No. 24-495

IN THE

Supreme Court of the United States

LEBENE KONAN,

Cross-Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,

Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR CROSS-PETITIONER

Easha Anand
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert Clary
Counsel of Record
ROBERT CLARY, PLLC
405 Windward Drive
Murphy, TX 75094
(972) 757-5690
rclary662@gmail.com

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The Government doesn't contest that splits over each of the questions presented have persisted for decades. BIO 15-17. And it has no response to Ms. Konan's arguments from text, history, and precedent against the Fifth Circuit's decision below. *See id.* 12-16. Indeed, the Government does not attempt to defend the Fifth Circuit's reasoning at all.

Split and merits unchallenged, the Government's brief in opposition instead urges percolation based on *Ziglar v. Abbasi*, 582 U.S. 120 (2017), and proffers inapposite vehicle arguments. But percolation isn't warranted: *Abbasi* didn't make any holding on the questions presented, as the Government itself concedes. *See* BIO 13-16. And this case is a perfectly suitable vehicle for answering the questions presented: Nothing in the Fifth Circuit's opinion suggests Ms. Konan will lose on remand, and the Government's arguments to the contrary make a hash of the case's procedural history.

As set forth in the cross-petition, Ms. Konan was the victim of a years-long campaign of degrading racial discrimination by two federal postal employees, a campaign that cost her rental income and damaged her hard-earned reputation. If this Court chooses to grant the Government's petition to reconsider Ms. Konan's remedy under the Federal Tort Claims Act, it should grant this cross-petition as well to give Ms. Konan the opportunity to argue for a remedy under 42 U.S.C. § 1985(3).

I. The Government concedes both splits.

The Government does not dispute two longstanding and acknowledged splits: a 7-1 split on whether Section 1985(3) reaches persons acting under color of federal law, and a 6-2-2 split on whether the intracorporate conspiracy doctrine applies to claims brought under Section 1985(3). Cross Pet. 12, 16. That should be the end of the story. The two bases on which the Fifth Circuit dismissed Ms. Konan's claim wouldn't foreclose her claim in other circuits.

The Government raises two arguments to minimize the import of the split. Neither is availing.

1. First, the Government suggests that neither split requires resolution because some circuits might change position in response to *Ziglar v. Abbasi*, 582 U.S. 120 (2017). BIO 15-16. But nothing this Court said in *Abbasi* has any bearing on the questions presented. *Abbasi* was a case about clearly established law for qualified immunity purposes. As the Government concedes, "*Abbasi* does not hold that Section 1985(3) 'categorically exempts federal actors from liability.'" BIO 14 (quoting Cross Pet. 15). And *Abbasi* clearly stated that "[n]othing in [its] opinion should be interpreted as either approving or disapproving" the intracorporate conspiracy doctrine's application to Section 1985(3) cases. 582 U.S. at 153, 155.

It's hardly surprising, then, that the Government doesn't point to a single case in the eight years since *Abbasi* suggesting all the circuits on the other side of the split will suddenly join the Fifth. Indeed, the one post-*Abbasi* case the Government points to is a case where the Third Circuit changed course to *break* ranks

with the Fifth Circuit and impose liability on federal actors. *See* BIO 16 (discussing *Davis v. Samuels*, 962 F.3d 105 (3rd Cir. 2020)).[1] And post-*Abbasi*, the Tenth Circuit has reaffirmed that the intracorporate conspiracy doctrine does not apply to Section 1985(3) cases. *See, e.g.*, *Gamel-Medler v. Almaguer*, 835 Fed. Appx. 354, 355 & n.1, 361 (10th Cir. 2020); *Cochran v. City of Wichita*, 771 Fed. Appx. 466, 468-69 (10th Cir. 2019).

Besides, *Abbasi* was about a "high-level executive policy" created by the FBI Director and the Attorney General "in the wake of a major terrorist attack," and its analysis focused on the special considerations of that setting. 582 U.S. at 140, 155. It's difficult to imagine *Abbasi* would motivate the circuits to change course and exempt *every* set of federal employees from liability under Section 1985(3). That would mean no liability where two National Park rangers refuse to issue a camping permit to a woman visitor, no liability where two Social Security clerks refuse to file a benefits application for a Muslim retiree, and no

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[1] The Government is wrong to claim that *Davis* does not split with the Fifth Circuit because some of the conspirators in *Davis* were not federal employees (BIO 16). *Davis* explicitly declined to decide whether some defendants were "rightly [] regarded as private actors," rather than federal employees, because the distinction did not matter: The Third Circuit held that Section 1985(3) doesn't operate any differently when it comes to federal employees. 962 F.3d at 114. And even if *Davis* were about a conspiracy involving some non-federal actors, it would still conflict with the Fifth Circuit's categorical rule, which reaches conspiracies involving *any* federal employee, not just conspiracies involving *only* federal employees. *See, e.g.*, *Johnson v. Dettmering*, 2021 WL 3234623, at *1, *4 (M.D. La. July 29, 2021) (conspiracy between an FBI agent and two state officials).

liability where two postal workers in a Dallas suburb refuse to deliver mail to a Black landlord—all because the Supreme Court suggested that national security discussions between Cabinet officials *might* deserve extra protection. And it's even harder to imagine that lower courts would coalesce around a rule extending *Abbasi* to a context like this case, where two low-level employees *disobeyed* a directive from a high-level official and violated several criminal statutes. Pet. App. 50a (collecting statutes); *see United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994).

2. The Government's second move is to suggest a new rule that exactly zero circuits have adopted: Section 1985(3) cannot apply to federal actors within the same "Executive Branch entity." BIO 16. It then claims its invented rule is consistent with the cases on both sides of each split. The Government's argument is both wrong and irrelevant.

Wrong: The cases are not, in fact, consistent with the Government's proposed rule. Plenty of cases allow Section 1985(3) liability against federal actors within the same Executive Branch entity. *See, e.g.*, *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (US Marshals); *Hobson v. Wilson*, 737 F.2d 1, 19 (D.C. Cir. 1984) (FBI agents). And plenty more allow Section 1985(3) liability against actors within the same state or local government entity. *See* Cross Pet. 17-21 (collecting cases).[2]

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[2] The Government claims that its rule may not necessarily extend to employees of the same state or local government entity. BIO 15 n.5. But the Government's rule is based on the notion that a Section 1985(3) claim cannot not lie where it "implicates the

Irrelevant: The Fifth Circuit didn't dismiss Ms. Konan's 1985(3) claim on the ground that both of the defendants were employed by the "same Executive Branch entity." *Contra* BIO 16. Indeed, it attached no significance to the fact that both individuals were USPS employees. Rather, it dismissed Ms. Konan's claim because it does not allow Section 1985(3) claims against federal employees at all and because of the intracorporate conspiracy doctrine. Pet. App. 11a-13a. Those are the questions that were aired below.

II. This case is a suitable vehicle to address the questions presented.

The Government does not deny that the questions presented in the cross-petition were pressed and passed upon below. Instead, it opposes certiorari with three versions of a harmless error argument. This Court routinely grants certiorari in the face of such arguments by the Government. *See, e.g.*, BIO at 15-17, *Dubin v. United States*, 143 S. Ct. 1557 (2023) (No. 22-10); BIO 12-13, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699). In any event, all three arguments lack merit.

1. The Government first suggests that Ms. Konan's Section 1985(3) claim might be dismissed on remand because her Section 1981 claim was already dismissed. BIO 9. Recall that the Fifth Circuit rejected

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substance of…official discussions." BIO 14 (citation omitted). That "official discussion" rationale applies with equal force to state and local governments, so it's hard to see how cases imposing liability on state or local officials are consistent with the Government's rule. *See Harlow v. Fitzgerald*, 458 U.S. 800, 817 (1982) (suits against state officials are "peculiarly disruptive of effective government").

Ms. Konan's Section 1981 claim in part because she did not adequately allege that defendants "continued to deliver mail to similarly situated white property owners." Pet. App. 30a-32a. Per the Government, that ground would bar Ms. Konan's Section 1985(3) claim as well. BIO 9.

Not so. As a threshold matter, it's not at all clear that a Section 1985(3) claim requires a similarly situated comparator to prove racial animus. Section 1981 protects certain rights to the "same" extent "as is enjoyed by white citizens"—language that arguably requires plaintiffs to identify such a comparator. But Section 1985(3) contains no such language, meaning that racial animus may be proven for a Section 1985(3) claim without pointing to a comparator.

The cases the Government cites to the contrary are inapposite. One concerns solely a Section 1981 claim. BIO 9 (citing *Abdallah v. Mesa Air Grp., Inc.*, 83 F.4th 1006 (5th Cir. 2023)). And the other two involve selective-prosecution claims, which require a similarly situated comparator because they "ask[] a court to exercise judicial power over a 'special province' of the Executive," namely prosecutorial discretion. *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (citation omitted) (discussed at BIO 8-9); *accord Jackson v. City of Hearne*, 959 F.3d 194, 201-02 (5th Cir. 2020) (same). That reasoning doesn't extend to other equal-protection claims. Unsurprisingly, then, district courts in the Fifth Circuit have held that evidence other than a similarly situated comparator may suffice for a Section 1985(3) claim. *See, e.g.*, *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1006-07 (S.D. Tex. 1981).

But let's assume, for the sake of argument, that Ms. Konan's Section 1985(3) claim *could* be dismissed for failure to adequately plead a similarly situated comparator. Reversal by this Court on the Section 1985(3) questions presented would still be outcome dispositive. The Fifth Circuit dismissed Ms. Konan's Section 1985(3) claims without leave to amend, because the federal-actor and intracorporate-conspiracy holdings would make amendment futile. But dismissal solely on the similarly situated comparator issue would surely be with leave to amend. *See* Cross Pet. 27.

The Government argues otherwise, noting that the Fifth Circuit did not grant Ms. Konan leave to amend her Section 1981 claim to allege a similarly situated comparator in more detail. But that's misleading. In addition to the comparator issue, the Fifth Circuit identified two defects with Ms. Konan's Section 1981 claim that no amount of amendment could cure: that Section 1981 explicitly excludes federal actors and that mail delivery is not one of the enumerated rights under Section 1981. Pet. App. 10a-11a. Accordingly, leave to amend would have been futile. The Fifth Circuit nowhere suggested that amendment would not be appropriate to more fully allege a similarly situated comparator. And the district court expressly stated that it would have granted leave to amend but for the fact that Ms. Konan's claims lay against federal employees and so could not be cured. Pet. App. 34a.[3]

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[3] The Government stretches the truth when it claims Ms. Konan has already had two chances to allege a similarly situated

2. Nor is the Government's second variation on harmless error a reason to deny review. The Government asserts that the pleadings contain "only conclusory allegations" of discriminatory motive. BIO 10-11. But this assertion ignores the deluge of concrete facts Ms. Konan has provided in her complaint. To name a handful: (i) defendants changed the designated owner of one of Ms. Konan's properties to one of her white tenants; (ii) defendants placed a lock on Ms. Konan's mailbox without her permission; (iii) defendants ignored a directive from USPS's Inspector General directing them to deliver the mail to Ms. Konan's home; and (iv) defendants stopped delivering mail to another home owned by Ms. Konan when they learned she owned that second residence. *See* Pet. App. 42a-43a. As the Fifth Circuit has recognized, "discriminatory motive may be—and commonly is—demonstrated by circumstantial evidence." *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386 (5th Cir. 2017). Ms. Konan has plausibly alleged that discriminatory motive here.

3. Finally, this Court should not deny review because the Government raises the specter of qualified immunity. BIO 11-12. Qualified immunity doesn't

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comparator. BIO 10. True, Ms. Konan filed two complaints. But the amended complaint differed from the original only in that it added the United States as a defendant to the Federal Tort Claims Act claim. And the amended complaint was filed before the Government even submitted a motion to dismiss. *See* Am. Comp., ECF No. 7 (filed Jan 24, 2022); Mot. to Dismiss, ECF No. 15 (filed March 29, 2022). Ms. Konan was not "put on notice" of the comparator issue—the critical question in granting leave to amend, *see Jack v. Evonik Corp.*, 79 F.4th 547, 565 (5th Cir. 2023)—until the Fifth Circuit's decision, more than two years after that amended complaint was filed. Pet. App. 1a.

protect those who engage in blatant racial harassment. *See Hampton Co. Nat. Sur. LLC v. Tunica Cnty., Miss.*, 543 F.3d 221, 229 (5th Cir. 2008). In any event, this Court routinely grants petitions for certiorari over objections that qualified immunity might ultimately apply on remand. *See, e.g.*, BIO at 20-23, *Barnes v. Felix*, No. 23-1239 (Aug. 14, 2024); BIO at 24, *Chiaverini v. City of Napoleon*, 144 S. Ct. 1745 (2024) (No. 23-50); BIO at 13-14, 16-18, *Thompson v. Clark*, 142 S. Ct. 1332 (2022) (No. 20-659). The Government advances no reason to approach this petition differently.

III. The Fifth Circuit's interpretation of Section 1985(3) is wrong, and policy considerations can't save it.

1. On both questions presented, the Government entirely fails to engage with the cross-petition's arguments from text, history, and precedent.

Start with federal employee liability. The Government concedes not only that Section 1985(3) applies to "two or more persons" but also that "federal officials are of course 'persons.'" BIO 12. The Government nowhere explains why courts should nonetheless read an implied carveout for federal actors into Section 1985(3), particularly since Congress expressly provided one in neighboring Section 1981. *See* Cross. Pet. 13-14. And the Government does not address this Court's contemporaneous constructions of identical language in companion statutes, which confirm Congress's intent to extend Section 1985(3)'s reach beyond state actors. Cross Pet. 13.

The Government's silence extends to the intracorporate conspiracy doctrine. The Government does not justify grafting an atextual Cold War-era antitrust doctrine onto a Reconstruction-era civil rights statute. Cross Pet. 21, 23-24. The Government even acknowledges that the doctrine it seeks to apply "turns on specific antitrust objectives . . . and this Court has not applied it outside of that context." BIO 14 (internal quotation marks and citation omitted). And the Government has no response to the fact that such a judicial rewriting of Section 1985(3) may well bar suit against members of the Ku Klux Klan—an implausible interpretation of the statute known as the Ku Klux Klan Act. Cross Pet. 22.

2. With plain text, history, and precedent against it, the Government turns to policy. Its sole contention is that Congress could not have meant what it said in Section 1985(3) because allowing suits against federal employees "would stifle internal Executive Branch communications." BIO 13, 15. But of course, it is "the role of this Court to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (quotations and alteration omitted).

Besides, if the Government is worried that allowing Section 1985(3) suits against federal employees will lay bare federal secrets, courts can use existing evidentiary rules to protect the Executive Branch. The deliberative process privilege, for example, "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8-9 (2001); *see Startzell*

v. City of Philadelphia, 2006 WL 2945226, at *1, *4 (E.D. Pa. Oct. 13, 2006) (applying deliberative process privilege in Section 1985(3) case).[4] And protective orders can ensure that any confidences turned up during litigation are not disclosed.

Courts may also rely on existing immunities to protect certain categories of government officials from suit. Qualified immunity protects officers from the "disruptive discovery" the Government fears. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (citation omitted). And absolute immunity protects government functions that must be carried out without any fear of suit. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951) (absolute immunity for state legislative committee members under Section 1985(3)); *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) (tribal councilmembers); *Rabkin v. Dean*, 856 F. Supp. 543, 548 (N.D. Cal. 1994) (city councilmembers).

It is those narrower tools that courts must rely on to protect the Executive Branch—not an atextual carveout for *all* federal employees or *all* codefendants who work for the same employer.

CONCLUSION

For the foregoing reasons, if this Court grants the Government's petition for a writ of certiorari, this conditional cross-petition should be granted as well.

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[4] To be clear, Ms. Konan disputes that the deliberative process privilege would apply in her case. Any "official discussions" had ended: Defendants in this case were acting contrary to instructions received from USPS's inspector general. Cross Pet. 4.

Respectfully submitted,

Easha Anand
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert Clary
Counsel of Record
ROBERT CLARY, PLLC
405 Windward Drive
Murphy, TX 75094
(972) 757-5690
rclary662@gmail.com

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