No. 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

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 two-year time limit for filing an administrative claim with the appropriate federal agency 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.

Respondent, who was the plaintiff in the district court and the appellant in the court of appeals, is Marlene June, in her capacity as "Conservator for minor and surviving son of deceased in his own right and on behalf of all statutory beneficiaries conservator for A.K.B. deceased, Anthony Edward Booth." App. *infra*, 1a.

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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 decision of the court of appeals (App., *infra*, 1a-2a) is not published in the *Federal Reporter* but is available at 2013 WL 6773664. The order of the district court (App., *infra*, 3a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 2013. 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*, 13a-18a.

STATEMENT

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA or the Act), 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 the federal district courts "exclusive jurisdiction" over such actions. 28 U.S.C. 1346(b)(1).

The waiver of sovereign immunity is limited in certain respects. *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Such an action "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). And of specific relevance here, 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." See *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 prema-

ture 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, if an "action" 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. On February 19, 2005, Andrew Edward Booth was killed in a car accident on an interstate highway in Arizona when the vehicle in which he was traveling as a passenger crossed a cable median barrier and crashed into oncoming traffic. App., *infra*, 3a-4a. In 2006, respondent, acting as conservator for decedent's minor son, filed a wrongful death action against a contractor and against the State of Arizona for negligently installing and maintaining the median barrier. See D. Ct. Doc. 10, Ex. 1 (Mot. to Dismiss).

3. On December 20, 2010, more than five years after the accident, respondent presented a claim under the FTCA to the Federal Highway Administration (FHWA). C.A. S.E.R. 3. On March 18, 2011, the FHWA denied respondent's claim as untimely. *Id.* at 5.

4. On May 5, 2011, respondent then filed this action in federal court against the United States under the FTCA. Respondent alleged that the United States "negligently failed to comply with its own policies and federal law mandating [that] safety barriers installed" on national highways "undergo crash testing and approval." App., *infra*, 4a.

The United States moved to dismiss for lack of jurisdiction. App., *infra*, 4a. The government argued, *inter alia*, that respondent failed to file a claim with

the FHWA within two years of accrual, and that the suit was therefore barred by 28 U.S.C. 2401. App. *infra*, 5a. The government also argued that the FTCA's two-year limit is not subject to equitable tolling. *Id.* at 7a-9a. Respondent, in turn, moved to amend the complaint to "include additional allegations relevant to the issues of equitable tolling and delayed accrual." *Id.* at 10a (citation omitted). The "additional allegations" (*ibid.*) asserted that respondent did not learn that the FHWA had concerns about the median barriers until 2009, in part because the FHWA declined to make employees available for depositions in the state lawsuit. D. Ct. Doc. 14, at 5-6 (Proposed 1st Am. Compl. ¶ 20).

The district court granted the United States' motion, denied respondent leave to amend, and dismissed the case. App., *infra*, 3a-12a. The court explained that "[a] tort action against the United States accrues 'when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Id.* at 5a (quoting *Hensley* v. *United States*, 531 F.3d 1052, 1056 (9th Cir. 2008), cert. denied, 556 U.S. 1257 (2009)). The court found that respondent "knew of the injury and its immediate physical cause" on the day of the accident and that "[n]one of the facts relevant to the accrual of [respondent's] claims were unknown to [respondent] or concealed by the United States." *Id.* at 6a.

The district court also rejected respondent's request for equitable tolling. App., *infra*, 7a-9a. The court explained that, in the context of the FTCA's six-month deadline in 28 U.S.C. 2401(b) for filing an action in court after the agency has denied the claim, the Ninth Circuit had recently "determined that the

FTCA's timing requirements are jurisdictional and, as a result, are not subject to equitable tolling." App. *infra*, 8a (citing *Marley* v. *United States*, 567 F.3d 1030, 1037 (9th Cir.), cert. denied, 558 U.S. 1076 (2009)). The court concluded that the same "analysis and holding applies equally to [Section] 2401(b)'s two-year statute of limitations." *Id.* at 8a n.1. Because respondent's "minority" status is also insufficient to "toll the FTCA's time requirements," the court dismissed for "lack of subject matter jurisdiction." *Id.* at 9a.

5. The court of appeals reversed and remanded in an unpublished memorandum decision. App., *infra*, 1a-2a. The court explained that its recent en banc decision in *Wong* v. *Beebe*, 732 F.3d 1030 (9th Cir. 2013), "held that 28 U.S.C. § 2401(b) of the Federal Tort Claims Act is not jurisdictional and that equitable adjustment of the limitations period in that section is not prohibited." App., *infra*, 2a.[1] Although *Wong* involved the FTCA's six-month suit-filing deadline, and not the two-year deadline for first presenting the claim to the agency, the court drew no distinction between the two. "In light of *Wong*," the court reversed and remanded for further proceedings. *Ibid.*

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has held that the FTCA's two-year time limit to present a tort claim to the appropriate federal agency is subject to equitable tolling. That decision is wrong for two reasons: (i) the two-year deadline is a jurisdictional limitation on the authority

[1] The United States discusses the en banc decision in *Wong* in more detail in the petition for a writ of certiorari seeking review of that decision, which the United States is filing together with the petition in this case. See note 2, *infra*.

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

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[2] The United States is simultaneously filing a petition for a writ of certiorari raising the same question about the FTCA's six-month deadline for filing a civil action in court. See *United States* v. *Wong* (filed Mar. 7, 2014). The decision below relied exclusively on the Ninth Circuit's en banc decision in *Wong*, which held that the six-month time bar is nonjurisdictional and subject to equitable tolling. 732 F.3d 1030 (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.

A. The Two-Year Deadline For Presenting An FTCA Claim To The Appropriate Agency, As A Prerequisite To Filing A Suit In Court, Is Not Subject To Equitable Tolling

The court of appeals erred by holding that the FTCA's two-year time limit for presenting a claim to the appropriate federal agency 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 presenting an untimely claim to the agency 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 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 "forbid[en]" from "consider[ing] whether certain equitable considerations warrant extending [the] limitations period." *Id.* at 133-134. The Court then 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

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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.*

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 *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 wording of Tucker Act 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 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 *Wong* v. *Beebe,* 732 F.3d 1030, 1055-1056 (9th Cir. 2013) (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 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 of Title 28 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 suit-filing period was codified in Chapter 161. *Id.* § 2401(b), 62 Stat. 971.

In *Wong*, the court of appeals relied on the fact that the time bars are no longer placed in a portion of the Code that addressed jurisdiction. 732 F.3d at 1042-1044. 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 chap-

[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.

ter 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, 28 U.S.C. 1491, that confers jurisdiction on the Court of Federal Claims, (Ch. 97). Accordingly, the current placement of the FTCA's time bars is not probative of any intent by Congress to expand the district court's 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, 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 agency); *Wong*, 732 F.3d at 1047; *Mader* v. *United States*, 654 F.3d 794, 805-808 (8th Cir. 2011); see 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. 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 Regional*) (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; 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.").

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. 8-9, *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. *Wong*, 732 F.3d at 1046 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 two-year limitation for presenting a claim to the appropriate federal agency 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]

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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

2. The court of appeals erred in subjecting the FTCA's two-year time bar to equitable tolling for a further reason. As the court of appeals recognized in *Wong*, even if a limitations period "is not jurisdictional, tolling may still be precluded." 732 F.3d at 1038; see *Auburn Regional*, 133 S. Ct. at 826-828 (finding that nonjurisdictional statutory time limit is not subject to equitable tolling). In *Wong*, the court applied a presumption in favor of equitable tolling to the FTCA's six-month deadline for filing a suit in court. 732 F.3d at 1047-1051 (citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). That presumption is not directly applicable to the adjudication of a claim presented to a federal agency. Cf. *Auburn Regional*, 133 S. Ct. at 827-828 (holding that *Irwin* presumption did not apply to provider administrative appeals under the Medicare program). But even if a presumption in favor of equitable tolling were applicable, there are, in any event, "good reasons to believe that Congress did *not* want the equitable

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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).

tolling doctrine to apply" to Section 2401(b). *Brockamp*, 519 U.S. at 350.

a. In *Irwin*, this 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." 498 U.S. at 95-96. The en banc Ninth Circuit in *Wong* applied a "particularly strong" form of that presumption to the FTCA's six-month deadline for filing suit in federal court. 732 F.3d at 1047-1048. The court below relied exclusively on *Wong* without acknowledging the quite distinct context of presenting a claim to a federal agency. App., *infra*, 2a.

As the Court explained in *Auburn Regional*, "*Irwin* itself, and equitable-tolling cases [the Court has] considered both pre- and post-*Irwin*, have generally involved time limits for filing suit in federal court." 133 S. Ct. at 827. In such cases, "a suit" against the United States may in appropriate circumstances be treated the same as "a suit" against a private person —absent a good reason to think Congress intended otherwise. *Irwin*, 498 U.S. at 95-96. Courts then would "render[] in the first instance the decision whether equity required tolling." *Auburn Regional*, 133 S. Ct. at 827.

The same is not true here. An FTCA claim must first be presented to a federal agency, not a court. See 28 U.S.C. 2675(a). If equitable tolling were available, an agency confronted with a facially untimely claim would be faced with the dilemma of having to decide whether to: (1) deny the claim outright because it is time barred (and thereby assume the risk that a court might override the time bar through equitable tolling), (2) conduct its own evaluation of possi-

ble tolling (an unfamiliar and potentially burdensome task for which the agency would not have relevant information of the sort Congress expected it to have concerning the merits of the claim), or (3) evaluate the merits and possible settlement of the time-barred claim along with the tolling issue because of the prospect that a court might later find equitable tolling appropriate (thereby diverting agency resources from the review of timely claims and complicating the administrative review process). If the agency chose the straightforward option of simply denying the claim because it is time barred, as Congress no doubt expected it would do, but a court later found equitable tolling appropriate and then proceeded to the merits of the claim, the agency would be denied the "fair opportunity to investigate and possibly settle the claim" and have to "assume the burden of costly and time-consuming litigation." *McNeil*, 508 U.S. at 111-112. The "interest in the orderly administration of this body of litigation" (*id.* at 112) would be undermined by importing into this framework for presentation of claims to an administrative agency a presumption in favor of equitable tolling that was intended to apply to ordinary statutes of limitations governing suits in court. Cf. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) (Courts should not "read the laws of Congress through the distorting lenses of inapplicable legal doctrine.").

b. In any event, even if a presumption in favor of equitable tolling applies in some form, that presumption is overcome here.

Many of the reasons set forth above demonstrate that, even if not strictly jurisdictional, the two-year time bar is still not subject to equitable tolling. Con-

gress used particularly "emphatic" language. *Brockamp*, 519 U.S. at 350; 28 U.S.C. 2401(b) ("[A] tort claim against the United States" is extinguished—"*forever barred*"—if not presented to the agency within two years.). (emphasis added). Congress modeled the FTCA's two-year suit-filing deadline on the limitations period in the Tucker Act that was (and is) not subject to equitable tolling. See pp. 8-9, 12, *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 an action during periods of disability (such as infancy or mental incompetency), or both.[6] That 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

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

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 another 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, the presentation of a tort claim to a federal agency seeking money from the Treasury, to be followed by an action at law against the United States

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[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]").

in court for money damages, is 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"). And the two-year period, which begins to run only when the claim "accrues" (28 U.S.C. 2401(b)), already builds in some added protection for plaintiffs. See *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998); *Kubrick*, 444 U.S. at 121 (A medical malpractice claim "accrue[s]" under 28 U.S.C. 2401(b) when a plaintiff knows or should have known of both the "injury and its cause.").

In the end, under the regime adopted by the Ninth Circuit, a broad spectrum of 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 Ninth Circuit Decision Further Perpetuates Widespread Confusion And Conflict Among The Courts Of Appeals

Review of the Ninth Circuit's decision in this case 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 understood 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 relying on *Wong* (which itself reverses prior circuit precedent) exacerbates that confusion and the untoward consequences of introducing a regime of equitable tolling into the interlocking system of administrative and judicial review that Congress established to "govern[] the processing of a vast multitude of claims." *McNeil*, 508 U.S. at 112. 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) have now recently held that FTCA time bars

are nonjurisdictional and are subject to equitable tolling. See App., *infra*, 1a-2a; *Wong, supra* (sixth-month court filing deadline); *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).

Four other courts of appeals now hold or (perhaps) suggest, in conflict with the three circuits just discussed, that the FTCA time limits are jurisdictional—but then hold that they are nevertheless subject to equitable tolling. 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 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 administrative filing 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 court filing deadline). That position cannot be reconciled with this Court's decisions concluding that a jurisdictional time bar is not subject to equitable exception or tolling. See *John R.*

Sand & Gravel, 552 U.S. at 133-134; *Auburn Regional*, 133 S. Ct. at 824.

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 not jurisdictional 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 that two-year deadline is 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. *Wong*, 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. 11-17776
D.C. No. 2:11-cv-00901-SRB

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

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

MEMORANDUM[*]

Submitted: Dec. 20, 2013[**]
Filed: Dec. 24, 2013

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

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: THOMAS and MCKEOWN, Circuit Judges, and BENNETT, District Judge.[***]

Plaintiff Marlene June, acting as conservator for A.K.B., ("June") appeals the district court's judgment in favor of the United States. We have jurisdiction pursuant to 28 U.S.C. § 1291 and reverse and remand. Because the parties are familiar with the factual and procedural history of the case, we will not recount it here.

After the district court entered judgment, an en banc panel of this Court held that 28 U.S.C. § 2401(b) of the Federal Tort Claims Act is not jurisdictional and that equitable adjustment of the limitations period in that section is not prohibited. *Wong v. Beebe*, —F.3d—, 2013 WL 5539621 (9th Cir. 2013) (en banc), *overruling Marley v. United States,* 567 F.3d 1030 (9th Cir. 2009). In light of *Wong*, we must reverse the district court's contrary ruling and remand for further proceedings consistent with this disposition.

We need not, and do not, reach any other issue urged by the parties on appeal.

REVERSED AND REMANDED.

[***] The Honorable Mark W. Bennett, District Judge for the U.S. District Court for the Northern District of Iowa, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 11-901-PHX-SRB

MARLENE JUNE, CONSERVATOR FOR A.K.B., A MINOR AND SURVIVING SON OF ANTHONY EDWARD BOOTH, IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Nov. 1, 2011

ORDER

The Court now considers Defendant the United States of America's Motion to Dismiss ("Def.'s Mot.") (Doc. 10). The Court also resolves Plaintiff Marlene June's Motion for Leave to File First Amended Complaint ("Pl.'s Mot. to Am.") (Doc. 13).

I. BACKGROUND

On February 19, 2005, Anthony Edward Booth was killed in an automobile accident on Interstate 10 in Phoenix, Arizona, after the vehicle in which he was traveling

passed through a cable median barrier and crossed into oncoming traffic. (Doc. 1, Compl. ¶¶ 9-14.) Plaintiff Marlene June, acting as conservator for A.K.B., the minor surviving son of Anthony Edward Booth, brings the instant action under the Federal Tort Claims Act ("FTCA"). *(Id.* ¶¶ 1, 19.) Plaintiff asserts that the cable median barrier on Interstate 10 failed and permitted the vehicle Mr. Booth was traveling in to collide with another vehicle, resulting in Mr. Booth's death. (*Id.* ¶ 14.) Plaintiff alleges that the United States negligently failed to comply with its own policies and federal law mandating that safety barriers installed on National Highway System roadways undergo crash testing and approval pursuant to the National Cooperative Highway Research Project Report 350. *(Id.* ¶ 29.) Plaintiff also asserts a claim for negligence per se, alleging that the United States violated its own federally mandated safety rules and regulations. *(Id.* ¶¶ 34-35.) The United States now moves to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that this Court does not have jurisdiction over Plaintiff's claims because the claims are barred by the FTCA's jurisdictional statute of limitations and that the Federal Aid Highway Act does not provide for a private cause of action. (Def.'s Mot. at 1, 3-11.)

II. LEGAL STANDARDS AND ANALYSIS

A. Standard Under Rule 12(b)(1)

The plaintiff, as the party asserting jurisdiction, has the burden of showing that he or she has alleged facts potentially within the FTCA's waiver of immunity. *Prescott v. United States,* 973 F.2d 696, 701 (9th Cir. 1992);

see also Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983) ("The party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity."). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, jurisdictional facts may be proved by "affidavit, declaration, or any other evidence properly before the court, in addition to the pleadings challenged by the motion." *Green v. United States*, 630 F.3d 1245, 1248 n.3 (9th Cir. 2011). A plaintiff need only make a prima facie showing of subject matter jurisdiction where the question of jurisdiction is decided based on the written materials. *Singh v. United States*, 718 F. Supp. 2d 1139, 1141 (N.D. Cal. 2010).

B. Defendant's Motion to Dismiss

The United States is generally immune from suit and "can be sued only to the extent that it has waived its immunity." *United States v. Orleans*, 425 U.S. 807, 814 (1976). Subject to certain exceptions, the FTCA provides a limited waiver of sovereign immunity for tort claims arising out of the negligence of federal employees and agencies where a claim would exist under state law if the United States were a private party. 28 U.S.C. § 1346(b); *see also Terbush v. United States*, 516 F.3d 1125, 1128-29 (9th Cir. 2008). Under the FTCA, tort claims against the United States are barred unless they are presented to the federal agency whose conduct is challenged "within two years after such claim[s] accrue[]." 28 U.S.C. § 2401(b); *see also Winter v. United States*, 244 F.3d 1088, 1090 (9th Cir. 2001).

1. Accrual of Plaintiff's Claims

A tort action against the United States accrues "when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Hensley v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008) (internal quotation marks and citation omitted). Generally, "ignorance of the involvement of government employees is irrelevant to accrual of a federal tort claim," and "accrual does not await a plaintiff's awareness, whether actual or constructive, of the government's negligence." *Id.* Even where the government remains silent concerning its possible negligence, the accrual of a claim is not delayed and the statute of limitations is not tolled in the absence of fraudulent concealment. *Id.* at 1057 (citing *Dyniewicz v. United States*, 742 F.2d 484, 487 (9th Cir. 1984)).

Plaintiff alleges that the claims asserted here "accrued no earlier than April 29, 2009." (Compl. ¶ 23.) However, the injury giving rise to Plaintiff's claim occurred on February 19, 2005. (*Id.* ¶¶ 9-14.) None of the facts relevant to the accrual of Plaintiff's claims were unknown to Plaintiff or concealed by the United States following the accident. *See Hensley*, 531 F.3d at 1056 (noting that ignorance of the government's involvement "is irrelevant to accrual of a federal tort claim"). Plaintiff knew of the injury and its immediate physical cause on February 19, 2005, and Plaintiff's claim accrued at that time. *See Hensley*, 531 F.3d at 1057 (finding that, following an automobile accident, the plaintiffs' injuries and the actual cause were immediately apparent and that a claim against the United States was time-barred even where the plaintiffs did not learn until much later that a

government actor caused the injury); *Dyniewicz,* 742 F.2d at 487 (holding that a wrongful death claim against the United States accrued when the plaintiffs "knew both the fact of injury and its immediate physical cause," regardless of the plaintiffs' "ignorance of the involvement of United States employees"). Plaintiff did not file a claim with the appropriate federal agency within two years of the date on which the claims accrued as required under the FTCA. *See* 28 U.S.C. § 2401(b); *Winters,* 244 F.3d at 1090; (Compl. ¶¶ 9-14, 16.)

2. Tolling the Statute of Limitations

Plaintiff argues that, even if the claims at issue accrued more than two years before Plaintiff filed a claim with the appropriate federal agency, the FTCA's statute of limitations is not jurisdictional and is tolled until A.K.B. reaches the age of majority. (Doc. 15, Pl.'s Resp, & Opp'n to Def.'s Mot. ("Pl.'s Resp.") at 8-9; Compl. ¶¶ 17-18.) Plaintiff also asserts that "the concealment of material facts by the Defendant will generally toll the statute of limitations." (Compl. ¶¶ 22.)

Generally, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Dep't of Veterens Affairs,* 498 U.S. 89, 95-96 (1990). However, where a statute of limitations "seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as . . . limiting the scope of a governmental waiver of sovereign immunity," the time limitation is generally considered jurisdictional and is not subject to waiver or equitable tolling. *John R. Sand &*

Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008). The FTCA's statute of limitations is considered a condition of the United States' waiver of sovereign immunity, and courts cannot "extend the waiver beyond that which Congress intended." *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). The Ninth Circuit Court of Appeals has determined that the FTCA's timing requirements are jurisdictional and, as a result, are not subject to equitable tolling or waiver. *Marley v. United States*, 567 F.3d 1030, 1037 (9th Cir. 2009) ("[B]ecause § 2401(b) is jurisdictional, [courts] must refrain from using equitable estoppel or equitable tolling to excuse . . . untimeliness.").[1] The *Marley* court noted that, unlike 28 U.S.C. § 2401(a), § 2401(b) does not contain any exceptions to its time limitations, and courts cannot create any exceptions to the time requirements established in § 2401(b). *Marley*, 567 F.3d at 1037. Where a claim is not filed within the FTCA's statute of limitations, federal courts are "deprive[d] . . . of jurisdiction," and the claim must be dismissed. *Id.* at 1038.[2] In addition, even

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[1] While the *Marley* court considered 28 U.S.C. § 2401(b)'s six-month time limitation, requiring that a plaintiff file a claim in federal court within six months of a final agency denial of the claim, the *Marley* analysis and holding applies equally to § 2401(b)'s two-year statute of limitations. *See Marley*, 567 F.3d at 1037-38; *see also Banares v. Demore*, 417 F. App'x 638, 639 (9th Cir. 2011) (applying the *Marley* holding to the two-year statute of limitations under § 2401(b)).

[2] Plaintiff cites *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996), and *Aloe Vera of America v. United States*, 574 F.3d 1176 (9th Cir. 2009), and argues that the Ninth Circuit Court of Appeals recognizes that equitable tolling applies to the FTCA's statute of limitations. (Pl.'s Resp. at 3-5.) However, the *Marley* court

were tolling permitted, "[t]he time limitation for FTCA claims is not tolled during a claimant's minority." *Papa v. United States*, 281 F.3d 1004, 1011 (9th Cir. 2002).

Here, as discussed above, Plaintiff's claims were raised outside of the applicable time limitations established by the FTCA. *(See* Compl. ¶¶ 9-14, 16.) The FTCA's time requirements are jurisdictional and are not subject to equitable tolling. *See Marley,* 567 F.3d at 1037-38. In addition, A.K.B.'s minority does not toll the FTCA's time requirements. *See Papa,* 281 F.3d at 1011. Accordingly, Plaintiff's claims are dismissed for lack of subject matter jurisdiction. *See Marley,* 567 F.3d at 1038.

The United States also argues that Plaintiff's claims must be dismissed because the Federal Aid Highway Act does not provide for a private cause of action. (Def.'s Mot. at 1, 9-11.) Because Plaintiff's claims are barred by the FTCA's statute of limitations, the Court does not reach this argument.

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found that the decision in *Alvarez-Machain* was not binding precedent, and explicitly held that the FTCA's statute of limitations was jurisdictional. *See Marley*, 567 F.3d at 1037-38. In addition, the Ninth Circuit Court of Appeals withdrew the *Aloe Vera* opinion cited by Plaintiff and submitted an amended opinion in which the court found that the statute of limitations at issue was jurisdictional under *John R. Sand.* *See Aloe Vera*, 574 F.3d 1176 (withdrawing original opinion); *Aloe Vera*, 580 F.3d 867, 872 (finding the applicable statute of limitations was jurisdictional). The *Marley* court's holding that the FTCA's time limitations are jurisdictional and not subject to equitable tolling is binding precedent and is not disturbed by the case law referenced by Plaintiff.

C. Plaintiff's Motion for Leave to File a First Amended Complaint

On August 12, 2011, Plaintiff moved for leave to file a first amended complaint in order to "include additional allegations relevant to the issues of equitable tolling and delayed accrual" and "to remove references to Arizona state law on the issues of accrual and tolling." (Pl.'s Mot. to Am. at 2.) Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend should be freely granted "when justice so requires." Fed. R. Civ. P. 15(a)(2). However, where amendment would be futile, a court may properly deny leave to amend. *United States* ex *rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001).

Here, Plaintiff cannot amend the Complaint to avoid the jurisdictional bar created by the FTCA's statute of limitations. As discussed above, Plaintiff knew of the injury and its cause on February 19, 2005, and Plaintiff's claim accrued at that time. *See supra* Part II.B.1. In addition, the FTCA's time requirements are jurisdictional and not subject to equitable tolling. *See supra* Part II.B.2. Plaintiff's Motion for Leave to File First Amended Complaint is, therefore, denied. *See SmithKline Beecham*, 245 F.3d at 1052 ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend." (internal quotation marks and citation omitted)).

D. Dismissal with Prejudice

Generally, claims dismissed for lack of subject matter jurisdiction are dismissed without prejudice so that a plaintiff may reassert the claims in the appropriate court.

Frigard v. United States, 862 F.2d 201, 204 (9th Cir. 1988). However, "the bar of sovereign immunity is absolute," and, where a plaintiff cannot redraft his or her claims in order to avoid the FTCA's limitations, dismissal with prejudice is appropriate. *Cf. id.* (finding that dismissal with prejudice was appropriate where the plaintiffs could not redraft their claims to avoid the exceptions to the FTCA's waiver of liability). Plaintiff's claims are barred by the FTCA's statute of limitations, and Plaintiff cannot amend the Complaint to avoid the jurisdictional bar created by the FTCA's statute of limitations. Therefore, Plaintiff's claims are dismissed with prejudice.

III. CONCLUSION

While Plaintiff pursues claims based on a tragic loss, the significance of the loss does not alter the law governing the jurisdiction of this Court. Plaintiff's claims are barred by the FTCA's jurisdictional statute of limitations.

IT IS THEREFORE ORDERED granting Defendant the United States of America's Motion to Dismiss (Doc. 10) and dismissing Plaintiff Marlene June's claims with prejudice.

IT IS FURTHER ORDERED denying Plaintiff Marlene June's Motion for Leave to File First Amended Complaint (Doc. 13).

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment of dismissal with prejudice in this matter.

DATED this 1st day of November, 2011.

/s/ SUSAN R. BOLTON
SUSAN R. BOLTON
United States District Judge

APPENDIX C

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.