No. 10-___

IN THE

Supreme Court of the United States

MONICA CASTRO, for herself and as Next Friend of R.M.G.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), apply to acts by federal employees that exceed the scope of their statutory or constitutional authority?

2. Even if governmental conduct would otherwise fit within the discretionary function exception, does the law enforcement proviso of the Federal Tort Claims Act, 28 U.S.C. § 2680(h) – which authorizes suits based on an enumerated list of common-law torts if those torts are committed by federal law enforcement officers – nonetheless permit a plaintiff to proceed?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monica Castro, for herself and as next friend of R.M.G., respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-18a) is reported at 608 F.3d 266. The panel decision (Pet. App. 19a-51a) is reported at 560 F.3d 381. The opinion of the district court (Pet. App. 52a-79a) is reported online at 2007 U.S. Dist. LEXIS 9440.

JURISDICTION

The opinion and judgment of the court of appeals on rehearing en banc was filed on June 2, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

> States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The full text of 28 U.S.C. § 2680 – the exceptions to jurisdiction under the Act – is set out in the appendix. Pet. App. 101a-103a. Section 2680 provides, in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT OF THE CASE

After fleeing her home in Texas following a domestic dispute, petitioner Monica Castro, a U.S. citizen, sought assistance from U.S. Border Patrol officers in recovering her daughter, petitioner R.M.G., from the baby's father. He was a Mexican citizen illegally in the United States. Border Patrol agents arrested him. But although they knew that R.M.G. was a U.S. citizen, they detained her as well, and refused to release her from immigration detention. Later that same day, over Castro's pleas and despite notice that Castro's lawyer was seeking a court order that would name her the custodian (thereby preventing R.M.G.'s removal from the United States), Government officials transported the baby across the international border. It took Castro three years to reunite with her daughter.

Petitioners sued the United States under the Federal Tort Claims Act for five state-law causes of action. A divided Fifth Circuit, sitting en banc, held that the district court lacked subject-matter jurisdiction because the agents' conduct fell within the discretionary function exception to the Act. 28 U.S.C. § 2680(a). This decision deepens two circuit splits over the nature and operation of this exception.

1. The material facts in this case are not in dispute.[1] In December 2002, petitioner Monica

[1] The district court dismissed the complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Thus, 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

Castro – a fourth-generation citizen – gave birth in Lubbock, Texas, to a daughter, R.M.G.[2] The baby's father was Omar Gallardo, a Mexican national present illegally in the United States.

Over the next year, Castro and Gallardo's relationship deteriorated. On Friday, November 28, 2003, after several violent arguments, petitioner tried to leave the couple's home with her baby. Gallardo held onto the child and shoved petitioner. Fearing further violence, petitioner left without her daughter. Pet. App. 54a-55a.

Petitioner immediately contacted local authorities seeking their assistance in recovering her baby. But they refused to help because she lacked a court order. *Id.* at 55a.

On Monday, December 1, 2003, petitioner went to the U.S. Border Patrol station in Lubbock. She met with Agent Manuel Sanchez. When she informed Sanchez about the situation, he told her that Gallardo was wanted along with his brothers for questioning regarding a homicide. *Id.* at 83a. Sanchez asked for petitioner's help in locating him. Despite never before having "invited" civilians to enforcement actions, R. 865:141-42,[3] Sanchez told

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"allegations are subject to dispute," *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

[2] Although R.M.G. is also a petitioner in this case, the petition refers to her by her initials to distinguish her from Castro.

[3] References to the Record on Appeal are cited "R. [page number]."

petitioner that if she accompanied the Patrol, agents would question the adults about their citizenship and leave R.M.G. with her, since both she and the child were U.S. citizens. Pet. App. 56a-57a, 83a.

Petitioner, however, feared that Gallardo or his relatives would retaliate against her for assisting the Government. So she told Sanchez that she did not want to attend the raid itself, but would instead watch from nearby. *Id.* at 57a. Sanchez agreed that he would take R.M.G. to the station and telephone petitioner to retrieve her. He indicated that the Government would not allow Gallardo to remove the child from the country. *Id.* at 83a.

Two days later, agents raided petitioner's home, arresting Gallardo and several relatives. They took the group, including R.M.G., to the Lubbock station and placed them in a holding cell. *Id.* at 57a.

Agents did not, however, contact petitioner. Nonetheless, shortly after the raid, she went to the station to request her daughter's release. *Id.* at 84a. After talking to Gallardo, the agents refused. They also refused to allow petitioner, who could hear her baby's cries from the waiting area, to see her child. *Id.* at 85a.

When she learned of the agents' plan to transport the child to Mexico that afternoon along with Gallardo (who was subject to summary deportation based on a prior order of removal, *id.* at 37a), petitioner sought legal assistance. *Id.* at 58a; R. 473:72 to 474:75. She met with attorney Lina Reyes-Trevino, who immediately contacted the Border Patrol. R. 524:16. Agent-in-Charge Greg Kurupas told Reyes-Trevino that unless she obtained a court

order by three p.m., the Government would take the baby to Mexico. *Id.* at 525:17.

Reyes-Trevino prepared a "Suit Affecting Parent-Child Relationship" – the method by which Texas adjudicates control over children, *see* Tex. Family Code §§ 101.001 *et seq.* – and a temporary restraining order to keep the baby from being transported. R. 524:16 to 525:17. She went directly to the local courthouse to obtain the TRO. All the judges were then in session. Both she and her secretary repeatedly telephoned the Border Patrol to update the Government. *Id.* at 525-26. Shortly before three, Reyes-Trevino called Kurupas to ask for more time. She called back a few minutes later to announce that a judge had agreed to hear her, only to be informed, "[T]oo late, I already put them on the bus." *Id.* at 526.[4]

The government van carrying R.M.G., along with Gallardo and other deportable aliens, traveled hundreds of miles to the international border. There, the Government delivered the child, along with the individuals being repatriated, to Mexican authorities.

Once he reached Mexico, Gallardo cut off contact with Castro. Despite written requests, petitioner received no assistance from the Government in locating her child. *See* R. 556-65. Nearly three years

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[4] Federal law permitted postponing removal until the state court had ruled, *see* 8 U.S.C. § 1231(a)(1)(A) (providing for a 90-day removal period), but Kurupas declined to do so to avoid the cost – somewhere between $40 and "over $200 plus," R. 553:117-18 – associated with lodging the baby overnight.

later, Gallardo was arrested after again returning illegally to the United States. He pleaded guilty and agreed to return R.M.G. *See* Pet. App. 59a-60a; R. 422-24.[5] On December 1, 2006, Castro and her now four year-old child were reunited. Pet. App. 60a.

2. On June 1, 2005, while R.M.G. was still missing, petitioner filed administrative claims, both in her individual capacity and as next friend of her daughter, with the Department of Homeland Security, Customs and Border Protection. The Government neither approved nor denied the claims within the next six months. Pet. App. 81a.

Having thus exhausted her administrative remedies, *see* 28 U.S.C. § 2675(a), Castro filed this suit, naming the United States as the sole defendant, in the United States District Court for the Southern District of Texas. The complaint invoked the Federal Tort Claims Act (FTCA), alleged claims under Texas law of gross negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault, and sought damages on behalf of both Castro and her daughter. *See* Pet. App. 80a, 89a-95a.[6]

The Government moved to dismiss for lack of subject-matter jurisdiction. It claimed that all the agents' actions were shielded by the discretionary

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[5] These pages are unpaginated in the court of appeals record.

[6] Petitioners' constitutional claims and claims for declaratory and injunctive relief were dismissed and are not before this Court.

function exception to the FTCA contained in 28 U.S.C. § 2680(a), which provides that the Act does not waive the Government's sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." Petitioners opposed the motion, arguing that the exception was inapplicable because the agents had acted outside the scope of their statutory and constitutional authority.

The district court agreed with the Government. It recognized that the FTCA provides a general waiver of the Government's sovereign immunity. Pet. App. 64a. It also recognized that petitioners' claims for assault, abuse of process and false imprisonment fell within the "law enforcement proviso" of Section 2680(h), which specifically authorizes jurisdiction over such claims when they involve "acts or omissions of investigative or law enforcement officers of the United States Government." Pet. App. 65a n.9 (quoting § 2680(h) and stating that Border Patrol officers "are federal law enforcement officers for purposes of the [FTCA].")

Nonetheless, the district court concluded that all of petitioners' claims were barred by the discretionary function exception. It based its analysis on a two-prong test articulated by the Fifth Circuit in *Garza v. United States*, 161 Fed. Appx. 341 (5th Cir. 2005), which was in turn ostensibly derived from this Court's decision in *United States v. Gaubert*, 499 U.S. 315 (1991). The first prong of the test

> requires that the challenged governmental action be the product of judgment or choice.

> Under this prong, we determine whether a statute, regulation, or policy mandates a specific course of action. If such a mandate exists, the discretionary function exception does not apply and the claim may move forward. When no mandate exists, however, the governmental action is considered discretionary and the first prong is satisfied.

Pet. App. 66a-67a (quoting *Garza*, 161 Fed. Appx. at 344).

The district court found that the decision not to release R.M.G. from immigration detention was the product of "judgment or choice." Pet. App. 68a. The district court saw "no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action in this unique situation." *Id.* at 70a & n.11. Thus, the agents' decision to keep the baby in the holding cell and transport her along with Gallardo to Mexico was discretionary.

The court then concluded that the Government had satisfied the second prong of the *Garza* test, which asks whether the choice at issue was "grounded in social, economic, or political policy," Pet. App. 67a (quoting *Garza*, 161 Fed. Appx. at 344). It found that the choice here "involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case." Pet. App. 75a.

3. On appeal, a divided panel of the Fifth Circuit reversed. *Id.* at 39a. The panel agreed with the district court that petitioners' assault, false

imprisonment, and abuse of process claims fell within the law enforcement proviso of Section 2680(h), and thus were not barred by the intentional tort exception to the FTCA. *Id.* at 31a. It then held that none of petitioners' claims was barred by the discretionary function exception.

Acknowledging that the Seventh Circuit had permitted invocation of the exception even with respect to "constitutionally repugnant" conduct in *Kiiskila v. United States,* 466 F.2d 626 (7th Cir. 1972), Pet. App. 33a, the panel instead aligned itself with the "majority of other circuits" that had held the exception unavailable when government agents "exceed the scope of their authority as designated by statute or the Constitution." *Id.* at 32a-33a (citing cases from the First, Second, Third, Fourth, Eighth, Ninth, and D.C. Circuits).

The panel then held that petitioners had alleged facts sufficient to establish that in the course of committing torts under Texas law – the predicate for bringing suit under the FTCA – the agents' acts "went beyond the scope of their authority" under federal immigration law and "the constitution" (specifically, the Fourth and Fifth Amendments). Pet. App. 34a-35a. The panel pointed to the "quite limited" power of Border Patrol agents "to detain U.S. citizens." *Id.* at 36a. Because the agents "concede[d] that they knew R.M.G. was a U.S. citizen," *id.* at 38a, they lacked any authority for detaining her. Thus, the panel remanded the case for further proceedings, emphasizing that its holding had been "limited to the jurisdictional question presented on appeal." *Id.* at 39a.

Judge Smith dissented. While this Court had held in *Gaubert* that violations of "a federal statute, regulation, or policy" would defeat the discretionary function exception, 499 U.S. at 322, Judge Smith postulated that the Court's "omission" of the Constitution from this list meant that the exception remained available to shield unconstitutional conduct. Pet. App. 42a. He claimed further support for this position from the Fifth Circuit's decision in *Santos v. United States*, 2006 U.S. App. LEXIS 10261 (5th Cir. 2006), which had upheld application of the exception to allegedly unconstitutional conduct. *Id.* at *9-*10. Because "the government has not waived its immunity with regard to constitutional torts," *id.* at *9 (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)), plaintiffs should not be permitted to overcome the discretionary function exception by alleging that the conduct at issue violated the Constitution as well as state law. *See* Pet. App. 42a-46a.

In any event, Judge Smith regarded the agents' actions as permissible in light of Gallardo's physical possession of R.M.G. at the time he was arrested and his desire to keep her with him when he was deported. *Id.* at 46a-50a.

4. The Government moved for rehearing en banc on the question whether an FTCA plaintiff can defeat the discretionary function exception by alleging that governmental agents acted in excess of their constitutional authority. *See* Gov't Pet. for Rehearing En Banc 1. The court of appeals granted the Government's petition. A divided court then affirmed the judgment of the district court, holding that "the discretionary function exception applies" to all of petitioners' claims. Pet. App. 2a. In its two-

page per curiam opinion, the en banc majority did not dispute petitioners' allegations that the agents had acted beyond their statutory authority and in violation of the Constitution. Instead, the en banc majority noted only that no "statute, regulation or policy" directly "mandated" that the Border Patrol take a specific action; therefore, the agents' acts were discretionary. *Id.* at 3a (quoting the district court). It thus "affirm[ed], essentially for the reasons given by the district court, the dismissal of the FTCA claims for want of jurisdiction." *Id.*

Judges Stewart, DeMoss, and Dennis each dissented. Judge Stewart's dissent, joined by Judge DeMoss, reiterated the points he had made in the panel opinion (which Judge DeMoss had joined). In particular, he emphasized that petitioners' complaint "plausibly alleged that the Border Patrol exceeded the scope of its authority under the Immigration and Nationality Act of 1953 ("INA"), 8 U.S.C. § 1101 *et seq.*, and the Fourth and Fifth Amendments." Pet. App. 7a. In his view, actions taken beyond statutory authority or in violation of constitutional prohibitions could not, as a matter of law, fall within the discretionary function exception of Section 2680(a). Pet. App. 8a (citing *Berkovitz v. United States*, 486 U.S. 531, 539 (1988)).

Judge DeMoss filed a separate dissent. He agreed that the discretionary function exception would not cover any of petitioners' claims "[i]f the Border Patrol agents exceeded the scope of their authority." Pet. App. 4a. But "even if the Border Patrol agents acted within the scope of their authority and the discretionary function exception applied," subject-matter jurisdiction existed over

petitioners' claims for false imprisonment, abuse of process, and assault because "[t]he law enforcement proviso [of Section 2680(h)] waives sovereign immunity for those claims." *Id.* In reaching this conclusion, he relied on the Eleventh Circuit's recent decision in *Nguyen v. United States*, 556 F.3d 1244 (11th Cir. 2009).

Judge Dennis agreed that the law enforcement proviso of Section 2680(h) conferred subject-matter jurisdiction over petitioners' claims for false imprisonment, abuse of process, and assault. Pet. App. 15a. But in his view petitioners had failed to state a claim for false imprisonment under Texas law. *Id.* at 16a. Moreover, although Judge Dennis also agreed that, as a matter of law, unconstitutional conduct cannot be shielded by the discretionary function exception, *id.* at 16a-17a, he believed that the alleged conduct here was not unconstitutional because it was permissible for Government agents to leave R.M.G. with Gallardo. *See id.* at 17a-18a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The discretionary function exception to the Government's waiver of sovereign immunity in the Federal Tort Claims Act, found at 28 U.S.C. § 2680(a), is "[u]ndoubtedly one of the [Act's] most important and frequently litigated provisions." Charles Alan Wright et al., 14 Federal Practice and Procedure § 3658.1 (3d ed. 1998 & 2010 Supp.). "Unfortunately, it is unclear exactly what falls within the scope of this provision, despite an immense amount of precedent that has developed on the

subject." *Id.* This case presents two important, recurring, and interrelated, questions of law concerning that exception, providing this Court with an opportunity to bring order to this muddled field.

The first is the availability of the exception in cases where conduct by a Government employee not only gives rise to a tort claim under state law – the predicate for liability under the FTCA – but also falls outside that employee's statutory or constitutional authority. This Court's decisions suggest, and the overwhelming majority of circuits have held, that the exception is unavailable in such cases. The Fifth Circuit, at the Government's urging, has issued an en banc decision that conflicts with this consensus, solidifying a circuit split on the issue.

The second question concerns the relationship between the discretionary function exception and the law enforcement proviso of Section 2680(h), which deals with suits arising out of conduct by law enforcement officers. The proviso affirmatively authorizes suits based on an enumerated list of common-law torts for which there would otherwise be no jurisdiction. The courts of appeals are splintered over whether, and if so, how, the discretionary function exception applies to these cases.

I. Certiorari Should Be Granted To Confirm That The Discretionary Function Exception Does Not Apply To *Ultra Vires* Or Unconstitutional Acts.

The "central purpose" of the Federal Tort Claims Act was to "waiv[e] the Government's immunity from suit in sweeping language." *Dolan v. United States*

Postal Service, 546 U.S. 481, 492 (2006) (internal quotation marks omitted)). The exceptions to jurisdiction in Section 2680 must be construed in light of that purpose. *Id.*

The discretionary function exception of Section 2680(a) deprives courts of jurisdiction over claims that involve "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This Court has refused to apply that exception to conduct that violates statutory mandates. But it has not expressly addressed the applicability of the exception to *ultra vires* conduct – that is, conduct that exceeds the scope of an employee's statutory or constitutional authority but does not contravene some affirmative legal duty.

Seven courts of appeals have reached this question, and have held that the exception does not apply. In conflict with those circuits, and aligning itself with only the Seventh Circuit, the Fifth Circuit's en banc decision extends the exception to conduct that exceeds an employee's statutory authority or violates the Constitution, so long as it does not fail to follow a statutory mandate. This holding warrants review and reversal.

A. The Decision In This Case Is Inconsistent With This Court's Decisions And Conflicts With The Decisions Of Seven Courts of Appeals.

The Fifth Circuit en banc majority did not dispute petitioners' allegation that Government

agents exceeded their statutory authority by keeping R.M.G. in immigration detention. Nor did the court dispute that the agents violated both petitioners' constitutional rights. Instead, it held that the Government was shielded from liability by the discretionary function exception simply because "the Border Patrol Agents' conduct in the situation" was not affirmatively "mandated" by federal law. Pet. App. 3a; *see also* Pet. App. 70a & n.11 (district court decision holding that exception applied because there was "no statute, regulation, or policy that directed the Border Control Agents to take a certain course of action"). This holding is inconsistent with this Court's decisions and conflicts with the rule in seven circuits, which have held that the exception does not cover conduct that is *ultra vires*.

1. In *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991), this Court clearly limited the discretionary function exception of Section 2680(a) to choices made within the bounds of federal law. In *Berkovitz*, it emphasized that the "range of choice" available to a Government employee is fixed "by federal policy and law." *Id.* at 538. Thus, actions outside that range cannot qualify for the exception, which only "insulates the Government from liability if the action challenged in the case involves the *permissible* exercise of policy judgment." *Id.* at 537 (emphasis added). In *Gaubert*, the Court reaffirmed that conduct qualifies for the exception only when it involves choice or "judgment as to which of a range of *permissible* courses is the wisest." 499 U.S. at 325 (emphasis added).

2. Consistent with this Court's approach, seven courts of appeals have held that the discretionary function exception does not shield "actions that are unauthorized because they are [1] unconstitutional, [2] proscribed by statute, or [3] exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254-255 (1st Cir. 2003), *cert. denied*, 542 U.S. 905 (2004). Thus, earlier this year, the First Circuit upheld a $100 million judgment against the United States on an intentional infliction of emotional distress claim arising out of FBI agents' involvement in framing several men for murder. *Limone v. United States*, 579 F.3d 79, 82-83 (2010). The court cited the panel opinion in this case for the conclusion that the exception does not "shield conduct that transgresses the Constitution." *Id.* at 101 (citing *Castro v. United States,* 560 F.3d 381, 389 (5th Cir. 2009)). Proof that Government agents had "participated in framing [the plaintiffs] and had withheld exculpatory evidence to cover up their malefactions stated a clear violation of due process." *Id.* at 102.

The First Circuit is joined by the Second, Third, Fourth, Eighth, Ninth, and D.C. Circuits. In *Myers & Myers Inc. v. U.S.P.S.*, 527 F.2d 1252, 1261 (2d Cir. 1975), the Second Circuit found subject-matter jurisdiction over a case where the complaint alleged facts that would establish not only negligence under state law but also a violation of due process, reasoning that "a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority." Similarly, in *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978), the court upheld liability with respect to a

common-law invasion of privacy claim arising from the conduct of CIA agents who opened and read the plaintiffs' mail. "[A] discretionary function can only be one within the scope of authority of an agency or an official, as delegated by statute, regulation, or jurisdictional grant," and the CIA's charter gave it "no authority to gather intelligence on domestic matters." *Id.* at 329.

The Third Circuit held in *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116 (3d Cir), *cert. denied*, 487 U.S. 1235 (1988), that "conduct cannot be discretionary if it violates the Constitution." *Id.* at 120. Accordingly in *Prisco v. Talty*, 993 F.2d 21 (3d Cir. 1993), the court held that the exception could not bar a suit for interference with state-created parental rights caused by the Government's permitting the other parent to take the child into the Witness Protection Program, because infringement of family relationships would give rise to a substantive due process claim. *Id.* at 26 n.14. *See also Medina v. United States,* 259 F.3d 220, 225 (4th Cir. 2001) (quoting *U.S. Fidelity*).

In *Raz v. United States*, 343 F.3d 945 (8th Cir. 2003) (per curiam), the Eighth Circuit found subject-matter jurisdiction over a suit for invasion of privacy and intentional infliction of emotional distress caused by FBI surveillance and harassment, holding that the agents' actions fell "outside" the exception because the plaintiff "alleged they were conducted in violation of his First and Fourth Amendment rights." *Id.* at 948. *See also Ruffalo v. United States*, 590 F. Supp. 706, 711-13 (W.D. Mo. 1984) (recognizing a claim for interference with state-law parental rights when law enforcement agents took plaintiff's child, along with

the child's father, into the Witness Protection Program).

The Ninth Circuit has taken the same approach. In *Nurse v. United States,* 226 F.3d 996 (9th Cir. 2000), it found jurisdiction over false imprisonment and negligence claims, because the plaintiff alleged conduct that was both tortious and discriminatory in violation of the Fifth Amendment. *See id.* at 1002-03.

Finally, the D.C. Circuit has held that a decision "cannot be shielded from liability" under the exception "if the decisionmaker is acting without actual authority." *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986) (permitting a negligence claim to proceed seeking compensation for property damage attributable to FBI conduct during a disturbance on an Indian reservation when the FBI had no jurisdiction to act).

3. By contrast, the Fifth Circuit does not consider whether the conduct giving rise to the state-law tort claim is unconstitutional or exceeds the scope of an official's authority. Instead, it has adopted a rule that looks only at whether federal law "mandates a specific course of action." *Garza v. United States*, 161 Fed. Appx. 341, 343 (5th Cir. 2005); Pet. App. 66a-67a. "When no mandate exists" the employee's action "is considered discretionary." *Id.* Thus, the Fifth Circuit applies the discretionary function exception without regard to a plaintiff's allegations that, although no "mandate" requires a "specific course of action," the course that was actually chosen exceeds the official's scope of authority or violates the Constitution. *See also*

Santos v. United States, 2006 U.S. App. LEXIS 10261 at *9 (5th Cir. 2006) (per curiam) (rejecting plaintiff's "attempt to save his claims from the discretionary function exception" by arguing that "the acts of which he complains not only constitute negligence, but also violate the Eighth Amendment"). In contrast to the seven circuits described above, such allegations are irrelevant in the Fifth Circuit.[7]

The Fifth Circuit's rule that the discretionary function exception can shield conduct that is unconstitutional is embraced by only one other court of appeals. *See Kiiskila v. United States,* 466 F.2d 626, 627-28 (7th Cir. 1972) (per curiam) (holding that even though a base commander's decision to exclude a civilian employee from the base was "constitutionally repugnant," because it violated the First Amendment, it fell within the exception).

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[7] Astonishingly, a Fifth Circuit panel opinion recently suggested that that court "has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception," *Spotts v. United States*, 2010 WL 2991759 at *6 (5th Cir. July 30, 2010). This assertion misconstrues the en banc court's decision in this case, which vacated the panel decision and embraced the district court's sole reliance on the absence of a direct mandate. In so doing, the Fifth Circuit did not dispute Castro's claims of *ultra vires* and unconstitutional acts; it simply applied the discretionary function exception anyway. *See also Santos v. United States*, 2006 U.S. App. LEXIS 10261 at *9-*10 (upholding application of the exception to allegedly unconstitutional conduct). Within the Fifth Circuit, there is no doubt that allegations of unconstitutional conduct are insufficient to defeat the exception.

B. The Discretionary Function Exception Does Not Apply To This Case.

1. The Fifth Circuit is wrong to treat Government conduct as discretionary within the meaning of Section 2680(a) when it is *ultra vires*. This Court has squarely held that the discretionary function exception does not apply when federal employees violate a federal "statute, regulation, or policy" in carrying out their duties. *See Gaubert*, 499 U.S. at 322, 324-26; *Berkovitz*, 486 U.S. at 536, 544. The Fifth Circuit has provided no reason to adopt a different rule with respect to the Constitution, the Supreme Law of the Land.[8] Indeed, this Court long

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[8] The suggestion floated by one member of the en banc majority – who hypothesized that this Court deliberately "omitted" the Constitution from its "list of sources" that can "nullif[y] the discretionary function exception," Pet. App. 42a – makes no sense. Equally unpersuasive is his suggestion (echoed by the Government in its brief before the en banc court) that the Government's failure to waive sovereign immunity for constitutional claims justifies extending the discretionary function exception to unconstitutional conduct. *See* Pet. App. 42a-46a. Petitioners' *causes of action* do not arise under the Constitution. Rather, they arise under state law, and the Government has affirmatively waived its immunity. 28 U.S.C. § 1346(b)(1).

Moreover, everyone agrees that if Government employees make choices that give rise to state-law claims and those choices also violate federal *statutes* or *regulations*, the discretionary function exception is unavailable. *See supra* 16-20; *see also Spotts*, 2010 WL 2991759 at *5. This is true regardless of whether the Government would consent to suit based directly on the violated statute or regulation. Neither the Government nor Judge Smith has provided any reason for thinking a different result should obtain if Government employees made choices that

ago recognized that governments have "no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

The fact that there may be several potential permissible courses of conduct in a given situation – and that the Government may be entitled to invoke the discretionary function exception when choosing from among that range – does not undercut the fact that conduct prohibited by the Constitution lies outside the range and is therefore unprotected. *See Berkovitz*, 486 U.S. at 537 (the exception protects choices within a "permissible" range); *Gaubert*, 499 U.S. at 325 (same).

The Fifth Circuit's failure to consider whether Government employees have acted in excess of their statutory authority suffers as well from an additional flaw. Almost by definition, when Government officials act outside the scope of their statutory authorization, there will not be a "mandate" directing them to take a "specific course of action," Pet. App. 66a-67a (internal quotations omitted), in a sphere they should not have entered in the first place. But under the Fifth Circuit's rule, the further outside the scope of their authority they act, the more likely their acts are to be considered discretionary.[9]

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give rise to state-law claims and those choices also violate the Constitution. Indeed, such a differentiation seems perverse.

[9] Nor will this anomaly be cured by the second prong of the Fifth Circuit's test. That prong asks "whether the judgment is grounded in social, economic, or political policy. If the judgment of the governmental official is based on any of these policy

2. This case provides an ideal vehicle for clarifying the scope of the discretionary function exception. There are no procedural obstacles to reaching the question presented. Moreover, the question is outcome-determinative. If the Fifth Circuit had applied the legal standard employed by seven other circuits, it would have found subject-matter jurisdiction here because the facts petitioners alleged plausibly establish that the officers acted outside of their statutory and constitutional authority.

a. *Statutory authority.* The Non-Detention Act, 18 U.S.C. § 4001(a), provides that "[n]o citizen" shall be "detained by the United States except pursuant to an Act of Congress." The Border Patrol's authority to detain U.S. citizens is sharply circumscribed. As Judge Stewart's panel opinion and en banc dissent explain, federal law authorizes the Patrol to detain citizens only in limited circumstances not present here. Pet. App. 13a-14a, 35a-38a; *see* 8 U.S.C. § 1357(a) (permitting detention only in connection with certain crimes allegedly committed by the citizen).

In recognition of this circumscribed authority, the Government recently acknowledged that it is a violation of federal policy to "knowingly hold a U.S. citizen child in detention." Department of Homeland

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considerations, then the discretionary function exemption applies and the claim is barred." *Garza*, 161 Fed. Appx. at 344 (internal citation omitted). As the decision in this case shows, the Fifth Circuit answers that question without asking whether federal law authorized *this* official or agency to make policy choices in a particular area.

Security, Office of Inspector General, Removals Involving Illegal Alien Parents of United States Citizen Children 11 (OIG-09-15 Jan. 2009):[10]

> Known U.S. citizens are not placed in immigration detention. ICE officials said that if CBP [Customs and Border Protection] or ICE identifies the child as a U.S. citizen, the child is released to the parent's designated custodian or to Child Protective Services.

Id.

In light of the scope of their authority, the agents in this case had several permissible options: they could have released R.M.G. to her mother; they could have released her to an adult designated by Gallardo; or they could have released her to Child Protective Services. What they had no jurisdiction to do was to continue holding her in immigration detention. Their decision to do so was *ultra vires*. Put another way, the fact that no federal law told them precisely what to do with R.M.G. in the sense of identifying a specific, mandatory course of action does not change the fact that the path they chose lay outside the permissible range.

Any suggestion that somehow the Government was not detaining R.M.G. will not wash. The Government locked the baby in a holding cell and denied access to her mother. Pet. App. 84a. When

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[10] The OIG Report was issued while this case was under submission and was brought to the attention of the en banc court. *See* En Banc C.A. Br. of Appellant Castro at 10-11, 39-40 (quoting the Report).

petitioner invoked the child's right to be released from immigration detention, the agents continued to keep her there. The Government then transported the infant hundreds of miles in a locked official vehicle to which the public had no access.

The fact that Gallardo was also, and undeniably, in immigration custody is irrelevant. Children are not barnacles attached to their parents. *Cf. Franz v. United States*, 707 F.2d 582, 590-94 (D.C. Cir. 1983) (finding the Government amenable to suit by a father who claimed deprivation of his state-law and federal constitutional rights to access to his children when the Government permitted his ex-wife to take them with her into the Witness Protection Program). Because the agents acted *ultra vires*, their acts are not shielded by the discretionary function exception.[11]

Moreover, because the courts below focused only on whether federal law provided a mandate for a "specific" course of action, they ignored the fact that the agents' conduct undermined well-established federal policy by enabling Gallardo to remove R.M.G. from the country. The International Parental

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[11] Still less did the Border Patrol act within its statutory authorization when it removed R.M.G. to Mexico. For nearly ninety years, it has been black-letter law that Government agents have no power to remove U.S. citizens. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (finding that such authorization "exists only if the person arrested is an alien"). In fact, the official "Record of Persons and Property Transferred" prepared by the Government omitted R.M.G. from the list of persons being turned over to Mexican authorities, because the officers recognized that she was a U.S. citizen over whom they had no authority. R. 533:49 to 534:55.

Kidnapping Crime Act, 18 U.S.C. § 1204(a) forbids removing a child from the United States "with intent to obstruct the lawful exercise of parental rights." The Act applies to parents as well as strangers. Gallardo's actions showed his intention to deny Castro the parental rights she possessed under Texas law. The Government not only allowed him to take the child with him to Mexico, despite knowing that Castro was pursuing a judicial order to keep her daughter in the United States under her custody, but it then failed to obtain an address or any other information that would have enabled petitioner to protect her rights. In doing so, the agents also undermined the federal policy embodied in the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99-11, to which the United States is a signatory. That treaty expresses a strong intention that child custody issues be adjudicated in the country of the child's habitual residence – here, the United States. *See Abbott v. Abbott*, 130 S. Ct. 1983 (2010). By whisking R.M.G. out of the country within hours of seizing her, the Border Patrol undermined that strong federal preference.

b. *Constitutional authority.* The factual allegations in petitioners' complaint also establish constitutional violations. To be clear: those violations are not the bases for petitioners' claims under the FTCA; Texas law is. But unconstitutional conduct defeats the discretionary function exception. *See supra* 21-22.

Petitioners have alleged facts that establish a violation of R.M.G.'s Fourth Amendment right to be free from an unreasonable seizure. To be sure, the

Government acted reasonably in taking R.M.G. to the stationhouse; no one suggests the agents should have left a one year-old child alone. *Cf.* Tex. Fam. Code § 261.001(4)(A) (defining neglect to include leaving a child in a risky situation without arranging "necessary care"). But because the agents knew R.M.G. was a U.S. citizen, they had no authority to hold her in immigration detention. Once her mother, petitioner Castro, invoked R.M.G.'s right to be released, Gallardo's wishes could not trump R.M.G.'s constitutional rights. *Cf. Georgia v. Randolph*, 547 U.S. 103 (2006) (if either resident of a house refuses consent to a search, the Government cannot search).

Second, petitioners' factual allegations establish a violation of R.M.G.'s Fifth Amendment "constitutional right to remain" in the United States. *Afroyim v. Rusk,* 387 U.S. 253, 268 (1967). "To deport one who . . . claims to be a citizen, obviously deprives him of liberty" and "may result also in loss . . . of all that makes life worth living." *Ng Fung Ho,* 259 U.S. at 284. Still more is this true when the Government *knows* that the person being transported out of the country is a citizen, particularly an infant citizen who cannot speak for herself but whose mother is seeking a court order that would prevent her removal.

Third, petitioners' factual allegations establish a violation of their Fifth Amendment substantive and procedural due process rights with respect to familial relationships. The interest of parents "in the care, custody, and control of their [children] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65

(2000). The rights of children to the love, care, and guidance of their families are equally fundamental.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court recognized that even in cases of parental neglect, parents must be given due process before they are stripped of "the rights ever to visit, communicate with, or regain custody of the child." *Id.* at 749. In this case, by contrast, the Border Patrol affirmatively undermined petitioners' constitutional rights by shoving R.M.G. on a bus bound for the border within hours of seizing her and in full knowledge that its actions would undercut Castro's invocation of procedures that would preserve her parental rights. This unconstitutional conduct cannot fall within the discretionary function exception.

II. Certiorari Should Be Granted To Decide The Applicability Of The Discretionary Function Exception To Claims That Fall Within The Law Enforcement Proviso.

As the Fourth Circuit noted in *Medina v. United States,* 259 F.3d 220, 224 (4th Cir. 2001), the federal courts of appeals have "struggled" in deciding the "unsettled" question "whether and how to apply the [discretionary function] exception in cases brought under the intentional tort proviso found in § 2680(h)." This struggle has not produced consensus. To the contrary, the courts of appeals are not just divided; they are splintered. This Court's intervention is required.

A. The Courts Of Appeals Have Adopted Wildly Different Approaches To Reconciling The Law Enforcement Proviso And The Discretionary Function Exception.

1. The positions taken by courts of appeals with respect to the relationship between the law enforcement proviso and the discretionary function exception run the gamut. The rule in the Eleventh Circuit is straightforward: "[S]overeign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244, 1256-57 (11th Cir. 2009). "[I]f a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event." *Id.* at 1257. In a false arrest, false imprisonment, and malicious prosecution case based on the DEA's investigation of the plaintiff's medical practice, the court rejected the Government's claim that the discretionary function exception applied because agents made a series of judgments about how to conduct the investigation. Instead, it held that "to the extent of any overlap and conflict between [the law enforcement] proviso and subsection (a), the proviso wins." 556 F.3d at 1252-53. It based that conclusion on "[t]wo fundamental canons of statutory construction, as well as the clear Congressional purpose behind the § 2680(h) proviso." *Id.* at 1252. First, Section 2680(h), "which applies only to six specified claims arising from acts of two specified types of government officers, is more specific than the discretionary function exception in § 2680(a)," and "a

specific statutory provision trumps a general one." 556 F.3d at 1253. Second, Section 2680(h) was amended after the enactment of Section 2680(a), and "[w]hen subsections battle, the contest goes to the younger one." 556 F.3d at 1253.

The Eleventh Circuit found further support for its position in the legislative history of the 1974 amendment that had added the law enforcement proviso to Section 2680(h). *See id.* at 1253-56. In light of the text and purpose, the court saw no justification for "rewriting the words 'any claim' in the proviso to mean only claims based on the performance of non-discretionary functions." *Id.* at 1256.

The Eleventh Circuit described "five other circuits" as refusing to adopt its categorical approach. See *id.* at 1257 (citing cases).[12] But it believed that those courts had failed to apply the appropriate canons of statutory construction and had not "com[e] to grips with the clear congressional purpose behind the enactment of the proviso to subsection (h)." *Id.*

The Second Circuit's approach in *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982), also relied on congressional purpose to hold that the discretionary function exception would not control cases falling within the law enforcement proviso. The underlying

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[12] It thought, however, that its approach was consistent with that taken by the Fifth Circuit. *See Nguyen*, 556 F.3d at 1257 (citing *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987). *But see infra* 33-34 (describing the Fifth Circuit's current position).

claim – for false imprisonment – arose from immigration officials' decision to detain the plaintiff in the mistaken belief that he was not a U.S. citizen. Applying the discretionary function exception to law enforcement conduct, which often involves "competing considerations," would "jeopardize a primary purpose for enacting § 2680(h)." 671 F.2d at 1234-35. Because "the basically mechanical duty" of deciding whether an individual satisfied the standards for entry into the U.S was less complex than the search-and-seizure related conduct that had prompted enactment of Section 2680(h), "Caban's seems an a fortiori case for allowing suit." *Id.*

2. The District of Columbia adopted the opposite categorical rule in *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). That case involved a gross negligence and malice claim by a former Acting Director of the FBI with respect to how the Justice Department had investigated him.

The D.C. Circuit affirmed dismissal of the suit, squarely rejecting Gray's claim that the discretionary function exception did not apply to suits "authorized by the 'investigative or law enforcement officer' proviso of section 2680(h)." 712 F.2d at 507. It saw the "plain language" of Section 2680(a) as "unambiguous" in making "the FTCA's general waiver of sovereign immunity . . . inapplicable to '*any* claim' based on a discretionary function." *Id.* Thus, it held that plaintiff "must clear the 'discretionary function' hurdle *and* satisfy the 'investigative or law enforcement officer' limitation to sustain" a claim under the FTCA. *Id.* at 508.

The Fourth Circuit adopted the D.C. Circuit's rule in *Medina*, *supra*. Relying on *Caban*, the court acknowledged that INS agents fit within Section 2680(h). But it sua sponte invoked the discretionary function exception to hold that Medina's claims were barred. 259 F.3d at 224. *See also Welch v. United States*, 409 F.3d 646, 651-52 (4th Cir. 2005).

The Ninth Circuit has also aligned itself with the D.C. Circuit. *See Gasho v. United States*, 39 F.3d 1420, 1433 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995) (holding that when there is "interplay" between the law enforcement proviso and the exceptions contained in the remainder of Section 2680, the exceptions control, despite recognizing that this rule would "effectively ba[r] any remedy" for some of the claims authorized by the proviso). While pre-*Gaubert* Ninth Circuit decisions had suggested that the discretionary function exception might not apply to conduct by line-level officers, *see, e.g., Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987); *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983), courts within the circuit now apply the discretionary function exception to cases falling within the law enforcement proviso. *See, e.g.*, *Casillas v. United States*, 2009 U.S. Dist. LEXIS 25662, at *56-57 (D. Ariz. 2009).

3. The Third Circuit, in *Pooler v. United States*, 787 F.2d 868 (3d Cir.), *cert. denied*, 479 U.S. 849 (1986), attempts to reconcile the discretionary function exception and the law enforcement proviso by holding that the proviso authorizes suits for the list of torts enumerated in Section 2680(h) only when those torts are committed during the course of a search, a seizure, or an arrest. *Id.* at 872. Thus,

although the Government employee in that case was a law enforcement officer, the proviso did not apply because the allegedly tortious conduct involved investigative methods and filing an unfounded complaint with state authorities.

The Seventh Circuit has in turn squarely rejected the Third Circuit's approach, viewing it as "unduly narrow and lacking any principled underpinning," *Reynolds v. United States*, 549 F.3d 1108, 1114 (7th Cir. 2008)(citation omitted).

4. In this case, the Fifth Circuit has aligned itself with the strongest version of the D.C. Circuit's position. The district court recognized that the "law enforcement proviso of 28 U.S.C. § 2680(h) applies to Plaintiffs' assault, abuse of process and false imprisonment claims." Pet. App. 65a n.9. Nevertheless, the court proceeded to apply the discretionary function exception without taking account of the law enforcement proviso in any way.

In the en banc proceedings, petitioners pointed to the Eleventh Circuit's decision in *Nguyen*, which had been issued two weeks prior to the panel decision. *See* Appellants' En Banc C.A. Brief at 7, 25. They further explained that *Nguyen* was in accord with an earlier Fifth Circuit opinion in *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987), which had declined to apply the discretionary function exception to claims authorized by the law enforcement proviso.

Nevertheless, and over the strong dissent of Judges DeMoss and Dennis, who invoked *Nguyen* and *Sutton*, the per curiam majority adopted the district court's discretionary function analysis

wholesale, Pet. App. 3a, without addressing the salience of Section 2680(h).

B. The Discretionary Function Exception Does Not Strip Federal Courts Of Subject Matter Jurisdiction Over Claims That Fall Within The Law Enforcement Proviso.

The Eleventh Circuit has adopted the correct rule: Federal courts have subject matter jurisdiction over cases within the law enforcement proviso even if law enforcement agents were "performing a "discretionary function" within the meaning of Section 2680(a).

1. Straightforward principles of statutory construction require this result. First, the language of Section 2680(h) is categorical. It provides that "with regard to acts or omissions" by law enforcement officers, 28 U.S.C. § 1346(b), which confers subject-matter jurisdiction on the federal district courts, "*shall* apply to *any* claim arising. . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" (emphasis added). It does not distinguish between ministerial and discretionary acts.

Second, as this Court reiterated last Term, a "specific provision" in a statute "controls one[s] of more general application." *Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) (quoting *Gozlon-Peretz v. United States,* 498 U.S. 395, 407 (1991)). The law enforcement proviso of Section 2680(h) pinpoints an enumerated list of torts committed by an identified group of government employees. It is thus far more specific than the discretionary function exception.

See Nguyen, 556 F.3d at 1253. Moreover, the fact that the law enforcement proviso was passed later in time reinforces the conclusion that it should control.

2. Applying the discretionary function exception to cases that fall within the law enforcement proviso produces perverse results. This Court has recognized our Nation's "well established tradition of police discretion." *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760 (2005). There is generally a good deal of "room for choice," *Gaubert*, 499 U.S. at 324, in deciding whether and how to conduct an investigation, engage in a search, or seize an individual. If courts were to apply the discretionary function exception to law enforcement personnel, the discretionary function exception would swallow up the law enforcement proviso.[13]

It is no answer, given the Fifth and Seventh Circuits' willingness to extend the discretionary function exception to unconstitutional conduct, *see supra* 19-21, to say that the proviso would retain meaning in cases where law enforcement officials engage in conduct that is also unconstitutional Absent a reversal by this Court, even

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[13] Prior to *Gaubert*, several courts tried to harmonize the two provisions by suggesting that law enforcement officers were "operational" actors whose work simply did not involve exercises of discretion. *See, e.g.*, *Garcia*, 826 F.2d at 809; *Pooler*, 787 F.2d at 872. But *Gaubert* decisively held that the discretionary function exception "is not confined to the policy or planning level," but can reach "operational" conduct as well. 499 U.S. at 325.

unconstitutional conduct would be shielded in those two circuits by the discretionary function exception.

3. In any case, limiting plaintiffs' ability to bring suit under section 2680(h) only to instances where law enforcement conduct is unconstitutional as well as tortious would defy Congress's clearly expressed intent. The 1974 Senate Report accompanying addition of the law enforcement proviso to Section 2680(h) explained that the proviso

> should not be viewed as limited to constitutional tort situations but would apply to *any* case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

S. Rep. No. 93-588, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 2789, 2791) (emphasis added). Congress thus expressly acquiesced to suit even in cases that would otherwise fall within the discretionary function exception. *See also* Jack Boger, Mark Gitenstein, & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Tort Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497, 515 (1976) (reviewing the legislative history of the proviso at length and explaining that the proponents were "clearly insistent" that the FTCA be available even in cases where plaintiffs could not bring *Bivens* actions).

The most sensible reading of Section 2680(h) recognizes that the law enforcement proviso creates subject-matter jurisdiction over the enumerated list of state-law claims when they arise in the course of federal law enforcement activity.

4. Finally, this case provides an appropriate vehicle for resolving this recurring question of federal law in light of the increasing disarray demonstrated by the recent decisions in *Nguyen*, *Reynolds*, and this case. There is no question that petitioners' complaint alleged causes of action that fall within the law enforcement proviso. Pet. App. 92a-95a (alleging false imprisonment, abuse of process, and assault, each of which is enumerated in Section 2680(h)). Nor is there any question that the Government employees involved were law enforcement officers engaged in law enforcement activity at all times relevant to this suit. Pet. App. 65a n.9; *see Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (holding that Border Patrol agents are law enforcement officers for purposes of Section 2680(c)); *cf. Medina*, 259 F.3d at 224 (holding that INS agents are law enforcement officers within the meaning of Section 2680(h)); *Caban*, 671 F.2d at 1234 (same).

Moreover, the conflict is outcome determinative. If petitioners' case had arisen in the Eleventh Circuit, there clearly would have been subject-matter jurisdiction over their false imprisonment, abuse of process, and assault claims, since that court does not even consider whether the conduct giving rise to such claims involved discretionary acts. So, too, in the Second Circuit.

And although the remaining circuits would apparently require petitioners to "clear the 'discretionary function' hurdle," *Gray*, 712 F.2d at 508, many of them would still reach a different result than the Fifth Circuit en banc because in those circuits, allegations establishing that the agents'

conduct was *ultra vires* or unconstitutional would defeat the discretionary function exception.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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