No. _____

In the
Supreme Court of the United States

MACKIE L. SHIVERS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), includes a "discretionary function exception," 28 U.S.C. 2680(a), that immunizes the United States from state tort liability based on its employees' performance of discretionary functions. The First, Eighth, Ninth, and D.C. Circuits have squarely held that the exception does not apply when federal employees' conduct violates the Constitution. Below, a divided panel of the Eleventh Circuit joined the Seventh Circuit in going the other way, holding in a reported decision that the exception applies, and thus bars suit against the United States, even when the challenged conduct is unconstitutional.

The question presented is:

Whether the discretionary function exception to the Federal Tort Claims Act immunizes the United States from tort liability for acts taken by its employees in violation of the Constitution.

PARTIES TO THE PROCEEDING

Petitioner here is Mackie L. Shivers, Jr.

Respondents are the United States of America, Dale Grafton, T. Anthony, FNU Spurlock, and FNU Gay.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Shivers v. United States*, No. 17-12493, United States Court of Appeals for the Eleventh Circuit. Judgment entered June 9, 2021.

- *Shivers v. United States*, No. 5:16-cv-00276-WTH-PRL, United States District Court for the Middle District of Florida. Judgment entered April 18, 2017.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mackie Shivers respectfully petitions for a writ of certiorari to review a split panel decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported and available at 1 F.4th 924. Pet.App.1a–33a. The United States District Court for the Middle District of Florida's opinion is unreported. Pet.App.34a–56a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of Shivers's complaint, which it then entered as the court's judgment, on June 9, 2021. This petition is timely filed in accordance with Rule 13 and this Court's July 19, 2021 order that enlarged to 150 days the deadline for petitioning for a writ of certiorari in certain cases, including this one.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1346(b)(1) of Title 28 of the U.S. Code provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims

> against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680 of Title 28 of the U.S. Code provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

INTRODUCTION

This petition squarely presents a recognized circuit split on a recurring question of exceptional importance: the scope of the "discretionary function" exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a).

Some thirty years ago, this Court explained that the discretionary function exception immunizes the United States from tort liability only when the official conduct at issue "involves an element of judgment" and "involves the permissible exercise of policy judgment." *Berkovitz* v. *United States*, 486 U.S. 531, 536, 539 (1988); *accord United States* v. *Gaubert*, 499 U.S. 315, 322–323 (1991). The courts of appeals have been unable to agree on whether the exception applies when federal employees act in violation of the Constitution, such that the United States cannot be liable under the FTCA for their tortious conduct. Indeed, there is a recognized circuit split on that precise question.

* * *

Petitioner Mackie Shivers is a federal inmate. He was stabbed in the right eye by his cellmate, rendering him permanently blind in that eye. Before the attack, Shivers alerted prison officials that his cellmate had been acting erratically, was mentally unstable, and had shown a pattern of assaulting his cellmates; Shivers also specifically told the officials that he feared for his safety, yet they failed to protect him.

Shivers sued the United States under the FTCA and brought claims against individual prison officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1973). He alleged that the officers' conduct was negligent and violated the Eighth Amendment, under clearly established Eleventh Circuit case law, by failing to protect him from a known, specifically communicated risk of harm. The district court dismissed the case, holding that the government was immune to FTCA liability because the officials were exercising their discretion, 28 U.S.C. 2680(a), and that the *Bivens* claims were procedurally barred. The Eleventh Circuit affirmed in a published, 2–1 decision; the dissent reasoned that the government could not avoid FTCA liability through the discretionary function exception because federal officials lack discretion to violate the Constitution.

* * *

The question presented extends far beyond prisoner litigation—or even the FTCA—and it has divided the circuits, as the opinions below expressly recognize.

1. Six courts of appeals have now answered the precise question presented. Four courts—the First, Eighth, Ninth, and D.C. Circuits—have squarely held that the discretionary function exception does not apply when the underlying federal-employee conduct violates the Constitution. (Another four circuits have agreed in dicta.) The last two courts of appeals to address the question have held to the contrary: Below, a divided panel of the Eleventh Circuit expressly rejected the majority rule

and instead joined the Seventh Circuit in holding that even unconstitutional conduct falls within the FTCA's discretionary function exception.

2. The decision below is wrong and would lead to anomalous results. It bars FTCA suits when the challenged conduct is unconstitutional even though section 2680(a) allows suits where the conduct violates a federal statute, rule, or policy. And, despite the panel majority's concern, correctly reading the discretionary function exception would not somehow authorize "constitutional claims" under the FTCA.

3. This case is an ideal vehicle because the question presented was outcome-determinative below and was squarely (and cleanly) presented by the parties and the divided panel. The question also is one of exceptional importance: It regularly arises in FTCA cases, brought by ordinary Americans, that involve various constitutional rights, and the federal circuits look to this Court's (and their own) FTCA decisions to interpret materially identical discretionary function exceptions found in other federal statutes.

The Court should resolve this deepening circuit split.

STATEMENT

A. Statutory Background

"The FTCA, 28 U.S.C. § 1346(b), generally authorizes suits against the United States for damages" caused by the negligence of its employees.

Berkovitz, 486 U.S. at 535. When its employees' negligent acts or omissions cause personal injury, the government is liable if a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). This potential tort liability extends to claims of federal prisoners who sustain injuries in prison because of prison officials' negligence. See *United States* v. *Muniz*, 374 U.S. 150, 150 (1963).

The FTCA's waiver of sovereign immunity is subject to various statutory exceptions, including the "discretionary function" exception, which immunizes the United States from "[a]ny claim based upon * * * the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

The discretionary function exception exists "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323 (internal quotation marks and citation omitted). As its name suggests, the exception "covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" *Id.* at 322 (quoting *Berkovitz*, 486 U.S. at 536) (alteration in original). "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the exception applies," and the exception "is not satisfied if a 'federal statute, regulation, or policy specifically

prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Ibid.* (first quoting *United States* v. *Varig Airlines*, 467 U.S. 797, 813 (1984); and then quoting *Berkovitz*, 486 U.S. at 536); *see also Berkovitz*, 486 U.S. at 539 ("The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.").

B. Factual Background

In August 2015, Shivers was a 64-year-old federal inmate; Marvin Dodson, a 26-year-old inmate, was housed in another cell at the same prison. Pet.App.2a. When officials reassigned the two men to share a cell, Shivers alerted prison officials that he was concerned for his safety given Dodson's erratic behavior and documented history of violence toward his cellmates. Soon after, Dodson stabbed Shivers in the eye with a pair of scissors while he slept. Shivers is now permanently blind in his right eye. *Id.* at 3a.

C. Proceedings Before the District Court

In April 2016, Shivers, acting pro se, sued the United States and five prison employees in the United States District Court for the Middle District of Florida, asserting FTCA and *Bivens* claims, respectively. He alleged that he told prison officials that his cellmate "was presenting aggressive and violent tendencies toward other prisoners" and that he had a history of assaulting his cellmates. Pet.App.3a (quotation omitted); Pet. C.A. App. 28.

Shivers detailed that he had been "afraid for his safety," based on his cellmate's previous and well-known behavior, and "that he voiced those concerns to prison officials." Pet.App.3a. He alleged that the officers' conduct was negligent and violated the Eighth Amendment, under clearly established Eleventh Circuit case law, by failing to protect him from (and ignoring) a known, specifically communicated safety risk. *Ibid.*; Pet. C.A. App. 28; see also *Harris* v. *Monds*, 696 So. 2d 446, 446–447 (Fla. Dist. Ct. App. 1997) (recognizing state-law negligence claim for breach of the "duty to protect [a prisoner] from assault by a fellow inmate"); *Bowen* v. *Warden Baldwin State Prison*, 826 F.3d 1312, 1324 (11th Cir. 2016) (holding that failure to protect inmate from cellmate who had attacked previous cellmates and had known violent history is a clearly established Eighth Amendment violation).

The government and the individual defendants moved to dismiss or, in the alternative, for summary judgment. As relevant here, the government argued that Shivers's FTCA claim was barred by the discretionary function exception. Pet.App.3a–4a.

The district court dismissed the case. The court held that the discretionary function exception barred Shivers's FTCA claim against the government because the officers were exercising their discretion to make cell assignments. Pet.App.7a–9a.

D. Proceedings Before the Court of Appeals

Shivers appealed to the Eleventh Circuit, where he was appointed appellate counsel. Pet.App.5a. Following oral argument, a panel of the Eleventh Circuit affirmed in a split decision. Judge Hull wrote for the majority; Judge Wilson dissented in relevant part. Pet.App.1a–2a.

In affirming the dismissal of the FTCA claim, the majority rejected Shivers's argument that because federal prison officials lack discretion to violate the Constitution, the government should not be entitled to the discretionary function exception as a bar to suit when the officials' conduct is unconstitutional. Pet.App.7a–9a. Judge Hull's opinion, in a footnote, expressly "acknowledge[d] that there is a circuit split on this same discretionary function issue" and explained that "[w]hile the Seventh Circuit is in the minority, we find its reasoning and analysis to be more persuasive." *Id.* at 16 n.5.

The majority reasoned that section 2680(a) contains no "constitutional-claims exclusion." Pet.App.10a–11a. The majority noted that this Court has excluded from section 2680(a) those circumstances "when a federal employee acts contrary to a *specific prescription* in federal law—be it a statute, regulation, or policy," see *Gaubert*, 499 U.S. at 322, but the majority concluded that "the Eighth Amendment itself contains no such specific directives as to inmate classifications or housing placements," and Shivers had not identified a "specifically prescribe[d] * * * course of action that

the prison employees here failed to follow." Pet.App.11a–12a.

The majority also reasoned that allowing unconstitutional conduct to evade the discretionary function exception would conflict "with the FTCA's remedial scheme" that addresses state-law tort claims, not constitutional claims. Pet.App.10a. And the majority voiced concern that allowing Shivers's claim would "circumvent the limitations on constitutional tort actions under *Bivens* * * * by recasting the same allegations (1) as a common-law tort claim under the FTCA that is not subject to the discretionary function exception or (2) as negating the discretionary function defense." *Id.* at 12a. The majority questioned how such an exception "would work in practice," given that parallel "state tort law and federal constitutional law [claims] would need to be tried in [a] singular FTCA case." *Id.* at 18a.[1]

Judge Wilson dissented on this point, explaining that he would have joined "virtually every other circuit to address the issue [in] conclud[ing] * * * that the discretionary function exception cannot provide blanket immunity for tortious conduct that also violates the Constitution." Pet.App.28a–29a (Wilson, J., dissenting). In Judge Wilson's view, the discretionary function exception should not immunize unconstitutional actions

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[1] The majority—joined by Judge Wilson—also concluded that Shivers's *Bivens* claims were properly dismissed because he had not exhausted his administrative remedies. Pet.App.21a–24a.

because the Constitution's "dictates are absolute and imperative." *Id.* at 26a (quotation omitted). Instead, "the discretionary function exception protects only conduct that involves" a "*permissible* exercise of policy judgment"—so unconstitutional actions, which are necessarily *impermissible*, fall outside the scope of the statutory exception to liability. *Ibid.* (quotation omitted). As Judge Wilson explained, "[t]he discretionary function exception does not protect such extra-discretionary conduct." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because (1) the decision below deepens a recognized circuit split; (2) the panel majority's decision below, which expressly adopted the "minority" view among the circuits, is wrong and leads to an anomalous result; and (3) this case is an ideal vehicle for answering the question presented, which is an important question that is likely to recur in a variety of contexts.

I. The Divided Decision Below Deepens A Recognized Circuit Split On The Precise Question Presented.

"[V]irtually every * * * circuit to address the issue has concluded * * * that the discretionary function exception cannot provide blanket immunity for tortious conduct that also violates the Constitution." Pet.App.28a–29a (Wilson, J., dissenting). Four circuits have expressly held that the discretionary function exception does not bar FTCA claims when the federal official engaged in unconstitutional conduct, and another four circuits have expressed a similar view in dicta. Until the

divided decision below, only one circuit had gone the other way. The decision below thus deepens a sharp and acknowledged circuit split.

1. Four circuits have expressly rejected the argument that the discretionary function exception shields the United States from tort liability for its officers' unconstitutional conduct.

Start with the D.C. Circuit. In *Loumiet* v. *United States*, 828 F.3d 935 (2016), the plaintiff sued the United States and four Office of the Comptroller of the Currency (OCC) employees under the FTCA and *Bivens*, alleging retaliatory prosecution in violation of the First and Fifth Amendments. The government invoked the discretionary function exception, insisting that "constitutional allegations do not affect the applicability of [the defense] to bar FTCA claims." *Id.* at 942. Acknowledging the circuit split, the D.C. Circuit "conclude[d], in line with the majority of [its] sister circuits to have considered the question, that the discretionary function exception does not categorically bar FTCA tort claims where the challenged exercise of discretion allegedly exceeded the government's constitutional authority to act." *Id.* at 943; *see also id.* at 944 ("This circuit has yet to decide whether the FTCA's discretionary-function exception generally immunizes allegedly unconstitutional abuses of discretion by the government. In deciding that it does not, we follow the clear weight of circuit authority.").[2] That

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[2] The D.C. Circuit has extended *Loumiet*'s reasoning to similar discretionary function exceptions in other statutory contexts.

conclusion followed because "[a] constitutional limit on governmental power, no less than a federal statutory or regulatory one * * * circumscribes the government's authority even on decisions that otherwise would fall within its lawful discretion." *Id.* at 944.

Similarly, the First Circuit rejected the government's invocation of the discretionary function exception in a case in which FBI agents "withh[eld] exculpatory information from state officials" leading to an improper prosecution. *Limone* v. *United States*, 579 F.3d 79, 101 (2009). That conduct "was unconstitutional and, therefore, not within the sweep of the discretionary function exception." *Id.* at 101–102 (It is "elementary that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statute or regulation[, n]or does it shield conduct that transgresses the Constitution.").

The Eighth Circuit likewise reversed the dismissal of FTCA claims relating to an FBI investigation, holding "that the FBI's alleged surveillance activities f[e]ll outside the FTCA's

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See Part III.C *infra*. In *Usoyan* v. *Republic of Turkey*, the D.C. Circuit analogized the FTCA's discretionary function exception to a materially identical discretionary function exception found in the Foreign Sovereign Immunities Act (FSIA). 6 F.4th 31 (2021). Writing for the unanimous panel, Judge Henderson reaffirmed *Loumiet*'s holding that "constitutionally ultra vires conduct cannot be discretionary." *Id.* at 39–40 (internal quotations and citation omitted).

discretionary function exception because [the plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights." *Raz* v. *United States*, 343 F.3d 945, 948 (2003).

And in *Nurse* v. *United States*, a case arising from an allegedly racially discriminatory detention, arrest, and search, the Ninth Circuit held that "the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply." 226 F.3d 996, 1002 n.2 (2000). That conclusion flowed from the rule that "governmental conduct cannot be discretionary if it violates a legal mandate," including a constitutional mandate. *Id.* at 1002.

2. Four other circuits—the Second, Third, Fourth, and Fifth Circuits—have recognized more broadly that federal officials lack discretion to engage in unconstitutional actions. See, *e.g.*, *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("[F]ederal officials do not possess discretion to violate constitutional rights or federal statutes." (alteration adopted) (quotation omitted)); *Prisco* v. *Talty*, 993 F.2d 21, 26 n.14 (3d Cir. 1993) (same, noting as a result that "the discretionary function exception to waiver of sovereign immunity d[id] not present a potential defense to [plaintiff's] FTCA claim");[3] *Sutton* v. *United States*, 819 F.2d 1289,

[3] See also, *e.g.*, *U.S. Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 120 (3d Cir. 1988) ("In the first place, conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation.").

1293 (5th Cir. 1987) (noting that an "action does not fall within the discretionary function of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution");[4] *Myers & Myers, Inc.* v. *U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority." (citing *Marbury* v. *Madison*, 5 U.S. 137, 170–171 (1803)).

In sum, as the D.C. Circuit recognized in *Loumiet*, 828 F.3d at 943, "[a]t least seven [other] circuits, including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, have either held or stated in dictum that the discretionary function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority."

3. The panel majority brushed aside the contrary circuit decisions in a footnote. See Pet.App.16a n.5. It instead adopted what it conceded was the "minority" view held only by the Seventh Circuit. *Id.* at 15a–16a & 16a n.5 (citing *Linder* v. *United States*, 937 F.3d 1087 (7th Cir. 2019), cert. denied, 141 S. Ct. 159 (2020)).

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[4] The Fifth Circuit has since clarified that it "has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception." *Spotts* v. *United States*, 613 F.3d 559, 569 (2010); see also *Loumiet*, 828 F.3d at 943 n.2 & 945–946 (discussing Fifth Circuit law).

The Seventh Circuit's *Linder* decision arose from an indictment filed against a deputy U.S. Marshal related to an alleged physical altercation with the father of a fugitive during an interrogation. 937 F.3d at 1088. During the deputy's criminal prosecution, the district's U.S. Marshal instructed other deputies not to communicate with the deputy or his lawyers without approval. *Ibid.* The district court in the criminal case dismissed the indictment, concluding that the no-contact order violated the Confrontation Clause of the Sixth Amendment. *Id.* at 1090.

The deputy later asserted FTCA claims for malicious prosecution and intentional infliction of emotional distress. *Linder*, 937 F.3d at 1088. And he argued that the discretionary function exception should not apply to his FTCA claims because government officials lack discretion to violate the Constitution. *Id.* at 1088, 1090. The Seventh Circuit questioned whether there had been a constitutional violation at all. (Indeed, the district court had dismissed the deputy's *Bivens* claim for just that reason—a holding he did not appeal.) Even so, the court concluded that because FTCA claims do "not apply to constitutional violations," but rather apply "to torts, as defined by state law," the principle invoked by the plaintiff that no one has the discretion to violate the Constitution was irrelevant to the discretionary function exception. *Id.* at 1090; *accord Kiiskila* v. *United States*, 466 F.2d 626, 627–628 (7th Cir. 1972) (applying the discretionary function exception to "constitutionally repugnant" conduct). And the court stated that "[t]he limited coverage of the FTCA, and its inapplicability to

constitutional torts, is why the Supreme Court created the *Bivens* remedy against individual federal employees." *Linder*, 937 F.3d at 1090.

The panel majority below "acknowledge[d] that there is a circuit split on this same * * * discretionary function issue." Pet.App.16a n.5. Yet in joining the Seventh Circuit's conceded "minority" view—and rejecting *Loumiet*, *Limone*, *Raz*, and *Nurse*—the majority stated that it found the Seventh Circuit's "reasoning and analysis more persuasive." *Ibid.*

Only this Court can resolve this irreconcilable divide.

II. The Decision Below Is Wrong.

The Eleventh Circuit's holding that the discretionary function exception applies even when official conduct violates the Constitution flouts this Court's precedent and defies common sense.

1. This Court has held that government officials lack discretion to violate the Constitution. *Owen* v. *City of Indep.*, 445 U.S. 622, 649 (1980) (The government "has no discretion to violate the Federal Constitution; its dictates are absolute and imperative." (internal quotation marks omitted));[5]

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[5] Cf. also *Gaubert*, 499 U.S. at 325 n.7 ("There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because th[o]se acts cannot be

accord Pet.App.26a (Wilson, J., dissenting) (quoting *Owen*, 445 U.S. at 649).

Indeed, the discretionary function exception only immunizes discretionary conduct involving a "*permissible* exercise of policy judgment." Pet.App.26a (Wilson, J., dissenting) (emphasis in original) (quoting *Berkovitz*, 486 U.S. at 539). When "government employees violate the Constitution, they are necessarily—and impermissibly—acting outside the scope of their discretion, rather than merely abusing the discretion they have." *Id.* at 26a–27a. Their conduct therefore cannot fall within the bounds of the discretionary function exception.

2. In holding otherwise, the panel majority misapplied this Court's two-part inquiry for determining whether challenged conduct falls within the discretionary function exception. The exception "covers only acts that are discretionary in nature," *Gaubert*, 499 U.S. at 322; so, *first*, the act must "'involve an element of judgment or choice.'" *Ibid.* (quoting *Berkovitz*, 486 U.S. at 536). *Second*, "it remains to be decided 'whether that judgment is of the kind that the discretionary function was designed to shield'"—*i.e.*, "the exception 'protects only governmental actions and decisions based on considerations of public policy.'" *Id.* at 322–323 (quoting *Berkovitz*, 486 U.S. at 536–37). So, "[t]he discretionary function exception applies only to

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said to be based on the purposes that the regulatory regime seeks to accomplish.").

conduct that involves the permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 539.

The panel majority stopped short—after framing the official conduct as "inmate-classification and housing-placement decisions," the court determined only that the acts at issue "'involved an element of judgment or choice.'" Pet.App.7a, 11a (quoting *Gaubert*). But the panel majority never determined that the alleged unconstitutional conduct "involve[d] the permissible exercise of policy judgment," *Berkovitz*, 486 U.S. at 537, 539. In the same way, the majority too narrowly framed the relevant question as whether there is an "extra-textual 'constitutional-claims exclusion'" to section 2680(a). Pet.App.10a. Under *Berkovitz* and *Gaubert*, a proper interpretation of the statutory text requires asking whether the challenged conduct can be said to be a "permissible exercise of policy judgment." There is no government policy that would allow a federal official to act in violation of the Constitution.

3. Nor does the minority view that the Eleventh Circuit adopted make sense. Just the opposite—"the absence of a limitation on the discretionary-function exception for constitutionally ultra vires conduct * * * yield[s] an illogical result." *Loumiet*, 828 F.3d at 944. Under the minority rule that the panel majority embraced, the FTCA "authorize[s] tort claims against the government for conduct that violates the mandates of a statute, rule, or policy, while insulating the government from claims alleging on-duty conduct so egregious that it violates the more fundamental requirements of the Constitution." *Ibid.*

4. The panel majority expressed two concerns about the implications of adopting a so-called "constitutional-claims exclusion" to the discretionary function exception, but both concerns are unfounded.

a. The majority first worried that recognizing a constitutional-claims exclusion to the discretionary function exception intruded on ground that *Bivens* already claimed. Pet.App.16a–17a (stating that "the Supreme Court created *Bivens* actions" in part because of "[t]he limited coverage of the FTCA, and its inapplicability to constitutional torts" (alteration in original) (quotation omitted). But "the FTCA and *Bivens* provide different remedies against different parties under different substantive law"—simply taking constitutional considerations into account "[w]hen evaluating the merits of an FTCA claim" does not change the fact that "state tort law still governs any liability determination, only the United States can be held liable, and the only available remedies are those provided by the FTCA." *Id.* at 31a (Wilson, J., dissenting); *accord Limone*, 579 F.3d at 102 n.13 ("[W]e do not view the FBI's constitutional transgressions as corresponding to the plaintiffs' causes of action—after all, the plaintiffs' claims are not *Bivens* claims—but rather, as negating the discretionary function defense.").

The D.C. Circuit rejected similar concerns in *Loumiet*, emphasizing that "[t]he state-law substance of an FTCA claim is unchanged by courts' recognition of constitutional bounds to the legitimate discretion that the FTCA immunizes." 828 F.3d at 945.

Although "constitutional defects in the conduct underlying [an] FTCA tort claim—whether or not [the plaintiff] advances a *Bivens* claim against the individual official involved—may affect the availability of the discretionary-function defense," this "does not thereby convert an FTCA claim into a constitutional damages claim against the government; state law is necessarily still the source of the substantive standard of FTCA liability." *Id.* at 945–946.

The panel majority's embrace of *Bivens* as a reason for rejecting a constitutional-claims exclusion to the discretionary function exception also makes little sense. The potential existence of a *Bivens* remedy against an individual official hardly means that the United States is shielded from FTCA liability for that official's conduct. Even after *Bivens*, this Court "recognized the continuing viability of state-law tort suits against federal officials." *Hernandez* v. *Mesa*, 140 S. Ct. 735, 748 (2020) (citing *Westfall* v. *Erwin*, 484 U.S. 292 (1988)). *Westfall* prompted Congress to pass the Westfall Act, making the FTCA "the exclusive remedy for most claims against Government employees arising out of their official conduct." *Ibid.* "Thus, a person injured by a federal employee may seek recovery directly from the United States under the FTCA." *Ibid.*

Indeed, this Court has unanimously recognized that "one of the FTCA's purposes" was to "channel[] liability away from individual employees and toward the United States." *Simmons* v. *Himmelreich*, 578 U.S. 621, 631 (2016); *accord* *Brownback* v. *King*, 141 S. Ct. 740, 746 (2021) (The

FTCA "thus opened a new path to relief (suits against the United States) while narrowing the earlier one (suits against employees).").

What's more, the Court has "changed course" since *Bivens*. See, *e.g.*, *Hernandez*, 140 S. Ct. at 741. "[I]n light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's * * * *Bivens* cases might have been different if they were decided today." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017); see also, *e.g.*, *Hernandez*, 140 S. Ct. at 751–753 (Thomas, J., concurring) (noting that the Court has "cabined the [*Bivens*] doctrine's scope, undermined its foundation, and limited its precedential value" to the point of effective repudiation); *Wilkie* v. *Robbins*, 551 U.S. 557, 568 (2007) (Thomas, J., concurring) (calling *Bivens* "a relic of the heady days in which this Court assumed common-law powers to create causes of action") (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

So, the majority's supposed deference to *Bivens* claims makes little sense.

b. The majority also fretted over how an exclusion "would work in practice," because "state tort law and federal constitutional law" claims "would need to be tried in [a] singular FTCA case." Pet.App.18a. But courts routinely tee up parallel federal and state law issues for juries. A plaintiff may, for example, "need to introduce evidence at trial to prove its standing," requiring the district court to "instruct[] the jury on how to properly—and separately—assess the jurisdictional and merits

issues." *Id.* at 32a (Wilson, J., dissenting). So as Judge Wilson explained here, a district court is "well-equipped to craft jury instructions on how to separately evaluate the jurisdictional issue (whether the discretionary function exception immunizes the United States from suit) and the merits issue (whether the defendants were negligent under Florida law)." *Ibid.*

Implementing a rule that precludes application of the discretionary function exception in the face of allegedly unconstitutional conduct would not present the insurmountable challenge the panel majority predicts.

III. This Question Is Squarely Presented, Exceptionally Important, And Likely To Recur.

A. This case presents an ideal vehicle for resolving the circuit split.

This case is an ideal vehicle for resolving the question presented, which was outcome-determinative below.

1. The divided panel of the Eleventh Circuit rejected Shivers's FTCA claim only because it held that there is no "constitutional-claims exclusion" to the discretionary function exception. Pet.App.10a. And the court's dueling majority and dissenting opinions track the deepening, recognized circuit split. No procedural or prudential obstacles impede this Court's review, and the split decision below is an apt candidate for this Court's resolution of the question presented.

The issue also requires no further percolation. Six circuits have already squarely weighed in on this precise issue, with four holding that the discretionary function exception does not shield the United States from tort liability under the FTCA when its officials violate the Constitution. With its decision below, the Eleventh Circuit joined the Seventh Circuit in adopting the minority view. As it stands, whether a plaintiff has a tort remedy against the United States for violations of state tort law that also violate the Constitution hinges on geographical happenstance. This Court should intervene now to remedy that lack of national uniformity.

2. This case also presents none of the vehicle problems that existed in *Linder*, in which this Court recently chose not to grant certiorari. In *Linder*, the asserted constitutional right at issue was dubious—the plaintiff argued that a pretrial "no-contact-without-approval order" issued by the U.S. Marshals Service "violated the Confrontation Clause of the Sixth Amendment." 937 F.3d at 1090. But "[c]ompulsory process is a trial right; the Constitution does not entitle a criminal defendant to interview potential witnesses or take their depositions before trial." *Ibid.* And so the Seventh Circuit found "problematic" the claim that the federal official's conduct could even have violated the Confrontation Clause. *Ibid.* Indeed, the district court had dismissed the underlying *Bivens* claim on the merits for that very reason, *Linder* v. *McPherson*, No. 14–cv–2714, 2015 WL 739633, at *6–7 (N.D. Ill. Jan. 29, 2015), and the plaintiff "abandoned" the claim on appeal, *Linder*, 937 F.3d at 1088.

Not so here. Shivers pleaded an Eighth Amendment violation that is clearly established under Eleventh Circuit case law. See, *e.g.*, *Bowen*, 826 F.3d at 1319 ("Beyond just restraining prison officials from inflicting cruel and unusual punishments upon inmates, the [Eighth] Amendment also imposes duties on these officials, who must take reasonable measures to guarantee the safety of the inmates." (alteration adopted) (quotation omitted)).[6] And neither the majority nor the government below questioned whether it offends the Eighth Amendment when a prison official fails to protect an inmate from a known, specifically communicated risk of harm.

Linder, too, was a case in which the plaintiff experienced "no harm" to remedy—the underlying indictment was dismissed. 937 F.3d at 1091. Here, Shivers is permanently blind in his right eye, and he alleges continued pain and suffering.

The Seventh Circuit's *Linder* decision also was unanimous. Now, the Eleventh Circuit has deepened the circuit split in a published opinion, with Judge

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[6] See also, *e.g.*, *Caldwell* v. *Warden, FCI Talladega*, 748 F.3d 1090, 1103 (11th Cir. 2014) (reinstating Eighth Amendment claim for assault by plaintiff's cellmate where prison officials, in making cell assignment, ignored plaintiff's reported fear of cellmate's violent history); *Cottone* v. *Jenne*, 326 F.3d 1352, 1358 (11th Cir. 2003) (affirming denial of motion to dismiss Eighth Amendment claim filed after prisoner was murdered by his cellmate, because the complaint alleged that officials knew of the cellmate's mental illness as well as previous outbursts).

Wilson writing a well-reasoned, thorough dissent. And the Eleventh Circuit is the first court of appeals to grapple with this question since this Court denied certiorari in *Linder*. The circuit split can only grow deeper and more entrenched from here.

B. The question presented raises an important and recurring issue.

The question presented is both important and recurring.

Whether the United States is immune from tort liability for its officials' unconstitutional conduct is a question of exceptional importance that presents itself in many contexts. After all, the Act imposes liability on the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of *any employee of the Government* while acting within the scope of his office or employment." *Kosak* v. *United States*, 465 U.S. 848, 851–852 (1984) (quoting 28 U.S.C. 1346(b)) (emphasis added).

The divided circuit decisions themselves show the issue's breadth. In assessing whether the discretionary function exception reaches the unconstitutional actions of federal employees, the circuits have considered FBI misconduct, *Limone*, 579 F.3d at 101; allegedly unconstitutional FBI surveillance, *Raz*, 343 F.3d at 948; retaliatory prosecution by the OCC, *Loumiet*, 828 F.3d at 938; unlawful arrest and searches by the U.S. Customs Service, *Nurse*, 226 F.3d at 1002; and malicious prosecution by federal law enforcement officials, *Linder*, 937 F.3d at 1088. And in wading into the

divide, the Eleventh Circuit confronted yet another FTCA context: prison officials' negligence.[7] Pet.App.7a–9a.

This issue continues to be actively litigated in the federal courts, virtually ensuring that the question will recur and the circuit split will endure.[8]

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[7] Such claims are common. See, *e.g.*, *Reid* v. *United States*, 626 Fed Appx. 766, 767 (10th Cir. 2015) (reversing and remanding dismissal of a federal prisoner's FTCA claims "for damages he allegedly sustained from another prisoner assaulting him"); *Rich* v. *United States*, 811 F.3d 140, 141–142 (4th Cir. 2015) (pursuing FTCA claim alleging that prison officials were negligent in failing to protect plaintiff from an attack in a recreation area, resulting in "serious injuries, including liver laceration, which required numerous invasive surgeries"); *Keller* v. *United States*, 771 F.3d 1021, 1022 (7th Cir. 2014) (involving FTCA claim against "the federal government to recover damages for an assault by [a] prisoner" in a federal penitentiary, after plaintiff was attacked for several minutes without intervention and was "left lying unconscious in the prison yard").

[8] See, *e.g.*, *Dalal* v. *Molinelli*, No. 20-1434, 2021 WL 1208901, at *10 (D.N.J. Mar. 30, 2021) ("Courts have nearly unanimously held that federal actors lack discretion to violate an individual's constitutional rights," citing *Loumiet*); *Gill* v. *United States*, 516 F. Supp. 3d 64, 83 (D. Mass. Jan. 29, 2021) (citing *Limone* and *Loumiet* for its holding that because a government official's "conduct plausibly violate[d] the Fourth Amendment as constituting excessive force" it was "unprotected by the discretionary function exception to the FTCA"); *Ashley* v. *United States*, No. 1:20-CV-0154-SWS/MLC, 2020 WL 8996805, at *9 (D.N.M. Nov. 2, 2020) (citing *Linder* for the proposition that "the theme that no one has discretion to violate the Constitution has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations" (internal quotation marks omitted)); *Ramirez* v. *Reddish*, No. 2:18-cv-

Indeed, it has been less than two years since this Court denied certiorari in *Linder*, and another circuit court has addressed the same discretionary-function-exception issue. Taking up the issue now would provide greater clarity and uniformity to similar cases throughout the circuits.

C. The question presented arises in other statutory contexts.

Certiorari also is warranted because the question presented implicates statutory schemes beyond the FTCA.

For example, both the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.*, and the Stafford Act, 42 U.S.C. 5121–5208, contain discretionary function exceptions materially identical to the FTCA's. See 28 U.S.C. 1605(a)(5) (FSIA); 42 U.S.C. 5148 (Stafford Act). Several circuits interpret those statutes' discretionary function exceptions by reference to the FTCA and the caselaw interpreting it. See, *e.g.*, *Usoyan* v. *Republic of Turkey*, 6 F.4th

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00176-DME-MEH, 2020 WL 1955366, at *28–32 (D. Utah Apr. 23, 2020) (similar, adopting *Linder*'s reasoning and rejecting *Loumiet*); *A.P.F.* v. *United States*, 492 F. Supp. 3d 989, 996 (D. Ariz. 2020) (citing *Nurse* for the assertion that the discretionary function "exception does not shield unconstitutional government conduct"); *Barbour* v. *United States*, No. 1:18-cv-0246-NONE-BAM (PC), 2020 WL 3571565, at *8 (E.D. Cal. July 1, 2020) (similar, citing *Loumiet*, *Nurse*, and *Raz*); *Doe KS* v. *United States*, No. 17-2306, 2017 WL 6039536, at *3 (D. Kan. Dec. 6, 2017) (discussing circuit split on discretionary function exception).

31, 38, 44–45 (D.C. Cir. 2021) (applying its reasoning in *Loumiet* to the FSIA's discretionary function exception, which is "modeled after [the] similarly worded exception in the [FTCA]"); *St. Tammany Par.* v. *FEMA*, 556 F.3d 307, 320 (5th Cir. 2009) (collecting cases applying interpretations of the FTCA's discretionary function exception to the Stafford Act's similar provision).

Stafford Act claims also are often brought under the Administrative Procedure Act (APA), see, *e.g.*, *St. Tammany Parish*, 556 F.3d at 318; *Rosas* v. *Brock*, 826 F.2d 1004, 1007–1008 (11th Cir. 1987), which precludes judicial review of agency action if "statutes preclude judicial review," 5 U.S.C. 701(a). Thus, this Court's interpretation of the FTCA's discretionary function exception will affect the availability of Stafford Act claims under both the FTCA *and* the APA—as it stands, some circuits may permit review under the APA if the underlying conduct is allegedly unconstitutional, while others may not. See generally *St. Tammany Parish*, 556 F.3d at 326 n.13 ("Because § 5148 applies, it bars any claim—whether alleged under the FTCA or APA.").

This Court's ruling would likewise affect statutes with *implied* discretionary function exceptions. Most circuits to consider the issue have held that a discretionary function exception is implied in both the Public Vessels Act (PVA), 46 U.S.C. 31101–31113, and the Suits in Admiralty Act (SAA), 46 U.S.C. 30901–30918. See, *e.g.*, *Tobar* v. *United States*, 731 F.3d 938, 944–945 (9th Cir. 2013) (holding that "[i]f Congress' intent to exempt discretionary functions from independent judicial

review is given effect, the discretionary function exception must apply to the PVA as well" and collecting cases holding the same); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996) (agreeing with and collecting cases finding a discretionary function exception to the SAA). In applying those implied discretionary function exceptions, lower courts follow this Court's FTCA discretionary function exception analysis. See *Tobar*, 731 F.3d at 945 (applying *Berkovitz*); *Tew*, 86 F.3d at 1005 (same).

Because the current circuit split affects the availability of claims under the FTCA, FSIA, Stafford Act, PVA, and SAA, this Court's resolution of the question presented would have far-reaching implications beyond just FTCA claims.

* * *

The interpretation of the FTCA's "discretionary function" exception that most courts of appeals recognize ensures that the United States is held accountable for the allegedly unconstitutional tortious actions of government officials, just as it would be held accountable for tortious actions that violated comparable statutes or regulations. This Court should address this important question, which has divided the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 5, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED JUNE 9, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12493

D.C. Docket No. 5:16-cv-00276-WTH-PRL

MACKIE L. SHIVERS, JR.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, DALE GRAFTON, UNIT MANAGER, USP COLEMAN 2, T. ANTHONY, COUNSELOR, USP COLEMAN 2, FNU SPURLOCK, COUNSELOR, USP COLEMAN 2, FNU GAY, PSYCHOLOGIST, USP COLEMAN 2, FNU BARKER, CASE MANAGER, USP COLEMAN 2, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida.

(June 9, 2021)

Before WILSON, LAGOA, and HULL, Circuit Judges. WILSON, Circuit Judge, concurring in part and dissenting in part.

Appendix A

HULL, Circuit Judge:

Mackie Shivers, a federal inmate, brought this civil action following an attack by his cellmate, Marvin Dodson. In his *pro se* complaint, Shivers alleged that prison officials negligently assigned Dodson to his cell and that their conduct also violated his Eighth Amendment rights. Shivers brought suit against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1) and against five prison employees under *Bivens*.[1]

The district court dismissed Shivers's FTCA claim against the United States based on the discretionary function exception, 28 U.S.C. § 2680(a), to the FTCA's waiver of sovereign immunity. It dismissed without prejudice his *Bivens* claim against the prison employees for failure to exhaust his administrative remedies. After review, and with the benefit of oral argument, we affirm the district court's dismissal of Shivers's claims.

I. BACKGROUND

In August 2015, Shivers was a 64-year-old inmate at a federal prison. Dodson was a 26-year-old, mentally unstable inmate at the same prison. Prison officials assigned Dodson to Shivers's cell. Both were imprisoned

1. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). A *Bivens* claim is a cause of action for damages against individual government officials alleged to have violated the plaintiff's constitutional rights. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66, 122 S. Ct. 515, 519, 151 L. Ed. 2d 456 (2001).

for cocaine drug convictions. After eight months without incident, Dodson stabbed Shivers in the eye with a pair of scissors while Shivers was sleeping. Shivers is now permanently blind in that eye.

Following the attack, Shivers pursued his administrative remedies with help from another inmate, Gordan Reid. The parties agree that Shivers properly completed the first three steps of the process—submission of BP-8, BP-9, and BP-10 forms. Shivers received denials at each level. Shivers believes he properly completed the fourth and final step of the administrative process—submission of the BP-11 form—but the government claims that it never received the form.

After he thought he had exhausted his administrative remedies, Shivers brought this FTCA and *Bivens* action against the United States and five prison employees (collectively, "the government"). His *pro se* complaint alleged that prison officials knew or should have known before they assigned Dodson to Shivers's cell that Dodson "was presenting aggressive and violent tendencies toward other prisoners"—especially his cellmates—and that he had a history of assaulting his cellmates. His complaint also alleged that he was afraid for his safety, and that he voiced those concerns to prison officials. He claimed that the government's conduct was negligent, and that his "[r]ight to be free of cruel and unusual [p]unishment was violated."

The government moved to dismiss or for summary judgment. Of relevance here, the government argued

that the discretionary function exception barred Shivers's FTCA claim. It also asserted that Shivers had failed to exhaust his administrative remedies as to his *Bivens* claim. The government attached a copy of the Bureau of Prison's ("BOP") SENTRY Administrative Remedy Generalized Retrieval database showing that the Central Office never received Shivers's BP-11 form.

As to the discretionary function exception, Shivers argued that he should be given the opportunity to conduct discovery to challenge the government's arguments and declarations about application of the exception. And as to the *Bivens* claim, Shivers argued that he had taken all necessary steps to exhaust his administrative remedies, providing his and Reid's declarations in support. The declarations said that Reid had helped him prepare the BP-11 form to be mailed to the Central Office in Washington, D.C.; that Shivers had provided Reid with a signed and dated copy of the form; and that Shivers had told Reid that he handed a stamped envelope containing the original to the prison's institutional-mail officer. Shivers also claimed that he had repeatedly asked various prison officials about the status of his BP-11 appeal to no avail. Shivers attached an unsigned copy of the BP-11 form to his declaration, claiming it was a "true and correct copy" of the form he submitted to the Central Office.

The district court granted the government's motion to dismiss. The court dismissed Shivers's FTCA claim for lack of subject matter jurisdiction because the discretionary function exception barred Shivers's claim against the United States. It dismissed Shivers's *Bivens*

claim for failure to exhaust administrative remedies. Shivers appeals both dismissals. This Court appointed appellate counsel for Shivers.

II. FTCA CLAIM

A. The FTCA, 28 U.S.C. § 1346(b)(1)

For starters, Shivers's FTCA tort claim is against only the United States which, as a sovereign entity, is immune from suit without the consent of Congress. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351, 63 L. Ed. 2d 607 (1980). The FTCA represents a limited congressional waiver of sovereign immunity for injury or loss caused by the "negligent or wrongful act or omission" of a government employee "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA addresses violations of state law by federal employees, not federal constitutional claims. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477-78, 114 S. Ct. 996, 1001, 127 L. Ed. 2d 308 (1994) (explaining a "constitutional tort claim is not 'cognizable' under § 1346(b)" because the source of substantive liability under the FTCA is state law, not federal law).

B. Exception in 28 U.S.C. § 2680(a)

Nonetheless, the FTCA broadly exempts (from the FTCA's waiver of sovereign immunity) "*[a]ny claim* . . .

based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused*." 28 U.S.C. § 2680(a) (emphasis added). The upshot of § 2680(a) is that when the United States's performance of a "function or duty" involves discretion, the fact that the discretion was misused or abused in any way does not lead to liability for the U.S. Treasury. "[T]he purpose of the exception is to prevent judicial second-guessing of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 323, 111 S. Ct. 1267, 1273, 113 L. Ed. 2d 335 (1991) (quotation marks omitted).

C. *Gaubert*'s Two-Prong Test

United States v. Gaubert and its two-prong test govern the application of the FTCA's discretionary function exception. 499 U.S. at 322-23, 111 S. Ct. at 1273-74. In *Gaubert*'s two-prong test, the Supreme Court expressly instructed courts how to determine whether challenged government conduct involves "a discretionary function or duty" for purposes of § 2680(a)'s exception. *Id.* at 322-23, 111 S. Ct. at 1273 (quoting 28 U.S.C. § 2680(a)). First, a court must determine whether the conduct challenged by the plaintiff was "discretionary in nature"—that is, whether it involved "an element of judgment or choice." *Id.* at 322, 111 S. Ct. at 1273 (quotation marks omitted). Second, a court must evaluate "whether that judgment [or choice] is of the kind that the discretionary function

exception was designed to shield." *Id.* at 322-23, 111 S. Ct. at 1273 (quotation marks omitted).

Applying *Gaubert*'s two-prong test, our Court has squarely held that the category of conduct challenged here—inmate-classification and housing-placement decisions—involves "a discretionary function or duty" protected by § 2680(a)'s exception. *Cohen v. United States*, 151 F.3d 1338, 1340, 1342-45 (11th Cir. 1998) (quoting 28 U.S.C. § 2680(a)) (concluding in an FTCA case that prison officials' actions in classifying prisoners and placing them in institutions—actions that "are part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation's prisons"—involve conduct or decisions that meet both prongs of the discretionary function exception). In *Cohen*, our Court held that, while 18 U.S.C. § 4042 "imposes on the BOP a general duty of care to safeguard prisoners," it "leaves BOP personnel sufficient discretion about how their § 4042 duty of care is to be accomplished to warrant application of the discretionary function exception." *Id.* at 1342. Thus, inmate-classification and housing-placement decisions fall squarely within the discretionary function exception. *See id.* at 1345.

D. Shivers's Arguments as to Constitutional Claims

Shivers nonetheless argues that the discretionary function exception does not apply here because the prison officials' decision to house Dodson in his cell violated the

Eighth Amendment.[2] Shivers contends that the BOP's discretionary inmate-placement decision is protected when the decision is merely tortious but not when that same conduct is both tortious and unconstitutional. Appellant's Supp. Br. at 22. Shivers reasons that prison employees "do not have discretion to violate the Constitution" and that therefore, as a matter of law, tortious conduct *if allegedly unconstitutional* necessarily falls outside the scope of the discretionary function exception "*even if* the government can otherwise meet the requirements" of *Gaubert*'s test, since the discretionary function exception "does not immunize conduct that violates the Constitution." *Id.* at 13, 22 (emphasis added).

Further, Shivers considers the allegations of unconstitutional conduct *only* as negating the discretionary function defense, not as part of the substantive FTCA claim. He maintains that while "[t]he substantive basis for [his] FTCA claim remains Florida law," an alleged constitutional violation "means that the government cannot shield itself using the discretionary function exception." *Id.* at 19-20. Under this view, his FTCA claim will proceed as a negligence claim, but the United States's statutory discretionary function defense to that negligence claim is not available if Shivers's complaint also sufficiently alleges an Eighth Amendment violation.

Under Shivers's creative dichotomy, an FTCA plaintiff would prove (1) first, the substantive FTCA state-law

2. We review *de novo* whether an FTCA claim is barred by the discretionary function exception. *Douglas v. United States*, 814 F.3d 1268, 1273 (11th Cir. 2016).

negligence claim, and (2) next, a federal violation of the Eighth Amendment by a prison employee that would negate the defendant United States's discretionary function defense to the plaintiff's state-law claim. While Shivers teases apart the two issues, what remains, in practice, is that in an FTCA state-law negligence case, the plaintiff can prevail (by negating the discretionary function defense) if the plaintiff proves that the alleged conduct "is both tortious and unconstitutional." *Id.* at 22. Shivers in effect argues for a "constitutional-claims exclusion" from the discretionary function exception in § 2680(a). Shivers's arguments fail, as discussed below.[3]

E. Analysis

First, the statutory text of the discretionary function exception is unambiguous and categorical: the FTCA "*shall not apply* to . . . *[a]ny claim*" that arises from "a discretionary function or duty on the part of a federal agency or any employee of the Government, *whether or not the discretion involved be abused*." 28 U.S.C. § 2680(a) (emphasis added). This statutory text is plain and broad, encompassing "[a]ny claim" based on "a discretionary function or duty." *Id.* And the language Congress chose in § 2680(a) is unqualified—there is nothing in the statutory language that limits application of this exception based on

3. The Dissent makes largely the same arguments as Shivers, and thus our analysis below of Shivers's claims applies to the Dissent as well. Further, we reject the government's argument that Shivers waived or forfeited his position that the discretionary function exception does not apply to his FTCA tort claim, and thus address the merits of Shivers's arguments.

the "degree" of the abuse of discretion or the egregiousness of the employee's performance. Congress could have adopted language that carved out certain behavior from this exception—for example, grossly negligent behavior, intentional behavior, or behavior that rises to the level of a constitutional violation. But Congress did not do so, and it is Congress that uniquely decides what should fall within the waiver of sovereign immunity.

The critical inquiry in an FTCA case like this one, therefore, is whether the category or type of challenged government activity is discretionary under *Gaubert*. If it is, the express terms of the congressional consent to be sued, as expressed in § 2680(a), shield the United States from liability whether the governmental employee's exercise of his or her discretion is appropriate, slightly abusive, or so abusive that it is unconstitutional.

Congress left no room for the extra-textual "constitutional-claims exclusion" for which Shivers advocates. *See Millbrook v. United States*, 569 U.S. 50, 56-57, 133 S. Ct. 1441, 1445-46, 185 L. Ed. 2d 531 (2013) (applying "[t]he plain text" of the FTCA and "declin[ing] to read . . . a limitation into unambiguous text"). The incompatibility of Shivers's proposed exclusion with the FTCA's remedial scheme is reinforced by the fact that Congress did not create the FTCA to address constitutional violations at all but, rather, to address violations of *state tort law* committed by federal employees. *See Meyer*, 510 U.S. at 477-78, 114 S. Ct. at 1001. The statutory language Congress used in the FTCA forecloses Shivers's claim. *See BP P.L.C. v. Mayor & City Council of Baltimore*,

593 U.S. ___, 141 S. Ct. 1523, 1539 (2021) ("Exceptions and exemptions are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect. That a law might temper its pursuit of one goal by accommodating others can come as no surprise.").

Second, the Supreme Court in *Gaubert* defined "a discretionary function or duty" on the part of a federal agency or employee and instructed how courts should determine if a "function or duty" is "discretionary" for purposes of § 2680(a). As noted earlier, under *Gaubert*'s first prong, a court must determine if the challenged conduct—here, an inmate-classification and housing-placement decision—was "discretionary in nature," that is whether it involved "an element of judgment or choice." *See Gaubert*, 499 U.S. at 322, 111 S. Ct. at 1273 (quotation marks omitted). *The inquiry is not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion* but whether the underlying function or duty itself was a discretionary one.

The Supreme Court has explained that there is no discretion to exercise when a "federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322, 111 S. Ct. at 1273 (emphasis added) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 1958-59, 100 L. Ed. 2d 531 (1988)). Only when a federal employee acts contrary to a *specific prescription* in federal law—be it a statute, regulation, or policy—does the discretionary function exception not apply. *See id.* at 322, 111 S. Ct. at 1273. The Supreme Court has repeatedly said that the discretionary

function exception applies *unless* a source of federal law "specifically prescribes" a course of conduct. *Id.* (quoting *Berkovitz*, 486 U.S. at 536, 108 S. Ct. at 1958-59).

Shivers points to no federal statute, regulation, or policy that specifically prescribes a course of action that the prison employees here failed to follow. And, of course, the Eighth Amendment itself contains no such specific directives as to inmate classifications or housing placements. Indeed, Shivers does not suggest on appeal that the prison officials had no discretion in their classification and housing placement decisions because of a directive from the Eighth Amendment that meets *Gaubert*'s test.

Further, the FTCA is not based on alleged constitutional violations, and a plaintiff cannot circumvent the limitations on constitutional tort actions under *Bivens*—including the qualified-immunity doctrine—by recasting the same allegations (1) as a common-law tort claim under the FTCA that is not subject to the discretionary function exception or (2) as negating the discretionary function defense.[4]

4. The Dissent argues that *Berkovitz* supports the position that unconstitutional conduct is never "*permissible* exercise of policy judgment." Diss. Op. at 25-27 (quoting *Berkovitz*, 486 U.S. at 539, 108 S. Ct. at 1960). However, *Berkovitz*, like *Gaubert*, actually shows why the discretionary function exception applies to Shivers's FTCA claim. The Supreme Court in *Berkovitz* instructed that conduct is discretionary if "it involves an element of judgment or choice" and that the exception "protects the discretion of the executive . . . to act according to one's judgment of the best course." 486 U.S. at 536, 108 S. Ct. at 1958 (quotation marks omitted). Indeed, the Supreme Court required that "a federal statute, regulation, or policy *specifically*

Third, a cogent analysis of why there is no "constitutional-claims exclusion" to the statutory discretionary function exception (to the FTCA's waiver of sovereign immunity) is found in two Seventh Circuit decisions: (1) *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972); and (2) *Linder v. United States*, 937 F.3d 1087 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 159, 207 L. Ed. 2d 1097 (2020). In *Kiiskila*, the plaintiff was the civilian office manager of a credit union located on a military base. *Id.* at 626. The base's commanding officer permanently barred the plaintiff from entry onto the base—thereby costing the plaintiff her job—because of the plaintiff's alleged violation of a base regulation. *See id.* at 626-27. In an earlier appeal in the case, the Seventh Circuit held that the exclusion of the plaintiff from the base and the resulting loss of her job violated the First Amendment. *Id.* at 627.

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prescribe[] a course of action for an employee to follow" in order for the discretionary function exception not to apply. *Id.* (emphasis added).

In *Berkovitz*, the Supreme Court emphasized that "a *specific statutory and regulatory directive*" required that the government agency receive certain test data before issuing a vaccine license, but the government agency issued the license without first obtaining the required test data. *Id.* at 533, 540-43, 108 S. Ct. at 1957, 1961-62 (emphasis added). Thus, the government agency had "no discretion to issue [the] license without first receiving the required test data; to do so . . . violate[d] a specific statutory and regulatory directive." *Id.* at 542-43, 108 S. Ct. at 1962. *Berkovitz* thus supports the government's position that the district court correctly dismissed Shivers's FTCA claim as barred by the discretionary function exception under *Cohen* because Shivers points to no specific statute, regulation, or policy that was violated.

On remand, the plaintiff amended her complaint to add a claim for damages under the FTCA. *Id.* The district court dismissed the FTCA claim based on the discretionary function exception, and the Seventh Circuit affirmed, holding that "her exclusion from Fort Sheridan was based upon Colonel Nichols' exercise of discretion, *albeit constitutionally repugnant*, and therefore excepted her claim from the reach of the [FTCA] under 28 U.S.C. § 2680(a)." *Id.* at 627-28 (emphasis added). The Seventh Circuit noted that the officer's decision to enforce the regulation against the plaintiff and his selection of the methods to accomplish that enforcement were both discretionary functions, and stated:

> Of course, this is not to say the Colonel could not, through negligence or wrongful exercise, have abused his discretion by enforcing the regulation against activity "too far removed in terms of both distance and time" to pass constitutional muster; we have already determined the constitutional infirmity of the Colonel's exclusion. But 28 U.S.C. § 2680(a) precludes action for abuse of discretionary authority whether through negligence or wrongfulness.
>
> Since Colonel Nichols had discretion in choosing to apply the regulation, the Government remains immune from liability under 28 U.S.C. § 2680(a).

Id. at 628 (citations omitted) (quoting *Kiiskila v. Nichols*, 433 F.2d 745, 751 (7th Cir. 1970) (en banc)).

Similarly, *Linder*, another FTCA case, expressly addresses whether a plaintiff's plausible allegation of unconstitutional conduct deprives the United States of its sovereign immunity, which is otherwise preserved by § 2680(a)'s discretionary function exception to the FTCA. *Linder*, 937 F.3d at 1090-91. Although the district court in *Linder* concluded that the federal employee's conduct violated the Sixth Amendment, the Seventh Circuit rejected the plaintiff's argument that a constitutional violation defeats the discretionary function exception to the FTCA's waiver of the United States's sovereign immunity. *Id.*

In *Linder*, the FTCA plaintiff made the same argument as Shivers—that "no one has discretion to violate the Constitution." *Id.* at 1090. The Seventh Circuit rejected it because that principle has "nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations." *Id.* The Seventh Circuit reasoned that the FTCA applies to torts, as defined by state law, in "circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," while the Constitution governs the conduct of only public officials, not private ones. *Id.* (quoting 28 U.S.C. § 1346(b)(1)). The Seventh Circuit explained:

> [U]nless § 2680(a) is to be drained of meaning, it must apply to discretionary acts that are tortious. That's the point of an *exception*: It forecloses an award of damages that otherwise would be justified by a tort. Nothing in

> subsection (a) suggests that some discretionary but tortious acts are outside the FTCA while others aren't.

Id. at 1091.

Once the BOP's inmate-classification and housing-placement function is determined to be a discretionary function, then tortious acts (including unconstitutional tortious acts) in exercising that function fall within § 2680(a)'s discretionary function exception. Prisoners can and should bring constitutional claims against individual prison officials under *Bivens* for their unconstitutional conduct, which is what Shivers did here against five prison employees. But a prisoner's *FTCA tort claim* based on the government's tortious abuse of that function—even unconstitutional tortious abuse—is barred by the statutory discretionary function exception, as written and enacted.[5]

Notably too, the Seventh Circuit in *Linder* explained that it was in part because of "[t]he limited coverage of

5. We acknowledge that there is a circuit split on this same discretionary function issue. *See Loumiet v. United States*, 828 F.3d 935, 944-46, 424 U.S. App. D.C. 113 (D.C. Cir. 2016); *Limone v. United States*, 579 F.3d 79, 101-02 (1st Cir. 2009); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000). These four other Circuits have generally concluded that the discretionary function exception does not categorically bar FTCA tort claims where the challenged government conduct or exercise of discretion also violated the Constitution. While the Seventh Circuit is in the minority, we find its reasoning and analysis to be more persuasive.

the FTCA, and its inapplicability to constitutional torts" that the Supreme Court created *Bivens* actions against individual federal employees in the first place. *Id.* at 1090. The Seventh Circuit pointed out that "when, in the wake of *Bivens*, Congress adopted the Westfall Act to permit the Attorney General to substitute the United States as a defendant in lieu of a federal employee, it prohibited this step when the plaintiff's claim rests on the Constitution." *Id.* (citing 28 U.S.C. § 2679(b)(2)(A)). The Seventh Circuit concluded, "[t]his leaves the FTCA as a means to seek damages for common-law torts, without regard to constitutional theories." *Id.*

Fourth, as we explain later, plaintiff Shivers failed to exhaust his constitutional *Bivens* claim against the prison-employee defendants. Now that his constitutional claim under *Bivens* is dismissed, Shivers cannot back-door into this case his constitutional claim on the theory that the discretionary function defense is precluded as to *his FTCA state-law tort claim* simply because he alleges the prison employees' tortious acts were also unconstitutional. At bottom, Shivers cannot, by alleging a constitutional violation, evade this Court's controlling *Cohen* precedent that inmate-classification and housing-placement decisions "exemplif[y] the type of case Congress must have had in mind when it enacted the discretionary function exception." *Cohen*, 151 F.3d at 1344.[6]

6. To be clear, deciding whether the district court properly dismissed Shivers's FTCA tort claim—as barred by the discretionary function exception—does not depend upon whether Shivers did or did not file a *Bivens* claim. Even if Shivers had never filed a *Bivens* claim, the district court still properly dismissed his FTCA tort claim

Shivers's flawed reasoning is also illustrated by how his constitutional-claim exclusion rule would work in practice. As mentioned earlier, to prove an FTCA tort claim, a plaintiff, like Shivers, must show negligence under state law. Yet to defeat the United States's discretionary function defense to that state-law claim, a plaintiff would have the burden to prove the challenged tortious conduct also violated the Eighth Amendment. Here that means Shivers must prove the prison employees acted with deliberate indifference to a known substantial risk of serious harm to the plaintiff.[7] Both types of claims—state tort law and federal constitutional law—would need to be tried in the singular FTCA case. And the district court would have to instruct the jury that, even if the plaintiff proves the prison employees were negligent under state law, the discretionary function defense bars that state-law claim against the United States unless the plaintiff also proves his federal constitutional claim that the same prison employees were deliberately indifferent to a substantial risk of serious harm and thereby violated his clearly established Eighth Amendment rights.[8]

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as barred by the discretionary function exception. We mention the "back-door" reentry of Shivers's *Bivens* claim only because he did file a *Bivens* claim that is now dismissed for failure to exhaust.

7. Federal constitutional law requires that to state an Eighth Amendment claim, a plaintiff must show the prison employee acted with deliberate indifference to a known substantial risk of serious harm to the plaintiff, which requires that the prison employee "actually (subjectively) knew that an inmate faced a substantial risk of serious harm." *See, e.g., Mosley v. Zachery*, 966 F.3d 1265, 1270 (11th Cir. 2020) (alterations accepted). This is far different from a negligence claim under state law.

8. Shivers and the Dissent cite *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), for the

Fifth and finally, we recognize Shivers cites dicta in *Denson v. United States*, 574 F.3d 1318 (11th Cir. 2009), arguing in that case we "endorsed" the view that because "government officials lack discretion to violate constitutional rights," the discretionary function defense would not be available to the United States in an FTCA case. Supp. Reply Br. at 4-5 (quoting *Denson*, 574 F.3d at 1336-37) (internal quotation marks omitted). Two observations.

First, *Denson* spoke of a successfully established *Bivens* claim in the same case, not a dismissed *Bivens* claim for failure to exhaust. Second, Shivers does not contend that this Court's statement in *Denson* was a

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proposition that the government has no discretion to violate the Constitution, but that is not an FTCA case. The plaintiff Owen, a discharged employee, brought a 42 U.S.C. § 1983 constitutional claim against the City, the City Manager, and the City Council members for a violation of his Fourteenth Amendment rights because he was discharged without notice of reasons and a hearing. *Id.* at 624, 629-30, 100 S. Ct. at 1402, 1404-05. In a five-four decision, the Supreme Court concluded that the City was not immune from suit under § 1983 for constitutional violations, that § 1983 "creates a species of tort liability that on its face admits of no immunities," and that the City may not assert the good faith of its officers as a defense. *Id.* at 635-39, 100 S. Ct. at 1407-09 (quotation marks omitted).

Unlike *Owen*, this case involves § 2680(a)'s statutory discretionary function defense to the FTCA liability that creates a broad exception to the FTCA's waiver of sovereign immunity. The 1980 *Owen* decision was also well before the 1991 *Gaubert* decision that instructed courts on precisely how to determine if a "function or duty" was discretionary for purposes of § 2680(a). *Owen* does not support Shivers's position.

holding, nor could he contend as much. In *Denson*, an airplane passenger brought suit: (1) against the customs officials under *Bivens* for intrusively searching her without probable cause, in violation of her Fourth and Fifth Amendment rights; and (2) against the United States under the FTCA, primarily based on Florida tort law. 574 F.3d at 1323, 1333. Ultimately, the district court concluded that the *Bivens* claims were barred by 28 U.S.C. § 2676 and that the plaintiff failed to prove her FTCA claim because she did not show that the customs officials committed the state-law torts she alleged. *Id.* at 1333-35. The district court's rulings were not based on § 2680(a)'s discretionary function exception. *See id.*

On appeal, this Court determined that (1) the plaintiff's *Bivens* claim failed because she did not show that the customs officials violated the Fourth Amendment, and (2) the FTCA claim failed because her state-law tort claims were barred by the Supremacy Clause. *See id.* at 1344-45. This Court concluded that "we need not consider the applicability of the discretionary function exception and whether jurisdiction exists to entertain them." *Id.* at 1345. As Shivers concedes, *Denson*'s comments on the discretionary function defense's applicability to unconstitutional tortious conduct are merely dicta. And we have not applied *Denson*'s dicta regarding the discretionary function defense in any subsequent published opinion.

For all of these reasons, we affirm the district court's dismissal of Shivers's FTCA state-law tort claim as barred by § 2680(a)'s discretionary function defense.

III. *BIVENS* CLAIM

The Prison Litigation Reform Act ("PLRA") requires prisoners to exhaust all available administrative remedies before bringing a *Bivens* claim. *See* 42 U.S.C. § 1997e(a). Because the failure to exhaust is "treated as a matter in abatement and not an adjudication on the merits," the district court may consider facts outside the pleadings "so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record." *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008) (footnote omitted).

"[D]eciding a motion to dismiss for failure to exhaust administrative remedies is a two-step process." *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). First, the court evaluates the factual allegations in the motion to dismiss and the response. *Id.* If they conflict, the court accepts the plaintiff's version as true. *Id.* "If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed." *Id.* Second, if the complaint would not be subject to dismissal, "the court then proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion." *Id.*

A plaintiff must follow a four-step process to exhaust his administrative remedies with the BOP. *See* 28 C.F.R. §§ 542.13(a), 542.14(a), 542.15(a). Here, the only step at issue is the fourth and final step: the appeal to the BOP's General Counsel at the Central Office in Washington, D.C. (BP-11 form). *See* § 542.15(a). The inmate must "date

and sign the Appeal," § 542.15(b)(3), and "a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received," 28 C.F.R. § 542.18.

First, Shivers argues that the district court erred by engaging in fact-finding without giving him adequate opportunity to conduct discovery to verify whether he submitted his BP-11 form. We disagree.[9] Shivers had adequate opportunity to develop the record on his *Bivens* claim; indeed, he obtained declarations and attached them to his response to the government's motion to dismiss. *See Bryant*, 530 F.3d at 1377. Further, as Shivers did not request an evidentiary hearing and the district court dismissed his *Bivens* claim without prejudice, the district court was within its discretion to "resolve material questions of fact on submitted papers for the PLRA's exhaustion of remedies requirement." *See id.* at 1377 n.16.

Second, Shivers claims the district court's finding that he failed to file his BP-11 form was clearly erroneous. It was not; substantial evidence supports the district court's finding. The government submitted a declaration by a BOP paralegal specialist stating that "Shivers failed to submit his appeal at the Central Office level." The declaration included an exhibit showing no entry of a BP-11 form in the BOP's SENTRY system. Because an appeal "is considered

9. We review a dismissal for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a) *de novo*, but we review the district court's findings of fact related to exhaustion for clear error. *Alexander v. Hawk*, 159 F.3d 1321, 1323 (11th Cir. 1998); *see Bryant*, 530 F.3d at 1377.

filed on the date it is logged into the Administrative Remedy Index as received," the district court could rely on the declaration and exhibit. *See* § 542.18. Further, the BP-11 form attached to Shivers's declaration, which he declared was a "true and correct copy" of the form he submitted, was unsigned. Therefore, the district court correctly concluded that Shivers's unsigned form would not have been acceptable even if it had been received by the Central Office. *See* § 542.15(b)(3).

IV. CONCLUSION

In sum, we affirm (1) the district court's dismissal of Shivers's FTCA claim as barred by the discretionary function exception in 28 U.S.C. § 2680(a), and (2) the district court's dismissal without prejudice of Shivers's *Bivens* claim for lack of subject matter jurisdiction.

AFFIRMED.

Appendix A

WILSON, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority in affirming the district court's dismissal of Shivers's *Bivens*[1] claim for failure to exhaust. I disagree with the majority's decision on the matter of first impression in this court—whether the discretionary function exception shields a government employee who violates the Constitution from liability under the Federal Tort Claims Act (FTCA). The majority holds that a "prisoner's FTCA tort claim based on the government's tortious abuse of [a discretionary] function—*even unconstitutional tortious abuse*—is barred by the statutory discretionary function exception, as written and enacted." Maj. Op. at 16 (emphasis omitted and added). I disagree. By violating the Constitution, a government employee necessarily steps outside his permissible discretion—and thus outside the discretionary function exception's protection. Accordingly, I would join most of our sister circuits who have reached this issue and hold that the discretionary function exception does not shield the government from FTCA liability based on unconstitutional conduct.

The discretionary function exception precludes "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of . . . an employee of the Government, whether or not the discretion involved be abused." 28

1. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

U.S.C. § 2680(a). Congress created the exception to prevent "judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984) (internal quotation marks omitted). Thus, "decisions that involve judgment grounded in these considerations fall within the exception." *Ochran v. United States*, 117 F.3d 495, 500 (11th Cir. 1997). But the exception "applies only to conduct that involves the *permissible* exercise of policy judgment." *Berkovitz v. United States*, 486 U.S. 531, 539, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988) (emphasis added).

As the majority explained, we follow the two-prong *Gaubert*[2] test to determine whether the discretionary function exception protects a certain type of conduct. For the first prong, we ask whether "the nature of the conduct . . . involves an element of judgment or choice." *Douglas v. United States*, 814 F.3d 1268, 1273 (11th Cir. 2016) (internal quotation mark omitted). And for the second prong, we ask whether the judgment or choice "is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. I disagree with the majority's position that "[o]nly when a federal employee acts contrary to a *specific prescription* in federal law—be it a statute, regulation or policy—does the discretionary function not apply." Maj. Op. at 12. That inquiry is relevant only to whether inmate housing

2. *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

decisions generally satisfy the first prong of the *Gaubert* test. *See Gaubert*, 499 U.S. at 322 ("The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" (quoting *Berkowitz*, 486 U.S. at 536)).

Here, there is no dispute over whether inmate housing decisions generally satisfy the first prong of *Gaubert*. We applied *Gaubert*'s two-part test in *Cohen* and determined that, generally, prison officials' decisions about inmate placement are protected by the discretionary function exception. *Cohen v. United States*, 151 F.3d 1338, 1342 (11th Cir. 1998). But *Cohen* did not present us with the question here: is a prison official's decision about inmate placement protected by the discretionary function exception when a plaintiff alleges that the decision was not just tortious, but also violated the Constitution?

The answer must be no. The government "has no discretion to violate the Federal Constitution; its dictates are absolute and imperative." *See Owen v. City of Independence*, 445 U.S. 622, 649, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) (internal quotation marks omitted); *see also Denson v. United States*, 574 F.3d 1318, 1337 (11th Cir. 2009) (noting that "government officials lack discretion to violate constitutional rights"). And the discretionary function exception protects only conduct that involves "the *permissible* exercise of policy judgment." *Berkovitz*, 486 U.S. at 537, 539 (emphasis added). Thus, if government employees violate the Constitution, they are necessarily—

and impermissibly—acting outside the scope of their discretion, rather than merely abusing the discretion they have. The discretionary function exception does not protect such extra-discretionary conduct.

The majority characterizes this conclusion as an "extra-textual 'constitutional-claims exclusion.'" Maj. Op. at 10. The majority also claims that "[t]he inquiry is not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one." Maj. Op. at 11-12. But these conclusions ignore Supreme Court precedent interpreting government officials' scope of discretion to exclude *impermissible* and *unconstitutional* conduct. *See Berkovitz*, 486 U.S. at 537, 539; *see also Owen*, 445 U.S. at 644-50.

A deeper look at *Owen* reveals the crucial flaw in the majority's interpretation of the discretionary function exception. There, the Supreme Court evaluated whether a common-law immunity for "discretionary" functions could protect municipalities against 42 U.S.C. § 1983 claims where the municipalities' employees acted in good faith. 445 U.S. at 644-50. The Court explained that this immunity doctrine was rooted in the concept of separation of powers; it served to "prevent[] courts from substituting their own judgment on matters within the lawful discretion of the municipality." *Id.* at 649. But the Court explained that this "discretionary" function immunity could not shield a municipality in a § 1983 action alleging unconstitutional conduct because a municipality has no "discretion" to violate the Constitution. *Id.*

The FTCA's discretionary function exception is similarly based on separation-of-powers principles. Like the common-law's discretionary function immunity, the exception serves to prevent "judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy." *See Varig Airlines*, 467 U.S. at 814 (internal quotation marks omitted). The contexts are thus well aligned. And because there is no discretion to violate the Constitution, unconstitutional conduct is necessarily outside the scope of the discretionary function exception, just like it is outside the scope of discretionary function immunity at common law. Therefore, the discretionary function exception likewise cannot shield the United States in an FTCA case where the tortious conduct at issue also allegedly violates the Constitution.

This conclusion is not revolutionary. This court stated as much in *Denson*, where we acknowledged that "a government official is not[] 'exercis[ing] or perfom[ing], or . . . fail[ing] to exercise or perform a discretionary function or duty'" when he violates the Constitution. 574 F.3d at 1337 n.55 (quoting § 2680(a)). We also indicated in *Denson* that the discretionary function exception would not be an available defense for the United States in an FTCA case if the plaintiff had successfully established a constitutional violation in a *Bivens* claim based on the same conduct. *Id.* Although these statements were dicta, they support the point that this court has interpreted the discretionary function exception to exclude protection for unconstitutional conduct before.

And virtually every other circuit to address the issue has concluded, based on the same reasoning, that

the discretionary function exception cannot provide blanket immunity for tortious conduct that also violates the Constitution. *See Loumiet v. United States*, 828 F.3d 935, 938, 424 U.S. App. D.C. 113 (D.C. Cir. 2016) (holding that the discretionary function exception does not "categorically bar FTCA tort claims where the challenged exercise of discretion allegedly exceeded the government's constitutional authority to act"); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (holding that allegedly unconstitutional conduct falls outside the scope of the FTCA's discretionary function exception); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (per curiam) (same); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (holding that although the FTCA's discretionary function exception would generally protect the creation of policies and rules, government actors do not have discretion to create unconstitutional policies); *see also Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986) (noting in dicta that the discretionary function exception would not apply if a complaint alleged that government officials' conduct violated the Constitution because "federal officials do not possess discretion to commit such violations"), *cert denied*, 479 U.S. 849, 107 S. Ct. 175, 93 L. Ed. 2d 111 (1986), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50, 133 S. Ct. 1441, 185 L. Ed. 2d 531 (2013).

The majority joins the one circuit that has gone the other way. In *Linder v. United States*, the Seventh Circuit dismissed the idea that the discretionary function exception does not bar FTCA claims involving allegations of unconstitutional conduct. 937 F.3d 1087, 1090 (7th Cir.

2019), *petition for cert. filed* (Mar. 2, 2020) (No. 19-1082). In its view, "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations." *Id.* The FTCA makes the United States liable for state law torts as a "private person" would be. *Id.* (quoting 28 U.S.C. § 1346(b)(1)). So, because "[t]he Constitution governs the conduct of public officials, not private ones," the FTCA is only "a means to seek damages for common-law torts, without regard to constitutional theories." *See id.*

This logic is unpersuasive. The Seventh Circuit's analysis assumes that evaluating a complaint's constitutional allegations transforms the substance of an FTCA claim from state tort law to constitutional law. The majority makes the same logical error, claiming that an unconstitutional-conduct limitation is incompatible with the FTCA because it was not created "to address constitutional violations at all but, rather, to address violations of *state tort law* . . . ." *See* Maj. Op. at 11. But as the District of Columbia Circuit explained in *Loumiet*:

> A plaintiff who identifies constitutional defects in the conduct underlying her FTCA tort claim—whether or not she advances a *Bivens* claim against the individual official involved—may affect the availability of the discretionary-function defense, but she does not thereby convert an FTCA claim into a constitutional damages claim against the government; state law is necessarily still the source of the substantive standard of FTCA liability.

828 F.3d at 945-46. In other words, we consider the allegations of unconstitutional conduct *only* as "negating the discretionary function defense," not as part of the substantive FTCA claim. *See Limone*, 579 F.3d at 102 & n.13. So the FTCA claim still addresses only "violations of *state tort law* committed by federal employees"; it does not "address [a defendant's] constitutional violations." *See* Maj. Op. at 11. It remains only "a means to seek damages for common-law torts." *Id.* at 17 (quoting *Linder*, 937 F.3d at 1090).

For example, allegations that a prison official's negligent inmate housing decision violated the Eighth Amendment show that the prison official acted outside the scope of his typical discretion to make inmate housing decisions. If sufficiently alleged, such allegations would preclude application of the discretionary function exception, no matter if the plaintiff also brought a viable *Bivens* claim. The plaintiff's FTCA claim would move forward *based on the allegations of negligence*; if those allegations are proven, the government would be held liable as a "private person" would be. *See* § 1346(b)(1). This interpretation of the discretionary function exception thus does not provide a "back door" for a plaintiff's failed *Bivens* claim. The FTCA and *Bivens* provide different remedies against different parties under different substantive law. When evaluating the merits of an FTCA claim, state tort law still governs any liability determination, only the United States can be held liable, and the only available remedies are those provided by the FTCA. Whether a plaintiff sufficiently alleges or even brings a *Bivens* claim is thus completely irrelevant to that analysis.

The majority claims that the practical effect of this would be that, to defeat the discretionary function defense, a plaintiff must prove the negligent conduct under state law and the constitutional violation in a single FTCA case. So even where no constitutional claim proceeds to trial, the plaintiff must prove a constitutional claim. Maj. Op. at 17. But as already stated, whether the plaintiff brings a constitutional claim is irrelevant, and the plaintiff would not be required to prove a constitutional claim. Proving that the government officials' conduct was unconstitutional is relevant *only* to whether the discretionary function exception applies.

Further, I do not share the majority's concerns with how this "would work in practice." *See* Maj. Op. at 18. It is not unusual for jurisdictional issues to proceed to trial alongside merits issues. For example, a plaintiff may need to introduce evidence at trial to prove its standing. In such cases, the district court instructs the jury on how to properly—and separately—assess the jurisdictional and merits issues. Put simply, district courts are well-equipped to craft jury instructions on how to separately evaluate the jurisdictional issue (whether the discretionary function exception immunizes the United States from suit) and the merits issue (whether the defendants were negligent under Florida law).

While I would hold that the discretionary function exception does not shield the government from FTCA liability based on unconstitutional conduct, the mere assertion of a constitutional violation cannot be enough to preclude application of the exception at the motion-to-

dismiss phase. The allegations supporting a constitutional violation must be *plausible*. Thus, I would vacate the district court's dismissal of Shivers's FTCA claim and remand the case to the district court to decide in the first instance whether Shivers plausibly alleged an Eighth Amendment violation, thereby rendering the discretionary function exception inapplicable to his FTCA claim.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, OCALA DIVISION, FILED APRIL 14, 2017

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Case No: 5:16-cv-276-Oc-10PRL

MACKIE SHIVERS,

Plaintiff,

v.

UNITED STATES OF AMERICA, DALE GRAFTON, T. ANTHONY, FNU SPURLOCK, FNU GAY AND FNU BARKER,

Defendants.

OPINION AND ORDER

Plaintiff, a prisoner at the United States Penitentiary in Coleman, Florida, initiated this action on April 14, 2016 by filing a *pro se* civil rights complaint against Defendants United States of America, Dale Grafton, T. Anthony, FNU Spurlock. FNU Gay, and FNU Barker (Doc. 1). Plaintiff raised claims pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2675, *et seq.* and *Bivens v. Six*

Unknown Fed. Narcotics Agents, 403 U.S.388 (1971).[1] Plaintiff's amended complaint (Doc. 6) is the operative complaint in this action. This cause is before the Court on the following:

> Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment (Doc. 22, filed September 26, 2016); and
>
> Plaintiff's Opposition to Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment (Doc. 31, filed February 6, 2017).

For the reasons given in this Order, the defendants' motion to dismiss is granted. Sovereign immunity bars Plaintiff's claims against the United States. Plaintiff's *Bivens* claims are dismissed without prejudice pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies.

I. Pleadings

Amended Complaint

Plaintiff asserts that, in August of 2015, Defendants Grafton, Spurlock, Anthony, and Barker assigned Marvin

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1. In *Bivens*, the United States Supreme Court recognized a cause of action against a federal employee who, while acting under color of federal law, violates an individual's constitutional rights. *Griffin v. City of Opa–Locka*, 261 F.3d 1295, 1303 (11th Cir. 2001). The law to be applied in *Bivens* cases is generally the law that has developed under 42 U.S.C. § 1983. *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995).

Dodson to Plaintiff's cell at USP Coleman II (Doc. 6 at 7) even though they knew, or should have known, that Dobson was mentally unstable and had demonstrated violence towards his cellmates. *Id.* Plaintiff became concerned for his safety and expressed his concern to Defendant Gay. *Id.*

On September 3, 2015, Dodson attacked Plaintiff while he (Plaintiff) was sleeping (Doc. 6 at 7). Dodson stabbed Plaintiff with a pair of scissors in his right eye, and as a result, Plaintiff has lost vision in that eye. *Id.*

Plaintiff asserts that the defendants violated his right to due process and to be free from cruel and unusual punishment because they were deliberately indifferent to his concerns regarding housing (Doc. 6 at 8). He also asserts that Defendant United States of America was negligent for failing to ensure that Plaintiff was safely housed. *Id.* He seeks damages of $1,200,000 against each individual defendant and $400,000 against the United States of America. *Id.*

Defendant's Motion to Dismiss or, alternatively, for Summary Judgment

Defendants filed a motion in which they assert that Plaintiff's complaint must be dismissed because: (1) Plaintiff did not exhaust his administrative remedies on his *Bivens* claims prior to filing his complaint; (2) the individual defendants have qualified immunity from Plaintiff's constitutional claims; and (3) Plaintiff's negligence claims against the United States are barred

by sovereign immunity under the discretionary function exception to the FTCA (Doc. 22).[2]

The defendants attach numerous documents to their motion and base some of their arguments on the attached documents (Doc. 21-1; Doc. 21-2). Specifically, Defendants attach: Declaration and Certification of Records by Caixa Santos ("Santos Aff.") (Doc. 22-1 at 2-4); SENTRY Administrative Generalized Retrieval Full Screen Format of Remedy No. 840881-F1 (Doc. 22-1 at 7); Administrative Remedy Submission No. 840881-F1 (Doc. 22-1 at 9-13); SENTRY Administrative Remedy Generalized Retrieval Full Screen Format of Remedy No. 840881-R1 (Doc. 22-1 at 15); SENTRY Administrative Remedy Generalized Retrieval (Doc. 22-1 at 17-18); Declaration of Kenneth Hill (Doc. 2202 at 2-5); Dodson's Housing assignment (Doc. 22-2 at 11-13); Inmate Investigative Report (Doc. 22-2 at 15-18); and Bureau of Prisons Psychology Services Sexual Abuse Intervention Report (Doc. 22-2 at 20).

Plaintiff also filed numerous documents with his response to the defendants' motion (Doc. 31; Doc. 32; Doc.

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2. The defendants' motion appears to be directed towards Plaintiff's original complaint (Doc. 1). However, Plaintiff was directed to file (and did file) an amended complaint on the Court's standard civil rights complaint form (Doc. 4; Doc. 6). Plaintiff asserts that this Court should deny the defendants' motion on the ground that it is directed towards the wrong complaint (Doc. 31 at 7). A review of Plaintiff's original complaint shows that it is identical in substance to the amended complaint. Accordingly, the Court will construe the defendants' motion to dismiss as being directed towards Plaintiff's amended complaint.

33). He attaches: Affidavit of Mackie Shivers ("Shivers Aff.") (Doc. 32 at 1-4); Informal Resolution Form (Doc. 32 at 5); Denial of BP-8 complaint (Doc. 32 at 8); October 30, 2015 Request for Administrative Remedy (BP-9), Case Number 840881-F1 (Doc. 32 at 10); November 2, 2015 Rejection of 840881-F1 Administrative Remedy Request (Doc. 32 at 12); November 19, 2015 Regional Administrative Remedy Appeal (BP-10) (Doc. 32 at 14); November 24, 2015 Rejection Notice Administrative Remedy (Doc. 32 at 16); December 18, 2015 Central Office Administrative Remedy Appeal (BP-11) (Doc. 32 at 18); and Affidavit of Gordon C. Reid ("Reid Aff.") (Doc. 33).

Generally, a district court must convert a motion to dismiss into a motion for summary judgment if it considers materials outside the complaint. Fed. R. Civ. P. 12(b); *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985). In the Eleventh Circuit, when a district court converts a Rule 12(b)(6) motion to dismiss into one for summary judgment by considering matters outside the pleadings, the judge must give all parties ten days' notice. *Donaldson v. Clark*, 819 F.2d 1551, 1555 (11th Cir. 1987). Because the claims in Plaintiff's complaint are subject to dismissal for failure to exhaust and for lack of jurisdiction, the Court declines to convert the defendants' motion into a motion for summary judgment. Accordingly, except for those related to exhaustion,[3] the attached

3. A district court may properly consider facts outside of the pleadings to resolve a factual issue regarding exhaustion where the factual dispute does not decide the merits and the parties have a sufficient opportunity to develop the record. *See Bryant v. Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008); *see also* discussion *infra* Part III(b).

documents (and arguments based upon those documents) will not be considered by the Court.

II. Standard of Review for Motions to Dismiss

When considering a motion to dismiss, this Court accepts as true all allegations in the complaint and construes them in the light most favorable to the plaintiff. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1262-63 (11th Cir. 2004). Further, this Court favors the plaintiff with all reasonable inferences from the allegations in the complaint. *Stephens v. Dep't of Health & Human Servs.*, 901 F.2d 1571, 1573 (11th Cir. 1990) ("On a motion to dismiss, the facts stated in [the] complaint and all reasonable inferences therefrom are taken as true."). However, the Supreme Court explains that:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations and quotation marks omitted). Further, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Appendix B

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court, referring to its earlier decision in *Bell Atlantic Corp. v. Twombly*, illustrated a two-pronged approach to motions to dismiss. First, a reviewing court must determine whether a Plaintiff's allegation is merely an unsupported legal conclusion that is not entitled to an assumption of truth. Next, the court must determine whether the complaint's factual allegations state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 679. In the case of a *pro se* action, the Court should construe the complaint more liberally than it would pleadings drafted by lawyers. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). Nevertheless, *pro se* litigants are not exempt from complying with the Federal Rules of Civil Procedure, including Rule 8(a)(2)'s pleading standard. *GJR Investments, Inc. v. Cnty. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998) ("Yet even in the case of *pro se* litigants this leniency does not give a court license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action[.]" (internal citations omitted)), *overruled on other grounds as recognized in Randall v. Scott*, 610 F.3d 701, 706 (11th Cir. 2010); *see also Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989) (stating that *pro se* litigants are "subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure").

Appendix B

III. Analysis

a. Plaintiff's FTCA claims against the United States are dismissed for lack of subject matter jurisdiction

Plaintiff asserts that Coleman prison officials were negligent for placing him in the same cell as Dodson after Plaintiff expressed reservations about the assignment. Accordingly, Plaintiff argues that the United States is liable for his injuries. Defendants argue that the discretionary function exception to the FTCA precludes this Court from considering this claim (Doc. 22 at 13). Plaintiff does not urge that the discretionary function exception does not apply under this factual scenario. Rather, he asserts that whether subject matter jurisdiction exists under the FTCA is a question of fact, and as a result, he (Plaintiff) must be allowed to conduct discovery before his FTCA claims are dismissed (Doc. 31 at 19). Plaintiff is mistaken. The question of whether the decisions of prison officials regarding Plaintiff's safety and housing fall within the discretionary function exception to the FTCA (thereby depriving the district court of subject matter jurisdiction) is a legal one. *See Cohen v. United States*, 151 F.3d 1338, 1340 (11th Cir. 1998) ("Whether the United States is entitled to application of the discretionary function exception to the FTCA is a question of law[.]"). Accordingly, this Court must determine whether the discretionary function exception bars Plaintiff's claims against the United States.

The United States is immune from suit unless it has consented to be sued, and its consent to be sued defines the

terms and conditions upon which it may be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The FTCA provides that the United States may be held liable for money damages for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" in the same manner and to the same extent as a private person under like circumstances. 28 U.S.C. § 1346(b)(1); *Turner ex rel. Turner v. United States*, 514 F.3d 1194, 1200 (11th Cir. 2008). Thus, the "FTCA is a specific, congressional exception" to the United States' sovereign immunity. *Suarez v. United States*, 22 F.3d 1064, 1065 (11th Cir. 1994). As such, the waiver of sovereign immunity permitted under the FTCA "must be scrupulously observed, and not expanded, by the courts." *Id.*

While the FTCA waives the United States' sovereign immunity from suit in federal courts for the negligent actions of its employees, this waiver of sovereign immunity is subject to exceptions. *Cohen*, 151 F.3d at 1340. "The discretionary function exception . . . precludes government liability for '[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.'" *Id.* (quoting 28 U.S.C. § 2680(a)). "If the discretionary function exception applies, the FTCA claim must be dismissed for lack of subject matter jurisdiction." *Id.; see also U.S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1299 (11th Cir. 2009) (stating that "[w]hen the discretionary

function exception to the FTCA applies, no federal subject matter jurisdiction exists").

The discretionary function exception "'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Cohen*, 151 F.3d at 1340 (quoting *United States v. Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 808 (1984)). This is so because to impose "liability on the government for its employees' discretionary acts 'would seriously handicap efficient governmental operations.'" *Id.* at 1340–41 (quoting *Varig Airlines*, 467 U.S. at 814). Thus, "even the negligent performance of a discretionary function does not subject the government to liability under the Federal Tort Claims Act." *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1194 (D.C. Cir. 1986).

In order for a claim to fall within the discretionary function exception to the FTCA, it must meet two requirements. First, the challenged action must involve an element of judgment or choice. The discretionary element does not exist where "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (internal quotation marks and citation omitted). In such event, the discretionary function exception does not apply because the employee has no rightful option but to adhere to the directive. *Id.* Next, if an element of choice or judgment *is* involved, the court must determine whether that choice or judgment is of

the kind that the discretionary function exception was designed to shield. *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991)). The exception "protects only governmental actions and decisions based on considerations of public policy." *Id.* at 323.

1. The prison officials' decisions regarding Plaintiff's safety and housing involved an element of judgment or choice

Title 18 U.S.C. § 4042(a) provides in pertinent part as follows:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

Id. Notably, the duty imposed by § 4042(a) is of a general nature, and broadly requires that the BOP provide for

the safekeeping, protection, and "suitable quarters" of federal inmates. BOP officials are given no guidance, and thus have discretion, in deciding how to accomplish these objectives. The Eleventh Circuit has determined that § 4042(a) does not specifically prescribe a course of action for prison officials to follow. *See Cohen*, 151 F.3d at 1342 ("[E]ven if § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception."); *see also Calderon v. United States*, 123 F.3d 947, 950 (7th Cir. 1997) ("While it is true that this statute sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates."); *Montez ex rel. Estate of Hearlson v. United States*, 359 F. 3d 392, 396 (6th Cir. 2004) (adopting the reasoning in *Cohen* and *Calderon* to determine that BOP officials have discretion in determining how to keep inmates safe).

Likewise, two provisions in the Code of Federal Regulations also govern the actions of prison officials. One states that an inmate "may" be removed from the general population for safety reasons. 28 C.F.R. § 541.22(a). Another provides that BOP staff "may consider . . . as protection cases" inmates who are in danger. 28 C.F.R. § 541.23(a). The use of the word "may" in these regulations, rather than "shall," demonstrates that their implementation is left to the discretion of BOP officials. *See Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 796

(8th Cir. 1998) (holding that "the use of the term 'may' in the regulations imports discretion"); *see also Dorris v. Absher*, 179 F.3d 420, 429 (6th Cir. 1999) ("The use of the term 'may' in a statute is generally construed as permissive rather than as mandatory."). Because these regulations contain no mandatory language, they do not impose a mandatory, nondiscretionary duty upon BOP officials. In sum, the relevant statute and regulations allowed BOP officials the discretion to exercise judgment when making decisions regarding Plaintiff's safety and housing arrangement.

2. The decisions regarding Plaintiff's safety and housing were the kind that the discretionary function were meant to shield

Under the Supreme Court's two-factor approach, we must next consider "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322–23 (quotation marks omitted). The Supreme Court has explicitly stated what a plaintiff must do to survive a motion to dismiss based upon the discretionary function exception:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege

> facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

Id. at 324–25. Based on this, we must decide whether Plaintiff's complaint alleges facts sufficient to rebut the presumption that the decisions by the prison officials regarding Plaintiff's safety were "of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322–23 (quotation marks omitted) (the *Gaubert* presumption).

In the present case, only three allegations in the complaint directly focus on the bases for the prison officials' decisions regarding Plaintiff's safety. The complaint first alleges that Defendants Grafton, Spurlock, Anthony, and Barker "knew, or reasonably should have known, that Mr. Dodson was mentally unstable, and was presenting aggressive and violent tendencies toward other prisoners and in particular his cellmates." (Doc. 6 at 7). He asserts that the prisoner officials also knew, or reasonably should have known, that Mr. Dodson was delusional and that Plaintiff was very concerned for his safety and had previously expressed these sentiments to [Defendant] Gay, and other prison officials." *Id.* Finally, argues Plaintiff, "these prison officials, and each of them, assigned this

violent and aggressive mentally unstable 26 year old to cell with this Plaintiff who, at the time, was 64 years old." *Id.* These allegations simply allege that the BOP officials were negligent in making a decision—to place Dodson in the same cell as Plaintiff— without addressing the nature of that decision, and therefore do not satisfy *Gaubert*'s requirement that a complaint "must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 324–25.

In conclusion, the relevant statute and regulations do not prescribe a mandatory course of conduct for prison officials to follow when making decisions regarding inmates' safety or housing. Moreover, Plaintiff's complaint fails to rebut the *Gaubert* presumption that the decisions by prison officials regarding his safety were based upon BOP policy. Therefore, the discretionary function exception shields the United States from liability in this case, and Plaintiff's FTCA claim must be dismissed for lack of subject matter jurisdiction. *See Cohen*, 151 F.3d at 1338 (recognizing that the BOP's decisions concerning classification of prisoners and what institution to place them in involve an element of choice entitled to protection under the discretionary function exception to the FTCA); *Patel v. United States*, 398 F. App'x 22, 29 (5th Cir. 2010) ("decisions regarding the transfers and classifications of prisoners generally fall within the discretionary function exception"); *Calderon*, 123 F.3d at 951 ("It is clear that balancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the

prison involves considerations based upon public policy."); *Santa–Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003) (decisions about classifying inmates or assigning them to a particular unit or institution, or about allocation of correctional staff, fall within the discretionary function exception); *Ballester v. United States*, No. 1:01-cv-27120JOF, 2006 WL 3544813 (N.D. Ga. 2006) (BOP's decision to place plaintiff in cell with another inmate who subsequently assaulted him fell within discretionary function exception to FTCA); *Brown v. United States,* 569 F.Supp.2d 596, 600 (W.D. Va. 2008) ("the court agrees with the United States that a prison official's decision regarding whether to place an inmate in the general population falls within the discretionary function exception").

b. Plaintiff's *Bivens* claims are unexhausted

Defendants assert that Plaintiff's *Bivens* claims against the individual defendants are subject to dismissal because Plaintiff has not exhausted his administrative remedies. Title 42 U.S.C. § 1997e provides, in relevant part:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). This exhaustion requirement applies to all inmate suits about prison life, whether they involve

general circumstances or particular episodes, whether they allege excessive force or some other wrong, and whether they seek only monetary damages. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The exhaustion requirement applies to *Bivens* actions. *Alexander v. Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998) (holding that prisoner asserting *Bivens* claim must exhaust available administrative remedies).

Exhaustion of all available administrative remedies is a mandatory pre-condition to suit. *Booth v. Churner*, 532 U.S. 731, 739 (2001) ("The 'available' 'remed[y]' must be 'exhausted' before a complaint under § 1983 may be entertained.") (emphasis added); *see also Porter*, 534 U.S. at 524-25 ("Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."); *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) ("[T]he PLRA exhaustion requirement requires proper exhaustion."). Proper exhaustion "demands compliance with an agency's deadlines and other critical procedural rules [as a precondition to filing suit in federal court] because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford*, 548 U.S. at 90-91. A failure to exhaust administrative remedies is an affirmative defense that the defendant bears the burden of proving. *See Jones v. Bock*, 549 U.S. 199 (2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.").

Appendix B

In *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008), the Eleventh Circuit outlined the procedure district courts should follow when presented with a motion to dismiss for failure to exhaust administrative remedies under the Prison Litigation Reform Act ("PLRA"). The *Bryant* court held that the defense of failure to exhaust should be treated as a matter in abatement. *Id.* at 1374. "This means that procedurally the defense is treated 'like a defense for lack of jurisdiction,' although it is not a jurisdictional matter." *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008) (quoting *Bryant*, 530 F.3d at 1374). Because exhaustion is a matter in abatement, "it should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment." *Bryant*, 530 F.3d at 1374-75 (citation and internal quotation omitted).

Deciding a motion to dismiss for failure to exhaust administrative remedies involves two steps. *Turner*, 541 F.3d at 1082. First, the court looks to the factual allegations in the defendants' motion, and those in the plaintiff's response. *Id.* If they conflict, the court accepts the plaintiff's version as true. "If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed." *Id.*; *see also Bryant*, 530 F.3d at 1373-74. If the complaint is not subject to dismissal at the first step, where the plaintiff's allegations are assumed to be true, "the court proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion." *Turner*, 541 F.3d at 1082 (citing *Bryant*, 530 F.3d at 1373-74, 1376). Upon making findings on the disputed issues of fact, the court then decides whether, under those findings,

the plaintiff has exhausted his available administrative remedies.

1. There is a disputed issue of fact as to whether Plaintiff exhausted his *Bivens* claims

The grievance procedure promulgated by the BOP (and which Plaintiff was required to follow) requires an inmate to: (1) file an informal grievance (BP-8); (2) file a formal written complaint with the institution by submitting a Request for Administrative Remedy (BP-9); (3) file an appeal to the Regional Director by submitting a Regional Administrative Remedy Appeal (BP-10); and (4) file an appeal to the General Counsel for the BOP by submitting a Central Office Administrative Remedy Appeal (BP-11). 28 C.F.R. § 542.10-542.15. Each of these steps is generally required to satisfy the exhaustion requirement. *Id.*

In the instant case, Defendants assert that Plaintiff submitted administrative remedies concerning the attack at the BP-9 and BP-10 levels (Doc. 22 at 6); ("Santos Aff" at ¶¶ 7, 8). Defendants claim that Plaintiff's BP-10 was rejected at the Regional Office and that "Plaintiff thereafter failed to submit his appeal to the BOP's Office of General Counsel". *Id.* In other words, Defendants urge that Plaintiff did not complete the administrative remedy process concerning Dobson's attack because he never filed an appeal at the BP-11 level. In support, Defendants attach the affidavit of Caixa Santos who attests that Plaintiff's appeal to the Regional Office (BP-

10) was rejected on November 24, 2015 because Plaintiff sought monetary compensation. Santos Aff. at ¶ 8. Santos states that no BP-11 was ever filed, and attaches a copy of Plaintiff's SENTRY report showing the final grievance filed regarding the incident to be the November 24, 2015 BP-10 (Doc. 22-1 at 13-18).

Plaintiff counters that he did file a BP-11 after his BP-10 was rejected and that "when he received no response at the final level, made several inquiries in regard thereto, to no avail." (Doc. 31 at 9). In support, he attaches his own sworn affidavit in which he attests that he mailed a BP-11 form to the Central Office on December 18, 2015 along with attached BP-8 and BP-9 forms (Shivers Aff. at ¶ 3). He asserts that a "true and correct copy of the documents described above" are attached to the affidavit. *Id.* at ¶ 4. He also attaches the affidavit of fellow inmate Gordon Reid who attests that he (Reid) typed Plaintiff's BP-11 form and reviewed "a copy of the form signed and dated December 18, 2015, on which day [Plaintiff] informed me that he had mailed to Central Office, 1st class postage, ppd., by giving in hand to the institutional mail officer." (Reid Aff. at ¶ 5).

Because there is a disputed issue of fact as to whether Plaintiff completed the exhaustion process, this issue cannot be resolved at the first step of the *Turner* analysis. Accordingly, the Court must make specific findings in order to resolve the disputed factual issues. *Turner*, 541 F.3d at 1082. Because the parties have had a sufficient opportunity to develop the factual record, this Court may resolve factual issues on this dispute. *See Turner*, 541 F.3d at 1082.

2. Plaintiff did not file a proper BP-11 form with the Central Office

After considering all the evidence submitted by both sides, this Court is persuaded by the affidavit of Caixa Santos, and the attachments thereto, that Plaintiff did not file a BP-11 form with the Central Office. Likewise, there is no record in SENTRY of Plaintiff's BP-11, even though SENTRY shows that Plaintiff filed BP-9 and BP-10 forms in this case and numerous grievances in a prior case (Doc. 22-1 at 18). Plaintiff urges that he prepared a BP-11 form on December 18, 2015 and then mailed the form to the Central Office—as evidence to support this claim, he attaches a copy of the alleged form to his response (Doc. 32 at 18). However, the copy of the BP-11 form provided as proof is *unsigned* and would not have served to exhaust this claim, even if filed. *See* 28 C.F.R. § 542.15 (b)(3) ("The inmate shall date and sign the Appeal and mail it to . . . the National Inmate Appeals Administrator, Office of the General Counsel[.]"). Further, while Plaintiff makes a cursory assertion that he "made several inquiries to various prison officials" about the status of his BP-11, he does not describe the inquiries or provide the identities of the officials who were allegedly queried about his appeal. The attestation of fellow inmate Gordon C. Reid that he saw a copy of the "signed and dated December 18, 2015" BP-11 form (Doc. 33) is not credible, given that the alleged copy of the BP-11 attached to Plaintiff's affidavit is unsigned and could not be the document to which Reid refers.

Plaintiff has provided no credible evidence, other than his own statement, that BOP personnel lost his BP-11 appeal. The Court finds that Plaintiff's assertion

is outweighed by other record evidence suggesting that such appeal was never filed, and if filed, was not done so properly. *See Trias v. Fla. Dep't of Corr.*, 587 F. App'x 531 (11th Cir. 2014) (on issue of exhaustion, district court entitled to find the affidavit of the FDOC records custodian more persuasive than Plaintiff's affidavit); *Bryant*, 530 F.3d at 1376-78 (recognizing that the district court may resolve a credibility issue when considering exhaustion and finding that the district court reasonably concluded that Plaintiff's allegation that he was denied access to grievance forms at the prison was not credible); *Wright v. Langford*, 562 F. App'x 769, 776 (11th Cir. 2014) (district court reasonably found Plaintiff's purported ignorance of grievance procedure was not credible and alternatively dismissed claim because even had grievance been timely filed, it was defective).

The defendants have met their burden of proving that Plaintiff failed to exhaust his available administrative remedies. Accordingly, their motion to dismiss Plaintiff's *Bivens* claims is granted.

Conclusion

It is hereby **ORDERED and ADJUDGED:**

1. Defendant's motion to dismiss Plaintiff's Complaint (Doc. 22) is **GRANTED**. Sovereign immunity bars Plaintiff's claims against the United States.[4] Plaintiff's

4. Because all claims are dismissed, the Court will not consider Defendants' arguments that Plaintiff has not stated a deliberate indifference claim against the individual defendants and that the defendants are entitled to qualified immunity.

Bivens claims are dismissed under 42 U.S.C. § 1997e(a) for Plaintiff's failure to exhaust his administrative remedies.

2. With no remaining claims or defendants, the **Clerk of Court** is directed to terminate any remaining pending motions, enter judgment in favor of the defendants, and close this case.

DONE and **ORDERED** in Ocala, Florida on April 14, 2017.

/s/
UNITED STATES
DISTRICT JUDGE

SA: OrlP-4
Copies to: Mackie Shivers
Counsel of Record