No. 10-1436

In the Supreme Court of the United States

BESSIE IRENE WALTZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under the Federal Tort Claims Act, "[a] tort claim against the United States shall be forever barred" unless a suit "is begun within six months after the date of mailing * * * of notice of final denial of the claim" by the relevant agency. 28 U.S.C. 2401(b). The question presented is whether the six-month deadline prescribed by Section 2401(b) for filing a complaint in district court is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published. The order of the district court (Pet. App. 4-15) is not published.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2011. The petition for a writ of certiorari was filed on May 24, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, waives the United States' sovereign immunity to suit by individuals "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 Govern-

ment while acting within the scope of his office or employment." 28 U.S.C. 1346(b). Under the FTCA, "[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." 28 U.S.C. 2401(b). To give the agency time to consider an administrative claim, the FTCA also provides that "[a]n action shall not be instituted upon a claim against the United States * * * unless * * * [the] claim shall have been finally denied by the agency in writing" or the agency has failed "to make final disposition of a claim within six months after it is filed," in which case the failure to act shall "be deemed a final denial of the claim." 28 U.S.C. 2675(a).

2. On May 20, 2006, petitioner was injured when her motorcycle collided with a United States Forest Service truck. Pet. App. 5. On June 21, 2006, she timely filed an administrative claim with the Forest Service. *Ibid*. On December 18, 2006, petitioner filed suit in federal district court, even though the agency had not issued a notice of final denial of her claim, and even though less than six months had passed since the filing of her administrative claim. *Id.* at 7.

On February 13, 2007, the Department of Agriculture issued a letter denying petitioner's claim. Pet. App. 6. Thereafter, the United States moved to dismiss the court action as premature under Section 2675(a). *Id*. at 6-7. The district court granted the motion. *Id*. at 8.

3. On November 20, 2007, more than six months after receiving the final notice of denial from the agency, petitioner filed a second action in district court on essen-

tially the same claim as her first action. Pet. App. 8. The government moved to dismiss the complaint as untimely. *Ibid.* Petitioner argued that Section 2401(b)'s time bar should be equitably tolled because, she said, government counsel had told her that the government would not object to her first district-court filing on the ground that it was premature. *Ibid.*

The district court dismissed the complaint. Pet. App. 4-15. The court determined that the Ninth Circuit's decision in *Marley* v. *United States*, 567 F.3d 1030, cert. denied, 130 S. Ct. 796 (2009), was "squarely on point." Pet. App. 14. Like this case, *Marley* was an FTCA case in which it was alleged that the government caused the plaintiff to file an untimely complaint. The Ninth Circuit in *Marley* relied on *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), in which this Court held that the limitations period in 28 U.S.C. 2501 is jurisdictional, and it concluded that the six-month deadline prescribed in Section 2401(b) is similarly jurisdictional and therefore not subject to tolling. 567 F.3d at 1035.

4. The court of appeals affirmed. Pet. App. 1-2. The court explained that, under *Marley*, Section 2401(b) "establishes a jurisdictional limitation that is not subject to equitable tolling." *Id.* at 2. The panel also rejected petitioner's contention that this Court's decision in *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010), had overturned *Marley*, and it concluded that "*Marley* continues to control." Pet. App. 2.

ARGUMENT

Petitioner argues (Pet. 11-31) that the six-month deadline prescribed in 28 U.S.C. 2401(b) for filing an FTCA action in district court is subject to equitable tolling. The court of appeals correctly rejected that argu-

ment, and its unpublished decision does not conflict with any decision of this Court or any other court of appeals. This Court recently denied certiorari in an essentially identical case. See *Marley* v. *United States*, 567 F.3d 1030 (9th Cir.), cert. denied, 130 S. Ct. 796 (2009). Further review is similarly unwarranted here.

1. In *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), this Court clarified its prior cases concerning the availability of equitable tolling in suits against the United States. The Court explained that "[m]ost statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims" and "permit courts to toll the limitations period in light of special equitable considerations." *Id.* at 133; see, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990). On the other hand, some statutes of limitations "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *John R. Sand & Gravel*, 552 U.S. at 133 (citations omitted). The time limits of such statutes are "more absolute" in requiring a court to decide a timeliness question despite a waiver and "forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Id.* at 133-134. The Court has referred to such time limits as "jurisdictional." *Id.* at 133. In *John R. Sand & Gravel*, the Court concluded that the statute of limitations for bringing a claim against the United States in the Court of Federal Claims, 28 U.S.C. 2501, is jurisdictional. 552 U.S. at 133-139.

2. Applying *John R. Sand & Gravel*, the courts below correctly held that the FTCA's six-month limitations period for filing a tort claim against the United States in federal court is jurisdictional and therefore not subject to equitable tolling.

Section 2401(b) employs particularly emphatic language that is almost identical to that of Section 2501, stating that a tort claim against the United States "shall be forever barred" 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." 28 U.S.C. 2401(b); see 28 U.S.C. 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). The operative text in Section 2401(b)—stating that a tort claim "shall be forever barred" if not filed within the specified time period—was contained in the limitations provision of the FTCA as originally enacted in 1946. See Legislative Reorganization Act of 1946, Pub. L. No. 601, ch. 753, § 420, 60 Stat. 845. At the time the FTCA was enacted in 1946, the language of Section 2501 had long been construed to be jurisdictional. See *Kendall* v. *United States*, 107 U.S. 123 (1883); *John R. Sand & Gravel*, 552 U.S. at 134-135. Congress should be presumed to have enacted Section 2401(b) with the understanding that it would be interpreted the same way. See *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (When "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well.").

In addition, as the court of appeals noted in *Marley*, although "Congress explicitly included some exceptions to the deadlines in [Section] 2401(a)," it "included no such exceptions in [Section] 2401(b)." 567 F.3d at 1037. That omission is significant because when Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998) (holding that tolling is unavailable under the Quiet Title Act, 28 U.S.C. 2409a, in part because the Act already provides for equitable exceptions); *United States* v. *Brockamp*, 519 U.S. 347, 351 (1997) (holding that tolling is unavailable under 26 U.S.C. 6511 because the statute "sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling'").

Moreover, as the district court explained, the purpose of the FTCA's six-month limitations period is "to achieve a broader system-related goal." Pet. App. 13 (quoting *John. R. Sand & Gravel*, 552 U.S. at 133). This Court has long considered the limitations period in Section 2401(b) to be a condition of the government's waiver of sovereign immunity, which the Court would not "extend * * * beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979). And as the district court noted, the legislative history and context of the FTCA support the conclusion that "applying * * * equitable tolling * * * improperly 'impinges on Congress's role as regulator of the jurisdiction of the federal courts.'" Pet. App. 14 (quoting *Marley*, 567 F.3d at 1037); see *id.* at 18 (stating that the statute

is "intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States") (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966), discussing 1966 amendments to Section 2401(b)). The FTCA's six-month limitations period thus belongs to that category of "more absolute," jurisdictional limitations periods that are not subject to equitable tolling. *John R. Sand & Gravel*, 552 U.S. at 133.

3. Petitioner asserts (Pet. 16-24) that the decision below conflicts with this Court's decisions in *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197 (2011); *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010); and *Union Pacific Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009), which, she argues "have narrowly circumscribed * * * a long line of Supreme Court precedent holding the statutes at issue as jurisdictional." Pet. 14 (emphasis omitted). The cited decisions do not cast doubt on the jurisdictional nature of the six-month time limit in Section 2401(b).

In *Henderson*, this Court emphasized "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," 131 S. Ct. at 1205, in concluding that the time limit for appealing an administrative denial of a veterans-benefits claim "should [not] be regarded as having 'jurisdictional' consequences," *id.* at 1200. In *Reed Elsevier*, the Court held that Congress did not intend the requirement that copyright owners register their works before suing for infringement to be jurisdictional, given that it "is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions." 130 S. Ct. at 1247; see

17 U.S.C. 411(a) (Supp. III 2009). And in *Union Pacific*, the Court concluded that "nothing in the [Railway Labor Act, 45 U.S.C. 151 *et seq.*] elevates to jurisdictional status the obligation to conference minor disputes" before seeking arbitration with the National Railroad Adjustment Board. 130 S. Ct. at 595-596.

Contrary to petitioner's suggestion, those cases acknowledged the continuing vitality of *John R. Sand & Gravel*. See *Henderson*, 131 S. Ct. at 1203 (citing *John R. Sand & Gravel* with approval); *Union Pacific* 130 S. Ct. at 597 (same). They also reaffirmed that congressional intent controls whether a statutory provision is jurisdictional in nature. See *Henderson*, 131 S. Ct. at 1203 ("The question here, therefore, is whether Congress mandated that the [provision] be 'jurisdictional.'"); *Reed Elsevier*, 130 S. Ct. at 1244 (courts should follow suit when a statute's "text and structure" "demonstrate that Congress 'rank[ed]' [a] requirement as jurisdictional") (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513-516 (2006)) (first brackets in original). This Court has explained that the intent of Congress can be determined both from the text itself and from the statutory context and purpose, and that Congress "need not use magic words in order to speak clearly" as to jurisdiction. *Henderson*, 131 S. Ct. at 1203; see *Reed Elsevier*, 130 S. Ct. at 1248 ("[T]he relevant question here is * * * whether the type of limitation that [the statute] imposes is one that is properly ranked as jurisdictional *absent an express designation*.") (emphasis added). The purported "confusion" (Pet. 11) to which petitioner alludes is simply a reflection of different congressional intent in different statutes. See *Henderson*, 131 S. Ct. at 1204 ("Instead of applying a categorical rule regarding [jurisdiction], we attempt to ascertain Congress'

intent regarding the particular type of review at issue in this case.").

4. Petitioner asserts (Pet. 24-28) that the decision below conflicts with decisions of other courts of appeals, but none of the cases he cites involved the six-month time limit at issue here, which governs the filing of claims in federal court after notice of the administrative denial of the claim. Instead, all of petitioner's cases involved the FTCA's two-year time limit for presenting an administrative claim to the appropriate federal agency in the first instance. See *Santos ex. rel. Beato* v. *United States*, 559 F.3d 189, 197 (3d Cir. 2009); *Valdez ex rel. Donely* v. *United States*, 518 F.3d 173, 176 (2d Cir. 2008); *T.L. ex rel. Ingram* v. *United States*, 443 F.3d 956, 961 (8th Cir. 2006); *Rakes* v. *United States*, 442 F.3d 7, 24-25 (1st Cir. 2006); *Kokotis* v. *USPS*, 223 F.3d 275, 278 (4th Cir. 2000); *Perez* v. *United States*, 167 F.3d 913, 915 (5th Cir. 1999); *Glarner v. United States* 30 F.3d 697, 701 (6th Cir. 1994).

Although the FTCA's six-month limitations period and its two-year limitations period are both contained in Section 2401(b), they are not identical. The two-year period is applicable to administrative claims and is principally designed to provide the agency an opportunity to consider and settle claims before claimants seek judicial review. The FTCA imposes no time limits on an agency's disposition of an administrative claim (although a plaintiff may, at his option, file suit if no action is taken within six months). See 28 U.S.C. 2675(a). In contrast, the six-month period is a strict limitation on the filing of a claim in federal court. It is designed, among other things, to serve a systematic interest in judicial efficiency. See *John R. Sand & Gravel*, 552 U.S. at 133.

In the government's view, both the two-year and the six-month limitations provisions of 28 U.S.C. 2401(b) are properly considered jurisdictional in nature and thus are not subject to equitable tolling. But even if the FTCA's two-year administrative filing deadline were subject to equitable tolling in certain circumstances, it would not follow that the six-month statutory time period for filing complaints in court would also be subject to equitable tolling. The six-month limitations period is short, to ensure particular expedition, and it is triggered by a specific notice denying the administrative claim, which sets a readily identifiable date for the filing of a suit.

The decision below therefore creates no conflict that warrants this Court's intervention. Even if there were a conflict, however, most of the cases petitioner cites were decided before *John R. Sand & Gravel*, which clarified the circumstances in which equitable tolling is available under limitations provisions governing monetary claims against the United States and construed statutory text virtually identical, for present purposes, to that in 28 U.S.C. 2401(b) as jurisdictional and not subject to equitable tolling. At least until other courts have had the opportunity to consider the issue in light of *John R. Sand & Gravel*, this Court's review would be premature. This Court recently denied certiorari in a case involving a similarly-situated petitioner who advanced essentially identical arguments. See *Marley*, *supra*. There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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