No. 19-1082

In The Supreme Court of the United States

STEPHEN LINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

The Government admits that there is "some disagreement" among the courts of appeals on both questions presented for review. BIO 9, 21. It attempts to avoid this Court's review, however, by arguing that Petitioner overstated the disagreement and that the disagreement has little practical significance. *Id*. Both arguments are wrong. The Government improperly imports the constitutional tort doctrine of qualified immunity to the FTCA and mischaracterizes the holdings of the cases at issue, thereby understating the magnitude and significance of the disagreements among the courts of appeals. The split in the circuits on each question is stark and profound and warrants this Court's review.[1]

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[1] The Government argues that the petition should be denied because the Court "has denied multiple prior petitions for a writ of certiorari raising similar issues." BIO 9. But none of the cases cited presented both of the questions presented here. Moreover, since the denial of the petition in *Castro v. United States*, 562 U.S. 1168 (2011) (No. 10-309), the panel's decision below on the question of the applicability of the discretionary function exception when a federal officer violates the constitution has deepened the split in the circuits. And at the time of the denial of the petition in *Welch v. United States*, 546 U.S. 1214 (2006) (No. 05-529), the Eleventh Circuit had not issued its decision in *Nguyen v. United States*, 556 F.3d 1244 (11th Cir. 2009), which created a split in the circuits on the issue of the interplay between the discretionary function exception in Section 2680(a) of the FTCA and the law enforcement proviso in Section 2680(h).

I. The Government Understates the Disagreement in the Courts of Appeals on the Applicability of the Discretionary Function Exception When a Federal Officer Violates the Constitution.

A. The Government's Argument Depends on Importing Doctrines from Unrelated Areas of Law.

The Government begins its analysis with the proposition that "[t]here is no dispute among the courts of appeals that, when a federal officer acts contrary to a *specific* prescription in federal law, be it constitutional, statutory, or regulatory, the discretionary function exception does not apply." BIO 12 (emphasis in original). But the Government creates this specificity requirement out of whole cloth. Having done so, the Government then attempts to define its invented requirement by importing an unrelated body of law. Borrowing from the doctrine of qualified immunity, an immunity available to federal officers to escape personal liability for constitutional violations, the Government argues that a "specific" constitutional violation can only be one that has been "clearly established." BIO 13-15. But qualified immunity serves different purposes and arises from different sources than FTCA liability and its exceptions. The Government is confusing apples with oranges.

The Government's contention that qualified immunity analysis has been imported into the discretionary function exception in the FTCA is based on the novel premise that granting qualified immunity is

tantamount to finding that the officer acted within the FTCA's discretionary function exception. BIO 13-14. The cases cited by the Government say no such thing.[2] Qualified immunity is a common law doctrine that shields officers from *personal* financial liability, and it is based on the premise that fear of such liability might lead officials to hesitate in fulfilling their duties when the law is unclear or undeveloped. *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 818 (1982). In contrast, the discretionary function exception is a statutory provision addressing the scope of the Government's waiver of sovereign immunity. *Berkovitz v. United States*, 486 U.S. 531, 535-536 (1988). Qualified immunity, unlike the discretionary function exception, says nothing about either the nature of the conduct at issue or the government's liability for that conduct. Moreover, this Court has previously cautioned against the transfer of concepts of immunity from the common law to statutory liability. *Owen v. Independence*, 445 U.S. 622, 649 (1980) (concept of common-law immunity for municipality for discretionary functions cannot serve as basis

[2] The Government's reliance on the concept of qualified immunity for constitutional torts is quintessentially the kind of "extra-textual 'constitutional claim' " it accuses Petitioner of advocating. BIO 12. To the contrary, Petitioner has been consistent in recognizing that state tort law provides the basis for the Government's liability here. See *Limone v. United States*, 579 F.3d 79 at n.13 (1st Cir. 2009) (holding that constitutional transgressions do not correspond to the FTCA claims; rather they negate the discretionary function defense); *Loumiet v. United States*, 828 F.3d 935, 945-946 (D.C. Cir. 2016) (noting that plaintiff who asserts constitutional violations as means of overcoming discretionary function defense does not convert his claim into a constitutional damages claim against the government).

for immunity under Section 1983 action because "a municipality has no 'discretion' to violate the Federal Constitution").

Bryan v. United States, 913 F.3d 356, 364 (3d Cir. 2019), on which the Government relies, BIO 15, does not support its argument. In *Bryan*, the Third Circuit granted summary judgment both on a *Bivens* claim alleging Fourth Amendment violations and on FTCA claims alleging invasion of privacy, false imprisonment, and intentional infliction of emotional distress. It is true that the *Bryan* court dismissed the FTCA claims because they did not involve "'clearly established constitutional rights . . . of which a reasonable person should have known.'" *Id.* at 364, citing *Harlow*, 457 U.S. at 818 (1982). But it did so because the plaintiffs expressly adopted that standard in their argument. *Id.* The Third Circuit, thus, did not analyze whether a constitutional violation must be "clearly established" to overcome the discretionary function exception and did not depart from its prior recognition that, "[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes." *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988).

And even if the Government were right that some circuits had adopted its position about qualified immunity and the FTCA, it would still be wrong that there is not a meaningful split of authority. There is, in fact, dispute on the proposition of whether unconstitutional conduct of any kind—clearly established or otherwise—precludes the discretionary function

exception. In *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972), on which the panel below relied, Pet. App. 8, the Seventh Circuit dismissed an FTCA claim brought by a civilian employee of a military base after the commanding officer had banned her from the base in conduct that the court had already concluded violated the employee's First Amendment rights. 466 F.2d at 627. Indeed, the court concluded that the discretionary function exception barred Kiiskila's claims, even though the commanding officer's conduct was "constitutionally repugnant." *Id.*

B. The Government's Argument Misstates or Misunderstands the Record in This Case and Misreads the Case Law.

Based upon its unsupported interpretation of the scope of the discretionary function exception, the Government argues that the exception cannot "be overcome by any allegation of a constitutional violation at a high level of generality," and maintains that the cases cited by Petitioner do not hold otherwise. BIO 15. That claim sidesteps the procedural history of this case and garbles the law.

Petitioner does not merely make "any allegation" of a constitutional violation in highly general terms. His FTCA claim is based on the explicit finding of an Article III judge—detailed in a lengthy memorandum opinion and reached after hearing four days of testimony—that Marshal McPherson and Special Agent Shirley specifically violated Petitioner's Fifth and

Sixth Amendment rights. *United States v. Linder*, No. 12 CR 22, 2013 WL 812382, 2013 U.S. Dist. LEXIS 29641 *2, 187 (N.D. Ill. March 5, 2013).

Moreover, at least four courts of appeals have held that a plausible allegation of unconstitutional conduct is sufficient to allow an FTCA claim to survive a motion to dismiss at the pleading stage. See *Loumiet v. United States*, 828 F.3d at 946 ("The district court should determine in the first instance whether Loumiet's complaint plausibly alleges that the OCC's conduct exceeded the scope of its constitutional authority so as to vitiate discretionary-function immunity."); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (FTCA claim allowed to move forward based on allegation that FBI surveillance activities violated plaintiff's First and Fourth Amendment rights); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (reversing dismissal of FTCA claims even though court could not "determine at this stage of the proceedings whether the acts of the policy-making defendants violated the Constitution, and, if so, what specific constitutional mandates they violated."); *Myers & Myers Inc. v. USPS*, 527 F.2d 1252, 1261-1262 (2d Cir. 1975) (reversing dismissal of FTCA claim based on allegation of constitutional violation).

Because Petitioner's allegations were based upon a finding by a United States District Court that the Government had violated his constitutional rights, his complaint would not have been dismissed at the pleadings stage in the Second, Eighth, Ninth, or D.C. Circuits. This Court should therefore grant the petition to

resolve the split among the courts of appeals as to whether allegations such as these are sufficient to prevent FTCA claims from being barred at the pleadings stage based on the discretionary function exception.

II. There is Practical Significance to the Disagreement Among the Circuits as to the Interplay between Sections 2680(a) and 2680(h).

Again, the Government concedes that there is "some disagreement" among the circuits on the question of whether the law enforcement proviso found in Section 2680(h) of the FTCA trumps the discretionary function exception found in Section 2680(a). BIO 21. And again, the Government mischaracterizes the holdings in applicable cases to downplay the circuit split.

In *Nguyen v. United States*, 556 F.3d 1244 (11th Cir. 2009), the Eleventh Circuit undertook a careful analysis, using longstanding principles of statutory construction, of the conflicting language in the two subsections and reached the conclusion that the discretionary function exception in Section 2680(a) does not apply when a plaintiff brings a claim based upon the conduct of an investigative or law enforcement officer for one of the torts specified in the proviso of Section 2680(h). *Id.* at 1250-1253. Other courts of appeals have concluded that if the conduct of the investigative or law enforcement officer at issue in the claim involved an exercise of discretion, the discretionary function exception in Section 2680(a) would still bar the claim. See

Campos v. United States, 888 F.3d 724 (5th Cir. 2018); *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001); *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983); *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982). Cf. *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994). None of those courts, however, have undertaken a detailed statutory construction analysis like the Eleventh Circuit's.

The Government suggests that this glaring split in the circuits is "of little practical significance," because the Eleventh Circuit has hinted that its conclusion in *Nguyen* that the law enforcement proviso overrode the discretionary function exception may apply only in situations where there has been a clear constitutional violation, citing a footnote in *Denson v. United States*, 574 F.3d 1318, 1336 n.55 (11th Cir. 2009). BIO 22-23. The Government overstates the implications of the *dicta* in the *Denson* opinion.

The *Denson* panel recognized that the *Nguyen* panel's holding indicated the discretionary function exception "would not apply even had the agents not violated the plaintiff's constitutional rights." 574 F.3d at n.55. The *Denson* panel did not disturb this holding; it merely observed that it did not have to reach the issue of whether the law enforcement proviso would trump the discretionary function exception in a situation where there was not a constitutional violation. *Id.*

The Government's suggestion that *Denson* represented some kind of walking back of the clear holding in *Nguyen* is not supported by citation to any authority. Indeed, in the eleven years since both decisions were

rendered, the *Denson* opinion has never been cited by any Eleventh Circuit panel in an FTCA case. By contrast, the *Nguyen* decision is cited repeatedly as establishing the law in that circuit that the discretionary function exception does not apply to cases brought under the law enforcement proviso. *Williams v. United States*, 2010 WL 1408398, at *10 n.35 (M.D. Fla. 2010). See, e.g., *Garling v. EPA*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017); *Bonilla v. United States*, 652 Fed. Appx. 885, 890 (11th Cir. 2016); *Milligan v. United States*, 670 F.3d 686, 695 n.2 (6th Cir. 2012); *Moher v. United States*, 875 F. Supp. 2d 739, 766 (W.D. Mich. 2012); *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1297-1298 (M.D. Ga. 2012). Thus, practically speaking, had Petitioner brought his malicious prosecution claim in the Eleventh Circuit, it would not have been dismissed. There is no reason for this Court to wait for "further percolation in the Eleventh Circuit," BIO 23, before addressing the clear split in the circuits on the interplay between Section 2680(h) and 2680(a).

Lastly, while the Government breezily professes "that disagreement [among the circuits] has had little practical significance," BIO 9, 21, it nowhere disputes that the discretionary function exception is the "most important" of the exceptions to the FTCA's waiver of sovereign immunity, as reaffirmed by the lower courts as well as the Government's own counsel and bulletin to United States Attorneys nationwide. Pet. 23-24. This Court's review is warranted to clarify the scope of this "most important" exception.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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