a cable median barrier along a stretch of Interstate 10 in Phoenix. J.A. 142-43. At the time of installation, the barrier had not passed the FHWA's required "crashworthiness" testing. *Id.* Indeed, it had not even been crash tested. *Id.* And the FHWA knew this. *Id.* at 145-46.

On February 19, 2005, Laquitha Green was driving a car on that same stretch of Interstate 10, with Booth as a passenger. *Id.* at 143-44. Green lost control of the car and hit the cable median barrier. *Id.* But the barrier neither redirected the car nor did it appreciably absorb the energy of a crash. *See id.* The vehicle crossed into oncoming traffic and collided with another vehicle. *Id.* Booth and Green both died of injuries sustained in the crash. *Id.*

In August 2005, that same cable median barrier that failed to protect Booth and Green on Interstate 10 was crash tested. *Id.* at 145. It failed. *Id.* In September 2005, the FHWA issued a public memorandum incorrectly representing that Interstate 10's cable median barrier had been approved as crashworthy. *Id.* at 145-46. The FHWA, however, knew this was false. *Id.*

Shortly thereafter, Respondent Marlene June, as conservator for Booth's minor child A.K.B., filed a wrongful-death action against the state of Arizona in state court. *Id.* at 26-33. During that and related state court litigation, June's counsel sought to depose certain FHWA personnel in order to determine whether the cable median barrier was functioning properly. *Id.* at 146. The FHWA refused to make them available for over two years. *Id.*

It was not until April 2009 that the FHWA finally made those employees available for deposition. *Id.* June's counsel learned for the first time that the FHWA had knowingly permitted the cable median barrier to be installed and remain in service despite

never having passed the FHWA's crashworthiness testing. *Id.*

June began the process of seeking relief against the government pursuant to the FTCA. On December 20, 2010, June presented a wrongful-death administrative tort claim to the FHWA as required by the FTCA. *Id.* at 148. In March 2011, the FHWA via certified mail issued a final denial of June's administrative claim. *Id.* at 149.

D. The Court of Appeals Holds That the Time Limit on Presenting Administrative Claims Can Be Equitably Tolled in Extraordinary Cases.

In May 2011, within six months of that final denial, June filed this lawsuit against the government. *Id.* at 117.

The government moved to dismiss on the ground that the district court lacked subject-matter jurisdiction. It contended that the time limit for presenting administrative claims was jurisdictional and that June missed that deadline. *Id.* at 128-36. Specifically, the government argued that June's claim accrued on February 19, 2005, the date of Booth's fatal accident, but noted that June did not present her administrative claim to the FHWA until December 20, 2010. *Id.*

June contended that the court had jurisdiction and that the two-year time limit should be equitably tolled. She sought leave to file an amended complaint that detailed how the FHWA had concealed

the defective condition of the cable median barrier that contributed to Booth's death. *Id.* at 152-61. And she argued that her claim was timely presented because she presented it within two years of when she learned about it in April 2009. *Id.*

The district court denied leave to amend the complaint, granted the government's motion, and dismissed the case. Pet. App. 3a-12a.

The court of appeals reversed. *Id.* at 1a-2a. The court explained that the FTCA's six-month time limit for filing suit in federal court may be equitably tolled in appropriate circumstances. *Id.* at 2a. On that basis, it held that the FTCA's two-year time limit for presenting administrative claims also can be equitably tolled in certain situations. *Id.* It remanded the case to the district court. *Id.*

SUMMARY OF ARGUMENT

I. A. Congress has long been presumed to intend that federal district courts retain their historic equitable power to toll the running of statutes of limitations in extraordinary circumstances. This Court has recognized the presumption going back more than a century, especially where a defendant has concealed critical information from the plaintiff. *See, e.g.*, *Bailey v. Glover*, 88 U.S. 342, 348-49 (1875). Periodically—including less than six months before Congress passed the FTCA—it has issued unambiguous reminders to Congress, reiterating that federal legislation concerning time limits will be interpreted with the presumption in mind.

The presumption is not just venerable, but strong. District courts will not be divested of their historic equitable power to toll federal time limits unless the clearest evidence indicates that Congress meant to do so. An equivocal legislative record will not suffice. Neither will silence.

B. As this Court held in *Irwin v. Department of Veterans Affairs*, "the same rebuttable presumption" in favor of the district courts retaining their equitable tolling power applies "in the same way" in suits against the government. 498 U.S. 89, 95-96 (1990). The Court reasoned that this "is likely to be a realistic assessment of legislative intent." *Id.* at 95.

Irwin contradicts the government's argument here that Congress likely would not want to preserve a district court's historic equitable tolling power in cases against the government. That is what *Irwin* was all about. It likewise contradicts the government's argument here that the rule articulated in *Irwin* applies only to post-*Irwin* legislation. After all, the Court in *Irwin* itself applied the rule to legislation enacted before the decision was issued.

In arguing otherwise, the government leans chiefly upon cases like *Soriano v. United States*, 352 U.S. 270 (1957), addressing the time limit applicable to suits under the Tucker Act in the Court of Claims (now called the Court of Federal Claims). The Court of Claims, however, traditionally had no equitable powers. Accordingly, those decisions have no bearing on the rule to be applied to time limits—like the FTCA's time limit on presenting administrative claims—to be administered by district courts, which

have a long and rich tradition of exercising equitable power, including the power to toll statutes of limitations in extraordinary circumstances.

II. A. Congress has never rebutted the presumption in favor of a district court's retention of its equitable tolling powers with respect to the FTCA's time limit on presenting administrative claims. Proving such a rebuttal would require clear evidence either that Congress intended the time limit to be jurisdictional, or that Congress intended the time limit, while non-jurisdictional, nevertheless to categorically preclude equitable tolling. The government cannot show either.

Congress has expressed no clear intent to make the administrative presentment time limit jurisdictional. This Court has held that the provision containing the time limit does not bear on district courts' jurisdiction under the FTCA. The language and structure of the statute itself—which received careful study, especially as to matters of jurisdiction, and which were subject to a "scientific" revision in 1948 to increase precision and clarity, H.R. Rep. No. 80-808, at 1 (1947)—make this evident. Nothing in the time limit refers to jurisdiction, and nothing in the provision related to jurisdiction refers to the time limit.

Further confirming the non-jurisdictional nature of the time limit on administrative presentment is the FTCA's express command that tort suits against the government track tort suits against private parties under state law. Nationwide, state tort law regularly treats applicable time limits as non-

jurisdictional and regularly recognizes the power of a trial court to toll the running of a statute of limitation.

Once again, the government's reliance on cases interpreting the Tucker Act time limit administered by the Court of Claims for the contrary position is unavailing. Linguistically, the time limits do appear similar. But critically, the contexts in which they are applied are anything but. As explained earlier, the Court of Claims did not traditionally exercise equitable power. District courts, by contrast, always have done so. This Court long ago rejected the argument the government makes here attempting to link a district court's power under the FTCA to the power of the Court of Claims under the Tucker Act.

B. The FTCA's language, structure, purpose, and legislative history do not provide the clear intent necessary to override the district courts' historic equitable tolling power. To the contrary, they are all fully consistent with an intent not to disturb a district court's traditional equitable tolling powers.

1. As noted, the FTCA expressly provides that tort suits against the government emulate tort suits against private parties under state law. Generally, such state law has long permitted case-specific tolling of time limits. That alone is powerful evidence that Congress wanted the FTCA's timing provisions—including the time limit on presenting administrative claims—to permit equitable tolling, as well.

This analysis is unaffected by other rules Congress adopted regarding the submission of a claim.

Simply put, none reveals a clear intent to prohibit district courts from exercising their historic power to equitably toll time limits in exceptional, especially deserving, individual cases. Moreover, drawing such an inference would be inconsistent with the very notion of a presumption of equitable tolling. The presumption means that this is not an area where this Court needs to read tea leaves. If Congress wants to prohibit a district court from exercising its historic equitable tolling power and to overcome the more-than-a-century-old presumption, it knows how to say so, and it knows that it has to say so clearly.

2. The FTCA's core purpose and legislative history are fully consistent with a district court's retention of its historic equitable tolling power. As this Court's decisions have noted, the FTCA's purpose and legislative history support interpreting the Act with fairness and equity to tort claimants. Courts should not act "as … self-constituted guardian[s] of the Treasury" in interpreting the statute. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). That principle applies with extra strength in regard to the administrative claim presentment time limit. The administrative process established by Congress is permeated with a claimant-friendly informality that is highly compatible with the exercise of equitable tolling to mitigate unfair results.

ARGUMENT

I. CONGRESS IS PRESUMED TO HAVE INTENDED THAT DISTRICT COURTS RETAIN THEIR HISTORIC POWER OF EQUITABLE TOLLING WHEN APPLYING THE FEDERAL TORT CLAIMS ACT'S TIME LIMIT ON PRESENTING ADMINISTRATIVE CLAIMS.

When enacting a statute of limitations, Congress is presumed not to disturb a district court's traditional equitable tolling power. *Infra* § I.A. That presumption applies equally where the government is the defendant, including to the FTCA's administrative presentment deadline enacted in 1966. *Infra* § I.B.

A. There Is a Venerable Presumption in Favor of Reading Statutes of Limitations to Preserve a District Court's Inherent Equitable Tolling Power.

"Equitable tolling" is "a doctrine that 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) (internal quotation marks omitted). The presumption is that "[e]quitable tolling is applicable to statutes of limitations." *Id.* This presumption is consistent with the function that statutes of limitations serve. *Id.* "[T]heir main thrust is to encourage the plaintiff to pursue his rights diligently." *Id.* (internal quotation

marks and alteration marks omitted). So "[w]hen an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by the statute of limitations does not further the statute's purpose." *Id.* (internal quotation marks omitted). The plaintiff *has* "pursue[d] diligent prosecution of known claims," but a sufficiently formidable obstacle stood in his way. *Id.* Thus, equitable tolling is not an exception to a limitations statute, but "seeks to vindicate … the genuine intent of the statute." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia J., dissenting on other grounds).

"[T]he doctrine of equitable tolling is centuries old," having been "reflected in Blackstone's Commentaries two-thirds of the way through the eighteenth century." *Id.* at 1941 (internal quotation marks omitted). It is particularly venerable in the context of a defendant's concealment of critical information. For example, nearly 140 years ago, in *Bailey v. Glover*, 88 U.S. 342 (1875), a creditor sued a debtor for improperly transferring property out of his estate in order to prevent the creditor from obtaining it in a bankruptcy proceeding. *Id.* at 346, 348-49. The relevant statute of limitations, enacted in 1867, provided that "no suit … shall in any case be maintained … unless brought within two years." *Id.* at 349. The plaintiff did not sue, however, until after that time had elapsed. *See id.* at 348-49. The defendant had hidden the transaction, so that the plaintiff did not discover it in time. *Id.* This Court allowed the suit. *Id.* at 349-50. It held that "in equity … the authorities are without conflict in support of the doctrine that where

the ignorance … has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief." *Id.* at 347. No language in the statute expressly barred the district court from employing its ordinary equitable power to vindicate that doctrine. *Id.* at 349. Accordingly, the court retained its inherent equitable power.

Nearly a century ago, this Court formally enshrined the rule as a presumption that statutes of limitation do not disturb a district court's traditional equitable power to toll the running of the limitations period. *Exploration Co., Ltd. v. United States*, 247 U.S. 435, 448-49 (1918). Citing an unbroken line of cases that had followed *Bailey*, this Court noted that "the rule of *Bailey v. Glover* [had become] the established doctrine of this Court" and "has been approved and followed." *Id.* It held that it would regard any time limit enacted after *Bailey*—i.e., after 1875—as "presumably enacted with the ruling of that case in mind." *Id.* Fraudulent concealment would toll the time limit where there was "no good reason why the rule, now almost universal, … should not apply." *Id.*

Less than six months before Congress first passed the FTCA, this Court again reaffirmed that district courts are presumed to retain their equitable tolling powers. The Court recited the doctrine that "[e]quity will not lend itself to … fraud and historically has relieved from it. It bars a defendant from setting up … a fraudulent defense." *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946). The Court declared that unless Congress provides otherwise,

"[t]his equitable doctrine is read into every federal statute of limitations." *Id.* at 397; *TRW v. Andrews*, 534 U.S. 19, 27 (2001) ("*Holmberg* … stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment ….").

Shortly before Congress's 1966 addition of the administrative presentment requirement and time limit at issue in this case, this Court reaffirmed the longstanding presumption in favor of a district court's retention of its equitable tolling powers. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234 (1959). The Court recited the equitable principle "that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." *Id.* at 234. And the Court declared that, in such a case, this principle would bar a statute-of-limitations defense when there is "nothing in the language or history of the [relevant statute] … to indicate that this principle of law ... was not to apply." *Id.*

This Court has since followed this presumption in a dizzying array of cases.[2]

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[2] *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (petition-filing time limit in Antiterrorism and Effective Death Penalty Act of 1996); *Young v. United States*, 535 U.S. 43, 49-51 (2002) (petition-filing time limit in Bankruptcy Act, as amended in 1966, is subject to equitable tolling); *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000) (suit-filing time limit in

The presumption is not easily overcome. Congress, of course, is always free to insert language into its statutes of limitations expressly prohibiting equitable tolling. Absent that, however, to overcome the presumption that a district court retains that power, a defendant must show that Congress's intention to remove that power was clear.

A defendant can do this in one of two ways. First, the defendant can rebut the presumption by showing a "clear indication" from Congress that the time limit is jurisdictional and actually constrains the adjudicatory power of the district court. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). Second, it can do so by demonstrating "the clearest command" that Congress intended for the time limit, while non-jurisdictional, nevertheless to preclude a district court from exercising its equitable tolling powers. *Holland v. Florida*, 560 U.S. 631, 646 (2010). Whichever route the government takes (and

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Clayton Act as amended in 1955, as later adopted for use as suit-filing time limit in civil Racketeer Influenced Corrupt Organizations Act, is subject to equitable tolling); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997) (same); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (suit-filing time limit in Title VII of Civil Rights Act of 1964 is subject to equitable tolling); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (administrative charge-filing time limit in Title VII of Civil Rights Act of 1964 is subject to equitable tolling, and the same result would obtain as to the administrative charge-filing time limits in National Labor Relations Act as amended in 1947 and Age Discrimination in Employment Act of 1967); *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 426 (1965) (suit-filing time limit in Federal Employers Liability Act, as amended in 1939, is subject to equitable tolling).

here, it tries both), the *contents* of that proof must meet a single demanding clear-statement standard. This imperative follows from the more general proposition that a district court's equitable power "is not to be denied or limited in the absence of a clear and valid legislative command." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

B. "The Same Rebuttable Presumption" Applies "in the Same Way" Against the Government, Including to the FTCA Administrative Presentment Deadline Enacted in 1966.

1. The presumption described above carries over jot-and-tittle to a district court's equitable powers in an action brought against the federal government. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court addressed a district court's equitable tolling authority when facing a Title VII action for money damages brought against a federal agency. This Court declared that "[t]he *same* rebuttable presumption of equitable tolling applicable to suits against private defendants … appl[ies] to suits against the United States." 498 U.S. at 95-96 (emphasis added). Moreover, the Court added, the presumption that a district court retains its equitable tolling powers applies "against the Government[] *in the same way* that it is applicable to private suits." *Id.* at 95 (emphasis added).

In *Irwin*, the Court recognized that in suits against the government, there is the added consideration of sovereign immunity. This Court observed

that all suits against the government are necessarily premised on a waiver of sovereign immunity and "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* (quotation marks omitted). But this consideration does not change the general presumption that district courts retain their equitable tolling powers. This is because "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." *Id.*

Irwin also confirms that the presumption applies with equal force whether the statute of limitations imposes a deadline for filing a complaint in court or for presenting a claim with an agency as a prerequisite to suing. The Court articulated the presumption as applying "to suits." 498 U.S. at 96. And it characterized both suit-filing deadlines and administrative-presentment prerequisite deadlines as "statutory time limits applicable to lawsuits" to which the presumption applies. *Id.* at 95; *id.* at 95 n.2 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Unsurprisingly so, as both deadlines are interpreted and applied by district courts—tribunals with historic equitable power.

Irwin's reference to *Zipes* is particularly telling here. That was the case mentioned above (at 7) in which the Court held that the administrative charge-filing time limit in Title VII of the Civil Rights Act of 1964 permits case-specific equitable tolling. The Court in *Zipes* also stated that the same result would obtain as to the administrative charge-filing time limit in the Age Discrimination in Employment

Act of 1967. 455 U.S. at 394. The provisions of those statutes requiring victims to seek informal administrative relief before filing suit were enacted roughly contemporaneously (1964 and 1967, as compared with 1966) with the similarly structured time limit at issue here. *Supra* 7-8.

2. The government's response to all this is slippery. It begins with an apparent concession: "In recent years, this Court has adopted a rebuttable presumption that federal statutes of limitation requiring that suits be filed in court by a certain time—including those applicable to suits against the United States—are subject to equitable tolling." Pet. Br. 15-16 (citing *Irwin*, 498 U.S. at 95-96). And much of its brief seems to accept that some form of presumption does apply and thus tries to rebut it. *See id.* at 16-53. In other places, however, the government suggests that "*Irwin*'s background presumption … does not govern this case" at all. *Id.* at 27 n.12. And even where it purports to apply a presumption, the government treats this presumption as no presumption at all. Instead of looking for a clear intent to deprive the district courts of their traditional equitable tolling power, the government seems to demand affirmative proof that Congress actively wanted to empower district courts to exercise that historic function. *See, e.g.*, *id.* at 53 (asserting that equitable tolling should be denied across the board because it is "unlikely that Congress actually intended to grant courts authority to toll that time limit").

The government's half-hearted embrace of the presumption appears to be premised in part on the

fact that the FTCA contains a waiver of sovereign immunity. For example, in arguing that the presumption does not apply in full, the government contends: "Congress understood the FTCA time bar as jurisdictional in significant part *because* it operated as a limit on the waiver of sovereign immunity to monetary claims against the United States." Pet. Br. 27 n.12. That, however, is exactly the argument that the government made, and this Court rejected, in *Irwin*, when the Court held that sovereign immunity concerns are *not* a basis for rejecting the presumption. That the government does not get special treatment vis-à-vis equitable tolling simply because it is the government is what *Irwin* was *all about*.[3]

The government also argues that the presumption is inapplicable to statutes passed before *Irwin*, asserting: "It may be that after *Irwin*, this Court would not … apply [a] categorical rationale to any *new statute* waiving immunity for claims against the United States," but not to statutes enacted in an earlier "era," back when Congress supposedly "did not

[3] This goes double in the context of the FTCA, because the time limit on administrative presentment is not a component of the waiver. "*[Section] 1346(b)* … waives the sovereign immunity of the United States for certain torts committed by federal employees." *Smith v. United States*, 507 U.S. 197, 201 (1993) (emphasis added). The FTCA's time limits, by contrast, are located in § 2401(b). They are mere "condition[s]" on that waiver. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Thus, permitting district courts to equitably toll the FTCA's deadlines involves no broadening of the waiver whatsoever, not even the "little" bit that *Irwin* found unobjectionable and insufficient to alter Congress's presumed intent.

expect its silence to be taken as implicit consent to equitable tolling." *Id.* at 32 (emphasis added). To the contrary, the presumption that applies in this case is not of recent vintage. Rather, as we have demonstrated (at 18-20), it is a deeply entrenched presumption that goes back more than a century.

The government's chief support for weakening or suspending the presumption is a line of cases purporting to discern Congress's intent regarding equitable tolling of time limits administered by the Court of Claims (now called the Court of Federal Claims). In particular, the government notes that in *Soriano v. United States*, 352 U.S. 270 (1957), the Court held that the six-year time limit on filing non-tort suits for money damages in the Court of Claims under the Tucker Act cannot be equitably tolled. Pet. Br. 30-32. And it asserts that Congress would have expected *that result*—the prohibition of tolling—to be the default.

This Court rejected that very argument when the government made it 25 years ago in *Irwin*. Like the government's first *Irwin* re-tread, this one, too, does not improve with age. The statute at issue in *Irwin* was the Civil Rights Act *of 1964*. And this Court applied the presumption to a statute of limitations that Congress added in *1972*, which was still 18 years before *Irwin*. That alone conclusively defeats the government's position here. Moreover, in *Irwin*, Justice White adopted the argument in his concurrence disagreeing with the majority on the difference between suits against the government and suits against private parties. Justice White argued that previously "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 99 n.2. He concluded that it was "unlikely that the 1972 Congress had in mind" what he characterized as "the Court's present departure from that [supposed] longstanding rule." *Id.* And he accused the Court's decision of "directly overul[ing] … *Soriano*." *Id.* at 98. The majority, however, was unpersuaded.

And for good reason. As mentioned above, *Soriano* is one of a line of cases that interprets the time limit governing actions in the *Court of Claims*. That court is very different from district courts in respects that bear critically on the issues in this case.

The Court of Claims is a tribunal that from inception has exercised only the most limited jurisdiction. At first, it did not have the power even to issue binding judgments, but simply issued recommendations to Congress. *See* Act. of Feb. 24, 1855, ch. 122, §§ 1, 7, 10 Stat. 612, 613. Even after Congress granted the Court of Claims the power to issue binding judgments, Congress heavily circumscribed its jurisdiction. This Court said that "[t]he matters made cognizable therein include nothing which inherently or necessarily requires judicial determination." *Ex parte Bakelite Corp.*, 279 U.S. 438, 453 (1929). It regarded the Court of Claims as merely "an incident of [Congress's] power to pay the debts of the United States." *Id.* at 452. Apart from some very narrow, very recent exceptions not relevant here, "'the Court of Claims has'" always had "'no power to grant equitable relief.'" *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.40 (1988) (quoting

Richardson v. Morris, 409 U.S. 464, 465 (1973)); *see United States v. Denedo*, 556 U.S. 904, 912 (2009) ("Th[e] rule [that Congress determines the jurisdiction of the federal courts] applies with added force to Article I tribunals … which owe their existence to Congress' authority to enact legislation pursuant to Article I, § 8 of the Constitution.").

In contrast, federal district courts have a "long tradition of equity practice." *Romero-Barcelo*, 456 U.S. at 320. That tradition extends to the exercise of equitable principles *against* the government. This Court has always presumed that Congress intends to preserve those historic powers. "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (applying presumption against government in Social Security Act as amended in 1939). "[W]hen Congress desire[s] to make … an abrupt departure from traditional equity practice …, it … ha[s] [to] ma[k]e its desire plain." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944).

To put it succinctly, "[t]he Claims Court does not have the general equitable powers of a district court." *Bowen*, 487 U.S. at 905. Accordingly, as this Court has recently reaffirmed, "ordinary legal principle[s]" concerning statutes of limitations "'*ha[ve] no application to suits in the Court of Claims against the United States*.'" *John R. Sand & Gravel*, 552 U.S. 130, 135 (2008) (quoting *Finn v. United States*, 123 U.S. 227, 232-33 (1887)) (emphasis added by *John R. Sand & Gravel Co.*). It emphasized the uniqueness of the Court of Claims, noting that "[o]ver the years, the Court has reiterated in various

contexts this or similar views about the more absolute nature of the [C]ourt of [C]laims limitations statute." *Id.* Even the government has highlighted and relied upon this uniqueness before this Court. Reply Brief for the Petitioner at 18, *U.S. Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (No. 97-1642) ("When it vests jurisdiction over certain causes of action (contract suits) in a court that lacks authority to grant equitable relief [(the Court of Claims)], the natural conclusion is that Congress intended such relief to be barred.").

For that reason, *Irwin*'s refusal to accord *Soriano* and like cases across-the-board talismanic significance to *all* statutes of limitations makes perfect sense. Those cases represent Congress's attitude specifically as to time limits in the Court of Claims.[4] It may make some sense to withhold a presumption in favor of equitable tolling from time limits administered by tribunals with no equitable power. But the Tucker Act cases do not represent Congress's intent as to time limits administered by district courts, which have a rich tradition of using equity to prevent unfair results. *That* intent is what *Irwin* decided. In doing so, it did not overrule *Soriano* or any other decision involving the Court of Claims. *John*

[4] The Tucker Act time limit also applies to a limited category of low-dollar-value non-tort claims against the government for money damages that may be heard in district court as well as the Court of Federal Claims. But Congress was careful to provide that district courts in such situations essentially sit as satellite branches of the Court of Federal Claims, exercising jurisdiction "concurrent with" that court. 28 U.S.C. § 1346(a)(2).

R. Sand & Gravel Co., 552 U.S. at 137 (explaining that "*Irwin* … does not imply revisiting past precedents" involving time limits in the Court of Claims).

The time limit at issue here (though it concerns presentation of claims to administrative agencies) is administered in FTCA lawsuits by federal district courts. Thus, the presumption of equitable tolling fully applies.

II. NOTHING IN THE FTCA EXHIBITS A CLEAR INTENT TO STRIP DISTRICT COURTS OF THEIR HISTORIC POWER OF EQUITABLE TOLLING.

Given *Irwin* and the long-established presumption in favor of a district court retaining its equitable tolling authority, the question here is whether Congress issued "a clear and valid legislative command" to the contrary regarding the FTCA's time limit on presenting administrative claims. *Romero-Barcelo*, 456 U.S. at 313. Congress did not. Contrary to the government's primary contention, the statute bespeaks no intention to treat the deadline as jurisdictional. *Infra* § II.A. And contrary to the government's backup position, the FTCA's language, structure, purpose, and legislative history do not clearly contradict—and indeed strongly support—the conclusion that Congress intended to preserve the district courts' customary equitable tolling power. *Infra* § II.B.

A. Congress Expressed No Clear Intent to Make the FTCA's Deadline for Presenting Administrative Claims Jurisdictional.

The government's lead argument is that § 2401(b)'s deadline for administrative presentment is jurisdictional. That assertion could not overcome the presumption unless Congress gave a "clear indication" of its intention to make the time limit jurisdictional. *Henderson*, 131 S. Ct. at 1203. Moreover, the government must establish that clear command *as to the time limit on presenting administrative claims, specifically*. It is not enough to prove that Congress intended to preclude equitable tolling of the six-month time limit for filing suit after the denial of an administrative claim. That in itself would not ipso facto prove that the time limit on presenting administrative claims prohibits equitable tolling simply because both are housed together and serve the same general function as time limits. *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975) ("Section 405(g) specifies [three] requirements for judicial review …. The second and third of these … are waivable …. [T]he first requirement, however, [is] central to the requisite grant of subject-matter jurisdiction …."); *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2014) ("A requirement [this Court] would otherwise classify as nonjurisdictional … does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." (citing *Gonzalez v. Thaler*, 132 S. Ct. 641, 651-52 (2012))); *Gonzalez*, 132 S. Ct. at 651 ("Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdiction-

al hurdle."). If anything, however, Congress has clearly indicated the time limit on presenting administrative claims is *not* jurisdictional.

1. In *FDIC v. Meyer*, 510 U.S. 471 (1994), this Court explained exactly what about the FTCA is jurisdictional. It said that "Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed]' itself liable." *Id.* at 477 (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)) (alteration in *Meyer*). This category "includes" any claim that is:

> [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.

Id. (quoting 28 U.S.C. § 1346(b)(1)) (alterations in *Meyer*). Clarifying the point, the Court reiterated that "[a] claim comes within this jurisdictional grant … if it alleges the six elements outlined above." *Id.* That is, satisfaction of those six elements is sufficient to confer jurisdiction.

That six-element list does *not* include the FTCA's time limits. In particular, it does *not* include the time limit on presenting administrative claims.

Thus, facially untimely claims may still come within district courts' jurisdiction.

2. The holding in *Meyer* is consistent with how this Court has always approached the jurisdictional-or-not inquiry. To start with the obvious, the Court "ha[s] rejected the notion that 'all mandatory prescriptions, however emphatic, are … properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Reg.*, 558 U.S. 67, 82 (2009)). "Among the types of rules that should not be described as jurisdictional are what [this Court] ha[s] called 'claim-processing rules'": "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at specified times." *Id.* at 1203. Directly on point, "[f]iling deadlines … are quintessential claim-processing rules." *Id.* From the get-go, all signs point against the FTCA's time limit on presenting administrative claims being jurisdictional.

The FTCA's structure reinforces this conclusion. Section 2401, entitled "Time for Commencing Action Against United States," contains the time limit on administrative presentment. It says nothing about jurisdiction. The jurisdictional provision (§ 1346(b)(1)), entitled "United States as Defendant," says nothing about time limits (much less the particular time limit at issue here)—not even a cross-reference to that section. And the two provisions are located far away from each other in Title 28 of the U.S. Code. Specifically, the jurisdictional provision is located in Chapter 85, "District Courts; Jurisdic-

tion," while the timing provision is located in Chapter 161, "United States as Party Generally."

This Court confronted the same structural attributes in *Zipes* and relied upon them heavily in "holding compliance with the filing period [for administrative charges] to be not a jurisdictional prerequisite to filing a Title VII suit." 455 U.S. at 398. Specifically, the Court indicated that it rested its conclusion largely on the observations that (1) "[t]he provision granting district courts jurisdiction contains no reference to the timely-filing requirement"; (2) "[the time limit] does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts"; and (3) "[t]he provision specifying the time for filing … with the [administrative agency] appears as an entirely separate provision" from the one granting jurisdiction. 455 U.S. at 393-94.

The FTCA presents an even more compelling case against finding the time limit on administrative presentment to be jurisdictional. This is because the time limit on presenting administrative claims is also isolated from the provision delineating the liability district courts should impose in FTCA cases. The liability provision, entitled "Liability of United States," is § 2674, which resides in Chapter 171, entitled "Tort Claims Procedure."

This distant placement of the jurisdictional provision was no accident. The 1948 revision "was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study," including "[f]ive years of Congressional attention." *Ex parte Collett*, 337 U.S. 55, 65 (1949). Congress over-

hauled the FTCA according to a "scientific plan" designed in part to clarify precisely what purpose each of Title 28's many provisions served. H.R. Rep. No. 80-808, at 1 (1947). In doing so, Congress carefully differentiated "provisions on jurisdiction" from those that instead "deal[t] with procedure." *Id.* at 5. Indeed, the former special counsel to the House Committee on Revision of the Laws said that he was "proudest of the way the [revised] code deals with jurisdiction … and procedure." *Revision of Titles 18 and 28 of the U.S. Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 44 (1947) (statement of John F.X. Finn).

Congress did not enact the administrative presentment time limit until 1966, nearly 20 years after the ink had dried on the 1948 revision. If Congress wanted to single out this new time limit and make sure it would be accorded jurisdictional status, Congress readily could have done so. But of course, Congress did not.

The government (at 34-35 & n.18) urges the Court to ignore the current structure of the FTCA—the structure Congress passed more than 60 years ago as the embodiment of a "scientific plan" by Congress to differentiate jurisdiction and procedure, H.R. Rep. No. 80-808, at 1, and the structure into which Congress in 1966 inserted the time limit on presenting administrative claims. The government proposes that the Court should focus exclusively on the structure and language of the original 1946 enactment, which was on the books for only two years. This, the government says, is because "changes re-

sulting from the 1948 recodification should not be given substantive significance" because it just "simplifies and restates" the original content. Pet. Br. 34 n.18 (quotation marks and citation to legislative history omitted).

But to focus on the text as recodified is not to infer substantive change from the recodification. Rather, it is simply to recognize that, as a result of the "close and prolonged study" that went into the revision—study that began before the original 1946 enactment—the revised text more clearly expresses what Congress's intent was all along.

Moreover, the original 1946 enactment does not suggest that the timing provision is jurisdictional, either. The government contends that the 1946 statute "expressly condition[ed] its grant of 'exclusive jurisdiction' … on the plaintiff's compliance with the time limitation for filing suit." Pet. Br. 34. This, the government asserts, is because the 1946 enactment "grant[ed] … jurisdiction 'subject to the provisions of this title'"—"this title" being Title IV of the Legislative Reorganization Act of 1946, i.e., the undifferentiated whole of the FTCA, including the suit-filing deadline. *Id.*

That is absurd, as it would render every word of the 1946 FTCA jurisdictional. That legislation also required plaintiffs to follow the Federal Rules of Civil Procedure. But if the cross-reference had jurisdictional import, then a district court would lose adjudicatory authority every time a victim failed to get the caption on her complaint letter-perfect, *see* Fed. R. Civ. P. 10(a) (1937), failed to organize her

complaint using numbered paragraphs throughout, *see* Fed. R. Civ. P. 10(b) (1937), or made a minor error in noticing a deposition, *see* Fed. R. Civ. P. 27(b) (1937). No rational Congress could have intended that.

Thus, the 1946 FTCA, even taken on its own terms, could not have vested the timing provision with jurisdictional significance. It simply confirms that the jurisdictional provision's blunderbuss cross-reference to the undifferentiated whole of the FTCA was an "ambiguity" that "had been removed" during Congress's careful 1948 revision. S. Rep. No. 80-1559, at 2 (1948).

3. Among the provisions that the 1948 recodification preserved were two sections that conclusively demonstrate that Congress did not intend for the time limit on presenting administrative claims to receive jurisdictional treatment. As it did from its inception, the FTCA currently provides that the government can be sued in any case "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," 28 U.S.C. § 1346(b)(1), and will be "liable … in the same manner and *to the same extent* as a private individual under like circumstances," *id.* § 2674 (emphasis added); *see Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 68 (1955) (FTCA generally "compensate[s] the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable"). There is no dispute that applicable time limits generally would not be jurisdictional in a private suit under state

law. The states have interpreted their time limits this way going back centuries. *See, e.g.*, *Braun v. Sauerwein*, 77 U.S. 218, 223 (1870); *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) (Story, J., riding circuit). Nor is there any dispute that they generally do so now, as well.

The government's argument for jurisdictional status is thus a request to have its liability measured in a *different manner* and to a *different extent* than a private individual under like circumstances—in defiance of the plain statutory text.

4. Instead of grappling with these explicit statutory commands, the government's main argument for treating the provision as jurisdictional revolves around a single phrase: "forever barred." The argument boils down to the following syllogism: (1) the Court has held the time limit on filing suit in the Court of Claims under the Tucker Act to be jurisdictional; (2) that time limit says that an action is "forever barred" if the defendant misses the deadline; (3) the FTCA's time limit on presenting administrative claims uses that same phrase; ergo (4) that deadline must also be jurisdictional. Pet. Br. 18-22.

Here, again, the government is misreading this Court's Tucker Act/Court of Claims cases as having anything to do with statutes other than the Tucker Act and tribunals other than the Court of Claims. For one thing, unlike the FTCA, "[t]he Tucker Act contains no … language expressing Congress' intent to waive sovereign immunity such that the government can be sued to the same extent as a 'private person.'" *Fed. Ins. Co. v. United States*, 29 Fed. Cl.

302, 306 (Fed. Cl. 1993). Moreover, as discussed above (at 26-30), the Tucker Act time limit is administered by the Court of Claims—a tribunal long recognized as having nothing like a district court's equity power.

These peculiarities have always done the heavy lifting in this Court's Tucker Act/Court of Claims cases—not the "forever barred" language. None of the opinions issued on the "*six* separate occasions" in which the Court has held that time limit to be jurisdictional (Pet. Br. 19) contain anything approaching a linguistic analysis of "forever barred." Three of them—*Munro v. United States*, 303 U.S. 36 (1938), *United States v. Wardwell*, 172 U.S. 48 (1898), and *United States v. New York*, 160 U.S. 598 (1896)—do not even quote the language at all. And the most recent opinion, *John R. Sand & Gravel Co.*, may as well have been labeled "dubitante." 552 U.S. at 139 (noting that the Court would be reluctant to reconsider the holding even though "[it] might believe that decision is no longer 'right'").

Nothing about the phrase "forever barred" bespeaks jurisdiction. While the government describes this language as "emphatic," Pet. Br. 32—indeed, "unusually" so, *id.*—it is just a description of the consequence of blowing the statute of limitations. Once the statute of limitations has run, barring some sort of "revival" procedure, the action, by definition, is "forever barred." Thus, at bottom, all that the time limit at issue here does is pair a deadline with a consequence of failing to meet that deadline. Such a formulation "is unexceptional." *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002). It

is an entirely commonplace formulation of garden-variety—i.e., non-jurisdictional—statutes of limitations.[5]

In this way, the FTCA's time limit on presenting administrative claims is no more emphatic than many other statutes of limitations that have been held to be not only non-jurisdictional but subject to equitable tolling. The statute in *Bailey*, which said "*no suit* at law or in equity shall *in any case* be maintained … unless brought within two years," is one example. 88 U.S. at 349 (petition-filing time limit from Bankruptcy Act of 1867) (emphasis added). Another is the time limit in *Glus*, which provided that "*[n]o action* shall be maintained … unless commenced within three years from the day the cause of action accrued." 359 U.S. at 232-34 (suit-filing time limit from Federal Employers' Liability Act as amended in 1939) (emphasis added).

There certainly is no magic in the particular word "forever" used to set forth the consequence of failing to meet the deadline. For proof, one need look no further than *Rotella v. Wood*, 528 U.S. 549 (2000). The Court there confronted a statute of limitations

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[5] *See* 927 (6th ed. 1990) (defining "statute of limitations" as "[a] statute … declaring that no suit shall be maintained on such causes of action … unless brought within a specified period after the right accrued"); *Black's Law Dictionary* 835 (5th ed. 1979) (same); *Black's Law Dictionary* 1077 (4th rev. ed. 1968) (same); *Black's Law Dictionary* 1077 (4th ed. 1957) (same); *Black's Law Dictionary* 1120 (3d ed. 1933) (same); *Black's Law Dictionary* 729 (2d ed. 1910) (same); *Black's Law Dictionary* 1122 (1st ed. 1891) (same).

providing that "[a]ny action to enforce any cause of action … *shall be forever barred* unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (suit-filing time limit for civil RICO, judicially adopted from suit-filing time limit under Clayton Act) (emphasis added). This Court found this statute consistent with "the understanding that federal statutes of limitations are generally subject to equitable principles of tolling." 528 U.S. at 560 (citing *Holmberg*, 327 U.S. at 397); *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194 (1997) (determining certain circumstances necessary "to toll the [same] limitations period" pursuant to "the doctrine of fraudulent concealment"). Thus, it is simply not true that the "forever barred" language in the FTCA's time limit on administrative presentment indicates a clear intent to bar a district court from employing equitable tolling in exceptional circumstances to pause the running of a limitations period.

5. The government asserts that the "legislative history establishes that Congress intended the FTCA to serve as the tort-claim analogue to the Tucker Act and thus confirms that the 'shall be forever barred' language in the FTCA time bar is likewise a jurisdictional limitation," including with respect to the time limit on presenting administrative claims. Pet. Br. 22; *id.* at 23 (citing H.R. Rep. No. 79-1287, at 5 (1945); H.R. Rep. No. 77-2245, at 9 (1942)). Once again, however, this Court has already rejected that exact argument.

More than 60 years ago, in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), the government "attempt[ed] to restrict [the FTCA's] scope" by "re-

view[ing] its legislative history" for references to a supposed intent to track the Tucker Act. In that case, *the exact same pages of the exact same reports as here* "[we]re relied upon by the Government … as assimilating the proposed jurisdiction of the District Courts under the Federal Tort Claims Act to their existing jurisdiction under the Tucker Act." *Id.* at 550 n.8 (citing H.R. Rep. No. 79-1287, at 5; H.R. Rep. No. 77-2245, at 9).

This Court rejected the government's argument. It observed that these "statements … were entirely omitted from even the sectional analysis of the measure when in 1946 it was incorporated into the Reorganization Bill and the report on it was made by the Senate Committee on the Organization of Congress." *Id.* Accordingly, the Court determined that "[t]he[se] views expressed in the earlier legislative history … lose force by their omission from the 1946 report and discussion." *Id.* "Recognizing such a clearly defined breadth of purpose for the [FTCA] as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit," the Court found these statements insufficient to support the government's attempt "to whittle it down by refinements." *Id.* at 550. Nothing has changed since then.

6. Finally, the government cites to private bills passed after the FTCA was enacted wherein Congress permitted courts to hear claims they had deemed to be time-barred, and recited that it was giving the courts "jurisdiction" to do so. In the first place, Congress's mere decision to revive such claims says nothing about the jurisdictional status of the

time limit on administrative presentment. That Congress decided to revive a claim that a *court* deemed time-barred does not compel the conclusion that *Congress* believed that the time bar was jurisdictional. It only demonstrates that the court in that instance thought that the deadline was not met.

That Congress occasionally used the word "jurisdiction" in doing so does not change the analysis. Congress was all over the map on this. Some private bills reviving untimely claims mention "jurisdiction" with respect to the suit-filing time limit only (and not the time limit on presenting administrative claims), *see, e.g.*, Priv. L. No. 99-18, 100 Stat. 4320, 4320-21 (1986). Others mention "jurisdiction" only with respect to the amount in controversy, *see, e.g.*, Priv. L. No. 82-71, 65 Stat. A28, A28-A29 (1951). And still others do not mention "jurisdiction" at all. *See, e.g.*, Priv. L. No. 94-55, 90 Stat. 2977, 2977 (1976); Priv. L. No. 86-296, 74 Stat. A27, A27 (1960); Priv. L. No. 84-772, 70 Stat. A124, A124 (1956); Priv. L. No. 84-280, 69 Stat. A97, A97 (1955); Priv. L. No. 82-19, 65 Stat. A9, A9-A10 (1951).

That Congress over time has used the term "jurisdiction" inconsistently in reference to private bills reviving untimely claims merely confirms that no inference can be drawn from those bills one way or the other. And with respect to such bills enacted after 1966, it proves that there is much wisdom behind this Court's observation that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960).

B. The FTCA's Language, Structure, Purpose, and Legislative History Indicate No Intent—Let Alone a Clear Intent—to Override the District Courts' Historic Equitable Tolling Power.

Far from indicating a clear intention to overcome the presumption of equitable tolling, every tool of statutory construction indicates that Congress intended the FTCA to reinforce it. The government has the burden of proof. But all the evidence in fact indicates that Congress affirmatively intended to preserve the district courts' historic power to equitably toll federal time limits in exceptional cases.

1. The FTCA's language and structure favor equitable tolling.

Let us start with the plain language. As noted above (at 37-41), the wording of the limitation does not indicate any intent to abolish equitable tolling, but other statutory language affirmatively indicates an intention to retain it. In that regard, we have already noted the statutory command that the government is subject to 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," 28 U.S.C. § 1346(b)(1) (emphasis added), and that the government "shall be liable … in the same manner and *to the same extent* as a private individual under like circumstances," *id.* § 2674 (emphasis added).

There are several ramifications to Congress's decision to fashion FTCA suits against the government

to mimic suits against private parties under relevant state law. State law generally has long permitted tolling of applicable time limits in suits against private parties. This is especially true with respect to tolling on the grounds of the defendant's deception. Justice Story, surveying this area of the law in 1828, lauded equitable tolling on the ground of the defendant's misconduct as "an implied exception" to prevent such time limits from "becom[ing] an instrument to encourage fraud." *Sherwood*, 21 F. Cas. at 1307. "[A]s far as I know," he observed, "the doctrine pervades the courts of law throughout this Union." *Id.* Such state law tolling is pervasive today, as well.[6] And there is no doubt that the rele-

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[6] *See, e.g.*, *Gallant v. MacDowell*, 759 S.E.2d 818, 821 n.5 (Ga. 2014) (recognizing "the tolling of the statute of limitations resulting from fraudulent concealment"); *Rolwing v. Nestle Holdings, Inc.*, 437 S.W.3d 180, 184 (Mo. 2014) ("[R]ecognized equitable tolling principles apply when the plaintiff was prevented from timely filing suit by the defendant's actions …."); *Alldredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1261 (Ind. 2014) ("[A] tortfeasor's fraudulent concealment of his wrong ordinarily will operate to toll the statute of limitation …."); *Minn. Laborers Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509, 514 (Minn. 2014) ("[T]he equitable doctrine of fraudulent concealment … can toll the limitations period."); *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 772 (Del. 2013) ("[T]he principle of equitable tolling compels the conclusion that [the plaintiff's] delay was reasonable."); *Gonzales v. S.W. Olshan Found. Repair Co., LLC*, 400 S.W.3d 52, 58 (Tex. 2013) ("The doctrine of fraudulent concealment tolls limitations because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run."); *Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 875 (Cal. 2013) ("The doctrine of fraudulent concealment tolls the statute of limitations where a defendant,

through deceptive conduct, has caused a claim to grow stale."); *Jett v. Wooten*, 110 So.3d 850, 856 (Ala. 2012) ("Alabama does recognize that a fraudulent concealment by a defendant tolls the running of the statute …."); *In re Estate of Davis*, 308 S.W.3d 832, 841 (Tenn. 2010) ("[I]n considering general statutes of limitation, there is a recognized … exception not voided in the statutes and which tolls the statute where, due to fraudulent concealment, a plaintiff is unaware of his cause of action."); *Whitaker v. Limeco Corp.*, 32 So.3d 429, 436 (Miss. 2010) ("Fraudulent concealment of a cause of action tolls its statute of limitations."); *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 687 S.E.2d 29, 32 (S.C. 2009) ("[I]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations."); *Kaplan v. Morgan Stanley & Co.*, 987 A.2d 258, 264 (Vt. 2009) ("Equitable tolling applies … where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit …."); *Masquat v. DaimlerChrysler Corp.*, 195 P.3d 48, 54-55 (Okla. 2008) ("Fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts and thereby prevents a discovery of … the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud."); *Gore v. Myrtle/Mueller*, 653 S.E.2d 400, 405 (N.C. 2007) (stating that statute-of-limitations defense may fail where defendant engages in "[c]onduct which amounts to a false representation or concealment of material facts"); *Ross v. Louise Wise Servs., Inc.*, 868 N.E.2d 189, 198 (N.Y. 2007) (explaining that statute-of-limitations defense may fail "if the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action"); *Snyder v. Love*, 153 P.3d 571, 573 (Mont. 2006) ("[A]s a general rule, a statute of limitations is tolled by a defendant's fraudulent concealment … because it would be inequitable to allow a defendant to use a statute intended as a device of fairness to perpetrate a fraud."); *DeLuna v. Burciaga*,

857 N.E.2d 229, 245 (Ill. 2006) ("[F]raudulent concealment will toll a limitations period …."); *Aiello v. Aiello*, 852 N.E.2d 68, 81 n.25 (Mass. 2006) ("[O]ur doctrine of fraudulent concealment provides for tolling of the limitations period in [certain] circumstances."); *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 279 (Ohio 2006) (suggesting that statute-of-limitations defense may fail if "[the plaintiff's] cause of action was … concealed from him" by the defendant's wrongful conduct); *Macomber v. Travelers Prop. & Cas. Corp.*, 894 A.2d 240, 251 (Conn. 2006) (recognizing "equitable tolling by fraudulent concealment"); *Williams v. Williams*, 129 P.3d 428, 432 (Alaska 2006) ("A party who fraudulently conceals from a plaintiff the existence of a cause of action" may be unable to succeed on a statute-of-limitations defense.); *Andres v. McNeil Co.*, 707 N.W.2d 777, 786 (Neb. 2005) ("[T]he doctrine of fraudulent concealment may render a statute of limitations defense unavailable."); *Blea v. Fields*, 120 P.3d 430, 437 (N.M. 2005) (recognizing "the … concept of fraudulent concealment for tolling a statute of limitations"); *Fine v. Ceccio*, 870 A.2d 850, 860 (Pa. 2005) ("[T]he doctrine of fraudulent concealment serves to toll the running of the statute of limitations."); *Price v. N.J. Mfrs. Ins. Co.*, 867 A.2d 1181, 1185 (N.J. 2005) ("[U]nder varying circumstances we have recognized that tolling of the statute of limitations is the fair and responsible result, because the unswerving mechanistic application of statutes of limitations would at times inflict obvious and unnecessary harm upon individual plaintiffs without advancing the legislative purposes."); *Carter v. Haygood*, 892 So.2d 1261, 1268 (La. 2005) (explaining that courts are allowed "to weigh the equitable nature of the circumstances in each individual case to determine whether [the limitation period] will be tolled"); *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 876 (Mich. 2004) (holding that "[t]he equities of this case" preclude a statute-of-limitations dismissal because "[p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion … rather than a negligent failure to preserve her rights"); *Muhammed v. Welch*, 675 N.W.2d 402, 408-09 (N.D. 2004) (stating that statute-of-limitations defense may fail where defendant "allegedly

concealed [critical facts] from the plaintiff"); *Jensen v. IHC Hosps., Inc.*, 82 P.3d 1076, 1093 (Utah 2003) ("[W]e did not modify the common law principle of fraudulent concealment that may be used to toll a statute of limitations."); *Purdy v. Fleming*, 655 N.W.2d 424, 431 (S.D. 2002) ("We have previously held that fraudulent concealment may toll the statute of limitations."); *Johnson v. Newport Cnty. Chapter for Retarded Citizens, Inc.*, 799 A.2d 289, 293 (R.I. 2002) ("[W]e recognize that, in appropriate circumstances, equitable tolling may serve as an exception to the statute of limitations …."); *Rieff v. Evans*, 630 N.W.2d 278, 298 (Iowa 2001) ("We recognize that fraudulent concealment can toll the applicable statute of limitations."); *Shelton v. Fiser*, 8 S.W.3d 557, 561 (Ark. 2000) ("Fraudulent concealment suspends the running of the statute of limitations …."); *Millay v. Cam*, 955 P.2d 791, 797 (Wash. 1998) ("[T]his court allows equitable tolling when justice requires."); *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 773 (D.C. 1998) ("When the party claiming the protection of the statute of limitations has employed affirmative acts … to fraudulently conceal … the existence of a claim …, such conduct will toll the running of the statute."); *Smith v. Boyett*, 908 P.2d 508, 512 (Colo. 1995) ("[W]e have consistently recognized fraudulent concealment as a basis for tolling statutes of limitation."); *Conrad v. Hazen*, 665 A.2d 372, 376 (N.H. 1995) ("The doctrine of fraudulent concealment is an equitable ground to justify the tolling of the statute of limitations based on the wrongful conduct of the defendant."); *Newberg v. Hudson*, 838 S.W.2d 384, 390 (Ky. 1992) ("[W]e have repeatedly held that a false representation or fraudulent concealment will toll the statute of limitations."); *Miller v. Romero*, 413 S.E.2d 178, 180 (W.Va. 1991) ("Fraudulent concealment on the part of the [defendant] will … extend the …. statute of limitations."); *Leibert v. Fin. Factors*, 788 P.2d 833, 835 (Haw. 1990) (holding that lower court did not err "in tolling the statute of limitations on grounds of fraudulent concealment"); *Geisz v. Greater Baltimore Med. Ctr.*, 545 A.2d 658, 669 (Md. 1988) ("[F]raud or fraudulent concealment of the cause of action operates to toll the substantive limitations period in [certain] statute[s]."); *Olson v. A.H. Robins Co.*, 696

vant state here permits case-specific tolling. *See, e.g., Hosogai v. Kadota*, 700 P.2d 1327, 1331-32 (Ariz. 1985).

P.2d 1294, 1299 (Wyo. 1985) (stating that a party cannot "rely[] upon the statute of limitations" when "conduct of [that] party … induces … a fraudulent concealment of the facts necessary to a cause of action"); *Hosogai v. Kadota*, 700 P.2d 1327, 1331 (Ariz. 1985) ("The equitable tolling doctrine is rooted in a number of common law exceptions to statutes of limitations, including: defendant's fraudulent concealment of a cause of action ….); *Copeland v. Desert Inn Hotel*, 673 P.2d 490, 492 (Nev. 1983) ("recogni[zing] … the doctrine of equitable tolling"); *Twin Falls Clinic & Hosp. Bldg. v. Hamill*, 644 P.2d 341, 344 (Idaho 1982) (recognizing that statute-of-limitations defense may fail if defendant made "a false representation or concealment of a material fact with actual or constructive knowledge of the truth"); *Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc.*, 266 S.E.2d 887, 890 (Va. 1980) (recognizing that "[f]raudulent concealment … consist[ing] of affirmative acts of misrepresentation" may in some situations "relieve the bar of the statute [of limitations]"); *Friends Univ. v. W.R. Grace & Co.*, 608 P.2d 936, 941 (Kan. 1980) (observing that "concealment of a cause of action" can in some circumstances "toll[] the statute of limitations"); *Bozzuto v. Ouellette*, 408 A.2d 697, 699 (Me. 1979) ("It is true that a defendant's fraudulent concealment from a plaintiff of the existence of a cause of action tolls the statute."); *Madison v. Hyland, Hall & Co.*, 243 N.W.2d 422, 432 (Wis. 1976) (observing that "fraudulent[] conceal[ment]" may preclude the "assert[ion] [of] the statute of limitations"); *Nardone v. Reynolds*, 333 So.2d 25, 32 (Fla. 1976) ("[T]he equitable principle of fraudulent concealment will be utilized to toll the statute of limitations …."); *Chaney v. Fields Chevrolet Co.*, 503 P.2d 1239, 1241 (Or. 1972) (subscribing to "the majority rule" that "fraudulent concealment of a cause of action from the one in whom it resides by the one against whom it lies constitutes an implied exception to the statute of limitations").

"[T]he[] words [directing FTCA suits to mimic suits against private parties under applicable state law] mean what they say." *United States v. Olson*, 546 U.S. 43, 44 (2005) (quoting 28 U.S.C. § 1346(b)(1)). In particular, the "law of the place" means "the whole law of the State where the act or omission occurred," not just random swatches of it. *Richards*, 369 U.S. at 11. As is evident from this language, the FTCA "was designed to build upon the legal relationships formulated and characterized by the States." *Id.* at 7. Where Congress "has not provided a specific and definite answer in [the] [A]ct" regarding a particular issue, state law controls. *Id.* at 11. A judge-made rule that would "set the courts completely adrift from state law" does not. *Id.*

This is all the more reason to enforce with extra vigor the presumption that Congress intends to maintain the district courts' historic equitable tolling power. Congress opted to use its own statute of limitations, including the time limit on presenting administrative claims, and thus surely intended for equitable tolling to be governed by a uniform federal rule. But Congress "has not provided a specific and definite answer in [the] [A]ct" to the question of whether that time limit ever can be equitably tolled. If Congress wanted to preclude tolling—which had achieved wide acceptance in the states centuries before the 1966 time limit was enacted—it would have said so clearly. Indeed, in the FTCA, Congress has been unusually "specific and definite" regarding other matters. *See* 28 U.S.C. § 2680(a)-(f), (h)-(n). But Congress said nothing expressly negating the avail-

ability of case-specific tolling of the time limit on presenting administrative claims.[7]

Contrary to the government's suggestion (at 35, 37, 39, 43, 46, 48), this analysis is unaffected by other timing rules established by Congress. For example, it is immaterial that Congress has expressly authorized additional time for a plaintiff to file an administrative claim where the United States substitutes itself for an employee sued in his individual capacity. 28 U.S.C. § 2679(d). That sheds no light on Congress's disposition toward the district courts' historic power to grant equitable tolling on a case-by-case basis upon a showing of extraordinary circumstances.

Because of the existing historic equitable power possessed by district courts, Congress had no need to enact statutory rules affirmatively authorizing case-by-case equitable tolling for FTCA claims. In contrast, when Congress desired the Court of Claims to

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[7] The government's litigating position concerning the relevance of state law to FTCA time-limit issues has not been consistent. Here, in the context of equitable tolling, the government argues for a uniform federal rule. Yet, in a different case—while the cert. petition in this case was pending—the government argued that the FTCA's express emulation of state law indicates Congress's intent for state law rules relating to time limits to apply directly. *See* Brief for the United States in Opposition at 7-8, *Augutis v. United States*, No. 13-1234, 2014 U.S. LEXIS 5776 (cert. denied Oct. 6, 2014) (contending that FTCA time limits do not preempt state statutes of repose). Under that theory, this case is even easier, as the Arizona law applicable here permits case-specific equitable tolling. *See, e.g., Hosogai*, 700 P.2d at 1331-32.

do anything remotely equitable regarding time limits, it had to affirmatively legislate. As discussed, the Court of Claims did not possess the historic equitable powers possessed by federal district courts. Thus, Congress saw it necessary to expressly provide for any tolling it wanted to permit in that court. *See* 28 U.S.C. § 2401(a) (adopting statutory categorical tolling rules for anyone who had not attained the age of majority, or tolling for anyone who had suffered under a disability). That Congress did not provide such statutory tolling rules for FTCA claims simply is a recognition that the district courts already possess such powers and that there was no need for Congress to grant further powers or to micromanage the equitable authority entrusted to district court judges.

Congress has long been aware of the presumption as applied to federal district courts. That it has not altered that authority or felt a need to codify that power is hardly grounds for finding that the presumption is overcome. That is the whole point of having a presumption. The presumption does not work if Congress has to affirmatively reinforce it.

Contrary to the government's argument (at 38), it is also not in the least bit probative that Congress in 1949 extended the suit-filing deadline from one year after accrual to two in order to ease the burden on claimants. This just shows that Congress felt that claimants *as a class* needed an extra year in which to sue, no-questions-asked. It does not show at all—much less *clearly*—that Congress felt that case-specific equitable tolling should not also be

available to deal with extraordinary circumstances arising case-by-case.

2. The FTCA's core purpose and legislative history favor equitable tolling.

Congress designed the FTCA in general and its administrative claims process in particular "to be 'unusually protective' of claimants." *Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). This strongly counsels against inferring an intent to deprive a district court of its power to toll the running of a limitation period where the defendant wrongfully conceals information critical to the plaintiff.

Congress designed the FTCA to create a compensation regime in which "equity [toward claimants] finds a comfortable home," *Holland*, 560 U.S. at 647. Fairness and justice toward victims of government negligence and wrongdoing were the driving forces that led to the passage of the FTCA. The legislature started with the proposition that persons injured by negligence should receive compensation. And it observed that, when that injury occurs because of the negligence of a private party, the law provides recompense. The FTCA was born "of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work" to that same extent. *Dalehite v. United States*, 346 U.S. 15, 24 (1953). Directing the government to assume that obligation was and is the Act's "broad and just purpose." *Indian Towing Co.*, 350 U.S. at 68.

Accordingly, in application, the FTCA is about doing right by victims and rewarding meritorious claims. As a bottom line, Congress expected that claimants would receive "just treatment." *Id.* at 69. Congress could have chosen to assign such claims to the Court of Claims, which lacks general equitable powers. Instead, it entrusted the federal district courts to apply the FTCA precisely because it viewed "[t]he United States courts a[s] well able and equipped to hear these claims and to decide them with justice and equity … to … the claimants." H.R. Rep. No. 79-1675, at 25 (1945). They are not to act "as … self-constituted guardian[s] of the Treasury," *Indian Towing Co.*, 350 U.S. at 68, by "'add[ing] to [the Act's] rigor by refinement of construction,'" *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949) (quoting *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926) (Cardozo, J.)).

That Congress designed the FTCA to protect claimants rather than promote rigid technicalities is also seen by examining what Congress did *not* want. It did not want a system that was "unjust to the claimants." H.R. Rep. No. 79-1287, at 2. And it did not want a regime that "appear[ed] to be … unfair to those persons who have meritorious claims." *Id.* at 7.

The FTCA administrative claims process embodies this claimant-protective philosophy. And it does so by eschewing rigid rules and embracing informal claimant-friendly practices, similar to how a court of equity would. Indeed, a key motivation behind increasing the relative role of the administrative process was to "provid[e] for … more fair and equitable

treatment of private individuals and claimants when they deal with the Government." H.R. Rep. No. 89-1532, at 5 (1966); *see Improvement of Procedures in Claims Settlement and Government Litigation: Hearing before Subcomm. No. 2 of the Comm. on the Judiciary*, 89th Cong. 14 (1966) ("1966 Hearings") (statement of Assistant Attorney General John W. Douglas) (explaining that the administrative claims process was and would continue to be governed by "informal agency procedures" that "should make it easier for many claimants to file claims and secure relief without the assistance of an attorney"); *id.* at 13 ("The claimant with a meritorious claim may not need to engage a lawyer.").

The informal claimant-friendly nature of the FTCA administrative claims process is evident from the start. Tort victims usually initiate the process by picking up and filling out a one-and-a-half-page form, called an "SF-95." Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 17.09[2] (2013). The claim does not have to be the equivalent of a fully drafted complaint. *Id.* Rather, the victim need only provide enough information to give the responsible agency enough notice to begin its own investigation. *Id.* Certain agencies estimate that the claimant can complete the form in only 30 minutes. *See* Transportation Security Administration Claims Management Branch Tort Claims Package 4, http://www.tsa.gov/sites/default/files/assets/pdf/sf95_cover_package_rev6_28.pdf (last visited Nov. 4, 2014).

The submission process, too, is unusually claimant-protective. Once the claimant completes the

form, the victim need not "file" or even "lodge" it with the responsible agency. He need only "present" it—a "textually weaker" requirement. *Perez v. United States*, 167 F.3d 913, 918 & n.2 (5th Cir. 1999). And if he "presents" it to the wrong agency, that agency will "transfer it forthwith to the appropriate agency … and advise the claimant of the transfer." 28 C.F.R. § 14.2(b)(1). Rigidity is nowhere to be found.

So, too, regarding the agency action that then takes place. It does not remotely resemble what happens inside a courtroom. The agency does not "adjudicate" the victim's claim. It "consider[s]" the claim, with a view toward "compromise" or "settle[ment]." 28 U.S.C. § 2672. Indeed, the Justice Department's regulations counsel that "[w]henever feasible, administrative claims should be resolved through informal discussions, negotiations, and settlements rather than through the use of any formal or structured process." 28 C.F.R. § 14.6(a)(1). In the words of Assistant Attorney General Douglas, the goal is not legalistically precise resolution but rather "equitable settlement." 1966 Hearings at 24.

This claimant-friendly informality also characterizes the relationship between the administrative process and any subsequent court proceedings. If the claimant is dissatisfied with the resolution at the administrative level, she can sue in federal district court on a plenary basis. She is not bound by the positions she took in discussions with the agency. The court action is a new case. It is not an "appeal" of the agency resolution.

Thus, from soup to nuts, the administrative claims process bends over backwards to make sure that claimants get a fair shake. This strongly suggests that Congress had equity in mind when enacting the time limit for commencing that process.[8] And it strongly counsels against finding a clear congressional intent to deprive district courts of their power to toll a limitations period based on equity where a defendant engages in concealment or fraud.[9]

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[8] So, too, does Congress's decision to make the time limit begin to run upon a claim's "accru[al]." 28 U.S.C. § 2401(b). As this Court has observed, accrual requires a highly fact-intensive inquiry that can be murky and fraught with uncertainty. *See Kubrick*, 444 U.S. at 122 (noting that accrual depends upon a variety of facts, some of which may be "very difficult to obtain"). Use of accrual as the triggering event thus reveals Congress's awareness that district courts may, in appropriate cases, have delicate fact-related judgments to make in determining timeliness.

This is further reinforced by the relatively short default period (two years) that Congress gave victims in which to present claims. It is far from the "unusually generous" provisions, like the 12-year period of the Quiet Title Act, which the Court has found suggest an intent to preclude equitable tolling. *See United States v. Beggerly*, 524 U.S. 38, 49 (1998).

[9] Contrary to the government's suggestion (at 51-52), agencies themselves are well positioned to conduct an equitable tolling inquiry in the first instance. They would not be quantitatively overburdened. This is not a situation like in *United States v. Brockamp*, 519 U.S. 347 (1997), where a single agency processes over 200 million submissions a year. FTCA claims, spread out among all the responsible federal agencies, number around 30,000 per year.

Nor would agencies be qualitatively tasked with a new responsibility. In the context of determining "accru[al]," when

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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faced with a facially untimely claim, agencies *every day* have to choose among denying the claim as untimely, investigating and evaluating a request to find timeliness on the ground that accrual was sufficiently delayed, or considering both accrual and the merits. That is qualitatively highly similar to the inquiry that equitable tolling calls for, but of course it would be undertaken only in the rare instance in which *extraordinary circumstances* are present.