No. 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

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

BRIEF FOR THE SOUTHEASTERN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Tort Claims Act's two-year limitations period for presenting an administrative claim may be equitably tolled in appropriate cases.

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Southeastern Legal Foundation (SLF) is a public interest law firm that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the federal circuit courts and the Supreme Court of the United States. SLF has an abiding interest in defending American businesses and families from excessive restriction by overzealous or unresponsive government agencies, and in challenging irresponsible government spending and regulation.

INTRODUCTION

The government's reading of the Federal Tort Claims Act (FTCA) is a clear example of excessive governmental restrictions that, if adopted, would ultimately result in irresponsible government spending. The government's view would incentivize plaintiffs to bring administrative FTCA claims when there is only a vague suspicion that the federal government might be involved, just to meet the two-year statute of limitations. This "file first, ask questions later" approach to FTCA claims would result in a flood of underdeveloped "just in case" claims that multiply agency expenditures and ultimately harm the taxpaying public.

In addition, the government's reading of the FTCA directly contravenes Congress's intent to put the gov-

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[*] The parties consented to the filing of this brief. The letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, has contributed monetarily to the preparation or submission of this brief.

ernment in a position as similar as possible to that of a private tort defendant. In defending FTCA cases, the government routinely asserts the same state-law defenses that are available to similarly situated private defendants, so that government liability is not enlarged beyond that of such defendants. Here, however, the government seeks special procedural advantages unavailable to private defendants in tort litigation. If adopted, the government's rule would arbitrarily insulate federal administrative agencies from responsibility for injuries to private citizens and business. Just as private tort defendants are subject to equitable tolling principles, however, so too should the government be.

STATEMENT

1. Congress passed the FTCA in 1946, as "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres* v. *United States*, 340 U.S. 135, 139 (1950). The Act sought both to ensure that the government "assume[s] the obligation to pay damages for the misfeasance" of federal employees and to replace the "notoriously clumsy" system of private bills in Congress with a "simplified recovery procedure" for tort claims. *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953).

The original Act included a statute of limitations providing that a claim "shall be forever barred, * * * unless within one year after such claim accrued * * * an action is begun." Pub. L. No. 79-601, § 420, 60 Stat. 843, 845. Congress provided an alternative for claims not exceeding $1,000, which could be presented to the relevant federal agency within one year. If the agency denied settlement, the claimant could sue in federal court within six months of that action.

Ibid. Three years later, Congress extended the limitations period to two years. See Pub. L. No. 81-55, § 1, 63 Stat. 62. And in 1959, Congress increased the settlement limit from $1,000 to $2,500. See Pub. L. No. 86-238, 73 Stat. 471, 471-472.

Congress enacted its next significant reform of the tort claim process in 1966, when it shifted the primary administrative burden of claims from the courts to federal agencies by removing the cap on agency settlements (with Attorney General approval required for settlements above $25,000) and requiring all claimants to present their claims initially to the appropriate federal agency. See generally Pub. L. No. 89-506, §§ 1-2, 80 Stat. 306. In keeping with these changes, Congress amended the statute of limitations to require presenting claims to agencies within two years of injury and filing of suit within six months of the agency's final denial of the claim. *Id.* § 7. These reforms were intended to "ease court congestion and avoid unnecessary litigation" while also ensuring "more fair and equitable treatment of private individuals and claimants." *Odin* v. *United States*, 656 F.2d 798, 801-802 (D.C. Cir. 1981) (citation omitted).

2. The FTCA's current statute of limitations 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.

28 U.S.C. § 2401(b). And as this court held in *United States* v. *Kubrick*, 444 U.S. 111, 113 (1979), this statutory two-year period for presentation begins "when the plaintiff knows both the existence and the cause of his injury."

3. This case arises out of the death of Anthony Edward Booth. On February 19, 2005, Booth was the passenger in a vehicle that crossed the median of Interstate 10 in Phoenix, Arizona. A cable median barrier was in place, but failed to divert the vehicle. The car collided with oncoming traffic, killing Booth. Pet. App. 3a-4a.

In February 2006, respondent Marlene June, acting as conservator for Booth's minor son, initiated a wrongful death action against a contractor and the State of Arizona, alleging that the median barrier had been negligently installed and maintained. J.A. 26-33. Because a September 12, 2005, memorandum issued by the Federal Highway Administration (FHWA) had asserted that the type of barrier involved in the accident was considered "crashworthy" and approved for use on the National Highway System (NHS), June pressed no claims against the federal government. See J.A. 145-148.

4. In early 2007, June's counsel sought to depose employees of the FHWA regarding the median barrier design. The FHWA refused to make the employees available for two years—until April 29, 2009. J.A. 146. When the depositions were finally taken, they revealed that, contrary to the 2005 memorandum, the cable median barrier design involved in the accident had not met the required standards for use on the NHS and in fact had failed an August 2005 crash test. *Ibid.*

Armed with this new information, June submitted an administrative claim to the FHWA on December 20, 2010. The FHWA denied the claim as untimely on March 18, 2011. J.A. 148-149.

5. In May 2011, June filed this FTCA suit, alleging that the FHWA negligently and in violation of its own regulations allowed Arizona to install a defective cable median barrier. J.A. 117-124. The government moved to dismiss, asserting that the district court lacked jurisdiction under 28 U.S.C. § 2401(b) because respondent had failed to present a claim to the FHWA within two years of the February 2005 accident. J.A. 125-140. The district court agreed. It ruled that the claim accrued at the time of the accident, and that equitable tolling was foreclosed by the Ninth Circuit's decision in *Marley* v. *United States*, 567 F.3d 1030 (9th Cir. 2009), which held that the timing provisions of 28 U.S.C. § 2401(b) are jurisdictional and thus not subject to equitable exceptions. Pet. App. 3a-12a.

6. June appealed the equitable tolling question. While the appeal was pending, the Ninth Circuit issued its en banc opinion in *Wong* v. *Beebe*, 732 F.3d 1030 (9th Cir. 2013). The court there overruled *Marley*, holding that § 2401(b) is not jurisdictional, and thus that "equitable adjustment of the limitations period in § 2401(b) is not prohibited." *Id*. at 1051. Citing *Wong*, the Ninth Circuit later reversed the district court's ruling here, and the government successfully sought certiorari.

SUMMARY OF ARGUMENT

I. If the rule that the government proposes here were adopted, no FTCA claim asserted more than two years after injury would *ever* be timely, without regard to the circumstances of the case or longstanding principles of equity. As respondent has explained, such a rule against equitable tolling finds no basis in the FTCA's text, structure, history, or purpose. In addition, however, such a rule would create troubling incentives—incentives that undermine basic principles of good and accountable government.

Specifically, ordinary citizens who might have been injured by the government would have every incentive to file FTCA claims with federal agencies, simply to avoid any risk of forfeiting the claims under an unbending two-year time limit. Whenever there was any remote chance that the federal government was responsible, injured parties would clog agencies with claims that typically prove meritless and unnecessary down the road—creating government waste and inefficiency, and ultimately harming American taxpayers.

Nor would these administrative costs and harm to taxpayers be trivial. As the statistics discussed below confirm, administrative claims under the FTCA arise in myriad contexts and are already voluminous. If equitable tolling becomes unavailable, the incentive to submit claims where there is any chance of federal involvement promises to increase the volume of claims by many times. Such a result would impose millions of dollars of costs on taxpayers—costs that could largely be avoided under a regime, like the current one, that allows equitable tolling in appropriate circumstances.

II. Making equitable tolling unavailable would also be inconsistent with the FTCA's central goal—putting the government in the shoes of similarly situated private tort defendants. In enacting the FTCA, Congress deliberately made the government liable for its torts "in the same manner and to the same extent" as analogous private defendants under state law. 28 U.S.C. § 2674. In a wide variety of FTCA cases, the government has successfully invoked this equal treatment rule—even when the government cannot comply with certain express technical requirements of applicable state law. Since private tort parties can generally invoke equitable tolling to ensure the timeliness of their claims in appropriate circumstances, Congress's goal of equal treatment is best advanced by applying equitable tolling to FTCA claims.

ARGUMENT

I. Barring equitable tolling of the FTCA's two-year limitations period would create undue incentives for parties to file underdeveloped and typically baseless administrative claims.

Should this Court adopt the government's reading of § 2401(b), such a ruling would create improper and undesirable incentives for FTCA plaintiffs to flood federal agencies with claims that are underdeveloped —and that typically prove baseless down the road. Wherever federal involvement in an injury was remotely possible, but difficult to uncover within two years, the absence of equitable tolling would discourage deeper, good-faith investigation into the facts while private litigation is pending. The government's reading of the statute would encourage a "file first, ask questions later" approach to FTCA claims.

Currently, provided the plaintiff is reasonably diligent but basic facts about the federal government's role in causing her injury are concealed, the plaintiff's counsel can argue that the FTCA's two-year limitation period runs only after the plaintiff discovered (or should have discovered) such concealed facts. But if this Court ruled that the two-year period is jurisdictional—and may *never* be tolled—the situation would be dramatically different. Wherever there was even the slightest possibility that federal government activity was connected to the injury, counsel would be compelled to file protective, "just in case" administrative claims within two years to avoid malpractice liability.

The costs of these wasteful administrative claims would ultimately be borne by the taxpaying public, and statistics concerning FTCA claim submissions and payments show that the costs would be substantial. FTCA claims affect an array of federal agencies and are already voluminous. Creating an incentive to submit claims within two years would multiply such claims several times over. That is not an acceptable price to pay for the advantage that the government seeks here, especially when the result would insulate the government from tort liability where its involvement was concealed from private plaintiffs—perhaps even intentionally.

A. If tolling became unavailable in difficult FTCA cases involving obscured facts, plaintiffs would be compelled to present a flood of underdeveloped, and typically baseless, administrative claims.

1. Diligent FTCA plaintiffs often find they can initially do little more than speculate as to whether

their injury was caused by a federal agent, and then investigate that possibility using the limited available information. But under a system that allows for equitable tolling in appropriate cases, such plaintiffs will not immediately rush off and file administrative claims. Rather, they will recognize that such claims should not typically be based on "a mere hunch, hint, suspicion, or rumor." See *Kronisch* v. *United States*, 150 F.3d 112, 121 (2d Cir. 1998). Merely suspecting that the federal government is involved does not cause "[a] claim" to "accrue"; it simply gives rise to a duty of inquiry. *Ibid*.

Like the discovery accrual rule, the equitable tolling regime recognized by the court below (and many other circuits) requires a plaintiff to exercise reasonable diligence in investigating her injuries to determine their cause and exercise her rights in a timely fashion. "Long-settled equitable-tolling principles instruct that generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Wong* v. *Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (alterations and quotations omitted). Thus, if and when plaintiffs "susp[ect] that [a federal agent] [is] partially to blame for their woes, it [is] incumbent on [them] to search out relevant information about [the agent's potential] role" in causing their injuries, "or risk losing their claims." *Rakes* v. *United States*, 442 F.3d 7, 23 (1st Cir. 2006).

Under an equitable tolling regime, therefore, a rational plaintiff will continue investigating to determine whether she has a claim. Submitting an administrative claim based on supposition is unlikely to result in recovery, and if diligent investigation leads to

unexpected discoveries as to the cause of the injury, the claim may be submitting at a later date. Whether the plaintiff submits an administrative claim will depend on what she unearths to substantiate or dispel the possibility of the government's involvement.

But where equitable tolling is *not* available, a rational plaintiff has every incentive to submit an administrative claim—even if it is supported only by "a mere hunch, hint, suspicion, or rumor." See *Kronisch*, 150 F.3d at 121. The plaintiff's diligence in continuing to investigate any federal involvement, and the fruits of that investigation, become irrelevant once the claim is time-barred. A rule that barred equitable tolling would virtually guarantee the government's need to respond to administrative claims in a much higher percentage of cases—claims based on whatever suppositions the plaintiff can muster. And if any doubt remained, the specter of malpractice liability would further tip the scales toward submitting an administrative claim—at least where the plaintiff is represented by counsel and there is any sign that the federal government might be involved.

2. As a review of the lower-court decisions issued since *Kubrick* confirm, there are myriad circumstances in which federal involvement is possible but difficult to discover. The most common fact pattern involves automobile crash cases like this one, where road safety features have potentially played a role in the plaintiff's injury.[1] If the government's view becomes the law, plaintiffs with even the most speculative basis for asserting claims against the FHWA are

[1] In addition to the decision below, see also, for example, *Miller* v. *United States*, 710 F.2d 656 (10th Cir. 1983); *Rothrock* v. *United States*, 62 F.3d 196 (7th Cir. 1995).

likely to do so, even when the basis for such a claim is purely speculative.

Medical malpractice claims provide another fertile ground for presenting underdeveloped FTCA claims. Besides the thousands of medical malpractice claims brought against the Veterans Administration, there are also many cases in which there is at least some possibility that a medical practitioner involved in the case received federal funds from, and might be deemed a federal actor under, the Federally Supported Health Centers Assistance Act of 1992, as amended at 42 U.S.C. § 233(g)-(n). See, *e.g.*, *Drazan* v. *United States*, 762 F.2d 56 (7th Cir. 1985) (involving a medical malpractice claim against the Veterans Administration); *Santos ex. rel. Beato* v. *United States*, 559 F.3d 189 (3rd Cir. 2009) (equitable tolling of medical malpractice claim allowed where dental clinic was not obviously a federally-qualified health center).

A third area in which the government's rule would incentivize presenting underdeveloped FTCA claims is cases involving injuries that occur on federal property such as military bases or national parkland. As discussed below (at 15-16), there are thousands of these cases too. Under the government's rule, it might well become routine to submit administrative claims with the federal agency in such cases, merely as a prophylactic measure intended to avoid forfeiting any claim against federal actors that is later uncovered during discovery in private litigation.

The unavailability of equitable tolling in FTCA cases would encourage private litigants to use administrative claims as a *means* to investigate or test the presence of federal action, rather than a *result* of

their own good-faith investigation into federal action. And it is no answer to say that many of these claims would turn out to contain insufficient facts to put an agency on notice of the claim against it, or otherwise to lack merit. That is exactly the problem.

B. By encouraging plaintiffs to present administrative claims before a full investigation, prohibiting equitable tolling would create unnecessary government waste and substantial taxpayer expense.

A review of available FTCA claims data (and studies thereof) underscores the importance of equitable tolling in preventing a flood of "just in case" claims. As the Solicitor General notes (at 51), leading commentators estimate that the government processes or defends between 15,000 and 30,000 FTCA claims each year. See Jayson & Longstreth § 1.01, at 1-8 (July 2014).[2] Most of these claims turn out to lack merit and result in no payment by the government. But the cost of defending such claims is substantial, and the government's rule would multiply the number of administrative FTCA claims that must be processed and defended—perhaps by a hefty factor.

1. The best estimates indicate that the government must defend between 15,000 and 30,000 FTCA claims every year. Of these, only a few thousand reach the courts. In 2013, there were 2,085 civil tort

[2] This volume, while significant, is orders of magnitude less than the "200 million tax returns each year" that proved an obstacle to equitable tolling in *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997).

cases filed involving the United States.[3] In 2012, there were 2,039 such cases.[4]

The great majority of FTCA claims—whether they reach the courts or end at the agency—result in no payment from the federal Judgment Fund. In 2013, the Judgment Fund paid some 3,409 FTCA claims. Of those, 1,016 claims were paid after litigation and the remaining 2,393 claims were paid after administrative processing but before litigation.[5] Similarly, in 2012, 3,366 claims were paid out of the Judgment Fund, with 657 arising from litigation and 2,709 arising directly from administrative claims. *Ibid.*

Together, the foregoing figures confirm that the government prevails, making no payment from the Judgment Fund, against most FTCA claims. The government even prevails in roughly 50% to 66% of cases that reach the courts. It stands to reason that a far lower percentage of claims submitted on a "just in

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[3] See United States Courts, Caseload Statistics 2013, "Table C-3: U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2013," available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C03Mar13.pdf (visited Oct. 26, 2014).

[4] See United States Courts, Caseload Statistics 2012, "Table C-3: U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2012," available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C03Mar12.pdf (visited Oct. 26, 2014).

[5] See *Judgment Fund Payment Search Database*, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (visited Oct. 24, 2014).

case" basis will prove meritorious. A rule that bars equitable tolling is virtually certain to increase the number of cases that must be defended but will ultimately prove baseless.

2. The risk that barring equitable tolling would produce substantial government waste is confirmed by other available data from agencies that report the rate at which they deny FTCA administrative claims. As those data suggest, the percentage of non-meritorious claims being submitted to federal agencies is already high.

Between 2010 and 2013, the Transportation Security Administration (TSA) received some 41,600 FTCA claims (10,400 per year).[6] And of the 34,650 on which TSA reached a recorded disposition, it denied about 63.2% (21,900) and approved or settled about 36.8% (12,750) of them. *Ibid.*[7]

Similarly, between 2005 and 2010 the Veterans Administration received an annual average of 1,381 medical malpractice administrative FTCA claims, and had an annual average of 237 medical malpractice FTCA lawsuits filed against it.[8] During that same period, the agency annually denied an average of 1,105 medical malpractice administrative FTCA

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[6] Database of TSA claims data, 2010-2013, available at http://www.tsa.gov/research-center/electronic-reading-room#claimsdata (last visited Oct. 24, 2014).

[7] The high numbers of payments on TSA claims suggests that many of them are lower than $2,500 and thus are not paid out of the Judgment Fund referenced above.

[8] GAO Report, "VA Health Care: VA Uses Medical Injury Tort Claims Data to Assess Veterans' Care, but Should Take Action to Ensure That These Data Are Complete," GAO-12-6R (Oct. 28, 2011).

claims, paying out on 251 such claims. *Ibid.* The agency also resolved an average of 234 malpractice FTCA lawsuits against it per year, with an average of 151 of them resulting in either a settlement or a judgment for the claimant. *Ibid.* The Veterans Administration made payments, on average, for 29% (402) of the 1,381 administrative FTCA claims made against it each year.[9]

3. Public data on what claims *could* have been submitted, but were not, are limited. But the data that exist suggest that a significant percentage of those injured in an area of federal activity—perhaps as many as 9 out of 10—currently submit no administrative claim. With the data discussed above, these numbers underscore why it is important not to incentivize "just in case" administrative claims that a full investigation would prove to be meritless.

One study estimated that, annually, roughly 5,000 serious injuries occur in the national parks.[10] Between them, however, the National Park Service (NPS), Forest Service (FS), Bureau of Land Management (BLM), and Fish and Wildlife Service (FWS) paid out of the Judgment Fund on only 271 claims in

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[9] While the cited GAO Report focuses upon improvements to be made in the collection of data on tort payments by the agency, the data on the Judgment Fund payments for medical malpractice of the Department of Veterans Administration closely tracks the data in the GAO Report, thus tending to corroborate it.

[10] See Scott Breen, *Tort Liability in National Parks and How NPS Tracks, Manages, and Responds to Tortious Incidents*, 30:3 George Wright Forum 247-252 (2013).

2012 and 2013 (217 from administrative claims, 54 from litigation).[11]

Extrapolating from the data concerning the other agencies discussed above—which pay out on roughly 30% to 35% of the claims they receive—one may reasonably infer that the national park-related agencies together received roughly 800 to 900 claims over that two-year period, or roughly 400 to 450 per year.[12] This suggests that less than 10% of the 5,000 people who suffer serious injuries in national parks each year submit administrative claims against the federal government. And while some cases likely involve situations in which the injured party does not believe (or realize) a tort has been committed against him, other cases likely involve situations where the injured party believes she has been injured by a private actor, not the government.

This case, however, could have a serious impact on that 10% figure. We cannot say precisely how many of the remaining 90% of injured individuals would believe there is a possibility of federal involvement—versus how many would reach that conclusion after a reasonable time period for diligent investigation. But at least some portion of these injured parties would believe a wrong was committed by *someone* leading to their injury. Unless they could affirmatively rule out any possibility of a federal cause—and any possibility that such a cause was hidden—prudence suggests that, if equitable tolling were unavailable, they would

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[11] See *Judgment Fund Payment Search Database*, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (visited Oct. 24, 2014).

[12] We were unable to find any readily available public record of the actual number of claims submitted to these agencies.

file a "just in case" claim against the government. And the national parks are just one of many areas where people potentially injured by federal actors will face such incentives.

Even though a substantial influx of claims would be unlikely to materially increase the government's *liability*—because most claims would ultimately prove meritless—it would greatly increase the government's expenditures on claims processing. As the government's own brief acknowledges (at 51-52), processing and investigating FTCA administrative claims can be time-consuming and wasteful.

The government is evidently willing to risk a great increase in the costs of processing claims that are technically timely but ultimately prove to lack merit. It wishes to take on this risk in exchange for a chance to avoid litigation expenses and potential liability on claims that might well be meritorious, but are untimely only because information was unavailable to or even hidden from the claimant. That would be a short-sighted trade-off. It would be inefficient, inconsistent with basic principles of government accountability, and contrary to the FTCA's broad purpose of holding federal agencies accountable to the same extent as private parties are liable for their torts. The judgment below should be affirmed.

C. Current administrative claim volumes reflect a status quo in which practitioners assume equitable tolling could be available in FTCA suits.

The above statistics cannot be brushed aside based on the notion that the equitable tolling rule is a new creation of the Ninth Circuit, or that these statistics already reflect practitioners working under a

bright-line rule that no claims can be presented beyond two years. To the contrary, the FTCA case law shows a broad range of cases where courts have found it appropriate to apply a discovery rule under which the claim accrues only when the plaintiff knows or reasonably should know both that she was injured and what caused her injury. That is doubly true where, as here, there is evidence that the government controlled and concealed crucial facts.

As this Court acknowledged in *Kubrick*, a plaintiff's injury "may be unknown or unknowable until the injury manifests itself," and "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122. Congress did not design the FTCA's time bar to punish those unlucky individuals who find themselves "at the mercy" of the government to release this information in a timely manner. *Ibid.* Rather, the clock begins to run only when the plaintiff is (or should be) "in possession of the critical facts that he has been hurt and who has inflicted the injury." *Ibid.* The reason why is simple: "[A]rmed with the facts about the harm done to him, [the plaintiff] can protect himself by seeking advice in the medical and legal community." *Id.* at 123.

The discovery rule applied below currently operates in a straightforward manner: Where the federal government is the direct cause of plaintiff's injury, the limitations period does not start to run until the plaintiff knows or reasonably should know of the government's role in that injury. *E.g.*, *Arroyo* v. *United States*, 656 F.3d 663, 669 (7th Cir. 2011) ("An FTCA claim accrues when: (A) an individual actually knows enough to tip him off that a governmental act (or omission) may have caused his injury; or (B) a rea-

sonable person in the individual's position would have known enough to prompt a deeper inquiry."); *Valdez ex rel. Donely* v. *United States*, 518 F.3d 173, 182 (2d Cir. 2008) ("Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." (internal quotation omitted)).

This is most clearly demonstrated in the arena of medical malpractice. Take, for example, the Seventh Circuit's decision in *Drazan*, 762 F.2d 56. The plaintiff there asserted that doctors at a Veterans Administration hospital committed malpractice by failing to order a follow-up exam upon receiving a radiology report suggesting that her husband, a tuberculosis patient, had developed a tumor in his lungs. *Id.* at 57. Over a year later, the patient died from the same tumor. But his spouse, the plaintiff, did not learn of the government's oversight until she received her husband's medical records ten months after her husband's death. *Id.* at 58. Those ten months meant the difference between a time bar and an actionable FTCA claim: If the clock started upon the death of her husband, she submitted her claim too late; if, however, the limitation period was tolled until she received the records disclosing the government's misconduct, her claim was timely.

Rejecting the government's position that the clock started upon the patient's death, the Seventh Circuit observed that "[t]he cause of which a federal tort claimant must have notice for the statute of limitations to begin to run *is the cause that is in the government's control*, not a concurrent but independent cause that would not lead anyone to suspect that the government had been responsible for the injury." *Id.*

at 59 (emphasis added). Any other rule, the court held, would lead to "ghoulish consequences" that are all too similar to those lurking in the background of this case:

> [A]ny time someone suffered pain or illness or death in a Veterans Administration hospital, he (or in the case of death his survivors) would request his hospital records to see whether diagnosis or treatment might have played a role in his distress * * * * *He could not wait till he had reason to think he had suffered any iatrogenic harm; the two years might have run.*

Ibid. (emphasis added). The Seventh Circuit rightly observed that "such [wasteful] behavior" should not be "encouraged," nor does "anything in *Kubrick* require[] us to encourage it." *Ibid.*

Courts have applied the discovery rule to a host of other claims in which the government's conduct causing the injury was unknown or concealed. Indeed, "courts of appeals have been slightly more forgiving" in applying the discovery rule outside of medical malpractice cases, "deferring the accrual of claims until a reasonably diligent plaintiff *has reason to suspect a governmental connection with the injury*." *Skwira* v. *United States*, 344 F.3d 64, 77 (1st Cir. 2003) (emphasis added); see also *Garza* v. *U.S. Bureau of Prisons*, 284 F.3d 930, 934 (8th Cir. 2002); *Diaz* v. *United States*, 165 F.3d 1337, 1340 (11th Cir. 1999). This is because "[o]utside the medical malpractice context * * * the identity of the individual(s) responsible for an injury may be less evident, and a plaintiff may have less reason to suspect governmental involvement." *Skwira*, 344 F.3d at 77.

The Tenth Circuit recently followed this approach in *Bayless* v. *United States*, 767 F.3d 958 (10th Cir. 2014), where the court analyzed the accrual of an FTCA claim brought by a plaintiff suffering from various maladies eventually traced to nerve gas emitted from an Army testing facility. *Id.* at 959. Despite "doggedly" seeking the cause of her illness for sixteen years, plaintiff did not connect her woes to the government's conduct until 2007. *Ibid.* Only at that point, the court held, did the FTCA limitations' clock begin to run—not in 2005 (as the government argued) when she learned of the mere existence of the Army testing facility. *Id.* at 968-69 (observing that plaintiff had no more than "a lay person's suspicion" until a 2007 test suggested her injuries might be caused by nerve gas).

Courts frequently apply the discovery rule where, as here, the government has concealed or refused to disclose the "critical facts" of the plaintiffs claim. In *Litif* v. *United States*, 670 F.3d 39 (1st Cir. 2012), relatives of a former associate of James "Whitey" Bulger sued upon learning that the FBI exposed Litif as a confidential information to Bulger (who himself was "a 'top echelon' FBI informant"), leading to Litif's murder by Bulger. *Id.* at 40-41. The court rejected the government's contention that the plaintiffs' claims should be barred based on information disclosed in "newspaper stories quoting anonymous sources that Bulger knew of Litif's offer to cooperate"—particularly when "[t]he FBI was formally and informally denying involvement" with Bulger.[13] *Id.*

[13] In a series of cases arising from the government's "unholy alliance" with Whitey Bulger and the Winter Hill Gang, the First Circuit has stressed that the FTCA's limitations period is tolled until "the plaintiffs acquire[] information

at 44; see also *McIntyre* v. *United States*, 367 F.3d 38, 53, 56 (1st Cir. 2004) (stressing that a suspicion of wrongdoing does not arise to a "duty to inquire" were "the government did not inform the plaintiffs of any investigation, appears to have held the facts revealed in its investigation confidential, and ultimately claimed to have cleared its agents of wrongdoing before the critical dates for accrual purposes").

As these precedents illustrate, the bright-line rule that the government proposes here would represent a major change in the current application of the FTCA, and one with major consequences for the public fisc. No longer able to resort to common-sense tolling rules as they have routinely been applied, risk-averse practitioners and their clients will react by firing off administrative claims rather than carefully investigating the facts. The government's proposed bright-line rule would lead to a drastic increase in meritless "just in case" claims submitted before the two-year mark, just to ensure against the mere possibility that government involvement will be hidden from the plaintiff for over two years. This Court should not adopt that rule.

II. Allowing equitable tolling advances the FTCA's purpose of putting the federal government in the same position as similarly situated private defendants.

Affirmance is independently warranted because equitable tolling advances the FTCA's core aim of

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about the government's role in causing the injury." *Donahue* v. *United States*, 634 F.3d 615, 616, 625 (1st Cir. 2011); see also *Rakes*, 442 F.3d at 22-23; *Callahan* v. *United States*, 426 F.3d 444, 451 (1st Cir. 2005).

putting the federal government in the same position as similarly situated private defendants. As this Court put it in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955), the FTCA has the "broad and just" purpose to "compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable."

The government has consistently invoked the "like circumstances" principle to *limit* the government's FTCA liability in appropriate circumstances, as well it should. In many contexts, the government analogizes itself to private litigants precisely in order to ensure that it receives the benefit of every state-law defense that a private litigant would have. As the government's brief put it in *United States* v. *Olson*, 546 U.S. 43 (2005), "the Court has long recognized that private-person liability is the touchstone for assessing the United States' potential FTCA liability." Reply Br. for Pet 4 (No. 04-759).

Here, the government takes the opposite tack: It seeks treatment *more protective* than that available to private litigants. But in view of the government's broad success in asserting state-law defenses based on the principle that it should stand in the shoes of a private litigant, the government's procedural defenses should be interpreted similarly. Both the text of the FTCA and basic fairness warrants no less.

A. The FTCA places the federal government on "equal footing" with private litigants facing state tort law claims.

In passing the FTCA, Congress made the government liable for its torts "in the same manner and to the same extent" as analogous private defendants. 28

U.S.C. § 2674. In applying the statute, therefore, federal courts are directed to examine how "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.* § 1346(b)(1).

Courts interpreting the FTCA thus look to state tort law. The FTCA is not intended "to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States." *Richards* v. *United States*, 369 U.S. 1, 6-7 (1962). Congress declined to "leave to the courts the task of developing a body of federal tort law." See *Hunt* v. *United States*, 636 F.2d 580, 584 (D.C. Cir. 1980). Instead, state law provides the field upon which the FTCA puts the federal government on "equal footing" with private litigants in "like circumstances." See, *e.g.*, *Roelofs* v. *United States*, 501 F.2d 87, 92 (5th Cir. 1974) (the FTCA "is given a broad interpretation to effectuate the legislative aim of putting citizen and national sovereign in tort claims suits on a footing of equality as between private parties within that state.").

Congress's "equal footing" framework furthers the goals of the FTCA by providing fairness and predictability to both sides of a federal tort claim. The legal landscape shaped by state law, and tested by experience in private disputes, provides an interdependent set of protections for both claimants and defendants. Placing the government on equal footing with similarly situated private defendants takes advantage of the familiarity and functionality of this system to promote the equitable and efficient administration of claims. Equitable tolling and discovery rules of claim accrual are part of that system, and therefore should be maintained in the FTCA.

B. The government in FTCA suits regularly employs state law defenses based on analogy to private defendants, and it should likewise be subject to equitable tolling like private defendants.

The United States takes full advantage of the "equal footing" rule, routinely analogizing itself to private defendants where doing so can help it defeat federal tort claims. As one U.S. Attorney's bulletin expresses the point: "Any and all defenses and statutory protections available to private persons under state law are available to the United States and can successfully be raised." See Adam M. Dinnell, *Using the "Private Individual Under Like Circumstances" to Your Advantage: The Analogous Private Liability Requirement Under the Federal Tort Claims Act*, 59 U.S. Atty's Bulletin 1, 10-13.

Occasionally, defenses available to private parties have requirements or qualifications that the United States cannot fulfill because it is not a private actor. But even then, the government argues with frequent success that its activities are the functional equivalent of the government's private analog, warranting application of the defense. FTCA case law provides a host of examples.

For instance, in the wake of Hurricanes Katrina and Rita, the Federal Emergency Management Agency (FEMA) provided emergency housing units to those displaced by the storms. Controversy later emerged over potentially dangerous levels of formaldehyde in the units, and some of the temporary residents filed FTCA claims, alleging that FEMA negligently delayed in warning residents. See *In re FEMA Trailer Formaldehyde Products Liability Litigation*,

668 F.3d 281 (5th Cir. 2012). After the FTCA's discretionary function exception was deemed inapplicable, the government turned to Mississippi and Alabama state law defenses. *Id*. at 285-286. Both jurisdictions had adopted emergency management laws providing that private persons who voluntarily and without compensation donated their real estate for shelter during or in recovery from a disaster would be shielded from civil liability for negligence related to that use. *Id*. at 287-288. The Fifth Circuit agreed that FEMA's provision of emergency trailers was sufficiently similar to such private provision to activate this statutory protection. *Id.* at 289-290. The government has similarly claimed the benefit of recreational land use statutes designed to protect private landowners. See, *e.g*., *Ewell* v. *United States*, 776 F.2d 246 (10th Cir. 1985) (U.S. protected against suit by motorcycle accident victim by Utah Limitation of Land Owner Liability Act).

Similarly, the government often seeks the benefit of private litigant statutory protections in the medical malpractice arena. In *Scheib* v. *Florida Sanitarium & Benevolent Association*, the plaintiff was awarded $1.03 million in damages for a Navy officer's medical malpractice, which left the plaintiff permanently comatose. 759 F.2d 859, 861 (11th Cir. 1985). Because the plaintiff's insurer had already provided over $400,000 to cover her past medical expenses, the United States invoked a Florida statute allowing damages to be reduced by the amount of payments made by "collateral sources." *Id*. at 861, 863. By its terms, this statute was limited to cases of negligence by physicians licensed in Florida, and the Naval health officer was not so licensed. *Ibid*. The Eleventh Circuit found that the "like circumstances" pro-

vision overcame this difficulty, and allowed the judgment to be reduced. *Id.* at 864. See also *Hill* v. *Smithkline Beecham Corp.*, 393 F.3d 1111 (10th Cir. 2004) (U.S. protected by requirement to seek certificate of review before filing suit against medical professional where statute specified Colorado license and Bureau of Prisons staff in question were not so licensed).

In a similar vein, the United States has repeatedly benefited from medical malpractice award caps—even where it does not meet the express technical requirements of the corresponding state legislation. See, *e.g.*, *Taylor* v. *United States*, 821 F.2d 1428 (9th Cir. 1987); *Owen* v. *United States*, 935 F.2d 734 (5th Cir. 1991); *Lozada* v. *United States*, 974 F.2d 986 (8th Cir. 1992); *Haceesa* v. *United States*, 309 F.3d 722 (10th Cir. 2002). And other areas in which the federal government has wielded the FTCA's "like circumstances" provision as a shield include auto insurance regimes and workers' compensation laws. See, *e.g.*, *Nationwide Mutual Insurance Co.* v. *United States*, 3 F.3d 1392, 1396-1397 (10th Cir. 1993) (U.S. "functionally complied" with requirements of Colorado auto accident law preventing subrogation); *Young* v. *United States*, 71 F.3d 1238 (6th Cir. 1995) (U.S. protected from auto insurer subrogation claim because it provided functional equivalent of security required by Kentucky's no-fault act); *Belluomini* v. *United States*, 64 F.3d 299 (7th Cir. 1995) (Workers' compensation prevents FTCA recovery where a private party in the government's position would be protected from suit under Illinois Workers' Compensation Act); *Willoughby* v. *United States*, 730 F.3d 476 (5th Cir. 2013) (U.S. protected by Texas workers' compensa-

tion law through requirement that contractor provide insurance coverage).

As these examples confirm, federal agencies are zealous in analogizing themselves to private defendants when doing so benefits their substantive defense against FTCA claims. And given the core purpose of the FTCA, that is as it should be. But the FTCA's "equal footing" design—and its purpose of fairly compensating injured private citizens—likewise confirms that the government's procedural advantages should not be enlarged arbitrarily beyond those available to private defendants. It is vital to the FTCA's design to keep equitable tolling available to the same extent that it is available in private tort litigation.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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