No. 24-5249

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FARID FATA.
(Your Name) — PETITIONER

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FOURTH CIRCUIT APPEAL COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

FARID FATA. # 48860-039
(Your Name)

FCI WLLIAMSBURG. P.O. BOX 340
(Address)

SALTERS, SC 29590
(City, State, Zip Code)

N/A
(Phone Number)

TRULINCS 48860039 - FATA, FARID - Unit: WIL-A-B

FROM: 48860039
TO:
SUBJECT: FTCA-I-PETITION FOR CERTIORARI
DATE: 07/28/2024 11:33:04 AM

CASE No.

QUESTIONS PRESENTED

Q 1 - Given the Supreme Court case law Precedents since after "Arbaugh v. Y&H. Corp., 546 U.S. 500, 515-16 (2006)", and amid a Circuit Split, is exhaustion of administrative remedies a jurisdictional requirement under 28 U.S.C.S. 2675 of the Federal Tort Claims Act (FTCA) ?

* * * *

Q 2 - Whether the waiver of Sovereign immunity in the alleged negligent conduct of a medical doctor's professional judgment, non-governmental in nature, is subject to a discretionary function exception, of the kind in the FTCA ?

* * * *

Q 3 - Whether the Supreme Court should revisit the Berkovitz-Gaubert two-prong test dated more than 35 years ago for when the FTCA's discretionary function exception applies because the exact boundaries of the exception remain unclear amid a Circuit Split. For there is a disconnect between the test that asks whether the challenged "action" involves the permissible exercise of policy judgment, See Berkovitz, 486 U.S. 531, at 536-37 (1988), but the text speaks of a discretionary function or duty ". 28 U.S.C. 2680(a).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Fata v. United States, 2024 U.S. App. LEXIS 9789, (4th Cir. 2024); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at Fata v. United States, 2023 U.S. Dist. LEXIS 217034 (D.S.C. Dec. 6, 2023); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 23, 2024.

[ ] No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 19, 2024, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

FROM: 48860039
TO:
SUBJECT: FTCA-III-PETITION FOR CERTIORARI
DATE: 07/28/2024 05:27:58 PM

CASE No.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) 28 U.S.C.S. 2675(a) :

A tort action shall not be instituted upon a claim against the United States for money damages for injury 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, unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

* * * *

(2) 28 C.F.R. 14.2(a) :

When a federal agency receives from a claimant, his duly authorized agent or legal representative, an executed standard Form 95 or "other written notification" of an accident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident.

* * * *

(3) 28 U.S.C.S. 2680(a) :

The provisions of this Chapter [28 USCS 2671 et Seq.] and Section 1346(b) of this title [28 USCS 1346(b)] 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.

FROM: 48860039
TO:
SUBJECT: FTCA-II-PETITION FOR CERTIORARI
DATE: 07/28/2024 08:23:50 PM

CASE No.

STATEMENT OF THE CASE

Under the Federal Tort Claims Act, Petitioner has raised a medical claim and a COVID Claim. Petitioner is only appealing his medical claim. The Covid claim falls. Fata's medical claim of the Bureau of Prisons' (BOP) failure to timely refer Fata for "urgent" outside consultations and to deny him urgent medical treatment was dismissed without prejudice for failure to exhaust his administrative remedies pursuant to 28 USCS 2675 (RE 35, at 5,6). Thus, the district court held that it lacks jurisdiction over Fata's medical claim. Accordingly, the district court overruled Fata's remaining objections regarding his medical claim and did not address the merits of the failure to timely provide Fata "urgent" treatment with NEUPOGEN injections during his neutropenic recurrent infections which caused him further harm and injury from recurrent chronic prostatitis twice . Fata has developed 14 infectious episodes from 2020 to 2024, due to his chronic cyclic neutropenia and immunocompromised status.

A - EXHAUSTION OF ADMINISTRATIVE REMEDIES:

The district court acknowledged that petitioner filed an amended SF-95, pursuant to 28 C.F.R. 14.2, and attached his medical records related to contracting recurrent infections where he cited the failure to timely refer him to outside specialty consultations, and flagged the clinical encounters of November 30, 2021 for "urgent" urology referral and February 24, 2022, for "urgent" hematology referral (DE 24 at 1-2). The record shows the BOP responded on July 18, 2022, stating the "Second Request" was viewed as a "duplicate claim", and no action would be taken "for the duplicate claim". (DE 24-3, at 2). Fata v. United States, 2023 U.S. Dist. LEXIS 219093 (D.S.C. Aug. 15, 2023); see Appendix C; see also Fata v. United States, 2023 U.S. Dist. LEXIS 217034 (D.S.C. Dec. 6, 2023); see Appendix B.

The district court held: (DE 35, at 5-6).

> "Fata submitted two SF-95 requests. The evidence indicates neither request explicitly raised Fata's medical claim. Fata contends the medical records attached to the second request suffice. But, as the Magistrate Judge determined, Fata's mere attachment of medical records, without explanation, failed to adequately provide the United States notice of his claim".

But the district court omitted or overlooked petitioner's [written notifications] to the BOP's Supervisory Attorney on July 14, 2022 and September 26, 2022 (DE 32, Exhibit A), containing specific information with his attached grievance and asked for an "investigative report" to his tort claims pursuant to 28 C.F.R.

14.2(a) on July 14, 2022, pertaining to the BOP's failure to refer Fata for "urgent" specialty consultations [before] the agency determined on July 18, 2022 that it will take no action toward Fata's second SF-95 administrative claims (DE 32, Exhibit A). Fata has also filed an affidavit signed under penalty of perjury (DE 32, Exhibit E). Thus, the government plainly was on notice of the facts supporting Fata's medical claim. Accordingly, the district court erred by concluding that Fata has failed to show his administrative filings met those listed requirements as to his medical claim (DE 35 at 6). The court noted:

> "Therefore, Fata failed to exhaust his administrative remedies as to his medical claim and the Court thus lacks jurisdiction over this claim. Accordingly, the court will overrule this objection, as well. Because this issue is dispositive, the court need not delve into Fata's remaining objections regarding Fata's medical claim".
>
> (DE 35 at 6).

The district court relied on established law in the Fourth Circuit since 1986 that held that Failure to exhaust administrative remedies in an FTCA case requires dismissal for lack of subject matter jurisdiction. Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986); Plyler v. United States, 900 F.2d 41, 42 (4th Cir. 1990); see also McNeil v. United States, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed. 2d 21 (1993); and Ahmed v. United States, 30 F.3D 514, 516 (4th Cir. 1994). Fata had good cause for not raising the non-jurisdictional exhaustion claim in the district court as the Fourth Circuit law noted above foreclosed the argument.

In conclusion, the district court dismissed petitioner's medical claim for failure to exhaust administrative remedies and did not address Fata's objections relevant to his medical claim that held the government, if a private person, liable to claimant in accordance with South Carolina law (DE 29; DE 35 at 5-6). Fata v. United States, 2023 U.S. Dist . LEXIS 217034 (D.S.C. Dec. 6, 2023). See Appendix B.

Fata timely appealed to the Fourth Circuit and raised two Grounds:

GROUND ONE: The district court erred in holding that plaintiff failed to exhaust his administrative remedies as to his medical claim:

(1) Absent discovery to complete record of the second SF-95 attachments to examine the listed requirements/notice to the United States sufficient to prompt investigation.

(2) Absent the court's review of plaintiff's [other written notifications] to the BOP's Supervisory Attorney pursuant to 28 C.F.R. 14.2(a), that meet the "minimum notice" requirement.

GROUND TWO: The district court erred as it did not address the merits of Fata's medical claim: For the waiver of Sovereign immunity in the alleged negligent conduct of a medical doctor's professional

judgment, non-governmental in nature, is not subject to the discretionary function exception of the FTCA.

On April 23, 2024, the Fourth Circuit Court of Appeals affirmed the district court's opinion based on (a) Plaintiff failed to exhaust his medical claims, as he did not provide sufficient notice of the specific claims in his Bureau of Prisons grievances prior to filing his federal complaint. (b) Fata's medical claim falls under the discretionary function exception. Fata v. United States, Case No. 23-7310, 2024 U.S. App. LEXIS 9789 (4th Cir. 2024); See Appendix A.

After Fata submitted his Informal Brief on appeal, the Fourth Circuit issued its holding in Est. of Van Emburgh v. United States, 2024 U.S. App. LEXIS 5867 (4th Cir. March 12, 2024)("Each of the three elements of exhaustion requirements in 28 USCS 2675 is jurisdictional). Accordingly, on May 10, 2024, Fata petitioned for de-novo en banc review asking the Fourth Circuit to overrule its law since 1986 under Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986), as it appears that the Fourth Circuit have not weighed on the FTCA's jurisdictional presentment requirement issue for the past 24 years since Kokotis v. United States Postal Serv., 223 F.3d 275, 278 (4th Cir. 2000). And the standing precedent in the Fourth Circuit treated 2675(a)'s presentment requirement as jurisdictional based on circuit law that predated the Supreme Court's re-examination of jurisdictional requirements that followed after the holdings in Arbaugh v. Y&H. Corp., 546 U.S. 500, 515-16 (2006)(regarding a "threshold limitation on a statute's scope as non-jurisdictional absent clear statement by Congress). But the recent intervening case law in the Fourth Circuit under "Est. Van Emburgh" that was decided after Fata submitted his Informal Brief on appeal may not survive "Arbaugh" nor the Supreme Court subsequent holdings in Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157-58 (2010); Simmons v. Himmel Reich, 578 U.S. 621 (2016) ("the FTCA jurisdictional provisions are contained in two Chapters of the U.S. Code ... 28 USCS 1346(b) ... and 'Tort Claims Procedure" 2671-2680"); Patchak v. Zinke, 583 U.S. ___, ___, 138 S.Ct. 897, 906 (2018)("the exhaustion of administrative remedies is considered as a "non-jurisdictional claim-processing rule[]"); Smith v. Berryhill, 139 S.Ct. 1765 (2019); and Santos-Zacaria v. Garland, 598 U.S. 411 (2023) ("Whether a court order must first exhaust certain administrative remedies is not jurisdictional because the provision lacks the clear statement necessary to qualify as jurisdictional; "we treat a rule as jurisdictional only if Congress 'clearly states' that it is".).

As to the merits of Fata's medical claim, Fata asked the en banc Court to determine whether the waiver of Sovereign Immunity in the alleged negligent conduct of a medical doctor's professional judgment,

non-governmental in nature, is subject to a discretionary function exception, of the kind in the FTCA.

On July 19, 2024, the Fourth Circuit denied Fata's Petition for Rehearing en banc. (Appendix A).

FROM: 48860039
TO:
SUBJECT: FTCA-IV-PETITION FOR CERTIORARI
DATE: 07/28/2024 08:25:44 PM

CASE No.

REASONS FOR GRANTING THE PETITION

GROUND ONE ,

(1) EXHAUSTION UNDER 28 U.S.C.S. 2675 OF THE FTCA IS NOT JURISDICTIONAL :

The district court treated the FTCA's exhaustion presentment requirement as jurisdictional and dismissed Fata's medical claim for lack of jurisdiction. Which begs the question whether there is a jurisdictional bar to a court's reaching the merits. Santos-Zacaria v. Garland, 598 U.S. 411 (2023). Because this issue is dispositive, the district court did not delve into Fata's remaining objections regarding his medical claim. Thus, the district court determined it need not decide whether Fata's medical claim against the United States was barred by Sovereign Immunity. The Fourth Circuit denied Fata's petition for rehearing en banc as its standing precedent since after Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986), Plyler v. United States, 900 F. 2d 41, 42 (4th Cir. 1990); and Ahmed v. United States, 30 F.3d 514 (4th Cir. 1994), treated 2675(a)'s presentment requirement as jurisdictional based on Circuit law that predated the Supreme Court's re-examination of jurisdictional requirements that followed after the holding in Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006)(regarding a "threshold limitation on a statute's scope as non jurisdictional absent clear statement by Congress). In Arbaugh, this Court criticized prior rulings for describing mandatory claims-processing rules in jurisdictional terms. Id at 511. The Court held that these "drive-by jurisdictional rulings" should be given "no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit". Id. (quotations omitted). But "Arbaugh" did not mention McNeil v. United States, 508 U.S. 106, 113 (1993) or the FTCA. "McNeil" suggested that the FTCA's exhaustion requirement is jurisdictional, 508 U.S. at 109, but at most, Arbaugh prevents the lower courts from reading that suggestion to be a holding. Arbaugh, 546 U.S. at 511, though Arbaugh does not affect McNeil's holding that the FTCA's exhaustion requirement is mandatory. And that is exactly what Fata did. Fata submitted an amended SF-95 pursuant to 28 C.F.R. 14.2(a) and attached his medical records and "flagged and cited" the failure to timely refer him for "urgent" urology and hematology consultations that took 6 and 8 months respectively. During those long-waiting months Fata developed further injuries from painful recurrent chronic prostatitis twice. The district court overlooked Fata's

"other written notifications" submitted to the BOP's Supervisory Attorney on July 14, 2022, to investigate Fata's medical claim and denied Fata's request for discovery to review those attachments and citations to his second amended SF-95. Thus, the district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) was improper as it created a jurisdictional bar to its reaching the merits of Fata's medical claim.

The Fourth Circuit affirmed and the en banc court denied Fata's request to consider this Court's holding that since Arbaugh this Court ha[s] yet to hold that any statutory exhaustion requirement is jurisdictional when applying the 'clear statement' rule. Santos-Zacaria, 143 S.Ct. at 1112-13 (recounting numerous cases since Arbaugh in which the Court declined to classify a statutory exhaustion requirement as jurisdictional). Indeed, this Court's instruction to "trea[t] as nonjurisdictional ... threshold requirements that claimants must complete, or exhaust" for judicial review, id. (alteration and omission in original) (quoting Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010)), have classified exhaustion requirements previously considered jurisdictional as non-jurisdictional claim-processing rules that promote the orderly progress of litigation but do not bear on a court's power. Boechler, P.C. v. Comm'r., 596 U.S. 199, 142 S.Ct. 1493, 1497, 212 L.Ed.2d 524 (2022). And applying this Court's "clear statement by Congress" standard rule in the context of the FTCA, the contrast between the text of 28 USCS 2675 and the unambiguous jurisdictional terms in the provisions of 28 USCS 1346, show that Congress would have spoken in clearer terms if it intended for 2675 to have similar jurisdictional force. Gonzalez v. Thaler, 565 U.S. 134, 143 (2012); see also United States v. Kwai Fun Wong, 575 U.S. 402, 411, 135 S.Ct. 1625, 191 L.Ed. 2d 533 (2015)("mandatory language like "shall" may be "of no consequence" to the jurisdictional analysis.").

(2) CIRCUITS' SPLIT :

Except for for the Seventh and Sixth Circuits, the remaining federal Circuits consider exhaustion or the presentment requirement in 28 USCS 2675(a) under the FTCA as jurisdictional. Thus, it cannot be waived or forfeited. Those Circuits have held that each of the three elements contained in the plain text of 28 USCS 2675 are jurisdictional: First, a plaintiff must present the claim to appropriate federal agency. 28 USCS 2675(a). Second, the plaintiff must state the sum they are seeking for the claim. 2675(b). Third, the plaintiff must wait either for the claim to be finally denied by the agency or for the agency to fail to make final disposition of the claim within six months after it is filed. 2675(a). A large

body of case law supports the Circuits' divide.

Collins v. United States, 996 F.3d 102 (2d Cir. 2021)(to satisfy the law's jurisdictional requirement, a presentment must be specific enough to serve the purpose of the FTCA); Knapp v. United States, 2022 U.S. App. LEXIS 23851 (3rd Cir. 2022)(the Supreme Court and the Maryland Court of Appeals have held that this exhaustion requirement is jurisdictional and cannot be waived); Est. of Emburgh v. United States, 2024 U.S. App. LEXIS 5867 (4th Cir. 2024)(Each of the three elements of exhaustion requirements in 28 USCS 2675 is jurisdictional); Nguyen v. United States, 2024 U.S. App. LEXIS 3773 (5th Cir. 2024) (Exhaustion: such a notice is a jurisdictional prerequisite to filing suit under the FTCA); Kellom v. Quinn, 86 F.4th 288 (6th Cir. 2023)("the FTCA's exhaustion requirement is a mandatory claims-processing rule - not a jurisdictional rule); Smoke Shop, LLC v. United States, 761 F.3d 779, 786-87 (7th Cir. 2014)("the Seventh Circuit no longer treats 2675(a) as a jurisdictional prerequisite"); Adams v. United States, 2023 U.S. App. LEXIS 17448 (8th Cir. 2023)(the Court noted that "[p]resentment of an administrative claim is jurisdictional and must be pleaded and proven by the FTCA claimant); Castro v. United States, 2024 U.S. App. LEXIS 14052 (9th Cir. 2024)(the FTCA claims presentation requirement is jurisdictional); Estate of Cummings v. Cnty. Health Sys., 881 F.3d 793 (10th Cir. 2018)(Exhaustion is a statutory jurisdictional requirement under the FTCA); Pinson v. United States, 2022 U.S. App. LEXIS 30697 (11th Cir. 2022)(Because plaintiffs failed to individually satisfy the jurisdictional prerequisite of filing a proper FTCA claim ...); N'Jai v. United States Dep't of Education, 2023 U.S. App. LEXIS 13832 (D.C. Cir. 2023)("FTCA exhaustion is a jurisdictional requirement".).

(3) THE STATUTORY PRESENTMENT REQUIREMENT UNDER 28 USCS 2675(a) IS VAGUE:

The text of 28 USCS 2675(a) notes: " a tort action shall not be instituted against the United States for money damages unless the claimant shall have first presented the claim to the appropriate Federal agency for its review". But the Statute does not

(a) contain a provision on how the presentment element should be held.

(b) include "Exceptions" to the presentment requirement "where the administrative body is shown to be biased or otherwise predetermined the issue before it. McCarthy v. Madigan, 503 U.S. 140, 144-149, 112 S.Ct. 1081, 117 L.Ed. 2d 291 (1992)("Futility is an established exception to the requirement of exhaustion of administrative remedies").

(c) contain any provision on the "minimal notice" requirement to prompt an investigation.

In the case at bar, Fata submitted a second amended SF-95 to the legal assistant in the BOP's Southeast legal Office in Edgefield, South Carolina, and two written notifications to the BOP's Supervisory Attorney in the Department of Justice, Washington, DC, before he filed his suit in court. The district court erred by failing to grant Fata's request for discovery to review the attachments to his amended SF-95. Thus, it based its decision absent complete record; and the district court and Fourth Circuit deferred or overlooked Fata's written notifications to the BOP's Supervisory Attorney relevant to his medical claim. The district court has adopted

(a) 28 C.F.R. 14.2(a) where Federal regulators deem a claim "to have been presented when a federal agency receives from a claimant ... an executed SF-95 [or] other written notification of an accident", accompanied by a claim for money damages in a sum certain. The notice must be sufficient to cause the agency to investigate[.], and

(b) the BOP Program Statement P1320.06, 7(b) (explaining inmates should file an SF-95 form or, in the alternative, a document containing all the listed information. DE 35 at 5.

But the district court and the Fourth Circuit erred for not exercising their independent judgment in deciding whether the presentment requirement interpretation in 28 USCS 2675(a), though vague, is met in 28 C.F.R. 14.2(a) and BOP Program Statement 1320.06's [other notifications of an incident] as Fata raised this question in his petition for Rehearing an banc filed on May 10, 2024 - Case No. 23-7310. Loper Bright Enterprises v. Raimondo, Case No. 22-451, 2024 U.S. App. LEXIS 2882; 144 S.Ct. 325 (S.Ct. June 28, 2024)("Courts need not and under the APA, may not defer to an agency interpretation of the Law simply because a statute is ambiguous".). Thus, absent clear statutory directives in 28 USCS 2675(a), Fata's administrative filings must be construed liberally based on their merits instead of disposing of them on technicalities. Erickson v. Pardus, 551 U.S. 89, 94 (2007)(Noting that courts must construe pro se pleadings liberally).

FROM: 48860039
TO:
SUBJECT: FTCA-V-PETITION FOR CERTIORARI
DATE: 07/28/2024 08:59:50 PM

CASE No.

GROUND TWO

QUESTION: "WHETHER THE WAIVER OF SOVEREIGN IMMUNITY IN THE ALLEGED NEGLIGENT CONDUCT OF A MEDICAL DOCTOR'S PROFESSIONAL JUDGMENT, NON-GOVERNMENTAL IN NATURE, IS SUBJECT TO A DISCRETIONARY FUNCTION EXCEPTION, OF THE KIND IN THE FTCA".

Due to his failure to satisfy the presentment requirement to his medical claim, the district court determined that it lacked jurisdiction over Fata's medical claim and overruled his remaining objections relevant to his medical claim and did not address the merits of the claim.

A - THE APPELLATE PANEL'S OPINION CONFLICTS WITH SISTER CIRCUITS' DECISIONS :

The appellate panel's decision that the second step of Fata's medical claim for denying Fata "urgent" medical treatment of NEUPOGEN for his neutropenic recurrent infections, causing him further harm from recurrent chronic prostatitis, where only professional, non-governmental discretion is at issue conflicts with sister circuits' decisions as the discretionary function exception does not apply.

In the case at bar, Dr. Hoey, DO, Clinical Director, refused to submit NEUPOGEN approval to Region to make the medication available at FCI Williamsburg as recommended by the BOP's own hematologist (RE 32, 33). A doctor aware of the severity and frequency of Fata's recurrent infections absent NEUPOGEN therapy does not possess discretion to deny NEUPOGEN approval knowing that further harm will result without therapy, as Fata alleged an improper medical, rather than a policy decision. In fact, the BOP does not have any policy that limits the scope of use of NEUPOGEN in care level 2 facilities as Dr. Hoey claimed, nor does it restrict NEUPOGEN's indication prescribed for Fata by his treating hematologist in the BOP, as the BOP owes Fata a legal duty under South Carolina Law to provide him the standard necessary treatment for his neutropenia that is available in the community in private medical practice. Thus, Dr. Hoey's decisions cannot be shielded by the discretionary function exception. See Thacker v. TVA, 139 S.Ct. 1435 (2019)("If the conduct was non-governmental - the kind of thing any power company might do - the TVA would not be able to invoke sovereign immunity. Only if the conduct was governmental might the court decide that an implied limit on the clause barred the suit".).

At the heart of the question presented to this Court is that the appellate opinion in the case at bar conflicts with analysis adopted by the majority of Circuits based on similar facts and a large body of case law supports this proposition. Jones v. United States, 91 F.3d 623 (3d Cir. 1996)("the court held that the BOP would be liable for breaching its duty of care to prisoners under 4042(a)(2) when prison staff were negligent in depriving the plaintiff of his blood pressure medications, causing him to have a debilitating stroke). Bird v. United States, 949 F.2d 1079 (10th Cir. 1991); Lather v. Beadle County, 879 F. 2d 365, 368 (8th Cir. 1989)(Discretionary function exception did not apply to decisions of a government physician providing patient treatment); Collazo v. United States, 850 F.2d 1 (1st Cir. 1988)("treatment by a government doctor did not necessarily involve the exercise of "governmental discretion", that the decision to release the descendant and refuse to readmit him to the hospital had not been shown to have been made on anything but medical grounds, and that where professional nongovernmental discretion was at issue, the discretionary function exception did not apply). See also Fang v. United States, 140 F.3d 1238 (9th Cir. 1998)("the claims of the actual administration of medical care - negligence in stabilizing descendant's spine and administering CPR - were not shielded by the discretionary function exception); See Adrulonis v. United States, 924 F. 2d 210 (2nd Cir. 1991); Bunche v. United States, 2018 U.S. App. LEXIS 16748 (6th Cir. 2018)(Bunche was denied emergency treatment to his cellulitis that led to further infectious harm requiring intravenous antibiotics); Anestis v. United States, 749 F.3d 520 (6th Cir. 2014) (the government failed to show that the actions of the VA employees, regarding the former Marine's medical emergency situation, satisfied the two-part test of the discretionary function exception under 28 U.S.C.S. 2680(a)).

B - THE APPELLATE OPINION CONFLICTS WITH SUPREME COURT AND SOUTH CAROLINA LAW:

Under Block v. Neal, 460 U.S. 289, 294 n.3, 75 L.Ed. 2d 67, 103 S.Ct. 1089 (1983), the Supreme Court held that the Court of Appeals failed to find that state law (1) recognized the doctrine under which the government was liable for negligence, and (2) would apply that doctrine to "a private person responsible for similar negligence". Fata's complaint was appropriately pled to show the negligent acts of Dr. Hoey, who denied Fata the standard NEUPOGEN treatment though it was prescribed by the BOP's own hematologist (RE 1, paragraph 32, 34) as Fata's lab. results indicated the need for it, resulting in further harm from recurrent chronic prostatitis on November 14, 2022 (RE 24) and September 28, 2023 (RE 32, 33), though NEUPOGEN is widely available in the community in private medical practice. Thus, rendering the government, if a private person, liable for negligence under South Carolina Law, as it owes Fata a legal duty to his care.

The appellate panel's opinion overlooked the district court's order that overruled petitioner's objections to the R&R relevant to Fata's medical claim that held the government, if a private person, liable to claimant in accordance with South Carolina Law (RE 29; and RE 35, page 5,6).

In Dawkins v. Union Hosp. Dist., 480 S.C. 171, 758 S.E. 2d. 501, 504 (S.C. 2014), the South Carolina Supreme Court examined two types of claims and observed, of particular relevance, that the medical professional must at all times "exercise ordinary and reasonable care to insure that no unnecessary harm [befalls] the patient". Id. at 178. And, "[t]hus, medical providers are still subject to claims sounding in ordinary negligence as Fata alleged in his Complaint. Id.

Further, this case involves an exceptional and compelling question of public interest on "Infection Control in Federal Prisons" as Dr. Hoey's clinical decisions denied NEUPOGEN as necessary treatment to prevent neutropenic recurrent infections that no public health policy for universal infection control in the immunocompromised can advocate, because his decisions caused harm and were beyond reason. Of particular relevance, FCI Williamsburg has been treating inmates with other diseases such as Crohn's ileocolitis with injectables (Humira injections) that Dr. Hoey himself made available after he submitted approval to Region for such necessary treatment prescribed by the outside gastroenterologist. But Dr. Hoey chose, to the contrary, to deny Fata NEUPOGEN as "urgent" treatment for his neutropenia where the question becomes not "IF" but "WHEN" would the next opportunistic infection in prison recur absent NEUPOGEN therapy as Fata has developed Staph skin infections, yeast or fungal skin infections, gingivitis, recurrent blepharitis, Providencia UTI, Covid-19 bronchitis, and recurrent chronic prostatitis twice. See Florence v. Board of Chosen Freeholders of County of Burlington, 566 U.S. 318, 132 S.Ct. 1510, at 1518, 182 L.Ed. 2d 566 (2012)("[t]he danger of introducing contagious infections in prisons is well documented ... it requires an extensive process to rid those infections from the facility).

Finally, Fata's medical claim raises a question as to whether Dr. Hoey's decisions can not be grounded in "public health policy" that involves balancing the goal of protecting the public and the immunocompromised from harmful infections with the public's need for effective drugs to boost immunity, prevent infection recurrence, and save lives. And that is exactly the case here where NEUPOGEN is proven to treat Fata's neutropenia causative of his recurrent infections, and prevent infectious complications that frequently lead to hospitalizations with a reported mortality > 36%. Bick, Infection Control in Jails and Prisons, 45 Healthcare Epidemiology 1047, 1049 (2007). See Biden v. Missouri, 595 U.S. 87 (2022)("enforce an

infection prevention and control program ... to help prevent the development and transmission of communicable diseases and infection as public health policy.").

In order to resolve a Circuits' split in an area of law where similar facts to Fata's medical claim have led to opposite conclusions in sister circuits, this Court should consider hearing the case as a reasonable jurist would ask whether the Supreme Court should revisit the Berkovitz-Gaubert two-prong test dated more than 35 years ago for when the FTCA's discretionary function exception applies because the exact boundaries of the exception remain unclear despite an immense amount of precedent, and, as professional non-governmental discretion is not implied.

To give just a few examples, Courts have disagreed about whether the discretionary function exception covers the government's failure to maintain a road, to post warning signs on federal property, to manage tree hazards, and to determine whether a challenged act was careless rather than a considered exercise of discretion.

With Bivens sharply limited, the stakes of clarifying the scope of the discretionary function exception grow ever greater. Plaintiffs like Fata must increasingly rely on the FTCA to vindicate their claims. They, the Government, and the Courts would all benefit from clearer guidance with impact on the public interest as the current test also seems divorced from the exception's text. The test asks whether the challenged "action" involved the permissible exercise of policy judgment, see Berkovitz, 486 U.S. 531, at 536-37 (1988), but the text speaks of a discretionary "function or duty". 28 U.S.C. 2680(a).

Signed under penalty of perjury under 28 U.S.C. 1746.

Respectfully Submitted,

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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