

26-5875

No. _____

IN THE
Supreme Court of the United States

GLENN SCOTT COHEN,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

GLENN SCOTT COHEN

Petitioner Pro Se

Address: 16 via de CASAS sur

apt103, Boynton beach FL.

33426

E-mail: Vendglenn84@aol.com

Telephone: 954-214-8273

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QUESTION PRESENTED

Whether, under 28 U.S.C. § 2401(b) and *United States v. Kubrick*, 444 U.S. 111 (1979), an FTCA medical-malpractice claim based on an alleged diagnostic act occurring on December 22, 2020 may accrue by the end of 2019 solely because the claimant experienced earlier symptoms and received prior VA medical treatment.

PARTIES TO THE PROCEEDING

Petitioner Glenn Scott Cohen was the plaintiff-appellant below.

Respondent Department of Veterans Affairs was the defendant-appellee below. The United States was not named as a party in the captions supplied with the present record.

RELATED PROCEEDINGS

Cohen v. Department of Veterans Affairs, No. 9:24-cv-80706-RLR, United States District Court for the Southern District of Florida. Orders entered January 16, 2025, and April 11, 2025.

Cohen v. Department of Veteran Affairs, No. 25-11523, United States Court of Appeals for the Eleventh Circuit. Opinion and judgment entered June 8, 2026; petition for panel rehearing filed July 17, 2026; panel rehearing denied July 29, 2026; mandate issued August 6, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Glenn Scott Cohen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced at App. 1a–9a. The order denying panel rehearing is reproduced at App. 10a. The district court’s April 11, 2025 order is reproduced at App. 11a–12a, and its January 16, 2025 order is reproduced at App. 13a–14a.

JURISDICTION

The Eleventh Circuit entered judgment on June 8, 2026. Petitioner timely filed a petition for panel rehearing on July 17, 2026, and the court denied rehearing on July 29, 2026. This petition is due October 27, 2026 under Supreme Court Rule 13.3. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction over the asserted Federal Tort Claims Act claim under 28 U.S.C. § 1346(b)(1), subject to the threshold and merits issues described below.

STATUTORY PROVISIONS INVOLVED

Section 2401(b) of Title 28 provides:

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.

Sections 1346(b)(1) and 2675(a) are reproduced at App. 15a–16a.

INTRODUCTION

The court of appeals held that petitioner’s claim accrued by the end of 2019 even though the medical act identified in his administrative claim—the VA’s allegedly negligent diagnostic testing and failure to diagnose venous insufficiency—did not occur until December 22, 2020. App. 8a–9a. That chronology presents a narrow question under 28 U.S.C. § 2401(b): can symptoms and earlier treatment start the limitations period for a claim based on a later diagnostic act before that act occurred?

United States v. Kubrick, 444 U.S. 111 (1979), begins with injury and cause. Kubrick knew that a specific VA treatment—the administration of neomycin—had probably caused his hearing loss. *Id.* at 113–14, 118, 122–25. The Court held that he did not also need knowledge that the treatment was negligent. *Id.* at 123. Kubrick did not hold that symptoms alone supply knowledge of a causal act that has not happened.

More recently, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799 (2024), reiterated the traditional rule that a claim accrues only when the plaintiff has a complete and present cause of action and can file suit and obtain relief. *Id.* at 807–09. Although *Corner Post* construed § 2401(a), its account of accrual confirms

the basic chronological problem here: before December 22, 2020, petitioner could not sue over what the VA allegedly did on December 22, 2020.

The decision below also presents substantial vehicle problems. The Eleventh Circuit independently affirmed dismissal because petitioner did not challenge one sovereign-immunity ground on appeal. App. 4a–5a. It also held that the amended complaint inadequately alleged the Florida malpractice elements and that the district court did not abuse its discretion after already allowing one amendment. App. 5a–9a. Those holdings may prevent reversal of the judgment even if the accrual ruling was erroneous. Petitioner does not conceal those obstacles. He submits, however, that the court expressly decided the federal accrual issue as an independent basis for holding any further amendment futile, and that the issue matters to claimants whose preexisting conditions are later subjected to a distinct diagnostic act.

STATEMENT

1. Petitioner had two ganglion cysts removed from his lower left leg at the West Palm Beach VA Medical Center in 2015. By the end of 2019, he noticed that the cysts had returned and that he had a painful varicose vein in the same leg. App. 1a–2a.

On December 22, 2020, the VA performed diagnostic testing for venous insufficiency. The result was negative. Afterward, petitioner sought a second opinion, and a non-VA physician diagnosed venous insufficiency on July 23, 2021. App. 2a–3a.

On August 29, 2022—less than two years after the December 22, 2020 test—petitioner submitted a Standard Form 95 to the Department of Veterans

Affairs. As the Eleventh Circuit described that form, petitioner alleged that the VA committed malpractice on December 22, 2020 by failing to diagnose venous insufficiency and that the misdiagnosis was followed by treatment for a venous eczema rash. App. 1a–2a.

2. Proceeding pro se, petitioner filed suit in June 2024 against the Department of Veterans Affairs. The district court dismissed the original complaint but allowed amendment. App. 2a–3a. The amended complaint alleged a breach causing ankle swelling, a bulging varicose vein, and a venous eczema rash, and it referred to the later non-VA diagnosis. App. 3a–4a.

The VA moved to dismiss on four grounds: asserted nonexhaustion, limitations, sovereign immunity based on failure to identify a specific federal employee, and failure to plead a Florida medical-malpractice claim. The district court dismissed “for the reasons set forth in the Motion to Dismiss.” App. 4a. The supplied record does not contain that final dismissal order, docket entry 34; the April 11 order later vacated only the portion resting on an erroneous belief that petitioner had not responded and left the merits dismissal in effect. App. 11a–12a.

3. The Eleventh Circuit affirmed. First, it held that petitioner had abandoned any challenge to the district court’s sovereign-immunity rationale and that the judgment was therefore due to be affirmed. App. 4a–5a. The court expressly stated that it did not reach petitioner’s other challenges to dismissal of the amended complaint. App. 5a n.3.

The court nevertheless reviewed the denial of another opportunity to amend. It identified two reasons supporting that ruling. First, petitioner had already received one opportunity to amend, and the amended complaint still did not adequately allege

duty, breach, and causation under Florida law. App. 5a–6a. Second, the court held that amendment would be futile because the FTCA claim was time-barred. App. 6a–9a.

On limitations, the court recognized that petitioner's SF-95 alleged malpractice on December 22, 2020. App. 1a–2a. It nevertheless held that the claim accrued by the end of 2019 because petitioner then knew of returning cysts and a painful varicose vein, and the VA had treated his leg for several years. The court reasoned that those facts should have alerted him to the possibility that his injury was connected to some VA act. It also relied on his later decision to obtain outside medical care. App. 8a–9a. The court therefore held the August 29, 2022 administrative claim untimely. App. 9a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE ACCRUAL PRINCIPLES APPLIED IN KUBRICK

Kubrick identifies the operative facts as the existence of the injury and its cause. 444 U.S. at 122–25. It distinguishes ignorance of those facts from ignorance that known treatment was legally negligent. *Id.* at 123. Kubrick thus began from a completed sequence: the VA administered neomycin; hearing loss followed; and a physician told Kubrick that the treatment probably caused the loss. *Id.* at 113–14. Once those facts were known, Kubrick could not defer accrual while investigating whether the treatment violated the standard of care.

This case presents the antecedent question. By the end of 2019, petitioner had symptoms and a

history of VA treatment. But the SF-95 described by the court of appeals attributed injury to a distinct diagnostic event on December 22, 2020. App. 1a–2a. Knowledge in 2019 that cysts had returned and a vein was painful could not supply knowledge that a December 2020 ultrasound had failed to identify venous insufficiency. The test had not occurred, its result did not exist, and the alleged diagnostic omission had not happened.

The decision below therefore did more than hold that petitioner need not know negligence. It treated knowledge of a medical condition and earlier treatment as knowledge of the cause of an injury attributed to a later act. That collapses the separate Kubrick requirements. Symptoms establish that something is wrong; they do not necessarily establish what caused the legally relevant injury. Kubrick itself stressed that a claimant must know both injury and cause. 444 U.S. at 120, 122.

The traditional accrual rule points the same way. A claim accrues when the plaintiff has a complete and present cause of action—when he can file suit and obtain relief. *Corner Post*, 603 U.S. at 807–09; *Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 201 (1997). *Corner Post* specifically rejected starting § 2401(a)’s clock before the plaintiff was injured and able to sue. 603 U.S. at 807–10. Section 2401(b) likewise uses accrual language, and Kubrick supplies the medical-malpractice discovery rule. Neither permits accrual of a claim based on a particular act before that act occurs.

This petition does not ask the Court to announce that every malpractice claim accrues on the date of the negligent act. Some injuries and causal

connections are discovered later, and continuing or earlier treatment can complicate the inquiry. The narrower point is chronological: symptoms that predate the particular diagnostic act alleged in the administrative claim cannot, without more, establish knowledge that the later act caused injury.

II. PREEXISTING SYMPTOMS CANNOT ESTABLISH KNOWLEDGE OF AN INJURY ATTRIBUTED TO A LATER MEDICAL ACT THAT HAD NOT YET OCCURRED

The court of appeals relied on three facts existing by the end of 2019: recurrence of cysts, a painful varicose vein, and years of VA treatment. App. 8a–9a. Those facts may have supported inquiry into the earlier surgeries or treatment. They did not notify petitioner of a claim that the VA would later misread or mishandle diagnostic testing performed on December 22, 2020.

The distinction matters because medical patients often present with conditions that predate the consultation, imaging study, or diagnosis later alleged to be negligent. If the presence of symptoms and prior treatment alone begins the limitations period for any later diagnostic error involving the same body part, the statutory clock may expire before the diagnostic act takes place. That result converts a limitations period into a species of repose untethered to the act alleged in the claim.

Corner Post’s reasoning is instructive. The Court distinguished a limitations period measured from accrual from a repose period measured from a defendant’s act. 603 U.S. at 809–11. The decision below goes further than a repose rule: it places

accrual before the defendant's identified act. Nothing in § 2401(b) signals such a rule.

Respondent may contend that petitioner's true claim concerned the 2015 surgeries or an ongoing failure to diagnose, rather than only the December 2020 test. That contention would present a record and claim-definition dispute. But the Eleventh Circuit itself described the SF-95 as alleging malpractice on December 22, 2020 by failure to diagnose venous insufficiency then. App. 1a–2a. Review should proceed on the claim as the court below described it, not on a different claim that might have accrued earlier.

III. McCULLOUGH DOES NOT SUPPORT ACCRUAL BEFORE THE ALLEGED NEGLIGENT ACT

The court of appeals relied heavily on *McCullough v. United States*, 607 F.3d 1355 (11th Cir. 2010). *McCullough* does not resolve this chronology. There, a veteran experienced neck pain before scheduled hernia surgery and became quadriplegic ten days after surgery. *Id.* at 1357. The issue was when he knew or should have known that the paralysis was connected to the government's treatment. *Id.* at 1359–60. The alleged government omissions already had occurred.

McCullough explained that awareness of injury alone is insufficient if the claimant is unaware of the act or omission that caused it. *Id.* at 1359 (quoting *Waits v. United States*, 611 F.2d 550, 552 (5th Cir. 1980)). It found causation reasonably knowable because the severe injury followed the relevant VA treatment in close physical and temporal proximity. 607 F.3d at 1360. That logic cannot be transposed to

December 2019 here, when the December 2020 diagnostic test was still a year away.

Nor does petitioner's later pursuit of outside care retroactively establish knowledge in 2019. The opinion states that he obtained the outside diagnosis after the December 2020 negative test and was diagnosed on July 23, 2021. App. 2a–3a. A later event may bear on when the claimant actually learned of a possible error, but it cannot show that he knew in 2019 of an omission during a test not yet performed.

Price likewise states that an FTCA malpractice claim accrues when the plaintiff is or should be aware of injury and its connection with some act of the defendant. *Price v. United States*, 775 F.2d 1491, 1494 (11th Cir. 1985). The phrase “some act” does not eliminate the need for a causal act. On the court of appeals' own description, the act identified in the administrative claim occurred on December 22, 2020.

IV. THE QUESTION IS IMPORTANT IN FEDERAL MEDICAL-MALPRACTICE CASES INVOLVING PREEXISTING CONDITIONS AND LATER DIAGNOSTIC ACTS

Veterans and other federal patients frequently seek care for symptoms that existed before the challenged appointment or diagnostic test. The distinction between knowledge of symptoms and knowledge of their connection to a government act determines whether § 2401(b) leaves a meaningful two-year presentation period.

The decision below risks a rule under which any prior government treatment of the same anatomical area supplies causal notice for later, distinct medical conduct. Such a rule gives claimants no stable way to

determine which event starts the clock and may require protective administrative claims before a later diagnostic act even occurs. It also obscures the line Kubrick drew between the critical facts of injury and cause, on one hand, and later knowledge of legal fault, on the other.

Petitioner has not identified a square conflict among the courts of appeals on the precise pre-act accrual question, and the opinion below is unpublished. Those facts weigh against certiorari. But the ruling is in tension with this Court's articulation of accrual in *Kubrick* and *Corner Post*, and its practical effect is recurring wherever a patient with a preexisting condition alleges a later failure to diagnose.

V. THE ACCRUAL QUESTION WAS EXPRESSLY DECIDED BELOW

The Eleventh Circuit expressly held that the limitations period began by the end of 2019 and that the August 29, 2022 SF-95 was untimely. App. 8a–9a. It did so while reviewing whether another amendment would have been futile. The federal question is therefore stated in the opinion and was a ground supporting the disposition of petitioner's request for further amendment.

The vehicle remains difficult. The court separately held that petitioner abandoned a challenge to an independent sovereign-immunity ground, making the dismissal judgment affirmable regardless of limitations. App. 4a–5a. It also relied on the inadequate pleading of duty, breach, and causation under Florida law, as well as the fact that petitioner had already received one chance to amend. App. 5a–6a. Respondent will therefore argue that

resolution of the accrual question cannot change the judgment.

Petitioner's best response is limited. The court used limitations to conclude that any further amendment would be futile. App. 6a-9a. Unlike a pleading defect that may be cured by alleging the responsible employees' conduct and the Florida elements with greater specificity, a time bar cannot be cured by repleading. Vacatur of the accrual ruling could therefore require renewed consideration of whether amendment should be allowed. But petitioner acknowledges that the alternative holdings may still preclude relief and may lead the Court to deny review under Rule 10.

A related issue is the lower courts' treatment of § 2401(b) as jurisdictional. This Court held in *United States v. Wong*, 575 U.S. 402, 412, 420 (2015), that § 2401(b)'s deadlines are nonjurisdictional and subject to equitable tolling. The petition does not separately seek review on that question because it was not included in the Question Presented and the record supplied does not establish preservation. The point nonetheless reinforces the need for care in characterizing the limitations ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GLENN SCOTT COHEN

Petitioner Pro Se

16 via de CASAS sur apt103

Boynton beach fl. 33426
Vendglenn84 @aol.com
954-214-8273
October 13, 2026