No. 14-326

# In the Supreme Court of the United States

LAWRENCE M. YACUBIAN, 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 a district court lacks jurisdiction over a claim asserted under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, if the Act's intentional-tort exception, 28 U.S.C. 2680(h), applies to that claim.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 750 F.3d 100. The opinion of the district court (Pet. App. 22a-35a) is reported at 952 F. Supp. 2d 334.

## JURISDICTION

The judgment of the court of appeals was entered on April 30, 2014. A petition for rehearing was denied on June 25, 2014 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on September 22, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 1346(b) of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, provides a limited waiver of the United States' sovereign immun-

ity from suit by vesting "the district courts * * * [with] exclusive jurisdiction" over certain tort claims against the United States. 28 U.S.C. 1346(b)(1). The FTCA further provides, however, that "[S]ection 1346(b) * * * shall not apply" to "[a]ny claim" identified in any of Section 2680's enumerated exceptions. 28 U.S.C. 2680.

As relevant here, Section 2680(h) excepts from the FTCA "[a]ny claim arising out of" 11 specified intentional torts, including "malicious prosecution" and "abuse of process." 28 U.S.C. 2680(h). Congress limited the intentional-tort exception, however, by adding a proviso that excludes from the exception's scope certain intentional torts by an "investigative or law enforcement officer[]," which the proviso defines to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.* More specifically, the law-enforcement proviso limits the exception by stating "[t]hat, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 U.S.C. 2671 to 2680] and section 1346(b) of [Title 28] shall apply to any claim arising * * * out of" six of the exception's intentional torts, including "malicious prosecution" and "abuse of process." *Ibid.* Malicious-prosecution and abuse-of-process claims are thus cognizable under the FTCA only when they are based on the acts or omissions of "investigative or law enforcement officers."

2. Petitioner, a former scallop fisherman, asserts malicious-prosecution and abuse-of-process claims arising from civil enforcement proceedings brought against him by the enforcement arm of the National

Oceanic and Atmospheric Administration (NOAA), a component of the Department of Commerce (Department). Petitioner filed his tort claims under the FTCA after reports by the Department's Office of the Inspector General (OIG) and a "special master" appointed by the Secretary of Commerce identified government abuses in the enforcement action against petitioner. See Pet. App. 10a-13a.

a. In December 1998, Coast Guard officers observed petitioner's vessel, the *F/V Independence*, in an area in which fishing was prohibited. Pet. App. 4a. After determining from a satellite-based monitoring system known as Boatracs that the vessel appeared to be engaged in prohibited fishing, the officers approached and boarded petitioner's vessel to investigate. *Ibid.* In response to the officers' questions, petitioner stated an estimate of the number of scallops that he was carrying on his ship, which was less than that determined by the officers. *Id.* at 4a-5a.

In June 2000, a NOAA Enforcement Attorney issued a "Notice of Violation and Assessment" and a "Notice of Permit Sanctions" that included two charges of fishing in a closed area and one charge of making a false statement to a Coast Guard officer about the number of scallops on board. Pet. App. 5a. In December 2001, after an evidentiary hearing, an Administrative Law Judge upheld the charges against petitioner, imposed $250,000 in civil penalties, and permanently revoked petitioner's fishing permits. *Id.* at 7a-8a.

One of the disputed issues at the hearing was the reliability of the Boatracs system that the Coast Guard used to determine that petitioner was fishing in a closed area. Pet. App. 5a-6a. Petitioner planned to call Lieutenant Peter Hanlon, a state environmental

police officer, as a witness to support petitioner's contention that the Boatracs system was inaccurate. *Id.* at 6a. According to petitioner, Lieutenant Hanlon initially agreed to testify voluntarily to that effect. *Ibid.* Hanlon did submit a written report on his findings, but he declined to testify in person at the hearing unless compelled by subpoena. *Id.* at 6a-7a & n.2. Petitioner alleges that NOAA Special Agent Andrew Cohen contacted Lieutenant Hanlon's supervisors and pressured them to prevent Hanlon from testifying without a subpoena. *Id.* at 6a, 18a n.13. Cf. *id.* at 6a n.1.

On judicial review, a district court upheld the agency's decision on the two unlawful-fishing counts but set aside the false-statement charge and vacated the $250,000 civil penalty and the revocation of petitioner's fishing permits. *Lobsters, Inc.* v. *Evans*, 346 F. Supp. 2d 340, 345, 347, 349 (D. Mass. 2004). The court remanded the matter to the agency "for *de novo* reconsideration of civil penalties and permit sanctions" for petitioner's unlawful-fishing violations. *Id.* at 349.

In June 2005, after the case had returned to the agency on remand, petitioner and the government entered a settlement agreement resolving all matters associated with the dispute. Pet. App. 10a. Petitioner agreed to pay a $430,000 civil penalty, to forfeit any claim to approximately $26,000 in proceeds from the government's sale of his catch from within closed areas, and permanently to forfeit his commercial fishing permits. *Ibid.*

b. In 2010, the Department's OIG issued reports finding NOAA responsible for a number of abuses, such as assessing excessive fines to extract favorable settlements from fishermen and using forfeited assets

to purchase luxury vessels and trips unrelated to the agency's enforcement mandate. Pet. App. 11a. On the basis of the OIG's findings, the Secretary of Commerce appointed a "special master" to review specific allegations of misconduct by NOAA, including allegations asserted by petitioner. *Ibid.*

In April 2011, the special master released his report. Pet. App. 11a. The master concluded that Agent Cohen had inappropriately dissuaded Lieutenant Hanlon from testifying in petitioner's defense. *Id.* at 11a-12a. The master also found that NOAA had coerced petitioner to settle for an excessive sum. *Id.* at 12a. The master recommended that petitioner be reimbursed $330,000. *Ibid.* The Secretary of Commerce later issued a memorandum responding to the special master's report, in which the Secretary increased the reimbursement amount to $400,000. *Ibid.*

3. a. On January 19, 2012—more than 11 years after NOAA initiated its enforcement action against petitioner and more than six years after petitioner's settlement with the government—petitioner filed administrative FTCA claims. Pet. App. 13a.

b. After exhausting his administrative remedies, petitioner filed this FTCA action in district court asserting malicious-prosecution and abuse-of-process claims. Pet. App. 13a & n.9. The government moved to dismiss on three grounds. First, the government argued that the court lacked subject-matter jurisdiction because petitioner filed his administrative claims long after the two-year limitations period in 28 U.S.C. 2401(b) had expired. Dist. Ct. Doc. 18, at 1, 10-18. Second, the government argued that the FTCA's intentional-tort exception in Section 2680(h) "deprive[d] the [district court] of jurisdiction" over peti-

tioner's tort claims because petitioner based those claims on alleged actions of NOAA enforcement attorneys, rather than actions of "investigative or law enforcement officers" (whose tortious actions would not be barred by the exemption). *Id.* at 2, 18-20. Finally, the government argued that petitioner's action should be dismissed for failure to state a claim because petitioner failed to allege facts sufficient to support either a malicious-prosecution or an abuse-of-process claim. *Id.* at 20-24. The government acknowledged that NOAA special agents, including Agent Cohen, were "investigative or law enforcement officers" whose tortious acts are not immunized by the intentional-tort exemption, see *id.* at 18, 20 & n.8, but it explained that petitioner failed to allege sufficient facts to state a claim that such officers or other federal employees committed the tort of malicious prosecution or abuse of process, *id.* at 20-24.

Petitioner opposed dismissal on three grounds. First, petitioner argued that Section 2401(b) did not deprive the district court of jurisdiction because, he contended, his administrative claims were timely because they did not accrue until January 2010. Dist. Ct. Doc. 24, at 9-17. Petitioner asserted that the government failed to offer any factual basis to dispute his accrual date, but, in a footnote, he alternatively requested jurisdictional discovery if the court were to disagree by "find[ing] that jurisdictional facts are in dispute." *Id.* at 9 & n.15. Second, petitioner did not dispute the government's contention that NOAA's enforcement attorneys are not law-enforcement officers under Section 2680(h), but he argued that the intentional-tort exception did not bar his malicious-prosecution and abuse-of-process claims because, he

explained, those claims were based on various actions by non-attorney law-enforcement officers, including "the [alleged] intimidation of Officer Hanlon by [Agent] Cohen." *Id.* at 17-20 & nn.33-34. Finally, petitioner argued that he alleged sufficient facts to state a claim for malicious prosecution and abuse of process by such officers. *Id.* at 20-27. Petitioner did not ask for discovery to buttress his allegations about those claims.

c. The district court dismissed the action. Pet. App. 22a-35a. The court first concluded that petitioner's administrative claims were untimely because his tort claims accrued on or before the June 2005 settlement agreement. *Id.* at 27a-30a. In the alternative, the court adopted the government's two other grounds for dismissal. *Id.* at 30a-34a. First, with respect to the intentional-tort claims based on alleged misconduct by NOAA enforcement attorneys, the court concluded that such attorneys were not "investigative or law enforcement officers" and that Section 2680(h)'s intentional-tort exception thus barred petitioner's claims arising from any conduct by them. *Id.* at 30a-32a. Second, with respect to the claims based on alleged misconduct by the "[r]emaining [o]fficers" who were investigative or law-enforcement officers, the court concluded that petitioner had failed to allege facts sufficient to state a malicious-prosecution or abuse-of-process claim. *Id.* at 32a-34a.

4. On appeal, petitioner renewed his argument that his administrative tort claims were timely and that Section 2401(b) thus did not undermine the district court's jurisdiction over his action. Pet. C.A. Br. 13-14, 19-37. Petitioner also argued that the district court erred in the second half of its alternative hold-

ing, *i.e.*, its non-jurisdictional conclusion under Federal Rule of Civil Procedure 12(b)(6) that petitioner failed to allege sufficient facts concerning conduct by "a law enforcement officer" to state a malicious-prosecution or abuse-of-process claim. Pet. C.A. Br. 14-15, 37-45. Petitioner contended that he had alleged that "[Agent] Cohen and other special agents were intimately involved" in NOAA's enforcement proceedings constituting malicious prosecution, *id.* at 42-43, and that "the officers," including Agent Cohen, caused abusive process to issue, *id.* at 44-45. Petitioner did not argue that the district court erred by evaluating the sufficiency of his complaint in this regard under Rule 12(b)(6) rather than Rule 12(b)(1). Nor did petitioner contend that the district court erred by declining to authorize "jurisdictional" discovery to augment his intentional-tort allegations.

a. The court of appeals affirmed. Pet. App. 1a-20a. The court declined to resolve whether petitioner's administrative tort claims were timely, *id.* at 3a, and instead affirmed the district court's Rule 12(b)(6) dismissal based on its conclusion that petitioner's complaint "failed to state a claim that any law enforcement officer" had "wrongfully induced a malicious prosecution or acted to abuse process," *id.* at 3a, 14a.

The court of appeals explained that petitioner "does not dispute" that the actions of NOAA's enforcement attorneys were "immune in this context" under Section 2680(h)'s intentional-tort exception because, as prosecutors, they are not "investigative or law enforcement officers" whose intentionally tortious actions fall outside that exception. Pet. App. 15a-16a. The court thus concluded that "[t]hat leaves only [the question] whether the complaint and appended docu-

ments plausibly allege that [Agent] Cohen himself" or other law-enforcement officers "wrongfully engaged in malicious prosecution or abuse of process." *Id.* at 16a; see *id.* at 6a n.1, 18a (finding insufficient allegations of tortious conduct by "any of the officers"). Accepting petitioner's pleading-stage documents as true for purposes of its analysis (*id.* at 3a), the court concluded that petitioner failed "plausibly [to] allege" facts supporting a malicious-prosecution or abuse-of-process claim. *Id.* at 16a-20a.

b. In his rehearing petition, petitioner argued, as relevant here, that the panel erred by resolving the sufficiency of his allegations as a Rule 12(b)(6) issue because Section 2680(h)'s intentional-tort exception is a jurisdictional, not merits, provision. Pet. C.A. Reh'g Pet. 3-5. Petitioner also argued for the first time that he was entitled to "jurisdictional discovery" that might allow him to buttress his allegations that "law enforcement officers" had engaged in an abuse of process or malicious prosecution. See *id.* at 7-8. Petitioner accordingly stated that "[i]f the panel intended to render a § 2680(h) holding—an issue neither party raised before [the court of appeals]—then it should remand with instructions authorizing jurisdictional discovery." *Id.* at 3. The court of appeals denied rehearing. Pet. App. 36a-37a.

**ARGUMENT**

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

Petitioner argues (Pet. 9, 24-32) that the court of appeals erred in ruling that Section 2680(h)'s intentional-tort exception is a non-jurisdictional provision. Petitioner further contends (Pet. 9-24) that review is

warranted to resolve a division of authority about whether Section 2680's exemptions more generally are "jurisdictional prerequisites or merits defenses," Pet. i. The court of appeals, however, did not affirm the dismissal of petitioner's action based on an application of the intentional-tort exception. It instead concluded that petitioner's pleading-stage allegations that a law-enforcement officer committed the torts of malicious prosecution and abuse of process—*i.e.*, claims that are *not* barred by the intentional-tort exception—were insufficient to state such claims under Federal Rule of Civil Procedure 12(b)(6). Indeed, if the court of appeals had concluded that petitioner's claim was barred by the intentional-court exception, the panel would have been bound by its own precedents, which have repeatedly held that a district court lacks subject-matter jurisdiction over a tort claim to which a Section 2680 exception applies. Moreover, petitioner forfeited contentions necessary for him to prevail. No further review is warranted.

1. This case does not present the question on which petitioner seeks review. The certiorari petition seeks review on the question whether "the statutory exemptions contained in 28 U.S.C. § 2680 constitute jurisdictional prerequisites or merits defenses." Pet. i. Petitioner asks this Court to answer that question by "declar[ing] that § 2680 implicates subject matter jurisdiction," because the Court has already concluded that (a) "'[s]overeign immunity is jurisdictional'" in nature and (b) the bar of sovereign immunity will remain in the FTCA context "'if one of the exceptions [in § 2680] applies.'" Pet. 11 (brackets in original) (quoting *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), and *Dolan* v. *USPS*, 546 U.S. 481, 485 (2006)). The government

does not quarrel with petitioner's contention that a district court lacks jurisdiction "*if* one of the exceptions [in § 2680] applies." *Ibid.* (emphasis added). But in this case the court of appeals did not base its decision on the view that Section 2680(h)'s intentional-tort exception applied to bar petitioner's claims.

The court of appeals stated that "[i]t is undisputed" in this case that the FTCA's intentional-tort exception bars claims of malicious prosecution and abuse of process based on "the actions of federal prosecutors" and that, as a result, "[petitioner] does not dispute" that his claims cannot rest on actions by the agency enforcement attorneys who prosecuted the civil proceedings against him. Pet. App. 15a-16a. The court recognized, however, that the intentional-tort exception does not apply to the "torts of malicious prosecution and abuse of process" when they are committed by "investigative or law enforcement officers." *Id.* at 15a. For that reason, the court explained, claims asserting those torts "are permitted to proceed only with respect to actions by 'investigative or law enforcement officers.'" *Ibid.* (citation omitted).

The court of appeals thus concluded that the "only" question before it was "whether the complaint and appended documents plausibly allege that [Agent] Cohen" or another law-enforcement officer whose actions would not be immunized by the intentional-tort exception "wrongfully engaged in malicious prosecution or abuse of process," Pet. App. 16a, and held that petitioner's allegations were insufficient in that regard, *id.* at 16a-19a; see *id.* at 6a n.1, 18a (finding insufficient allegations of tortious conduct by "any of the officers"). Because the court of appeals recognized that the intentional-tort exception did *not* apply

to petitioner's tort claims based on alleged misconduct by a law-enforcement officer and rested its decision on the view that petitioner had failed adequately to allege such claims, no resolution of the question petitioner presents would aid petitioner in this case.

If this case had presented the question on which petitioner seeks review, the court of appeals would have resolved that question in the way petitioner suggests. Consistent with petitioner's arguments in this Court, the court of appeals has repeatedly held that a district court lacks subject-matter jurisdiction over FTCA claims when one of Section 2680's exceptions applies. See, *e.g.*, *Irving* v. *United States*, 162 F.3d 154, 160 (1st Cir. 1998) (en banc) (A Section 2680 exception "implicates the federal courts' subject matter jurisdiction."), cert. denied, 528 U.S. 812 (1999).[1]

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[1] See also, *e.g.*, *Mahon* v. *United States*, 742 F.3d 11, 12, 16 (1st Cir. 2014) ("[I]f one [of the FTCA exceptions] applies, * * * there is no subject-matter jurisdiction."); *Carroll* v. *United States*, 661 F.3d 87, 93 (1st Cir. 2011) ("[W]here [the FTCA's exceptions] apply, 'the federal courts lack subject matter jurisdiction over torts against the United States.'") (citation omitted); *Abreu* v. *United States*, 468 F.3d 20, 25 (1st Cir. 2006) ("[I]f [an FTCA] exception applies, * * * the claim must be dismissed for lack of subject matter jurisdiction."); *Muniz-Rivera* v. *United States*, 326 F.3d 8, 12 (1st Cir.) (If an FTCA exception applies, the "action is outside the ambit of federal subject matter jurisdiction."), cert. denied, 540 U.S. 873 (2003); *Hydrogen Tech. Corp.* v. *United States*, 831 F.2d 1155, 1161, 1162 n.6 (1st Cir. 1987) ("[W]hen an exception to the FTCA applies, * * * federal courts have no subject matter jurisdiction to entertain an action."), cert. denied, 486 U.S. 1022 (1988). Indeed, that precedent is reflected in the decisions cited by the panel in this case. Compare Pet. App. 15a (citing the following decisions) with, *e.g.*, *Bolduc* v. *United States*, 402 F.3d 50, 60 (1st Cir. 2005) ("When a claim falls within the contours of [a Section 2680 exception], it must be dismissed for

Petitioner's problem is that the court of appeals' decision does not turn on the jurisdictional status of the intentional-tort exception.

Because this case does not present the question on which petitioner seeks review, petitioner's asserted division of authority (Pet. 12-14) is irrelevant. We note, however, that nearly all the courts of appeals, like the court of appeals here, conclude that the FTCA's exceptions are jurisdictional. See, *e.g.*, *Loughlin* v. *United States*, 393 F.3d 155, 162 (D.C. Cir. 2004); *Diaz* v. *United States*, 517 F.3d 608, 613-614 (2d Cir. 2008); *CNA* v. *United States*, 535 F.3d 132, 150 (3d Cir. 2008); *Holbrook* v. *United States*, 673 F.3d 341, 345 (4th Cir. 2012); *Truman* v. *United States*, 26 F.3d 592, 594 (5th Cir. 1994); *Milligan* v. *United States*, 670 F.3d 686, 692 (6th Cir. 2012); *Najbar* v. *United States*, 649 F.3d 868, 870 (8th Cir. 2011), cert. denied, 132 S. Ct. 2378 (2012); *Bramwell* v. *BOP*, 348 F.3d 804, 808 (9th Cir. 2003), cert. denied, 543 U.S. 811 (2004); *Ecco Plains, LLC* v. *United States*, 728 F.3d 1190, 1195 (10th Cir. 2013), cert. denied, 134 S. Ct. 1034 (2014); *JBP Acquisitions, LP* v. *United States*, 224 F.3d 1260, 1263-1264 (11th Cir. 2000).[2]

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lack of subject matter jurisdiction."), and *Limone* v. *United States*, 579 F.3d 79, 87 n.2, 88-89 & n.3, 92 (1st Cir. 2009) (explaining that an FTCA "exception, when applicable, deprives a court of subject matter jurisdiction" and that the intentional-tort exception in particular "deprives a district court of jurisdiction over a claim whenever the claim is, or arises out of, a specifically enumerated tort").

[2] Although petitioner suggests (Pet. 14 & nn.22-26) that a few of those courts have been "equivoc[al]" on this point, petitioner appears to base that view in significant part on the misconception that a summary judgment dismissing an FTCA claim is not a jurisdictional dismissal. Jurisdictional dismissals can occur at any

2. Even if petitioner's question were otherwise presented, this case would be a poor vehicle for review because petitioner failed to preserve the contentions necessary for him to prevail. Petitioner no longer contends in this Court that his factual allegations of malicious prosecution and abuse of process were suffi-

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stage of the litigation, including at summary judgment. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (Article III jurisdiction must be established "at the successive stages of the litigation," including at "summary judgment").

Petitioner asserts (Pet. 9, 11-12 & n.16) that the Seventh Circuit holds that Section 2680's exceptions are not jurisdictional, but the status of the law in the Seventh Circuit is unclear. The Seventh Circuit previously concluded, like its sister circuits, that the FTCA's exceptions are jurisdictional. See, *e.g.*, *Calderon* v. *United States*, 123 F.3d 947, 948, 950, 951 n.2 (7th Cir. 1997) (ruling that an FTCA exception presents a "prerequisite jurisdictional" issue and affirming dismissal on the ground that plaintiff "failed to establish subject matter jurisdiction"); *Schneider* v. *United States*, 936 F.2d 956, 963 (7th Cir. 1991) ("[F]ederal courts lack subject matter jurisdiction to entertain claims against the United States falling within one of the statutory exceptions to the FTCA.") (citation omitted), cert. denied, 502 U.S. 1071 (1992). More recently, Seventh Circuit panels have acknowledged "some wavering in [their] own cases" but have criticized "the cases that hold [that the FTCA's exceptions] are jurisdictional" and concluded that such exceptions are not jurisdictional. See *Collins* v. *United States*, 564 F.3d 833, 837 (7th Cir. 2009) (discussing recent cases). Because an earlier "panel decision is binding on another court panel unless overruled with the approval of the en banc court," *In re Skupniewitz*, 73 F.3d 702, 705 (7th Cir.), cert. denied, 517 U.S. 1124 (1996), the state of the law in Seventh Circuit is not clear and would not warrant review in this context in this case. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("[D]oubt about the respect to be accorded to a previous decision" of a court of appeals does not warrant certiorari because it is primarily the responsibility of that court "to reconcile its internal difficulties.").

cient in themselves to survive a pleading-stage dismissal. Petitioner instead argues (Pet. 22-23) that, because the intentional-tort exception is a jurisdictional bar, he should have been entitled to pursue jurisdictional discovery in order to develop facts connecting law-enforcement officers to the torts that he seeks to assert. Petitioner forfeited that contention below.

Petitioner never argued on appeal that the district court erred in its second alternative ruling by dismissing his action for failure to state a claim under Rule 12(b)(6), rather than for want of jurisdiction under Rule 12(b)(1). See p. 8, *supra*. Petitioner also failed to argue (before his rehearing petition) that he should have been entitled to jurisdictional discovery. Petitioner merely argued that he had alleged sufficient facts to survive a pleading-stage dismissal. See Pet. C.A. Br. 14-15, 37-45; see pp. 7-8, *supra*. Indeed, had petitioner argued that the district court abused its discretion in denying jurisdictional discovery, petitioner would have had to confront the fact that he requested jurisdictional discovery only concerning the timeliness of his administrative claims and never requested that the district court permit such discovery to allow him to bolster his underlying factual allegations. See pp. 6-7, *supra*. Because petitioner forfeited his jurisdictional-discovery contentions in both courts below, petitioner would be unable to benefit from a ruling by the Court that district courts lack jurisdiction when the intentional-tort exception applies.

3. Petitioner suggests (Pet. 32-33) that this Court hold this petition pending its decisions in *United States* v. *Wong*, No. 13-1074 (argued Dec. 10, 2014), and *United States* v. *June*, No. 13-1075 (same), which present the questions whether the two FTCA limita-

tions periods in 28 U.S.C. 2401(b) are jurisdictional restrictions that cannot be equitably tolled. Both cases present questions distinct from the question whether Section 2680(h)'s exception is jurisdictional, and the latter question is not presented in this case in any event. But even if that question were presented and were the same as those in *Wong* and *June*, for the reasons above, the resolution of those questions would not affect the proper disposition here.[3]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2015

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[3] Petitioner appears to suggest (Pet. 7 n.11) in the statement to his petition that the court of appeals should have decided whether his administrative claims were timely under Section 2401(b) before it resolved a merits issue like his complaint's failure to state a claim. The petition, however, fails to develop an argument that the court of appeals erred in that regard and fails to present this order-of-decision issue as a question for this Court's review. That distinct issue thus is not properly before this Court. See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (citation omitted).