United States District Court
Eastern District of New York
---X

GINO FIERMONTE,

Plaintiff,

Civil Action No. 2:24-cv-02749-GRB-SIL

-against-

AIRPORT DESIGN CONSULTANTS, INC., BURNS ENGINEERING, INC., SAVIK & MURRAY, CONSULTING ENGINEERS, PLLC, SAVIK, MURRAY & AURORA CONSTRUCTION MANAGEMENT CO., LLC, SAVIK AND MURRAY, LLP, LONG ISLAND POWER AUTHORITY, TOWN OF ISLIP, JOHNSON, KUKATA & LUCHESSI, P.C. and THE UNITED STATES OF AMERICA,

Defendants.
---X

PLAINTIFF'S MEMORANDUM OF LAW OPPOSING DEFENDANT UNITED STATES' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

The Second Circuit has remanded this case for the Court to (1) determine whether Plaintiff Gino Fiermonte satisfied 28 U.S.C. § 2401(b)'s "requirement to commence an 'action' within six months of exhausting administrative remedies [under the Federal Tort Claims Act] when he filed his complaint in state, not federal, court," and, if in any event, (2) "Fiermonte qualifies for equitable tolling." *Fiermonte v. Deonarain*, No. 25-357-cv, 2026 WL 603557, at *4 (2d Cir. Mar. 4, 2026). The answers are both "yes," but to aid the Court in untangling these thorny questions of procedural law, we begin with the basics.

When a plaintiff brings a tort lawsuit against an employee of the United States, the case proceeds in one of two ways. If the employee was acting *within* the scope of his employment, the plaintiff's claim must proceed under the Federal Tort Claims Act, and the United States must be the defendant. *See* 28 U.S.C. § 2679(b)(1); *but see* 28 U.S.C. § 2679(b)(2). If the employee was acting *outside* the scope of his employment, the plaintiff's claim must proceed under state tort law, and the individual employee must be the defendant.

This scope-of-employment distinction has several critical implications. To begin, state courts lack jurisdiction to hear FTCA claims. *See* 28 U.S.C. § 1346(b)(1). And unlike state-law tort suits, FTCA suits must comply with two unique procedural requirements. First is administrative exhaustion: A plaintiff has two years to present a written request for payment to the agency that employs the tortfeasing employee. *Id.*; 28 U.S.C. §§ 2675(a), 2401(b). Second is a filing deadline: Once the agency denies the plaintiff's request for relief, he must bring an "action" within six months. 28 U.S.C. § 2401(b). If the plaintiff fails to comply with these requirements, his lawsuit "shall be forever barred."[1]

[1] Every circuit to have considered the issue (including the Second) has held that plaintiffs must satisfy *both* the two-year claim presentation deadline *and* the six-month filing deadline. *See Sconiers v. United States*, 896 F.3d 595, 599 (3d Cir. 2018) (collecting cases); *Willis v. United States*, 719 F.2d 608, 612–13 (2d Cir. 1983). But the FTCA's text imposes no such requirement. To the contrary, the relevant statutory text provides that an FTCA claim "shall be forever barred [1] unless it is presented in writing

Id. Section 2401(b)'s requirements are non-jurisdictional, but failure to comply with them can cause a plaintiff's lawsuit to be dismissed for failure to state a claim unless a court equitably tolls the deadlines. *See generally United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

The scope-of-employment question therefore determines the proper venue (state or federal court), the proper defendant (the individual employee or the United States), and the proper procedure (exhaustion requirement or no exhaustion requirement). In most cases—including this case—this question is settled by the Attorney General, who may certify under the Westfall Act that the United States is the proper defendant for the plaintiff's tort claims.[2] *See* 28 U.S.C. § 2679(d)(1). If the Attorney General certifies an employee's scope of employment, any state claims the plaintiff has against the employee transform into FTCA claims. 28 U.S.C. § 2679(d)(4). And if the Attorney General declines to certify the scope of employment (and the district court does not disturb that decision), the action is remanded to state court. 28 U.S.C. § 2679(d)(3). This means that once the scope of employment is certified, there is no going back to state court.

The Second Circuit has asked this Court to consider how these provisions intersect when a plaintiff submits an administrative claim to an agency, receives a denial, and sues the employee in *state* court within six months—all before the Attorney General has certified the employee's scope of employment. In the government's view, these lawsuits are retroactively doomed. To dismiss them, the

---

to the appropriate Federal agency within two years after such claim accrues *or* [2] 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) (emphasis added). Because the statute bars a claim only "unless" one condition "or" the other is met, the disjunctive "or" is most naturally read to render each clause independently sufficient to avoid the bar. Fiermonte presents this argument solely to preserve it for appeal, as the United States avers that he failed to file an appropriate "action" within six months of agency denial.

[2] "[W]hile a Westfall certification is conclusive for purposes of removal," federal courts may ultimately "determine independently whether the employee acted within the scope of employment[.]" *Harbury v. Hayden*, 444 F. Supp. 2d 19, 28 (D.D.C. 2006). That said, the Attorney General's certification generally controls.

United States need only wait until the FTCA's six-month filing deadline has lapsed, remove the case to federal court, certify the employee's scope of employment, and move to dismiss the plaintiff's claims for failure to file a federal lawsuit under the FTCA at the outset.

The government's arguments misunderstand the FTCA's text, disregard the Westfall Act, and threaten to preclude meritorious claims from proceeding based solely on a factor over which plaintiffs have no control: the timing of the federal government's employment certification. As a matter of law, plaintiffs like Fiermonte cannot know whether their claims should proceed under state law against the individual employee or under the FTCA against the United States until the government decides whether to certify the federal employee's scope of employment. Both the text of Section 2401(b) and provisions of the Westfall Act make clear that Congress anticipated situations like this one arising. Indeed, the Westfall Act requires the United States to "defend *any civil action* or proceeding brought in *any court* against *any employee* of the Government[.]" 28 U.S.C. § 2679(c) (emphases added). In cases like this one, that means a plaintiff's state-law claims become FTCA claims as soon as the government issues the employment certification, and the case proceeds like any other tort lawsuit against the United States. A contrary ruling would "allow the United States to 'sandbag' plaintiffs" by simply waiting until an FTCA lawsuit would be untimely before certifying the scope of employment. *McGowan v. Williams*, 623 F.2d 1239, 1243 (7th Cir. 1980). That is what the government has attempted to do here, but it was not Congress's design.

The government's other arguments fare no better. Even if this Court were to determine that Fiermonte had not complied with Section 2401(b), his claims against the United States should be equitably tolled. And Fiermonte's amended complaint—which was filed before this case was removed—complied with New York law. This Court should therefore deny the government's motion to dismiss.

STATEMENT OF FACTS

In September 2021, Fiermonte started a new job as an electrician at the Long Island MacArthur Airport. During his second day on the job, Fiermonte was repairing a runway sign when he was severely shocked. Doc. 1-1 ¶¶ 637, 681. Fiermonte's coworker, who was repairing the sign alongside him, died from electrocution. *See id.* ¶¶ 673–74. Relevant here, Fiermonte alleges that the incident and his injury resulted, in part, from a Federal Aviation Administration employee's negligent failure to keep the sign de-energized during the repairs. *Id.* ¶¶ 605–33, 673–74.

After the incident, Fiermonte did two things: He sued certain non-federal actors in state court in November 2022, and he submitted an administrative claim to the FAA in April 2023. The FAA denied Fiermonte's claim on September 28, 2023. Mem. Supp. U.S. Mot. Dismiss ("U.S. Br.") Ex. B. As the administrative claim was pending, Fiermonte's state-court lawsuit entered motion practice. The Suffolk County Supreme Court denied a private defendant's motion to dismiss on January 11, 2024, *see* Order Denying Mot. Dismiss, *Fiermonte v. Long Island Power Auth., et al.*, No. 205623/2022 (N.Y. Sup. Ct. Jan. 11, 2024), Dkt. No. 41, which prompted that defendant to answer Fiermonte's complaint on January 25, *see* Answer, *Fiermonte v. Long Island Power Auth., et al.*, No. 205623/2022 (N.Y. Sup. Ct. Jan. 25, 2024), Dkt. No. 43. Eighteen days later, Fiermonte filed an amended complaint in state court that, for the first time, named the FAA employee as a defendant in her individual capacity. *See* Am. Compl., *Fiermonte v. Long Island Power Auth., et al.*, No. 205623/2022 (N.Y. Sup. Ct. Feb. 12, 2024), Dkt. No. 45.

In April 2024—more than six months after Fiermonte's administrative claim was denied—the government removed the case to this Court.[3] Doc. 1. Later that month, the United States issued a Westfall Act certification for the employee, which established—for the first time—that she had been

[3] Technically, the notice of removal was filed by the FAA employee who has been represented throughout this case by an Assistant United States Attorney. *See generally* Doc. 1.

acting within the scope of her employment during the incident and substituted the United States as the defendant for Fiermonte's tort claims. Doc. 16-1. The United States then moved to dismiss the claims against it for lack of subject-matter jurisdiction. Doc. 16 at 2. According to the United States, the Court lacked jurisdiction because Fiermonte filed his amended complaint in state—not federal—court, which never had jurisdiction over his FTCA claims. *Id.* This Court granted the government's motion. Doc. 59-1 at 24. The Court based its holding on two rationales. First, it held that it lacked derivative jurisdiction because the state court never had proper jurisdiction over Fiermonte's FTCA claim. *See* Doc. 60 at 2. Second, it held that Fiermonte's amended complaint (which had been filed in state court fewer than six months after the FAA denied his administrative claim) was untimely. *See id.*; *see also Fiermonte,* 2026 WL 603557, at *2.

Fiermonte appealed, and the Second Circuit vacated and remanded. The court began with timeliness, explaining that "the Supreme Court has held that the FTCA's timing requirements under 28 U.S.C. § 2401(b) are nonjurisdictional" and may be equitably tolled. *Id.* at *3. Then, turning to this Court's derivative-jurisdiction holding, the Second Circuit clarified that "at the time [the FAA employee] removed the suit from state court, the federal government had not yet certified that, for the purposes of this lawsuit, [she] was a federal employee acting within the scope of her employment. . . . As a result, the state court had not yet been divested of jurisdiction under the Westfall Act." *Id.*

After holding that this Court had subject-matter jurisdiction, the Second Circuit considered whether Fiermonte's suit should be dismissed under Rule 12(b)(6) for failure to comply with the FTCA's procedural requirements. *Id.* It noted that Section 2401(b) requires plaintiffs to "commence an 'action' within six months of exhausting their administrative remedies," but it also found that "the statute is silent on whether the action must be filed in federal court[.]" *Id.* Explaining that this question has given rise to a circuit split, the Second Circuit remanded the case to this Court to address two questions: (1) whether Fiermonte "satisfied Section 2401(b)'s requirement to commence an 'action' within six months of exhausting administrative remedies when he filed his complaint in state, not federal, court"; and (2), if not, whether Fiermonte "qualifies for equitable tolling" under *Kwai Fun Wong*. *Id.* at *4.

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

I. Fiermonte's amended complaint complied with the FTCA's procedural requirements.

The Second Circuit instructed this Court to begin its analysis by deciding whether Fiermonte has satisfied the FTCA's pre-filing requirement "to commence an 'action' within six months of exhausting administrative remedies." *Fiermonte*, 2026 WL 603557, at *4 (citing 28 U.S.C. § 2401(b)). Straightforward statutory construction confirms that he has.

The starting point for statutory analysis is the text. *Babb v. Wilkie*, 589 U.S. 399, 404 (2020). Here, the text of Section 2401(b) is clear. It does not require a plaintiff to file a "*federal* action" within six months of the denial of her administrative claims—it simply requires an "action." 28 U.S.C. § 2401(b). Congress added this language to the FTCA in 1966, *see* Pub. L. 89-506, 80 Stat. 306 (1966), and readers at the time would have understood that "action" meant "[t]he legal and formal demand of one's right from another person or party made and insisted on in a court of justice," *Black's Law Dictionary* 49 (4th ed. 1951).[4] The word carries with it no distinction between a lawsuit filed in state or federal court. And for good reason. Congress chose this open-ended word because a plaintiff cannot

[4] The same was true when Congress passed the FTCA in 1946. *See Black's Law Dictionary* 41 (3d ed. 1933) (identical definition).

be certain that the federal employee was acting within the scope of his employment until *after* the plaintiff files suit.

The text of the Westfall Act, which Congress passed in 1988, confirms this understanding. Before the Act, individuals harmed by the torts of federal employees could choose between (1) suing those employees individually under state law and (2) suing the United States under the FTCA. *See generally Westfall v. Erwin*, 484 U.S. 292, 293 (1988). The Act amended the FTCA to make the United States the exclusive defendant for tort claims arising out of federal officials' actions taken in the scope of their employment. *See* 28 U.S.C. § 2679(b)(1).

With this exclusive remedy came certain obligations on the federal government—several of which explicitly contemplate timely state-court lawsuits forming the basis of FTCA liability. Among other things, the Act requires the United States to "defend *any civil action* or proceeding brought in *any court* against *any employee* of the Government[.]" 28 U.S.C. § 2679(c) (emphases added). It requires the Attorney General to determine whether the employee was acting within the scope of her federal employment. 28 U.S.C. § 2679(d)(1)–(3). If so, it requires the United States to remove the case to federal court and step in as the defendant. 28 U.S.C. § 2679(d)(2). And if not, it requires the court to send the case *back* to state court. 28 U.S.C. § 2679(d)(3).

The employment certification cannot take place until a lawsuit has already been filed, and a plaintiff cannot know in advance whether the government will issue the certification. Once the scope of employment has been certified, "any action" originally filed in state court "shall proceed in the same manner as any action against the United States filed" under the FTCA to begin with. 28 U.S.C. § 2679(d)(4). It would be bizarre for Congress to lay out such comprehensive procedural mechanisms if timely state-court complaints could not satisfy the FTCA's requirement to file an "action" within six months of agency denial. *See* 28 U.S.C. § 2401(b). Indeed, such an interpretation would render much of the Westfall Act useless.

A commonsense application of Section 2401(b)'s text—paired with the procedures laid out in the Westfall Act—demonstrates that Fiermonte's amended complaint complied with the FTCA's timing requirements. The FAA denied Fiermonte's administrative claim on September 28, 2023, U.S. Br. Ex. B, and he filed his amended complaint on February 12, 2024, *see* Doc. 1-1. Because Fiermonte filed his amended complaint—an "action" under Section 2401(b)—fewer than six months after the denial, he complied with Section 2401(b)'s timing requirement. After the case was removed to this Court, the United States certified that the employee had been acting within the scope of her employment and substituted itself as the defendant (as the Westfall Act commands). Doc. 16; 28 U.S.C. § 2679(d); 28 U.S.C. § 1442. There is nothing improper about this procedure; it is exactly what Congress intended to happen when a plaintiff files a timely state-court complaint that gives rise to FTCA liability. *See generally* 28 U.S.C. § 2679(d). By using the word "action" rather than "federal action" (or something similar) in Section 2401(b), Congress recognized that plaintiffs should not be punished for filing a timely lawsuit in state court because the government—not the plaintiff—generally controls whether the lawsuit will ultimately proceed under state tort law or the FTCA. Had Congress sought to mandate that all lawsuits against federal employees could only be filed in federal court, it would have said so.[5]

Although the text of the FTCA is both clear and dispositive, the Second Circuit found that "[f]our circuit courts have adopted conflicting positions" on whether a state-court lawsuit qualifies as an "action" that satisfies the FTCA's procedural requirements. *Fiermonte*, 2026 WL 603557, at *3. Each

[5] Furthermore, limiting "action" to federal actions would have other unintended consequences within the FTCA. For instance, it would severely limit the reach of the FTCA's judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. If "action" excludes a *state* lawsuit, the judgment bar would not shield federal employees from any follow-on litigation, so long as it is brought in state court. *See, e.g.*, 28 U.S.C. § 2679(b)(2)(A); N.Y. Civ. Rights Law § 85 (permitting constitutional claims against federal employees under New York law).

case was decided before Congress passed the Westfall Act, but they did involve the Westfall Act's predecessor, the Federal Drivers Act, which prescribed a similarly exclusive remedy in cases involving negligent driving. Importantly, the disagreement identified by the Second Circuit is confined to the exhaustion question the Fourth and Fifth Circuits decided; on the question presented here, the cases align.

Of the cases in this split, the Seventh Circuit's ruling in *McGowan v. Williams*, 623 F.2d 1239 (7th Cir. 1980), is the most on point, and it supports Fiermonte. There, the court held that "an action brought against a federal [employee] in state court within the [six-month] time limitation of 28 U.S.C. § 2401(b) is timely for purposes of the Federal Tort Claims Act when the action is removed to federal court[.]" *Id.* at 1244. *McGowan* is the only case identified by the Second Circuit that truly mirrors the facts here. In both cases, a plaintiff filed an administrative claim with an agency, that claim was denied, and the plaintiff timely filed a state-court amended complaint naming the federal employee as an individual defendant. *See id.* at 1240–41. In both cases, the government argued that the action could only satisfy the FTCA's procedural requirements "if it was filed in *federal district court* . . . six months from the denial of the administrative claim[.]" *Id.* at 1241 (emphasis added). And in both cases, a win for the government would leave the plaintiff "without any remedy at all if removal is not effected until after the federal statute of limitations has run." *Id.* at 1243.

The government attempts to distinguish *McGowan* by claiming that Fiermonte should have known to file his complaint in federal court to begin with because the FAA and an Assistant United States Attorney told him that he should file under the FTCA. *See* U.S. Br. at 7. This argument is irrelevant. The Westfall Act makes clear that it is the scope-of-employment certification—and nothing else—that determines whether a case must proceed in state court (against the individual employee) or federal court (against the United States).[6] *See* 28 U.S.C. § 2679(d). The FTCA imposes no textual requirement that a plaintiff follow the government's offhand directions on how it would prefer to be sued.[7] What's more, there is good reason for a plaintiff to be wary of the government's representations regarding whether it will certify an employee's scope of employment. The government sometimes seeks to strategically certify the scope of employment when it benefits federal interests and avoid certification when it undermines them. *See, e.g.*, *Carroll v. Trump*, 151 F.4th 50, 62 (2d Cir. 2025).

At bottom, the court in *McGowan* addressed the exact circumstances presented here, and in a thorough, text-based opinion, it found that lawsuits like Fiermonte's satisfy the FTCA's procedural requirements. 623 F.2d at 1244. This Court should do the same.

In cases involving different facts, circuits' analyses have differed. In *Staple v. United States*, 740 F.2d 766 (9th Cir. 1984), for instance, the Ninth Circuit was asked to resolve two questions: one that had been presented in *McGowan*, and one that had not. The first question—the one that is relevant here—was whether a timely state-court lawsuit qualifies as an "action" under Section 2401(b). *Id.* at 769. On this point, the Ninth Circuit agreed with the Seventh. *Id.* It ruled that "[t]he place of filing may be state court for the purpose of applying section 2401(b)," rendering state-court complaints like Fiermonte's sufficient to satisfy the FTCA's procedural requirements. *Id.* at 769–70.

The second question at issue in *Staple* was not presented in *McGowan*, and it has no bearing on this case. That question asked whether a plaintiff who files suit in state court against federal defendants *before exhausting her administrative remedies* nevertheless complies with the FTCA. *Staple*, 740 F.2d at 768.

---

[6] The same was true in *McGowan* under the Federal Drivers Act. *See* 623 F.2d at 1242–43.

[7] In fact, the Westfall Act mandates that any federal employee sued in his individual capacity must deliver "all process served upon him . . . to his immediate supervisor," who must then "promptly furnish copies of the pleadings and process therein to the United States attorney . . . , to the Attorney General, and to the head of his employing Federal agency." 28 U.S.C. § 2679(c). This language ensures that the United States is apprised of claims against its officers, and it offers further evidence that Congress contemplated timely state-court lawsuits against individual officers giving rise to FTCA liability.

In the Ninth Circuit's view, so long as the federal government removed a case more than six months after an administrative claim was denied, the plaintiff's failure to exhaust her administrative remedies before filing a state-court complaint did not matter. *Id.*

The cases on the other side of this split—one from the Fifth Circuit, and another from the Fourth—do not disagree with *McGowan*, and they only split from the *second* part of *Staple*. *Houston v. U.S. Postal Serv.*, 823 F.2d 896, 903 (5th Cir. 1987) ("[U]nlike the plaintiff in *McGowan*, Houston is relying on a suit brought *before* he had exhausted his administrative remedies."); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986) ("[Appellants] argue that by filing their complaints in state court they satisfied the statutory requirement of filing an administrative claim[.]"). Both courts simply held that a state-court lawsuit, standing alone, does not satisfy the FTCA's *exhaustion* requirement—a question not at issue here. *Houston*, 823 F.2d at 900; *Henderson*, 785 F.2d at 125. For similar reasons, *Kelley v. United States*, 568 F.2d 259 (2d Cir. 1978), is not on point. There, the Second Circuit found that the Federal Drivers Act did not mandate the dismissal of a plaintiff's FTCA claim even though "no administrative claim against the United States was filed." 568 F.2d at 265. This aspect of the split has no bearing on Fiermonte's case. In fact, Congress solved this circuit split when it passed the Westfall Act, which created procedures that allow a plaintiff to cure his failure to exhaust before suing. *See* 28 U.S.C. § 2679(d)(5).[8]

---

[8] This provision further demonstrates that, when Congress enacted the Westfall Act, it foresaw timely state-court complaints giving rise to FTCA liability. It states that a complaint "shall be deemed to be timely presented under section 2401(b)" if it "would have been timely had it been filed on the date the *underlying civil action* was commenced" and the plaintiff presents the administrative claim to the federal agency "within 60 days after dismissal of the *civil action*." 28 U.S.C. § 2679(d)(5)(A)–(B) (emphases added). Citing this provision, the Second Circuit has explained that "[t]he Westfall Act . . . clarifies that *all* suits against the United States, *including those originating in state court* against defendants yet to be formally replaced by the United States, must be subject to the administrative-exhaustion requirements" and that, by allowing plaintiffs to cure this deficiency, the Westfall Act "addresses the chief problem that troubled [the court] in *Kelley*." *Celestine v. Mt. Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 83 (2d Cir. 2005) (second emphasis added).

The question here is different because Fiermonte exhausted his administrative remedies. He timely filed a claim with the FAA, and he named the FAA employee as a defendant fewer than six months after that claim was denied. *See* U.S. Br. Ex. B; Doc. 1-1. To allow Fiermonte's FTCA suit to proceed, this Court need only rule that, after Fiermonte's administrative claim was denied, his state-court lawsuit satisfied Section 2401(b)'s *separate* requirement to begin an "action" within six months of the denial. *See Fiermonte*, 2026 WL 603557, at *1. The court in *McGowan* squarely addressed this situation, and it found no procedural issue. 623 F.2d at 1244. Four years later, the court in *Staple* agreed. 740 F.2d at 769. *Houston* and *Henderson*, meanwhile, are simply silent on the issue—their holdings rest on plaintiffs' failures to present their claims to an agency before suing a federal party. *Houston*, 823 F.2d at 900; *Henderson*, 785 F.2d at 125. That failure is absent here.

At bottom, none of the cases in this split suggests that Fiermonte's FTCA claims should be dismissed. This is unsurprising because, while plaintiffs can control whether they exhaust their pre-suit administrative remedies, they generally cannot control whether the United States will certify the federal official's scope of employment. *See* 28 U.S.C. § 2679(d)(2). And once the case is converted into an FTCA case, there is no going back to state court. *See* 28 U.S.C. § 2679(d)(3). This statutory scheme, consistent with the foundational idea that "[f]ederal courts are courts of limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), encourages uncertain plaintiffs to file suit in state court and wait to see whether the United States will step in. As a result, a ruling in the government's favor would "allow the United States to 'sandbag' plaintiffs" by waiting to remove the case and certify the official's scope of employment until after the plaintiff's six-month window to file a federal lawsuit has lapsed—rendering the plaintiff remediless. *McGowan*, 623 F.2d at 1243. If the government waits until a new federal lawsuit would be untimely, and then (as here) converts a timely state action into a federal action, it cannot then claim that the claims are untimely. Rather than entertain such blatant gamesmanship, this Court should hold that Fiermonte has complied with Section 2401(b).

II. Even if Fiermonte's amended complaint did not comply with the FTCA's procedural requirements, the filing deadline should be equitably tolled.

If the Court finds that Fiermonte has complied with the FTCA's pre-filing requirements, its analysis can end. *See Fiermonte*, 2026 WL 603557, at *4. But if not, the Court must next address whether Fiermonte's claims are subject to equitable tolling. *Id.* They are.

In *Kwai Fun Wong*, the Supreme Court held that general principles of equitable tolling apply equally to FTCA claims. 575 U.S. at 412. Those general principles were laid out in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). There, the Court explained that equitable tolling is allowed "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period[.]" *Id.* at 96. Indeed, *Irwin* specifically relied on several cases where the Supreme Court equitably tolled filing deadlines when—as the government alleges here—a plaintiff timely files his complaint in the wrong court. *Id.* at 96. n.3 (citing *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424 (1965); *Herb v. Pitcairn*, 325 U.S. 77 (1945)).

Under *Kwai Fun Wong* and *Irwin*, Fiermonte's FTCA claims should proceed. Fiermonte has doggedly pursued his legal remedies after being shocked on his second day of the job in September 2021. Shortly after the incident, he exhausted his administrative remedies under the FTCA by submitting a timely administrative claim to the FAA. *See* U.S. Br. Ex. A; U.S. Br. Ex. B. When that administrative claim was denied, Fiermonte amended his state-court complaint to add the FAA employee as a defendant. *See* Doc. 1-1. Between the administrative claim and the state-court lawsuit, the United States was on notice that Fiermonte had tort claims arising from the conduct of a federal employee. *See* 28 U.S.C. § 2679(c). But Fiermonte could not be certain as a matter of law whether the official was acting within the scope of her employment—a requirement for FTCA liability—until the government said so. *See* 28 U.S.C. § 2679(d). Thus, even if Fiermonte's state-court lawsuit against the FAA employee did not strictly comply with Section 2401(b), his deadline should be equitably tolled because he filed a "defective pleading"—an amended state-court complaint—fewer than six months after the FAA denied his administrative claim.[9] *Irwin*, 498 U.S. at 96 & n.3.

The United States never mentions *Irwin* or the cases it relied on, but it offers several reasons why it believes equitable tolling is not appropriate here. Each is unavailing. To begin, the government claims that equitable tolling is appropriate only when a plaintiff "has been pursuing his rights diligently" but "some extraordinary circumstance stood in his way and prevented timely filing." U.S. Br. at 10 (quotation marks omitted) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). As discussed above, Fiermonte has diligently pursued his rights. As for the "extraordinary circumstance" requirement, the Second Circuit has explained that this inquiry "depends not on 'the uniqueness of a party's circumstances' or the outrageousness of what they endured, 'but rather . . . the severity of the obstacle impeding compliance with a limitations period.'" *Doe v. United States*, 76 F.4th 64, 72 (2d Cir. 2023) (quoting *Smalls v. Collins*, 10 F.4th 117, 145 (2d Cir. 2021)). Because this question does not turn on "the uniqueness of a party's circumstances," *id.*, the government's contention that a plaintiff must show that he was mentally or physically incapacitated to qualify for equitable tolling is wrong, *see* U.S. Br. at 10–11. Of course, incapacity may be *one way* to establish that a party's circumstances were extraordinary, but it is not a requirement. *See, e.g.*, *Doe*, 76 F.4th at 72 (explaining that the threat of government retaliation for filing an FTCA lawsuit justifies equitable tolling).

Here, the obstacle arises because a plaintiff who has a tort claim based on of the actions of a federal employee must make a choice: sue the individual employee in state court, or sue the United States in federal court. Again, it is impossible for the plaintiff to be sure which option is correct before the United States decides whether to issue a scope-of-employment certification, which it cannot do until the case has already been filed. *See* 28 U.S.C. § 2679(d). Given this uncertainty, it makes sense for

---

[9] Again, Fiermonte maintains that he *did* comply with the FTCA's six-month deadline. *See* Part I, *supra*.

a plaintiff like Fiermonte—who has several state-law claims against non-federal parties arising out of the same incident—to avoid claim splitting by bringing all related claims in one state court action. No binding precedent from either the Second Circuit or the Supreme Court has ever suggested that this is procedurally improper under Section 2401(b).[10]

Relying on *Kelley v. United States* and *Celestine v. Mount Vernon Neighborhood Health Center*, 403 F.3d 76 (2d Cir. 2005), the government insists that equitable tolling is reserved for plaintiffs who were unaware that the tortfeasor was a federal employee, U.S. Br. at 10. But again, these cases asked whether a plaintiff's failure to *exhaust administrative remedies* before filing suit should be excused—an issue absent here. *Kelley*, 568 F.2d at 265 (excusing the defect before the Westfall Act); *Celestine*, 403 F.3d at 83 (refusing to excuse the defect because the Westfall Act "addresses the chief problem . . . in *Kelley*"); *see* 28 U.S.C. § 2679(d)(5). In any event, the government's argument ignores *Doe*. The extraordinary-circumstance inquiry turns on "the severity of the obstacle impeding compliance with a limitations period," not on a plaintiff's subjective awareness or "the uniqueness of a party's circumstances." *Doe*, 76 F.4th at 72 (citation omitted). The obstacle here was never Fiermonte's knowledge of who employed the FAA worker; it was the timing of the scope-of-employment certification. Knowing that the employee worked for the FAA told Fiermonte nothing about whether the government would certify that she acted within the scope of her employment—and it is that certification alone that

[10] Aside from avoiding claim splitting, there are other valid reasons why a plaintiff may want to avoid filing a case under the FTCA at the outset. If a plaintiff files in federal court to begin with, but the government *refuses* to certify the scope of employment, that plaintiff could face a mirror image of the problem Fiermonte faces here. In that situation, the district court would dismiss the plaintiff's claims for lack of subject-matter jurisdiction after concluding that the employee was not acting within the scope of his employment. *See, e.g.*, *Jackson v. United States*, No. 1:11-cv-01001, 2012 WL 4468499, at *4 (W.D. Tenn. Sept. 25, 2012). If that decision issues after the state statute of limitations has passed, the plaintiff may not be able to sue the employee in her individual capacity unless the state court equitably tolls the deadline. As a result, a plaintiff's safest course of action is often to file in state court and wait for the government to determine whether it will inject itself into the case.

determined whether Fiermonte's remedy lay in a state-law action against her or an FTCA action against the United States.[11]

Still, the government contends that equitable tolling is inappropriate because, in its view, Fiermonte's decision to file his amended complaint in state court amounts to "[a]ttorney error or misunderstanding of the law." U.S. Br. at 11. Not so. As the Second Circuit recognized in this very case, "[f]our circuit courts have adopted conflicting positions" on "whether a complaint initially filed in state court within the six-month time period" can "satisfy Section 2401(b)." *Fiermonte*, 2026 WL 603557, at *3. So at most, the issue is an open question. But as discussed above, only one circuit—the Seventh—has meaningfully analyzed this question in a case like this one. *See McGowan*, 623 F.2d at 1244. That court found that claims like Fiermonte's comply with the FTCA's requirements. *Id.*; *see also Staple*, 740 F.2d at 769. Given the Second Circuit's silence on the matter, it was reasonable for Fiermonte's counsel to rely on *McGowan*'s understanding of the law when pursuing his claims. It would be unjust for this Court to bar Fiermonte's claims because his counsel relied on the most on-point decision from a circuit court addressing the matter.

Like the Seventh Circuit in *McGowan*, this Court should hold that a timely state-court complaint filed after exhausting administrative remedies satisfies the FTCA's procedural requirements. *See* Part I, *supra*. But if it does not, it should recognize that the unsettled state of the law created an

[11] The Second Circuit in *Celestine* explained that equitable tolling would be appropriate in a similar circumstance. There, the court suggested that *Kelley* remains good law when a plaintiff is "unaware that the named tortfeasor was acting as an agent of the United States" and files a timely state-court complaint after the FTCA statute of limitations has passed. *Celestine*, 403 F.3d at 84. If it is unjust to punish a plaintiff for filing in state court *after* the FTCA's statute of limitations has run out, it is even more unjust to punish Fiermonte for electing to file in state court *before* the federal action is untimely. Fiermonte did not sleep on his rights; he simply filed in state court because he could not know whether, as a matter of law, his case could proceed under the FTCA until the United States certified the FAA official's scope of employment.

extraordinary circumstance justifying Fiermonte's inadvertent filing of a timely amended complaint in state court. *Irwin*, 498 U.S. at 96 & n.3.

III. Fiermonte's amended complaint is not a "legal nullity."

Rather than address the two narrow issues the Second Circuit explicitly instructed this Court to consider on remand, the government's top-line argument is that Fiermonte's amended complaint is a "legal nullity" because it was filed without leave of court. U.S. Br. at 5. This argument is both incorrect and improper. It is incorrect because, under New York law, Fiermonte did not need to seek leave before filing his amended complaint. It is improper because the validity of Fiermonte's amended complaint is not properly before this Court on remand.

A. Under New York law, Fiermonte did not need to seek leave before filing his amended complaint.

The simplest reason why Fiermonte's amended complaint is not a nullity is because it was properly filed. In New York, "[a] party may amend his pleading once without leave of court . . . within twenty days after service of a pleading responding to it." N.Y. C.P.L.R. 3025(a). This rule extends to amendments that join new defendants. N.Y. C.P.L.R. 1003 (allowing a plaintiff to add parties once without leave "within twenty days after service of a pleading responding to" the original summons); *see Wyatt v. City of New York*, 9 N.Y.S.3d 596 (N.Y. Sup. Ct. 2015) (table).

New York courts have consistently held that these rules allow a plaintiff to amend his complaint without leave "within 20 days after service of the *last* pleading responding to his pleading." *Citibank, N.A. v. Suthers*, 418 N.Y.S.2d 679, 681 (N.Y. App. Div. 1979); *see also, e.g.*, *STS Mgmt. Dev. Inc. v. N.Y. State Dep't of Tax'n & Fin.*, 678 N.Y.S.2d 772, 773 (N.Y. App. Div. 1998) (allowing plaintiff to amend complaint up to 20 days after service of defendant's answer, which was filed after defendant's motion to dismiss); *Johnson v. Spence*, 730 N.Y.S.2d 334, 336 (N.Y. App. Div. 2001) (explaining that leave to file an amended complaint was unnecessary because "the defendant's motion to dismiss the complaint, which extended his time to answer the complaint, also extended the plaintiff's time to amend the complaint"); *Wyatt*, 9 N.Y.S.3d 596 ("In multiparty litigation, the pleader may amend as of right within 20 days after service of the last pleading responding to his pleading." (cleaned up)).

Fiermonte did not need to seek leave before filing his amended complaint. After the Suffolk County Supreme Court denied a private defendant's motion to dismiss, that defendant answered Fiermonte's original complaint on January 25, 2024. Answer, *Fiermonte v. Long Island Power Auth., et al.*, No. 205623/2022 (N.Y. Sup. Ct. Jan. 25, 2024), Dkt. No. 43. Fiermonte filed his amended complaint just 18 days later. *See* Doc. 1-1. This placed him within the 20-day time limit in Rules 3025(a) and 1003, rendering his amended complaint valid. *See, e.g.*, *Citibank*, 418 N.Y.S.2d at 681.

The government's cases all involve a plaintiff who failed to amend his complaint within 20 days of receiving a responsive pleading, and each recognizes that the case would come out differently if the plaintiff had amended as of right. *Bodkin v. 112 Auto. Ctr., Inc.*, 182 N.Y.S.3d 921, 922 (N.Y. App. Div. 2023) ("[T]he plaintiff sought to add the moving defendants to this action by amending the complaint *after the time to do so as of right had expired*[.]" (emphasis added)); *Braylovskaya v. Skazka Rest.*, 217 N.Y.S.3d 654, 656 (N.Y. App. Div. 2024) (similar); *Nikolic v. Fed'n Emp. & Guidance Serv.*, 795 N.Y.S.2d 303, 305 (N.Y. App. Div. 2005) (holding amended complaint was null because it was served more than 20 days after the most recent responsive pleading).[12] These cases also demonstrate that Fiermonte's amended complaint was properly filed.

B. The validity of Fiermonte's amended complaint is not before the Court.

Even if Fiermonte's amended complaint were somehow defective when it was filed (it was not), the complaint's validity is no longer at issue for two reasons.

First, the United States has waived its arguments about the validity of Fiermonte's amended

[12] The United States also cites *Dauernheim v. Lendlease Cars, Inc.*, 609 N.Y.S.2d 302 (N.Y. App. Div. 1994), but the court in *Dauernheim* did not discuss whether the amended complaint was filed more than 20 days after receipt of the last responsive pleading—presumably because the plaintiff did not (or could not) contest that issue.

complaint by waiting more than two years to challenge it. New York courts treat improper amendment and joinder as issues of personal jurisdiction. *See, e.g.*, *Raiola v. Roman Catholic Diocese of Brooklyn*, 234 N.Y.S.3d 585, 588 (N.Y. App. Div. 2025) ("Since the plaintiff failed to comply with CPLR 1003 and 3025, the amended complaint was a legal nullity warranting dismissal of the amended complaint . . . for lack of personal jurisdiction."); *see also* U.S. Br. at 5. Like all issues of personal jurisdiction, this argument can be waived if a defendant participates in litigation without timely raising its objections. *McDaniel v. Clarkstown Cent. Dist. No. 1*, 441 N.Y.S.2d 532, 534 (N.Y. App. Div. 1981) (holding that a defendant waived its objection to improper joinder by participating in the litigation until the statute of limitations had passed). The Second Circuit similarly holds that a party's continued participation in litigation precludes him from arguing that the court lacks jurisdiction over him. *See, e.g.*, *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60 (2d Cir. 1999).

Procedurally, the United States' argument that Fiermonte's amended complaint is a nullity is confusing. In essence, the government argues that Fiermonte's alleged failure to properly add a *different* party (the FAA employee) to his *state court* proceedings (before this case was removed) now renders the *United States* an improper party in these *federal* proceedings. But the only reason this lawsuit now belongs in federal court is because the government certified the FAA employee's scope of employment and substituted itself as the defendant. *See* Doc. 16 at 2. From there, the government moved to dismiss Fiermonte's FTCA claims on unrelated grounds and litigated the issue all the way up through the Second Circuit. Now, on remand, it alleges for the first time that it never should have added itself to this case in the first place. It would be manifestly unjust to allow a party to excise itself from litigation that it has willingly participated in—indeed, invited—based on alleged 28-month-old pleading defects.

Second, whether Fiermonte properly amended his complaint lies far beyond the scope of the two discrete questions of law the Second Circuit instructed this Court to address on remand. When a case is decided by a higher court and sent back down, "the court to which [the case] is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *Kerman v. City of New York*, 374 F.3d 93, 109 (2d Cir. 2004) (quoting *United States v. Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974)). This concern is especially acute when a higher court's mandate "limits the issues open for consideration on remand[.]" *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 175 (2d Cir. 2014). In these situations, "the district court ordinarily may not deviate from the specific dictates or spirit of the mandate by considering additional issues[.]" *Id.* As a result, "it is highly improper for a defendant to raise new defenses on remand that were not discussed in [the higher court's] earlier mandate(s) in the case." *N.Y.C. Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 724 n.3 (2d Cir. 1984).

Here, the Second Circuit explicitly instructed this Court "to consider whether Fiermonte satisfied Section 2401(b)'s requirement to commence an 'action' within six months of exhausting administrative remedies." *Fiermonte*, 2026 WL 603557, at *4. The mandate added that, "[i]f not, the district court *shall* consider whether Fiermonte qualifies for equitable tolling." *Id.* (emphasis added). It is improper for the government to ask this Court to step beyond the Second Circuit's narrow mandate and address issues it has not been instructed to address. But, even if it does, the government's arguments are without merit.

CONCLUSION

For the reasons discussed above, the Court should deny the United States' motion to dismiss.

Submitted June 29, 2026,

/s/ Dylan Moore
Dylan Moore*
Anya Bidwell*
Patrick Jaicomo*
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321
dmoore@ij.org

Megan M. Mackenzie
Svetlana Walker
Walker & Mackenzie, P.C.
1650 Sycamore Avenue, Suite 19
Bohemia, New York 11716
Phone: (631) 791-5090
Fax: (631) 791-5095
mmackenzie@walkermackenzielaw.com

abidwell@ij.org
pjaicomo@ij.org

swalker@walkermackenzielaw.com

**Admitted Pro Hac Vice*

Counsel for Plaintiff