No. 13-1249

In the Supreme Court of the United States

ANGEL SANCHEZ, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF RAFAELA SANCHEZ, 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 and under what circumstances the two-year time bar for filing an administrative claim with the appropriate federal agency under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 740 F.3d 47. The memorandum opinion and order of the district court (Pet. App. 23a-28a) is reported at 932 F. Supp. 2d 229.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2014. The petition for a writ of certiorari was filed on April 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA) waives the federal government's immunity to suit by individuals "for injury or loss of property, or personal injury or

death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1). Under the FTCA, any tort claim against the United States is "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 * * * of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, provides individual government employees with immunity from personal liability by permitting substitution of the United States as the defendant if the Attorney General certifies that the employee was acting within the scope of his employment. 28 U.S.C. 2679(b)(1) and (d); see generally *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995). Doctors employed by certain entities that receive federal funding are considered federal employees for such purposes. See 42 U.S.C. 233. Once the United States has been substituted as the defendant, the case proceeds under the FTCA. See 42 U.S.C. 233(g)(1)(A); see also 28 U.S.C. 2679(d)(4).

2. On April 24, 2009, two days after giving birth to her third child, petitioner's wife died at North Shore Medical Center-Salem Hospital of a postpartum hemorrhage. Pet. App. 5a-6a. Dr. Kristen Cotter performed the cesarean delivery. *Id.* at 24a. Dr. Kalinda Dennis performed a subsequent postpartum hysterectomy. *Ibid.* Both treating physicians were employed

by Lynn Community Health Center (LCHC), where petitioner's wife had received prenatal care. *Id.* at 5a. That facility is a federally supported health center, and Drs. Cotter and Dennis are considered federal employees for purposes of the FTCA. *Id.* at 6a, 24a.

At some point before February 2010, petitioner retained legal counsel. Pet. App. 6a. In April 2012, nearly three years after his wife's death, petitioner filed a medical malpractice suit against Dr. Cotter in Massachusetts state court. *Id.* at 6a, 24a. Nine days later, he amended the complaint to add Dr. Dennis. *Id.* at 6a. Petitioner alleged that the treating physicians knew or should have known that his wife had a potentially dangerous medical condition, which required special care in removing the placenta and probably a hysterectomy to minimize the likelihood of a hemorrhage caused by the delivery. *Id.* at 5a. Petitioner also alleged that Dr. Cotter had left the hospital after the delivery, and that a hysterectomy was not performed until after the hemorrhaging began. *Id.* at 5a-6a.

3. The case was removed to federal court, and the United States was substituted as the defendant. Pet. App. 6a. The United States subsequently moved to dismiss for lack of jurisdiction. *Id.* at 24a. The government argued that petitioner had failed to file a claim with the relevant federal agency within two years of accrual, and that the suit was therefore barred by 28 U.S.C. 2401(b). Pet. App. 25a. Petitioner argued, *inter alia*, that the two-year time bar should be equitably tolled because he did not know about the treating physicians' federal-employment status. *Id.* at 26a.

The district court granted the United States' motion and dismissed the case. Pet. App. 23a-28a. The court held that petitioner was not entitled to equitable tolling because he had "failed to present evidence that he made any inquiry at all into the potential status of the defendant doctors as federal employees or that such information was concealed from him or his counsel." *Id.* at 28a.

4. The court of appeals affirmed. Pet. App. 3a-22a. As relevant here, the court began by considering the "long running debate over whether the concept of equitable tolling can be used to delay the running of the timeliness requirements that are conditions to the FTCA's waiver of sovereign immunity." *Id.* at 15a. The court explained that it had "previously opined that the FTCA's timeliness requirements are jurisdictional," but had "nevertheless assumed that equitable tolling can be applied to those deadlines." *Id.* at 16a. The court of appeals noted that this Court's recent decisions suggest that "labeling these deadlines 'jurisdictional' would preclude application of equitable tolling" and that, as a result, "something must eventually give in our circuit's jurisprudence." *Ibid.* The court, however, declined to "definitively unravel this skein." *Id.* at 17a. Instead, the court gave petitioner "the benefit of assuming that equity can toll the running of the FTCA's limitations period if a factual basis for tolling exists." *Ibid.*

The court of appeals then concluded that a factual basis for tolling did not exist. Pet. App. 17a-22a. The court noted that, in a 2002 case, it had "instruct[ed] * * * lawyers handling medical malpractice cases" that they "cannot simply assume without investigation that" a longer state limitations period "controls. In-

stead, they need make inquiry (or, perhaps, simply sue within two years of accrual)." *Id.* at 17a-18a (citing *Gonzalez* v. *United States*, 284 F.3d 281, 291 (1st Cir.)). The court then explained that "'due diligence is a sine qua non for equitable tolling,'" and that "neither inaction born of ignorance nor recklessness in the face of a known risk could provide a basis for establishing diligence given the holding in *Gonzalez*." *Id.* at 18a-19a (citation omitted).

The court of appeals rejected petitioner's suggestion that "any inquiry regarding the employment status of the doctors would have been unavailing." Pet. App. 19a. The court explained that a public website maintained by the United States Department of Health and Human Services (HHS) "would certainly have put them on at least heightened inquiry notice regarding the treating doctors' deemed-federal status"; that "a Lexis or Westlaw search for [LCHC] would have revealed * * * a 2002 FTCA medical malpractice case against another of LCHC's doctors"; that *Gonzalez* had been decided "well before the events in question here"; and that there was "no evidence that a phone call or letter to LCHC inquiring about its (or its doctors') status would have been ignored." *Id.* at 19a-20a. The court thus concluded that "no reasonably diligent lawyer who checked any of these sources of information would have let two years pass without doing much more." *Id.* at 20a.

ARGUMENT

Petitioner contends (Pet. 10-18, 25-29) that the FTCA's two-year time bar for filing an administrative claim with the appropriate federal agency is subject to equitable tolling and that the courts of appeals are split on that question. This Court recently granted

review of the question whether equitable tolling applies in this context. See *United States* v. *June*, cert. granted, No. 13-1075 (June 30, 2014). There is no reason to hold this petition for a decision in that case, however, because *June* will have no impact on the outcome here. Petitioner further contends (Pet. 20-25) that the court of appeals erred in finding that equitable tolling was not warranted on the facts of this case. The court correctly rejected equitable tolling, and its decision does not implicate any conflict among the courts of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 10-18, 25-29) that the FTCA's two-year time bar for filing an administrative claim with the appropriate federal agency is subject to equitable tolling and that the courts of appeals are split on that question. This Court recently granted review in *United States* v. *June*, *supra* (No. 13-1075), to decide "[w]hether the two-year time limit for filing an administrative claim with the appropriate federal agency under the [FTCA] is subject to equitable tolling." There is no need, however, to hold this case for *June*.

If the Court concludes that the FTCA's two-year time bar is not subject to equitable tolling, as the government contends in *June*, then petitioner's claim was properly dismissed. Even if the Court concludes that the FTCA's two-year time bar is subject to equitable tolling, petitioner would still receive no benefit from that ruling because that is what the court of appeals assumed in this case. The court gave petitioner "the benefit of assuming that equity can toll the running of the FTCA's limitations period if a factual basis for tolling exists." Pet. App. 17a. It simply concluded

that no such factual basis existed in this case. *Id.* at 17a-22a. That subsidiary (and fact-intensive) question is not before the Court in *June*. Because *June* will therefore have no bearing on the outcome of this case, there is no need to hold it pending issuance of that decision.

2. Petitioner also contends (Pet. 20-25) that the court of appeals erred in finding that he failed to establish a factual basis for equitable tolling in this case. More specifically, petitioner contends that the court erred in finding that his counsel had not exercised the requisite diligence to warrant tolling, and he briefly suggests that some division among the courts of appeals exists regarding the level of diligence required to uncover the federal status of healthcare providers. That fact-specific issue is not before the Court in *June*, it does not implicate any circuit conflict, and it does not warrant the Court's review.

a. A litigant seeking equitable tolling generally "bears the burden of establishing two elements: (1) *that he has been pursuing his rights diligently*, and (2) that some extraordinary circumstances stood in his way." *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414, 1419 (2012) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Thus, as the court of appeals recognized, "due diligence is a sine qua non for equitable tolling." Pet. App. 19a (quoting *Donahue* v. *United States*, 634 F.3d 615, 629 (1st Cir. 2011), cert. denied, 132 S. Ct. 2375 (2012)). The court correctly held that, if equitable tolling is available at all, it is not available on the facts of this case because petitioner's counsel failed to exercise the requisite level of diligence.

That doctors employed by certain entities that receive federal funding are considered federal employees for FTCA purposes is nothing new. It is "not asking too much of the medical malpractice bar to be aware of the existence of federally funded health centers that can be sued for malpractice only under" the FTCA. *Arteaga* v. *United States*, 711 F.3d 828, 834 (7th Cir. 2013). Indeed, in 2002, "well before the events in question here," the First Circuit "instruct[ed] * * * lawyers handling medical malpractice cases" that they "cannot simply assume without investigation that" a longer state limitations period "controls." Pet. App. 17a-18a, 20a (citing *Gonzalez* v. *United States*, 284 F.3d 281, 291). Rather, they must inquire as to the doctor's status "(or, perhaps, simply sue within two years of accrual)." *Id.* at 17a-18a.

Petitioner's counsel made no such inquiry. They did not access the public HHS website, which would have "put them on at least heightened inquiry notice regarding the treating doctors' deemed-federal status." Pet. App. 19a. They did not do "a Lexis or Westlaw search for [LCHC, which] would have revealed * * * a 2002 FTCA medical malpractice case against another of LCHC's doctors." *Id.* at 19a-20a. And they did not call or write LCHC or the government to inquire about LCHC's or its doctors' federal status. *Id.* at 20a. As the court of appeals concluded, "no reasonably diligent lawyer who checked any of these sources of information would have let two years pass without doing much more." *Ibid.*

b. Petitioner suggests in passing (Pet. 2) that there is some division among the courts of appeals regarding the level of diligence required to uncover the fed-

eral status of healthcare providers. No such conflict is presented here.

No court of appeals has permitted equitable tolling in circumstances where (as here) the plaintiff did nothing to determine the healthcare providers' federal status. Consistent with the decision below, several courts of appeals have rejected requests for equitable tolling in similar circumstances. See, *e.g.*, *Arteaga*, 711 F.3d at 833-835; *A.Q.C.* v. *United States*, 656 F.3d 135, 144-145 (2d Cir. 2011); *T.L.* v. *United States*, 443 F.3d 956, 964 (8th Cir. 2006). Petitioner relies (Pet. 10, 14-15) on *Santos* v. *United States*, 559 F.3d 189 (3d Cir. 2009). In *Santos*, the Third Circuit held that the plaintiff was entitled to equitable tolling of the FTCA two-year time bar. But in that case the plaintiff's counsel ran a public records search on the health center that employed the defendant physicians, conducted "inquiries," reviewed "records," made "other contacts with" the entity's staff, and visited the facility. *Id.* at 200-201; see *id.* at 199-200 (distinguishing cases in which plaintiffs made no inquiry and "a simple investigation could have revealed the critical information").[1] Accordingly, even if there were some disagreement as to what constitutes due diligence in

[1] Petitioner also relies on the Second Circuit's decision in *Phillips* v. *Generations Family Health Center*, 723 F.3d 144 (2013) (cited at Pet. 16), but the court of appeals in that case remanded for the district court to consider whether equitable tolling was warranted without offering any "view as to the ultimate outcome." *Id.* at 155. And *Kokotis* v. *USPS*, 223 F.3d 275 (4th Cir. 2000) (cited at Pet. 13-14), did not involve the "imputed federal status" of doctors (Pet. 12).

this context, no circuit "blesses complete inaction." Pet. App. 21a.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] Moreover, as petitioner acknowledges, HHS now encourages eligible health centers to post a notice on their website and in other locations that informs the public that "[t]his health center is a Health Center Program grantee under 42 U.S.C. 254b, and a deemed Public Health Service employee under 42 U.S.C. 233(g)-(n)." Pet. 10 n.1. Accordingly, any purported conflict may be of limited prospective significance.