No. _____

In The
Supreme Court of the United States

SUSAN HERTZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER B. HERTZ, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should this Court grant certiorari where the Sixth Circuit Court of Appeals established a new rule of law governing the accrual of claims under the Federal Tort Claims Act in plane crash cases, which decision conflicts with both a decision of this Court and decisions of other Circuit Courts of Appeals and which, if not reversed by this Court, will result in substantial prejudice to the Petitioner and lead to the filing of numerous unnecessary Administrative Claims. Petitioner's husband died in a plane crash. Three weeks after the crash Petitioner acquired knowledge that the crash may have been caused by the actions of the air traffic controllers, who are employees of the United States government. Petitioner filed an Administrative Claim against the government within two years of learning facts evidencing possible government involvement in the crash but more than two years from the date of the crash. The Sixth Circuit found her claims to be time-barred and created a rule that in plane crash cases, a claim under the Federal Tort Claims Act accrues on the date of the crash if, within the subsequent twenty-four months, the claimant should have been able to determine whether to file an Administrative Claim. As stated above, such a rule is without precedent, conflicts with other relevant decisions, and review by this Court is warranted.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding.

Petitioner is an individual and therefore no corporate disclosure statement is necessary.

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BASIS FOR JURISDICTION

The judgment and opinion of the Sixth Circuit Court of Appeals was entered on March 31, 2009. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2401(b), part of the Federal Tort Claims Act ("FTCA"), provides as follows:

> 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.

(Apx. 12a.)

STATEMENT OF THE CASE

I. BACKGROUND FACTS

This is a wrongful death suit brought under the FTCA against the United States for negligence and reckless conduct by air traffic controllers which caused a plane crash. On May 31, 2004, Petitioner/Plaintiff Susan Hertz' ("Plaintiff" or "Petitioner") husband, Roger B. Hertz, was a passenger on board an amateur-built airplane for a business trip from Michigan to Oregon. (Complaint, ¶ 9). The plane was flown by a licensed pilot and there was one other passenger on board in addition to Plaintiff's husband. (National Transportation Safety Board's Factual Report ("NTSB Report"), p. 1; Apx. 15a.) During the flight, the pilot requested the air traffic controllers to provide vectors around adverse weather and informed air traffic control that the aircraft was not equipped with weather radar. (*Id.*, p. 1a; Apx. 16a-17a.) Despite this explicit request, the air traffic controllers failed to provide adverse weather avoidance as they are required to do. (*Id.*, pp. 1a, 1f; Apx. 16a, 18a.) Instead, the air traffic controllers' instructions, which the pilot followed, directed the aircraft into level-six thunderstorm activity, the most extreme thunderstorm classification. (*Id.*, p. 1a; Apx. 17a-18a.) Upon entering this adverse weather, the plane went into a spiral descent and crashed in the woods near Vermontville, Michigan, killing all on board. (*Id.*, pp. 1b, 1c; Apx. 19a-20a.)

On June 25, 2004, in a telephone conversation with the NTSB investigator-in-charge, Plaintiff learned for the first time that the NTSB's investigation (the only investigation permitted by law) suggested that the

plane crash, and, accordingly, her husband's death, may have been caused by the actions of air traffic control. (Affidavit of Susan Hertz, ¶¶. 5-9; Apx. 34a-35a.) This was the first time Plaintiff learned (or could have possibly known) that air traffic control may have been the cause of her husband's death.

Plaintiff retained counsel (who were subsequently replaced by her current counsel) in July 2004 to prosecute any claims she had relating to her husband's death. (*Id.*, ¶10; Apx. 36a.) On June 9, 2006, Plaintiff served an Administrative Claim, known as a Form 95, relating to her husband's death on the Federal Aviation Administration ("FAA"). (Plaintiff's Form 95; Apx. 40a.) The FAA denied Plaintiff's claim as untimely because it was served more than two years after the date of the accident. (June 15, 2006 Letter from FAA; Apx. 107a.)

II. DISTRICT COURT CASE AND DECISION

On December 8, 2006, Plaintiff filed a wrongful death action under the FTCA against the United States in the United States District Court for the Eastern District of Michigan alleging air traffic control negligence. The district court had jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331 and 1346(b). The United States moved to dismiss the complaint on statute of limitations grounds because the Administrative Claim was not filed within two years of the decedent's death. (Defendant's Motion to Dismiss.) Plaintiff opposed the motion. (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss.) Oral argument was held. (April 5, 2007 Transcript.)

In response to the motion, Plaintiff argued that her claim was not barred because it did not accrue until she first became aware (or could possibly have become aware) that the conduct of air traffic controllers may have caused her husband's death. On April 6, 2007, the district court granted the United States' motion and dismissed Plaintiff's complaint, essentially finding that the claim accrued on the date of the accident. (Apx. 10a.) The district court also noted that Plaintiff had 22 months in which to file her claim after she spoke with the NTSB investigator-in-charge. (Apx. 10a.)[1] Plaintiff timely appealed the district court's decision to the Sixth Circuit Court of Appeals.

III. DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS

On March 31, 2009, the United States Court of Appeals for the Sixth Circuit affirmed the district court's order granting Defendant's motion to dismiss. (Apx. 1a.) The court held that "an [FTCA] claim accrues when a plaintiff possesses enough information with respect to her injury that, '[h]ad [she] sought out independent legal and [expert] advice at that point, [she] should have been able to determine in the two year period whether to file an administrative claim.'" (Apx. 4a-5a, cites omitted.) The court noted that in cases such as medical malpractice claims, a plaintiff might need to know of doctor-caused harm in order for his or her claim to accrue, but "deaths by plane crashes are different." The court then stated that "plane crashes by their nature typically involve negligence

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[1] Plaintiff also made an equitable tolling argument which was rejected by the lower courts and is not at issue in this petition.

somewhere in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim." (Apx. 5a, emphasis in original.) The court found that because Plaintiff knew within the two year period following the crash that she had a claim against the government, her claim accrued on the date of injury, *i.e.*, on the date of the crash. (Apx. 6a.) In so holding, the Court of Appeals created a new rule of law that an FTCA claim arising from a plane crash accrues on the date of the crash if the claimant was able to determine, or should have been able to determine, anytime within the subsequent two years that he or she had a claim against a governmental agent.

ARGUMENT

The FTCA grants a limited waiver of sovereign immunity and allows tort claims against the United States to proceed in the same manner and to the same extent as against a private individual under like circumstances. To pursue a FTCA claim against the United States the claim, known as an "Administrative Claim," must be "presented in writing to the appropriate federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b).[2] Whether

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[2] Courts have interpreted the FTCA as requiring that a plaintiff *both* file an Administrative Claim within two years of when the claim accrues *and* bring suit within six months of the denial of that Administrative Claim. *See*, e.g. *Schuler v. United States*, 628 F.2d 199 (D.C.Cir., *en banc*, 1980). It is undisputed that Plaintiff filed her complaint within six months of the denial of her Administrative Claim. Therefore, only the first of these two requirements is at issue in this case.

Plaintiff's Administrative Claim was timely depends on when her claim is deemed to have accrued.

The question of when a claim accrues under the FTCA is an important issue of federal law. This Court has rejected the argument that an FTCA claim always accrues on the date of the injury at issue. *United States v. Kubrick,* 444 U.S. 111; 100 S. Ct. 352; 62 L. Ed. 2d 659 (1979). In *Kubrick,* this Court found that an FTCA claim accrues when the plaintiff knows both the existence and the cause of his injury. Since *Kubrick* was decided, many Circuit Courts have applied *Kubrick* to determine claim accrual under the FTCA. The Sixth Circuit's holding that an FTCA claim against the government arising from a plane crash accrues on the date of the crash if the record reveals that the plaintiff should have been able to determine in the two year period following the crash whether to file an administrative claim is inconsistent with *Kubrick* and other Circuit Courts' interpretation of *Kubrick.* Strangely, the Sixth Circuit's rule looks to determine when the plaintiff knew or should have known of a possible governmental cause, the touchstone of the discovery rule, as discussed below. But the court's rule does not then utilize this date to start the accrual period, as should be the case, but instead uses it to determine that if this happened within two years of the crash, the discovery rule does not apply. In other words, the Sixth Circuit finds the discovery date to be relevant only because the court may then render it irrelevant for claim accrual purposes.

The Sixth Circuit's holding is inconsistent with *Kubrick's* finding that a claim accrues when the plaintiff knows both the existence *and the cause* of his

injury. The Sixth Circuit's holding also conflicts with other Circuits' holdings that claims brought under the FTCA accrue only when the plaintiff knows of the decedent's death *and* its potential causal connection with the government. For these reasons, as discussed in more detail below, review and reversal by this Court is warranted. Sup. Ct. R. 10(a) and (c).

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH A RELEVANT DECISION OF THIS COURT.

Although the general rule in FTCA actions is that the two-year period to file an Administrative Claim begins to run on the date of the injury at issue, *Kubrick,* 444 U.S. at 120, exceptions have evolved to avoid the injustice that would result from the application of this rule in a rigid, inflexible manner, for example, when a plaintiff knows she has been injured but does not yet know the cause of the injury. To remedy this injustice, this Court has held that the accrual of a cause of action under the FTCA occurs when a plaintiff has discovered *both* her injury *and* its cause. *Id.* (emphasis added). This judicial exception is commonly referred to as the "discovery rule." *See Chomic v. United States,* 377 F.3d 607, 613 (6th Cir. 2004); *McIntyre v. United States*, 367 F.3d 38, 51-52 (1st Cir. 2004).

A. *Kubrick* Held That a Claim Accrues When the Plaintiff Knows *Both* Her Injury *and* its Cause.

In *Kubrick*, a veteran brought suit under the FTCA to recover for hearing loss allegedly caused by medical malpractice in a Veterans Administration ("VA")

hospital. *Kubrick*, 444 U.S. at 113-15. In April 1968, the plaintiff was admitted to the VA hospital for treatment of an infection of the right femur. Following surgery, the infected area was irrigated with neomycin, an antibiotic. Approximately six weeks after the plaintiff was discharged he noticed some hearing loss and was diagnosed with bilateral nerve deafness. *Id.* Thereafter, in January 1969, after looking at plaintiff's VA hospital records, a specialist informed the plaintiff that it was highly possible that his hearing loss was the result of the neomycin treatment administered at the VA hospital. Based on this information, the plaintiff sought additional benefits from the VA. *Id.*

In June 1971, during the course of the plaintiff's unsuccessful administrative appeal from the VA's denial of his claim for benefits, another private physician told the plaintiff that the neomycin that caused his injury should not have been administered. *Id.* In 1972, the plaintiff filed a malpractice suit against the government under the FTCA.

The government moved to dismiss the plaintiff's complaint arguing that the claim was barred by the two year statute of limitations because it accrued in January 1969—when Kubrick learned that his hearing loss resulted from the neomycin. *Id.* at 115. The district court denied the motion, and the Court of Appeals for the Third Circuit affirmed, both holding that the plaintiff's claim did not accrue until June 1971, when he found out that the neomycin should not have been administered by the VA doctor. *Id.* at 116. This Court, however, reversed the lower court's decisions and held that that the plaintiff's claim accrued earlier, when he learned that the neomycin

treatment caused his hearing loss. *Id* at 115, 119. This Court reasoned that the two year period to bring an FTCA claim begins to run when the plaintiff has discovered the essential facts of his injury and its cause. *Id.* at 121.

In *Kubrick*, the plaintiff's claim did not accrue as early as the date on which the neomycin was administered. Nor did it accrue later when the plaintiff learned that the administration of neomycin may have been improper. Instead, his claim accrued when he learned that his hearing loss may have been caused by the actions of a government employee in administering neomycin, knowledge he gained months after the administration of the medication, and after discovery of the injury. *Id.* at 115, 119. Thus, the Administrative Claim period does not begin to run until there is knowledge of the cause of an injury (the administration of neomycin there; the activities of air traffic control here), which may come after discovery of the injury (hearing loss there; death by plane crash here) and before discovery of legal culpability (medical malpractice there; air traffic control negligence here). It simply cannot be said after *Kubrick* that an FTCA claim accrues on the date of injury, regardless of knowledge, or lack of knowledge, as to its cause.

B. The Sixth Circuit's Opinion Ignores *Kubrick's* Knowledge of Cause Requirement.

The Sixth Circuit's decision ignores the cause element of claim accrual acknowledged in *Kubrick*. Its explanation for not following *Kubrick* is that death by plane crashes are different, for purposes of claim accrual, than death by, for example, cancer. (Apx. 5a.)

Yet, *Kubrick's* claim accrual rule is not specifically limited to medical malpractice claims, and has been applied in cases involving claims other than malpractice. *See e.g., Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003) (applying discovery rule in negligent supervision case involving plaintiff's death due to criminal conduct of nurse at VA hospital); *Rakes v. United States*, 442 F.3d 7 (1st Cir. 2006) (wrongful disclosure and negligent supervision claims under the FTCA accrue only when person in the plaintiff's position has sufficient facts to permit reasonable person to believe there is a causal connection between the government and the injury); *McIntyre*, *supra*, 367 F.3d 38 (discovery rule applied in wrongful death case against federal government involving negligence in revealing victim's status as FBI informant); *Ramming v. United States*, 281 F.3d 158, 162 -63 (5th Cir. 2001) (malicious prosecution claim brought under FTCA only accrues when plaintiff is aware of the injury and the connection between the injury and the government's actions); *Garza v. United States,* 284 F.3d 930, 934 (8th Cir. 2002) (negligent supervision FTCA claim accrues only when plaintiff has reason to believe he has been injured by an act or omission of the government). This makes sense because *Kubrick's* logic applies to all types of cases in which the injured party does not (and could not) immediately know the cause of his or her injury, regardless of the nature of the claim.

The Sixth Circuit's analysis is inconsistent with *Kubrick*. The court took the date of injury, added two years, and asked whether the plaintiff could have determined whether to file a claim within that two year period. Under the Sixth Circuit's rationale, if a claimant learns of the potential cause attributable to

the government one year and 364 days after the accident, he or she must file the Administrative Claim the very next day (day 730) or be time-barred, because the knowledge acquired on day 729 (*i.e.,* one year and 364 days) causes the claim to accrue retroactively. This is not a proper claim accrual analysis under *Kubrick*.

In *Kubrick,* this Court found that for statute of limitations purposes under the FTCA, a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should not receive identical treatment.

> That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and *the facts about causation may be in the control of the putative defendant*, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of critical facts that he has been hurt or *who has inflicted the injury.* He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.

Kubrick, 444 U.S. at 122. (emphasis added).

Both the Sixth Circuit and the district court focused on Plaintiff's knowledge of the injury itself and her ignorance of her legal rights, and overlooked her ignorance as to who caused the injury. Although death by plane crash is different than death by cancer, this is irrelevant to the claim accrual issue and certainly should not mean that every claimant in an airplane crash must assume that government conduct may have played a role in the crash. The courts below were

required to base their claim accrual decision on when Plaintiff could have acquired possession of the critical facts regarding who inflicted her injury. *Id.* This is especially true because the facts about causation were in the exclusive control of the putative defendant, *i.e.*, the United States.[3] More specifically, the lower courts were required to analyze when Plaintiff should have known that the government may have caused the crash and held that it was then, and only then, that the cause of action accrued under the FTCA. Their failure to do so and the Sixth Circuit's new claim accrual rule conflict with this Court's analysis and holding in *Kubrick*, and warrants review, and ultimately reversal, by this Court.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FIRST, FIFTH, SEVENTH, AND EIGHTH CIRCUIT COURTS OF APPEAL ON THE SAME SUBJECT MATTER

The Sixth Circuit refused to follow the rule set forth in *Kubrick,* and held that Plaintiff's claim

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[3] In the weeks between the accident and when the NTSB investigator-in-charge advised Plaintiff that air traffic control conduct may have led to the crash, Plaintiff could not have conducted *any* investigation into the actions of air traffic control personnel; by law the NTSB had exclusive access to the information necessary to allow a reasonable person to conclude that air traffic control conduct caused the crash. *See* 49 C.F.R. § 831.2(a)(1). This is still the law. Until the NTSB releases information concerning an accident investigation, only the investigator-in-charge can release or approve the release of information to any person who is not a party to the investigation. 49 C.F.R. § 831.13(b). Petitioner was not a party to the NTSB's accident investigation.

accrued on the date of the crash. The court supported this refusal by distinguishing negligent air traffic control from negligent medical treatment.[4] *Kubrick* and its progeny, however, have made it clear that the "discovery rule"—or "inquiry-notice rule" as the Sixth Circuit now calls it—applies to cases outside of the medical malpractice arena. In other words, other circuits have held that non-medical malpractice claims brought under the FTCA do not accrue until the plaintiff knew or should have known of her injury and the cause attributable to the government. This Court could make this the clear rule by granting certiorari in this case.

A. The First, Fifth, Seventh, and Eighth Circuits Consider Knowledge of Government Cause When Determining Claim Accrual.

The First, Fifth, Seventh, and Eighth Circuit Courts of Appeal have applied *Kubrick's* holding that a claim accrues when the plaintiff knows or should have known of his injury and its cause to cases outside of the medical malpractice context, and have held that FTCA claim accrual awaits knowledge not just of *a* cause, but of government cause.

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[4] Although the First Circuit Court of Appeals in *Skwira* also distinguished between medical malpractice and other types of claims, as discussed *infra*, it noted that one is *more* likely to know of the cause of an injury in medical malpractice claims than in other sorts of claims, which argues in favor of expanding the cases in which the discovery rule applies, not restricting it, as the Sixth Circuit has done.

1. The Seventh Circuit Court of Appeals

Shortly after *Kubrick* was decided, the Seventh Circuit ruled on the issue of whether the discovery rule only applied to FTCA medical malpractice cases. *Stoleson v United States*, 629 F.2d 1265 (7th Cir 1980). In *Stoleson*, an occupational exposure case, the court held that the discovery rule is not limited to malpractice cases and found that the plaintiff's claim did not accrue until she had knowledge of causation. *Id.* at 1270-71. Indeed, the court found that the FTCA statute of limitations did not begin to run until the point in time in "at which [the plaintiff] could have pursued a claim against the Government." *Id.*

Several years later the Seventh Circuit further analyzed *Kubrick*, and held that when there are two causes of an injury, and only one is attributable to the government, the knowledge required to start the FTCA limitations period is knowledge of the government cause, not knowledge of the other cause or causes. *Drazen v. United States,* 762 F.2d 56, 59 (7th Cir. 1985). Although *Drazen* was a medical malpractice case, the court's opinion included a hypothetical analogy that is applicable to this case.

> A postal van knocks a man down. No one sees the accident, and the hospital to which the body is taken gives out the cause of death as a fractured skull. That is one cause but the postal service is another; and unless the decedent's survivors know or should know that the postal service caused the decedent's head to hit the pavement, just knowing that he died from a fractured skull does not start the statute of

> limitations running [for purposes of bringing a claim under the FTCA].

Id. The Seventh Circuit found that under this hypothetical, the plaintiff's claim would accrue when he or she first had reason to believe that an act or omission by the government had been a cause of the decedent's death, not when they knew an accident fractured the decedent's skull. The clock begins to run "when the government cause is known or when a reasonably diligent person reacting to any suspicious circumstances of which he might have been aware would have discovered the government cause." *Id.*

Here, the obvious cause of Plaintiff's decedent's death was the plane crash. There are numerous potential underlying causes of a plane crash, however, such as pilot error, pilot illness, mechanical failure, product defect, extreme weather, etc. The potential cause for purposes of the FTCA—air traffic control conduct in the instant case—which turned out to be the actual cause of the crash, was unknown (and unknowable) to everyone but the NTSB for the first 25 days after the crash. Under these circumstances, just knowing that Plaintiff's decedent died in an airplane crash did not start the statute of limitations running under *Kubrick,* as analyzed by other Court of Appeals, such as the Seventh Circuit. The clock did not start to run until Plaintiff knew or should have known that the actions or inactions of government personnel may have caused the crash.

2. The First Circuit Court of Appeals

The First Circuit Court of Appeals has held on numerous occasions that knowledge (actual or imputed

under a reasonable person standard) of government cause is the critical element in FTCA claim accrual. One of the first non-medical malpractices cases that made this distinction after *Kubrick* was *Attallah v. United States,* 955 F.2d 776 (1st Cir. 1992). There, the plaintiffs sued the government to recover damages for property theft following the robbery and murder of a courier by United States custom agents. *Id.* at 778. The First Circuit rejected the government's claim that the plaintiffs were armed with the crucial facts concerning their injury (loss of assets) and its cause (abduction and murder of courier) when the courier's body was found. Instead, the court found that the plaintiffs' cause of action did not accrue until government involvement in the abduction and murder were known, *i.e.*, criminal indictments were brought against the government agents.[5] *Id.*

Here, the Sixth Circuit should have followed the reasoning of the First Circuit and rejected the government's argument that Plaintiff's claim accrued when she was armed with facts concerning her injury (the decedent's death) and its cause (plane crash). Like the First Circuit, the court should have held that Plaintiff's cause of action did not accrue until she was aware (or through reasonable diligence could have become aware) of the facts concerning air traffic control's involvement in the crash.

After *Attallah,* the First Circuit thoroughly analyzed *Kubrick* and applied the knowledge of

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[5] Plaintiff's claims were ultimately barred on grounds unrelated to the FTCA statute of limitations.

government cause requirement to a non-medical malpractice wrongful death case in *Skwira,* holding:

> Outside the medical malpractice context, a claim accrues under the FTCA once a plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury.

344 F.3d at 82. *Skwira* involved a wrongful death case against the government for the death of a patient at the VA Medical Center. *Id.* at 67. Five years after the death, a nurse was convicted of murdering the decedent by injecting lethal doses of a drug to stimulate natural death. *Id.* The decedent's survivors filed suit one year later. *Id.* at 70. The court found that the cause of action accrued, at the latest, on the day after the patient's autopsy—which was after the date of death—because the plaintiffs then learned that the decedent did not die of causes listed on the death certificate.[6] *Id.* at 80. Since *Skwira,* the First Circuit has continued to apply what it refers to as the "discovery rule" to define FTCA claims accrual as distinct from the date of injury.

In a 2004 First Circuit case, a decedent's personal representative brought an action against the United States for negligence for revealing an informant's identity, the disclosure of which ultimately led to the

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[6] The court of appeals affirmed the trial court's dismissal of the plaintiffs' claim because they did not file their administrative claim within two years after the autopsy. *Id.* at 83.

decedent/informant's murder by gang members. *McIntyre*, *supra*, 367 F.3d 38. The court held that claims against the government by the murder victim's family accrued when the family learned that the FBI disclosed the victim's status, not earlier when they learned that the victim had been murdered. *Id.* at 54-56.

In analyzing whether the discovery rule extended the time in which to file an Administrative Claim, the *McIntyre* court examined this Court's holding in *Kubrick*. It acknowledged that once the claimant has "knowledge of the fact of injury *and the identity of the party that caused* [it], . . .", 367 F.3d. at 52 (emphasis added), the limitations clock begins to run. "The same is not necessarily true of plaintiffs who are ignorant of the facts, particularly when the government may be in possession or control of the necessary information." *Id.* The question posed by the court was whether a reasonable person in the plaintiff's position, after conducting a diligent investigation, would have uncovered a sufficient factual basis to believe, *more than two years prior* to the filing of plaintiff's Administrative Claim, that the FBI was the source of the leak of the decedent's identity to the gang members. The court answered no. *Id.* at 54.

In the case at bar, a reasonably diligent investigation could not have disclosed a connection between the plane crash and the government's acts at any point before the NTSB provided information about its preliminary conclusions to the decedent's widow. As mentioned above, the NTSB, a federal agency, was in exclusive possession and control of the investigation into the plane crash and the Plaintiff was not a party to the NTSB's accident investigation.

The First Circuit again analyzed the applicability of the discovery rule to FTCA claim accrual in *Rakes, supra*, 442 F.3d 7. *Rakes* involved claims by extortion victims who alleged that the extortionists were informants shielded by the FBI, and therefore the government was liable for plaintiffs' money losses. *Id.* at 11. The First Circuit reiterated that the discovery rule governs claim accrual under the FTCA where the cause of an injury is unknown (or unknowable) to the plaintiff for some time after the injury occurs. *Id.* at 19. *Rakes* acknowledged that this Court applied the discovery rule in the medical malpractice context in *Kubrick,* and that the First Circuit has applied the discovery rule outside of the medical malpractice context, making it a rule of general application. *Id.*, citing *Kubrick*, 444 U.S. at 111. It also acknowledged that the First Circuit has continuously held that the "start of the FTCA's limitation period may be delayed during a period in which an injured party has no way of knowing that he has been injured or that it was the government who caused the injury." 442 F.3d at 11.

Echoing the holding in *McIntyre*, the First Circuit panel in *Rakes* employed the "objective observer" standard in determining whether the injured party knew, actually or constructively, sufficient facts so as to permit a reasonable person to believe that there was a causal connection between the injury and the federal government. *Id.* at 20. In that case, the court determined that the plaintiffs did not have knowledge of the injury and the government causation on the date of the injury. *Id.* at 23. The court therefore extended the claim accrual date more than 14 years past the date of injury to a date in which the court believed the

plaintiffs should have known of the FBI's involvement.[7]

3. The Fifth Circuit Court of Appeals

The Fifth Circuit has similarly held that an FTCA claim accrues upon knowledge of the "existence of the injury and causation, that is, the connection between the injury and the defendant's actions." *Ramming, supra,* 281 F.3d at 162-63. As to causation, the court found that the claim does not begin to accrue until the claimant has "knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection...or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the [government's] acts and the [plaintiff's] injury." *Id.* (*citing Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995)).

Under this claim accrual test, Plaintiff's cause of action did not accrue until she had knowledge of facts that would lead a reasonable person to conclude that there was a causal connection between the government's acts—air traffic control—and the death of her husband. The Sixth Circuit's holding that her claim accrued on the date of the crash, rather than on the date when she learned (or for the first time could have possibly learned) that air traffic control's actions may have caused the crash, conflicts with this test.

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[7] The court ultimately held the plaintiff's claim was nonetheless barred because despite application of the discovery rule, the claim was still not timely filed.

4. The Eighth Circuit Court of Appeals

The Eighth Circuit is in line with the FTCA claim accrual analysis of the First, Fifth, and Seventh Circuits in non-medical malpractice cases. In *Garza*, *supra*, a federal prisoner, having escaped from a halfway house, killed his wife. 284 F.3d at 933. The wife's estate brought a wrongful death action under the FTCA against the United States Prison Bureau alleging that federal employees had failed to adequately supervise the prisoner and failed to advise authorities and the decedent of the prisoner's escape. *Id.* at 934. The Court of Appeals held that the FTCA claim accrued for limitations purposes when it was apparent that there was a relationship between the halfway house and federal authorities that would require further inquiry.

In support of its holding, the *Garza* court found that although a FTCA claim generally accrues when the plaintiff is injured, sometimes it does not accrue until the plaintiff knows of both an injury's existence and its cause. *Id.* at 934. The court further found that this discovery rule does not apply only to medical malpractice cases. Rather, it applies in situations where a plaintiff is blamelessly unaware of his claim because the facts establishing a causal link between the injury and the tortious activity are in control of the tortfeasor or are otherwise not evident. *Id.* "Therefore, where the government has shown that a suit was untimely in that the claim was presented more than two years from the date of injury, the plaintiff may show that he had no reason to believe he had been injured by an act or omission by the government." *Id.* The court continued, "when there are two causes of an injury, and only one is the government, the knowledge

that is required to set the statute of limitations running is knowledge of government cause, not just the other cause." *Id.* (*citing Drazen,* 762 F.2d at 59-60).

Although that court found that the claim accrual date was later than the date on which the decedent was murdered, it ultimately held that the estate's claim was nevertheless time-barred. This was because the court found that sufficient details were presented to give notice of the Bureau's involvement and to require inquiry as to their legal significance more than two years before the claim was filed (but significantly this date was after the date of the decedent's death). 284 F.3d at 937. Here, Plaintiff's claim accrued not on the date of the plane crash, but on the date at which Plaintiff had sufficient details to be on notice of the FAA's involvement, *i.e.,* June 25, 2004, and the Administrative Claim was filed within two years of that date.[8]

B. The Sixth Circuit's New Rule is Unsupported by any Precedent and Ignores the Issue of Knowledge of Government Cause.

The Sixth Circuit's holding is based on its newly announced rule that "a claim accrues when a plaintiff

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[8] Indeed, it cannot be disputed that plaintiff was diligent in discovering potential government culpability in the death of her husband. On June 25, 2004, less than one month after the crash, Plaintiff, on her own initiative, contacted the NTSB Investigator-in-Charge to learn of any facts surrounding her husband's death. Prior to that date, Plaintiff was in a state of shock, did not discuss the facts of the accident with anyone, and was not contacted by the NTSB. (Affidavit of Susan Hertz, ¶¶ 5-9; Apx. 34a-35a.)

possesses enough information with respect to her injury that, '[had] [she] sought out independent legal and [expert] advice at that point, [she] should have been able to determine in the two-year period whether to file an administrative claim.'" (Apx. 4a-6a.) The court found that a claim arising from a plane crash accrues on the date of the crash as long as the record reveals that the plaintiff should have been able to determine in the subsequent two year period whether to file an administrative claim. Under the court's analysis, Plaintiff's claim accrued on the date of the crash because she had 22 months after she discovered the potential cause attributable to the government—which, the court implied, was enough time to determine whether to file a claim. (Apx. 6a.)

The Sixth Circuit cited *McIntyre, supra,* and *Kronisch v. United States,* 150 F.3d. 112, 121 (2nd Cir. 1998), in support of the above stated rule. Neither of these cases, however, support such an unprecedented holding. The quoted language from *McIntyre* is from the portion of *McIntyre* that discusses *Skwira.* In *Skwira,* the court found that the two year limitations period began when a reasonable person would believe that there was a causal connection between the injury and the acts or omission of a government employee. *Skwira,* 344 F.3d. at 80. Both *Skwira* and *McIntyre* based their claim accrual decision on objective knowledge of a causal connection between the government and the injury. The Sixth Circuit, on the other hand, did not discuss how Plaintiff's knowledge or ignorance of air traffic control conduct affected claim accrual, or why the claim accrual date would be retroactively fixed, based on later events, *i.e.,* Plaintiff's discovery of the government's potential involvement in the death of her husband. As stated

earlier, the Sixth Circuit's decision is nonsensical in that it looks at when the plaintiff had knowledge or should have had knowledge of a governmental cause. In so doing, the Sixth Circuit appears to be applying the discovery rule, only to then hold that this means there is no discovery rule, and if you discovered the governmental cause any time within two years after the crash, your claim accrued back when the crash occurred. Clearly, this is not what the discovery rule required and such a holding is inconsistent with this Court's, as well as other Circuit's, application of the discovery rule.

In *Kronisch,* the Second Circuit Court of Appeals held that the plaintiff's FTCA claim was untimely because he was aware of the basic facts of his FTCA claim more than two years before he filed his claim. 150 F.3d. at 121. The Sixth Circuit relied on *Kronisch's* finding that "a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice." (Apx. 5a.) The court in *Kronisch*, like most courts, determined an accrual date based on what plaintiff should have known at different points in time. Once an accrual date is determined, the plaintiff's subsequent knowledge is irrelevant. Indeed, under the Sixth Circuit's analysis, if Plaintiff did not know, and could not have known, about air traffic control's conduct until more than two years after the crash, its holding likely would have been different. Here, however, the Sixth Circuit determined an accrual date based on subsequent knowledge. This approach to claim accrual is clearly inconsistent with *Kronisch, McIntyre* and the other cases interpreting *Kubrick.*

Although the Sixth Circuit implicitly conceded that June 25, 2004—the date Plaintiff spoke with the NTSB investigator—was the first day she knew or should have known that the government may have caused the crash, it ignored the rule set forth in *McIntyre*, *Rakes*, *Skwira*, *Garza*, *Ramming*, and *Drazen* that a claim does not accrue until the claimant knows or should have known of facts relating to government causation, and failed to set June 25, 2004, as the claim accrual date. The court sidestepped this critical analysis by stating that Plaintiff had plenty of time (22 months) to file her claim.[9] Yet, the Sixth Circuit should not have affirmed the district court unless it found that the government cause (air traffic control) was known, or should have been known, by plaintiff on or before June 8, 2004, two years and one day before the Administrative Claim was filed. It made no such finding because such a finding was not supported by the record.

By ignoring the issue of knowledge of government causation, or, more accurately, misapplying it, the Sixth Circuit established a claim accrual rule for FTCA cases that conflicts with the First, Fifth, Seventh, and Eighth Circuits.[10] That rule, if not

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[9] The Sixth Circuit's reference to 22 months is yet another example of its error in determining claim accrual in this case and why its unprecedented rule is inconsistent with §2401(b). The rule allows a claimant 24 months. A claim accrual rule that focuses on any period of time less than 24 months is improper and inconsistent with *Kubrick* and the Courts of Appeal cases discussed herein.

[10] The Ninth Circuit Court of Appeals held in a plane crash case that the plaintiff's claim accrued when she knew of her injury (the

reversed, will result in irreparable harm and substantial prejudice to Plaintiff. Moreover, such a precedent will encourage the filing of Administrative Claims after all plane crash cases in the Sixth Circuit. Counsel for injured families will file claims purely as a preventive measure in case it should be discovered within the next two years that a governmental agency may have been the cause of the crash, thus retroactively causing the FTCA claim to begin to accrue on the date of the crash.

In an apparent attempt to evade the question of knowledge of government cause, the Sixth Circuit stated that "plane crashes by their nature typically involve negligence somewhere in the causal chain; and the mere fact of this event is thus typically enough to put the plaintiff on inquiry notice of his claim." (Apx 5a.) First, this statement is simply not true. Events such as bird or lightening strikes, or pilot illness, may cause a crash without there being any negligence by anyone involved. Also, in the case of a single aircraft accident as in the case at bar, governmental involvement in the cause is not common. Second, even if this were true, it is irrelevant to the issue of claim accrual. An FTCA claim accrues only when a plaintiff is armed with sufficient facts to permit a reasonable person to believe that there is a causal connection

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death of her mother) and its immediate physical cause (the plane crash). *Green v. United States,* 172 F3d 56 (9th Cir. 1998) (unpublished table decision). Although the Ninth Circuit's ruling (which was not relied upon below) is consistent with the Sixth Circuit opinion at issue, it provides little guidance as it does not discuss the discovery rule in any depth or discuss the reasons for its holding. If nothing else, *Green* shows there to be a circuit split that further warrants this Court's review.

between the *government* and their injury, not just that someone at some point may have been negligent.

> [I]n the medical malpractice context, where there is often a direct relationship between the patient and doctor, one need not know of a governmental causal connection for a claim to accrue under the FTCA. Outside the medical malpractice context, however, the identity of the individual(s) responsible for an injury may be less evident, and a plaintiff may have less reason to suspect governmental involvement. Not surprisingly, courts of appeals have been slightly more forgiving in these cases, deferring the accrual of claims until a reasonably diligent plaintiff has reason to suspect a governmental connection with the injury.

Skwira, 344 F.3d at 77. The Sixth Circuit's reasoning for distinguishing plane crashes from other events is flawed. If anything, plane crashes present a more compelling case for application of the discovery rule because (1) the relevant facts are within the exclusive province of the NTSB and individual investigations are not allowed, and (2) air traffic control negligence involving the crash of a single general aviation aircraft is uncommon, and therefore, an unanticipated event.

Under *Kubrick* and its progeny as annunciated by the First, Fifth, Seventh, and Eighth Circuits, to determine the point of accrual, the Sixth Circuit and trial court were required to evaluate when a reasonable person received sufficient information to place him or her on notice that the government was responsible for the crash. Before June 25, 2004, a reasonable person in Plaintiff's position would not

have uncovered a sufficient basis to believe that the FAA was the cause of the crash because the NTSB had exclusive access to the necessary information. *See McIntyre*, 367 F.3d at 54; *see also* 49 C.F.R. § 831.2(a)(1)(2008). It was not until June 25, 2004, at the earliest, that Plaintiff (through her own initiative) could have discovered both her injury (the decedent's death) and the government-related cause (air traffic control). Under these circumstances, just knowing that Plaintiff's decedent died in an airplane crash should not have started the statute of limitations running for purposes of claim accrual under the FTCA. The clock did not begin to run until Plaintiff knew or should have known that the actions or inactions of government personnel caused the crash. *See Skwira,* 344 F.3d at 82; *Rakes*, 442 F.3d at 11; *McIntyre*, 367 F.3d at 52; *Garza*, 284 F.3d at 934; *Ramming,* 281 F.3d at 162-63. This occurred on June 25, 2004, and the Administrative Claim was timely filed before June 25, 2006, two years after the claim accrued. Therefore, the Sixth Circuit erred and review by this Court is necessary.

CONCLUSION

The Sixth Circuit Court of Appeals created a new rule of law that an FTCA claim arising from a plane crash accrues on the date of the crash if the claimant should have been able to determine anytime within the following two years that he or she had a claim against a governmental entity. The Sixth Circuit's holding and rule is inconsistent with this Court's holding in *Kubrick* and the First, Fifth, Seventh, and Eighth Circuits application of *Kubrick's* "discovery rule" regarding claim accrual.

Petitioner respectfully requests that this Court grant the writ of certiorari, review this case, and upon review, reverse the Sixth Circuit Court of Appeals' decision.

Respectfully submitted,

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