No. 13-1234

In the Supreme Court of the United States

JEROME AUGUTIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the United States' sovereign immunity from tort suits only in cases where a private person in like circumstances would be liable under applicable state law. 28 U.S.C. 1346(b)(1), 2674. The FTCA requires a claimant to present his claim to the appropriate agency within two years of the date that the claim accrues, and to bring suit in federal court within six months after denial of his claim. 28 U.S.C. 2401(b). The question presented is whether 28 U.S.C. 2401(b) preempts the Illinois statute of repose for medical malpractice claims, 735 Ill. Comp. Stat. Ann. 5/13-212(a) (West 2011), which extinguishes tort liability four years after a defendant's last relevant act or omission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 732 F.3d 749. The opinion of the district court (Pet. App. 12-16) is not published in the *Federal Supplement*.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2013. A petition for rehearing was denied on December 9, 2013 (Pet. App. 17). On February 28, 2014, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including April 10, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the sovereign immunity of the United States and creates a cause of action for certain torts of government employees acting within the scope of their employment, "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); see 28 U.S.C. 2674.

Before bringing a tort suit against the United States, a claimant "shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). The statute further provides, however, that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." *Ibid.*

The FTCA "forever bar[s]" a tort claim

> 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 a veteran who underwent reconstructive surgery on his foot at a Department of Veterans Affairs hospital in Hines, Illinois on July 14, 2006. Due to medical complications, doctors amputat-

ed petitioner's leg below the knee on September 22, 2006. Pet. App. 2.

On July 11, 2008, petitioner filed a timely administrative complaint with the Department of Veterans Affairs under the FTCA, alleging that the amputation resulted from negligent medical treatment. Pet. App. 1-2. On September 27, 2010, the agency denied petitioner's claim, instructing petitioner that he had six months to request reconsideration of the decision or to file suit in district court. *Id.* at 2.

On March 21, 2011, petitioner sought reconsideration. Pet. App. 2. On October 3, 2011, the agency informed petitioner that it had not yet completed reconsideration, but that "[b]ecause the six-month period [during which no lawsuit may be filed] has passed, suit can now be filed in Federal district court, or, additional time can be permitted to allow the agency to reach a decision." *Ibid.* (brackets in original). The agency's letter noted that "FTCA claims are governed by a combination of Federal and state laws" and that "[s]ome state laws may limit or bar a claim or law suit." *Ibid.* (brackets in original). On October 6, 2011, the agency denied petitioner's request for reconsideration. *Id.* at 3.

3. On April 3, 2012, petitioner brought suit against the United States in district court under the FTCA. Pet. App. 12. The United States moved to dismiss the suit, on the ground that Illinois's statute of repose, 735 Ill. Comp. Stat. Ann. 5/13-212(a) (West 2011), requires a medical malpractice claim to be brought within four years of the date that the alleged malpractice occurred. Pet. App. 3.

The district court granted the motion, explaining that the FTCA "merely waives sovereign immunity to

the same extent a private person would be liable." Pet. App. 15; see *id.* at 12-16. Because petitioner could not sue a private party in 2012 for malpractice that occurred in 2006, the court reasoned, petitioner could not sue the United States under the FTCA. See *id.* at 15. The court noted that the Supreme Court of Illinois has "clearly described" the statute at issue as a statute of repose, which "extinguishes the action itself after a fixed period of time, regardless of when the action accrued," rather than as a statute of limitation, which governs the time within which a suit may be commenced after the cause of action has accrued. *Id.* at 15-16.

4. The court of appeals affirmed. Pet. App. 1-11. The court explained that the FTCA imposes several "procedural hurdles" on claimants, including the requirement that claims be presented "to the appropriate agency within two years of the date that the claims accrue." *Id.* at 4 (citing 28 U.S.C. 2401(b)). The court explained, however, that a "claimant who clears these procedural hurdles is not automatically free to recover under the FTCA" because the statute "incorporates the substantive law of the state where the tortious act or omission occurred." *Ibid.* (citation omitted).

The court of appeals noted that Illinois law has a "bifurcated" provision governing medical malpractice actions, providing that no such action

> shall be brought more than 2 years after the date on which the claimant knew . . . of the existence of the injury . . . but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

Pet. App. 5 (emphasis omitted) (quoting 735 Ill. Comp. Stat. Ann. 5/13-212(a) (West 2011)). The court explained that this provision is "an excellent example of how statutes of limitations and statutes of repose operate": the two-year provision "is a statute of limitations, because its running is contingent on accrual—plaintiff must have 'discovered' his injury." *Id.* at 6 (citation omitted). "The second part, by contrast, is a statute of repose, because it begins to run regardless of 'discovery' and sets an outer limit within which a cause of action must be brought." *Ibid.* (internal quotation marks and citation omitted).

The court of appeals explained that "Illinois courts have consistently construed the four-year" statute of repose in Section 13-212 "as a substantive limit on liability, not a procedural bar to suit." Pet. App. 6. Because the FTCA "incorporates the substantive law of the state where the tortious act or omission occurred," *id.* at 4 (citation omitted), the court therefore held that the four-year statute of repose applied to petitioner's claim, *id.* at 9. In reaching that conclusion, the court "join[ed] two of [its] sister circuits, which have also determined that 'an FTCA claim does not lie against the United States where a statute of repose would bar the action if brought against a private person in state court.'" *Ibid.* (quoting *Anderson* v. *United States*, 669 F.3d 161, 165 (4th Cir. 2011), and citing *Smith* v. *United States*, 430 Fed. Appx. 246, 246-247 (5th Cir. 2011) (per curiam)).

The court of appeals rejected petitioner's contention that the FTCA's own procedural scheme preempts the Illinois statute of repose, noting that the FTCA does not expressly or impliedly preempt state substantive law, but rather "expressly incorporates

it." Pet. App. 8. The court also noted that "here there is no conflict between state and federal law because it was possible for [petitioner] to have satisfied the requirements of both regimes," in that petitioner was free to bring suit under 28 U.S.C. 2675(a) six months after filing his administrative claim. Pet. App. 8. "In other words, [petitioner] had approximately eighteen months to file suit while complying with both the FTCA procedures and the Illinois statute of repose." *Ibid.*

The court of appeals also rejected petitioner's contention that the United States was equitably estopped from invoking the statute of repose because the letters from the agency caused petitioner to believe he could delay filing suit in district court. Pet. App. 10. The court found that even if Illinois recognized an estoppel exception to the statute of repose, and even if equitable estoppel were available against the United States, petitioner could not show that he relied on the agency's letters to his detriment. See *id.* at 10-11. "[T]he Department's first letter to [petitioner] was sent on September 27, 2010—i.e., shortly *after* the four-year repose period had elapsed," so that "by the time [petitioner] received anything to rely on, his claim had already been extinguished." *Id.* at 11.

ARGUMENT

The court of appeals correctly determined that Illinois's substantive four-year statute of repose for medical malpractice actions applies to petitioner's FTCA claim against the United States. That decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that petitioner's FTCA claim is barred by the substantive law of Illinois. See Pet. App. 3-11.

Congress has placed several conditions on the waiver of sovereign immunity of the United States in the FTCA. The FTCA establishes a generally applicable time limit, requiring claims to be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b). After six months, the plaintiff may deem the claim denied and proceed to district court. 28 U.S.C. 2675(a). If the plaintiff chooses to wait for a final disposition of his claim, he must bring suit "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). Because the FTCA establishes the applicable time limits for statute-of-limitations purposes, otherwise applicable state statutes of limitations are preempted. See, *e.g.*, *Richards* v. *United States*, 369 U.S. 1, 13 n.28 (1962); *Poindexter* v. *United States*, 647 F.2d 34, 36-37 (9th Cir. 1981).

As the court of appeals below correctly recognized, satisfaction of those procedural requirements is necessary, but not sufficient, to maintain a tort suit against the United States. Pet. App. 4. The FTCA provides that the United States is liable in tort only "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, and only to the extent that "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). The substantive law of each State determines whether the United States is liable. *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994). Thus, a

plaintiff who fully complies with the FTCA's administrative requirements nonetheless cannot recover against the United States if the relevant State would not allow suit against a private party on the same facts.

Here, the relevant substantive state law includes Section 13-212 of the Illinois Code of Civil Procedure, which provides in relevant part that "no action for damages for injury or death against any physician * * * or hospital * * * shall be brought * * * more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." 735 Ill. Comp. Stat. Ann. 5/13-212(a) (West 2011). Illinois courts have consistently construed that four-year limitation as a substantive bar to liability, rather than a procedural bar to suit. See, *e.g.*, *Orlak* v. *Loyola Univ. Health Sys.*, 885 N.E.2d 999, 1003 (2007); *Cunningham* v. *Huffman*, 609 N.E.2d 321, 325 (1993); see also *CTS Corp.* v. *Waldburger*, No. 13-339, 2014 WL 2560466 (June 9, 2014), slip op. 15 ("A statute of repose can be said to define the scope of the cause of action, and therefore the liability of the defendant."). Because the FTCA incorporates state substantive law and because the four-year time limit in Section 13-212(a) is substantive, the court of appeals correctly concluded that it applies to petitioner's FTCA suit against the United States. Pet. App. 9.

Petitioner complains (Pet. 20-21) that under this reasoning, the outcome of an FTCA suit against a federal employee, acting within the scope of his employment, will depend "not on the clear provisions enacted in the FTCA," but instead on where a claimant resides and under which state's tort law a claim is

brought. Far from being an anomaly, however, that result follows directly from Congress's choice to permit a tort action against the United States only under circumstances in which a private person would be liable under the relevant state law for the same conduct. 28 U.S.C. 1346(b)(1), 2674.

2. Contrary to petitioner's contention (Pet. 9, 13-21), the decision of the court of appeals does not conflict with the decision of any other court of appeals. Only one other court of appeals has addressed this question in a published opinion, and it reached the same conclusion as the court of appeals here, determining that, "[b]ecause statutes of repose are substantive limitations on liability, an FTCA claim does not lie against the United States where a statute of repose would bar the action if brought against a private person in state court." *Anderson* v. *United States*, 669 F.3d 161, 164-165 (4th Cir. 2011);[1] accord

[1] Because the court of appeals in *Anderson* viewed the distinction between statutes of repose and statutes of limitations as dispositive, the court certified to the Court of Appeals of Maryland the question of how to classify the Maryland statute at issue there. 669 F.3d at 171. The Maryland court answered the certified question by stating that the time bar was a statute of limitations, so the Fourth Circuit ultimately concluded that the state time limit was "inapplicable" to the FTCA claim at issue there. *Anderson* v. *United States*, 474 Fed. Appx. 891, 891-892 (4th Cir. 2012) (per curiam); see *Anderson* v. *United States*, 46 A.3d 426 (Md. 2012). Contrary to petitioner's suggestion (Pet. 17), the Fourth Circuit's unpublished opinion did not "overrule[]" its earlier published opinion on the distinction between statutes of limitations and statutes of repose for purposes of the FTCA. Instead, the court applied that distinction and found the state time bar preempted *because* it was a statute of limitations rather than a statute of repose. See *Anderson*, 474 Fed. Appx. at 892. In this case, the Illinois courts

Huddleston v. *United States*, 485 Fed. Appx. 744, 745 (6th Cir. 2012) ("Plaintiffs must satisfy [Section] 2401(b) in addition to—rather than in place of—meeting substantive state tort-law requirements."), cert. denied, 133 S. Ct. 859 (2013); *Smith* v. *United States*, 430 Fed. Appx. 246, 246-247 (5th Cir. 2011) (per curiam) (affirming dismissal of FTCA medical malpractice action based on Texas statute of repose).

Petitioner points (Pet. 15-16) to *Poindexter*, 647 F.2d at 35-37, in which the Ninth Circuit considered a worker's compensation statute requiring that any suit based on a claim for personal injuries by an employee who had received worker's compensation benefits be filed within one year of occurrence of the injuries. The Ninth Circuit in that case, however, specifically held that this provision was a state statute of limitations and therefore was *not* "substantive" (unlike the provision at issue here). *Id.* at 36.

The Sixth Circuit's unpublished disposition in *Kennedy* v. *United States Veterans Administration*, 526 Fed. Appx. 450 (2013), is likewise inapposite. But cf. Pet. 16-17. There, the court of appeals concluded that under Ohio law, the "[p]laintiff's discovery of his injury within the four-year repose period vested him with a substantive right of action that could not be extinguished" by the statute of repose. *Kennedy*, 526 Fed. Appx. at 455. Consequently, the court stated, "the statute of repose's bar is not at play here and we need not decide whether it is preempted by the FTCA." *Ibid.*

3. This case likewise presents no conflict with *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1947 (2013), which

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have clearly held that the relevant statutory provision is a substantive statute of repose. Pet. App. 6.

held that the Federal Employees' Group Life Insurance Act of 1954, Pub. L. No. 83-598, 68 Stat. 736, preempted a provision of a Virginia statute addressing the situation in which an employee's marital status has changed but he failed to update his life-insurance beneficiary designation prior to death. But cf. Pet. 9, 21-22. There, the Court reiterated that "[s]tate law is pre-empted 'to the extent of any conflict with a federal statute,'" a circumstance that occurs "when compliance with both federal and state regulations is impossible, * * * or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'" *Hillman*, 133 S. Ct. at 1949-1950 (citations omitted).

Illinois's statute of repose does not conflict with 28 U.S.C. 2401(b), because the laws address two different issues. Section 13-212 addresses a substantive prerequisite for making out a medical malpractice cause of action in Illinois, while Section 2401(b) is a procedural condition on the government's waiver of sovereign immunity to suit. "Against this backdrop, [Section] 2401(b) cannot relieve plaintiffs from the substantive requirements of state tort law; it acts merely as a limitation on the federal governments' waiver of sovereign immunity." *Huddleston*, 485 Fed. Appx. at 745. Cases finding state statutes of limitation to be preempted by 28 U.S.C. 2401(b) in FTCA actions are therefore inapposite. See Pet. 25-26 (citing, *inter alia*, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 368-369 (1977) (application of State's one-year statute of limitations held unreasonable when applied to agency that brings enforcement actions)).[2]

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[2] *Hardin* v. *Straub*, 490 U.S. 536 (1989), on which petitioner also relies (Pet. 25-26), involved the inapposite question of when it is

Nor did Section 13-212 stand as an obstacle to meaningful agency consideration of petitioner's FTCA claim before he filed suit. Petitioner argues (Pet. 23) that the federal purpose behind Section 2401(b) is to encourage the agency's resolution of claims without invoking civil litigation processes. The FTCA, however, also provides that if an agency does not decide a claim within six months, the claimant may cut short the agency's administrative consideration and instead file suit in district court. 28 U.S.C. 2675(a). In this case, that six-month period elapsed in January 2009, after which petitioner still had 18 months to file his FTCA action in court before the Illinois statute-of-repose period expired. Cf. *Stanley* v. *United States*, 321 F. Supp. 2d 805, 806, 808-809 (N.D. W. Va. 2004) (finding no conflict between FTCA pre-filing requirements and "more demanding" state law requiring plaintiff to file certificate of merit before suing for professional medical negligence, where "there is nothing to prevent a plaintiff from complying with both requirements" and the two laws serve different purposes).

4. This Court recently denied a petition for a writ of certiorari raising the same question presented. See *Huddleston* v. *United States*, 133 S. Ct. 859 (2013). The same result is warranted here.

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appropriate to apply a state provision tolling the limitations period for prisoners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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