No. 13-1075

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

MARLENE JUNE, CONSERVATOR

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

## REPLY BRIEF FOR PETITIONER

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Congress's intent controls whether a particular statutory time limit is subject to equitable tolling. See, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137-138 (2008). Here, the text, context, and history of the time bar in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), demonstrate that Congress enacted an absolute deadline that cannot be tolled.

When Congress drafted the FTCA in 1946, it modeled the time bar on the virtually identical provision governing Tucker Act suits. This Court had repeatedly held that provision to be a jurisdictional limit not amenable to tolling. Congress's decision to borrow the same text using the same sentence structure when it enacted the FTCA demonstrates that equitable tolling is precluded under the FTCA as well.

Respondent's arguments to the contrary lack merit. She denies the relevance of this Court's Tucker Act precedents because Tucker Act suits are brought in the Court of Claims, which, respondent asserts, historically lacked authority to apply equitable doctrines. But the premise of respondent's argument is simply wrong. This Court has repeatedly confirmed the Court of Claims' authority to consider equitable principles. And nothing in this Court's Tucker Act cases suggests that they interpreted the time bar to preclude equitable tolling based on *forum*-related considerations. That leaves respondent with no tenable basis to distinguish the FTCA's limitations provision.

Respondent's other arguments are similarly incompatible with the statutory text and this Court's precedent. She misreads *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), erroneously arguing that it forecloses any inquiry into whether Congress intended to preclude tolling in part due to sovereign-immunity considerations. She advances textual and structural arguments that do nothing to diminish the "good reason[s] to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). And she attempts to defend the lower court's equitable tolling holding through reliance on the distinct doctrine of fraudulent concealment, which affects only when a claim accrues and not when a limitations period can be suspended *following* accrual.

In the end, respondent cannot escape the fact that her argument utterly lacks historical support. She offers no evidence that *any* Member of Congress, court, or Executive Branch official believed that the FTCA's time bar could be tolled when it was enacted and re-

enacted in 1946 and 1966. Because Congress plainly intended to prohibit tolling then, the decision below should be reversed.

### A. Congress Fashioned The FTCA Time Bar To Mirror The Jurisdictional Time Bar Applicable To Tucker Act Suits

Our opening brief explains (at 3-5, 18-26) that Congress modeled the FTCA time bar on the statutory time bar governing damages actions under the Tucker Act and its predecessors. The FTCA filled the gap left when Congress carved out tort claims from the Tucker Act's authorization of suits against the United States for money damages. See S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946) (1946 Senate Report) ("The existing exemption in respect to common-law torts appears incongruous."). Following the Tucker Act model, Congress "extend[ed] to claimants against the Government for torts of negligence the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." S. Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942).

Consistent with this purpose to create a tort-law analogue to the Tucker Act, Congress used virtually identical language in the FTCA's time bar. See U.S. Br. 20 n.6 ("Every claim against the United States cognizable * * * shall be forever barred[,] unless"). In the Tucker Act context, this Court had repeatedly interpreted that language to set forth a jurisdictional limit not subject to equitable tolling. U.S. Br. 19-22. In these circumstances—"[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional"—this Court "will presume" that Congress intended to enact

a jurisdictional time limit that cannot be tolled. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks and citation omitted). That rule controls here.

1. Respondent acknowledges (Br. 15) the direct textual parallel between the FTCA and Tucker Act time bars, but she insists the virtually identical language should be interpreted differently because, she contends, in contrast to district courts, the "Court of Claims did not traditionally exercise equitable power." Respondent asserts (Br. 51-52) that the differences between those tribunals trigger different presumptions: Congress must "affirmatively authoriz[e] tolling" for suits in the Court of Claims (now the Court of Federal Claims), but the opposite rule applies to suits in district courts. And she further asserts (Br. 39) that this forum-based distinction has "always done the heavy lifting in this Court's Tucker Act/Court of Claims cases." Respondent's theory fundamentally misunderstands this Court's precedent and the Court of Claims' power.

a. Respondent contends (Br. 27-29, 52) that the Court of Claims historically had no equitable authority. But that argument confuses equitable *doctrines* like tolling with the authority to order equitable *remedies*—*e.g.*, injunctions, declaratory judgments, and other prospective relief. The Court of Claims generally can award only money damages—just like district courts adjudicating FTCA suits. But respondent is wrong to suggest that the Court of Claims traditionally had no power to apply equitable doctrines en route to a money judgment.

Indeed, this Court's decision in *Bull* v. *United States*, 295 U.S. 247 (1935), squarely forecloses re-

spondent's contention. The question in *Bull* "was whether the Court of Claims, *in the interests of equity*," could offset taxes owed by taxes that had been overpaid but could not be recovered in a refund action because of the statute of limitations. *United States* v. *Dalm*, 494 U.S. 596, 606 (1990) (emphasis added). Although Congress had not explicitly authorized equitable recoupment, *Bull* held that the Court of Claims should have exercised that power because the government's retention of the money offended principles of "natural justice and equity." 295 U.S. at 261 (citation omitted). Because recoupment is an equitable defense that alleviates the consequences of a limitations bar, see *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 299-303 (1946), respondent is simply incorrect to assert that "when Congress desired the Court of Claims to do *anything remotely equitable* regarding time limits, it had to affirmatively legislate." Resp. Br. 51-52 (emphasis added).

Other decisions further demonstrate respondent's error. For example, in *United States* v. *Milliken Imprinting Co.*, 202 U.S. 168, 173-174 (1906), this Court held that the Court of Claims had the power to order equitable reformation of a contract. This Court has also approved the Court of Claims' authority to invoke the equitable doctrines of laches and estoppel against plaintiffs, thereby ensuring that "no one shall be permitted to found any claim upon his own inequity." *R.H. Stearns Co.* v. *United States*, 291 U.S. 54, 61-62 (1934) (equitable estoppel); *Nicholas* v. *United States*, 257 U.S. 71, 76-77 (1921) (laches); see *Henry* v. *United States*, 153 F. Supp. 285, 290 (Ct. Cl. 1957) (recognizing Supreme Court's approval of this power). And the Court of Federal Claims considers requests for equi-

table tolling of statutory time limits it deems amenable to that doctrine. See, *e.g.*, *Cloer* v. *Secretary of Health & Human Servs.*, 654 F.3d 1322, 1340-1342 (Fed. Cir. 2011) (en banc) (National Childhood Vaccine Injury Act), cert. denied, 132 S. Ct. 1908 (2012); *Arctic Slope Native Ass'n* v. *Sebelius*, 583 F.3d 785, 798-800 (Fed. Cir. 2009) (Contract Disputes Act), cert. denied, 561 U.S. 1026, and 131 S. Ct. 144 (2010).

Given these precedents, the central premise underlying respondent's effort to distinguish the Tucker Act cases—her assertion (Br. 29) that the Court of Claims has no power to "us[e] equity to prevent unfair results"—is mistaken.[1]

b. This Court has also previously rejected respondent's argument (Br. 13-14, 15, 38-39, 51-52, 54) that different presumptions regarding congressional intent apply depending on whether Congress vested jurisdiction in district courts or the Court of Claims. In *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), an employee argued that Congress intended to permit jury trials in Age Discrimination in Employment Act (ADEA) suits against the federal government because "Congress conferred jurisdiction over ADEA suits upon the federal district courts, where jury trials are ordinarily available, rather than upon the Court of Claims, where they are not." *Id.* at 164. The Court

[1] Respondent states that Congress empowered district courts — and not the Court of Claims—to adjudicate FTCA cases "precisely because" "'the United States courts'" are equipped to provide "'justice and equity'" to claimants. Resp. Br. 54 (quoting H.R. Rep. No. 1675, 79th Cong., 2d Sess. 25 (1946)). That mischaracterizes the legislative history. In fact, the House Report's reference to "United States courts" unambiguously encompassed both district courts *and* the Court of Claims. Moreover, the report discussed private claims generally, not the FTCA specifically.

dismissed this argument, finding "little logical support for th[e] inference." *Ibid.* The Court emphasized that "if Congress waives the Government's immunity * * * , the plaintiff has a right to a trial by jury only where that right is one of the terms of [the Government's] consent to be sued." *Id.* at 160 (internal quotation marks and citation omitted; brackets in original). Thus, irrespective of the forum, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Id.* at 161 (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)). The same analysis defeats respondent's forum-based rationale here.

c. Respondent's attempt (Br. 28) to distinguish the Tucker Act cases on forum-related grounds is also at odds with the reasoning of those decisions.[2] As explained in our opening brief (at 20-22, 27-28, 30-32, 40), those cases rested primarily on the statutory language and the settled rule that time limits conditioning a waiver of sovereign immunity must be strictly construed. See, *e.g.*, *Soriano*, 352 U.S. at 273; *Finn* v. *United States*, 123 U.S. 227, 231 (1887); *Kendall* v. *United States*, 107 U.S. 123, 125 (1883). Nothing in the decisions implies the result would have been different if the time bar had governed cases brought in district court.

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[2] Respondent further asserts that those cases hinged on the Tucker Act's failure to state that "the government can be sued to the same extent as a private person." Resp. Br. 38-39 (citation omitted). But nothing in the cases suggests that the *absence* of such a provision had any relevance to the Court's holding that the time bar could not be tolled.

Just the opposite: *Soriano* made clear that the same jurisdictional analysis would govern claims brought under "statutes permitting suits for tax refunds, tort actions, [and] alien property litigation," 352 U.S. at 275—all of which can be adjudicated in district court, see 28 U.S.C. 1346(b)(1); 28 U.S.C. 1340 (1952); 50 U.S.C. App. 9(a) (1952). Moreover, the Court has often relied on Tucker Act precedents when interpreting statutes conferring jurisdiction on district courts—including the FTCA. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Richards* v. *United States*, 369 U.S. 1, 7 n.12 (1962); see also *Lehman*, 453 U.S. at 161 (ADEA). It is accordingly untenable for respondent to contend (Br. 38) that the *Kendall-Soriano* line of cases has "[no]thing to do with statutes other than the Tucker Act and tribunals other than the Court of Claims."

2. Respondent fares no better with her assertion (Br. 39) that the Tucker Act cases do not illuminate the meaning of the virtually identical FTCA time bar because they do not "contain anything approaching a linguistic analysis" of the limitations provision. *Kendall*—the Court's first decision on the issue—emphasized the language declaring that untimely claims "shall be forever barred" and reasoned that "[t]he express words of the statute leave no room for contention" that any claim could proceed outside the specified period. 107 U.S. at 124, 125. "[I]n view of the language of the statute," the Court held that equitable tolling was unavailable. *Id.* at 126. See also *Finn*, 123 U.S. at 229, 232 (similar).

In any event, there is no doubt that this Court's Tucker Act decisions attached jurisdictional significance to the time bar and held that its text did not

permit equitable tolling. The Court's decisions thereby provided Congress with a clear model of how to draft a jurisdictional time bar that could not be tolled. Because Congress employed the very same operative language using the very same sentence structure when it drafted the FTCA time bar governing the tort claims that were carved out of the Tucker Act, Congress must be presumed to have intended that language to be interpreted the same way.[3] It makes no sense to think that Congress borrowed the identical language and structure in this deliberately parallel context to achieve the *opposite* result and *allow* equitable tolling.[4]

3. Respondent asserts (Br. 41-42) that *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951), "rejected th[e] exact argument" that Congress intended the FTCA to serve as the tort-law analogue to the Tucker Act. That is incorrect.

*Yellow Cab* held that the United States may be joined as a third-party defendant under the FTCA.

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[3] Respondent accordingly cannot dismiss (Br. 39) the analysis in *John R. Sand & Gravel* simply because it invoked *stare decisis*. *Stare decisis* enables Congress to legislate against a stable legal backdrop, and the doctrine "has added force when the legislature * * * ha[s] acted in reliance on a previous decision." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Congress justifiably relied on the settled meaning of the Tucker Act time bar when it incorporated the same language into the FTCA.

[4] Respondent observes that other time bars use "forever barred" yet can be tolled. Resp. Br. 41 (citing 15 U.S.C. 15b). But those statutes, unlike the FTCA, are entirely unrelated to the Tucker Act; do not borrow its unique sentence structure providing that "[e]very claim against the United States, cognizable * * * , shall be forever barred unless"; and do not involve waivers of sovereign immunity.

340 U.S. at 556-557. In reaching that conclusion, the Court rejected the notion that joinder should be prohibited under the FTCA because it is not permitted under the Tucker Act. *Id.* at 550 n.8. The Court observed that Congress created several differences between a district court's adjudication of FTCA and Tucker Act suits with respect not only to joinder but also to whether the court is "restricted to claims not exceeding $10,000," has concurrent jurisdiction with the Court of Claims, and must apply the Federal Rules of Civil Procedure. *Ibid.*

Notably, in highlighting differences between the FTCA and the Tucker Act, *Yellow Cab* focused on *textual* distinctions. 340 U.S. at 549, 550 n.8, 553. It was accordingly clear that Congress wanted to treat FTCA and Tucker Act cases differently in those respects. By contrast, the statutory time bars governing FTCA and Tucker Act suits are virtually identical, and there is no textual or historical basis for concluding that Congress intended them to be interpreted in fundamentally different ways.[5]

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[5] Respondent observes (Br. 41-42) that *Yellow Cab* declined to rely on statements in House Reports addressing draft tort-claim bills proposed in 1942 and 1945 because those statements were omitted from the Senate Report accompanying the final version of the FTCA enacted in 1946. But this Court has subsequently relied on those House Reports even when their content was not carried over to the 1946 Senate Report. See, *e.g.*, *Berkovitz* v. *United States*, 486 U.S. 531, 538 n.4 (1988); *Dalehite* v. *United States*, 346 U.S. 15, 28-29 & n.21 (1953). Respondent, too, relies on those reports. Resp. Br. 54 (quoting language of 1945 House Report that does not appear in 1946 Senate Report). In any event, the 1946 Senate Report itself emphasizes that the FTCA would serve as the tort-law analogue to the Tucker Act. See 1946 Senate Report 31

### B. Sovereign-Immunity Considerations Confirm That The FTCA Time Bar Precludes Equitable Tolling

Our opening brief explains (at 26-32, 39-42) that Congress intended to preclude tolling of the FTCA time bar in part because it conditioned Congress's waiver of sovereign immunity. Respondent contends (Br. 24-30) that *Irwin* forecloses that argument. She is mistaken.

1. *Irwin* articulated a rebuttable presumption that statutory time limits for filing suit against the federal government are subject to equitable tolling. See U.S. Br. 18-20.[6] The Court adopted that presumption out of deference to what it concluded was Congress's "likely meaning in the mine run of instances." *John R. Sand & Gravel*, 552 U.S. at 137. Accordingly, the Court has repeatedly observed that the presumption "is not conclusive" and can be rebutted "by demonstrating Congress' intent to the contrary." *Id.* at 137-138; see *Brockamp*, 519 U.S. at 350 (presumption rebutted when there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply").[7]

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(deeming Tucker Act's exception for claims "sounding in tort" "incongruous").

[6] As explained in our opening brief (at 52-53), it is not clear that the *Irwin* presumption applies to the adjudication of claims presented to a federal agency. See *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827. But if it does, it is rebutted here.

[7] The government agrees with respondent that the *Irwin* presumption applies at the threshold to pre-*Irwin* statutes. Nevertheless, courts may consider whether Congress legislated before or after *Irwin* when determining whether the presumption reflects a "realistic assessment of legislative intent," 498 U.S. at 95, in any particular case. See *Holland* v. *Florida*, 560 U.S. 631, 646 (2010) (presumption is stronger as applied to post-*Irwin* statutes because

2. Respondent does not dispute that *Irwin*'s presumption is rebuttable, but she seeks (Br. 25) to circumscribe the inquiry into Congress's intent with a bright-line rule that "sovereign immunity concerns are *not* a basis for rejecting the presumption."

Respondent is wrong. *Irwin* holds that sovereign-immunity considerations—*without more*—do not establish that Congress intended to foreclose tolling. 498 U.S. at 95-96. But that does not mean that sovereign-immunity considerations are *irrelevant*. Respondent's restrictive rule would violate *Irwin*'s own rationale: Whereas *Irwin* based the presumption on a "realistic assessment of legislative intent," *id.* at 95, respondent would disregard what Congress *actually* intended if the historical evidence showed that sovereign-immunity concerns shaped Congress's intent concerning a particular time bar. Cf. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment) (cautioning against "apply-[ing] a new background rule to previously enacted legislation" if it would amount to "revers[ing] prior congressional judgments").

As this Court confirmed in *John R. Sand & Gravel*, even after *Irwin* it is proper to consider whether Congress intended to enact a jurisdictional time bar to "achieve a broader system-related goal, such as * * * limiting the scope of a governmental waiver

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"Congress * * * was likely aware that courts, when interpreting [the statute's] timing provisions, would apply the presumption"); *Cannon* v. *University of Chi.*, 441 U.S. 677, 698-699 & nn.22-23 (1979) (even if intervening Supreme Court precedent suggests a different interpretive approach, "evaluation of congressional action" still "must take into account its contemporary legal context").

of sovereign immunity." 552 U.S. at 133-134 (citing *Dalm*, 494 U.S. at 609-610). *Irwin* accordingly provides no basis to ignore that Congress in 1946 and 1966 intended to preclude tolling under the FTCA in part due to sovereign-immunity considerations.[8]

### C. Respondent's Arguments That The FTCA Nevertheless Permits Equitable Tolling Lack Merit

Respondent cannot counter the compelling grounds for concluding that the FTCA time bar is jurisdictional and does not permit tolling.

1. Respondent contends (Br. 32-34) that the FTCA time bar is not jurisdictional because it appears in a different provision and chapter of the United States Code than Section 1346(b)(1), which confers jurisdiction on district courts to adjudicate FTCA claims.

Respondent's argument fails because this Court has already made clear that Section 1346(b)(1) is not the *only* source of jurisdictional limits on FTCA suits. In *McNeil* v. *United States*, 508 U.S. 106 (1993), the Court strictly construed 28 U.S.C. 2675(a)'s administrative-exhaustion requirement and affirmed the dismissal of an FTCA action—for lack of jurisdiction—where the claimant had not satisfied that requirement. 508 U.S. at 109-113; see *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)

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[8] Although respondent invokes the "hornbook" principle that time bars ordinarily can be tolled (Br. 4), in fact "hornbook law" at the time recognized the important qualification that "'[g]enerally speaking the time requirement prescribed by a statute granting the right to sue the United States'" is "'jurisdictional'" and an "'indispensable condition of the liability and of the action which it permits.'" *Simon* v. *United States*, 244 F.2d 703, 705 (5th Cir. 1957) (emphasis omitted) (quoting 34 Am. Jur. *Limitation of Actions* § 7, at 17 (1941 & 1956 Supp.)).

("[S]ome time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants.").[9]

Respondent's structural argument fares no better. Respondent maintains that Congress purposefully placed the time bar in a different chapter in the 1948 recodification of Title 28 to differentiate it from the FTCA's jurisdictional provisions. But Congress expressly *denied* that this was the recodification's purpose: "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 * * * in which any * * * section is placed." Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991. That congressional directive settles the matter.

Moreover, this Court has repeatedly found time bars jurisdictional even though they did not appear in the same chapter or statutory provision defining the "jurisdiction" of the court administering the bar. See, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007); *Dalm*, 494 U.S. at 601-602, 609-610. Once again, the Tucker Act foundation for Section 2401(b) confirms that conclusion: The petitioner in *John R. Sand & Gravel* argued that 28 U.S.C. 2501 is not jurisdictional because in the same 1948 recodification it was placed "in a procedure chapter of the Judicial Code" "separate and distinct * * * from the jurisdictional provi-

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[9] Respondent's reliance (Br. 32-33) on *FDIC* v. *Meyer*, 510 U.S. 471 (1994), is misplaced. *Meyer* interpreted a statutory provision that referred to claims "cognizable *under section 1346(b)*," but the Court expressly distinguished this inquiry from "whether a claim is cognizable *under the FTCA* generally." *Id.* at 476-477 & n.5. Thus, *Meyer* discussed which elements *of Section 1346(b)* are jurisdictional, but had no occasion to go further and "explain[] exactly what about the FTCA is jurisdictional." Resp. Br. 32.

sions." Pet. Br. at 10, 19-24, *John R. Sand & Gravel*, *supra* (No. 06-1164). As it did before, the Court should reject that argument.

2. Respondent also cannot square her argument with Congress's enactment of numerous private laws granting district courts "jurisdiction" to hear untimely FTCA claims. Respondent maintains that "no inference can be drawn" from those bills (Br. 43), but Congress would not have needed to "confer[]" "jurisdiction" "*notwithstanding*" the time bar if it did not consider that bar to be a jurisdictional impediment. U.S. Br. 44-46.

Respondent observes (Br. 43) that other private laws authorized untimely FTCA claims without using the word "jurisdiction." But that does not mean Congress was "inconsistent[]" (*ibid.*) in viewing the time bar as jurisdictional. Indeed, the legislative history of those laws expressly states that their purpose was to "confer *jurisdiction* on a district court and waive lapse of time." H.R. Rep. No. 434, 94th Cong., 1st Sess. 1 (1975) (emphasis added); see, *e.g.*, H.R. Rep. No. 2450, 84th Cong., 2d Sess. 1 (1956); S. Rep. No. 837, 84th Cong., 1st Sess. 3 (1955).

Respondent further asserts (Br. 43) that Congress's decision "to revive a claim that a *court* deemed time-barred" does not show that Congress agreed the bar was jurisdictional. But several of the private laws involved claims that had never been presented to a court, where the jurisdictional conclusion was Congress's alone. See, *e.g.*, H.R. Rep. No. 58, 91st Cong., 1st Sess. 2-3 (1969); H.R. Rep. No. 120, 85th Cong., 1st Sess. 3 (1957). Moreover, if Congress had disagreed with courts on this issue it would have clarified that equitable tolling was available when it reenacted the

time bar in 1966. Instead, Congress adhered to the rule recognized in those decisions by reenacting the bar without material change and rejecting proposals to embrace equitable tolling in subsequent decades. See U.S. Br. 39-44, 47.

3. Even if this Court were to conclude that the FTCA's time bar is not jurisdictional, respondent cannot refute the powerful evidence that Congress nonetheless intended to preclude equitable tolling. Respondent's sole textual argument to the contrary relies on 28 U.S.C. 1346(b)(1) and 2674, which provide that the United States is liable under the FTCA to the same extent as a private person under state tort law. Resp. Br. 37-38, 44-51 & n.6.[10] But as respondent elsewhere seems to recognize (Br. 50), a key purpose of the FTCA limitations provision is to ensure that the deadline for filing an FTCA action will *not* mirror private-party, state-law tort suits. As this Court has observed, "Congress has been specific in those instances where it intended the federal courts [applying the FTCA] to depart completely from state law." *Richards*, 369 U.S. at 14. Indeed, *Richards* identified the FTCA time bar as a prime example of a provision in which Congress "specifically" indicated that "the liability of the United States is *not* co-extensive with that of a private person under state law." *Id.* at 13-14 & n.28 (emphasis added). Because Section 2401(b) imposes uniform time limits that apply to all FTCA claims without regard to how private defendants are treated in analogous circumstances, Sections

[10] Respondent emphasizes (Br. 38-39) that the Tucker Act does not contain similar language, but that is because Congress did not need to borrow state-law substantive standards of liability for the federal claims under the Tucker Act.

1346(b)(1) and 2674 provide no support for equitable tolling.

4. Moreover, respondent has no persuasive answer to our point (U.S. Br. 35-36, 43-44) that when Congress wanted to permit equitable tolling in closely analogous contexts, it did so expressly. In an effort to explain why Congress affirmatively authorized tolling in specified circumstances in Tucker Act suits (see 28 U.S.C. 2501) but not FTCA actions, respondent clings (Br. 51-52) to her flawed distinction between the Court of Claims and district courts. But even if this Court had not already rejected that theory, see *Lehman*, 453 U.S. at 164, it would not explain why Congress expressly permitted tolling in suits brought *by* the government under 28 U.S.C. 2416, which Congress enacted *the very same day* in 1966 as it reenacted the FTCA time bar without any equitable exception. U.S. Br. 43-44. See also H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947) (observing that 1948 recodification "omitted as superfluous" an express prohibition on tolling beyond specified disabilities in 28 U.S.C. 2401(a)).

5. Respondent also fails to overcome the significance of Congress's decision to extend the FTCA's suit-filing deadline in 1949. She maintains (Br. 52) that Congress simply "felt that claimants *as a class*" needed additional time. But the relevant House and Senate Committees observed that the existing one-year period was unfair in individual cases of hardship. U.S. Br. 38-39. That concern makes sense only if Congress understood the original time bar to preclude equitable tolling on a case-by-case basis.

6. Finally, respondent points to (Br. 53) the FTCA's purpose of providing a remedy to victims of

government negligence. But "no legislation pursues its purposes at all costs" and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). Indeed, the "very purpose" of the FTCA's time bar is to "make it impossible to enforce what were otherwise perfectly valid claims" if they are filed beyond the period Congress specified. *Kubrick*, 444 U.S. at 125. This Court must "give * * * effect" to that time bar "in accordance with * * * legislative intent." *Ibid.* Because Congress did not intend to permit tolling under the FTCA, respondent cannot excuse her untimely filing.

### D. The Fraudulent Concealment Doctrine Does Not Support Respondent's Equitable Tolling Argument

Respondent argues (Br. 4-5, 12, 18-20, 45-49 & n.6) that Congress intended the FTCA time bar to incorporate the fraudulent concealment doctrine. That doctrine delays accrual of a claim when a defendant prevents a diligent plaintiff from discovering her cause of action by concealing the relevant facts. See *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414, 1419-1420 (2012); Note, *Fraudulent Concealment of a Right of Action and the Statute of Limitations*, 43 Harv. L. Rev. 471, 473-476 (1930). We agree that fraudulent concealment can affect the *accrual* of an FTCA claim, but that does not justify the distinct and much broader *equitable tolling* rule applied here. Moreover, respondent cannot in any event benefit from delayed accrual based on fraudulent concealment.

1. This Court has long observed that the statute of limitations in cases involving fraudulent concealment

"does not begin to run until the fraud is discovered." *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 350 (1875); see *Exploration Co.* v. *United States*, 247 U.S. 435, 447 (1918) (reaffirming *Bailey*'s rule that in cases involving fraudulent concealment "the cause of action d[oes] not accrue until the discovery of the fraud"). The discovery rule for fraudulent concealment is an "exception to the general limitations rule that a cause of action accrues once a plaintiff has a complete and present cause of action." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644 (2010) (internal quotation marks and citation omitted). The core justification for the rule is that defendants are not *entitled* to repose when their own deceptive conduct has foreclosed potential plaintiffs from seeking redress. By delaying accrual of a claim, the doctrine ensures that "the law which was designed to prevent fraud [does not] become the means by which it is made successful and secure." *Ibid.* (quoting *Bailey*, 88 U.S. (21 Wall.) at 349).

The fraudulent concealment discovery rule provides no support for interpreting the FTCA to permit equitable tolling. Unlike fraudulent concealment, equitable tolling does not require that a defendant's misconduct prevented a plaintiff from discovering her claim; it focuses instead on the *plaintiff* and whether there is an equitable reason for excusing her compliance with a statutory deadline, see *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014). And while fraudulent concealment only affects when a claim accrues, "equitable tolling pauses the running of" a limitations period *after* accrual. *Ibid.*[11]

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[11] Although delayed accrual and equitable tolling may produce the same result in certain situations, they are analytically distinct. See *Holland*, 560 U.S. at 647 ("We must * * * distinguish be-

There is a reasonable basis for presuming that Congress intended the FTCA to incorporate the fraudulent concealment discovery rule. That rule is "read into every" limitations statute, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946), and it is regularly applied in Tucker Act suits even though that time bar is jurisdictional and not subject to equitable tolling. See, *e.g.*, *Thompson* v. *United States*, 88 Fed. Cl. 263, 266 (Fed. Cl. 2009), aff'd, 480 Fed. Appx. 575 (Fed. Cir. 2012) (per curiam); *Young* v. *United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008), cert. denied, 555 U.S. 1214 (2009). Indeed, the FTCA (like the Tucker Act) expressly provides that the time limit for presenting an administrative claim does not begin to run until "such claim accrues." 28 U.S.C. 2401(b). But there is no comparable reason to think that Congress intended to permit equitable tolling; as we have established, the FTCA's text, context, and history instead demonstrate the opposite.

Thus, although fraudulent concealment affects the *accrual* of an FTCA claim, see, *e.g.*, *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 250 (1st Cir. 1990); *Diminnie* v. *United States*, 728 F.2d 301, 305 (6th Cir.), cert. denied, 469 U.S. 842 (1984), respondent errs in invoking the doctrine to support the court of appeals' equitable tolling analysis.[12]

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tween the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations" (citation omitted)); *United States* v. *Beggerly*, 524 U.S. 38, 49-50 (1998) (Stevens, J., concurring) (fraudulent concealment doctrine is "distinct from equitable tolling" and "might apply" to the Quiet Title Act, 29 U.S.C. 2409a, which cannot be tolled).

[12] This Court has sometimes used equitable tolling terminology when discussing the fraudulent concealment doctrine, even when it was clearly referring to the discovery accrual rule. See, *e.g.*, *TRW*

2. Respondent cannot claim delayed accrual based on fraudulent concealment because, as the district court concluded, none of the facts "were unknown to [her] or concealed by the United States." Pet. App. 6a.

Respondent claims the Federal Highway Administration (FHWA) negligently approved Arizona's allegedly defective cable median barrier for use on the National Highway System (NHS). J.A. 149-151. It was apparent the barrier might be defective when the accident occurred on February 19, 2005—and indeed, respondent sued Arizona less than one year later, alleging that the barrier was "not designed, constructed or maintained in conformance with generally accepted standards." J.A. 26, 29. Respondent also was aware that FHWA had approved the barrier. J.A. 145-146 (citing September 12, 2005 FHWA memorandum indicating barrier was "approved for use").[13] Thus, respondent knew every fact necessary to her FTCA suit more than *five years* before she filed an administrative claim.

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*Inc.*, 534 U.S. at 27 (summarizing applications of discovery rule, including principle that "equity tolls the statute of limitations in cases of fraud or concealment"); see also *Simmonds*, 132 S. Ct. at 1419-1420; *Irwin*, 498 U.S. at 96. In those cases, unlike this one, it made no legal difference whether fraudulent concealment was labeled a doctrine of tolling or accrual.

[13] Respondent incorrectly asserts (Br. 10) that FHWA made false representations in that 2005 memorandum. All the memorandum said was that FHWA "considered [the barrier] acceptable" for use on the NHS—and that was true. See FHWA, *Information: Generic Cable Barriers* (Sept. 12, 2005), http://www.safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/barriers/pdf/b64sup.htm. That is the very basis of respondent's FTCA claim: she alleges FHWA was negligent in granting the approval.

Respondent nevertheless asserts (Br. 10-11) that the time bar did not begin to run until April 2009, when her counsel supposedly "learned for the first time that the FHWA had knowingly permitted the cable median barrier to be installed and remain in service despite never having passed the FHWA's crashworthiness testing." But the record disproves that counsel only learned about this in 2009. In November 2006, respondent's counsel—who was representing plaintiffs in several cases involving the same barrier—submitted a FOIA request to FHWA with allegations that the agency had "approved [the barrier] for use on the NHS" and "deemed [it] * * * compliant" with crashworthiness standards, even though it was counsel's "understanding" that the barrier had "never passed [the allegedly required] testing." J.A. 35, 36, 41. In December 2007, respondent's counsel submitted an administrative FTCA claim on behalf of a different individual alleging that FHWA had negligently approved the barrier because it had not been crash tested. J.A. 106.[14] And in May 2008, respondent's counsel filed an FTCA suit on behalf of a different plaintiff alleging that FHWA was negligent in "approv[ing]" Arizona's cable median barrier because it was an "untested design." Compl. at 4, *Melvin* v. *United States*, 2:08-cv-00950-DKD (D. Ariz. May 20, 2008); see also J.A. 134-136.

Respondent does not—and cannot—explain how "the government prevent[ed] her from presenting a timely administrative claim" when her counsel was pursuing an FTCA suit based on materially identical

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[14] Notably, counsel acknowledged that the "deadline for presenting th[is] claim" was two years from the accident, J.A. 98, apparently recognizing there was no fraudulent concealment.

facts more than two years before she submitted a claim to FHWA. Br. 8 (capitalization omitted).

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

DECEMBER 2014