No. 21-682

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

REPLY BRIEF FOR THE PETITIONER

Lindsey C Boney IV
Counsel of Record
Stanley E. Blackmon
Sarah Gunn
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
Phone: (205) 521-8914
lboney@bradley.com

Charles F. Spainhour
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, TN 37203-2771

Attorneys for Petitioner

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Tellingly, the government devotes nearly all of its opposition to arguing the merits of a *different question* than the one the Eleventh Circuit decided below. The government has little to say on the actual question presented, which has expressly divided the circuits: whether the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), categorically immunizes the government from tort liability irrespective of whether the federal officials' challenged conduct violated the Constitution. Instead, the government argues about *under what circumstances* allegations of unconstitutional conduct negate that defense—a question that was never presented or decided below and that is not raised here.

This sleight of hand is an effort to downplay—and distract from—the irreconcilable and deepening circuit conflict. The government ignores that the decision below expressly recognized that the courts of appeals are divided on the actual question presented. And in its efforts to reframe that question, the government shows why certiorari review is needed. The government *does not even defend* the panel majority's holding below; it does not dispute that the actual question is an important and recurring one; and it offers no valid reason to postpone resolution of it or why this case does not present the ideal vehicle for doing so.

The petition for a writ of certiorari should be granted.

1. The government contends that petitioner overstates and oversimplifies the nature of the circuit conflict. See Br. in Opp. 8–9. But the government's assertions mischaracterize petitioner's position and are otherwise flatly contradicted by the courts of appeals themselves.

a. Although the government portrays the conflict as "considerably narrower and less clear than petitioner suggests," Br. in Opp. 8, both opinions below explicitly "acknowledge[d] that there is a circuit split" on this very question, Pet.App.16a n.5; see also *id.* at 28a–29a (Wilson, J., dissenting). The panel majority noted that the D.C., First, Eighth, and Ninth 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 (and now the Eleventh) has staked out a "minority" position. *Id.* at 16a n.5. So the decision below plainly refutes the government's effort to downplay the deepening circuit split. See also, *e.g.*, *Loumiet* v. *United States*, 828 F.3d 935, 943–944 (D.C. Cir. 2016) ("At least seven 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," and at that point "only the Seventh Circuit ha[d] held otherwise.").

Indeed, the government ultimately concedes the circuit split, agreeing that "the First, Ninth, and D.C. Circuits" have "determined . . . that unconstitutional conduct can fall outside the discretionary function exception in some circumstances."[1] Br. in Opp. 9. So despite the government's assertion that the split has "little practical significance," *id.* at 4–5, the happenstance of a plaintiff's geography is currently outcome determinative. Petitioner's claim could proceed in the First, Eighth, Ninth, and D.C. Circuits but would be rejected out-of-hand in the Seventh and Eleventh Circuits. Because this case would have come out

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[1] Although the opinion below recognized that its holding conflicted with the Eighth Circuit's view, Pet.App.16a n.5, the government tries to distinguish the Eighth Circuit decision, as discussed *infra* at 4–5.

differently had it been in a different circuit, there is a valid circuit conflict that warrants the Court's review. See Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a) (11th ed. 2019).

b. The government sets up a strawman in purporting to clarify petitioner's supposed misstatement that "eight courts of appeals . . . have *held* that the discretionary function exception does not apply to unconstitutional conduct," noting that several circuits only addressed the question in dicta. Br. in Opp. 9 (emphasis added). No clarification is necessary: petitioner expressly—and repeatedly—acknowledged that "[s]ix courts of appeals have now answered the precise question presented" (*i.e.*, four in one direction, two in the other), and "[a]nother four circuits have agreed [with the panel dissent] in dicta." Pet. 4; see also *id.* at i (noting that four circuits "have squarely held" one way, with two circuits "going the other way"), 11, 14–15.

c. In an attempt to paper over the clear split, the government has tried to change the relevant question, arguing that "[t]he First, [Eighth,] Ninth, and D.C. Circuits" left open for another day "whether conduct falls outside the exception even when the unconstitutionality of the conduct was not already clearly established." Br. in Opp. 9; see also *id.* at 10 (arguing that *Raz* v. *United States*, 343 F.3d 945 (8th Cir. 2003) "did not address whether the asserted constitutional limitations were clearly established"). But *none* of the six circuit decisions addressed that question—not even the Eleventh Circuit below undertook a "clearly established" analysis because it held (like the Seventh Circuit) that *any* alleged

unconstitutionality of the underlying federal officials' conduct *simply does not matter*. On the actual question presented, there can be no dispute—indeed, the courts of appeals expressly recognize—that there is a clear conflict between those two circuits and the four circuits that have held that the discretionary function exception does not give the government blanket immunity when federal employees' conduct violates the Constitution.

2. Faced with an indisputable circuit split, the government does not defend the holding below and instead pivots to arguing the merits of a question that is not presented here and was neither discussed nor raised below.

a. To start, not even the government agrees with the panel majority's resolution of the actual question presented. The majority rejected *any* "'constitutional-claims exclusion' from the discretionary function exception in § 2680(a)." Pet.App.9a. It instead agreed with the Seventh Circuit that even "a plaintiff's plausible allegation of unconstitutional conduct [does not] deprive[] the United States of its sovereign immunity" under the discretionary function exception. *Id.* at 15a. But the government acknowledges that the Constitution can sometimes "negate the applicability of the discretionary function exception" when there is "a clear and specific directive." Br. in Opp. 6–7.

So rather than embrace the court of appeals' resolution of the question presented, the government's brief refutes it.

b. The government instead pushes to limit the "majority" position adopted by four courts of appeals and Judge Wilson in dissent below. Pet.App.24a (Wilson, J., dissenting). Rather than advocate for "blanket immunity" under the discretionary function exception like the panel majority held below, *id.* at 10a ("Congress left no room for [an] extra-textual 'constitutional-claims exclusion' . . . ."), the government contends that FTCA plaintiffs' allegations of unconstitutional conduct should be assessed by "analogy to the common-law doctrine of official immunity," with its "clearly established" standard, Br. in Opp. 5–7.

The government's proposed framework does not address the merits of the question presented—*whether* a federal official's unconstitutional conduct can *ever* negate application of the discretionary function exception. The circuits are clearly and intractably divided on that question of law. Instead, the government addresses a different question—*how* a court should resolve such a claim. That is a question that the court of appeals did not answer below because it wrongly held that the constitutionality of a federal official's conduct was irrelevant to the FTCA. Cf. *Loumiet*, 828 F.3d at 946 ("[T]he district court on remand might allow [the] FTCA claims to proceed under a narrow standard such as the government suggests. . . . To resolve this appeal, we need go no further than to hold that the district court erred as a matter of law in barring Loumiet's FTCA claims on the ground that, as a general matter, 'even constitutionally defective' exercises of discretion fall within the Act's discretionary-function exception." (quotation and

footnote omitted)). Indeed, the government did not press this qualified-immunity framework below, the court of appeals did not confront it, and no court of appeals has adopted it.[2]

The government's attempt to change the question presented shows that this Court's review is urgently needed.

c. Without following the government too far into the merits of its off-point question, even if the government were correct in importing qualified immunity, it seeks to misapply that law here.

This Court long ago established that prison officials violate the Eighth Amendment by acting with deliberate indifference—*i.e.*, "if [they] know[]

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[2] *Bryan* v. *United States*, 913 F.3d 356 (3d Cir. 2019), cannot bear the weight the government places on it. To be sure, the court there dismissed the FTCA claim because the federal officials had "not violate[d] clearly established constitutional rights." *Id.* at 364. But the plaintiff there had expressly adopted that standard, so the court had no occasion to decide whether it was proper. *Ibid.* And "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster* v. *Fall*, 266 U.S. 507, 511 (1925)).

If anything can be gleaned from *Bryan*, it is that, in the Third Circuit, at least some constitutional violations could negate the discretionary function exception. That outcome conflicts with the contrary blanket rule that is the subject of the question presented.

that inmates face a substantial risk of serious harm and disregard[] that risk by failing to take reasonable measures to abate it." *Farmer* v. *Brennan*, 511 U.S. 825, 847 (1994). And the Eleventh Circuit has repeatedly held that a "total failure to investigate—or take any other action to mitigate—the substantial risk of serious harm that [a violent inmate] pose[s] to [another inmate] constitute[s] unconstitutional deliberate indifference." *Bowen* v. *Warden, Baldwin State Prison*, 826 F.3d 1312, 1325 (11th Cir. 2016) (quoting *Caldwell* v. *Warden, FCI Talladega*, 748 F.3d 1090, 1103 (11th Cir. 2014) (denying qualified immunity)). The government ignores these precedents and summarily argues only that petitioner's *pro se* complaint did "not suffice to show a violation of the Constitution."[3] Br. in Opp. 11. The government is wrong.

d. Finally, the government conflates the question presented with an attempt to merge FTCA claims with *Bivens*. See Br. in Opp. 6 (arguing that the FTCA was not enacted "to address constitutional violations"). The relevance of the constitutionality of the officials' conduct is in negating that they were performing a discretionary function. See Pet. 20–21.

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[3] The government also misstates the facts of the attack on petitioner. The government alleges that Dodson stabbed petitioner "[e]ight months" after being assigned to his cell. See Br. in Opp. 1. Petitioner alleged that he was attacked on September 3, 2015, less than one month after officials assigned Dodson to share his cell, see Pet.App.35a–36a, an allegation that must be credited on a motion to dismiss.

Just as an allegation that a government official is not entitled to the exception because he violated a statute does not transform a state tort claim into a statutory one, neither does an allegation that an official violated the Constitution transform a state tort claim into a constitutional one. "[S]tate tort law still governs any liability determination . . . and the only available remedies are those provided by the FTCA." Pet.App.31a (Wilson, J., dissenting).

3. The government has no answer to counter that this case is an ideal vehicle for resolving the question presented and does not meaningfully dispute that this is an important, recurring question arising frequently in the lower courts.

a. The government cites no procedural or prudential obstacles that would frustrate the Court's review, and it does not argue that review is premature.

Here again, the government simply reverts to the (wrong) merits, that this case would be a "poor vehicle" because petitioner's *pro se* complaint did "not plausibly allege[]" an Eighth Amendment violation. Br. in Opp. 11. But, again, how petitioner's allegations are assessed is irrelevant, both to certiorari and to the merits themselves. And it is an issue that the court of appeals did not decide—the government cannot insulate the Eleventh Circuit's outcome-determinative decision from review by claiming that it should still prevail for a different reason that no court has decided. This Court, after all, is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7

(2005). Instead, if this Court were to hold that the FTCA's discretionary function exception does not categorically bar tort claims when a federal employee violates the Constitution, it would remand for the lower courts to consider petitioner's complaint under the proper legal standard. Cf. Pet.App.33a (Wilson, J., dissenting) ("I would vacate the district court's dismissal . . . 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."). Far from creating a vehicle problem, that is this Court's routine practice. See, *e.g.*, *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 922 (2017) (remanding for the lower court to decide an issue that it "never confronted" based on its "wrong[]" application of a legal standard).[4]

b. The government contends that review is unwarranted because this Court has denied petitions "raising similar issues." Br. in Opp. 5 (citing *Linder* v. *United States*, 141 S. Ct. 159 (2020) (No. 19-1082); *Campos* v. *United States*, 139 S. Ct. 1317 (2019) (No. 18-234); *Castro* v. *United States*, 562 U.S. 1168

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[4] The government also alludes to its earlier argument that Shivers's *pro se* district court briefing did not adequately raise this issue. But as the government concedes, Br. in Opp. 3, the Eleventh Circuit rejected that forfeiture argument. All agree that the question whether the discretionary function exception categorically immunizes the United States from state-law tort liability when its employees violate the Constitution was pressed and passed upon below.

(2011) (No. 10-309); *Welch* v. *United States*, 546 U.S. 1214 (2006) (No. 05-529)). The government is wrong.

To start, only *Linder* even involved the question presented here. But since this Court denied review in *Linder*, the circuit conflict has only become more entrenched. That conflict cannot be resolved absent this Court's intervention, and this case is a far superior vehicle to resolve it than was *Linder*. See Pet. 24–26.

The government's reliance on *Campos*, *Welch*, and *Castro* is misplaced. *Campos* and *Welch* both involved the interplay between the FTCA's law enforcement proviso, 28 U.S.C. 2680(h), and the discretionary function exception. See Pet. for Writ of Cert., *Campos* v. *United States*, 2018 WL 4063282, at *i (2018) (No. 18-234); Pet. for Writ of Cert., *Welch* v. *United States*, 2005 WL 2777348, at *i (2005) (No. 05-529). And in *Castro*, the government took *the opposite position* from its current argument. There, the petitioner framed one of the questions as whether "the discretionary function exception . . . appl[ies] to acts by federal employees that exceed the scope of their statutory or constitutional authority," Pet. for Writ of Cert., *Castro* v. *United States*, 2010 WL 3442087, at *i (2010) (No. 10-309), but the government argued that the decision below "addresse[d] neither of the questions presented in the petition . . . and neither was properly preserved below," Br. in Opp., *Castro* v. *United States*, 2010 WL 4959714, at *9–10 (2010) (No. 10-309); see generally *Castro* v. *United States*, 608 F.3d 266 (5th Cir. 2010).

c. The question presented is important. No one disputes that it would affect numerous constitutional rights, and the government cannot distinguish the materially identical provisions in other statutory schemes simply by pointing to the statutes' irrelevant idiosyncrasies.

The government says that review would not inform application of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, "because the United States Constitution does not bind foreign sovereigns." Br. in Opp. 10. But the D.C. Circuit, in view of that fact, recently analogized the two statutes because its holding in "*Loumiet* supports the proposition that the discretionary function exception does not apply if an employee acts without a delegation of initial authority." *Usoyan* v. *Republic of Turkey*, 6 F.4th 31, 45 (2021). Likewise, courts routinely liken the FTCA's discretionary function exception to similar provisions in the Stafford Act and other statutes. See Pet. 28–30. And the government offers no response on the Public Vessels Act and Suits in Admiralty Act. *Id.* at 29–30.

d. Finally, the question presented is likely to recur—indeed, it continues to arise in the lower courts. For example, in *Bulger* v. *Hurwitz*, the plaintiff brought FTCA claims against the United States (and constitutional claims against individual defendants) on behalf of his uncle's estate, after his uncle was murdered in prison. No. 3:20-CV-206, 2022 WL 340594, at *1–2, *9 (N.D. W. Va. Jan. 12, 2022). Although the district court did not reach the question presented here, in the underlying briefing, the plaintiff contended that the discretionary

function exception should not bar his FTCA claim because the conduct at issue violated the Eighth Amendment. Pl.'s Resp. at 14–15, *Bulger* v. *Hurwitz*, No. 3:20-cv-206 (N.D. W. Va. Nov. 22, 2021), ECF No. 57. And notably, the government responded by citing the decision below in this case. Def.'s Reply at 6 n.3, *Bulger* v. *Hurwitz*, No. 3:20-cv-206 (N.D. W. Va. Dec. 6, 2021), ECF No. 59.

* * *

In sum, this case presents an acknowledged circuit split on a question of exceptional legal and practical importance. The Court should grant review to resolve the conflict and correct a chronic misapplication of the FTCA's discretionary function exception. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lindsey C Boney IV
Counsel of Record
Stanley E. Blackmon
Sarah Gunn
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
Phone: (205) 521-8914
lboney@bradley.com

Charles F. Spainhour
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, TN 37203-2771

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