No. 04-694

In the Supreme Court of the United States

JENNIE E. CHOMIC, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) effects a waiver of sovereign immunity for tort claims against the United States, with certain limitations and exceptions, where a private individual would be liable under state law. 28 U.S.C. 1346(b), 2674. Under Section 2401(b) of the FTCA, an otherwise permissible claim against the United States is barred unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. 2401(b). The issue in this case is as follows:

Whether, under Section 2401(b), a "wrongful death" claim accrues when the injury resulting in death is known or when death occurs, where the applicable state law authorizes only survival claims for the underlying injuries causing the decedent's death, and not an independent cause of action that third parties can assert for the wrongful death itself.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 377 F.3d 607. The opinions of the district court (Pet. App. 21a-29a, 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2004. The petition for a writ of certiorari was filed on October 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to certain restrictions, the Federal Tort Claims Act (FTCA or Act) effects a waiver of sovereign immunity for tort claims against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or

omission occurred." 28 U.S.C. 1346(b)(1). Specifically, the Act provides that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances," except the United States is not "liable for interest prior to judgment or for punitive damages." 28 U.S.C. 2674. This waiver of sovereign immunity is limited in one important respect by Section 2401(b) of the FTCA. Section 2401(b) provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

2. Petitioner is the personal representative of the estate of James Gorjup, who died after receiving care at a government-run medical facility. Petitioner contends that on October 21, 1998, while Gorjup was a resident at a Department of Veterans Affairs Medical Center in Michigan, he fell and fractured his hip. Pet. App. 3a. Although Gorjup underwent surgery to repair the fracture, his condition deteriorated, and he died on November 23, 1998. *Ibid.*

On May 11, 1999, petitioner was appointed the personal representative of Gorjup's estate, and on November 17, 2000, petitioner, acting in this representative capacity, filed an administrative claim under the FTCA with the Department of Veterans Affairs (VA) seeking damages for the injuries and death Gorjup suffered at the VA facility. Pet. App. 3a. Because the claim was not filed within two years of the injuries Gorjup suffered, the VA denied the claim. *Id.* at 3a, 39a.

On February 19, 2002, petitioner commenced this action in the district court, alleging that medical malpractice of government doctors resulted in Gorjup's injury and death. *Id.* at 3a; 37a-42a.

3. The district court granted summary judgment in the government's favor, and dismissed petitioner's action as untimely under 28 U.S.C. 2401(b). Pet. App. 4a.[1] The court observed that "[f]or purposes of the FTCA, [s]tate law determines whether there is an underlying cause of action; but federal law defines the limitations period and determines when that cause of action accrued." *Id.* at 22a (internal quotation marks and citation omitted). Citing this Court's decision in *United States* v. *Kubrick*, 444 U.S. 111 (1979), the court concluded that a "medical malpractice claim under the FTCA" accrues "when the claimant first knows of the existence of an injury and its cause." Pet. App. 25a-26a. "In this case," the court reasoned, petitioner was effectively asserting a medical malpractice claim, and because on October 21, 1998, "both the existence of [Gorjup's] injury and its alleged cause were known," there was "no issue of fact that the medical malpractice or negligence claim, if any, accrued on October 21, 1998, the date * * * Gorjup fell and broke his hip." *Id.* at 26a.

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[1] Initially, the district court denied the government's motion, but reconsidered its decision at the government's urging. Pet. App. 31a-36a. On reconsideration, the court granted the government's motion in part, holding that petitioner's claim "accrued on October 21, 1998." *Id.* at 29a. The court ultimately dismissed petitioner's claim after determining that equitable tolling principles do not apply in this case. *Id.* at 4a. Petitioner does not seek review of any issue related to equitable tolling.

The court rejected the argument that petitioner's claim necessarily accrued on the date of Gorjup's death. Pet. App. 23a-25a. The Michigan Wrongful Death Act, the court stated, governed petitioner's claim, and it did "not create a new cause of action" for wrongful death. *Id.* at 25a. It merely "provide[d] for the survival of [any] *previously existing* cause of action" that the decedent could have asserted but for death. *Ibid.* (emphasis added) (citing *Hardy* v. *Maxheimer*, 416 N.W.2d 299, 307 n.17 (Mich. 1987)). Thus, the court concluded that petitioner's "action must be characterized by the underlying claim for negligence or malpractice" "in determining the relevant limitations period." *Ibid.*

The district court also rejected the argument that "wrongful death" claims asserted under the FTCA always accrue on the date of the claimant's death, regardless of the manner in which state law defines the claim. Pet. App. 26a-27a. The cases petitioner cited for this proposition were largely distinguishable, the court observed, because in those cases, "the death coincided with the wrongful act, or * * * the existence of the injury or its cause was not known or knowable until death." *Id.* at 26a.

4. The court of appeals affirmed. Pet. App. 1a-18a. Citing *Kubrick*, the court of appeals concluded that "a negligence or medical malpractice claim accrues within the meaning of § 2401(b) when a plaintiff knows of both the existence and the cause of his injury." *Id.* at 6a. Petitioner could not, the court stated, treat Gorjup's death as the relevant injury, because Michigan law did not recognize an independent cause of action for his death; under Michigan law, petitioner could assert only Gorjup's claim for "the underlying wrong which caused the death." *Id.* at 8a-9a. Thus, the court held, "as

Michigan law does not create an independent cause of action for wrongful death, and as the record in this case is clear that on October 21, 1998, both the existence of Gorjup's injury and its alleged cause were known," petitioner's claim "accrued on the date of injury and not at the later date of death." *Id.* at 9a.

The court rejected (Pet. App. 9a-12a, 15a) the conclusion of the Fifth Circuit in *Johnston* v. *United States*, 85 F.3d 217, 224 (1996), that "as a matter of federal law," "a wrongful death claim cannot accrue prior to death." In the court of appeals' view, the Fifth Circuit's decision "ignores the fundamental principle that state law identifies whether a plaintiff has a cause of action and determines what that cause of action is." Pet. App. 10a. Indeed, the court of appeals reasoned that this Court's decision in *Kubrick* "had already settled" that an FTCA claim for medical malpractice accrues, "as a matter of federal law," "when a plaintiff knows of both the existence and the cause of his injury." *Ibid.* The Fifth Circuit had "failed to explain" in *Johnston* why "the clock should be set to zero on the same claim if, later on, the injured person dies." *Ibid.*

In addition, the court observed that other circuit courts had rejected the analytical path followed by the Fifth Circuit. Specifically, in *Miller* v. *United States*, 932 F.2d 301 (4th Cir. 1991), and *Fisk* v. *United States*, 657 F.2d 167 (7th Cir. 1981), the Fourth and Seventh Circuits, respectively, concluded that courts should "look to the nature of a state's wrongful death statute in determining when a cause of action thereunder accrues for purposes of the FTCA." Pet. App. 13a. Crediting the logic of those cases, the court of appeals declined to follow what it understood to be the Fifth Circuit's per se approach, and "instead follow[ed] the lead of the Fourth

and Seventh Circuits" in holding that whether a claim accrued at death depends on the nature of the State's wrongful death statute. *Id.* at 15a. Accordingly, "where state law provides a derivative, rather than an independent, cause of action for wrongful death, and where the underlying cause of action sounds in negligence or medical malpractice, a claim for wrongful death under the FTCA accrues on the date when both an injury and its cause are known." *Id.* at 17a-18a.

ARGUMENT

Petitioner contends (Pet. 4-20) that the court of appeals misapplied this Court's precedents concerning the accrual date of claims asserted under the FTCA and that its decision conflicts with the Fifth Circuit's decision in *Johnston*. The decision below, however, is correct and does not conflict with any decision of this Court. Nor does it implicate any developed conflict of authority that requires resolution by this Court. Further review by this Court is therefore not warranted.

1. a. The court of appeals correctly applied this Court's precedents to conclude that petitioner's wrongful death cause of action accrued on the date that Gorjup's injury and its probable cause were known, not on the date of his death. In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court held that the "general rule" under the FTCA is that "a tort claim accrues at the time of the plaintiff's injury" for purposes of Section 2401(b). *Id.* at 120. Where injuries do not immediately manifest themselves, a claim under the FTCA accrues when the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury." *Id.* at 122. Thus, accrual occurs under Section 2401(b)

on the date the plaintiff is "aware of his injury and its probable cause." *Id.* at 118.

Because the FTCA does not create "new causes of action but [requires government] acceptance of liability under circumstances that would bring private liability into existence" under state law, *Feres* v. *United States*, 340 U.S. 135, 141 (1950), the date on which a cognizable injury comes into being for purposes of Section 2401(b) necessarily depends on the state law defining the cause of action for the injury. See 28 U.S.C. 2674. The application of this principle has special significance in the wrongful death context, for the generic term "wrongful death" embraces two distinct causes of action—one, none, or both of which may be provided under state law. First, wrongful death can denote a new and *independent* cause of action asserted by third parties, usually close relatives of the decedent, for their loss due to the death. In its most traditional form, this independent claim exists whenever negligence results in the death of another. A few States, however, have created a subset of independent wrongful death claims that come into being only if the decedent could have maintained his own cause of action for personal injury but for his death. Second, and separately, wrongful death can denote, as here, a *survival* cause of action —that is, the decedent's own personal injury claim that pre-exists death and that, solely by operation of statute, "survives" death. See Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan. L. Rev. 1043, 1044 (1964-1965).

Where a plaintiff asserts a purely independent wrongful death claim, the claim accrues when death occurs, because death is the event triggering the cause of action. *Fisk*, 657 F.2d at 171 ("[W]hen a state statute

creates an independent cause of action for wrongful death, it cannot accrue for FTCA purposes until the date of the death which gives rise to the action."); Restatement of Torts (Second) § 899 cmt. c (1977) ("A cause of action for death is complete when death occurs."). But, when an estate asserts a survival claim, "the statute of limitations necessarily runs from the time of [the decedent's] original injury," Restatement, *supra*, § 899 cmt. c, because that injury is the event giving rise to the claim. See *Miller*, 932 F.2d at 303-304; *Winn* v. *United States*, 593 F.2d 855, 857 (9th Cir. 1979). Death operates only to transfer the legal right to assert the claim from the decedent to his estate.

b. In light of these principles, the court of appeals in this case correctly held that petitioner's survival claim is barred under Section 2401(b) of the FTCA. The Michigan Supreme Court's precedents establish that claims for personal injuries resulting in death must proceed under the State's Wrongful Death Act. *Hardy*, 416 N.W.2d at 304. That Act authorizes a decedent's personal representative only to "stand[] in the [decedent's] shoes" to assert a claim for the underlying tortious injury that resulted in death. *Xu* v. *Gay*, 668 N.W.2d 166, 174 (Mich. Ct. App. 2003) (internal quotation marks and citation omitted). Petitioner's claim under the Michigan Wrongful Death Act is thus not an independent cause of action arising from Gorjup's death, but a survival claim, specifically the tort action Gorjup could have asserted had he not died.

There is no dispute that the injury ultimately giving rise to Gorjup's death occurred on October 21, 1998, when Gorjup fell and broke his hip. Accordingly, the courts below correctly held that petitioner's FTCA claim

accrued at the time of Gorjup's injury, not his death. See *Kubrick*, 444 U.S. at 120, 122.

c. Petitioner errs in contending (Pet. 5-7) that the court of appeals should not have applied this Court's decision in *Kubrick*, which considered when medical malpractice and negligence claims accrue, to the wrongful death claim at issue here. This Court acknowledged the broad application of its decision in *Kubrick* when it observed that the rule that "a tort claim accrues at the time of the plaintiff's injury" is not limited in application but is "the *general* rule under the [FTCA]." 444 U.S. at 120 (emphasis added). In any event, because Michigan law operates solely to transfer a pre-existing right of action from the decedent to the decedent's estate and the decedent's claim in this case is a medical malpractice action, *Kubrick* would define the accrual rule applicable here even if its precedential value were limited to medical malpractice claims.

Petitioner's contention that the decision below "create[s] an illogical and unjust result for plaintiffs" (Pet. 6) similarly misapprehends the nature of the wrongful death claim at issue here. Permitting accrual to occur before death where state law provides *only* a survival claim does not require loved-ones "to speculate" about their loved-one's fate or file premature suits (*ibid.*), because the underlying injury is not dependent on the death. Death is only the event that permits the estate to pursue causes of action on the decedent's behalf.

2. a. Petitioner's argument (Pet. 7-12) that review is necessary to resolve a conflict among the courts of appeals is similarly unpersuasive. Petitioner, indeed, conflates the various kinds of wrongful death claims, and

thereby ignores important distinctions among state laws that explain different courts of appeals' decisions.

Apart from the court below, only one other court of appeals has considered when survival claims accrue under the FTCA, and that court, consistent with the decision below, concluded that survival claims can accrue prior to death. In *Miller* v. *United States*, 932 F.2d 301 (1991), the Fourth Circuit considered the timeliness of an action under the FTCA where the underlying state law, specifically Virginia's wrongful death statute, did "not create a new cause of action, but only a right of action in a personal representative to enforce the decedent's claim for any personal injury that caused death." *Id.* at 303. Because Virginia provided solely for survival claims, the court reasoned that "a wrongful death action under Virginia law is necessarily time-barred if at the time of the decedent's death her personal injury claim based on the tortious conduct that ultimately caused death is already time-barred." *Ibid.*[2]

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[2] Petitioner errs in contending (Pet. 7-8) that the Sixth Circuit has rendered inconsistent decisions on the question presented. In *Kington* v. *United States*, 396 F.2d 9, cert. denied, 393 U.S. 960 (1968), the case petitioner cites as inconsistent with the decision below, the Sixth Circuit dismissed a wrongful death claim where the plaintiff had failed to act promptly after discovering that a tortious injury had caused her husband's death. *Id.* at 10-11. Although the court opined generally that "under the [FTCA], the claim for wrongful death accrues upon the date of death," *id.* at 12, it did not decide whether a wrongful death action could accrue prior to the decedent's demise where, as here, the underlying injury is known prior to death. In addition, the Sixth Circuit made clear in its decision below that *Kington* is no longer persuasive authority, because the court assumed in that case that the FTCA "creat[ed] a cause of action for wrongful death independent of state law," *id.* at 11, but this assumption "is in direct conflict with" this Court's decision in *Feres*. Pet. App. 8a. In any event, to the extent the Sixth Circuit's precedents may not be entirely uniform, a conflict among

The supposedly conflicting decisions petitioner cites (Pet. 8-9) do not concern accrual of *survival* claims, but the accrual of *independent* causes of action for wrongful death. For example, in *Fisk* v. *United States*, 657 F.2d 167, 171 (1981), the Seventh Circuit correctly concluded that the wrongful death action at issue did not "accrue for FTCA purposes until the date of the death which gives rise to the action," because the applicable Indiana wrongful death statute created an independent tort "to provide a means by which the decedent's survivors may be compensated for the loss they have sustained by reason of the death." *Id.* at 170. See *Richardson* v. *Knud Hansen Mem'l Hosp.*, 744 F.2d 1007, 1012 (3d Cir. 1984) (a non-FTCA case holding that, as a matter of local law, the accrual date for an independent wrongful death action "is the date of the decedent's death, not the date of injury"). These cases are wholly inapposite to the question presented, because the government agrees that purely *independent* wrongful death actions accrue at death.

In addition, petitioner wrongly relies on cases involving the subset of independent wrongful death claims that establish independent causes of action for death, but only where the decedent could have asserted a personal injury claim for the injuries resulting in death. For example, in *Washington* v. *United States*, 769 F.2d 1436, 1438 (1985), the Ninth Circuit, considering an action under such a state law, held that the plaintiffs had satisfied the state law requirements for pursuing a claim because the decedent "had a viable

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decisions of the same court of appeals is a matter properly resolved by that court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

personal injury action at the time of her death." *Id.* at 1439. "Until [the decedent's] death, there was always the possibility that she could recover from [her] coma and could assert the claim herself." *Ibid.* Having concluded that an independent wrongful death claim existed under state law, the court considered whether the action was timely under the FTCA, and concluded that it was because the independent action "did not accrue until * * * death." *Ibid.* Because the Ninth Circuit had no occasion to consider when survival claims accrue, its decision does not bear on the question here.[3]

b. Of the numerous cases petitioner cites, only *Johnston* v. *United States*, 85 F.3d 217 (5th Cir. 1996), contains some broad language that arguably conflicts with the court of appeals' decision below, but ultimately, it is also distinguishable. In *Johnston*, the Fifth Circuit considered the timeliness of an FTCA claim based on a Texas law that created an independent cause of action for wrongful death, but only where "the individual injured would have been entitled to bring an action for the injury if he had lived." *Id.* at 222 (internal quotation marks and citation omitted). Complicating the court's

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[3] In the remaining cases petitioner cites (Pet. 9-12), the courts of appeals held, consistent with the decision below, that a claim under the FTCA accrues when an injury and its probable cause are known. In those cases, however, the injury was not discovered until *after* the decedent's death. See *Skwira* v. *United States*, 344 F.3d 64 (1st Cir. 2003), cert. denied, 124 S. Ct. 2836 (2004); *Garza* v. *United States Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002); *Diaz* v. *United States*, 165 F.3d 1337 (11th Cir. 1999); *In Re Swine Flu Prods. Liab. Litig.*, 764 F.2d 637 (9th Cir. 1985); *Drazan* v. *United States*, 762 F.2d 56, 59 (7th Cir. 1985); *McGowan* v. *University of Scranton*, 759 F.2d 287 (3d Cir. 1985); *Barrett* v. *United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983). Accordingly, the cases do not conflict with, and are factually distinguishable from, the decision below.

analysis was the further fact that the Texas statute provided that the independent wrongful death actions it authorized accrued on the date of the decedent's death, but there was an exception where the death was attributable to medical malpractice. In such a case, a separate two-year state statute of limitations for all medical malpractice claims controlled, and the cause of action accrued on the date of the negligent act. *Id.* at 219, 222-223.

The Fifth Circuit concluded that the Texas accrual rule, which effectively allowed an *independent* wrongful death claim to accrue pre-death, had to be disregarded when determining the date of accrual under the FTCA. *Johnston*, 85 F.3d at 223. Adopting the Texas rule would, the court reasoned, be "inconsistent with both the goals of uniformity and equity that must guide [it] on matters of accrual." *Id.* at 223-224. Accordingly, the court held that "as a matter of federal law, * * * a wrongful death claim cannot accrue prior to death." *Id. at* at 224. This language quoted from the *Johnston* opinion has little bearing on the question at issue here, for it simply explains that the special state statute of limitations could not be given effect in light of the federal limitations provision in 28 U.S.C. 2401(b). The Fifth Circuit did not hold in the case that a state statute of limitations or accrual rule controlled. It looked to state law only to determine the nature of the underlying cause of action.

Moreover, because the Texas provision at issue in *Johnston* created an *independent* cause of action for wrongful death, the result in that case does not conflict with the result below. Indeed, because the Fifth Circuit failed even to consider "the difference between an independent cause of action for wrongful death and a

state statute merely providing that death does not extinguish a preexisting cause of action" (Pet. App. 11a), *Johnston* sheds no light on the accrual rule that the Fifth Circuit would apply to survival claims. It is significant in this regard that the Fifth Circuit in *Johnston* did not even cite the Fourth Circuit's decision in *Miller*, which did involve a state survival statute and reached the same result as the Sixth Circuit in this case. See p. 10-11, *supra*. This omission reinforces the conclusion that the Fifth Circuit's discussion of a uniform federal accrual rule for wrongful death actions was not meant to encompass the distinct cause of action under a state survival statute at issue here. Only if the Fifth Circuit had addressed the accrual of an FTCA cause of action based on a state survival statute, such as the Michigan law at issue here, and disagreed with the Sixth Circuit's ruling in this case and the Fourth's Circuit's decision in *Miller*, would a square circuit conflict be presented. At that point, the Court could then consider whether any divergence among the circuits warranted review.

Even if the Fifth Circuit's decision in *Johnston* were given a broader interpretation and read to impose a rule of accrual at death in *all* wrongful death cases, regardless of the nature of the state law claim, the narrow resultant conflict would not merit this Court's review at this time. Petitioner did not seek rehearing en banc in the proceedings below; nor did the parties involved in *Johnston* or *Miller* seek rehearing en banc. As a result, the courts of appeals retain the ability to harmonize their precedents by sitting en banc.

3. Petitioner's remaining arguments lack merit. Petitioner's contention (Pet. 12-15) that Congress intended wrongful death claims to be uniform under the

FTCA is simply wrong. While Congress clearly intended to impose a uniform statute of limitations on claims, the Act relies entirely on the "law of the place where the [allegedly tortious] act or omission occurred" to define the underlying cause of action. 28 U.S.C. 1346(b)(1); see *Feres*, 340 U.S. at 141; *Winn*, 593 F.2d at 856. Because state laws, particularly state statutes defining wrongful death actions, vary from jurisdiction to jurisdiction, the FTCA necessarily contemplates some lack of uniformity in the standards defining when a claim exists. Indeed, the non-uniformity about which petitioner complains (Pet. 14) is attributable to this aspect of the FTCA, not the decision below.

In addition, petitioner errs in contending (Pet. 16-19) that *Reading* v. *Koons*, 271 U.S. 58 (1926), holds that the term "accrual" always indicates Congress's intent to fix the date of accrual in wrongful death cases at the date of death. In *Reading*, this Court considered the meaning of a limitations provision in the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* The FELA itself created an independent wrongful death cause of action where an employee of an interstate common carrier dies on the job as a result of negligence, as well as a survival claim for personal injuries if the employee dies from other causes after the injury, and FELA requires that parties seeking damages under either provision to commence an action "within two years from the day the cause of action accrued." *Reading*, 271 U.S. at 60, 63. This Court observed that the FELA was best effectuated "if the word 'accrued,' whether applied to causes of action for personal injury or for wrongful death, be taken to apply uniformly to the time when the events have occurred which determine that the carrier is liable, even though the person

through whose agency the liability is to be enforced, has not been designated." *Id.* at 63-64. Thus, the Court held, survival actions accrue at the time of injury, not later, and independent causes of action for wrongful death accrue at the time of death, not later—a result that bolsters the government's argument here. *Id.* at 64.

Finally, petitioner contends (Pet. 20) that determining the "date of injury" may be difficult where the tortious injury is cumulative, *i.e.*, due to long-term exposure to toxic substances. Because this case does not involve such an injury, that concern is inapposite here. That distinct issue, moreover, exists independently of whether the cause of action is brought by the injured party himself during his lifetime or by his survivors after his death. It therefore had no particular relevance to the distinction between survival and independent wrongful death causes of action under the FTCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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