No. 21-682

In the Supreme Court of the United States

MACKIE L. SHIVERS, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a tort claim against the United States falls outside the scope of the Federal Tort Claims Act's discretionary function exception, 28 U.S.C. 2680(a), simply because the plaintiff alleges a violation of the Constitution.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 1 F.4th 924. The order of the district court (Pet. App. 34a-56a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2021. The petition for a writ of certiorari was filed on November 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an inmate in a federal prison. Pet. App. 2a. In August 2015, prison employees assigned another inmate, Marvin Dodson, as his cellmate. *Ibid.* Eight months later, Dodson stabbed petitioner in the eye with a pair of scissors, leaving petitioner permanently blind in that eye. *Id.* at 3a.

After the attack, petitioner filed this action in the United States District Court for the Middle District of Florida. Pet. App. 34a. Petitioner raised claims against the United States under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346(b), 2671 *et seq.*, and against prison employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 3a. Petitioner alleged that the prison employees knew or should have known that Dodson had violent tendencies and that they were negligent in housing petitioner and Dodson together. *Ibid.* He further alleged that the prison employees' conduct violated his rights under the Eighth Amendment. *Ibid.*

The district court dismissed the complaint. Pet. App. 34a-56a. As relevant here, the court determined that it lacked subject-matter jurisdiction over petitioner's FTCA claims against the United States. *Id.* at 41a-49a. The United States is immune from being sued without its consent. See *United States* v. *Navajo Nation*, 556 U.S. 287, 289 (2009). In the FTCA, Congress consented to damages suits against the United States with respect to certain torts of federal employees, acting within the scope of their employment, under circumstances in which a private individual would be liable under state law. See 28 U.S.C. 1346(b)(1). But the Act contains various exceptions that limit the scope of the waiver of sovereign immunity. See 28 U.S.C. 2680.

The district court held that petitioner's claim fell within the FTCA's discretionary function exception, which precludes any 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); see Pet. App. 42a-49a. This Court has explained that an act falls within the scope of that exception if it involves "an element of judgment or choice" and "that judgment is of the kind that the discretionary function exception was designed to shield." *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991) (citations omitted). In this case, the district court determined that a prison employee's decisions about housing inmates involved an element of judgment or choice, Pet. App. 44a-46a, and that the discretionary function exception was designed to shield that kind of judgment, *id.* at 46a-49a.

2. The court of appeals affirmed. Pet. App. 1a-33a.

As relevant here, the court of appeals affirmed the district court's application of the discretionary function exception. Pet. App. 5a-20a. The court of appeals noted that it had previously held that the exception covers prison employees' "inmate-classification and housing-placement decisions." *Id.* at 7a (citing *Cohen* v. *United States*, 151 F.3d 1338, 1340, 1342-1345 (11th Cir. 1998), cert. denied, 526 U.S. 1130 (1999)).

Petitioner argued for the first time on appeal that the discretionary function exception does not apply to his claims "because the prison officials' decision to house Dodson in his cell violated the Eighth Amendment." Pet. App. 7a-8a. The government argued that petitioner had forfeited that contention by failing to raise it in the district court, but the court of appeals rejected that argument. *Id.* at 9a n.3.

The court of appeals then rejected petitioner's contention on the merits. Pet. App. 9a-20a. The court observed that "the statutory text of the discretionary function exception is unambiguous and categorical," *id.* at 9a: the FTCA does not apply to "[a]ny claim" that

arises from the performance of a discretionary function, "whether or not the discretion involved be abused," 28 U.S.C. 2680(a). The court concluded that this language left "no room for the extra-textual 'constitutional claims exclusion' for which [petitioner] advocates." Pet. App. 10a. The court acknowledged that the discretionary function exception does not apply when federal law "specifically prescribes a course of action for an employee to follow." *Id.* at 11a (quoting *Gaubert*, 499 U.S. at 322) (emphasis omitted). But the court explained that, because the Eighth Amendment does not contain "specific directives as to inmate classifications or housing placements," it does not displace the discretionary function exception. *Id.* at 12a.

Judge Wilson concurred in part and dissented in part. Pet. App. 24a-33a. Judge Wilson would have concluded that, "[b]y violating the Constitution, a government employee necessarily steps outside his permissible discretion—and thus outside the discretionary function exception's protection." *Id.* at 24a. He would have vacated the district court's dismissal of the complaint and remanded the case so that the district court could determine in the first instance whether the complaint plausibly alleged a constitutional violation. *Id.* at 33a.

ARGUMENT

Petitioner renews his contention (Pet. 11-30) that the FTCA's discretionary function exception, 28 U.S.C. 2680(a), is categorically inapplicable where a plaintiff alleges that the federal employee's conduct violated the Constitution. The court of appeals correctly rejected that contention. Although there is some difference in the manner in which courts of appeals have addressed the application of the discretionary function exception when the plaintiff alleges a constitutional violation,

petitioner overstates the nature and extent of that difference, and any disagreement has had little practical significance. This case, moreover, would be a poor vehicle for resolving that disagreement. The Court has denied multiple petitions for writs of certiorari raising similar issues. See *Linder* v. *United States*, 141 S. Ct. 159 (2020) (No. 19-1082); *Chaidez Campos* v. *United States*, 139 S. Ct. 1317 (2019) (No. 18-234); *Castro* v. *United States*, 562 U.S. 1168 (2011) (No. 10-309); *Welch* v. *United States*, 546 U.S. 1214 (2006) (No. 05-529). The Court should follow the same course here.

1. The court of appeals correctly determined that petitioner's allegation that the prison employees' conduct violated the Eighth Amendment does not negate the applicability of the FTCA's discretionary function exception.

The discretionary function exception applies to "[a]ny claim" based on the exercise of a discretionary function, "whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The word "[a]ny," *ibid.*, indicates that the exception applies regardless of the nature of the claim; it leaves no room for an exception for constitutional claims. In addition, because the exception applies "whether or not the discretion involved be abused," *ibid.*, application of the exception does not turn on whether the official has exercised the discretion in a permissible manner. "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." Pet. App. 11a (emphasis omitted).

An analogy to the common-law doctrine of official immunity, which formed the backdrop to the FTCA's discretionary function exception, reinforces that reading.

Under that doctrine, "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). That immunity may apply even if the official's conduct violated the Constitution, so long as the constitutional right was not defined with sufficient specificity that the official should have known that the act was prohibited. See, *e.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 614-615 (1999) (using the "discretionary functions" formulation and holding that officers were entitled to immunity because the constitutional violation was not clearly established with sufficient specificity). So too here, an activity can qualify as a "discretionary function" under the FTCA even if the federal employee violates the Constitution in performing it.

In addition, Congress enacted the FTCA (as its title suggests) to address violations of state tort law committed by federal employees—not to address constitutional violations. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994) (recognizing that the FTCA "does not provide a cause of action" for a "constitutional tort claim"). It would therefore be incongruous to read the discretionary function exception to include an unwritten carveout for cases in which plaintiffs allege constitutional violations.

To be sure, as the court of appeals recognized, this Court has explained that an activity falls outside the scope of the discretionary function exception if federal law "specifically prescribes a course of action for an employee to follow." *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991) (citation omitted); see Pet. App. 12a & n.4. Accordingly, if the Constitution, a federal statute,

or a federal regulation requires or forbids a course of conduct with sufficient specificity and clarity, it can eliminate the "element of judgment or choice" in the employee's activity and thus negate the applicability of the discretionary function exception. *Gaubert*, 499 U.S. at 322 (citation omitted); see Pet. App. 12a. In the absence of such a clear and specific directive, however, the exception applies even if the plaintiff later claims that the challenged conduct violated the Constitution or the law. See, *e.g.*, *Bryan* v. *United States*, 913 F.3d 356, 364 (3d Cir. 2019) (concluding that, where federal officials "did not violate clearly established constitutional rights," their actions fell within the scope of the discretionary function exception).

Petitioner's contrary arguments lack merit. Petitioner argues that the discretionary function exception applies only to a "*permissible* exercise" of discretion. Pet. 18 (citation omitted). But the statute's plain terms provide that the exception applies "whether or not the discretion involved be abused," 28 U.S.C. 2680(a), making clear that application of the exception does not turn on whether the official has exercised his discretion in a permissible way. This Court recognized as much in *Butz* v. *Economou*, 438 U.S. 478 (1978), observing that "no compensation would be available from the Government" in suits alleging that officials' discretionary conduct violated the Constitution, because the FTCA "prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused." *Id.* at 505.

Petitioner also argues that the government "has no discretion to violate the Federal Constitution." Pet. 17 (citation omitted). But that misunderstands the nature of the inquiry. The applicability of the discretionary

function exception turns on "the nature of the conduct" in which the federal employee is engaged, *Gaubert*, 499 U.S. at 322 (citation omitted)—that is, on whether "the underlying function or duty itself was a discretionary one," Pet. App. 11a. It does not turn on whether the employee performed that function "poorly, abusively, or unconstitutionally" in a particular instance. *Ibid.* (emphasis omitted). As the court of appeals concluded and as petitioner does not dispute, the underlying function here, deciding where to house inmates in a federal prison, is discretionary. *Id.* at 7a. That should end the statutory analysis.

Finally, petitioner briefly suggests (Pet. 4, 8, 25) that, in this case, he did allege a violation of a "clearly established" right and that he is accordingly entitled to prevail even under the government's reading of the Act. This Court has cautioned in other contexts, however, that courts should not "define clearly established law at a high level of generality," but should instead focus on whether "the violative nature of particular conduct is clearly established." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011). Petitioner argues that Eleventh Circuit case law clearly established that officials "must take reasonable measures to guarantee the safety of the inmates," Pet. 25 (citation omitted), but that highly general proposition does not establish that the Eighth Amendment clearly forbade the prison employees' conduct or "specifically prescribe[d] a course of action for [the] employee[s] to follow." *Gaubert*, 499 U.S. at 322.

2. The question presented does not warrant this Court's review. Any disagreement among the courts of appeals about the question presented is considerably narrower and less clear than petitioner suggests.

Petitioner contends (Pet. 12-15) that eight courts of appeals—the First, Second, Third, Fourth, Fifth, Eighth, Ninth, and D.C. Circuits—have held that the discretionary function exception does not apply to unconstitutional conduct. But the Third, Fourth, and Fifth Circuit cases on which petitioners rely did not involve allegations of unconstitutional conduct at all; they addressed the question presented here in dicta. See *United States Fidelity & Guarantee Co.* v. *United States*, 837 F.2d 116, 123 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Sutton* v. *United States*, 819 F.2d 1289, 1292 (5th Cir. 1987). Similarly, the Second Circuit considered a limitation on the discretionary function exception with little in analysis in a decades-old case, without deciding whether agency regulations or the Constitution actually circumscribed the agency's discretion and without addressing whether a specific constitutional right had been clearly established. See *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252, 1261-1262 (1975) (leaving for remand whether the Postal Service had improperly denied a hearing that "was required by either the Constitution or the Postal Service regulations").

The First, Ninth, and D.C. Circuits, in turn, determined at most that unconstitutional conduct can fall outside the discretionary function exception in some circumstances. They did not resolve the question whether conduct falls outside the exception even when the unconstitutionality of the conduct was not already clearly established. See *Limone* v. *United States*, 579 F.3d 79, 102 (1st Cir. 2009) (holding that the exception did not apply to conduct that the court had previously found constituted "a clear violation of due process"); *Nurse* v.

United States, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (stating that "the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply," but declining to resolve "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor"); *Loumiet* v. *United States*, 828 F.3d 935, 946 (D.C. Cir. 2016) ("leav[ing] for another day the question whether the FTCA immunizes exercises of policy discretion in violation of constitutional constraints that are not already clear").

Finally, the remaining court, the Eighth Circuit, stated in a brief per curiam opinion that alleged surveillance activities fell outside the scope of the 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). The court provided little analysis to support that conclusion and did not address whether the asserted constitutional limitations were clearly established with specificity. See *ibid.*

Petitioner argues (Pet. 28-30) that the question presented affects not only the FTCA, but also immunity provisions in other statutes. Petitioner observes (Pet. 28) that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, contains a discretionary function exception, but the question presented here would not arise in that context, because the United States Constitution does not bind foreign sovereigns. Petitioner also observes (Pet. 28) that Section 305 of the Robert T. Stafford Diaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5148, contains a similar discretionary function exception. But the Stafford Act's exception has been read to cover claims for any kind of

relief, not just damages claims; thus, unlike the FTCA's remedial scheme, it raises issues about foreclosing all judicial review of unconstitutional agency action. See *Rosas* v. *Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987).

3. This case would in any event be a poor vehicle in which to resolve the question presented, because petitioner has not plausibly alleged that the prison employees' conduct violated the Eighth Amendment. This Court has concluded that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994). The Court has made clear that "deliberate indifference describes a state of mind more blameworthy than negligence"; the standard requires, among other things, a showing that the prison officials "actually knew of a substantial risk" to the inmate. *Id.* at 835, 844. As the district court concluded, however, the allegations in petitioner's complaint suggest at most "that the [prison] officials were negligent" in placing Dodson in the same cell as petitioner. Pet. App. 48a; see, *e.g.*, *id.* at 47a (quoting allegation in the complaint that the prison employees "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") (emphasis added; citation omitted). That does not suffice to show a violation of the Constitution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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