No. 01-858

In the

Supreme Court of the United States

ESTATE OF JOSEPH SCOTT GLADDEN, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an individual who notifies a federal agency of a claim for damages "in excess of the sum of $100,000.00" has specified a "sum certain" and therefore met a pre-condition for bringing a lawsuit under the Federal Tort Claims Act.

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OPINIONS BELOW

The unreported order of the court of appeals is reproduced at Pet. App. 1-4. The unreported opinion of the district court is reproduced at Pet. App. 5-11.

JURISDICTION

The order of the court of appeals dismissing this case was entered on September 6, 2001. Pet. App. 1. The petition for a writ of certiorari was filed on December 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. To reduce federal district court congestion, Congress amended the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671-2680, to facilitate administrative settlement

of tort claims against the federal government. As originally enacted, the FTCA authorized heads of federal agencies to entertain only those claims "where the total amount of the claim does not exceed $1,000." See Federal Tort Claims Act, ch. 753, § 403(a), 60 Stat. 842, 843. Presentation of the claims to the agency was optional. *Id.* at § 410(b), 60 Stat. 844. In 1966, Congress granted to the head of each federal agency the authority, in accordance with regulations prescribed by the Attorney General, to "consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States * * * ." 28 U.S.C. 2672. Congress also provided that an FTCA action "shall not be instituted * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a).[1] The tort claim must be presented to the agency within two years of its accrual and any FTCA lawsuit must be brought within six months of the agency's decision. 28 U.S.C. 2401(b).

As contemplated by Congress, the Attorney General issued regulations describing the general procedures for agency handling of FTCA claims. Those regulations, contained in 28 C.F.R. part 14, state that a claim is deemed "presented" to the agency when the agency receives "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain * * *." 28 C.F.R. 14.2(a).[2] The regulations

[1] Furthermore, an FTCA action "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 * * *" 28 U.S.C. 2675(b).

[2] To facilitate agency processing of FTCA claims, the Department of Justice developed Standard Form 95. Standard Form 95 asks for the "total" amount of the claim and warns that "[f]ailure to specify may

also authorize each agency to issue supplemental regulations and procedures for processing FTCA claims. 28 C.F.R. 14.11.

2. Joseph Scott Gladden, an employee of the Federal Bureau of Prisons, committed suicide. Almost two years later, his mother, petitioner Sharron Gladden, filed, on behalf of his estate, a Standard Form 95 alleging that Mr. Gladden's death was caused by the Bureau's negligence. Petitioner Gladden did not include a "total" amount of claim on the form, but attached a narrative that sought "in excess of the sum of $100,000.00." Petitioner Gladden's form did not refer to any injuries suffered by her individually or by the decedent's children.

Mr. Hood, the Regional Counsel for the Bureau, denied petitioner Gladden's claim. Mr. Hood noted that the claim did not include the required "sum certain" of a total damages amount. Gov't C.A. App. 7. In addition, he noted "[o]ther considerations" that rendered her claim "not properly presented." *Ibid.* For example, "the claim contains no documentation demonstrating that Ms. Gladden is the personal representative of Mr. Gladden's estate * * *." *Id.* at 8. Although the Bureau usually affords claimants an opportunity to correct their claims, see 28 C.F.R. 543.32(a), there was no time for Ms. Gladden to correct her claim because she submitted it only two days before the statute of limitations elapsed. As a result, Mr. Hood denied the claim, advising Gladden of the six-month time limit for brining an action under the FTCA. *Id.* at 7-8.

3. a. More than six months after the agency's decision, Ms. Gladden, on behalf of the Estate of Joseph Scott Gladden and herself, along with Ms. Shelly Walling, on

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cause forfeiture of your rights." See Gov'nt Ct. App. Br. Appx. at 1. Standard Form 95 also states: "Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights." See Gov'nt Ct. App. Br. Appx. at 2 (bold in original).

behalf of Mr. Gladden's children, Amanda Diane Walling and Devin Ryan Gladden, filed a complaint in the United States District Court for the Western District of Oklahoma. As relevant here, petitioners alleged several claims for relief under the Federal Tort Claims Act.[3]

The United States moved to dismiss the complaint for lack of jurisdiction. The government argued that petitioners had not met at least two prerequisites for bringing an FTCA action. Petitioner Gladden's Standard Form 95 had not included a "sum certain." In addition, petitioners' law suit was filed more than six months after the agency denied the claim.[4]

The district court granted the government's motion to dismiss for lack of subject matter jurisdiction. The district court agreed with the government that petitioners had not met the "sum certain" requirement because petitioner Gladden's request for damages "in excess of the sum of $100,00.00" did not constitute a "sum certain." Pet. App. 7. The district court did not reach the government's alternative contention that the complaint was untimely.

b. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed. Pet. App. 1-4. The court noted that the "sole issue on appeal is whether plaintiffs' claim, which stated their damages as 'in excess of $100,000,' satisfied the notice requirements of the FTCA." Pet. App. 3a. The court observed that this "precise issue was addressed and resolved by [the Tenth Circuit] in *Bradley*

[3] Petitioners also alleged various violations of Mr. Gladden's constitutional rights. The district court dismissed the constitutional claims as barred by the statute of limitations. Petitioners did not appeal from the dismissal of the constitutional claims. See Pet. App. 4a.

[4] The Bureau denied petitioner Gladden's claim on June 2, 1998. Accordingly, petitioner was required to file any FTCA law suit before December 2, 1998. This law suit, filed on February 7, 2000, and an earlier law suit, filed on February 5, 1999, were both untimely.

v. *United States ex rel. Veterans Admin.*, 951 F.2d 268, 271 (10th Cir. 1991)." The court explained that a "valuation without a ceiling does not 'afford the agency sufficient information to determine whether Plaintiff's claim [is] realistic or settleable.'" *Ibid.*, quoting *Bradley*.

ARGUMENT

The decision below is correct and not in conflict with the position of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that petitioners' FTCA lawsuit is barred because petitioners failed to provide the Bureau with the specific value of their claims. To permit the Bureau to "consider, ascertain, adjust, determine, compromise, and settle" claims, see 28 U.S.C. 2672, the Bureau, acting pursuant to the Attorney General's regulation permitting agencies to issue supplemental regulations governing FTCA procedures, has issued a regulation providing that an FTCA claim must include "time, date, and place where the incident occurred, and a specific sum of money you are requesting as damages". 28 C.F.R. 543.32(a). Petitioner Gladden informed the Bureau that the Estate of Mr. Gladden had tort damages "in excess of the sum of $100,000.00." The Bureau, through its Regional Counsel, decided that this statement did not contain the "sum certain" required by the Bureau's and Attorney General's regulations. That decision is reasonable because it is consistent with both the language and purpose of the regulation. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of its own regulation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation ").

Petitioner Gladden's statement "in excess of the sum of $100,000.00" does not, as a matter of grammar and policy,

provide the agency with the required "sum certain" because there is nothing certain or fixed about the stated sum. Petitioner Gladden could subsequently have valued the tort action at *any* number above 100,000 and remained literally consistent with her form. For all the Bureau knew, petitioner Gladden valued the Estate's claim at $1 million, $10 million or higher. Compare *Bradley*, 951 F.2d at 271 (noting that original valuation of "in excess" of $100,000 was later increased by plaintiff to $600,000). Indeed, in a wrongful death action, there was every reason to think she placed far greater value than $100,000 on the value of the Estate's law suit. Moreover, petitioner Gladden's form provide no inkling of the value ascribed by petitioners to their own claims. In short, there was nothing "certain" about the sum petitioners' ascribed to their FTCA claims.

And without the required certainty, the agency was unable to "consider, ascertain, adjust, determine, compromise, and settle" claims, see 28 U.S.C. 2672, because the agency had no idea of the true value petitioners' ascribed to their potential law suits.

Petitioners do not challenge the Attorney General's regulation requiring FTCA claimants to provide the appropriate agency with a "sum certain" valuation of their injury. Instead, petitioners claim that petitioner Gladden "did state a specific dollar amount, '$100,000.00.'" Pet. Br. at 8. In petitioners' view, "the agency could have reasonably limited the 'sum certain' of [petitioner's] claim to $100,000." *Ibid*. But, as discussed above, the "in excess of" language renders the stated sum uncertain–there is no telling how much more value petitioners' ascribe to their claims.[5] In any event, it is not enough for petitioners to

[5] For this reason, petitioners gain no support from Section 2675(b), which generally provides that an FTCA action "shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency * * * ." If the amount of the claim presented is

suggest an alternative interpretation of the "sum certain" requirement. An alternative interpretation of an agency's regulation does nothing to show that the agency's own interpretation is plainly erroneous or inconsistent with the regulation.

2. Petitioner asserts (at 4) that the decision below is in "direct conflict" with the position of the Fifth Circuit and the Seventh Circuit. That is wrong.

The Seventh Circuit has emphasized that failure to provide specific sums for *sub-totals* does not render an FTCA claim invalid. In *Erxleben* v. *United States*, 668 F.2d 268, 270 (7th Cir. 1981), plaintiff's Standard Form 95 sought "$259.34" in "total" damages. The same form noted "$149.42 presently" in medical expenses. *Ibid.* The Seventh Circuit ruled that the form satisfied the sum certain requirement, despite the "presently" language in the subtotal, because the "total claim" amount was specified without qualification. *Id.* at 273. Thus, despite the "presently" qualification in the subtotal, the value plaintiff placed on the claim was reasonably clear. As a result, the "government could have acted on those figures." *Ibid.*

The decision below does not conflict with *Erxleben* or any other Seventh Circuit decision because the modifying language here applied to the total damages sought rather than any subtotal. See *Corte-Real* v. *United States*, 949 F.2d 484, 487 (1st Cir. 1991) (describing holding in *Erxleben* as premised on plaintiff's statement of a "definite amount" in total box). Moreover, even the amount that was not definitive in *Erxleben* was still roughly approximate; the "presently" subtotal referred to outstanding medical bills, a relatively discrete amount.[6] In contrast, the "in excess

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reasonably deemed uncertain, then it is likewise impossible to determine what amount would be "in excess" of the claim.

[6] See also *Fallon* v. *United States*, 405 F. Supp. 1320 (D. Mont. 1976) ("approximately $15,000"); *Industrial Indemnity Company* v.

of" phrase at issue here refers to the far more fluid valuation of the consequences to family members of a wrongful death. Unlike in *Erxleben*, therefore, petitioners did not provide the government with figures that the agency "could have acted on."

In an attempt to show a conflict with the Fifth Circuit, petitioner relies heavily on *Martinez* v. *United States*, 728 F.2d 694 (5th Cir. 1984). In *Martinez*, the Fifth Circuit held that the "presentation of an administrative claim 'in excess of $100,000' is a reasonable compliance with the 'sum certain' requirement of 28 C.F.R. § 14.2." 728 F.2d at 697. Although *Martinez* purported to rely on the rationale of *Erxleben*, it failed to note that *Erxleben* involved an unqualified total claim and far less variable amounts. Accordingly, at least one court of appeals has recognized that *Martinez* represents the outer limit of decisions interpreting the sum certain requirement. See *Corte-Real*, 949 F.2d at 487 (describing *Martinez* as going "so far").

Moreover, it is far from clear that *Martinez* suggests how the Fifth Circuit would rule in this case. In a subsequent case, *Montoya* v. *United States*, 841 F.2d 102 (5th Cir. 1988), the Fifth Circuit held that "in excess" language, in combination with other defects in a claim, warranted dismissal of an FTCA claim. In *Montoya*, plaintiff's notification to the agency sought "in excess of $1,500.00" and failed to quantify her personal injury claim. The claim also did not suggest a dollar amount for minors injured in the incident. The Fifth Circuit ruled that the claim was not properly presented and affirmed the dismissal of the FTCA complaint. The multiple defects in the claim here–including the "in excess of" language and the failure to suggest a dollar amount for other plaintiff's injuries – suggest that *Montoya*, rather than *Martinez*, is the relevant Fifth

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United States, 504 F. Supp. 394 (E.D. Cal. 1980) ("[c]ompensation benefits are continuing").

Circuit precedent.

In any event, despite any conflict between the decision below and the position of the Fifth Circuit, further review is not warranted because any conflict is unimportant. Agencies notify claimants of any defects in their claim, including the failure to specify a sum certain, provided there is time to correct the defect. See 28 C.F.R. 543.32(a) ("If you fail to provide all necessary information, your claim will be rejected and returned to you requesting supplemental information."). As potential litigants should have the opportunity to remove any qualifying language, the conflict on the consequences of including such language is relatively unimportant. Indeed, petitioner points to no evidence that any conflict between the Tenth and Fifth Circuits has proven hard for private litigants or federal agencies to accommodate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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