No. 02-1178

In the Supreme Court of the United States

WAYNE EMMETT MCKILLOP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States brought suit against petitioner, who held a Forest Service permit authorizing his personal recreational use of certain land in the Pike National Forest, to recover damages arising out of his use of the permit, including the costs of suppressing a forest fire started by his guests. The question presented is whether the United States' suit is barred by a state law requiring claims against public employees to be asserted within 180 days after discovery of the injury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 301 F.3d 1270. The opinion of the district court (Pet. App. 15a-70a) is reported at 53 F. Supp. 2d 1056.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2002. A petition for rehearing was denied on November 8, 2002 (Pet. App. 75a-76a). The petition for a writ of certiorari was filed on February 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Agriculture is authorized, upon such terms and conditions as she may deem proper, to permit the use and occupancy of land within the national forests for specified purposes, including for "constructing or maintaining summer homes." 16 U.S.C. 497(b). The Secretary has delegated to the Forest Service the authority to issue permits for such purposes, which are referred to as "special use authorizations" or "special use permits." See 36 C.F.R. 251.52, 251.53.

Under regulations promulgated by the Secretary, each permit must contain, *inter alia*, "[s]uch terms and conditions as the authorized officer deems necessary to * * * [p]rotect Federal property and economic interests." 36 C.F.R. 251.56(a)(1)(ii). The regulations provide that each permit holder "shall pay the United States for all injury, loss, or damage, including fire suppression costs, in accordance with existing Federal and State laws," 36 C.F.R. 251.56(d), and "indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use or occupancy," 36 C.F.R. 251.56(d)(1).

2. In February 1993, the Forest Service issued a 20-year special use permit to petitioner and his wife. The permit authorizes their personal recreational use of approximately one acre of land, including a cabin, in the Pike National Forest in Colorado. The permit states that "[t]he holder shall be liable for any damage suffered by the United States resulting from or related to use of this permit, including damages to National Forest resources and costs of fire suppression." Pet. App. 84a; see C.A. App. 54-61.

In May 1996, petitioner, a public school teacher, allowed 16 students from his school to visit his cabin. The students were under petitioner's supervision during the visit. Pet. App. 3a, 84a-85a.

With petitioner's permission, five of the students camped overnight in an area of the Pike National Forest that adjoined the property described in petitioner's permit. Although the Forest Service prohibited campfires at that location, the students built a campfire there. The campfire caused a forest fire that destroyed portions of the Pike National Forest, damaged and destroyed private property, and caused the United States to expend substantial resources to extinguish the fire. Pet. App. 3a, 85a-86a.

3. Private owners whose property was damaged by the fire filed suit in federal district court against the United States, petitioner, and others. Pet. App. 4a. The United States filed a cross-claim against petitioner, alleging that he was liable under the special use permit for fire suppression costs and damage to the Pike National Forest. *Id.* at 86a-87a.

Petitioner moved to dismiss the cross-claim, relying on the Colorado Governmental Immunity Act (CGIA), Colo. Rev. Stat. Ann. §§ 24-10-101 *et seq.* (2001). The CGIA confers immunity from tort claims on public employees acting within the scope of their employment, unless their conduct was willful and wanton. See *id.* § 24-10-118(2)(a). Even for willful and wanton conduct, the CGIA provides that a claim is barred if notice of the claim was not given within 180 days of the discovery of the injury. See *id.* §§ 24-10-109, 24-10-118(1)(a).

The district court granted petitioner's motion. Pet. App. 15a-74a. The court held that a reasonable jury could find that petitioner's conduct was willful and wanton, and thus did not dismiss the claim on immunity

grounds. See *id.* at 40a-46a. The court held, however, that the CGIA's notice-of-claim requirement defeated the United States' claim. *Id.* at 55a-59a. The court recognized that "where a plaintiff has stated a federal claim * * * a notice of claim provision may be struck down based on supremacy because allowing a federal claim to be limited by state law would defeat the objective of the federal law." *Id.* at 58a. The court reasoned, however, that the United States' claim was "properly construed as a state tort claim alleging damages as a result of [petitioner's] alleged negligence." *Id.* at 57a. Accordingly, the court held that the claim was barred because the United States had not, as the CGIA requires, filed a notice of claim within 180 days of its discovery. *Ibid.*[1]

4. The court of appeals reversed. Pet. App. 1a-14a. The court reasoned that the United States' claim against petitioner is "essentially a contract claim" based on petitioner's special use permit and, consequently, is governed by federal, not state, law. *Id.* at. 13a. After noting that "where federal and state laws are in conflict, the Supremacy Clause of the United States Constitution requires that the federal limitation prevail," the court held that 28 U.S.C. 2415(a), the six-year statute of limitations governing contract actions by the United States, preempts the CGIA's 180-day notice of claim requirement. *Ibid.*

ARGUMENT

The court of appeals correctly held that the United States' suit against petitioner to enforce the terms of a

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[1] After the other claims in the case were settled or dismissed, the court entered final judgment against the United States. Pet. App. 4a.

Forest Service special use permit was not subject to the state-law requirement that notice of a claim against a public employee be given within 180 days of its discovery. That holding does not conflict with any decision of this Court or any other court of appeals. The petition should, therefore, be denied.

1. Petitioner asserts that the court of appeals erred in holding that the Colorado notice-of-claim requirement could not be applied to defeat the United States' suit, suggesting that no "significant conflict" exists between any "federal policy or interest and the [operation] of the state law." Pet. 6 (quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988)), 14-15. Petitioner is mistaken.

a. The United States' authority to administer public lands, including the authority to permit the use of those lands subject to conditions designed to preserve them, derives from the Constitution. See U.S. Const. Art. IV, § 3, Cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

Congress has authorized the Secretary of Agriculture to permit the use and occupancy of land within national forests on such terms and conditions as she may deem proper. See 16 U.S.C. 497. Pursuant to that authority, the Secretary has promulgated regulations requiring that permits contain "[s]uch terms and conditions as the authorized officer deems necessary to * * * [p]rotect Federal property and economic interests." 36 C.F.R. 251.56(a)(1)(ii). Those regulations specifically require that permit holders "indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judg-

ments caused by the holder's use or occupancy." 36 C.F.R. 251.56(d)(1). Consistent with those regulations, the permit issued to petitioner made him liable for "any damage suffered by the United States resulting from or related to use of this permit, including damages to National Forest resources and costs of fire suppression." Pet. App. 84a.

Congress has also expressly addressed the appropriate statute of limitations for contract actions by the United States, 28 U.S.C. 2415(a), and tort actions by the United States "to recover damages resulting from fire to [public] lands," 28 U.S.C. 2415(b). The limitations period for both types of actions is six years.

b. The United States brought this suit to enforce its rights under a federal permit issued pursuant to federal regulations for the use of federal land. It would be difficult to posit a matter more pervasively federal in character. This Court "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). As particularly relevant here, the "rights of the United States under its contracts are governed exclusively by federal law." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504 (1988); see *United States* v. *Standard Oil Co.*, 332 U.S. 301, 306 (1947) (noting "the Government's paramount power of control over its own property, both to prevent its unauthorized use or destruction and to secure indemnity for those injuries"); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). The timeliness of such actions is governed by 28 U.S.C. 2415(a).

To be sure, controversies "directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform

federal rules." *Kimbell Foods*, 440 U.S. at 727-728. Thus, "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision," unless the "application of state law would frustrate specific objectives of the federal programs." *Id.* at 728. State law cannot be applied, however, if "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.'" *Boyle*, 487 U.S. at 507 (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)) (alteration in *Boyle*). Although some such conflict must exist, the "conflict with federal policy need not be as sharp as that which must exist for ordinary preemption." *Ibid.*[2]

c. Under the analysis previously articulated by the Court, federal law preempts the tort immunities that Colorado confers on public employees. Federal law requires holders of special use permits for national forests to indemnify the United States for damage and fire suppression costs that result from or relate to use of the permit, see 36 C.F.R. 251.56(d)(1), and gives the United States six years to investigate claims and to sue permit holders for damage caused by fire, see 28 U.S.C. 2415. The six-year limitations period applies regardless of whether the action against petitioner is regarded as one founded upon a contract, see 28 U.S.C. 2415(a), or one founded upon a tort, because Congress has pro-

[2] Thus, in *Boyle*, the Court held that state tort law could not be applied in a private suit against a government contractor that supplied allegedly defective military equipment to the United States under government specifications. See 487 U.S. at 509. The Court concluded that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512.

vided a special statute of limitations that gives the United States six years to bring a tort action "to recover damages resulting from fire to [public] lands," see 28 U.S.C. 2415(b). Federal law thus gives permit holders a strong incentive to take adequate fire prevention measures.

By contrast, when the permit holder is a Colorado public employee acting within the scope of his employment, the CGIA would give the permit holder immunity unless his conduct was willful and wanton. See Colo. Rev. Stat. Ann. § 24-10-181(2)(a) (2001). It would also allow the permit holder to avoid liability even for willful and wanton conduct whenever the United States was unable to assert its claim within 180 days. See *id.* §§ 24-10-109, 24-10-118(1)(a). Those provisions would prevent the United States from seeking damages from such permit holders in many circumstances, and thus would undermine the incentive to exercise caution that is central to the federal permit program. Those provisions cannot, therefore, be applied to defeat the United States' claim.

That conclusion follows from *Felder* v. *Casey*, 487 U.S. 131, 144-146 (1988), which held that a state notice-of-claim requirement could not be applied to defeat a state court action brought under 42 U.S.C. 1983. Although the statute of limitations for Section 1983 claims is borrowed from state law, and although the plaintiff had brought suit in state court, the Court held that the notice-of-claim provision "conflicts in both its purpose and effects with the remedial objectives of § 1983" and thus was preempted. 487 U.S. at 138. The case for preemption is even stronger here because the

six-year statute of limitations is supplied by a federal statute rather than borrowed from state law.[3]

2. Petitioner also asserts that the Tenth Circuit's decision in this case "directly conflicts" with the Ninth Circuit's decision in *United States* v. *California*, 655 F.2d 914 (1980). Pet. 8. Petitioner is mistaken.

In the *California* case, the Ninth Circuit held that a state notice-of-claim requirement could be applied to defeat the United States' suit arising out of a forest fire that was caused by public employees. In contrast to this case, the United States' suit against California was not founded upon a permit. It was instead a simple tort suit in which the court "borrowed" the state fire-suppression statute to supply the elements of the cause of action. See 655 F.2d at 916-917. The court concluded that, "if state law is to be borrowed to fashion the federal rule of decision in this case, the law applicable to the federal government must include the state's claim filing statutes as well as the fire suppression costs statute." *Id.* at 919.

There is no similar need to "borrow" state law to supply a rule of decision in this case. The terms of petitioner's liability are set by the permit itself, which implements federal law. Consequently, this case differs from *California* on grounds central to the Ninth Circuit's analysis.

In the United States' view, *California* was wrongly decided. The Ninth Circuit recognized that Congress

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[3] It is thus unsurprising that petitioner conceded before the district court that "[t]o require notice of claim as a condition precedent of [a federal] suit" would "unduly interfere with the federal action." Gov't C.A. App. 49; see *ibid.* ("[T]he rationale is that allowing a federal claim to be limited by state law would defeat the objective of the federal law.") (citing *Felder*, 487 U.S. at 153).

had enacted a special statute of limitations that gives the United States six years to bring a tort suit to recover damages to federal lands resulting from fires. See 655 F.2d at 919 (citing 28 U.S.C. 2415(b)). The court opined that the "only federal interest infringed by requiring compliance" with the state notice requirement "would be its interest in preparing claims and litigation at a more leisurely pace," and that such infringement was not a sufficient reason to override the State's "more restrictive time requirements." *Ibid.* In so reasoning, the court gave inadequate deference to the congressional judgment, embodied in Section 2415(b), that it is impracticable for the United States to assert claims arising out of fires on federal lands under such "restrictive time requirements." The court also failed to appreciate that the United States' interests are not confined to having adequate time to investigate and prepare its claims. If the United States' ability to seek and recover damages from fires on federal lands is diminished, the incentive for persons to exercise caution on such lands is diminished. Thus, the special limitations period for claims for damages resulting from fires advances not only the United States' interest in financial recovery but also its interest in protecting the national forests and other public lands.

California was decided more than two decades ago. There is some question whether the Ninth Circuit would continue to adhere to that decision in light of this Court's subsequent decisions in *Boyle* and *Felder*. In any event, the decision in this case presents no square conflict with *California* and would not be a suitable vehicle for addressing the issue presented in that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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