No. 13-1074

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the six-month time bar for filing suit in federal court under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant in the district court and the appellee in the court of appeals, is the United States of America. The following individuals were also defendants in the district court: David V. Beebe, Jerry F. Garcia, Jack O'Brien, and Douglas Glover. Those defendants are no longer parties in the case and are not petitioners here.

Respondent, who was the plaintiff in the district court and the appellant in the court of appeals, is Kwai Fun Wong. The Wu Wei Tien Tao Association and Chong Hua Shen Mu Gong were also plaintiffs in the district court but are no longer parties in the case.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-102a) is reported at 732 F.3d 1030. The order of the district court granting reconsideration (App., *infra*, 103a-105a) is unreported. An order of the district court (App., *infra*, 106a-107a), adopting the magistrate judge's findings and recommendation on summary judgment (App., *infra*, 108a-127a), is unreported but is available at 2006 WL 977746. A prior order of the district court (App., *infra*, 128a-129a), adopting the magistrate judge's findings and recommendation (App., *infra*, 130a-186a), is unreported, but the findings and recommendations are availa-

ble at 2002 WL 31548486. A prior memorandum opinion of the court of appeals (App., *infra*, 187a-189a) is not published in the *Federal Reporter* but is reprinted at 381 Fed. Appx. 715. Another prior opinion of the court of appeals (App., *infra*, 190a-238a) is reported at 373 F.3d 952. Another order of the district court (App., *infra*, 239a-241a), adopting the magistrate judge's findings and recommendations on summary judgment (App., *infra*, 242a-306a), is unreported but is available at 2007 WL 1170621.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2013. On December 27, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 6, 2014. On January 24, 2014, Justice Kennedy further extended the time to March 8, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 308a-312a.

STATEMENT

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671-2680. The FTCA "waive[s] the United States' sovereign immunity for claims" against the United States for money damages "arising out of torts committed by federal employees." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). The Act grants federal district courts "exclusive jurisdiction" over such actions, 28 U.S.C. 1346(b)(1), subject to certain

conditions. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979).

A tort action against the United States "shall not be instituted * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). If the claim is not "presented in writing to the appropriate Federal agency within two years after such claim accrues," it "shall be forever barred." 28 U.S.C. 2401(b). The requirement that the claim first be presented to the appropriate agency allows the agency with the "best information" to "consider[]" and resolve the claim "without the need for filing suit and possibl[y] expensive and time-consuming litigation." *McNeil* v. *United States*, 508 U.S. 106, 112 n.7 (1993) (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 3 (1966)).

A plaintiff may not file suit in federal court until the claim is "finally denied by the agency in writing and sent by certified or registered mail," or until six months have passed without the agency making "final disposition" of the claim. 28 U.S.C. 2675(a). A premature complaint, filed before that six-month period for consideration by the agency has expired, must be dismissed. *McNeil*, 508 U.S. at 110-113. By the same token, and of particular relevance here, if an "action" in court is not "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," the claim "shall be forever barred." 28 U.S.C. 2401(b).

2. Respondent, Wong, a citizen of Hong Kong, was held in immigration detention in the Multnomah

County Detention Center in Portland, Oregon for five days while awaiting expedited removal. App., *infra*, 109a-110a. On June 22, 1999, she was removed from the United States. *Id.* at 110a.

a. On May 18, 2001, respondent filed two documents relevant to this case. App., *infra*, 5a. The first was an action in federal court seeking damages based on respondent's removal and the conditions of her confinement prior to removal. *Id.* at 5a, 110a-111a, 131a. The complaint asserted various constitutional claims against officials in Portland in the Immigration and Naturalization Service (INS) in their individual capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App., *infra*, 131a. The second relevant filing was a claim presented to the INS under the FTCA, alleging (among other things) negligence based on the conditions of respondent's confinement. *Id.* at 5a, 110a-111a.

The federal court case proceeded. In October 2001, respondent filed a first amended complaint adding the United States as a defendant and asserting additional claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1.[1] App., *infra*, 112a n.4. On November 9 and 14, 2001, respondent sought leave to file a second amended complaint that would add an FTCA claim against the United States. *Id.* at 5a-6a,

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[1] The individual defendants were ultimately dismissed from the case, as were the RFRA claims. App., *infra*, 187a-306a. Several FTCA claims were later dismissed by the district court. *Id.* at 239a-306a. Because the United States is the only defendant still in the case, and a negligence claim under the FTCA is the only remaining claim, *id.* at 5a, this brief will use the term FTCA "claim" throughout.

111a-112a. At the time of respondent's motion, the INS had not finally denied her claim and six months had not yet elapsed from the date on which she presented her claim to the INS. Respondent therefore asked the court to grant her motion "on or after November 20, 2001," at which time she would treat the agency's failure to act as a denial. *Id.* at 5a-6a, 111a. The United States opposed the motion to amend and argued that respondent should have to file a new civil action after completely exhausting her administrative remedies. *Id.* at 182a-184a.

On December 3, 2001, the INS issued a final denial of respondent's administrative claim. App., *infra*, 6a. Respondent thus had six months (until June 3, 2002) to bring an action in federal court under the FTCA. *Ibid.*; see 28 U.S.C. 2401(b). Respondent did not file a new civil action and did not ask the district court to expedite the pending motion to amend. On April 5, 2002, the magistrate judge recommended that respondent be granted leave to file a second amended complaint. App., *infra,* 130a, 182a-185a. On June 25, 2002, three weeks after the six-month deadline had passed, the district court adopted the magistrate judge's findings and recommendation. *Id.* at 128a-129a. Seven weeks later, on August 13, 2002, respondent filed a second amended complaint adding (among other things) a negligence claim against the United States under the FTCA. *Id.* at 7a.

b. The United States moved for summary judgment arguing, *inter alia*, that the district court lacked jurisdiction over respondent's FTCA claim because it was not timely filed. App., *infra*, 108a-109a, 112a-117a. The magistrate judge disagreed, *id.* at 112a-117a, and the district court adopted her findings and

recommendation, *id.* at 106a-107a. The court did not dispute that the FTCA claim was not filed within the time limits required by statute: if deemed filed when respondent first moved to amend the complaint, it was filed too early (because the administrative claim had not yet been denied or deemed denied), and if deemed filed when respondent actually filed the second amended complaint, then it was too late (because more than six months had elapsed after final denial of the administrative claim). The court nevertheless agreed to equitably toll the six-month time period for 81 days (between the date the magistrate judge recommended that respondent be granted leave to amend and the date the district court actually granted such leave), and declined to dismiss the FTCA claim on timeliness grounds. *Id.* at 117a.

c. Several years later, while the case was still pending in district court, the Ninth Circuit decided *Marley* v. *United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). In *Marley*, the Ninth Circuit held that the six-month time limit for filing suit under the FTCA cannot be equitably tolled because the statutory deadlines for FTCA claims against the United States are jurisdictional. *Id.* at 1033-1038.

d. Relying on *Marley*, the United States moved for reconsideration. App., *infra*, 103a-105a. The district court granted the motion, held that it lacked jurisdiction over respondent's untimely FTCA claim, and entered final judgment in favor of the United States. *Ibid.*

3. Respondent appealed. After oral argument, the court of appeals sua sponte ordered the case to be heard en banc to resolve an intracircuit conflict. App.,

infra, 307a. A divided en banc panel reversed in four separate opinions. *Id.* at 1a-102a.

a. Judge Berzon, writing for an eight-judge majority, first held that the FTCA's six-month time bar is not jurisdictional. App., *infra*, 1a-36a. The court found that "nothing in the language of [Section] 2401(b)—including the term 'shall . . . be barred,' and the word 'forever'—supplies a 'clear statement' that Congress intended the six-month filing deadline to be jurisdictional." *Id.* at 22a-23a. The court noted that the limitations period is located in a different section and chapter than the FTCA's "jurisdiction-granting provision" in 28 U.S.C. 1346(b)(1), and it declined to give any weight to the statutory history demonstrating that this placement was a result of the 1948 recodification and reorganization of Title 28, in which no substantive changes were intended. App., *infra*, 23a-29a. The court also relied on the absence of "a century's worth of precedent" from this Court ranking the "time limit as jurisdictional," as had been the case with the time for taking an appeal at issue in *Bowles* v. *Russell*, 551 U.S. 205, 209 n.2 (2007). App., *infra*, 30a-32a (citation omitted). And the court distinguished the FTCA's requirement in 28 U.S.C. 2675(a) of prior presentation of the claim to the appropriate agency, which had previously found to be "jurisdictional." App., *infra*, 34a-35a (quoting *Brady* v. *United States*, 211 F.3d 499, 502 (9th Cir.), cert. denied, 531 U.S. 1037 (2000)). In sum, the court found "nothing in the text, context, or purpose of [Section] 2401(b) clearly indicat[ing] that the FTCA's six-month limitations period implicates the district courts' adjudicatory authority." *Id.* at 35a-36a.

The court of appeals acknowledged that "even if [a time deadline] is not jurisdictional, tolling may still be precluded by a sufficiently clear congressional expression of that restriction." App., *infra*, 15a. But in addressing that issue, the court applied a "particularly strong" "presumption in favor of equitable tolling." *Id.* at 36a-38a. The court found such a "strong" presumption warranted because, in its view, Congress intended "suits against the government" under the FTCA to be "treated no differently than suits against private defendants," and because courts have applied a "discovery" rule to determine when a claim "accrues" for purposes of the two-year deadline for presenting a claim to the responsible agency. *Ibid.* (citation omitted). For reasons similar to those on which the court relied to find Section 2401(b) nonjurisdictional, the court concluded that its strong "presumption" in favor of equitable tolling had not been "overcome." *Id.* at 40a-43a.

Finally, the court of appeals held that respondent was entitled to equitable tolling in this case. App., *infra*, 43a-48a. The court proceeded on the assumption that respondent's FTCA claim was filed "too late," declining to find an earlier "constructive filing date" under which the claim would have been timely. *Id.* at 43a-45a. In the court's view, however, respondent's failure to file an FTCA complaint within the six-month period after her claim was denied by the INS "was not the consequence of any fault or lack of due diligence on [her] part," but the result of "the delay inherent in the Magistrate Judge system." *Id.* at 46a, 47a. The court rejected the government's contention that equitable tolling was inappropriate because respondent could have "request[ed] a timely ruling" or

could have filed a separate FTCA complaint anytime during the six-month period. *Id.* at 47a. The court accordingly applied "equitable tolling * * * to excuse [respondent's] late-filed amended complaint" and remanded for the FTCA claim to proceed. *Id.* at 48a.

b. Chief Judge Kozinski concurred in the judgment. App., *infra*, 48a-52a. He agreed with the dissenters that "[Section] 2401(b) is jurisdictional" and that "the FTCA's text, context, and relevant historical treatment prohibit equitable tolling of the statutory deadline." *Id.* at 48a, 51a. But he equitably construed respondent's court filings to render her claim timely and, thus, concurred in the judgment. *Id.* at 48a-52a.

c. Judges Tashima and Bea dissented in two separate opinions, which they both joined. App., *infra*, 52a-102a. Judge Tashima concluded that the statutory "history, once understood in full context, dispels any doubt that the FTCA's limitations period was intended to be jurisdictional." *Id.* at 52a. He explained that "the limitations provision was jurisdictional as of the original 1946 Act, for the grant of jurisdiction was expressly '[s]ubject to'—that is, 'contingent or conditional upon'—compliance with that provision." *Id.* at 55a-56a (brackets in original; internal quotation marks and citation omitted). And, he continued, Congress did not "intend[] to strip the limitations provision of its jurisdictional status only two years later," when "reorganizing Title 28" in the 1948 recodification. *Id.* at 56a-58a.

Judge Bea concluded that "Congress clearly expressed its intent that [Section] 2401(b) would have 'jurisdictional' consequences." App., *infra*, 102a. He explained that "[j]urisdictional treatment accords with

the statute's text," particularly Congress's command that late claims shall be "forever barred." *Id.* at 69a-84a, 102a. He also pointed to Section 2401(b)'s "context" in the "larger statutory scheme," including the administrative exhaustion requirement, as well as its "broad, system-related purposes." *Id.* at 93a, 97a-102a. Finally, he noted that this Court's "analysis of similar provisions" furnished further reason to construe Section 2401(b) as jurisdictional. *Id.* at 102a.

REASONS FOR GRANTING THE PETITION

A divided en banc Ninth Circuit has held that the FTCA's six-month time limit to file a tort suit for money damages against the United States, after final denial of a statutorily mandated administrative claim, is subject to equitable tolling. That decision is wrong for two reasons: (i) the six-month deadline is a jurisdictional limitation on the authority of the district court, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-134 (2008) (*John R. Sand & Gravel*), and (ii) there are, in any event, "good reason[s]" to think "that Congress did *not* want the equitable tolling doctrine to apply" to the FTCA's time limits, *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). The Ninth Circuit's erroneous decision further perpetuates widespread confusion and conflict in the courts of appeals. As a result of adverse decisions in some circuits, and unsettled law in others, the United States is routinely forced to expend substantial resources litigating fact-intensive assertions of equitable tolling and defending against untimely claims. This Court's intervention is needed to enforce the jurisdictional limitations and mandatory deadlines Congress prescribed, to provide clarity in an area that has been

mired in uncertainty, and to relieve the attendant burdens on the United States and the courts.[2]

A. The FTCA's Six-Month Suit-Filing Deadline Is Not Subject To Equitable Tolling

The court of appeals erred by holding that the FTCA's six-month deadline for filing a civil action for money damages against the United States, after final denial of a statutorily mandated administrative claim, is subject to equitable tolling. That holding cannot be squared with the statute's text, structure, history, and purpose, and it does not follow from this Court's precedents. The bar to filing an untimely civil action is a jurisdictional limitation that does not admit of equitable exceptions. *John R. Sand & Gravel*, 552 U.S. at 133-134. But even if that bar were nonjurisdictional, it is nonetheless mandatory and not subject to equitable tolling. That was certainly true at the time of the FTCA's enactment, and it is equally true today.

1. In *John R. Sand & Gravel*, this Court explained that there are two different types of limitations provisions: those that "seek primarily to protect defendants against stale or unduly delayed claims," and

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[2] The United States is simultaneously filing a petition for a writ of certiorari raising the same question with respect to the FTCA's two-year deadline for presenting a claim to the appropriate federal agency. See *United States* v. *June* (filed Mar. 7, 2014). In *June*, the Ninth Circuit relied entirely on the en banc decision here to hold the two-year time bar nonjurisdictional and subject to equitable tolling. No. 11-17776, 2013 WL 6773664 (Dec. 24, 2013). Because both time limits are codified in the same provision (28 U.S.C. 2401(b)), because there is substantial overlap in the arguments concerning equitable tolling, and because both questions are important, the United States recommends that the Court grant both petitions and consolidate the cases for briefing and argument.

those that "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal." 552 U.S. at 133. The former "typically permit courts to toll the limitations period in light of special equitable considerations." *Ibid.* The latter, "sometimes referred to" as "jurisdictional," are often read as "more absolute," such that courts are "forbidd[en]" from "consider[ing] whether certain equitable considerations warrant extending [the] limitations period." *Id.* at 133-134. The Court concluded that the Tucker Act's six-year limitations period is "this second, more absolute kind of limitations period." *Id.* at 134. The same is true here.

a. The text and history of the FTCA evidence Congress's clear intent to enact an absolute, jurisdictional time bar.

In 1946, "after nearly thirty years of congressional consideration," Congress enacted the FTCA, which vested district courts with exclusive jurisdiction to hear tort suits against the United States that fall within the statute's waiver of sovereign immunity. *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953). The FTCA filled a gap left by the Tucker Act, ch. 359, 24 Stat. 505, which as early as 1887 had allowed claims against the United States in "cases for damages not sounding in tort," but had left unaddressed the "large and highly important area" of tort claims for money damages against the sovereign. *Dalehite*, 346 U.S. at 25 n.10. Congress imposed a one-year limitation on the period during which such a tort suit against the United States could be brought: "Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued * * * an action is begun." Federal

Tort Claims Act (1946 Act), ch. 753, § 420, 60 Stat. 845.[3]

The text Congress chose for the FTCA's suit-filing bar is the same that it had long used to set deadlines for damages actions against the United States under the Tucker Act. See Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) ("every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court * * * within six years after the claim first accrues"); Judicial Code, ch. 231, § 156, 36 Stat. 1139; see also *John R. Sand & Gravel*, 552 U.S. at 135. And it is the same operative text this Court had repeatedly construed in Tucker Act suits against the United States as jurisdictional and not subject to equitable exceptions. See *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); *Kendall* v. *United States*, 107 U.S. 123, 125-126 (1883); see also *John R. Sand & Gravel*, 552 U.S. at 134-135 (citing cases); cf. *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898) (construing slightly different text in similar fashion); *de Arnaud* v. *United States*, 151 U.S. 483, 495-496 (1894) (same). Moreover, Congress expressly conditioned the grant of "exclusive jurisdiction" to the district courts over tort claims against the United States on the plaintiff's compliance with the time limitation for filing suit. See 1946 Act § 410(a), 60 Stat. 843-844 (granting jurisdiction over

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[3] If the claim was for less than $1000, it could be "presented in writing to the Federal agency out of whose activities it arises" "within one year after such claim accrued." 1946 Act § 420, 60 Stat. 845. In those cases, the time to file suit was "extended for a period of six months from the date of mailing of notice" of the agency's "final disposition of the claim." *Ibid.*

tort claims against the United States "[s]ubject to the provisions of this title"); *id.* § 420, 60 Stat. 845 ("this title" included the bar to filing after the one-year period); see App., *infra*, 53a-54a (Tashima, J., dissenting).

The 1946 Congress thus surely intended to limit the FTCA's waiver of sovereign immunity from suits for money damages to be paid out of the federal Treasury by foreclosing the federal courts from exercising jurisdiction to adjudicate untimely actions. Based on this Court's longstanding precedent at that time, it had every reason to believe that its intent would be effectuated.

b. The question, then, is whether anything has changed between 1946 and today to warrant a different result. There have been changes, but the court of appeals was wrong to think that they alter the outcome.

First, in the general recodification of Title 28 in 1948, the FTCA's jurisdiction-granting provision was codified in Chapter 85 and most of the FTCA's other provisions were codified in Chapter 171. See Act of June 25, 1948 (1948 Act), ch. 646, sec. 1, §§ 1346, 2671-2680, 62 Stat. 933, 982-985. The jurisdictional provision was accordingly reworded to make jurisdiction "subject to chapter 17[1] of this title." *Id.* § 1346(b), 62 Stat. 933.[4] The FTCA's one-year deadline for filing suit was codified in Chapter 161. *Id.* § 2401(b), 62 Stat. 971.

The court of appeals relied on the fact that the time bars are no longer placed in a portion of the Code that

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[4] As enacted, the reference was to Chapter 173, not Chapter 171; that scrivener's error was corrected the following year. See Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62.

addressed jurisdiction. App., *infra*, 23a-29a. But this Court has repeatedly made clear that changes resulting from the 1948 recodification—including changes in the Tucker Act's limitations provision that the Court has held to be jurisdictional—should not be given any substantive significance in statutory interpretation. See *John R. Sand & Gravel*, 552 U.S. at 136; *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 225-226 (1957); see also 1948 Act § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed."). Indeed, the time bar applicable to Tucker Act claims, 28 U.S.C. 2501, which this Court has repeatedly held to be a jurisdictional limitation, is set forth in a different chapter of Title 28 (Ch. 165) than the statutory provision that confers jurisdiction on the Court of Federal Claims, 28 U.S.C. 1491 (Ch. 91). Accordingly, the current placement of the FTCA's time bars is not probative of any intent by Congress to expand the district courts' jurisdiction to hear FTCA actions.

Second, Congress has since amended the FTCA by extending the suit-filing period to two years, Act of Apr. 25, 1949 (1949 Act), ch. 92, § 1, 63 Stat. 62; adding a mandatory requirement of prior presentation of the claim to the appropriate federal agency for a period of six months, Act of July 18, 1966, Pub. L. No. 89-506, § 2(a), 80 Stat. 306; and restructuring the time bars to account for that mandatory exhaustion, *id.* § 7, 80 Stat. 307. The time bars are now linked directly to the provisions governing prior presentation of claims to the agency, which are themselves treated as jurisdictional. See *McNeil* v. *United States*, 508 U.S. 106,

109-113 (1993) (affirming dismissal for lack of jurisdiction where tort action was prematurely filed before expiration of six-month period following presentation of claim to the agency); App., *infra*, 34a-35a; *Mader* v. *United States*, 654 F.3d 794, 805-808 (8th Cir. 2011); see also 28 U.S.C. 1346(b)(1) (District court jurisdiction is "[s]ubject to the provisions of chapter 171 of this title."); 28 U.S.C. 2675(a) (codified in Ch. 171). And the relevant statutory text remains unchanged. See 28 U.S.C. 2401(b) ("shall be forever barred"). In the intervening years, this Court again reaffirmed in *Soriano* v. *United States*, 352 U.S. 270 (1957), that the parallel Tucker Act limitations period is jurisdictional, that "conditions upon which the Government consents to be sued must be strictly observed," and that "exceptions thereto [will not] be implied." *Id.* at 271, 273, 276. The amendments to the FTCA following that reaffirmation thus reinforce the jurisdictional nature of the time bar.

Third, this Court has sought in recent years "'to bring some discipline to the use' of the term 'jurisdiction.'" *Sebelius* v. *Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (*Auburn Regionial*) (quoting *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011)). Although the Court has looked for a "clear statement" that a "rule is jurisdictional," it has not required "magic words." *Ibid.* (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515-516 (2011)). "[C]ontext, including this Court's interpretation of similar provisions," is "probative of whether Congress intended a particular provision to rank as jurisdictional." *Ibid.* (quoting *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010)). And "Congress is free to attach the conditions that go with the jurisdictional label to a rule that

[the Court may] prefer to call a claim-processing rule." *Henderson*, 131 S. Ct. at 1203.

That is precisely what Congress did here. Section 2401(b) contains emphatic language ("shall be forever barred") that was patterned after the jurisdictional limitation on Tucker Act suits (*John R. Sand & Gravel*, 552 U.S. at 134-139) and historically linked to the FTCA's jurisdiction-granting provision (see pp. 13-14, *supra*). Moreover, like the limitations period in the Tucker Act, the FTCA's time bars "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve * * * broader system-related goal[s]." *John R. Sand & Gravel*, 552 U.S. at 133. They "limit[] the scope of a governmental waiver of sovereign immunity," *ibid.*, and they do so for actions against the United States itself for money damages, which are at the very core of the sovereign's immunity from suit. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (FTCA "waives the immunity of the United States and * * * in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."); cf. App., *infra*, 33a n.12 (acknowledging that this Court's more recent cases on jurisdiction "were not lawsuits in federal court against the federal government" for money damages and may not implicate "parallel sovereign immunity concerns").

The FTCA "governs the processing of a vast multitude of claims." *McNeil*, 508 U.S. at 112. As this Court recognized in *McNeil*, "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *Ibid.* Because the FTCA's six-month suit-

filing deadline is thus a "more absolute," "jurisdictional" time bar, it is not subject to equitable tolling. See *Auburn Regional*, 133 S. Ct. at 824 (if a time bar is "jurisdictional," there can "be no equitable tolling"). The court of appeals erred in holding otherwise.[5]

2. The court of appeals erred in subjecting the FTCA's six-month time bar to equitable tolling for a further reason. As the court of appeals recognized, even if a limitations period "is not jurisdictional, tolling may still be precluded." App., *infra*, 15a; see *Auburn Regional*, 133 S. Ct. at 826-828 (holding that nonjurisdictional time bar is not subject to equitable tolling). Here, there are "good reason[s] to believe that Congress did *not* want the equitable tolling doctrine to apply" to Section 2401(b). *Brockamp*, 519 U.S. at 350. Those reasons are sufficient to rebut any "presumption of equitable tolling." *Irwin* v. *Depart-*

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[5] Although this Court has not considered whether the FTCA's time limits are jurisdictional, for decades after the FTCA's enactment, the courts of appeals uniformly characterized them as such and attached jurisdictional consequences to untimely filings. See *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 248 (1st Cir. 1990); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Peterson* v. *United States*, 694 F.2d 943, 945 (3d Cir. 1988); *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-742 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991); *Simon* v. *United States*, 244 F.2d 703, 704-706 (5th Cir. 1957); *Allgeier* v. *United States*, 909 F.2d 869, 871 (6th Cir. 1990); *Charlton* v. *United States*, 743 F.2d 557, 558-559 (7th Cir. 1984) (per curiam); *Schmidt* v. *United States*, 901 F.2d 680, 683 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991); *Mann* v. *United States*, 399 F.2d 672, 673 (9th Cir. 1968); *Anderberg* v. *United States*, 718 F.2d 976, 977 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984); *Adkins* v. *United States*, 896 F.2d 1324, 1325, 1326 (11th Cir. 1990) (per curiam); *Sexton* v. *United States*, 832 F.2d 629, 633 & n.4 (D.C. Cir. 1987).

ment of Veterans Affairs, 498 U.S. 89, 95-96 (1990); see *Lozano* v. *Alvarez*, No. 12-820 (Mar. 5, 2014), slip op. 8 ("[W]hether equitable tolling is available is fundamentally a question of statutory intent.").

Many of the reasons set forth above demonstrate that, even if not strictly jurisdictional, the six-month time bar is still not subject to equitable tolling. Congress used particularly "emphatic" language. *Brockamp*, 519 U.S. at 350; see 28 U.S.C. 2401(b) ("[A] tort claim against the United States * * * shall be *forever barred*.") (emphasis added). Congress modeled the FTCA's six-month suit-filing deadline on the limitations period in the Tucker Act that was (and is) not subject to equitable tolling. See pp. 11-12, 13, 16, *supra*. And Congress enacted (and amended) Section 2401(b) decades before "this Court decided *Irwin* and therefore" could not have been "aware that courts, when interpreting [the FTCA's] timing provisions, would apply" a presumption in favor of equitable tolling. *Holland* v. *Florida*, 560 U.S. 631, 646 (2010).

There are further reasons to conclude that Congress did not intend courts to apply general principles of equitable tolling to FTCA claims. During the decades-long process of drafting the FTCA, several of the bills introduced in Congress either contained a "reasonable cause" exception, a savings provision that tolled the time for filing a claim during periods of disability (such as infancy or mental incompetency), or both.[6] That

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[6] See S. 1043, 74th Cong., 1st Sess. §§ 1(c), 202(a) (1935); S. 1833, 73d Cong., 1st Sess. §§ 1(c), 202(a) (1932); S. 4567, 72d Cong., 1st Sess. §§ 1(c), 202(a) (1932); H.R. 16429, 71st Cong., 3d Sess. §§ 22, 34 (1931); H.R. 15428, 71st Cong., 3d Sess. §§ 202(a), 304 (1930); S. 4377, 71st Cong., 2d Sess. §§ 202(a), 304 (1930); H.R. 9285, 70th Cong., 1st Sess. §§ 202(a), 304 (1928); S. 1912, 69th Cong., 1st

such exceptions were "absent from the Act itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon the language of the earlier bills." *United States* v. *Muniz*, 374 U.S. 150, 155-156 (1963).[7]

Three years after enacting the FTCA, when the one-year period that triggered the time bar proved to be too short, Congress extended the period to two years—again, without allowing for any tolling. See 1949 Act § 1, 63 Stat. 62. Nor did Congress provide for any case-specific exceptions until 1988 when, to remedy the inequity of a plaintiff's timely claim being barred because she sued the wrong party, Congress provided for a limited form of tolling—but only in specifically delineated circumstances. See 28 U.S.C. 2679(d)(5). And while a neighboring subsection (28 U.S.C. 2401(a)) provides for delayed accrual of anoth-

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Sess. §§ 202(a), 304 (1926); H.R. 6716, 69th Cong., 1st Sess. §§ 202(c), 305 (1926).

[7] As with the Tucker Act, the remedy for individual cases of hardship was to come from Congress in the form of private bills, not from the courts. See *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940) ("If unusual cases of hardship arise, the claimant may still have recourse to a private bill, over which the claims committee would have jurisdiction.") (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen.); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 21 (1940) (noting that there are "private bills" under the Tucker Act and that there would "undoubtedly" be "private bills" under the FTCA) (statement of Alexander Holtzoff); see *Kosak* v. *United States*, 465 U.S. 848, 856 (1984) (describing "Judge Holtzoff" as "one of the major figures in the development of the [FTCA]").

er limitations period in the case of certain legal disabilities, Section 2401(b) notably does not. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Moreover, contrary to the court of appeals' assertion (App., *infra*, 41a), tort suits for money damages against the United States following final disposition of an administrative claim are not an "area of the law where equity finds a comfortable home." *Holland*, 560 U.S. at 647; see *id.* at 646 (finding presumption "strength[ened]" by "the fact that equitable principles have traditionally governed the substantive law of habeas corpus") (internal quotation marks and citation omitted); *Young* v. *United States*, 535 U.S. 43, 50 (2002) (finding *Irwin* presumption appropriate "when [Congress] is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence'") (citation omitted); cf. *Brockamp*, 519 U.S. at 352 (noting that tax law "is not normally characterized by case-specific exceptions reflecting individualized equities").

The FTCA's suit-filing period (six months) is also rather generous given that it follows the presentation of a claim to the appropriate federal agency and is triggered by the "mailing, by certified or registered mail, of notice of final denial of the claim by the agency," 28 U.S.C. 2401(b). See *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998). With such a readily ascertainable triggering event, there should be few if any occasions for equitable tolling even if it were permitted. But that does not mean that plaintiffs would not routinely assert equitable tolling to excuse a late filing. As the voluminous case law reveals (see Pt. B, *infra*), they will. Under the regime adopted by the

Ninth Circuit, numerous federal agencies would be forced "to respond to, and [sometimes] litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, * * * turn out to lack sufficient equitable justification." *Brockamp*, 519 U.S. at 352. Given the "broader system-related goal[s]" at stake, *John R. Sand & Gravel*, 552 U.S. at 133, including the need to examine and adjudicate a "vast multitude" of FTCA claims, *McNeil*, 508 U.S. at 112, that additional burden provides yet another reason why Congress would "have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so," *Brockamp*, 519 U.S. at 353.

B. The En Banc Ninth Circuit Decision Further Perpetuates Widespread Confusion And Conflict Among The Courts Of Appeals

Review of the decision of the divided en banc Ninth Circuit is warranted to restore the mandatory and jurisdictional force of the FTCA's time bars. For decades after the FTCA's enactment, the courts of appeals uniformly characterized the time bars in Section 2401(b) as jurisdictional and attached jurisdictional consequences to untimely filings. See note 5, *supra*. They were correct to do so, for all the reasons set forth above.

More recently, however, some courts of appeals have reconsidered (and, at times, ignored) that settled circuit precedent in light of intervening decisions of this Court. The issue has recurred with remarkable frequency. And the current state of the law can be best described as widespread conflict and confusion. The Ninth Circuit decision (which itself reverses prior

precedent) perpetuates that confusion. This Court's intervention is needed.

Categorizing the courts of appeals cases is no easy matter, but they can generally be divided into four groups. Three courts of appeals (including the Ninth Circuit) now hold that FTCA time limits are nonjurisdictional and are subject to equitable tolling. See App., *infra*, 1a-103a; *June* v. *United States*, No. 11-17776, 2013 WL 6773664 (Dec. 24, 2013) (two-year deadline for presentation of claim to agency); *Arteaga* v. *United States*, 711 F.3d 828 (7th Cir. 2013) (two-year deadline for presentation of claim to agency); *Santos* v. *United States*, 559 F.3d 189 (3d Cir. 2009) (two-year deadline for presentation of claim to agency).[8]

Four other courts of appeals now hold or (perhaps) suggest that the FTCA time limits are jurisdictional, but are nevertheless subject to equitable tolling—a position inconsistent with this Court's decisions concerning the nature of a jurisdictional limitation. See *T.L.* v. *United States*, 443 F.3d 956, 959-961, 963-964 (8th Cir. 2006) (holding two-year deadline "jurisdictional" but subject to equitable tolling); *Sanchez* v. *United States*, 740 F.3d 47, 53-54 (1st Cir. 2014) (noting that it had "previously opined that the FTCA's timeliness requirements are jurisdictional," while at

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[8] As noted in the text, some of the courts of appeals' decisions involve the two-year deadline in 28 U.S.C. 2401(b) for presentation of a claim to the appropriate agency. The courts, however, have not generally distinguished between the two time bars, and the related question of whether equitable tolling is available for the two-year time bar is presented in the government's petition for a writ of certiorari in *June*, also filed with the Court today. See note 2, *supra*.

the same time "assum[ing] that equitable tolling can be applied to those deadlines"); *Kokotis* v. *USPS*, 223 F.3d 275, 278, 280-281 (4th Cir. 2000) (describing two-year deadline as "jurisdictional," but then considering argument for equitable tolling on its merits); *Harvey* v. *United States*, 685 F.3d 939, 947 (10th Cir. 2012) ("court lacks subject matter jurisdiction to proceed under the FTCA if a plaintiff fails to satisfy the FTCA's timing requirements set forth in [Section] 2401(b)") (citation omitted); *Benge* v. *United States*, 17 F.3d 1286, 1288 (10th Cir. 1994) (assuming arguendo that court may equitably toll six-month deadline).

Three circuits have expressly declared the question open and declined to decide it. See *Phillips* v. *Generations Family Health Ctr.*, 723 F.3d 144, 149 (2d Cir. 2013); *Motta* v. *United States*, 717 F.3d 840, 846 (11th Cir. 2013); *Norman* v. *United States*, 467 F.3d 773, 776 (D.C. Cir. 2006).

Two other circuits have conflicting case law that is difficult to reconcile. Compare *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185, 190-191 (5th Cir. 2011) (describing FTCA time limits as "jurisdictional" and not subject to equitable tolling) and *Young* v. *United States*, 727 F.3d 444, 447 & n.8 (5th Cir. 2013) (same), with *Perez* v. *United States*, 167 F.3d 913, 915-917 (5th Cir. 1999) (two-year deadline nonjurisdictional and subject to equitable tolling); see also *Bazzo* v. *United States*, 494 Fed. Appx. 545, 546-547 (6th Cir. 2012) (noting conflicting precedents); *Glarner* v. *United States*, 30 F.3d 697, 700-701 (6th Cir. 1994) (holding two-year deadline nonjurisdictional and subject to equitable tolling).

The current state of the law is thus unsettled and in a state of flux. The uncertainty has persisted for

some time. That state of affairs continues to impose a substantial burden on agencies, on courts, and on the United States Treasury. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be consolidated for briefing and argument with *United States* v. *June*, petition for cert. pending (filed Mar. 7, 2014).

Respectfully submitted.

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MARCH 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-36136
D.C. No. 3:01-cv-00718-JO

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION,
PLAINTIFFS-APPELLANTS

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted En Banc: Mar. 20, 2013
Filed: Oct. 9, 2013

OPINION

Before: ALEX KOZINSKI, Chief Judge, and HARRY PREGERSON, A. WALLACE TASHIMA, M. MARGARET MCKEOWN, WILLIAM A. FLETCHER, MARSHA S. BERZON, RICHARD R. CLIFTON, JAY S. BYBEE, CARLOS T. BEA,

MILAN D. SMITH, Jr., and MARY H. MURGUIA, Circuit Judges.

Opinion by Judge BERZON; concurrence by Chief Judge KOZINSKI; dissent by Judge TASHIMA; dissent by Judge BEA.

SUMMARY[*]

Federal Tort Claims Act

The en banc court reversed the district court's dismissal of a negligence claim brought against the United States and remanded, holding that the six-month statute of limitations in the Federal Tort Claims Act, 28 U.S.C. § 2401(b), may be equitably tolled and that equitable tolling was available under the circumstances presented in this case.

The court held that nothing in the text, context, or purpose of § 2401(b) clearly indicated that the Federal Tort Claims Act's six-month limitations period implicated the district courts' adjudicatory authority. The court therefore held that § 2401(b) is a nonjurisdictional claim-processing rule subject to the presumption in favor of equitable tolling set forth in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The court overruled the contrary holding in *Marley v. United States*, 567 F.3d 1030, 1038 (9th Cir. 2009). The court held that the presumption in favor of equitable tolling was not overcome in this case.

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The court held that plaintiff Kwai Fun Wong's claim, which was not filed within six months after the denial of her administrative claim by the INS, was rendered untimely because of external circumstances beyond her control. In light of these circumstances, the court concluded that equitable tolling properly applied to excuse Wong's late-filed amended complaint, and that her Federal Tort Claims Act claim against the United States therefore could proceed.

Concurring in the judgment, Chief Judge Kozinski agreed with the dissents that 28 U.S.C. § 2401(b) is jurisdictional, but stated that he could not dissent in this case because Wong had filed a reply memorandum reiterating her request for leave to file a second amended complaint after the INS denied her claim and before the six-month section 2401(b) window slammed shut.

Dissenting, Judge Tashima, joined by Judge Bea, stated he joined Judge Bea's dissenting opinion in full, but wrote separately to clarify that the Federal Tort Claims Act's legislative history dispelled any doubt that the Act's limitations provision was intended to be jurisdictional.

Dissenting, Judge Bea stated that he believed that Congress clearly expressed its intent that 28 U.S.C. § 2401(b) would limit the jurisdiction of federal courts by providing that tort claims "shall be forever barred" unless action is begun within the six-month period following denial of the administrative claim by the concerned agency, with no exceptions.

OPINION

BERZON, Circuit Judge:

We agreed to hear this case en banc to clarify whether the statute of limitations in 28 U.S.C. § 2401(b) of the Federal Tort Claims Act ("FTCA") may be equitably tolled. We hold that § 2401(b) is not "jurisdictional," and that equitable tolling is available under the circumstances presented in this case.

I. BACKGROUND

A. Statutory Background

The FTCA contains three timing rules that govern when a plaintiff may file a claim against the United States in the district court: First, 28 U.S.C. § 2675(a) establishes an administrative exhaustion requirement, which states that "[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." Section 2675 further provides that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim." *Id.*

Second, one statute of limitations in § 2401(b) sets a two-year deadline within which a claimant must present his claim "to the appropriate Federal agency . . . after such claim accrues." *Id.* § 2401(b); *see United States v. Kubrick*, 444 U.S. 111, 119-21 (1979).

Finally, § 2401(b) also establishes a second limitations period—that "[a] tort claim against the United States shall

be forever barred . . . unless action is begun within six months after the . . . final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

With this statutory framework in mind, we turn to the procedural history of this case, the material facts of which are not in dispute.

B. Facts

More than a decade ago, Kwai Fun Wong ("Wong") and Wu Wei Tien Tao Association ("the Association"), a religious organization, sued the United States and several Immigration and Naturalization Service ("INS") officials for claims arising out of Wong's detention. *See Wong v. INS (Wong I),* 373 F.3d 952 (9th Cir. 2004); *Wong v. Beebe (Wong II),* No. 07-35426 (9th Cir. June 4, 2010) (per curiam). The only remaining claim is one under the FTCA, alleging negligence against the United States based on the conditions of her confinement.

Wong and the Association filed their original complaint in the district court on May 18, 2001. That same day, Wong filed her negligence claim with the INS pursuant to the FTCA's administrative exhaustion requirement, 28 U.S.C. § 2675(a). Under § 2675(a), Wong was required to wait six months—until November 19, 2001—or until the INS denied the claim, before filing her negligence claim in the district court. *See* 28 U.S.C. §§ 1346(b)(1), 2675(a).

On November 14, 2001, Wong filed a motion in the district court seeking leave to file a Second Amended Complaint adding the negligence claim "on or after November 20, 2001"—*i.e.,* after the six-month waiting period re-

quired under § 2675(a) had expired. The INS issued a written decision denying Wong's administrative claim on December 3, 2001.

At that point, Wong had until June 3, 2002, to file her negligence claim in the district court. Here is why: Pursuant to § 2675(a), Wong was prohibited from filing her claim in the district court until after she presented it to the INS and the INS "finally decided [the claim] . . . in writing and sent [it] by certified or registered mail." 28 U.S.C. § 2675(a). Alternatively, § 2675(a) gave Wong the option to treat the INS's "failure . . . to make final disposition of [her] claim within six months after it [was] filed" as the "final denial of the claim." *Id.* Wong attempted to exercise that option when she filed her motion in the district court seeking leave to file her amended complaint "on or after November 20, 2001"—six months after she filed her claim with the INS. Had her motion been granted, then, pursuant to § 2401(b), Wong would have had six months—until May 20, 2002—to file her amended complaint with the added FTCA claim in the district court. *See id.* § 2401(b). As noted, however, the INS denied Wong's claim on December 3, 2001, thereby starting anew the clock on the six-months limitations period in § 2401(b). Thus, the relevant deadline for filing Wong's claim in the district court was June 3, 2002. *See Lehman v. United States*, 154 F.3d 1010, 1015 (9th Cir. 1998).

On April 5, 2002, more than five months after Wong filed her motion seeking leave to amend, the magistrate judge issued Findings and Recommendations ("F & R") recommending that Wong be permitted to file an amended complaint adding her FTCA claim. The district court did

not issue an order adopting the F & R until June 25, 2002, three weeks after the six-month filing deadline had expired.

Wong did file an amended complaint on August 13, 2002, which included the FTCA claim. The district court, relying on *Marley v. United States*, 567 F.3d 1030, 1038 (9th Cir. 2009), held that § 2401(b) was "jurisdictional," and that equitable tolling was therefore not available to excuse Wong's untimely filing of her claim. The district court dismissed Wong's FTCA claim for lack of jurisdiction. This appeal followed.

II. DISCUSSION

A. Applicability of Equitable Tolling to FTCA Claims

1. General Background

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), sets forth the "general rule . . . govern[ing] the applicability of equitable tolling in suits against the Government." *Id.* at 95. That case considered whether the "rule of equitable tolling" applied to an untimely Title VII claim brought against the government. *Id.* at 94-95. Noting that "[t]ime requirements in lawsuits between private litigants are customarily subject to equitable tolling," *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96 (internal quotation marks omitted).

Irwin's "general rule" is not without exception. Some statutes of limitation are "more absolute," and do not permit "court[s] to consider whether certain equitable considerations warrant extending a limitations period." *John*

R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008). "As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as 'jurisdictional.'" *Id.* at 134 (citing *Bowles v. Russell*, 551 U.S. 205, 210 (2007)).

The "jurisdiction" terminology used in the government-defendant equitable tolling context can, however, be misleading. In a series of recent cases, the Supreme Court has "pressed a stricter distinction between *truly* jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004) (emphasis added)). This distinction is critical for present purposes, because, while courts "[have] no authority to create equitable exceptions to jurisdictional requirements," *Bowles*, 551 U.S. at 214, nonjurisdictional claim-processing requirements remain "subject to [*Irwin's*] rebuttable presumption in *favor* of equitable tolling." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (internal quotation marks omitted).

Applying these principles to the particular statute of limitations here, our case law has come to contradictory results. *Alvarez-Machain v. United States (Alvarez-Machain I)*, 107 F.3d 696, 701 (9th Cir. 1996), held that "[e]quitable tolling is available for FTCA claims in the appropriate circumstances." Twelve years later, *Marley* held precisely the opposite, stating "that the statute of limitations in 28 U.S.C. § 2401(b) is jurisdictional and, conse-

quently, equitable doctrines that otherwise could excuse a claimant's untimely filing do not apply."[1] 567 F.3d at 1032; *see also Adams v. United States,* 658 F.3d 928, 933 (9th Cir. 2011) (applying *Marley*).

We agreed to hear this case to resolve the conflict between *Alvarez-Machain I* and *Marley. See Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc). Doing so, we join with several other circuits in concluding that § 2401(b) is subject to equitable tolling. *See Arteaga v. United States,* 711 F.3d 828, 832-33 (7th Cir. 2013); *Santos ex rel. Beato v. United States,* 559 F.3d 189, 194-98 (3d Cir. 2009); *Perez v. United States,* 167 F.3d 913, 916-17 (5th Cir. 1999).

2. Jurisdictional vs. Nonjurisdictional Claim-Processing Rules

As a threshold matter, we must decide whether § 2401(b) is a "jurisdictional" rule, to which equitable doctrines cannot apply, or a nonjurisdictional "claim-proces-

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[1] *Marley* dismissed *Alvarez-Machain I* as having "no precedential value" because the panel opinion in that case was vacated and the case was taken en banc. *See Marley,* 567 F.3d at 1037-38 (citing *Alvarez-Machain v. United States (Alvarez-Machain III),* 284 F.3d 1039 (9th Cir. 2002)). But the opinion that was vacated by *Alvarez-Machain III* was not *Alvarez-Machain I.* Rather, it was a different opinion in the same case: *Alvarez-Machain v. United States (Alvarez-Machain II),* 266 F.3d 1045 (9th Cir. 2001). Thus, *Alvarez-Machain I* was still good law when *Marley* was decided. The result was an intracircuit conflict, which we can resolve only through en banc proceedings. *See Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc).

sing rule" subject to *Irwin's* presumption in favor of equitable tolling. Both *Alvarez-Machain I* and *Marley* were decided without the benefit of the Supreme Court's most recent decisions clarifying the difference between these two categories. Accordingly, before turning to § 2401(b) itself, we discuss the Court's efforts in recent years to "bring some discipline" to the "jurisdictional" label. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011); *see also Gonzalez*, 132 S. Ct. at 648.

The consequences of labeling a particular statutory requirement "jurisdictional" are "drastic." *Gonzalez*, 132 S. Ct. at 648. A court's "[s]ubject-matter jurisdiction can never be waived or forfeited," "objections [to the court's jurisdiction] may be resurrected at any point in the litigation," and courts are obligated to consider *sua sponte* requirements that "go[] to subject-matter jurisdiction." *Id.*; *see also Henderson*, 131 S. Ct. at 1202; *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1219 (9th Cir. 2009).

The Court has clarified in recent years that the term "'[j]urisdiction[al]' refers to a court's adjudicatory authority . . . [and] properly applies *only* to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010) (emphasis added) (internal quotation marks and citation omitted). Under this narrow interpretation, the term "jurisdictional" "refers [only] to a tribunal's power to hear a case." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009) (internal quotation marks omitted). So-called "claim-processing

rules," by contrast, "are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

"To ward off profligate use of the term 'jurisdiction,' [the Court has] adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)). Specifically, courts must now ask "whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement . . . 'courts should treat the restriction as nonjurisdictional in character.'" *Id.* (quoting *Arbaugh*, 546 U.S. at 515-16). Congress need not "incant magic words in order to speak clearly." *Id.* Rather, courts are to review a statute's language, "context, and relevant historical treatment" to determine whether Congress clearly intended a statutory restriction to be jurisdictional. *Reed Elsevier, Inc.*, 559 U.S. at 166.

Applying this bright-line rule in a spate of recent cases, the Court has held nonjurisdictional various statutory limitations on the substantive coverage of statutes or the procedures for enforcing them. *See, e.g., Union Pac. R.R.*, 558 U.S. at 81-82 (holding not jurisdictional a Railway Labor Act procedural rule requiring proof of a prearbitration settlement conference); *Reed Elsevier*, 559 U.S. at 164-66 (holding not jurisdictional the Copyright Act registration requirement); *Gonzalez*, 132 S. Ct. at 648-52 (holding not jurisdictional certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requiring issuance of a certificate of appeala-

bility indicating which specific issues sufficiently implicate the denial of a constitutional right); *but see Bowles*, 551 U.S. at 209-10 (holding jurisdictional a time limit for filing a notice of appeal in a civil case under 28 U.S.C. § 2107(c)).

As the issue here pertains to a statute of limitations, the Court's recent decisions applying the "clear statement" rule to statutory time limits are particularly instructive. *Henderson* held that "a veteran's failure to file a notice of appeal within the 120-day period" required under 38 U.S.C. § 7266(a) "should [not] be regarded as having 'jurisdictional' consequences." 131 S. Ct. at 1200. Canvassing the Court's recent case law discussing jurisdictional versus nonjurisdictional rules, *Henderson* explained that "[f]iling deadlines . . . are *quintessential* claim-processing rules." *Id.* at 1203 (emphasis added). "[E]ven if important and mandatory," such rules, "should not be given the jurisdictional brand." *Id.*

Turning to the text of § 7266, *Henderson* emphasized that the relevant provision "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [Veterans Court].'" *Id.* at 1204 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) (alteration in original)). Although "§ 7266 is cast in mandatory language"—providing that a claimant "*shall* file a notice of appeal . . . within 120 days"—*Henderson* "rejected the notion that 'all mandatory prescriptions, *however emphatic*, are . . . properly typed jurisdictional.'" *Id.* at 1204-05 (quoting *Union Pac. R.R.*, 558 U.S. at 81) (emphasis added). Indeed, as *Henderson* noted, Congress placed § 7266 "in a subchapter entitled 'Procedure,' " and not in the "Organization and Jurisdiction" subchapter of the statute, which "suggests Congress regarded the 120-

day limit as a claim-processing rule." *Id.* *Henderson* therefore found no clear statement indicating that § 7266 was "jurisdictional." *Id.; see also Holland*, 130 S. Ct. at 2560 (holding not jurisdictional AEDPA's statute of limitations in 28 U.S.C. § 2244(d)).

More recently, *Auburn Regional Medical Center* considered whether the Medicare Act's 180-day statutory deadline for filing an administrative appeal challenging Medicare reimbursements is jurisdictional. 133 S. Ct. at 821. The Court held that it is not. "Key to our decision," the Court explained, is that "filing deadlines ordinarily are not jurisdictional; indeed, we have described them as 'quintessential claim-processing rules.'" *Id.* at 825 (quoting *Henderson*, 131 S. Ct. at 1203).

Auburn Regional Medical Center went on to reject the notion that the 180-day limit was "jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Id.* at 825. Nor was it significant in *Auburn Regional Medical Center* that Congress "expressly made . . . *other* time limits in the Medicare Act" nonjurisdictional. *Id.* (emphasis added). Structural considerations such as these did not provide a "clear statement" that Congress intended the 180-day limit to be jurisdictional. The limitations provision was therefore "most sensibly characterized as a nonjurisdictional prescription." *Id.* at 826.

Finally, we applied a similar analysis in a recent en banc case addressing whether the exhaustion-of-remedies requirement of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(*l*), is jurisdictional. *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (2011) (en

banc). Based on the Supreme Court's recent line of cases "clarifying the difference between provisions limiting our subject matter jurisdiction, which cannot be waived . . . , and 'claims processing provisions,'" we concluded that § 1415(*l*) is not jurisdictional for three reasons. *Id.* at 867-69 (citing cases).

First, "we observe[d] that nothing in § 1415 mentions the jurisdiction of the federal courts." *Id.* at 869. "Second, nothing in the relevant jurisdictional statutes requires exhaustion under the IDEA." *Id.* at 870. "Without clearer instruction from Congress," we declined to "infer" a jurisdictional exhaustion-of-remedies requirement. *Id.* "Finally, we [could] find no reason why § 1415(*l*) should be read to make exhaustion a prerequisite to the exercise of federal subject matter jurisdiction." *Id.* To the contrary, we suggested that there were "many good reasons why" § 1415(*l*) should not qualify as jurisdictional. Most notably, determining whether a plaintiff had exhausted her remedies is an "inexact science," subject to various "fact-specific" questions such as whether exhaustion would be futile. *Id.* Thus, we summarized, § 1415(*l*) is not jurisdictional, as it "is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions." *Id.* at 870-71 (quoting *Reed Elsevier*, 559 U.S. at 166); *see also Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 979 (9th Cir. 2012) (holding that an employee's status as a plan "participant" is an element of his ERISA claim, not a jurisdictional limitation).

3. § 2401(b) Is Not Jurisdictional

Marley stated that "[r]esolution of the present case . . . [first] depends on how to categorize the six-month filing deadline of § 2401(b)"—as a "jurisdictional" requirement or as a nonjurisdictional "claim-processing rule." 567 F.3d at 1035. That is true, but only in the asymmetrical sense that if the deadline is jurisdictional, it cannot be tolled; as will appear, even if it is not jurisdictional, tolling may still be precluded by a sufficiently clear congressional expression of that restriction. We hold that § 2401(b) falls squarely in the claim-processing category, and so overrule *Marley's* contrary conclusion.

Several factors underlie our conclusion that § 2401(b) is nonjurisdictional.

a. *Language*

First, by its terms, § 2401(b) provides only that "[a] tort claim against the United States shall be forever barred unless . . . action is begun within six months" of mailing of notice of the final agency denial. 28 U.S.C. § 2401(b). That statement "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [federal courts]." *Henderson*, 131 S. Ct. at 1204; *see also Payne*, 653 F.3d at 869-70. Rather, § 2401(b) merely states what is ordinarily true of statutory filing deadlines: once the limitations period ends, whether extended by the application of tolling principles or not, a plaintiff is "forever barred" from presenting his claim to the relevant adjudicatory body. *See Kubrick*, 444 U.S. at 117.

Notably, although the exact language differs, § 2401(b) is the same in its lack of a reference to jurisdiction as

the general, non-tort statute of limitations contained in § 2401(a), which establishes a six-year filing deadline for "every civil action commenced against the United States." 28 U.S.C. § 2401(a). And *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), held subsection (a) nonjurisdictional, emphasizing that it "does not speak of jurisdiction, but erects only a procedural bar."[2]

Contrary to the government's assertion, § 2401(b) does not contain such unusually emphatic language that we may infer congressional intent to limit the adjudicatory authority of the federal courts from that language. We have held on prior occasions that statutes of limitations containing the phrase "forever barred" are subject to equitable tolling. For example, the 1955 Clayton Act Amendments provided that any action to enforce a right under §§ 15, 15a, and 15c of the Act "shall be *forever barred* unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (emphasis added); *see also* Pub. L. No. 137, 69 Stat. 283 (1955). *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 396-407 (9th Cir. 1980), determined that § 15b could be equitably tolled. *See also Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060-61 (9th Cir. 2012) (discussing tolling under § 15b); *cf. Rotella v. Wood*, 528 U.S. 549,

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[2] *Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 872 (9th Cir. 2009), called into question *Cedars-Sinai's* continued vitality following the Supreme Court's decision in *John R. Sand & Gravel Co.*, 552 U.S. 130 (2008). That statement was made without the benefit of the Supreme Court's most recent decisions clarifying the distinction between jurisdictional and nonjurisdictional rules.

561 (2000) (indicating that equitable tolling may be available for civil claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which applies the same four-year statute of limitations in 15 U.S.C. § 15b).

Likewise, the 1947 amendments to the Fair Labor Standards Act ("FLSA")—which were enacted on the heels of the FTCA—provided that every action under the FLSA "shall be *forever barred* unless commenced within two years after the cause of action accrued" 29 U.S.C. § 255(a) (emphasis added); *see also* Pub. L. No. 40, § 6(b), 61 Stat. 84, 88 (1947). *Partlow v. Jewish Orphans' Home of Southern California*, 645 F.2d 757, 760-61 (9th Cir. 1981), *abrogated on other grounds by Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), held that this statute of limitations could be equitably tolled.

In various other statutes enacted in the mid-twentieth century, Congress included limitations provisions "forever barr[ing]" untimely claims. *See, e.g.*, Automobile Dealer Franchise Act of 1956, 84 Pub. L. No. 1026, § 3, 70 Stat. 1125 (1956), *codified at* 15 U.S.C. § 1223 ("Any action brought pursuant to this Act shall be *forever barred* unless commenced within three years after the cause of action shall have accrued.") (emphasis added); National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 111(b), 80 Stat. 718, 725 (1966), *as amended by* Pub. L. No. 103-272, 108 Stat. 745 (1994) ("Any action brought pursuant to this section shall be *forever barred* unless commenced within three years after the cause of action shall have accrued.") (emphasis added); Agricultural Fair Practices Act of 1967, Pub. L. No. 90-288, § 6(a), 82 Stat. 93, 95 (1967), *codified at* 7 U.S.C. § 2305(c) (same); Na-

tional Mobile Home Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, § 613, 88 Stat. 633, 707 (1974), *codified at* 42 U.S.C. § 5412(b) (same). Viewed against this backdrop, § 2401(b)'s "forever barred" language appears to be more a vestige of mid-twentieth-century congressional drafting conventions than a "clear statement" of Congress's intent to include a jurisdictional filing deadline in the FTCA.

Moreover, even if one does read the "forever barred" language in § 2401(b) as an especially emphatic limitation on FTCA claims, the Supreme Court's recent line of cases clarifying the jurisdictional/nonjurisdictional distinction make plain that not all "'mandatory prescriptions, *however emphatic*, are . . . properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pac. R.R.*, 558 U.S. at 81) (emphasis added); *see also Gonzalez*, 132 S. Ct. at 651; *Kontrick*, 540 U.S. at 454. And nothing in the text of § 2401(b) suggests that it is anything other than a straightforward filing deadline—a "quintessential claim-processing rule[]." *Henderson*, 131 S. Ct. at 1203.

Undeterred by the statute's silence as to whether the limitations period is jurisdictional (and by its placement in a section not directed at jurisdiction), Judge Bea offers a grand theory as to why § 2401(b) nonetheless clearly states a jurisdictional rule, positing that there are two types of statutes of limitations: "Plain Statutes of Limitations" and "Consequence Statutes of Limitations." Bea Dissent at 67, 71. The latter purportedly "provide mandatory consequences for failures to act according to their prescriptions," *id.* at 72, and so "require the courts to respond in a certain way to a party's failure to timely act." *Id.* Judge Bea's dissent goes on to maintain that *when-*

ever a limitations provision states that a claim "shall be . . . barred," or "forever barred," "Congress has spoken in jurisdictional terms" and the courts lack authority to adjudicate the claim—even if there is no mention of jurisdiction or placement in a jurisdiction provision. *Id.* at 72-74.

Judge Bea's consequential language approach is not one that the Supreme Court has ever articulated or relied upon in determining whether a particular limitations provision is jurisdictional. Indeed, the Court criticized this approach in *Irwin*, noting that, "[a]n argument can undoubtedly be made that the . . . language is more stringent . . . , but we are not persuaded that the difference . . . is enough to manifest a different congressional intent with respect to the availability of equitable tolling." 498 U.S. at 95. While the Court has held jurisdictional certain limitations provisions containing the phrase "shall be . . . barred," it has never relied on the notion of "consequential" language to do so.[3] Instead, the Court has repeatedly eschewed a "magic words" ap-

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[3] Contrary to Judge Bea's assertion, *John R. Sand & Gravel* did not hold 28 U.S.C. § 2501 "jurisdictional" based on the "consequential" language of the statute. Rather, it held *Irwin's* presumption of equitable tolling rebutted based on the fact that "the Court had . . . previously provided a definitive interpretation" of § 2501. 552 U.S. at 137. Nor did *Bowles* hold that the limitations provision in 28 U.S.C. § 2107 was jurisdictional solely based on its "consequential" language; like *John R. Sand & Gravel*, *Bowles* rested largely on the "century's worth of precedent and practice in American courts" ranking "time limits for filing a notice of appeal" jurisdictional. 551 U.S. at 209 n.2.

proach to determining whether procedural requirements are jurisdictional, repeatedly taking a multifactor approach to the inquiry. *See Reed Elsevier,* 559 U.S. at 165; *Auburn Reg'l Med. Ctr.,* 133 S. Ct. at 824.

Beyond that observation, we shall bypass ruling on whether Judge Bea's "consequential" language theory is a helpful construct in some circumstances. As with most attempts to create rigid dichotomous categories, the trick is not in devising the categories but in placing various circumstances into one or the other category. Although, according to Judge Bea, a limitations provision containing "shall . . . be barred" language "'set[s] forth an inflexible rule requiring dismissal,'" Bea Dissent at 75 (quoting *Holland,* 130 S. Ct. at 2560), the words relied upon simply do not have that import.

First, as to the word "shall," the Court consistently has rejected arguments "seiz[ing] on the word 'shall'" to suggest that "'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'" *Gonzalez,* 132 S. Ct. at 651 (quoting *Henderson,* 131 S. Ct. at 1205); *see also Dolan v. United States,* 130 S. Ct. 2533, 2539 (2010) (holding that a statute's use of the word "shall" alone does not render statutory deadline jurisdictional).

Second, § 2401(b) does not in terms order *courts* to do anything, including dismiss any untimely claim. Like the exhaustion-of-remedies requirement at issue in *Payne,* "neither the word 'courts' nor the word 'jurisdiction' appears in [§ 2401(b)]." *Payne,* 653 F.3d at 869. Instead, the phrase "shall be . . . barred" is couched in the passive tense, and so could as well be directed to the plaintiff, barring him from filing the suit, as to the court, di-

recting it to bar the filing. The "shall be . . . barred" language of the six-month filing deadline therefore does not express "an inflexible rule requiring dismissal whenever its clock has run." *Holland*, 130 S. Ct. at 2560 (internal quotation marks omitted).

Third, the word "forever" in § 2401(b) cannot supply the missing link with regard to declaration of an inflexible rule. *See* Bea Dissent at 76-77. The word "forever" is most commonly understood as one focusing on *time*, not on scope or degree of flexibility in a static time frame. *See* Webster's New International Dictionary of the English Language 990 (2d ed. 1940) (defining "forever" to mean "[f]or a limitless time or endless ages; everlastingly; eternally," and "[a]t all times; always; incessantly"); Oxford English Dictionary (2013) (defining "forever" to mean "[a]lways, at all times; in all cases . . . [t]hroughout all time, eternally; throughout all past or all future time; perpetually"). As such, the term "forever" is most naturally read to emphasize that an untimely FTCA claim, once barred, is precluded permanently, not temporarily or until some later event occurs. A claimant therefore cannot refile the claim, nor may the time bar be lifted once it is imposed. So understood, the term "forever" does have a function in the statute, just not the one Judge Bea posits.[4] Thus, as the Fifth Circuit observed, "the use of the

[4] It is unclear how much weight the Bea dissent accords the term "forever." For the most part, the dissent categorizes statutes that simply use "shall be barred" terminology as within its self-created "consequence" category. See Bea Dissent at 72-75. But Judge Bea then devotes an entire section to the word "forever," and writes

words 'forever barred' [in § 2401(b)] is irrelevant to equitable tolling, which properly conceived does not resuscitate stale claims, but rather prevents them from becoming stale in the first place."[5] *Perez*, 167 F.3d at 916.

In sum, nothing in the language of § 2401(b)—including the term "shall . . . be barred," and the word "for-

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that "[i]t is especially telling" that Congress included the term "forever barred" in § 2401(b), but did not do so in § 2401(a), "the very section that precedes the one here in issue." Bea Dissent at 76-79.

In fact, as we have noted, § 2401(a) does provide that an FTCA claim "shall be barred" unless it is filed within six years after the right of action accrues. *See* 28 U.S.C. § 2401(a); see also Act of June 25, 1948, chap. 646, 62 Stat. 971 (1948). Thus, the dissent seems to rest, at least in part, on the proposition that it is the word "forever" that transforms limitations language into the "consequential" variety. For reasons discussed in the text, the word "forever" cannot bear that weight.

[5] Judge Bea also takes issue with *Partlow* and *Mount Hood Stages*, *supra*, which, as discussed above, held statutes of limitation containing language similar to § 2401(b) subject to equitable tolling. Judge Bea questions the value of these precedents because they preceded the Court's more recent cases distinguishing between jurisdictional and nonjurisdictional rules. Bea Dissent at 84-87. As noted, however, later decisions by this Court and the Supreme Court affirm the availability of equitable tolling under 15 U.S.C. § 15b, the statute at issue in *Partlow*. See *Hexcel Corp.*, 681 F.3d at 1060-61; *Rotella*, 528 U.S. at 561. More fundamentally, these precedents undermine the notion that Congress intended through the use of magic words in the Clayton Act Amendments and FLSA limitations provisions to establish jurisdictional bars in statutes allowing for civil suits against private parties.

ever"—supplies a "clear statement" that Congress intended the six-month filing deadline to be jurisdictional.[6]

b. *Placement*

The "context" surrounding § 2401(b) likewise does not "clearly" indicate Congress's intent to "rank" this provision as jurisdictional. *Auburn Reg'l Med. Ctr.,* 133 S. Ct. at 824.

The jurisdiction-granting provision of the FTCA is located at 28 U.S.C. § 1346(b)(1) and provides that "[s]ubject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . under circumstances where the United States, if a private person, would be liable to the claimant." Section 1346(b)(1) makes no mention of the six-month filing dead-

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[6] Judge Bea's reference to *Kendall v. United States*, 107 U.S. 123 (1883), as support for attributing jurisdictional meaning to the phrase "forever barred," Bea Dissent at 77-78, is misplaced. Though *John R. Sand & Gravel* did rely on *Kendall*, it did so not because of *Kendall*'s logic, but out of deference to "[b]asic principles of *stare decisis*," *John R. Sand & Gravel*, 552 U.S. at 139, as the statute in *John R. Sand & Gravel* was the same court of claims statute that *Kendall* (and *Finn v. United States*, 123 U.S. 227 (1887), and *Soriano v. United States*, 352 U.S. 270 (1957)) had already interpreted. *Id.* at 134-35. Indeed, *John R. Sand & Gravel* recognized that the older cases on which it relied were out of step with *Irwin*, but justified that reliance on "Justice Brandeis['s] . . . observ[ation] that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.* at 139 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting opinion)).

line in § 2401(b). Furthermore, while § 1346(b)(1) does cross-reference "the provisions of chapter 171," it does *not* cross-reference § 2401(b), which is located in chapter 161, not chapter 171. Thus, the FTCA's statute of limitations "is located in a provision separate from [the provision] granting federal courts subject-matter jurisdiction over [FTCA] claims." *Reed Elsevier*, 559 U.S. at 164 (internal quotation marks omitted); *see also Henderson*, 131 S. Ct. at 1205.

Further, even if § 1326(b) did mention the six-month filing deadline in § 2401(b), the Court's recent guidance on this subject indicates that an otherwise nonjurisdictional rule's location within a statutory scheme does not automatically transform the rule into a jurisdictional prerequisite. Thus, a rule "does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825; *see also Gonzalez*, 132 S. Ct. at 651.

Not satisfied with the plain language of § 1346(b), the government looks elsewhere for a "clear statement" of § 2401(b)'s jurisdictional import: the legislative history of the FTCA. According to the government, "[t]he FTCA's limitations provision is found outside of chapter 171 only as a happenstance of recodification." In his dissent, Judge Tashima likewise relies on the earlier version of the FTCA to conclude that "Congress provided a clear statement [that the FTCA's limitations provision was jurisdictional] when enacting the provision in 1946," and that statement remains clear today. Tashima Dissent at 59.

In the first place, and dispositively, it is improper to consider legislative history in this instance. "[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Consequently, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)) (internal quotation marks omitted). The current statutory language of § 1326(b), the FTCA jurisdictional provision, cross-references other provisions of the FTCA but not the chapter containing the limitations provision, § 2401(b). There is no ambiguity whatever in this regard; chapter 171 is not, and does not include, chapter 161, period.[7]

Secondly, even if we were to consider the FTCA's legislative history, we could find no "clear statement" as to jurisdiction. *See Exxon Mobil*, 545 U.S. at 568-69. Congress first enacted the FTCA in 1946 as Title IV of the Legislative Reorganization Act ("1946 Act"). *See* Pub. L. No. 79-601, tit. IV, 60 Stat. 812, 842-47 (1946). The provi-

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[7] The fact that this statute "produce[d] an intracircuit split, several en banc dissents, and dozens of pages of analysis by the majority," Tashima Dissent at 56, does not mean that the cross reference to chapter 171 is itself ambiguous. While reasonable jurists may certainly debate the general equitable tolling question this case presents, the cross reference to chapter 171, and not to chapter 161, is plain as day.

sions of the FTCA were codified in chapter 20 of Title 28 of the United States Code. *See* 28 U.S.C. §§ 921-46 (1946).[8] As originally codified, the FTCA's grant of jurisdiction read:

> Subject to the provisions of this chapter, the United States district court for the district court wherein the plaintiff is resident or wherein the act or omission complained of occurred . . . shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only . . . on account of personal injury or death caused by the negligent or wrongful act or omission of

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[8] The original limitations provision in Section 420 of the Act provided:

> Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued . . . it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued . . . an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

60 Stat. 812, 845. As originally enacted, the FTCA did not *require* claimants to exhaust their administrative remedies. That requirement was added in 1966. See 28 U.S.C. § 2401(b) (1994); H.R. Rep. No. 89-1532 at 6-7 (1966); S. Rep. No. 89-1327 at 2-3 (1966).

> 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 for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 931(a) (1946). Congress recodified and reorganized all of Title 28 in 1948, and, in the course of doing so, placed the FTCA's limitations provision in its current location in chapter 161, while placing most of the other FTCA provisions formerly located in chapter 20 in chapter 171. Pub. L. No. 80-773 ("1948 Act"), 62 Stat. 869, 970-74 (1948); *id.* 62 Stat. 869, 982-85. The jurisdiction-granting provision was relocated to chapter 85 and codified at 28 U.S.C. § 1346(b). *Id.* at 933. Because § 1346(b) was no longer located in the same chapter as the other FTCA provisions, the "subject to" phrase was changed to refer to "the provisions of chapter 173 of this title." *Id.*

As Judge Tashima points out, the reference in the 1948 version of § 1346(b) to chapter 173 was a scrivener's error, as there was no chapter 173 of Title 28. Tashima Dissent at 53. A year later, Congress corrected the error, changing the language of § 1346(b) to read: "[s]ubject to the provisions of chapter 171." *See* Pub. L. No. 81-55, 63 Stat. 62 (1949). But that correction did nothing to erase the fact that the only cross-reference in the jurisdictional provision, § 1346(b), is to a chapter, chapter 171, which *does not* contain the FTCA limitations provisions.

Nor does the directive of the 1948 Act that we are not to "infer . . . a legislative construction from the chapter in which a provision appears" override the plain

terms of § 1346(b) as revised. No *inference* is required to conclude that the FTCA jurisdictional provision is no longer "subject to" the limitations section. Instead, one need only read § 1346(b) to determine that that is so; again, chapter 161 is not chapter 171, period. Thus, although the Court "does not presume that the 1948 revision worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed," *John R. Sand & Gravel Co.,* 552 U.S. at 136 (internal quotation marks omitted), that intent *was* clearly expressed when the cross-reference to § 1346(b) was revised to include many provisions of the FTCA but not the applicable limitations period.

Under Judge Tashima's "inference" approach to the clear statutory language, it would not have mattered what Congress wrote into the FTCA's jurisdictional grant in 1948 (and later corrected in 1949). Congress could have revised the statute to read "Subject to the provisions of chapter 171" (as it eventually did); "Subject to the provisions of chapter 171 and 161"; or "Subject to the provisions of chapter 161," and Judge Tashima's interpretation would still be the same—"subject to any provision of the original FTCA as codified in 1946."[9]

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[9] We note as well that the proposition that *any* requirement that the FTCA's jurisdictional grant is "subject to" is automatically a jurisdictional prerequisite is a questionable one. The fact that § 1326(b) requires plaintiffs to comply with certain requirements to file a claim against the United States does not mean that each and every one of those requirements concern "a tribunal's power to hear a case." *Union Pac. R.R.*, 558 U.S. at 81. Indeed, "subject to" or-

We hold, instead, that § 1346(b) means what it says: that the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States[] for money damages," "[s]ubject to the provisions of chapter 171." 28 U.S.C. § 1346(b). The FTCA's legislative history cannot supply a "clear statement" to the contrary. Accordingly, there is no contextual reason to think that the limitations period provisions are jurisdictional.[10]

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iginally encompassed section 411 of Title IV, which made the Federal Rules of Civil Procedure applicable in FTCA cases; under Judge Tashima's approach, compliance with the Federal Rules would have thus been a jurisdictional requirement. "Subject to" is more sensibly read to mean that litigants have to follow the prescribed procedures, not that each and every one of those procedures, if not followed, gives rise to the "drastic" consequences that follow from lack of subject matter jurisdiction. *See Gonzalez*, 132 S. Ct. at 648. We have never held otherwise. And where the Supreme Court has held a specific provision in chapter 171 jurisdictional, it has not done so because every rule in chapter 171 is a jurisdictional requirement. *See McNeil v. United States*, 508 U.S. 106, 111-13 (1993); *Smith v. United States*, 507 U.S. 197, 199 (1993).

[10] Aside from our holdings in *Brady v. United States*, 211 F.3d 499, 502-03 (9th Cir. 2000), and *Lesoeur v. United States*, 21 F.3d 965, 967 (9th Cir. 1994), which held, respectively, that the administrative exhaustion requirement in § 2675(a) and discretionary function exception in § 2680(a) are jurisdictional, we have not addressed whether any of the other provisions in chapter 171 of the FTCA set forth jurisdictional requirements. In holding § 2401(b) nonjurisdictional, we express no views as to whether the other provisions located in chapter 171 are jurisdictional.

c. *Exceptions*

In holding § 2401(b) "jurisdictional," *Marley* found it significant that Congress "explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b)." 567 F.3d at 1037. Section 2401(a) provides, in relevant part, that an "action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. § 2401(a). *Marley* reasoned that "[b]ecause Congress chose to extend the time limit in § 2401(a) under certain circumstances, but did not include any exceptions to the limitations period of § 2401(b), we must conclude that Congress intended the deadlines of § 2401(b) to be adhered to strictly." 567 F.3d at 1037 (emphasis omitted).

That conclusion cannot be squared with *Auburn Regional Medical Center*, which rejected the argument that a statutory time limit "should be viewed as jurisdictional because Congress could have expressly made the provision nonjurisdictional, and indeed did so for other time limits in the [statute]." 133 S. Ct. at 825. Although "Congress's use of certain language in one part of the statute and different language in another can indicate that different meanings were intended," that interpretive principle cannot, without more, provide the "clear statement" required to classify § 2401(b) as "jurisdictional." *Id.* at 825-26 (internal quotation marks omitted); *see also Santos*, 559 F.3d at 195-96.

d. *Earlier Cases*

Finally, unlike in *Bowles*, 551 U.S. at 210-13, and *John R. Sand & Gravel*, 552 U.S. at 137-39, there has not been a

venerable, consistent line of cases treating the FTCA limitations period as jurisdictional counseling against switching gears now. Although we have held that § 2401(b) is jurisdictional, *see Marley,* 567 F.3d at 1035-36 (citing *Berti v. V.A. Hosp.,* 860 F.2d 338, 340 (9th Cir. 1988); *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983); *Blain v. United States,* 552 F.2d 289, 291 (9th Cir. 1977) (per curiam); *Mann v. United States,* 399 F.2d 672, 673 (9th Cir. 1968)), unlike in *Bowles* and *John R. Sand & Gravel,* there is no Supreme Court precedent on the question. *See Reed Elsevier,* 559 U.S. at 173-74 (Ginsburg, J. concurring) (rejecting citation to non-Supreme Court precedent because *Bowles* and *John R. Sand & Gravel* "relied on longstanding decisions of *this* Court typing the relevant prescriptions 'jurisdictional'") (emphasis in original). And we have also held otherwise in *Alvarez-Machain I,* 107 F.3d 696.

Further, the pre-*Alvarez-Machain I* cases cited in *Marley* preceded both *Irwin* and the Supreme Court's more recent decisions clarifying the distinction between jurisdictional and nonjurisdictional rules. Indeed, our pre-*Alvarez-Machain I* decisions are emblematic of the "drive-by jurisdictional rulings" to which the Supreme Court has cautioned against giving "precedential effect" in its more recent cases. *See Arbaugh,* 546 U.S. at 511. For example, *Berti,* a three-page opinion, labels § 2401(b) "jurisdictional," but provides no analysis as to the meaning or significance of that term.[11] *See Berti,* 860 F.2d at 340.

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[11] *Blain*, *Mann*, and *Augustine*, cited in *Marley*, addressed the two-year administrative claim limitation period in § 2401(b), not the

Accordingly, this is certainly not the "exceptional [case] in which a 'century's worth of precedent and practice in American courts' rank [the] time limit as jurisdictional." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (quoting *Bowles*, 551 U.S. at 209 n.2).

e. *Purpose*

Finally, with regard to the particular role of the FTCA's six-month limitations period for filing suit we "find no reason why [§ 2401(b)] should be read . . . [as] a prerequisite to the exercise of federal subject matter jurisdiction." *Payne*, 653 F.3d at 870.

First, the consideration that the FTCA authorizes suits against the federal government does not, standing alone, supply such a reason. In so concluding, "[w]e . . . have in mind that the [FTCA] waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Kubrick*, 444 U.S. at 117-18; *see also Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 287 (1983). But the fact that the FTCA is predicated on a sovereign immunity waiver does not make the six-month filing deadline a jurisdictional prerequisite, not subject to equitable tolling. Although waivers must be "strictly construed," *Irwin* explained that "[o]nce Congress has made such a waiver, . . . making the rule of equitable tolling applicable to suits against

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six-month post-exhaustion period. *See Blain*, 552 F.2d at 291; *Mann*, 399 F.2d at 673; *Augustine*, 704 F.2d at 1077.

the Government, in the same way that is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U.S. at 94-95.

John R. Sand & Gravel, 552 U.S. 130, is not to the contrary. That case did note that "[t]he Court has often read the time limits of these [sovereign immunity waiver] statutes as more absolute," *id.* at 133-34, and "has sometimes referred to the time limits in such statutes as 'jurisdictional.'"[12] *Id.* at 133-34 (citing *Bowles*, 551 U.S. at 210). But *John R. Sand & Gravel* did not turn on any bright-line distinction between statutes of limitation that "protect a defendant's case-specific interest in timeliness," and those "limiting the scope of a governmental waiver of sovereign immunity." 552 U.S. at 133-34. Instead, *John R. Sand & Gravel* reiterated and applied *Irwin*'s presumption that equitable tolling applies to statutes of limitations in suits against the government, distinguishing *Irwin* on the grounds that "*Irwin* dealt with a different limitations statute [that] . . . , while similar to [§ 2501] in language, is unlike [§ 2501] in the key respect that the Court had not previously provided a definitive interpretation." *Id.* at 137.

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[12] The Court's other recent cases discussing the distinction between jurisdictional and nonjurisdictional statutes, including *Auburn Regional Medical Center*, 133 S. Ct. 817, *Gonzalez*, 132 S. Ct. 641, *Henderson*, 131 S. Ct. 1197, *Holland*, 130 S. Ct. 2549, and *Bowles*, 551 U.S. 205, also involve lawsuits against governmental entities. But they were not lawsuits in federal court against the federal government, and so may not raise precisely parallel sovereign immunity concerns.

Second, there is no reason to think § 2401(b) more concerned with "achiev[ing] a broader system-related goal" than simply with protecting the government's "case-specific interest in timeliness." *Id.* at 133. *Holland* is instructive in this regard. As noted above, *Holland* held that AEDPA's statute of limitations in 28 U.S.C. § 2244(d) is not jurisdictional, and therefore is "subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" 130 S. Ct. at 2560 (quoting *Irwin*, 498 U.S. at 95-96). Doing so, *Holland* rejected the argument "that equitable tolling undermines AEDPA's basic purposes." *Id.* at 2562. While acknowledging AEDPA's systemic goal of "eliminat[ing] delays in the federal habeas review process," *Holland* emphasized that AEDPA "[does] not seek to end every possible delay at all costs." *Id.* *Holland* therefore declined to read § 2244(d) as indicating "congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Id.*

Section 2401(b) likewise does not evince congressional intent to foreclose the application of equitable principles for the sake of "broader system-related goals." As *Kubrick* explained, § 2401(b)'s "obvious purpose[] . . . is to encourage the prompt presentation of claims." 444 U.S. at 117. That is consistent "with the general purpose of statutes of limitations: 'to protect defendants against stale or unduly delayed claims.'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (quoting *John R. Sand & Gravel*, 552 U.S. at 133).

McNeil v. United States, 508 U.S. 106 (1993), does not detract from our conclusion. *McNeil* strictly construed the administrative exhaustion requirement in 28 U.S.C. § 2675(a), holding that an FTCA action filed before ex-

haustion had been completed could not proceed in the district court even where the litigation had not substantially progressed. 508 U.S. at 111-13. The exhaustion requirement, unlike the § 2401(b) limitations period, *is* tied by explicit statutory language to jurisdiction, and was deemed "jurisdictional" in *Brady v. U.S.*, 211 F.3d 499, 502 (9th Cir. 2000). The "straightforward statutory command" in § 2675(a), *McNeil* explained, served "[t]he interest in orderly administration of this body of litigation." *Id.* at 112.

Judge Bea maintains that *McNeil*'s concern about the "orderly administration of [FTCA] litigation" with respect to the exhaustion-of-remedies requirement in § 2675(a) compels us also to treat § 2401(b)'s six-month filing deadline as jurisdictional. We disagree. Strict enforcement of an exhaustion requirement serves to assure a particular administrative interest—namely, the interest in assuring that agency officials have a full opportunity to investigate and consult internally with regard to claims for compensation due to negligence by agency employees. Further, that purpose recognized by the Supreme Court in *McNeil* —reducing court congestion by keeping claims out of court until an administrative agency has had a chance to settle them—is not implicated by § 2401(b)'s sixth-month post-exhaustion limitations period. *See id.* at 111-12, 112 n.8. Where agency exhaustion is required, there is notice of the claim and of the need for information collection, as well as an opportunity to settle the claim, well before suit is filed in court.

In short, nothing in the text, context, or purpose of § 2401(b) clearly indicates that the FTCA's six-month limitations period implicates the district courts' adjudica-

tory authority. We therefore hold that § 2401(b) is a nonjurisdictional claim-processing rule subject to the presumption in favor of equitable tolling, and so overrule *Marley*'s contrary holding.

4. The *Irwin* Presumption in Favor of Equitable Tolling

Having concluded that § 2401(b) is a nonjurisdictional statute of limitations subject to *Irwin*'s presumption in favor of equitable tolling, we must next determine whether that presumption has been overcome in this case. *See Holland*, 130 S. Ct. at 2560; *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1098 (9th Cir. 2005). "It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (internal quotation marks and citations omitted). We must therefore ask whether "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply" to § 2401(b). *United States v. Brockamp*, 519 U.S. 347, 350 (1997). There is no such reason.

As an initial matter, we note that the *Irwin* presumption regarding the tolling of limitations periods in suits against the federal government is particularly strong in FTCA cases. Various provisions of the FTCA confirm that suits against the government are to be treated no differently than suits against private defendants.

For example, § 2674, governing the "Liability of [the] United States," states that "[t]he 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*." 28 U.S.C. § 2674 (emphasis added); *see Arteaga*, 711 F.3d at 833. Likewise, § 1346(b)(1) grants the district courts exclusive jurisdiction over civil actions against the government "under circumstances where the United States, *if a private person*, would be liable." *Id.* § 1346(b)(1) (emphasis added). Thus, as a general matter, the FTCA places suits against the United States on equal footing with suits against private individuals.

The *Irwin* presumption is further strengthened by the "discovery" rule applicable to § 2401(b): A plaintiff is required to file her claim with the relevant federal agency "within two years after such claim accrues," *id.* § 2401(b). Applying the common law discovery rule—which does not appear in the statute—courts view a claim as "'accru[ing]' within the meaning of [§ 2401(b)] when the plaintiff knows both the existence and the cause of his injury." *See Kubrick*, 444 U.S. at 119-21 and n.7. As a practical matter, this common law rule "extends the statute of limitations by delaying the date on which it begins to run." *Arteaga*, 711 F.3d at 833. Application of a common law discovery rule not enunciated in the statute to aspects of § 2401(b) reinforces the notion that the FTCA's statutes of limitations admit of common law exceptions.

Without the discovery rule, the deadlines contained in § 2401(b) would closely resemble a "statute of repose": "a fixed, statutory cutoff date, usually independent of any variable, such as claimant's awareness of a violation." *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). "[L]ike a jurisdictional prerequisite," a statute of repose is not subject to equitable tolling. *Albillo-DeLeon*, 410 F.3d

at 1097 n.5; *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 534-36 (9th Cir. 2011). While a nonjurisdictional statute of limitations "bars plaintiff[s] from bringing an already accrued claim after a specified period of time," a statute of repose "terminates a right of action after a specific time, even if the injury has not yet occurred." *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n.7 (9th Cir. 2005).[13]

Far from setting a fixed cutoff date, § 2401(b) "is in the traditional form of a statute of limitations." *Johnson v. Aljian*, 490 F.3d 778, 781 n.12 (9th Cir. 2007). As such, just as it is subject to the common law discovery rule, so the presumption favoring equitable tolling applies.

That § 2401(b) acts as a condition on the FTCA's waiver of sovereign immunity does not alter our conclusion, essentially for the same reasons discussed earlier with regard to the jurisdictional question. With or without a waiver of sovereign immunity, the key inquiry, following *Irwin*, remains whether equitable tolling "is inconsistent

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[13] In *Munoz*, for example, we held that section 203 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997), was a statute of repose, because it contained "fixed, statutory cutoff date[s]" requiring an alien to file an application for relief by April 1, 1990 or December 31, 1991. The statute did "'not await a specific event to start the deadline clock,'" but "'[r]ather . . . served as the endpoint of the definite time period in which Congress would permit [applicants] to file applications.'" 339 F.3d at 957 (quoting *Iacono v. Office of Pers. Mgmt.*, 974 F.2d 1326, 1328 (Fed. Cir. 1992) (emphasis omitted)).

with the text of the relevant statute."[14] *United States v. Beggerly,* 524 U.S. 38, 48 (1998); *see also John R. Sand & Gravel,* 552 U.S. at 139. For the reasons already discussed, nothing in § 2401(b) suggests that it is inconsistent with equitable tolling. To the contrary, the FTCA goes out of its way in its efforts to treat the United States the same as private tort defendants.

Neither *Brockamp,* 519 U.S. 347, nor *Beggerly,* 524 U.S. 38, two cases in which the Supreme Court held the *Irwin* presumption rebutted, indicates that the same conclusion is appropriate here. *Brockamp* held that a stat-

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[14] The Supreme Court has, at times, indicated that equitable considerations are less likely to apply to limitations provisions limiting the scope of a governmental waiver of sovereign immunity. *See John R. Gravel & Sand*, 552 U.S. at 133-34; *Soriano*, 352 U.S. at 275-77. Most notably, *Soriano* declined to equitably toll the statute of limitations for filing a claim in the Court of Claims, 28 U.S.C. § 2501, explaining "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *See* 352 U.S. at 275-76.

Noting that the Court's "previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent," *Irwin* discussed the result in *Soriano*, and concluded that its holding did not apply to the thirty-day time limit in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16(c). *Irwin*, 498 U.S. at 94-95. Instead, *Irwin* explained, "this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government," namely, the rebuttable presumption in favor of tolling. *Id.* at 95-96. In announcing this "general prospective rule," *John R. Sand & Gravel*, 552 U.S. at 137, *Irwin* did not expressly overrule *Soriano*, but made clear that *Soriano* is not to be read to proscribe the application of equitable doctrines to limitations on waivers of sovereign immunity in every case.

ute of limitations for filing tax refund claims foreclosed application of equitable tolling, citing as evidence of Congress's intent the statute's "highly detailed," "technical," and "unusually emphatic form." 519 U.S. at 350. *Brockamp* further emphasized that "tax law," the subject matter of the statute of limitations in that case, "is not normally characterized by case-specific exceptions reflecting individual equities," given the more than "200 million tax returns" and "more than 90 million refunds" processsed each year. *Id.* at 352. *Beggerly,* in turn, determined that an "unusually generous" twelve-year statute of limitations was "incompatible" with equitable tolling, in large part because the underlying subject matter concerned "ownership of land," and equitable tolling would "throw a cloud of uncertainty over [property] rights." 524 U.S. at 48-49.

For reasons similar to those relied upon in the Supreme Court's more recent *Holland* decision, the statute of limitations here "differs significantly from the statutes at issue in [*Brockamp*] and [*Beggerly*]." *Holland,* 130 S. Ct. at 2561. *Holland* held AEDPA's one-year statute of limitations in 28 U.S.C. § 2244(d) nonjurisdictional and "subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" *Id.* at 2560 (quoting *Irwin,* 498 U.S. at 95-96) (emphasis omitted). Applying that presumption, *Holland* explained that, unlike the statute of limitations at issue in *Brockamp*, § 2244(d) "does not contain language that is 'unusually emphatic,' nor does it 're-iterat[e]' its time limitation." *Id.* at 2561. Moreover, "unlike the subject matters at issue in both *Brockamp* and *Beggerly*—tax collection and land claims—AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity

finds a comfortable home." *Id.* Accordingly, "neither AEDPA's textual characteristics nor the statute's basic purposes 'rebut' the basic presumption set forth in *Irwin*." *Id.* at 2562.

The same conclusion applies to § 2401(b). As discussed above, the FTCA's limitations provision is not cast in particularly emphatic language given its provenance; nor is it unusually generous. *See* Part II.A.3. And, unlike the limitations provision in *Brockamp*, § 2401(b) does not "reiterate[] its limitations several times in several different ways." *Brockamp,* 519 U.S. at 351. Instead, § 2401(b) "reads like an ordinary, run-of-the-mill statute of limitations," reflecting its period of enactment. *Holland,* 130 S. Ct. at 2561.

Furthermore, like the statute of limitations at issue in *Holland*, § 2401(b) "pertains to an area of the law where equity finds a comfortable home." *Id.* As *Irwin* noted, "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" 498 U.S. at 95. And, as discussed above, the FTCA places tort suits against the United States on equal footing with tort suits against private individuals, exposing the government to liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. That Congress saw fit to include a time limit on such claims without any specific limitations on tolling indicates, if anything, that it intended to allow the operation of normal equitable tolling principles that would be applicable in ordinary tort suits against private individuals, not that it harbored an intention otherwise.

Rouse v. United States Department of State, 567 F.3d 408 (9th Cir. 2009) (analyzing the Privacy Act's two-year statute of limitations, 5 U.S.C. § 552a(g)(5)), reached a similar result to the one we reach here. In that case, a U.S. citizen sued the "U.S. Department of State under the Privacy Act for damages arising from his imprisonment in a foreign country." 567 F.3d at 412. *Rouse* held, first, that the citizen's claims were "sufficiently similar to traditional tort actions such as misrepresentation and false light to warrant the application of *Irwin*'s rebuttable presumption." *Id.* at 416. Next, *Rouse* distinguished § 552a(g)(5) from the limitations provisions at issue in *Brockamp* and *Beggerly,* noting that § 552a(g)(5) lacked "detail[ed], . . . technical language" and did not concern an "area[] of law where the running of a defined statute of limitations is of special importance.'" *Id.* at 417 (first alteration in original) (internal quotation marks omitted). *Rouse* therefore concluded that the *Irwin* presumption had not been rebutted in that case.

Finally, for the reasons similar to those we surveyed in declining to infer § 2401(b)'s "jurisdictional" status from other FTCA provisions and subsection (a) of § 2401, *see supra* Part II.A.3, Congress's decision to include explicit exceptions in other FTCA limitations provisions does not rebut the *Irwin* presumption.[15] As *Holland* explained,

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[15] For example, the revisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-964, §§ 5-6, 102 Stat. 4563, 4564-65 (1988), to 28 U.S.C. § 2679(d)(5), provide that an action dismissed under the exhaustion requirement in 28 U.S.C. § 2675(a) is considered timely un-

the fact that a statute "is silent as to equitable tolling while containing one provision that expressly refers to a different kind of tolling" does not foreclose the application of equitable tolling. 130 S. Ct. at 2561-62; *see also Young,* 535 U.S. at 53 (rejecting the argument that an "express tolling provision, appearing in the same subsection as the [limitations] period, demonstrates a statutory intent *not* to toll the [limitations] period").

In short, the *Irwin* presumption is not overcome. Nothing in § 2401(b)'s text or context indicates that Congress intended to preclude courts from *ever* applying equitable tolling to claims filed outside of the six-month limitations period.

B. Wong Is Entitled to Equitable Tolling

Concluding, as we do, that equitable adjustment of the limitations period in § 2401(b) is not prohibited, does not decide under what circumstances equitable tolling may be appropriate. Whether a particular untimely claim may be excused for a particular reason varies with the reason. We decide only that under the circumstances presented here, the usual principles governing equitable tolling apply and we can find no "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp,* 519 U.S. at 350.

We assume for present purposes, without deciding, that Wong's FTCA claim was filed in the district court too

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der 28 U.S.C. § 2401(b) if the administrative claim would have been timely had the claim been filed on the date of commencement of the civil action. See 28 U.S.C. § 2679(d)(5).

late. In doing so, we pause to note that whether this is so depends on: (1) whether the claim could be considered filed in the district court at a point earlier than the amendment actually adding the FTCA claim was filed; and (2) whether, if so, the relevant filing date was (a) November 14, 2001, the date Wong's formal motion to file the amended complaint was filed; (b) November 20, 2001, the date as of which the motion to file the amended complaint requested that the complaint be amended; or (c) December 10, 2001, the date Wong's Reply Memorandum on the motion to amend, which reiterated the request to amend, was filed. Adopting the first of these possible dates would create its own timeliness problem—whether the court claim was filed too early—under *McNeil*, 508 U.S. at 111-13; adopting the second might also raise a *McNeil* problem.[16]

Although there may be a defensible road through this thicket yielding the result that the FTCA claim was timely filed, at least constructively, *cf.* Fed. R. Civ. P. 15(c), reaching that result would entail one or more novel rulings concerning when FTCA claims added by amendment are considered filed. Moreover, and notably, any such ruling would in all likelihood itself rest on an equitable adjustment of the usual application of limitations periods, because some form of constructive filing date, different from the date the amended complaint was actually filed in the

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[16] As noted, Wong's initial motion seeking leave to amend sought to treat the INS's inactivity regarding her claim as the agency's final decision under § 2675(a), but preceded the INS's denial of her claim on December 3, 2001. *See supra* part I.B.

district court, would be required. In the end, then, there is little difference in the underlying justification between applying traditional equitable tolling principles and devising a novel equitable solution to the filing date problem in this case. We therefore proceed along the established, traditional route.

In applying equitable tolling, courts "follow[] a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Holland*, 130 S. Ct. at 2563 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). Thus, the equitable tolling doctrine "enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id.* (internal quotation marks omitted) (alterations in original).

"[L]ong-settled equitable-tolling principles" instruct that "'[g]enerally, 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.'" *Credit Suisse*, 132 S. Ct. at 1419 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (emphasis omitted)); *see also Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). As to the first element, "[t]he standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011). Central to the analysis is

whether the plaintiff was "without any fault" in pursuing his claim. *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

With regard to the second showing, "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Holland*, 130 S. Ct. at 2564 (internal quotation marks and citations omitted). Instead, a litigant must show that "extraordinary circumstances were the cause of his untimeliness and . . . ma[de] it impossible to file [the document] on time." *Ramirez*, 571 F.3d at 997 (internal quotation marks and citations omitted) (second alteration in original). Accordingly, "[e]quitable tolling is typically granted when litigants are unable to file timely [documents] as a result of external circumstances beyond their direct control." *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008).

Applying these longstanding principles in this case, we conclude that whatever may be the case regarding other bases for tolling, Wong's circumstances easily justify equitable tolling. As noted, Wong's claim was untimely because it was not filed within the six-month window running from December 3, 2001—the date on which the INS denied Wong's administrative claim—to June 3, 2002. That result was not the consequence of any fault or lack of due diligence on Wong's part. If anything, Wong took special care in exercising due diligence: Wong first sought leave to file her amended complaint "on or after November 20, 2001," which was, at the time that request was filed, the first day following exhaustion of her administrative remedies on which Wong would have been permitted to file her claim in the district court. And, even

after the INS denied her claim, thereby starting anew the six-month deadline under § 2401(b), *see Lehman*, 154 F.3d at 1014-15, Wong filed a Reply Memorandum reiterating her request to file an amended complaint including the FTCA claim. As the Magistrate Judge noted, it was "due solely to the delay inherent in the Magistrate Judge system" that no action was taken with respect to those requests until the six-month limitations period had already run. Moreover, by informing the parties and the court of her desire to file an FTCA claim well before the filing deadline and requesting leave to do so, Wong fulfilled the notice concern that partially underlies limitations statutes. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

We are not persuaded by the government's assertion that Wong was dilatory in seeking to file her claim because she did not expressly request a timely ruling from the district court. Nor are we persuaded that Wong should have filed an entirely new complaint alleging the FTCA claim rather than waiting for a ruling on the motion to amend. Wong was entitled to expect a timely ruling on her request to amend, which was made with a great deal of time to spare. And filing a new suit on the same facts as one pending would have been inefficient for all concerned —which is why amendments alleging new causes of action on the same factual allegations are permitted. *See* Fed. R. Civ. P. 15. Thus, Wong put forth the "effort that a reasonable person might be expected to deliver under . . . her particular circumstances." *Busby*, 661 F.3d at 1015.

In short, Wong's claim was rendered untimely because of external circumstances beyond her control. In light of these circumstances, we conclude that equitable tolling properly applies to excuse Wong's late-filed amended complaint, and that her FTCA claim against the United States therefore may proceed.

REVERSED and REMANDED.

Chief Judge KOZINSKI, concurring in the judgment:

I agree with Judges Tashima and Bea that 28 U.S.C. § 2401(b) is jurisdictional, but can't dissent because a plaintiff like Wong who begins her FTCA action too early can cure the defect by filing a motion to amend the premature complaint. *See Valadez-Lopez v. Chertoff,* 656 F.3d 851, 855-58 (9th Cir. 2011). Wong filed such a motion before she had finally exhausted her administrative remedies, which was too soon. *See* 28 U.S.C. § 2675(a); *McNeil v. United States,* 508 U.S. 106, 112-13 (1993). But, on December 10, 2001, after the INS denied her claim and before the six-month section 2401(b) window slammed shut, Wong filed a reply memorandum reiterating her request for leave to file a second amended complaint.

While we don't typically treat a reply as a motion, there's nothing to preclude us from doing so. In this case, Wong's request had all the physical attributes of a motion: It was made in writing, filed with the court, served on the other side, prayed for relief and "state[d] with particularity" why she was entitled to it. *See* Fed. R. Civ. P. 7(b). She pointed out that "the court currently has jurisdiction over plaintiffs' FTCA claims and plaintiffs should be allowed to amend the complaint to add those claims." In her conclusion, she again prayed for this

relief: "[P]laintiffs should be granted leave to file their Second Amended Complaint."

The government concedes that if Wong moved for leave to amend her complaint during the six months following the INS's denial of her claim, she's entitled to maintain her lawsuit. *Cf. McNeil*, 508 U.S. at 107-10 & n.5; *Valadez-Lopez*, 656 F.3d at 855-58. Wong *did* file such a motion, albeit within a document captioned "Reply Memorandum."

The majority claims that construing Wong's reply as a motion would be "novel," maj. op. 43, but we regularly treat non-motion filings as motions when equity calls for it. *See, e.g., United States v. Rewald*, 835 F.2d 215, 216 (9th Cir. 1987) (construing notice of appeal as motion for remand); *United States v. Aguirre-Pineda*, 349 Fed. Appx. 212, 2009 WL 3368445, at *1 (9th Cir. 2009) (construing letter as motion for appointment of counsel); *Rapanan v. Nikkei Manor/Mikkei Concerns*, 42 Fed. Appx. 976, 2002 WL 1891677 (9th Cir. 2002) (construing letter as motion for extension of time to request oral argument). And there's certainly nothing novel about finding a motion nested within a document that serves another purpose. *See, e.g., United States v. Harvey*, 55 Fed. Appx. 445, 446 (9th Cir. 2003) (construing opening brief as motion to withdraw as counsel of record). Sometimes, we're even required to do so. *See, e.g.*, Ninth Circuit Rule 22-1(e) ("Uncertified issues raised and designated in [an appellant's opening brief] will be construed as a motion to expand the COA. . . . "). But even if it were novel, so what? Novelty is not an enemy of justice; we're judges, not plumbers.

We owe Wong the benefit of our compassion and creativity. After all, had the district court acted on her motion within the section 2401(b) six-month period, she wouldn't be in this fix. But the court took more than seven months to act on this routine motion—a delay Wong didn't cause and couldn't have foreseen. The government suggests that, instead of waiting for the district court to act on her motion, Wong should have refiled it. Yeah, right. How many litigants have the nerve to vex a federal judge with a clone motion while the original is still pending? Bad things can happen to those who twist the tiger's tail. *See, e.g., Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 439 (9th Cir. 1992) (affirming imposition of sanctions for filing duplicative motions). Instead, Wong used her reply sensibly: She reiterated her request to amend, advanced new arguments in support of that request and pointed out that the court had acquired jurisdiction to grant it. To treat Wong's document as a legal nullity because she called it a reply rather than a motion is inequitable and nonsensical. I thought we had abandoned such pedantry in 1938. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1196 (3d ed. 2004) ("Fortunately, under federal practice the technical name attached to a motion or pleading is not as important as its substance."); *see also* Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 Brook. L. Rev. 1, 2-3 (1988) ("When the Rules were first adopted, they were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through.").

The majority claims that construing Wong's reply as satisfying section 2401(b) would itself be "an equitable adjustment of the usual application of limitations periods." Maj. op. 43. If we're willing to do that, my colleagues argue, we should avoid this procedural "thicket" and just equitably toll the statute of limitations. *Id.* "In the end," the majority concludes, "there is little difference in the underlying justification between" its approach and mine. *Id.* But the FTCA's text, context and relevant historical treatment prohibit equitable tolling of the statutory deadline, not equitable construction of court filings. The majority and I may emerge on the same side—but I take the road our law provides. And that makes all the difference.

McNeil v. United States, 508 U.S. 106 (1993), confirms this. *McNeil* dealt with section 2675(a), a different timing provision of the FTCA, which bars instituting an action in federal court before the administrative claim is "finally denied by the agency." 508 U.S. at 111 (quoting 28 U.S.C. § 2675(a)). The Court held in no uncertain terms that this exhaustion requirement is jurisdictional. *McNeil*, 508 U.S. at 113; *see also* Bea Dissent at 90. But it also left open the possibility that a plaintiff who had filed a complaint prematurely might, after agency denial, file something else that "constitute[s] the commencement of a new action." *McNeil*, 508 U.S. at 110-11. The Court explained: "As the case comes to us, we assume that the Court of Appeals correctly held that nothing done by petitioner after the denial of his administrative claim on July 21, 1989, constituted the commencement of a new action." *Id.* at 110. The Court reiterated this later in the opinion: "Again, the question whether the Court of

Appeals should have liberally construed petitioner's letter [requesting counsel] as instituting a new action is not before us." *Id.* at 113 n.9. Thus, while finding a similar FTCA timing requirement to be jurisdictional, the Court made clear that the statute didn't impair our traditional power to liberally construe court filings—even mere letters—when equity calls for us to do so. If a letter asking for counsel can be "liberally construed . . . as instituting a new action," why not a reply? The Court saw no contradiction between construing the statute strictly and construing a pleading liberally. That's plenty good enough for me.

The federal judiciary caused Wong's problem, and in good conscience we should use such powers as we have to make it up to her. Had she filed nothing within the relevant time-frame, there would be nothing for us to construe and she'd be barred by the statute. *See* Bea Dissent; Tashima Dissent. But Wong *did* file, and that document contains a crystal clear motion to amend the complaint. We owe it to Wong to recognize this. I therefore concur in the judgment of the majority but in the reasoning of the dissents (as far as they go).

TASHIMA, Circuit Judge, joined by BEA, Circuit Judge, dissenting:

I join Judge Bea's dissenting opinion in full. I write separately to clarify the Federal Tort Claims Act's ("FTCA's") legislative history. This history, once understood in full context, dispels any doubt that the FTCA's limitations provision was intended to be jurisdictional.

I.

Two provisions of the FTCA are central for present purposes—the limitations provision, currently codified at 28 U.S.C. § 2401(b), and the jurisdiction-granting provision, currently codified at 28 U.S.C. § 1346(b). I begin with a brief history of these two provisions.

The FTCA was originally enacted in 1946 as Title IV of the Legislative Reorganization Act. *See* Pub. L. No. 79-601 ("1946 Act"), tit. IV, 60 Stat. 812, 842-47 (1946). Pursuant to the 1946 Act, the provisions of the FTCA were codified in Chapter 20 of Title 28. *See* 28 U.S.C. §§ 921-946 (1946). Among these provisions was the jurisdiction-granting provision, which read, in pertinent part:

> *Subject to the provisions of this chapter*, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of 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 for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.

Id. § 931(a) (emphasis added). The FTCA thus conferred exclusive federal jurisdiction over tort actions against the United States, but "[s]ubject to the provisions of" Chapter 20. Included within Chapter 20 was the FTCA's limitations provision, then-codified at 28 U.S.C. § 942. *See id.* § 942. Accordingly, as originally enacted in the 1946 Act, the FTCA's grant of jurisdiction was "[s]ubject to" the limitations provision.

Congress recodified and reorganized Title 28 in 1948. *See* Pub. L. 80-773 ("1948 Act"), § 1, 62 Stat. 869 (1948). As part of the recodification, most of the provisions formerly grouped under Chapter 20 were regrouped under Chapter 171. *See id.* at 982-85. The limitations provision, however, was removed from this grouping and placed in its current location in Chapter 161, at 28 U.S.C. § 2401(b). *See id.* at 970-71. There, it was situated alongside 28 U.S.C. § 2401(a), which provides for a six-year statute of limitations in other types of civil actions against the United States. *See id.* at 971.

Also removed from the former Chapter 20 grouping was the jurisdiction-granting provision, which was recodified in Chapter 85, at 28 U.S.C. § 1346(b). *See id.* at 930, 933. Similarly to the limitations provision, this move consolidated the jurisdiction-granting provision with the other provisions of Title 28 granting jurisdiction in civil actions against the United States. *See id.* at 933. Because the reference to "this chapter" in the opening clause of § 1346(b) was now stale—given that § 1346(b) was no longer in the same chapter as the other FTCA provisions—the clause was changed to read, "Subject to the provisions of chapter 173 of this title." *Id.*

However, there was no Chapter 173 of Title 28. Rather, this was a scrivener's error that should have read Chapter 171. Throughout the drafting history of the 1948 Act, the chapter that would become Chapter 171—titled "Tort Claims Procedure"—had been designated Chapter 173, with the cross-reference in § 1346(b) corresponding to this designation. *See, e.g.*, H.R. 2055, 80th Cong., chs. 85, 173 (1947). When the chapter was renumbered to 171 via a late Senate amendment, *see* S. Rep. No. 80-1559, at 8 (1948), the drafters simply failed to update the cross-reference in § 1346(b). It is thus evident that, as of the 1948 Act, the opening clause of § 1346(b) should have read, "Subject to the provisions of chapter 171 of this title." Indeed, a year later, Congress amended § 1346(b) to correct this error and change the cross-reference to Chapter 171. *See* Pub. L. 81-55, 63 Stat. 62 (1949); *see also* S. Rep. No. 81-135, at 1-2 (1949).

II.

The history of the limitations and jurisdiction-granting provisions, as recounted above, taken in conjunction with the considerations discussed below, offer "a clear indication that Congress wanted the [limitations] rule to be jurisdictional." *Henderson ex. rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks omitted). First, and most importantly, it is plain that the limitations provision was jurisdictional as of the original 1946 Act, for the grant of jurisdiction was expressly "[s]ubject to"—that is, "contingent or conditional upon"—compliance with that provision. *See* Webster's New World Dictionary 1333 (3d Coll. ed. 1994); *see also* Webster's New International Dictionary 2509 (2d ed. 1940) (defining "subject to" as "[b]eing under the contingency of;

dependent upon or exposed to (some contingent action)"). It is difficult to imagine a more "clear statement" as to Congress' intent.[1] *See Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013).

If one accepts this proposition—which the majority only obliquely disputes[2]—then, in order to find § 2401(b) non-jurisdictional, one must conclude that Congress intended to strip the limitations provision of its jurisdictional status only two years later, through the 1948 Act. Under long-established Supreme Court precedent, however, we are not to "presume that the 1948 revision worked a

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[1] Of course, this logic dictates that the requirements of Chapter 171 are also jurisdictional. At least two Circuit Courts have so held in accord with this reasoning. *See Mader v. United States*, 654 F.3d 794, 807 (8th Cir. 2011) (en banc) (relying on the "[s]ubject to" language of § 1346(b) in finding the presentment requirements of 28 U.S.C. § 2675(a) jurisdictional); *White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 457-58 (3d Cir. 2010) (relying on the same in finding the sum certain requirement of 28 U.S.C. § 2675(b) jurisdictional). *But see Parrott v. United States*, 536 F.3d 629, 634-35 (7th Cir. 2008) (holding that the statutory exceptions of 28 U.S.C. § 2680 are not jurisdictional, notwithstanding the language of § 1346(b)).

[2] In a footnote, the majority suggests that the phrase "'[s]ubject to' is more sensibly read to mean that litigants have to follow the prescribed procedures, not that each and every one of those procedures, if not followed, gives rise to the 'drastic' consequences that follow from lack of subject matter jurisdiction." Maj. Op. at 28 n.9. This interpretation not only ignores the ordinary meaning of "subject to," but it would render the opening clause of § 1346(b) surplusage. The very existence of the "prescribed procedures," as standalone statutory provisions, "means that litigants have to follow [them]." Thus, the "[s]ubject to" clause of § 1346(b) would have no substantive import under the majority's reading.

change in the underlying substantive law unless an intent to make such a change is clearly expressed." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (internal quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (citing cases applying this rule). Here, not only is such "clearly expressed" intent lacking, but there is an abundance of evidence to the contrary—that Congress had no desire to alter the jurisdictional status of the limitations provision.

In the Reviser's Notes to the 1948 Act,[3] Congress explained that § 2401 "consolidates" the FTCA's limitations provision with the six-year limitations period of 28 U.S.C. § 2401(a), which, like § 2401(b), had formerly been codified elsewhere in Title 28. *See* H.R. Rep. 80-308, at A185 (1947); *see also* 28 U.S.C. § 41(20) (1946) (former section of six-year limitations period). This purely organizational function—to consolidate the provisions of Title 28 setting forth limitations periods in actions against the government—is the obvious reason that Congress separated § 2401(b) from the other FTCA provisions and placed it in chapter 161.[4] If there were any doubt as to whether a substantive

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[3] The Supreme Court has repeatedly relied on the Reviser's Notes in determining whether a substantive change was intended through the 1948 Act. *See, e.g., John R. Sand & Gravel*, 552 U.S. at 136; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989).

[4] The same purpose was carried out with respect to the jurisdiction-granting provision, which was consolidated in § 1346 with the other provisions of Title 28 granting jurisdiction in civil actions against the government. *See* 1948 Act, § 1, 62 Stat. at 933; *see also* William W. Barron, *The Judicial Code: 1948 Revision*,

purpose was intended, the Reviser's Notes then added, "Subsection (b) of the revised section [2401] simplifies and restates [former 28 U.S.C. § 942], *without change of substance*." H.R. Rep. 80-308, at A185 (emphasis added).

Congress provided equally definitive guidance in the actual text of the 1948 Act. In an uncodified provision, Congress instructed, "*No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any [] section is placed.*" 1948 Act, § 33, 62 Stat. at 991 (emphasis added). Of course, precisely such an inference is required to find § 2401(b) nonjurisdictional, because one must assume that Congress intended to alter the jurisdictional status of the limitations provision by removing it from the FTCA Chapter and placing it in Chapter 161.

In short, there is no indication—let alone a "clearly expressed" indication—that Congress intended to alter the jurisdictional status of the limitations provision through the 1948 Act.

III.

The majority offers several responses to this historical evidence, none of which is persuasive. First, the majority contends that "it is improper to consider legislative history" because the statutory text is "plain." Maj. Op. at 24. It is a curious statute that is unambiguous but manages to

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8 F.R.D. 439, 445 (1949) ("The statutes conferring jurisdiction . . . are consolidated into a single section. The revised section consolidates and clarifies three widely separated provisions of the former code.").

produce an intracircuit split, several en banc dissents, and dozens of pages of analysis by the majority to justify its conclusion. These considerations aside, the fact is that the goal of the jurisdictional inquiry is "to ascertain Congress' intent." *Henderson*, 131 S. Ct. at 1204. The majority recognizes that we must look to factors such as "context" and "relevant historical treatment" to discern this intent, Maj. Op. at 11 (quoting *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1246 (2010)), but it provides no reason why legislative history may not similarly be considered.[5] The majority, in effect, invokes the requirement that there be evidence of clear congressional intent, and it then seeks to shut the door on the very evidence that could support this showing.

Perhaps recognizing that its "plain text" argument sits on shaky ground, next, the majority implicitly acknowledges that the limitations provision was jurisdictional under the original 1946 Act, but it contends that the 1948 revision undid this status. Maj. Op. at 25-28. In this regard, the majority does at least make a passing reference to the rule that we are not to presume the 1948 Act effected substantive change unless "clearly expressed." Maj. Op. at 27. According to the majority, though, such clear expression can be found in Congress' amending the

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[5] As described below, the legislative history is particularly probative of congressional intent in the instant case given that the focus is on the statutory scheme as enacted by Congress, and given that this enactment occurred only two years prior to the adoption of the current statutory language.

cross-reference in § 1346(b) to Chapter 171, which did not include the limitations provision. Maj. Op. at 27.

This argument quickly falls apart upon considering the history of the two key provisions. As explained, the removal of the limitations provision from the FTCA Chapter was solely for organizational purposes, to consolidate the provisions of Title 28 setting forth limitations periods in actions against the government. Likewise, the redesignation of the cross-reference in § 1346(b), to Chapter 171, was merely an artifact of reorganization. The jurisdiction-granting provision previously referenced "this chapter"—referring to the FTCA Chapter of Title 28—but this reference became outdated once the jurisdiction-granting provision was stripped out of the FTCA Chapter. Congress simply updated the cross-reference, inserting the new number of the FTCA Chapter, Chapter 171. In the end, therefore, the majority's argument is entirely circular. The majority relies on the reorganization, and nothing else, as a clear expression that the reorganization effected substantive change.[6]

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[6] The majority contends that, under my treatment of the legislative history, the limitations period would remain jurisdictional regardless of "what Congress wrote into the FTCA's jurisdictional grant in 1948." Maj. Op. at 27. Hardly the case. If Congress truly intended to alter the provision's jurisdictional status, it could have provided an affirmative statement to this effect in the text of the 1948 Act, in the Reviser's Notes, or elsewhere in the legislative history. *See* Barron, *supra*, at 446 ("Congress . . . includ[ed] in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor."). The requirement that Congress affirmatively express

Finally, the majority falls back on the notion that the FTCA's "drafting history" cannot supply a clear statement of Congress' intent. Maj. Op. at 27-28. The 1946 Act, however, does not reflect "drafting history." It is the statutory scheme as enacted by Congress. And it is the scheme put into place only two years prior to the revisions that produced the current statutory language, revisions that we are to presume did not effect any substantive change. Under these circumstances, it is entirely reasonable to rely on the 1946 Act as providing a "clear indication" of Congress' intent. *Henderson*, 131 S. Ct. at 1205.

IV.

Given the legislative history recited above, I have little difficulty concluding that the FTCA's limitations provision was intended to be jurisdictional. Congress provided a clear statement to this effect when enacting the provision in 1946. When reorganizing Title 28 only two years later, Congress did not "clearly express[]," or provide any indication at all, that it intended to disturb this status. For these reasons, as well as the reasons outlined in Judge Bea's dissenting opinion, I respectfully dissent.

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such an intent is not one I have created, but one that is mandated as a matter of Supreme Court doctrine. *See Keene Corp.*, 508 U.S. at 209.

BEA, Circuit Judge, with whom TASHIMA, Circuit Judge, joins, dissenting:

The majority opinion permits courts, for equitable reasons, to extend the time in which a tort action can be begun against the Government, after the obligatory administrative claim has been filed and denied. Because I believe Congress clearly expressed its intent that 28 U.S.C. § 2401(b) would limit the jurisdiction of federal courts by providing that tort claims "shall be forever barred" unless action is begun within the six-month period following denial of the administrative claim by the concerned agency, with no exceptions, I respectfully dissent.

I. The "Jurisdictional" vs. "Claim-Processing" Distinction and Our Inquiry

The majority is correct, of course, in noting that the Supreme Court has created a rebuttable presumption that equitable tolling applies to suits against the United States. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).[1] But that presumption is not universally applica-

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[1] In *Irwin*, the petitioner was fired from his job by the Veterans' Administration ("VA"). *See id.* at 90. He filed a complaint with the VA, alleging that it had unlawfully discharged him on the basis of race and physical disability. *See id.* at 91. The VA dismissed the complaint, and the Equal Employment Opportunity Commission ("EEOC") affirmed that decision. *See id.* The petitioner had the right to file a civil action in district court but was required to do so within 30 days of the EEOC's affirmance. *See id.* (citing 42 U.S.C. § 2000e-16(c)). The petitioner filed a complaint in district court 44 days after his attorney's office received the EEOC's notice, which was only 29 days after the date on which he claimed to have received

ble. As the majority admits, it has no application to certain kinds of "more absolute" statutes of limitations. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008).[2] These "more absolute" statutes "seek not

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the notice. *See id.* The district court held that the limitations period began when the attorney's office received the notice and granted the VA's motion to dismiss for lack of jurisdiction. *See id.* The Fifth Circuit affirmed and held that compliance with § 2000e-16(c)'s time limit was a jurisdictional requirement. *See id.* The Supreme Court held that § 2000e-16(c)'s time limit was not jurisdictional; instead, the Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. Because the principles of equitable tolling did "not extend to what is at best a garden variety claim of excusable neglect," however, the Court affirmed the dismissal. *See id.* at 96.

[2] In *John R. Sand & Gravel*, the petitioner filed an action in the Court of Federal Claims, asserting that various Environmental Protection Agency activities on land it leased for mining purposes amounted to an unconstitutional taking of its leasehold rights. *See id.* at 132. The Government initially asserted that the claims were untimely under 28 U.S.C. § 2501, which provides that "[e]very 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." *See id.* (quoting 28 U.S.C. § 2501). The Government later conceded that certain claims were timely, and subsequently won on the merits. *See id.* On appeal, the Court of Appeals for the Federal Circuit held that the action was untimely filed and should have been dismissed for that reason. *See id.* at 133. The Supreme Court affirmed and held that compliance with § 2501's time limit is a jurisdictional requirement. *See id.* at 138-39. As noted below, the Court also explained the difference between jurisdictional statutes of limitations and those to which *Irwin*'s presumption can be applied. *See id.* at 133-34.

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." *Id.* at 133. The Court has described the time limits in such statutes of limitations as "jurisdictional." *See id.* at 134.

The majority believes the distinction between these "more absolute" or "jurisdictional" statutes, to which courts cannot create exceptions based on equitable considerations, and mere "claim-processing rules," to which *Irwin*'s rebuttable presumption applies, is "critical for present purposes." *See* Op. at 8-9. The majority calls § 2401(b) a "quintessential claim-processing rule," *see* Op. at 1039, but calling something a name does not change its nature.[3] And the critical question is not whether *we* characterize § 2401(b) as a "quintessential claim-processing rule," *see* Op. at 18, but whether *Congress* mandated that its prescribed time limit be jurisdictional, *see Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (noting that "Congress is free to attach the conditions that go with the jurisdictional label to a rule that [courts] would prefer to call a claim-processing rule.").[4] To make this

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[3] The majority ignores the simple truth contained in the aphorism ascribed, perhaps apocryphally, to Abraham Lincoln: "If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't make it a leg."

[4] In *Henderson*, the petitioner, a veteran of the Korean War who had been given a 100-percent disability rating for paranoid schizophrenia, filed a claim with the Department of Veterans Affairs ("VA") for supplemental benefits based on his need for in-home care.

determination, the court must "look to see if there is any clear indication that Congress wanted the rule to be jurisdictional." *Id.* (internal quotation marks and citation omitted). And, to find such a "clear indication," we must examine the statute's "text, context and relevant historical treatment." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010).[5]

See id. at 1201. The VA regional office and Board of Veterans' Appeals denied the petitioner's claim. *See id.* The petitioner filed a notice of appeal with the Veterans Court, but he missed the 120-day filing deadline by 15 days. *See id.* (citing 38 U.S.C. § 7266(a)). The Veterans Court dismissed the appeal for lack of jurisdiction, treating compliance with the 120-day deadline as a jurisdictional requirement. *See id.* at 1202. The Federal Circuit affirmed. *See id.* Because § 7266(a) "provide[d] no clear indication that Congress wanted the provision to be treated as having jurisdictional attributes," the Supreme Court reversed and held that the 120-day limitation period was not jurisdictional. *Id.* at 1205-06.

[5] In *Reed Elsevier*, authors, some of whom had registered copyrights for their works and others who had not, sued publishers and electronic databases for copyright infringement. *See id.* at 158. The parties settled and filed a motion in federal district court to certify a class for settlement and approve the settlement agreement. *See id.* at 159. Ten freelance authors ("the Muchnick respondents") objected. *See id.* The district court overruled those objections, certified a settlement class of freelance authors, approved the settlement, and entered final judgment. *See id.* The Muchnick respondents appealed, and the Second Circuit held that the district court lacked jurisdiction to certify a class of claims arising from the infringement of unregistered works. *See id.* at 159-60 (citing 17 U.S.C. § 411(a), which provides, in relevant part, that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made"). The Supreme Court reversed and held that

II. The Statute's Text

Section 2401(b) provides, in relevant part, that "[a] tort claim against the United States shall be forever barred 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).

A. Reading § 2401(b) with § 2675.

Perhaps where the majority goes wrong is in considering § 2401(b) as a stand-alone statute of limitations, rather than considering it in conjunction with the complementary administrative exhaustion requirement of 28 U.S.C. § 2675. The Court has instructed against such a restrictive view of statutory conditions for bringing suit. *See United States v. Dalm*, 494 U.S. 596, 601 (1990).[6] Instead, courts should

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§ 411(a) imposed a nonjurisdictional precondition to suit. *See id.* at 166.

[6] In *Dalm*, the respondent had been appointed administratrix of her employer's estate. *See id.* at 598. In return for her services, she received fees from the estate and two payments from the employer's surviving brother. *See id.* at 599. The respondent reported the latter payments as gifts and paid the appropriate gift tax. *See id.* The Internal Revenue Service ("IRS") audited the respondent's income tax returns and determined that the payments should have been reported as income. *See id.* The respondent petitioned the Tax Court for a redetermination but subsequently settled the case. *See id.* After she agreed to the settlement, the respondent immediately filed an administrative claim for return of the gift tax she had paid. *See id.* When the IRS failed to act on her claim within six months, she filed suit in district court, seeking a refund of "overpaid gift tax." *Id.* at 600. The district court granted the Gov-

read together "provisions which qualify an [individual]'s right to bring . . . suit upon compliance with certain conditions." *Id.*[7] Here, two statutory provisions qualify an individual's right to file suit for tort against the United States. *See* 28 U.S.C. § 2675(a); 28 U.S.C. § 2401(b).

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ernment's motion to dismiss the suit for lack of jurisdiction, because the respondent's suit was untimely under the applicable statute of limitations: 26 U.S.C. § 6511(a). *See id.* The Sixth Circuit reversed and held that the doctrine of equitable recoupment should be applied to permit the respondent's suit to proceed. *See id.* The Supreme Court reversed and held that the district court did not have jurisdiction to entertain the untimely action. *See id.* at 610.

[7] In *Dalm*, there were two such provisions. See *id.* at 601-02 (stating that 26 U.S.C. § 7422, which provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary," and 26 U.S.C. § 6511(a), which provides that, if a taxpayer is required to file a return with respect to a tax, the "[c]laim for refund or credit . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later," were both relevant qualifications on a taxpayer's right to bring a refund suit). Because both provisions established conditions on a taxpayer's right to bring suit, the Court read them together. *See id.* at 602 ("Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund . . . may not be maintained in any court." (citations omitted)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

First, § 2675 provides that "[a]n action shall not be instituted upon a claim against the United States for money damages . . . , unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). This section requires that an administrative claim be made to the responsible agency, and it disallows suit until the denial of such claim is final. *See id.* No such administrative claims filing is needed to commence an action against a private person under applicable state law. *Irwin*, 498 U.S. at 96 (reasoning that principles "applicable to suits against private defendants should also apply to suits against the United States").

Section 2401(b) is § 2675(a)'s logical complement. It provides that:

> [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). This provision establishes the time limits applicable to presenting an administrative claim and beginning a civil action. As in *Dalm*, the import of these two sections is clear when they are read together: Unless an administrative claim is presented to the responsible agency before action is begun, and unless both the claim and the action are begun within the time limits im-

posed by § 2401(b), the tort claim against the United States "shall be forever barred."

B. Section 2401(b) Refers to Courts' Jurisdiction.

The majority holds, in a rather conclusory fashion, that § 2401(b) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the federal courts." Op. at 15 (internal quotations and citations omitted). I disagree. While it is true that § 2401(b) does not mention the term "jurisdiction," the same is true of several statutes of limitations the Court has found to be jurisdictional. *See John R. Sand & Gravel*, 552 U.S. at 134 (holding 28 U.S.C. § 2501 jurisdictional, despite the absence of the term "jurisdiction"); *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (same with respect to 28 U.S.C. § 2107(a) and (c))[8]; *Dalm*,

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[8] In *Bowles*, an Ohio jury convicted the petitioner of murder and sentenced him to 15-years-to-life imprisonment. *See id.* at 207. The petitioner unsuccessfully challenged his conviction and sentence on direct appeal, and then filed a federal habeas corpus petition. *See id.* The district court denied habeas relief. *See id.* After the entry of final judgment, the petitioner had 30 days to file a notice of appeal. *See id.* (citing 28 U.S.C. § 2107(a)). He failed to do so. *See id.* Instead, he later filed a motion to reopen the period in which to file a notice of appeal under 28 U.S.C. § 2107(c), which allows district courts to extend the filing period for 14 days. *See id.* The district court granted the motion to reopen, but "inexplicably gave [the petitioner] 17 days," instead of the 14 days permitted by statute. *See id.* The petitioner filed his notice of appeal after the 14-day period allowed by statute but within the 17 days allowed by the district court. *See id.* The Sixth Circuit held that it lacked jurisdiction to entertain the appeal, because the notice of appeal was untimely filed. *See id.* The Supreme Court affirmed and held that

494 U.S. at 609 (same with respect to 26 U.S.C. § 7422(a) and 26 U.S.C. § 6511(a)).[9] The majority fails to appreciate a crucial difference between the statutes of limitations the Court has deemed jurisdictional and those to which the Court has applied equitable tolling: whether the statute expressly mandates a consequence for the failure timely to file.

1. Plain Statutes of Limitations: No Consequences Mandated for Failure Timely to File

Some statutes of limitations require that certain actions be performed within a specified period of time without specifying consequences to be applied where the actions are not performed as prescribed. *See, e.g.*, 17 U.S.C. § 411(a) ("[Subject to certain exceptions], no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."); 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."); 38 U.S.C. § 7266(a) ("In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall

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"the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 214.

[9] Unfortunately, the Court has not yet analyzed whether § 2401(b) is or is not jurisdictional. We must therefore use what tools the Court has given us in its discussions of similar statutory provisions and reason by analogy.

file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed. . . . "); F. R. Bankr. P. 4004(a) ("[A] complaint . . . objecting to the debtor's discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)."). These statutes, as evidenced by the quotations above, are often written in mandatory terms. Significantly, while they make *parties'* actions mandatory, they do not contain mandatory *consequences* for noncompliance.

The Court has instructed that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003).[10] It

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[10] In *Barnhart*, the Court addressed 26 U.S.C. § 9706(a)'s requirement that the Commissioner of Social Security assign, before October 1, 1993, each coal industry retiree eligible for benefits to an operating company or related entity, which would then be responsible for funding the assigned beneficiary's benefits. *See id.* at 152-53. The Commissioner did not complete all the assignments by the statutory date, and several coal companies challenged the Commissioner's by then tardy assignments. *See id.* at 156. The companies obtained summary judgments in each case, and the Sixth Circuit affirmed. *See id.* at 157. The Supreme Court held that it was "unrealistic to think that Congress understood unassigned status as an enduring 'consequence' of uncompleted work, for nothing indicates that Congress even foresaw that some beneficiaries matchable with operators still in business might not be assigned before October 1, 1993." *Id.* at 164-65. Thus, it read the statutory deadline as "a spur to prompt action, not as a bar to tardy completion of the business of ensuring

makes good sense, then, that the Court has regularly held that statutes of limitations lacking provisions specifying consequences do not speak in jurisdictional terms or refer to the courts' jurisdiction. *See, e.g.*, *Henderson*, 131 S. Ct. at 1204 (holding that the terms of 38 U.S.C. § 7266(a) "do not suggest, let alone provide clear evidence, that the provision was meant to carry jurisdictional consequences"); *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (holding that 28 U.S.C. § 2244(d)(1) "does not set forth an inflexible rule requiring dismissal whenever its clock has run" (internal quotation marks and citations omitted))[11]; *Reed Elsevier*, 559 U.S. at 165 (holding that 17

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that benefits are funded . . . by those identified by Congress as principally responsible." *Id.* at 172.

[11] In *Holland*, the petitioner was convicted of first-degree murder and sentenced to death. *See id.* at 2555. The Florida Supreme Court affirmed that judgment, and, on October 1, 2001, the Supreme Court denied the petition for certiorari. *See id.* On that date, 28 U.S.C. § 2244(d)'s one-year statute of limitations for filing a habeas petition began to run. *See id.* On September 19, 2002 (i.e. 12 days before the one-year limitations period expired), a state-appointed attorney filed a motion for post-conviction relief in the state court, which automatically stopped the running of the limitations period. *See id.* In May 2003, the state trial court denied relief. *See id.* By February 2005, when the Florida Supreme Court heard oral argument in the case, the petitioner and his appointed attorney rarely communicated. *See id.* Indeed, the petitioner asked the Florida Supreme Court to remove the attorney from his case because of a "complete breakdown in communication," including a failure to keep him informed of the case's status. *See id.* The Florida Supreme Court denied the petitioner's request. *See id.* at 2556. The petitioner subsequently wrote the attorney several times and emphasized the importance of filing a timely petition for habeas

U.S.C. § 411(a) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" (citation omitted)); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (holding that "the filing deadline[] prescribed in Bankruptcy Rule[] 4004 . . . do[es] not delineate what cases bankruptcy courts are competent to adjudicate").[12] These cases stand for the general proposition

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corpus in federal court once the Florida Supreme Court ruled against him. *See id.* In November 2005, the Florida Supreme Court affirmed the denial of post-conviction relief. *See id.* On December 1, 2005, it issued its mandate, and the federal habeas clock began again to tick. *See id.* Twelve days later, the one-year limitations period expired, with the petitioner never having been informed that the Florida Supreme Court had made a ruling. *See id.* at 2556-57. When the petitioner learned of the adverse ruling on January 18, 2006, he immediately wrote a pro se habeas petition and mailed it to the district court. *See id.* at 2557. The district court held that equitable tolling was unwarranted because the petitioner did not seek help from the court system to determine when the mandate issued. *See id.* The Eleventh Circuit affirmed and held that the attorney's negligence could never constitute an "extraordinary circumstance" sufficient to toll the limitations period. *See id.* The Supreme Court rejected the district court's erroneous determination that the petitioner had not been diligent and the Eleventh Circuit's rigid, categorical approach. *See id.* at 2565. It then held that § 2244(d)'s time limit was subject to equitable tolling and remanded for further proceedings. *See id.* at 2565.

[12] In *Kontrick*, a creditor objected to a debtor's discharge in a liquidation proceeding. *See id.* at 446. The applicable rule provided that such an objection had to be made within "60 days after the first date set for the meeting of creditors." *Id.* (quoting Fed. R. Bkrtcy. P. 4004(a)). The creditor's objection was untimely under this rule. *See id.* The debtor did not file a motion to dismiss the objection as untimely, however, until after the Bankruptcy Court

identified above: If the statutory text does not mandate dismissal as the consequence for noncompliance, the courts should not read the statute as having jurisdictional consequences (i.e. mandatory dismissal without exception). Instead, per *Irwin*'s instruction, the courts should presume equitable tolling may be applied to the statute in question, and then proceed to determine whether that presumption has been rebutted and, if not, whether the running of the timing provision should be tolled for equitable reasons. *See Irwin*, 498 U.S. at 95-97.[13]

2. Consequence Statutes of Limitations: Mandatory Consequences for a Failure Timely to File

In contrast, however, are statutes of limitations that specify the consequences of a party's failure to adhere to a prescribed time limit. *See, e.g.*, 26 U.S.C. § 7422(a) ("No

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decided that the discharge should be refused. *See id.* The Bankruptcy Court held that the time limit was not jurisdictional, and the Seventh Circuit affirmed. *See id.* at 447. The Supreme Court affirmed and held that Rule 4004(a) was not jurisdictional, so that "a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge." *Id.*

[13] Of course, if the court finds that the presumption has been rebutted or that no equitable considerations justify tolling the statute, it should dismiss the complaint for failure to comply with the statute of limitations. The key consideration here is that, when a statute does not specify mandatory consequences for failure timely to act, the court is permitted to rely on *Irwin*'s presumption that equitable tolling applies. Nothing in the text of that statute suggests that the presumption should not apply.

suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed with the Secretary. . . . "); 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."); 28 U.S.C. § 2107(a) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."); 28 U.S.C. § 2409a(g) ("Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued."). Like the first category of statutes discussed *supra*, these statutes speak in mandatory terms. They do not, however, merely require that parties take actions at specified times. Instead, these statutes require the courts to respond in a certain way to a party's failure to timely act by making the *consequences* of noncompliance, rather than just the acts, mandatory.

It is clear, then, that there are two different kinds of mandatory provisions: (1) those that make certain actions mandatory on the parties but do not specify the consequences of noncompliance, and (2) those that also provide mandatory consequences for failures to act according to their prescriptions. The Court has mentioned the importance of this distinction in the past. *See Henderson*, 131 S. Ct. at 1204 (holding a statute nonjurisdictional in part because its language did "not suggest, let alone

provide clear evidence, that the provision was meant to carry jurisdictional consequences"); *Holland*, 130 S. Ct. at 2560 (noting that the nonjurisdictional statute did "not set forth an inflexible rule requiring dismissal whenever its clock has run" (internal quotation marks and citations omitted)). I agree with the majority that not all mandatory prescriptions are properly categorized as jurisdictional. *See* Op. at 18. But I also believe that, to determine which mandatory prescriptions are jurisdictional, we must pay close attention to precisely *what* Congress has made mandatory (i.e. a party's action or the consequences for a party's failure timely to act). Thus, when Congress has mandated that a particular consequence will accompany a party's noncompliance with statutory timing provisions, courts are not free to impose other consequences or, as the majority does in this case, to fail to impose any consequence at all.

The reason is simple: When Congress mandates that a particular *consequence* be imposed, it limits the court's power to act. When the consequence is that the claim "shall be barred" or the case "shall not be maintained," Congress has spoken in jurisdictional terms.[14] *Cf. John*

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[14] I acknowledge that such a holding may conflict with *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), but, for reasons discussed *infra* at 79-83, I believe that case is inconsistent with subsequent Supreme Court cases and is no longer good law.

Further, by giving examples of when Congress has spoken in jurisdictional terms I am not relying on "magic words" that must be included. Op. at 19. These phrases are merely examples of terms

R. Sand & Gravel, 552 U.S. at 134 (holding that 28 U.S.C. § 2501, which includes "shall be barred" language, is jurisdictional); *Dalm*, 494 U.S. at 609 (holding that 26 U.S.C. § 6511(a), which, when read with 26 U.S.C. § 7422(a), includes "may not be maintained" language, is jurisdictional). The majority holds that *John R. Sand & Gravel* and *Bowles* "did not hold [the statutes at issue] jurisdictional based on the consequential language of the statute" but because of "a century's worth of precedent and practice in American courts." Op. at 19, n.3. But what was that "century's worth of precedent" based on? The Court's ancient recognition that some statutes of limitations have *consequences*. *Kendall v. United States*, 107 U.S. 123, 125 (1883) (statute of limitation "forever barred" "*every claim*"); *Finn v. United States*, 123 U.S. 227, 332 (1887) (holding that the express words of the act of 1863—stating claims were "forever barred"—was a condition to the right to a judgment against the United States and the court *must* dismiss the petition if the condition was not satisfied). Such consequences speak to "the courts' statutory . . . power to adjudicate the case." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). To illustrate this point, one asks: What statutory power does a court have to adjudicate a claim which, according to congressional mandate, "shall be barred" or "shall not be maintained?" The answer is simple: None.[15] It seems natural, then, to conclude that when a

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which mandate that a particular consequence must be imposed, and that *consequence* is what makes the statute jurisdictional.

[15] This fact separates the two kinds of statutes of limitations. When a statute does not specify a mandatory consequence, the oper-

statute includes such language, it speaks in jurisdictional terms. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes speak to the power of the court rather than to the rights of obligations of the parties." (citation omitted)).[16]

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ation of *Irwin*'s presumption makes sense (i.e. courts can generally assume Congress intended equitable tolling to apply unless something suggests otherwise). When Congress specifies a mandatory consequence, however, courts should assume Congress meant what it said (i.e. that the consequence is mandatory and applicable in every case).

[16] Unfortunately, while the Court has stated, on several occasions, that a particular statute does not speak in jurisdictional terms, *see ante* at 68, it has not clarified exactly when a statute does speak in jurisdictional terms. Still, the Court has held that the statutes in the second category above are jurisdictional. *See John R. Sand & Gravel*, 552 U.S. at 134 (holding that 28 U.S.C. § 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition is filed within six years after such claim first accrued," is jurisdictional); *Bowles*, 551 U.S. at 213 (holding that 28 U.S.C. § 2107(a) and (c), which provide that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment, order or decree," except that a court may "extend the time for appeal upon a showing of excusable neglect or good cause," is jurisdictional); *Dalm*, 494 U.S. at 609 (holding that 26 U.S.C. § 6511(a), which, when read with 26 U.S.C. § 7422(a), provides that "unless a claim for refund of a tax has been filed within the time limits . . . , a suit for refund . . . may not be maintained in any court," is jurisdictional). It has also mentioned the kind of language that would speak in jurisdictional terms. *See Henderson*, 131 S. Ct. at 1204 (implying that jurisdictional language would include a suggestion "that the provision was meant to carry

Section 2401(b) falls into the second category identified above. It does not merely specify what a party must do; it specifies the consequences of a failure to act according to its time limit. If action is not begun within six months after the agency mailed its final denial of the claim, such claim "shall be forever barred." *See* 28 U.S.C. § 2401(b). Because the court has no statutory power to adjudicate such a claim, I would hold that, unlike the statute considered in *Holland*, § 2401(b) "set[s] forth an inflexible rule requiring dismissal whenever its clock has run." *Holland*, 130 S. Ct. at 2560. In that manner, and unlike the statute considered in *Henderson*, the language of § 2401(b) "provide[s] clear evidence[] that the provision was meant to carry jurisdictional consequences." *Henderson*, 131 S. Ct. at 1204. Thus, its pronouncement "speak[s] in jurisdictional terms" or, at the very least, "refer[s] in any way to the jurisdiction of the district courts." *Reed Elsevier*, 559 U.S. at 165.[17]

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jurisdictional consequences"); *Holland*, 130 S. Ct. at 2560 (implying that a statute would speak in jurisdictional language if it "set forth an inflexible rule requiring dismissal whenever its clock has run" (internal quotation marks and citations omitted)). In any event, as the majority acknowledges, the Court has instructed that Congress "need not incant magic words . . . to speak clearly." Op. at 11 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013)). Thus, Congress need not explicitly state that a time limit is jurisdictional; it is free to specify consequences that relate to a court's power to adjudicate cases and trust that the court will understand what those consequences mean.

[17] While a statute that specifies mandatory consequences is jurisdictional, the reverse is not necessarily true. *See, e.g., McNeil*, 508 U.S. at 111-12 (holding 28 U.S.C. § 2675, which does not specify

The majority calls my delineation of statutes of limitations a "grand theory". Op. at 18. I appreciate their praise, but I humbly submit there is nothing "grand" about following the "clear evidence" provided by Congress and the Supreme Court.

C. The Importance of the Term "Forever."

The majority escapes this rather straightforward conclusion with the assertion that "§ 2401(b) merely states what is always true of statutory filing deadlines: once the limitations period ends, whether extended by the application of tolling principles or not, a plaintiff is 'forever barred' from presenting his claim to the relevant adjudicatory body." Op. at 1038 (citing *Kubrick*, 444 U.S. at 117).[18] The majority has simply written the term "forev-

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mandatory consequences for noncompliance, jurisdictional). This dissent does not imply that the specification of mandatory consequences is the *only* way for Congress to express its intent that a statute be jurisdictional. Congress may express its intent that a statute be jurisdictional in other ways (i.e. it need not incant magic words), and, indeed, a statute may be jurisdictional for reasons other than the text. *See Reed Elsevier*, 559 U.S. at 166 (2010) (instructing courts, in determining whether a statute is jurisdictional, to look to the statute's "text, *context and relevant historical treatment*" (emphasis added)).

[18] I must confess that I have struggled to find which portion of the Court's opinion in *Kubrick* supports the majority's position about what is "ordinarily true of statutory filing deadlines." Op. at 15. Surely it is not this portion: "Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. And

er" out of the statute, ascribing it no meaning nor importance at all. It is a mere "vestige of mid-twentieth-century congressional drafting conventions,"[19] Op. at 18, and adds nothing that the statute would not say without it, because all statutes of limitations, if applicable, bar claims "forever," *see* Op. at 15-17.

But the majority fails to consider the standard canon of statutory construction that requires courts to give meaning, if possible, to *each* of a statute's terms. *See Lowe v. SEC.*, 472 U.S. 181, 208 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (explaining that "[t]he surplusage canon holds that it is no more the court's function to revise by subtraction than by addition."). To the majority, the term "forever" is tautological; it has no meaning whatsoever. But that is not the view of well-established dictionaries at the time the statute was drafted. *See, e.g.,* Webster's New International Dictionary 990 (2d ed. 1943) (defining the adverb "forever" as "1. For a limitless time or endless ages; everlastingly; eternally," and "2. At all times; always; incessantly,"

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surely it is not this portion: "We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Id.* at 117-18. I simply see no support for the majority's position in *Kubrick*.

[19] The majority's deprecatory labelling is off by about 100 years. In *Kendall v. U.S.*, 107 U.S. at 124, the term "forever barred" in the act of March 3, 1863, was definitively interpreted.

and identifying "invariably" and "unchangeably" as synonyms).

Usage of the term "forever," as in "forever barred," connotes something that obtains under any and all circumstances, something that is invariably so. But this is nothing new. In *Kendall v. United States*, the Supreme Court interpreted a statute of limitations which included the phrase "forever barred" and stated: "What claims are thus barred? The express words of the statute leave no room for contention. *Every claim*—except those specially enumerated—is forever barred unless asserted within six years from the time it first accrued." 107 U.S. at 125 (emphasis added). Forever, as in "forever barred", has an inclusionary meaning—"every claim"—as well as a temporal meaning—for all time. *Kendall* has continued to be cited approvingly in *Soriano v. United States*, 352 U.S. at 273,[20] and *John R. Sand & Gravel*, 552 U.S. at 134, on the way to holding statutes of limitations "jurisdictional."

As used in § 2401(b), then, the term "forever" means that an FTCA claim is invariably barred unless a civil action is commenced within the six-month period following final denial of the administrative claim. Moreover, according to the majority's theory, the fact that Congress included "forever barred" language in "various other statutes enacted in the mid-twentieth century," *see* Op. at 17, must mean that Congress merely plugged boilerplate

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[20] *John R. Sand & Gravel* held that *Soriano* is still good law. 552 U.S. at 137.

language into these provisions, without thinking or assigning any special meaning to the words it chose to employ. But the fact that Congress included the term in *various* limitations periods, and not *all* limitations periods, suggests the exact opposite is true: On the occasions when Congress used the term "forever barred," it did so intentionally and for a reason. It is especially telling that Congress did not adhere to the majority's claimed "drafting convention" when, in 1948, it drafted § 2401(a), the very section that precedes the one here in issue. *See* Act of June 25, 1948, chap. 646, 62 Stat. 971 (June 25, 1948) ("Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here 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" (citations omitted)).

The majority finally holds that *if* "forever" does mean anything, it merely focuses on time and emphasizes that "once barred, [a FTCA claim] is precluded permanently, not temporarily or until some later event occurs" and that "the word 'forever' cannot bear [the] weight" that I give it. Op. at 21, n.4. However, our canons of construction cannot bear the *lack* of weight the majority gives it, see *Lowe*, 472 U.S. 181 at n.53, and neither can our history. *See Kendall*, 107 U.S. at 125.

I do not subscribe to the facile construct that we can read "forever barred" to mean nothing more than "barred." Nor do I believe "forever" is a non-cipher.

"We are not free to rewrite the statutory text." *McNeil*, 508 U.S. at 111. By providing that claims not presented within the time prescribed "shall be forever barred," Congress clearly expressed its intention that "every claim" (*Kendall*, 107 U.S. at 125) would be *invariably* barred, not *sometimes* barred so that equitable considerations might be held to extend the time in which to begin actions on such claims.

D. Ninth Circuit Precedent

The majority relies on three of this court's previous opinions to support its conclusion that § 2401(b)'s "shall be forever barred" language does not mean that the statute's time limit is jurisdictional.[21] *See* Op. at 16-17. It first

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[21] The majority also cites out of circuit authority—*Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013); *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194-98 (3d Cir. 2009); *Perez v. United States*, 167 F.3d 913, 916-17 (5th Cir. 1999)—for the proposition that § 2401(b) is subject to tolling. However, these cases are not persuasive. *Arteaga* holds that because 28 U.S.C. § 2674 meant to hold the government liable in the same way as a private individual, and equitable tolling is available to private individuals, equitable tolling is available under the FTCA. *Arteaga*, 711 F.3d at 833. However, the *Arteaga* court ignores the plain language of § 2401(b) which states "to the agency to which it was presented." A private individual may not be held liable for an agency claim. Further, *Santos* ignores Congress' clear intent when it concludes that "the placement of the separate statutory savings provision does not suggest that Congress intended it to preclude equitable tolling." *Santos*, 559 F.3d at 196. *See* Pub. L. No. 773, 62 Stat. 869, 991 (1948) ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, . . . in which any section is placed."). Finally, *Perez* discussed the use of

relies on *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), which held that § 2401(a) is not jurisdictional. In fairness, the majority notes that this opinion's continued vitality was called into question by *Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 872 (9th Cir. 2009) ("To the extent that *Cedars-Sinai* is still valid after *John R. Sand*, the holding in *Cedars-Sinai* does not dictate the jurisdictional nature of section 7431(d)." (citation omitted)). It dismisses that statement, however, because it "was made without the benefit of the Supreme Court's most recent decisions clarifying the distinction between jurisdictional and nonjurisdictional rules." Op. at 16 n.2. Of course, this claim gets us nowhere, because *Cedars-Sinai* was also decided without the benefit of those decisions. Thus, we cannot blindly rely on *Cedars-Sinai*; instead, we must examine whether it accords with the Supreme Court's most recent guidance.[22]

Cedars-Sinai's analysis of the jurisdictional question is simple and brief. *See Cedars-Sinai*, 125 F.3d at 770. The court held: "Because the statute of limitations codified at 28 U.S.C. § 2401(a) makes no mention of jurisdiction but erects only a procedural bar, . . . we hold

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the phrase "forever barred" and found it was irrelevant, but failed to consider and attempt to distinguish prior cases interpreting the term, such as *Perez v. U.S.*, 167 F.3d at 915-18, and *Finn v. U.S.*, 123 U.S. at 233.

[22] The Court's "recent guidance" includes *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), *Holland v. Florida*, 130 S. Ct. 2549 (2010), *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), and *Auburn Regional Medical Center*, 133 S. Ct. 817.

that § 2401(a)'s six-year statute of limitations is not jurisdictional, but is subject to waiver." *Id.* (citations omitted). Two problems with *Cedars-Sinai*'s analysis lead me to conclude that it is no longer good law.

First, *Cedars-Sinai* appears to erect an absolute rule that a statute of limitations is jurisdictional only when it specifically mentions the term "jurisdiction." *See Cedars-Sinai*, 125 F.3d at 770. Since *Cedars-Sinai* was decided, however, the Supreme Court has advised that Congress "need not incant magic words . . . to speak clearly [about jurisdiction]." *Sebelius*, 133 S. Ct. at 824.[23] A requirement that Congress use the term "jurisdiction" runs afoul of this instruction. Moreover, the Court has clarified that a statute of limitations may be jurisdictional when it "speak[s] in jurisdictional terms or refer[s] *in any way* to the jurisdiction of the district courts." *Reed Elsevier*, 559 U.S. at 165 (emphasis added). As previously discussed, one way to refer to the courts' jurisdiction is to

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[23] In *Sebelius*, the governing statute allowed health care providers to file, within 180 days, an administrative appeal to the Provider Reimbursement Review Board from an initial determination of the reimbursement owed for inpatient services rendered to Medicare beneficiaries. *See id.* at 821 (citing 42 U.S.C. § 1395*oo*(a)(3)). The Secretary of the Department of Health and Human Services, by regulation, authorized the Board to extend the 180-day limitation, for good cause, up to three years. *See id.* The Court held that the 180-day limitation period was not jurisdictional and that the regulation permitting a three-year extension was a permissible construction of the statute. *See id.* at 821-22. It further held that equitable tolling "does not apply to administrative appeals of the kind here at issue." *Id.* at 822.

"suggest . . . that the provision was meant to carry jurisdictional consequences." *Henderson*, 131 S. Ct. at 1204. *Cedars-Sinai* failed to appreciate that, by providing that any claim not filed within the time specified "shall be barred," § 2401(a) limited the courts' power to act and, thus, referred to the courts' jurisdiction.

Second, *Cedars-Sinai* relied heavily on *Irwin*'s quotation of 28 U.S.C. § 2501, which the Court had deemed jurisdictional in *Soriano v. United States*, 352 U.S. 270 (1957).[24] After *Irwin*, there was initially good reason to believe *Soriano* had been overruled. *See Irwin*, 498 U.S. at 98 (White, J., concurring in part and concurring in the judgment) ("Not only is the Court's holding inconsistent with our traditional approach to cases involving sovereign immunity, it directly overrules a prior decision by this Court, *Soriano v. United States*." (citation omitted)). Because it seemed *Irwin* had overruled *Soriano*, it also

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[24] In *Soriano*, the petitioner, a resident of the Philippines, filed suit in the Court of Claims to recover "just compensation for the requisitioning by Philippine guerilla forces of certain foodstuffs, supplies, equipment, and merchandise during the Japanese occupation of the Philippine Islands." *Id.* at 270-71. The relevant statute of limitations provided that "[e]very claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . . within six years after such claim first accrues." *Id.* at 271 n.1 (quoting 28 U.S.C. § 2501). The petitioner filed suit more than six years after the alleged requisition claiming his delay was caused by World War II conditions in the Philippines. *See id.* at 271. The Court of Claims dismissed the suit without reaching the limitation question. *See id.* at 272. The Supreme Court affirmed and held that, by the time the petitioner filed suit, "his claim . . . was barred by statute." *Id.* at 277.

seemed the terms "shall be barred" were insufficient to make a statute jurisdictional. If that had been true, *Cedars-Sinai* may have been correct. But the Court has since clarified *Irwin* and reaffirmed *Soriano*'s vitality. *See John R. Sand & Gravel,* 552 U.S. at 137 ("[T]he Court [in *Irwin*], while mentioning a case that reflects the particular interpretive history of the court of claims statute, namely *Soriano,* says nothing at all about overturning that or any other case in that line. Courts do not normally overturn a long line of earlier cases without mentioning the matter." (citations omitted)). Given this clarification, and *Cedars-Sinai*'s tension with intervening Supreme Court decisions, I would hold that it was incorrectly decided and is of no precedential value on this issue. *See Oregon Natural Desert Ass'n v. U.S. Forest Serv.,* 550 F.3d 778, 782-83 (9th Cir. 2008) (explaining that circuit precedent is "effectively overruled" when its "reasoning or theory . . . is clearly irreconcilable with the reasoning or theory of intervening higher authority." (internal quotation marks and citations omitted)).

The majority then cites *Partlow v. Jewish Orphans' Home of Southern California,* 645 F.2d 757, 760-61 (9th Cir. 1981), *abrogated on other grounds by Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165 (1989), and *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 616 F.2d 394, 396-407 (9th Cir. 1980), as instances where this court has held that the language "shall be forever barred" did not render a statute jurisdictional. *See* Op. at 17. Of course, these cases pre-date all of the Supreme Court's recent guidance as well. For that reason, we should once again take a critical look at their reasoning before relying on them.

The *Partlow* court held that equitable tolling could be applied to 29 U.S.C. § 255, the statute of limitations applicable to actions brought under the Fair Labor Standards Act. *See Partlow*, 645 F.2d at 760-61. Interestingly, the court did not conduct any in-depth analysis of the statute's text, context, or historical treatment. Indeed, the *Partlow* opinion does not once quote the statute's text or even mention the phrase "shall be forever barred." *See id.* at 757-61. Instead, the court relied on opinions from two of our sister circuits, each of which held that § 255 could be equitably tolled. *See id.* at 760 (citing *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975), and *Hodgson v. Humphries*, 454 F.2d 1279, 1283-84 (10th Cir. 1972)). It then noted that "courts have often stated that equitable tolling is read into *every* federal statute of limitations." *Id.* (citation omitted) (emphasis added). It then concluded that the statute should be tolled in the circumstances of that case. *See id.* at 760-61.

If it were unclear at the time *Partlow* was decided, it has since become abundantly clear that equitable tolling is not to be read into *every* federal statute of limitations. *See John R. Sand & Gravel*, 552 U.S. at 133-34 (explaining that some federal statutes of limitations—such as 28 U.S.C. § 2501, for instance—must be treated as jurisdictional, so that courts are forbidden to "consider whether certain equitable considerations warrant extending [the] limitations period[s]" they contain). Moreover, *Partlow* fails to conduct the kind of analysis required by the Court's more recent decisions. *See Reed Elsevier*, 559 U.S. at 166 (providing that "the jurisdictional analysis must focus on the 'legal character' of the requirement, which we discern[] by looking to the condition's text, con-

text, and relevant historical treatment" (citations omitted)). For these reasons, I would hold that *Partlow* is today flat wrong, and of no precedential value on the question presently before the court.

In *Mt. Hood Stages,* this court held that equitable tolling could be applied to 15 U.S.C. § 15b. *See Mt. Hood Stages,* 616 F.2d at 396. It is once again telling that the court did not conduct any in-depth analysis of the statute's text or even mention the statute's phrase "shall be forever barred." *See id.* at 396-406. It is clear, then, that the decision was not based on a determination that the statute did not refer in any way to the courts' jurisdiction. In a word, *Mt. Hood Stages* skipped the first, Court-required step of textual analysis for a consideration of the statute's purpose in a regulatory scheme. *See Reed Elsevier*, 559 U.S. at 166.[25] Instead, the decision was based on the court's conclusion that "tolling the running of limitations serves the important federal interest in accommodating enforcement of the Sherman Act with enforcement of the Interstate Commerce Act, and is not inconsistent with the purposes of the Clayton Act's limitation period." *Id.* at 396.

In particular, the *Mt. Hood Stages* court found that tolling would "contribute[] to a reasonable accommodation of the [Interstate Commerce Commission]'s responsibility for furthering the national transportation policy with the responsibility of the courts to effectuate the national antitrust policy." *Id.* at 397. Because the case "involved

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[25] This dissent analyzes § 2401(b)'s purposes in Part III, *infra.*

subject matter Congress ha[d] given the Commission jurisdiction to regulate," it "created a dispute *only* the Commission could resolve." *Id.* (emphasis added). The court noted that, "[i]f Mt. Hood had filed [its] antitrust suit . . . prior to the Commission determination [of a particular factual issue]," accommodation of the Clayton and Interstate Commerce Acts would have compelled "the court . . . to dismiss or stay the suit pending the necessary administrative determination." *Id.* at 399. Thus, "[c]ongressional purposes under the two statutory regimes would be served by tolling the statute of limitations during the Commission proceeding." *Id.* at 400. For that reason, the court held that the statute of limitations could be "tolled pending resort to an administrative agency for a preliminary determination of issues within its primary jurisdiction." *Id.* at 405; *see also Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987) ("[O]ur decision [in *Mt. Hood Stages*] rested on considerations of federal policy and primary jurisdiction which are not present here.").

Contrary to the majority's implication, *see* Op. at 16, *Mt. Hood Stages* does not stand for the proposition that "shall be forever barred" does not refer to the courts' jurisdiction. Indeed, a statute may *refer* to the courts' jurisdiction and yet not be jurisdictional, much like a statute which does not speak in jurisdictional terms may still be jurisdictional. *See United States v. Brockamp*, 519 U.S. 347, 352 (1997) (holding that the timing requirements of 26 U.S.C. § 6511 are jurisdictional, even though the statute does not refer to the courts' jurisdiction, because of the provision's "detail, its technical language, the iteration of the limitations in both procedural and substantive

forms, and the explicit listing of exceptions"). In short, even a statute that refers in some way to the courts' jurisdiction may not be jurisdictional when, for example, Congress has created dual statutory regimes, such as those involved in *Mt. Hood Stages,* that essentially require tolling for their accommodation. Of course, there are no such dual regimes at issue in this case, nor does this case involve the sort of federal policy and primary jurisdiction considerations that animated the court's opinion in *Mt. Hood Stages.* Thus, I would hold that *Mt. Hood Stages* offers no useful guidance on the question whether § 2401(b)'s language refers to the courts' jurisdiction.

In defense of *Partlow* and *Mount Hood Stages,* the majority states that these cases still "undermine the notion that Congress intended through the use of magic words . . . to establish jurisdictional bars in statutes allowing for civil suits against private parties." Op. at 22, n.5. Of course, this argument is merely a straw man; we all agree that Congress never uses "magic words" to establish jurisdiction. *See supra,* Bea Dissent at 75, n.17.

III. The Statute's Purpose

As earlier noted, in *John R. Sand & Gravel,* the Court identified the kinds of goals that make statutes of limitations jurisdictional: "[Jurisdictional] 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." 552 U.S. at 133. Consideration of each of the goals outlined in *John R. Sand & Gravel* illustrates that § 2401(b)'s

broad, system-related purposes require us to find that its timing provisions are indeed jurisdictional.

A. Section 2401(b) Facilitates the Administration of Claims

The Court has held that § 2401(b)'s "obvious purpose" is to "encourage the prompt presentation of claims." *See United States v. Kubrick*, 444 U.S. 111, 117 (1979).[26] The requirement that a civil action be filed within six months of a denial of an administrative claim guarantees that the civil action will commence while the denial of the claim is relatively fresh. For actions filed within that time period,

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[26] In *Kubrick*, the respondent, a veteran, was admitted to a VA hospital for treatment of an infected femur in April 1968. *See id.* at 113. Medical personnel irrigated the infected area with neomycin, an antibiotic, until the infection cleared. *See id.* Six weeks later, the respondent noticed some hearing loss. *See id.* at 114. In January 1969, doctors informed the respondent that it was "highly possible" that the neomycin treatment caused his hearing loss. *See id.* In 1972, the respondent filed suit under the FTCA, alleging he had been injured by negligent treatment at a VA hospital. *See id.* at 115. The VA denied the respondent's administrative claim, which he presented after he filed suit, in April 1973. *See id.* at 116 n.4. The Government then filed a motion to dismiss the suit as time-barred under 28 U.S.C. § 2401(b)'s two-year statute of limitations, on the theory that the respondent's claim accrued in January 1969, when doctors told the respondent that his hearing loss was likely caused by the neomycin treatment. *See id.* at 115. The district court rejected this defense and rendered judgment for the respondent. *See id.* The Third Circuit affirmed. *See id.* at 116. The Supreme Court reversed and held that claims accrue when the individual "knows both the existence and the cause of his injury." *See id.* at 113, 124-25.

the Department of Justice, which will defend the cases, will be able to access the relatively fresh memories of the administrators who denied the claim. It is also more likely that those administrators will be on the job six months after the denial of the claim than would be the case if the denial had taken place years before.

B. Section 2401(b) Limits a Waiver of Sovereign Immunity

The Court has held that § 2401(b) limits the waiver of sovereign immunity expressed in the FTCA. *See Kubrick*, 444 U.S. at 117-18. In particular, the Court has stated:

> "We should . . . have in mind that the [FTCA] waives the immunity of the United States and that in construing the statute of limitations [expressed in § 2401(b)], *which is a condition of that waiver*, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."

Id. (emphasis added). This passage clearly identifies § 2401(b) as a provision "limiting the scope of a governmental waiver of sovereign immunity," which is exactly the kind of broader, system-related goal that makes a statute's time limit "more absolute." *See John R. Sand & Gravel*, 552 U.S. at 133; Op. at 32.

The majority agrees that the FTCA "is predicated on a sovereign immunity waiver." Op. at 31. Further, the majority admits that many of the cases upon which they rely—*Auburn Regional Medical Center*, *Gonzalez*, *Henderson*, *Holland*, and *Bowles*—do *not* involve issues of government immunity and therefore "may not raise pre-

cisely parallel sovereign immunity concerns" as are now before us. *See* Op. at 32 n.12. The majority is unable to deny that (1) the FTCA limits waiver of sovereign immunity and therefore meets a goal that makes statutes of limitations jurisdictional under *John R. Sand & Gravel*, or (2) this difference distinguishes the FTCA and § 2401(b) from other cases on which the majority tries to rely.

C. Section 2401(b) Promotes Judicial Efficiency

First, like all statutes of limitations, § 2401(b) "protect[s] . . . the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *See Kubrick*, 444 U.S. at 117. By promoting the prompt presentation of claims, § 2401(b) seeks to limit the amount of evidence lost to time and ensure that courts will adjudicate cases with complete records. *See id.*

Second, when read together with § 2675, it is clear that § 2401(b) was intended to protect against the burdens of claims filed outside of its time prescriptions. In *McNeil v. United States*, the Court held that § 2675's administrative exhaustion requirement was jurisdictional. 508 U.S. 106, 111-12 (1993). There, the petitioner filed a complaint in federal district court alleging that the United States Public Health Service had injured him while conducting experimentation on prisoners in the custody of the Illinois Department of Corrections. *See id.* at 108. Four months later, he submitted a claim for damages to the Department of Health and Human Services. *See id.* at 109. After the Department denied the claim, the peti-

tioner sent the district court a letter and asked that it permit him to commence his legal action. *See id.* The court held that it lacked jurisdiction to entertain an action commenced before satisfaction of § 2675's administrative exhaustion requirement. *See id.* The Seventh Circuit affirmed and held that the petitioner had filed his action too early. *See id.*

The Supreme Court affirmed and held that § 2675's administrative exhaustion requirement was a jurisdictional prerequisite to filing suit under the FTCA. *See id.* at 112-13. As relevant here, it noted that "every premature filing of an action under the FTCA imposes some burden on the judicial system. . . ." *Id.* at 112. Similar burdens are imposed on the judicial system when actions are filed late, accompanied by claims that the court should toll the running of the statute of limitations for equitable reasons which may or may not justify the plaintiff's tardiness. As was the case for premature filings in *McNeil*, "the burden may be slight in the individual case." *Id.* But § 2401(b) "governs the processsing of a vast multitude of claims." *Id.* For that reason, "adherence to the straightforward statutory command" is the best way to promote "[t]he interest in orderly administration of this body of litigation." *Id.*

Because § 2401(b) serves each of the three system-related purposes identified in *John R. Sand & Gravel* as making statutory time limits "more absolute," equitable tolling should not be applied here. Instead, we should hold that § 2401's time limits are jurisdictional in nature.

IV. The Statute's Context

Section 2401(b)'s context includes its placement in the larger statutory scheme, as well as any relevant exceptions Congress may have legislated. It also includes the Supreme Court's "interpretation of similar provisions in many years past." *Reed Elsevier*, 559 U.S. at 168.

A. The Supreme Court's Interpretation of Similar Provisions

The majority correctly notes that "there has not been . . . a venerable, consistent line of [Supreme Court] cases treating the FTCA limitations period as jurisdictional" and, indeed, that "there is no Supreme Court precedent on the question."[27] Op. at 30. Still, the Supreme Court has examined similar provisions and offered guidance useful here. As previously stated, *Kubrick* and *John R. Sand & Gravel*, taken together, strongly suggest that § 2401(b)'s time limits are jurisdictional.

The Court's analysis in *McNeil* only bolsters this conclusion. There, the Court held that 28 U.S.C. § 2675(a)

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[27] The majority's focus is—jurisprudentially speaking—far too narrow. *See Reed Elsevier*, 559 U.S. at 168 ("[T]he relevant question here is not . . . whether [the statute] itself has long been labeled jurisdictional, but whether the type of limitation that [the statute] imposes is one that is properly ranked as jurisdictional absent an express designation."). Section 2401(b) expresses the same "type of limitation" the Court held jurisdictional in *Soriano* and *John R. Sand & Gravel*. 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.").

"bars claimants from bringing suit in federal court [under the FTCA] until they have exhausted their administrative remedies." *McNeil*, 508 U.S. at 113. This requirement is jurisdictional. Courts cannot entertain a suit brought before exhaustion of administrative remedies, even if the claimant exhausts those remedies before "substantial progress [is] made in the litigation," because such a suit was filed too early. *Id.* at 110-11. Here, there is no dispute that, like the petitioner in *McNeil*, Wong filed her action before denial of her administrative claim and was similarly premature.

The majority emphasizes that § 2675(a) is located in chapter 171 and that Congress expressly conditioned the district courts' jurisdiction upon plaintiffs' compliance with the provisions of that chapter. *See* Op. at 23. In *McNeil*, however, the Court did not even mention this fact. Instead, it based its decision on two considerations: (1) the statutory text is unambiguous and expresses Congress's intent to require complete exhaustion of administrative remedies, and (2) "[e]very premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions." *McNeil*, 508 U.S. at 111-12. With respect to the premature filing, the Court noted that, "[a]lthough the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims," such that "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *Id.*

The Court's language suggests once again that the FTCA's timing requirements fit into the jurisdictional

category. *See John R. Sand & Gravel*, 552 U.S. at 133 (identifying "facilitating the administration of claims" as one of the broader, system-related goals that makes a statutory time limit "more absolute"). In *McNeil*, the Court took a systemic view of its decision; it was concerned with the "orderly administration of this body of litigation" precisely because § 2675(a) "governs the processing of a vast multitude of claims." *McNeil*, 508 U.S. at 112. Because the same is true of § 2401(b), our analysis should feature the same concern. And, when one takes this more systemic view of § 2401(b), one will surely find that every premature—or late—filing imposes a burden on the judicial system and on the Department of Justice and agree with the Court that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 113.[28]

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[28] The majority notes that § 2675 is silent as to the deadline for filing a properly exhausted claim in the district court and concludes that "there is no contextual reason to think that the limitations period provisions are also jurisdictional." Op. at 28. But § 2675 does not require only that individuals exhaust their administrative remedies; instead, it specifies that individuals must exhaust their administrative remedies first (i.e. before they file complaints in federal court). *See* 28 U.S.C. § 2675(a). Thus, the statute requires a particular timing of administrative exhaustion, and the *McNeil* Court found this timing requirement significant. *See McNeil*, 508 U.S. at 111 (noting that the "petitioner's complaint was filed too early"); *id.* at 112 (addressing the burdens premature filings impose on the judicial system and the Department of Justice). Just as in *McNeil*, appellant Wong's complaint was filed "too early" and imposed a burden on the judicial system and Department of Justice. Because late

B. Placement

Seeking another interpretive tool to support its position, the majority emphasizes the fact that § 2401(b) is located in a provision separate from the FTCA's jurisdiction-granting provision. *See* Op. at 23. With respect, this fact is irrelevant. As the Court has explained, "some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, while others are not, even when incorporated into the jurisdictional provisions." *Barnhart*, 537 U.S. at 159 n.6 (citations omitted). "Formalistic rules do not account for the difference, which is explained by contextual and historical indications of what Congress meant to accomplish." *Id.*

Even more problematic to the majority's analysis of the FTCA's reorganization in 1948, *see* Op. at 26, is the inconvenient enactment of a law rejecting placement in the Act as a valid interpretive tool. The majority acknowledges that, before 1948, Congress had expressly conditioned the grant of jurisdiction over tort claims against the United States upon plaintiffs' compliance with, among other things, the FTCA's original limitations provision. *See* Op. at 26. In 1948, however, Congress reorganized the FTCA and placed the limitations provision in chapter 161 and other provisions, such as § 2675, in chapter 171. *See* Op. at 26. It appears the majority would conclude from this fact that Congress intended to separate jurisdictional

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filings impose similar burdens on the courts and the Department of Justice, there is good reason to believe that the limitations period expressed in § 2401(b) is also jurisdictional.

requirements (§ 2675) from non-jurisdictional ones (§ 2401). Congress, however, expressly rejected this possible reading of its reorganization efforts by an enactment of law. *See* Pub. L. No. 773, 62 Stat. 869, 991 (1948) ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, . . . in which any section is placed."). The majority simply ignores this Act of Congress, perhaps because it cuts directly against the majority's desired result: interpretive value based on the statute's placement.

Congress clearly stated that the placement of § 2401 in chapter 161 was not intended to change the way it should be interpreted. If Congress intended to condition the grant of jurisdiction over tort claims against the United States on compliance with the limitations period, the recodification in 1948 should not be read to alter that intent. That Congress later amended the jurisdiction-granting provision to provide that the district courts would have exclusive jurisdiction over FTCA actions "[s]ubject to the provisions of chapter 171 of this title," 28 U.S.C. § 1346(b)(1), says nothing about the jurisdictional status of a provision located in chapter 161.

C. The Significance of § 2401(a)'s Exceptions

"[A]s a general rule, . . . Congress's use of certain language in one part of [a] statute and different language in another can indicate that different meanings were intended." *Sebelius,* 133 S. Ct. at 825. As relevant here, § 2401(b) enumerates no exceptions, while § 2401(a) provides that "action of any person under legal disability or beyond the seas at the time the claim accrues may be

commenced within three years after the disability ceases." 28 U.S.C. § 2401(a). The relevant meaning to be inferred from *Sibelius*' interpretive canon quoted above is that Congress did not intend for any exceptions to be applied to § 2401(b). The majority is correct that this canon, standing alone, does not constitute a "clear statement" by Congress. *See* Op. at 28. The canon can, however, "tip the scales when a statute could be read in multiple ways." *Sebelius*, 133 S. Ct. at 826. I would not hold that consideration of this canon alone dictates a conclusion that § 2401(b)' s time limit is jurisdictional, but it reinforces that conclusion when considered with the statute's text and context.

V. Conclusion

Congress clearly expressed its intent that § 2401(b) would have "jurisdictional" consequences. Jurisdictional treatment accords with the statute's text and the Supreme Court's analysis of similar provisions. For these reasons, equitable tolling should not be applied to the time limits contained in § 2401(b). I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-JO

KWAI FUN WONG; ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE ET AL.,
DEFENDANTS

Oct. 28, 2010

OPINION AND ORDER

JONES, Judge:

In this protracted litigation, which the Ninth Circuit recently returned—once again—to this court, defendant United States moves (# 504) the court to reconsider a decision Magistrate Judge Stewart rendered in February 2006, and this court adopted in April 2006. *See Kwai Fun Wong, et al. v. Beebe, et al.*, Civil No. 01-718-ST (Findings and Recommendation, Feb. 14, 2006) (# 325), adopted by Order (April 10, 2006) (Jones, J.) (# 358). Specifically, defendant asks this court to reconsider the decision to apply equitable tolling to excuse plaintiffs late

filing of her Federal Tort Claims Act ("FTCA") claim for negligence, which is plaintiffs only surviving claim.[1]

Without question, Judge Stewart applied, and this court adopted the application of, principles of equitable tolling in permitting plaintiff's late filing. Findings and Recommendation, pp. 6-9. And also without question, under Ninth Circuit precedent then and now, the court should have dismissed the untimely FTCA claim for lack of jurisdiction. As the Ninth Circuit recently clarified:

> [T]he six-month statute of limitation in § 2401(b) [of the FTCA] is jurisdictional and . . . the failure to file a claim within that time period deprives the federal courts of jurisdiction. Accordingly, the doctrines of equitable estoppel and equitable tolling do not apply.

Marley v. United States, 567 F.3d 1030, 1038 (9th Cir. 2009). In so stating, the Ninth Circuit explained in detail that it had "long held that § 2401(b) is jurisdictional," citing Ninth Circuit precedent supporting that view and explaining away a contrary 1996 panel decision. *See Marley*, 567 F.3d at 1035-36, 1037-38. Consequently, plaintiff's contention that *Marley* should not be applied retroactively is misplaced.

Accordingly, defendant's motion (# 504) for reconsideration must be granted. On reconsideration, I conclude that this court has lacked jurisdiction over plaintiff's un-

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[1] The history of this litigation is well-documented in numerous decisions by this court and the Ninth Circuit, and need not be repeated here.

timely filed FTCA claim since she first filed the claim in August 13, 2002.

CONCLUSION

Defendant's Motion for Reconsideration (# 504) is GRANTED. Plaintiff having no surviving claims, this action is dismissed with prejudice. Any other pending motions are denied as moot.

DATED this *28th* day of October, 2010.

/s/ ROBERT E. JONES
ROBERT E. JONES
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG AND WU WEI TIEN TAO ASSOCIATION, PLAINTIFFS,

v.

DAVID V. BEEBE, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

Apr. 10, 2006

ORDER

JONES, Judge:

Magistrate Judge Janice M. Stewart filed Findings and Recommendation (#325) on February 14, 2006, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1);

McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiff Wong and Defendants have timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Stewart's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Stewart's Findings and Recommendation (#325) dated February 14, 2006, in its entirety. Plaintiff Kwai FunWong's Motion (#192) for partial summary judgment is denied and the United States' cross-motion (#206) for partial summary judgment on plaintiff Kwai Fun Wong's false imprisonment claim is granted without prejudice. Accordingly, the United States is granted summary judgment against the portion of the Fifth Claim for Relief by Wong alleging a violation of the FTCA based on the tort of false imprisonment. However, Wong is granted leave to replead her FTCA claim to the extent she can allege a viable tort claim outside the due care exception to the FTCA concerning the manner in which she was detained when defendants executed the expedited removal order.

IT IS SO ORDERED.

DATED this *10th* day of April, 2006.

/s/ ROBERT E. JONES
ROBERT E. JONES
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV-01-718-ST

KWAI FUN WONG AND WU WEI TIEN TAO ASSOCIATION, PLAINTIFFS

v.

DAVID V. BEEBE, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

Feb. 14, 2006

FINDINGS AND RECOMMENDATION

STEWART, Magistrate Judge:

INTRODUCTION

Following a July 24, 2002 appeal to the Ninth Circuit (*Wong v. United States Immigration & Naturalization Serv., et al*, 373 F.3d 952 (9th Cir. 2004)), and further proceedings in this court on remand, plaintiffs filed a Fourth Amended Complaint (docket #170).

Plaintiff Kwai Fun Wong ("Wong") has now filed a Motion for Partial Summary Judgment Against the United States (docket #192), and the United States has filed a Cross-Motion for Partial Summary Judgment on Plaintiff Kwai Fun Wong's False Imprisonment Claim (docket #206). For the reasons that follow, this court recommends that Wong's motion be denied and the United States cross-motion be granted without prejudice and with leave to amend.

ANALYSIS

These two motions concern that portion of Wong's Fifth Claim for Relief under the Federal Tort Claims Act ("FTCA") alleging a claim for false imprisonment.

I. Background Facts and Pertinent Allegations

The factual and procedural history of this case has been throughly discussed in this court's prior opinions, as well as in the Ninth Circuit's decision, and need not be repeated here. The pertinent factual history and allegations are set forth only as necessary to rule on the pending motions.

II. Timeliness of the FTCA Claim

The United States contends that this court has no subject matter jurisdiction over Wong's FTCA claim because that it is untimely. For the reasons that follow, that argument is rejected.

A. Procedural History of the FTCA Claim

Wong alleges that she is a citizen of Hong Kong, the Matriarch of the Tao Heritage, and the leader of plaintiff Wu-Wei Tien Tao Association ("Association"), a worldwide

non-profit religious organization registered in Oregon. Fourth Amended Complaint, ¶¶ 3-4. In their Fifth Claim for Relief, Wong and the Association allege that the United States is liable to them under the FTCA for the torts of: (1) false imprisonment (as to Wong only); (2) intentional interference with economic relations; and (3) negligence (as to Wong only). *Id*, ¶ 46. Both plaintiffs seek awards of economic damages on this claim, and Wong also seeks non-economic damages. *Id*, ¶ 47.

The detention that forms the basis of Wong's FTCA claim for false imprisonment took place on June 17, 1999, when the United States Immigration and Naturalization Service ("INS")[1] detained Wong at its Portland, Oregon office. On that same date, Wong was arrested, handcuffed and taken to the Multnomah County Detention Center ("MCDC"). *Id*, ¶ 17. Wong was imprisoned at MCDC for five days, during which time she alleges that she was subjected to unlawful conditions of confinement.[2] *Id*, ¶¶ 17-18. On June 22, 1999, Wong was removed from the United States and remains outside the country. *Id*, ¶ 20.

On May 18, 2001, plaintiffs simultaneously filed the original Complaint in this case and hand-delivered admin-

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[1] All functions of the INS have now been transferred to the Department of Homeland Security. However, because this agency was known as the INS at all times relevant to plaintiffs' allegations, this court will refer to it as the INS, as did the Ninth Circuit. *Wong*, 373 F.3d at 958 n.4.

[2] The conditions of Wong's confinement are the subject of other claims in the Fourth Amended Complaint.

istrative claim against the INS. Plaintiff's Exhibits 16-17.[3] Neither the original Complaint (docket #1) filed on May 18, 2001, nor the First Amended Complaint (docket #30) filed on October 17, 2001, included a claim against the United States under the FTCA.[4] On October 30, 2001, defendants filed a Motion to Dismiss the First Amended Complaint (docket #31), which this court set for oral argument along with several other pending motions on December 17, 2001. Minute Order dated November 5, 2001 (docket #41).

On November 9, 2001, plaintiffs filed a Motion to Allow Filing of a Second Amended Complaint (docket #44), seeking to add their claim under the FTCA on or after November 20, 2001, when the administrative claim would have been deemed denied. 28 USC § 2675(a) ("The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section."). On November 14, 2001, plaintiffs filed an Amended Motion to Allow Filing of a Second Amended Complaint (docket #46). The purpose of that amended motion was to add a claim for attorney fees under the RFRA, which was inadvertently omit-

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[3] References to Plaintiffs' Exhibits are to those documents attached to the Affidavit of Tom Steenson with Exhibits in Support of Plaintiff Kwai Fun Wong's Motion for Partial Summary Judgment Against Defendant United States of America (docket #195).

[4] The First Amended Complaint did contain other claims against the United States for declaratory relief (Third Claim) and violation of RFRA (Fourth Claim).

ted from the first motion to amend. Absent a request for expedited consideration, that amended motion went advisement on December 17, 2001. LR 7.1(g); *see* Minute Order dated November 20, 2001 (docket #47) (setting oral argument on docket #46 for December 17, 2001). Shortly thereafter, on December 3, 2001, the INS issued a written decision denying plaintiffs' administrative claim because plaintiffs "have exercised [their] option under § 2675(a) to file suit." Government Exhibit 19.

On December 17, 2001, this court heard oral argument on the pending motions. After receiving additional briefing, on January 29, 2002, this court struck the case schedule and took all the pending motions under advisement, including defendants' motions to dismiss, to compel and to clarify, as well as plaintiffs' motion for a stay of discovery and to amend to include their FTCA claim. On April 5, 2002, this court issued an Order, Findings, and Recommendations (docket #62) ("F&R"), which, among other things, granted plaintiff's motion to amend and recommended denial of defendants' motion to dismiss. District Court Judge Robert E. Jones adopted the F&R in its entirety on June 25, 2002. Order (docket #69). Almost six weeks later, on August 13, 2002, plaintiffs filed the Second Amended Complaint (docket #83) which contained the FTCA claim.

B. Filing Time Lines for FTCA Claims

Defendants argue that plaintiffs filed their FTCA claim either too early or too late. However, this court concludes that plaintiffs' FTCA claim should be deemed timely.

In order to proceed with a claim against the United States under the FTCA, the plaintiff must file an administrative claim against the relevant federal agency. The statute governing such claims 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 USC § 2401(b).

This statute requires that a plaintiff meet two limitations periods. "A claim must be filed with the agency within two years of the claim's accrual and the claimant must file suit within six months of administrative denial of the claim. If either requirement is not met, suit will be time barred." *Dyniewicz v. United States*, 742 F2d 484, 485 (9th Cir. 1984). Wong timely filed her administrative claim for false imprisonment with the INS. However, the government contends that she did not commence her FTCA claim within six months after the INS denied her claim on December 3, 2001. If the action is deemed to have begun on November 9 or 14, 2001, when plaintiffs filed their motions to amend their pleadings to add a claim under the FTCA, then the government argues that it was filed too early. At that point, the INS had not yet denied the claim. Alternatively, if the action is deemed to have begun on August 13, 2002, with the filing of the Second Amended Complaint, then the government argues that it

was filed too late since the six month period expired on June 3, 2002.

The "obvious purpose [of 28 USC § 2401(b)] is to encourage the prompt presentation of claims" against the United States. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Where those ends have been met and where there is no prejudice to the United States, equitable tolling may be warranted by the interests of justice. "The purpose of a statute of limitation is 'to prevent assertion of stale claims against a defendant.' Where the danger of prejudice to the defendant is absent, and the interests of justice so require, equitable tolling of the limitations period may be appropriate." *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) quoting *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1136 (9th Cir. 2001) and citing *Stoll v. Runyon*, 165 F3d 1238, 1242 (9th Cir. 1999).

In this case, the government was not faced with the presentation of stale claims and has made no showing of any prejudice whatsoever. To the contrary, the government was fully apprised of plaintiffs' claims by their administrative filing, had full notice of plaintiffs' intended FTCA claim just prior to the expiration of the six-month administrative review period, and was aware that plaintiffs were seeking to add the FTCA claim to this case *after* expiration of the six-month administrative review period. *See* Amended Motion to Allow Filing of Second Amended Complaint (docket #46) moving "for an order allowing the filing of plaintiffs' Second Amended Complaint *on or after November 20, 2001*.").

In response to plaintiffs' motion to amend, defendants argued that the "only way for Plaintiffs to properly invoke

this Court's jurisdiction under the FTCA is to institute a new action once they have completely exhausted their administrative remedies." Memorandum in Support of Defendants' Opposition to Plaintiffs' Motions to Allow Filing of Second Amended Complaint (docket #50), p. 5 (citations omitted). On April 5, 2002, this court rejected that argument and allowed the filing of a Second Amended Complaint adding an FTCA claim. F&R (docket #62), pp. 45-47. At that point in time, plaintiffs had exhausted their administrative remedies and were within the window of time allowed for filing their FTCA claim. However, this court also issued a recommendation denying defendants' Motion to Dismiss the First Amended Complaint (docket #31) to which the government filed objections. Until a final ruling was issued on that motion two months later, it was not clear to the parties which claims plaintiffs could include in a further amended complaint. By that time, more than six months had passed since the denial of plaintiffs' administrative claim.

Accepting the position of the government on this issue would effectively impose on plaintiffs a court-created Catch-22 and make a mockery of this court's prior ruling allowing the filing of the FTCA claim in this action, while doing nothing to serve the intended purpose of the statute of limitations in preventing the assertion of stale claims. No case of which this court is aware addresses a situation quite on point with the one here. In essence, the government seeks to deny plaintiffs an opportunity to present their FTCA claims due solely to the delay inherent in the Magistrate Judge system. Absent consent of the parties, Magistrate Judges make recommendations to a district court judge on dispositive pretrial matters. 28 USC

§ 636(b) & (c). This necessarily causes delay in entry of a final order. Had the government filed no objections by April 26, 2002, to the recommendation denying their motion to dismiss, then the F&R would have been immediately referred to Judge Jones who would have issued a final ruling shortly thereafter and well before June 3, 2002. Alternatively, had all parties consented to a Magistrate Judge, then this court's ruling on the motion to dismiss would have been final, which would have given plaintiffs over eight weeks within which to add the FTCA claim prior to the expiration of the six-month period set forth in 28 USC § 2401(b). Instead, no final ruling on the motion to dismiss was issued until several weeks after that period expired.

This court will not countenance the result that defendants seek, namely that plaintiffs' FTCA claims be deemed premature or too late based upon the happenstance of the timing of this court's rulings. Plaintiffs had already instituted this action alleging other claims against defendants, including the United States. They did not prematurely file their FTCA claims, nor did they seek to do so when they filed their motions to amend. Instead, they sensibly sought to add to this case the FTCA claims which arise out of the identical events as do their other claims. Plaintiffs moved to amend just prior to the expiration of six months from the date they filed their administrative claim and expressly included a request that they be allowed to add their FTCA claims to this action after that period expired. This court allowed them to do so. However, plaintiffs appropriately waited until a final ruling on the defendants' motion to dismiss to file their amended complaint. By then, plaintiffs would know which claims to include in

order to comply with the court's rulings. The government seeks to use the time period between issuance of this court's April 5 and June 25, 2002 rulings to its advantage, arguing that plaintiffs FTCA claims are barred because their August 13, 2002 Second Amended Complaint was filed too late and cannot relate back to earlier pleadings because plaintiffs' motions to amend were filed too early.

The government has suffered no prejudice whatsoever and the purposes of the administrative filing requirements and time lines have been more than met. The government had notice of the intended FTCA claims with the filing of the motions to amend and now simply seeks to gain an unwarranted advantage.

Accordingly, this court concludes that in the interests of justice, the limitations period should be tolled for the 81 days between issuance of the April 25, 2002 F&R on the motion to dismiss and the June 25, 2005 final order adopting that F&R. Adding that period of time to the limitations period would require plaintiffs to have begun action on their FTCA claims no later than August 23, 2002. As a result, the FTCA claims asserted in the August 13, 2002 Second Amended Complaint are rendered timely.

Thus, to the extent it is premised upon the applicable statute of limitations, the United States' motion for summary judgment against the false imprisonment portion of the FTCA should be denied. However, as explained below, the motion should be granted on the basis that there has been no waiver of the sovereign immunity of the United States, at least with respect to the false imprisonment claim.

III. Waiver of Sovereign Immunity Under the FTCA

The United States also argues that the portion of the Fifth Claim alleging a claim for false imprisonment by Wong under the FTCA fails because the United States has not waived sovereign immunity. This court agrees and, therefore, concludes that although the FTCA claim should be deemed timely filed, this court nevertheless lacks subject matter jurisdiction over the false imprisonment portion of Wong's Fifth Claim for Relief. However, Wong should be allowed leave to plead a claim based on intentional conduct about the manner in which she was detained when defendants executed the expedited removal order.

The FTCA "provides a limited waiver of the sovereign immunity of the United States for torts committed by federal employees acting within the scope of their employment." *Nurse v. United States.*, 226 F.3d 996, 1000 (9th Cir. 2000). When the FTCA applies, the United States may be held civilly liable for the torts of its employees "in the same manner and to the same extent as a private individual under like circumstances." 28 USC § 2674. However, where the claim falls within one or more of the statutory exceptions to the FTCA, then the "cause of action must be dismissed for want of federal subject matter jurisdiction." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F3d 840, 853-54 (10th Cir. 2005) (citations omitted); *see also Nurse*, 226 F3d at 1000.

The FTCA specifically waives sovereign immunity for liability arising out of certain intentional torts, including false imprisonment or false arrest, when committed by federal investigative or law enforcement officers, including INS officials. 29 USC § 2680(h); *Caban v. United States*, 671 F2d 1230, 1234 n.4 (2nd Cir. 1982). However, one of

the enumerated exceptions to the FTCA's waiver of sovereign immunity is any claim: (1) "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid;" or (2) based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 USC § 2680(a). These so-called "due care" and "discretionary function" exceptions completely bar any claim within their ambit:

> The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. . . . [T]he FTCA allows neither jury trial nor punitive damages. And recovery may be barred altogether if the claim arises from a "discretionary function" or the "execution of a statute or regulation, whether or not such statute or regulation is valid."

Carlson v. Green, 446 U.S. 14, 28 n.1 (1980) (Powell, J. and Stewart, J., concurring), quoting 28 USC § 2680(a).

Central to Wong's false imprisonment claim under the FTCA is her contention that her detention was illegal because the INS had no authority to detain her. Wong argues that she was not an "arriving" alien pursuant to *Sissoko v. Rocha*, 412 F.3d 1021 (9th Cir. 2005) and *Rosenburg v. Flueti*, 374 US 449 (1963) because her departure was "brief, casual, and innocent." This court previously considered and rejected this argument prior to the decision in *Sissoko*. See F&R (docket #62), pp. 17-25; s*ee*

also, *Wong*, 373 F3d at 974 (describing due process rights of "non-admitted aliens such as Wong"). *Sissoko* does not appreciably alter the legal landscape relative to this issue. *Sissoko* was a "legalization" applicant under 8 USC § 1255a (as opposed to an applicant for adjustment of status under 8 USC § 1255) and departed the country with advance parole. Unlike Sissoko, Wong did not obtain advance parole prior to departing the United States and did not qualify for adjustment of status under 8 USC § 1255a, a statute which expressly provides that "brief, casual, and innocent absences from the United States" will not interfere with an assertion of "continuous physical presence in the United States" for purposes of legalization proceedings. Thus, this court adheres to its prior rulings on this subject and concludes that neither *Sissoko* nor *Flueti* provide a basis from which to argue that Wong was not subject to the expedited removal statute, 8 USC § 1225(b)(1)(A)(i).

Wong also argues that the INS acted outside its statutory authority in enacting the regulation pursuant to which she was detained. Wong was detained pursuant to 8 CFR § 235.3(b)(2)(iii), which provides as follows:

> Detention and parole of alien in expedited removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section *shall be detained pending determination and removal*, except that parole of such alien, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

(Emphasis added).

Wong contends that in enacting this regulation, the INS acted outside its statutory authority because Congress authorized only expedited *removal*, and not *detention*, of arriving aliens:

> **(b) Inspection of applicants for admission**
>
> **(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled**
>
> **(A) Screening**
>
> **(i) In general**
>
> If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section 1182(a)(6)(c) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

8 USC § 1225(b)(1)(A)(i).

Specifically, Wong contends that this statute authorizes only the *removal* and not the *detention* of arriving aliens who are determined to be inadmissible. As a consequence, Wong asserts that the INS exceeded its statutory authority by enacting 8 CFR § 235.3 requiring mandatory detention and, therefore, that her detention pursuant to that regulation was unlawful. The difficulty with Wong's

argument is that her false imprisonment claim turns on the contention that her detention was pursuant to an invalid regulation which falls within the ambit of the "due care" exception to the FTCA.

In *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005), *petition for cert filed*, 74 USLW 3275, October 24, 2005, No. 05-529, Welch was detained for over a year under an immigration statute that the court later determined was unconstitutional as applied to him due to its failure to provide for a bail hearing. The Fourth Circuit affirmed the dismissal of Welch's claim for false imprisonment under the "due care" exception to the FTCA, applying a two-part analysis:

> First, we determine whether the statute or regulation in question specifically proscribes a course of action for an officer to follow. Second, if a specific action is mandated, we inquire as to whether the officer exercised due care in following the dictates of the statute or regulation. If due care was exercised, sovereign immunity has not been waived.

Welch, 409 F3d at 652, citing *Crumpton v. Stone*, 59 F3d 1400, 1403 (DC Cir 1995).

Because of the mandatory language of the statute under which Welch was detained, the court found the first part of the analysis satisfied:

> The language in this provision specifically proscribes a course of action to be followed by officers of the United States. The detention . . . is mandatory; the 'shall' language in the provision indicates that an individual officer cannot deviate from its enforcement.

> Once Welch was deemed deportable, the INS officers had no discretion in their actions. The decision to detain him was statutorily required, thus satisfying the first requirement of the due care exception.

Id.

As in *Welch*, the first part of this analysis is satisfied here. On May 20, 1999, Douglas Glover, a Supervisory Immigration Inspector, and John H. O'Brien, a Port Director, issued a Determination of Inadmissibility and Order of Removal Under Section 235(b)(1) of the Act. Plaintiffs' Exhibit 8; Plaintiff's Concise Statement of Material Facts, ¶ 9. The regulation pursuant to which Wong was detained (8 CFR § 235.3(b)(2)(iii)) is couched in mandatory language, requiring the detention of aliens who have been ordered removed.

This leaves only the question of whether the officer exercised due care in following the dictates of the statute or regulation. As in *Welch*, the gravamen of Wong's false imprisonment claim and the focus of the pending motions is the alleged illegality of the decision to detain her in the first instance. Wong makes several arguments as to why the regulation should not have been applied to her, including that she was not an "arriving" alien (and therefore 8 U.S.C. § 1225(b)(1)(A)(i) did not apply to her), that she was in possession of a valid, unexpired B-2 visitor visa (and therefore had a valid entry document and was not inadmissible under 8 U.S.C. § 1182(a)(7)), and that by the time she was detained, she had filed an I-485 petition seeking adjustment to permanent resident status (and therefore was no longer an applicant for admission under 8 U.S.C.

§ 1225, but was instead an applicant for adjustment of status under 8 U.S.C. § 1255).

However, even assuming the validity of some of these arguments,[5] her false imprisonment claim cannot be salvaged. The core of that claim and these arguments is that no expedited removal order should have been entered against Wong. However, this court lacks jurisdiction to entertain such an argument. 8 U.S.C. § 1252(a)(2)(A)(i). The fact that an expedited removal order was issued against Wong, combined with a regulation which mandates detention upon issuance of such an order (even if invalid), results in Wong being unable to successfully bring a claim for false imprisonment in this court.

However, some of Wong's allegations go beyond the mere fact of her detention and instead implicate the *manner* in which she was detained. In *Welch*, the court emphasized that "[w]hen a statute requires an official to take a particular action, *the manner in which the act is undertaken may nevertheless be improper and thus performed without due care*." *Welch*, 409 F.3d at 653 (emphasis added). In such a case, the second prong of the due care

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[5] Defendants dispute each of these arguments on the basis that Wong had abandoned her previous applications for adjustment of status by departing without advance parole and could not enter the country on a nonimmigrant visa in order to apply for an adjustment of status. However, resolution of this dispute is unnecessary because of the jurisdictional inability of this court to hear challenges to expedited removal orders and the corresponding regulation mandating detention when such orders issue.

exception analysis is not met, and the exception to a waiver of sovereign immunity does not apply.

Wong alleges that six weeks after revoking her parole status and three weeks after issuing the expedited removal order, and fully aware of—but deliberately ignoring—her adjustment of status application, defendants induced her into coming to the INS offices by sending her a letter requesting her to appear to pick up her Employment Authorization Card. Fourth Amended Complaint, ¶¶ 12-16. When she did so, Wong was summarily given a letter denying her application for adjustment of status which misrepresented her appeal rights. She was then arrested, handcuffed, and placed in detention. *Id*, ¶ 17. Wong alleges that the INS's "bait and switch" letter and misrepresentations effectively cut off her ability to request review or appeal of the denial of her adjustment of status application. *Id*, ¶¶ 17, 19-21. The focus of the false imprisonment claim and the present motions is on the legality of the detention itself. However, these allegations appear to target conduct apart from the bare fact of the detention and instead strike at the denial of other legally protected interests by means of INS trickery.

Some of these allegations may be encompassed in Wong's negligence claim under the FTCA. However, the allegations also appear to be directed at conduct which may form the basis for torts other than negligence or false imprisonment. This court expresses no opinion on the nature or availability of any such tort, except to note that such allegations appear to fall outside the proscriptive boundaries of the due care exception to the FTCA.

Accordingly, this court concludes that the United States has not waived sovereign immunity for Wong's FTCA claim for false imprisonment. As a result, this court lacks subject matter jurisdiction over that particular tort claim. Because discovery has not closed and this court is not privy to the details of what discovery has revealed thus far, this court expresses no opinion as to what possible tort claims may or may not be supported by Wong's allegations about the manner in which the expedited removal order was executed. Instead, the door should be left open to Wong to replead and adequately frame any such claims in addition to her remaining FTCA claim for negligence.

RECOMMENDATION

For the reasons set forth above, plaintiff Kwai Fun Wong's Motion for Partial Summary Judgment Against the United States (docket #192) should be DENIED and the United States' Cross-Motion for Partial Summary Judgment on Plaintiff Kwai Fun Wong's False Imprisonment Claim (docket #206) should be GRANTED WITHOUT PREJUDICE.

Accordingly, the United States should be granted summary judgment against the portion of the Fifth Claim for Relief by Wong alleging a violation of the FTCA based on the tort of false imprisonment. However, Wong should be granted leave to replead her FTCA claim to the extent she can allege a viable tort claim outside the due care exception to the FTCA concerning the manner in which she was detained when defendants executed the expedited removal order.

SCHEDULING ORDER

Objections to this Findings and Recommendation, if any, are due March 6, 2006. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

DATED this 14th day of February, 2006.

s/ JANICE M. STEWART
JANICE M. STEWART
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG, PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE (INS), BEING SUED AS DAVID V. BEEBE, JOHN F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER AND JOHN DOE, INS OFFICIALS, ET AL., DEFENDANTS

June 25, 2002

ORDER

JONES, Judge:

Magistrate Judge Janice M. Stewart filed Findings and Recommendation (#62) on April 5, 2002, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Ma-*

chines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Defendants have timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Stewart's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Stewart's Findings and Recommendation (#62) dated April 5, 2002, in its entirety. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (#31) is DENIED, and plaintiffs are ordered to replead their claims to specify which underlying factual allegations they rely on for each of their *Bivens* claims and to replead their claim for declaratory relief.

IT IS SO ORDERED.

DATED this 25th day of June, 2002.

/s/ ROBERT E. JONES
ROBERT E. JONES
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV-01-718-ST

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION; AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID V. BEEBE; JERRY F. GARCIA; JACK O'BRIEN; DOUGLAS GLOVER; JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS; AND UNITED STATES OF AMERICA, DEFENDANTS

Apr. 5, 2002

ORDER, FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate J.

INTRODUCTION

On June 17, 1999, the United States Immigration and Naturalization Service ("INS") detained plaintiff, Kwai Fun Wong ("Wong"), at its Portland, Oregon office. Wong is a citizen of Hong Kong, the Matriarch of the Tao Heritage, and the leader of plaintiff Wu-Wei Tien Tao Association ("Association"), a non-profit organization registered in Oregon. The Association operates plaintiff

Chong Hua Sheng Mu Gong ("Sheng Gong"), a non-profit religious organization located in Houston, Texas. Wong has taken lifelong vows of vegetarianism and celibacy.

Immediately following her detention on June 17, 1999, Wong was arrested, handcuffed, and taken to the Multnomah County Detention Center ("MCDC"). Wong was imprisoned at MCDC for five days, during which time she alleges that she was twice subjected to strip searches, including orifice searches, was denied access to her attorney or her followers, and was denied vegetarian meals. On June 22, 1999, Wong was removed from the United States.

Wong, the Association, and Sheng Gong allege that defendants, the INS and various INS officials, including defendants David V. Beebe, Jerry F. Garcia, Jack O'Brien, and Douglas Glover, violated their rights under the First, Fourth, and Fifth Amendments to the United States Constitution and substantially burdened their exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 USC § 2000bb, by denying Wong advance parole prior to or after her trip to Hong Kong, improperly revoking Wong's parole after her return to the United States, improperly refusing to adjust Wong's status to that of lawful permanent resident, then detaining and arresting Wong, subjecting her to strip searches, denying her information on how to contact her attorney or her followers, denying her vegetarian meals, and summarily removing her from the United States.

The following motions are now pending in this matter: (1) Defendants' Motion to Stay Discovery Until After the Court Rules on Defendants' Motion to Dismiss (docket

20); (2) Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (docket # 31); (3) Plaintiffs' Motion to Compel (docket # 33); (4) Plaintiffs' Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs (a) are Allowed to File Their Amended Complaint; and (b) are Allowed Discovery (docket # 34); (5) Plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46); and (6) Defendants' Motion for Clarification (docket # 53).

For the reasons that follow, defendants' Motion for Clarification (docket # 53) is granted; the parties' competing motions to stay discovery (docket # 20) or to stay the pending motions to dismiss (docket # 34) are denied; plaintiffs' Amended Motion to Allow Filing of a Second Amended Complaint (docket # 46) is granted; and plaintiffs' Motion to Compel (docket # 33) is granted, subject to adoption of the following recommendation by a district court judge. This court further recommends that defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (docket # 31) should be denied.

ANALYSIS

I. *Preliminary Matters*

A. *Defendants' Motion for Clarification*

On December 13, 2001, defendants filed a Motion for Clarification (docket # 53), asking this court to clarify its minute order dated November 14, 2001 (docket # 45). That minute order grants plaintiffs' motion filed on November 9, 2001 (docket # 44), to Alter, Amend, or Correct their Motion to Allow Filing of a Second Amended Complaint. The purpose of plaintiffs' motion was simply to

amend their proposed Motion to Allow Filing of a Second Amended Complaint (and the proposed Second Amended Complaint submitted therewith) to reflect a request for attorney fees in their Fourth Claim for Relief under RFRA. However, the minute order incorrectly states that it is "Granting plaintiffs' motion to allow filing of second amended complaint," rather than granting plaintiffs' Motion to Alter, Amend, or Correct their motion to Allow Filing of a Second Amended Complaint. Accordingly, defendants' Motion for Clarification (docket # 53) is granted and the minute order will be amended.

B. *Motions to Stay*

The parties also have filed competing motions to stay. Defendants assert that discovery should be stayed until this court rules on their motion to dismiss, while plaintiffs assert that defendants' motion to dismiss should be stayed. Furthermore, plaintiffs move to compel certain discovery. As discussed in detail below, several legal issues in this case will control the future course of this litigation. Those legal issues, which are squarely presented by defendants' motion to dismiss, should be put to rest so that all parties can proceed in the most expeditious manner. Thus, plaintiffs' Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs (a) are Allowed to File Their Amended Complaint; and (b) are Allowed Discovery (docket # 34) is denied.

However, this court also grants plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46) to allow plaintiffs to add a claim under the Federal Tort Claims Act ("FTCA"), 28 USC §§ 2671-80, and recommends that defendants' Motion to Dismiss

Plaintiffs' First Amended Complaint (docket # 31) should be denied, with plaintiffs given leave to replead to specify the factual allegations underlying each of their claims. As a result, and in order that discovery in this case not be unnecessarily delayed, defendants' Motion to Stay Discovery Until After the Court Rules on Defendants' Motion to Dismiss (docket # 20) is also denied.

C. *Plaintiffs' Motion to Compel*

Plaintiffs have also filed a Motion to Compel (docket # 33), seeking responses to Request for Production Nos. 1-5 and 12-21 in Plaintiffs' First Discovery Requests. Defendants counter that no discovery should be allowed because plaintiffs' claims should be dismissed. As discussed below, this court recommends that plaintiffs be allowed to proceed with their claims. Accordingly, plaintiffs' Motion to Compel (docket # 33) is granted, subject to adoption of these Findings and Recommendations by a district court judge.

II. *Motion to Dismiss—Lack of Subject Matter Jurisdiction*

A. *Procedural Posture*

The original Complaint in this action was filed on May 18, 2001. Thereafter, on September 27, 2001, defendants filed a Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief May be Granted (docket # 14). On October 17, 2001, plaintiffs filed a First Amended Complaint (docket # 30), and defendants' Motion to Dismiss (docket # 14) was therefore deemed withdrawn. *See* Minute Order dated November 5, 2001 (docket # 41). Defendants then filed the present

Motion to Dismiss the First Amended Complaint (docket # 31), asserting that: (1) this court lacks subject matter jurisdiction; (2) plaintiffs have failed to state any claim upon which relief can be granted; and (3) even if plaintiffs' claims survive these two challenges, the individual defendants are entitled to qualified immunity. This court first addresses defendants' assertion that plaintiffs fail to allege subject matter jurisdiction.

B. *Legal Standard*

In considering FRCP 12(b)(1) motions to dismiss for lack of subject matter jurisdiction which attack the face of the complaint, as opposed to relying upon extrinsic evidence, the court must consider the allegations of the complaint as true. *Gould v. Electronics Inc. v. United States*, 220 F3d 169, 176 (3rd Cir. 2000); *Valdez v. United States*, 837 F. Supp. 1065, 1067 (ED Ca 1993), *aff'd*, 56 F3d 1177 (9th Cir1995). In addition, courts may consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir), *cert denied*, 525 U.S. 1001 (1998) (citations omitted). Dismissals under FRCP 12(b)(1) are limited to cases where the federal claim is "immaterial and made only for the purpose of obtaining federal jurisdiction" or the "claim is wholly insubstantial and frivolous." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

However, when ruling on a challenge to subject matter jurisdiction, the court is free to hear evidence regarding

jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In such cases, no presumption of truthfulness attaches to plaintiff's allegations. *Id.* Unlike a motion to dismiss for failure to state a claim under FRCP 12(b)(6), a court may consider extrinsic evidence regarding a motion to dismiss for lack of subject matter jurisdiction without converting the motion into one for summary judgment. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987).

C. *Allegations of the First Amended Complaint*

The First Amended Complaint references a number of documents, copies of which the parties have attached to various filings in support of their respective motions. Since the parties do not appear to question the authenticity of those documents, this court will consider them in ruling on the motion to dismiss for lack of subject matter jurisdiction. Additionally, while the parties have considerably different views of the legal significance of the facts of this case, defendants do not challenge the basic historical factual allegations underlying plaintiffs' claims, nor have they submitted any evidence to challenge the remaining factual allegations. Thus, this court assumes as true the following allegations of the First Amended Complaint (docket # 30):

1. *Background and Parties*

Wong is a citizen of Hong Kong and the selected Matriarch of the Tao Heritage and the leader of the Association. Wong is the heavenly mandated successor to continue the unbroken lineage of the ancient Tao Heritage.

First Amended Complaint, ¶¶ 3, 26. She first lawfully entered the United States in 1985 as a qualified Tao Minister. *Id*, ¶ 3.

The Association is a worldwide, nonprofit religious organization registered in New York, Texas, and Oregon. *Id*, ¶ 4. Sheng Gong is a nonprofit religious organization located in Houston, Texas and operated by the Association. One of the missions of Sheng Gong is the creation of a holy meeting place for all beings to receive God. *Id*, ¶ 5. The function of Tien Tao is both religious and educational. It is dedicated to the operation of the Association and the fostering of universal truth. The followers believe that Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return heaven by restoring the original nature. One of the most important missions of Tao is to propagate the truth of the immortal Tao throughout the world in order to enlighten people to their true selves and awaken their conscience so that all people can live in harmony, exercise virtue, and restore their connection with God. *Id*, ¶ 11.

At all times material herein, defendants David V. Beebe ("Beebe"), Jerry F. Garcia ("Garcia"), Jack O'Brien ("O'Brien"), Douglas Glover ("Glover"), and John Doe INS officials ("John Does") were employees of the United States and officials of the INS. *Id*, ¶ 6. At the INS's Portland office, Beebe was the District Director (*id*, ¶ 7); Garcia was Assistant District Director of Examinations (*id*, ¶ 8); O'Brien was the Port Director (*id*, ¶ 9); and Glover was a Supervisory Inspections Officer (*id*, ¶ 10).

2. *Wong's Entry Into the United States and Succession in the Tao Heritage*

In 1992, the former Leader of the Association, Fat Fan Cheung ("Qian Ren"), instructed Wong to accompany him to apply for permanent residency in the United States in order to accomplish the mission of establishing Tao in the west. The Association filed the initial immigration petition on Wong's behalf in 1992. The INS approved Wong's filing in November of 1992 and again in December of 1994. In 1993, Qian Ren appointed Wong as the inheritor of the ancient Tao Heritage. Wong resided in the United States carrying out her religious work while her petitions were pending before the INS for over six years. Wong never received notice whether her applications had been ruled upon. *Id*, ¶ 12.

3. *Wong's Succession and Departure from the United States*

On March 16, 1999, Qian Ren passed away in Houston, Texas. Upon his death, Wong became his successor in the ancient Tao Heritage and was obliged to arrange his funeral services and accompany his body back to Hong Kong for burial. In the Tao Way, it was crucial for Wong to accompany Qian Ren's body back to Hong Kong. Wong was responsible for meeting with all senior Tao ministers from the worldwide Tao arena in Hong Kong to plan the future operations of the Association in the aftermath of Qian Ren's sudden death. Wong, as the inheritor of Qian Ren and the leader of the Association, was the only person qualified and in the position to handle the funerary services of Qian Ren and the one in charge of directing the future of the worldwide organization. Under the circum-

stances, Wong was compelled to leave the United States to fulfill her religious obligations. *Id*, ¶ 13.

Because her petition for permanent residency was pending, Wong was not permitted to leave the United States without advance permission (advance parole) from the INS. Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advance parole, but was unsuccessful. Because of the state of extreme urgency and under the heavy burden of her religious obligations, Wong departed the United States on or about March 27, 1999, having not been able to obtain advance parole authorization prior to her departure. *Id*, ¶ 14.

4. *Wong's Return to the United States*

On April 13, 1999, 18 days after Wong departed the United States, she returned to the United States via San Francisco, California. When the INS officers in the San Francisco airport were informed of the reason for Wong's departure without receiving advance parole and her prior application for permanent residency, they paroled Wong into the United States and requested that she report for a deferred inspection in Portland on April 28, 1999. *Id*, ¶ 15.

On or about April 20, 1999, Wong and the Association together filed an adjustment of status application under the Immigration and Naturalization Act ("INA"), § 245(i), 8 USC § 1255(i) ("INA § 245(i)"), which was accepted by the INS's Nebraska Service Center. *Id*, ¶ 16. According to the INS's June 17, 1999 letter to Wong, she also filed an Application for Advance Parole, presumably ret-

roactively. *See* Letter from INS to Wong dated June 17, 1999 ("Denial Letter"), p. 3, a copy of which is attached as Exhibit 5 to Declaration of Counsel in Support of Plaintiffs' (1) Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs Are Allowed Discovery; and (2) Motion to Compel Discovery ("Declaration of Plaintiffs' Counsel"), filed October 29, 2001 (docket # 35).

On or about April 26, 1999, Wong's immigration attorney notified the Portland INS office that Wong had filed her adjustment of status application and notified O'Brien to contact his office if O'Brien wanted to meet with Wong in person. No one at the INS requested such a meeting, nor contacted Wong's attorney. *Id*, ¶ 17.

On or about April 29, 1999, Beebe revoked Wong's parole status. Plaintiffs allege that this revocation of parole was improper because Wong's adjustment of status application had not yet been decided. *Id*, ¶ 18.

On or about May 20, 1999, Glover and O'Brien issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility, finding Wong "inadmissible in proceedings under [the expedited removal provision.]"[1] *See* Declaration of Plaintiffs' Counsel, Exhibit 13. In doing so, plaintiffs allege that the Portland INS office and the individual defendants ignored the filing of the adjustment of status application and failed to consider Wong's

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[1] The specific provision pursuant to which Wong was removed was INA § 235(b)(1), 8 USC § 1225(b)(1) ("INA § 235(b)(1)"). Unless otherwise specified, all references to "the expedited removal provision" are to that specific subsection.

application under the INA, § 245(i), thereby violating her constitutionally guaranteed due process rights. *Id*, ¶ 19.

5. *Wong's Detention and Removal from the United States*

On or about June 9, 1999, Beebe issued a letter requesting Wong to appear at the Portland INS office to receive her Employment Authorization Card on June 17, 1999. *Id*, ¶ 20.

Wong appeared as requested on June 17, 1999, to receive her Employment Authorization Card and was seized by INS officers. Wong was locked in a room by four INS officers and subjected to an inquisition. Wong was given a letter denying her application for the adjustment of status signed by Garcia on behalf of Beebe (the Denial Letter, referenced above). After the inquisition, Wong was arrested, handcuffed, and placed in detention. She was then taken to MCDC where she was subjected to two strip searches, including an orifice search. Wong was imprisoned for a total of five days. *Id*, ¶ 21.

Wong has made a lifetime vow of vegetarianism. Requests were made for vegetarian meals for Wong, but these requests were ignored. She lived on bread and water during her five-day detention and was unable to practice her faith. In addition, while Wong was incarcerated, she was not provided with a translator or information about her rights or how to contact her attorney or her followers. *Id*, ¶ 22.

After her arrest, Wong was not provided with a hearing before an administrative law judge, despite repeated requests by her immigration attorney. *Id*, ¶ 23. On or

about June 22, 1999, Wong was removed from the United States under protest and extreme duress. That same day, she was served with the Notice and Order of Expedited Removal, described above. *Id*, ¶ 24.

6. *Damages*

Wong, as the leader of the Association, has been denied her right to be in the United States to perform her duties which are essential to the proper functioning of the Association and Sheng Gong, which has had serious consequences for the Association and Sheng Gong. This situation has bred confusion and chaos among Tao practitioners in regions throughout the world. Also, Wong's standing as the Leader of the Association and Sheng Gong has suffered substantial harm and her mandated mission is now being challenged. The mission of Tao and the administration of the Association and Sheng Gong have been seriously jeopardized. *Id*, ¶ 26.

The faith of the members of the Association has also been shaken by Wong's unlawful arrest, detention, and removal, thereby damaging Wong's reputation, the reputation of the Association, and the reputation of Sheng Gong. Wong's sacred life was completely obstructed. She was treated like a criminal by the individual defendants. Their treatment of Wong is an insult to her human dignity and to all members of the Association and Sheng Gong. *Id*, ¶ 27.

The Association and Sheng Gong are registered religious groups in the United States and the individual defendants, by virtue of their conduct described herein, have denied the Association, Sheng Gong and its leader the right to practice their religion and to associate for that

purpose under the First and Fifth Amendments to the United States Constitution. This situation has a substantial damaging impact on both the current and the future propagation of their religious mission. *Id*, ¶ 28.

The Association and Sheng Gong have been severely damaged economically by Wong's forced absence. There has been a dramatic decrease of donation income as well as membership in the Association and Sheng Gong. The construction of Chong Hua Sheng Mu Gong (God's Home) could not be completed, which is of utmost importance to the members of the Association and Sheng Gong. *Id*, ¶ 29.

The Association and Sheng Gong also suffered non-economic damages resulting directly from the removal of Wong from the United States. Wong's removal made it necessary for the Association to restructure its worldwide operations. Wong is responsible for the entire Tao arena, including the United States, and must be consulted daily for guidance with everyday matters. Her removal caused extreme inconvenience to the Tao administration which disrupted the operations of the entire region. *id*, ¶ 30.

Many members throughout the world disassociated from the Association as a direct result of Wong's unlawful imprisonment and removal. Many members chose not to recognize Wong as the inheritor of the Tao mandate and the leader of the Association because her reputation was so severely damaged by the actions of the individual defendants. This loss of membership as a direct result of Wong's removal from the United States has caused severe hardship both economically and non-economically to the Association. *Id*, ¶ 31.

As a result of the individual defendants' conduct described above, Wong was forced to endure severe distress, humiliation and embarrassment. *Id*, ¶ 34.

7. *Plaintiffs' Claims*

Wong, the Association, and Sheng Gong allege four claims in the First Amended Complaint. Two of those claims seek damages pursuant to *Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971). The first *Bivens* claim is alleged by Wong for a violation of the Fourth and Fifth Amendments (First Claim for Relief), while the second is alleged by all plaintiffs for violation of the First and Fifth Amendments (Second Claim for Relief). Taken together and read most broadly, the First and Second Claims allege that the individual defendants violated: (1) Wong's rights to: (a) practice her religion; (b) associate with others in the practice of her religion, including members of the Association; (c) enjoy the full measure of her liberty rights under the governing immigration law; (d) be free from unreasonable searches and seizures; and (e) be provided substantive and procedural due process of law; and (2) the rights of the Association and Sheng Gong and their members to practice their religion and associate with others in the practice of their religion, including their right to associate with Wong. Specifically, plaintiffs allege that these rights were violated by defendants' acts of: (1) refusing to grant Wong advance parole or to allow her to leave without advance parole (First Amended Complaint, ¶ 14); (2) refusing to consider Wong's adjustment of status application under INA § 245(i) (*id*, ¶ 19); (3) revoking Wong's parole status without first issuing a decision concerning her request for adjustment of status under INA § 245(i) (*id*, ¶ 18); and (4)

applying the expedited removal provision to Wong while her application for adjustment of status was still outstanding (*id*, ¶ 19).

The Third Claim for Relief alleges that Wong is entitled to declaratory relief under 28 USC § 2201. Specifically, Wong alleges that she is entitled to have her application for adjustment of status ruled upon under INA § 245(i).

Finally, the Fourth Claim for Relief alleges that plaintiffs are entitled to an award of damages under RFRA because defendants' conduct substantially burdened their exercise of religion. Additionally, in their Amended Motion to Allow Filing of a Second Amended Complaint (docket # 46), plaintiffs seek to add claims under the FTCA for false imprisonment, intentional interference with economic relations, and negligence.

D. *Analysis*

Each side vehemently accuses the other of turning a shield into a sword. Plaintiffs argue that the INS has impermissibly turned the expedited removal provision into a draconian means to avoid giving any legitimate consideration to the requests for advance parole and pending applications for adjustment of status and of persecuting individuals with legitimate and longstanding ties to the United States. Defendants argue that plaintiffs, under the "guise" of a *Bivens* action, are attempting to use the generous protections afforded by the United States Constitution as a means to thwart obvious congressional intent to prevent non-citizens from "flagrantly circumvent[ing] the normal immigrant visa-issuing process abroad by the United States consul." Denial Letter, p. 3. Perhaps not

surprisingly, the truth lies somewhere in between these two extremes.

Defendants argue that the First Amended Complaint must be dismissed, and plaintiffs' motion to file a Second Amended Complaint must be denied, because this court lacks subject matter jurisdiction over plaintiffs' claims. This court clearly has federal question jurisdiction under 28 USC § 1331 over the *Bivens* and RFRA claims.[2] Additionally, as discussed below, plaintiffs' Amended Motion to File a Second Amended Complaint (docket # 46) to add claims under the Federal Tort Claims Act ("FTCA") is granted. Those claims, once added, also are well within this court's jurisdiction under 28 USC §§ 1331 and 1346(b). However, defendants contend that general federal question jurisdiction over plaintiffs' claims under 28 USC § 1331 is barred by INA § 242(a)(2)(A), (a)(2)(B), and (e)(5), 8 USC §§ 1252(a)(2)(A), (a)(2)(B), and (e)(5) ("INA § 242"),[3] and that plaintiffs' challenge of Wong's expedit-

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[2] The Third Claim for Relief under the Declaratory Judgment Act does not provide plaintiffs with any jurisdictional leverage. *Gritchen v. Collier*, 254 F.3d 807, 811 (9th Cir. 2001) ("The Declaratory Judgement Act . . . applies only if federal jurisdiction independently exists.").

[3] The INS cites INA § 242(a)(1)(B), but there is no such section. Instead, the relevant provisions limiting judicial review provide as follows:

> "no court shall have jurisdiction to review—(i) . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [INA § 235(b)(1)]." INA § 242(a)(2)(A);

ed removal cannot be litigated by means of a *Bivens* action.

This case revolves around fundamental disagreements over the exact nature of Wong's immigration status between the time she was paroled into the United States on April 13, 1999, by INS officials in San Francisco and the time she was detained on June 17, 1999, by INS officials in Portland, and the resulting statutory or constitutional rights, if any, plaintiffs enjoyed during that time period.

Defendants characterize Wong's return to the United States from Hong Kong as an attempted "illegal" entry with no valid entry documents and strenuously assert that Wong enjoyed no constitutional rights during that critical time period. In the INS's view, the fact that Wong lived in the United States for some seven years prior to her fateful trip to Hong Kong between March 27 and April 13, 1999, is constitutionally meaningless and that Wong was, for all purposes, on equal footing with a person who had never stepped foot inside the borders of this country. Relying on the *Fleuti* doctrine,[4] plaintiffs counter that Wong's longstanding domicile in the United States excus-

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"no court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under [section 245 of the INA,] section . . . 1255 of this title" INA § 242(a)(2)(B); and

"[i]n determining whether an alien has been ordered removed under section 1225(b)(1) . . . the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner." INA § 242(e)(5).

[4] This doctrine was first enunciated in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963).

es her 18 day trip to Hong Kong. Defendants rejoin that Wong is not entitled to the benefits of the *Fleuti* doctrine and that they had unquestionable authority to detain her pending her removal from the United States. According to defendants, these two legal truisms strip this court of jurisdiction to hear any of plaintiffs' claims.

While this court agrees with defendants that *Fleuti* does not provide Wong with a safe haven, it disagrees that such a conclusion bars all of plaintiffs' claims. As discussed below, plaintiffs assert claims which do not turn on application of the *Fleuti* doctrine. Those claims are not subject to dismissal for either lack of subject matter jurisdiction or failure to state a claim. However, because the applicability of the *Fleuti* doctrine is pivotal to the future of this litigation, this court first discusses that issue, and then explains why plaintiffs' claims are, at least at this point in this litigation, not subject to dismissal.

1. *The Expedited Removal Provision*

The heart of defendants' position is that Wong was properly removed from the United States pursuant to the expedited removal provision, thus depriving this court of jurisdiction over any of plaintiffs' claims pursuant to INA § 242(a)(2)(A) and (e)(5).

In 1996, prompted by its concern that "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter,"[5] Congress substantially revised the immigration laws and enacted

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[5] H.R. Rep No. 104-469, pt 1 at 158 (March 4, 1996).

the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). IIRIRA included the expedited removal provision and made "comprehensive amendments to the [INA], 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq*." *INS v. St. Cyr*, 533 U.S. 289, 292 (2001). The expedited removal provision gives the INS broad authority to order aliens "arriving in the United States" removed if "an immigration officer determines" that the alien is "inadmissible under section . . . 1182(a)(7)." INA § 235(b)(1). An alien is inadmissible under that provision if "at the time of application for admission," the alien is not in possession of a "valid entry document . . . and a valid unexpired passport, or other suitable travel document." INA § 212(a)(7)(A)(i), 8 USC § 1182(a)(7)(A)(i) ("INA § 212").

2. *The* Fleuti *Doctrine*

Defendants assert that Wong was unquestionably subject to removal under the expedited removal provision because at the time she returned to the United States on April 13, 1999, she was not in possession of a "suitable entry document" as required under INA § 212(a)(7)(A)(i).

Wong departed the United States on March 27, 1999, without first obtaining advance parole authorization. When Wong returned to the United States via San Fransisco on April 13, 1999, INS officials paroled her into the United States and requested that she report for a deferred inspection in Portland on April 28, 1999. Wong never reported for the deferred inspection. Instead, through her attorney, she filed the April 20, 1999 adjustment of status application, and then notified the Portland INS office of that application and notified O'Brien to contact

Wong's attorney if he wanted to meet personally with Wong. Rather than contacting Wong's attorney, and before any decision was issued concerning Wong's three pending adjustment of status applications, Beebe revoked Wong's parole status on or about April 29, 1999. Then, on May 20, 1999, without notifying Wong, Glover and O'Brien issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility. Beebe then issued a letter to Wong to appear at the INS's Portland office to receive her Employment Authorization Card on June 17, 1999. When Wong appeared at the Portland INS office on June 17, 1999, she was given the Denial Letter, which purported to deny each of her three pending adjustment of status applications. She was then arrested, handcuffed, and transported to MCDC, where she was kept for five days. On June 22, 1999, Wong was served with a copy of the May 20, 1999 Notice and Order of Expedited Removal and removed from the United States.

In response to that argument, plaintiffs assert that, under the *Fleuti* doctrine, Wong was not attempting to "enter" the United States after her return from Hong Kong. The plaintiff in *Fleuti* was a Swiss national who was admitted to the United States for permanent residence in 1952 and had been continuously in the country except for a visit of "a couple hours" to Ensenada, Mexico in August 1956. In 1959, the INS sought to deport him on the ground that, at the time of his return to the country in 1956, he was within one or more of the classes of excludable aliens. Fleuti was ordered deported as an alien "afflicted with a psychopathic personality" because he was homosexual. His appeal to the Board of Immigration Appeals was dismissed and he then filed an action in fed-

eral court for declaratory relief and review of the administrative action. Declining to rule on whether the provision allowing exclusion of aliens "afflicted with a psychopathic personality" was unconstitutionally vague, the Supreme Court instead determined that Fleuti's "innocent, casual, and brief" departure in August 1956 did not constitute an "entry" within the meaning of the INA and therefore could not "subject him to the consequences of an 'entry' upon his return." *Fleuti*, 374 U.S. at 462.

Plaintiffs assert that Wong's departure, undertaken in a "state of extreme urgency and under the heavy burden of [Wong's] religious obligations," First Amended Complaint, ¶ 14, was like Fleuti's "innocent, casual, and brief" trip to Mexico, and that Wong therefore should not have been deemed to be attempting an "entry" or subjected to the consequences of an entry (namely application of the expedited removal provision against her) upon her return. This argument must be rejected for three reasons.

First, the statutory language which formed the basis for the reasoning of *Fleuti* has been amended. At the time *Fleuti* was decided, the INA used the term "entry" to denote the "coming of an alien into the United States" with the following exception:

> an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his

> presence in a foreign port or place or in an outlying possession was not voluntary.

Fleuti, 374 U.S. at 452, quoting INA § 101(a)(13), 8 USC § 1101(a)(13) as it then existed.

Interpreting this exception, the Court declared that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of [the alien's] resident alien status and therefore may not subject [the alien] to the consequences of an 'entry' upon [the alien's] return." *Id* at 462.

With the enactment of IIRIRA, Congress replaced the concept of "entry" discussed in *Fleuti* with the concept of "admission," which means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 USC § 1101(a)(13)(A). It does not further define "entry." The Board of Immigration Appeals has declared that this amendment eviscerated the *Fleuti* doctrine. *See*, *e.g.*, *In Re Collado-Munoz*, 21 I & N Dec 1061 (Dec 18, 1997, *en banc*) (concluding that *Fleuti*, "with its origins in the no longer existent definition of 'entry' in the Act, does not survive the enactment of the IIRIRA as a judicial doctrine."). Thus, it is questionable whether *Fleuti* survives IIRIRA.

Second, while the Ninth Circuit has not gone so far as the BIA to declare *Fleuti* nonexistent, it has taken the position that, absent "a congressional mandate . . . the *Fleuti* doctrine applies only to lawful permanent resident aliens." *Mendoza v. INS*, 16 F.3d 335, 337 (9th Cir. 1994). Such a mandate has been found in the statutes

which expressly incorporate the language at issue in *Fleuti*. These statutes govern suspension of deportation, INA § 244, 8 USC § 1254[6] and applicants seeking legalization, INA § 245a, 8 USC § 1255a.[7] *Id* at 336-37 n3-4; *see also, Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1274 (9th Cir. 1996), *rehr'g and suggestion for rehr'g en banc denied*, 109 F3d 551 (9th Cir. 1997); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1362-63 (9th Cir. 1995). The same language has also been found in the provisions governing travel by participants in the Special Agricultural Worker program, INA § 210, 8 USC § 1160.[8] *Aguilera-Medina v. INS*, 137 F.3d 1401, 1403-04 (9th Cir. 1998). Because Wong is not

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[6] INA § 244(b)(2), 8 USC § 1254(b)(2) (repealed in 1996), stated: "'An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . *if the absence from the United States was brief, casual and innocent* and did not meaningfully interrupt the physical presence.'" *Mendoza*, 16 F.3d at 337 n3 (emphasis in original).

[7] INA § 245a(a)(3)(B), 8 USC § 1255a(a)(3)(B), states: "An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . *by virtue of brief, casual, and innocent absences from the United State*s." (emphasis added).

[8] INA § 210(a)(4), 8 USC § 1160(a)(4), grants to "lawful temporary resident[s] . . . the right to travel abroad . . . in the same manner as for aliens lawfully admitted for permanent residence." In *Aguilera-Medina*, the Ninth Circuit considered the 1990 (pre-IIRIRA) departure by a lawful temporary resident and determined that Congress had extended the protections of *Fleuti* to those individuals by decreeing that "lawful temporary residents were to be treated as permanent legal residents for the purposes of travel, and that lawful permanent residents were to have the benefit of *Fleuti*." *Aguilera-Medina*, 137 F.3d at 1403.

a lawful permanent resident alien, *Fleuti* does not apply to her in the Ninth Circuit.

Finally, even assuming *Fleuti* extends to aliens such as Wong who do not yet enjoy the status of a lawful permanent resident, it is difficult to reconcile the facts of this case with a viable claim for application of the *Fleuti* doctrine. In *Fleuti*, the court listed a number of factors relevant to the determination of whether the alien intended to depart "in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence," including the length of time the alien is absent, the purpose of the visit, and "whether the alien has to procure any travel documents in order to make his trip, *since the need to obtain such items might well cause the alien to consider more fully the implications involved in leaving the country*." *Fleuti*, 374 U.S. at 462 (emphasis added).

In this case, plaintiffs acknowledge that "[b]ecause her petition for permanent residency was pending, . . . Wong was not permitted to leave the United States without advance permission (advance parole) from the INS." First Amended Complaint, ¶ 14. According to the INS, Wong had previously filed two applications for adjustment of status in 1992 and 1994, then left the United States while those applications were pending. However, those departures and subsequent reentries were apparently undertaken prior to the enactment of IIRIRA, which considerably altered the landscape for aliens presenting themselves at the borders of the United States. Wong's apparent attempt to obtain advance parole prior to her departure, or to be granted permission to leave without it, gives rise to the inference that she fully understood the possible implications of her departure. Thus, at least this

factor identified in *Fleuti* weighs against application of that doctrine in her favor.

3. *Result of* Fleuti*'s Inapplicability*

Defendants assert that since *Fleuti* is inapplicable, they automatically win because they properly applied the expedited removal provision to Wong which this court lacks jurisdiction to review. However, defendants too narrowly read plaintiffs' allegations.

Plaintiffs allege a broad range of wrongful actions by defendants prior to her removal on June 22, 1999. Because plaintiffs do not specify which of their factual allegations support each of their substantive claims, it is somewhat difficult to discern the exact nature of those claims. However, as best as can be discerned, plaintiffs allege that, as a result of the individual defendants' discrimination against them on the basis of their religious practices, beliefs, and association (First Amended Complaint, ¶ 32), or as a result of discrimination against Wong due to her race and/or national origin (*id*, ¶ 33): (1) Wong was unable to obtain advance parole authorization either prior to her departure or retroactively upon her return (*id*, ¶ 14 and Denial Letter, p. 3); (2) despite making attempts through her attorney to do so, Wong was unsuccessful at making special arrangements with the INS to leave the United States without advance parole (First Amended Complaint, ¶ 14); (3) defendants failed or refused to rule on Wong's pending adjustment of status application under INA § 245(i), and then improperly revoked her parole status (*id*, ¶¶ 16, 18); (4) Wong was taken to the MCDC where she was subjected to strip searches, denied vegetarian meals, denied a translator, and never provided

information about her rights or how to contact her attorney or her followers (*id*, ¶¶ 21-22); and (5) Wong was denied a hearing before an administrative law judge in violation of the INA and her due process rights (*id*, ¶¶ 23-25).

The First Amended Complaint alleges four claims for relief, only one of which expressly incorporates all of these allegations (First Amended Complaint, ¶ 47). However, based on plaintiffs' arguments, this court assumes that each claim incorporates all factual allegations. As discussed in more detail below, these allegations are sufficient to withstand a motion to dismiss for failure to state a claim against plaintiffs' *Bivens* and RFRA claims. Thus, defendants' arguments that this court is without subject matter jurisdiction should be rejected.

III. *Motion to Dismiss—Standing*

Defendants also argue that Wong and the Association have no standing to seek declaratory relief that the INS must rule on her adjustment of status application under INA § 245(i). According to defendants, plaintiffs suffered no "injury in fact" because the INS has already ruled on that application.

"[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations and footnote omitted). Specifically, a plaintiff must show:

> (1) she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bernhardt v. County of Los Angeles, 279 F.3d 862, 868-69 (9th Cir. 2002) (citation omitted).

Wong and the Association jointly filed the April 20, 1999 application for adjustment of status. Although the INS denied this application, Wong and the Association argue that they suffered an "injury" because defendants effectively precluded their ability to seek any reopening or reconsideration of the denial of the application by notifying Wong that there was no review, then summarily detaining, incarcerating, and removing her from the United States.

Defendants argue that Wong has no right of review. However, on a motion to dismiss, this court must accept plaintiffs' allegations as true that Wong was denied a hearing before an administrative law judge in violation of her due process rights. First Amended Complaint, ¶ 23. Thus, both Wong and the Association, as joint applicants, have standing to seek redress for that injury because they argue that defendants precluded them from pursuing their limited rights for review of the denial. That injury may be addressed by a declaration that the INS must allow them to pursue such review. Whether plaintiffs have any further right of review, as alleged in the First Amended

Complaint, is a question that may be addressed at a later date.

IV. *Motion to Dismiss—Failure to State a Claim under FRCP 12(b)(6)*

A. *Legal Standard*

A motion to dismiss under FRCP 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." *Gilligan v. Jamco Development Corp.*, 108 F3d 246, 248 (9th Cir. 1997). Normally, the review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Id.* The court, however, may consider whether conclusory allegations follow from the description of facts alleged. *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992). A court may deny leave to amend when any proposed amendment would be futile. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990), *cert denied*, 502 U.S. 921 (1991).

B. *Analysis of Substantive Claims*

1. Bivens *Claims*

As discussed above, the two *Bivens* claims allege a violation of: (1) Wong's rights under the Fourth and Fifth Amendments, including her: (a) liberty rights under the INA; (b) right to procedural due process; and (c) right to be free from unreasonable seizures and searches; and (2) all plaintiffs' rights under the First and Fifth Amendments to practice their religion and associate with others in the practice of their religion. Defendants assert that the First Claim for Relief should be dismissed because

MCDC officials, not INS officials, strip searched Wong and otherwise subjected her to unconstitutional conditions of confinement. Defendants assert that the Second Claim for Relief should be dismissed because plaintiffs enjoy no First Amendment right. Defendants also assert that, assuming plaintiffs do state cognizable claims, the individual defendants are entitled to qualified immunity against both claims.

a. *First Claim for Relief—Liability for the Conditions at MCDC*

The Fourth Amendment prohibits "unreasonable" governmental interference with "[t]he right of the people to be secure in their persons, houses, papers, and effects" and protects against "unreasonable searches and seizures." These Fourth Amendment protections apply to aliens. *See Rhoden v. United States*, 55 F.3d 428, 431-32 (9th Cir. 1995) (citing cases). Similarly, "once an alien enters the country, . . . the Due Process Clause [provides them with protection since it protects] all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted).[9]

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[9] Defendants strenuously assert that these constitutional protections do not apply because Wong was on parole status and therefore had not made an "entry" or been "admitted" into the country during the time between her return from Hong Kong on April 13, 1999, and her removal on June 22, 1999. *See* INA § 101(a)(13)(B), 8 USC § 1101(a)(13)(B) (stating that "[a]n alien who is paroled . . . shall not be considered to have been admitted."). However, plain-

To the extent that this claim rests on allegations that officials at MCDC subjected Wong to strip searches and denied her vegetarian meals, a translator, and contact with her attorney and her followers, defendants argue that they are entitled to summary judgment because Multnomah County officials, not the individual INS officials who are defendants in this case, are responsible for the unconstitutional actions.

Plaintiffs correctly point out that the Ninth Circuit has held that liability in a *Bivens* case can be predicated on a broader range of conduct than direct personal participation in the specific unconstitutional act:

> [P]ersonal participation is not the only predicate for section 1983 liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

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tiffs allege that defendants' first unconstitutional act took place when they denied advance parole to Wong *prior* to her fateful departure for Hong Kong. There is nothing in the record to counter the conclusion that at that time, Wong had made an "entry" and had been "admitted." Because all of plaintiffs' claims relate back to an allegedly unconstitutional act at a time when it appears that Wong was an alien who had "entered" or been "admitted," this court rejects defendants' argument that plaintiffs cannot allege any constitutional claims.

Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).[10]

Defendants rely principally on *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515 (2001), for the proposition that the individual defendants may not be held personally liable for the actions of the MCDC, an independent local entity. However, *Correctional Services Corp.* did not address the issue of whether liability against a federal official extends to anything other than direct personal participation in the alleged unconstitutional act. Instead, *Correctional Services Corp.* addressed whether a *Bivens* action would lie against private entities acting under color of federal law. *Id*, 122 S. Ct. at 519 ("Respondent now asks that we . . . confer a right of action for damages against private entities acting under color of federal law. . . . We have heretofore refused to imply new substantive liabilities under such circumstances, and we decline to do so here."). In this case, plaintiffs have alleged their *Bivens* claims only against individual federal officials, not against MCDC or any other local or federal agency. Thus, the precise issue addressed in *Correctional Services Corp.* has no bearing on this case.

With respect to the strip searches, defendants cite *United States v. Robinson*, 414 U.S. 218, 235 (1973) to argue that any search of Wong conducted at the MCDC,

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[10] *Johnson* involved a claim pursuant to 42 USC § 1983. However, "[a]ctions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*." *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

including a strip search, was not a violation of the law. The Ninth Circuit has expressly rejected such a broad reading of *Robinson*: "In *Giles* we held that the 'full search' authorized by *Robinson* was limited to a pat-down and an examination of the arrestee's pockets, and did not extend to 'a strip search or bodily intrusion.'" *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991), quoting *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984), *cert denied*, 471 U.S. 1053 (1985). Defendants also argue that they are protected from liability because strip searches are routinely performed at the MCDC for safety and security reasons. However, that argument bolsters plaintiffs' case since well before Wong's strip and cavity search, it was clear that blanket strip search policies are unconstitutional if justified by nothing more than an arrest on suspicion of the commission of a felony or a planned confinement in the general jail population. *Id* at 1445-46 (9th Cir. 1991); *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 713-15 (9th Cir. 1989); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446-47 (9th Cir. 1989).

While defendants assert that it is "indisputable" that the individual defendants did not direct or supervise the MCDC in any manner, that assertion has not yet been tested by discovery. At this point, this court is required to accept plaintiffs' allegations as true. Plaintiffs allege that Wong was unable to practice several important tenants of her religion while incarcerated at the MCDC. As discussed in more detail below, plaintiffs allege that defendants duped Wong into coming to the INS offices by asking her to pick up her employment authorization card, then incarcerated her without providing her a copy of the Notice and Order of Expedited Removal until five days

later when they summarily removed her from the country. All of these acts allegedly were driven by defendants' discriminatory animus toward plaintiffs, their religious practices, beliefs, and associations. Plaintiffs assert that defendants knew or should have known that the constitutional violations about which she complains would result from their decision to incarcerate Wong at MCDC. Under Ninth Circuit authority, this is sufficient to withstand a motion to dismiss based on a lack of causation. *See Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997), *cert denied*, 522 U.S. 1115 (1998).

Defendants also argue that they are absolved of any liability with respect to Wong's detention by virtue of 8 CFR § 235.3(b)(2)(iii), which states that "[a]n alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal." However, the First Amended Complaint is not directed simply at the fact of the detention, but at the reasonableness of that detention and the searches that accompanied it. Plaintiffs allege that Wong was subjected to strip searches, including orifice searches, denied a translator, denied contact with her attorney and her followers, and denied vegetarian meals, none of which is authorized by 8 CFR § 235(b)(2)(iii).

Plaintiffs have sufficiently alleged a claim under the Fourth Amendment and defendants do not directly address the Fifth Amendment issues raised by the First Claim for Relief. At this juncture, this court simply finds that defendants may not escape plaintiffs' First Claim for Relief by pointing the finger at unnamed MCDC officials.

Their motion to dismiss the First Claim for Relief should be denied.

b. *Second Claim for Relief—First Amendment and Due Process*

The Second Claim for Relief alleges that defendants violated the First and Fifth Amendments by denying plaintiffs' rights to practice their religion and to associate with each other. Defendants' attack against the Second Claim for Relief is similar to their jurisdictional attack in that defendants insist that Wong attempted to enter the United States illegally and had no valid entry documents. Based on that premise, defendants conclude that the Second Claim for Relief fails to state a claim because they properly commenced removal proceedings against Wong.

Were plaintiffs simply challenging the merits of the Notice and Order of Expedited Removal, defendants would be correct that this court lacks jurisdiction to entertain plaintiffs' claims. *Li v. Eddy*, 259 F.3d 1132, 1134 (9th Cir. 2001) (noting that INA § 242(e)(5) "expressly declares that judicial review does not extend to actual admissibility"). However, the First Amended Complaint does not expressly challenge the merits of the Notice and Order of Expedited Removal, but instead seeks damages for defendants: (1) refusing to grant Wong advance parole prior to her departure or permission to leave without advance parole; (2) improperly revoking Wong's parole while her adjustment of status applications were pending; (3) denying her application under INA 245(i); (4) denying her retroactive advance parole; (5) detaining her and subjecting her to unconstitutional conditions of confinement; (6) denying her any opportunity for reopening or

reconsideration of the denial of her application for adjustment of status;[11] and finally (6) removing her from the United States. The essence of plaintiffs' claims is that by taking each of these actions, defendants violated various constitutional provisions on an improper and discriminatory basis. Consideration of plaintiffs' *Bivens*, RFRA, and FTCA claims may involve consideration of the same types of issues as would be involved in reviewing the merits of the Notice and Order of Expedited Removal (*i.e.* whether racial or religious discrimination was the impetus for the actions). However, that factual overlap does not convert plaintiffs' *Bivens*, RFRA, and FTCA claims into an impermissible challenge to the Notice and Order of Expedited Removal.

The lynchpin of defendants' arguments against plaintiffs' *Bivens* claims is that Wong's status when she returned to the United States on April 13, 1999, put her in the same position as an alien who had never lived in the United States and was seeking entry to the country for the first time. According to defendants, Wong was, for all purposes, on the same footing as the plaintiff in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In that case, a Belgium journalist and six American university professors who had invited him to speak filed an action to compel the Attorney General to grant a temporary nonimmigrant visa

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[11] As discussed below regarding plaintiffs' claim for declaratory relief, it appears that Wong's application under INA § 245(i) was decided, but that plaintiffs may have a claim premised upon defendants' acts which denied Wong any opportunity for post-denial reopening or reconsideration.

to the journalist. The journalist had temporarily visited the United States twice before. The Court noted that the journalist, "personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id* at 762. Citing that sentence, defendants argue that Wong enjoyed no First Amendment protection relating to her admission to the United States. There are two flaws with this argument.

First, each of plaintiffs' claims traces back to defendants' allegedly discriminatory act of denying advance parole to Wong, either prior to her departure or retroactively upon her return. Had Wong not been denied advance parole on an impermissible basis, her departure would not have affected her immigration status at all. Thus, it is analytically more appropriate to consider the Second Claim for Relief from the standpoint of Wong's status at the time of the first alleged constitutional injury, namely prior to her departure to Hong Kong. There is no suggestion in the record that Wong was not "lawfully present" in this country as of the date of her departure to Hong Kong on March 27, 1999. Mere "lawful presence" in this country guarantees an alien some measure of constitutional protection and undercuts defendants' argument that Wong enjoyed no constitutional protections:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of in-

> tention to become a citizen, and they expand to those of full citizenship upon naturalization.
>
> *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950).

Second, despite defendants' characterization to the contrary, the premise of plaintiffs' Second Claim for Relief is not that the First Amendment entitled Wong to admission. Plaintiffs make no such allegation, nor can they. Such a claim, if permitted, would arguably render the entire INA meaningless since every applicant for admission to the United States could assert religious beliefs they desire to practice or opinions they wish to express. Instead, plaintiffs allege that Wong was entitled to have the INS fully and fairly consider her requests for advance parole (both before her departure and retroactively upon her return) and adjustment of status under the governing immigration statutes and regulations, and that defendants violated plaintiffs' First and Fifth Amendment rights by denying those requests and denying any opportunity to appeal those denials, on impermissible grounds. In short, plaintiffs assert that the procedures employed and substantive factors considered by defendants, namely plaintiffs' religious practices, beliefs and association, fell short of being "fundamentally fair," which defendants acknowledge as the applicable constitutional standard in immigration proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984); *Ramirez-Durazo v. INS*, 794 F.2d 491, 499-500 (9th Cir. 1986).

The central question is to what status Wong should be "'assimilated . . . for constitutional purposes.'" *Shaughnessy v. Mezei*, 345 U.S. 206, 214 (1953), quoting *Chew v. Colding*, 344 U.S. 590, 599 (1953). Unlike the

plaintiff in *Shaughnessy*, Wong did not simply depart the United States and then remain physically outside its borders for a protracted period of time. Instead, Wong alleges that she sought advance parole, or special permission to depart without it, and remained physically absent for only 18 days. Wong's claims that defendants improperly, and for discriminatory reasons, revoked her parole, denied her requests for adjustment of status, and subjected her to expedited removal are analytically identical to her claim that defendants refused to grant her advance parole prior to her departure.

Assume for the sake of argument that Wong had not left, but had instead remained here and filed a *Bivens* claim alleging that INS officials had denied her advance parole on discriminatory grounds, or had otherwise denied her statutorily or constitutionally protected rights. Defendants then would be unable to successfully argue that plaintiffs have no standing or fail to state a claim or that this court has no jurisdiction. Defendants' arguments that the expedited removal provision eliminates plaintiffs' ability to seek damages for those other violations of their constitutionally protected interests simply goes too far.

As discussed above, plaintiffs do not specify exactly which conduct they claim violated which constitutional provision. However, because this court is faced with a motion to dismiss, it must give the plaintiffs the benefit of any doubt. Plaintiffs allege that defendants' actions of revoking Wong's parole, then detaining, imprisoning, and eventually removing Wong from the country were premised upon Wong's lack of proper documents upon her return to the United States and defendants' denial of the pending adjustment of status applications. The lack of

proper documents was caused by defendants' discrimination against plaintiffs by denying advance parole or adjustment of status either because of Wong's national origin or race or because of plaintiffs' religious beliefs, practices, or associations. In short, plaintiffs have alleged that all of the individual defendants' actions have their source in defendants' refusal to grant Wong advance parole or adjustment of status because of Wong's race or national origin, or because of plaintiffs' religious practices, beliefs, or association. Such allegations clearly may form the basis for a constitutional violation for denial of a benefit:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." . . . Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Board of County Comm'rs, Wabaunsee Kansas v. Umbehr*, 518 U.S. 668, 674 (1996); *Hyland v. Wonder*, 972

F.2d 1129, 1134-36 (9th Cir1992) (discussing cases), *cert denied*, 508 U.S. 908 (1993).

For these reasons, this court concludes that the Second Claim for Relief adequately alleges a violation of the First Amendment. As with the First Claim for Relief, defendants do not directly address dismissal of the Second Claim for Relief to the extent it raises Fifth Amendment issues, other than to argue that Wong was on parole status and therefore enjoyed no constitutional protections. This court recommends rejection of that argument and therefore recommends denial of defendants' motion to dismiss the Second Claim for Relief. The issue of what relief plaintiffs ultimately will be entitled to obtain should they prevail on either their First or Second Claims for Relief is left for another day.

c. *Qualified Immunity*

The individual defendants also assert that they are entitled to qualified immunity.

> In S*aucier v. Katz*, . . . the Supreme Court clarified the two-step qualified immunity inquiry. To decide whether a defendant is protected by qualified immunity, a court must first determine whether, "[t]aken in the light most favorable to the party asserting injury, . . . the facts alleged show the officer's conduct violated a constitutional right." . . . If the plaintiff's factual allegations do add up to a violation of the plaintiff's federal rights, then the court must proceed to determine whether the right was "clearly established," *i.e.*, whether the contours of the right were already delineated with sufficient clarity to make a reasonable officer in the defendant's circum-

> stances aware that what he was doing violated the right. . . . In essence, at the first step, the inquiry is whether the facts alleged constitute a violation of the plaintiff's rights. If they do, then, at the second step, the question is whether the defendant could nonetheless have reasonably but erroneously believed that his or her conduct did not violate the plaintiff's rights.

Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001), quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Defendants assert that liability cannot be premised upon the actions they took following Wong's return to the United States, namely revoking her parole, detaining her, and then removing her from the United States, because defendants were relying on statutes and regulations permitting those actions. However, blind reliance on a statute or ordinance does not always protect a government official from liability. As explained by the Ninth Circuit:

> As with most legal matters, there are no absolutes here. On the one hand, an officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. On the other, as historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. Similarly, an officer who unlawfully

> enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity even if there is no clear case law declaring the ordinance or the officer's particular conduct unconstitutional. In the end, however, an officer who reasonably relies on the legislature's determination that a statute is constitutional should be shielded from personal liability.

Grossman v. City of Portland, 33 F3d 1200, 1209 (9th Cir. 1994) (citations and footnote omitted).

Put another way, "qualified immunity is not available if, 'in light of pre-existing law,' the unlawfulness of the officer's conduct was 'apparent.'" *Pierce v. Multnomah County*, 76 F3d 1032, 1037 (9th Cir), *cert denied*, 519 U.S. 1006 (1996), quoting A*nderson v. Creighton*, 483 U.S. 635, 640 (1987).

With respect to the first step of the qualified immunity analysis, the allegations viewed in the light most favorable to plaintiffs reveal that they have alleged colorable constitutional claims, as discussed above. With respect to the second step of the qualified immunity analysis, assuming that defendants denied advance parole to Wong on the basis that she was of a race or national origin, or the leader of a religious organization that defendants abhor, defendants simply could not "have reasonably but erroneously believed that [their] conduct did not violate the plaintiff's rights." *Devereaux*, 263 F3d at 1074. Thus, defendants are not entitled to qualified immunity.

2. *RFRA—Fourth Claim for Relief*

Defendants also assert that plaintiffs' Fourth Claim for Relief under RFRA must be dismissed for failure to state a claim.

RFRA is premised upon congressional findings that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that "governments should not substantially burden religious exercise without compelling justification." 42 USC § 2000bb(a)(2) and (3). The express purpose of RFRA is to "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 USC § 2000bb(a)(3) and (b)(2). "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a(2) sincere (3) exercise of religion. *Kikamura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (citations omitted). Under RFRA, "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law)." 42 USC § 2000bb-2.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court recognized the "sweeping" nature of RFRA's coverage and noted that its provisions work to prohibit "official actions of almost every description and regardless of subject matter," and that those restrictions "apply to every agency and official" of the federal government, and to "all federal . . . law, statutory or otherwise." *Id* at 532. The Court concluded that, under RFRA, "[a]ny law is subject to challenge at any time by

any individual who alleges a substantial burden on his or her free exercise of religion." *Id.*

In this case, plaintiffs allege that the individual defendants discriminated against them because of their religious practices, beliefs, and association. They also allege that defendants' actions substantially burdened their exercise of religion. Given that the only issue presently before this court is whether plaintiffs' pleadings can survive a motion to dismiss, this court is required to construe all the allegations in plaintiffs' favor.

Defendants argue that RFRA may not be used to challenge a regulation, citing *Anderson v. Angelone*, 123 F.3d 1197, 1198 n.2 (9th Cir. 1997). However, *Anderson* involved a challenge to a state prison regulation by way of a RFRA claim brought against only state actors. The Ninth Circuit has held that the Supreme Court "invalidated RFRA only as applied to state and local law." *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000), *cert denied*, 532 U.S. 958 (2001), citing *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 832 (9th Cir. 1999). In *Anderson*, the Ninth Circuit merely recognized that, in light of *Boerne*, it did not need to consider plaintiff's RFRA claim because it challenged a state prison regulation being enforced by state actors at a state prison. Here plaintiffs' RFRA claim is against federal actors enforcing federal law.

Defendants also argue that plaintiffs' Fourth Claim for Relief under RFRA fails to state a claim because plaintiffs fail to allege that vegetarian meals are a required tenent of Wong's faith and therefore no link exists between her

dietary habits and any violation of RFRA. However, plaintiffs allege that Wong "has made a lifetime vow of vegetarianism," that defendants' failure to accommodate her vegetarian diet "interfer[ed] with the practice of [Wong's] faith," and that defendants' actions "substantially burdened plaintiffs' exercise of religion." First Amended Complaint, ¶¶ 22, 47. Given these allegations, defendants' assertion is not well taken.

Defendants also argue that plaintiffs' RFRA claim is without merit because Wong's religious exercise could not have been "substantially" burdened as required by 42 USC § 2000bb-1(a) by only five days of detention. Furthermore, defendants assert that it was local, not federal, officials who allegedly subjected Wong to strip searches and impermissible conditions of confinement. As discussed above with regard to plaintiffs' *Bivens* claims, federal officials may be subject to liability for setting into motion a series of acts by others which lead to constitutional violations. While the parties did not specifically brief this issue as it pertains to the RFRA claim, the same logic applies.

Moreover, this court does not read plaintiffs' RFRA claim as simply objecting to the fact that Wong was incarcerated for five days.[12] Again, this court is somewhat disadvantaged by the fact that the RFRA claim simply incorporates the factual allegations that precede it. However, plaintiffs' allegations appear to be aimed not only at

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[12] Even if that were Wong's only allegation, defendants have not cited any authority for the proposition that a particular detention period is legally insufficient under RFRA.

the fact and conditions of Wong's incarceration, but also at defendants' actions, which in effect forced Wong to either forego her religious obligation to accompany Qian Ren's body back to Hong Kong or to abandon her pending application for adjustment of status.

An adherent's free exercise of his or her religion is substantially burdened by a statute that either (1) requires the adherent to refrain from engaging in a practice important to his or her religion . . . or (2) forces the adherent to choose between following a particular religious practice or accepting the statute's benefits. . . . More fully explained, the latter type of substantial burden occurs where non-adherence to a religious practice is necessary to obtain a statute's benefits; such a statute has an indirect coercive effect on the religious adherent's free exercise.

In re Hodge, 220 BR 386, 390 (DC Idaho), citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140-41 (1987); *Thomas v. Indiana Employment Sec. Div.*, 450 U.S. 707, 717-19 (1981); and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Thus, even if the short period of Wong's detention precludes a claim that her detention violated RFRA, her RFRA claim would nonetheless withstand a motion to dismiss based on plaintiffs' other allegations.

Finally, defendants also argue that they are entitled to qualified immunity from plaintiffs' RFRA claims. However, they premise that argument on the incorrect assertion that plaintiffs fail to allege that defendants actions were prompted by religious discrimination. Because plaintiffs do make that allegation, *see* First Amended Complaint, ¶¶ 32 & 47, this argument also fails.

3. *Declaratory Relief—Third Claim for Relief*

Plaintiffs seek a declaration requiring the INS to rule on Wong's adjustment of status application under INA § 245(i). This statute allows an alien who is "physically present in the United States" who "entered the United States without inspection" and who is the beneficiary of "a petition for classification under [8 USC § 1154] that was filed with the Attorney General on or before January 14, 1998"[13] to apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. *Id.* Plaintiffs assert that Wong "entered without inspection," had an adjustment of status application pending, and had prior applications for special immigrant status and the organization's initial approval as a bona fide religious group

Plaintiffs argue that defendants failed or refused to make a decision on her application under INA § 245(i), allege that "Wong is entitled to have her application for adjustment of status ruled on under the INA, Section 245(i)," and seek a "judgment against the United States declaring that the INS must rule on [Wong's] application for adjustment of status under the INA, Section 245(i)." First Amended Complaint, ¶¶ 44-45. The record in this case does not support plaintiffs' contention that no decision has yet been made under INA § 245(i). Therefore her request for declaratory relief, as presently pled,

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[13] The deadline for this filing was amended in 2000 to provide that the petition must have been filed by April 30, 2001. *See* INA § 245(i)(1)(B)(i) (2002), as amended by Pub. L. 106-554, § 1(a)(4) [Div. B, Title XV, § 1502(a)(1)(B)].

should be dismissed. However, as discussed below, this court finds that Wong should be granted leave to replead her Third Claim for Relief to seek a declaration that defendants are required to allow plaintiffs to pursue a request for reopening or reconsideration.

Under the INA § 245(i)(1), two classes of aliens are allowed to apply for adjustment of status, namely aliens who either (i) "entered the United States without inspection" or (ii) are "within one of the classes enumerated in subsection (c) of this section." INA § 245(i)(1)(A)(i) and (ii). The Denial Letter only partially addresses Wong's eligibility under INA § 245(i). It states that "Section 245(i) provides relief for those classes of aliens listed as ineligible to adjust status in Section 245(c)." Denial Letter, p. 2. It then states that "At the time your latest Form I-485 was filed, you were still in parole status and thus not subject to the provisions of Section 245(c) of the Act. Therefore, your application will be considered under Section 245(a) of the Act." *Id.* Thus, it does not reach the merits of Wong's application under subsection (1)(A)(ii).

The Denial Letter is silent about whether Wong is entitled to relief as an alien who "entered without inspection," leading inexorably to the conclusion that the INS did not believe that subsection (1)(A)(i) even applied. The parties debate whether or not Wong in fact "entered without inspection," but this court need not decide that issue at this juncture.

The Denial Letter makes clear that the INS made a decision under INA § 245(i), namely that it did not apply because Wong had not "entered without inspection" as required under subsection (1)(A)(i) and because Wong was

on parole status and not subject to INA § 245(c) as required under subsection (1)(A)(ii). Because the declaratory relief Wong seeks has already been granted, the Third Claim for Relief, as presently pled, should be dismissed.

However, the briefing submitted by the parties reveals that plaintiffs also assert that defendants denied Wong the opportunity to receive full and fair consideration of her application for adjustment of status by refusing to reach the merits of her application under INA § 245(i), and prevented plaintiffs from pursuing any of their post-decision rights by summarily arresting, imprisoning, and then removing Wong from the United States.

Just as it is clear that the INS in fact ruled on Wong's adjustment of status application under INA § 245(i), it is also clear that the INS did not reach the merits of the adjustment of status application under that provision. Instead, its conclusion is based on the facts that Wong had abandoned her two earlier applications and that there were no "intervening equities" allowing her to "avoid" the "visa issuing functions of consuls abroad." Denial Letter, p. 3.

In their briefing on the present motions, plaintiffs assert that defendants effectively (and unconstitutionally) cut off any post-denial rights Wong or the Association may have enjoyed by representing that there were no such rights, by detaining Wong, and by removing Wong from the country. Plaintiffs correctly point out that Wong and the Association had the right to ask for reopening or reconsideration of the denial of the adjustment of status application under 8 CFR § 103.5. However, such a re-

quest must be submitted in writing on a particular form, accompanied by a nonrefundable fee, and submitted to the office maintaining the record upon which the unfavorable decision was made. 8 CFR § 103.5(a)(i)-(iii). Had Wong or the Association been able to pursue a request for reopening or reconsideration, they would have been able to argue that the decision was incorrect, based upon an incorrect application of law or Service policy and on the evidence of record at the time of the initial decision. *See* 8 CFR 103.5(a)(3). They would have been able to raise the same issues they now raise, including the issue of whether the application should have been considered under subsection (1)(A)(i) because Wong "entered without inspection." They also would have been able to raise any other issues regarding whether they were entitled to have Wong's status adjusted and, if so, whether such an adjustment should have been granted. They could have raised the issue that there were in fact "intervening equities" supporting the request for adjustment of status and challenged the assertions in the Denial Letter that Wong had "displayed a significant pattern of misconduct" and "flagrantly circumvented the normal immigrant visa-issuing process abroad by the United States consul." Denial Letter, p. 2. However, plaintiffs allege that defendants deliberately and improperly short-circuited that process.

The last sentence of the denial letter states "please note that the decisions in this case are not subject to review given your final order of removal pursuant to Section 235(b)(1) of the Act, as amended." Denial Letter, p. 3. Plaintiffs allege that Wong was handed the Denial Letter and then summarily arrested and hauled off to MCDC.

Given the express representation that the decision on the application for adjustment of status was "not subject to review," and plaintiffs' allegations that Wong was rendered unable to contact her followers or her attorney during her five day stint in MCDC at defendants' direction, Wong and the Association have a potential claim that defendants denied them the opportunity to request reopening or reconsideration under 8 CFR § 103.5(a).

Plaintiffs' allegations are coupled with the allegation that defendants were driven by discriminatory animus. As discussed above, defendants' efforts to pigeonhole Wong for all purposes into the same category as aliens arriving for the first time on the shores of the United States is unavailing. The fact that defendants went to the time and effort of writing a three page letter denying each of the three pending adjustment of status applications is mute testimony to the fact that defendants were not free to simply ignore those applications and hastily remove Wong under the expedited removal provision. Additionally, plaintiffs allege that Wong was not provided with a copy of the Notice and Order of Expedited Removal until June 22, 1999, the day she was removed from the country. The Denial Letter cites the "final order of removal" as authority for the statement that the denial of the adjustment of status application is "not subject to review." Denial Letter, p. 3. Assuming, as this court must for purposes of these motions, the truth of the allegation that Wong had not yet been served with the Notice and Order of Expedited Removal, it is difficult to understand how that order could be in any sense "final." Under the INS's own regulations, removal proceedings do not "commence"

until "issuance *and service*" of the Notice and Order of Expedited Removal. *See* 8 CFR 245.1(c)(9)(i)(E).

At this juncture, this court need not delve into the merits of plaintiffs' claims. The limited issue is whether the Third Claim for Relief is subject to dismisssal. This court finds that it is, but that plaintiffs should be granted leave to replead to seek declaratory relief that defendants are required to allow plaintiffs to pursue a request for reopening or reconsideration.

V. *Motion to Allow Filing of Second Amended Complaint*

Finally, in their Amended Motion to Allow Filing of Second Amended Complaint (docket # 46), plaintiffs seek leave to amend to add a claim under the Federal Tort Claims Act ("FTCA") and a request for attorney fees under RFRA. Defendants have not opposed the request to add a claim for attorney fees under RFRA, but do oppose the request to add a claim against the United States under the FTCA on the grounds that such an amendment is futile. Defendants assert that plaintiffs are up against a jurisdictional bar because they failed to exhaust their administrative remedies as required by 28 USC § 2675(a). Defendants' argument is not well taken.

Plaintiffs' First Amended Complaint did not allege any claim for damages under the FTCA, nor did it allege jurisdiction under the FTCA's jurisdictional provision, 28 USC § 1346(b). Instead, plaintiffs First Amended Complaint alleged two *Bivens* claims, a request for declaratory relief, and a claim under RFRA, and asserted general federal jurisdiction under 28 USC § 1331, and the Declaratory Relief Act, 28 USC § 2201. In their original pro-

posed Second Amended Complaint, submitted along with their original Motion to Amend (docket # 44), filed on November 9, 2001, plaintiffs for the first time sought to add a claim under the FTCA and alleged jurisdiction under 28 USC § 1346(b). Their amended proposed Second Amended Complaint, filed along with their Amended Motion to Allow Filing of Second Amended Complaint, on November 14, 2001 (docket # 46) also included these additions.

Unlike the cases cited by defendants, the FTCA claim involved here has not yet been added and thus is not yet before this court, except to the degree that plaintiffs now seek to add that claim. Plaintiffs are not seeking to "cure [a] jurisdictional deficiency created by the premature filing of the original complaint." *Duplan v. Harper*, 188 F.3d 1195, 1200 (10th Cir. 1999).

Defendants make much out of the fact that the only claim alleged against the United States in the First Amended Complaint was a claim for declaratory relief, which in and of itself does not provide an independent basis for jurisdiction. *See* footnote 4, *supra*. They then point out that, when they challenged plaintiffs' declaratory relief claim on that basis, plaintiffs objected to dismissing the United States as a defendant on the ground that plaintiffs intended to file an FTCA claim against the United States upon exhaustion of their administrative remedies. Defendants reason that naming the United States as a defendant without asserting any other basis for jurisdiction other than an intention to file an FTCA claim against the United States was tantamount to filing an FTCA claim against the United States. However, the fact that the United States may have had a shot at knocking out plain-

tiffs' claim for declaratory relief on legal grounds does not thereby render plaintiffs' act of naming the United States as a defendant the same as instituting an FTCA claim against the United States. The fact remains that no FTCA claim has yet been alleged, nor have plaintiffs yet alleged jurisdiction under 28 USC § 1346(b). In short, their act of seeking leave to add a claim under the FTCA following exhaustion of their administrative process is more "properly construed as instituting a new action against the government" over which this court has jurisdiction due to plaintiffs' exhaustion of their administrative remedies. *Duplan*, 188 F.3d at 1200.

At least at this point, defendants have not raised any other challenge to plaintiffs' Fifth Claim for Relief. Thus, this court reserves for another day all remaining issues related to that claim.

Thus, plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46) should be granted to allow plaintiffs to add their Fifth Claim for Relief under the FTCA, and to add a request for attorney fees to their Fourth Claim for Relief under RFRA.[14]

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[14] As discussed above, this court recommends that plaintiffs replead their *Bivens* claims to specify the exact conduct which supports those two claims, and recommends that plaintiffs' Third Claim for Relief be dismissed, with leave granted for plaintiffs to replead that claim to seek declaratory relief that Wong be allowed to pursue a motion to reopen or reconsider the denial of her applications for adjustment of status. Thus, assuming that these recommendations are adopted by a district court judge, the amended proposed Second

ORDER

For the reasons stated above:

Defendants' Motion to Stay Discovery Until After the Court Rules on Defendants' Motion to Dismiss (docket # 20) is DENIED;

Plaintiffs' Motion to Compel (docket # 33) is GRANTED, subject to adoption of these Findings and Recommendations by a district court judge;

Plaintiffs' Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs (a) are Allowed to File Their Amended Complaint; and (b) are Allowed Discovery (docket # 34) is DENIED;

Plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46) is GRANTED; and

Defendants' Motion for Clarification (docket # 53) is GRANTED, and this court's minute order dated November 14, 2001 (docket # 45) is amended by replacing the last sentence of that minute order with the following sentence: "Order-Granting Plaintiff's Motion to Alter, Amend, or Correct their Motion to Allow Filing of Second Amended Complaint (Related Document # 44)" to clarify that plaintiffs were not given leave to file their Second Amended Complaint.

Amended Complaint must be revised in accordance with this court's rulings.

RECOMMENDATIONS

In addition, for the reasons stated above, defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (docket # 31) should be DENIED, and plaintiffs should be ordered to replead their claims to specify which underlying factual allegations they rely on for each of their *Bivens* claims and to replead their claim for delaratory relief.

SCHEDULING ORDER

Objections to these Findings and Recommendations, if any, are due April 26, 2002. If no objections are filed, then the Findings and Recommendations will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than May 13, 2002. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will be referred to a district court judge and go under advisement.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35426
D.C. No. CV-01-00718-ST

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION, PLAINTIFFS-APPELLEES

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted Mar. 3, 2009
Submission Withdrawn Mar. 4, 2009
Resubmitted May 24, 2010
Filed June 4, 2010

MEMORANDUM[*]

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[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: GRABER, FISHER and M. SMITH, Circuit Judges.

Kwai Fun Wong filed this 42 U.S.C. § 1983 action alleging that David V. Beebe, former director of the Portland, Oregon, district office of the Immigration and Naturalization Service, violated her Fourth Amendment rights. In 1999, Wong was detained for five days in Multnomah County jails pending her removal from the United States. During her detention she was subjected to two strip searches, allegedly in the presence of men. Beebe appeals the district court's denial of his motion for summary judgment seeking qualified immunity. In light of the recent en banc decision in *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010), we reverse.

In *Bull*, we upheld a county's blanket policy requiring strip searches of all arrestees classified for housing in the general jail population. *Id.* at 982. Although Wong was searched under a similar policy, she argues that her searches were unconstitutional because she was an immigration detainee rather than a domestic criminal arrestee and because she was searched not only upon her introduction to the general jail population but also upon her transfer between secure jail facilities. We need not decide whether the searches were unconstitutional, however, because even assuming a constitutional violation, Beebe is entitled to summary judgment because the right to be free from strip searches under those circumstances was not "clearly established" in 1999. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Bull*, 595 F.3d at 978 n.14 (upholding a blanket strip search policy covering not only dangerous detainees but also "persons with no criminal

history arrested for trivial offenses," who "pose no credible risk of smuggling contraband into jails" (internal quotation marks omitted)); *Bell v. Wolfish*, 441 U.S. 520, 524 (1979) (upholding a blanket strip search policy covering witnesses in protective custody and persons incarcerated for civil contempt).

Wong also alleges that she was searched in the presence of men, in violation of the county's written policy. If true, the searches may have been unconstitutional. *See Bull*, 595 F.3d at 967. Wong has not produced any evidence, however, suggesting that Beebe knew or should have known that she would be searched in the presence of men. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 966-67 (9th Cir. 2004). Beebe is therefore entitled to qualified immunity. And Wong has not named as a defendant anyone who performed or authorized such a search.

The parties shall bear their own costs of appeal.

REVERSED and **REMANDED**.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35727

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA IMMIGRATION AND NATURALIZATION SERVICE, BEING SUED AS DAVID V. BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER AND JOHN DOE INS OFFICIALS; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the District of Oregon

D.C. No. CV-01-00718-REJ(JMS)

Argued and Submitted: July 10, 2003
Filed: June 25, 2004

Before: GOODWIN, HUG, and BERZON, Circuit Judges.

BERZON, Circuit Judge:

This appeal presents a set of thorny procedural and substantive questions implicating several areas of constitutional and immigration law. These questions include:

the scope of some of the jurisdiction-stripping provisions of the Immigration and Nationality Act (INA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[1]; the boundaries of the constitutional protections afforded certain aliens returning from abroad; and the availability of a qualified immunity defense to federal officials facing Religious Freedom Restoration Act (RFRA)[2] claims. Yet, as this is an appeal from a denial of a motion to dismiss on grounds largely of qualified immunity, we are asked to decide these weighty questions aided only by the skeletal —at best—factual picture sketched out in the complaint.

The confluence of two well-intentioned doctrines, notice pleading and qualified immunity, give rise to this exercise in legal decisionmaking based on facts both hypothetical and vague. On one hand, the federal courts may not dismiss a complaint unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (citation and internal quotation marks omitted). All that is required is a "short and plain statement" of the plaintiff's claims. Fed. R. Civ. P. 8(a)(2); *see also Swierkiewicz*, 534 U.S. at 512, 122 S. Ct. 992 (citing Fed. R. Civ. P. 8(a)(2)). On the other hand, government officials are entitled to raise the qualified immunity defense immediately, on a motion to dismiss the complaint, to protect against the burdens of discovery and other

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[1] Pub. L. No. 104-208, 110 Stat. 3009-546.

[2] 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

pre-trial procedures. *Behrens v. Pelletier*, 516 U.S. 299, 308, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The qualified immunity issue, in turn, cannot be resolved without first deciding the scope of the constitutional rights at stake. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The unintended consequence of this confluence of procedural doctrines is that the courts may be called upon to decide far-reaching constitutional questions on a nonexistent factual record, even where, as the government defendants contend and as may be the case here, discovery would readily reveal the plaintiff's claims to be factually baseless.

We are therefore moved at the outset to suggest that while government officials have the right, for well-developed policy reasons, *see Mitchell v. Forsyth*, 472 U.S. 511, 525-27, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), to raise and immediately appeal the qualified immunity defense on a motion to dismiss, the exercise of that authority is not a wise choice in every case. The ill-considered filing of a qualified immunity appeal on the pleadings alone can lead not only to a waste of scarce public and judicial resources, but to the development of legal doctrine that has lost its moorings in the empirical world, and that might never need to be determined were the case permitted to proceed, at least to the summary judgment stage. *Cf. Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 575, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947) (discussing the difficulties in deciding constitutional questions presented in "highly abstract form").

The government officials in this case having appealed despite these considerations, we now turn to the questions

they raise, after first recounting the rather sketchy facts we must presume true in this litigation.

I. BACKGROUND

A. Factual Background

According to the operative complaint:[3]

Kwai Fun Wong, a citizen of Hong Kong, first lawfully entered the United States in 1985 as a Tao minister. She later became the head of the Wu-Wei Tien Tao Association (hereinafter "Tien Tao") and, according to the belief of her religion, the "heavenly mandated" Matriarch of the Tao Heritage. Tien Tao is a religious organization dedicated to spreading the truth of Tao throughout the world. Followers of Tao believe that "Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return [to] heaven by restoring the original nature."

In 1992, Wong's predecessor as leader of Tien Tao, Qi-an Ren, instructed Wong to apply for permanent residence in the United States so she would be able to pursue

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[3] All factual allegations are derived from the first amended complaint, the complaint considered by the district court in the decision we review on appeal. After the notice of appeal was filed, appellees filed a second amended complaint, but the government has filed an opposition to the filing of the second amended complaint in the district court. That opposition is still outstanding, as all proceedings in the district court were stayed pending this appeal. We therefore rely exclusively upon the first amended complaint, and do not address whether the allegations Wong seeks to add would support a contrary result. Instead, we leave that question for consideration on remand should the district court permit the filing of the second amended complaint.

Tien Tao's religious mission. Wong filed two petitions with the Immigration and Naturalization Service (INS)[4] for permanent residence, in 1992 and 1994, and resided in the United States while the petitions were pending.[5]

When Qian Ren passed away on March 16, 1999, Wong became the head of Tien Tao. To fulfill her religious duties, including arranging the funerary services and meeting with Tao ministers in Hong Kong to plan Tien Tao's future, Wong had to accompany Qian Ren's body back to Hong Kong for burial.

Under 8 C.F.R. § 245.2(a)(4)(ii), an alien with a pending application for adjustment of status is considered to have abandoned her application if she leaves the country without first obtaining permission ("advance parole") from the INS.[6] Prior to her departure for Hong Kong, Wong's

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[4] Under the Department of Homeland Security Reorganization Plan, the INS was abolished effective March 1, 2003 and its functions transferred to the newly formed Department of Homeland Security. *See* 6 U.S.C. § 542. As the agency was known as the INS at all times pertinent to this appeal, we so refer to it in this opinion.

[5] Wong's immigration status during the pendency of these petitions is not explained in her complaint. The complaint does allege, however, that Wong's original entry into the United States was lawful, and there is nothing in the complaint to suggest that Wong's presence in the U.S. immediately prior to her departure for Hong Kong was anything but legal.

[6] At the pertinent time, the regulation provided:

> [T]he departure of an applicant [for adjustment of status] who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, unless the applicant was pre-

immigration attorney attempted unsuccessfully to make arrangements with the INS to permit Wong to leave without advance parole.[7] Eleven days after Qian Ren's death, Wong left for Hong Kong without having obtained advance parole or any special dispensation waiving the advance parole requirement.

Wong returned to the United States via San Francisco eighteen days later. Upon her arrival, INS officers paroled her into the country pending a deferred inspection in Portland on April 28.[8]

Soon thereafter, Wong and Tien Tao filed another adjustment of status application under INA § 245(i) on Wong's behalf. Wong's attorney notified the Portland INS office of Wong's application and asked Defendant-Appellant Jack O'Brien, port director of that office, to contact him if he wished to meet with Wong in person. Wong did not appear for her deferred inspection on April 28, for reasons not explained in the complaint.

The next day, April 29, Defendant-Appellant David V. Beebe, district director of the Portland INS office, re-

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viously granted advance parole by the Service for such absences, and was inspected upon returning to the United States.

8 C.F.R. § 245.2(a)(4)(ii)(A) (1999).

[7] The complaint does not explain whether Wong sought advance parole before seeking a waiver of the advance parole requirement and if not, why not.

[8] A temporary parolee is considered not to have gained admission to the United States. *See* 8 U.S.C. § 1182(d)(5)(A) ("[P]arole of [any alien applying for admission to the U.S.] alien shall not be regarded as an admission of the alien. . . .").

voked Wong's parole. Shortly afterward, O'Brien and Defendant-Appellant Douglas Glover, a supervisory inspections officer with the Portland office, issued a "Notice and Order of Expedited Removal" and a determination of inadmissibility. Wong did not receive this Notice until June 22, 1999, the day she was removed from the country.

In early June, Wong received a letter from Beebe requesting that Wong appear at the Portland INS office on June 17 to receive her employment authorization card. When Wong presented herself, she was seized by INS officers and handed a letter denying her application for adjustment of status, signed by Defendant-Appellant Jerry F. Garcia on behalf of Beebe. After questioning, Wong was placed in detention, where she remained for five days.

At the Multnomah County Detention Center, Wong was subjected to two strip searches, including an orifice search. Wong's requests for vegetarian meals were denied, "interfering with the practice of her faith." During detention Wong was not permitted access to a translator, information about her rights, information about how to contact her attorney, or access to her followers. Despite repeated requests by her attorney, Wong was not accorded a hearing regarding her exclusion from the United States.

Wong was removed from the United States on June 22, 1999, and remains outside the country.

B. Claims and Procedural History

Wong and Tien Tao brought this damages action against the INS officials[9] for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and against the INS officials and the United States for violations of RFRA.[10] Wong and Tien Tao claim that: (1) the INS officials violated their rights under the First and Fifth Amendments to practice their religion and associate with others in the practice of their religion; and (2) the INS officials and the United States substantially burdened their exercise of religion in violation of RFRA. Wong also challenges her treatment while in INS detention, contending that the INS officials violated her right under the Fourth and Fifth Amendments to be free of unreasonable searches and seizures and her rights to liberty, due process, and equal protection of the laws under the Fifth Amendment.

Although the factual predicate for some of these claims is unclear, the first amended complaint, construed broadly, challenges on constitutional and RFRA grounds the following alleged actions of the INS officers: refusing to grant Wong permission to depart the United States to fulfill her religious obligations; revoking her parole status without first deciding her new adjustment of status petition; failing during her detention to provide her with a

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[9] We refer to the individual Defendant-Appellants collectively as "INS officials."

[10] Wong and Tien Tao also assert additional claims not at issue in this appeal.

translator, information about her rights, information about how to contact her attorney, and access to her followers; subjecting Wong to strip searches; interfering with Wong's practice of her faith through denial of vegetarian meals while in detention; excluding Wong from the United States and interfering with her duties as a religious leader; discriminating against Wong and Tien Tao on the basis of their religious practices, beliefs, and association; and discriminating against Wong on the basis of her race and/or national origin.

The INS officials and the United States filed a motion to dismiss for lack of subject matter jurisdiction, failure to state a claim, and qualified immunity. After a thorough and careful analysis, the magistrate judge recommended the denial of the motion to dismiss in a report of her findings and recommendations, which was adopted in full by the district court.

II. APPELLATE JURISDICTION

The threshold question is whether we have appellate jurisdiction. No doubt we do over the qualified immunity issue. A district court's denial of a motion to grant qualified immunity is an appealable final decision within the meaning of 28 U.S.C. § 1291 to the extent that it turns on a question of law. *Behrens*, 516 U.S. at 306-07, 116 S. Ct. 834; *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001). Even where controverted issues of material fact remain, an appellate court may review "'abstract issue[s] of law' relating to qualified immunity," taking the facts in the light most favorable to the plaintiff. *Behrens*, 516 U.S. at 313, 116 S. Ct. 834 (citation omitted).

But the government[11] raises several additional issues not ordinarily reviewable on interlocutory appeal. We may exercise "pendent" appellate jurisdiction over an otherwise nonappealable ruling if the ruling is "inextricably intertwined" with a claim properly before us on interlocutory appeal. *See Cunningham v. Gates*, 229 F.3d 1271, 1284-85 (9th Cir. 2000); *cf. Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (holding that two district court decisions were not inextricably intertwined because they turned on different issues of law). Two issues are "inextricably intertwined" if they are "(a) [] so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Cunningham*, 229 F.3d at 1285 (citations omitted). Applying these standards to consider the reviewability of each of the issues other than qualified immunity raised by one or more defendants, we conclude that some qualify as pendent issues but others do not.

A. Subject Matter Jurisdiction

The government argues that 8 U.S.C. § 1252 bars judicial review of the actions challenged by Wong,[12] and the district court therefore lacks jurisdiction over this case.

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[11] We refer to the individual INS officials and the United States collectively as "the government," except where necessary to distinguish between the two.

[12] Except when the distinction between the two appellees matters, we refer to both as "Wong."

Ordinarily, though, denial of a motion to dismiss based on lack of jurisdiction is not immediately reviewable. *Catlin v. United States,* 324 U.S. 229, 236, 65 S. Ct. 631, 89 L. Ed. 911 (1945). Nor is the subject matter jurisdiction question "inextricably intertwined" with the qualified immunity issue. Instead, the court must apply entirely different legal standards to resolve each issue.

We have, however, exercised appellate jurisdiction to review issues not "inextricably intertwined" where review of the issue is "necessary to ensure meaningful review of" the issue properly on appeal. *Meredith v. Oregon,* 321 F.3d 807, 812-13 (9th Cir. 2003) (quoting *Swint,* 514 U.S. at 51, 115 S. Ct. 1203). "Resolution of subject matter jurisdiction . . . is 'necessary to ensure meaningful review of' the district court's interlocutory rulings because if the appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings.'" *Id.* at 816; *cf. Spencer Enters., Inc. v. United States,* 345 F.3d 683, 687 (9th Cir. 2003) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'. . . ."") (quoting *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)) (alteration in original).

Accordingly, we have appellate jurisdiction over the subject matter jurisdiction issues.

B. The *Bivens* Right of Action

The INS officials contend that no right of action exists under *Bivens* to contest expedited removal under the INA, because the INA is a comprehensive remedial scheme intended to preclude a damages remedy.

Cf. Schweiker v. Chilicky, 487 U.S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); *Adams v. Johnson,* 355 F.3d 1179, 1183-84 (9th Cir. 2004). Interlocutory review of this issue is not available. *See Pelletier v. Fed. Home Loan Bank of San Francisco,* 968 F.2d 865, 871 (9th Cir. 1992) (stating that the consideration of an argument against judicial creation of *Bivens* remedy was outside the limited scope of a qualified immunity interlocutory appeal), *criticized on other grounds in Behrens,* 516 U.S. at 308-09, 116 S. Ct. 834. Deciding this question requires the consideration of entirely distinct legal standards from, and its resolution is not a logical predicate to the resolution of, the qualified immunity issue.

Nor does the question whether a *Bivens* remedy may be inferred implicate the very power of the district court to issue the rulings on appeal:

> [Jurisdiction] is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946); *see also Janicki Logging Co. v. Mateer,* 42 F.3d 561, 563 (9th Cir. 1994) (determining that the district court had subject matter jurisdiction over a *Bivens* claim, but that the existence of a comprehensive remedial scheme counseled against permitting a *Bivens* remedy).

We therefore lack jurisdiction in this interlocutory appeal to review the district court's decision to infer a *Bivens* remedy.

C. Failure to State a Claim[13]

1. INS officials

The INS officials also seek review of the district court's denial of their motion to dismiss the constitutional and RFRA claims for failure to state a claim, a decision not ordinarily subject to immediate appeal. *See Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993). Whether a complaint fails to allege legally cognizable claims is, however, "inextricably intertwined" with the qualified immunity issue.

To determine whether the INS officials are entitled to qualified immunity, we must first consider whether, taken in the light most favorable to the plaintiff, the facts alleged show the violation of a constitutional or statutory right. *See Saucier*, 533 U.S. at 201, 121 S. Ct. 2151. Similarly, in reviewing a district court's denial of a motion to dismiss for failure to state a claim, we must consider whether, construing the allegations of the complaint in the light most favorable to the plaintiff, it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed.

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[13] We use the phrase "failure to state a claim" to refer to the failure, as a substantive matter, to state a constitutional or statutory claim, not to the existence or nonexistence of a *Bivens* remedy.

2d 80 (1957)). So to determine whether the facts as alleged show that the INS officials violated a legal right (the qualified immunity inquiry), we have to determine whether the facts as alleged state a claim for violation of constitutional or statutory rights. *See, e.g., Schwenk v. Hartford,* 204 F.3d 1187, 1198-99 & n.8 (9th Cir. 2000) (concluding that the review of a denial of a motion to dismiss for failure to state a claim is "part and parcel of the qualified immunity analysis"). We may therefore exercise pendent jurisdiction to review the district court's denial of the substantive motion to dismiss.

2. United States

The United States also moves to dismiss the RFRA claims for failure to state a claim, contending that we may exercise pendent party jurisdiction over its appeal because the issues raised in its appeal are coterminous with those raised by the INS officials' qualified immunity appeal. As will appear, however, our dismissal of the RFRA claim against the INS officials does not dispose of the RFRA claim against the United States. *See infra* at section V. We therefore lack jurisdiction over the United States' appeal. *See Huskey v. City of San Jose,* 204 F.3d 893, 905 (9th Cir. 2000) ("Th[e] narrow avenue for the continued use of pendent appellate jurisdiction left open by *Swint* would not apply to the instant case if our ruling on the merits of the collateral qualified immunity appeal did not resolve all of the remaining issues presented by the pendent appeal.").

III. THE INA'S JURISDICTIONAL PROVISIONS

In 1996, as part of IIRIRA, Congress passed several amendments to the INA circumscribing the availability of

judicial review. Three of the amendments may affect the district court's jurisdiction over Wong's claims. Keeping in mind the twin background principles that there is a strong presumption favoring judicial review of administrative decisions and that ambiguities in deportation statutes should be construed in favor of the alien, *see Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2002), we consider in turn, de novo, the effect of each relevant provision on subject matter jurisdiction. *See United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002).

A. 8 U.S.C. § 1252(a)(2)(B)—Review of Discretionary Decisions by the Attorney General[14]

Section 1252(a)(2)(B) reads in pertinent part:

> Denials of Discretionary Relief.—Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under [various provisions of the INA, including that governing adjustment of status, § 245], or
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General . . .

8 U.S.C. § 1252(a)(2)(B). The government maintains that this provision precludes jurisdiction in this *Bivens* action over Wong's challenges to the decisions regarding ad-

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[14] All further references are to 8 U.S.C. unless otherwise noted.

justment of status, advance parole or permission to depart without advance parole, and revocation of parole.

In *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) (*AADC*), the Supreme Court interpreted § 1252(g). In the course of doing so, the Court cautioned that we must be careful not to read broadly language in the INA affecting court jurisdiction that is subject to a "much narrower" interpretation. *See id.* at 478-82, 119 S. Ct. 936. Consistent with that admonition, we have recognized that the § 1252(a)(2)(B) jurisdictional bar is not to be expanded beyond its precise language.

For example, decisions made on a purely legal basis may be reviewed, as they do not turn on discretionary judgment. *See Zazueta-Carrillo v. Ashcroft,* 322 F.3d 1166, 1169-70 (9th Cir. 2003) (decision that alien was statutorily barred from petitioning for adjustment of status was not discretionary and could be reviewed notwithstanding § 1252(a)(2)(B)); *Montero-Martinez,* 277 F.3d at 1143-44 (§ 1252(a)(2)(B) does not preclude jurisdiction over purely legal, and hence non-discretionary, questions). Moreover, decisions that violate the Constitution cannot be "discretionary," so claims of constitutional violations are not barred by § 1252(a)(2)(B). *See Torres-Aguilar v. INS,* 246 F.3d 1267, 1270 (9th Cir. 2001); *see also Sanchez-Cruz v. INS,* 255 F.3d 775, 779 (9th Cir. 2001). In addition, § 1252(a)(2)(B)(ii) precludes jurisdiction only over decisions as to which discretionary authority is "specified" by statute, not all discretionary decisions. *See Spencer Enterprises, Inc.,* 345 F.3d at 689-90.

Under these precedents, the bar on review of discretionary decisions does not apply to Wong's claims. Her claims raise only constitutional or purely legal, nondiscretionary challenges to the decisions in question. Specifically, Wong's complaint alleges that the INS officials' handling of the advance parole, adjustment of status, and revocation of parole decisions was infected by various kinds of discriminatory animus in violation of the Constitution's guarantees against such bias. Her complaint also alleges that the INS officials' handling of these decisions violated RFRA and the due process guarantees of the Fifth Amendment. Section 1252(a)(2)(B) does not preclude the district court from entertaining such claims.

B. Section 1252(g)—Review of Decisions or Actions by the Attorney General to Commence Proceedings, Adjudicate Cases, or Execute Removal Orders

Section 1252(g) limits judicial review of certain decisions or actions of the Attorney General regarding removal.[15] That provision states:

> Exclusive Jurisdiction.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

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[15] As the government recognizes, nothing in § 1252 bars the claims alleging that Wong's detention conditions violated the Constitution and RFRA.

8 U.S.C. § 1252(g).

AADC held that § 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" 525 U.S. at 482, 119 S. Ct. 936. Section 1252(g), consequently, does not bar "all claims relating in any way to deportation proceedings." *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc). As *AADC* noted, "[t]here are of course many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final deportation order . . . , and to refuse reconsideration of that order." *AADC*, 525 U.S. at 482, 119 S. Ct. 936.

Following *AADC*, we have narrowly construed § 1252(g). For example, we have held that "the reference to 'executing removal orders' appearing in [§ 1252(g)] should be interpreted narrowly, and not as referring to the underlying merits of the removal decision." *Maharaj v. Ashcroft*, 295 F.3d 963, 965 (9th Cir. 2002) (citations omitted). Similarly, in *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120-21 (9th Cir. 2001), we held that § 1252(g) does not bar judicial review of decisions or actions that occur *during* the formal adjudicatory process, because they are separate from the "decision to adjudicate." *Sulit v. Schiltgen*, 213 F.3d 449 (9th Cir. 2000), determined that § 1252(g) does not bar the due process claims of aliens alleging that their green cards were improperly seized without a hearing, that the INS failed to provide them with notice requiring them to surrender for

deportation, and that their counsel failed to notify them of the issuance of the court's decision. *See id.* at 452-53 & n.1; *see also Catholic Soc. Servs.*, 232 F.3d at 1150 (concluding that § 1252(g) does not limit jurisdiction to grant injunctive relief in a class action challenging the INS's advance parole policy). *But see Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (holding that § 1252(g)'s bar to judicial review of decision *whether* to commence proceedings precludes review of the decision *when* to commence proceedings).

Characterizing Wong's claims primarily as removal-based, the government urges that they are for the most part barred by § 1252(g). Although her complaint could be read to challenge the constitutionality of the removal itself, Wong has renounced such a broad reading of her ambiguous allegations, stating in her brief that:

> Plaintiffs' claims [do] not amount to a challenge of the decision of the INS to 'commence proceedings,' 'adjudicate cases,' or 'execute removal orders.' Rather, . . . Plaintiffs' claims arise from the discriminatory animus that motivated and underlay the actions of the individual defendants which *resulted in* the INS's decision to commence removal proceedings and ultimately to remove Plaintiff Wong from the United States.
>
> . . .
>
> The instant case . . . involves claims arising prior to any INS decision 'to commence proceedings against Wong, as well as claims that the Defendants placed Wong in a detention situation where she suffered constitutional injury at the hands of third parties.

(emphasis added). Wong thus disclaims any challenge to the execution of the removal itself, but rather asserts that her claims implicate only actions *other than* that removal, or the commencement of proceedings, if any, leading to that removal.[16]

Wong is correct that § 1252(g) does not bar review of the actions that occurred *prior* to any decision to "commence proceedings," if any, against her or to execute the removal order, such as the INS officials' allegedly discriminatory decisions regarding advance parole, adjustment of status, and revocation of parole. *See Humphries v. Various Fed. USINS Employees*, 164 F.3d 936, 944 (5th Cir. 1999) ("[W]e would defy logic by holding that a claim for relief somehow 'aris[es] from' decisions and actions accomplished only after the injury allegedly occurred.") (second alteration in original). None of these decisions involves the discrete actions enumerated in § 1252(g).

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[16] Of course, Wong will be held in the remainder of this litigation to her representations in this court regarding the intended reach of her complaint. Wong's representations in this court are construed as a waiver of any claims focusing on the execution of the removal or the commencement, if any, of removal proceedings. *Cf. Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1095-96 (9th Cir. 1985) (where Postal Service had abandoned its statutory claims on appeal, court of appeals remanded with instructions to the district court to enter summary judgment against the Service where the Service had no remedies apart from those already abandoned).

C. Section 1252(a)(2)(A)—Jurisdiction to Review Any Cause or Claim Arising From or Relating to Implementation or Operation of an Expedited Removal Order

Similarly, the government asserts that § 1252(a)(2)(A), which deals directly with the expedited removal procedure under which Wong was removed, may also be implicated by Wong's claims. Section 1252(a)(2)(A) reads in relevant part:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> > (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1) [setting forth procedures for expedited removal],
> >
> > (ii) except as provided in subsection (e), a decision by the Attorney 'General to invoke the provisions of such section, [or]
> >
> > (iii) the application of such section to individual aliens, including the determination made [as to eligibility for asylum].

8 U.S.C. § 1252(a)(2)(A). Subsection (e) provides that no court may "enter declaratory, injunctive, or other equitable relief in any action pertaining to an [expedited removal order]," unless certain exceptions not applicable here apply. 8 U.S.C. § 1252(e)(1)(A).

Like § 1252(g), § 1252(a)(2)(A) does not preclude Wong's claims concerning events that occurred prior to

the decision to initiate her expedited removal—namely, the claims challenging the adjustment of status, advance parole, and revocation of parole decisions. None of these claims implicates actions covered by § 1252(a)(2)(A). And, as we explained above, Wong has expressly disclaimed interpreting her complaint to include a challenge to her expedited removal, maintaining instead that the complaint challenges only the decisions described above, which preceded her removal.[17]

We conclude that the district court properly exercised jurisdiction over Wong's claims regarding advance parole, adjustment of status, and parole revocation, as well as over her detention-related claims.

IV. WONG'S CONSTITUTIONAL CLAIMS

We are now ready to consider the merits of this appeal.

The qualified immunity defense "'shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Behrens*, 516 U.S. at 305, 116 S. Ct. 834 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102

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[17] For the same reason, we do not consider whether § 1252(a)(2)(A)'s restrictions on "jurisdiction to review" applies only to petitions for review of decisions of the Bureau of Immigration Appeals, and not to *Bivens* claims such as Wong's. *Cf. Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818 (9th Cir. 2004) ("We are . . . well aware of the fact that the language 'jurisdiction to review' is generally construed to mean review on direct appeal rather than collateral review on habeas corpus.").

S. Ct. 2727, 73 L. Ed. 2d 396 (1982)) (alterations in original). In deciding whether the INS officials are entitled to qualified immunity, we must undertake two inquiries, both de novo:[18] (1) whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right"; and, if a violation of a constitutional right is found, (2) "whether the right was clearly established." *Saucier,* 533 U.S. at 201, 121 S. Ct. 2151.

A. Deprivation of a Constitutional Right

1. Detention-Related Claims

Wong alleges that by, *inter alia,* denying her vegetarian meals, subjecting her to strip searches, and denying her access to her followers, the INS officials subjected her to detention conditions that violated her First Amendment right to freely practice her religion and her Fourth Amendment right to be free of unreasonable searches and seizures.

Wong correctly argues that direct, personal participation is not necessary to establish liability for a constitutional violation. *See Johnson v. Duffy,* 588 F.2d 740, 743 (9th Cir. 1978). "The requisite causal connection can be established . . . also by setting in motion a series of

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[18] *See Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002) (stating that we review qualified immunity decisions de novo). A district court's decision on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is also reviewed de novo. *See Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 927 (9th Cir. 2002).

acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743-44; *see also Stevenson v. Koskey,* 877 F.2d 1435, 1439 (9th Cir. 1989) (causation is established where officer participates in the affirmative acts of another that, acting concurrently, result in deprivation of federal rights). The critical question is whether it was reasonably foreseeable that the actions of the particular INS officials who are named as defendants would lead to the rights violations alleged to have occurred during Wong's detention. *See Gini v. Las Vegas Metro. Police Dep't,* 40 F.3d 1041, 1044 (9th Cir. 1994) (where official did not directly cause a constitutional violation, plaintiff must show the violation was reasonably foreseeable to him).

Wong's first amended complaint, however, fails to identify what role, if any, each individual defendant had in placing her in detention, much less whether any of the named INS officials knew or reasonably should have known of the detention conditions to which Wong would be subjected. Without providing the identity of the official or officials who caused the alleged violations, the complaint merely states that

> Ms. Wong was arrested, handcuffed and placed in detention. She was then taken to the Multnomah County Detention Center where she was subjected to a strip search, including an orifice search, on two separate occasions. Ms. Wong was imprisoned for a total of five days.

First Amended Complaint at ¶ 21. With respect to the individual actions of the named defendants, the complaint makes only the following allegations:

"Beebe improperly revoked Ms. Wong's parole status," *id.* at ¶ 18;"Glover and O'Brien erroneously issued a 'Notice and Order of Expedited Removal' and a Determination of Inadmissibility," *id.* at ¶ 19; and

"Ms. Wong was given a letter denying her application for the adjustment of status signed by Garcia for Beebe," *id.* at ¶ 21.

The complaint thus fails to identify how the actions of the individual INS officials could foreseeably have caused the First and Fourth Amendment violations Wong is alleged to have suffered while in detention. It is possible that, upon identifying those officials responsible for placing her in detention and for overseeing detention conditions at the INS contract facility in question, Wong may be able to amend her complaint to properly allege constitutional violations *by those officials.* Her current complaint, however, is insufficient to allege any detention-related constitutional violations by the named INS officials, none of whom is alleged to have played a role in placing her in detention.[19]

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[19] The second amended complaint, unlike the first, alleges that the defendants "caus[ed] Wong to be unlawfully detained and [knew] or ha[d] reason to know she would be subjected to at least two strip searches, including an orifice search . . . and [knew] or ha[d] reason to know Wong would be denied vegetarian meals to accommodate her religious tenet." Although these allegations may be sufficient to meet the applicable legal standards, we do not consider them here, as the second amended complaint has been neither accepted nor reviewed by the district court.

We conclude that the allegations of the operative, first amended complaint are insufficient to establish a constitutional violation regarding Wong's detention conditions on the part of the named INS officials. As far as the complaint demonstrates, the actions of the named INS officials were simply too far removed from the violations of which Wong complains. Accordingly, Wong's detention-related claims against the named INS officials must be dismissed for failure to state a claim.[20]

2. Due Process

Wong appears to allege that the INS officials violated her procedural due process rights by revoking her temporary parole without first deciding her adjustment of status application. On the bare pleadings, it is difficult to ascertain the contours of this claim, and Wong's briefing before this court has not clarified the legal basis for her allegation that the parole revocation and failure to first decide her adjustment of status application violated the Due Process Clause. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the mean-

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[20] We reiterate that we do not decide whether the complaint might be amended to state a claim against the INS official or officials who placed Wong in detention, or the official or officials responsible for monitoring conditions at the detention center, *see* 8 U.S.C. § 1231(g)(1) (providing that "[t]he Attorney General shall arrange for appropriate places of detention"). *Cf.* Fed. R. Civ. P. 15(a) ("[L]eave [to amend] shall be freely given when justice so requires."); Fed. R. Civ. P. 15(c)(3) (permitting relation back of amended pleadings).

ing of the Due Process Clause of the Fifth . . . Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). We can discern no substantive liberty or property interest, however, in temporary parole status, and Wong has alleged none. Section 1182(d)(5)(A) provides that the Attorney General may

> *in his discretion* parole into the United States temporarily under such conditions as he may prescribe . . . any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(emphasis added); *cf. Sidhu v. Ashcroft*, 368 F.3d 1160 (9th Cir. 2004) (adopting the BIA's more detailed entry criteria). The INA does not create any liberty interest in temporary parole that is protected by the Fifth Amendment. Rather, the statute makes clear that whether and for how long temporary parole is granted are matters entirely within the discretion of the Attorney General. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (explaining that to possess a property interest in a government benefit, an individual must possess "a legitimate claim of entitlement to it"). *Compare Meachum v. Fano*, 427 U.S. 215, 228, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) (holding that a prisoner's interest in not being transferred to another prison facility is "too emphemeral and insubstantial to trigger

procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all"), *with Bd. of Pardons v. Allen*, 482 U.S. 369, 377-78, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987) (holding that a state prisoner has a liberty interest in parole release where the state statute uses mandatory language creating a presumption that parole release will be granted).

Wong's due process claim must therefore be dismissed.

3. Discrimination Claims

Wong alleges that the INS officials acted out of discriminatory animus in making their various decisions, including the decisions involving adjustment of status, advance parole, and revocation of temporary parole. Specifically, she alleges that the INS officials discriminated against her on the basis of her race and/or her national origin,[21] and on the basis of her religious practices, beliefs, and association. Taking her allegations in the light most favorable to her, Wong has alleged violations of the equal protection component of the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954), based on the INS officials' actions. With the exception of the advance parole claim, these allegations could be sufficient to entitle Wong to relief if she is ultimately able to prove that the

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[21] We understand Wong's national origin discrimination claim to refer to her ethnicity and not to her country of origin.

INS officials' actions were motivated by unlawful discriminatory animus.[22]

Wong's advance parole claim must fail because she has not alleged that any of the individual INS defendants were in any way involved with the decision not to grant her a waiver of the advance parole requirement. Her complaint merely states that "Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advanced parole, but was unsuccessful." While it is possible that Wong might be able to make out a claim against some INS official based on the allegedly discriminatory advance parole decision, her claim must be dismissed as to the named INS officials, as nothing in the complaint links any of them to unconstitutional behavior with regard to the advance parole issue. *See Paine v. City of Lompoc,* 265 F.3d 975, 984 (9th Cir. 2001) ("[I]n resolving a motion for summary judgment based on qualified immunity, a court must carefully examine the specific factual allegations against each individual defendant.") (quoting *Cunningham,* 229 F.3d at 1287). Thus, the facts alleged in the complaint do not establish that any defendant "officer's conduct violated a constitutional right" with regard to the advance parole decision. *Saucier,* 533 U.S. at 201, 121 S. Ct. 2151.

As to Wong's remaining discrimination claims, the INS officials maintain that her "bare allegations" that the INS

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[22] We discuss later the question whether Wong is precluded from asserting these otherwise cognizable constitutional rights because of her status as a temporarily paroled alien. *See infra*, at 973-75.

officials' conduct was due to discriminatory animus are legally insufficient to survive a motion to dismiss for failure to state a claim. This contention is wrong.

As *Swierkiewicz* demonstrates, and as we have had occasion to reiterate recently, the government's contention is belied by federal notice pleading principles. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061-63 (9th Cir. 2004) (holding that the plaintiff's admittedly "opaque[]" allegations of discriminatory retaliation were sufficient to withstand a motion to dismiss). "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz*, 534 U.S. at 514, 122 S. Ct. 992 (alteration in original) (citation omitted). *Swierkiewicz* specifically disclaimed any requirement that discrimination plaintiffs plead all the elements of a prima facie case. *See id.* at 510-13, 122 S. Ct. 992; *see also Edwards*, 356 F.3d at 1061-62. Instead, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Swierkiewicz*, 534 U.S. at 512, 122 S. Ct. 992. Such statement must give the defendant fair notice of the basis for the plaintiff's claims. *See Swierkiewicz*, 534 U.S. at 512, 514, 122 S. Ct. 992; *Edwards*, 356 F.3d at 1061.

Indeed, in *Swierkiewicz* the Court rejected the very policy argument made by the INS officials in this case:

> Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled

> [plaintiffs] to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard. . . . A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

Id. at 514-15, 122 S. Ct. 992 (citation omitted); *see also Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (applying *Swierkiewicz* to evaluate the complaint in a 42 U.S.C. § 1983 action and concluding that previous cases requiring heightened pleading of improper motive in constitutional tort cases "are no longer good law").

The INS officials also contend that Wong alleges claims of selective enforcement which *AADC* held are not constitutionally cognizable. Citing concerns about judicial interference with the INS's prosecutorial discretion and the need to prevent obstruction and prolongation of the execution of removal orders, *AADC* indeed announced a "general rule" against selective prosecution claims as a "defense against [] deportation." *See* 525 U.S. at 488-91, 119 S. Ct. 936.

Wong, however, does not assert any claims as a defense against exclusion or deportation. Indeed, her claims of discriminatory adjustment of status and parole revocation decisions cannot fairly be characterized as selective *prosecution* claims at all. The claims do not implicate the Attorney General's *prosecutorial* discretion—that is, in this context, his discretion to choose to deport one person rather than another among those who are illegally in the

country. Rather, Wong alleges that the INS officials denied her various immigration benefits because of her membership in a protected class. As such, the challenged administrative actions, as construed in light of Wong's concessions in the course of this litigation, do not involve the expedited removal itself, and do not pose the threat of obstruction of the institution of removal proceedings or the execution of removal orders about which *AADC* was concerned. *See id.* Wong's discrimination claims are not precluded by *AADC*.

4. Applicability of Entry Fiction to Wong's Constitutional Claims

The INS officials do not contest that Wong was entitled to constitutional protections on her return despite her brief departure. They argue only that the extent of Wong's constitutional rights was not clearly established, because she was an alien lacking entry papers upon her return. As a result, the INS officials maintain, a reasonable official would not have known that Wong was entitled to the full panoply of protections offered by the Constitution.

Despite the limited scope of the officials' argument, we must address to some degree the extent of Wong's entitlement to constitutional rights. *Saucier* counsels that we must first determine whether a constitutional right has adequately been alleged by the plaintiff before turning to the "clearly established" prong. *See* 533 U.S. at 200, 121 S. Ct. 2151 ("[T]he requisites of a qualified immunity defense must be considered in proper sequence."); *Doe v. Lebbos*, 348 F.3d 820, 828 (9th Cir. 2003) (noting that although the parties did not brief the issue of whether the

plaintiff had adequately alleged the violation of a constitutional right, "[w]e are obligated under *Saucier* . . . to address this issue at the outset of our qualified immunity analysis"). In light of our preceding discussion concluding that only Wong's discrimination claims continue to be viable, *see supra* at 969, we limit our substantive constitutional analysis to her entitlement to the rights implicated by those claims.[23]

The Supreme Court has long recognized a distinction between the constitutional rights afforded those who have effected an entry into the U.S., whether legally or otherwise, and those considered never to have entered. *See Zadvydas v. Davis,* 533 U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); *Xi v. U.S. INS,* 298 F.3d 832, 837 (9th Cir. 2002). Aliens inside the U.S., regardless of whether their presence here is temporary or unlawful, are entitled to certain constitutional protections unavailable to those outside our borders. *See Zadvydas,* 533 U.S. at 693-94, 121 S. Ct. 2491; *see also Plyler v. Doe,* 457 U.S. 202, 210, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Yick*

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[23] We do not consider separately the measure of constitutional rights to which Tien Tao's members might be entitled. The complaint contains no allegation that Tien Tao is suing on behalf of its members, or that its members are U.S. residents, let alone individuals in a different immigration status than Wong.

Wo v. Hopkins, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) ("[The Fourteenth Amendment's] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.").

At the same time, under the "entry fiction" recognized in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953), an alien seeking admission has not "entered" the United States, even if the alien is in fact physically present.[24] *See id.* at 213, 215, 73 S. Ct. 625; *see also Kaplan v. Tod*, 267 U.S. 228, 230, 45 S. Ct. 257, 69 L. Ed. 585 (1925) (though present in the United States, excluded alien "was still in theory of law at the boundary line and had gained no foothold in the United States"). Applying this legal fiction, *Mezei* held that the procedural due process rights of an alien detained on Ellis Island were not violated when he was excluded without a hearing. *See Mezei*, 345 U.S. at 214, 73 S. Ct. 625. *Mezei* explained:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by

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[24] Aliens granted temporary parole under 8 U.S.C. § 1182(d)(5)(A) fall into this category, as they have not been granted admission to the U.S. *See id.* ("[P]arole of such alien shall not be regarded as an admission of the alien. . . ."); *supra* n.8.

> Congress is, it is due process as far as an alien denied entry is concerned."

Id. at 212, 73 S. Ct. 625 (internal citations omitted).

The entry fiction thus appears determinative of the *procedural* rights of aliens with respect to their applications for admission. The entry doctrine has not, however, been applied, by the Supreme Court or by this court, to deny all constitutional rights to non-admitted aliens.[25] As *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc),[26] explained, "[w]hile it is . . . clear that excludable aliens have no procedural due process rights in the admission process, the law is not settled with regard to nonprocedural rights." *Id.* at 1449; *see also Zadvydas*, 533 U.S. at 693, 121 S. Ct. 2491 ("It is well established that *certain* constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.") (emphasis added); *id.* at

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[25] For the purposes of this opinion, we use the term "non-admitted aliens" to describe those aliens who have presented themselves for immigration inspection and have not been granted an administrative determination of admissibility into the U.S., including those who are paroled in under 8 U.S.C. § 1182(d)(5)(A). We do not use the term to refer to those aliens who were not rejected during immigration inspection and are nonetheless present in this country illegally.

[26] We note that *Barrera-Echavarria*'s statutory holding—that 8 U.S.C. § 1227(a)(1) authorized the indefinite detention of aliens subject to exclusion proceedings—has since been superseded by statute. See *Xi v. INS*, 298 F.3d 832, 837 (9th Cir. 2002) (explaining that the statute interpreted in *Barrera-Echavarria* "no longer exists" and that the statute now applicable is 8 U.S.C. § 1231(a)(6)).

703-04, 121 S. Ct. 2491 (Scalia, J., dissenting) (noting that the entry fiction only "makes perfect sense . . . with regard to the question of what *procedures* are necessary to prevent entry, as opposed to what *procedures* are necessary to eject a person already in the United States"). *Barrera-Echavarria* then went on to consider specifically whether such aliens have a constitutional right to be free from extended detention, concluding that they do not.[27] *See* 44 F.3d at 1449.

Our sister circuits have likewise posited that the entry fiction is pertinent mostly with respect to the narrow question of the scope of procedural rights available in the admissions process, and is not necessarily applicable with regard to other constitutional rights. In *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987), for example, the Fifth Circuit held that the entry fiction "determines the aliens' rights with regard to immigration and deportation proceedings[,]" but "does not limit the right of excludable

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[27] *Barrera-Echavarria* concluded that *Barrera*'s case was controlled by *Mezei*, which, the court explained, suggests that "excludable aliens simply enjoy no constitutional right to be paroled into the United States, even if the only alternative is prolonged detention." 44 F.3d at 1450. *Barrera-Echavarria* went on to explain that its decision was premised on the fact that Barrera's detention was not indefinite, but was instead a series of one-year periods of detention followed by an opportunity for release, and as such, was constitutional. *Id.* at 1450. Thus, although the court noted that this outcome was "reasonabl[e]" in light of the entry fiction, its decision was based for the most part on considerations particular to the substantive due process right asserted in that case—the right to be free of detention.

aliens detained within United States territory to humane treatment." *Id.* at 1373.

Similarly, the Third Circuit has recognized that "[e]ven an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process." *Ngo v. INS,* 192 F.3d 390, 396 (3d Cir. 1999); *see also Rosales-Garcia v. Holland,* 322 F.3d 386, 410 (6th Cir.) (en banc) ("The fact that excludable aliens are entitled to less process . . . does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."), *cert. denied,* 539 U.S. 941, 123 S. Ct. 2607, 156 L. Ed. 2d 627 (2003);[28] *Sierra v. INS,* 258 F.3d 1213, 1218 n.3 (10th Cir. 2001) (noting that the entry fiction "applies to procedural due process challenges such as Sierra's. This case does not involve, and we do not address, a substantive due process challenge").

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[28] We recognize that the ultimate holding of *Rosales-Garcia*—that the detention of Cuban nationals under the Cuban Review Plan violates due process, see 322 F.3d at 412-13—conflicts with *Barrera-Echavarria*'s conclusion that it does not, *see* 44 F.3d at 1450. *Rosales-Garcia* characterized the Cuban Review Plan as permitting indefinite detention, *see* 322 F.3d at 412 n.30, whereas the *Barrera-Echavarria* court specifically noted that the Plan's annual review procedures distinguished that case from one involving indefinite detention, *see* 44 F.3d at 1450. For our analysis, this disagreement on an issue not before us is not pertinent. Rather, what matters for present purposes is that we are in agreement with the Sixth Circuit on the more general principle that the entry fiction is dispositive with respect to procedural rights in the admissions process, but not necessarily with respect to other constitutional protections.

The decisions of courts confronted with the everyday reality of the great number of non-admitted aliens living and working in the American community reflect an understanding that such aliens are undeniably "persons" entitled to constitutional protection, especially with respect to areas not implicating the government's plenary power to regulate immigration. Several courts have held, for example, that non-admitted aliens in the criminal justice system may not be punished prior to an adjudication of guilt in conformance with due process of law, a Fifth and Sixth Amendment safeguard available to citizens and aliens alike. *See Alvarez-Mendez v. Stock,* 941 F.2d 956, 962 & n.6 (9th Cir. 1991) (considering whether detention of excluded Cuban refugee violated his substantive due process rights, and noting that Fifth and Sixth Amendments apply to aliens as well as citizens); *Lynch,* 810 F.2d at 1374 ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials."). Courts have held that non-admitted aliens are entitled to *Miranda* warnings prior to custodial interrogations. *See, e.g., United States v. Moya,* 74 F.3d 1117, 1119 (11th Cir. 1996); *United States v. Henry,* 604 F.2d 908, 914 (5th Cir. 1979).

The Supreme Court has also indicated that the equal protection component of the Fifth Amendment's Due Process Clause extends to non-admitted aliens. In *Mathews v. Diaz,* 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976), the Court considered whether a statute conditioning eligibility for medicare benefits on five years of continuous residence and admission for permanent residence

violated the equal protection rights of Cuban refugees granted temporary parole under 8 U.S.C. § 1182(d)(5). *See* 426 U.S. at 75 n.7, 77-83, 96 S. Ct. 1883. *Mathews* explained that

> [t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

Id. at 77, 96 S. Ct. 1883 (citations omitted). The Court's sweeping language clearly applied to aliens temporarily paroled into the United States, as two of the plaintiffs were so paroled. *See id.* at 75 n.7, 96 S. Ct. 1883. *Mathews'* significance for present purposes is that the entry fiction does not preclude substantive constitutional protection, including protection under the equal protection component of the Fifth Amendment's Due Process Clause, for aliens paroled into the country after having been stopped at the border.

The cases discussed above indicate that the entry doctrine does not categorically exclude non-admitted aliens from all constitutional coverage, including coverage by equal protection guarantees. Recognizing such a logical endpoint to the entry fiction prevents its application from becoming an exercise inconsistent with our basic constitutional values. It also vitiates the perverse incentive that would otherwise exist for aliens to evade immigration checkpoints altogether and thereby acquire constitutional protections. The entry fiction is best seen, instead, as a

fairly narrow doctrine that primarily determines the *procedures* that the executive branch must follow before turning an immigrant away. Otherwise, the doctrine would allow any number of abuses to be deemed constitutionally permissible merely by labelling certain "persons" as non-persons. As Justice Marshall forcefully articulated in his dissenting opinion in *Jean v. Nelson*, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985), addressing a question the majority declined to reach:

> [T]he principle that unadmitted aliens have no constitutionally protected rights defies rationality. Under this view, the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. He might argue that scarce immigration resources could be better spent by hiring additional agents to patrol our borders than by providing food for detainees. Surely we would not condone mass starvation.

Id. at 874, 105 S. Ct. 2992 (Marshall, J., dissenting); *see also Zadvydas*, 533 U.S. at 704, 121 S. Ct. 2491 (Scalia, J., dissenting) ("I am sure[deportable aliens] cannot be tortured, as well. . . .").

In light of these considerations, Justice Marshall concluded in *Jean* that *Mezei's* determination with respect to procedural due process rights "is not applicable to the separate constitutional question whether the Government may establish a policy of making parole decisions on the basis of race or national origin without articulating any justification for its discriminatory conduct." *Jean*, 472 U.S. at 879, 105 S. Ct. 2992 (Marshall, J., dissenting). In his view, "in the absence of any reasons closely related to

immigration concerns," the government may not discriminate against unadmitted aliens on the basis of race or national origin. *Id.* at 881-82, 105 S. Ct. 2992.

We are persuaded by the considerations outlined above, and by Justice Marshall's opinion addressing essentially the same question presented here, that the entry fiction does not preclude non-admitted aliens such as Wong from coming within the ambit of the equal protection component of the Due Process Clause. We cannot countenance that the Constitution would permit immigration officials to engage in such behavior as rounding up all immigration parolees of a particular race solely because of a consideration such as skin color.[29]

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[29] We do not here address the question whether racial, ethnic, or religious discrimination against immigration parolees is tested by the usual heightened scrutiny applicable to such classifications. *See Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (stating that "all racial classifications imposed by government must be analyzed . . . under strict scrutiny") (citation and internal quotation marks omitted); *Christian Sci. Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010, 1012 (9th Cir. 1986) (classifications based on religious sect are suspect), *as amended by* 792 F.2d 124 (9th Cir. 1986). Again, at this juncture we need consider only whether there is any state of facts consistent with the complaint on which Wong could prevail. *See Swierkiewicz*, 534 U.S. at 514, 122 S. Ct. 992. Applying that standard, one set of facts consistent with the complaint is that the defendants refused Wong adjustment of status, or other unidentified INS officials refused her a waiver of advance parole prior to her departure, solely on the basis of her race, ethnicity, or religion, and for no immigration-related reason or other governmental purpose. Were that the case, Wong could prevail even under the "wholly

Although "Congress has 'plenary power' to create immigration law, and . . . the judicial branch must defer to executive and legislative branch decisionmaking in that area, ... that power is subject to important constitutional limitations." *Zadvydas,* 533 U.S. at 695, 121 S. Ct. 2491; *cf. Fiallo v. Bell,* 430 U.S. 787, 793 n.5, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens. . . ."). We can imagine no proper governmental interest furthered by the purely invidious discrimination alleged to have been carried out by individual INS officers in this case.

Were there any doubt regarding this general proposition, our decision in this case that the allegations of racial, ethnic, and religious discrimination with regard to decisions concerning temporary parole and adjustment of status are sufficient to state a claim of constitutional violation might still be compelled by both the procedural posture of this case and several considerations particular to Wong. Again, Wong's equal protection claim cannot be dismissed for failure to state a claim unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz,* 534 U.S. at 514, 122 S. Ct. 992 (citation and internal quotation marks omitted); *see also Conley,* 355 U.S. at 45-46, 78

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irrational" standard applied in *Mathews*, where no putatively suspect classification was alleged. In the current posture of this case, that is all we need decide.

S. Ct. 99 ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Wong alleges that she resided in the United States continuously for seven years, before her brief departure undertaken under exigent circumstances. She left the country for only eighteen days—a period far briefer than Mezei's "protracted" stay abroad of nineteen months. *See Mezei*, 345 U.S. at 214, 73 S. Ct. 625; *Zadvydas*, 533 U.S. at 693, 121 S. Ct. 2491 (discussing Mezei's "extended departure"). More importantly, Wong alleges that her failure to obtain advance parole or a waiver of the requirement was due to invidious discrimination by immigration officials prior to her departure, at which time she undisputedly had a right to be free from such discrimination.[30] *See Plyler*, 457 U.S. at 215, 102 S. Ct. 2382. Had Wong been granted such a waiver, she would have returned to the United States with the same immigration status she held prior to her departure, and her entitlement to equal protection would have been unquestioned. Under these circumstances, Wong would more properly be viewed as an alien to whom the entry fiction does not apply, as she would have been allowed to enter on her return, and therefore as an alien who is for constitutional purposes "within the United States . . . whether [her] presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S.

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[30] We note that we do not rule out the possibility that Wong's pre-departure discrimination claim with respect to advance parole may still be viable were she to amend her complaint.

at 693, 121 S. Ct. 2491. We are for that reason as well unable to conclude that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz*, 534 U.S. at 514, 122 S. Ct. 992 (citation and internal quotation marks omitted).

We therefore conclude that Wong's allegations of invidious discrimination are sufficient at this pleading stage to make out a Fifth Amendment discrimination claim arising out of the INS officials' actions with respect to revocation of Wong's temporary parole status and post-return rejection of her adjustment of status applications.

B. Whether the Law Was Clearly Established

Even where a constitutional violation has occurred, whether an official asserting qualified immunity may be held liable "generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (internal citation omitted). Because of the uncertainty surrounding the constitutional status of an alien in Wong's unusual position during the period after her return, we conclude that Wong has not alleged violations of clearly established law. "'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034) (alterations in original); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1075

(9th Cir. 2001) (en banc) ("[W]hat is required is that government officials have 'fair and clear warning' that their conduct is unlawful.") (citation omitted). In other words, "in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034) (internal quotation marks omitted).

A reasonable INS official very well could have been unsure of the level of constitutional protection against discrimination afforded to aliens in Wong's rather unique circumstances.[31] Although we suggested in *Barrera-Echavarria* that aliens in Wong's position *might* have some constitutional rights, we have never squarely held that such aliens are entitled to equal protection guarantees, nor has the Supreme Court.

Indeed, a dispute over the very issue whether the government can discriminate in granting parole to non-admitted aliens on the basis of race divided the Eleventh Circuit en banc court in *Jean*, *see Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), and led to Justice Marshall's dissent on the question when the Supreme Court majority declined to reach the issue. *See Jean*, 472 U.S.

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[31] We repeat that Wong has only stated a cognizable cause of action against the present defendants with regard to the adjustment of status and revocation of temporary parole decisions made after her return. Were we considering the decisions made before her departure, the entry fiction would not be pertinent, Wong's status as an individual on the *Plyler v. Doe/Zadvydas* side of the constitutional divide would be plain, and it is quite likely that our conclusion regarding qualified immunity would be otherwise than it is.

at 868-82, 105 S. Ct. 2992 (Marshall, J., dissenting). Under these circumstances of constitutional uncertainty regarding race discrimination against nonadmitted aliens, the contours of any constitutional doctrine we now recognize were not sufficiently clear that a reasonable INS officer would have realized that Wong after her return was entitled to Fifth Amendment equal protection with regard to immigration-related decisions.[32]

Further, while we have concluded that Wong's particular circumstances support the conclusion that it was unconstitutional to discriminate against her on the basis of race, ethnicity, or religion, the complaint does not allege that the present defendants knew that she had been discriminated against with regard to the advance parole or waiver decisions. In the absence of such knowledge, the present defendants were not aware of this reason why Wong could not be discriminated against in violation of the equal protection component of the Due Process Clause.

We therefore conclude that the INS officials are entitled to qualified immunity on Wong's remaining discrimination claims.

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[32] We note that were the race, ethnicity, and religion-based equal protection claims in this case unrelated to Wong's immigration status, we doubt the responsible government officials would be entitled to qualified immunity. As far as we are aware, no court has ever held or indicated that paroled aliens can be subjected to race-based discrimination with regard to issues such as school attendance or police protection while physically within the borders of the country; we suspect no reasonable governmental official could believe such discrimination to be legal.

V. RFRA CLAIMS

The INS officials contend that qualified immunity is available as a defense to Wong's RFRA claims, asserting that they are entitled to prevail on qualified immunity grounds. Neither this court nor any other court of appeals has decided whether qualified immunity is available to a federal government official sued under RFRA.[33] We do not reach that question, however.

Wong and Tien Tao assert that by subjecting Wong to strip searches, denying her vegetarian meals, denying her

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[33] Although the INS officials cited to *Resnick v. Adams*, 317 F.3d 1056 (9th Cir. 2003), as a case applying qualified immunity to a RFRA claim, that opinion has since been amended to clarify that the RFRA claim was not considered on appeal. *See* 348 F.3d 763, 766 (9th Cir. 2003) (noting that *Resnick* had amended his complaint to drop his RFRA cause of action). We have, in earlier cases, considered qualified immunity in the context of a cause of action under 42 U.S.C. § 1983 premised on violations of RFRA. *See, e.g., May v. Baldwin*, 109 F.3d 557, 561-62 (9th Cir. 1997) (concluding that prison officials were entitled to qualified immunity in § 1983 suit alleging violations of RFRA); *Friedman v. South*, 92 F.3d 989, 989 (9th Cir. 1996) (holding that RFRA is inapplicable to § 1983 action alleging violations predating RFRA's enactment, because prison officials are entitled to qualified immunity when law is not clearly established). These cases predate *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), which held RFRA to be unconstitutional as applied to state and local governments. More recently, in *Kaahumanu v. County of Maui*, 315 F.3d 1215 (9th Cir. 2003), we declined to consider whether legislative immunity extends to suits brought under the statute enacted to replace the void provisions of RFRA, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. *See id.* at 1219 n.3.

access to her followers, and removing her, the INS officials substantially burdened their religious rights in violation of RFRA. For the reasons discussed above, Wong does not in the presently operative complaint state a claim against the INS officials for violation of her religious rights, because she has failed to allege that any of the individual defendants had anything to do with the detention conditions to which she was subjected. *See supra* at 967.

The question whether the complaint adequately alleges a causal relationship between the actions of the individual INS officials and Wong's detention-based injuries for RFRA purposes is governed by the same legal standard as the question whether the complaint adequately alleges a causal relationship between those actions and Wong's detention-based injuries for constitutional purposes. *See, e.g., Stevenson*, 877 F.2d at 1439 (explaining that causation can be established by showing that the officer participated in the affirmative acts of another that, acting concurrently, resulted in a deprivation of federal rights). Our resolution of the causation issue with respect to Wong's constitutional claim "necessarily resolves" the causation issue with respect to her RFRA claim. *Cunningham*, 229 F.3d at 1285 (citations omitted). The two questions are therefore inextricably intertwined. As the RFRA cause of action thus fails without regard to qualified immunity, we do not reach that issue of first impression. We therefore dismiss Wong's RFRA claims as against the individual defendants.

Because we do not reach the question whether Wong has otherwise alleged a violation of RFRA, we do not have

jurisdiction over the United States' appeal with respect to the RFRA claim.

VI. CONCLUSION

We AFFIRM the district court's denial of the INS officials' motion to dismiss for lack of subject matter jurisdiction. We REVERSE the district court's denial of the INS officials' motion to dismiss, on the respective grounds enumerated in this opinion, on all claims against the individual defendants. We decline to exercise jurisdiction over the appeal of the United States, and REMAND the remainder of the action for proceedings consistent with this opinion.

Each party shall bear its own costs.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG AND WU-WEI TIEN TAO ASSOCIATION, PLAINTIFFS

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL, AND THE UNITED STATES OF AMERICA, DEFENDANTS

Apr. 11, 2007

ORDER

JONES, Judge:

Magistrate Judge Janice M. Stewart filed Findings and Recommendation (#443) on January 24, 2007, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Ma-*

chines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiffs and defendants have timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Stewart's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Stewart's Findings and Recommendation (#443) dated January 24, 2007, in its entirety. Plaintiff Wong's motion (#400) for partial summary judgment against the defendants David V. Beebe and the United States of America is denied; defendant David Beebe's motion (#403) for summary judgment is granted in part and denied in part; and defendant United States' motion (#405) for summary judgment is granted in part and denied in part as follows:

First Claim (Fourth Amendment):

Deny summary judgment both to Wong and Beebe as to whether the strip searches violated the Fourth Amendment

Second Claim (First Amendment):

Grant summary judgment to Beebe

Third Claim (Declaratory Judgment):

Grant summary judgment to the United States

Fourth Claim (RFRA):

Grant summary judgment to Beebe and deny summary judgment to Wong

Fifth Claim (FTCA):

False Imprisonment: Grant summary judgment to the United States and deny summary judgment to Wong

Invasion of Privacy: Grant summary judgment to the United States and deny summary judgment to Wong

Negligence:

Grant summary judgment to the United States against the Wu-Wei Tien Tao Association as to all specifications;

Grant summary judgment to the United States against Wong and deny summary judgment to Wong as to sending letters containing misstatements and adjudicating adjustment of status application;

Deny summary judgment to the United States against Wong and deny summary judgment to Wong as to conditions of confinement.

I further deny plaintiffs' motion (#454) to supplement the summary judgment record.

IT IS SO ORDERED.

DATED this 10th day of Apr., 2007.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CV-01-718-ST

KWAI FUN WONG AND WU WEI TIEN TAO ASSOCIATION, PLAINTIFFS

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL, AND THE UNITED STATES OF AMERICA, DEFENDANTS

Filed: Jan. 24, 2007

FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate Judge:

INTRODUCTION

Following a July 24, 2002 appeal to the Ninth Circuit (*Wong v. United States Immigration & Naturalization Serv., et al*, 373 F3d 952 (9th Cir 2004)), and further proceedings in this court on remand, plaintiffs filed a Fourth Amended Complaint (docket #170), followed by a Fifth Amended Complaint (docket #350).

Plaintiff Kwai Fun Wong ("Wong") alleges that she is the Matriarch of the Tao Heritage, and the spiritual leader

of plaintiff Wu Wei Tien Tao Association ("Association"), a worldwide non-profit religious organization registered in Oregon.[1] Wong, who was born in Hong Kong, is a Tien Tao minister[2] and first entered the United States on July 14, 1992. Seven years later, Wong was subjected to an expedited removal from the United States. The surrounding circumstances of that removal form the basis for plaintiffs' claims in this case.

Wong alleges that her constitutional rights and her rights under the Religious Freedom Restoration Act, 42 USC § 2000bb-1 ("RFRA"), were violated by her arrest and removal from the United States in June 1999 by the

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[1] Plaintiffs allege that the Association was formerly known as "Tien Tao Association, Inc." and is made up of four legal entities, namely Wu Wei Tien Tao Association Oregon; Tien Tao Association, Houston; Wu Wei Tien Tao Association, Texas; and Wu Wei Tien Tao Association, New York. Fifth Amended Complaint, ¶ 4; Plaintiffs' Corrected Memorandum in Opposition to United States' Motion for Summary Judgment (docket #421), p. 17. Defendants argue that the Association *of Oregon* is the only entity seeking damages in this case and that plaintiffs have no claim to damages based on loss of affiliation by legally and financially independent organizations in New York and Texas. As discussed below, the claims of the Association (both local and "worldwide") are barred so this court need not determine the extent of damages which might flow from those claims.

[2] There is a dispute over the date Wong became a minister. Plaintiffs' Concise Statement of Material Facts (docket #417), ¶ 6; App 4, 18-19. However, for purposes of these motions, this court accepts as true Wong's assertions about the length of her ministry, the sincerity of her religious beliefs, and the requirements and proscriptions of her faith.

Immigration and Naturalization Service ("INS")[3] and David V. Beebe ("Beebe"),[4] the former District Director of the INS office in Portland, Oregon. She also alleges that the United States improperly denied her the right to request reopening or reconsideration of the denial of her request for adjustment of status and subjected her to various torts which are cognizable against the United States under the Federal Tort Claims Act ("FTCA"), 28 USC §§ 1346(b), 2671-80.

Presently, Wong alleges three claims against Beebe for: (1) violation of the Fourth Amendment premised upon the strip searches she endured during her five-day detention (Fifth Amended Complaint, ¶¶ 36-38) ("First Claim"); (2) denial of her right to practice her religion in violation of the First Amendment (*id* at ¶¶ 39-41) ("Second Claim"); and (3) violation of RFRA based on her assertion that the exercise of her religion was substantially burdened by the denial of her adjustment of status application and the conditions under which she was detained (*id* at ¶¶ 46-48) ("Fourth Claim"). Wong and the Association also allege two claims against the United States for: (1) declaratory relief that they are entitled to pursue their post-denial

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[3] All functions of the INS have now been transferred to the Department of Homeland Security ("DHS"). However, because this agency was known as the INS at all times relevant to plaintiffs' allegations, this court will refer to it as the INS, as did the Ninth Circuit. *Wong*, 373 F3d at 958 n4.

[4] Beebe served as the District Director in the Portland INS Office for approximately 12 years, until his retirement in October 2000. App 106-07.

rights to request reopening or reconsideration of the denial of Wong's April 20, 1999 application for adjustment of status[5] (*id* at ¶¶ 42-45) ("Third Claim"); and (2) violation of the FTCA based on the torts of false imprisonment, invasion of privacy, and negligence (*id* at ¶¶ 49-51) ("Fifth Claim").

Wong has now filed a Motion for Partial Summary Judgment (docket #400) only on her First Claim against Beebe for violation of the Fourth Amendment by causing her to be strip searched twice and her Fifth Claim against the United States under the Federal Tort Claims Act premised upon claims for invasion of privacy, negligence, and false imprisonment. In response, defendants have filed cross-motions for summary judgment, namely Beebe's Motion for Summary Judgment (docket #403) and the United States' Motion for Summary Judgment (docket #405) against each of plaintiffs' claims.

For the reasons that follow, this court recommends that Wong's motion be denied and that Beebe's motion and the United States' motion be granted in part and denied in part, leaving for trial only Wong's claims against Beebe for violation of the Fourth Amendment (First Claim) and against the United States for negligence with respect to her conditions of confinement (Fifth Claim).

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[5] As discussed in more detail below, Wong filed a total of three applications for adjustment of status. However, plaintiffs do not seek to reopen or reconsider the first two applications for adjustment of status which were filed December 2, 1992 (Plaintiffs' Ex 3 and App 12-14) and December 8, 1994 (Plaintiffs' Ex 3 and App 33-36).

DISCUSSION

I. Background Facts and Pertinent Allegations

A. Wong's Ministry and Entry into the United States

Wong became a Minister of Tien Tao in the mid-1980s. At that time, the last Patriarch of Tien Tao, Wu Wei Lao Zhu (Elder Cheung Fat Fan, respectfully called Qian Ren), was bringing many people to the United States to spread the Tien Tao to the West. Wong first entered the United States on July 14, 1992, under a B-2 visitor visa issued by the INS on March 11, 1992. Shortly after Wong's entry into the United States, the Tien Tao Association, Inc., filed a petition for an immigrant visa on behalf of Wong, asking that she be granted special immigrant status as a religious worker. Appendix in Support of Defendants' Motions for Summary Judgment ("App") attached to Declaration of R. Joseph Sher, 1-10 (Form I-360, Petition for Amerasian, Widower, or Special Immigrant, and supporting documentation). That petition was approved on November 9, 1992. App 11.

On December 2, 1992, Wong filed her first Form I-485 (Application for Permanent Residence), seeking permanent resident status. App 12-14. She filed a second Form I-485, (Application to Register Permanent Residence or Adjust Status) on December 8, 1994.[6] App

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[6] In early January 1993, Wong applied for and received an advance parole document authorizing her to reenter the United States any time before March 4, 1993. App 16. Wong apparently left the United States in early 1993, but did not reenter the United States until two weeks after the advance parole authorization expired. On

33-36. Some time thereafter, pursuant to the instructions of Qian Ren, Wong relocated to Oregon and became involved in the Association in Oregon.

As part of her adherence to Tien Tao, Wong took instructions and received guidance from Qian Ren. Qian Ren formed and started the Tien Tao Association, which was registered in the State of Oregon and whose name was later changed to Wu Wei Tien Tao Association.

B. 1999 Departure From and Return to the United States

Qian Ren died in Houston, Texas, on March 16, 1999. On March 25, 1999, without first obtaining advance parole, Wong departed the United States in order to arrange and attend his funeral. When she returned to the United States (through the San Francisco port of entry) on April 13, 1999 (App 43), Wong was ordered to report to the Portland INS office for a deferred inspection on April 28,

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March 19, 1993, Wong entered the United States using her B-2 visitor visa, gaining entry through September 18, 1993. App 21, 69. Wong again left the country and reentered on September 9, 1993. App 28, 69. Some time later, Wong again departed the United States and sought to reenter on November 14, 1994, by again presenting her B-2 visitor visa. App 32. However, she was referred for secondary inspection when the immigration officer noticed that she had an I-485 petition pending. *Id.* Her departure without advance parole necessitated the refiling of Wong's I-485 petition, which she filed during the time of her parole in to the United States between November 14 and December 28, 1994. App 31 & 226; 8 CFR 245.2(a)(4)(ii)(B).

1999. App 43, 50-51. Shortly thereafter, Wong contacted her attorney in Portland. App 264.

On April 15, 1999, Wong filed an Application for Advance Parole (Form I-131). App 70.[7] Then, on April 20, 1999, a week before the scheduled date of her deferred inspection at the Portland INS office, Wong's attorney sent a Form I-485 (Application to Register Permanent Residence or Adjust Status) to the INS's Nebraska Service Center. App 44-47, 51. A week later, her attorney notified the Portland INS office, by means of a letter dated April 26, 1999, addressed to the INS's Portland Port Director, Jack O'Brien ("O'Brien"), that Wong had abandoned her prior adjustment of status application, had filed a new adjustment of status application and would not be appearing for the deferred inspection on April 28, 1999, explaining:

> Under current immigration law, [Wong] is immediately allowed to refile her adjustment application under Section 245(i) of the [INA] based on an approved petition with a priority date of October 30, 1992. Attached is a copy of the INS cover letter and Federal Express confirmation of the alien's adjustment application refiled in the Nebraska Service Center on April 20, 1999.
>
> In order to avoid possible detention and removal from the United States at the time of her deferred inspection, I have asked [Wong] not to appear for the defer-

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[7] Although the form was supposedly filed April 15, 1999 (App 48 & 70), it was not signed by Wong until April 19, 1999, and by Wong's attorney until April 22, 1999 (App 49).

> red inspection at this time. Should you require anything further or still wish to see [Wong], please let me know.

App 51.

Shortly before the time set for Wong's deferred inspection, one of her attorneys, Gretel Ness ("Ness"), contacted Douglas Glover ("Glover"), a Supervisory Immigration Inspector in the Portland INS Office, and asked him if he had seen the April 26, 1999 letter, explaining that she believed Wong was eligible for adjustment of status under INA § 245(i), 8 USC § 1255(i). App 188. Glover told Ness that he needed to research the issue. App 190 (Glover Depo, p. 25).

C. INS Response to Post-Return Filings

Shortly thereafter,[8] Beebe convened a meeting to discuss the letter from Wong's attorney. Beebe, Gerry Garcia ("Garcia") (the Assistant District Director for Examinations in the Portland INS Office), Glover, O'Brien (Glover's supervisor), and Phillip Crawford ("Crawford") (the Deputy District Director at the Portland INS Office)

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[8] It is unclear from the record exactly when this meeting took place. However, Glover testified that the first time he became aware of Wong was during the telephone call from Ness (App 188), and Garcia testified that the meeting involved the letter which stated that Wong would not be appearing for her deferred inspection (App 181). Thus, this meeting apparently took place some time between the date when Ness contacted Glover (after the letter was sent on April 26, 1999) and the date scheduled for deferred inspection (April 28, 1999).

all attended the meeting. During the discussion, Garcia stated that if Wong did not appear, she would be a fugitive from justice. App 181 (Garcia Depo, p. 12). In response to Beebe's question regarding a pending application for adjustment of status, Garcia said that if Wong had left the United States without advance parole, then the application for adjustment of status was abandoned. *Id.* He also told Beebe that he believed that a person who was paroled into the United States was not eligible to apply under INA § 245(i), 8 USC § 1255(i). App 182 (Garcia Depo, p. 13).

Beebe asked Garcia to request Wong's I-485 application from the Nebraska Service Center.[9] *Id.* Garcia then had to leave the meeting, and the meeting continued between Beebe, O'Brien, Glover, and Crawford. App 183 (Garcia Depo, p. 14). The "consensus was that an Expedited Removal Order should be entered into the file" and that "parole should be revoked at the time." App 149-50 (Crawford Depo, pp. 70-71).

Although he had authority to sign it himself, O'Brien later went to the office of the two Supervisory Immigration Inspectors (Glover and Greg Fiorentino) and requested that "someone . . . sign a . . . determination of inadmissibility" (Form I-860), notifying Wong that she was ineligible for admission to the United States

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[9] According to Beebe, adjustment of status applicants "typically had their adjustment applications forwarded, or they were instructed to forward their adjustment applications to one of four service processing centers in the United States operated by the Immigration Service for consideration." App 118 (Beebe Depo, p. 71).

because at the time of her application for admission (her return from Hong Kong on April 13, 1999), she was not in possession of a valid unexpired immigrant visa. App 54, 189-90 (Glover Depo, pp. 21-25). At that time, it "appear[ed to Glover] the decision had been made to place [Wong] into expedited removal proceedings, and since by that time [Glover] had some understanding of the case . . . [he] was asked to sign [the Notice and Order of Expedited Removal]." App 190 (Glover Depo, p. 25). The Order of Removal is dated May 20, 1999, and signed by both Glover and O'Brien. App 54.

D. Adjudication of Form I-485

Wong's adjustment of status application was referred to Pamela Cooley ("Cooley"), an adjudications officer in the Portland INS Office. Plaintiffs' Ex 46 (Cooley Depo), p. 11; Plaintiffs' Ex 47 (Garcia Depo), p. 15. Although adjustment of status applicants are generally brought in for a personal interview (Plaintiffs' Ex 47 (Garcia Depo), p. 31), Cooley did not interview Wong or contact her attorneys. Plaintiffs' Ex 46 (Cooley Depo), p. 54. Cooley recalls Garcia telling her that she needed to adjudicate Wong's adjustment of status application fairly quickly and that there was "pressure" to get Wong's adjustment of status request adjudicated quickly, but she does not recall any conversations as to the reasons for the rush. *Id* at 43-44.

Normally Cooley's practice is to review the entire contents of the applicant's A-file prior to making a decision on an adjustment of status application. *Id* at 74-75. Cooley, Elizabeth Godfrey ("Godfrey"), a Deportation Officer, and

Garcia discussed Wong's eligibility to adjust status with three pending adjustment of status applications. App 142 (Cooley Depo, pp. 51-52). They "all concluded together that [Wong] did not merit adjustment of status" because she had "circumvented the normal immigrant visa processing processes." App 142, 145-46 (Cooley Depo, pp. 52, 73-74). Cooley reviewed Wong's application for adjustment of status, prepared a written decision, and forwarded the decision to Garcia for review. App 142 (Cooley Depo, p. 51). Garcia reviewed and approved the letter denying the applications and signed it for Beebe, as was standard practice. App 68-70, 184-85 (Garcia Depo, pp. 25-26). Garcia did not discuss the denial of Wong's applications with Beebe before he signed it. App 184 (Garcia Depo, p. 25). Although an I-485 adjudication normally takes from 12 to 24 months, Wong's was adjudicated in less than two months. Plaintiffs' Ex 47 (Garcia Depo), p. 37. Of the 12 or so religious worker adjustment of status applications that were adjudicated in the INS's Portland office, Wong's was the first one ever denied. Plaintiffs' Ex 47 (Garcia Depo), pp. 20-21; Plaintiffs' Ex 46 (Cooley Depo), p. 38.

E. <u>Employment Authorization Letter and Wong's Arrest</u>

Although unknown to Wong at the time, all of her pending I-485 applications were denied on June 3, 1999. Plaintiffs' Ex 10. On or about June 10, 1999, Beebe sent Wong an Employment Authorization Letter. Plaintiffs' Ex 11. In part, the letter claimed to have been written to Wong:

> to acknowledge receipt of [her I-485] application [and to notify her that] [p]ending final approval of [her] application, please be aware of the following: 1. The current processing time for this type of application(s) is fifteen (15) months. . . 3. If you applied for an Employment Authorization Document [which she did] you are scheduled to appear at this office on Thurs 6-17-99 at 1:30 pm to receive your document in Room #117.

Id.

The issuance of the Employment Authorization Letter to Wong after denial of her I-485 applications directly contravened the INS policy prohibiting the use of such subterfuges for the purpose of luring unsuspecting individuals into an INS office in order to arrest, deport, and remove them from the country. Plaintiffs' Ex 19 (Crawford Depo), pp 47-49.

In compliance with the Employment Authorization Letter, Wong appeared at the scheduled time in the INS's Portland office on Thursday, June 17, 1999, with Ness, her attorney, and Lily Li ("Li"), her interpreter. App 267 (Ness Depo, pp. 38-39). However, instead of having her employment authorization document processed, she was interviewed by immigration inspector Ron Spaude about her April 13, 1999 return from Hong Kong. App 65-67. Spaude never spoke to Beebe about Wong, and Beebe apparently was not in the office at that time. App 252 (Li Depo, pp. 223-24), 267 (Ness Depo, p. 40), 272 (Spaude Depo, p. 35).

Wong was then provided with a copy of a letter dated that same day (June 17) and signed by Garcia denying her three applications for adjustment of status. App 68-70, 184 (Garcia Depo, p. 25). That letter provided in part that "the decisions in this case are not subject to review given your final order of removal pursuant to Section 235(b)(1) of the Act, as amended." App 70.

Wong was then detained. Godfrey escorted Wong to the detention area. App 176. Because the INS had no detention facilities in Portland, it detained people in county jails. App 167 (Edenfield Depo, p. 9). After being handcuffed, Wong was transported by INS officer Richard Horne ("Horne") to the Multnomah County Detention Center ("MCDC") where she was booked. Plaintiffs' Exs 15-17; Plaintiffs' Ex 1 (Wong Depo), pp. 98-121, 127-137, 153-156.

F. Requests for Vegetarian Meals

As Wong was being escorted to the INS detention area, Li told Godfrey that Wong had taken vows as a "lifetime vegetarian" and could not eat meat or any of five "impure vegetables," including garlic, onion, leek, tobacco, and alcohol. App 177 (Godfrey Depo, pp. 31-32), 247 (Li Depo, pp. 170-72); Plaintiffs' Ex 1 (Wong Depo), p. 105. Horne was told by someone at the Portland INS office that Wong needed vegetarian food, so he wrote "please vegetarian food only, thank you" on the booking form at MCDC. App 71 (booking sheet); App 216-17 (Horne Depo, pp. 32-33). Although Godfrey understood that Wong's vegetarian diet was related to her religion (App 177 (Godfrey Depo, p. 32)), she either did not communicate

that part of the information to Horne, or if she did, Horne neglected to specify it in the booking form. App 71.

The term "vegetarian," as apparently used by Tien Tao adherents, means a strict vegetarian (or vegan) diet excluding all animal products, including dairy products and eggs. Plaintiffs' Ex 38. Someone at MCDC brought Wong milk and "what appeared to be an egg and ham sandwich" which she could not eat. Plaintiffs' Ex 1 (Wong Depo), p. 109. After being transferred to another jail (Inverness), Wong was only given "meat, eggs and milk," which she could not eat. *Id* at 113. On the second day of her detention, the woman who delivered meals at that facility, Susan Liu ("Liu"), spoke Cantonese and became concerned because Wong was eating so little. *Id* at 114. Wong told Liu she was a vegetarian and had no one there to interpret for her. *Id.* Liu helped Wong place a phone call to Li and to fill out the necessary paperwork so that Li could visit Wong in jail. *Id* at 115. On the third day of her detention, Li visited Wong in the jail. *Id* at 118. She told Wong she was going to contact Wong's attorney to arrange for Wong's release and arrange vegetarian meals for her. *Id* at 129.

MCDC offered religious and medical diets. App 391-92. However, any request for special meals based on religious grounds had to be communicated through the chaplain. App 391-96 (Yankee Depo, pp. 9-20). Li contacted both Godfrey and Paige Edenfield ("Edenfield"), the su-

pervisory Detention and Deportation Officer,[10] several times after Wong was detained and told her that Wong was not receiving a vegetarian diet. Plaintiffs' Ex 31 (Li Depo), pp. 180-84. Although both Godfrey and Edenfield assured Li that they would contact Multnomah County about the issue, the record is devoid of evidence indicating that either Godfrey or Edenfield contacted Multnomah County and communicated that Wong needed a vegetarian diet based on religious grounds.

Either because MCDC assumed the request on the booking form was medically based, or because Wong followed Liu's suggestion a day or two later to tell the jail's doctor that eggs, meat and milk made her "very uncomfortable" (Plaintiffs' Ex 1 (Wong Depo), pp. 119-21), at some unknown time during Wong's detention, MCDC slated her to receive a "VEGETARIAN/BLAND/MILK-FREE/NO EGGS" diet. App 72.

G. Strip Searches

During her detention with Multnomah County, Wong was subjected to two strip searches, first when being transferred from MCDC to Inverness Jail and again when being transferred back to MCDC. Plaintiffs' Ex 1 (Wong Depo), pp. 111-12, 133; App 53. She was required to remove all her clothing and bend over in front of male jail staff so that visual body cavity searches could be conducted. *Id* at 111-12. She found these searches embar-

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[10] Edenfield does not recall ever being contacted by Li or MCDC with regard to vegetarian meals. Plaintiffs' Ex 28 (Edenfield Depo), pp. 14-15.

rassing and upsetting. *Id.* These searches were undertaken pursuant to a provision in the Multnomah County Sheriff's Office Division Operational Procedure Manual (1995 Edition) which required strip searches "[b]efore a change of housing assignment from Reception or transfer to a different Multnomah County facility." Plaintiffs' Ex 20 (Multnomah County Sheriff's Office Division Operational Procedure Manual (1995 Edition), CD07.109.053, subpart 4).

The INS policies prohibit strip searches of detainees by either the INS or its contractors in detention facilities absent "some rational relationship to institution safety or security" or "a reasonable suspicion that contraband or evidence may be concealed on the person." Plaintiffs' Exs 22-25; Plaintiffs' Ex 26 (Beebe Depo), p. 68. At no time did the INS have a reason to believe that Wong was in possession of drugs, weapons or contraband. Plaintiffs' Ex 29 (Godfrey Depo), pp 32-33 (no reason to believe she was carrying weapons and no reason to frisk (pat search) her); Plaintiffs' Ex 30 (Horne Depo), pp 8-9, 38-39 (no particular concern about safety when transporting Wong; no reason to believe Wong was carrying a weapon or was in possession of contraband).

INS officers regularly inspect facilities in which INS detainees will be held, including a review of the existing policies and procedures. Plaintiffs' Ex 29 (Godfrey Depo) pp. 42-46. During the relevant time period, the inspection forms were given to Edenfield or the Assistant District Director for Detention, Deportation and Parole and then forwarded to headquarters. *Id.* Edenfield knew

that everyone booked into MCDC was strip searched. App 170 (Edenfield Depo, pp. 15-16).

Beebe was unaware that MCDC routinely strip searched everyone placed in its custody, but would not have been "concerned" or "bothered . . . a bit" if MCDC routinely strip searched INS detainees. App 116 (Beebe Depo), p. 65. Instead, he deferred to the Multnomah County Sheriff regarding the operation and management of his detention facilities and did not believe it would have been prudent to approach the sheriff with a proposal not to routinely strip search the INS's detainees. Plaintiffs' Ex 26 (Beebe Depo), pp. 66-69.

H. Removal

On June 22, 1999, after spending five days in detention, Wong was transferred from MCDC custody to INS custody, transported to the airport, escorted from Portland to San Francisco, and removed from the United States on a flight to Hong Kong. App 74, 325-26 (Wong Depo, pp. 154-55), 397-98 (Yankee Depo, pp. 21-22).

II. Claims Against Beebe

Beebe seeks summary judgment against each of Wong's claims on the basis of qualified immunity.[11] The First Claim (Fourth Amendment), the Second Claim (First Amendment), and the Fourth Claim (RFRA) are premised

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[11] This court previously concluded that federal officials sued under RFRA are entitled to raise a qualified immunity defense. Findings and Recommendation dated April 26, 2005, pp. 20-21 (docket #151), adopted by Order dated June 28, 2005 (docket #169).

upon one or more of three events or series of events. First, Wong alleges that the denial of her adjustment of status application violated both her First Amendment and RFRA rights (Second and Fourth Claims).[12] Second, she alleges that she was denied meals adequate to sustain her in good health that satisfied the dietary laws of her religion in violation of both her First Amendment and RFRA rights (Second and Fourth Claims). Finally, she alleges that the two strip searches she endured while detained by the INS violated her Fourth Amendment and RFRA rights (First and Fourth Claims).

A. Qualified Immunity

The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 US 800, 818 (1982). To determine whether

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[12] Defendants argue that Wong raises no RFRA claim premised upon the denial of her adjustment of status application based on a sentence in one of this court's prior opinions. *See* Reply Memorandum in Support of David Beebe's Motion for Summary Judgment (docket #428), p. 14, n. 9. However, Wong contends that she does raise such a claim and the sentence cited by defendants was simply this court's summary of what it could discern were the ways in which Wong alleged that her "right to practice her religion" were infringed. The sentence relied on by defendants is *dicta* based on this court's struggle to accurately understand and analyze Wong's claims. In order not to unduly prejudice Wong, this court will not rely its perhaps too-narrow interpretation of her Third Amended Complaint.

Beebe is entitled to qualified immunity, this court must follow two analytical steps, as discussed in *Saucier v. Katz*, 533 US 194, 201 (2001); *see also Moreno v. Baca*, 431 F3d 633, 638 (9th Cir 2005). The first step is to determine whether, viewing the record in the light most favorable to the party asserting the injury, the officer's conduct violated a constitutional right. *Saucier*, 533 US at 201. If so, the next inquiry is whether the right was clearly established at the time alleged. *Moreno*, 431 F3d at 638.

There is no *respondeat superior* liability in constitutional tort actions. *Terrell v. Brewer*, 935 F2d 1015, 1018 (9th Cir 1991). As a result, Beebe cannot be held liable simply due to his position as the District Director of the Portland INS Office. Instead, supervisory defendants must play an "affirmative part in the alleged deprivation of constitutional rights." *Graves v. City of Coeur D' Alene*, 339 F3d 828, 848 (9th Cir 2003). A supervisor is liable for the constitutional violations of subordinates "if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F2d 1040, 1045 (9th Cir 1989). "[T]he critical question is whether it was reasonably foreseeable that the actions of the particular INS officials who are named as defendants would lead to the rights violations alleged to have occurred during Wong's detention." *Wong*, 373 F3d at 966, citing *Gini v. Los Vegas Metro. Police Dep't*, 40 F3d 1041, 1044 (9th Cir 1994). It is sufficient if the defendant set into motion a series of acts by others which the defendant knew or reasonably should have known would cause others to inflict the constitutional injury. *Hydrick v. Hunter*, 466 F3d 676, 689 (9th Cir

2006), citing *Johnson v. Duffy*, 588 F2d 740, 743-44 (9th Cir 1978).

B. Denial of Adjustment of Status Application

Wong filed three applications for adjustment of status. Her claims against Beebe for violating the First Amendment (Second Claim) and RFRA (Fourth Claim) are based in part on her contention that the denial of her third (April 20, 1999) application for adjustment of status was the result of discrimination against her due to her religious practices, beliefs, or association. Fifth Amended Complaint, ¶ 32. After a careful review of the record in this case, this court concludes that Bebee is entitled to summary judgment against these claims because they either allege claims (right of access to followers) previously dismissed by this court or because Beebe enjoys qualified immunity on the basis that the law was not clearly established.

1. Claims Previously Dismissed

In considering previous motions filed in this case, this court has struggled to correctly construe and analyze Wong's claims. In those endeavors, this court has construed Wong's allegations of interference with her religious rights under the First Amendment and RFRA as encompassing interference with a right of association (Wong's right to associate with her followers and vice versa) and interference with a right to practice her religion (due to the conditions under which she was detained). This court distinguished the allegations concerning Wong's conditions of confinement (strip searches and denial of vegetarian meals) from other allegations which

did not burden the practice of Wong's religion, including allegations that she was denied a translator and access to information about her rights or how to contact her attorney. Findings and Recommendation (April 26, 2005) (docket #151) ("April 26, 2005 F&R"), adopted by Order dated June 28, 2005 (docket #169). This court dismissed all claims by both Wong and the Association insofar as they were premised upon plaintiffs' associational rights. *Id* at 21-23 (RFRA claim); Findings and Recommendation (November 17, 2005) (docket #238), p. 7, adopted by Order dated January 9, 2006 (docket #284) (First Amendment claim).

In an effort to distance the First Amendment and RFRA claims alleged in the Fifth Amended Complaint from those rulings, Wong contends that the discriminatory denial of her application for adjustment of status infringed her right to practice her religion by substantially interfering with her ability to carry out the instructions of her spiritual leader, Qian Ren, to maintain and supervise all activities at an altar in Oregon, as well as with her ability, as the chosen Matriarch and Qian Ren's successor, to lead the Tien Tao arena nationwide. Although Wong does not further explain this new recharacterization of the allegations, it is evident that the inability to associate with her followers is at least part of the causal link between the alleged harm (the allegedly discriminatory denial of the adjustment of status application) and the alleged injuries (inability to maintain and supervise all activities at the Oregon alter and to lead the Tien Tao arena nationwide). For the same reasons previously articulated by this court,

any claim premised upon a denial of associational rights fails.

Although this court previously understood that a claim to a denial of associational right was the only allegation of these claims separate and apart from Wong's conditions of confinement claims, Wong now appears to assert that the denial of her adjustment of status application resulted in her removal from the United States (which interfered with her ability to act as the chosen Matriarch and to faithfully carry out Qian Ren's instruction to maintain an Oregon altar). However, Wong has failed to allege or establish any clearly established right to have her adjustment of status application approved in order for her to be in the United States to perform her religious functions. Moreover, Wong was removed because an Order of Removal was entered against her (on May 20, 1999), which took place prior to the ruling on her adjustment of status application (on June 3, 1999). The entry and execution of the Order of Removal may not be reviewed by this court, *see* 8 USC § 1252 (a) & (g), and the pending application for adjustment of status did not suspend or terminate removal proceedings, *see Rubio De Cachu v. INS*, 568 F2d 625, 628 (9th Cir 1977), leaving Wong to argue that Beebe should have exercised his discretion differently to adjust her status. However, the INA precludes such a claim. *See* 8 USC § 1252(a)(2)(B) (stripping courts of jurisdiction to review denials of discretionary relief, including denials of adjustment of status applications). For these reasons alone, Bebee is entitled to summary judgment against the First Amendment and RFRA claims to the extent they are

premised upon an allegedly discriminatory denial of Wong's adjustment of status application.

2. Qualified Immunity

Even if the above arguments proved no hurdle to Wong's First Amendment and RFRA claims based on a denial of her adjustment of status application, Bebee argues that he is entitled to qualified immunity due to a lack of a clearly established right. This court agrees.

Wong's religious discrimination claims are premised upon the contention that Bebee denied her adjustment of status application due to animus against Wong's religious beliefs or practices. Thus, the issue is whether Wong had a constitutional right to have her adjustment of status application adjudicated without the taint of religiously-based discriminatory animus, and if so, whether that right was clearly established at the time Bebee denied Wong's adjustment of status application.[13]

Wong argues forcefully that Bebee was responsible for the denial of her adjustment of status application, duped her into coming in to pick up her employment papers so that he could then have her arrested, and started into motion the events that led to her unconstitutional strip/orifice searches and summary removal from the United States. Even construing these contentions in Wong's favor, Wong has failed to present any authority that she

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[13] This court previously addressed but rejected the argument that Wong's immigration status affected her claims of unlawful conditions of confinement. April 26, 2005 F&R, pp. 21-23.

had a First Amendment or RFRA right to an adjudication of her adjustment of status application free of discriminatory animus.

The Ninth Circuit previously held "Wong's allegations of invidious discrimination [were] sufficient . . . to make out a Fifth Amendment discrimination claim arising out of the INS officials' actions with respect to [the] post-return rejection of her adjustment of status applications" *Wong*, 373 F3d at 975. Nevertheless, due to "the uncertainty surrounding the constitutional status of an alien in Wong's unusual position during the period after her return," the Ninth Circuit granted qualified immunity to INS officials on Wong's equal protection claims finding that Wong had not alleged violations of clearly established law. *Id* at 976. The court reached this conclusion based upon the dearth of case law by either the Supreme Court or the Ninth Circuit recognizing a right to be free from discrimination in such immigration proceedings:

> Although we [previously] suggested . . . that aliens in Wong's position *might* have some constitutional rights, we have never squarely held that such aliens are entitled to equal protection guarantees, nor has the Supreme Court. . . . Under these circumstances of constitutional uncertainty regarding race discrimination against nonadmitted aliens, the contours of any constitutional doctrine we now recognize were not sufficiently clear that a reasonable INS officer would have realized that Wong after her return was entitled to Fifth Amendment equal protection with regard to immigration-related decisions.

Id (emphasis in original, citations omitted).

Key to the Ninth Circuit's decision was Wong's immigration status under the "entry fiction," under which she was deemed to have not yet "entered" the country for immigration purposes, even though she was physically present inside the borders of the United States. *Wong*, 373 F3d at 976 n31 (emphasizing that it was "quite likely" that qualified immunity would not protect defendants if decisions made before her departure were under consideration). The Ninth Circuit later noted that in *Wong* it "[c]onfronted for the first time . . . the question whether the entry fiction deprives non-admitted aliens of all substantive constitutional rights" and lamented that, even after *Wong*, the "precise reach of the entry fiction doctrine is unclear." *Alvarez-Garcia v. Ashcroft*, 378 F3d 1094, 1098 (9th Cir 2004).

Thus, for the same reasons articulated by the Ninth Circuit with regard to Wong's Fifth Amendment claims, Wong has failed to establish that she had a clearly established statutory or constitutional right for an adjudication free of discriminatory animus at the time of that denial. Bebee therefore is entitled to qualified immunity from the First Amendment claim. This same line of reasoning forecloses any RFRA claim premised upon the denial of Wong's third adjustment of status application.

As a result, Beebe is entitled to summary judgment on the Second Claim (First Amendment) and Fourth Claim (RFRA) to the extent those claims are premised upon a constitutional violation due to the denial of Wong's application for adjustment of status.

C. Meals Provided in Detention

Beebe also is entitled to summary judgment against Wong's Second and Fourth Claims to the extent they are premised upon the denial of a vegetarian diet while detained. There is simply no evidence linking Beebe with the failure to provide meals which would adequately meet Wong's religious needs.

The record reveals that Multnomah County had in place a policy of accommodating medically or religiously based dietary requests. Religiously-based dietary requests had to be made through the jail's chaplain. A request for "vegetarian food only" might generate a medical inquiry as to the basis of the request, but not a religious inquiry. Unlike the situation with the strip searches (discussed below), that policy does not give rise to any inference that Beebe either knew or should have known that Wong's religiously-based dietary needs would not be met in Multnomah County jails. Moreover, nothing in the record indicates that Beebe was aware of the inadequacy of the meals Wong was receiving, of Li's calls to Godfrey and Edenfield, or of Wong's communications to MCDC staff regarding the religious insufficiency of the meals at MCDC.

Absent evidence making this linkage between Beebe and the jail's conduct, Beebe is entitled to summary judgment against the Second Claim (First Amendment) and Fourth Claim (RFRA) insofar as they are based on the assertion that Beebe violated Wong's First Amendment rights by denying her meals sufficient to meet the requirements of her religion.

D. Strip Searches

1. Fourth Amendment (First Claim)

Both Wong and Beebe seek summary judgment on her First Claim against Beebe for subjecting her to strip searches in violation of the Fourth Amendment. Beebe does not contest that the type of blanket strip searches to which Wong was twice subjected violate the Fourth Amendment.[14] Instead, he argues that he is entitled to qualified immunity for two reasons: (1) he did not cause the violation of Wong's Fourth Amendment rights; and (2) even if he did, Wong's right not to be subjected to an unreasonable search of her body was not clearly established in June 1999.

a. Constitutional Violation

Wong argues that even if Beebe did not conduct the strip searches himself, he is liable because he set in motion the series of events that led to the violation of her Fourth Amendment rights.

It is unclear what role Beebe played in deciding that Wong was inadmissable or removable. Beebe did not sign the Notice and Order of Expedited Removal and denies ever making or consulting on any decisions regarding Wong and claims that he was not aware of the Wong case prior to her removal. App 110, 113, 134-35 (Beebe Depo, pp. 47, 53, 117-18). Yet other witnesses confirm that he

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[14] The first strip search occurred when Wong entered MCDC and the second strip search occurred later when she was transferred between Multnomah County jails.

convened and attended a meeting to discuss Wong's adjustment of status application which she had filed with the INS's Nebraska Service Center. Beebe asked to have her file transferred to Oregon and the meeting resulted in the decision to revoke Wong's parole. After that meeting, Garcia told Cooley that Wong's application had to be adjudicated quickly because there was pressure from somewhere to do so. Although an adjudication of an I-485 normally takes from 12 to 24 months, Wong's I-485 was adjudicated in less than two months. During that process, Wong's attorneys were never contacted for information. Of the 12 or so religious worker adjustment of status applications that were adjudicated in the Portland District Office, Wong's was the only one ever denied. For purposes of this motion, this court must view the facts most favorably to Wong. From that perspective, it is reasonable to infer that Beebe played an affirmative role in causing Wong's revocation of parole, denial of adjustment of status, and removal.

The decision regarding where to detain Wong was made by the on-duty detention supervisor at the time of Wong's transfer to detention, not by Beebe. However, the record raises an issue of fact as to whether Beebe knew or should have known that if Wong was removed, she would be transferred to a Multnomah County jail and subjected to a strip search. As Beebe acknowledges, he was ultimately responsible for the conditions in the detention facilities. App 115 (Beebe Depo, p. 64). Under 8 USC § 1231(g)(1), the district director of the INS is mandated to "arrange for appropriate places of detention for aliens detained pending removal or a decision on re-

moval." As the District Director, Beebe signed the contract with the Multnomah County Sheriff for housing INS detainees in 1994 (App 421-30), and Edenfield signed the contract extension in 1999. Although the record is not clear, it appears that the only other detention facilities used by the INS Portland office at that time were the Yamhill County and Clark County jails. Plaintiffs' Ex 28 (Edenfield Depo), p. 16; Plaintiffs' Ex 41. Although Beebe had the authority to use detention facilities other than local jails, such as hotels and motels, he choose not to do so, apparently for financial reasons. *Id*; Plaintiffs' Ex 26, pp. 66-67; Plaintiffs' Exs 40 & 41 (January 1999 refusal by Port of Portland and Delta Airlines to take custody and arrange housing for detained aliens due to cost of providing security). Therefore, Beebe knew that Wong would be detained at a local jail, including MCDC, pending her removal.

According to the contract, the Multnomah County Sheriff was required to follow federal law. Yet as early as 1995, the Multnomah County jails followed a policy of routinely conducting strip searches on prisoners being transferred in and out of custody, contrary to the INS policy for strip searches. However, Beebe states that he did not review the Multnomah County policy, claims that he was unaware of it, and apparently delegated responsibility to his employees for monitoring the conditions of confinement for those in INS custody. App 115-16 (Beebe Depo, pp. 64-65). Even if Beebe was not actually aware of Multnomah County's blanket strip search policy, as he claims, it could reasonably be inferred that he should have known of it. After all, he is charged with knowledge of

the INS policy prohibiting routine strip searches on detainees by contrractors, and Edenfield, his supervisory detention and deportation officer, freely admitted knowledge of MCDC's blanket strip search policy. Plaintiffs' Ex 28 (Ededfield Depo), pp. 15-16. Even more troubling, Beebe admitted that a blanket strip search policy would not have "concerned" or "bothered [him] a bit" even though it violated the INS policy. App 116 (Beebe Depo), p. 65.

If foreseeability alone suffices, then Beebe could be held liable for the constitutional harm inflicted on Wong even though he was not directly involved in the decision where to detain Wong. Had he not entered into a contract with the Multnomah County Sheriff or had he not turned a blind eye to—or had he even been the least bit concerned about—Multnomah County's blanket strip search policy, then Wong would not have been subjected to strip searches while detained in the Multnomah County jails.

Another court found a causal connection in a similar situation. In *Tungwarara v. United States*, 400 F Supp 2d 1213 (ND Cal 2005), the plaintiff alien was detained by an immigration inspector after she tried to gain admission to the United States. She was then transported to a local detention facility, where she was strip searched pursuant to jail policy. She alleged that the immigration inspector was liable under the Fourth Amendment for causing her detention and unlawful strip search. The inspector was not involved in the decision to detain the alien or where to detain her. However, the inspector had coerced her into withdrawing her application for admission and making

misrepresentations regarding her intent which resulted in a finding that she was a flight risk and should be detained pending removal. The court found that this coercion, combined with undisputed knowledge of the local jail's strip search policy, raised a triable issue of material fact as to whether the inspector's conduct was causally linked to the asserted injury. Unlike the inspector in *Tungwarara*, Beebe had no direct contact with Wong and did not coerce her into making any misrepresentations regarding her intentions. However, the evidence supports the inference that, despite his denial, Beebe participated in the decision to issue the Expedited Removal Order and deny adjustment of status. If he did, then he knew that Wong would be detained as a result, knew that she would likely be transferred to a Multnomah County jail, and should have known of Multnomah County's blanket strip search policy which he condoned. From the standpoint of foreseeability, this appears to be a sufficient causal link to at least raise a triable issue of fact for purposes of summary judgment.

b. Clearly Established Law

Citing *Tungwarara*, Beebe also argues that he is entitled to qualified immunity because Wong had no clearly established right not to be strip searched. After finding that some level of suspicion is required under the Fourth Amendment to conduct strip searches of non-admitted aliens, the court in *Tungwarara* determined at the second step of the qualified immunity analysis that such a right was not clearly established in January 2002. *Id* at 1222-23. The court recognized that prior Ninth Circuit cases had recognized the "unsettled" nature of the case

law regarding the constitutional rights of non-admitted aliens. *Id* at 1220-21, citing *Wong*, 373 F3d at 976; *Barrera-Echavarria v. Rison*, 44 F3d 1441, 1449 (9th Cir) (*en banc*), *cert denied*, 516 US 976 (1995). The court also recognized that previous cases had dismissed claims of improper search and seizure on the ground that such aliens are not afforded due process protections, *see Papa v. United States*, 281 F3d 1004, 1010 (9th Cir 2002), and implied that the text of the Fourth Amendment does not apply to arriving aliens, *see United States v. Verdugo-Urquidez*, 494 US 259, 265 (1990). *Tungwarara*, 400 F Supp 2d at 1221. After distinguishing several cases as not addressing the particular situation of a strip search of a nonadmitted, adult alien at the border, the court then concluded that although:

> a non-invasive strip search of a non-admitted adult alien at the border without *any* suspicion of any kind is unconstitutional, the Court cannot conclude that this right was clearly established at the time of the incident. If the same search had occurred later after the Ninth Circuit's decision in *Wong,* or had been more invasive or abusive at the time, the Plaintiff's "clearly established" rights would likely have been violated. On the uncontested facts of the search here, however, [the inspector] is entitled to qualified immunity.

Id at 1222 (emphasis in original).

Due to inconsistencies in her sworn statement to immigration officials at the port of entry, the plaintiff in *Tungwarara* was deemed a flight risk and not eligible for parole into the country. Wong, on the other hand, was not deemed to be any kind of risk and was readily paroled into

the country pending a deferred inspection. Although she did not appear for the deferred inspection, her attorney gave advance notice with an explanation. There is no suggestion in the record that Wong would flee. Second, the search in *Tungwarara* was described as no more than a "pat down" conducted in private by a female. Wong's search, in contrast, was far more extensive, requiring her to strip naked, bend over for visual inspection of her genital and anal area, in an area that was separated from the public only by a thin curtain, through which Wong could see male staff (and presumably they could see her too), who handed her clothes after the search. These key distinctions render *Tungwarara* factually inapposite.

Furthermore, it is not necessary that the exact conduct be declared unconstitutional before a finding may be made that a right was clearly established. *United States v. Lanier,* 520 US 259, 271 (1997) (involving the Eighth Amendment); *see also*, *Anderson v. Creighton,* 483 US 635, 640 (1987). As the Ninth Circuit has recently noted, "precedent directly on point is not necessary to demonstrate a clearly established right." *Hydrick*, 466 F3d at 690, quoting *Blueford v. Prunty*, 108 F3d 251, 255 (9th Cir 1997). Rather, "[i]f the only reasonable conclusion from binding authority were that the disputed right existed, even if no case had specifically so declared, [Defendants] would be on notice of the right and [officials] would not be qualifiedly immune if they acted to offend it." *Id.*

It was clearly established well before June 1999 that generalized strip searches of persons arrested for minor offenses without reasonable suspicion violate the Fourth Amendment. *Giles v. Ackerman*, 746 F2d 614 (9th Cir

1984), *cert denied*, 471 US 1053 (1985). With respect to incarcerated prisoners, the Fourth Amendment requires searches to be reasonably related to legitimate penological interests. *Michenfelder v. Sumner*, 860 F2d 328 (9th Cir 1988). It also has been clearly established for over 20 years that although routine border searches are allowed, the Fourth Amendment protects aliens seeking admission at the border from unreasonable searches, including strip searches and body-cavity searches. *United States v. Montoya De Hernandez*, 473 US 531, 539 (1985). In particular, it is unconstitutional for INS officers to strip search illegal aliens at the border without a reasonable suspicion that the search will reveal weapons or contraband. *United States v. Gonzalez-Rincon*, 36 F3d 859 (9th Cir 1994), *cert denied*, 514 US 1008 (1995); *also see Flores v. Meese,* 681 F Supp 665, 669 (CD Cal 1988) (finding that INS policy of routinely strip searching juveniles, absent a reasonable suspicion, violates the Fourth Amendment). Also in June 1999, the INS itself prohibited blanket strip searches of persons in INS custody.

In sum, no INS official could have reasonably believed in June 1999 that without violating the Fourth Amendment, someone who presented no cause for suspicion of harboring contraband, who had not been charged with any crime, and who did not pose any risk of flight or danger, could be detained in a jail facility that conducted blanket strip searches.

Accordingly, Beebe is not entitled to summary judgment against the First Claim for violation of the Fourth Amendment on the basis of qualified immunity. However, due to issues of fact as to whether Beebe set in motion the

series of events leading to the strip search of Wong, Wong also is not entitled to summary judgment on this claim.

2. RFRA (Fourth Claim)

Wong alleges that the strip searches violated her "lifetime purity vow of celibacy." Fifth Amended Complaint, ¶ 27. However, Wong testified only that she found the searches embarrassing, not that they somehow interfered with or substantially burdened her religious beliefs. App 319-20. This is consistent with the testimony of Dr. Shean Lin Want, a Tien Tao minister, that an involuntary strip search does not violate the Tien Tao vow of celibacy. App 365.

Nevertheless, Wong contends that a reasonable juror could find that Wong's vows of celibacy were substantially burdened by the dehumanizing strip searches to which she was subjected and by her treatment as a common criminal without any basis. This court disagrees. In the absence of any evidence that a strip search somehow violated Wong's religious beliefs, Beebe should be granted to summary judgment against the Fourth Claim alleging a violation of RFRA with respect to the strip searches.

III. Claim Against the United States for Declaratory Relief (Third Claim)

Wong[15] contends that she is entitled to declaratory relief that the United States (and its agencies INS or DHS)

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[15] The Association is also listed as a plaintiff with respect to the Third Claim for declaratory relief. This court previously found that the Association had no standing with respect to the Third Claim.

must allow her to file a motion to reopen the proceedings on her third (April 20, 1999) application for adjustment of status or have the prior decision on that application reconsidered. Fifth Amended Complaint, ¶ 44; *see* 8 CFR § 103.5(a). The United States seeks summary judgment against this claim, contending that it is moot and, even if not moot, it did not improperly deny Wong the opportunity to file such a motion.

A. Whether the Declaratory Relief Claim is Moot

1. Wong's Intent to Live in the United States

The United States argues that this claim is now moot because Wong no longer intends to live in the United States. That argument is based on Wong's deposition testimony that "[s]ince [defense counsel] kept on pressing me about where I intend to stay, I want to tell him it is Hong Kong." App 303. However, due to nuances in the language used by Wong, her testimony is more ambiguous than the written transcript reveals. Immediately following Wong's statement, the interpreter clarified that Wong's testimony was not tense-specific: "THE INTERPRETER: The interpreter wants to add in—

Opinion & Order dated April 26, 2005 (docket #150), p. 7. Moreover, as discussed below, the same regulation that precludes Wong's claim due to the abandonment of her application also operates to preclude the Association's claim. Finally, the reasons which Wong cites for her inability to file her motion for reopening or reconsideration within 30 days (being subjected to expedited removal, detained, and forced to leave the United States, Fifth Amended Complaint, ¶ 42) would not have prevented the Association from filing a motion for reopening or reconsideration.

specifically, this sentence, there is no adverb. So the interpreter does not know the tense, whether this is current or past. The interpreter doesn't know." *Id.* In the context of Wong's other statements on the subject, the deposition does not reflect any lack of intent to live in the United States. App 303-04 ("Tao followers . . . do not have personal agenda . . . [so she] had to go back to where [Qian Ren, predecessor leader of the Association] wanted [her] to be" (App 303) and "I still need to serve my Tao duty. . . . Therefore, I put my mother aside; I put my family aside to follow Qian Ren," (App 304)). To the contrary, it indicates that Wong continues to want to follow the mandate of Qian Ren, namely by "spread[ing] the Tao to the whole world." App 304.

2. <u>Abandonment of the Adjustment of Status Application</u>

The United States also argues that the declaratory relief claim is moot because Wong's adjustment application was deemed abandoned when she departed while under removal proceedings. During the relevant time period, federal regulations governing adjustment of status applications provided as follows:

> The departure from the United States of an applicant who is under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of the proceeding by reason of the departure. The departure of an applicant who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, unless the applicant was pre-

> viously granted advance parole by the Service for such absence, and was inspected upon returning to the United States.

8 CFR § 245.2(a)(4)(ii) (1999).

Wong argues that this regulation is inapplicable because her third application for adjustment of status had already been denied (App 68-70) as of the date of her departure. Because her application was no longer pending, she reasons that it could not be deemed abandoned. The question is whether a ruling on the merits precludes application of the regulation's presumptive ruling that the applicant has chosen to abandon his or her application. Despite its logical appeal, in this context the argument that a denied application has been ruled on and, therefore, cannot be "abandoned" must be rejected.

The text of the abandonment regulation makes no distinction as to the adjudicatory stage of the adjustment of status application, but simply refers to "the proceeding" involving the application. A ruling on the merits of a particular application does not necessarily terminate a proceeding. Where, as here, the applicant's request for adjustment of status has been denied, he or she might take further action to continue the proceedings, such as filing an appeal or requesting reconsideration. While such actions might constitute grounds for renewing the proceeding, this regulation recognizes that other actions by the applicant might constitute grounds for terminating the proceeding. The issue is whether the regulation only contemplates the abandonment of applications on which no

ruling has yet been issued, or also includes applications that have been denied.

Ambiguities in deportation statutes should be construed in favor of the alien. *Wong*, 373 F3d at 962; *see also Montero-Martinez v. Ashcroft*, 277 F3d 1137, 1141 (9th Cir 2002). When Wong departed the United States on June 22, 1999, an Order of Removal had been signed. App 54. Because Wong was "under . . . removal proceedings" at the time of her departure, her application was deemed abandoned under the first sentence of this regulation. In 2000, the regulation was amended by adding the word "pending" in the second sentence regarding departures by applicants who are not under removal proceedings. 8 CFR § 245.2(a)(4)(ii)(2000); Fed Register Vol 64, No. 104 (June 1, 1999) (" . . . shall be deemed an abandonment of the application constituting grounds for termination of any *pending* application for adjustment of status . . . "). The legislative history gives no hint as to the reason for the addition of that adjective. The amendment of only the second sentence in 2000 evidences an intent to not similarly restrict the first sentence (applicable to Wong) to pending applications. Thus, to the extent legislative history sheds any light on this issue, it tends to favor the interpretation proffered by the INS.

Moreover, construing this regulation to include only to those applications on which no substantive ruling has yet issued is inconsistent with the overall structure of immigration law. Adjustment is a process designed for aliens who are physically present in the United States. *See* 8 USC § 1255(a) & (i). Aliens who are not physically present in the United States and who wish to immigrate must

obtain a visa from a consulate abroad. For an alien who has been removed, adjustment is no longer the appropriate avenue to permanent residence for that alien. Instead, the alien is again eligible to seek an immigrant visa (which, if the alien is eligible for adjustment, should be available already, *see* 8 USC § 1255(a), (i)) and to present herself for inspection as an immigrant. *See* 8 USC § 1181(a).

Thus, when Wong was removed, her departure (though involuntary) resulted in her application for adjustment of status being deemed abandoned and constituted grounds for the termination of the adjustment of status proceeding. Because she was and is outside the United States, she was no longer eligible for adjustment of status. A motion for reconsideration or reopening filed prior to her departure might have renewed the proceeding on Wong's adjustment of status of application. However, once she departed, any motion for reconsideration or reopening could not result in effective relief given her ineligibility. As a result, her claim for declaratory relief is moot, and the United States should be granted summary judgment against the Third Claim.

B. Denial of Opportunity to File Motion

Because a motion to reopen proceedings would be moot, this court need not address the alternative argument made by the United States that it did not improperly deny Wong the opportunity to file such a motion.

IV. Claims Against the United States Under the FTCA (Fifth Claim)

In the Fifth Claim, Wong alleges that the United States is liable under the FTCA for the torts of: (1) false imprisonment; (2) invasion of privacy; and (3) negligence. In addition, the Association alleges that a FTCA claim against the United States for negligence.[16]

A. False Imprisonment Claim Barred by Prior Rulings

False imprisonment has been specified as part of plaintiffs' FTCA claim(s) since the filing of the Second Amended Complaint (docket #83) over four years ago. However, three years after that tort specification emerged, the parties filed cross-motions for summary judgment on the false imprisonment claim.[17] After carefully considering

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[16] At oral argument on these motions, counsel for plaintiffs clarified that the only portion of the Fifth Claim pertaining to the Association is that portion sounding in negligence. Specifically, the Association contends that it was a "quasi-applicant" regarding Wong's application for adjustment of status and that, to the extent Wong was not provided proper notice of her rights when that application was denied, the Association has a claim co-extensive with the claim brought by Wong. Thus, this court considers only that portion of the negligence claim with respect to the Association and deems all remaining claims as brought by Wong only.

[17] *See* Plaintiff Kwai Fun Wong's Motion for Partial Summary Judgment Against Defendant United States (docket #192) and United States' Cross Motion for Partial Summary Judgment on Plaintiff Kwai Fun Wong's False Imprisonment Claim (docket #206).

the merits of those motions, this court concluded that, although the FTCA claim(s) were timely filed, this court lacked subject matter jurisdiction over the false imprisonment portion of the FTCA claim under 8 USC § 1252(a)(2)(A)(i): "The core of [the false imprisonment] claim and [Wong's] arguments is that no expedited removal order should have been entered against Wong. However, this court lacks jurisdiction to entertain such an argument." Findings and Recommendation dated February 14, 2006 (docket #325) ("February 14, 2006 F&R"), pp. 9-15, adopted by Order dated April 10, 2006 (docket #358). This court allowed that Wong might be able to allege some tort claim other than false imprisonment premised upon the manner (as opposed to the fact) of her detention (*id* at 15-16). However, the false imprisonment claim only contests the fact, not the manner, of her imprisonment. This court sees no basis for review of that prior decision at this juncture.

Accordingly, to the extent Wong seeks summary judgment on the false imprisonment specification of the Fifth Claim under the FTCA, the United States' motion for summary judgment should be granted and Wong's motion should be denied.

B. Legal Standards Governing Remaining FTCA Claims

This court next turns to the FTCA claims alleging invasion of privacy and negligence. The FTCA provides a limited waiver of sovereign immunity for certain torts committed by federal employees acting within the scope of their employment. Specifically, the "United States shall

be liable . . . in the same manner and to the same extent as a private individual under like circumstances" would be liable under the law of the state "where the act or omission occurred." 28 USC §§ 1346(b) & 2674. The universe of cognizable claims under the FTCA is limited by a variety of exceptions which "are to be strictly construed. If the asserted liability falls within an exception to the FTCA, then the claims must be dismissed for lack of subject matter jurisdiction." *Bibeau v. Pac. Northwest Research Found., Inc.*, 339 F3d 942, 945 (9th Cir 2003) (citations omitted). Here, the United States argues that plaintiffs' FTCA claims are barred by operation of the independent contractor and misrepresentation exceptions. 28 USC §§ 2671 & 2680(h).

If a claim is not barred by an exception, then it cannot be premised on a violation of federal law; instead, "plaintiffs must show that the conduct of the government violates some state law." *Delta Sav. Bank v. United States*, 265 F3d 1017, 1025 (9th Cir 2001), *cert denied* 534 US 1082 (2002). Moreover, even where uniquely governmental functions are at issue, the FTCA waives sovereign immunity only where local law would make a private person liable in tort, not where local law would make state or municipal entities liable. *United States v. Olson*, 546 US 43, __, 126 SCt 510, 512-13 (2005) (abrogating line of Ninth Circuit decisions to the contrary). Where such uniquely governmental functions are at issue, the court's role is to determine whether any private person analogy for the particular kind of governmental task at issue provides a basis for liability. *Id*, 126 SCt at 513.

C. Conditions of Confinement: Independent Contractor Exception

Two of the remaining tort claims alleged by Wong are premised, at least in part, upon the conditions of confinement she endured in the Multnomah County jails. Both her invasion of privacy claim and a portion of her negligence claim are premised on her contention that the United States must answer for the strip searches she endured while in detention. In addition, her negligence claim is premised upon her contention that the United States failed to ensure that she received the diet mandated by her religion while housed at MCDC. The United States contends that these assertions are outside the scope of its liability under the FTCA because they are barred by the independent contractor exception. This court disagrees to the extent that Wong's claims are premised upon negligence of the INS as separate from the negligence of Multnomah County.

Subject to enumerated exceptions, the United States may be held liable for the negligent or wrongful act or omission of any "employee of the Government while acting within the scope of his office or employment." 28 USC § 1346(b)(1). However, an "employee of the Government . . . does not include any contractor with the United States." 28 USC § 2671. Under this "independent contractor" exception to FTCA, the "critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the detailed physical performance and day to day operations of the contractor." *Hines v. United States*, 60 F3d 1442, 1446

(9th Cir 1995) (citations and internal quotation marks omitted).

The United States argues that Multnomah County, which operated the jails where Wong was detained, was an independent contractor. As a result, the United States contends that it is not liable for Wong's invasion of privacy claim and any part of her negligence claim premised upon the strip searches and failure to provide meals adequate to meet her religious needs. However, the independent contractor exception does not cut this wide a swath.

In *Logue*, "the Supreme Court held that the government was not liable for the negligent acts of an independent contractor running a jail, but did not rule out liability based on the negligent acts of the Government's employees in placing the inmate in the care of the contractor." *Sandoval v. United States*, 980 F2d 1057, 1059 (9th Cir 1993); s*ee also Berkman v. United States*, 957 F2d 108, 114-15 (4th Cir 1992).

With regard to the strip searches, Wong alleges that government employees were negligent in placing her in Multnomah County jails because the United States knew or should have known that she would be subjected to strip searches. Her claims hinge largely on the United States' failure to protect her from the blanket requirement of strip searches of inmates prior to changes in housing assignments from reception or when transferred to another Multnomah County facility. As in *Logue*, Wong alleges negligence by the United States separate and apart from the negligence of Multnomah County in operating its detention facilities.

Similarly, the record supports the conclusion that prior to placing Wong in the custody of Multnomah County, INS officials were told that she needed a "vegetarian" diet for religious reasons. Although the evidence indicates that Li (who communicated that information) and Godfrey (to whom Li communicated that information) may have had a differing understanding of the specific type of "vegetarian" meals that Wong's religious vows required, it is clear that the fact that the request was religiously based was communicated to employees of the United States. There is also evidence that INS officials later were told that Wong was not receiving meals which complied with the mandates of her religion. Based on that evidence, Wong alleges that, both before and after they placed her in Multnomah County's custody, employees of the United States failed to convey to Multnomah County that her need for a "vegetarian" diet was religiously based. As a consequence, Multnomah County took no action to inquire into Wong's religiously based dietary needs.

The only evidence in the record indicates that Multnomah County had a policy of accommodating dietary requests that were religiously or medically based. Wong alleges that, due to the failure of the INS to convey the information it had received, *i.e.* that her request for "vegetarian" food was religiously based, the exact parameters of Wong's religiously based dietary restrictions were never considered by Multnomah County. In short, the specifications of negligence are geared at negligent acts by the INS separately from negligent acts by Multnomah County and, thus, fall outside the independent contractor exception.

D. Invasion of Privacy

The second tort identified by Wong in connection with her FTCA claim is invasion of privacy. As discussed above, the independent contractor exception to the FTCA does not bar this claim. Thus, the issue is whether Wong can show that a "private individual under like circumstances" would be liable under Oregon law. 28 USC §§ 1346(b) & 2674.

In general, the tort of invasion of privacy "protects the right of a plaintiff 'to be let alone.'" *Mauri v. Smith*, 324 Or 476, 482, 929 P2d 307, 310 (1996), quoting *Humphers v. First Interstate Bank*, 298 Or 706, 714, 696 P2d 527, 531 (1985). Under this "umbrella" tort, four separate theories support a claim: "(1) intrusion upon seclusion; (2) appropriation of another's name or likeness; (3) false light; and (4) publication of private facts." *Id* (citations omitted). To establish a claim under a theory of intrusion upon seclusion, plaintiff must prove three elements: "(1) an intentional intrusion, physical or otherwise, (2) upon the plaintiff's solitude or seclusion, or private affairs or concerns, (3) which would be highly offensive to a reasonable person." *Id.*

It is undisputed that Wong was strip searched twice. The record reveals no facts supporting the inference that the reasons supporting Wong's detention or her behavior while in detention justified such a search. Moreover, there is no dispute that such a search amounts to a severe invasion of privacy without invitation, permission or welcome. *Kennedy v. Los Angeles Police Dept.*, 901 F2d 702, 711 (9th Cir 1989) ("the intrusiveness of a body cavity

search cannot be overstated."); *also see Helton v. United States*, 191 F Supp 2d 179, 182-83 (D DC 2002) (plaintiffs stated a claim for intrusion upon seclusion based on their allegations of a strip and squat search ordered by the United States Marshals Service).

However, this claim suffers from a fatal flaw in that no official of the United States actually conducted the strip searches of Wong. At best, the United States selected Multnomah County jails as detention facilities without ensuring that Multnomah County did not perform blanket strip searches of INS detainees. That may give rise to a negligence claim, as discussed next, but not to an invasion of privacy claim against the United States which requires an intentional act. Thus, the United States is entitled to summary judgment against the invasion of privacy portion of the Fourth Claim.

E. Negligence

Finally, both plaintiffs allege a claim for negligence against the United States under the FTCA. For the reasons that follow, this court concludes that the Association's claim is barred and that only Wong's assertions that the United States was negligent in making arrangements for her detention survives summary judgment.

1. Association's Claim Barred by Economic Loss Rule

As discussed above, the Association contends that it was the "quasi-applicant" regarding Wong's application for adjustment of status because it filed the petition for an immigration visa (Form I-360) upon which Wong's request for adjustment of status is based. It is questionable

whether the Association has standing to bring this claim. Even assuming the Association has standing, its negligence claim is nevertheless barred by Oregon's economic loss rule.

The Second, Third, and Fourth Amended Complaints each alleged an FTCA claim by both Wong and the Association for false imprisonment, intentional interference with economic relations, and negligence. Second Amended Complaint (docket #83), ¶¶ 50-52; Third Amended Complaint (docket #110), ¶¶ 46-48; Fourth Amended Complaint (docket #170), ¶¶ 46-48. The bodies of those pleadings each alleged that the Association suffered both economic and noneconomic damages. Second Amended Complaint (docket #83), ¶¶ 29-31; Third Amended Complaint (docket #110), ¶¶ 25-27; and Fourth Amended Complaint (docket #170), ¶¶ 25-27. The prayers for damages were ambiguous as to whether Wong, the Association, or both, sought non-economic damages on the FTCA claim. Second Amended Complaint, ¶ 51; Third Amended Complaint, ¶ 47; and Fourth Amended Complaint, ¶ 47. However, in opposing defendants' motion against the "religious schism" claims, plaintiffs maintained that the Association's damages claims under the RFRA and the FTCA were strictly economic in nature:

> [U]nder the Federal Tort Claims Act ("FTCA"), Plaintiff Wong seeks non-economic damages against the United States arising out of its negligence and false imprisonment of her. . . . Also, under the FTCA, both plaintiffs allege an intentional interference with economic relations arising out of Plaintiff Wong's arrest, imprisonment, disassociation from the Association

> and its members, strip search, and denial of the food mandated by her diet.

Corrected Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment on Plaintiff's RFRA and Religious Schism Claims (docket #257), p. 18.

> THE COURT: All right. Well, let me hear the plaintiffs' response to this religious schism issue.
>
> MR. STEENSON: Briefly, your Honor.
>
> * * *
>
> Here's—here's what we view the claim by the Association to be, under RFRA. And that is simply for the loss of membership, and a loss of corresponding donations. Obviously the Association is not entitled to non-economic damages, and their claim is going to be restricted to an economic claim. And I didn't mean to leave out the FTCA, but likewise the FTCA.
>
> THE COURT: Actually, I'm glad you clarified that, because that was one question I had. It appeared to me the Association could only have economic damages.
>
> MR. STEENSON: Exactly.

Second Supplemental App 475-76 (Transcript of Court Proceedings December 20, 2005) (docket #268); *See also*, Findings and Recommendation dated January 10, 2006 (docket #287), pp. 10-11 and n5, adopted by Order dated February 21, 2006 (docket #332); *see also* App 418-19.

In the Fifth Amended Complaint, plaintiffs realleged a claim under the FTCA. In doing so, plaintiffs dropped the portion of FTCA claim based on intentional interfer-

ence with economic relations, kept the portion of the claim based on the torts of false imprisonment and negligence, and added invasion of privacy. Fifth Amended Complaint, ¶ 49. As do the Second, Third, and Fourth Amended Complaints, the allegations of the Fifth Amended Complaint allege both economic and non-economic injury to the Association (*id* at ¶¶ 29-31) and the prayer for the Fifth Claim is ambiguous as to what damages each plaintiff seeks: "Plaintiffs are entitled to separate awards of economic and non-economic damages against Defendant United States in an amount to be determined at trial." *Id* at ¶ 50.

The Association alleges no personal injury or damage to personal property. Based on the history of this claim, it is evident that the Association seeks only economic damages related to the Fifth Claim under the FTCA, regardless of the nature of the alleged underlying tort. During oral argument on the pending motions, plaintiffs reiterated that they still intend to pursue a negligence claim on behalf of the Association under the FTCA. However, such a claim must be based on a viable state law claim. In Oregon, "[w]hen a claim based on negligence seeks recovery for economic damages only, the claim must be predicated on some duty of the negligent actor to the injured party beyond the common-law duty to exercise reasonable care to prevent foreseeable harm." *Lewis-Williamson v. Grange Mut. Ins. Co.*, 179 Or App 491, 493, 39 P3d 947, 949 (2002), citing *Onita Pac. Corp. v. Trustees of Bronson*, 315 Or 149, 159, 842 P2d 890, 896 (1992). Specifically, the plaintiff must allege and prove that the defendant had some relationship to the plaintiff which

gave rise to a duty to protect the economic interests of the plaintiff:

> [T]o recover purely economic losses, a plaintiff must plead some source of duty outside of the common law of negligence. Such a duty arises only in attorney-client, architect-client, agent-principal, and similar relationships where the professional owes a duty of care to further the economic interests of the "client." . . . [A] particular source for the duty to protect from economic losses is required even if economic losses are a foreseeable consequence of a defendant's conduct. Thus, a plaintiff must first show the *existence* of a special relationship in which the defendant had some obligation to pursue the plaintiff's economic interests. Only then does [the] foreseeability analysis come in to play.

Roberts v. Fearey, 162 Or App 546, 549-50, 986 P2d 690, 692-93 (1999) (citations omitted; emphasis in original).

The Association fails to allege or to submit evidence of any special relationship with the United States which would prevent application of the economic loss rule. To the contrary, the only special relationship invoked in this case is that of a prisoner and guard. That relationship may well affect Wong's FTCA claims, but has no bearing on any FTCA claim by the Association. Instead, the only relevant relationship between the United States and the Association was that of a government (through its agency) adjudicating a petition for an immigrant visa. Such a relationship is not analogous to the types of relationships discussed in *Roberts* and imposes no duty to protect from economic harm. Accordingly, this court concludes that

the Association's negligence claim—to the extent any such claim is alleged in the Fifth Amended Complaint—is barred. This leaves for consideration only the negligence claim alleged by Wong.

2. Wong's Specifications of Negligence

The Fifth Claim (Fifth Amended Complaint, ¶¶ 49-51) does not expressly identify the actions or failures which form the basis of Wong's negligence claim. However, in response to the United States' motion for summary judgment, Wong asserts that the INS was negligent in:

(1) sending the employment authorization letter (some time prior to June 10, 1999);

(2) selecting MCDC for detention of those it arrested and detained;

(3) failing to take reasonable steps to ensure that she received vegetarian meals as required by her religious vows in light of the INS's knowledge that she needed such meals;

(4) denying her third adjustment of status application; and

(5) misstating her rights to review when issuing her application for adjustment of status denial letter.[18]

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[18] In Plaintiff's Response to the United States' First Set of Interrogatories, Wong also alleged that the United States was negligent in failing to follow the legal opinion of the INS Office of General Counsel and in failing to properly investigate Wong's claims to religious worker status, as well as the circumstances surrounding her

As these specifications reveal, the negligence claim is based on three categories of conduct on the part of the INS, namely: (1) sending Wong letters regarding immigration proceedings which contained misstatements; (2) making arrangements for Wong's detention (choosing MCDC as the detention facility and simultaneously failing to ensure adequate constitutional safeguards); and (3) adjudicating Wong's adjustment of status application. For the reasons that follow, this court concludes that only the allegations of negligence with respect to making arrangements for Wong's detention survive summary judgment.

Government bodies in Oregon can be liable for negligence with respect to the manner in which their law enforcement personnel discharge their duties and responsibilities. *McAlpine* v. *Multnomah County*, 166 Or App 472, 482-83, 999 P2d 522, 528 (2000), *rev den* 336 Or 60, 77 P3d 635 (2003).

a. Claims Regarding Letters Barred by Misrepresentation Exception

The FTCA excludes from its reach "[a]ny claim arising out of . . . misrepresentation. . . ." 28 USC § 2680(h). This misrepresentation exception "shields

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claim to that status. App 404-05. However, Wong does not raise those specifications of negligence in her briefing on the present motions, and does not counter the reasons given by the United States for granting summary judgment against those specifications of negligence. Thus, this court assumes that Wong has abandoned resort to those specifications as a basis for her negligence claim.

government employees from tort liability for failure to communicate information, whether negligent, or intentional." *Lawrence v. United States*, 340 F3d 952, 958 (9th Cir 2003), citing *United States v. Neustadt*, 366 US 696, 705-06 (1961). "[A] negligent failure to inform, without more, is misrepresentation within the meaning of 28 USC § 2680(h). 'The intent of the section is to except from the [FTCA] cases where mere "talk" or failure to "talk" on the part of a government employee is asserted as a proximate cause of the damage sought to be recovered from the United States.'" *City and County of San Francisco v. United States*, 615 F2d 498, 505 (9th Cir 1980), quoting *Nat'l Mfg. Co. v. United States*, 210 F2d 263, 276 (8th Cir), *cert denied*, 347 US 967 (1954).

Wong alleges that, in violation of INS policy and with the intent to remove her from the United States, the INS "issued a deceitful letter . . . inducing Wong to appear at the Portland INS Office . . . purportedly to receive her Employment Authorization Card." Fifth Amended Complaint, ¶ 17. Wong also alleges that she was "not provided with correct or timely information on her right to appeal her adjustment of status denial and request a hearing before an administrative law judge," despite defendants' "mandatory obligation to correctly and timely inform [her] of her rights." *Id* at ¶ 23. Wong's response to the United States' motion on this subject clarifies that she claims the INS "was negligent in assessing and communicating Ms. Wong's rights of review for the denial of her application for adjustment of status." Plaintiffs' Corrected Memorandum in Opposition to United States Motion for Summary Judgment (docket #421),

p. 15. Each of these allegations challenges the communication of allegedly false or misleading information by the INS to Wong, namely that she could pick up employment authorization documents and that she had no right of review of the denial of her request for adjustment of status.

Wong asserts that the misrepresentation exception does not bar these claims, citing the "operational tasks" distinction:

> Courts have had difficulty determining whether a claim is one for misrepresentation. The concept is slippery; "any misrepresentation involves some underlying negligence" and "any negligence action can be characterized as one for misrepresentation because anytime a person does something he explicitly or implicitly represents that he will do the thing non-negligently." *Guild v. United States*, 685 F2d 324, 325 (9th Cir 1982). To determine whether the claim is one of misrepresentation or negligence the court examines the distinction between the performance of operational tasks and the communication of information. The Government is liable for injuries resulting from negligence and performance of operational tasks even though misrepresentations are collaterally involved.

Mundy v. United States, 983 F2d 950, 952 (9th Cir 1993), quoting *United States v. Fowler*, 913 F2d 1382, 1387 (9th Cir 1990).

Rather than asserting injury from the information communicated in its employment authorization letter, Wong bases her claim on the act of sending the letter it-

self. However, unlike *Mundy*, which involved the "operational task" of an allegedly negligent denial of a security clearance and the subsequent communication of that denial to plaintiff's employer, Wong's claim turns on the information communicated or omitted. The employment authorization letter communicated information which induced her to appear, and the letter denying her request for adjustment of status omitted to mention the regulation (8 CFR § 103.5(a)) allowing a motion for reopening or reconsideration.

The difficulty in this case is that Wong, as did the plaintiff in *Gen. Pub. Util. Corp. v. United States*, 551 F Supp 521 (ED Pa 1982), alleges claims that are best described as a "hybrid" case falling somewhere in between two distinct lines of Supreme Court cases, namely *United States v. Neustadt*, 366 US 696 (1961), and *Indian Towing v. United States*, 350 US 61 (1955):

> The initial issue [in applying the misrepresentation exception is] one of characterization. Does the complaint at bar sound in "negligent misrepresentation" or "negligence"? The inquiry is a difficult one and conflicts between decided cases are not subject to facile resolution.
>
> [*Neustadt* and *Indian Towing*] highlight the conflicting lines of authority.
>
> * * *
>
> The case at bar actually represents a hybrid case falling somewhere between *Neustadt* and *Indian Towing*. The *Indian Towing* line of cases usually involves the negligent "operational control" of the harm-causing in-

> strumentality. Damages generally are expressed in terms of personal injury or loss of property. The cases which follow *Neustadt* concern governmental transmission of information which results in damages flowing from commercial decisions based thereon. Under *Neustadt*, there is no "operational control" and frequently no liability. In the case at bar, we have the element of the transmittal of false information coupled with the *Indian Towing* element of property damage.

Relying on *Neustadt*, Wong argues that the misrepresentation exception bars only those claims for damages resulting from commercial decisions based upon false or inadequate information provided by the government. However, the statutory language does not support this restriction. Instead, "[*a*]*ny claim* arising out of . . . misrepresentation" is barred by this exception. 28 USC 2680(h) (emphasis added). The cases patterned after *Neustadt* may have arisen in the commercial context, as a result of which "[c]ourts have interpreted this exception to bar claims arising from commercial decisions based on false or inadequate information provided by the government." *Frigard v. United States*, 862 F2d 201, 202 (9th Cir 1988), *cert denied*, 490 US 1098 (1989) (citations omitted). However, it is equally accurate that courts, including the Ninth Circuit, have applied the misrepresentation exception in cases involving personal injuries.

In *Lawrence v. United States*, 340 F3d 952 (9th Cir 2003), the juvenile female plaintiff was sexually abused by a felon in a witness security program. The felon was employed at a group home where the plaintiff was a resident and was also placed into the felon's care as his foster

child. Among other claims, the plaintiff brought a claim under the FTCA, alleging that two federal officials had failed to provide complete and accurate information at the exemption hearing at which the felon was seeking to pursue employment at the group home. The Ninth Circuit affirmed dismissal of the FTCA claim based on application of both the discretionary function and the misrepresentation exception.

Cases in other districts have reached the same conclusion that the misrepresentation exception applies to personal injury claims, as well as to claims for financial loss. "Despite the language of *Neustadt* that describes the traditional tort of misrepresentation involving 'economic affairs,' the misrepresentation exception of the FTCA has been applied to claims involving personal injury." *Russ v. United States*, 129 F Supp2d 905, 909 (MD NC 2001) (citing cases).

This court discerns no meaningful distinction between the basis of the claim in *Lawrence* and the basis of Wong's claim. Both cases allege personal injury (sexual assault of Lawrence; invasive strip searches of Wong)[19] resulting from allegedly false (employment documents) or incom-

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[19] The "injury" attributable to the failure to inform Wong of her right to request reopening or reconsideration is somewhat more difficult to categorize. Wong contends that the failure to notify her of her right to request reopening or reconsideration denied her the right to such review. Whatever the nature the injury, however, it is barred by the misrepresentation exception because Wong alleges no facts which place her claim outside the scope of the misrepresentation exception.

plete (failure to cite regulation granting right to request reopening or reconsideration) information provided by the United States. Based on the broadly-worded text of the misrepresentation exception, as well as on *Lawrence* and cases from other courts applying the exception in the personal injury context, this court concludes that the misrepresentation exception bars Wong's claims for the United States' actions of sending both the employment authorization letter (Fifth Amended Complaint, ¶ 17), as well as the letter denying her request for adjustment of status (*id* at ¶¶ 18, 23-24).

b. Arranging for Wong's Detention

Two specifications of negligence identified by Wong relate to the United States' action of making arrangements for her detention. First, Wong alleges that by selecting Multnomah County jails as a detention facility, the INS subjected her to undue intrusion and harm and a violation of her Fourth Amendment rights while in its custody and control. Second, Wong alleges that after receiving complaints that she was not provided vegetarian meals, the United States did nothing to ensure that her First Amendment rights were not violated. As discussed above, the independent contractor exception does not bar these specifications to the extent they allege negligence separate and apart from the negligence of Multnomah County.

i. Selecting MCDC as the Detention Facility

Multnomah County had a written policy of strip searching all persons arriving at its detention facilities

which violated the INS' own policy barring strip searches. At least one INS official (Edenfield) knew of that policy. Thus, it was foreseeable that Wong would be detained at a Multnomah County jail where a degrading and unlawful strip search was inevitable. Although the INS did not control the day-to-day operations of the Multnomah County jails, it placed her in the care of Multnomah County with knowledge that it did not comply with federal law regarding strip searches of INS detainees. By not ensuring that INS detainees were properly treated, the United States could be held negligent for allowing Wong to be subject to an invasion of privacy by Multnomah County. *See Sandoval*, 980 F2d at 1059.

ii. Vegetarian Meals

Similarly, it was foreseeable that the failure to communicate the fact that Wong's request for a "vegetarian" diet was religiously-based would result in Multnomah County failing to provide her with a diet that met the strictures of her religious beliefs. As discussed above, Beebe cannot be held liable for any constitutional violation because Multnomah County had a policy that would have met Wong's religiously-based dietary needs after detention and because he was unaware of any facts that Wong was not receiving the diet she requested. However, this claim is premised not only on Beebe's conduct, but also on the conduct of other INS employees, namely Godfrey and Horne. They were aware that Wong's dietary needs were religious, but failed to communicate the religious nature of her dietary requests to Multnomah County. That failure is a sufficient basis to support a negligence claim.

c. Adjudicating Wong's Adjustment of Status Application

Wong's final specification of negligence alleges that the INS negligently adjudicated her application for adjustment of status. Specifically, Wong contends that the INS was negligent in failing to contact her or her attorneys, failing to interview her concerning the factual predicate of her application, making assumptions about her motives in coming to and departing the United States and her place of residence, improperly considering an inadmissibility determination that was based on the false premise that she did not have a valid visa, and refusing to accept her attorney's conclusions about Wong's eligibility to adjust her status.

The problem with this claim is the lack of any analogous liability on the part of private persons under Oregon law. As recognized in *C.P. Chem. Co., Inc. v. United States*, 810 F2d 34, 37 (2d Cir 1987), "[a]s to certain governmental functions, the United States cannot be held liable, for no private analog exists." Thus, "quasi-legislative or quasi-adjudicative action by an agency of the federal government is action of the type that private persons could not engage in and hence could not be liable for under local law." *Id*, quoting *Jayvee Brand v. United States*, 721 F2d 385, 390 (DC Cir 1983). A private person could not be liable for negligently denying an application for adjustment of status. This forecloses any FTCA claim premised upon negligence in adjudicating Wong's adjustment of status application.

Moreover, assuming Wong could overcome this hurdle, she has not identified any state-law duty, the breach of which would give rise to a claim in this context. She has failed to establish the existence, source, or nature of any applicable standard of care governing such a claim, relying instead on allegations that the INS acted "below the standard of care" in adjudicating her application for adjustment of status. In the absence of a duty of care in Oregon applicable to private parties, this claim falls.

Finally—and perhaps most fatally—the INA precludes review of both the inadmissibility determination and the removal order. 8 USC §§ 1252(a)(2)(A) and 1225(b)(1)(A)(i). Thus, even were Wong able to identify a private party analog and articulate an applicable standard of care, defendants would nonetheless be entitled to summary judgment against any claim premised on negligence in adjudicating Wong's adjustment of status application.

RECOMMENDATIONS

For the reasons set forth above, plaintiff Wong's Motion for Partial Summary Judgment Against the Defendants David V. Beebe and the United States of America (docket #400) should be DENIED; defendant David Beebe's Motion for Summary Judgment (docket #403) should be GRANTED IN PART and DENIED IN PART; and defendant United States' Motion for Summary Judgment (docket #405) should be GRANTED IN PART AND DENIED IN PART as follows:

First Claim (Fourth Amendment):

Deny summary judgment both to Wong and Beebe as to whether the strip searches violated the Fourth Amendment

Second Claim (First Amendment):

Grant summary judgment to Beebe

Third Claim (Declaratory Judgment):

Grant summary judgment to the United States

Fourth Claim (RFRA):

Grant summary judgment to Beebe and deny summary judgment to Wong

Fifth Claim: (FTCA)

False Imprisonment: Grant summary judgment to the United States and deny summary judgment to Wong

Invasion of Privacy: Grant summary judgment to the United States and deny summary judgment to Wong

Negligence:

Grant summary judgment to the United States against the Association as to all specifications;

Grant summary judgment to the United States against Wong and deny summary judgment to Wong as to sending letters containing misstatements and adjudicating adjustment of status application;

Deny summary judgment to the United States against Wong and deny summary judgment to Wong as to conditions of confinement.

As a result, the only remaining claims for trial are Wong's First Claim (Fourth Amendment) against Beebe concerning the strip searches and the portion of Wong's Fifth Claim (FTCA) alleging negligence by the United States based on the conditions of confinement.

SCHEDULING ORDER

Objections to this Findings and Recommendation, if any, are due February 12, 2007. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

DATED this 24th day of Jan., 2007.

/s/ JANICE M. STEWART
JANICE M. STEWART
United States Magistrate Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-36136
D.C. No. 3:01-cv-00718-JO

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION,
PLAINTIFFS-APPELLANTS

v.

DAVID BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (N.K.A. DEPARTMENT OF HOMELAND SECURITY) OFFICIAL; UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

Jan. 3, 2013

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3.

APPENDIX L

1. 28 U.S.C. 1346(b)(1) provides:

United States as defendant

* * * * *

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.

2. 28 U.S.C. 2401 provides:

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) 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.

3. 28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not

reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

4. 28 U.S.C. 2679(d) provides:

Exclusiveness of remedy

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or pro-

ceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be sub-

ject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.