No. 13-1249

IN THE

Supreme Court of the United States

ANGEL SANCHEZ, ADMINISTRATOR OF THE ESTATE OF RAFAELA SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Massachusetts Academy of Trial Attorneys (MATA), together with other Trial Lawyer Associations from some of the several states and the District of Columbia (collectively, *amici curiae*), are voluntary, non-profit, state-wide professional associations of attorneys in the country.[1] Their purpose is to uphold and defend the Constitution of the United States and that of their respective States; to promote the administration of justice; to uphold the honor of the legal profession; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; steadfastly to resist efforts to curtail the rights of injured people; and to help them enforce their rights through the courts and other tribunals.

The *Amici* support the Petitioner's request for a writ of certiorari to the First Circuit Court of Appeals as there is a woeful lack of uniformity, and a concomitant absence of reliability, in the federal law at issue in this matter. Petitioner's request passes the test of the (second) Justice Harlan: "The nub of all these qualifications is that a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone." Justice

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* state that the parties in this case were notified at least ten days prior to the due date of *Amici's* intention to file this brief to which they have consented. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored any part of this brief, nor did any person or entity other than *amici*, their members, or counsel make a monetary contribution to its preparation.

Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L. J. 108 (1959).

SUMMARY OF ARGUMENT

The courts of appeals are deeply conflicted over if, how, and when to apply the doctrine of equitable tolling to actions brought against federally-deemed employees which actions were not (but ought to have been) brought under the Federal Tort Claims Act (FTCA). In the Third, Seventh, and Ninth Circuits equitable tolling applies to such actions dismissed on jurisdictional grounds. But in the First, as well as the Fourth and Eighth Circuits, the doctrine is only available in extraordinary instances. The Second Circuit is undecided but leaning toward applying the doctrine and the Tenth Circuit never applies it to such cases. The others courts of appeals in the country are in various states of flux on the subject. The issue needs clarity.

Additionally, the enormous number of plaintiffs caught up in the "trap" which ensnared the Petitioner further countenances allowing his request. And that is to say nothing of the increase in the number due to the Affordable Care Act (ACA) as well as pending legislation which, combined, will increase the number of federally-deemed employees who, however unwittingly, set that trap for those people.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS CONFESS THEIR IRRECONCILABLE CONFLICT OVER THE ISSUE OF EQUITABLE TOLLING UNDER THE FEDERAL TORT CLAIMS ACT.

The doctrine of equitable tolling as it exists under the FTCA is subject to a Byzantine bollix of rules and exceptions in a stark absence of uniformity among the circuits. The First Circuit's decision Petitioner seeks to review reinforces an extreme position in the circuit-wide conflict; it is but one expression in an agglomeration in desperate need of clarification.

This patchwork of case law has existed for several years, and is growing wider. Not just some "brooding omnipresence in the sky[ ]" *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) this question, as was said of another jumble of jurisprudence, is "beset with distinctions so delicate that chaos is the consequence." Cardozo, Benjamin N., *A Ministry of Justice*, 35 Harv. L. Rev. 113, 121 (1921). The circuits cannot resolve this confusion; they need this Court's clarification of this important rule of federal law.

A. The Fifth, Sixth, and Tenth Circuits Are Conflicted on Equitable Tolling as Applied to the FTCA.

The Fifth, Sixth, and Tenth Circuits have deep-seated intra-circuit conflicts as to whether or not the FTCA time limits are jurisdictional, and therefore not subject to tolling, or are not jurisdictional and thus subject to such tolling. In the Fifth

Circuit, *compare In Re FEMA Trailer Formaldehyde Products Liability Litigation*, 646 F.3d 185 (5th Cir. 2011) (rule is jurisdictional and not subject to tolling) *with Galindo v. United States Department of Justice*, 153 F. App'x 333, 334 (5th Cir. 2005) (FTCA is subject to equitable tolling).

The Sixth Circuit has a three-way conflict, answering the question with "yes," "no," and "maybe.": *Glarner v. United States*, 30 F.3d 697 (6th Cir. 1994) (FTCA is not jurisdictional and subject to equitable tolling); *Rogers v. United States*, 675 F.2d 123, 124 (6th Cir. 1982) (filing deadline is jurisdictional); and *Bazzo v. United States*, 494 F. App'x 545, 546 (6th Cir. 2012) ("the question whether § 2401(b)'s exhaustion provisions constitute jurisdictional requirements divides circuit courts and even prompts inconsistent rulings within this circuit.").

As to the Tenth Circuit, *compare Harvey v. United States*, 685 F.3d 939, 947 (10th Cir. 2012) (FTCA time limits are jurisdictional and equitable tolling is unavailable) *with Benge v. United States*, 17 F.3d 1286, 1288 (10th Cir. 1994) ("it is settled law that in a narrow range of situations a federal statute of limitations may be equitably tolled.").

B. The Third, Seventh, and Ninth Circuits Allow Equitable Tolling.

Elsewhere, the Third, Seventh, and Ninth Circuits clearly allow equitable tolling when construing the limitations period under the FTCA. In *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194 (3d Cir. 2009), the Third Circuit held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should

also apply to suits against the United States," citing *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 93-96 (1990); likewise in the Seventh Circuit. *Arteaga v. United States*, 711 F.3d 828, 833 (7th Cir. 2013) ("[w]e are mindful of conflicting views in the courts of appeals concerning whether the statute of limitations governing tort claims against the federal government can be tolled . . . . [b]ut we think the answer is that it can be tolled. . ."). So too in the Ninth Circuit: *Kwai Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (FTCA time limits are non-jurisdictional and subject to tolling.).

C. The Second, Eleventh, and D.C. Circuits Have Not Decided Whether Equitable Tolling Applies to the FTCA.

But the question is undecided elsewhere. The Second, Eleventh, and D.C. Circuits have avoided the issue all together. For example, *Phillips v. Generations Family Health Center*, 723 F.3d 144 (2nd Cir. 2013) noted that whether the equitable relief is available at all under the FTCA "is an open question in this circuit." *Id.* at 149. Although that circuit has "hinted" that tolling might be appropriate, it "explicitly declined to resolve whether the FTCA's statute of limitations is 'jurisdictional' and, hence, not subject to tolling." *Id.*

The Eleventh Circuit is similarly conflicted. In *Ramos v. United States Department of Health & Human Services*, 429 F. App'x 947, 951 (11th Cir. 2011) it held that "[t]he general rule is that statutes of limitation are subject to equitable tolling . . . . [b]ut we have never decided whether the rule extends to claims under the FTCA and need not do so

in this case." *Id*. And the D.C. Circuit in *Norman v. United States*, 467 F.3d 773, 776 (D.C. Cir. 2006) simply stated that it has "never squarely addressed whether equitable tolling applies to the FTCA's statute of limitations, and we need not do so here . . ."

D. The First and Eighth Circuits Consider Equitable Tolling Jurisdictional But Available Under Extraordinary Circumstances.

The First Circuit does allow equitable tolling of the FTCA limitations period, but only sparingly and under exceptional circumstances. *Wilson v. United States*, 23 F.3d 559 (1st Cir. 1994). Indeed, it has never found a claim that has qualified for equitable tolling. *Gonzalez v. United States*, 284 F.3d 281 (1st Cir. 2002). In the Eighth Circuit, its intra-circuit conflict has evolved over the years. *T.L. ex rel. Ingram v. United States*, 443 F.3d 956 (8th Cir. 2006).

That Circuit notes that its earlier cases treated the FTCA as jurisdictional. *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990). Since then other panels in the circuit have treated the doctrine as an affirmative defense. *Krueger v. Saiki*, 19 F.3d 1285 (8th Cir. 1994) (per curiam). Although the FTCA's statute of limitations may not be jurisdictional the Eighth Circuit now allows equitable tolling, but only where the government has deceived or misled a plaintiff, or has otherwise hidden the federally-deemed status of the alleged tortfeasors. *T.L. ex rel. Ingram*, 443 F.3d at 964, citing *Garza v. U.S. Bureau of Prisons*, 284 F.3d 930, 935 (8th Cir. 2002).

II. EQUITABLE TOLLING FREQUENTLY ARISES IN ACTIONS AGAINST FEDERALLY-DEEMED EMPLOYEES UNDER THE FEDERALLY SUPPORTED HEALTH CENTERS ASSISTANCE ACT.

Congress enacted the Federally Supported Health Centers Assistance Act (FSHCAA) to increase the availability of health-care services to the poor and underserved. Pub. L. No. 102-501, 106 Stat. 3268 (codified as amended at 42 U.S.C. § 233) (2013). The goal was to generate more funds for health care services by eliminating the need for those facilities to purchase malpractice insurance in the marketplace. 141 Cong. Rec. H14275.

Congress wanted to siphon money away from the malpractice insurance premiums and apply it to providing medical care. The House Report on this legislation noted that more than $50 million was being used to buy malpractice insurance; the money was better spent on medical care for Americans to whom the government had allocated the funds. *Id*.

To accomplish its goal, the FSHCAA transformed these facilities and their staff into fictional government "employees." As employees of the Public Health Services, doctors and others working in the facilities would no longer need private insurance because they would be subject to the FTCA. Any claims against them would have to be brought against the federal government; they would have to be presented and later filed within two years of accrual of the cause of action. 28 U.S.C. § 2675(a); 28 U.S.C. § 2401(b).

A. The Result of the Legislation Has Been to Deny Victims Injured Due to Medical Malpractice a Forum in Which to Seek Relief.

An unintended but unfortunate consequence of the legislation, however, is that across the country many victims of medical malpractice allegedly at the hands of health-care providers in these facilities fall into this trap. They are left without a forum in which to seek redress because they are unaware that they must first file an administrative claim and also bring an action against the United States within two years. *Id.* There is no statute or regulation requiring these facilities to notify patients that their providers are federally-deemed employees.

As District Court Judge Gorton observed, Petitioner and similarly-situated claimants are caught in a "statute of limitations trap" created by the government's "not formulating a regulation that would require notice to a patient that the doctor rendering service to him is an employee of the United States." Pet. App. 27a, citing *Valdez ex rel. v. United States*, 518 F.3d 173, 183 (2d Cir. 2008). Commentators have discussed the inherent problems with the statute in the literature. *See generally* Bourne, Richard W., *A Day Late, A Dollar Short: Opening A Governmental Snare Which Tricks Poor Victims Out Of Medical Malpractice Claims*, 62 U. Pitt. L. Rev. 87 (2000).

Neither the name of the facility nor the circumstances of treatment suggested that Petitioner's decedent was under the care of federal employees in a federal facility. Nowhere in the name of the facility that employed the tortfeasors (the Lynn Community

Health Center (LCHC)) or in the name of the hospital where the decedent delivered her child (North Shore Medical Hospital-Salem Hospital) does the word "federal" appear. Neither facility is located in a government building nor are the employees on a federal payroll. Indeed, nowhere in the facts which inform the underlying issue is there any connection with the federal government. In a larger sense, the doctors working at these facilities would not pass the black-letter law for employees, *i.e.*, that a federal agency exercises the right to control their actions.

The websites touting these facilities are silent as to the facilities' federal status; nor do they announce the protection afforded by the FTCA. The LCHC website, for example, says nothing of the facility being affiliated with the federal government; it does not even say that it is federally *funded*. The website never indicated that it was a federally-qualified health center, much less that its doctors were deemed federal employees, until June 2011. Sadly, that was two months *after* expiration of the two-year statute of limitation under the FTCA in this case. 28 U.S.C. § 2401(b).

Any lawyer screening Petitioner's case for intake and reading the facility's website, therefore, would have had no reason to suspect that claims against the facility or its agents would have to be filed within two years of accrual of Petitioner's claim, instead of three years under State law. Mass. Gen. Laws ch. 260, § 4. Indeed, for the Petitioner—and many similarly-situated Americans—to know that he was facing a two-year rather than a three-year limitations period would have required more than due diligence; it would have required clairvoyance.

B. Courts and Commentators Have Criticized the Inherent Inequities of the "Statute of Limitations Trap" Which Ensnared the Petitioner.

Scholars have commented on the "obvious injustice" of the Petitioner's plight. Wright & Miller, *Statutory Exceptions to Sovereign Immunity—Actions Under the Federal Tort Claims Act: General Procedural Requirements*, 14 Fed. Prac. & Proc. Juris. § 3658 (3d ed.). They note that in states with periods of limitations longer than the two-year rule of the FTCA, when plaintiffs are understandably unaware that their physician had been deemed a federal employee, their suit may be barred. *Id.* Given the differences in state laws, Wright and Miller note "lower federal court cases reaching this conclusion [*i.e.*, barring claims] should be regarded with some suspicion until the matter of the applicable limitations period [is] settled definitively." *Id.* Petitioner's case presents the perfect opportunity for this Court to settle the matter definitively.

Courts have also noted the inherent unfairness of this statute of limitation trap. *See*, *e.g.*, *Santos ex rel. Beatos*, 559 F.3d at 202-03 ("the Department of Health & Human Services has created a potential statute of limitations trap in states [that] may provide a longer period of time than the FTCA to file a complaint." (citation omitted)). A common thread running through these decisions is recognition of the unjust irony of on the one hand jurisprudence that fails to apply equitable tolling evenly and on the other hand federal agencies that do not require disclosure of the federally-deemed status of their agents.

The trial judge in Petitioner's case, while stating he was "humbly sympathetic to plaintiff's effort to move forward with this claim and cognizant of the 'statute of limitations trap' that the Department of Health and Human Services has created," acknowledged that "unfortunately" he was bound by First Circuit precedent. Pet. App. 27(a); *Gonzalez,* 284 F.3d 281 (denying equitable tolling on these facts).

III. THE INCREASING NUMBER OF FEDERALLY-SUPPORTED HEALTH CARE FACILITIES AND FEDERAL-DEEMED EMPLOYEES FORESHADOW A RISE IN THE NUMBER OF AMERICANS IN PETITIONER'S PREDICAMENT.

Petitioner's dilemma will be more frequent as some 22 million Americans receive health care from over 1,200 Federally Qualified Health Centers (FQHC) at more than 9,000 sites in the country. The vast majority of people serviced by these FQHCs are at or below the federally-defined poverty level.[2] Additionally, with some 8 million newly-covered patients under the ACA, one would expect that a significant number of those Americans will receive care from FQHCs as well.[3] The growing number of Americans thus exposed to what the First Circuit described as the "trap for the unwary" which befell the Petitioner underscores the need for resolution of this unsettled area of federal law. Pet. App. 17a.

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[2] *National Association of Community Health Centers, Fact Sheet* (Aug. 2013), http://www.nachc.com/ client/documents/America's_CHCs_0813.pdf (last visited May 9, 2014).

[3] http://obamacarefacts.com/obamacare-facts.php (last visited May 9, 2014).

Congress enacted the FSHCAA to provide financial support to community health centers providing services to poor and medically underserved Americans. Pub. L. No. 102-501, 106 Stat. 3268 (codified as amended at 42 U.S.C. § 233) (2013) amending § 224 of the Public Health Service Act (PHSA), 42 U.S.C. ch. 6A. Section 330 of the PHSA authorizes federal grants to these public non-profit private health centers. 42 U.S.C. § 254.

To be deemed eligible for funding, a FQHC must be qualified by the government. Those that receive federal funds are protected by the FTCA for medical malpractice claims. Indeed, the "intent of the [FSHCAA] was to increase the availability of funds for the provision of primary health care services by reducing the expenditure of Health Center funds for malpractice insurance premiums." Gaston, M.D., Marilyn H., Assistant Surgeon General, Policy Information Notice 99-08, *Health Centers and the Federal Tort Claims Act*, at 1 (Apr. 12, 1999).[4] It did so by making officers, directors, employees and certain contractors of deemed Health Centers, "Federal employees for the purpose of medical malpractice." *Id*.

For example, FTCA malpractice protection is available under the PHSA to a wide variety of entities, including Community Health Centers (§ 330); Migrant Health Centers (§ 329); Homeless Health Centers (§ 340); and Health Services for residents of public housing (§ 340A). Moreover, pending legislation may expand the number of federally-deemed in-

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[4] http://biotech.law.lsu.edu/cases/immunity/PIN99-08.PDF (last visited May 8, 2014).

dividuals under the FTCA to cover health-care professionals volunteering in Community Health Centers. The Family Health Care Accessibility Act of 2013, H.R. 2703, 113th Cong. (2013-2014).

FTCA coverage extends to individual health care providers, employees, officers, governing board members or qualified contractors of deemed FQHCs by virtue of their contractual relationship with the covered entity. To compound the confusion, those individuals are not covered in *all* circumstances or for *all* claims. For example, an individual provider is only covered if he or she works full-time for the covered entity; only if he or she is employed by the covered entity in an individual capacity (*i.e.*, not as an LLC or corporation); and only for claims which arise out the scope of his or her employment contract with the FQHC.

There are additional limitations as to the approved scope of the employment and services, including consideration of the service provided as well as the location of those services. Whether an individual is actually covered under the FTCA for any particular alleged malpractice claim comes clear only after review of the claim by Department of Health and Human Services or the Department of Justice.

CONCLUSION

The importance of the issue framed in the current Petition is underscored by both the extent and the frequency with which the courts of appeals are divided on the notion of equitable tolling as applied to the FTCA. It gains increasing significance in view of the number of Americans who might fall into this "trap." The matter cries out for resolution and as this

is the "Court of last resort in the federal system, [it has] supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). For the foregoing reasons *Amici Curiae* urge this Court to grant the Petition for Certiorari.

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