No. _____

In The

Supreme Court of the United States

LARRY STEVEN WILKINS; JANE B. STANTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JAMES M. MANLEY
Pacific Legal Foundation
3217 East Shea Blvd.
No. 108
Phoenix, AZ 85028
jmanley@pacificlegal.org

ETHAN BLEVINS
Pacific Legal Foundation
839 W. 3600 S.
Bountiful, UT 84010
eblevins@pacificlegal.org

JEFFREY W. MCCOY*
**Counsel of Record*
DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
jmccoy@pacificlegal.org
dschiff@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

Two Montana landowners filed a quiet title action seeking to resolve a dispute over the scope of an easement held by the United States that runs across their land and the federal government's duties under the easement. The District Court held that the Quiet Title Act's statute of limitations is jurisdictional, found that the landowners did not prove that their claims arose within twelve years of the lawsuit being filed, and dismissed the case. The District Court's treatment of the statute of limitations as jurisdictional—rather than a claim-processing rule—subjected the landowners to different standards for resolving the motion to dismiss, allowing the court to dismiss the case without holding a hearing to determine and resolve disputed facts.

In conflict with the Seventh Circuit, the Ninth Circuit affirmed, holding the Quiet Title Act's statute of limitations is jurisdictional.

The question presented is:

Whether the Quiet Title Act's Statute of Limitations is a jurisdictional requirement or a claim-processing rule?

PARTIES TO THE PROCEEDING

Petitioners Larry Steven Wilkins and Jane B. Stanton were the plaintiffs-appellants below.

Respondent United States of America was the defendant-appellee below.

STATEMENT OF RELATED PROCEEDINGS

Wilkins v. United States, No. 20-35745 (9th Cir.) (opinions issued September 15, 2021; rehearing en banc denied November 23, 2021).

Wilkins v. United States, No. CV 18-147-M-DLC-KLD (D. Mont.) (judgment entered May 26, 2020, motion to alter or amend judgment denied August 11, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Larry Steven (Wil) Wilkins and Jane B. Stanton (landowners) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals, holding that the Quiet Title Act's statute of limitations is jurisdictional, is published at 13 F.4th 791 (9th Cir. 2021) and included in Petitioners' Appendix (App.) A. The panel's unpublished memorandum opinion affirming the judgment of the District Court is included at App. B. The District Court's decision denying the landowners' motion to alter or amend the judgment is included at App. C. The District Court's order granting the motion to dismiss is included at App. D. The Magistrate Judge's findings and recommendations on the motion to dismiss are included at App. E. The Ninth Circuit's order denying the petition for rehearing en banc is included at App. F.

JURISDICTION

The District Court granted the defendants' motion to dismiss on May 26, 2020. The landowners filed a timely appeal to the Ninth Circuit. On September 15, 2021, a panel of the Ninth Circuit affirmed the dismissal of the District Court. The landowners then filed a timely petition for rehearing en banc, which was denied on November 23, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346 provides, in relevant Part:

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(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

***

28 U.S.C. § 2409a provides, in relevant Part:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

***

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his

predecessor in interest knew or should have known of the claim of the United States.

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INTRODUCTION

The Courts of Appeals are divided on the question of whether the Quiet Title Act's statute of limitations is jurisdictional. *See, e.g.*, *Wisconsin Valley Improvement Co. v. United States*, 569 F.3d 331, 334 (7th Cir. 2009) (holding that the Quiet Title Act's statute of limitations is not jurisdictional); *Rio Grande Silvery Minnow (Hybognathus amarus) v. Bureau of Reclamation*, 599 F.3d 1165, 1175 (10th Cir. 2010) (citing circuits holding that Quiet Title Act's statute of limitations is jurisdictional).

The circuit split began before this Court's recent attempt to bring discipline to what legal rules should be properly characterized as jurisdictional. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) ("[W]e have tried in recent cases to bring some discipline to the use of the term jurisdiction." (quotations omitted)). As a result, most courts that treat the Quiet Title Act's statute of limitations as jurisdictional established their rules without the benefit of this Court's decisions explaining how to determine whether a statute of limitations is jurisdictional.

Until recently, this Court has used the term "jurisdiction" inconsistently in dicta, resulting in confusion among lower courts. *See Sebelius*, 568 U.S. at 153; *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (jurisdiction "is a word of many, too many, meanings" (internal quotation marks omitted)). It has admittedly

"sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). Over the past decade, it has worked to correct that mistake and prevent the "untoward consequences" of mislabeling a rule jurisdictional. *Sebelius*, 568 U.S. at 153.

"Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). "Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them *sua sponte*." *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1849, (2019) (quotations omitted). A jurisdictional rule shifts the burden of proof and allows a court to "proceed as it never could under Rule 12(b)(6) or Fed.R.Civ.P. 56." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (citation omitted). Because of this unique status, this Court has repeatedly granted certiorari in cases to resolve circuit splits concerning the nature of various legal rules, which has helped to ensure that lower courts do not mislabel claim-processing rules as jurisdictional.[1]

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[1] *See Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 55 (2021) (granting certiorari to decide whether the 30-day rule for filing a petition for review of a notice of determination from the IRS is jurisdictional); *Fort Bend Cty.*, 139 S. Ct. at 1846 (Title VII's charge-filing requirement is not jurisdictional); *Hamer v.*

Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 16–17, 22 (2017) (time limit for an extension of time to file a notice of appeal is not jurisdictional); *United States v. Wong*, 575 U.S. 402, 409–10 (2015) (Federal Tort Claims Act's statute of limitations is not jurisdictional); *Sebelius*, 568 U.S. at 148–49 (provision of Medicare statute setting 180-day limit for filing appeals to Provider Reimbursement Review Board is not jurisdictional); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (provision of Antiterrorism and Effective Death Penalty Act of 1996, requiring the certificate of appealability to indicate which specific issue or issues satisfy the Act's requirement that a petitioner make a substantial showing of the denial of a constitutional right, is not jurisdictional); *Stern v. Marshall*, 564 U.S. 462, 479 (2011) (bankruptcy statute's requirement that "personal injury tort" claims be tried in district court, rather than bankruptcy court, is not jurisdictional); *Henderson*, 562 U.S. at 438–41 (deadline on filing appeals to Veterans Court is not jurisdictional); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (statute of limitations on petitions for federal habeas relief by state prisoners is not jurisdictional); *Dolan v. United States*, 560 U.S. 605, 610–11 (2010) (statutory deadline for ordering restitution is not jurisdictional); *Reed Elsevier*, 559 U.S. at 157 (requirement that copyright be registered before filing suit is not jurisdictional); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 71–72 (2009) (procedural rule requiring proof of conferencing prior to arbitration of minor disputes before the National Railroad Adjustment Board is not jurisdictional); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504–05, 516 (2006) (Title VII's employee-numerosity requirement for establishing "employer" status under the Act is not jurisdictional); *Eberhart v. United States*, 546 U.S. 12, 15–16 (2005) (per curiam) (rules setting forth time limits for a defendant's motion for a new trial are not jurisdictional); *Scarborough v. Principi*, 541 U.S. 401, 411–12 (2004) (Equal Access to Justice Act's 30-day deadline for attorney fee applications and its application-content specifications are not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 452–54 (2004) (time constraints for objecting to bankruptcy discharge is not jurisdictional).

This Court's review is again needed to resolve a circuit split about the nature of a claim-processing rule. Below, the panel entrenched the circuit split over the Quiet Title Act's statute of limitations by not applying this Court's recent precedents, instead relying on past Ninth Circuit precedent to hold that the Quiet Title Act's statute of limitations is jurisdictional. App. A-7 (citing *Skranak v. Castenada*, 425 F.3d 1213 (9th Cir. 2005); *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189 (9th Cir. 2008); *Fidelity Expl. & Prod. Co. v. United States*, 506 F.3d 1182 (9th Cir. 2007)). As a result, property owners in quiet title cases, like the landowners here, are procedurally hamstrung and unable to make their case. A jurisdictional time bar subjects litigants to different standards for resolving motions to dismiss and, as happened below, allows courts to dismiss cases without holding a hearing to determine and resolve disputed facts.

The petition should be granted to bring uniformity among the lower courts and to ensure the Quiet Title Act's statute of limitations is not mislabeled as a jurisdictional rule.

STATEMENT OF THE CASE

A. Factual Background

Larry Steven "Wil" Wilkins is a veteran diagnosed with post-traumatic stress disorder. 2 Appellants' Excerpts of Record (ER) at 110 ¶ 3, Ninth Circuit case no. 20-35745, docket no. 12 (filed Dec. 23, 2020). In 2004, he purchased property in rural Montana and moved to Robbins Gulch Road in Ravalli County. *Id.* ¶ 4. Across the road lives Jane Stanton, who purchased property and moved to Robbins Gulch Road

in 1990 with her husband. 3 ER at 394 (Depo. Stanton, 17:1). Since 2013, when Mrs. Stanton's husband passed away, she has been the sole owner of her property. 2 ER at 261.

Both Mr. Wilkins's and Mrs. Stanton's properties are burdened by an easement owned by the federal government and managed by the United States Forest Service (Forest Service). 2 ER at 262; 2 ER at 286–87; 2 ER at 282; 2 ER at 227. The landowners' predecessors granted the easement in 1962 in two separate deeds that contain substantially the same language. 2 ER at 227; 2 ER at 234. The easement conveys to the United States "and its assigns" a 60-foot easement "for a road as now constructed and in place and to be re-constructed, improved, used, operated, patrolled, and maintained and known as the Robbins Gulch road, Project Number 446." 2 ER at 227.[2] According to a contemporaneous statement by the then-Forest Supervisor to the grantors, the "[p]urpose of the road" was for "timber harvest." 2 ER at 244.

Until recently, the Forest Service's management of the easement has ensured that use of the easement did not unreasonably burden Mr. Wilkins's and Mrs. Stanton's property. But in September 2006, the Forest Service commissioned a sign to be installed along Robbins Gulch Road that read "public access

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[2] The easement differs in significant ways from the form easements in the Forest Service Handbook used by the agency at the time. Namely, the form easements purport to grant the United State an easement for "highway purposes," 2 ER at 149, whereas the 1962 deeds state that the easements are "for a road as now constructed and in place." 2 ER at 227. Also, unlike the form easements, the 1962 deeds state that the easement road will be "patrolled." *Id*.

thru private lands." 3 ER at 516; 3 ER at 518. Since that sign was installed, traffic along the easement has increased. 3 ER at 333 (Depo. Wilkins, 28:17). The expanded use of the easement has interfered with Mr. Wilkins's and Mrs. Stanton's use and enjoyment of their property. 3 ER at 359 (Depo. Wilkins, 132:22–133:24); 3 ER at 410 (Depo. Stanton, 79:5–80:22).

Due to this expanded use, Mr. Wilkins, Mrs. Stanton, and their neighbors have had to deal with trespassers on their private property, theft of their personal property, people shooting at their houses, people hunting both on and off the easement, and people travelling at dangerous speeds on and around Robbins Gulch Road. 3 ER at 359 (Depo. Wilkins, 132:22–133:24); 3 ER at 410 (Depo. Stanton, 79:5–80:22); 2 ER at 114–15 ¶¶ 5–13. In September 2019, someone travelling along the road shot Mr. Wilkins's cat. 2 ER at 111 ¶¶ 12–13. The recent, excessive use of the road and adjacent property by the public and Forest Service permittees has even caused some neighbors to move. 2 ER at 116 ¶ 27.

Additionally, the increased use of the easement has caused erosion of the road that affects the adjacent property. 3 ER at 542 ¶ 15. The road condition has caused sediment and silt to build up on the underlying properties, and has caused washout on those properties. 3 ER at 352 (Depo. Wilkins, 103:3–6). The Forest Service's maintenance of the easement, however, has become more sporadic in recent years. 3 ER at 351 (Depo. Wilkins, 100:25–101:8).

In 2017, the landowners and their neighbors requested that the Forest Service help address these problems. 2 ER at 116 ¶ 26; 3 ER at 433 (Depo. Winthers, 14:14–15:17). The Forest Service declined.

2 ER at 116 ¶ 26. Not only did the agency disagree that the easement is limited in scope, it also disclaimed any obligations under the easement. 2 ER at 64; 3 ER at 544 (Answer denying that landowners are entitled to requested relief). It informed the property owners that it would manage the easement however it wished, and that it owed no duties to the underlying owners. 2 ER at 116 ¶ 26. A few months later, Mr. Wilkins's attorney followed up with a letter to the United States Department of Agriculture Office of the General Counsel. *See* 2 ER at 64. In July 2018, the Office of the General Counsel reiterated the Forest Service's position that it could allow whomever it wanted on the easement and that all management decisions were at the Forest Service's sole discretion. *Id.*

B. Procedural Background

Unable to get help from the Forest Service, Mr. Wilkins and Mrs. Stanton filed this suit in August 2018. *See* 3 ER at 548. Brought under the Quiet Title Act, the Complaint asked the District Court to interpret the easement under Montana law to determine the lawful use of the easement and the government's duties under it. *See* 3 ER at 562.[3]

In October 2019, the government moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), arguing that the landowners did not bring the case within the Quiet

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[3] Montana law governs the easement at issue here. *See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378–79 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.").

Title Act's twelve-year statute of limitations. *See* App. E-1. The government could "not pin down precisely when Plaintiffs' claims expired" but argued that the claims accrued more than twelve years before the lawsuit was filed. App. D-20. The landowners responded that the Quiet Title Act's statute of limitations is not jurisdictional, and that the case could not be resolved on a motion to dismiss. *See* App. E-2. The landowners further argued that based on the Forest Service's actions in managing the easement, including statements by Forest Service officers to the landowners and their neighbors, that the claims only accrued when the Forest Service put up a sign that read "public access thru private lands." *See* Opening Brief Section IV-E, Ninth Circuit case no. 20-35745, docket no. 11 (filed Dec. 23, 2020); App. E-16–17 (Magistrate Judge stating that "Landowners filed this lawsuit because of the alleged changes in the scope of the USFS's operation and management of the easement."). The Forest Service commissioned the sign in September 2006, eleven years and eleven months before the lawsuit was filed. 3 ER at 516; 3 ER at 518.

Magistrate Judge DeSoto recommended that the motion to dismiss be denied. App. E-18. Judge DeSoto concluded that the Quiet Title Act's statute of limitations is not jurisdictional. App. E-14. Hence, the government's motion to dismiss for lack of jurisdiction was improper, and its statute of limitations arguments should be decided on a motion for summary judgment or trial. App. E-17.

The government objected to the findings and recommendations, and reiterated the arguments made in its motion to dismiss. App. D-5. The District

Court held that the Quiet Title Act's statute of limitations is jurisdictional, App. D-15, and placed the burden on the landowners to prove that they had brought the complaint within the statute of limitations. App. D-23. The District Court, without holding an evidentiary hearing to determine and resolve disputed facts, concluded that the landowners failed to meet their burden and dismissed the case. *Id.*

Mr. Wilkins and Mrs. Stanton filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). On August 11, 2020, the court denied the motion, App. C-7. Mr. Wilkins and Mrs. Stanton appealed on August 26, 2020. 3 ER at 564.

On September 15, 2021, the Ninth Circuit panel affirmed the judgment of the District Court. App. A-12; App. B-6. In a published opinion, the panel held that the Quiet Title Act's statute of limitations is jurisdictional. App. A-10. In a separate unpublished opinion, the panel, reviewing the District Court's order for clear error, affirmed the dismissal. App. B-5. Mr. Wilkins and Mrs. Stanton filed a petition for rehearing en banc, which the Ninth Circuit denied on November 23, 2021. App. F-1.

REASONS TO GRANT THE PETITION

I. Certiorari Should Be Granted To Resolve a Circuit Split About Whether the Quiet Title Act's Statute of Limitations Is Jurisdictional

The circuit courts are split on whether the Quiet Title Act's statute of limitations is jurisdictional. The Seventh Circuit has held that the Quiet Title Act's statute of limitations is not jurisdictional. *Wisconsin*

Valley, 569 F.3d at 334. Seven others have held that the statute of limitations is jurisdictional. *See Kingman Reef*, 541 F.3d 1189; *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 769 (4th Cir. 1991); *Bank One Tex., N.A. v. United States*, 157 F.3d 397, 403 (5th Cir. 1998); *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 737–38 (8th Cir. 2001); *Knapp v. United States*, 636 F.2d 279, 282 (10th Cir. 1980); *F.E.B. Corp. v. United States*, 818 F.3d 681, 685 n.3 (11th Cir. 2016); *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 558 F.3d 592, 595 (D.C. Cir. 2009).

A. The circuit split began before this Court's recent cases describing how to determine whether a statute of limitations is jurisdictional

Nearly all the circuits that have held that the Quiet Title Act's statute of limitations is jurisdictional did so before this Court's recent cases articulating the standards for determining whether a rule is jurisdictional. Most of the circuits holding that the Quiet Title Act's statute of limitations is jurisdictional are based on one passing reference to jurisdiction in *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983).[4] But as this Court has recently made clear, lower courts should not read too much into this Court's passing use of "jurisdiction." *Cf.*

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[4] *See Skranak*, 425 F.3d at 1216 (citing *Block*, 461 U.S. at 292); *Bank One Tex.*, 157 F.3d at 403 (same); *F.E.B. Corp.*, 818 F.3d at 685 n.3 (same); *see also Spirit Lake Tribe*, 262 F.3d at 737–38 (citing *Block*, 461 U.S. at 286); *Warren v. United States*, 234 F.3d 1331, 1335 (D.C. Cir. 2000) (same); *Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 769 (citing *Block*, 461 U.S. at 282–83).

Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 21 (2017) ("The mandatory and jurisdictional formulation is a characterization left over from days when we were less than meticulous in our use of the term jurisdictional." (quotations omitted)).

In *Block*, this Court considered (1) whether the Quiet Title Act provides the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property, and (2) whether the Quiet Title Act's statute of limitations is applicable where the plaintiff is a state. 461 U.S. at 276–77. *Block* did not, however, consider whether the Quiet Title Act's statute of limitations is jurisdictional. *Block* made one passing reference in the conclusion of its opinion that the courts below would lack jurisdiction if the suit were barred by the statute of limitations. *Id.* at 292. But this Court has "described such unrefined dispositions as drive-by jurisdictional rulings that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511 (quotations omitted).

Unlike other circuits, the Seventh Circuit refused to read too much into *Block*'s drive-by reference. *Wisconsin Valley*, 569 F.3d at 334. In *Wisconsin Valley*, Judge Easterbrook, writing for the court, recognized that *Block* was "yet another example of the tendency … to employ the word [jurisdiction] loosely," and was not meant to opine on the jurisdictional nature of the Quiet Title Act's statute of limitations. *Id*. Because "not every reference to 'jurisdiction' in the Supreme Court's large corpus of decisions means 'subject-matter jurisdiction' in the contemporary

sense," the Seventh Circuit held that the Quiet Title Act's statute of limitations was not jurisdictional. *Id.*

The decision in *Wisconsin Valley* was prescient. In the past decade, this Court has worked to clearly define when statutes of limitations and other legal rules are jurisdictional. *See*, n.1, *supra*. This Court has held that, absent a clear statement from Congress to the contrary, a statute of limitations is not jurisdictional. *United States v. Wong*, 575 U.S. 402, 409–10 (2015). Because most of the circuits analyzed the Quiet Title Act's statute of limitations decades ago, they were unable to apply the clear statement test to their holdings.

B. This Court's recent cases undermine the reasoning of those circuits that have held the Quiet Title Act's statute of limitations is jurisdictional

This Court's recent decisions demonstrate the flawed reasoning of those circuits that have held the Quiet Title Act's statute of limitations is jurisdictional. In addition to *Block*'s passing reference to jurisdiction, those circuits justified their conclusions based on the Quiet Title Act's waiver of sovereign immunity. *Spirit Lake Tribe*, 262 F.3d at 737–38 ("Because the QTA waives the government's sovereign immunity … the QTA statute of limitations acts as a jurisdictional bar …." (citing *Block*, 461 U.S. at 280)); *Knapp*, 636 F.2d at 282 ("As a condition to suit against the sovereign, the 12-year rule must be strictly construed in favor of the sovereign."); *Bank One Tex.*, 157 F.3d at 403 ("[B]ecause it circumscribes the scope of a waiver of sovereign immunity, the statute of limitations manifests a jurisdictional prerequisite, rather than an affirmative defense.");

Richmond, Fredericksburg & Potomac R.R. Co., 945 F.2d at 769 ("Because the limitations period represents a condition on the waiver of federal sovereign immunity, it is a jurisdictional prerequisite to suit[.]" (citing *Block*, 461 U.S. at 282–83)).

But, as this Court has made clear in its recent decisions "it makes no difference" to the jurisdictional question "that a time bar conditions a waiver of sovereign immunity, even if Congress enacted the measure when different interpretive conventions applied …." *Wong*, 575 U.S. at 420. The waiver of sovereign immunity is irrelevant because this Court "treat[s] time bars in suits against the Government …. the same as in litigation between private parties." *Id.* But nearly all the opinions holding that the Quiet Title Act's statute of limitations is jurisdictional rely on the waiver of sovereign immunity to justify their holdings. Because those courts did not have the benefit of this Court's recent decisions, they issued holdings based on faulty premises.

C. Only this Court can resolve the circuit split

The decision below ensures that the circuit split will persist. Despite recognizing "tension between *Wong*'s reasoning and the analysis underlying Ninth Circuit precedent interpreting the jurisdictional nature of the [Quiet Title Act's] statute of limitations," the court below chose not to overturn its previous precedents. App. A-9. Now, the Ninth Circuit's holding that the Quiet Title Act's statute of limitations is jurisdictional can only be overruled on discretionary, en banc review. *See* App. A-7–9. Without this Court's intervention, the Ninth Circuit

will remain in conflict with the Seventh Circuit indefinitely.

Furthermore, if this Court does not grant certiorari, it is likely that the circuit split will deepen. Unlike the Ninth Circuit, some courts will reconsider their previous holdings on whether the Quiet Title Act's statute of limitations is jurisdictional. Indeed, prior to the decision below, two district courts in the Ninth Circuit held that, in light of *Wong*, the Quiet Title Act's statute of limitations is not jurisdictional. *Payne v. U.S. Bureau of Reclamation*, No. CV 17-00490-AB (MRWx), 2017 WL 6819927 (C.D. Cal. Aug. 15, 2017); *Bar K Ranch, LLC v. United States*, No. CV-19-6-BU-BMM, 2019 WL 5328782 (D. Mont. Oct. 21, 2019).

Some circuits will follow suit and hold that the Quiet Title Act's statute of limitations is not jurisdictional. Many of these circuits have already applied this Court's recent cases to other statutes of limitations and claim-processing rules, in some cases reversing decisions that previously held a rule is jurisdictional.[5] These circuits have not had the

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[5] *See In re Bonvillian Marine Serv., Inc.,* 19 F.4th 787, 790 (5th Cir. 2021) (overturning, in light of *Wong*, previous standard for determining whether a rule is jurisdictional); *Gad v. Kansas State Univ.*, 787 F.3d 1032, 1039–40 (10th Cir. 2015) (holding that Title VII's requirement that a claimant verify the charges against an employer is not jurisdictional and stating "To the extent our previous cases would require a contrary result," *Wong* and other superseding contrary decisions from this Court control); *Sisseton-Wahpeton Oyate of Lake Traverse Rsrv. v. U.S. Corps of Eng'rs*, 888 F.3d 906, 917 n.4 (8th Cir. 2018) (recognizing *Wong*'s effect on analysis of whether a statute of limitations is jurisdictional, but stating that "because we decide the issue on

opportunity to revisit their Quiet Title Act cases, but if they continue their trend and apply this Court's recent cases to hold that the Quiet Title Act's statute of limitations is not jurisdictional, then they will issue decisions in conflict with the decision below.

Some circuits may reaffirm their previous holdings that the Quiet Title Act's statute of limitations is jurisdictional, but that will not bring uniformity to the issue. The Eleventh Circuit, for example, recently relied on the passing reference in *Block* to hold that, despite *Wong*, the Quiet Title Act's statute of limitations is jurisdictional. *F.E.B. Corp.*, 818 F.3d at 685 n.3. But that decision only reinforced the existing circuit split with the Seventh Circuit.

Only this Court can resolve the split over whether the Quiet Title Act's statute of limitations is jurisdictional. The petition for a writ of certiorari should be granted.

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other grounds, this case is not an appropriate vehicle to reconsider our prior decision that § 2401(a) is a jurisdictional statute of limitations."); *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 546–47 (4th Cir. 2019) (Applying this Court's recent cases to hold, in conflict with the D.C. circuit, that the Real Estate Settlement Procedures Act's statute of limitations is not jurisdictional); *Myers v. Comm'r of Internal Revenue Serv.*, 928 F.3d 1025, 1035 (D.C. Cir. 2019) (holding that Internal Revenue Code provision requiring aggrieved claimant to file petition for Tax Court review within 30 days is not jurisdictional and stating that "the Court has not yet identified a single filing deadline that meets the 'clear statement' test").

II. Certiorari Should Be Granted Because the Decision Below Conflicts with This Court's Precedents About How Courts Determine Whether an Act's Statute of Limitations Is Jurisdictional

This Court's decade-long quest to bring discipline to the use of the term jurisdiction has resulted in clear standards for how a court should determine the jurisdictional nature of a statute of limitations. *See Wong*, 575 U.S. at 410–20. But the court below did not apply these standards, instead opting to rely on out-of-date Ninth Circuit cases. *See* App. A-7 (citing *Skranak*, 425 F.3d 1213; *Kingman Reef*, 541 F.3d 1189; *Fidelity Expl. & Prod. Co.*, 506 F.3d 1182). In doing so, the court below issued a decision in conflict with this Court's recent precedents.

A. This Court's recent precedents hold that Congress must clearly state when a statute of limitations is jurisdictional

This Court's recent precedents make clear "that most time bars are nonjurisdictional." *Wong*, 575 U.S. at 410. "Time and again," this Court has "described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." *Id.* (quoting *Henderson*, 562 U.S. at 435).

This Court has articulated a "readily administrable bright line" rule to determine whether a filing rule is jurisdictional. *Arbaugh*, 546 U.S. at 516. Absent a "clear statement" from Congress, courts should treat filing deadlines "as nonjurisdictional in character." *Sebelius*, 568 U.S. at 153 (quotations omitted). Congress need not "'incant magic words'" to

make a rule jurisdictional, but "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Wong*, 575 U.S. at 410 (quoting *Sebelius*, 568 U.S. at 153). It is a steep burden to demonstrate that a rule is jurisdictional. Indeed, this Court "has not yet identified a single filing deadline that meets the 'clear statement' test." *Myers v. Comm'r of Internal Revenue Serv.*, 928 F.3d 1025, 1035 (D.C. Cir. 2019); *see also* Petition for a Writ of Certiorari 17, *Boechler, P.C. v. Comm'r of Internal Revenue* (No. 20-1472), cert. granted Sept. 30, 2021.

In recent years, lower courts have followed this Court's lead, applying the clear statement test to determine that other statutes of limitations are not jurisdictional. *See* Section I-C, *supra*; *see also Herr v. U.S. Forest Service*, 803 F.3d 809, 818 (6th Cir. 2015) (suggesting that other courts' holdings about the jurisdictional nature of the general statute of limitations for civil actions against the federal government are outdated because they "have not grappled with the Supreme Court's recent cases limiting the concept of jurisdiction" or "considered the impact" of *Wong*). The court below, however, failed to apply the clear statement test in holding that the Quiet Title Act's statute of limitations is jurisdictional.

B. The Quiet Title Act does not provide a clear statement that the statute of limitations is jurisdictional

In enacting the Quiet Title Act, Congress did not clearly state its intention to make the statute of limitations jurisdictional. The Quiet Title Act provides that "[a]ny civil action under this section,

except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g). "Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.*

The Quiet Title Act thus uses "mundane statute-of-limitations language, saying only what every time bar, by definition, must: that after a certain time a claim is barred." *Wong*, 575 U.S. at 410. Indeed, the Quiet Title Act's statute of limitations uses practically the same language as the Federal Tort Claims Act's time bar that *Wong* held is not jurisdictional. *Id.* The only difference is the Federal Tort Claims Act's statute of limitations is more forceful, stating that an untimely action "shall be *forever* barred …." 28 U.S.C. § 2401(b) (emphasis added). If the Federal Tort Claims Act's statute of limitations is not jurisdictional, then the similarly worded, yet less definitive, Quiet Title Act statute of limitations cannot be either.

Furthermore, Congress separated the Quiet Title Act's statute of limitations from its grant of jurisdiction. 28 U.S.C. §§ 1346(f), 2409a(g). The Quiet Title Act grants federal district courts "exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." Pub. L. No. 92-562, 86 Stat. 1176, 1176 (Oct. 25, 1972), *codified at* 28 U.S.C. § 1346(f). This grant of jurisdiction is not only in a different section of the Act from the statute of limitations, but also codified in a separate section of the U.S. Code. *Id.*

"This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Wong*, 575 U.S. at 411 (citing *Henderson*, 562 U.S. at 439–40; *Reed Elsevier*, 559 U.S. at 164–65; *Arbaugh*, 546 U.S. at 515; *Zipes v. Trans World Airlines*, 455 U.S. 385, 393–94 (1982)); *see also Davis,* 139 S. Ct. at 1850 (Title VII's grant of jurisdiction is in a separate provision as the nonjurisdictional charge-filing requirement). This separation further demonstrates that the Quiet Title Act's statute of limitations "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Wong*, 575 U.S. at 411 (quotations omitted). As a result, the Quiet Title Act lacks a clear statement that its statute of limitations is jurisdictional.

C. Instead of applying this Court's recent precedents, the court below applied outdated circuit precedent

The court below did not apply the clear statement test, however, and instead relied on previous Ninth Circuit precedents to reach its holding. *See* App. A-7 (citing *Skranak*, 425 F.3d at 1216; *Kingman Reef*, 541 F.3d at 1195). But both *Skranak* and *Kingman Reef* rely on premises directly contradicted by this Court's cases. *See Skranak*, 425 F.3d at 1216; *Kingman Reef*, 541 F.3d at 1195. In *Skranak*, the Ninth Circuit stated that "[t]he Quiet Title Act is a waiver of sovereign immunity" and "[i]f the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction." 425 F.3d at 1216. *Kingman Reef* also followed the mistaken assumption that Congress's waiver of sovereign immunity matters in interpreting the jurisdictional nature of the statute of limitations.

541 F.3d at 1195. As this Court has clearly stated, "it makes no difference" to the jurisdictional question "that a time bar conditions a waiver of sovereign immunity …." *Wong*, 575 U.S. at 420.

Skranak and *Kingman Reef* also conflict with this Court's decisions because the Ninth Circuit cases do not cite, much less analyze, the Quiet Title Act's jurisdictional grant in 28 U.S.C. § 1346(f). *Skranak*, 425 F.3d 1213; *Kingman Reef*, 541 F.3d 1189;[6] *Fidelity Expl. & Prod. Co.*, 506 F.3d 1182. Despite this Court clearly explaining that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional, the court below relied on previous Ninth Circuit cases and again failed to cite or discuss the Quiet Title Act's jurisdictional grant. App. A-7.

The court below believed it did not have to apply the clear statement test because of this Court's decisions in *Block* and *United States v. Beggerly*, 524 U.S. 38 (1998). *See* App. A-9. But neither holds that the Quiet Title Act's statute of limitations is jurisdictional. *Block* was, at most, a "drive-by" jurisdictional ruling that has no precedential effect. *See* Section I-A, *supra*. *Beggerly* also does not hold that the Quiet Title Act's statute of limitations is jurisdictional and, in fact, supports the view that the

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[6] The panel in *Kingman Reef* incorrectly implied that the whole of the Quiet Title Act is codified at 28 U.S.C. § 2409a. *Compare Kingman Reef*, 541 F.3d at 1195, *with* Pub. L. No. 92-562, 86 Stat. at 1176. The only reference to 28 U.S.C. § 1346(f) is when the panel quotes verbatim 28 U.S.C. § 2409a(e) in footnote 5. *Kingman Reef*, 541 F.3d at 1200 n.5. But the *Kingman Reef* court did not quote § 1346(f) itself, let alone examine the jurisdictional implications of its separation from the statute of limitations.

Quiet Title Act's statute of limitations is not jurisdictional. 524 U.S. at 49.

In *Beggerly*, this Court considered whether the Quiet Title Act's statute of limitations allows for equitable tolling. *Id.* at 48–49. It concluded that the statute of limitations "effectively allow[s] for equitable tolling" and, as a result, declined to allow further equitable tolling outside the statutory language. *Id.* at 48.

In engaging with the question of how much equitable tolling the Quiet Title Act allows, this Court indicated that the Act's limitations period is not jurisdictional. For, if a time bar is jurisdictional, a court has no authority to hear a case "even if equitable considerations would support extending the prescribed time period." *Wong*, 575 U.S. at 408–09. If the Quiet Title Act's statute of limitations were jurisdictional, that would have answered the question presented in *Beggerly* without further analysis. Instead, this Court had to examine whether and how much equitable tolling is allowed under the Quiet Title Act's statute of limitations because that limitations period is not jurisdictional.[7] While *Beggerly* noted that the District Court dismissed for lack of subject matter jurisdiction, 524 U.S. at 41, this statement, like the one in *Block*, was an unanalyzed statement that was not central to the case.

Justice Stevens's concurrence also supports the conclusion that the Quiet Title Act's statute of

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[7] This Court's holding that the Quiet Title Act's statute of limitations is mandatory does not imply that the rule is jurisdictional because "a rule may be mandatory without being jurisdictional …." *Fort Bend Cty.*, 139 S. Ct. at 1852.

limitations is not jurisdictional. *See Beggerly*, 524 U.S. at 49–50 (Stevens, J., concurring). He noted that the case did not present the question of "whether a doctrine such as fraudulent concealment or equitable estoppel might apply if the Government were guilty of outrageous misconduct that prevented the plaintiff, though fully aware of the Government's claim of title, from knowing of her own claim." *Id.* at 49. In such a case, Justice Stevens opined, the Quiet Title Act might allow for equitable tolling. *Id.* at 50. The Court's opinion also provides support for Justice Stevens's position. *Id.* at 48 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). But, if the Quiet Title Act's statute of limitations were jurisdictional, then it would foreclose a suit even where the government was guilty of outrageous misconduct. *See Wong*, 575 U.S. at 408–09. Thus, contrary to the Ninth Circuit's reading, the opinions in *Beggerly* support the position that the Quiet Title Act's statute of limitations is not jurisdictional.

Wong itself also undermines the Ninth Circuit's argument that *Block* and *Beggerly* hold that the Quiet Title Act's statute of limitations is jurisdictional. In *Wong*, this Court mentioned only one statute, the Tucker Act, it held to be jurisdictional prior to the adoption of the clear statement test. 575 U.S. at 416. The *Wong* Court discussed a recent case that "refused to overturn our century-old view that the Tucker Act's time bar is jurisdictional," and not apply the clear statement test, only because the Tucker Act's statute of limitations had been the subject of "a definitive earlier interpretation." *Id.* (quotations omitted). This Court, however, did not mention any other statutes that are not subject to the clear statement test or any other cases where this Court has made a definitive

earlier interpretation about a jurisdictional rule. This Court's failure to mention any other statute suggests that the Tucker Act is unique in not being subject to the clear statement test.

In conflict with this Court's recent precedents, the court below failed to apply the clear statement test. This Court should grant the petition to ensure that the Quiet Title Act's statute of limitations is not mislabeled as a jurisdictional rule.

III. Certiorari Should Be Granted Because Whether the Quiet Title Act's Statute of Limitations Is Jurisdictional Affects Landowners' Ability To Vindicate Their Property Rights

By holding that the Quiet Title Act's statute of limitations is jurisdictional, the District Court and the court below deprived the landowners of the normal procedural safeguards of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

In the Ninth Circuit, a defendant may make a "facial or factual" attack on jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). If a defendant makes a "factual attack (meaning the facts negating jurisdiction exist outside the complaint) no presumption of truthfulness attaches to plaintiff's allegations, a court may freely consider extrinsic evidence, and it may resolve factual disputes with or without a hearing." App. D-4 (citing *Kingman Reef*, 541 F.3d at 1195; *Roberts v. Corrothers*, 812 F.3d 1173, 1177 (9th Cir. 1987)). Additionally, "[a]lthough the defendant is the moving party, the plaintiff bears the burden of satisfying the court as to its jurisdiction." App. D-4–5 (citing *Safe*

Air, 373 F.3d at 1039). The plaintiff "must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction" regardless of the stage of the litigation. *Safe Air*, 373 F.3d at 1039.[8]

As a result, the District Court's holding on the jurisdictional nature of the Quiet Title Act's statute of limitations affected how the case was decided. The landowners were procedurally hamstrung and unable to make their case, despite demonstrating multiple disputed material facts. *See* App. E-17 (magistrate judge stated that "Under the facts alleged, it is therefore unclear whether, over twelve years ago, a reasonable landowner would have known the scope of the easement claimed by the United States."). The landowners presented testimony disputing the government's account of the Forest Service's 2006 order, *see* 2 ER at 110 ¶¶ 5–6; 3 ER at 352 (Depo. Wilkins, 104:8–9); 3 ER at 412 (Depo. Stanton, 86:2–4); they presented witnesses that contradicted the testimony in the government's declarations, *see* 2 ER at 114–16; and they presented evidence of statements from Forest Service officials about the scope of the easement that caused the landowners to delay filing the lawsuit. 2 ER at 88 (Depo. Oliver, 38:23–25). The District Court, however, did not hold a hearing to determine and resolve disputed facts. *See* App. D-4–5.

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[8] The Ninth Circuit continues to employ the "factual attack" standard despite this Court's statement in *Lujan v. Defenders of Wildlife* that "each element" of a jurisdictional claim "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. 555, 561 (1992).

In short, because the District Court determined that the Quiet Title Act's statute of limitations is jurisdictional, it was able to circumvent the usual litigation processes. *See Thornhill Publ'g Co.*, 594 F.2d at 733.[9]

The decision below places these harsh consequences on property owners in Quiet Title Act cases. The effects are especially consequential in the Ninth Circuit, where the federal government owns over half the land in the states within the court's jurisdiction. *See* Carol Hardy Vincent & Laura A. Hanson, Congressional Research Service, *Federal Land Ownership: Overview and Data* 7–8 (Feb. 2020).[10] Quiet title cases are more likely to arise in the western United States, and now plaintiffs in these cases will be hampered by the decision below.

This Court has emphasized the "harsh consequences" that result from labeling a rule

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[9] The same problems arise in other circuits. Other court apply the facial-factual distinction for motions to dismiss for lack of subject matter jurisdiction. *See GBForefront, L.P. v. Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 35 (3d Cir. 2018); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980); *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015); *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015); *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997). In some instances, plaintiffs in Quiet Title Act cases have to supply sufficient evidence to defeat a jurisdictional motion to dismiss without conducting any discovery. *See Cheyenne Arapaho Tribes of Oklahoma*, 558 F.3d at 595 (affirming motion to dismiss quiet title case for lack of jurisdiction and concluding that "the district court did not abuse its discretion in denying jurisdictional discovery …").

[10] *Available at* https://crsreports.congress.gov/product/pdf/R/R42346.

jurisdictional. *Wong*, 575 U.S. at 409. Jurisdictional rules are "unique in our adversarial system" and can be used to "disturbingly disarm litigants." *Sebelius*, 568 U.S. at 153. "The Court has therefore stressed the distinction between jurisdictional prescriptions and nonjurisdictional claim-processing rules[.]" *Fort Bend Cty.*, 139 S. Ct. at 1849.

Based on a "drive-by" jurisdictional reference in this Court's cases, and in conflict with this Court's most recent cases, the court below entrenched a circuit split about the jurisdictional nature of the Quiet Title Act's statute of limitations. This Court should grant the petition to ensure that courts do not continue to mischaracterize the Quiet Title Act's statute of limitations as jurisdictional.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: February 2022.

Respectfully submitted,

JAMES M. MANLEY
Pacific Legal Foundation
3217 East Shea Blvd.
No. 108
Phoenix, AZ 85028
jmanley@pacificlegal.org

ETHAN BLEVINS
Pacific Legal Foundation
839 W. 3600 S.
Bountiful, UT 84010
eblevins@pacificlegal.org

JEFFREY W. MCCOY*
**Counsel of Record*
DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
jmccoy@pacificlegal.org
dschiff@pacificlegal.org

Counsel for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY STEVEN WILKINS; JANE B. STANTON, *Plaintiffs-Appellants*, v. UNITED STATES OF AMERICA, *Defendant-Appellee*.	No. 20-35745 D.C. No. 9:18-cv-00147-DLC OPINION

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted August 11, 2021
Seattle, Washington

Filed September 15, 2021

Before: David M. Ebel,* Daniel A. Bress, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge VanDyke

* The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

SUMMARY**

Quiet Title Act

The panel affirmed the district court's dismissal for lack of subject-matter jurisdiction of a Quiet Title Act ("QTA") action brought by appellants against the United States seeking to confirm that an easement for Robbins Gulch Road near Connor, Montana, granted to appellants' predecessors-in-interest, did not permit public use of the road, and to enforce the government's obligations to patrol and maintain the road against unrestricted public use.

The district court granted the government's motion to dismiss based on the district court lacking subject-matter jurisdiction because the QTA's statute of limitations was jurisdictional and had expired.

The panel held that the district court did not err in determining that the QTA's statute of limitations was jurisdictional. Prior Supreme Court and Ninth Circuit precedent declaring the QTA's statute of limitations jurisdictional was dispositive here, even though for other statutes the Supreme Court recently set forth a seemingly different framework for assessing whether a statute of limitations was jurisdictional. The panel concluded that the district court did not err in granting the government's Fed. R. Civ. P. 12(b)(1) motion to dismiss on those grounds.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the question of when appellants' claims accrued was not so intertwined with the merits as to make dismissal improper. Here, the question of whether the court has jurisdiction to hear this case was not dependent on resolving the underlying merits. The panel held further that appellants' argument—that the jurisdictional and merits questions were intermeshed because the same evidence was relevant to both—had no merit.

The panel concurrently filed a memorandum disposition addressing appellants' remaining arguments.

COUNSEL

Jeffrey W. McCoy (argued) and Damien M. Schiff, Pacific Legal Foundation, Sacramento, California; Ethan Blevins, Pacific Legal Foundation, Bountiful, Utah; James M. Manley, Pacific Legal Foundation, Phoenix, Arizona; for Plaintiffs-Appellants.

Kevin W. McArdle (argued) Mark Steger Smith, John M. Newman, and John L. Smeltzer, Attorneys; Jean E. Williams, Acting Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Babak Rastgoufard, Attorney, Office of the General Counsel, United States Department of Agriculture, Washington, D.C.; for Defendant-Appellee.

OPINION

VANDYKE, Circuit Judge:

Appellants Larry Wilkins and Jane Stanton live along Robbins Gulch Road near Connor, Montana. The road runs between Highway 93 and the Bitterroot National Forest, crossing private property for approximately one mile. Appellants acquired their properties in 1991 and 2004, respectively, and their predecessors-in-interest had previously granted the United States an easement for Robbins Gulch Road in 1962. In August 2018, Appellants sued the United States under the Quiet Title Act (QTA), 28 U.S.C. § 2409a, to confirm that the easement does not permit public use of the road and to enforce the government's obligations to patrol and maintain the road against unrestricted public use. The government moved to dismiss, arguing that the district court lacked subject-matter jurisdiction because the QTA's statute of limitations is jurisdictional and had expired. The district court granted the motion to dismiss and later denied Appellants' motion to alter or amend the judgment under Rule 59(e).

On appeal, Appellants contend that the district court erred in determining that (1) the QTA's statute of limitations is jurisdictional; (2) the question of when Appellants' claims accrued was not so intertwined with the merits to make dismissal improper; (3) all of Appellants' claims accrued at the same time; and (4) the claims were untimely.

With respect to Appellants' first argument, we reaffirm that the QTA's statute of limitations is jurisdictional. Prior Supreme Court and Ninth Circuit

precedent declaring the QTA's statute of limitations jurisdictional is dispositive here. These clear and direct holdings still control, even though for other statutes the Supreme Court has more recently set forth a seemingly different framework for assessing whether a statute of limitations is jurisdictional. Regarding Appellants' second argument, the jurisdictional question and the merits question are not so intertwined that dismissal was improper because the determination of jurisdiction is not dependent on the merits of Appellants' claims. Finally, we reject Appellants' third and fourth arguments, which are addressed in a separate memorandum disposition filed simultaneously with this opinion.[1]

With jurisdiction under 28 U.S.C. § 1291, we affirm the district court's dismissal for lack of subject-matter jurisdiction.

STANDARD OF REVIEW

We review de novo the district court's decision to dismiss for lack of subject-matter jurisdiction. *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015) (en banc). "Where the district court relied on findings of fact to draw its conclusions about subject-matter jurisdiction, we review those factual findings for clear error." *Id.* at 1126–27. Additionally, "[w]hen the accrual of the statute of limitations in part turns on what a

[1] The memorandum disposition concludes that Appellants' claims (all of which were premised on the public's alleged unauthorized use of the road) accrued more than twelve years before Appellants initiated this lawsuit, and were thus time-barred under the QTA's statute of limitations.

reasonable person should have known, we review . . . for clear error." *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008) (citation and internal quotation marks omitted).

DISCUSSION

A. The Quiet Title Act's Statute of Limitations is Jurisdictional.

Appellants first contend that the district court improperly dismissed this case for lack of subject-matter jurisdiction on the basis that the QTA's statute of limitations is jurisdictional. Appellants claim that the "Supreme Court has never previously considered whether the [QTA's] statute of limitations is jurisdictional," and therefore, the Court's reasoning in *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015)—that absent a clear statement from Congress, courts should treat a statute of limitations as non-jurisdictional—applies here. While Appellants acknowledge that Ninth Circuit precedent has held the QTA's statute of limitations is jurisdictional, they assert that these decisions were issued before *Wong* and are clearly irreconcilable with *Wong*'s reasoning, thereby requiring abrogation under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

Appellants' arguments fail for multiple reasons. The Supreme Court, in assessing whether a State was subject to the QTA's statute of limitations provision, has explicitly stated that if the State's suit was barred by the QTA's statute of limitations, "the courts below had *no jurisdiction* to inquire into the merits." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (emphasis added). This court has

repeatedly interpreted *Block* as holding that the QTA's statute of limitations is jurisdictional. *See, e.g.*, *Kingman*, 541 F.3d at 1195–96 (citing *Block* for the conclusion that "[t]he running of the twelve-year limitations period deprives the federal courts of jurisdiction to inquire into the merits of an action brought under the QTA" and acknowledging that this court must follow *Block* as controlling precedent in the absence of a Supreme Court decision overruling it) (internal quotation marks omitted); *Fid. Expl. & Prod. Co. v. United States*, 506 F.3d 1182, 1186 (9th Cir. 2007) (explaining that because "we must follow the Supreme Court precedent that directly controls [referring to *Block*,] . . . . we treat the statute of limitations in the QTA as jurisdictional"); *Skranak v. Castenada*, 425 F.3d 1213, 1216 (9th Cir. 2005) ("If the statute of limitations has run on a waiver of sovereign immunity, [referring to the QTA,] federal courts lack jurisdiction." (citing *Block*)); *Adams v. United States*, 255 F.3d 787, 796 (9th Cir. 2001) (asserting that "if an action is barred by the statute of limitations of the Quiet Title Act, 'the courts below [have] no jurisdiction to inquire into the merits'" (quoting *Block*)).

Although these cases did precede the Supreme Court's decision in *Wong*, they are not "clearly irreconcilable" with *Wong*'s analysis. *See Miller*, 335 F.3d at 893 (explaining "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority").

The Supreme Court in *Wong* addressed whether the statute of limitations in the Federal Tort Claims

Act was subject to equitable tolling. 575 U.S. at 405. The Court concluded that it was, rejecting the government's argument that equitable tolling was unavailable because the statute of limitations was jurisdictional. *Id.* The *Wong* Court relied heavily on its prior analysis in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990) to reach its result.[2] This reliance is important because although this court has yet to address whether *Block* is still good law in light of *Wong*, it has—on multiple occasions—rejected the argument that *Block* is no longer good law in light of *Irwin*, and instead has continued to treat *Block* as binding and the QTA's statute of limitations as jurisdictional. *See, e.g.*, *Kingman*, 541 F.3d at 1196 (rejecting appellant's contention "that *Block*'s jurisdictional ruling has been superceded by subsequent decisions of the Supreme Court," including *Irwin*); *Fidelity Expl. & Prod. Co. v. United States*, 506 F.3d 1182, 1186 (9th Cir. 2007) (rejecting the argument "that *Block* is no longer good law given the Court's later decision in *Irwin*"). If prior Ninth Circuit precedent was not "clearly irreconcilable" with the reasoning of *Irwin*, that same precedent is not

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[2] *Wong* assessed whether *Irwin*'s "rebuttable presumption of equitable tolling" was rebutted by the government's jurisdictional argument, 575 U.S. at 407–08 (quoting *Irwin*, 498 U.S. at 95–96); applied the reasoning in *Irwin* to reject the government's statutory language argument, *id.* at 415–16; and analyzed how *Irwin* foreclosed the government's argument that Congress understood all statutes of limitations involving suits against the government to be jurisdictional at the time, *id.* at 417–18. The *Wong* Court concluded: "Our precedents make this a clear-cut case. *Irwin* requires an affirmative indication from Congress that it intends to preclude equitable tolling in a suit against the Government." *Id.* at 420 (citing *Irwin*, 498 U.S. at 95–96).

"clearly irreconcilable" with the reasoning of *Wong*, which has significant analytical overlap with *Irwin*.

Furthermore, just like this court has reasoned with respect to *Irwin*, *Wong* "never purported to overrule *Block*." *Fidelity*, 506 F.3d at 1186; *see generally Wong*, 575 U.S. 402 (no mention of *Block* or the QTA). *Wong* also never purported to overrule *United States v. Beggerly*, where the Supreme Court determined that the QTA's statute of limitations is not subject to equitable tolling, citing *Irwin* in support of its conclusion. 524 U.S. 38, 48–49 (1998); *see generally Wong*, 575 U.S. 402 (no mention of *Beggerly*).

In fact, when faced with prior precedent in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), applying seemingly inconsistent reasoning from that in *Wong*, the *Wong* Court explicitly declined to overrule that precedent (which had declared the Tucker Act's statute of limitations as jurisdictional) on stare decisis grounds. *See Wong*, 575 U.S. at 416. The Court's express preservation of its Tucker Act precedent in *Wong* indicates that *Wong* should not be read as blanketly overturning all prior Court decisions treating a statute of limitations as jurisdictional, including *Block* and *Beggerly*. There is some tension between *Wong*'s reasoning and the analysis underlying Ninth Circuit precedent interpreting the jurisdictional nature of the QTA's statute of limitations. *Compare Wong*, 575 U.S. at 418 (explaining the Court in *Irwin* "declined to count time bars as jurisdictional merely because they condition waivers of [sovereign] immunity") *with Skranak*, 425 F.3d at 1216 (asserting "[i]f the statute of limitations has run on a waiver of sovereign immunity, federal

courts lack jurisdiction"). But mere tension does not necessarily rise to the level of "clearly irreconcilable," particularly where that same tension has been recognized by the Supreme Court and permitted. *See Miller*, 335 F.3d at 893. Because "we must follow the Supreme Court precedent that directly controls, leaving to the Court the prerogative of overruling its own prior decisions," *Fidelity*, 506 F.3d at 1186, we are still bound by the conclusion in *Block*—as interpreted by many Ninth Circuit decisions—that the QTA's statute of limitations is jurisdictional. Therefore, the district court did not err in granting the government's Rule 12(b)(1) motion to dismiss on those grounds.

B. The Jurisdictional Question is Not So Intertwined with the Merits as to Prevent Dismissal.

Appellants next assert that the district court erred in its determination that the statute of limitations question is not so intertwined with the merits of the case as to make dismissal improper. They argue that the jurisdictional question is inextricably intertwined with the merits because the QTA "provides the basis for both the court's subject matter jurisdiction and the substantive claim for relief, and the same evidence is relevant to resolving both questions." These contentions, however, are insufficient to show that the issues are inextricably intertwined.

In a Rule 12(b)(1) motion to dismiss, a district court may generally "resolve disputed factual issues bearing upon subject matter jurisdiction . . . unless 'the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is

dependent on decision of the merits.'" *Kingman*, 541 F.3d at 1196–97 (citation omitted). "Such an intertwining of jurisdiction and merits *may* occur when a party's right to recovery rests upon the interpretation of a federal statute that provides both the basis for the court's subject matter jurisdiction and the plaintiff's claim for relief." *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1094 (9th Cir. 2008) (emphasis added). Where the questions are "so intermeshed," dismissal is improper. *Kingman*, 541 F.3d at 1196–97 (citation omitted).

But here the question of whether the court has jurisdiction to hear this case is not dependent on resolving the underlying merits. In rejecting the argument that the statute of limitations issue and the merits were intermeshed with respect to a QTA claim, the *Kingman* court itself reasoned: "the crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid." *Id.* at 1197 (citation and internal alteration marks omitted). Here, the district court similarly explained that the merits and jurisdictional "questions are different because the latter [jurisdictional question] does not require the Forest Service to be correct—it only requires the Court to determine when a reasonable person would have understood that the Forest Service believed its easement granted public access." We agree. Even assuming the two questions have some overlap, they are not so intermeshed that dismissal was improper.

Appellants' additional argument that the jurisdictional and merits questions are intermeshed

because the same evidence is relevant to both has no merit. As noted above, the proper inquiry is whether the "question of jurisdiction is *dependent* on decision of the merits," *Kingman*, 541 F.3d at 1197 (emphasis added) (citation omitted), not whether there is overlapping evidence. Here, the jurisdictional issues are not dependent on the merits of Appellants' claims. Therefore, the district court did not err in determining that the jurisdictional and merits questions were not so inextricably intertwined that dismissal on Rule 12(b)(1) grounds would be improper.

CONCLUSION

For the reasons expressed herein and in the accompanying memorandum disposition, the government's motion to dismiss was properly granted. Accordingly, the judgment of the district court is **AFFIRMED**.

Filed Sept. 15, 2021

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY STEVEN WILKINS; JANE B. STANTON, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 20-35745 D.C. No. 9:18-cv-00147-DLC MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted August 11, 2021
Seattle, Washington

Before: EBEL,** BRESS, and VANDYKE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

Appellants are landowners near Connor, Montana, whose properties are burdened by an easement that their predecessors-in-interest granted to the United States in 1962.[1] The easement covers Robbins Gulch Road, which crosses Appellants' private property for approximately one mile.[2]

As early as 1972, maps published by the U.S. Forest Service identified Robbins Gulch Road as an "improved road" with no use restrictions. Forest Service maps from 1981, 1993, and 2005 confirmed the same: the use of Robbins Gulch Road had no restrictions. On May 3, 2006, the Forest Service temporarily closed Robbins Gulch Road to the public with a physical barrier and later placed a sign on the road that read "PUBLIC ACCESS THRU PRIVATE LANDS."

Frustrated by increasing public use of the road and the effects of that use on their properties, Appellants brought suit against the United States on August 23, 2018 under the Quiet Title Act (QTA), 28 U.S.C. § 2409a. Appellants sought to confirm that the easement does not permit public use of the road and to enforce the government's obligations to patrol and maintain the road against unrestricted public use. The district court granted the government's motion to dismiss, finding it lacked jurisdiction because Appellants' claims were time-barred under the QTA.

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[1] Larry Wilkins obtained his property in 1991, and Jane Stanton in 2004.

[2] The parties are familiar with the facts, and we cite them herein only where necessary.

The district court later denied Appellants' motion to alter or amend the judgment under Rule 59(e).

On appeal, Appellants contend that the district court erred in determining that (1) the QTA's statute of limitations is jurisdictional; (2) the question of when Appellants' claims accrued was not so intertwined with the merits to make dismissal improper; (3) all of Appellants' claims accrued at the same time; and (4) the claims were untimely. In a separate opinion filed simultaneously with this memorandum disposition, we rejected Appellants' first and second arguments.[3]

We have jurisdiction under 28 U.S.C. § 1291 and review de novo the district court's decision to dismiss for lack of subject-matter jurisdiction. *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015) (en banc). "Where the district court relied on findings of fact to draw its conclusions about subject-matter jurisdiction, we review those factual findings for clear error." *Id.* at 1126–27. Additionally, "[w]hen the accrual of the statute of limitations in part turns on what a reasonable person should have known, we review … for clear error." *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008) (citation and internal quotation marks omitted).

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[3] The opinion reaffirms that the QTA's statute of limitations is jurisdictional under binding precedent and that the jurisdictional questions in this appeal are not dependent on the merits.

DISCUSSION

A. All of Appellants' Claims Accrued at the Same Time.

Appellants argue that the district court erred in treating their claims as accruing at the same time. Specifically, Appellants argue that their claims—challenging public use of the easement, parking along the easement, and the government's satisfaction of its obligations under the easement—accrued at different times and should have been analyzed on an individual basis.

For purposes of calculating the statute of limitations under the QTA, an "action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or *should have known* of the claim of the United States." 28 U.S.C. § 2409a(g) (emphasis added). An action accrues when a "reasonable landowner" would have been alerted to an adverse claim. *Shultz v. Dep't of Army*, 886 F.2d 1157, 1160 (9th Cir. 1989).

All of Appellants' claims—despite being organized as two separate causes of action in the complaint—were ultimately premised on the public's alleged unauthorized use of the road. The claims therefore accrued at the same time—when a reasonable landowner should have known of the government's position that its easement allowed for public use of the road.

Appellants' complaint focuses its parking challenge on "public" parking in the easement and is not a distinct claim that accrued separately from the

public use claim. Likewise, Appellants' "patrol and maintain" claims are premised on patrolling and maintaining the road *against public use* and thus also accrued at the same time as the public use claim. A "reasonable landowner," *Shultz*, 886 F.2d at 1160, would have been alerted to all of these claims at the same time, and therefore they accrued simultaneously.

Accordingly, the district court did not err in treating all of Appellants' claims as accruing at the same time.

B. All of Appellants' Claims are Time-Barred.

Finally, Appellants claim that the district court erred in determining that their claims were time-barred under the QTA's twelve-year statute of limitations. The QTA's statute of limitations requires Appellants to bring a case "within twelve years of the date upon which [the claims] accrued." 28 U.S.C. § 2409a(g). Accrual occurs "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.* And "[t]o start the limitations period, the government's claim must be adverse to the claim asserted by the [plaintiffs]." *Michel v. United States*, 65 F.3d 130, 131–32 (9th Cir. 1995) (per curiam).

The district court did not clearly err in concluding that Appellants' claims were untimely. The district court based its determination on two sources of evidence—Forest Service maps of the area from 1950 to 2005 which identified no use restrictions on the road, and the government's temporary closure of the road by erecting a sign and barrier in May 2006.

Together with the historic public use of the road, the historic maps should have alerted a reasonable landowner of the government's view regarding public access of the easement more than twelve years before Appellants filed suit. And the government's temporary closure of the road in 2006 was consistent with this understanding.

CONCLUSION

Accordingly, for the reasons expressed herein and in our accompanying opinion, the government's motion to dismiss was properly granted. The judgment of the district court is **AFFIRMED**.

Filed Aug. 11, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

LARRY STEVEN WILKINS and JANE B. STANTON, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	CV 18–147–M–DLC–KLD ORDER

Plaintiffs Larry Stevens Wilkins and Jane Stanton move to alter or amend the Court's judgment under Federal Rule of Civil Procedure 59(e). (Doc. 61.) For the reasons explained, the motion is denied.

BACKGROUND

On August 23, 2018, Plaintiffs filed a Complaint raising two claims under the Quiet Title Act ("QTA"). (Doc. 1 at 13–14.) They first requested the Court confirm that the 1962 easement granted by Plaintiffs' predecessors-in-interest to the United States for the use of Robbins Gulch Road did not grant the public access to use the road (the "public use claim"). (Doc. 1 at 13.) They also asked the Court to confirm and enforce the Forest Service's obligations to maintain and patrol the road arising under the easement (the "maintenance and patrol claim"). (*Id.* at 14.) Defendant moved to dismiss arguing, *inter alia*, that

Plaintiffs claim was barred by the QTA's jurisdictional statute of limitations. (Doc. 30.) United States Magistrate Judge Kathleen L. DeSoto recommended the Court deny Defendant's motion upon construing the QTA's statute of limitations as non-jurisdictional. (Doc. 53.) The Court disagreed and dismissed the entire case after concluding that both of Plaintiffs' claims were properly raised under the QTA, both claims were untimely, and that the QTA's time bar deprived the Court of jurisdiction. (Doc. 59.) Plaintiffs now seek to alter that judgment asserting that the Court failed to conduct a separate statute of limitations analysis for the maintenance and patrol claim and failed to specifically address its allegation that the public is not permitted to park along Robbins Gulch Road. (Doc. 62.)

LEGAL STANDARD

Rule 59(e) gives the court a chance "'to rectify its own mistakes in the period immediately following' its decision." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450 (1982)). But the Rule provides an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A motion to alter or amend judgment should only be granted in "highly unusual circumstances," when, as pertinent here, the court commits clear error. *Id.* (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v.*

Syrax, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

DISCUSSION

Plaintiffs request the Court amend its judgment to allow their maintenance and patrol claim to proceed and to vacate the dismissal of the parking allegations raised in Plaintiffs' first claim. (Doc. 62 at 6.) Additionally, Plaintiffs request the Court grant them leave to amend their Complaint to raise the maintenance and patrol claim under the Administrative Procedure Act ("APA"). (*Id.* at 19.) The Court will address each argument below.

I. The Maintenance & Patrol Claim

Plaintiffs assert that the "extent of Defendant's obligations under the easement is a separate question from the question of who may use the road." (Doc. 62 at 12.) As a separate question, Plaintiffs contend that the Court must engage in a separate statute of limitations analysis, and that the facts relied upon by the Court when it determined that the public use claim was time barred do not apply to this claim. (Doc. 66 at 6 (citing *Michel v. United States*, 65 F.3d 130 (9th Cir. 1995)).) In its order granting Defendant's motion to dismiss, the Court stated that Plaintiffs maintenance and patrol claim fell within the scope of the QTA because Plaintiffs did not allege that the "Forest Service failed to 'patrol' or 'maintain' against any threat other than public use[.]" (Doc. 59 at 2 n.2.) Plaintiffs argue that the Court erred by overlooking aspects of the Complaint that alleged "trespassing, illegal hunting, speeding and disrespectful activities often aimed at the Plaintiffs and other neighboring

owners of private lands traversed by the road." (Doc. 1 at 4.)

Defendant asserts that the maintenance and patrol claim is not a distinct claim (and therefore does not require a separate statute of limitations analysis) because the Complaint expressly links the maintenance and patrol claim to the public use claim so that resolution of the former determines the latter. (*See* Doc. 65 at 7–8.) The Court agrees.

The Complaint states that under the "1962 easement, the United States has an obligation to [maintain and] 'patrol' the Robbins Gulch Road to ensure that the road is secure and that unauthorized trespasses are not occurring." (Doc. 1 at 14.) The Complaint goes on to state that "[t]he Forest Service is authorizing and facilitating the current ongoing unrestricted use by the general public in violation of the obligation of the United States to maintain and patrol this road." (*Id.*) In short, Plaintiffs argue that the Forest Service breached its obligation to maintain and patrol the road against unauthorized users and associated wear and tear. This is not a claim distinct from the public use claim because there is no independent duty to maintain and patrol. Rather, the maintenance and patrol claim flows from the public use claim. For example, if the Court had resolved the case on the merits and ruled for Plaintiffs on their public use claim concluding that the easement does not grant public access to Robbins Gulch Road, Plaintiffs would prevail on their second claim. In effect, the question of whether the Forest Service must maintain and patrol Robbins Gulch Road against unauthorized public use is simply a follow up question

to the broader question of whether the easement allows for public access. Because this claim is not a standalone claim, it does not have a separate statute of limitations period.

Moreover, it is simply not true that Plaintiffs additional allegations of "trespass[s], illegal hunting, speeding and [other] disrespectful activities" take the claim beyond the allegations raised in the public use claim. For starters, the public cannot trespass on a public road. As for the remaining allegations of illegal "hunting, speeding and other disrespectful activities," Plaintiffs allege nothing more than undesirable behavior resulting from public use. As Defendant notes, these allegations are not "problems beyond mere public use of the road—they are problems because of public use of the road." (Doc. 65 at 9.)

The maintenance and patrol claim is part and parcel with the public use claim and both accrued when a reasonable landowner would have known that the Forest Service was holding Robbins Gulch Road open for public use. Therefore, both claims are untimely, and the Court lacks jurisdiction over the Complaint.

II. Parking Allegations

Plaintiffs assert that its public use claim raised two separate questions—whether the public could use the road, and whether the public could park on the road. (Doc. 62 at 18.) Plaintiffs contend that the Court erred by failing to separately analyze each claim. (*Id.*)

If there is any error, it is that the Court assumed it goes without saying that if the public can't travel on

the road, the public can't park on the road. Plaintiffs assert that each specific claim has a separate statute of limitations, but this strains credulity. A challenge to the public's use in general encompasses its specific challenge to a particular use; i.e. the public's right to park on the road. The Court will not disturb its ruling for failing to clearly articulate that the parking allegation does not result in a separate statute of limitations analysis.

III. Leave to Amend

Finally, Plaintiffs conditionally renew their request for leave to amend. (Doc. 62 at 20.) In the Court's order granting Defendant's motion to dismiss, it observed in a footnote that it did not believe the APA applied to Plaintiffs' Complaint given the specific allegations raised in the Complaint. (Doc. 59 at 2 n.2.) The Court determined that all claims were properly raised under the QTA. (*Id.*) Both parties agree with this assessment. (Doc. 66 at 11.) Nevertheless, Plaintiffs request leave to amend their Complaint but only in the event the Court believes a claim may be brought under the APA. (Docs. 62 at 20; 66 at 11.)

The Court will not litigate the case on behalf of Plaintiffs. For the purpose of resolving this issue, it is sufficient that Plaintiffs agree that both claims were properly raised under the QTA. Additionally, the Court construes this agreement as a concession that amendment would be futile. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). Plaintiffs request is therefore denied.

IT IS ORDERED that the Motion (Doc. 61) is DENIED.

DATED this 11th day of August, 2020.

/s/ Dana L. Christensen
Dana L. Christensen, District Judge
United States District Court

Filed May 26, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

LARRY STEVEN WILKINS and JANE B. STANTON, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	CV 18–147–M–DLC–KLD ORDER

On February 4, 2020, United States Magistrate Judge Kathleen L. DeSoto entered her Findings and Recommendation recommending that the Government's Motion to Dismiss for lack of subject matter jurisdiction be denied. (Doc. 53.) The Government timely objects and so is entitled to de novo review. 28 U.S.C. § 636(b)(1)(C).

BACKGROUND

In 1962, Plaintiffs Larry Steven Wilkins and Jane B. Stanton's predecessors-in-interest granted the United States an easement for Robbins Gulch Road. (Doc. 1 at 4.) Located off Highway 93, just south of Connor, Montana, Robbins Gulch Road transverses private property for approximately a mile before entering the boundary of the Bitterroot National

Forest.[1] (Doc. 32-24.) Plaintiffs each acquired their properties in 1991 and 2004, respectively. (Doc. 1 at 3.)

Plaintiffs filed this action against the United States under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, alleging that the United States Forest Service has exceeded the scope of its limited easement by failing to "manage . . . this road in accordance with the intended limited use of the road for U.S. Forest Service administrative purposes" and has instead managed the road in a way that has enabled public access, including posting signs that encourage public use. (Doc. 1 at 2-3, 13.) Plaintiffs also seek to confirm and enforce the Forest Service's obligation to patrol and maintain the road.[2] (*Id.* at 14.) The Government moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, asserting that Plaintiffs' action is barred by the QTA's statute of limitations which the Government claims is jurisdictional. Alternatively, the Government argues that Plaintiffs lack standing

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[1] When the Court refers to Robbins Gulch Road hereafter, it will mean only that initial approximate 1-mile portion of the road which traverses private property.

[2] To the extent Plaintiffs' second claim seeks to impose an affirmative action duty on the Forest Service to "maintain and patrol" Robbins Gulch Road, this allegation seems to take this claim outside of the QTA. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). Nevertheless, having scoured Plaintiffs' complaint and finding no allegation that the Forest Service failed to "patrol" or "maintain" against any threat other than public use, the Court does not find any inference of a stand-alone APA claim. The Court will therefore construe both claims under the QTA.

because they do not own the land underlying Robbins Gulch Road. (Docs. 30, 31.)

Judge DeSoto recommended the Court deny the Government's motion. (Doc. 53 at 1.) First, she determined that Plaintiffs have standing because Montana law presumes that a landowner owns property to the center line of the road. Mont. Code Ann. § 70-16-202. (*Id.* at 8-11.) Additionally, she determined that the United State's easement encroaches on at least five feet of Plaintiffs' properties. (*Id.* at 11.) Then, following the lead of Chief Judge Morris in *Bar K Ranch, LLC v. United States*, No. CV-19-6-BU-BMM, 2019 WL 5328782 (D. Mont. Oct. 21, 2019), Judge DeSoto determined that the QTA's statute of limitations is non-jurisdictional and therefore the Government's motion to dismiss should be construed under 12(b)(6) for failure to state a claim rather than 12(b)(1) for lack of subject matter jurisdiction. (Doc. 53 at 16-17.) Looking only at the allegations in the Complaint, she recommended the Court deny the Government's motion. (*Id.* at 16-19.)

LEGAL STANDARD

A statute-of-limitations defense is typically raised under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010). However, where the statute of limitations is jurisdictional, and the issue is not "inextricably entwined" with the merits of the case, a court should address the claim under Rule 12(b)(1) for lack of subject matter jurisdiction. *See Kingman Reef Atoll Inv., L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008); *see*

also Tobar v. United States, 639 F.3d 1191, 1195 (9th Cir. 2011) ("The waiver of sovereign immunity is a prerequisite to federal-court jurisdiction."). An argument that a party lacks statutory standing should be addressed under 12(b)(6). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). Motions under 12(b)(6) and 12(b)(1) are governed by different legal standards.

Under Rule 12(b)(6), "[a] complaint may be dismissed for failure to state a claim only when it fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). In resolving the motion, a court takes the well-pleaded factual allegations as true and draw inferences in the plaintiff's favor. *Id.* A court may consider only the allegations in the complaint, documents attached to the complaint, or documents on which the plaintiff's case relies, "the authenticity of which is not contested," even if submitted by the defendant. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) *supersceded on nonrelevant grounds as recognized by Steinle v. City & Cty. of San Francisco*, 919 F.3d 1154, 1158 (9th Cir. 2019).

In contrast, under a Rule 12(b)(1) factual attack (meaning the facts negating jurisdiction exist outside the complaint) no presumption of truthfulness attaches to plaintiff's allegations, a court may freely consider extrinsic evidence, and it may resolve factual disputes with or without a hearing. *Kingman Reef Atoll Inv.*, 541 F.3d at 1195; *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987). Although the

defendant is the moving party, the plaintiff bears the burden of satisfying the court as to its jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

DISCUSSION

The Government raises four objections to the Findings and Recommendation. (Doc. 55.) The Court will consider only its first objection to the statute-of-limitations issue, as it is dispositive. Judge DeSoto determined that the QTA's statute of limitations is a mere claim-processing rule after applying the "clear statement" test set forth in *United States v. Kwai Fun Wong*, 515 U.S. 402 (2015). Chief Judge Morris reached the same conclusion in *Bar K Ranch*, 2019 WL 5328782, at *2-3. The Court takes a different view of it. Recognizing that its decision today creates an intra-district split on an issue critical to the disposition of property rights in Montana, the Court believes that it is bound by the Supreme Court's decision in *Block v. North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273 (1983) and Ninth Circuit law holding that the QTA's statute of limitations is jurisdictional. Ultimately, it is up to the Ninth Circuit to decide whether *Wong* is "clearly irreconcilable" with its prior settled precedent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). For the reasons explained, the Court will grant the Government's motion to dismiss because Plaintiffs' claim is untimely and the Court lacks jurisdiction to consider it.

I. The Quiet Title Act's Statute of Limitations

In *Block*, the Supreme Court defined the scope of the QTA when it determined that North Dakota's challenge to the United States' "competing claims to title of certain portions of the bed of the Little Missoula River" was barred, assuming the district court determined that the statute of limitations had run. *Block*, 461 U.S. at 277, 292-93. In a narrow sense, the Supreme Court addressed only two questions. It first considered whether the QTA provided the exclusive remedy to challenge the United States' competing claim to title of real property. *Id.* at 276-77. Then it considered whether the QTA's statute of limitations applied equally to states. *Id.* at 277. In a broader sense, however, the Court's opinion was all about the limits of Congress's waiver of sovereign immunity, a jurisdictional prerequisite.

At trial, North Dakota introduced evidence that the Little Missouri River was navigable at statehood so that under the equal footing doctrine title passed at that time from the United States to North Dakota. *Id.* at 279. The government did not introduce evidence to rebut the merits—instead, it defended the case on the grounds that the twelve-year statute of limitations had run prior to North Dakota's commencement of the suit. *Id.* at 278-79. The district court ruled in North Dakota's favor on navigability and rejected and government's statute-of-limitations defense by applying "the rule of construction that statutes of limitations do not apply to sovereigns unless a contrary legislative intention is clearly evidence from the express language of the statute[.]" *Id.* at 279. The

court of appeals affirmed, and the Supreme Court granted certiorari. *Id.*

First, the Court addressed whether a plaintiff could avoid the QTA's statute of limitations by invoking another basis for relief. *See id.* at 280-81. In answering "no," the Court reviewed the political and legislative backdrop of the QTA. *Id.* at 280-85. Because suits against the federal government are barred by sovereign immunity unless waived by Congress, early plaintiffs seeking title from the United States experienced limited and inconsistent success. *Id.* at 280. Plaintiffs could attempt to plead around sovereign immunity by bringing an "officer's suit"—a suit against a specific government official charged with administering the area—or they could attempt to induce the government to sue them. *Id.* at 280-81. Although the Supreme Court accepted the officer's suit in early cases, in *Malone v. Bowdoin*, 369 U.S. 643 (1962), the Court mostly foreclosed that possibility, holding that officers' suits were only viable when the officer's actions were not authorized by law. *Id.* at 281.

In passing the QTA, Congress sought to provide a consistent remedy for plaintiffs to obtain title. *Id.* at 282. Congress's initial draft was met with opposition from the executive branch who feared that recognizing this cause of action would create an unmanageable workload for government attorneys and the courts. *Id.* The executive branch favored a "more-elaborate bill" with "appropriate safeguards for protection of the public interest." *Id.* at 282-83. Its proposal "limited the waiver of sovereign immunity in several important respects," by excluding Indian lands and

ongoing federal programs, having prospective effect only, and providing a six-year statute of limitations to ensure the government did not have to defend against stale claims. *Id.* at 283. The Senate largely accepted the executive's proposal with one exception—it did not believe the bill should have prospective effect only. *Id.* In the final compromise, Congress enacted the QTA with a twelve-year statute of limitations and prospective-only language. *Id.* This longer window gave the law retroactive effect for a limited period. *Id.*

The Court found this history determinative of the first question. *Id.* It reasoned that if North Dakota were able to circumvent the QTA by asserting any other theory such as an officer's suit, it would render null Congress's "carefully crafted provisions . . . deemed necessary for protection of the national public interest." *Id.* at 284-85. The Court then held that the QTA provides the exclusive remedy. *Id.* at 286.

Turning to the second question, the Court addressed whether the statute of limitations applied equally to states. *Id.* at 287. The Court observed the common principle that where Congress attaches a condition to the waiver of sovereign immunity, that condition ought to be strictly observed. *Id.* Searching the text and legislative history, the Court found no evidence that Congress intended to expand its waiver of sovereign immunity by allowing states to bring claims beyond the 12-year window. *Id.* The Court ultimately decided that "States must fully adhere to the requirements" of the QTA, including its statute of limitations. *Id.*

On whole, *Block* stands for the proposition that the express terms of the QTA provide the universe of

claims that may be brought against the United States over disputes concerning real property. This is because "[w]hatever the merits of the title dispute may be, . . . if North Dakota's suit is barred by [the statute of limitations], the court below had no jurisdiction to inquire into the merits." *Id.* Three years later, the Court reiterated this principle stating that "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States v. Mottaz*, 476 U.S. 834, 841 (1986) (citing *Block*, 461 U.S. at 586). Then, over a decade later, the Supreme Court spoke again in jurisdictional terms, holding that once the statute of limitations begins to run, that window cannot be equitably tolled. *United States v. Beggerly*, 524 U.S. 38, 48 (1998). "This is particularly true given that the QTA deals with ownership of land. It is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge." *Id.* at 48-49. The Court reasoned that permitting "[e]quitable tolling of the already generous statute of limitations incorporated in the QTA would throw a cloud of uncertainty over these rights," something that is "incompatible with the Act." *Id.* at 49.

In the early 1990s, the Supreme Court began to rethink whether the various procedural prerequisites for bringing suit against the federal government ought to define the scope of the court's subject matter jurisdiction. *See Irwin v. Dep't of Vet. Aff.*, 498 U.S. 89, 95-96 (1990) (holding that the 30-day time limit to file suit against a federal employer is non-jurisdictional and a rebuttable presumption of equitable tolling applies to cases against the government); *Kingman*

Reef Atoll Inv., L.L.C., 541 F.3d at 1196 (listing cases). Consistent with this trend, in 2015, the Supreme Court held that the Federal Tort Claims Act's statute of limitations is non-jurisdictional. *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015). Extending *Irwin*'s rebuttable presumption, *Wong* held that for a time bar to be jurisdictional, the government must show some "clear statement" that Congress intended such a result. *Id.* at 408-10. The Court reasoned that the language of the time bar itself was not necessarily controlling because most are written with forceful mandatory language. *Id.* at 408-10, 415-17. Nor does it make a difference that a "time bar conditions a waiver of sovereign immunity." *Id.* at 420. To find a "clear statement," Congress must do "something special, beyond setting an exception-free deadline [in order] to tag a statute of limitations as jurisdictional." *Id.* at 410.

However, the Court in *Wong* also affirmed that its prior decision in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 138 (2008) (holding that the Tucker Act's time bar is jurisdictional) remained good law. *Id.* at 416. The Court justified its arguably incompatible treatment of the Tucker Act by explaining that the difference came "down to two words: stare decisis." *Id.* By excluding *John R. Sand & Gravel Co.* from its scope, the Court explained that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Id.*

In 2005, citing *Block*, the Ninth Circuit held that the QTA's statute of limitations is jurisdictional. *Skranak v. Castenada*, 425 F.3d 1213, 1216 (9th Cir.

2005). In *Skranak*, the court raised the issue sua sponte, reversed the district court's grant of summary judgment to the plaintiffs, and remanded for the district court to determine whether the plaintiffs' claim was timely, which would in turn govern whether the court had subject matter jurisdiction over the case. *Id.* at 1216-17. Subsequently in *Kingman*, the plaintiff asked the Ninth Circuit to reconsider *Skranak*, citing *Irwin* for that proposition that the Supreme Court was no longer treating claim-processing requirements as jurisdictional barriers. *Kingman Reef Atoll Inv.*, 541 F.3d at 1196. The Ninth Circuit declined to read *Irwin* as overruling *Block* and noted that it was bound by its own precedent interpreting *Block* as "directly control[ling]." *Id.* (citing *Fidelity Exploration and Prod Co. v. United States*, 506 F.3d 1182, 1186 (9th Cir. 2007) (affirming that *Block* pronounced that the QTA's statute of limitations is jurisdictional)). The Ninth Circuit has affirmed its adherence to this rule in, at least, four published opinions. *Kingman Reef Atoll Inv.*, 541 F.3d at 1196; *Fidelity Exploration and Prod. Co.*, 506 F.3d at 1186; *Skranak*, 425 F.3d at 1216; *Adams v. United States*, 255 F.3d 787, 796 (9th Cir. 2001). It has even done so after *Wong*, albeit in a memorandum disposition. *Hein v. United States*, 783 F. App'x 650,651 (9th Cir. 2019).

Although two district courts have determined that the QTA' s statute of limitations is non-jurisdictional, *Bar K Ranch*, 2019 WL 5328782, *2-3, *Payne v. United States Bureau of Reclamation*, No. CV1700490ABMRWX, 2017 WL 6819927, at *2 (C.D. Cal. Aug. 15, 2017), these decisions appear to be outliers, and the Court is not persuaded by their reasoning. First, both courts assumed without

deciding that *Block*'s pronouncement that the QTA's statute of limitations is jurisdictional was obitur dictum. As such, neither court consider whether, as Supreme Court judicial dicta, the statement ought to be given greater persuasive weight. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000). Even assuming *Block*'s statement is not binding law, neither court read *Block* alongside *Beggerly*'s conclusion that once that QTA's statute of limitations begins it cannot be equitably tolled. *Beggerly*, 524 U.S. at 48. Then, both courts disregarded settled Ninth Circuit precedent without addressing the relevant standard for doing so. *See Bar K Ranch*, 2019 WL 5328782, *2 (determining that *Wong* "cast doubt" upon once "seemingly clear" law); *Payne*, 2017 WL 6819927, at *2 (failing to address Ninth Circuit law entirely). Finally, neither court considered whether the QTA's negotiated safeguards constitute a "clear statement" that Congress intended its statute of limitations to be jurisdictional. For these reasons, the Court believes these decisions reached the wrong result.

As an initial matter, the Court reads *Block*'s pronouncement that the QTA's statute of limitations is jurisdictional as part of the Court's holding. The Ninth Circuit has defined a holding as a statement "germane to the eventual resolution of the case, . . . resolve[d] . . . after reasoned consideration in a published opinion." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, C.J., concurring); *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc) (adopting Judge Kozinski's definition in the majority opinion); *see also* Ryan S. Killian, *Dicta and the Rule of Law*, 2013 Pepp. L. Rev.

1, 11-14 (2013). Applying this definition, *Block*'s statement is binding law because it was critical to the Court's reasoning on an issue actually decided. In answering both questions posed by North Dakota, the *Block* Court was principally swayed by the compromise struck between the legislative and executive branches. *Block*, 461 U.S. at 280-85. The Court determined that all of the strings that Congress had attached to the QTA, such as its statute of limitations ("the one point on which the Executive Branch was most insistent," *id.* at 285,) defined the limits on its waiver of sovereign immunity, i.e. the Court's power to hear the case, *id.* at 290-91. Although *Wong* subsequently said that this reasoning is not dispositive of whether a statute of limitations is jurisdictional when interpreted for the first time today, this reasoning was critical to the Court's resolution of *Block*, making it a part of the Court's holding.

Whatever ambiguity persisted after *Block*, the *Beggerly* Court doubled down on Congress's limited waiver of sovereign immunity by prohibiting equitable tolling. *Beggerly*, 524 U.S. at 49. The Court recognized the "special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge." *Id.* Even if a high court's individual decision does not create a rule a property, a series of decisions read together may, particularly when those decisions create reliance interests. *See, e.g.*, *Christy v. Pridgeon*, 71 U.S. (4 Wall.) 196, 200 (1866) (per Field, J.); *Bogle Farms, Inc. v. Baca*, 925 P.2d 1184, 1193 (N.M. 1996). Together *Block*, *Mottaz*, and *Beggerly* provide a rule of property which requires courts to give stare decisis

"peculiar force and strictness," *Abbott v. City of Los Angeles*, 326 P.2d 484, 494-95 (Cal. 1958), because "in questions which respect the rights of property, it is better to adhere to principles once fixed . . . than to unsettle the law in order to render it more consistent with the dictates of sound reason," *Marine Ins. Co. of Alexandria v. Tucker*, 1 U.S. (3 Cranch) 357, 388 (1806) (per Washington, J.).

Although, admittedly, *Skranak* did not discuss whether *Block*'s statement about the jurisdictional nature of its decision occurred in holding or dictum, the Ninth Circuit's pronouncement itself is the binding law of the circuit. The Ninth Circuit has said as much in a subsequent case. *Kingman Reef Atoll Inv.*, 541 F.3d at 1196.

If a district court disagrees with the Ninth Circuit or believes it to have taken an erroneous view of Supreme Court law, that court is still bound by the law of the circuit unless a superseding Supreme Court opinion "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller*, 335 F.3d at 900. To be "clearly irreconcilable" means there can be no interpretation that renders the superseding Supreme Court case harmonious or compatible with the prior law. It is not enough that a subsequent case merely "cast doubt" upon an older decision.

Wong is not "clearly irreconcilable" with *Block* because *Wong* expressly exempted prior settled cases from reassessment. The Eleventh Circuit—the only circuit court to have squarely addressed the issue—dismissed it in a footnote, observing that its decision to enforce the QTA's jurisdictional bar is consistent

with *Wong* because *Wong* requires adherence to stare decisis. *F.E.B. Corp. v. United States*, 818 F.3d 681, 686 n.3 (11th Cir. 2016).

Even if *Wong* created a clear conflict to the extent that a court was no longer bound by Ninth Circuit law, as *Block* describes, Congress provided a "clear statement" that it intended the QTA to be jurisdictional. During the drafting process, Congress was sensitive to the executive branches' chief concern that the failure to implement "appropriate safeguards" would create an unmanageable workload for federal employees. *Block*, 461 U.S. at 283-84. The final draft of the QTA recognized this concern by excluding Indian lands and ongoing federal projects and authorizing only prospective actions brought within twelve-years of accrual. *Id.* If the statute of limitations is non-jurisdictional, stale claims are often not appropriately dismissed on the pleadings, as apparent by this litigation. Reading Congress's twelve-year statute of limitations to circumscribe a jurisdictional bar protects the compromise struck by congress and the executive branch by ensuring that time-barred claims are easily dismissed at the outset. This is Congress's "clear statement."

Following the binding precedent of the Supreme Court and Ninth Circuit Court of Appeals, the QTA's statute of limitations is jurisdictional. Accordingly, the Government's motion is properly analyzed under Federal Rule 12(b)(1).

II. Timeliness

The QTA's statute of limitations begins to run when a plaintiff's claim accrues. "Such an action shall

be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). The phrase "'should have known' imparts a test of reasonableness." *Shultz v. Dep't of Army, U.S.*, 886 F.2d 1157, 1160 (9th Cir. 1989) (quoting 28 U.S.C. § 2409a(g)). A claim accrues when the United States' actions "would have alerted a reasonable landowner" to the adverse interest of the United States. *Id.*

Plaintiffs correctly observe that actions that would constitute accrual over a fee dispute do not necessarily put a reasonable landowner on notice of the government's adverse interest when the property at issue is an easement. (Doc. 35 at 23; *McFarland v. Norton*, 425 F.3d 724, 726-27 (9th Cir. 2005).)

For example, in *Michel v. United States*, the Ninth Circuit explained:

> If a claimant asserts fee title to disputed property, notice of a government claim that creates even a cloud on that title may be sufficient to trigger the limitations period. But when the plaintiff claims a non-possessory interest such as an easement, knowledge of a government claim of ownership may be entirely consistent with a plaintiff's claim. A plaintiff's cause of action for an easement across government land only accrues when the government, "adversely to the interests of plaintiffs, denie[s] or limit[s] the use of the roadway for access to plaintiffs' property."

65 F.3d 130, 132 (9th Cir. 1995) (per curiam) (internal citations omitted).

Subsequently in *McFarland v. Norton*, the Ninth Circuit clarified that regulatory or supervisory actions taken by the government are often consistent with its right as owner of the servient estate and, where so, those actions do not cause a claim to accrue. 425 F.3d at 727. There, plaintiffs were landowners who claimed an easement over parts of Glacier National Park to access their private parcel within the park's boundaries. *Id.* at 725. The district court concluded that the claim accrued in the 1970s when the Park Service erected a locked gate restricting wintertime access, which required the plaintiffs to request permission from the Park Service to access their property. *Id.* at 726. The Ninth Circuit reversed, finding that the Park Service's decision to restrict wintertime motorists was consistent with its regulatory authority as the owner of the servient tenement. *Id.* at 727-28. The court clarified that when it comes to easements the analysis is different because a "claim to ownership and control of the servient tenement can be entirely consistent with private ownership of an easement." *Id.* at 727.

> To avoid forcing landowners and the government into "premature, and often unnecessary, suits" [a court] should not lightly assume that regulatory or supervisory actions, as opposed to those that deny the easement's existence, will trigger the statute of limitations. Were it not so, any regulation of a property interest would challenge ownership of the interest itself.

Id. (citing *Michel*, 65 F.3d at 132 (internal citations omitted)). The court reasoned that requiring private owners to request permission to enter through an otherwise locked gate did not trigger the statute of limitations when there was no evidence that any landowner was denied access when the road was passable. *Id.* at 728. Instead, the court determined that the claim accrued in 1999 when the Park Service informed the plaintiffs of its new policy that no motorists would be allowed access while the road was closed. *Id.*

Unlike the cases above where it was the plaintiffs who claimed an easement and the government who owned the servient estate, the opposite is true here. Plaintiffs argue that this makes the "peaceful coexistence" of the Forest Service's regulatory actions and the landowner's view of the easement "especially likely." (Doc. 35 at 23.) But the Court does not share this view. Whether the Forest Service is exercising regulatory control as owner of the easement or the servient estate makes little difference. Plaintiffs argue that the Forest Service has managed the road in violation of its limited easement by facilitating public access. The question then is when a reasonable landowner would have known that the Forest Service believed its easement granted public access or opened the road to the public.

As a preliminary matter, the Court must decide whether answering this question is appropriate on the pleadings or whether the issue is "inextricably entwined" with the merits. "Such an intertwining of jurisdiction and merits may occur when a party's right to recovery rests upon the interpretation of a federal

statute that provides both the basis for the court's subject matter jurisdiction and the plaintiff's claim for relief." *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean, Geological Formation*, 524 F.3d 1090, 1094 (9th Cir. 2008).

Although the QTA simultaneously establishes the Court's jurisdiction and a plaintiff's right to recover, the timeliness of Plaintiffs' claims are not "inextricably entwined" with the merits because each question requires the Court to consider different evidence and issues. The question on the merits is whether "the 1962 easement is limited in scope" which requires the Court to consider the text of the easement, and, if necessary, various sources of extrinsic evidence, such as the Forest Service Handbook, the text of other Forest Service easements, and any contemporaneous communications between the parties concerning the scope of the agreement. (*See* Doc. 42 at 18-25.) Whereas the question of timeliness requires the Court to consider the Forest Service's historic treatment of Robbins Gulch Road by considering evidence like historic maps, signs, administrative closures, or direct communications between the parties. (*See* Doc. 31 at 27-37.) These questions are different because the latter does not require the Forest Service to be correct—it only requires the Court to determine when a reasonable person would have understood the Forest Service believed its easement granted public access.

The Government asserts five specific notices to indicate that the statute of limitations has run, specifically: (1) the public's historic use of Robbins

Gulch Road and belief that this use is authorized; (2) the Forest Service's issuance of federal grazing permits; (3) the Forest Service's May 2006 temporary closure of Robbins Gulch Road; (4) its depiction of Robbins Gulch Road as an unrestricted road on various historic maps; and (5) the signs depicting Robbins Gulch Road as open for public use. The Court will consider only the historic maps and the May 2006 temporary closure.[3] Nevertheless, the Court agrees with the Government.

Although the Government does not pin down precisely when Plaintiffs' claims expired, the Government offers enough evidence for the Court to conclude that the statute of limitations ran before

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[3] Plaintiffs assert that only government actions cause a claim's accrual—meaning the community's belief that Robbins Gulch Road is public is irrelevant. (Doc. 35 at 25.) The Court agrees in part. It will consider this testimony only to the limited extent that it conforms with the Forest Service's characterization of the road in its publicly available maps. Additionally, the Court declines to consider the Forest Service's issuance of grazing permits because Plaintiffs "do not dispute that the United States can . . . allow certain people to use the road," (*id.* at 24)—therefore the existence of grazing permits "peacefully coexists" with Plaintiffs' claims. Finally, the Court will not consider the sign posted on Plaintiff Jane Stanton's property in September 2006 stating "Public Access Thru Private Lands Next 1 Mile" because the evidence suggests the sign was posted within the twelve-year window. Although Stanton's statement that she permitted the Forest Service to place the sign on her property because "she didn't see why not" (Doc. 32-18 at 20) indicates that Stanton had actual knowledge of the Forest Service's adverse claim, the Court cannot determine when Stanton developed this knowledge from the posting of the sign.

August 23, 2006,[4] the most telling of which is a series of historic Bitterroot Forest maps. The Government first submits a map of the region from 1950, twelve years prior to the Forest Service's acquisition of the easement. (Doc. 32-25.) This map depicts Robbins Gulch Road as a non-system road in good motor condition that connects Highway 93 before dead ending within the Bitterroot National Forest. (*Id.*) Then, in 1964, two years after the Forest Service acquired its easement, it issued a map depicting Robbins Gulch Road as Forest Road 446. (Doc. 32-26.) That it alternately listed Robbins Gulch Road by a Forest Service numbered designation does not necessarily mean the road was open to the public. Its 1964 map does not contain any route restrictions. However, in 1972, 1981, and 1993 respectively, the Forest Service displayed Robbins Gulch Road as an "improved road" in contrast to some other roads characterized as "road[s] or trail[s] with restrictions—inquire [at the] local forest service station." (Doc. 32-28, 32-27, 32-29.) Then, in 2005, the Forest Service published a visitors map of the Bitterroot National Forest South Half designed to help visitors "travel safely" and use the area lawfully. (*See* Doc. 32-24.) This map depicted restricted roads by a lettered system corresponding to the type of seasonal restriction. (*Id.*) Here again, Robbins Gulch Road is not depicted as having any user restrictions. These maps tell a clear story—the Forest Service has been informing the public since, at least, 1972 that it may access the Bitterroot National Forest by using unrestricted road 446. What's more—the public heard

[4] Plaintiffs filed their Complaint on August 23, 2018. (Doc. 1.) Therefore, to be timely, their claim must not have accrued prior to August 23, 2006.

this message and has been using the road as a public access route since that time. (Docs. 32-18 at 12 (Deposition of Plaintiff Jane Stanton who reports that hunters and teenagers have openly used the road since 1990); 32-15 (Declaration of David Coultas, whose grandparents granted the Forest Service its easement in 1962, states that the easement was "intended to allow regular members of the public to use the road, without having to ask anyone for permission"); 32-16 (Declaration of Lori Connor, a predecessor-in-interest to Plaintiff Wilkin's property, observes that the road "has always been intended to provide public access" and, growing up in the surrounding community, her family used the road in this way); 32-12 (Declaration of Dalton Christopherson who reports that since 1991 his family traveled Robbins Gulch Road to go elk hunting each fall); 32-13 (Declaration of Laura Lindenlaud who states that she has used the road two to three times per week seasonally since 2000); 32-14 (Declaration of Ric Brown who has "always considered it a road open to the public" and has used it regularly since the 1960s or early 1970s). A reasonable landowner observing this public use would have known to check local maps to see whether the road was designated as public or restricted. Upon doing so, a reasonable landowner would have been aware of the Forest Service's adverse claim prior to August 23, 2006.

Finally, on May 3, 2006, pursuant to 36 C.F.R. 261.53 (which authorizes the Forest Service to enact "special closures" for a variety of reasons including "public health or safety") the Forest Service temporarily closed the road. (Doc. 32-23.) The Forest Service notified the public of its closure by erecting a

physical barrier and posting a sign. (Doc. 32-22 at 31.) Under the terms of the order, Robbins Gulch Road was closed to public motorists absent three exceptions: persons with a permit authorizing the otherwise prohibited act (such as homeowners), first responders, and forest administrative personnel. (Doc. 32-23.) At first glance, erecting a road closure appears to be regulatory or supervisory action which is not inherently incompatible with Plaintiffs' theory of the easement. On closer inspection, however, this closure would have provided a reasonable landowner with notice of the Forest Service's adverse claim. By "expressly excluding the public during this time," the Forest Service communicated that it "viewed the road as [otherwise] open to the public." (Doc. 31 at 30.) If the Forest Service believed that Robbins Gulch Road was only open to residents and administrative personnel, it would not have needed to temporarily close the road while exempting those users. A reasonable landowner seeing this sign in May 2006 should have known the Forest Service believed its easement to provide public access. Although the record contains evidence that Plaintiffs' claims likely accrued sometime in the 1970s, the record is abundantly clear that it accrued, at the latest, on May 3, 2006. Accordingly, Plaintiffs have not met their burden to show that their claim is timely. The Court will dismiss this action for lack of jurisdiction.

IT IS ORDERED that the Findings and Recommendation (Doc. 53) is REJECTED. This case is dismissed for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that the Government's Motion to Dismiss (Doc. 30) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. 41) is DENIED.

The Clerk of Court is directed to enter judgment of dismissal by separate document.

DATED this 26th day of May, 2020.

/s/ Dana L. Christensen
Dana L. Christensen, District Judge
United States District Court

Filed Feb. 4, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

LARRY STEVEN WILKINS and JANE B. STANTON, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	CV 18–147–M–DLC–KLD FINDINGS AND RECOMMENDATION

Plaintiffs Larry Steven Wilkins and Jane B. Stanton ("Landowners") bring this action to quiet title to an easement acquired by the United States and administered by the U.S. Forest Service ("USFS"). The United States has moved to dismiss the Landowners' complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). (Doc. 30.) For the following reasons, the Court recommends the motion be **DENIED**.

I. Background

According to their complaint, Landowners own property in Conner, Montana along Robbins Gulch Road. (Doc. 1 at ¶¶ 5-7.) The United States owns a 1962 easement for Robbins Gulch Road, which traverses the Landowners' property and provides access to the Bitterroot National Forest. (Doc. 1 at

¶ 7.) Prior to taking title to their respective properties, Landowners' predecessor in title granted the 1962 easement to the United States through two conveyances. (Doc. 1 at ¶¶ 11, 16.) The grant provided the United States and its assigns with an easement and right-of-way for Robbins Gulch Road. (Doc. 1 at ¶ 16.) Thereafter, the land surrounding Robbins Gulch Road was subdivided. Landowners acquired ownership of their parcels in 2004 and 1991. (Doc. 1 at ¶ 8, 9.) They now object to the USFS's alleged mismanagement of Robbins Gulch Road, including the "current and ongoing excessive use" of the road. (Doc. 1 at ¶ 10.) They seek to quiet title to confirm the scope of the 1962 easement and enforce the USFS's obligations under the easement.

II. Legal Standard

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction over the action. As the party asserting jurisdiction, the plaintiff bears the burden of proving its existence. *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008.) The court will presume jurisdiction is lacking until the plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

In considering a 12(b)(1) motion challenging the facts supporting subject matter jurisdiction, a court may consider extra-pleading materials submitted by the parties. *Assoc. of American Medical Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *see also McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("Moreover, when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court

is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction."). The court may weigh the evidence without converting the motion into one for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A defendant's factual attack on subject matter jurisdiction requires the plaintiff to "support her jurisdictional allegations with 'competent proof[.]'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Hertz Corp v. Friend*, 559 U.S. 77, 96-97 (2010)). A federal court is one of limited jurisdiction; it must dismiss a case upon concluding it lacks jurisdiction. *High Country Resources v. F.E.R.C.*, 255 F.3d 741, 747 (9th Cir. 2001).

III. Discussion

Landowners allege two counts against the United States: quiet title to confirm the limited scope of the 1962 easement for Robbins Gulch Road (Count I), and quiet title to confirm and enforce the USFS's obligations under the 1962 easement for Robbins Gulch Road (Count II). Landowners bring these causes of action under the Quiet Title Act ("QTA"). *See* 28 U.S.C. § 2409a; 28 U.S.C. § 1346(f).

The United States moves to dismiss for lack of jurisdiction. (Doc. 30.) The United States argues Landowners' complaint fails to establish subject matter jurisdiction because Landowners cannot establish they own the real property underlying Robbins Gulch Road. A claimed interest in the disputed property is a requirement that must be met for the United States' sovereign immunity to be waived under the QTA. 28 U.S.C. § 2409a(d); *Long v.*

Area Manager, Bureau of Reclamation, 236 F.3d 910, 915 (8th Cir. 2001); *see also Friends of Panamint Valley v. Kempthorne*, 499 F.Supp.2d 1165, 1174 (E.D. Cal. July 24, 2007) ("Congress . . . permitted challenges to the United States' claim of title to real property only to parties who themselves claim an interest in title."). The United States also argues Landowners' claim is barred by the QTA's twelve-year statute of limitations, which, the United States argues, is jurisdictional. (Doc. 31 at 9.)

In response, Landowners assert they have a claim of title to the property underlying the easement because under Montana law, their properties are presumed to extend to the centerline of Robbins Gulch Road. (Doc. 35 at 13.) Landowners further argue that even assuming their properties do not extend to the centerline of Robbins Gulch Road, evidence establishes that the United States' easement encroaches on their property. (Doc. 35 at 16-18.) Landowners also argue the QTA's twelve-year statute of limitations is not jurisdictional, and the Court should therefore deny the United States' motion to dismiss.

The QTA serves as a conditional waiver of the federal government's sovereign immunity in actions by plaintiffs seeking to quiet title to property in which the United States claims an interest. 28 U.S.C. § 2409a. Exceptions and restrictions condition the QTA's waiver, including a twelve-year statute of limitations and the requirement that a plaintiff must claim an interest in the disputed title. 28 U.S.C. § 2409a(g), (d). The issue of subject matter jurisdiction

therefore requires the court to determine whether Landowners have met these conditions.

A. Landowners' Property Interest

The QTA requires Landowners' complaint to "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d). Landowners must, therefore, "claim a property interest to which title may be quieted." *Long*, 236 F.3d at 915. Unless Landowners have met this requirement, the United States' sovereign immunity has not been waived and this case must be dismissed for lack of subject matter jurisdiction. *See*, *Mills v. U.S.*, 742 F.3d 400, 406 (9th Cir. 2014) (construing the QTA's waiver of sovereign immunity narrowly and dismissing claims for lack of subject matter jurisdiction when the QTA's requirements are not met) and *McMaster v. U.S.*, 731 F.3d 881, 897 (9th Cir. 2013) ("To invoke the QTA, a complaint must "set forth with particularity the nature of the right, title or interest which the plaintiff claims in the real property, the circumstances under which it was acquired . . . .").

Because the United States has factually attacked whether the Court has jurisdiction over the Landowners' claims, the Landowners must support its claim of jurisdiction with competent proof. *Leite*, 749 F.3d at 1122. The Court must determine whether Landowners have sufficiently shown they have a property interest to which title may be quieted. "As long as the complaint purports to set out a federal claim and that claim is not insubstantial and

frivolous, this Court has subject matter jurisdiction." *Buchler v. U.S.*, 384 F.Supp.709 (E.D. Cal 1974) (citing *Wheeldin v. Wheeler*, 373 U.S. 647 (1963)). Under these circumstances, even if Landowners' complaint fails to meet the pleading requirements of 28 U.S.C. § 2409a, the Court still may have subject matter jurisdiction. *Buchler*, 384 F.Supp. at 714.

Landowners have submitted 23 exhibits in support of their jurisdictional claim. They first argue that Montana law presumes an owner of land bounded by a road is presumed to own to the road's centerline. *See*, Mont. Code Ann. § 70-16-202. Although that presumption may be overcome by a contrary intent apparent from the deed, Landowners argue their deeds express no such intent. Landowners cite *McPherson v. Monegan*, 187 P.2d 542, 543-45 (Mont. 1947) for the position that a deed's description of a property's boundary lines as following the side of a county road is insufficient to overcome the presumption that the property owner owns to the center of the road. Because their deeds contain language similar to the language in *McPherson*, Landowners argue the presumption has not been overcome.

Landowners next argue that the United States' evidence includes a draft retracement survey that shows the easement encroaches onto Plaintiff Wilkins' property. According to the survey, the Robbins Gulch easement extends 30 feet from the centerline of the road, while Plaintiff Wilkins' property is approximately 25 feet from the centerline. (Doc. 32-11 at 9.) Landowners therefore argue that because at least five feet of the easement encroaches on Mr.

Wilkins' property, the property interest requirement is met. Additionally, because Plaintiff Stanton's property line mirrors Plaintiff Wilkins', the survey supports finding that the easement also encumbers Plaintiff Stanton's property.

Landowners' submitted evidence is competent proof that they have a property interest to which title may be quieted. First, as owners of land adjacent to Robbins Gulch Road, Montana law presumes Landowners own to the center of the road. Mont. Code Ann. § 70-16-202. The United States has not shown that the Landowners' deeds express a contrary intent sufficient to overcome the presumption. Rather, the United States contends the presumption is inapplicable because it applies only to public roads. However, the Court is unaware of any such express limitation on the presumption. To adequately refute the presumption, the United States must show the Landowners' deeds express the original grantor's intent to retain title to Robbins Gulch Road. *McPherson*, 187 P.2d at 543.

In attempting to refute the Landowners' property interest, the United States has submitted evidence that does not discuss the language of the deeds. Instead, the United States has submitted survey evidence, tax records, and spatial data. None of this evidence rebuts the presumption that Landowners possess title to the middle of Robbins Gulch Road because none of the evidence interprets the language of the deeds. *See Tester v. Tester*, 3 P.3d 109, ¶ 15 (Mont. 2000) (examining the chain-of title is the first step in determining whether an individual has title to disputed property).

Upon examining the Landowners' deeds, the Court finds no language indicating the grantor intended to retain title to the section of Robbins Gulch Road bordering Landowners' properties. Plaintiff Stanton's deed describes her property as "PARCEL E, Certificate of Survey No. 38, being a portion of Section 17, T2N, R20W, PMM, Ravalli County, Montana." (Doc. 36-6 at 2.) Plaintiff Wilkins' deed describes his property as "A tract of land located in the SE1/4 Section 17, Township 2 North, Range 20 West, P.M.M., Ravalli County, Montana, and being more particularly described as Parcel A, Certificate of Survey No. 5594-R." (Doc. 36-7 at 23.)

The Court also finds the historic deeds concerning Landowners' properties do not include language indicating the original grantor intended to retain Robbins Gulch Road. (*See* Docs. 36-7 at 2-21.) The original owners of the properties, John and Jean Coultas, subdivided their property and sold parcels, including those now owned by the Landowners. In 1972, the Coultases conveyed Parcel E, now owned by Plaintiff Stanton, to Donald and Doris Meech. (Doc. 36-7 at 2.) The property was described as continuing "to the easterly right of way of Robbins Gulch Road; thence, southernly along said easterly right of way . . . with the northerly right of way of U.S. highway 93 . . .[.]" (Doc. 36-7 at 3.) The Coultases also sold what is now Plaintiff Wilkins' parcel to the Meech's. The property was similarly described as "along the easterly right of way of U.S. 93 . . . 363.62 feet more or less to the intersection with the westerly right of way of Robbins Gulch Road[.]" (Doc. 36-7 at 5.) The Coultases devised the tracts of land "subject to

easements and rights of way of record or visible on the premises."[1] (Doc 36-7 at 3.)

In *McPherson*, the Montana Supreme Court discussed similar property descriptions and found that language identifying a tract of land as "following" the side of a road did not overcome the presumption that the landowners owned title to the centerline of the road. 187 P.2d 542, at 543. In reaching its holding, the court adopted the minority rule "that a boundary to and with the side of a street carries the fee to the center of the street unless the contrary intent appears from the deed[.]" *McPherson*, 187 P.2d 542, at 544.

The court discussed the minority rule again in *Montgomery v. Gehring*, 400 P.2d 403, 406 (Mont. 1965). There, the court found the language in the deed at issue overcame the presumption because it expressly reserved and excepts land to indicate "a different intent that the middle of the stream be the boundary." *Montgomery*, 400 P.2d at 405. The language in *Montgomery* differed substantially from the language in *McPherson*; the *Montgomery* deed stated: "EXCEPT, however, that there is expressly reserved and excepted therefrom all the land in the corner which is under fence southwest of Poorman [creek], of which the other side of Poorman would be the boundary[.]" *Montgomery*, 400 P.2d at 405. Unlike this language, Landowners' deeds do not include a

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[1] This "subject to" language is present throughout the chain-of-title documents concerning the Landowners' properties. For example, in 1993 Plaintiff Wilkins' property was conveyed to Gary Hursh. The land description stated, "subject to an easement and right-of-way in favor of the United States of America [.]" (Doc. 36-7 at 18.)

reservation or declared intent to alter the property line from the centerline of Robbins Gulch Road.

Apart from the deed language, Landowners also point to the United States' survey evidence to prove they have a property interest in the easement. The Coultases granted the easement and right-of-way to the United States in 1962. As granted, the easement is 60 feet wide with the centerline of the road serving as the true centerline of the easement. (Doc. 36-1 at 2.) The United States survey evidence, however, finds that Plaintiff Wilkins' property is 24-25 feet from the centerline of Robbins Gulch Road. (Doc. 32-11 at 9.) Therefore, even if Landowners do not own the property underlying Robbins Gulch Road, the survey evidence concludes that at least five feet of the easement encroaches onto Landowners' property. Because the Landowners' property underlies at least some of the easement, competent proof supports Landowners' argument that the property interest requirement has been met.

In response, the United States argues that Landowners have failed to allege any injury to the five-foot strips of land burdened by the easement and therefore have failed to establish standing. The Court finds otherwise. Even assuming their property interest is only in the five-foot strips of land, Landowners have adequately alleged injury resulting from the USFS's failure to manage the road according to the easement's terms. They allege injury related to the "increasing excessive use" of the easement which has resulted in "serious traffic hazards, road damage, fire threats, noise . . . , misconduct, trespassing, illegal hunting, speeding and disrespectful activities often

aimed at the Plaintiffs[.]" (Doc. 1 at ¶ 13.) These alleged injuries are not restricted to the portions of the easement within the road's shoulders, but logically implicate the entire easement and affect the unencumbered portions of Landowners' properties. Based on the foregoing, the Court finds Landowners have supported their claim of jurisdiction under the QTA with competent proof.

B. The QTA Statute of Limitations

The United States argues that even if Landowners have a property interest in the easement, their claims are time-barred and must be dismissed. In support of their argument, the United States contends Landowners were required to bring this lawsuit within twelve years of receiving notice of the United States' ownership interest. The United States maintains Landowners had "abundant notice and reason to know" of the government's adverse property claim long before the limitations period expired. (Doc. 31 at 19.) Arguing its sovereign immunity has not been waived if the limitations period has expired, the United States requests the Court dismiss Landowners' complaint for lack of jurisdiction. In response, Landowners argue that in light of recent case law finding the QTA's statute of limitations to be non-jurisdictional, dismissal would be improper.

An action under the QTA must be brought within twelve years of the date of accrual. 28 U.S.C. § 2409a(g). The action is deemed to have accrued "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). The Ninth Circuit, following the Supreme Court's opinion in *Block v.*

North Dakota ex rel. Board of U. & Sch. Lands, 461 U.S. 273 (1983), has determined that the QTA's statute of limitations is a jurisdictional prerequisite to bringing a claim. *Skranak v. Castenada*, 425 F.3d 1213, 1216 (9th Cir. 2005) ("Such bar is jurisdictional. The [QTA] is a waiver of sovereign immunity. If the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction."). *See also*, *Fidelity Exploration and Prod. Co. v. United States*, 506 F.3d 1182, 1186 (9th Cir. 2007) (reaffirming its adherence to *Block* because "we must follow the Supreme Court precedent that directly controls, leaving to the Court the prerogative of overruling its own prior decisions.").

Although the Ninth Circuit has directly addressed this issue, Landowners maintain that the QTA's statute of limitations is non-jurisdictional. In support, Landowners cite subsequent Supreme Court cases that call into question whether *Block* remains good law. Landowners also rely on a case recently decided by this District Court which discussed *Block* and its progeny and concluded the QTA statute of limitations is non-jurisdictional. *Bar K Ranch, LLC v. United States*, 2019 WL 5328782 (D. Mont. Oct. 21, 2019).

In *Block*, the Supreme Court reversed an appeal from the Eighth Circuit affirming the judgment of the United States District Court for the District of North Dakota. 461 U.S. 273, 275. The state of North Dakota brought the case to adjudicate title to the bed of the Little Missouri River. *Block*, 461 U.S. at 275. At the District Court level, the case went to trial and the District Court found for the state of North Dakota. In its judgment, the court determined the QTA's statute

of limitations did not apply to states and therefore the suit was not barred by the QTA's statute of limitations. *Block*, 461 U.S. at 279. Upon granting certiorari, the Supreme Court determined that states are not exempted from the QTA's twelve year statute of limitations. *Block*, 461 U.S. at 287-290. The Court therefore held that if North Dakota's lawsuit was barred by the QTA's limitations period, "the courts below had no jurisdiction to inquire into the merits." *Block*, 461 U.S. at 292.

Since *Block*, the Ninth Circuit has not deviated from the rule that the QTA's statute of limitations is a jurisdictional prerequisite to bringing an action. *See*, *Fidelity*, 506 F.3d at 1186 and *Kingman Reef Attoll Invest.*, 541 F.3d at 1196 (adhering to *Block*). However, the Supreme Court's decision in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015) appears to directly conflict with *Block*. And, while other courts have resolved *Wong*'s impact on the QTA's statute of limitations[2], the Ninth Circuit has not yet addressed *Wong*'s effect.

In *Wong*, the Supreme Court dealt with the issue of whether the Federal Tort Claims Act's time limitations were jurisdictional. The Court found that, "it makes no difference that a time bar conditions a waiver of sovereign immunity[,]" a statute of limitations will only be found to be jurisdictional if congress had done "something special, beyond setting an exception-free deadline, to tag a statute of

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[2] *See F.E.B. Corp v. United States*, 818 F.3d 681, 685 n.2 (11th Cir. 2016); *Payne v. United States Bureau of Reclamation*, 2017 WL 6819927, at *2 (C.D. Cal. Aug. 15, 2017); *Herr v. United States Forest Service*, 803 F.3d 809 (6th Cir. 2015).

limitations as jurisdictional[.]" *Wong*, 575 U.S. at 410. Because the Federal Tort Claims Act included no "clear statement indicating that [it's] statute of limitations can deprive a court of jurisdiction[,]" the Act's "standard time bar" is not jurisdictional. *Wong*, 575 U.S. at 410. The court in *Bar K Ranch* aptly noted that *Wong*'s "'clear statement' rule . . . appears to conflict with the canon of statutory construction that directs courts to construe narrowly waivers of sovereign immunity." 2019 WL 5328782, at *2.

Based on the Supreme Court's reasoning in *Wong*, the Court finds the QTA's statute of limitations is non-jurisdictional. The QTA's time limitation language includes no "clear statement" that "plainly show[s] that Congress imbued a procedural bar with jurisdictional consequences." *Wong*, 575 U.S. at 409-410. Rather, it "speaks only to a claim's timeliness, not to a court's power." *Wong*, 575 U.S. at 410. The time limitation provision states: "[a]ny civil action under this action, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g). The language does not implicate a court's ability to hear a case or limit its powers. It neither "speak[s] in jurisdictional terms [n]or refer[s] in any way to the jurisdiction of the district courts." *Wong*, 575 U.S. at 411 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006)). "Statutory context" further supports finding the statute of limitations to be non-jurisdictional. *Wong*, 575 U.S. at 403. The limitations period is located separately from the Act's grant of jurisdiction and the "jurisdictional grant is not expressly conditioned on compliance with

[§2409a(g)'s] limitations period[.]" *Wong*, 575 U.S. at 403; *See also*, 28 U.S.C. §§ 1346(f), 2409a(a), 2409a(g).

Having concluded the QTA's statute of limitations is non-jurisdictional, the Court must analyze the United States' argument that Landowners' claims are time barred under Rule 12(b)(6). *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995). The United States' request for dismissal is largely supported by documents purporting to show that Landowners had notice of the scope of the government's adverse claim over twelve-years prior to filing this action. (Doc. 31 at 18-37; Doc. 32.) The documents the United States relies on, however, are not attached or incorporated by reference into the complaint. *See*, Doc. 1. The documents are therefore inadmissible for the purposes of resolving the 12(b)(6) motion. *Payne v. United States Bureau of Reclamation*, 2017 WL 6819927, *3 (C.D. Cal. Aug. 15, 2017).

The United States also cites *Beasley v. U.S.*, 2013 WL 1832653 (E.D. Wash. May 1, 2013) to support its argument that Landowners' claim should be dismissed because they were on notice of the government's scope of interest claimed in the easement. In *Beasley*, the plaintiff argued his claim was not barred because, although he was aware of the easement for over twelve years, he was not aware of the scope of interest the government claimed in the easement until he filed a lawsuit. *Beasley*, 2013 WL 1832653 at * 5. The court agreed that the relevant issue was "not the government's mere claiming of an interest, but the scope of the interest claimed." *Beasley*, 2013 WL 1832653 at *5 (quoting *Kootenai*

Canyon Ranch, Inc. v. United States Forest Service, 338 F.Supp.2d 1129, 1133 (D. Mont. 2004)). The court nevertheless found "the expansive language of the Easement, considered as a whole, [was] sufficient to alert a reasonable landowner [of the scope of the interest claimed.]" *Beasley*, 2013 WL 1832653, at *5. The court also concluded that even without the expansive language of the easement, the plaintiff should have known the United States' claimed scope based on the reoccurring activities involved in its operation of the easement. *Beasley*, 2013 WL 1832653, at * 5.

The factors in *Beasley* are unlike those presented here. First, the easement language is less expansive than the language in *Beasley*. The language in *Beasley* provided the United States with an easement encompassing "any and all [purposes] deemed necessary and desirable in connection with the control, management and administration of the National Forest, or the resources thereof, and insofar as compatible therewith, use by the general public." *Beasley*, 2013 WL 1832653, at *5. The Robbins Gulch Road easement includes no similar language and is plainly more restrictive.[3] Additionally, unlike the facts in *Beasley*, it is disputed whether the USFS's operation and management of the easement have remained consistent. In fact, Landowners filed this lawsuit because of the alleged changes in the scope of

[3] The easement language provides: "the party of the first part does hereby grant and convey unto the party of the second part and its assigns an easement and right-of-way for a road as now constructed and in place to be reconstructed, improved, used, operated, patrolled, and maintained and known as the Robbins Gulch Road . . . ." (Doc. 36-1 at 2; Doc. 36-2 at 2.)

the USFS's operation and management of the easement. Under the facts alleged, it is therefore unclear whether, over twelve years ago, a reasonable landowner would have known the scope of the easement claimed by the United States.

The United States' reliance on *Park Cty., Mont. v. U.S.*, (9th Cir. 1980) is also unavailing. In *Park Cty.*, the plaintiffs refuted that they had knowledge of the government's claimed interest in an easement. The plaintiffs' knowledge of the scope of the easement was not at issue. 626 F.2d at 719. The Ninth Circuit affirmed the lower court's grant of summary judgment determining the plaintiffs knew or should have known of the United States' claim when it placed a sign and rock barrier on the easement. *Park Cty.*, 626 F.2d at 720. Here, the United States argues its posting of signs on Robbins Gulch Road was sufficient to put Landowners on notice of the scope it claimed. The Court disagrees. Although *Park Cty.* holds that a sign serves as notice that the United States claims an interest, it does not hold that a sign unconditionally serves as notice of the claimed scope of that interest.

At this stage and with the record presented, the Court cannot conclude that the Landowners' claim accrued within the QTA's twelve-year limitations period. The United States may reassert this issue at the summary judgment stage where it would be more appropriately considered.

IV. Conclusion

Having considered the United States' Motion to Dismiss (Doc. 30), the Court determines that dismissal is not warranted at this time. Landowners

have demonstrated competent proof that they have an interest in the property at issue, and the United States has not shown that Landowners' claim is time-barred.

Accordingly, **IT IS RECOMMENDED** that:

1. Defendant's Motion to Dismiss (Doc. 30) be **DENIED**;

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

IT IS ORDERED.

DATED this 4th day of February, 2020.

/s/ Kathleen L. DeSoto
Kathleen L. DeSoto
United States Magistrate Judge

Filed Nov. 23, 2021

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY STEVEN WILKINS; JANE B. STANTON, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 20-35745 D.C. No. 9:18-cv-00147-DLC District of Montana, Missoula ORDER

Before: EBEL,* BRESS, and VANDYKE, Circuit Judges.

Judge Ebel recommended that the panel deny Appellants' Petition for Rehearing En Banc, filed October 29, 2021 (ECF No. 42), and Judges Bress and VanDyke voted to deny the petition.

The full court has been advised of the petition, and no judge has requested a vote on whether to rehear the matter en banc.

Accordingly, the petition is DENIED. Fed. R. App. P. 35.

* The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

No. _____

In The

Supreme Court of the United States

LARRY STEVEN WILKINS; JANE B. STANTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JAMES M. MANLEY
Pacific Legal Foundation
3217 East Shea Blvd.
No. 108
Phoenix, AZ 85028
jmanley@pacificlegal.org

ETHAN BLEVINS
Pacific Legal Foundation
839 W. 3600 S.
Bountiful, UT 84010
eblevins@pacificlegal.org

JEFFREY W. MCCOY*
**Counsel of Record*
DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
jmccoy@pacificlegal.org
dschiff@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

Two Montana landowners filed a quiet title action seeking to resolve a dispute over the scope of an easement held by the United States that runs across their land and the federal government's duties under the easement. The District Court held that the Quiet Title Act's statute of limitations is jurisdictional, found that the landowners did not prove that their claims arose within twelve years of the lawsuit being filed, and dismissed the case. The District Court's treatment of the statute of limitations as jurisdictional—rather than a claim-processing rule—subjected the landowners to different standards for resolving the motion to dismiss, allowing the court to dismiss the case without holding a hearing to determine and resolve disputed facts.

In conflict with the Seventh Circuit, the Ninth Circuit affirmed, holding the Quiet Title Act's statute of limitations is jurisdictional.

The question presented is:

Whether the Quiet Title Act's Statute of Limitations is a jurisdictional requirement or a claim-processing rule?

PARTIES TO THE PROCEEDING

Petitioners Larry Steven Wilkins and Jane B. Stanton were the plaintiffs-appellants below.

Respondent United States of America was the defendant-appellee below.

STATEMENT OF RELATED PROCEEDINGS

Wilkins v. United States, No. 20-35745 (9th Cir.) (opinions issued September 15, 2021; rehearing en banc denied November 23, 2021).

Wilkins v. United States, No. CV 18-147-M-DLC-KLD (D. Mont.) (judgment entered May 26, 2020, motion to alter or amend judgment denied August 11, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Larry Steven (Wil) Wilkins and Jane B. Stanton (landowners) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals, holding that the Quiet Title Act's statute of limitations is jurisdictional, is published at 13 F.4th 791 (9th Cir. 2021) and included in Petitioners' Appendix (App.) A. The panel's unpublished memorandum opinion affirming the judgment of the District Court is included at App. B. The District Court's decision denying the landowners' motion to alter or amend the judgment is included at App. C. The District Court's order granting the motion to dismiss is included at App. D. The Magistrate Judge's findings and recommendations on the motion to dismiss are included at App. E. The Ninth Circuit's order denying the petition for rehearing en banc is included at App. F.

JURISDICTION

The District Court granted the defendants' motion to dismiss on May 26, 2020. The landowners filed a timely appeal to the Ninth Circuit. On September 15, 2021, a panel of the Ninth Circuit affirmed the dismissal of the District Court. The landowners then filed a timely petition for rehearing en banc, which was denied on November 23, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346 provides, in relevant Part:

***

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

***

28 U.S.C. § 2409a provides, in relevant Part:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

***

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his

predecessor in interest knew or should have known of the claim of the United States.

***

INTRODUCTION

The Courts of Appeals are divided on the question of whether the Quiet Title Act's statute of limitations is jurisdictional. *See, e.g.*, *Wisconsin Valley Improvement Co. v. United States*, 569 F.3d 331, 334 (7th Cir. 2009) (holding that the Quiet Title Act's statute of limitations is not jurisdictional); *Rio Grande Silvery Minnow (Hybognathus amarus) v. Bureau of Reclamation*, 599 F.3d 1165, 1175 (10th Cir. 2010) (citing circuits holding that Quiet Title Act's statute of limitations is jurisdictional).

The circuit split began before this Court's recent attempt to bring discipline to what legal rules should be properly characterized as jurisdictional. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) ("[W]e have tried in recent cases to bring some discipline to the use of the term jurisdiction." (quotations omitted)). As a result, most courts that treat the Quiet Title Act's statute of limitations as jurisdictional established their rules without the benefit of this Court's decisions explaining how to determine whether a statute of limitations is jurisdictional.

Until recently, this Court has used the term "jurisdiction" inconsistently in dicta, resulting in confusion among lower courts. *See Sebelius*, 568 U.S. at 153; *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (jurisdiction "is a word of many, too many, meanings" (internal quotation marks omitted)). It has admittedly

"sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). Over the past decade, it has worked to correct that mistake and prevent the "untoward consequences" of mislabeling a rule jurisdictional. *Sebelius*, 568 U.S. at 153.

"Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). "Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them *sua sponte*." *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1849, (2019) (quotations omitted). A jurisdictional rule shifts the burden of proof and allows a court to "proceed as it never could under Rule 12(b)(6) or Fed.R.Civ.P. 56." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (citation omitted). Because of this unique status, this Court has repeatedly granted certiorari in cases to resolve circuit splits concerning the nature of various legal rules, which has helped to ensure that lower courts do not mislabel claim-processing rules as jurisdictional.[1]

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[1] *See Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 55 (2021) (granting certiorari to decide whether the 30-day rule for filing a petition for review of a notice of determination from the IRS is jurisdictional); *Fort Bend Cty.*, 139 S. Ct. at 1846 (Title VII's charge-filing requirement is not jurisdictional); *Hamer v.*

Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 16–17, 22 (2017) (time limit for an extension of time to file a notice of appeal is not jurisdictional); *United States v. Wong*, 575 U.S. 402, 409–10 (2015) (Federal Tort Claims Act's statute of limitations is not jurisdictional); *Sebelius*, 568 U.S. at 148–49 (provision of Medicare statute setting 180-day limit for filing appeals to Provider Reimbursement Review Board is not jurisdictional); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (provision of Antiterrorism and Effective Death Penalty Act of 1996, requiring the certificate of appealability to indicate which specific issue or issues satisfy the Act's requirement that a petitioner make a substantial showing of the denial of a constitutional right, is not jurisdictional); *Stern v. Marshall*, 564 U.S. 462, 479 (2011) (bankruptcy statute's requirement that "personal injury tort" claims be tried in district court, rather than bankruptcy court, is not jurisdictional); *Henderson*, 562 U.S. at 438–41 (deadline on filing appeals to Veterans Court is not jurisdictional); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (statute of limitations on petitions for federal habeas relief by state prisoners is not jurisdictional); *Dolan v. United States*, 560 U.S. 605, 610–11 (2010) (statutory deadline for ordering restitution is not jurisdictional); *Reed Elsevier*, 559 U.S. at 157 (requirement that copyright be registered before filing suit is not jurisdictional); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 71–72 (2009) (procedural rule requiring proof of conferencing prior to arbitration of minor disputes before the National Railroad Adjustment Board is not jurisdictional); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504–05, 516 (2006) (Title VII's employee-numerosity requirement for establishing "employer" status under the Act is not jurisdictional); *Eberhart v. United States*, 546 U.S. 12, 15–16 (2005) (per curiam) (rules setting forth time limits for a defendant's motion for a new trial are not jurisdictional); *Scarborough v. Principi*, 541 U.S. 401, 411–12 (2004) (Equal Access to Justice Act's 30-day deadline for attorney fee applications and its application-content specifications are not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 452–54 (2004) (time constraints for objecting to bankruptcy discharge is not jurisdictional).

This Court's review is again needed to resolve a circuit split about the nature of a claim-processing rule. Below, the panel entrenched the circuit split over the Quiet Title Act's statute of limitations by not applying this Court's recent precedents, instead relying on past Ninth Circuit precedent to hold that the Quiet Title Act's statute of limitations is jurisdictional. App. A-7 (citing *Skranak v. Castenada*, 425 F.3d 1213 (9th Cir. 2005); *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189 (9th Cir. 2008); *Fidelity Expl. & Prod. Co. v. United States*, 506 F.3d 1182 (9th Cir. 2007)). As a result, property owners in quiet title cases, like the landowners here, are procedurally hamstrung and unable to make their case. A jurisdictional time bar subjects litigants to different standards for resolving motions to dismiss and, as happened below, allows courts to dismiss cases without holding a hearing to determine and resolve disputed facts.

The petition should be granted to bring uniformity among the lower courts and to ensure the Quiet Title Act's statute of limitations is not mislabeled as a jurisdictional rule.

STATEMENT OF THE CASE

A. Factual Background

Larry Steven "Wil" Wilkins is a veteran diagnosed with post-traumatic stress disorder. 2 Appellants' Excerpts of Record (ER) at 110 ¶ 3, Ninth Circuit case no. 20-35745, docket no. 12 (filed Dec. 23, 2020). In 2004, he purchased property in rural Montana and moved to Robbins Gulch Road in Ravalli County. *Id.* ¶ 4. Across the road lives Jane Stanton, who purchased property and moved to Robbins Gulch Road

in 1990 with her husband. 3 ER at 394 (Depo. Stanton, 17:1). Since 2013, when Mrs. Stanton's husband passed away, she has been the sole owner of her property. 2 ER at 261.

Both Mr. Wilkins's and Mrs. Stanton's properties are burdened by an easement owned by the federal government and managed by the United States Forest Service (Forest Service). 2 ER at 262; 2 ER at 286–87; 2 ER at 282; 2 ER at 227. The landowners' predecessors granted the easement in 1962 in two separate deeds that contain substantially the same language. 2 ER at 227; 2 ER at 234. The easement conveys to the United States "and its assigns" a 60-foot easement "for a road as now constructed and in place and to be re-constructed, improved, used, operated, patrolled, and maintained and known as the Robbins Gulch road, Project Number 446." 2 ER at 227.[2] According to a contemporaneous statement by the then-Forest Supervisor to the grantors, the "[p]urpose of the road" was for "timber harvest." 2 ER at 244.

Until recently, the Forest Service's management of the easement has ensured that use of the easement did not unreasonably burden Mr. Wilkins's and Mrs. Stanton's property. But in September 2006, the Forest Service commissioned a sign to be installed along Robbins Gulch Road that read "public access

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[2] The easement differs in significant ways from the form easements in the Forest Service Handbook used by the agency at the time. Namely, the form easements purport to grant the United State an easement for "highway purposes," 2 ER at 149, whereas the 1962 deeds state that the easements are "for a road as now constructed and in place." 2 ER at 227. Also, unlike the form easements, the 1962 deeds state that the easement road will be "patrolled." *Id*.

thru private lands." 3 ER at 516; 3 ER at 518. Since that sign was installed, traffic along the easement has increased. 3 ER at 333 (Depo. Wilkins, 28:17). The expanded use of the easement has interfered with Mr. Wilkins's and Mrs. Stanton's use and enjoyment of their property. 3 ER at 359 (Depo. Wilkins, 132:22–133:24); 3 ER at 410 (Depo. Stanton, 79:5–80:22).

Due to this expanded use, Mr. Wilkins, Mrs. Stanton, and their neighbors have had to deal with trespassers on their private property, theft of their personal property, people shooting at their houses, people hunting both on and off the easement, and people travelling at dangerous speeds on and around Robbins Gulch Road. 3 ER at 359 (Depo. Wilkins, 132:22–133:24); 3 ER at 410 (Depo. Stanton, 79:5–80:22); 2 ER at 114–15 ¶¶ 5–13. In September 2019, someone travelling along the road shot Mr. Wilkins's cat. 2 ER at 111 ¶¶ 12–13. The recent, excessive use of the road and adjacent property by the public and Forest Service permittees has even caused some neighbors to move. 2 ER at 116 ¶ 27.

Additionally, the increased use of the easement has caused erosion of the road that affects the adjacent property. 3 ER at 542 ¶ 15. The road condition has caused sediment and silt to build up on the underlying properties, and has caused washout on those properties. 3 ER at 352 (Depo. Wilkins, 103:3–6). The Forest Service's maintenance of the easement, however, has become more sporadic in recent years. 3 ER at 351 (Depo. Wilkins, 100:25–101:8).

In 2017, the landowners and their neighbors requested that the Forest Service help address these problems. 2 ER at 116 ¶ 26; 3 ER at 433 (Depo. Winthers, 14:14–15:17). The Forest Service declined.

2 ER at 116 ¶ 26. Not only did the agency disagree that the easement is limited in scope, it also disclaimed any obligations under the easement. 2 ER at 64; 3 ER at 544 (Answer denying that landowners are entitled to requested relief). It informed the property owners that it would manage the easement however it wished, and that it owed no duties to the underlying owners. 2 ER at 116 ¶ 26. A few months later, Mr. Wilkins's attorney followed up with a letter to the United States Department of Agriculture Office of the General Counsel. *See* 2 ER at 64. In July 2018, the Office of the General Counsel reiterated the Forest Service's position that it could allow whomever it wanted on the easement and that all management decisions were at the Forest Service's sole discretion. *Id.*

B. Procedural Background

Unable to get help from the Forest Service, Mr. Wilkins and Mrs. Stanton filed this suit in August 2018. *See* 3 ER at 548. Brought under the Quiet Title Act, the Complaint asked the District Court to interpret the easement under Montana law to determine the lawful use of the easement and the government's duties under it. *See* 3 ER at 562.[3]

In October 2019, the government moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), arguing that the landowners did not bring the case within the Quiet

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[3] Montana law governs the easement at issue here. *See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378–79 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.").

Title Act's twelve-year statute of limitations. *See* App. E-1. The government could "not pin down precisely when Plaintiffs' claims expired" but argued that the claims accrued more than twelve years before the lawsuit was filed. App. D-20. The landowners responded that the Quiet Title Act's statute of limitations is not jurisdictional, and that the case could not be resolved on a motion to dismiss. *See* App. E-2. The landowners further argued that based on the Forest Service's actions in managing the easement, including statements by Forest Service officers to the landowners and their neighbors, that the claims only accrued when the Forest Service put up a sign that read "public access thru private lands." *See* Opening Brief Section IV-E, Ninth Circuit case no. 20-35745, docket no. 11 (filed Dec. 23, 2020); App. E-16–17 (Magistrate Judge stating that "Landowners filed this lawsuit because of the alleged changes in the scope of the USFS's operation and management of the easement."). The Forest Service commissioned the sign in September 2006, eleven years and eleven months before the lawsuit was filed. 3 ER at 516; 3 ER at 518.

Magistrate Judge DeSoto recommended that the motion to dismiss be denied. App. E-18. Judge DeSoto concluded that the Quiet Title Act's statute of limitations is not jurisdictional. App. E-14. Hence, the government's motion to dismiss for lack of jurisdiction was improper, and its statute of limitations arguments should be decided on a motion for summary judgment or trial. App. E-17.

The government objected to the findings and recommendations, and reiterated the arguments made in its motion to dismiss. App. D-5. The District

Court held that the Quiet Title Act's statute of limitations is jurisdictional, App. D-15, and placed the burden on the landowners to prove that they had brought the complaint within the statute of limitations. App. D-23. The District Court, without holding an evidentiary hearing to determine and resolve disputed facts, concluded that the landowners failed to meet their burden and dismissed the case. *Id.*

Mr. Wilkins and Mrs. Stanton filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). On August 11, 2020, the court denied the motion, App. C-7. Mr. Wilkins and Mrs. Stanton appealed on August 26, 2020. 3 ER at 564.

On September 15, 2021, the Ninth Circuit panel affirmed the judgment of the District Court. App. A-12; App. B-6. In a published opinion, the panel held that the Quiet Title Act's statute of limitations is jurisdictional. App. A-10. In a separate unpublished opinion, the panel, reviewing the District Court's order for clear error, affirmed the dismissal. App. B-5. Mr. Wilkins and Mrs. Stanton filed a petition for rehearing en banc, which the Ninth Circuit denied on November 23, 2021. App. F-1.

REASONS TO GRANT THE PETITION

I. Certiorari Should Be Granted To Resolve a Circuit Split About Whether the Quiet Title Act's Statute of Limitations Is Jurisdictional

The circuit courts are split on whether the Quiet Title Act's statute of limitations is jurisdictional. The Seventh Circuit has held that the Quiet Title Act's statute of limitations is not jurisdictional. *Wisconsin*

Valley, 569 F.3d at 334. Seven others have held that the statute of limitations is jurisdictional. *See Kingman Reef*, 541 F.3d 1189; *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 769 (4th Cir. 1991); *Bank One Tex., N.A. v. United States*, 157 F.3d 397, 403 (5th Cir. 1998); *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 737–38 (8th Cir. 2001); *Knapp v. United States*, 636 F.2d 279, 282 (10th Cir. 1980); *F.E.B. Corp. v. United States*, 818 F.3d 681, 685 n.3 (11th Cir. 2016); *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 558 F.3d 592, 595 (D.C. Cir. 2009).

A. The circuit split began before this Court's recent cases describing how to determine whether a statute of limitations is jurisdictional

Nearly all the circuits that have held that the Quiet Title Act's statute of limitations is jurisdictional did so before this Court's recent cases articulating the standards for determining whether a rule is jurisdictional. Most of the circuits holding that the Quiet Title Act's statute of limitations is jurisdictional are based on one passing reference to jurisdiction in *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983).[4] But as this Court has recently made clear, lower courts should not read too much into this Court's passing use of "jurisdiction." *Cf.*

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[4] *See Skranak*, 425 F.3d at 1216 (citing *Block*, 461 U.S. at 292); *Bank One Tex.*, 157 F.3d at 403 (same); *F.E.B. Corp.*, 818 F.3d at 685 n.3 (same); *see also Spirit Lake Tribe*, 262 F.3d at 737–38 (citing *Block*, 461 U.S. at 286); *Warren v. United States*, 234 F.3d 1331, 1335 (D.C. Cir. 2000) (same); *Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 769 (citing *Block*, 461 U.S. at 282–83).

Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 21 (2017) ("The mandatory and jurisdictional formulation is a characterization left over from days when we were less than meticulous in our use of the term jurisdictional." (quotations omitted)).

In *Block*, this Court considered (1) whether the Quiet Title Act provides the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property, and (2) whether the Quiet Title Act's statute of limitations is applicable where the plaintiff is a state. 461 U.S. at 276–77. *Block* did not, however, consider whether the Quiet Title Act's statute of limitations is jurisdictional. *Block* made one passing reference in the conclusion of its opinion that the courts below would lack jurisdiction if the suit were barred by the statute of limitations. *Id.* at 292. But this Court has "described such unrefined dispositions as drive-by jurisdictional rulings that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511 (quotations omitted).

Unlike other circuits, the Seventh Circuit refused to read too much into *Block*'s drive-by reference. *Wisconsin Valley*, 569 F.3d at 334. In *Wisconsin Valley*, Judge Easterbrook, writing for the court, recognized that *Block* was "yet another example of the tendency … to employ the word [jurisdiction] loosely," and was not meant to opine on the jurisdictional nature of the Quiet Title Act's statute of limitations. *Id*. Because "not every reference to 'jurisdiction' in the Supreme Court's large corpus of decisions means 'subject-matter jurisdiction' in the contemporary

sense," the Seventh Circuit held that the Quiet Title Act's statute of limitations was not jurisdictional. *Id.*

The decision in *Wisconsin Valley* was prescient. In the past decade, this Court has worked to clearly define when statutes of limitations and other legal rules are jurisdictional. *See*, n.1, *supra*. This Court has held that, absent a clear statement from Congress to the contrary, a statute of limitations is not jurisdictional. *United States v. Wong*, 575 U.S. 402, 409–10 (2015). Because most of the circuits analyzed the Quiet Title Act's statute of limitations decades ago, they were unable to apply the clear statement test to their holdings.

B. This Court's recent cases undermine the reasoning of those circuits that have held the Quiet Title Act's statute of limitations is jurisdictional

This Court's recent decisions demonstrate the flawed reasoning of those circuits that have held the Quiet Title Act's statute of limitations is jurisdictional. In addition to *Block*'s passing reference to jurisdiction, those circuits justified their conclusions based on the Quiet Title Act's waiver of sovereign immunity. *Spirit Lake Tribe*, 262 F.3d at 737–38 ("Because the QTA waives the government's sovereign immunity … the QTA statute of limitations acts as a jurisdictional bar …." (citing *Block*, 461 U.S. at 280)); *Knapp*, 636 F.2d at 282 ("As a condition to suit against the sovereign, the 12-year rule must be strictly construed in favor of the sovereign."); *Bank One Tex.*, 157 F.3d at 403 ("[B]ecause it circumscribes the scope of a waiver of sovereign immunity, the statute of limitations manifests a jurisdictional prerequisite, rather than an affirmative defense.");

Richmond, Fredericksburg & Potomac R.R. Co., 945 F.2d at 769 ("Because the limitations period represents a condition on the waiver of federal sovereign immunity, it is a jurisdictional prerequisite to suit[.]" (citing *Block*, 461 U.S. at 282–83)).

But, as this Court has made clear in its recent decisions "it makes no difference" to the jurisdictional question "that a time bar conditions a waiver of sovereign immunity, even if Congress enacted the measure when different interpretive conventions applied …." *Wong*, 575 U.S. at 420. The waiver of sovereign immunity is irrelevant because this Court "treat[s] time bars in suits against the Government …. the same as in litigation between private parties." *Id.* But nearly all the opinions holding that the Quiet Title Act's statute of limitations is jurisdictional rely on the waiver of sovereign immunity to justify their holdings. Because those courts did not have the benefit of this Court's recent decisions, they issued holdings based on faulty premises.

C. Only this Court can resolve the circuit split

The decision below ensures that the circuit split will persist. Despite recognizing "tension between *Wong*'s reasoning and the analysis underlying Ninth Circuit precedent interpreting the jurisdictional nature of the [Quiet Title Act's] statute of limitations," the court below chose not to overturn its previous precedents. App. A-9. Now, the Ninth Circuit's holding that the Quiet Title Act's statute of limitations is jurisdictional can only be overruled on discretionary, en banc review. *See* App. A-7–9. Without this Court's intervention, the Ninth Circuit

will remain in conflict with the Seventh Circuit indefinitely.

Furthermore, if this Court does not grant certiorari, it is likely that the circuit split will deepen. Unlike the Ninth Circuit, some courts will reconsider their previous holdings on whether the Quiet Title Act's statute of limitations is jurisdictional. Indeed, prior to the decision below, two district courts in the Ninth Circuit held that, in light of *Wong*, the Quiet Title Act's statute of limitations is not jurisdictional. *Payne v. U.S. Bureau of Reclamation*, No. CV 17-00490-AB (MRWx), 2017 WL 6819927 (C.D. Cal. Aug. 15, 2017); *Bar K Ranch, LLC v. United States*, No. CV-19-6-BU-BMM, 2019 WL 5328782 (D. Mont. Oct. 21, 2019).

Some circuits will follow suit and hold that the Quiet Title Act's statute of limitations is not jurisdictional. Many of these circuits have already applied this Court's recent cases to other statutes of limitations and claim-processing rules, in some cases reversing decisions that previously held a rule is jurisdictional.[5] These circuits have not had the

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[5] *See In re Bonvillian Marine Serv., Inc.,* 19 F.4th 787, 790 (5th Cir. 2021) (overturning, in light of *Wong*, previous standard for determining whether a rule is jurisdictional); *Gad v. Kansas State Univ.*, 787 F.3d 1032, 1039–40 (10th Cir. 2015) (holding that Title VII's requirement that a claimant verify the charges against an employer is not jurisdictional and stating "To the extent our previous cases would require a contrary result," *Wong* and other superseding contrary decisions from this Court control); *Sisseton-Wahpeton Oyate of Lake Traverse Rsrv. v. U.S. Corps of Eng'rs*, 888 F.3d 906, 917 n.4 (8th Cir. 2018) (recognizing *Wong*'s effect on analysis of whether a statute of limitations is jurisdictional, but stating that "because we decide the issue on

opportunity to revisit their Quiet Title Act cases, but if they continue their trend and apply this Court's recent cases to hold that the Quiet Title Act's statute of limitations is not jurisdictional, then they will issue decisions in conflict with the decision below.

Some circuits may reaffirm their previous holdings that the Quiet Title Act's statute of limitations is jurisdictional, but that will not bring uniformity to the issue. The Eleventh Circuit, for example, recently relied on the passing reference in *Block* to hold that, despite *Wong*, the Quiet Title Act's statute of limitations is jurisdictional. *F.E.B. Corp.*, 818 F.3d at 685 n.3. But that decision only reinforced the existing circuit split with the Seventh Circuit.

Only this Court can resolve the split over whether the Quiet Title Act's statute of limitations is jurisdictional. The petition for a writ of certiorari should be granted.

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other grounds, this case is not an appropriate vehicle to reconsider our prior decision that § 2401(a) is a jurisdictional statute of limitations."); *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 546–47 (4th Cir. 2019) (Applying this Court's recent cases to hold, in conflict with the D.C. circuit, that the Real Estate Settlement Procedures Act's statute of limitations is not jurisdictional); *Myers v. Comm'r of Internal Revenue Serv.*, 928 F.3d 1025, 1035 (D.C. Cir. 2019) (holding that Internal Revenue Code provision requiring aggrieved claimant to file petition for Tax Court review within 30 days is not jurisdictional and stating that "the Court has not yet identified a single filing deadline that meets the 'clear statement' test").

II. Certiorari Should Be Granted Because the Decision Below Conflicts with This Court's Precedents About How Courts Determine Whether an Act's Statute of Limitations Is Jurisdictional

This Court's decade-long quest to bring discipline to the use of the term jurisdiction has resulted in clear standards for how a court should determine the jurisdictional nature of a statute of limitations. *See Wong*, 575 U.S. at 410–20. But the court below did not apply these standards, instead opting to rely on out-of-date Ninth Circuit cases. *See* App. A-7 (citing *Skranak*, 425 F.3d 1213; *Kingman Reef*, 541 F.3d 1189; *Fidelity Expl. & Prod. Co.*, 506 F.3d 1182). In doing so, the court below issued a decision in conflict with this Court's recent precedents.

A. This Court's recent precedents hold that Congress must clearly state when a statute of limitations is jurisdictional

This Court's recent precedents make clear "that most time bars are nonjurisdictional." *Wong*, 575 U.S. at 410. "Time and again," this Court has "described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." *Id.* (quoting *Henderson*, 562 U.S. at 435).

This Court has articulated a "readily administrable bright line" rule to determine whether a filing rule is jurisdictional. *Arbaugh*, 546 U.S. at 516. Absent a "clear statement" from Congress, courts should treat filing deadlines "as nonjurisdictional in character." *Sebelius*, 568 U.S. at 153 (quotations omitted). Congress need not "'incant magic words'" to

make a rule jurisdictional, but "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Wong*, 575 U.S. at 410 (quoting *Sebelius*, 568 U.S. at 153). It is a steep burden to demonstrate that a rule is jurisdictional. Indeed, this Court "has not yet identified a single filing deadline that meets the 'clear statement' test." *Myers v. Comm'r of Internal Revenue Serv.*, 928 F.3d 1025, 1035 (D.C. Cir. 2019); *see also* Petition for a Writ of Certiorari 17, *Boechler, P.C. v. Comm'r of Internal Revenue* (No. 20-1472), cert. granted Sept. 30, 2021.

In recent years, lower courts have followed this Court's lead, applying the clear statement test to determine that other statutes of limitations are not jurisdictional. *See* Section I-C, *supra*; *see also Herr v. U.S. Forest Service*, 803 F.3d 809, 818 (6th Cir. 2015) (suggesting that other courts' holdings about the jurisdictional nature of the general statute of limitations for civil actions against the federal government are outdated because they "have not grappled with the Supreme Court's recent cases limiting the concept of jurisdiction" or "considered the impact" of *Wong*). The court below, however, failed to apply the clear statement test in holding that the Quiet Title Act's statute of limitations is jurisdictional.

B. The Quiet Title Act does not provide a clear statement that the statute of limitations is jurisdictional

In enacting the Quiet Title Act, Congress did not clearly state its intention to make the statute of limitations jurisdictional. The Quiet Title Act provides that "[a]ny civil action under this section,

except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g). "Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.*

The Quiet Title Act thus uses "mundane statute-of-limitations language, saying only what every time bar, by definition, must: that after a certain time a claim is barred." *Wong*, 575 U.S. at 410. Indeed, the Quiet Title Act's statute of limitations uses practically the same language as the Federal Tort Claims Act's time bar that *Wong* held is not jurisdictional. *Id.* The only difference is the Federal Tort Claims Act's statute of limitations is more forceful, stating that an untimely action "shall be *forever* barred …." 28 U.S.C. § 2401(b) (emphasis added). If the Federal Tort Claims Act's statute of limitations is not jurisdictional, then the similarly worded, yet less definitive, Quiet Title Act statute of limitations cannot be either.

Furthermore, Congress separated the Quiet Title Act's statute of limitations from its grant of jurisdiction. 28 U.S.C. §§ 1346(f), 2409a(g). The Quiet Title Act grants federal district courts "exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." Pub. L. No. 92-562, 86 Stat. 1176, 1176 (Oct. 25, 1972), *codified at* 28 U.S.C. § 1346(f). This grant of jurisdiction is not only in a different section of the Act from the statute of limitations, but also codified in a separate section of the U.S. Code. *Id.*

"This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Wong*, 575 U.S. at 411 (citing *Henderson*, 562 U.S. at 439–40; *Reed Elsevier*, 559 U.S. at 164–65; *Arbaugh*, 546 U.S. at 515; *Zipes v. Trans World Airlines*, 455 U.S. 385, 393–94 (1982)); *see also Davis,* 139 S. Ct. at 1850 (Title VII's grant of jurisdiction is in a separate provision as the nonjurisdictional charge-filing requirement). This separation further demonstrates that the Quiet Title Act's statute of limitations "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Wong*, 575 U.S. at 411 (quotations omitted). As a result, the Quiet Title Act lacks a clear statement that its statute of limitations is jurisdictional.

C. Instead of applying this Court's recent precedents, the court below applied outdated circuit precedent

The court below did not apply the clear statement test, however, and instead relied on previous Ninth Circuit precedents to reach its holding. *See* App. A-7 (citing *Skranak*, 425 F.3d at 1216; *Kingman Reef*, 541 F.3d at 1195). But both *Skranak* and *Kingman Reef* rely on premises directly contradicted by this Court's cases. *See Skranak*, 425 F.3d at 1216; *Kingman Reef*, 541 F.3d at 1195. In *Skranak*, the Ninth Circuit stated that "[t]he Quiet Title Act is a waiver of sovereign immunity" and "[i]f the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction." 425 F.3d at 1216. *Kingman Reef* also followed the mistaken assumption that Congress's waiver of sovereign immunity matters in interpreting the jurisdictional nature of the statute of limitations.

541 F.3d at 1195. As this Court has clearly stated, "it makes no difference" to the jurisdictional question "that a time bar conditions a waiver of sovereign immunity …." *Wong*, 575 U.S. at 420.

Skranak and *Kingman Reef* also conflict with this Court's decisions because the Ninth Circuit cases do not cite, much less analyze, the Quiet Title Act's jurisdictional grant in 28 U.S.C. § 1346(f). *Skranak*, 425 F.3d 1213; *Kingman Reef*, 541 F.3d 1189;[6] *Fidelity Expl. & Prod. Co.*, 506 F.3d 1182. Despite this Court clearly explaining that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional, the court below relied on previous Ninth Circuit cases and again failed to cite or discuss the Quiet Title Act's jurisdictional grant. App. A-7.

The court below believed it did not have to apply the clear statement test because of this Court's decisions in *Block* and *United States v. Beggerly*, 524 U.S. 38 (1998). *See* App. A-9. But neither holds that the Quiet Title Act's statute of limitations is jurisdictional. *Block* was, at most, a "drive-by" jurisdictional ruling that has no precedential effect. *See* Section I-A, *supra*. *Beggerly* also does not hold that the Quiet Title Act's statute of limitations is jurisdictional and, in fact, supports the view that the

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[6] The panel in *Kingman Reef* incorrectly implied that the whole of the Quiet Title Act is codified at 28 U.S.C. § 2409a. *Compare Kingman Reef*, 541 F.3d at 1195, *with* Pub. L. No. 92-562, 86 Stat. at 1176. The only reference to 28 U.S.C. § 1346(f) is when the panel quotes verbatim 28 U.S.C. § 2409a(e) in footnote 5. *Kingman Reef*, 541 F.3d at 1200 n.5. But the *Kingman Reef* court did not quote § 1346(f) itself, let alone examine the jurisdictional implications of its separation from the statute of limitations.

Quiet Title Act's statute of limitations is not jurisdictional. 524 U.S. at 49.

In *Beggerly*, this Court considered whether the Quiet Title Act's statute of limitations allows for equitable tolling. *Id.* at 48–49. It concluded that the statute of limitations "effectively allow[s] for equitable tolling" and, as a result, declined to allow further equitable tolling outside the statutory language. *Id.* at 48.

In engaging with the question of how much equitable tolling the Quiet Title Act allows, this Court indicated that the Act's limitations period is not jurisdictional. For, if a time bar is jurisdictional, a court has no authority to hear a case "even if equitable considerations would support extending the prescribed time period." *Wong*, 575 U.S. at 408–09. If the Quiet Title Act's statute of limitations were jurisdictional, that would have answered the question presented in *Beggerly* without further analysis. Instead, this Court had to examine whether and how much equitable tolling is allowed under the Quiet Title Act's statute of limitations because that limitations period is not jurisdictional.[7] While *Beggerly* noted that the District Court dismissed for lack of subject matter jurisdiction, 524 U.S. at 41, this statement, like the one in *Block*, was an unanalyzed statement that was not central to the case.

Justice Stevens's concurrence also supports the conclusion that the Quiet Title Act's statute of

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[7] This Court's holding that the Quiet Title Act's statute of limitations is mandatory does not imply that the rule is jurisdictional because "a rule may be mandatory without being jurisdictional …." *Fort Bend Cty.*, 139 S. Ct. at 1852.

limitations is not jurisdictional. *See Beggerly*, 524 U.S. at 49–50 (Stevens, J., concurring). He noted that the case did not present the question of "whether a doctrine such as fraudulent concealment or equitable estoppel might apply if the Government were guilty of outrageous misconduct that prevented the plaintiff, though fully aware of the Government's claim of title, from knowing of her own claim." *Id.* at 49. In such a case, Justice Stevens opined, the Quiet Title Act might allow for equitable tolling. *Id.* at 50. The Court's opinion also provides support for Justice Stevens's position. *Id.* at 48 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). But, if the Quiet Title Act's statute of limitations were jurisdictional, then it would foreclose a suit even where the government was guilty of outrageous misconduct. *See Wong*, 575 U.S. at 408–09. Thus, contrary to the Ninth Circuit's reading, the opinions in *Beggerly* support the position that the Quiet Title Act's statute of limitations is not jurisdictional.

Wong itself also undermines the Ninth Circuit's argument that *Block* and *Beggerly* hold that the Quiet Title Act's statute of limitations is jurisdictional. In *Wong*, this Court mentioned only one statute, the Tucker Act, it held to be jurisdictional prior to the adoption of the clear statement test. 575 U.S. at 416. The *Wong* Court discussed a recent case that "refused to overturn our century-old view that the Tucker Act's time bar is jurisdictional," and not apply the clear statement test, only because the Tucker Act's statute of limitations had been the subject of "a definitive earlier interpretation." *Id.* (quotations omitted). This Court, however, did not mention any other statutes that are not subject to the clear statement test or any other cases where this Court has made a definitive

earlier interpretation about a jurisdictional rule. This Court's failure to mention any other statute suggests that the Tucker Act is unique in not being subject to the clear statement test.

In conflict with this Court's recent precedents, the court below failed to apply the clear statement test. This Court should grant the petition to ensure that the Quiet Title Act's statute of limitations is not mislabeled as a jurisdictional rule.

III. Certiorari Should Be Granted Because Whether the Quiet Title Act's Statute of Limitations Is Jurisdictional Affects Landowners' Ability To Vindicate Their Property Rights

By holding that the Quiet Title Act's statute of limitations is jurisdictional, the District Court and the court below deprived the landowners of the normal procedural safeguards of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

In the Ninth Circuit, a defendant may make a "facial or factual" attack on jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). If a defendant makes a "factual attack (meaning the facts negating jurisdiction exist outside the complaint) no presumption of truthfulness attaches to plaintiff's allegations, a court may freely consider extrinsic evidence, and it may resolve factual disputes with or without a hearing." App. D-4 (citing *Kingman Reef*, 541 F.3d at 1195; *Roberts v. Corrothers*, 812 F.3d 1173, 1177 (9th Cir. 1987)). Additionally, "[a]lthough the defendant is the moving party, the plaintiff bears the burden of satisfying the court as to its jurisdiction." App. D-4–5 (citing *Safe*

Air, 373 F.3d at 1039). The plaintiff "must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction" regardless of the stage of the litigation. *Safe Air*, 373 F.3d at 1039.[8]

As a result, the District Court's holding on the jurisdictional nature of the Quiet Title Act's statute of limitations affected how the case was decided. The landowners were procedurally hamstrung and unable to make their case, despite demonstrating multiple disputed material facts. *See* App. E-17 (magistrate judge stated that "Under the facts alleged, it is therefore unclear whether, over twelve years ago, a reasonable landowner would have known the scope of the easement claimed by the United States."). The landowners presented testimony disputing the government's account of the Forest Service's 2006 order, *see* 2 ER at 110 ¶¶ 5–6; 3 ER at 352 (Depo. Wilkins, 104:8–9); 3 ER at 412 (Depo. Stanton, 86:2–4); they presented witnesses that contradicted the testimony in the government's declarations, *see* 2 ER at 114–16; and they presented evidence of statements from Forest Service officials about the scope of the easement that caused the landowners to delay filing the lawsuit. 2 ER at 88 (Depo. Oliver, 38:23–25). The District Court, however, did not hold a hearing to determine and resolve disputed facts. *See* App. D-4–5.

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[8] The Ninth Circuit continues to employ the "factual attack" standard despite this Court's statement in *Lujan v. Defenders of Wildlife* that "each element" of a jurisdictional claim "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. 555, 561 (1992).

In short, because the District Court determined that the Quiet Title Act's statute of limitations is jurisdictional, it was able to circumvent the usual litigation processes. *See Thornhill Publ'g Co.*, 594 F.2d at 733.[9]

The decision below places these harsh consequences on property owners in Quiet Title Act cases. The effects are especially consequential in the Ninth Circuit, where the federal government owns over half the land in the states within the court's jurisdiction. *See* Carol Hardy Vincent & Laura A. Hanson, Congressional Research Service, *Federal Land Ownership: Overview and Data* 7–8 (Feb. 2020).[10] Quiet title cases are more likely to arise in the western United States, and now plaintiffs in these cases will be hampered by the decision below.

This Court has emphasized the "harsh consequences" that result from labeling a rule

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[9] The same problems arise in other circuits. Other court apply the facial-factual distinction for motions to dismiss for lack of subject matter jurisdiction. *See GBForefront, L.P. v. Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 35 (3d Cir. 2018); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980); *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015); *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015); *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997). In some instances, plaintiffs in Quiet Title Act cases have to supply sufficient evidence to defeat a jurisdictional motion to dismiss without conducting any discovery. *See Cheyenne Arapaho Tribes of Oklahoma*, 558 F.3d at 595 (affirming motion to dismiss quiet title case for lack of jurisdiction and concluding that "the district court did not abuse its discretion in denying jurisdictional discovery …").

[10] *Available at* https://crsreports.congress.gov/product/pdf/R/R42346.

jurisdictional. *Wong*, 575 U.S. at 409. Jurisdictional rules are "unique in our adversarial system" and can be used to "disturbingly disarm litigants." *Sebelius*, 568 U.S. at 153. "The Court has therefore stressed the distinction between jurisdictional prescriptions and nonjurisdictional claim-processing rules[.]" *Fort Bend Cty.*, 139 S. Ct. at 1849.

Based on a "drive-by" jurisdictional reference in this Court's cases, and in conflict with this Court's most recent cases, the court below entrenched a circuit split about the jurisdictional nature of the Quiet Title Act's statute of limitations. This Court should grant the petition to ensure that courts do not continue to mischaracterize the Quiet Title Act's statute of limitations as jurisdictional.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: February 2022.

Respectfully submitted,

JAMES M. MANLEY
Pacific Legal Foundation
3217 East Shea Blvd.
No. 108
Phoenix, AZ 85028
jmanley@pacificlegal.org

ETHAN BLEVINS
Pacific Legal Foundation
839 W. 3600 S.
Bountiful, UT 84010
eblevins@pacificlegal.org

JEFFREY W. MCCOY*
**Counsel of Record*
DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
jmccoy@pacificlegal.org
dschiff@pacificlegal.org

Counsel for Petitioners

No. _____

In the
Supreme Court of the United States

LARRY STEVEN WILKINS; JANE B. STANTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 7,515 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 2022.

JEFFREY W. McCOY
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Email: jmccoy@pacificlegal.org
Counsel for Petitioners

Kiren Mathews

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Sent:	Friday, February 18, 2022 8:43 AM
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Subject:	FW: Wilkins v. United States - Cert Petition
Attachments:	Cockle Affidavit of Service Feb 18 2022.pdf; Wilkins Cert of Compliance Feb 2022.pdf; FINAL Wilkins Cert Petition Feb 17 2022.pdf; Wilkins Appendix to Cert Petition.pdf

Attachments and email below.
1-1576

Tawnda Dyer | Senior Litigation Secretary
Pacific Legal Foundation
555 Capitol Mall, Suite 1290 | Sacramento, CA 95814
916.500.2862

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From: Tawnda Dyer <TDyer@pacificlegal.org>
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To: 'SupremeCtBriefs@usdoj.gov' <SupremeCtBriefs@usdoj.gov>; mark.smith3@usdoj.gov; kevin.mcardle@usdoj.gov; john.newman@usdoj.gov
Cc: Jeffrey W. McCoy <JMcCoy@pacificlegal.org>
Subject: Wilkins v. United States - Cert Petition

This morning, Petitioners e-filed the attached Petition for Writ of Certiorari and Appendix. You will receive hard copies via U.S. Mail.

Tawnda Dyer | Senior Litigation Secretary
Pacific Legal Foundation
555 Capitol Mall, Suite 1290 | Sacramento, CA 95814
916.500.2862

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