No. 09-26

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In *United States v. Kubrick*, 444 U.S. 111; 100 S. Ct. 352; 62 L. Ed. 2d 659 (1979), this Court found that a Federal Tort Claims Act ("FTCA") claim accrues when the plaintiff knows both the existence and the cause of his injury. In this case, both the Sixth Circuit and the district court focused on Plaintiff's knowledge of the injury and overlooked her inability to know who caused the injury. Pursuant to *Kubrick*, the courts below were required to base their claim accrual analysis on when Plaintiff could or should have acquired possession of the critical facts regarding who inflicted her injury. *Id.* More specifically, the Court of Appeals was required to analyze when Plaintiff should have known that government conduct may have caused the crash. That proper analysis, had it been done, would have led the Court to conclude that Plaintiff's claim accrued on June 25, 2004 and her notice of claim was timely.

Instead, when the Sixth Circuit held that "a claim accrues when a plaintiff 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,' it created a rule that conflicts with decisions of this Court and other Circuits. (Apx. 4a-6a.) Accordingly, this new claim accrual rule should be reviewed by this Court.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KUBRICK*.

The United States argues that the Sixth Circuit's ruling is consistent with *Kubrick* in that claim accrual does not await awareness by the plaintiff that her injury was negligently inflicted. In support, the United States repeatedly mischaracterizes Plaintiff's argument as one focusing on knowledge of negligence. (See United States Opposition, p. 4-5). Specifically, the United States claims that Plaintiff "contends that her claim was timely because it was filed within two years of learning...that air traffic controller negligence might have contributed to her husband's death." (United States Opposition, p. 4.) Indeed, the United States' "Question Presented" focuses on knowledge of negligence rather than knowledge of causation. This is not only a mischaracterization of Plaintiff's argument, it is also wrong. Plaintiff does not argue, nor has she ever argued, that claim accrual awaits knowledge of negligence. Rather, her argument echoes the holding in *Kubrick* that, for purposes of claims accrual under the FTCA, knowledge of potential *government causation* (measured by an objective standard) is necessary before a claim can accrue. These are distinct arguments with different legal consequences. Whereas knowledge of negligence has no bearing on claim accrual, claim accrual is dependent on the knowledge of potential government causation. *Kubrick*, 444 US at 118-120. Plaintiff's argument is based exclusively on knowledge of causation, not negligence, as the United States argues. Plaintiff's argument is therefore entirely consistent with *Kubrick*.

Because the Sixth Circuit's holding and new claim accrual rule focuses on the date of injury without considering when Plaintiff first should have acquired knowledge of potential government causation, it conflicts with *Kubrick,* and review, and ultimately reversal, by this Court is warranted.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The Sixth Circuit's holding also conflicts with the holdings by other Circuit Courts of Appeals 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. As more fully set forth in Plaintiff's petition, other circuits have held that 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. The United States erroneously claims that this is not the rule in other circuits and argues that knowledge of government cause is irrelevant in plane crash cases.

The United States tries to downplay the use of the word "government cause" in the decisions of other circuit courts. Citing *Jones v. United States,* 294 Fed. Appx. 476, 480 (11th Cir. 2008), the United States argues that the phrase "government cause" was used simply because the government was the only defendant in those cases. The United States, however, took this statement out of context. In the same paragraph to which the United States cites, the *Jones* court found that "[t]he knowledge of government cause" requirement simply clarified that a plaintiff

must know of the cause attributed to the defendant for the cause of action to accrue. *Id.* In other words, where the government is the defendant, a claim does not accrue until the plaintiff knows the cause attributed to the government. Here, that cause is air traffic control conduct. Accordingly, *Jones* supports Plaintiff's claim that other circuits have held that knowledge of potential government cause is the crux of claim accrual under the FTCA and, contrary to the United States' argument, it does not refute the requirement that a claim does not accrue until there is knowledge (measured objectively) of government causation.

The United States also argues that *Garza v. United States Bureau of Prisons,* 284 F.3d 930 (8th Cir. 2002), holds that an FTCA claim does not wait to accrue until plaintiff is aware that an alleged tortfeasor is a federal employee. Although this language is found in *Garza*, the United States misleads the Court as to its application and relevance to this case. *Garza* focused on a situation where the plaintiff knows who the alleged tortfeasor is but is unaware that the tortfeasor is a federal employee. *Id.* at 935. In that situation, the claim would accrue when the plaintiff knows the identity of the alleged tortfeasor, not when she knows that the tortfeasor is employed by the government. This rule is irrelevant to the case at bar as there is no dispute as to whether Plaintiff was aware that the air traffic controllers were federal employees. Rather, the holding from *Garza* that is applicable is that when the government argues that a suit is untimely under the FTCA, the plaintiff may show that the suit is timely if "he had no reason to believe he had been injured by an act or omission by the government." *Id.* at 934. Such is the case here as Plaintiff could not have known of

potential government involvement until June 25, 2004.[1]

The United States also urges the Court to ignore the cases cited by Plaintiff that require knowledge of government causation because none of those cases involved a plane crash. Identical facts, however, are not needed for the application of the discovery rule as enunciated by various circuit courts, *i.e.*, the statute of limitations does not begin to run until the claimant knew or should have known that the actions or inactions of the government caused the injury. See *Skwira v. United States*, 344 F.3d 64, 82 (1st Cir. 2003); *Rakes v. United States,*. 442 F.3d 7, 11 (1st Cir. 2006); *McIntyre v. United States,* 367 F.3d 38, 52 (1st Cir. 2004); *Garza v. United States,* 284 F.3d 930, 934 (8th Cir. 2002); *Ramming v. United States*, 281 F.3d 158, 162-63 (5th Cir. 2001); *Drazen v. United States,* 762 F.2d 56, 59 (7th Cir. 1985). The United States tries to dismiss these holdings out of hand by stating that they "have little if any bearing on determining the accrual date of a claim arising out of a plane crash." The United States fails, however, to explain why this rule is inapplicable to this case or why plane crash cases should be treated differently.

The cases cited by Plaintiff all involved situations where, like here, the government's involvement in the tort was unknown, or more importantly, unknowable,

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[1] It is not disputed that, due to the National Transportation Safety Board's exclusive control of the accident investigation, Plaintiff did not know, nor could not have possibly known, of potential government causation until her conversation with the National Transportation Safety Board's Investigator-in-Charge on June 25, 2004.

until a specific point in time after the injury. Plaintiff could not know that the government played a role in her husband's death until June 25, 2004. Accordingly, the Sixth Circuit's failure to consider the knowledge of "government cause" in its claim accrual analysis is inconsistent with the holdings from other Circuits and contrary to the precedent set by this Court in *Kubrick*.

Lastly, the United States evades the question of knowledge of government cause by quoting the Sixth Circuit's finding 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.) Even if this statement was true and supported by the record below, which it is not, 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 between the *government* and their injury, not when she should have known that some pilot or aircraft manufacturer or maintenance provider at some point in time may have been negligent.

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. This rule is contrary and inconsistent with this Court's holding in *Kubrick* and with several circuit courts. Accordingly, 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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