CASE NO. 20-1766

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

DONTE PARRISH

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT CLARKSBURG

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of West Virginia had jurisdiction pursuant to 28 U.S.C. § 1346(b)(1). The district court entered final judgment on March 24, 2020. This Court has jurisdiction over the appeal from that court's final order under 28 U.S.C. § 1291. Plaintiff-Appellant Donte Parish filed his notice of appeal pursuant to Federal Rule of Appellate Procedure ("FRAP") 4(a)(1)(B) on July 13, 2020. Parrish's appeal was untimely, but this Court construed his notice of appeal as a motion to reopen the appeal period and remanded to the district court. On January 8, 2021, the district court granted that motion under FRAP 4(a)(6).

ISSUES PRESENTED

(1) Does a district court's grant of a reopening of the time to file an appeal under FRAP 4(a)(6) validate an appellant's earlier filed notice of appeal without the need for a second notice?

(2) Does *Heck v. Humphrey*, 512 U.S. 477 (1994), apply to Federal Tort Claims Act ("FTCA") claims and, if so, did *Heck* toll the statute of limitations until Parrish was exonerated?

(3) Does the prison mailbox rule apply to FTCA claims and, if so, is Parrish entitled to a remand to resolve disputed issues of fact?

(4) Does 28 U.S.C. § 2401(b) require plaintiffs to both file a claim before the appropriate agency within two years and bring an action within six months of the agency's denial?

INTRODUCTION

This is a FTCA suit seeking damages for Appellant Donte Parrish's multi-year detention in administrative segregation for a jailhouse murder he did not commit. The Bureau of Prisons ("BOP") refused to give Parrish a hearing for several years while he languished in segregation, because the Federal Bureau of Investigation and Department of Justice were investigating. After that investigation was abandoned, the BOP finally convened a disciplinary hearing and found Parrish responsible. But Parrish was granted a new hearing, at which the BOP concluded that there was insufficient evidence to find him guilty of any wrongdoing and expunged his prison disciplinary record. Parrish then filed this suit, which the district court dismissed on limitations and exhaustion grounds.

This Court held that Parrish's original notice of appeal was untimely, but construed it as a motion to reopen the time for filing and remanded to the district court—which granted that motion. This Court's precedents and Rule 4's treatment of closely analogous situations confirm that there was no need for Parrish to then file a second notice of appeal.

On the merits, the central issue on appeal is whether Parrish's claims are timely under the FTCA's statute of limitations. They are, for at least four reasons.

First, the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), means that Parrish could not sue for money damages until he was cleared of the underlying wrongdoing in the prison grievance process or a *habeas* suit. The district court accepted that premise but misunderstood the timeline. The court thought that the prison appeal order granting Parrish a new hearing was the favorable termination that Parrish needed under *Heck*. But the relevant date is the date of the second hearing, where BOP found Parrish not guilty and expunged his prison disciplinary record. This suit was filed within six months of that date.

Second, Parrish's suit is timely in any event if it was filed when it is dated—on April 7, 2017. Parrish insists that he gave the complaint to prison staff then, and the ordinary prison mailbox rule would treat it as filed at that point. But the district court held that its obligation to "strictly construe[]" waivers of sovereign immunity meant that the prison mailbox rule does not apply to FTCA claims. That holding is error. The FTCA provides that the United States shall be liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Both this Court and the Supreme Court have recognized that "the general rule that waivers of sovereign immunity should be strictly construed 'is unhelpful in the FTCA context [because it] … run[s] the risk of defeating the

central purpose of the statute, which waives the Government's immunity from suit in sweeping language.'" *Sanders v. United States*, 937 F.3d 316, 327 (4th Cir. 2019) (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491–92 (2006)). "Strict" construction of the FTCA does not support *ad hoc* modifications of the ordinary rules of civil procedure to benefit the United States—and certainly does not support disregarding the prison mailbox rule, which exists because prisoners are entirely dependent on the government to process their mail.

In this Federal Rule of Civil Procedure ("FRCP") 12(b)(6) posture, the district court should have credited the April 7, 2017 dates on Parrish's complaint—particularly after he filed an affidavit attesting that he gave it to prison officials on that date. Parrish's timeliness claim is clearly plausible, especially given the BOP's other failure to promptly deliver Parrish's mail in this very case—which necessitated equitable relief under FRAP 4(a)(6). JA328–331. If there is a factual dispute about when Parrish put his complaint into the prison mail system, it must be resolved on summary judgment after the discovery mandated by *Pledger v. Lynch*, 5 F.4th 511 (4th Cir. 2021).

Third, although the case law pervasively misunderstands the statute, the FTCA's six-month filing deadline does not even apply here. The FTCA bars claims against the United States unless "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…of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b) (emphasis added). The district court treated that "or" as an "and." Although that error is deeply entrenched in the case law, this Court should correct it. Because Parrish's claims were presented to BOP within two years, he does not also need to independently satisfy the six-month limit.

Finally, under any understanding of the FTCA's statute of limitations, Parrish's complaint was timely filed within six months from the denial of one of his two administrative claim filings. The district court acknowledged as much but held that the particular administrative filing did not fairly encompass Parrish's claims in this lawsuit and dismissed the entire complaint as a result. But the district court took an inappropriately narrow view of that administrative filing, which—given a generous reading appropriate for a *pro se* inmate—encompassed important dimensions of the claims asserted here.

The district court's dismissal should be reversed, and the case remanded for discovery.

STATEMENT OF THE CASE

A. Statement of Facts

Because the district court resolved this case on a motion to dismiss, JA127 n.2, 318–22, the facts as alleged in the amended complaint must be accepted as

true and viewed in the light most favorable to Parrish. *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

1. Parrish's Detention

On December 6, 2009, a riot at United States Prison ("USP") Hazleton resulted in the stabbing death of inmate Jimmy Lee Wilson. JA84. Mr. Parrish, who was serving a prison sentence at Hazleton, was placed in administrative detention. JA70, JA72. The BOP charged Parrish in the prison disciplinary process with killing and being in an unauthorized area. JA84. But the BOP referred the Incident Report to the FBI for independent criminal investigation, where it would languish unresolved for nearly six years. JA31, JA63. Parrish alleges he had no means of contesting his culpability for the killing during this time. JA72.

As a result of his administrative detention, Parrish was denied access to his "property and law library privileges" and missed the deadline to file his habeas appeal. JA43. He was unable to have familial visits despite repeated requests for relief. JA44. Parrish alleges that BOP personnel informed him that his ongoing detention was because of his alleged culpability in Wilson's death. JA 44.

In November 2010, an administrative hearing officer recommended Parrish be sent to a Special Management Unit ("SMU"), purportedly due to "disruptive behavior during his confinement." JA51. Conditions in the SMU "are more restrictive than for general population inmates." JA266. Inmates beginning the

program have "minimal" interaction and are "normally…restricted to their assigned cells." JA269. Parrish admits to being in possession of "a razor blade and a bag of wine." JA43. But Parrish alleges that the real reason for his transfer was Wilson's death. JA31–32, JA39–40, JA54–55.

Parrish was confined to the SMU for years, during which time he was "denied showers [and] access to the law library." JA45. Parrish's public defender was not able to contact him despite "a number of attempts" to do so, including "contact[ing] and le[aving] numerous messages to [Parrish's] counselor." JA96. On one occasion, Parrish was "forced to stay in a cell with [a] feces stained wall and floor for at least a week." JA45.

Parrish's complaint sketches the highly restrictive conditions in the SMU, and public sources appropriate for judicial notice confirm that his allegations are more than plausible. The SMU was created for inmates who are "dangerously violent, confrontational, defiant, antagonistic, and violent."[1] Parrish's SMU program has been described as "the worst place in the federal prison system" with "SMU inmates spend[ing] 23 hours per day confined to cells they share with a roommate; the cells are so small that both men cannot walk around at the same

[1] *Special Housing Unit Review and Assessment Report Response*, FEDERAL BUREAU OF PRISONS (Feb 2015), https://www.bop.gov/resources/news/pdfs/CNA_Response-V05a-saa.pdf.

time."[2] The D.C. Corrections Information Council, a city agency, found that Parrish's SMU was in violation of the BOP's use of force program.[3] Parrish alleges that he suffered many of the abuses commonly reported,[4] including being placed with a known violent inmate in a confined cell and being "forced to sleep in…handcuffs and shackles" to the point where Parrish "received damage in [his] hands." JA74; *see also* JA45. Parrish's lengthy SMU confinement and harsh treatment also caused him to develop depression and antisocial personality disorder, conditions which he still suffers from today. JA40.

Parrish's twenty-month stint in the SMU should have been over in July 2012. JA61. He had no disciplinary infractions during his twenty months in the program and expected to be transferred back to the general prison population.

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[2] Justin Peters, *How America's Model Prison Became the Most Horrific Facility in the Federal System*, SLATE (Nov. 20, 2013), https://slate.com/news-and-politics/2013/11/usp-lewisburg-special-management-unit-how-americas-model-prison-became-the-most-horrific-facility-in-the-federal-system.html.

[3] Huffman, Carter, and Compani, *Inspection Report USP Lewisburg*, DISTRICT OF COLUMBIA CORRECTIONS INFORMATION COUNCIL (Nov. 5, 2015), at 11, https://cic.dc.gov/sites/default/files/dc/sites/cic/publication/attachments/Final%20USP%20Lewisburg%20Report%2011.5.15.pdf.

[4] Joseph Shapiro, *Inside Lewisburg Prison: A Choice Between a Violent Cellmate or Shackles*, NPR (Oct. 26, 2016), https://www.npr.org/2016/10/26/498582706/inside-lewisburg-prison-a-choice-between-a-violent-cellmate-or-shackles.

He was not. Parrish made a series of inquiries to BOP staff to no avail. JA56. He then filed a Request for Administrative Remedy seeking transfer from the SMU. JA56. Over a month after Parrish's SMU term ended, J.P. Young, the Warden of Federal Correction Complex ("FCC") Oakdale, informed Parrish that he had "completed the SMU program" but that transfer was being "deferred by the Designation and Sentencing Computation Center ("DSCC") pending disposition of incident reports received at USP Hazelton." JA58. According to Warden Young, Parrish would be "redesignated to an institution commensurate with [his] security level" only *after* the Hazleton incident was resolved. JA58. Parrish appealed, noting that his transfer was being denied "based on an incident…currently under investigation and [which] has been since 2009," effectively confining him "to serve an indefinite sentence" in the SMU. JA56, JA59–60. Not until November 7, nearly four months after the designated end of Parrish's time in the SMU, was he transferred to a lower security facility at USP Big Sandy. JA72.

2. Parrish's Exoneration and Administrative Claims

In June 2015, the FBI determined that it would not pursue criminal charges in the Hazleton killing and returned the case to the BOP. JA63. In August—five and a half years after the underlying incident—a Discipline Hearing Officer ("DHO") held a hearing to adjudicate Parrish's guilt. JA62. In March 2016, Parrish was informed that the DHO found him guilty of killing (a code 100 offense) and

being in an unauthorized area (a code 316 offense), the two offenses he was originally charged with in his 2009 Incident Report. JA64–65. He was sanctioned with the loss of forty-one days of Good Conduct Time, loss of thirty days of visiting privileges, and one additional day in Disciplinary Segregation. Parrish promptly appealed. JA64–65.

On June 3, 2016, regional director J.F. Caraway partially granted Parrish's appeal and ordered a rehearing. JA67. Director Caraway's remand order changed Parrish's charged offense from killing (code 100) to *assisting* in killing (code 100A). JA67.

Parrish filed the first of two administrative tort claims (Claim No. TRT-MXR-2016-06283) (the "'283 filing") on September 1, 2016. JA92. Parrish alleged that Director Caraway had "abused the process" by ordering a rehearing on a 100A offense that was never charged in the initial Incident Report. JA92. Parrish explained that he was "never given due process," that the Director "acted outside the scope of his administrative duties," and that the BOP "violat[ed it's]…Program statement, CFR 542 subpart B," regulations regarding the administrative remedy program. JA92, JA94. Parrish also alleged various injuries, including denial of "access to the courts," "institutional jobs," and "rehabilitative programs"; the inability to lower his custody level or "redress t[he] wrongs in [his] first hearing"; and a "loss of liberty." JA92, JA94. The government denied Parrish's claim for

failure to assert "a specific physical injury from the alleged negligence of a BOP employee." JA69.

On September 23, Parrish filed his second administrative tort claim (Claim No. TRT-MXR-2016-06710) (the "'710 filing"), alleging wrongful confinement and false imprisonment based on his three-year detention for Wilson's murder. JA70–71. Parrish's filing cited multiple forms of physical injury, including loss of eyesight and wrongful use of physical restraints, which has resulted in ongoing numbness and cold sensation in his wrists. JA74. Parrish also claimed that he faced harassment from BOP staff, was denied access to legal representation, and never received an administrative detention order in violation of BOP policy. JA72–73. The government denied Parrish's claim on October 6, finding that Parrish had not "suffered a compensable personal injury due to the negligence of staff during the performance of their duties." JA75.

A second DHO hearing was held consistent with Director Caraway's rehearing order in January 2017. Parrish again asserted his innocence. JA76. On October 18, 2017—nearly eight years after the start of Parrish's ordeal—the DHO found that "no prohibited act was committed" by Parrish and directed that his disciplinary record be expunged. JA77.

B. Procedural History

Parrish then brought this action alleging claims under the FTCA, as administratively exhausted in the ’283 and ’710 filings. Parrish signed, dated, and delivered his complaint to BOP to mail on April 7, 2017. *See* JA22 (signing the original complaint 4/7/17). But the complaint was not received by the district court until May 3. JA25.

The government moved to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1). JA126–127. The government argued that Parrish’s suit was barred under the FTCA’s statute of limitations because his complaint was not filed within six months of BOP’s denial of his administrative claims. JA126–128. The ’283 filing was denied on September 14, 2016, and the ’710 filing was denied on October 7, 2016. JA69, JA75. The government asserted that Parrish’s time to file suit therefore expired by March 14 and April 7, 2017, respectively. Although Parrish’s complaint was signed April 7, the government attached factual affidavits from BOP officials describing how the USP Big Sandy mail system operates to contend that Parrish could not have deposited his complaint in the prison mail system on that day. JA103–104.

Parrish made two arguments in response. First, he asserted that the statute of limitations should run not from the denials of his administrative claims, but from January 25, 2017, the date he “got the rehearing charges thrown out and expunged

from [his] record." JA131. Any earlier filing, he argued, would have been premature, as the "claims did not accrue" until January 25 under the favorable termination rule of *Heck v. Humphrey*, which requires a plaintiff to have their conviction (or disciplinary action) overturned before they can seek civil damages. JA131. Second, Parrish asserted that his complaint was filed on April 7, 2017 in accordance with the prison mailbox rule. JA132–134.

The district court correctly recognized that the FTCA's statute of limitations "is not a jurisdictional rule" and converted the government's motion to a motion to dismiss under FRCP 12(b)(6), which it granted. JA127 n.2. The district court acknowledged Parrish's argument that his claims were non-cognizable under *Heck* until the disciplinary findings were expunged but held that Parrish's claims "accrued on June 3, 2016"—the date on which the regional director granted Parrish's administrative appeal and remanded for a new hearing. JA131–132. The court then held that "the [prison] mailbox rule does not apply to Parrish's FTCA claims" because "waiver of immunity must be strictly construed." JA134 (citations omitted). The court thus considered it immaterial whether Parrish mailed his complaint on April 7, as it "was not received by this Court until…May 3, 2017." JA132. Finally, the court held there were no "extraordinary circumstances" entitling Parrish "to equitable tolling with regard to the '710 Claims." JA138.

Despite the 12(b)(6) posture, the district court made repeated reference to the government's factual affidavits. The court provided a detailed recounting of the journey of a piece of "outgoing mail…from inmates" to the "mail room at USP Big Sandy," its "transport[]…to a United States Postal Service ("USPS") facility located in Inez, Kentucky," and its arrival at "a USPS 'hub' in Charleston, West Virginia, where the mail is sorted, metered, and dispatched for delivery," and where Parrish's complaint was eventually postmarked. JA134–135. Based on these facts in the "affidavit attached to the defendant's motion," the court concluded that "it appears that Parrish forwarded his complaint to the staff at USP Big Sandy for mailing on [May 1] or, at the earliest…April 28, 2017, after outgoing mail had been collected for the day." JA134–135. The district court also criticized Parrish for failing to present his own evidence at the 12(b)(6) stage. *See* JA138 ("[T]he record contains no evidence establishing that the defendant prevented Parrish from filing his FTCA complaint on time.").

The district court denied the government's motion to dismiss Parrish's claims on timeliness grounds to the extent those claims were exhausted in the '283 administrative filing. BOP's letter denying those claims "did not advise Plaintiff of the six-month deadline in which he was required to file suit," which "prevent[ed] this communication from being a proper final agency denial." JA117, JA128–129. The government then filed a second motion to dismiss, which the court granted.

JA322. Parrish's amended complaint asserted five FTCA claims against the government: false imprisonment, abuse of process, intentional infliction of emotional distress, negligence, and malicious prosecution. JA31–34. The court held that none of them were fairly alleged in the '283 filing that would render them timely, and that all of them could be dismissed under either FRCP 12(b)(6) (as untimely) or 12(b)(1) (for failure to exhaust administrative remedies). JA318–322.

The court entered judgment in favor of the government on March 24, 2020, but Parrish was "being transferred from federal to state custody" at that time and he "did not receive [the court's] order until" three months later. JA324–325. He promptly prepared a notice of appeal within two weeks, but after the sixty-day window established by FRAP 4(a)(1)(B). JA324–325. This Court construed Parrish's notice of appeal as a motion to reopen the time to appeal and remanded to the district court to determine if Parrish satisfied FRAP 4(a)(6)'s requirements. JA327. The district court concluded that "the time for [Parrish] to file an appeal should be reopened," as "service of the Court's Order was not completed until, at the earliest, June 25, 2020, ninety-eight (93) (sic) days after its entry." JA330. The court further observed that Parrish "filed his Notice of Appeal within fourteen (14) days after he received that Order" and that "no party will be prejudiced if Parrish is allowed to refile his appeal." JA330–331.

SUMMARY OF THE ARGUMENT

Parrish's notice of appeal was validated by the FRAP 4(a)(6) reopening of time. It has long been the rule in this Court and other circuits that a finding of excusable delay validates a prior-filed but otherwise untimely notice of appeal. Ruling otherwise would ignore the remainder of FRAP 4 and serve only to create a trap for litigants. This Court has also ruled that motions for extension of time may double-count as notices of appeal. Against that backdrop, it would be incongruous to require an appellant who filed an *actual* notice of appeal to file a second one.

On any reading of the FTCA and the record, Parrish's complaint was filed within the time allowed by the statute of limitations. Under *Heck*, the deadline for Parrish to bring an action did not begin until he was cleared of the underlying wrongdoing, which did not occur until his second DHO hearing. The complaint was filed within six months of that deadline. Even if denial of the '710 filing was the relevant date, Parrish gave his complaint to prison officials to mail within six months of that denial. This Court's precedent and opinions of other circuits make clear that the prison mailbox rule applies to the FTCA just as in any other lawsuit. Any factual dispute about when Parrish gave his complaint to prison officials cannot be resolved against him in this posture and prior to discovery.

Moreover, the FTCA only requires plaintiffs to present their claim to the agency within two years *or* to file their complaint within six months of the

agency's denial. 28 U.S.C. § 2401(b). Because Parrish satisfied the first requirement, he did not need to independently satisfy the second. The district court relied on precedent from other circuits explicitly disregarding the plain text to treat that "or" as an "and." That precedent rests on flawed premises and should be rejected.

Finally, the district court also took an impermissibly narrow view of Parrish's *pro se* filings to hold that the '283 filing did not independently encompass a single allegation in the amended complaint, including where Parrish copied verbatim from the '283 filing in the complaint.

STANDARD OF REVIEW

Whether Parrish was required to file a second notice of appeal is a legal issue reviewed *de novo.* The district court's grant of a motion to dismiss for failure to state a claim is also reviewed *de novo*. *Weidman v. Exxon Mobil Corp*, 776 F.3d 214, 219 (4th Cir. 2015). To the extent the district court's decision is understood to make findings of jurisdictional fact pursuant to a partial dismissal under FRCP 12(b)(1), those findings would be reviewed for clear error. *In re KBR, Inc., Burn Pit Litig*., 744 F.3d 326, 333 (4th Cir. 2014). Legal issues relevant to jurisdiction are reviewed *de novo. Id.*

ARGUMENT

I. PARRISH'S NOTICE OF APPEAL WAS TIMELY

A. This Circuit Has Held Extensions of Time Validate Prior Filings

When the district court reopened the time to appeal under FRAP 4(a)(6), it validated Parrish's prior notice of appeal. "A finding by the District Judge that the delay in filing was excusable will validate a late filing." *Evans v. Jones*, 366 F.2d 772, 773 (4th Cir. 1966). *Evans* establishes a sensible, bright-line rule that extensions and reopenings cure timeliness defects in prior notices of appeal, with no need to file a second, superfluous notice.

FRAP 4(a)(6) is a direct descendant of the rule considered in *Evans*, then-FRCP 73(a). *Id.* When the Appellate Rules were adopted, FRCP 73(a) became FRAP 4(a) "without any change of substance." FRAP 4 Advisory Committee's Note to 1967 Adoption, Subdivision (a). In particular, the time extension provision considered in *Evans* became subsection (a)(5), which was extended by subsection (a)(6) in 1991. *See* 16A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 3950.6 (5th ed.), Westlaw (database updated April 2022). Subsection (a)(6) lengthens the 30-day extension period already available under subsection (a)(5) in the particularly compelling circumstance where a party has not received timely notice of the entry of the relevant judgement or order. *See id.* Reflecting their close connection, the main provisions of subsections (a)(5) and

(a)(6) are codified together in 28 U.S.C. § 2107(c). This Court's insight in *Evans* applies with equal force to each.

B. Requiring a Second Notice of Appeal Would Be Discordant With Other Settled Law in this Circuit

A departure from *Evans* would also treat reopenings under FRAP 4(a)(6) differently than motions for extension of time, with no rational justification. This Court has held that *pro se* motions for extensions of time can double-count as notices of appeal. *See Clark v. Cartledge*, 829 F.3d 303, 304–07 (4th Cir. 2016) (holding that the Court had jurisdiction after construing a *pro se* prisoner's FRAP 4(a)(5) motion as including a notice of appeal). When something other than a notice of appeal is construed to embrace an implicit notice of appeal, no second, actual notice is necessary. *See id.*

Parrish is functionally in the same position as the *pro se* litigant in *Clark*, except that the time sequence of the filings was reversed. This Court treated his untimely notice of appeal as a motion for an extension of time, and the district court granted that motion. JA327, JA331. If a successful motion for an extension of time can be treated as embracing an implicit notice of appeal, then surely *an actual notice of appeal* suffices. Indeed, Parrish's case is stronger than Clark's, because his notice of appeal provided the clear notice of intent that Judge Niemeyer thought was missing in that case. *See Clark*, 829 F.3d at 308 (Niemeyer,

J., dissenting). Unsurprisingly, courts have held that a successful FRAP 4(a)(6) motion validates prior notices of appeal, albeit without independent analysis.[5]

C. The Surrounding Provisions in Rule 4(a) Support Treating a 4(a)(6) Motion As Validating Prior Notices of Appeal

Cases examining other provisions of FRAP 4(a) confirm that a successful FRAP 4(a)(6) motion validates a previously untimely notice of appeal. In the widely cited case *Hinton v. City of Elwood*, the Tenth Circuit noted that the then-current version of FRAP 4(a) provided that a premature notice of appeal filed after announcement of a decision but before entry of judgment would be treated as valid after entry of judgment. 997 F.2d 774, 778 (10th Cir. 1993). Meanwhile, notices filed before disposition of certain substantive post-trial motions would not be validated by later events. *Id.* The Tenth Circuit concluded that this structure evinced a general intent for "a premature notice of appeal [to] retain[] its validity[, but] only when the order appealed from is likely to remain unchanged in both its form and its content." *Id.* Since an extension granted under subsection (a)(5)

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[5] *See Jacobs v. Looney*, 249 F. App'x 10, at *12 (10th Cir. 2007); *In re Smalis*, 684 F. App'x 109, 111 n.2 (3d Cir. 2017); *Dickinson v. New York State Comm'n of Correction*, No. 9:16-CV-0898, 2017 WL 2493446, at *2 (N.D.N.Y. June 9, 2017); *Grant v. City of Roanoke*, No. 7:16-CV-00007, 2019 WL 6833664, at *3 (W.D. Va. Dec. 13, 2019); *Toscano v. United States*, No. SA CR 04-00281, 2013 WL 588997, at *2 (C.D. Cal. Feb. 13, 2013); *Johns v. Hjerpe*, No. 14-CV-02995, 2017 WL 2229994, at *2 (S.D. Cal. May 19, 2017); *Jacoby v. Thomas*, No. 2:15-CV-0367, 2019 WL 3226896, at *3 (M.D. Ala. July 17, 2019).

presented no danger of substantive change, requiring a new notice would create a "hollow ritual" of "empty paper shuffling" that the Rules did not intend. *Id.*; *see also McNicholes v. Subotnik*, 12 F.3d 105, 107 (8th Cir. 1993) (ruling that grant of FRAP 4(a)(5) motion "retroactively validate[s] the…[prior] notice of appeal"); *Joseph v. Pennsylvania Dep't of Pub. Welfare*, 602 F. App'x 898, 900 n.3 (3d Cir. 2015) (same).

Hinton has been influential, and subsequent changes to FRAP 4(a) reinforce its holding. In 1993, FRAP 4(a)(4) was amended so that even notices filed *before disposition of substantive post-trial motions* would be deemed valid after the motions were resolved. *See* FRAP 4 Advisory Committee's Note to 1993 Amendment. Now *every* provision in FRAP 4(a) addressing premature notices of appeal validates the notice retroactively once the conditions rendering it premature are resolved. The Advisory Committee explained that "[m]any litigants, especially pro se litigants, fail to file the second notice of appeal." *Id.* The earlier version of the rule thus "created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending." *Id.* Even with the Committee's change, the appellee would have "sufficient notice of the appellant's intentions, [so] the Committee d[id] not believe that an additional notice of appeal [was] needed." *Id.*

The Advisory Committee's reasoning aligns with broader Supreme Court and Circuit precedent, which holds that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Clark*, 829 F.3d at 305 (quoting *Becker v. Montgomery*, 532 U.S. 757, 767 (2001)). This Court and the Supreme Court have even "permit[ed] notices of appeal 'technically at variance with the letter of a procedural rule' but that amount to 'the functional equivalent of what the rule requires.'" *Id.* (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17 (1988)).

The present case is no different. Defendants had ample notice that Parrish intended to appeal. Requiring a second notice of appeal because of a perceived "technical deficienc[y]" would "create[] a trap" for "unsuspecting" *pro se* litigants and serve no purpose except to promote "empty paper shuffling." *Id.*; FRAP 4 Advisory Committee's Note to 1993 Amendment; *Hinton*, 997 F.2d at 778.

II. PARRISH'S COMPLAINT SATISFIED THE STATUTE OF LIMITATIONS

Parrish satisfied the FTCA's statute of limitations for three independent reasons. First, Parrish's claims did not become cognizable until January 25, 2017, when his record was expunged. There is no dispute that Parrish's complaint was filed within six months of that date. *See* JA25 (receipt of the original complaint on May 3, 2017). Second, Parrish placed his complaint in the prison mailbox within

six months of BOP's denial of the '710 filing. Third, the statute does not actually require plaintiffs to bring an action within six months if they presented their claim to the agency within two years of the claim's accrual.

A. Parrish's Claims Did Not Accrue Until His Disciplinary Record Was Expunged Following His Rehearing

Because Parrish seeks damages stemming from wrongful confinement, *Heck* barred his claims until he received a favorable termination of the underlying disciplinary proceedings. The district court did not disagree, but it incorrectly treated the grant of Parrish's administrative appeal on June 3, 2016 as the triggering date. JA131–132. Parrish was not cleared of the underlying wrongdoing until the conclusion of his second hearing on January 25, 2017. And regardless of whether the prison mailbox rule applies, it is undisputed that Parrish filed his complaint within six months of this date, as the district court stamped it "received" on May 3, 2017. *See* JA25.

Under *Heck*, a prisoner seeking to recover damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid…must prove that the conviction or sentence has been reversed." 512 U.S. at 486–87. Until that reversal, the claim "is not cognizable." *Id.* at 487. And a "statute of limitations poses no difficulty" while challenges to the underlying misconduct findings "are being pursued," since under *Heck* the claim for damages "has not yet arisen." *Id.* at 489.

Though *Heck* resolved a § 1983 claim, this Court has recognized that its "rationale" extends to *Bivens* actions. *See, e.g.*, *Covey v. Assessor of Ohio County*, 777 F.3d 186, 196 n.8 (4th Cir. 2015) (internal citations omitted) ("Although *Heck* involved only a § 1983 claim, we have construed *Heck* to apply equally to *Bivens* claims."). That same rationale applies to the FTCA—as other circuits, district courts in this Circuit, and an unpublished decision of this Court have recognized.[6] Counsel has not encountered any case reaching a different conclusion.

It is also settled law that the *Heck* rule applies to damages claims premised on allegations that prison discipline was unwarranted. In a case closely analogous to this one, the Supreme Court held that *Heck* barred a § 1983 suit seeking damages stemming from prison disciplinary findings. *Edwards v. Balisok*, 520 U.S. 641 (1997). The inmate tried to evade *Heck* by limiting his claim to "the validity of the procedures used" rather than "the result" that was reached, alleging that BOP officials engaged in "deceit and bias," that the "hearing officer lied" about evidence, and that the inmate was "thus 'intentionally denied'" a fair process. *Id.* at 643, 645. But the Supreme Court recognized that his claims "necessarily impl[ied]

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[6] *See, e.g.*, *Liounis v. United States*, No. 3:20-CV-187, 2020 WL 11422812, at *4 (N.D.W. Va. Nov. 23, 2020) (collecting cases), *report and recommendation adopted*, 2021 WL 3598542 (N.D.W. Va. Aug. 13, 2021), *aff'd as modified*, No. 21-1946, 2021 WL 6101842 (4th Cir. Dec. 22, 2021) ("[W]e agree that *Heck* applies to [the prisoner's FTCA] claims.").

the invalidity of the punishment imposed," including loss of good-time credits. *Id.* at 646–48.

Similarly, Parrish's complaint alleges that BOP was biased against him because of his race, JA32, JA73; that BOP made false findings to convict him, JA33–34, JA41, JA45, JA54, JA72; and that BOP violated its own procedures, JA31–33, JA43, JA72. As in *Edwards*, Parrish's '283 filing challenged the fairness of BOP's procedures. *See* JA92, JA94. But success on that claim would imply the invalidity of at least some of the punishment imposed. JA64 (disallowing 41 days good conduct time). And the '710 filing directly challenges the merits of the decision to confine him. *See* JA70, JA72–74. His claims were therefore not cognizable until the disciplinary charges were expunged.

The disciplinary charges were not expunged until after the rehearing on January 25, 2017. The district court incorrectly believed that the regional director's remand order fully granted Parrish his requested relief, including expungement of his record. JA131–132. But the regional director's order stated that "we are remanding the incident report…for a rehearing" and expressly noted Parrish's appeal was only "granted to the extent set forth above." JA67. Prison officials did not clear Parrish of Wilson's murder until the second DHO hearing on January 25, 2017, and it was only then that "the Incident Report [was] therefore expunged." JA77. The examiner would not have had a record to expunge if BOP had already

cleared Parrish's record six months prior. The government's own filings confirm that reality. In a memorandum supporting its second motion to dismiss, the government included a declaration from the Regional Discipline Hearing Administrator, who stated that the DHO "expunged the incident report" "[f]ollowing the rehearing" on January 25. JA175. Thus, Parrish's claims accrued no earlier than January 25, 2017. By any reckoning, Parrish timely filed his complaint within six months of that date.

B. Parrish Filed His Complaint Within Six Months of the Final Denial of the '710 Filing

Even without tolling under *Heck*, Parrish's complaint was filed when he gave it to prison officials on April 7, 2017, exactly six months from the denial of the '710 filing on October 7, 2017. Both the prison mailbox rule and the counting methodology outlined in FRCP 6(a) apply in FTCA actions.

1. The Prison Mailbox Rule Applies to FTCA Complaints

The Supreme Court held in *Houston v. Lack* that a *pro se* prisoner's late-arriving habeas appeal was timely because it was "filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk." 487 U.S. 266, 276 (1988). Although the relevant rules required an appeal to be filed "with the clerk of the district court" within the specified time, the Court held that "the jailer is in effect the clerk of the District Court" for purposes of evaluating timeliness. *Id.* at 270, 272. The court reasoned that, unlike an ordinary civil

litigant, a prisoner must trust the processing of his mail "to prison authorities whom he cannot control or supervise and who may have every incentive to delay." *Id.* at 271. And if prison officials do delay, the prisoner "is unlikely to have any means of proving it." *Id.*

This Court has explained that *Houston* "sets forth a bright line rule" for all "filings" because the same concerns "are equally present" in non-habeas cases. *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 735 (4th Cir. 1991). "Fundamentally, the rule in *Houston* is a rule of equal treatment; it seeks to ensure that imprisoned litigants are not disadvantaged by delays which other litigants might readily overcome." *Id. Lewis* involved a § 1983 claim, but this Court recognized that the filing type is irrelevant as "pro se litigants…must rely on correctional authorities" for all manner of pleadings. *Id.* That is why "[t]he mailbox rule appl[ying] to all prisoner district court filings…appears to be the rule in every other circuit to have considered the point." *Edwards v. United States*, 266 F.3d 756, 758 (7th Cir. 2001) (collecting cases).

Few courts have had occasion to apply these principles in the specific context of FTCA complaints, but every circuit to consider the question has held that "*Houston* [applies] to *pro se* prisoners filing complaints…under the Federal Tort Claims Act," and that "[i]n these cases, *the date of filing shall be that of delivery to prison officials* of a complaint or other papers destined for district

court." *Garvey v. Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993); *see also Gaines v. U.S. Marshals Serv.*, 291 F. App'x 134 (10th Cir. 2008) (holding that the prison mailbox rule would have applied to FTCA complaint if prisoner affidavit had been properly executed). The Eleventh Circuit in *Garvey* "approve[d] and adopt[ed] the Fourth Circuit's reasoning in *Lewis*, which is directly analogous," involving "the same considerations of equal access to the courts." *Id.* at 782. It noted that the Supreme Court "has emphasized 'that the requirements of the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits.'" *Id.* (quoting *Torres*, 487 U.S. at 316).

The district court relied on unpublished and inapplicable district court opinions to hold that the prison mailbox rule did not apply. *See* JA133. Every case it cited dealt with either the general mailbox rule or the presentment of administrative claims to administrative agencies. *Id.* The Supreme Court designed the prison mailbox rule as an *exception* to situations where the general mailbox rule would not apply. *See Houston*, 487 U.S. at 274. Agency presentment is not at issue here; regardless, the weight of authority holds that it is subject to the prison mailbox rule. *See, e.g.*, *Censke v. United States*, 947 F.3d 488, 490–93 (7th Cir. 2020); *Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 & n.1 (2d Cir. 1999).

The district court also erred by relying on the principle that waivers of sovereign immunity should be construed narrowly to ignore the bright-line holdings of *Houston* and *Lewis*. "[T]he FTCA treats the United States more like a commoner than like the Crown," and the Supreme Court "has often rejected the Government's calls to cabin the FTCA on the ground that it waives sovereign immunity,…even as it was construing *other* waivers of immunity narrowly." *United States v. Kwai Fun Wong*, 575 U.S. 402, 419–20 (2015). This Court has explained that "the general rule that waivers of sovereign immunity should be strictly construed 'is unhelpful in the FTCA context [because it]…run[s] the risk of defeating the central purpose of the statute, which waives the Government's immunity from suit in sweeping language.'" *Sanders*, 937 F.3d at 327 (quoting *Dolan*, 546 U.S. at 491–92). Indeed, the Supreme Court recently held that the FTCA's statute of limitations is subject to equitable tolling. *Kwai Fun Wong*, 575 U.S. at 419–20. If "the FTCA…allows a court to hear late claims," *id.* at 420, then surely it does not require an exception from the prison mailbox rule. Unlike equitable tolling, the prison mailbox rule is not an extension of the time to file and does not "subvert the policies—those of speedy resolution and repose—which underlie the imposition of time limitations." *Lewis*, 947 F.2d at 736.

More broadly, a principle that waivers of sovereign immunity should be narrowly construed is not a license to invent *ad hoc* modifications of the ordinary

rules of civil procedure. There is no dispute in this case that Parrish's claims are embraced within the United States' waiver of sovereign immunity in the FTCA, so the narrow or generous scope of that waiver is not at issue. The only question is whether the United States should be treated as an ordinary litigant in cases where it *has* waived immunity. Any answer other than "yes" has no limiting principle.

2. Parrish Has Plausibly Alleged He Submitted His Complaint to Prison Officials on April 7, 2017

Parrish has plausibly alleged that he submitted his complaint to prison officials on April 7, 2017, the final day of the statute of limitation and when Parrish hand-dated his complaint. JA22.

Because the FTCA limitations period is not jurisdictional, the district court correctly construed the government's first motion to dismiss under 12(b)(1) as a 12(b)(6) motion. JA127 n.2. On a 12(b)(6) motion, a district court must accept all of the non-moving party's plausible allegations as true and cannot make findings of fact, unless the Court treats it as a summary judgment motion and fully complies with Rule 56. *See, e.g.*, FRCP 12(d); *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). Despite quoting from the government's factual affidavits, JA134–135, the district court did not consider the motion under Rule 56 and could not have. *Pro se* litigants must be offered an opportunity for discovery before summary judgment. *See, e.g.*, *Pledger*, 5 F.4th at 526–27 ("Given…the failure to provide [the plaintiff] with an opportunity for discovery, the district court abused

its discretion in granting summary judgment in this posture."). The *Pledger* rule is "especially important" where, as here, "the relevant facts…[are] exclusively in the control of the opposing party." *Id.* at 526 (quoting *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246–47 (4th Cir. 2002)). One of the main rationales for the prison mailbox rule is that "[t]he prison will be the only party with access to at least some of the evidence needed to resolve such questions" as when a document was mailed. *Houston*, 487 U.S. at 276.

Regardless, to the extent that the district court's decision is understood as a summary judgment motion, crediting the government's factual affidavit over the date in Parrish's complaint was still error. JA134–135. "*Houston* places the burden of proof…on the prison authorities, who have the ability to establish the correct date through their logs." *Garvey*, 993 F.2d at 780–81. A "*pro se* inmate-litigant is presumed to have submitted his notice of appeal on the day he signed it." *Boatman v. Berreto*, 938 F.3d 1275, 1278 (11th Cir. 2019); *see also Marsh v. Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000) (same). Once a prisoner has submitted an affidavit under penalty of perjury pursuant to 28 U.S.C. § 1746 attesting that they delivered a document on a given date to prison officials to mail, the state "bears the burden of proof to establish that the statute of limitations has run and that the prison mailbox rule does not apply." *United States v. McNeill*, 523 F. App'x 979, 983 (4th Cir. 2013). In an affidavit made under penalty of perjury pursuant to 28

U.S.C. § 1746, Parrish stated that on April 7, 2017, he "place[d] the [complaint] in [his] door as the officer made rounds picking up mail." JA106. Parrish further testified that mail at USP Big Sandy was not handled in a regular manner and "[i]t is not uncommon for mail to be misplaced, lost[,] or late. Maybe even sent to the wrong block." JA107.

The government's affidavit does not prove otherwise. The government contends that Parrish could not possibly have mailed his complaint before April 28, 2017, based on the May 1 postmark. JA104. But the postmark at most shows when the prison *sent* Parrish's complaint, not when they *received* it. The government's affidavit recounts a convoluted journey from the cell door mailbox allotted to Parrish to the prison mailroom to a post office in Kentucky to *another* post office in West Virginia. JA103–104. Only at this second post office was Parrish's complaint eventually postmarked. The government admits that "outgoing correspondence [like Parrish's] is not specifically logged or otherwise tracked." JA103. Given *Houston*'s and *Lewis*'s concerns that "correctional authorities…may be motivated to delay the filing" *Lewis*, 947 F.2d at 735, the government's failure to have "well-developed procedures for recording the date and time at which they receive papers for mailing," *Houston*, 487 U.S. at 275, should not be held against Parrish.

Indeed, this was not the only time there have been significant delays in processing Parrish's mail in the present case. After the court entered judgment, the BOP failed to deliver a copy of the order to Parrish until, "at the earliest, [] ninety-eight (93) (sic) days after its entry," well past the sixty-day window for Parrish to file his appeal. JA330–331. This necessitated the court's order reopening the time for appeal. *Id*. The government's delays should be no more rewarded when a prisoner is sending mail to the court than when he is receiving it from the court. And that delay confirms that Parrish's allegations are *at least* plausible.

Unresolved factual disputes of this nature typically require remand. *See, e.g.*, *McNeill*, 523 F. App'x at 982–83 (remanding where "the district court ha[d] not made any clear factual finding" as to the date the plaintiff mailed his petition, let alone uncovered any "time-certain records"). For example, in *Boatman*, a case strikingly similar to Parrish's, the Eleventh Circuit remanded a civil rights case when the district court had failed to determine when the plaintiff had given his complaint to his captors, after the district court had mistakenly concluded that the prison mailbox rule did not apply. 938 F.3d at 1276–78. Like Parrish, the detainee in *Boatman* had "signed and dated his notice of appeal…within the deadline, but the envelope that contained the notice b[ore] a [civil commitment facility] stamp indicating that it was delivered for mailing [nearly a full month later]." *Id.* at 1278.

The court held this "conflicting evidence" was sufficient to "create[] a factual question to be decided in the first instance by the district court." *Id.*

3. April 7, 2017 Is Six Months From the Final Denial of the '710 Filing Under FRCP 6(a)

FRCP (6)(a) states that it "appl[ies] in computing any time period…in any statute that does not specify a method of computing time," such as the FTCA statute of limitations, 28 U.S.C. § 2401(b). FRCP 6(a) directs courts to "exclude the day of the event that triggers the period," but include the final day. When the time period is expressed in months or years, as in § 2401(b), the day number for the final day will be the same as that of the triggering event; *i.e.*, the final day will be an "anniversary" or monthly equivalent of the triggering event. *See, e.g.*, *Raplee v. United States*, 842 F.3d 328, 330 (4th Cir. 2016) (stating that where the relevant agency mailed notice of final denial of an administrative claim on June 19, 2012, the plaintiff had until December 19, 2012 to file an FTCA claim); *Hernandez v. Caldwell*, 225 F.3d 435, 439 (4th Cir. 2000) (noting "anniversary" rule). Under those rules, "six months" from October 7, 2017, when the BOP denied Parrish's '710 filing, was April 7, 2017—the day he signed the complaint and attests that he delivered it to prison officials. Thus, Parrish satisfied any § 2401(b) requirement that he file within "six months" of final agency denial. The magistrate judge wrongly concluded that "[p]ursuant to Fed.R.Civ.P. Rule 6(a), 180 days or six months from the date of that final denial was Thursday, April 6, 2017." JA118. The district court declined to correct that mistake, because it deemed the issue

immaterial after holding that the prison mailbox rule does not apply. But this was clear error—and a *sua sponte* one, since the government's own calculations indicated that April 7, 2017 was the last day to file claims predicated on the '710 filing. JA113.

C. The Six-Month Deadline Does Not Apply to Parrish's Claims

We close with a point that would logically come first, but for the widespread misinterpretation of the FTCA's statute of limitations in the existing case law. The FTCA provides, in relevant part, that:

> (a) …[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.
> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues ***or*** unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401 (emphasis added). Section 2401(b) is plainly disjunctive: a plaintiff must *either* present his claim to the agency within two years *or* bring an action within six months of a final agency denial.

Despite the plain language, however, numerous courts have required plaintiffs to present their claims to the agency within two years *and* bring suit within six months of agency denial. Neither the Supreme Court nor this Court appear to have resolved the issue conclusively, although both have assumed that

both deadlines must be met.[7] This misunderstanding has deep roots in the nationwide case law, but the cases are wrong and this Court should say so.

1. The FTCA Establishes Two Alternative Paths To Timeliness

Under a plain-text reading, the FTCA filing deadlines are a bit complex but far from absurd. The FTCA imposes two distinct procedural requirements: administrative exhaustion and timely filing. No action can be filed against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." 28 U.S.C. § 2675(a). The agency then has six months to resolve an administrative claim, after which the agency's silence may "be deemed a final denial of the claim." *Id.* All claims are then subject to the general limitations rule that they are "barred unless the complaint is filed within six years after the right of action first accrues." § 2401(a). For tort claims only, the action is also "barred unless it is presented in writing to the appropriate Federal agency within two years

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[7] In *Kwai Fun Wong*, the Supreme Court assumed that both deadlines must be met along the way to holding that both could be equitably tolled. *See* 575 U.S. at 405 405. This Court made a similar assumption in *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986). The *Henderson* Court did not specify whether its plaintiff met neither deadline or just one, *id.* at 123 & n.9, but the issue of whether both deadlines had to be met appears to have been "neither briefed nor disputed," and thus *Henderson*'s assumption about §2401(b)'s requirements "does not constitute a holding." *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019).

after such claim accrues or unless action is begun within six months after...final denial of the claim by the agency." 28 U.S.C. § 2401(b).

Taken together, these provisions provide a clear, workable structure for when claims may be brought. Any claim against the United States must, in effect, be presented to the agency no later than five years and six months from accrual. Tort plaintiffs are subject to a stricter rule requiring timelier administrative presentment. If a tort plaintiff presents his claim to the agency within two years, he is treated like a non-tort plaintiff and benefits from the full six-year statute of limitation in § 2401(a). But if he presents his claim to the agency *after* two years, the limitations period for court filing is shortened to six months after agency denial.

That is a somewhat unusual limitations structure, but it is far from irrational. One of Congress's primary aims in amending the FTCA was to give agencies "an opportunity to settle disputes before defending against litigation in court." *Smoke Shop, LLC v. United States*, 761 F.3d 779, 786 (7th Cir. 2014) (citing *McNeil v. United States*, 508 U.S. 106, 112 & n.7 (1993)). It is understandable that Congress set up a special incentive for timely presentment in tort cases, which are more likely to present problems of faded memory or lost evidence than, for example, contract and real estate disputes. And if a plaintiff *does* comply with the two-year

presentment deadline, the six-year limitations period in § 2401(a) preserves an outer boundary for bringing suit.

2. Legislative History Does Not Support Rewriting the Plain Text of the Statute

The early circuits to interpret § 2401(b) reached a contrary conclusion by impermissibly relying on legislative history to rewrite the statute. The Ninth Circuit simply stated that § 2401(b) was "clear" in requiring a plaintiff to file within six months of agency denial because of unelaborated-on "significant legislative history," without any attempt to wrestle with the text. *Claremont Aircraft, Inc. v. United States*, 420 F.2d 896, 897 (9th Cir. 1969). The Fifth Circuit purportedly relied on the "plain wording of the statute" to make a similar assumption, while excising the offending "or" from its explanatory quote of § 2401(b) and citing to *Claremont*. *Childers v. United States*, 442 F.2d 1299, 1301 (5th Cir. 1971).

No circuit attempted more than a pro forma analysis until the D.C. Circuit's decision in *Schuler v. United States*, 628 F.2d 199 (D.C. Cir. 1980). The D.C. Circuit worried that "[w]ere we to read the 'or' in the section as really intending the disjunctive…a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief." *Id.* at 201. That result does not follow. A claimant would still be subject to the limitation in § 2401(a), which bars *any* claim not

brought within six years of accrual. But the *Schuler* court thought that "relying on [§ 2401(a)] makes little sense" because it is a "general" limitation "superseded" by the "specific language of Section 2401(b)." *Id.* And while § 2401(a) and (b) could jointly operate, the court determined that "the legislative history of Section 2401(b) clearly shows that Congress intended a claimant to surmount both barriers." *Id.* at 201–02. The court therefore held that "common sense and the legislative history tell us" that the "or" must function as an "and." *Id.* at 201.

Three years later, the Second Circuit acknowledged that "[i]t is beyond dispute that 'or' generally is a disjunctive." *Willis v. United States*, 719 F.2d 608, 610 (2d Cir. 1983). But, relying on *Schuler*, the court believed (again, incorrectly) that treating "or" disjunctively would allow claimants an indefinite time within which to bring their claims. *Id.* This misunderstanding led the court to declare it "beyond our ken" "[w]hy the draftsman chose to use 'or' in the bill, as distinguished from the crystal clear 'and' of the committee reports" or why Congress had ignored the ambiguity for fifteen years. *Id.* at 612, 613 n.3. The court then rewrote § 2401(b) because it believed "a strictly literal reading [of § 2401(b)] would be absurd" and "the committees had the 'or' language of the bills before them and thought it meant 'and.'" *Id.* at 610, 612. It recognized, however, that the issue was uncertain enough that it "might even lead to an intercircuit conflict" and

"may cause hardship to litigants acting pro se or represented by inexpert counsel." *Id*. at 613 n.3.

The Fifth and Ninth Circuits subsequently made clear what their earlier holdings had presumed: "though phrased in the disjunctive," "Section § 2401(b) establishes two…hurdles, both of which must be met." *Houston v. U.S. Postal Serv.*, 823 F.2d 896, 902 (5th Cir. 1987); *Dyniewicz v. United States*, 742 F.2d 484, 485 (9th Cir. 1984).

Although statutory interpretation was more freewheeling in the early 1980s, subsequent precedent of the Supreme Court and this Court makes clear that the plain language of a statute cannot be disregarded (or inverted) based on stray comments in legislative history. "When interpreting statutes[, this Court] start[s] with the plain language," because it is "the most reliable indicator of congressional intent" and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)); *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 505 (4th Cir. 2011) (internal quotations omitted). "Legislative history is not the law," and insofar as it is ever a proper source for divining congressional intent, it is only to *resolve* an ambiguity, not to *create* one by "muddy[ing] clear statutory language." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019). A statute can be

"awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue." *Lamie*, 540 U.S. at 534. It is not the role of the courts to "soften the import of Congress' chosen words even if [they] believe the words lead to a harsh outcome." *Id.* at 538. This is particularly true "with respect to filing deadlines[, where] a literal reading of Congress' words is generally the only proper reading of those words." *United States v. Locke*, 471 U.S. 84, 93 (1985); *see also Spivey v. Vertrue, Inc.* 528 F.3d 982, 984 (7th Cir. 2008) ("That Congress has written a deadline imprecisely, or even perversely, is not a sufficient reason to disregard the enacted language.").

There is no ambiguity in the meaning of "or." Indeed, the *Willis* court acknowledged that it was "beyond dispute that 'or' generally is a disjunctive" and cited several dictionaries. 719 F.2d at 610. None of the above circuit courts even purported to identify an ambiguity in the text. They simply thought that Congress did not intend what it wrote or believed (wrongly) that respecting the plain text could allow plaintiffs to delay indefinitely.

3. Recent Efforts To Reconcile The Text And Legislative History Are Unpersuasive

More recently, the Sixth Circuit recognized that an approach that simply "transforms 'or' into 'and'" is inconsistent with the modern jurisprudence of statutory interpretation. *Ellison v. United States*, 531 F.3d 359, 362–63 (6th Cir. 2008). In an effort to salvage a conjunctive understanding, the Sixth Circuit

reframed the inquiry as "whether the…'or' means that the statute sets forth two different ways of barring an action on limitations grounds or two different ways of satisfying the limitations requirement." *Id.* at 361. And the court then offered several reasons why the purported ambiguity should be resolved in favor of an interpretation that bars "claims that fail to satisfy either one of [the] two deadlines." *Id.*

That effort fails at the first step. The Sixth Circuit purported to resolve a textual ambiguity that does not exist. The statute establishes a rule followed by two distinct exceptions, not two conditions jointly necessary to evade the rule. A "tort claim against the United States shall be forever barred"—the rule— "unless it is presented…to the…agency within two years…or unless action is begun within six months after…final denial…by the agency"—the exceptions. The two instances of "unless" in the statute unambiguously mark the clauses that follow as exceptions to the rule that tort claims against the United States are barred, and the "or" separating those clauses means that either exception suffices. The Sixth Circuit's suggestion that the disjunctive language can be read instead as identifying "two different ways to file a claim late" simply ignores the fundamental logic and structure of the sentence. *Id.* at 363.

In any event, none of the Sixth Circuit's reasons for how it resolved the purported ambiguity are persuasive. The court reasoned that taking the disjunctive

language seriously "would pull at least two threads out of a coherent reading of the provisions." *Id.* at 362. First, the statute "plainly contemplates that one act (the administrative filing) will precede the other (court filing) and thus most naturally requires claimants to satisfy both deadlines." *Id.* But there is no question that administrative exhaustion is required (*see* § 2675(a)), and that the administrative filing therefore must necessarily precede court filing. That sequence sheds no light on whether—assuming the exhaustion requirement has been satisfied—the statute's two timing rules are disjunctive alternatives or conjunctive requirements.

Second, the Sixth Circuit repeated the error of *Schuler* and *Willis*, claiming that "the alternative would effectively eliminate *any* court deadline." *Id.* at 362. Recognizing that "Congress meant to impose *some* time limitation on administrative and court filings," the Sixth Circuit reasoned that § 2401(b) must set out two alternate means of barring a claim. *Id*. Again, however, § 2401(a) already establishes a six-year outer boundary for *all* tort claims against the United States. It is not necessary to torture § 2401(b) to establish some deadline.

The Sixth Circuit also pointed to *Willis*, *Schuler*, and *Houston* as evidence that its view aligned with other circuits. But those courts followed an interpretive methodology and rationale that the Sixth Circuit acknowledged to be unworkable. Maintaining consistency with the outcomes of past cases is no virtue when the reasoning of those cases is indefensible.

Courts following *Ellison* have only perpetuated and compounded its error. The First Circuit adopted *Ellison* in a footnote, repeating the mistaken line that the alternative would be "no deadline at all." *Sanchez v. United States*, 740 F.3d 47, 50 n.6 (1st Cir. 2014). The Third Circuit adopted *Ellison*'s reasoning after noting that "the Act's established procedures have [to] be[] strictly construed" in favor of the government "because the [FTCA] constitutes a waiver of sovereign immunity." *Sconiers v. United States*, 896 F.3d 595, 598–99 (3d Cir. 2018). *But see* § II.B.1, *supra*. None of these decisions succeed in reconciling the longstanding misinterpretations of the statute with its plain text.

III. THE '283 FILING ENCOMPASSES CLAIMS IN THE AMENDED COMPLAINT

Even if the Court rejects *all* of the timeliness points explained above, Parrish's claims in this case would still be timely to the extent that they are encompassed by the '283 administrative filing. The district court correctly held that the limitations period for any claims based on that filing was tolled because the BOP's denial letter did not include the required warning of a six-month deadline. JA69, JA127, JA139; *see* 28 C.F.R. § 14.9(a). The district court nonetheless relied on a narrow reading of the claims presented in the '283 filing to dismiss all of the legal claims in Parrish's amended complaint. JA318–322.

Parrish's '283 filing alleged that the BOP abused prison procedures when it changed the originally charged theory of Parrish's culpability in Wilson's murder.

JA92. In an attachment to the BOP form, Parrish explained that he was denied due process, that the Director acted beyond the scope of his powers, and that the BOP violated regulations regarding the administrative remedy program. JA94. Parrish also alleged various injuries, including denial of access to the courts, institutional jobs, and rehabilitative programs; the inability to lower his custody or redress the sanctions from his first hearing; and a loss of liberty. JA92.

Parrish's amended complaint alleges at least five claims against the government: false imprisonment, intentional infliction of emotional distress, negligence, malicious prosecution, and abuse of process. JA31–34. Parrish acknowledges that the false imprisonment and intentional infliction of emotional distress claims were only presented in the '710 filing.[8] But his negligence, malicious prosecution, and abuse of process claims were adequately presented to the BOP in the '283 filing, at least in part.[9] The district court failed to read

[8] The district court did not decide whether the intentional infliction of emotional distress claim was independently raised in the '710 filing. JA319.

[9] The magistrate judge also recommended that Parrish's "claim for relief be denied because it exceeded the amount originally sought in the '283 claim." JA312–313; *see* 28 U.S.C. § 2675(b) (limiting damages to amount in administrative claim, absent newly discovered evidence not reasonably discoverable before or other intervening facts). But that would only limit the available remedy, not the district court's jurisdiction to resolve his underlying claims. *See, e.g.*, *Kielwien v. United States*, 540 F.2d 676, 681 (4th Cir. 1976) (remanding for district court to "reduce the amount of plaintiff's recovery…to the maximum amount claimed in her administrative claim").

Parrish's administrative filings with the liberality appropriate to an incarcerated *pro se* litigant.

Negligence

The district court held that Parrish's negligence claim "allege[s] theories of relief [he] clearly did not present in Claim '283." JA319. But Parrish did not have to articulate a specific legal theory in his administrative claim. A claim need only give "due notice that the agency should investigate the possibility of particular (potentially tortious) conduct." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852 (10th Cir. 2005) (quoting *Dynamic Image Techs., Inc v. United States*, 221 F.3d 34, 40 (1st Cir. 2000)). The "FTCA's notice requirements should not be interpreted inflexibly," as a claimant must only give "notice of the facts and circumstances underlying a claim rather than the exact grounds upon which plaintiff seeks to hold the government liable." *Id.* at 853; *accord Burchfield v. United States*, 168 F.3d 1252, 1255 (11th Cir. 1999) ("the amount of information required is 'minimal'"). Indeed, "a plaintiff's administrative claims are sufficient even if a separate basis of liability arising out of the same incident is pled in federal court." *Goodman v. United States*, 298 F.3d 1048, 1055 (9th Cir. 2002).

Parrish's amended complaint alleges that BOP was "negligent in failing to review my case and releas[e] me in an orderly fashion." JA33. Parrish's '283 claim encompasses that allegation at least as to the final period, by alleging that BOP

"changed the whole landscape" by adding "a charge [Parrish] was never charged with in the initial incident report," rather than properly concluding at that point that Parrish was not culpable in Wilson's death. JA92. The over six-month delay between the rehearing order and expungement "left [Parrish] in a place where [he] c[ould] seek no redress." JA94. Indeed, the BOP appeared to acknowledge that Parrish's administrative claim alleged a theory of negligence; it simply rejected that claim on the merits. Its denial letter informed Parrish that he "failed to assert that you have suffered a specific physical injury from the alleged negligence of a BOP employee." JA69.

Malicious Prosecution

For much the same reason, Parrish's malicious prosecution claim was also properly presented to the BOP. The amended complaint alleges the government was set on finding Parrish responsible for Wilson's murder, including by making faulty determinations. JA33. Parrish's '283 claim encompassed one component of this theory. Parrish claims that when the facts could not support finding him guilty of killing, the BOP ordered a new hearing on an entirely new theory of the case (assisting in killing) rather than exonerate him, even though the BOP already possessed sufficient evidence to determine his innocence. JA92–94.

Abuse of Process

Parrish's complaint includes two abuse of process claims: one relating to misuse of SMU and administrative detention and one relating to BOP's remand order. The former was raised in the '710 filing but the latter was squarely presented in the '283 filing. *See* JA92 (labeling Parrish's '283 filing against BOP as "ABUSE OF PROCESS" and describing in detail his grievance with the remand order).

The district court mistakenly believed that Parrish's complaint only alleged the '710-based theory of abuse of process. JA320–321. When Parrish filed his amended complaint, he informed the court that he had "just been transferred" and was "without [his] property." JA29. As a result, he lacked the records to fully document his claims and only initially included a description of the misuse of SMU and administrative detention under his abuse of process claim. JA31–32. The district court ordered Parrish to supplement his complaint and he responded by later filing a Memorandum of Evidence, which the court directed the clerk to redocket as attachments to Parrish's amended complaint. JA81–83, JA85–86.

Parrish's Memorandum of Evidence restated his claims stemming from the '283 filing: that BOP "abused the process of a rewrite" when ordering a rehearing where "the code was changed from a 100 to a 100(a)." JA41. Parrish's complaint admittedly does not always draw a bright line between these two incidents, in part because the amended complaint was filed before the claims related to the '710

filing were excised from the suit and was thus drawing on facts from both the ’710 and ’283 filings. But *pro se* documents are “to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal citations and quotation marks omitted). Parrish’s amended complaint expressly referenced the ’283 filing and his grievance with the rehearing order, including calling it an “abuse[] of process.” JA37, JA41. The remand order was thus squarely raised in the complaint, and the district court erred in holding otherwise.

CONCLUSION

For the reasons set forth above, this Court should vacate the district court’s orders dismissing Parrish’s complaint and remand the case to proceed to discovery.

ORAL ARGUMENT STATEMENT

Appellant respectfully requests oral argument in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Opening Brief of Appellant has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 11,683 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line printout.

s/ J. Scott Ballenger
J. Scott Ballenger