Nos. 13-1074, 13-1075

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

KWAI FUN WONG, CONSERVATOR

Respondent.

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of amicus curiae briefs have been filed with this Court.

The American Association for Justice is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. Many American Association for Justice members represent people who have been wrongfully injured, including those who have been injured by negligent employees of the Federal Government and who must seek compensation under the Federal Tort Claims Act.

American Association for Justice members are keenly aware of the importance of keeping the doors of our courthouses open for those who seek legal redress. Courts, including federal courts, have done so, using their inherent equitable powers. Federal courts of appeals have overwhelmingly held that courts may equitably toll the FTCA's time limitations in appropriate cases. The American Association for Justice is concerned that if the Government's position is adopted in this case—prohibiting federal courts from tolling those time limits in cases where the plaintiff has diligently pursued her cause of action but has failed to meet those deadlines for reasons beyond her control—those courthouse doors will be shut against claimants whom Congress intended to have their day in court. To protect the rights of those

persons, the American Association for Justice submits this amicus curiae brief.[1]

SUMMARY OF ARGUMENT

1. The question presented in this case, whether the time limitations imposed on plaintiffs by the Federal Tort Claims Act ("FTCA") may be equitably tolled, has been answered in the affirmative by all federal circuit courts of appeals to have addressed the question. The Government has provided this Court with no reason to reject that considered construction.

No one disputes that waiver of sovereign immunity and the scope of that waiver is a matter of congressional intent. But that intent cannot be reliably ascertained by examining this Court's decisions concerning other statutes reaching back to the 19th Century, or by looking to inconclusive legislative history or the bills Congress did not pass. The intent of Congress is clear from the text of the statute itself.

This Court set forth a bright-line rule for determining whether time limitations on Congress-created causes of action preclude courts from making use of equitable tolling: It is presumed that Congress intended to permit courts to equitably toll statutes of limitations unless Congress has issued a clear statement to the contrary. The Government's

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation of submission of this brief.

attempts to label the FTCA's time limitations as "jurisdictional" does not rebut this presumption. Indeed, this Court in recent cases has distinguished between those statutory requirements that are truly jurisdictional, in the sense of depriving the federal court of its adjudicatory power, and those that are mere "claims processing rules," which may be tolled. Generally, this Court has found that time limitations on the filing of claims against the Federal Government belong in the second category. The plain text of the FTCA indicates that its time limits are claims-processing rules as well.

Perhaps the most important textual indicator of congressional intent is the fact that Congress waived sovereign immunity and vested federal courts with the jurisdiction to hold the United States liable in the same manner and to the same extent as a private individual. Statutes of limitations in causes of action against private individuals are usually subject to equitable tolling. Congress intended the limitations on the national government's liability to be subject to the same equitable considerations.

Nor does the statutory phrase "shall be forever barred" rebut the presumption in favor of equitable tolling. That language, though emphatic, is not itself jurisdictional. Its plain meaning is that causes of action that have expired due to the time limits shall not be resuscitated. Equitable tolling, on the other hand, suspends the time limitation and prevents the cause of action from expiring. This Court has held that the same phrase used in the Tucker Act is jurisdictional and not amenable to equitable tolling. But that decision was based on the principle of *stare decisis*, not on the plain meaning of the statutory text. Moreover, there are other statutes that also employ

the "shall be forever barred" phraseology which this Court has held are subject to equitable tolling.

2. The interpretation of the FTCA time limits adopted by the lower court and the overwhelming majority of other federal courts of appeals is also consistent with the compensatory purpose of the FTCA. Congress enacted the statute, after decades of consideration, following a tragic aircraft accident that left families without legal recourse.

In addition, prohibiting courts from using their equitable tolling authority would allow the Government to take advantage of injured victims, including children, who are vulnerable to unexpected traps in FTCA law. One example is a provision under which private physicians employed at private medical facilities that receive federal funds may be deemed to be Federal Government employees. Courts have tolled the FTCA deadlines to prevent unfairness in such instances. It is consistent with Congress's compensatory purpose that courts exercise their equitable powers to avoid harsh results.

3. Federal courts' judicious use of equitable tolling of statutes of limitations also prevents deprivations of plaintiffs' constitutional rights to due process and access to the courts. In one case before this Court, the plaintiff was deprived of her cause of action, not because she lacked diligence, but because of shortcomings by the district court and magistrate system in processing her motions. This Court has previously held in similar circumstances that such a deprivation violated a plaintiff's right to due process.

In the other case before this Court, the plaintiff was prevented from timely filing her FTCA claim by the actions of a federal agency that concealed the Federal Government's role in causing a highway fatality. This Court has previously held that such concealment may amount to violation of plaintiff's constitutional right of access to the courts. In such cases, federal courts should be authorized to make use of their equitable power to toll the statutory time limits and thereby avoid deprivations of claimants' fundamental constitutional rights.

ARGUMENT

INTRODUCTION

President Abraham Lincoln famously declared, it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." *United States v. Mitchell*, 463 U.S. 206, 213 (1983) (quoting Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862)). It would be 84 years before Congress would shoulder that responsibility to render justice to those who have been injured because of the negligence of Federal Government employees by enacting the Federal Tort Claims Act.

The FTCA offers fair compensation for those who might be injured due to the negligence of government employees, including "tens of millions of Americans [who] receive medical care at military base facilities, U.S. Department of Veterans Affairs (VA) hospitals, and federally funded clinics," as well as the millions of Americans who "share the road every day with postal trucks and military vehicles." Laurie Higginbotham & Jamal Alsaffar, *Navigating The*

Federal Tort Claims Act, 47 Trial 14, 14 (2011). But the FTCA "also presents the challenge of satisfying myriad federal and state law requirements that threaten to destroy [a plaintiff's] chances of recovery." *Id*. One such challenge is compliance with the Act's time limits on presenting claims to the appropriate federal agency and on filing in federal court.

The doctrine of sovereign immunity is firmly rooted in American jurisprudence. *See Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.") Because any compensation for harm caused by government employees must necessarily be drawn from the Treasury, the authority to waive immunity is constitutionally placed in the hands of Congress. *See* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1264 (2009). As this Court has made clear, "[i]f any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress." *United States v. Dalm*, 494 U.S. 596, 610 (1990).

The Federal Government was never wholly unaccountable for wrongs to its citizens. The First Amendment guaranteed to Americans the right to petition their Government for redress directly through private bills in Congress. *Mitchell*, 463 U.S. at 212-213 (1983). In 1855 Congress established the Court of Claims and over the course of time enacted "a broad tapestry of authorized judicial actions against the federal Government." Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245,

1252-53 (2014). Among them is the Federal Tort Claims Act, which states:

> The United States shall be liable [for tort claims] *in the same manner and to the same extent as a private individual* under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674 (emphasis added). Congress provided that the federal courts

> [S]hall have exclusive jurisdiction of civil actions on claims 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, 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.

28 U.S.C. § 1346(b) (emphasis added). In a separate section, Congress also provided:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered

> mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

The question presented in this case—whether the time limitations prescribed in 28 U.S.C. § 2401(b) are subject to equitable tolling—is not an unsettled one. Nine United States courts of appeals have held or assumed that those limits may be equitably tolled. *See Sanchez v. United States*, 740 F.3d 47, 54 (1st Cir. 2014); *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194 (3d Cir. 2009); *Kokotis v. U.S. Postal Serv.*, 223 F.3d 275, 280-81 (4th Cir. 2000); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999); *Glarner* v. *United States*, 30 F.3d 697, 700-01 (6th Cir. 1994); *Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013); *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006); *Wong v. Beebe*, 732 F.3d 1030, 1046 (9th Cir. 2013), *cert. granted sub nom.*, *United States v. Wong*, 134 S. Ct. 2873 (2014); *Benge* v. *United States*, 17 F.3d 1286, 1288 (10th Cir. 1994). No circuit holds that federal courts lack jurisdiction to toll the FTCA time limitations where equity may require. The American Association for Justice respectfully submits that the Government has advanced no persuasive rationale for overturning that body of federal precedent.

I. THE TEXT OF THE FEDERAL TORT CLAIMS ACT SUPPORTS APPLICATION OF EQUITABLE TOLLING OF THE TIME LIMITS IN 28 U.S.C. § 2401(b).

The Government's position may be put succinctly: The statutory time limits are jurisdictional by congressional design, they are to be strictly

interpreted, and they do not permit equitable tolling. *See* Pet'r's Br.17, *United States v. Wong*, No. 13-1074 (U.S. Sept. 9, 2014). The Government correctly states whether federal courts may toll the Act's time limits for equitable reasons turns on the intent of Congress. *Id.* at 18. However, the Government devotes a large part of its argument to an attempt to establish congressional intent through examination of Congress's use of similar language in statutes enacted in 1863 and 1911, *see id.* at 20-28. The Government also looks for clues to congressional intent in other pre-FTCA statutes, *see id.* at 31-35; in the FTCA's inconclusive legislative history, *see id.* at 36-39; in the subsequent actions of Congress, *see id.* at 40-49; and in bills that Congress did not enact. *See id.* at 49-50.

Of course, as this Court has "repeatedly held, the authoritative statement [of Congress's intent] is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The American Association for Justice submits that the statutory text in this case gives no indication, much less a "clear statement," that Congress intended to prohibit federal courts from equitably tolling the FTCA time limitations in appropriate cases.

A. The Limitations Periods in 28 U.S.C. § 2401(b) Are Presumed to be Subject to Equitable Tolling in the Absence of a Clear Statement by Congress to the Contrary.

The task of ascertaining whether Congress intended to preclude federal courts from tolling the time limitations in 28 U.S.C. § 2401(b) begins with

this Court's decision in *Irwin v. Veterans Administration*, 498 U.S. 89 (1990).

Irwin's employment discrimination suit under Title VII of the Civil Rights Act of 1964 was dismissed for non-compliance with 42 U.S.C. § 2000e-16(c), which allows an individual a limited time to commence suit after receiving a right-to-sue letter from the Equal Employment Opportunity Commission. This Court granted certiorari "to resolve the Circuit conflict over whether late-filed claims are jurisdictionally barred." 498 U.S. at 92. This Court concluded that statutes of limitations in suits against the Government are not jurisdictional and may be subject to equitable tolling.

Chief Justice Rehnquist, writing for a unanimous Court, explained that "[t]ime requirements in lawsuits between private litigants are customarily subject to equitable tolling." *Id*. at 95. In addition, although waivers of sovereign immunity "must be unequivocally expressed, . . . [o]nce Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.*

This Court therefore announced as a "general rule to govern the applicability of equitable tolling in suits against the Government," that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id*. at 95-96. The Court viewed this general rule as "likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id*. at

95. This Court has also stated that "the presumption's strength is reinforced by the fact" that the Court will "not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (internal quotations and citations omitted).

The Government's heavy insistence that the FTCA time limits are "jurisdictional," *see* Pet'r's Br. 19, and its reliance on a line of decisions reaching back to the 19th Century in which this Court attached the jurisdictional label to time limitations, *see id.* at 22-24, essentially devalues the *Irwin* presumption.

Recognizing that "jurisdiction" has been a "word of many, too many, meanings," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998), this Court has "tried in recent cases to bring some discipline to the use" of the term. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). Not all statutory requirements that courts in the past typed as "jurisdictional" were truly essential to the court's power to decide the case. In recent cases, this Court has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). "Claim-processing rules," the Court has explained, merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203. Therefore,

> To ward off profligate use of the term "jurisdiction," [this Court has] adopted a

> "readily administrable bright line" for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has "clearly state[d]" that the rule is jurisdictional; absent such a clear statement, we have cautioned, "courts should treat the restriction as nonjurisdictional in character."

Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)).

In this case, the Act contains no clear statement by Congress that non-compliance with the six-month and two-year deadlines deprives the court of adjudicatory power or that Congress intended to prohibit courts from invoking the equitable tolling doctrine. 28 U.S.C. § 2401(b) is addressed to claimants, requiring them to take certain procedural steps at specified times. It "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [court]." *Henderson*, 131 S. Ct. at 1204. Moreover, the section in which Congress confers jurisdiction on federal courts to decide tort claims is 28 U.S.C. § 1346(b)(1), an entirely separate section which does not reference § 2401(b) or time limits. This Court has instead stated that "filing deadlines ordinarily are not jurisdictional; indeed, we have described them as 'quintessential claim-processing rules.'" *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (quoting *Henderson*, 131 S. Ct. at 1203). There is no clear statement in the statute that Congress intended otherwise in this instance.

B. Consent to Liability "To the Same Extent As a Private Individual" Indicates Congressional Intent That Time Limitations Be Subject to Equitable Tolling.

Under the FTCA, "[t]he United States [is] liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Likewise, section 1346(b)(1) grants the district courts exclusive jurisdiction over tort actions against the Government "under circumstances where the United States, if a private person, would be liable." *Id*. at § 1346(b)(1). As Justice Ginsberg, writing for the Court, has noted, "[o]nce the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity." *Franconia Assoc. v. United States*, 536 U.S. 129, 141 (2002).

The language used in the statute clearly indicates Congress's intent that equitable tolling apply to the limitations periods. This Court has stated, "It is hornbook law that limitations periods are customarily subject to equitable tolling . . . . Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted); *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (statutes of limitations "typically permit courts to toll the limitations period in light of special equitable considerations").

C. Statutory Command That Claims Not Filed Within Limitations Periods Be "Forever Barred" Does Not Prohibit Courts From Equitably Tolling Time Limits in Appropriate Cases.

The FTCA states that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless [a civil] action is begun within six months after . . . denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

The Government places a great deal of emphasis on Congress's use of the phrase "shall be forever barred." The Government contends that the "unusually emphatic form" of this phrase, *see* Pet'r's Br. 35, and the fact that the same phrase appeared in the 1863 and 1911 Acts, governing Tucker Act suits in the Court of Claims, *see* Pet'r's Br. 22 & n.7, demonstrate that the FTCA's time limits have "jurisdictional effect" and are "not subject to equitable tolling." *Id*. at 28.

This Court has explained that not all "'mandatory prescriptions, *however emphatic,* are . . . properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pacific R.R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. 67, 81 (2009)) (emphasis added). Courts, in the past, "including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." *Kontrick*, 540 U.S. at 454. The

Government's efforts to affix the label "jurisdictional" to the Act's time limits do not make a convincing argument.

More importantly, the plain meaning of the phrase "forever barred" is not inconsistent with the doctrine of equitable tolling. A fair reading of § 2401(b) is that any claim that has expired shall not be resuscitated. The focus of the phrase is the end point of the limitations period. The provision does not preclude delaying the start of the limitations period by invoking the discovery rule. *See United States v. Kubrick*, 444 U.S. 111, 123-24 (1979) (discovery rule of accrual applicable in FTCA actions). Nor should it preclude suspending the running of the time limit by equitable tolling, which "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014). In short, as Judge Patrick E. Higginbotham has remarked, equitable tolling "does not resuscitate stale claims, but rather prevents them from becoming stale in the first place." *Perez*, 167 F.3d at 916.

The Act's "emphatic" tone, therefore, does not indicate any congressional intent to treat the limitations periods any differently than other federal statutes of limitations, which "are generally subject to equitable principles of tolling." *Rotella v. Wood*, 528 U.S. 549, 560 (2000).

The Government makes much of the fact that Congress also used the phrase "shall be forever barred" in the Tucker Act, which, this Court held in *John R. Sand & Gravel Co. v. United States*, 552 U.S.

130 (2008), is not subject to equitable tolling. *See* Pet'r's Br. 19-21 & 28. However, as Judge Posner has pointed out, this Court's "opinion in *John R. Sand & Gravel* actually reaffirms the presumption that equitable tolling applies to statutes of limitations in suits against the government, while emphasizing that the presumption is rebuttable." *Arteaga*, 711 F.3d at 833.

Justice Breyer, writing for the majority in *John R. Sand & Gravel*, made clear that the Court's decision regarding the "jurisdictional" status of the Tucker Act time limit was not premised on a reading of the statutory text, but on "[b]asic principles of *stare decisis*" and the line of this Court's prior Tucker Act decisions, dating from the 19th Century. 552 U.S. at 139; *id*. at 134-35 (discussing cases, beginning with *Kendall v. United States*, 107 U.S. 123 (1883), in which the Court denied equitable tolling to a former employee of the Confederate States of America). *See also* Pet'r's Br. 22-24 (discussing the same cases). As Justice Ginsberg later pointed out, the Court decided *John R. Sand & Gravel* "largely on *stare decisis* grounds" and "relied on longstanding decisions of *this* Court typing the relevant prescriptions 'jurisdictional.'" *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173-74 (2010) (Ginsburg, J. concurring) (emphasis in original). *See also* Sisk, *supra*, at 1279 (The Court's decision in *John R. Sand & Gravel* "was premised squarely on the principle of stare decisis" and "adhered to a nineteenth century line of cases that regarded this particular statute of limitations as jurisdictional.").

Those concerns are absent here. This Court has not previously addressed whether Congress intended the FTCA time limits to be a "more absolute" type of

jurisdictional limitation that does not permit equitable tolling. *John R. Sand & Gravel*, 552 U.S. at 134. There is no "long line of this Court's decisions left undisturbed by Congress" from which, as the Government suggests, Pet'r's Br. 21, such an intent might be gleaned.

In any event, this Court has found congressional intent to permit equitable tolling in other similarly worded federal statutes of limitations. A provision of the Racketeer-Influenced Corrupt Organizations ("RICO") allows the victims of criminal enterprises to bring a civil action for damages. 18 U.S.C. § 1964. Civil RICO actions are governed by the four-year statute of limitations set out in the Clayton Act, 15 U.S.C. § 15b. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). That section provides that "[a]ny action to enforce a cause of action under [civil RICO] *shall be forever barred* unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (emphasis added). This Court has held that this limitation is subject to equitable tolling where the plaintiff has exercised "reasonable diligence." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-96 (1997).

Thus, the phrase "shall be forever barred" does not amount to a "clear statement" that a claimant's noncompliance with FTCA's time limits deprives the court of jurisdiction. The Government has failed to rebut the presumption that Congress intended to allow courts to apply equitable tolling in appropriate cases.

II. APPLICATION OF EQUITABLE TOLLING TO FTCA TIME LIMITATIONS IS CONSISTENT WITH THE CONGRESS'S COMPENSATORY PURPOSE.

The compensatory purpose of the FTCA is not disputed. On July 28, 1945, a fighter pilot lost his bearings in heavy fog and slammed his B-25 bomber into the Empire State Building. The plane ripped through the 78th and 80th floors, where the offices of the National Catholic Welfare Council were located, causing 14 deaths. Joe Richman, *The Day A Bomber Hit The Empire State Building*, *NPR All Things Considered*, July 28, 2008, *available at*, http://www.npr.org/templates/story/story.php?storyId=92987873.

That tragedy was a catalyst for enactment of legislation waiving the sovereign immunity of the Federal Government for tortious injury, which had been languishing in Congress for two decades. The Federal Tort Claims Act of 1946, was made retroactive to 1945 in order to allow victims of the B-25 crash to seek recovery. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 536 (2008). The statute represented a "legislative pledge of relief to those harmed by their government." *Id*. at 522.

This Court has described the Act as "the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953), *overruled in part on other grounds by*, *Rayonier Inc. v. United States*, 352 U.S. 315 (1957). The Court also noted that the FTCA "was Congress's solution" to the

"notoriously clumsy" device of petitioning Congress for private bills, by "affording instead *easy and simple access to the federal courts* for torts within its scope." *Id.* at 24-25 (emphasis added).

This Court has declared:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.

Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955).

This Court has stated it would not undermine the compensatory purpose of Congress by acting "as a self-constituted guardian of the Treasury [and] import[ing] immunity back into a statute designed to limit it." *Id.* at 69. *See also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (warning that "unduly generous interpretations of the exceptions [to FTCA liability] run the risk of defeating the central purpose of the statute") (internal quotation omitted).

It should also be kept in mind that the plaintiffs in personal injury actions against the government are often vulnerable victims. Congress's aim of providing easy and simple access to the federal courts for redress is undermined when the Government itself has a hand, intentionally or not, in placing impediments in their path to the courthouse.

One recurring instance involves an individual who is harmed by medical malpractice by a private physician at a private clinic where, unbeknownst to the patient or to the public at large, medical personnel are deemed to be federal government employees for purposes of the FTCA because the clinic receives federal funds.[2] Actions for damages caused by such physicians must be brought under the FTCA against the United States in federal court and subject to the FTCA's time limitations. *See Arteaga*, 711 F.3d at 830. Several courts have pointedly highlighted the inequity of the Government's attempts to take advantage of patients' understandable ignorance of this arrangement. As the Second Circuit stated:

> Patients receiving such treatment are not aware, because they are never told or put on any notice, that the clinics they attend are government-funded or that doctors treating them are government employees. Such an omission does not

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[2] "Pursuant to the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. § 233(g)-(n) (the Act), the employees of any federally supported health center are deemed to be employees of the United States for purposes of bringing civil actions against them for damages resulting from the performance of medical, surgical, dental or related functions." *Valdez ex rel. Donely v. United States*, 415 F. Supp. 2d 345, 347 (S.D.N.Y. 2006), *vacated*, 518 F.3d 173 (2d Cir. 2008). *See also* Richard W. Bourne, *A Day Late, A Dollar Short: Opening A Governmental Snare Which Tricks Poor Victims Out of Medical Malpractice Claims*, 62 U. Pitt. L. Rev. 87, 88-89 (2000) (While the "goal of this legislation is laudable . . . by not requiring service providers to carry and pay for malpractice insurance, the legislation hurts poor consumers of federally subsidized health care services, the very populations the federal program was meant to help.").

> rise to the level of fraud. Nevertheless, by not formulating a regulation that would require notice to a patient that the doctor rendering service to him is an employee of the United States, the Department of Health & Human Services has created a potential statute of limitations trap in states . . . [that] may provide a longer period of time than the FTCA to file a complaint. The number of cases in which the United States has sought to take advantage of this trap suggests that it is aware of the consequences of its failure to disclose the material facts of federal employment by doctors who might reasonably be viewed as private practitioners.

Valdez ex rel. Donely v. United States, 518 F.3d 173, 183 (2d Cir. 2008).

The Third Circuit has likewise noted the unfairness of dismissing a medical negligence claim as untimely where the injured victim is a child and plaintiff and plaintiff's counsel understandably rely on state laws that toll the statute of limitations for minors:

> We make one final observation about the inequity of the Government's position that should be apparent to all. The only reason that Santos has been barred from bringing her action is that at the time of her injury she was a minor, so her counsel understandably believed that the Pennsylvania statutory tolling rule protecting minors applied in her case. . . .

> Thus, the Government is contending for a result likely to prejudice the weakest and most vulnerable members of our society . . . There is no escape from the reality that the statute of limitations trap to which the court referred in *Valdez* is a perfect vehicle to ensnare children.

Santos ex rel. Beato, 559 F.3d at 203-04.

Congress did not intend the statutory protection extended to physicians to leave those injured by medical negligence without remedy. Indeed, Congress's purpose in waiving the doctrine of sovereign immunity to tort claims was to afford legitimate claimants their day in court. The Government concedes that dismissal of a plaintiff's cause of action in such circumstances is "harsh." Pet'r's Br. 39. The Government contends, however, that "Congress . . . expected that claimants in such cases would seek enactment of a private law—not that courts would grant equitable tolling." *Id*. It makes little sense that Congress would have replaced the widely criticized system of private bills to compensate tort claims with a judicial remedy, *except* for those claimants whose unfair treatment the courts have equitable powers to address.

III. DISTRICT COURTS SHOULD BE AUTHORIZED TO USE EQUITABLE TOLLING IN APPRORIATE CASES TO AVOID DEPRIVATIONS OF CLAIMANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS.

A. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to a Hearing on Their FTCA Claims for Reasons Beyond Their Control.

The cases before this Court present compelling examples of the federal courts' use of traditional equitable tolling to prevent not only inequitable, but unconstitutional outcomes. *United States v. Wong*, No. 13-1074, is an example of a claim that was diligently prosecuted by the plaintiff, but was rendered untimely under 28 U.S.C. § 2401(b) due to circumstances beyond her control.

Ms. Wong filed her administrative claim with the Immigration and Naturalization Service ("INS") on May 18, 2001, seeking damages arising out of conditions of her detention by the agency. The INS should have responded no later than November 19. Anticipating denial, Plaintiff moved for leave to file a civil action by way of an amended complaint containing an FTCA claim "on or after November 20," the first day she was permitted to file. The INS missed its deadline, but denied Wong's claim on December 3, which restarted her six-month period in which to file her civil action. On April 5, 2002, the magistrate judge issued a recommendation to the district court that Wong's motion be granted and that she be permitted

to file her amended complaint. However, the district court did not issue an order adopting that recommendation until June 25, three weeks after the six-month filing deadline had expired. Wong thereafter filed her amended complaint, and the district court granted the Government's motion to dismiss the complaint as untimely. *Wong v. Beebe*, 732 F.3d 1030, 1033-34 (9th Cir. 2013), *cert. granted sub nom.*, *United States v. Wong*, 134 S. Ct. 2873 (2014).

As the court of appeals was careful to emphasize, this result "was not the consequence of any fault or lack of due diligence on Wong's part. If anything, Wong took special care in exercising due diligence." *Id*. at 1052. The court continued,

> As the Magistrate Judge noted, it was "due solely to the delay inherent in the Magistrate Judge system" that no action was taken with respect to [Wong's] requests until the six-month limitations period had already run. Moreover, by informing the parties and the court of her desire to file an FTCA claim well before the filing deadline and requesting leave to do so, Wong fulfilled the notice concern that partially underlies limitations statutes. . . . Wong was entitled to expect a timely ruling on her request to amend, which was made with a great deal of time to spare. . . . In short, Wong's claim was rendered untimely because of external circumstances beyond her control.

Id. at 1052-53. In his separate opinion, Chief Judge Kozinski added by way of explanation that "federal

district courts are chronically overworked, facing volumes of motions and briefing every day. It thus took the court more than seven months to act on this routine motion—a delay Wong didn't cause and couldn't have foreseen." *Id*. at 1054 (Kozinski, C.J., concurring).

Where Congress has established a right and a procedure for vindicating that right, courts may not sit passively while systemic deficiencies rob claimants of the ability to make use of that procedure. This Court so held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Logan alleged that he was fired because of his physical disability in violation of the Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48, ¶¶ 851 *et seq*., which also established a comprehensive scheme for adjudicating such claims. When an employee has filed a charge of unlawful discrimination, the Act required the Illinois Fair Employment Practices Commission to convene a factfinding conference within 120 days to obtain evidence, ascertain the position of the parties, and explore the possibility of negotiated settlement. The findings may result in dismissal of the charge or more formal adversary proceedings against the employer. The complainant was entitled to full review by the Commission and, thereafter, to judicial review. *See* 455 U.S. at 424-25.

In Logan's case, however, the Commission failed to schedule a conference until after 120 days had elapsed. The Illinois Supreme Court held that the time limitation was mandatory and failure to comply with the deadline deprived the Commission of jurisdiction to hear Logan's case. *Id*. at 427;

Zimmerman Brush Co. v. Fair Employment Practices Comm'n, 411 N.E.2d 277, 281 (Ill. 1980).

This Court reversed. The Court began by recognizing that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan*, 455 U.S. at 428. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as plaintiffs attempting to redress grievances." *Id.* at 429; *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 804 (1996). In particular, the due process clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." 455 U.S. at 429 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)).

This Court explained that, while the legislature may create statutory rights and may establish reasonable rules for pursuing those rights, the due process clause imposes federal minimum procedural requirements of fairness. *Id.* at 432. "Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest." *Id.* "To put it as plainly as possible," the Court declared, "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* at 434. The Court took care to note that due process did not require a hearing on the merits of a claim "when the *claimant* fails to comply with a reasonable procedural requirement, or fails to file a timely charge." *Id.* at 434 n.7. But in Logan's case, "it is the *state system itself* that destroys a complainant's property interest, by operation of law, whenever the Commission fails to

convene a timely conference." *Id.* at 436. (emphasis added).[3]

The American Association for Justice submits that the court's authority to equitably toll the time limitations serves as a proper procedural safeguard to prevent such a deprivation of plaintiff's due process rights. Equitable tolling would have prevented just such a deprivation in *Logan*. As Justice Powell pointed out, "One would have expected this sort of negligence by the State to toll the statutory period within which a hearing must be held. The Supreme Court of Illinois, however, *read the statutory terms as mandatory and jurisdictional*." *Id.* at 443 (Powell, J., concurring) (emphasis added).

The American Association for Justice submits that a construction of 28 U.S.C. § 2401(b) that prohibits federal courts from making use of equitable tolling where a plaintiff has been diligent in pursuing her rights and has been deprived of a hearing for reasons that are not within her control would allow results that, as this Court found in *Logan*, violate due process.

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[3] This Court has also held that the constitutional right of access to the courts is implicated where "systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits." *Christopher v. Harbury*, 536 U.S. 403, 413 (2002). This court recognized an access to court claim whose justification "is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed." *Id.*

B. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to Access to Courts Where Government Actions Resulted in Claimant's Failure to Comply With FTCA Time Limits.

The basis for equitable tolling in *United States v. June*, No. 13-1075, also focuses on conduct by the Federal Government. Because the district court dismissed plaintiff's FTCA cause of action as untimely, this Court "accept[s] as true the allegations of the complaint." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012).

The case arises out of a highway tragedy on February 19, 2005 on Interstate 10 in Arizona. A driver lost control, entered the median, passed through the cable median barrier, and crashed into oncoming traffic, killing both the driver and her passenger. Plaintiff June filed an action against the state of Arizona for the wrongful death of the passenger, alleging that the cable median barrier installed at that location was defective and failed to prevent the car from crossing the median as intended. Resp't's Br. 10, *United States v. June*, No. 13-1075 (U.S. Nov. 4, 2014).

In September 2005, the Federal Highway Administration ("FHWA") issued a public memorandum falsely stating that the cable median barrier used on Interstate 10 had been approved as crashworthy. *Id.* For two years, FHWA refused to make personnel available for deposition in plaintiff's state court action. In April 2009 plaintiff's counsel was finally able to depose those employees and "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." *Id.* at 10-11.

After denial by FHWA of her administrative tort claim, June filed suit under the FTCA in district court and argued that the two-year limitation should be equitably tolled due to the Government's concealment. The district court granted the Government's motion to dismiss. *Id*. at 12. The court of appeals reversed, holding that federal courts may invoke the doctrine of equitable tolling. This Court should uphold the equitable powers of the courts to avoid dismissal of FTCA claims that would amount to violation of the plaintiff's right to access to the courts.

This Court has made clear that access to the courts is a fundamental constitutional right which this Court has grounded in "the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses." *Christopher*, 536 U.S. at 415 n.12 (citations omitted).

In that case, Jennifer Harbury, whose husband disappeared in Guatemala, alleged that U.S. State Department officials had falsely denied knowing of her husband's whereabouts and had concealed the CIA's involvement in his detention, thereby depriving her of the ability to file a lawsuit that may have saved his life. *Id*. at 405. Ms. Harbury was ultimately unsuccessful in this Court because her complaint did not describe the underlying cause of action she might have brought nor identify the remedy that might have been awarded. *Id*. at 415.

However, Justice Souter, writing for a unanimous Court, took pains to make clear: Actions by government employees to conceal or misrepresent facts and thereby prevent an individual from filing a legitimate lawsuit in which relief might be awarded constitute a violation of the individual's right of access. The Court's opinion cites with approval a line of decisions by U.S. courts of appeals that demonstrate this principle. *See id*. at 414 & n.7.

In one example, local prosecutors who falsified a death certificate to indicate suicide, rather than murder as the cause of death, may be held to have deprived the victim's family of access to court to file a wrongful death action against the murderer. *Ryland v. Shapiro*, 708 F.2d 967, 972-73 (5th Cir. 1983).

Similarly, where police officers tampered with evidence and gave false statements in order to cover up a police shooting of an unarmed black youth, the Fifth Circuit upheld an award of damages to the victim's family under 42 U.S.C. § 1983 for violation of their right of access to court to pursue a wrongful death action. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

The court stated,

> To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress.

Id. at 1261.

A third decision that this Court looked to is *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). Swekel's husband was fatally injured when he was struck by two cars as he crossed the street. Swekel successfully pursued a wrongful death action against the one driver. However, she alleged, police officers covered up evidence of the identity of the second driver because that driver was the son of a high-ranking police officer. Swekel brought a § 1983 action against the officers for violation of her right to access to courts, alleging that their concealment delayed her discovery of the identity of the second driver until after the wrongful death statute of limitations had passed. *Id.* at 1260-61.

The Sixth Circuit acknowledged that "a state official's actions in covering-up evidence [may amount] to a denial of access to the courts." *Id.* at 1262 (discussing both *Bell* and *Ryland*). However, the court pointed out, "[i]n most instances, state courts can address pre-filing abuses *by tolling the statute of limitations*." *Id.* at 1264. Because Swekel had not given the state court the opportunity to toll the limitation in her case, the court found that she had not been denied her federal constitutional right of access. *Id.*

This Court should recognize that equitable tolling of limitations periods is a tool that should be available to federal courts to suspend the time limitation and allow plaintiff's cause of action to proceed in circumstances such as those present in *United States v. Wong* and *United States v. June* where harsh enforcement of the deadlines would result in depriving plaintiffs of their constitutional rights to due process or access to the courts.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the judgments below.

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Respectfully submitted,

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