Scott E. Borg
Barber & Borg, LLC
Pro Hac Vice
P.O. Box 30745-0745
Albuquerque, NM 87190
(505) 884-0004
(505) 884-0077 (fax)
scott@barberborg.com
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Felix H. Kinlichee, et al.,	)	CV 11-8038-PHX-JAT
	)	
Plaintiffs,	)	PLAINTIFFS' RESPONSE TO MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM
	)	
vs.	)	
	)	
United States of America,	)	
	)	
Defendant.	)	
	)	

Plaintiffs, through undersigned counsel, hereby respond to the United States' Motion to Dismiss and Memorandum of Points and Authorities (Doc. 47, "Motion").

I. Summary of Argument

The first part of the Motion seeks dismissal of the entire wrongful death case brought pursuant to the Federal Tort Claims Act ("FTCA") on behalf of the six surviving children of Filbert H. Kinlichee, because their counsel did not provide the U.S. Department of Health and Social Services with evidence (in addition to his signature as their attorney on each Form 95) of his authority to act on their behalf.[1] This part of the Motion should be denied because, under

[1] The motion on this ground is surprising, because defendant in its Answer, Doc. 6 at 2, ¶ 5, admitted paragraph 5 of the complaint, including the averment that plaintiffs had "exhausted their administrative remedies as required by the FTCA." Paragraph 5 of the complaint, Doc. 1 at 2, reads:

> 5. Plaintiffs filed with the Department of Health and Human Services timely administrative claims under the FTCA for damages. Those claims have not been acted upon and more than six

Warren v. U.S. Dept. of Interior Bur. of Land Management, 724 F.2d 776 (9th Cir. 1984) (*en banc*) ("*Warren*"), the long-settled law and controlling precedent in this circuit, plaintiffs fully complied with every element for presentment of a claim that is **statutorily** required for this court's jurisdiction, which elements do not include provision of evidence of authority under 28 C.F.R. §14.2(a). *Warren*'s holding and approach are in accord with the recent line of U.S. Supreme Court cases setting forth the principles for distinguishing between jurisdictional limitations on the power of the federal courts to hear cases and mere "claim-processing" rules.

The second part of the Motion seeks, in the alternative, dismissal of plaintiff Priscilla Davis's claims for her losses that have resulted from the wrongful death of her non-biological father due to the negligence of staff at the federal Chinle Comprehensive Health Care Facility on the ground that Arizona law prevents her from making a claim, because Filbert H. Kinlichee did not formally adopt her. Defendant's contention fails, because the decedent adopted her in accordance with the Navajo Common Law, as shown by the Order of the Family Court of the Navajo Nation, District of Chinle, which has exclusive jurisdiction over her adoption by him, under *Fisher v. District Court*, 424 U.S. 382 (1976). *See* Ex. 1, attached.

II. Argument

A. The Motion to Dismiss for Lack of Jurisdiction Should Be Denied.

The issue is whether, despite plaintiffs' timely filed Forms 95 that a) notified the U.S. Department of Health and Social Services of the incident, b) requested a sum certain in damages for their father's wrongful death due to medical malpractice, and c) were signed by their attorney as "Attorney," their claims are barred solely because no additional evidence of the attorney's

---

months has elapsed since the date on which the tort claims were filed and the government was given notice of plaintiffs' intentions to pursue claims pursuant to the provisions of the FTCA. Plaintiffs have now exhausted their administrative remedies as required by the FTCA. The claims may now be deemed by plaintiffs to have been denied. Plaintiffs are thus authorized by law to file this action at this time against the United States.

authority to present the claims was provided to the agency. The "evidence of authority" language is found not in the FTCA, but in the Attorney General's regulation, 28 C.F.R. § 14.2(a). Stated differently, the issue is whether Congress clearly delegated to the Attorney General the authority to add, by means of a regulation, a third jurisdictional requirement (evidence of authority) to the notice of incident and damages amount requirements that are explicitly required by the FTCA.

1. The Ninth Circuit's Holding in *Warren* That 28 C.F.R. Sec. 14.2(a)'s Predecessor Regulation Was Not a Jurisdictional Requirement of the FTCA Mandates Denial of the Motion to Dismiss for Lack of Jurisdiction.

In both *Warren* and the case at bar, plaintiffs' attorneys did not provide the relevant federal agency with separate, extrinsic evidence of authority to present the FTCA claim on the claimants' behalf. Administrative instructions, as provided by the regulation (28 U.S.C. §14.3(e) in *Warren* and §14.2(a) here) say such evidence is to be provided. In holding that non-compliance with the regulation's language on evidence of authority did not bar the court's jurisdiction over the FTCA wrongful death claim, *Warren, supra,* 724 F.2d at 778, stated:

> We find the relevant statutes and their legislative histories reveal that Congress did not intend to treat regulations promulgated pursuant to section 2672 as jurisdictional prerequisites under section 2675(a).[fn5 [omitted here but discussed below in Part II(A)(3) of this Response]]. *Accord, Avery,* 680 F.2d [608]…at 611[(9th Cir. 1982)]; *Adams v. United States,* 615 F.2d 284, 289-90, *amended,* 622 F.2d 197 (5th Cir. 1980). Section 2672 states, *inter alia:*
>
> > The head of each Federal agency or his designee, *in accordance with regulations prescribed by the Attorney General,* may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States. . .
>
> (Emphasis supplied.) The regulations in question were promulgated by the Attorney General pursuant to this authority. Nothing in this language suggests that these regulations are to be applied jurisdictionally under section 2675(a). If Congress intended to authorize the promulgation of jurisdictional regulations, it would have created that authority directly. Congress has never delegated such authority under section 2675(a).

The court noted that in 1966, "Difficulties presented by the former claims process prompted Congress to amend it," *id.*, resulting in amended versions of sections 2672 and 2675, which required all FTCA claims to be presented first to the appropriate agency before a claimant could file suit in federal court. *Warren*, at 780, after finding that Congress intended only minimal notice to the agency, held that:

> section 2675(a) requires the claimant or his legal representative to file (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim.

The court thus refused to burden these two statutorily mandated elements of "presentment" of a claim under Sec. 2675 with the Attorney General's regulatory instruction to provide evidence of a representative's authority. Its reasons were 1) that Congress did not grant him authority to adopt regulations with jurisdictional effect and 2) that to interpret the regulation as jurisdictional "would impose on claimants an added burden which would inevitably result in barring meritorious claims. Such a result would frustrate the purposes of both 28 U.S.C. sec. 2672 and sec. 2675(a)." *Warren, supra*, at 778-779.

2. The Attorney General's 1987 Amendments to His Regulations Do Not Undermine *Warren.*

The Motion at 11-12 contends that this court should not follow *Warren*, because the Attorney General altered the regulation in 1987 simply to insert a reference to 28 U.S.C. § 2675, "to make explicit that this regulation was intended to govern claim presentment under that section," and because, "to the extent that...[the *Warren*] court...relied on any arguable ambiguity in the regulation, such reasoning is no longer valid." Of course, *Warren* did not rely on any "arguable ambiguity." While footnote 5[2] in *Warren* does not apply to the current regulation at

[2] Footnote 5 states in full: "Further evidence against construing section 14.3(e) as a jurisdictional requirement exists in the regulations themselves. The regulations do not purport to define a "claim" for purposes of section 2675:

issue, the *Warren* court's analysis of congressional intent to limit the Attorney General's rule-making authority under §2672 to non-jurisdictional matters in no way depends on the regulation's failure to mention §2675. The Court merely footnoted the absence of a reference to § 2675 in the regulation as "**further evidence** against construing section 14.3 as a jurisdictional requirement," (emphasis added), after it had already determined that "the relevant statutes and their legislative histories reveal that Congress did not intend to treat regulations promulgated pursuant to section 2672 as jurisdictional prerequisites under section 2675(a)." *Warren* at 778. No change in the regulation could make the "evidence of authority" portion jurisdictional, given the Attorney General's lack of authority to amend the statute or otherwise impose jurisdictional requirements by regulation.

3. Recent U.S. Supreme Court Cases Support *Warren*

Defendant's Motion is yet another example of the U.S. Attorney's practice of "continu[ing] to ignore the Supreme Court's clear mandate to be precise when using the term 'jurisdiction.'" *Hoover v. Shinseki* (D. Ariz. 4-4-2012) at 2. The Motion fails to mention this jurisprudence, "a series of recent cases [in which] the Supreme Court has addressed courts' misapplication of the label 'jurisdiction' to what are actually merits-based dismissals for failure to state a claim." *Dunlap v. U.S.*, No CV 111-01360-PHXFJM, 2012 WL 510532, at *2 (D. Ariz. 2-16-2012), citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511, 126 S. Ct. 1235, 1242 (2006). *Dunlap*, 2012 WL 510532, at *2-*3, summarized these cases as follows:

> To determine whether a federal statute's prerequisite for relief is truly jurisdictional, Arbaugh applied what it characterized as a "readily administrable bright line" rule:

> *For purposes. . . of 28 U.S.C. § 2401(b) and 2672,* a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, [a written notification of the incident], accompanied by a claim for money changes in a sum certain. . . .
>
> 28 C.F.R. § 14.2(a) (1982) (emphasis supplied)."

> If the **Legislature clearly states** that a **threshold limitation** on a statute's scope **shall count as jurisdictional**, then courts and litigants will be duly instructed and will not be left to wrestle with the issue... [b]ut **when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.**

Id. at 515-16, 126 S. Ct. at 1245 (internal citation omitted[, emphases added]). Based on this principle, Arbaugh concluded that Title VII's fifteen employee requirement was not jurisdictional. Id. In 2010, the Court again highlighted the **distinctions between "jurisdictional prescriptions and claim-processing rules.**" [Emphasis added.] Reed Elsevier, Inc. v. Muchnick, ___ U.S. ___, 130 S. Ct. 1237, 1244 (2010). Reed Elsevier followed Arbaugh's approach by reviewing 1) the statutory text to determine whether it clearly states that the limitation is jurisdictional, 2) the statute's structure to see where the limitation is placed in relation to the jurisdiction-granting portion of the statute, and 3) whether any other factors suggest that the requirement is jurisdictional. Based on these factors, the Court concluded that § 411(a) of the Copyright Act, which requires registration of a copyright claim, was not jurisdictional. Id. at ___, 130 S. Ct. at 1244-48. The Court followed the same approach and concluded that the 120 day deadline for filing a notice of appeal for a veteran claim was not jurisdictional. Henderson ex rel. Henderson v. Shinseki, ___ U.S. ___, ___, 131 S. Ct. 1197, 1206 (2011). Shinseki reiterated the point that **claim-processing rules "should not be described as jurisdictional,**" noting that "[f]iling deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules." Id. at ___, 131 S. Ct. at 1203 [emphasis added]. Most recently, the Court applied the above analysis to conclude that the requirement that a habeas petitioner must obtain a certificate of appealability to appeal a district court's habeas ruling, 28 U.S.C. § 2253(c)(3), is not jurisdictional. Gonzalez v. Thaler, ___ U.S. ___, 132 S. Ct. 641, 648-52 (2012).

Dunlap, supra, at *3-*4, then explained the Ninth Circuit's application of this line of cases:

> The Ninth Circuit has begun applying Arbaugh, Reed Elsevier, and Shinseki's analysis to determine whether a statutory requirement is jurisdictional or merely a claim-processing rule. In 2011, the court sitting *en banc* held that the exhaustion requirement in the Individuals with Disabilities Education Act was a claim-processing rule, overruling its earlier decisions that classified the requirement as jurisdictional. Payne v. Peninsula Sch. Dist., 653 F.3d 863, 870-71 (9th Cir. 2011). And in January 2012, the Ninth Circuit stated that Arbaugh, Reed Elsevier, and Shinseki "compel[] [it] to conclude that participant status is an element of an ERISA claim, not a jurisdictional limitation." Leeson v. Transmerica Disability Income Plan, ___ F.3d ___, 2012 WL 171598, at *9 (9th Cir. 2012). Leeson overruled prior cases holding that ERISA participant status is a "prerequisite to federal court subject matter jurisdiction." Id. Indeed, the three-

> judge panel in Leeson found that Supreme Court precedent was so "clearly irreconcilable" with its prior decisions addressing the jurisdictional effect of ERISA that it applied an exception to the general rule that a panel may not overrule a prior panel opinion. Id. at *8 (citation omitted).

Although the Ninth Circuit, in light of the *Arbaugh* line of cases, has decided it must overrule a few previous decisions holding certain provisions to be jurisdictional limitations, *Warren*'s holding that the regulatory requirement of "evidence of authority" is **not** a jurisdictional limitation fully accords with recent Supreme Court directives to find a threshold limitation in a statute non-jurisdictional unless Congress has clearly stated that the limitation should be treated as jurisdictional. The U.S. Attorney in this case is, therefore, swimming against a strong tide of Supreme Court opinion in seeking to have an administrative regulation given jurisdictional effect when there is no clear statement of congressional intent that it be treated as jurisdictional and the regulation is of the "claims-processing" variety promulgated under 28 U.S.C. §2672, entitled "Administrative Adjustment of Claims."

4. Cases Citing 28 C.F.R. § 14.2(a) as Defining the "Presentment" Requirements of 28 U.S.C. § 2675 Without Focusing on its "Evidence of Authority" Element Do Not Apply to the Issue.

Because 28 C.F.R. §14.2(a) includes two elements of claims "presentment" to a federal agency -- written notification and statement of "sum certain" -- that are manifestly required by the FTCA for subsequent federal court jurisdiction over a claim pursuant to 28 U.S.C. § 2675, cases that simply refer to that regulation as defining "presentment" but do not focus on the validity of its third requirement -- "evidence of authority"-- are not legal authority for the jurisdictional nature of that element. It is irrelevant that *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1251 (9th Cir. 2006), said that the regulation governs the issue of when an administrative claim is presented for FTCA purposes, when the court there was concerned with only that portion

of §14.2(a) dealing with the agency's **receipt** of the written claim, because the agency contended that it had never received one. *Vacek* does not, therefore, differ from *Warren*, as the Motion at 12 seems to suggest by saying to "compare" them. Similarly *Bembenista v. U.S.*, 866 F.2d 493, 499 (D.C. Cir. 1989) does not differ from *GAF Corp. v. U.S.*, 818 F.2d 901 (D.C. Cir. 1987) (at 920: "Along with the Fifth, Sixth and Ninth Circuits, we hold that Congress has not delegated to the agencies the power to determine, by regulation, the jurisdiction of Article III courts under the Act."). Notably, the parts of §14.2(a) that *Bembenista* quoted at 499[3], do not contain the "evidence of authority" requirement. It is therefore misleading to refer to the Ninth and D.C. Circuits' case law as "mixed." Motion at 12. Both circuits follow the majority position that Congress has not delegated authority to the Attorney General to promulgate regulations under the FTCA that create jurisdictional hurdles beyond those created explicitly by that statute. Finally, as in *Vacek* and *Bembenista*, the reference to §14.2(a) in *Douglas v. U.S.*, 658 F.2d 445, 447-48 (6th Cir. 1981), is to only the written notice and "sum certain" part of it, quoted in fn. 2 of the opinion.

5. *Mader v. U.S.*, 654 F.3d 794 (8th Cir. 2011) (*en banc*) Was Wrongly Decided and Is Distinguishable.

In contrast to the cases cited in the Motion at 11-12, *Mader* dealt specifically with the portion of §14.2(a) at issue here: the jurisdictional effect of its "evidence of authority" instruction. In *Mader*, a closely divided court (7-5), found that aspect of the regulation jurisdictional and reversed the previous panel opinion. With only a single vote determining the

[3] *Bembenista* said: "The applicable regulations, found at 28 C.F.R. § 14.2(a) (1988), provide that an FTCA claim shall be deemed "presented" when a federal agency receives an SF-95 "or other written notification of an incident, accompanied by a claim for money damages in sum certain."

outcome and with a vigorous, well-reasoned dissent, *Mader*, on which the Motion, at 13-14 and 17, heavily relies, is a weak and flawed decision.

The dissent in *Mader*, at 809, zeroing in on the source of the "evidence of authority" requirement, finds its genesis, not in the language of the statute, but in the Department of Justice ("DOJ") regulation 28 C.F.R. § 14.2(a), as well as in its predecessor § 14.3(e). It cites decisions from five circuit courts of appeals that have considered the requirement's "pedigree" and agree with that finding. *Id.* After quoting the relevant portions of 28 U.S.C. §1346 (b)(1), §2675, and §2672, used by the majority to show the jurisdictional nature of the "evidence of authority" requirement, the dissenters could find no basis for it in those statutory provisions. What those undisputed statutory provisions do require, however, is "minimal notice" to the agency in writing (with the written requirement found explicitly in 28 U.S.C. §2401(b)),[4] consisting of a sufficient description of the injury to enable the agency to begin its own investigation, and 2) a sum-certain damages claim (referred to explicitly in §2675(b)).[5] After citing eight circuit courts' decisions holding that §2675 mandates only those two elements of "minimal notice," the dissent states: "Not so with the evidence of authority, which is not mentioned anywhere in the statute." *Id.*, at 810. That analysis is precisely what the Supreme Court requires in the *Arbaugh* line of cases -- and one searching the statutory language for a clear congressional statement of its intent that the DOJ's "evidence of authority" requirement have jurisdictional effect comes up empty-handed.

The Motion at 13 and the *Mader* majority erred in overemphasizing the so-called "interconnected nature" of §§ 2675 and 2672, in order to turn the DOJ's instruction to claimants on "evidence of authority" into a requirement for jurisdiction under § 2675. As the *Mader* dissent

[4] 28 U.S.C. §2401(b) establishes a statute of limitations for actions under the FTCA, which bars an action "unless it is presented in writing to the appropriate Federal agency within two years."

[5] 28 U.S.C. §2675(b) prohibits claimants from bringing an action "for any sum in excess of the amount of the claim presented to the federal agency."

explained at 811-12:

> Section 2675 requires an FTCA claimant to give the agency an opportunity to consider a claim before the claimant takes it to court, *McNeil v. United States*, 508 U.S. 106, 111 n. 7, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (describing the intent of the 1966 amendments as merely to "make it possible for the claim first to be considered by the agency"); section 2672 merely authorizes the government to enter into a settlement *if* the claimant is willing to accept it.
>
> "Although many claimants will rationally elect to settle their claims, Congress clearly did not deem settlement mandatory." *Adams*, 615 F.2d at 291. Section 2675 allows the claimant to file a complaint in federal court at the expiration of six months even in the absence of the agency response. *See* S.Rep. No. 89-1327, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S.C.C.A.N. 2515, 2518-19 (1966) (explaining that, "even though th[e] 6-month period may prove insufficient in some instances [to enter into the ultimate settlement], the committee does not believe that this period ought to be enlarged to attempt to insure time for final decision on all claims"). **Nothing in sections 2675 or 2672 affects the truism that agencies will not settle the bulk of the claims before them, particularly where such claims involve complex issues of liability and damages. *Id.* at 2520 (acknowledging many cases alleging medical malpractice**, drug and products liability, or arising out of aviation accidents **are not amenable to settlement and will continue to be litigated**). And nothing in those sections compels the claimant to accept the agency's settlement, no matter how generous. *Adams*, 615 F.2d at 290 (**rejecting "the erroneous conclusion that claimants** must settle with the relevant federal agency, if the agency so desires, **and must provide that agency with any and all information requested in order to preserve their right to sue**"). In the end, the settlement-oriented framework of the FTCA was only meant to "encourage claimants and their attorneys to make use of this new administrative procedure," S.Rep. No. 89-1327, at 2524 (speaking about the provision raising allowable attorney's fees), and "[e]ncouragement would hardly have been thought necessary if the administrative procedures under section 2672 were mandatory or were, through section 2675, a jurisdictional prerequisite to suit." *Adams*, 615 F.2d at 290 n. 11.

(Emphases added.) See counsel's affidavit, attached as Ex. 2, regarding his experience in trying to settle tort claims with federal agencies. Because the instant case involved medical malpractice causing death, it was not likely to be settled administratively.

The Motion at 13 erroneously refers to the "**legislative** amendments to 28 C.F.R. §14.2," when there have been only **administrative** amendments to that regulation adopted by the DOJ. The distinction between the legislature and the executive is at the center of the issue. Only

Congress can limit the jurisdiction of the Article III courts, *Kontrick v. Ryan*, 540 U.S. 443, 452, 124 S. Ct. 906, 157 L.Ed. 2d 867 (2004)("Only Congress may determine a lower federal court's subject-matter jurisdiction."), and Congress did not do so with respect to the "evidence of authority" rule. Nor did Congress authorize the DOJ to erect whatever barriers to federal court jurisdiction the DOJ—the courtroom adversary to every FTCA claimant—deems necessary for federal agencies' claims processing. As *Warren* stated, 724 F.2d at 779: "There is no evidence that Congress wished to restrict access to the courts in cases where settlement was not possible by creating jurisdictional obstacles during the settlement process."

Not only is *Mader* wrong, it is distinguishable. The authority of the representative at issue there was not the authority of the **attorney who signed the claim** for the estate's purported representative, but was instead the authority of the **estate's representative herself**, who, as the purported personal representative of her husband Mr. Mader's estate, claimed to act on behalf of all of the decedent's beneficiaries under Nebraska law.[6]

The important distinction between an attorney's authority to represent a claimant and a non-attorney's authority to do so was pointed out in *Warren.* In its fn. 3, the court noted that the then-current version of the regulation might be construed as inapplicable to attorneys, "Particularly in view of Fed.R.Civ.P. 11, which authorizes attorneys to sign pleadings on behalf of clients and provides that such signature constitutes a certificate that there is good ground to support the pleading…." In addition to the federal rules, ethical duties with disciplinary sanctions for violations apply solely to members of the bar. The fact that the claimants' counsel is an

[6] In fact, Mrs. Mader's authority as personal representative of the estate had expired even before she made a written notice of the claim with sum certain to the Veterans Administration. The Eighth Circuit then showed that false claims of representation can properly lead to the dismissal of an FTCA case on non-jurisdictional grounds. It held, in the alternative to its holding that the regulation's "evidence of authority" instruction was jurisdictional, that Mrs. Mader lacked standing to bring the wrongful death claim under state law and, on that ground, upheld the district court's dismissal of the case. *Mader*, *supra*, at 808.

attorney, therefore, distinguishes this case from *Mader.*

Counsel signed the Forms 95 submitted to the agency "Scott E. Borg for [each claimant individually]," and identified himself as attorney for the claimant. *See*, for example, Ex. 3. Counsel submitted requests for medical records to the agency's hospital, signed by the personal representatives of Filbert H. Kinlichee's Estate. *See*, for example, Ex. 4. Furthermore, the agency acknowledged that the claimants were counsel's clients. *See*, first paragraph of Ex. 5, Letter to Mr. Borg dated June 7, 2010, from the Department of Health and Social Services, Office of General Counsel.[7] Once counsel filed suit on claimants' behalf, after the agency had failed to act on the claim for 6 months, the U.S. Attorney's Office never questioned his authority to represent them as their attorney or requested evidence other than his signed assertions of such authority. As stated above at footnote 1, the government formally admitted that plaintiffs had exhausted administrative remedies and were authorized to file suit because their claims were denied. After a great deal of correspondence, many telephone conferences, and lengthy discovery, in which the defendant treated plaintiffs' counsel as the attorney in fact for the claimants,[8] little more than two weeks before a scheduled mediation in this case,[9] defendant moved for dismissal of the claims due to lack of evidence of authority on a legal theory that has never been the law in the Ninth

[7] That paragraph said: "Dear Mr. Borg: This will acknowledge receipt of your clients' claims which allege that, from November 5-8, 2009, unspecified health providers at the Chinle Comprehensive Health Care Facility, Chinle, AZ, failed to diagnose and treat acute epiglottitis, which resulted in the death of Filbert Kinlichee. Your clients' claims were received in the Claims Office, Office of General Counsel, Washington, D.C., on May 24, 2010." Given this acknowledgment of claimants' notice of their claims, defendant's contention at 14, that counsel's failure to send evidence of his authority "divested [the U.S.] of any power to negotiate" them rings hollow. In addition, on May 26, 2011, the Department of Health & Human Services "sent a notice of final determination on the claim" formally denying plaintiffs' claims on the merits. Ex. 6. This shows that the department accepted plaintiffs' notice of the claims as legally sufficient. The department did not reject the claims because it lacked power over them.

[8] Counsel for the defendant said "I think this is a damages case," and that the government considers "this to be a damages case." Ex. 7, Ex.8. For that reason she asked plaintiffs' counsel to withdraw discovery requests directed to liability issues because only damages were at issue from then on. Ex. 9. *See,* Doc. 21, filed December 1, 2011 (notice of withdrawal). Clearly, the DOJ did not believe there was any jurisdictional defect at that time.

[9] If the DOJ believed there was no power to negotiate, why would it participate in a mediation of plaintiffs' claims?

Circuit and is almost universally rejected by other circuits. Counsel was entitled to rely on the long-standing case law applicable in this circuit in not supplying additional evidence of his authority to the agency.

6. Defendant Errs in Contending that Unless This Court Gives the Regulation's "Evidence of Authority" Instruction Jurisdictional Effect, No Regulation Promulgated Pursuant to §2672 Is Enforceable.

The Motion at 15 threatens that all of DOJ's regulations issued under 28 U.S.C. §2672 will be "effectively unenforceable" if this court refuses to give the "evidence of authority" rule jurisdictional effect by dismissing the case. That threat is obviously untrue as to the statutorily determined "minimal notice" requirements that the DOJ included in 28 C.F.R. §14.2(a), because courts have consistently interpreted them as having jurisdictional effect based on the express language of the statute.

Moreover, this argument is a red herring. Because Congress has not authorized the DOJ to issue any regulations increasing the FTCA's jurisdictional requirements, courts cannot properly interpret the "evidence of authority" part of the regulation as jurisdictional. While it is clear that the directive from the DOJ is not enforceable by dismissal of this case, there are other means for the DOJ to seek compliance. It could advise agencies not to negotiate claims in the absence of such evidence of authority. If claimants wish to settle administratively with the agency, they will then supply the evidence. It could also suggest or even mandate that agencies discuss their investigations of FTCA claims with claimants and their representatives in order to encourage them to trust that the agency truly has an interest in settling meritorious claims. Such an approach is more likely to result in cooperation from claimants' attorneys than the agencies' current threatening stance, as long as the agencies keep in mind that 28 U.S.C. §2675 does not "allow an agency to insist on proof of a claim to its satisfaction before the claimant becomes

entitled to a day in court." *Avery v. United States*, 680 F.2d 608, 611 (9th Cir. 1982).

7. The *Warren* Court Properly Picked Only the FTCA-Based "Cherries" in 28 C.F.R. §14.2(a) as Having Jurisdictional Effect.

The Motion at 17 complains that, because "all of the Courts of Appeals that have considered the issue and decided it directly have held that the sum certain requirement in §14.2 (a) is a prerequisite for filing suit…, the Court in *Warren* cherry-picked what parts of the regulation to enforce." The *Warren* court correctly chose for jurisdictional effect only those parts of §14.2(a) that were mandated by the FTCA. Its "cherry-picking," unlike that in *Mader* and *Kanar v. U.S.*, 118 F.3d 527 (7th Cir. 1997), was thoroughly grounded in proper analysis of the FTCA and its legislative history.

Moreover, contrary to the Motion's assertions at 16, *Warren* followed the "plain meaning" of the FTCA by finding nothing in the language of 28 U.S.C. §2672 to suggest "that [the Attorney General's regulations] are to be applied jurisdictionally under §2675." *Warren*, at 778. Applying the canon that "the legislature says in a statute what it means," the *Warren* Court stated, *id.*:

> If Congress intended to authorize the promulgation of jurisdictional regulations, it would have created that authority directly. Congress has never delegated such authority under section 2675(a).

Both *Avril v.U.S.*, 461 F.2d 1090 (9th Cir. 1972), and *Caton v. U.S.*, 495 F.2d 635 (9th Cir. 1974), relied on in the Motion at 17-19, fully accord with *Warren.* *Avril* and *Caton* dealt solely with the regulation's sum-certain requirement, which, unlike the "evidence of authority" rule at issue here and in *Warren*, was based on explicit requirements of the FTCA and has therefore been universally held to be a requirement for federal court jurisdiction.

B. The Motion to Dismiss Priscilla Davis's Claims Should Be Denied, Because She Was the Adopted Daughter of Filbert H. Kinlichee under

the Navajo Common Law, Custom, and Tradition, which Are Conclusive.

The Motion, at 19-23, seeks dismissal of plaintiff Priscilla Davis's claims for losses resulting from the death of Filbert H. Kinlichee, stating that 1) the Arizona Wrongful Death statute, A.R.S. §12-612, grants standing solely to biological or adopted children of the decedent, and 2) Priscilla, was not Mr. Kinlichee's biological child and was never legally adopted by him. Citing A.R.S. § 8-117, Defendant states, at 21, "Only a lawfully adopted child has all of the rights that a child of natural birth does to bring a wrongful death suit in the name of the parent who adopts them [sic]," and "only upon an entry of decree of adoption will a child have full legal rights and stand in the shoes of a biological child."

This part of the Motion must be denied, because on June 22, 2012, the Family Court of the Navajo Nation, Judicial District of Chinle, Arizona, in a case entitled *In the Matter of the Adoption of Priscilla L. Davis*, entered an *Order Validating Navajo Common Law Adoption* of Priscilla Davis by Filbert H. Kinlichee, effective February 12, 2003 ("Adoption Order"). *See* Ex. 1. Because that family court has exclusive jurisdiction of an adoption of a Navajo[10] by a Navajo[11] within the boundaries of the Navajo Indian Reservation, *Fisher v. District Court*, 424 U.S. 382 (1976), that Adoption Order is determinative that Mr. Kinlichee legally adopted her under Navajo Nation law.[12] Because the Arizona courts had no jurisdiction over Mr. Kinlichee's adoption of Priscilla Davis, the Arizona adoption statutes, A.R.S. §§ 8-105, 8-106, 8-107, 8-108, 8-123 and 8-533, cited in the Motion at 20-21, do not apply to her adoption. They are irrelevant.

[10] Defendant, at 22, correctly refers to "Plaintiff Davis, a member of the Navajo Nation."

[11] Filbert H. Kinlichee's Death Certificate, attached as Ex. 10, correctly shows his race as "American Indian: Navajo Tribe." This document was provided to Defendant in Plaintiffs' Initial Rule 26(a)(1) Disclosures served on opposing counsel on July 21, 2011.

[12]Note that the Indian Child Welfare Act, 25 U.S.C. § 1903(9), recognizes adoptions under tribal law or custom. It provides in relevant part: "'[P]arent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."

Nor do the requirements of the Indian Child Welfare Act ("ICWA"), relied on in the Motion at 22-23, apply to adoptions in tribal courts. The ICWA establishes federal requirements that apply **solely** to **state** child custody proceedings involving an American Indian child who is a member of a federal recognized tribe. Defendant, Motion at 22, appears to understand that the Navajo tribal court has exclusive jurisdiction over an adoption of Priscilla Davis by Mr. Kinlichee when it cites 25 U.S.C. §1911(a), but then it says at 23 that "in order for Mr. Kinlichee to adopt her, he must have also complied with explicit provisions set forth in the Indian Child Welfare Act," which does not apply to tribal court actions. The ICWA, 25 U.S.C. §1911(d),[13] requires the United States and Arizona to give full faith and credit to the Navajo Nation Family Court's *Order Validating Navajo Common Law Adoption* of Priscilla Davis by Filbert H. Kinlichee, effective February 12, 2003. As a person legally adopted by Mr. Filbert H. Kinlichee, Priscilla Davis has standing to bring this wrongful death claim under A.R.S. §12-612.

III. Conclusion

For the foregoing reasons, defendant's Motion should be denied in its entirety.

Dated this 28th day of June, 2012.

Respectfully submitted,

Barber & Borg, LLC

/s/ Scott E. Borg

[13] 25 U.S.C. § 1911(d) provides:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2012, I caused to be electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Ferdose Al-Taie
Assistant U.S. Attorney
Two Renaissance Square
40 North Central Ave., Suite 1200
Phoenix, Arizona 85004-4408
Ferdose.al-Taie@usdoj.gov

/s/ Scott E. Borg