No. 11-1367

IN THE

Supreme Court of the United States

TOMAS RIVAS LOPEZ AND MARIA ISABEL PARADA DE RIVAS, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF JULIO ADALBERTO RIVAS-PARADA, ALSO KNOWN AS JUAN CARLOS MONTANO-PARADA,

Petitioners,

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Government's Brief in Opposition rests on a fundamental misreading of the court of appeals' decision in this case. Indeed, if the Government's reading of the decision were correct, then this Court should summarily reverse the judgment of the Fifth Circuit.

1. As petitioners have already set out, the court of appeals recognized that United States Marshal Service (USMS) policies – "labeled 'Directives' – *required* 'an initial on-site inspection of detention facilities to determine the facility's level of compliance with USMS inspection guidelines'" before the USMS entered into an intergovernmental service agreement to send prisoners in its custody to local detention facilities. Pet. App. 7a (quoting U.S. MARSHALS SERV., POLICY DIRECTIVE § 9.26(A)(3)(a)(5)) (emphasis added). The court of appeals also acknowledged the "necessity" that the initial inspection be conducted by USMS personnel even in situations where subsequent annual inspections could be delegated to local regulators. Pet. App. 8a; *see also* Pet. 4-5.

Despite these policies, the USMS failed to conduct any initial inspection of the Crystal City Correctional Center (CCCC) before entering into an intergovernmental service agreement with Crystal City, Texas. Had the USMS conducted the required inspection, it would have discovered gaping deficiencies in the facility's medical policies, personnel, and resources (*see* Pet. 6), and would either have required their correction or refused to send federal detainees there, Pet. 26-27. Either way,

petitioners' son would not have been subjected to the grossly inadequate medical care that killed him.

In the face of the "seemingly mandatory language" of the USMS policies, Pet. App. 13a, the court of appeals nonetheless held that the USMS's failure to perform an initial inspection was shielded by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The basis for that holding was the panel's view that the USMS policy failed to establish a nondiscretionary duty because it did not "prescribe 'specific direction'" with respect to "a variety of topics" connected to "*how*" the initial "inspection obligation" should be fulfilled. Pet. App. 13a-14a (emphasis added) (citing *Guile v. United States*, 422 F.3d 221 (5th Cir. 2005)).

The Government does not defend that holding, which conflicts with the position taken by five other circuits. In contrast to the Fifth Circuit, those courts have held that the potential for government officials to exercise discretion in the actual performance of a mandatory duty to inspect or investigate does not shield the Government from liability for a failure to perform the inspection or investigation at all. *See* Pet. 13-20. The Fifth Circuit's distinctively expansive and unsupportable reading of the discretionary function exception is especially pernicious when it interacts with the Government's decision to outsource its responsibilities, because inspection requirements often form the last line of defense in protecting individuals' constitutional

rights. This Court's intervention is therefore warranted. *See* Pet. 20-24, 27-31.[1]

2. The Government instead argues that the court of appeals' decision rests on a completely different legal theory. According to the Government, the court of appeals held that "USMS had no mandatory duty to inspect the CCCC" because the facility had previously housed federal prisoners pursuant to another agency's agreement. BIO 7; *see also id.* at 8 (claiming that the court of appeals held that the USMS's decision about "whether to conduct inspections of the CCCC in 2003" was itself a discretionary decision).

The Government's reading is wrong both as a description of what the court of appeals held and as an application of the Federal Tort Claims Act.

a. The court of appeals did not rest its decision on the presence of federal detainees at CCCC prior to the 2003 USMS intergovernmental service agreement. Its discussion of the discretionary

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[1] Far from making this case "factbound," *see* BIO 12, the range of "different agency policies" to which the rule has been applied, *id.,* actually strengthens the case for review, by showing that the question presented by this petition determines the outcome of Federal Tort Claims Act litigation across a variety of domains. The importance of the issue and the outlier position of the Fifth Circuit is highlighted by courts having held in so many different circumstances that the presence of "discretion in the conduct of an investigation" does not trigger the discretionary function exception with respect to "the question of whether . . . to investigate *at all*." *Vickers v. United States*, 228 F.3d 944, 953 (9th Cir. 2000) (emphasis in the original).

function exception referred to the "backdrop of the facility's historical use in housing federal detainees" only once, and then only in passing. Pet. App. 14a. In any event, it described that factor as relevant to the "decisions how to conduct an inspection and whether to rely on annual state inspections." *Id.* Contrary to the Government's insinuation, the court of appeals never said that that "backdrop" gave the USMS a choice *whether* to conduct an *initial* inspection.

b. If the court of appeals had adopted the position the Government tries to ascribe to it, the court would have been dead wrong. The plain language of the USMS policies undercuts the Government's position that the USMS had any discretion in deciding whether to conduct an initial inspection before entering into an intergovernmental service agreement. The policy provides that before the USMS enters into such an agreement, "Each USM" (and not some other government agent) "will" (not "may") conduct an initial inspection. It goes on to specify that a prescribed inspection form (issued by the USMS and not by some other Government agency) "will be completed to document the inspection." R. 2752, 2753.[2]

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[2] References to the Record on Appeal are cited "R. [page number]." In full, the relevant section of the "IGA Award Procedures" set out in the Directive on "Detention Facility Contracting Policy and Procedures" provides that "Each USM will do the following":

> Conduct an initial on-site inspection of detention facilities to determine the facility's level of compliance

This mandatory language in the USMS policy is crystal clear. When governments declare "that certain procedures 'shall,' 'will,' or 'must' be employed," they use "language of an unmistakably mandatory character." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983); *see also Campbell v. Pan American World Airways, Inc.*, 668 F. Supp. 139, 142 (E.D.N.Y. 1987) ("*Will*, like *shall*, is a mandatory word"). To say that "[m]andatory words impose a duty" is "so obvious as to be hardly worth the saying." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112 (2012).[3] Earlier this summer, the Third Circuit relied on this precise point to reinstate the FTCA negligence claim of an inmate injured when his cellmate attacked him with a razor that a correctional officer had failed to collect after shaving time had ended. The institution's Handbook provided that "[a]ll razors will be accounted for and disposed of at the end of the shower." *Gray v. United States*, 2012 WL 2384251 at *3 (3d Cir. June 26, 2012) (per curiam). Italicizing the word "will" in its opinion, the court of appeals held that "the language in the Handbook" laid out "a mandatory policy requiring that razors be accounted

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> with USMS inspection guidelines. A Form USM-218, *U.S. Marshals Service IGA Facility Inspection Report*, will be completed to document the inspection.

R. 2752-53.

[3] Indeed, in light of the Directive, the Director of the USMS recognized that it would "still be necessary to inspect a facility upon the initial award of a new IGA," R. 2683, even under circumstances where subsequent annual inspections could be delegated to other actors.

for and disposed of at the end of a shower." *Id.* "Because a 'policy specifically prescribes a course of action for [prison staff] to follow,' the task of collecting razors does not involve an element of judgment or choice and the discretionary function exception is inapplicable." *Id.* (interpolations in the original; quoting *S.R.P. v. United States*, 676 F.3d 329, 333 (3d Cir. 2012)). The fact that the policy did not lay out precisely how the staff was to account for or dispose of the razors in no way diminished the mandatory nature of the duty. So too with respect to the mandatory duty in this case. Even if USMS personnel enjoy some discretion in performing an initial inspection, that discretion is not unbounded.[4] And discretion in performing the inspection does not undercut the fact that the initial USMS inspection is required.

c. Furthermore, the USMS Directive on Intergovernmental Agreement Programs, R. 2752-61, contains no suggestion that prior intergovernmental service agreements with other agencies relieve the USMS of its obligation to inspect a facility itself before entering into its own agreement.[5] The USMS is of course aware that other federal agencies may

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[4] For example, the prescribed inspection form USM-218 contains detailed directives on factors the inspectors are to consider. *See* Pet. 5.

[5] The ability of the USMS to house its detainees in a facility "pursuant to a rider to [another agency's] intergovernmental service agreement," BIO 8, without conducting its own initial inspection is not at issue in this case because, at the time of the events at issue in this case, there was no other such agreement in place.

also house detainees in local facilities. That awareness is reflected in the Directives' reference to "coordinat[ing]" with agencies such as the Bureau of Prisons or the Bureau of Immigration and Customs Enforcement. R. 2752. Nevertheless, the Directives expressly require, before the USMS enters into an intergovernmental agreement, that the "USM" perform "an initial on-site inspection . . . to determine the facility's level of compliance with USMS inspection guidelines" and complete a USMS form "to document the inspection." R. 2752-53.

And for good reason, as this case shows. The Government makes rather a lot of the fact that, prior to entering into the 2003 agreement with the USMS, Crystal City had been party to an agreement with the Immigration and Naturalization Service (later Immigration and Customs Enforcement (ICE)). *See* BIO 2, 6, 7, 8. But the Government conveniently never mentions that ICE had terminated its agreement due to "concerns about financial transactions between the [private] contractor that runs the facility and the local government," *Pl. C.A. Reply Br.* 6-7 (quoting documents produced at the deposition of a USMS official). If anything, the termination of the ICE contract under these circumstances should have suggested a special need for the USMS to inspect the facility itself to ensure compliance with constitutional requirements. Moreover, as petitioners pointed out to the court of appeals, there was no firm evidence in the record that ICE had conducted full inspections of CCCC prior to 2003, when the USMS entered into its agreement, let alone that any inspections ICE might performed were equivalent to the initial inspection

the USMS was required to conduct. *Id.* at 4. In deposition, the Government's witness acknowledged that the only evidence he possessed concerning ICE inspections of CCCC involved ones "done in 2004 and 2005," R. 2116, which he acknowledged was *after* the USMS had entered into its agreement, R. 2112-13. Those later-conducted inspections cannot substitute for a never-conducted required initial inspection in any event.

Thus, if the basis for the court of appeals' decision was that the USMS had no duty to conduct an initial inspection – rather than that discretion in how to conduct that inspection triggered the discretionary function exception – the court of appeals' decision is so mistaken that summary reversal, rather than plenary review, would be appropriate.

3. Finally, the Government briefly suggests that this case is an unsuitable vehicle for clarifying the scope of the discretionary function exception because petitioners did not allege "a plausible causal relationship" between the failure to inspect in 2003 and their son's death in 2006. BIO 13.

The Government is mistaken. It acknowledges petitioners' argument that if the USMS had conducted the required inspection "marshals would have discovered the gaping deficiencies at CCCC and either required their correction or refused to enter into an IGA." BIO 13 (quoting Pet. 26). It does not dispute that "[u]nder either scenario, Rivas-Parada would not have been placed in a facility with inadequate medical care." Pet. 27. But it suggests that petitioners somehow still fail to sufficiently allege causation because they "do not specify what

deficiencies USMS would have uncovered in 2003 that would not have been uncovered in subsequent inspections by the [Texas Commission on Jail Standards] nor do they explain how any such deficiencies caused their injuries." BIO 13.

The first suggestion is irrelevant and the second is obtuse. The Government never denies that the medical policies, personnel, and resources at CCCC fell far short of the constitutionally required minimum.[6] And the Government never suggests that those deficiencies occurred only after it entered into the agreement with Crystal City. Finally, the Government does not even dispute petitioners' claim that had it discovered those inadequacies in 2003, it would not have sent detainees to CCCC unless and until it cured those problems.[7] These concessions,

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[6] In any event, because the district court dismissed the complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), this Court will "accept all of the factual allegations in [petitioners'] complaint as true," *United States* v. *Gaubert*, 499 U.S. 315, 327 (1991), regardless of whether particular "allegations are subject to dispute," *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

[7] Indeed, to contest that claim would expose the Government to FTCA liability on a different theory because "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment," *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (internal quotation marks and citations omitted). Because it would violate the Eighth Amendment to knowingly send prisoners to a facility with constitutionally deficient medical care, the USMS's decision to do so would take its conduct outside the scope of the discretionary function exception—or at least that would be the clear outcome in every circuit that has considered the issue other than the Fifth. As

taken together, are enough to satisfy petitioners' obligation to allege a plausible causal relationship. Petitioners are not required to speculate as to why the local inspections failed to catch these egregious deficiencies.

The Government's second suggestion, which it raises for the first time in this Court, is hard to fathom. CCCC lacked adequate medical staff, lacked the supplies to provide basic hydration, and had a policy against using an ambulance to transport a conscious inmate to the hospital. Even a cursory inspection of CCCC should have uncovered these facts – for example, the ambulance policy was posted on the wall. *See* Pet. 6.[8] Had any one of those three facts been different, petitioners' son would not have died: competent medical staff would have properly diagnosed his condition instead of leaving him to dehydrate and starve, and would have sought emergency treatment when his seizure occurred. And had he been transported to the hospital only a few hours earlier, he could have been saved. Pet. 9. The causal argument here is clear, and only the Fifth Circuit's misunderstanding of the discretionary function exception kept it from recognizing that. Pet. 26-27.

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petitioners have noted, the Fifth Circuit stands alone in extending the discretionary function exception to unconstitutional conduct. Pet. 22-23.

[8] And the form that documents a USMS initial inspection directs officials, among other things to "[a]scertain the level of medical staffing" and review the "availability of . . . emergency health services." Pet. 5.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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