No. 11-838

In the Supreme Court of the United States

PATRICIA MACARELLI, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF EDWARD BRIAN HALLORAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim under the Federal Tort Claims Act was properly dismissed under the applicable statute of limitations where petitioner's administrative claim was filed more than two years after the date upon which petitioner reasonably should have been aware of the existence and cause of petitioner's injury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 634 F.3d 615. The order of the court of appeals denying rehearing and rehearing en banc and accompanying opinions (Pet. App. 73a-91a) are reported at 660 F.3d 523. The opinion of the district court (Pet. App. 52a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2011. A petition for rehearing was denied on October 6, 2011. The petition for a writ of certiorari was filed on December 30, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, arises out of the operation of the "Winter Hill Gang," a Boston criminal group led by James "Whitey" Bulger and Stephen Flemmi. Pet. App. 2a-3a. Bulger and Flemmi were informants for the Federal Bureau of Investigation (FBI), "handled" by Agent John Connolly, who was overseen by Agent John Morris. *Id.* at 3a-4a. The relationship between these informants and their handlers was corrupt. Bulger and Flemmi gave Connolly and Morris "assorted gratuities," in addition to "high-quality information that led to the convictions of several Mafia hierarchs." *Id.* at 4a. In return, "Connolly and Morris did everything in their power, whether legal or illegal, to protect their prized informants and keep them happy." *Ibid.*

Edward Brian Halloran was a "low-level hoodlum, who functioned primarily as a cocaine dealer." Pet. App. 5a. At times, Halloran "worked with the Winter Hill Gang," and, at the time he was killed, he "was facing a state murder charge." *Ibid.* In early 1982, Halloran offered the FBI incriminating information about Bulger and Flemmi, namely that they had conspired to kill Roger Wheeler, an Oklahoma businessman murdered some years earlier. *United States* v. *Salemme*, 91 F. Supp. 2d 141, 208 (D. Mass. 1999). Connolly leaked to Bulger the fact that Halloran was providing the FBI with this information. Shortly thereafter, Bulger and Flemmi plotted to eliminate Halloran. Pet. App. 5a-6a. On May 11, 1982, Bulger and others murdered Halloran along with Michael Donahue, who was driving the car in which Halloran was a passenger. Before he died, Halloran claimed that James Flynn was the assailant.

Id. at 6a-7a. The State of Massachusetts charged Flynn with murdering Halloran and Donahue, but Flynn was acquitted in 1985. *Id.* at 8a.

The facts relating to the murders of Halloran and Donahue, and the murders' potential connection to the federal government, received extensive publicity in the late 1990s. In 1995, a grand jury in the District of Massachusetts handed down a 91-page indictment of Bulger, Flemmi, Francis P. Salemme, and several other "gangland crime figures." Pet. App. 8a; *Salemme*, 91 F. Supp. 2d at 301. Although Bulger fled before he could be apprehended, Flemmi was arrested shortly after the indictment issued. Pet. App. 8a.

In mid-1997, "a front-page article in the Boston Herald suggested that the FBI continued to use Bulger and Flemmi as informants even though they were suspects in Halloran's execution." Pet. App. 11a. In 1998, the hearings in Flemmi's criminal case provided further information that was widely reported. FBI Agent Morris testified under oath that he told Agent Connolly about Halloran's offer to incriminate Bulger and that Connolly had leaked Halloran's identity to Bulger. Morris further testified that he suspected that Bulger and Flemmi were responsible for Halloran's murder. *Id.* at 9a. Flemmi corroborated this testimony, indicating that the FBI had told him about Halloran's informant activities and his role as a potential accuser. *Id.* at 10a. Testimony by former federal prosecutor William Weld revealed that the agent second in command of the FBI's Boston office had expressed concern to him that Halloran was in "grave danger" just days before his murder. *Ibid.* In addition, an informant named Joseph Murray had later "told FBI agents that Bulger was responsible for Halloran's murder and that someone in the

FBI's Boston office was leaking confidential information to Bulger." *Ibid*.

These and related statements quickly surfaced in the Boston press in "an avalanche of news stories" before September 2, 1998. Pet. App. 11a, 32a-36a (collecting articles). In particular, "[t]he two most widely circulated Boston-area newspapers—the Boston Globe and the Boston Herald—covered these disclosures in laborious detail, often with gripping headlines and prominent placement." *Id.* at 11a. "[T]hese press dispatches reiterated time and again the corrupt Bulger-FBI linkage and its tragic consequences for Halloran and Donahue." *Id*. at 12a.

2. On September 25, 2000, more than two years after the events and publicity described above, petitioner—Halloran's estate—filed an administrative tort claim against the FBI seeking $40,000,000 in compensation for Halloran's murder. Pet App. 13a; C.A. App. 418; see 28 U.S.C. 2675. Donahue's widow and estate filed a similar claim on March 29, 2001. Pet. App. 13a. Neither claim was satisfied by the FBI, and plaintiffs proceeded to file FTCA actions in district court. *Ibid.*

The government moved to dismiss both cases on the basis that the claims were barred by the FTCA's two-year statute of limitations. Pet. App. 14a; see 28 U.S.C. 2401(b). The district court denied the motion to dismiss in *Donahue* v. *FBI*, 204 F. Supp. 2d 169 (D. Mass. 2002), on the ground that "it was not unreasonable for the plaintiffs to have failed to discover the factual basis for their claims until after" the relevant cutoff date. Pet. App. 71a. The district court explained that the passage of 16 years after the murders and the fact that Flynn had been tried for the murders made it reasonable that the *Donahue* plaintiffs were unaware of the news re-

ports implicating Bulger and the government. *Id.* at 14a, 71a. In *Estate of Halloran* v. *United States*, 268 F. Supp. 2d 91 (D. Mass. 2003), a different district court judge likewise denied the government's motion to dismiss, referencing the reasons given in *Donahue* and finding the two cases "factually and legally indistinguishable." Pet. App. 52a-53a; see *id.* at 14a.

The cases were then consolidated. The district court granted partial summary judgment to the plaintiffs with respect to liability and, after a bench trial on damages, entered judgments against the United States for $6.3 million to the *Donahue* plaintiffs and nearly $2.1 million to petitioner. Pet. App. 14a.

3. a. The court of appeals reversed, holding that both claims were barred by the FTCA's statute of limitations. Pet. App. 1a-32a. As a condition of the FTCA's waiver of sovereign immunity, the court explained, the Act requires that an administrative tort claim be presented to the appropriate agency "within two years after such claim accrues." *Id.* at 16a (quoting 28 U.S.C. 2401(b)). Because "the relevant facts for calculating the accrual date are nearly identical for both sets of claimants," the court focused on the accrual date of the first-filed claim: "if the first-filed (Halloran) claim is time-barred, the later-filed (Donahue) claim is time-barred as well." *Ibid.* The dispositive question was whether plaintiffs' claims accrued more than two years before petitioner presented its claim to the appropriate agency —*i.e.*, before September 25, 1998.

Because the plaintiffs did not necessarily know the cause of their injuries at the time of the murders, the court of appeals applied a "discovery rule," under which "a claim accrues when a plaintiff knows (or is chargeable with knowledge) of both the existence and the cause of

her injury." Pet. App. 17a (citing *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979)). In the context of the FTCA, a claim thus accrues for the purposes of the discovery rule when a plaintiff knows or should know the existence of the injury and the causal connection between the government and the injury. *Id.* at 18a. For purposes of this inquiry, a plaintiff is chargeable with knowledge based on generally available information concerning the relevant facts, including information that "achieves a level of local notoriety," as well as "the likely results of any further inquiry that a reasonable plaintiff, knowing these facts, would undertake." *Id.* at 19a-20a. Thus, "when either the generally available information or the likely outcome of a reasonably diligent investigation that follows inquiry notice is sufficient to ground a reasonable belief that the plaintiff has been injured and that there is a causal nexus between the injury and some governmental conduct, accrual begins." *Id.* at 20a.

Applying these principles, the court of appeals held that plaintiffs' claims accrued no later than September 2, 1998. Pet. App. 22a, 25a. As early as 1996, there had been public speculation "that Bulger and Flemmi had killed Halloran and that the FBI was complicit." *Id.* at 22a. The mechanism of this complicity was spelled out in Morris's sworn testimony in April 1998, which "was extensively reported by both local and national media," including being "prominently featured in both of the major Boston newspapers," which "repeatedly mentioned Halloran by name, usually within their lead paragraphs." *Id.* at 23a; see *id.* at 25a (referring to the "widespread publicity" surrounding Morris's testimony). The court noted that "the import of these disclosures [wa]s unmistakable," *id.* at 24a: They made the connection between the government and plaintiffs' claimed

harms—the murders of Halloran and Donahue—by suggesting the government's responsibility for the murders. And these disclosures did not do so by mere suspicion or speculation, but rather through sworn testimony based on personal knowledge that was independently corroborated. *Id.* at 24a-25a. Accordingly, the court concluded, by September 2, 1998, "plaintiffs reasonably should have known of the FBI's possible connection to the murders" and they therefore "had sufficient factual information to start the running of the accrual period." *Id.* at 25a. Because "generally available information was sufficient to trigger the accrual of the claim" by September 2, 1998, the court did not need to address what, if any, additional information further inquiry would have revealed. *Id.* at 22a.

The court of appeals rejected plaintiffs' arguments that the generally available information as of September 2, 1998 was insufficient to trigger accrual. The court held that the 16-year gap between the murders and the revelations connecting the murders to the government did not prevent plaintiffs' claims from accruing, given the widespread publicity accompanying those revelations. Pet. App. 25a-26a. Any alleged attempts by the government to cover up or minimize its role in the murders did not prevent plaintiffs' claims from accruing because the facts emerged regardless. *Id.* at 26a. And the court determined that it was not reasonable for plaintiffs to rely on the fact that Flynn was initially charged with the murders, because Flynn was acquitted, and because Morris's testimony and the other information that emerged by September 1998 pointed in a different direction. *Id.* at 28a-29a.

The court of appeals likewise rejected the contention that plaintiffs' claims accrued only with the publication

of Judge Wolf's opinion in *Salemme*, *supra*, on September 15, 1999. The court explained that the *Salemme* opinion did not create or publicize new information. Rather, although it "wrapped all the pieces of the puzzle in a neat package, the pieces themselves were readily available at an earlier date." Pet. App. 29a.

b. Judge Torruella dissented. He would have held that the plaintiffs reasonably believed that Flynn was the assailant, despite his acquittal, and therefore were not required to give credence to the subsequent information provided by Morris and others that the FBI might have been involved. Pet. App. 39a-40a & n.8.

4. Plaintiffs filed petitions for rehearing and rehearing en banc. The court of appeals denied the petitions. Pet. App. 73a-91a. Chief Judge Lynch and Judges Boudin and Howard issued a statement on denial of rehearing en banc, explaining why, in their view, rehearing was unwarranted. *Id.* at 74a-75a. Judges Torruella, Lipez, and Thompson issued separate statements, explaining why, in their view, rehearing should have been granted. *Id.* at 76a- 91a.

ARGUMENT

Petitioner contends that the court of appeals' decision conflicts with decisions of this Court (Pet. 15-21) and presents an "exceptionally important question" of federal law that warrants this Court's review (Pet. 21-27). The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. Under the FTCA, "[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." 28 U.S.C. 2401(b). This statute of limitations reflects "the balance struck by Congress in the context of tort claims against the Government." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). Its "obvious purpose * * * is to encourage the prompt presentation of claims." *Ibid.*

In *Kubrick*, this Court noted 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). 444 U.S. at 120. Where injuries or their causes do not immediately manifest themselves, however, a claim under the FTCA accrues when the plaintiff is, or reasonably should be, "in possession of the critical facts that he has been hurt and who has inflicted the injury." *Id.* at 122. Thus, under Section 2401(b) accrual occurs in such a case on the date the plaintiff is, or reasonably should be, "aware of his injury and its probable cause." *Id.* at 118.

The court of appeals applied the proper legal standard for assessing accrual of petitioner's FTCA claim under Section 2401(b): "a claim accrues when a plaintiff knows (or is chargeable with knowledge) of both the existence and the cause of her injury." Pet. App. 17a (citing *Kubrick*, 444 U.S. at 122). And it correctly concluded that, based on information that was widely publicized concerning the revelations of the FBI's potential involvement in the deaths of Halloran and Donahue, petitioner was chargeable with knowledge of both the existence and cause of its injury no later than September 2, 1998—more than two years before petitioner filed its administrative claim. *Id.* at 11a, 22a, 25a.

As the court of appeals explained, FBI Agent Morris's public testimony under oath in April 1998 indicated

that the government may have been responsible for Halloran's murder:

> Morris unequivocally stated that he told Connolly of Halloran's cooperation with the FBI. He also confirmed that Connolly "had informed Bulger and Flemmi that Halloran was implicating them in Wheeler's murder." Morris further acknowledged that, as a result of this leak, "he believed that Bulger and Flemmi may have killed Halloran."

Pet. App. 23a (internal citations omitted). Underscoring the possible connection between the FBI and the murder, "Morris expressed concern that 'he had sent Halloran to his death.'" *Ibid*. The connection was corroborated by testimony under oath by an informant, a federal prosecutor, and Flemmi himself. *Id.* at 23a-24a. And all four men's testimony was widely reported in both of the major newspapers for the Boston area. *Id.* at 24a; see *id.* at 32a-36a (listing 36 stories published in the *Boston Herald* or *Boston Globe* on or before September 2, 1998 detailing the FBI-Bulger relationship). As the court of appeals concluded, this testimony and the ensuing publicity "spelled out in exquisite detail the facts needed" to charge petitioner with knowledge of the likely cause of its injury and to trigger accrual of petitioner's FTCA claim. *Id.* at 23a.

b. Petitioner argues that the court of appeals misapplied the standard for assessing the accrual date of its FTCA claim. See Pet. 22-27. Even if that argument had merit, this Court's review is rarely granted to correct "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In any event, petitioner's contention that the court of appeals incorrectly applied the standard is unavailing.

Petitioner asserts that Morris's testimony was "ungrounded speculation" suggesting an "apparently outlandish possibility." Pet. 24 (quoting Judge Torruella's dissent at Pet. App. 40a). Far from ungrounded speculation, however, Agent Morris's testimony was "unequivocal[]," "given under oath," and "based upon personal knowledge." Pet. App. 23a, 24a. Morris admitted that *he* lied to other FBI agents and that *his* actions may have led to the murders of Halloran and Donahue. See *id.* at 9a, 23a. Moreover, his testimony was "corroborated by independent accounts" from informant Joseph Murray, former federal prosecutor William Weld, and Flemmi himself of the FBI's possible connection to Halloran's death. *Id.* at 24a-25a.

Petitioner also suggests that it was reasonable to disregard the information regarding the government's involvement in the murder "[b]ecause the Flynn prosecution gave Petitioner a 'plausible explanation' for the murder." Pet. 24 (quoting Pet. App. 40a). But Flynn was acquitted in 1985. Pet. App. 8a. And as the court of appeals correctly pointed out, even if the failed prosecution of Flynn gave rise to a reasonable inference, for some period, of his responsibility for the murder, that inference would not justify ignoring or discrediting the substantial information to the contrary that emerged in 1998. See *id.* at 28a (noting that petitioner's "rationale was severely undercut, if not wholly extirpated, by Flynn's acquittal, Morris's testimony, Flemmi's admission, and the other new information that emerged in 1998").

In contrast to the flawed reasons petitioner offers for why the decision below incorrectly determined the accrual date of petitioner's claim, it is noteworthy that petitioner has failed to put forth any reasonable alterna-

tive date of accrual. Petitioner appears to set the accrual date on September 15, 1999, the date of publication of the district court's opinion in *United States* v. *Salemme*, 91 F. Supp. 2d 141, 208 (D. Mass.). See Pet. i (referring to the *Salemme* opinion's publication as the event that "for the first time, credibly linked and placed in context the government's involvement with the murder").[1] But, as the court of appeals explained, the *Salemme* opinion would not have triggered accrual here if accrual had not previously occurred because, with respect to the relevant facts regarding the Halloran murder, the opinion was merely a "recapitulation" of "the well-publicized information that surfaced during the *Salemme* hearings" prior to September 2, 1998. Pet. App. 29a. Petitioner has never specified what, if any, relevant information was made publicly available for the first time in the *Salemme* opinion. As petitioner acknowledges, the focal point for accrual purposes is when sufficient information "become[s] available," Pet. 13, not a later point in time when the information may be compiled in a judicial opinion. The court of appeals correctly determined that petitioner's claim accrued no later than September 2, 1998, more than two years before petitioner filed its administrative claim.

2. Petitioner contends that the decision below conflicts with this Court's decisions in *Merck & Co.* v.

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[1] See also Pet. App. 29a (recounting petitioner's assertion below that it was "not chargeable with knowledge of the cause of the injury until the publication of Judge Wolf's opinion in *Salemme*"); Halloran Mem. in Opp. to Mot. to Dismiss (Dist. Ct. Docket entry No. 7) (arguing in the district court that the publication of the *Salemme* opinion triggered the statute of limitations period); C.A. App. 420 (petitioner's administrative claim stating that the *Salemme* opinion "revealed for the first time * * * Defendants['] involvement in the murder of Halloran").

Reynolds, 130 S. Ct. 1784 (2010), *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Kubrick*, *supra*. Pet. 15-21. Petitioner is incorrect.

a. Petitioner argues that the court of appeals' decision conflicts with *Merck* because it improperly "focused on 'inquiry notice,' the point at which information was first revealed that pointed speculatively to a governmental cause, and found that such speculative information was sufficient to trigger accrual of Petitioner's claim." Pet. 16; accord Pet. 18 (stating that "the court of appeals failed to distinguish between facts that 'would lead a reasonably diligent plaintiff to investigate further,' [and] facts sufficient for an FTCA claim to accrue").

As an initial matter, it is not at all clear that the Court's decision in *Merck* has any application to petitioner's FTCA claim. In *Merck*, this Court noted that claims of securities fraud accrue not when a plaintiff "possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry," but when "a reasonably diligent plaintiff would have 'discover[ed] the facts constituting the violation.'" 130 S. Ct. at 1797, 1798 (quoting 28 U.S.C. 1658). The Court was interpreting a statutory scheme different from the FTCA, with distinct statutory language. Compare 28 U.S.C. 1658(b)(1) (requiring that civil securities fraud actions be brought within "2 years after the discovery of the facts constituting the violation") with 28 U.S.C. 2401(b) (barring FTCA claims unless presented to the appropriate agency "within two years after such claim accrues"). While the statute interpreted in *Merck* explicitly commences the limitations period when the plaintiff has "discover[ed] the facts constituting the violation" (which the Court construed to include when a reasonably diligent plaintiff would have discovered those

facts, 130 S. Ct. at 1793-1796), the general rule under the FTCA is "a tort claim accrues at the time of the plaintiff's injury," *Kubrick*, 444 U.S. at 120, and the discovery rule is a judicially recognized exception to that general rule. Moreover, unlike the statute at issue in *Merck*, the FTCA constitutes a waiver of sovereign immunity; it must be carefully construed to avoid extending or narrowing the waiver beyond what Congress intended. See *Smith* v. *United States*, 507 U.S. 197, 203 (1993) (citing *Kubrick*, 444 U.S. at 117-118); see also *Federal Aviation Admin.* v. *Cooper*, No. 10-1024 (Mar. 28, 2012), slip op. 5 ("Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires.") (citations omitted).

In any event, the court of appeals' decision does not conflict with the Court's reasoning in *Merck*. To the contrary, the court below articulated the distinction between inquiry notice and accrual: "when either the generally available information or the likely outcome of a reasonably diligent investigation that follows inquiry notice is sufficient to ground a reasonable belief that the plaintiff has been injured and that there is a causal nexus between the injury and some government conduct, accrual begins." Pet. App. 20a. The court of appeals' conclusion that petitioner's claim accrued no later than September 2, 1998, was not because the information available as of that date should have triggered further inquiry, but because "[a]t that time, the plaintiffs reasonably should have known of the FBI's possible connection to the murders" based on the information that was already "generally available." *Id.* at 25a; see also *id.* at 22a ("Because in this case the generally available infor-

mation was sufficient to trigger the accrual of the claim on that date, we need not examine the alternate component of the accrual calculus—the information that further inquiry would have revealed.").

b. Petitioner's contention that the decision below conflicts with *Iqbal*, *supra*, is similarly misplaced. The Court held in *Iqbal* that, to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 556 U.S. at 678 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). In other words, it must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ibid.* *Iqbal* does not address any question pertaining to the timeliness of administrative tort claims, as petitioner appears to concede. See Pet. 17-18. Petitioner instead invokes *Iqbal* under the theory that, because an FTCA plaintiff must file an action in court within six months of the denial of the administrative claim (28 U.S.C. 2401(b)), and because any such suit must be capable of surviving a motion to dismiss, an FTCA claim should not accrue until the claimant has—or would have within six months—enough evidence to survive a motion to dismiss. See Pet. 17-20; accord Pet. 27 (arguing that an FTCA claim does not accrue when "a reasonably diligent plaintiff would have discovered the critical facts sufficient to enable that plaintiff to submit an administrative claim," but must further await the point in time at which a claimant will "within six months thereafter" be able to file a judicial complaint capable of withstanding a motion to dismiss).

Petitioner waived this argument below, which was mentioned in its court of appeals brief only in an

isolated footnote (Pet. C.A. Br. 43 n.24). See, *e.g.*, *Soto-Fonalledas* v. *Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 475 n.2 (1st Cir. 2011) (argument raised only briefly in footnote is waived); *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 19 n.18 (1st Cir. 2010) (same). Accordingly, the court of appeals did not address the issue, and it is not properly presented for this Court's review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).[2]

In any event, the argument is without merit. This Court has never held that the accrual of a plaintiff's FTCA claim is contingent on his ability to file a civil complaint that could survive a motion to dismiss. In *Kubrick*, the Court held that an FTCA claim accrues "when the plaintiff knows both the existence and cause of his injury," 444 U.S. at 113, which may occur before any "awareness by the plaintiff that his injury was negligently inflicted," *id.* at 123. In *Rotella* v. *Wood*, 528 U.S. 549 (2000), a case arising under the Racketeer Influenced and Corrupt Organizations Act, the Court explained that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock" for filing a tort claim, and it quoted the FTCA decision in *Kubrick* in support of that proposition, *id.* at 555-556. Unlike a judicial complaint, an FTCA administrative claim need only provide enough information for the agency to undertake an investigation. See, *e.g.*, *Life Partners Inc.* v. *United States*, 650 F.3d 1026, 1030 (5th Cir. 2011), cert. denied, 132 S. Ct. 1104 (2012); *Skwira* v. *United States*, 344 F.3d 64, 81 (1st Cir. 2003), cert. denied, 542 U.S. 903 (2004); *Blakely* v. *United States*, 276

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[2] The panel dissent mentions *Iqbal* once. Pet. App. 50a. The judicial statements regarding rehearing do not refer to *Iqbal*.

F.3d 853, 864 (6th Cir. 2002); *Burchfield* v. *United States*, 168 F.3d 1252, 1255 (11th Cir. 1999); *Cizek* v. *United States*, 953 F.2d 1232, 1233 (10th Cir. 1992); see also 28 C.F.R. 14.2(a). These "minimal" requirements for an FTCA administrative claim are substantially less rigorous than the requirements for a complaint capable of surviving a motion to dismiss as discussed in *Iqbal*. See *Burchfield*, 168 F.3d at 1255.

Petitioner cites *Kronisch* v. *United States*, 150 F.3d 112, 122 n.5 (2d Cir. 1998), in support of its novel legal rule. See Pet. 18-19. But the footnote in *Kronisch* merely reflects that if a claimant possesses sufficient information to survive a motion to dismiss, the claimant's administrative claim has unquestionably accrued. *Kronisch* says nothing about petitioner's very different proposition that an administrative claim does not accrue absent information sufficient to withstand a motion to dismiss.

Petitioner suggests that notwithstanding *Kubrick* and *Rotella*, it is unfair for an FTCA claim to accrue before a plaintiff can file a complaint capable of surviving a motion to dismiss because allowing for earlier accrual could leave "many valid claimants without any remedy whatsoever." Pet. 19. But as this Court has noted, "statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims." *Kubrick*, 444 U.S. at 125. Indeed, "that is their very purpose." *Ibid.*[3]

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[3] Even if it were advisable to adjust the discovery rule to account for the requirements of filing a civil complaint, petitioner's rule—that an FTCA claim must not accrue before a reasonably diligent claimant could obtain the details necessary to survive a motion to dismiss within six months, Pet. 20—would not follow. An FTCA claimant need not file even his administrative tort claim for two years after his claim accrues.

c. Finally, petitioner incorrectly asserts that the court of appeals' decision conflicts with *Kubrick*, *supra*, "because the court found that the claim accrued prior to the time Petitioner knew the identity of the party who caused the injury." Pet. 21. To the extent this argument is simply that the court of appeals misapplied the legal rule from *Kubrick*, it is incorrect and does not warrant this Court's review. See pp. 9-13, *supra*. To the extent petitioner seeks to add a new accrual requirement, that the link to a governmental cause must include "knowledge of the identity of the government agents involved," Pet. 16, petitioner provides no basis for this additional requirement. "Accrual is based on a plaintiff's knowledge of facts sufficient to give rise to a belief that the government—not any particular agency of the government—caused the injury." *Barrett* v. *United States*, 462 F.3d 28, 40 (1st Cir. 2006), cert. denied, 550 U.S. 936 (2007). In any event, it was reasonably clear before September 2, 1998 that the government agents involved were FBI Agents Connolly and Morris. See Pet. App. 9a, 33a.

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28 U.S.C. 2401(b). He then has six more months from the date of "notice of final denial of the claim" by the agency to begin his civil action. *Ibid.* Thus, even if an agency were to deny an administrative claim the same day it was filed, the claimant would have 2.5 years from the accrual date to file a civil complaint that could survive a motion to dismiss under *Iqbal*. Moreover, any time taken by the agency to investigate the claim or, at the request of the claimant, to hold the claim in abeyance would extend the time the claimant has to file his civil complaint. See Pet. App. 27a. Here, for example, the six-month clock for filing a civil complaint never even started because the FBI had not issued a notice of final denial when petitioner filed its civil complaint. Petitioner instead chose to deem its administrative claim denied under 28 U.S.C. 2675(a), when it had not received a notice of denial within six months of filing its administrative claim. Pet. App. 13a.

3. Petitioner argues that this case presents "an exceptionally important question about the responsibility of the federal government to the public," Pet. 21, and contends that the decision below poses "grievous consequences * * * for the public's ability to hold government agents accountable for wrongdoing," Pet. 27. Petitioner overstates the implications of the decision below. The fact-bound question presented here is the narrow one of whether the court of appeals properly applied established statute-of-limitations principles to the particular circumstances of this case. Indeed, petitioner stresses the specific circumstances of these murders. See, *e.g.*, Pet. 23-24; see also Pet. App. 36a (dissent from panel decision stating that its disagreement with the majority "concerns the legal salience of the 1985 indictment, trial, and acquittal of Jimmy Flynn"); *id.* at 84a (dissent from denial of rehearing en banc, noting that "[t]his case is moored deeply in its facts").

The public undoubtedly has an interest in the larger background of this case, with its allegations of public corruption resulting in murder. But a wealth of publications, including the newspaper articles discussed above and many other media reports, have already disclosed in detail the underlying facts. Published judicial opinions have also provided ample information, both in cases where plaintiffs filed timely claims and ultimately prevailed on the merits of their FTCA cases, see, *e.g.*, *McIntyre* v. *United States*, 545 F.3d 27 (1st Cir. 2008); *Estate of Castucci* v. *United States*, 311 F. Supp. 2d 184 (D. Mass. 2004), and in other FTCA cases like this one where plaintiffs failed to file timely claims, see, *e.g.*, *Barrett*, *supra*; *Rakes* v. *United States*, 442 F.3d 7 (1st Cir. 2006); *Callahan* v. *United States*, 426 F.3d 444 (1st Cir. 2005); *McIntyre* v. *United States*, 367 F.3d 38 (1st

Cir. 2004); *Bennett* v. *United States*, 429 F. Supp. 2d 270 (D. Mass. 2006). The outcome of each of these cases has properly turned on the specific facts and circumstances presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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