No. 24-____

IN THE

Supreme Court of the United States

LEBENE KONAN,

Cross-Petitioner,

v.

RAYMOND ROJAS, ET AL.,

Cross-Respondents.

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ku Klux Klan Act provides a federal cause of action against "two or more persons" who "conspire," as relevant here, to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Rev. Stat. § 1980, 42 U.S.C. § 1985(3).

The questions presented are:

(1) Whether federal employees can be liable under Section 1985(3).

(2) Whether or under what circumstances the intracorporate conspiracy doctrine—which holds that employees of the same entity cannot be liable for conspiracy—applies to Section 1985(3).

PARTIES TO THE PROCEEDING

Cross-petitioner is plaintiff in this case and was appellant in the court of appeals: Lebene Konan.

Cross-respondents are defendants and were the appellees in the court of appeals: Raymond Rojas and Jason Drake.

Petitioners the United States and the United States Postal Service are respondents to this conditional cross-petition. *See* Sup. Ct. R. 12.6.

RELATED PROCEEDINGS

Supreme Court of the United States:

United States Postal Service v. Konan, Nos. 24-351 (petition for a writ of certiorari filed Sept. 27, 2024)

United States Court of Appeals (5th Cir.):

Konan v. United States Postal Service et al., No. 23-10179 (Mar. 20, 2024)

United States District Court (N.D. Tex.):

Konan v. United States Postal Service et al., No. 22-cv-139 (Jan. 19, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Legislative Materials

Other Authorities

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioner Lebene Konan respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a–13a) is published at 96 F.4th 799. The district court's order (Pet. App. 14a–35a) is published at 652 F. Supp. 3d 721.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2024. Pet. App. 1a. A petition for a writ of certiorari was docketed on September 27, 2024. This conditional cross-petition is timely filed within 30 days of September 27, 2024, in accordance with this Court's Rules 12.5 and 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1985(3) provides in relevant part: "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property,

or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

INTRODUCTION

For years, two U.S. Postal Service (USPS) employees refused to deliver mail to properties owned by cross-petitioner Lebene Konan because she is Black. USPS employees Raymond Rojas and Jason Drake changed the lock on Ms. Konan's mailbox with no warning; placed a red-lettered notice in her neighborhood's central mailbox making clear they would not deliver to many of her tenants; and demanded that Ms. Konan's tenants—and only Ms. Konan's tenants—show ID in order to pick up their mail. Even after USPS's own Inspector General ordered them to deliver all mail addressed to residents of Ms. Konan's properties, Rojas and Drake refused to do so. All the while, Rojas and Drake delivered mail to Ms. Konan's white neighbors and their tenants without incident.

Ms. Konan sued Rojas, Drake, and the United States. The Fifth Circuit allowed one of her claims, under the Federal Tort Claims Act (FTCA), to proceed. The United States has sought certiorari on that holding. As is explained in Ms. Konan's brief in opposition, this Court's intervention is unnecessary; the Fifth Circuit's holding does not warrant review.

But should this Court choose to grant the United States's petition regarding Ms. Konan's FTCA claim, it should also grant this conditional cross-petition to

review the Fifth Circuit's dismissal of Ms. Konan's civil rights conspiracy claim brought under 42 U.S.C. § 1985(3). Ms. Konan's case concerns whether federal law provides a remedy against USPS employees who engage in intentional racial discrimination. The answer should be yes. If this Court chooses to reconsider the Fifth Circuit's holding that the FTCA provides such a remedy, it should also reconsider the Fifth Circuit's holding that Section 1985(3) does not.

If the Court does consider the questions presented here, it should find, like many courts of appeals have, that Section 1985(3) provides a remedy under these circumstances. That statute, enacted as part of the Ku Klux Klan Act, is unqualified. It allows suit against *any* "two or more persons" who "conspire" for various ends, including, as relevant here, depriving others of the equal protection of the laws. Despite the clarity of that textual prohibition, the Fifth Circuit held that Section 1985 does not reach federal actors and does not reach cases where defendants are employees of the same entity. Both holdings implicate acknowledged circuit splits. Neither can be squared with text, history, or this Court's precedents.

STATEMENT OF THE CASE

A. Legal background

1. In March of 1871, the Senate's Select Committee to Investigate Alleged Outrages in the Southern States issued a nearly 600-page report regarding the lack of "security for persons and property" in the South. S. Rep. No. 42–1, at I (1871). The Committee found that persons and property in the South were vulnerable not only to outright

violence but also to widespread denial of civil justice and property rights, often effectuated by "members" of "organized bands," "b[ound]" by the "Ku-Klux organization" to "carry out" crime. *Id.* at XXXI. As one witness testified about conditions in North Carolina:

> Colored men cannot get justice, cannot get their hard earned money. They agree to give [the Klan] part of the crop, and about the time of the harvest they charge them with something and run them off. They dare not say a word. That is the general state of things throughout several of the counties of the State.

Id. at 10.

Within weeks, President Grant sent an urgent message to Congress seeking legislation to address that "condition of affairs" throughout the South "rendering life and property insecure." Cong. Globe, 42d Cong., 1st Sess. 236 (1871). Congress's debates about how to respond to such lawlessness were "long and extensive." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). In particular, the "breadth of the remedy" to address these anarchic conditions was a crucial point of contention. *See id.* at 173–81. By April, Congress responded by enacting the Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

2. The Ku Klux Klan Act includes two provisions relevant here.

First, in Section 1—now codified at 42 U.S.C. § 1983—the Act provides a federal forum and cause of action to address deprivations of federal rights by persons acting "under color of" state law. *See* Ku Klux Klan Act § 1, 17 Stat. at 13.

Second, in the relevant portion of Section 2—the provision directly at issue in this case and codified at 42 U.S.C. § 1985—the Act provides a federal forum and civil cause of action to address various kinds of conspiracies. *See* Ku Klux Klan Act § 2, 17 Stat. at 13–14. Section 2's text covers "two or more persons" who "conspire," 17 Stat. at 13, to engage in "five broad classes of conspiratorial activity." *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). For instance, Section 1985(3)—the recodified provision under which Ms. Konan raised her claims—prohibits "two or more persons" from "conspir[ing]" for "the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3).

Unlike Section 1, Section 2 omitted any color-of-state-law requirement. Its prohibitions have thus long been understood to reach private conspiracies. Alongside the civil provision now codified at Section 1985, Section 2 contained a since-repealed[1] criminal conspiracy provision that used the same "two persons conspire" language. Shortly after the Act's passage, this Court held that the criminal provision "as appears by its terms," was "framed to protect" equal protection rights "from invasion by private persons." *See United States v. Harris*, 106 U.S. 629, 637 (1883). This Court later extended that same holding to Section 2's civil conspiracy provisions, now codified in Section 1985. *See Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971).

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[1] *See* Pub. L. No. 60–350, § 341, 35 Stat. 1088, 1153 (1909).

B. Factual background[2]

Lebene Konan is a respected and successful realtor and licensed insurance agent in Texas. Compl. ¶ 1, Pet. App. 38a–39a. She owns two multifamily residences that she rents out in Euless, a suburb of Dallas. Pet. App. 2a, 15a. Due to the malfeasance of two United States Postal Service (USPS) employees—Raymond Rojas, a mail carrier, and Jason Drake, a local postmaster—neither Ms. Konan nor many of her tenants received mail for more than two years. Pet. App. 2a–3a, 16a–17a.

Rojas and Drake first targeted a rental property—the "Saratoga Residence"—that Ms. Konan purchased in 2015. Pet. App. 2a.; Compl. ¶ 12, Pet. App. 42a. Until May 2020, she and her tenants received all their mail with no issues. Compl. ¶ 12, Pet. App. 42a. But in May 2020, Rojas changed the USPS-provided mailbox lock for the Saratoga Residence without giving Ms. Konan notice or acquiring her consent. Pet. App. 2a; Compl. ¶ 10, Pet. App. 41a. Without any basis, Rojas claimed that one of Ms. Konan's white tenants was the true owner of the Saratoga Residence. Compl. ¶ 13, Pet. App. 42a. But that tenant actually lived at the property for only two months and never at any time owned the property. Compl. ¶ 14, Pet. App. 42a.

Ms. Konan went to the USPS Inspector General, who "confirmed that [Ms.] Konan owned the property" and "instructed that mail be delivered."

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[2] Because Ms. Konan's claims were dismissed at the complaint stage, the facts alleged in her complaint are taken as true. *See* Pet. App. 4a; 19a.

Pet. App. 2a. Disregarding that instruction, local postmaster Drake sided with Rojas and encouraged him to continue his campaign against Ms. Konan. Compl. ¶ 23, Pet. App. 45a. Drake even encouraged other employees not to deliver mail to the Saratoga Residence unless the would-be recipient provided identification. *Id.*

Rojas and Drake's campaign against Ms. Konan escalated in the ensuing years. At the neighborhood's shared mailbox servicing the Saratoga Residence, Rojas taped a notice in red lettering in Ms. Konan's box listing the names of the handful of tenants whose mail he was willing to deliver. Compl. ¶ 35, Pet. App. 48a. Then, in 2021, Rojas learned that Ms. Konan owned a separate property and promptly stopped delivering mail to that property under the pretense that "something 'nefarious' was afoot." Pet. App. 3a; Compl. ¶ 37, Pet. App. 48a.

Ms. Konan repeatedly raised concerns with USPS about her mail. She subscribed to USPS's Informed Delivery Service, which made clear that mail addressed to both residences was in USPS's possession but never delivered. She submitted more than fifty complaints with the USPS Inspector General's office and USPS's local community service station. Ultimately, she filed a formal administrative claim. All to no avail. *See* Compl. ¶¶ 30–31, Pet. App. 47a.

Rojas and Drake's acts inflicted real harms on Ms. Konan. For one, those acts diminished the value of Ms. Konan's properties by "driving both existing and prospective tenants away." Compl. ¶ 47, Pet. App. 51a. Moreover, the withheld mail was often of vital importance; among the many items Rojas and

Drake withheld from Ms. Konan were "doctor's bills, medications, credit card statements, car titles and property tax statements." Compl. ¶ 24, Pet. App. 45a. Such withholding of properly addressed mail violates federal criminal law. Compl. ¶ 43, Pet. App. 50a; *see, e.g.*, 18 U.S.C. § 1693.

Rojas and Drake singled out Ms. Konan because they "did not 'like the idea that a black person own[ed]'" the properties. Pet. App. 2a. The duo "delivers mail addressed to residences owned by white people without exception, including residences in which there are multiple addressees." Compl. ¶ 39, Pet. App. 49a. They have not changed the lock on any white owners' mailbox. Compl. ¶ 17, Pet. App. 43a. They have not posted notices on any white owners' mailbox announcing arbitrary limitations on who can receive mail. Compl. ¶ 35–36, Pet. App. 48a. And they have neither demanded of white property owners the proof of ownership they've asked of Ms. Konan, nor demanded IDs of the tenants of white property owners the way they have of Ms. Konan's tenants. Compl. ¶ 39, Pet. App. 49a.

C. Procedural background

1. In 2022, Ms. Konan filed suit. Pet. App. 38a. As relevant to this cross-petition, Ms. Konan raised claims under 42 U.S.C. § 1985(3) against Rojas and Drake, alleging that they singled her out on the basis of her race and denied her equal protection of the laws by refusing her postal privileges that they provide to white people. *See* Compl. ¶¶ 100–03, Pet. App. 62a–63a. Ms. Konan also raised claims against the United States and USPS under the Federal Tort Claims Act and against Rojas and Drake under a

different civil rights statute, 42 U.S.C. § 1981. *See* Pet. App. 3a.

2. The district court dismissed all of Ms. Konan's claims. Pet. App. 4a. With respect to her Section 1985(3) claim, it applied settled Fifth Circuit precedent holding that federal actors cannot be sued under Section 1985. Pet. App. 32a–33a. It also rested its holding on the "intracorporate conspiracy doctrine," which the Fifth Circuit has held bars a plaintiff from bringing any Section 1985(3) claim "against multiple defendants employed by the same governmental entity." Pet. App. 33a.

The court also dismissed Ms. Konan's Section 1981 and FTCA claims. Believing all three of Ms. Konan's claims had "fundamental" legal defects, the court concluded that leave to amend to elaborate on the underlying facts would be "futile" and dismissed the case with prejudice. Pet. App. 35a.

3. The Fifth Circuit affirmed in part and reversed in part.

The court of appeals affirmed the dismissal of Ms. Konan's Section 1985 claim on the same two grounds. First, the Fifth Circuit considered itself bound by circuit precedent holding that the statute "does not apply to federal actors." Pet. App. 11a (citing *Mack v. Alexander*, 575 F.2d 488, 489 (5th Cir. 1978)). Second, the Fifth Circuit held that the intracorporate conspiracy doctrine barred Ms. Konan's claim. Pet. App. 12a. Despite acknowledging Ms. Konan's allegation that Rojas and Drake "were conspiring to commit a criminal act," the Fifth Circuit concluded that Rojas and Drake were not liable because they were employees of the same agency. Pet. App. 12a.

The Fifth Circuit also affirmed dismissal of Ms. Konan's Section 1981 claim, on the grounds that Ms. Konan had not alleged sufficient facts about similarly situated white property owners and that receiving mail is not an enumerated right under Section 1981. Pet. App. 11a.

Finally, it reversed the district court's dismissal of Ms. Konan's FTCA claim. Pet. App. 8a–9a.

4. The United States seeks review of the Fifth Circuit's FTCA holding. *See* Pet. iii. This conditional cross-petition for certiorari regarding Ms. Konan's Section 1985(3) claim follows.

REASONS FOR GRANTING THE CONDITIONAL WRIT

As will be set forth in Ms. Konan's brief in opposition, this Court should not grant the government's petition seeking review of Ms. Konan's FTCA claim.

However, if the Court grants that petition, it should also grant this cross-petition and review the lower court's holdings as to Ms. Konan's Section 1985(3) claim. Had Ms. Konan's properties been located just eighty miles north of Euless, Texas, in Thackerville, Oklahoma, her Section 1985(3) claim would have proceeded. In the Tenth Circuit—as in six other circuits—Section 1985(3) can be used to hold federal actors liable. And in the Tenth Circuit—as in three other circuits—the intracorporate conspiracy doctrine would not have barred Ms. Konan's suit.

The Fifth Circuit's opinion below thus implicates two circuit splits. And it is wrong, injecting two gaping exceptions into a statute whose text is deliberately unqualified. This Court should not

countenance that evisceration of an important federal statute.

I. The Fifth Circuit's rule that Section 1985(3) does not apply to federal employees is an erroneous minority rule.

In the opinion below and repeatedly over the past half century, the Fifth Circuit has held that Section 1985(3) liability does not reach persons acting under color of federal law. *See* Pet. App. 11a; *Mack v. Alexander*, 575 F.2d 488, 489 (5th Cir. 1978). As the court below acknowledged, that holding "has been widely questioned," but it has "not been overturned." Pet. App. 11a (citing *Cantú v. Moody*, 933 F.3d 414, 419 (5th Cir. 2019)).

Mack's rule has rightly been questioned. It is an outlier that conflicts with the rule in seven other circuits and cannot be squared with Section 1985(3)'s text or this Court's precedents.

A. There is an acknowledged 7–1 circuit split over this issue.

The Fifth Circuit has long held that Section 1985(3) does not reach persons acting under color of federal law. *See Mack*, 575 F.2d at 489; Pet. App. 11a.

Nearly forty years ago, the Seventh Circuit observed that the Fifth Circuit's rule is the "minority rule." *Ogden v. United States*, 758 F.2d 1168, 1175 n.3 (7th Cir. 1985). That's even more true today. As the Third Circuit put the point: "A significant consensus among our sister Courts of Appeals" has rejected the argument "that § 1985(3) is inapplicable

to those acting under color of federal law." *Davis v. Samuels*, 962 F.3d 105, 114 (3d Cir. 2020).

To be precise, the Fifth Circuit's holding conflicts with the governing rule in the D.C., Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits, all of which hold that federal actors can be sued under Section 1985(3). *See Hobson v. Wilson*, 737 F.2d 1, 19 (D.C. Cir. 1984) (FBI agents); *Iqbal v. Hasty*, 490 F.3d 143, 176 (2d Cir. 2007), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (Department of Justice, FBI, and Bureau of Prisons officials and employees); *Davis*, 962 F.3d at 115 (Department of Homeland Security and Bureau of Prisons officials); *Jafree v. Barber*, 689 F.2d 640, 643–44 (7th Cir. 1982) (FBI agents); *Federer v. Gephardt*, 363 F.3d 754, 758 (8th Cir. 2004) (Congressman and staffers); *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (U.S. Marshals); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (10th Cir. 1975) (Department of the Interior officials).

B. The Fifth Circuit's rule flouts both the text of Section 1985(3) and this Court's precedents.

The governing Fifth Circuit precedent consists of a single conclusory sentence, explaining that Section 1985 "provide[s] a remedy for deprivation of rights under color of state law and do[es] not apply when the defendants are acting under color of federal law." *Mack*, 575 F.2d at 489. As a matter of text and this Court's precedents, that assertion is wrong.

1. Start with the text of the statute. Section 1985 applies to "two or more persons" who "conspire" to various ends. 42 U.S.C. § 1985(3). There is, of course,

no legal authority for the proposition that an individual is not a "person" just because they work for the federal government.

The Fifth Circuit's unsupported assertion that Section 1985 is limited to "deprivation of rights under color of state law" is similarly implausible. There is no under-color-of-state-law requirement in the text of Section 1985. That's particularly telling because Section 1985's better-known neighbor, Section 1983—another provision of the Ku Klux Klan Act—*does* contain that language: It limits liability to "person[s] who, under color of any statute, ordinance, regulation, custom, or usage, of any State," cause the deprivation of a constitutional right. Section 1985 is not limited in that respect; it reaches "two or more persons"—no qualification—who "conspire" to various ends. And Congress "generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *See DHS v. MacLean*, 574 U.S. 383, 391–92 (2015).

The Fifth Circuit's reading of that language is also contrary to contemporaneous constructions of that language. Twelve years after the passage of the Ku Klux Klan Act, this Court read identical language ("two or more persons" who "conspire") in the Act's since-repealed criminal conspiracy provision to reach purely *private* actors—that is, persons acting under color of *no* law whatsoever. *See United States v. Harris*, 106 U.S. 629, 639 (1883) ("Under [the Act] private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.").

Plus, had Congress intended to reach private actors and state actors, but not federal actors, it

would have said so. Congress has amended Section 1981—which traces to another Reconstruction-era civil rights statute—to cover "impairment by nongovernmental discrimination and impairment under color of State law," making clear that federal actors are excluded. *See* Pub. L. No. 102–166, § 101, 105 Stat. 1071, 1071–72 (1991). But Section 1985 contains no such language.

Finally, Section 1985's remedial provision confirms its expansive scope. It allows "an action for the recovery of damages . . . against *any* one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). There's no suggestion that federal employees are exempt from that provision. To the contrary, the word "any" signals "an expansive meaning." *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020) (citation omitted).

2. *Mack* is also irreconcilable with this Court's case law.

First, this Court has held that private actors are covered by Section 1985(3). *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). In so holding, the Court rejected the color-of-state-law requirement underlying the Fifth Circuit's rule, holding that reading in such a requirement would "deprive" Section 1985 "of all independent effect"; after all, Section 1983 already generates liability for persons acting under color of state law. *Griffin*, 403 U.S. at 99. This Court has therefore already rejected a necessary premise to *Mack*'s holding—that Section 1985(3) applies only to persons acting under color of state law. *See* 575 F.2d at 489.

Moreover, this Court's opinion in *Abbasi* strongly suggests that Section 1985(3) is available against federal actors. *See Ziglar v. Abbasi*, 582 U.S. 120 (2017). In that case, defendants sought qualified immunity in part on the basis that it was unclear whether Section 1985(3) applied to federal actors. *See* Ziglar Merits Br. 22, *Ziglar v. Abbasi*, 582 U.S. 120 (2017) (No. 15–1358); Ashcroft Merits Br. 39, *Ashcroft v. Abbasi* (No. 15–1359); Hasty Merits Br. 43–44, *Hasty v. Abbasi* (No. 15–1363). This Court nonetheless entertained the Section 1985(3) claim against federal actors with nary a suggestion that the provision categorically exempts federal actors from liability. *See Abbasi*, 582 U.S. at 149–50. The natural takeaway is that this Court has already "assumed § 1985(3) applies to federal officers." *Cantú*, 933 F.3d at 419 (citing *Abbasi*, 582 U.S. at 149–55).

In short, as the Fifth Circuit itself has recognized, *Mack*—already wrong when it was written—has not "aged well." *Cantú*, 933 F.3d at 419. There is no basis for reading an unwritten exception for federal employees into the plain text of Section 1985.

II. The Fifth Circuit's rule applying the intracorporate conspiracy doctrine to all Section 1985(3) claims implicates an acknowledged split and is wrong.

The Fifth Circuit also rejected Ms. Konan's Section 1985(3) claim on the basis that the two defendants—Rojas and Drake—work for the same employer, a rule that is sometimes called the "intracorporate conspiracy doctrine." In four other circuits, that doctrine would not have applied to Ms. Konan's case. For good reason. Applying the

intracorporate conspiracy doctrine to Ms. Konan's case would be contrary to the text of Section 1985(3) and the historical context of the Ku Klux Klan Act.

A. The circuits are divided 6–2–2 over this issue.

As this Court has recognized, there is longstanding "division in the courts of appeals" as to "the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies." *Ziglar v. Abbasi*, 582 U.S. 120, 153 (2017); *see also Hull v. Shuck*, 501 U.S. 1261, 1261–62 (1991) (White, J., dissenting on denial of certiorari) (urging this Court to grant certiorari to determine whether the intracorporate conspiracy doctrine applies to Section 1985(3)).[3]

1. The Second, Fourth, Sixth, Seventh, and Eighth Circuits—like the Fifth—all have a categorical intracorporate conspiracy rule: Section 1985(3) does not permit suits against defendants who are all employees of the same entity who acted within

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[3] *See also* 2 Ivan E. Bodensteiner & Rosalie Berger Levinson, *State and Local Government Civil Rights Liability* § 3:5 (2024 Update) ("A common issue, not yet resolved by the Supreme Court, concerns the application of § 1985(3) to conspiracies within a corporate entity."); *Fazaga v. FBI*, 965 F.3d 1015, 1060 & n.41 (9th Cir. 2020) (the circuits "were split" on the application of the intracorporate conspiracy doctrine to § 1985(3) claims), *rev'd and remanded*, 595 U.S. 344 (2022); *Afr.-Am. Cultural Ass'n, Inc. v. Davidson Hotel Co.*, 2000 WL 36739514, at *4 n.4 (D.N.M. Oct. 24, 2000) ("The circuit courts are heavily divided on this issue.").

the scope of their employment.[4] This intracorporate conspiracy doctrine derives from a 1950s case about antitrust law, where courts reason that "the acts of the agent are the acts of the corporation." *See Nelson Radio & Supply Co. v. Motorola Inc.*, 200 F.2d 911, 914 (5th Cir. 1952). Following that logic, circuits like the Fifth maintain that two employees of the same corporation act as a "single legal entity which is incapable of conspiring with itself" for Section 1985(3) purposes as well. Pet. App. 12a.

2. In contrast, Ms. Konan's Section 1985(3) claim would have proceeded if she had sued in the First, Third, Tenth, and Eleventh Circuits. In the Third and Tenth Circuits, the intracorporate conspiracy doctrine does not apply to Section 1985 claims at all. And though the First and Eleventh Circuits may apply the intracorporate conspiracy doctrine to some Section 1985 claims, they would not apply it to Ms. Konan's.

a. *Third and Tenth Circuits.* The Third Circuit has held that "concerted action by officers and

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[4] *See Murphy v. City of Stamford*, 634 Fed. Appx. 804, 805 (2d Cir. 2015); *Hartline v. Gallo*, 546 F.3d 95, 99 n.3 (2d Cir. 2008); *Bhattacharya v. Murray*, 93 F.4th 675, 699 (4th Cir. 2024); *Buschi v. Kirven*, 775 F.2d 1240, 1244, 1251, 1253 (4th Cir. 1985); *Upton v. City of Royal Oak*, 492 Fed. Appx. 492, 493, 507 (6th Cir. 2012); *Hull v. Cuyahoga Valley Jt. Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 509–10 (6th Cir. 1991); *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 642 (7th Cir. 2006); *Hartman v. Bd. of Trs. of Cmty. Coll. Dist. No. 508, Cook Cnty., Ill.*, 4 F.3d 465, 470–71 (7th Cir. 1993); *Johnson v. Vilsack*, 833 F.3d 948, 958 (8th Cir. 2016); *Kelly v. City of Omaha, Neb.*, 813 F.3d 1070, 1077, 1079 (8th Cir. 2016); *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985).

employees of a corporation" can violate Section 1985(3). *See Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1257–58 (3rd Cir. 1978) (en banc), *rev'd on other grounds*, 442 U.S. 366 (1979). The court explained it could "perceive no function to be served by immunizing" conspirators under Section 1985(3) simply because they work for the same business. *Id.* at 1257. District courts in that circuit thus routinely hear cases like Ms. Konan's, where a plaintiff alleges a conspiracy among employees of the same entity under Section 1985(3), without regard to the intracorporate conspiracy doctrine.[5]

Additionally, the Tenth Circuit has held that the intracorporate conspiracy doctrine does not apply to Section 1985(3). *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1127 (10th Cir. 1994). The doctrine was "designed to allow one corporation to take actions that two corporations could not agree to do"; it thus has no application where a corporation and its employees "engage in civil rights violations." *Id.*

Confirming that categorical holding, the Tenth Circuit has repeatedly entertained Section 1985(3) conspiracy claims against employees of the same entity without even addressing any intracorporate

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[5] *See, e.g.*, *Best v. Cnty. of Northumberland*, 2011 WL 6003853, at *7 (M.D. Pa. Nov. 30, 2011) (county commissioners); *Sarteschi v. Pennsylvania*, 2007 WL 1217858, at *5 (M.D. Pa. Apr. 24, 2007) (officers of state commission); *Bedford v. Se. Pa. Transp. Auth.*, 867 F. Supp. 288, 295 (E.D. Pa. 1994) (employees of transit authority).

conspiracy argument.[6] And district courts in that circuit follow suit, rejecting the intracorporate conspiracy doctrine: The doctrine "does not apply in the civil rights context," meaning that "an agreement between two employees of the same enterprise can constitute a conspiracy for § 1985 purposes." *Sims v. Unified Gov't of Wyandotte Cnty./Kansas City, Kan.*, 120 F. Supp. 2d 938, 958 (D. Kan. 2000).[7]

b. *First and Eleventh Circuits.* Although neither the First nor the Eleventh Circuit has categorically foreclosed the application of the intracorporate conspiracy doctrine to Section 1985(3) claims, the governing law in both would have allowed Ms. Konan's claim to go forward.

Start with the First Circuit. That court has held that whatever the intracorporate conspiracy doctrine's application to Section 1985(3) might be, it should not extend beyond "simple ratification of a

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[6] *See, e.g.*, *Gamel-Medler v. Almaguer*, 835 Fed. Appx. 354, 355 & n.1, 361 (10th Cir. 2020) (sheriff and undersheriff); *Cochran v. City of Wichita*, 771 Fed. Appx. 466, 468–69 (10th Cir. 2019) (city councilor defendants); *Hamby v. Associated Ctrs. for Therapy*, 230 Fed. Appx. 772, 774, 776, 780, 786–87 (10th Cir. 2007) (employees of the same nonprofit entity); *Salehpoor v. Shahinpoor*, 358 F.3d 782, 784, 789 (10th Cir. 2004) (employees of the same public university).

[7] *See also, e.g.*, *Gamel-Medler v. Pauls*, 2019 WL 11278465, at *6 (W.D. Okla. Aug. 1, 2019); *Barber v. Henderson*, 2014 WL 4064036, at *6–7 (N.D. Okla. Aug. 15, 2014); *Hunt v. Cent. Consol. Sch. Dist.*, 951 F. Supp. 2d 1136, 1228 (D.N.M. 2013); *Smith v. Bd. of Cnty. Comm'rs of Okla. Cnty., Okla.*, 2011 WL 3299072, at *4 n.4 (W.D. Okla. Aug. 1, 2011); *Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288, 1298 (D. Kan. 1997), *order vacated in part*, 996 F. Supp. 1299 (D. Kan. 1998).

managerial decision." *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir. 1984); *see Bossé v. N.Y. Life Ins. Co.*, 2019 WL 5967204, at *8 (D.N.H. Nov. 13, 2019) (*Stathos* "remains the law in this Circuit"), *rev'd on other grounds*, 992 F.3d 20, 26 n.4 (1st Cir. 2021). It does not reach a series of "joint discretionary activit[ies]" by multiple employees of the same entity. *Stathos*, 728 F.2d at 21.

The intracorporate conspiracy doctrine thus would not bar Ms. Konan's Section 1985(3) claim in the First Circuit. Rojas and Drake in fact flouted the instructions of USPS—including a direct order from the USPS Inspector General—when they refused to deliver mail to Ms. Konan's property. There was no "managerial decision" that Rojas and Drake were "simpl[y] ratif[ying]"; indeed, they were disobeying any such decision. *See Stathos*, 728 F.2d at 21. The pair instead made a "joint discretionary" decision to deprive Ms. Konan and her tenants of their mail. *See id.*

Nor would the intracorporate conspiracy doctrine bar Ms. Konan's claim in the Eleventh Circuit. That court has explained that "when a criminal conspiracy is alleged, the underlying conduct is of a sort" that the intracorporate conspiracy doctrine was not "intended or used to shield." *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1041 (11th Cir. 2000).[8]

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[8] Although *McAndrew* was about a claim under Section 1985(2), Section 1985(3) uses precisely the same "two or more persons conspire" language as Section 1985(2), and nothing about the Eleventh Circuit's reasoning in *McAndrew* was specific to Section 1985(2). *See* 206 F.3d at 1040–41. District courts have applied *McAndrew*'s reasoning to Section 1985(3)

Ms. Konan alleged that Rojas and Drake "conspir[ed] to commit a criminal act" against her, so her Section 1985(3) claim could proceed in the Eleventh Circuit. Pet. App. 12a; *see also* Compl. ¶¶ 43–44, Pet. App. 50a–51a (enumerating federal criminal laws proscribing Rojas and Drake's actions).

B. The Fifth Circuit's rule is wrong.

The Fifth Circuit's rule that two persons are exempt from Section 1985(3) liability so long as they are employed by the same corporate entity cannot be squared with the text and the historical context of the Ku Klux Klan Act.

1. Return to the text. Section 1985(3) applies to "conspir[acies]" among "two or more persons." 42 U.S.C. § 1985(3). It contains no exemption for persons employed by the same corporate entity.

What's more, this Court has repeatedly allowed federal criminal conspiracy charges against employees of the same entity under statutes that use the same operative language as Section 1985(3) and that similarly trace to Reconstruction-era civil rights statutes. *See, e.g.*, *United States v. Classic*, 313 U.S. 299, 308, 321 (1941) (reversing dismissal of prosecution against local elections commissioners under statute using "two or more persons conspire"

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claims like Ms. Konan's, concluding that the intracorporate conspiracy doctrine does not prohibit liability where the conspiratorial acts are criminal. *See, e.g.*, *N.P. by Perillo v. Sch. Bd. of Okloosa Cnty., Fla.*, 2019 WL 4774037, at *17 (N.D. Fla. Sept. 30, 2019); *Bradley v. Franklin*, 2019 WL 1111404, at *5–6 (N.D. Ala. Mar. 11, 2019).

language); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (upholding indictment against officers of county election board under statute using "two or more persons conspire" language).

2. Not only would it contravene basic rules of statutory construction, but it would be passing strange to apply the intracorporate conspiracy doctrine to the Ku Klux Klan Act.

The Act was, of course, passed by a Congress that "had the Klan 'particularly in mind.'" *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (citation omitted). But the Fifth Circuit's blanket application of the doctrine may well foreclose liability for Klan members. Take, for example, the brutal lynching of Michael Donald by members of the Ku Klux Klan. Complaint, *Donald v. United Klans of Am., Inc.*, No. 84–0725 (S.D. Ala. Aug. 19, 1985), https://perma.cc/DK8K-RJM9. His family filed suit under Section 1985(3) against one of the Ku Klux Klan's corporate entities—the United Klans of America—as well as multiple members of the organization. *See id.* ¶¶ 5–13, 44, 46. The family secured a jury award, but under the intracorporate conspiracy doctrine, the multiple Klan members who worked in concert to lynch Donald would not have been liable because they represented the same corporate entity. That cannot be right.

To be sure, some lower courts that would otherwise apply the intracorporate conspiracy doctrine have gerrymandered exceptions for Klan-like actors,[9] apparently recognizing the absurdity of

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[9] *See, e.g.*, *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 840 (6th Cir. 1994) (explaining that the "corporation's

such a result. But those contortions make still clearer that a blanket exemption for conspirators who work for the same employer cannot be justified.

3. The historical backdrop of Section 1985 confirms as much.

a. "In 1871, no common law precedent had invoked the intracorporate conspiracy doctrine, or any similar rule, to bar a plaintiff from bringing a cause of action to redress harms caused by a conspiracy among employees of a single corporation." Geoff Lundeen Carter, *Agreements within Government Entities and Conspiracies under § 1985(3)—A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. Chi. L. Rev. 1139, 1155 (1996). Indeed, "courts routinely held that intracorporate agreements and actions"—that is, agreements and actions among officials of the same corporation—could form the basis of conspiracy liability in both criminal and tort contexts. Note, *Intracorporate Conspiracies under 42 U.S.C. § 1985(c)*, 92 Harv. L. Rev. 470, 479–80 (1978) (footnote omitted). That proposition "was generally not debated." *Id.* at 480.

Thus, in the latter half of the nineteenth century, both civil conspiracy suits and criminal conspiracy prosecutions were routinely brought against

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mission" is relevant to the intracorporate conspiracy exception because "members of the Ku Klux Klan could not avoid liability by incorporating"); *Dombroski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (asserting exception to intracorporate conspiracy doctrine for "[a]gents of the Klan" claiming they were "acting under orders from the Grand Dragon").

employees of the same corporate entity. *See, e.g.*, *Page v. Cushing*, 38 Me. 523, 525–26 (1854) (tort action for "conspiracy, in the malicious institution of a prosecution, and abuse of legal process," allowed against employees of the same law enforcement office); *State v. Donaldson*, 32 N.J.L. 151, 156 (Super. Ct. 1867) (criminal conspiracy against employees of the same corporation); *People v. Powell*, 63 N.Y. 88, 89, 92 (1875) (criminal conspiracy charges against county commissioners); *Ochs v. People*, N.E. 662, 670 (Ill. 1888) (same); *People v. Duke*, 19 Misc. 292, 293 (N.Y. Gen. Sess. 1897) (rejecting defense to criminal conspiracy indictment that defendants were "officers and agents of a lawfully established corporation . . . ; that their acts are the acts of the corporation; [and] that a corporation is but one person").

b. The intracorporate conspiracy doctrine came onto the scene only much later. In 1952, the Fifth Circuit carved out an antitrust exception to the general rule that intracorporate agreements could be the basis for conspiracy liability. *See Nelson Radio & Supply Co.*, 200 F.2d 911. That carveout is the basis for the intracorporate conspiracy doctrine exception to Section 1985.[10] To state the obvious, a doctrine

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[10] *See, e.g.*, *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126 (10th Cir. 1994) (the doctrine was "first developed in the antitrust context"); *Buschi v. Kirven*, 775 F.2d 1240, 1251 (4th Cir. 1985) (the doctrine "grew out of the decision in *Nelson Radio*"); Carter, *supra*, 63 U. Chi. L. Rev. at 1155 ("Indeed, the [intracorporate conspiracy] doctrine did not finally take shape until the 1950s, when courts settled on applying the doctrine to § 1 of the Sherman Act."); Allen Page, *The Problems with Alleging Federal Government Conspiracies Under 42 U.S.C. § 1985(3)*, 68 Emory L. J. 563, 580 (2019) (similar).

that didn't develop until 1952—and one that developed in the antitrust law context, to boot—is no basis to imply an exception to the plain text of a civil rights statute drafted in 1871.

Plus, the reasons for departing from the background conspiracy-liability rule in the antitrust context don't apply to Section 1985(3). Antitrust law is designed to promote economic competition, and it is thus built on the "basic distinction between concerted and independent action." *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (citation omitted). "[O]fficers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* at 769.

That's a far cry from the concern of the Ku Klux Klan Act's conspiracy prohibition. There is no reason to think that an equal protection conspiracy is categorically worse simply because the actors work for different enterprises. *Stathos*, 728 F.2d at 21. Indeed, in the civil rights context, "the action by an incorporated collection of individuals creates the 'group danger' at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose." *Brever*, 40 F.3d at 1127 (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981)).

4. Some courts have tried to justify the application of the intracorporate conspiracy doctrine to Section 1985 by way of the following syllogism: By the time of the Ku Klux Klan Act's passage, a corporation and its employees had long been "considered as one person in law"; one person cannot

conspire with itself; thus, employees of the same corporation cannot conspire. *See Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 110 (7th Cir. 1990) (quoting 1 William Blackstone, *Commentaries* *456).

The first step of that syllogism fails. As the cases detailed *supra*, 21, 23–24, make clear, whatever force that legal fiction may have in other contexts, it did not preclude conspiracy suits and prosecutions. That shouldn't come as a surprise: Lawyers have long recognized that the concept of a corporation as a unit is "not only a fiction" but at times "a useless and unreasonable" one, such that "where the fiction can serve no purpose but to accomplish injustice, . . . the court will not permit this legal fiction to prevail against real substance." 1 William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 42, at 57 (1917). Besides, courts often limited the legal fiction that a corporation and its employees were one unit to the corporation's high-level managers—those who could "wield[] the whole executive power of the corporation" or who could affix the corporation's seal. *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 114 (1893); 1 Blackstone, *Commentaries* *464. Discretionary decisions by low-level employees such as Rojas and Drake would not have been attributable to the corporation at common law. *See Stathos*, 728 F.2d at 21.

III. This case is an excellent vehicle for addressing the questions presented.

1. This case tees up both questions presented cleanly. The federal-actor and intracorporate-conspiracy-doctrine issues were pressed and passed upon in the lower courts. *See* Pet. App. 11a–12a, 32a–

33a; Konan C.A. Br. 33–34, 36 & n.15. Those two issues were also the sole bases for the judgment below dismissing Ms. Konan's Section 1985(3) claim.

Resolution of the questions presented would also be outcome determinative for Ms. Konan's appeal of her Section 1985(3) claim. But for the Fifth Circuit's blanket rules regarding federal employee liability and the intracorporate conspiracy doctrine, Ms. Konan's Section 1985(3) claim could not have been dismissed with prejudice. To be sure, the Fifth Circuit held that Ms. Konan's separate Section 1981 claim failed in part because she had insufficiently alleged that Rojas and Drake continued to deliver mail to similarly situated white property owners. Pet. App. 11a.[11] But even if that conclusion applied to Ms. Konan's Section 1985(3) claim, it would justify only dismissal with leave to amend, not dismissal with prejudice. If necessary, for example, Ms. Konan could add more identifying details regarding the treatment of similarly situated white property owners to her complaint. *See* Konan CA5 Reply Br. 21.

2. Should this Court grant the government's petition, it should also grant Ms. Konan's cross-petition. Section 1985 claims and FTCA claims are often litigated in conjunction because—outside the Fifth Circuit—they both provide avenues of redress against federal actors' tortious behavior.[12] Addressing

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[11] The Fifth Circuit also held that Ms. Konan's Section 1981 claim could not proceed because Rojas and Drake's pattern of behavior did not implicate "any of the enumerated provisions of Section 1981(a)," making amendment futile. Pet. App. 11a.

[12] *See, e.g.*, *Ramirez v. Reddish*, 104 F.4th 1219, 1223 (10th Cir. 2024); *Fazaga v. FBI*, 965 F.3d 1015, 1024 n.1, 1059 (9th

both sets of questions presented would provide this Court with a more complete picture of the possibilities for remedying these sorts of injuries.

Plus, some of the statutory arguments regarding the two provisions may overlap. For instance, in the Westfall Act, Congress amended the FTCA by creating a general rule that individual federal employees aren't liable in money damages but exempting claims "brought for a violation of the Constitution of the United States." *See* Pub. L. No. 100–694, § 5, 102 Stat. 4563, 4564 (1988) (codified at 28 U.S.C. § 2679(b)(2)(A)). Section 1985(3) is one of the only ways that a plaintiff can bring a damages suit for a constitutional violation against a federal employee. Barring such a claim—either by declaring that Section 1985(3) does not apply to federal employees or by allowing the intercorporate conspiracy doctrine to foreclose it—would undermine the Westfall Act's exemption.

Finally, if this Court considers depriving Ms. Konan of a remedy under the FTCA, Ms. Konan deserves the opportunity to challenge whether the Fifth Circuit was correct to deprive her of a remedy under Section 1985(3). USPS employees conspired against Ms. Konan because she is Black, effectively

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Cir. 2020), *rev'd and remanded*, 595 U.S. 344 (2022); *Vidurek v. Koskinen*, 789 Fed. Appx. 889, 893 (2d Cir. 2019); *Cantú v. Moody*, 933 F.3d 414, 418 (5th Cir. 2019); *Rodriguez v. Editor in Chief*, 285 Fed. Appx. 756, 758 (D.C. Cir. 2008); *D'Addabbo v. United States*, 316 Fed. Appx. 722, 723, 727 (10th Cir. 2008); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1020 (9th Cir. 2001).

ensuring she would lose rental income. Those injuries warrant a remedy.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted if this Court grants the United States' petition for certiorari.

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