No. 13-1075

In the Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
MARLENE JUNE, CONSERVATOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CLINIC FOR LEGAL ASSISTANCE TO SERVICEMEMBERS AND VETERANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The Clinic for Legal Assistance to Servicemembers and Veterans (CLASV) is dedicated to providing active-duty members of the armed forces, their families, and veterans with free legal representation in matters of clear injustice or where they cannot retain counsel without undue hardship. CLASV was established in 2004 at George Mason University School of Law, and has assisted hundreds of servicemembers, their families, and veterans in matters involving civil litigation, family law, landlord-tenant disputes, military law, contract issues, administrative law, and bankruptcy in federal and state forums. The services rendered by CLASV have a direct bearing on the readiness, quality of life, and morale of the armed forces and their families.

In 2006, CLASV students were *amici curiae* in the only brief from the law school community that supported, against constitutional attack, the Solomon Amendment. That Amendment provides an incentive for law schools to allow recruiters from the military on campus. It was upheld by a unanimous decision of this Court. *See Rumsfeld v. Forum for*

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief.

Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).

CLASV has received written support and recognition from the President of the United States, United States Senators, a United States Congressman, the General Counsel of the Department of Defense, the Judge Advocate General of the Army, the Staff Judge Advocate at Marine Corps Base Quantico, and all five legal assistance policy chiefs of the armed forces. CLASV has been featured in essays appearing in the *National Law Journal*, *Business Law Today*, and the *Richmond Times-Dispatch*, and in articles in the *Washington Post*, the *Fairfax Times*, the *Legal Times*, *Stars and Stripes*, and the *Los Angeles Daily Journal*.

Pursuant to its organizational mission, CLASV assists servicemembers, their families, and veterans with the investigation and presentation of administrative claims under the Federal Tort Claims Act (FTCA). In CLASV's experience, servicemembers and their families often encounter multiple and profound difficulties in meeting the FTCA's two-year deadline for presenting administrative claims. Many of these difficulties—some of which are unique to the Military Health System (MHS) and military culture—implicate, directly, the equitable tolling doctrine that is at issue in this case. CLASV accordingly submits this brief in support of Respondent to describe the limited but critical role that the equitable tolling doctrine plays

in protecting the rights and interests of military families.

SUMMARY OF ARGUMENT

In the United States, the MHS operates a health care delivery system that includes 41 military hospitals and hundreds of military clinics serving active military, veterans, and their dependents. The MHS also supports a network of private sector health care providers under its health insurance system, Tricare. Overall, the MHS serves approximately 9.6 million active-duty servicemembers, veterans, and their eligible family members and survivors. With a budget that exceeds $50 billion, the MHS is one of the largest health systems in the nation. *See* Fact Sheet: Overview of the Department of Defense's Military Health System; *see also* Final Report to the Secretary of Defense, Military Health System Review, p. 2 (August 2014).

Due to the structure and incentives of military insurance plans, such as Tricare, military families find it advantageous to use the MHS for care and treatment. Unfortunately, MHS care is often sub-standard—especially in maternity care and surgery. *See* Sharon LaFraniere and Andrew W. Lehren, *In Military Care, a Pattern of Errors but Not Scrutiny*, N.Y. Times (June 28, 2014) ("[B]y several measures considered crucial barometers of patient safety, the military system has consistently had higher than

expected rates of harm and complications in two central parts of its business – maternity care and surgery.").

To that end, a recent comprehensive review by the Department of Defense (DoD) confirmed instances of substandard care, particularly in maternity care and surgery. *See* Fact Sheet: The Department of Defense's 90-Day Review of the Military Health System. The DoD found that "on several specific measures (to include postpartum hemorrhage and undefined neonatal trauma), the MHS is performing below the [National Perinatal Information Center] benchmarks" and that "[t]he surgical morbidity (surgical complications) rate was statistically significantly below average in eight of 17 participating [military treatment facilities] in 2013." *Id.*; Final Report to the Secretary of Defense, Military Health System Review, pp. 104, 111 (August 2014).

Those who receive substandard care from military hospitals and clinics often lack ready access to lawyers and can be unaware of their rights. Even with assistance from CLASV's members, the information needed to substantiate the existence and value of a claim is hard to acquire. Healthcare claims, in particular, present challenges because information on treatment is often in the possession of the same hospitals and clinics that are alleged to have caused an injury. The military's culture of respect for the chain of command and, sometimes

and unfortunately, misinformation, provides additional hurdles as well.

These challenges in obtaining accurate, complete, and relevant information substantiating potential claims implicate the equitable tolling doctrine that is stage center in this case. While the availability of equitable tolling under the FTCA is a matter of debate between the parties here, there is no debate about the benefits that the doctrine confers for those who must submit FTCA claims, including the servicemembers and their families that CLASV represents.

ARGUMENT

A. Servicemembers And Their Families Face Challenges In The Administrative Claims Process When Pursuing Remedies For Substandard Care.

The FTCA 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).

The general rule under the FTCA is that a tort claim accrues at the time of the plaintiff's injury. *United States v. Kubrick*, 444 U.S. 111, 120 (1979). However, where a plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, the "'diligence-discovery rule of accrual'" applies. *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 177 (2d Cir. 2008) (quoting *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998)); *see also Kubrick*, 444 U.S. at 120 n.7 (noting that a number of Circuits have applied the discovery rule to medical malpractice claims under the FTCA). Under this rule, "'accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause.'" *Valdez*, 518 F.3d at 177 (quoting *Kronisch*, 150 F.3d at 121).

In circumstances involving medical negligence, therefore, once an injury and its cause are discovered, the FTCA's two-year limitations period for presenting an administrative claim begins to run. To initiate the claims process, a claimant must execute a Standard Form (SF) 95 and present a claim for money damages in a sum certain to the responsible federal agency. 28 C.F.R. § 14.2. Unfortunately, servicemembers and their families can encounter profound difficulties in meeting the two-year deadline to submit a claim.

First, there is a lack of awareness among servicemembers' families that the claims process

even exists as a requirement for obtaining a recovery. In CLASV's experience, despite efforts to publicize the claims process, servicemembers' families often do not learn of the process until the two-year limitations period already has begun.

Second, there are inherent challenges to military life that inhibit the claims process, even where the families are aware of the process. Servicemembers' families frequently have only one parent to manage a busy household, leaving little time to tackle the claims process. *See* The White House, Strengthening Our Military Families, Meeting America's Commitment, p. 7 (January 2011) ("More than 700,000 children have experienced one or more parental deployment. Currently, about 220,000 children have a parent deployed."). If the head-of-household is the family member who has sustained the injury, these issues are compounded. An injured parent left to care for the family while a loved one is on active-duty, possibly thousands of miles away, faces considerable time management issues—the burden of the claims process only adds to these issues. *Id.* As a result, in CLASV's experience, claimants frequently do not come forward until much of the statutory period has run.

Third, assuming that the decision is made to tackle the claims process, there are added complications in completing the required form. While the claims process is a fair and equitable one, the form requires specific foundational information

supporting the claim (including possible witnesses) and a representation about the claim's economic value. For personal injury claims, the information needed includes "a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred." The process for acquiring the needed information therefore takes additional time, with the statutory clock continuing to run.

Indeed, with medical claims specifically, the access to relevant information for servicemembers' families (and those who assist them) is daunting. To begin with, medical reports bearing on the existence of a claim are often difficult to come by, even when claimants employ the utmost diligence. According to the DoD's recent review of the MHS, a survey on patient safety culture revealed that "[f]ewer than 30 percent of staff actively reports patient safety events" which "puts DoD within the 10th percentile (underperforming) for patient safety reporting when compared to the . . . national average." Final Report to the Secretary of Defense, Military Health System Review, pp. 7, 179 (August 2014). Media attention has highlighted these systemic reporting problems in the MHS. *See* Sharon LaFraniere and Andrew W. Lehren, *In Military Care, a Pattern of Errors but Not*

Scrutiny, N.Y. Times (June 28, 2014) ("[A] pilot study by the Pentagon last year found that nearly half the patients whose files were reviewed at a major military hospital had been harmed at least once. The study suggested 99 percent of harm at that hospital was not reported by medical workers.").

Some of the reporting problems also emanate from certain characteristics of the military culture. In assisting military personnel and their families, CLASV's members have observed an intense culture of respect for the chain of command within the military, including within the MHS. Reporting incidents of wrongdoing by superiors could be perceived as insubordination; therefore, staff may be hesitant to file reports containing the information necessary for administrative claims. Notably, in reviewing comments obtained from hospital staff at town hall meetings, the DoD found that at least one staff member at multiple facilities "stated that they felt they would be retaliated against for speaking up regarding reporting errors and events." Final Report to the Secretary of Defense, Military Health System Review, pp. 187-88 (August 2014); *see also* Sharon LaFraniere and Andrew W. Lehren, *U.S. Military Hospitals Are Ordered to Improve Care, Access and Safety*, N.Y. Times (Oct. 1, 2014) ("[T]he study released Wednesday found that some military medical workers are afraid to report safety problems for fear of retribution, raising the possibility that

lapses or mistakes in treatment have gone unnoticed.").

Moreover, even where servicemembers' families are able to obtain essential information on their claims and diligently pursue their rights, additional obstacles may prevent them from presenting a timely claim. In particular, servicemembers' families can be subject to misinformation and bureaucratic mishap. When wrongdoing is suspected in the sustaining of an injury at a military hospital, the potential claimant or their families frequently will seek guidance from medical personnel. In such cases, they may receive faulty information on the claims process, make decisions based on that misinformation, and miss out on an opportunity to seek appropriate relief.

A contributing factor to the dissemination of false information is, once again, specific to the military culture. CLASV's members have observed that, far too often, military personnel and their families are told the untruth that "you can't sue the Government." That refrain is echoed even by military personnel within the MHS. Consequently, this culture of misinformation can further delay potential FTCA claimants who are diligently pursuing their rights but already have faced delays in obtaining information essential to their claims.

In short, although the two-year window for submitting an administrative claim under the FTCA

seems adequate in the abstract, a number of factors can combine to make a timely submission impractical or even impossible. To be sure, that is not always the case, but when it is, and there has been no lack of diligence, the doctrine of equitable tolling can have a material and beneficial impact.

B. Equitable Tolling Can Be Critical To Preserving Administrative Claims Under The FTCA.

"Equitable tolling" is "a doctrine that pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (internal quotation marks omitted); *see also Valdez*, 518 F.3d at 182 ("Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations 'if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.'" (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990))). Equitable tolling differs from the delayed discovery accrual principle noted above in that "the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Cada*, 920 F.2d at 451.

Although it can be implicated, fraudulent concealment is not essential to equitable tolling. Equitable tolling "'does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing.'" *Valdez*, 518 F.3d at 182 (quoting *Cada*, 920 F.2d at 451); *see also Santos ex rel. Beato v. United States*, 559 F.3d 189, 203 (3d Cir. 2009) ("affirmative misconduct is not required to find that [plaintiff] exercised due diligence sufficient for equitable tolling to apply"). The relevant question for equitable tolling "'is not the intention underlying the defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action.'" *Valdez*, 518 F.3d at 183 (quoting *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004)).

The equitable tolling doctrine, at present, is utilized by FTCA claimants and relied on by courts. Thus, courts have applied equitable tolling to preserve claims where, despite all reasonable diligence, potential claimants are unable to obtain information vital to a timely submission of an FTCA administrative claim. Specifically, courts have provided the benefits of equitable tolling where claimants are unable to obtain medical records from military hospitals despite repeated requests.

In *Aziz ex rel. Azizi v. United States*, for example, the district court applied equitable tolling to a claim of negligent pre-natal care at a military

hospital. 338 F. Supp. 2d 1057 (D. Neb. 2004). "Of particular significance" to the court was "the fact that plaintiff ha[d] shown that she attempted to obtain medical records and that records were not provided to her." *Id.* at 1062; *see also Gess v. United States*, 909 F. Supp. 1426, 1441-42 (M.D. Ala. 1995) (relying on equitable tolling to deny summary judgment on a claim for medical malpractice, finding "of great importance the fact that the [Air Force Office of Special Investigations] never informed [the plaintiff] of its finding" on malpractice at the hospital).

Additionally, courts have invoked equitable tolling in cases where claimants were given misinformation about the FTCA claims process. In *Bartus v. United States*, for example, the district court held that the FTCA limitations period was equitably tolled because the claimant acted on misinformation given by a benefits counselor. 930 F. Supp. 679, 682 (D. Mass. 1996). The claimant intended to present an FTCA claim, but, heeding the benefit counselor's instructions, filled out a form for disability benefits. *Id.* at 680. The court acknowledged that there was no evidence that the benefits counselor had engaged in affirmative misconduct, but held that "[a] claimant need not necessarily show affirmative misconduct to avail himself of equitable tolling; rather, he must show that failure to meet a filing deadline was, in a phrase, 'out of his hands.'" *Id.* (quoting *Kelley v.*

N.L.R.B., 79 F.3d 1238, 1248 (1st Cir. 1996)). According to the court, "it would be distinctly unfair to allow this bureaucratic snafu to foreclose plaintiff's claim." *Id.*

These examples are by no means exclusive. Rather, the tolling doctrine is applied in a variety of fact patterns when equity and fairness warrant it. *See, e.g.*, *Glarner v. United States, Dep't of Veterans Admin.*, 30 F.3d 697, 702 (6th Cir. 1994) ("[W]e hold that the statute was equitably tolled from the point at which the VA failed to furnish Glarner with an SF95 and failed to inform him of the need to file one."); *Jackson v. United States*, 488 F. Supp. 2d 191, 196 (N.D.N.Y. 2007) ("[T]his Court finds that the statute was equitably tolled starting at the time when the VA failed to inform Plaintiff of the proper procedure and failed to provide the proper (SF95) form when it sent Plaintiff the . . . request for further information for his benefits claim."); *Casey v. United States*, 161 F. Supp. 2d 86, 95 (D. Conn. 2001) (applying equitable tolling where "no VA employee apprised plaintiff of the procedures he would have to follow to file a tort claim against the [G]overnment, even though plaintiff discussed the possibility of filing a tort action with his counselors").

In sum, as shown by these exemplar cases, when exceptional fact patterns arise, equitable tolling prevents "distinctly unfair" results from befalling servicemembers and their families who

have FTCA claims but are unable to timely pursue them for reasons beyond their control.

C. Equitable Tolling Should Be Preserved For FTCA Claims As A Matter Of Sound Policy.

The FTCA was enacted to provide a fair and just process for preserving the rights of individuals who have meritorious claims against the Government. Indeed, Congress specifically designed the FTCA claims process "to be 'unusually protective' of claimants." *Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)); *see also Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of [G]overnment activities[.]"). The doctrine of equitable tolling furthers this protective purpose. As the cases discussed previously serve to underscore, the doctrine plays a small but vital role in a narrow range of fact patterns to help protect claimants and allow recovery where the FTCA provides for it.

While the Government argues that the FTCA's two-year statute of limitations needs to be applied absolutely, and without recognition of equitable tolling, CLASV strongly opposes the Government's position. There is no express indication in the FTCA's limitations provision that

equitable tolling cannot be applied. The Government adopts that position only by implication and inference from language that does not refer to tolling at all.

Nor is there any perceptible or quantifiable reason that equitable tolling should not be applied. The doctrine aligns with the FTCA's protective goals. And, there is no indication that the application of the doctrine in those cases where it is warranted has led to any wholesale assault on the public fisc. On the contrary, the federal courts have applied the doctrine carefully, and only where the record unequivocally supports it. *See, e.g.*, *Barry v. Mukasey*, 524 F.3d 721, 724-25 (6th Cir. 2008) (refusing to invoke equitable tolling to excuse a lack of diligence); *Ryan v. United States*, 534 F.3d 828, 832 (8th Cir. 2008) (same); *Gonzalez v. United States*, 284 F.3d 281, 291-93 (1st Cir. 2002) (same).

By the same token, however, the equitable tolling doctrine, when applicable, is of material benefit to servicemembers and their families who, despite their best efforts, cannot present a timely claim. The case-by-case application of the doctrine thus should be retained to help servicemembers and their families receive the benefits intended by the claims process, rather than being burdened with the hardships that denial of a meritorious claim portends.

CONCLUSION

For the reasons noted, *amicus* respectfully urges this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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