No. 21-311

IN THE

Supreme Court of the United States

CARRIE S. WILLIS, INDIVIDUALLY AND AS TRUSTEE OF THE TRUST OF JAMES C. AND NORMA D. WILLIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Grant Rahmeyer
STRONG-GARNER-BAUER P.C.
415 E. Chestnut Expwy.
Springfield, MO 65802

Walter Dellinger
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5204
kendallturner@omm.com

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

I. This case is an excellent vehicle to consider the proper scope of the FTCA's discretionary-function exception 1

II. The Government's defense of the decision below is unavailing 4

III. The Eighth Circuit's decision creates one split and deepens another 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Amond v. Ron York & Sons Towing,
302 S.W.3d 708 (Mo. Ct. App. 2009)........................ 3

Andrews v. United States,
121 F.3d 1430 (11th Cir. 1997).............................. 10

Anestis v. United States,
749 F.3d 520 (6th Cir. 2014).................................... 9

Berkovitz v. United States,
486 U.S. 531 (1988)... 6, 7, 8

Collins v. Trammell,
911 S.W.2d 635 (Mo. Ct. App. 1995)........................ 3

Coulthurst v. United States,
214 F.3d 106 (2d Cir. 2000) 11

Credit Suisse Sec. (USA) LLC v. Simmonds,
566 U.S. 221 (2012).. 3

Cutter v. Wilkinson,
544 U.S. 709 (2005).. 3

DelCostello v. Int'l Bhd. of Teamsters,
462 U.S. 151 (1983).. 4

Downs v. U.S. Army Corps of Eng'rs,
333 Fed. Appx. 403 (11th Cir. 2009)...................... 11

Emerick v. Mut. Ben. Life Ins. Co.,
756 S.W.2d 513 (Mo. 1988) 3

In re Glacier Bay,
71 F.3d 1447 (9th Cir. 1995)................................. 10

Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler,
481 U.S. 851 (1987).. 3

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Keller v. United States,
771 F.3d 1021 (7th Cir. 2014) 11

Motor Vehicle Mfrs. Ass'n v. State Farm Mut.,
463 U.S. 29 (1983) 8

Palay v. United States,
349 F.3d 418 (7th Cir. 2003) 11

Parrott v. United States,
536 F.3d 629 (7th Cir. 2008) 10

Rich v. United States,
811 F.3d 140 (4th Cir. 2015) 11

Sanders v. United States,
937 F.3d 316 (4th Cir. 2019) 10

Triestman v. Fed. Bureau of Prisons,
470 F.3d 471 (2d Cir. 2006) 11

Turner v. Safley,
482 U.S. 78 (1987) 12

Tyree v. United States,
814 Fed. Appx. 762 (4th Cir. 2020) 11

United States v. Gaubert,
499 U.S. 315 (1991) 4, 7, 8

United States v. Kubrick,
444 U.S. 111 (1979) 2

Wallace v. Kato,
549 U.S. 384 (2007) 2

Statutes

28 U.S.C. § 2401(b) 2

28 U.S.C. § 2860(a) 7

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Other Authorities

90 C.J.S. *Trover and Conversion* (2021) 3

REPLY BRIEF FOR PETITIONER

The Government does not dispute the importance of the questions presented. Nor could it: The FTCA is the only avenue of relief for most victims of government torts, and the decision below severely limits the availability of that relief. *See* Pet. 18-19. The Government also offers no effective response to the petition's demonstration of conflicts on both questions presented. *See* BIO 13-17. That leaves the Government's argument that this case is not a good vehicle to resolve those conflicts because petitioner's claims are untimely and the decision below is "fact-bound." BIO 17, 7. The timeliness argument—which the courts below rebuffed—rests on a mischaracterization of petitioner's claim. And while the Eighth Circuit's decision, like all tort cases, arises from specific facts, it adopts a categorical rule that other courts of appeals have rejected. Certiorari should be granted.

I. This case is an excellent vehicle to consider the proper scope of the FTCA's discretionary-function exception.

The Government does not dispute that the questions presented were "fully briefed and directly resolved" by the lower courts. Pet. 22-23. But it opposes review on the ground that petitioner's claim is untimely and "fact-bound." BIO 17, 7. Neither argument presents any impediment to reversing the Eighth Circuit's erroneous interpretation of the FTCA and remanding for further proceedings. In any event, the Government is wrong on both counts.

A. FTCA plaintiffs must satisfy two limitations periods. First, they must present their claims "in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). Second, they must file any federal suit challenging the agency's denial of relief within six months of that denial. *Id.* The Government does not dispute that petitioner satisfied the latter requirement. Nor could it: The Department of Treasury denied relief on January 14, 2016, *see* Dkt. No. 67-1, and petitioner filed suit on June 24, 2016, *see* Dkt. No. 1.

As to the first requirement, the Government first informed petitioner it would not be returning her coins on April 13, 2015. *See* Pet. 9; Pet. App. 20a; BIO 2. Petitioner then presented her claim to the Department of Treasury on August 17, 2015, *see* Pet. App. 23a; BIO 18-19—just four months later, and well within the FTCA's two-year limitations period.

The Government nonetheless suggests that petitioner's claim accrued when the Government "did not accede to" her December 2012 demand for the coins. BIO 18. That is incorrect. Tort claims accrue "at the time of the plaintiff's injury." *United States v. Kubrick*, 444 U.S. 111, 120 (1979); *see* BIO 18. But an injury occurs only when "the plaintiff has a complete and present cause of action" and "can file suit and obtain relief." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (internal quotation marks omitted). The underlying state tort law determines when a plaintiff has that complete and present cause of action. *See* BIO 18.

In petitioner's state of Missouri, a claim for conversion arising from an initially lawful taking of property requires both a demand for the return of

property *and* a refusal to return it. *See, e.g.*, *Emerick v. Mut. Benefit Life Ins. Co.*, 756 S.W.2d 513, 525 (Mo. 1988); *Amond v. Ron York & Sons Towing*, 302 S.W.3d 708, 712 (Mo. Ct. App. 2009); *Collins v. Trammell*, 911 S.W.2d 635, 638 (Mo. Ct. App. 1995). Silence is not "a sufficient refusal." *See* 90 C.J.S. *Trover and Conversion* § 47 (2021). That is especially true here, where petitioner had every reason to think that the Government would return the 364,000 collectible coins it seized: It claimed to be holding them as evidence, *see* Pet. App. 26a, and it had a duty to return them, *see* Internal Revenue Manual (IRM) 9.7.12.2.2. Petitioner's claim thus did not accrue until the Government informed her that it refused to return the coins because it had converted them to cash—which occurred on April 13, 2015, *see* Pet. 9; Pet. App. 23a.

Even if there were some real question about the timeliness of petitioner's claim, that would not change the legal rule adopted by the Eighth Circuit or the questions presented by this case. The proper course would therefore be to grant review, resolve those questions, and remand for the court of appeals to address any other argument the Government might have. That is this Court's usual practice where a district court "reject[s]" a challenge and it is "not addressed by the Court of Appeals." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And the Court has repeatedly applied this general rule in the specific context of timeliness questions not addressed by the court below. *See, e.g.*, *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 229 (2012); *Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 865 (1987); *DelCostello v. Int'l Bhd. of*

Teamsters, 462 U.S. 151, 172 (1983). There is no reason for a different approach here.

B. The Government's effort to portray petitioner's case as hinging on a misreading of the IRM, *see* BIO 7, is equally unavailing. The Government agrees that an agent must expeditiously deposit seized currency if it is ordinary currency. *See* IRM 9.7.4.6.1; IRM 9.7.6.14.1; Pet. 14; BIO 9. It also agrees that agents must preserve—rather than deposit—seized, collectible currency. *See* BIO 9. And for good reason: Collectible coins can be worth many times their nominal values, and the Government should not have the discretion to seize such personal assets and treat them as ordinary nickels and dimes.

Because both sides agree Agent Jackson had a mandatory duty here, this case is hardly "fact-bound." Rather, it is a cleaner vehicle to address the questions presented than many other FTCA cases, in which the parties may dispute whether a mandatory duty exists *at all*.

II. The Government's defense of the decision below is unavailing.

On the merits, the Government's argument fails at each step of the discretionary-function analysis. Step one allows the case to proceed if the regulation or policy at issue "prescribes a course of action" for a government agent to follow, such that no discretion is involved. *United States v. Gaubert*, 499 U.S. 315, 322 (1991). Under step two, even if the challenged government action involved some discretion, the case may still proceed if the sort of discretion involved was not "the kind that the discretionary function exception was designed to shield." *Id.* at 322-23.

The Eighth Circuit's decision implicates two questions that map onto the two steps of the discretionary-function analysis. The first asks whether the exception shields the Government from suit whenever an agent fails to fulfill a mandatory duty that applies only in certain circumstances, on the theory that the agent must have determined those circumstances did not exist. The second asks whether the discretionary-function exception shields an agent's undisputed failure to exercise discretion. The answer to both questions is no.

A. *Step one.* All agree that Agent Jackson had a duty to determine whether petitioner's coins were collectible assets. *See supra* at 4. But the Government argues that, because IRS regulations do not require "any particular steps" to determine whether currency is a collectible asset, Agent Jackson's actions were entirely discretionary, BIO 10, and because he "quickly processed" the coins, he "quite clearly decided [they] were ordinary currency," BIO 9 (quoting Pet. App. 7a).

The Government's view of the law (which mirrors the Eighth Circuit's) makes no sense. Imagine a policy requiring government employees to raise a drawbridge whenever a boat taller than 30 feet approaches. This duty is plainly mandatory. It is no less so if the policy does not lay out "particular steps" to determine a vessel's height. But on the Government's theory, the United States would be insulated from suit if a 40-foot-tall craft collided with the bridge, on the theory that a government employee must have "quite clearly decided" that the boat was shorter. BIO 9 (quoting Pet. App. 7a).

The Government's position is also inconsistent with this Court's precedent. In *Berkovitz v. United States*, 486 U.S. 531 (1988), the National Institutes of Health's Division of Biologic Standards (DBS) was alleged to have approved an unsafe polio vaccine. The plaintiff claimed DBS violated its mandatory duty to issue a vaccine license only if it "receive[d] all data the manufacturer is required to submit." *Id.* at 542. The Court agreed, holding that "the discretionary function exception imposes no bar" in such circumstances. *Id.* at 543.

The Government tries to distinguish *Berkovitz* by claiming that, there, "obtaining required test data . . . was commanded by a specific, mandatory directive," whereas "[n]o similar requirement governed the process of categorizing the coins here." BIO 11-12. Not so. In *Berkovitz*, the regulation required DBS to receive specific data when reviewing a vaccine license application. 486 U.S. at 542-43. Here, the IRM required Agent Jackson to obtain specific data when seizing currency—i.e., the currency's status as collectible or ordinary currency. *See supra* at 4. Both requirements are "specific" and "mandatory." BIO 11. And in each case, the Government was *required* to act in a certain way, depending on the data it obtained: approving or denying the license application in *Berkovitz*, and depositing or preserving the seized currency here.

Berkovitz also directly undermines the notion that Agent Jackson necessarily decided petitioner's coins were ordinary currency simply because he deposited them. *See* BIO 9. DBS was also obligated to "make a determination that the [vaccine] complie[d] with safety standards" before issuing a license.

Berkovitz, 486 U.S. at 542. The Court concluded that if DBS had issued a license "without determining whether the vaccine complied with regulatory standards," the discretionary-function exemption would not apply. *Id.* at 544. But if the Government's view of the law were correct, DBS would have been shielded from suit because the very fact that it issued a license would show that it must have "quite clearly decided" the vaccine complied with safety standards. BIO 9 (quoting Pet. App. 7a).

B. *Step two.* Even if Agent Jackson was performing a discretionary (rather than mandatory) function when he deposited petitioner's coins, the Eighth Circuit's decision is still incorrect. Where, as here, a government agent exercised no discretion, the discretionary-function exception does not apply.

That is the clear import of the statute's text. The FTCA exempts from liability any "failure to exercise or perform a discretionary function . . . whether or not the discretion involved be abused." 28 U.S.C. § 2860(a). The Government argues that, at most, Agent Jackson abused his discretion—and thus the discretionary-function exception applies. *See* BIO 16. But this argument ignores that the exception applies only if the "discretion *involved*" is abused. 28 U.S.C. § 2860(a) (emphasis added); *see United States v. Gaubert*, 499 U.S. 315, 325 (1991) (the exception shields neglect and carelessness only to the extent that they occur in the exercise of "the discretion conferred by statute or regulation").

An admitted failure to exercise any discretion, Pet. App. 3a, is simply not an abuse of "the discretion involved" in the government employee's job. An example confirms the point. Consider an employee

who has discretion to approve or deny permit applications. If she exercises her discretion—even negligently, *see* BIO 16—the discretionary-function exception protects the Government from suit. But if the employee simply denies all applications without reviewing them, the discretionary-function exception is inapplicable because the employee is not exercising "the discretion involved" in her job.

It is of no moment that the agent could have reached the same bottom-line conclusion—denial of a particular application—through "policy analysis." BIO 10. What matters, as this Court has explained, is "the *nature of the actions taken*" and "whether they are subject to policy analysis." *Gaubert*, 499 U.S. at 325 (emphasis added). Although the Government suggests that the "nature" of the action taken is merely the bottom-line decision, *see* BIO 12, that is incorrect. Indeed, in *Berkovitz* "the Government conceded" that a federal agency "has no discretion to" fail to exercise its discretion, even if its bottom-line conclusion is one it might have reached by exercising its discretion. 486 U.S. at 544 n.10. And in an analogous context, this Court has held that a federal agency's failure to exercise its discretion renders its action impermissible—even if it could have reached the same ultimate conclusion by exercising its discretion. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 50 (1983).

III. The Eighth Circuit's decision creates one split and deepens another.

A. *Step one.* In the Eighth Circuit's view, the discretionary-function exception applies where a government agent fails to fulfill a mandatory duty, on the theory that the agent must have determined that the circumstances in which the duty applies were not present. Pet. 12-15. Five courts of appeals disagree. The Government attempts to differentiate these courts' decisions on the theory that they "involved specific, mandatory directives with which the government failed to comply." BIO 13. But the Government contorts these cases: None involved specific guidelines for determining the existence of the circumstances in which the mandatory duty applied.

For example, in *Anestis v. United States*, 749 F.3d 520 (6th Cir. 2014), government hospital staff were required to send any patient "in an emergency state" to treatment. *Id.* at 529. Although the staff was subject to "specific directives" once such "an emergency situation arose," BIO 13 (citation omitted), no specific directive governed its determination *whether* an emergency situation existed. *Anestis*, 749 F.3d at 529. After hospital staff turned a former Marine away from two government facilities, the Marine committed suicide. *Id.* at 523. The Sixth Circuit held that the hospital staff breached their mandatory duty to provide care in an emergency situation, and thus the discretionary-function exception did not apply. *Id.* at 529. It was irrelevant that government regulations did not explain *how* to determine whether the Marine was "in an emergency state."

Similarly, in *In re Glacier Bay*, 71 F.3d 1447 (9th Cir. 1995), government hydrographers were required to lay sounding lines to map the ocean floor. *Id.* at 1452. They had a mandatory duty, given the depth of the water, to space the lines a certain distance apart. *Id.* Because the hydrographers violated that duty by spacing the lines too far apart, the court held that the discretionary-function exception did not apply. *Id.* In contrast, the Eighth Circuit's rule here would have dictated that, by virtue of having spaced the lines too far apart, the hydrographers must have made a discretionary determination that the water was deeper than it was.

The other cases cited in the petition are similar: Government agents had mandatory duties that applied only once they made an antecedent determination. And there were no "specific decision-making steps or criteria" they had to follow in making that antecedent determination. BIO 13. For example, in *Sanders v. United States*, 937 F.3d 316 (4th Cir. 2019), federal agents had to contact local law enforcement if they determined that initial outreach had been unsuccessful. *Id.* at 329-31. But the court pointed to no regulation or rule dictating how the agents were supposed to determine whether initial outreach was unsuccessful. *See id.*; *see also Parrott v. United States*, 536 F.3d 629, 637-38 (7th Cir. 2008) (duty to segregate inmates if separation order was in place, but no specific steps for determining whether separation order existed); *Andrews v. United States*, 121 F.3d 1430, 1441 (11th Cir. 1997) (duty to segregate flammable liquid waste, but no specific steps for determining whether waste was flammable); *Downs v. U.S. Army Corps of Eng'rs*,

333 Fed. Appx. 403, 413 (11th Cir. 2009) (duty to fill beach area with "non-rocky" and "sandy" materials, but no specific steps for determining whether materials were non-rocky or sandy). Each decision would have come out differently had the courts of appeals followed the reasoning of the Eighth Circuit.

B. *Step two.* The Government does not dispute that three courts of appeals have held—in conflict with the Eighth Circuit's decision below—that "government inattention or carelessness is not protected by the discretionary-function exception." Pet. 15; *see* BIO 16-17. All the Government says is that these "cases all involved alleged conduct by prison guards." BIO 17.

The Government offers no persuasive reason why that context distinguishes the cases petitioner identifies. It suggests that prison guards' decisions are similar to driving decisions, which are not susceptible to policy concerns. BIO 17. But the Government offers no support for the analogy. Nor could it: Decisions about how to protect unattended inmates, *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 472 (2d Cir. 2006); *Tyree v. United States*, 814 Fed. Appx. 762, 762-63 (4th Cir. 2020), or how to assign prisoners to units, *Palay v. United States*, 349 F.3d 418, 428-29 (7th Cir. 2003), or how to monitor prison yards, *Keller v. United States*, 771 F.3d 1021, 1025 (7th Cir. 2014), all can implicate "legitimate policy considerations, such as accounting for other ongoing inmate issues," *Tyree*, 814 Fed. Appx. at 768; *see also Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000) (inspecting prison weight machine); *Rich v. United States*, 811 F.3d 140, 147 (4th Cir. 2015) (patting down prisoners). The courts

held that the discretionary-function exception would not apply if the government agents *did not* exercise discretion—even if they *could* have done so.

If anything, decisions about how to treat and monitor incarcerated individuals are generally *more* susceptible to policy analysis than decisions about how to treat collectible assets. *Cf. Turner v. Safley*, 482 U.S. 78, 87 (1987) (courts "inquire[] whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns"). It is therefore especially clear that decisions refusing to apply the discretionary-function exception to inattentive or careless conduct in prisons cannot be reconciled with the decision below.

CONCLUSION

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

Respectfully submitted,

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Walter Dellinger
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20009
(202) 383-5204
kendallturner@omm.com

Grant Rahmeyer
STRONG-GARNER-BAUER P.C.
415 E. Chestnut Expwy.
Springfield, MO 65802

November 15, 2021