No. 07-40416

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MONICA CASTRO, for Herself and as Next Friend
of R.M.G., a Minor Child,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF OF THE UNITED STATES OF AMERICA ON REHEARING EN BANC

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331 and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680. Record on Appeal ("ROA") 102 (Amended Complaint ¶3). The district court dismissed plaintiffs' claims under the Federal Tort Claims Act for lack of subject matter jurisdiction on February 9, 2007, and dismissed the remainder of plaintiffs' suit and entered judgment on April 4, 2007. ROA 992-1019, 1029-37. Plaintiffs filed a timely notice of appeal on April 23, 2007. ROA 1049-50. To the extent the district court

possessed subject matter jurisdiction over plaintiffs' claims, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether a plaintiff under the Federal Tort Claims Act may seek recovery for claimed negligence in the performance of a federal official's discretionary function on the basis of general allegations of constitutional misconduct.

2. Whether Border Patrol agents exercised a discretionary function when, incident to the processing and repatriation of a Mexican national, the agents declined to remove the individual's infant daughter from his care in the absence of a state custody order to that effect.

STATEMENT OF THE CASE

When Omar Gallardo, a Mexican national, was detained and returned to Mexico by the U.S. Border Patrol, federal officers allowed his infant daughter to remain in his care. The child's mother, Monica Castro, brought suit on behalf of herself and her daughter under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680 ("FTCA"), claiming that the Border Patrol officers' refusal to forcibly remove the infant from Gallardo and place her in Castro's custody violated the Fourth and Fifth Amendments and several provisions of state tort law.

The district court dismissed plaintiffs' suit with prejudice, holding that the government's conduct fell within the FTCA's discretionary function exception. A divided panel of this

Court reversed, reasoning that plaintiffs' constitutional allegations might be sufficient to render the discretionary function exception inapplicable. The full Court vacated the panel's opinion and ordered that the case be reheard en banc.

STATEMENT OF THE FACTS

I. Statutory Framework

The FTCA creates a cause of action against the United States for negligent or wrongful acts of federal employees within the scope of their 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." 28 U.S.C. § 1346(b)(1). The statute does not subject the United States to suit for constitutional claims or violations of federal law. FDIC v. Meyer, 510 U.S. 471, 477-78 (1994).

Liability under the statute is also limited by several exceptions, including an exception for 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." 28 U.S.C. § 2680(a). This discretionary function exception serves "to prevent judicial second-guessing of legislative and administrative decisions . . . through the medium of an action in tort." United States v. Gaubert, 499 U.S. 315, 323 (1991) (quotation marks omitted).

II. Factual Background

1. Plaintiff Monica Castro, a United States citizen, and Omar Gallardo, a Mexican national, lived together near Lubbock, Texas where Castro gave birth to their daughter, R.M.G. ROA 993 (Order at 2). On November 29, 2003, shortly before R.M.G.'s first birthday, Castro left Gallardo and their daughter following an argument. ROA 993-94 (Order at 2-3). Castro contacted Texas Child Protective Services, the county sheriff's department, and the county police department later that day to determine how to obtain custody of the child. ROA 994-95 (Order at 3-4).

All three agencies informed Castro that she and Gallardo shared parental rights and that she would need to hire an attorney to seek a custody order. ROA 185-86 (Castro Dep. at 31-32); ROA 224 (Rodriguez Dep. at 12); ROA 995 (Order at 4). Child Protective Services suggested that Castro fill out an application to obtain assistance in securing custody. ROA 995 (Order at 4). Castro did not do so, allegedly because she did not wish to wait one to two days for the process to be completed. Id.

2. Instead, two days later, Castro went to the local U.S. Border Patrol station to report Gallardo as an illegal alien. ROA 995-96 (Order at 4). When Castro asked a Border Patrol agent whether she could recover R.M.G. from Gallardo, the agent contacted the sheriff's department. ROA 241-42 (Sanchez Decl. at 1-2). The agent was informed that "the best thing for [Castro] to do was obtain a court order from a Judge ordering her

husband to release the child to her." ROA 242 (Sanchez Decl. at 2); ROA 862 (Sanchez Dep. at 115-16); ROA 952 (Sanchez Mem. at 2). Based on this conversation, the Border Patrol agent advised Castro to obtain a court order for temporary custody of the child "as soon as possible." ROA 243 (Sanchez Decl. at 3); ROA 952 (Sanchez Mem. at 2).[1] The agent also suggested that if Castro were present when Gallardo was apprehended, she could take custody of the child. ROA 996 (Order at 5). Castro did not seek a state custody order, and declined to be present when the agents visited Gallardo. ROA 996-97, 1008-10 (Order at 5-6, 17-19).

3. Acting on the information provided by Castro, the Border Patrol apprehended Gallardo two days later, at approximately 7:00 in the morning. ROA 865 (Sanchez Dep. at 142-43). Gallardo had R.M.G. with him when he was taken into custody, and took her with him to the Border Patrol station. ROA 997 (Order at 6). Castro observed the proceedings from a relative's home across the street, but did not make her presence known to the Border Patrol agents. Id.; ROA 851 (Castro Dep. at 58-61).

Castro arrived at the Border Patrol station soon after, and requested that R.M.G. be taken from Gallardo and placed in her care. ROA 997 (Order at 6). The Border Patrol then informed

[1]Although plaintiffs contend (Supp. Br. 3) that the Border Patrol agent "never informed Ms. Castro during that December 1 meeting that the Border Patrol would require a court order to deliver the baby to her," the evidence cited by plaintiffs does not deny that the agent advised Castro to seek such an order as soon as possible.

Gallardo that Castro had come to the station and had asked for their daughter; Gallardo responded that Castro had abandoned him and their baby and that he did not want to give R.M.G. to Castro. Id.; ROA 249 (Kurupas Decl. at 2).

The Border Patrol agents contacted the Texas Department of Family and Protective Services to determine whether the state agency could resolve the custody dispute, informing the agency of the parents' conflicting accounts. ROA 249 (Kurupas Decl. at 2); ROA 998 (Order at 7). State officials instructed the Border Patrol that "the father had the right to the child," and that, absent allegations of harm to the infant, the Department was "not in a position to take the child away from the parent that had physical custody" and would not become involved in the dispute. ROA 245 (Sanchez Decl. at 5); ROA 249 (Kurupas Decl. at 2); ROA 949 (Kurupas Mem. at 2); ROA 953 (Sanchez Mem. at 3); ROA 246 (Perkins-McCall Decl. at 1).

Gallardo admitted that he was in the United States illegally. ROA 274 (I-213, at 2). Accordingly, the Border Patrol prepared to return him to Mexico on the agency's daily transport, which was required to leave no later than 3:15 p.m. to ensure that it would arrive in Mexico at a reasonable hour. ROA 998 (Order at 7); ROA 249 (Kurupas Decl. at 2).

At around 1:30 p.m., Castro retained an attorney to seek a temporary custody order for R.M.G. ROA 998 (Order at 7). The attorney drafted the necessary paperwork and proceeded to the

courthouse, but was unable to obtain a signed order before the transport departed. ROA 998-99 (Order at 7-8). Although the transport takes approximately seven hours to travel to Mexico, ROA 916 (Garcia Dep. at 64), Castro's attorney did not pursue the matter further after the transport departed. ROA 934 (Kurupas Dep. at 120); ROA 999 (Order at 8). Gallardo was thus repatriated to Mexico accompanied by his daughter. ROA 999 (Order at 8).

III. Prior Proceedings.

1. Castro brought suit against the United States on behalf of herself and R.M.G., seeking relief under the Fourth and Fifth Amendments, the FTCA, and the Immigration and Nationality Act, 8 U.S.C. §§ 1101 et seq. ROA 102 (Amended Complaint ¶2). Castro alleged that the Border Patrol had acted tortiously by allowing Gallardo to retain custody of his infant daughter while he was processed for removal and subsequently returned to Mexico. Castro asserted claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault, ROA 110-114 (Amended Complaint ¶¶54-77), and sought damages of $2.5 million apiece for herself and R.M.G. ROA 114-115 (Amended Complaint at 13-14).

The district court dismissed plaintiffs' suit, holding inter alia that their FTCA claims were barred by the discretionary function exception, 28 U.S.C. § 2680(a). The court explained that the exception applies to discretionary conduct that is "the

product of 'judgment or choice'" and "susceptible to policy analysis." ROA 1007, 1014 (Order at 16, 23) (citations omitted).

The court held that the Border Patrol's actions met both of these criteria. The court noted that Castro had been informed repeatedly by state and local agencies that she would need to obtain a court order before she would be entitled to take her daughter from Gallardo, and that Castro had declined to do so. ROA 1008-09 (Order at 17-18). Instead, Castro had waited two days before contacting the Border Patrol to declare that Gallardo was an illegal alien. Id. When Gallardo was taken to the Border Patrol station two days later, "very early in the morning," Castro had waited six hours before seeking a court order and then abandoned her efforts once Gallardo and R.M.G. were placed on the transport to Mexico. ROA 1009-10 (Order at 18-19).

Castro's "decision not to be present at the time of the arrest" and "not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico" presented the Border Patrol with "an untenable decision: either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to Mexico." ROA 1010, 1014 (Order at 19, 23). The court found "no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action" in these

circumstances, and held that the officers' actions were the product of judgment or choice. ROA 1011 (Order at 20).

Those actions were likewise susceptible to policy analysis. As the court explained, the options available to the Border Patrol were "(1) forcibly removing R.M.G. from Mr. Gallardo and placing her with Ms. Castro; (2) expending further resources in detaining Mr. Gallardo in Lubbock while Ms. Castro belatedly sought a court custody order; or (3) allowing R.M.G. to accompany her father to Mexico." ROA 1015 (Order at 24). Such decisions, involving the treatment of an infant child in possession of a foreign national under the Border Patrol's authority, were "unequivocally subject to policy analysis." ROA 1016 (Order at 25).

The court accordingly dismissed plaintiffs' FTCA claims for lack of jurisdiction. ROA 1019 (Order at 28). The court dismissed the remainder of plaintiffs' claims as nonjusticiable, and entered judgment for the United States. Id.; ROA 1029-36 (Doc. 42); ROA 1037 (Doc. 43).

2. A divided panel of this Court reversed. The panel did not question that the conduct at issue was of the kind protected by the discretionary function exception. The majority noted, however, that the discretionary function exception does not apply when "a statute, regulation, or policy mandates a specific course of action," and reasoned that discretion would likewise be precluded in the face of alleged constitutional violations where

"there is a specific and intelligible constitutional mandate that involves or is related to the alleged intentional torts of the accused officer(s)." Castro v. United States of America, 560 F.3d 381, 387, 390 (5th Cir.), reh'g granted 581 F.3d 275 (5th Cir. 2009) (citations omitted). The panel concluded that Castro's allegations were sufficient to describe a specific directive that would preclude the exercise of discretion, and accordingly remanded "for the district court to consider in the first instance to what extent the alleged constitutional violations are cognizable under Castro's FTCA claims." Id. at 392.

Judge Smith dissented. The dissent noted that the FTCA does not waive the United States' sovereign immunity for alleged constitutional torts, which may be redressed by money damages only through suits against individual officers under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Castro, 560 F.3d at 393-94 (Smith, J., dissenting). By holding Castro's generalized constitutional claims sufficient to overcome the discretionary function exception, the majority had "turn[ed] Bivens on its head" by providing that "the United States may be liable for conduct even where its officers cannot be," in instances where the conduct alleged was not clearly contrary to the Constitution. Id. at 394. Judge Smith emphasized that the Border Patrol had not violated any constitutional provision, clear or otherwise: the agency had allowed the infant's parent to

make decisions affecting her welfare, and in so doing had chosen the course "that least enmeshed the federal government in state custody issues" by "elect[ing] not to interfere with the status quo as R.M.G.'s parents had left it." Id. at 396-97.

The United States petitioned for rehearing en banc, which the full Court granted on August 28, 2009.

SUMMARY OF THE ARGUMENT

When Omar Gallardo was detained and returned to Mexico by the U.S. Border Patrol, federal officers allowed his one-year-old daughter to remain in his care rather than forcibly removing her to Monica Castro's custody. Castro does not contend that she had greater rights to the child. Despite repeated advice from both state and local agencies and the Border Patrol that she should seek a state court order to establish superior custody rights, Castro declined to do so. When she ultimately did seek a court order in the few hours before Gallardo was scheduled to return to Mexico, she was accordingly unable to obtain one.

In these circumstances, Border Patrol agents were faced with the unenviable task of choosing between two parents' conflicting desires for their daughter. Federal officers asked state child services for guidance; when the state agency refused to alter the status quo between the parents, the federal agents did the same and declined to remove the infant from Gallardo's care. No provision of federal law required the Border Patrol agents to do otherwise, and the officers' actions reflect precisely the type

of decisionmaking that the FTCA's discretionary function exception was designed to protect.

Castro's allegation that the agents' actions violated the Fourth and Fifth Amendments does not alter that analysis. The Supreme Court has held that the actions of federal officers do not qualify as discretionary only when a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Gaubert, 499 U.S. at 322 (emphasis added) (quotation marks omitted). That principle applies equally to alleged constitutional violations. Where, as here, a plaintiff fails to show that the actions of federal officers violated any clearly established constitutional mandate, the discretionary function exception precludes recovery under the FTCA for decisions susceptible to policy analysis.

That conclusion is underscored by the longstanding doctrine of official immunity, which Congress incorporated through the discretionary function exception, as well as by the qualified immunity applied in parallel Bivens actions against federal officers. Such immunity forecloses liability for officers' decisionmaking even when their conduct violates the Constitution, as long as the constitutional right was not defined sufficiently specifically that the official should have known the act was prohibited. The discretionary function exception entitles the United States to like treatment when it is substituted for its officers under the FTCA. To hold otherwise would thwart the

exception's purpose, allow plaintiffs to invoke constitutional claims to obtain recovery under the FTCA even where no Bivens action is available, and deter federal officers from the effective exercise of judgment in the course of their duties.

STANDARD OF REVIEW

This Court reviews a dismissal for lack of subject matter jurisdiction de novo, with any factual findings reviewed for clear error. United States ex rel. Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 376 (5th Cir. 2009).

ARGUMENT

I. The FTCA's Discretionary Function Exception Cannot Be Overcome By Alleging A Constitutional Violation That Is Not Clearly Established.

The discretionary function exception limits the FTCA's waiver of immunity, barring claims "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." 28 U.S.C. 2680(a). The exception prevents a plaintiff from testing "the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act . . . through the medium of a damage suit for tort," United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 809-10 (1984) (citation omitted), and applies whenever a federal officer's action involves "'an element of judgment or choice'" and is "susceptible

to policy analysis." Gaubert, 499 U.S. at 322, 325 (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

The district court and the panel majority and dissent agree that the acts at issue here are of the type protected by the discretionary function exception. The sole point of disagreement is whether plaintiffs' allegations of unconstitutional conduct are sufficient to exclude those acts from the ambit of the exception.

The Supreme Court has explained that when a "'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,'" the government has already exercised relevant policy discretion and there is no further discretion to exercise. Gaubert, 499 U.S. at 322 (quoting Berkovitz, 486 U.S. at 536) (emphasis added). Plaintiffs misconstrue this analysis, contending that conduct cannot fall within the discretionary function exception if it is alleged to be unconstitutional. Pl. Supp. Br. 17-19.

That contention is squarely at odds with principles of official immunity that formed the backdrop to the FTCA and which were incorporated by Congress. The Supreme Court has long recognized that conduct may be discretionary even if it is later determined to have violated the Constitution. The common law doctrine of official immunity thus applies to the exercise of "discretionary functions" even when conduct violates the Constitution, as long as the constitutional right was not defined

sufficiently specifically that the official should have known the act was prohibited. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (emphasis added)).

The FTCA provided plaintiffs with a claim against the United States in place of claims against federal employees personally.[2] In enacting the statute, Congress did not set aside recognized principles of official immunity. See Comment, The Federal Tort Claims Act, 56 Yale L.J. 534, 545 (1947) ("The immunity thus retained is in accord with the generally accepted doctrine of the non-liability of public officers for acts involving the exercise of judgment and discretion.") (cited by In re Tex. City Disaster Litig., 197 F.2d 771, 778 (5th Cir. 1952)). Any doubt that might otherwise have existed on that score was removed by the inclusion of an explicit discretionary function exception. See Varig Airlines, 467 U.S. at 810 ("It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial

[2]When the FTCA was originally enacted, plaintiffs could elect whether to pursue an FTCA suit against the United States or an action against an individual federal officer. In enacting the Westfall Act, Congress mandated the substitution of the United States as defendant for federal employees in claims arising out of acts in the scope of their employment. 28 U.S.C. § 2679(d).

construction; nevertheless, the specific exception was added to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action."). Thus, when the Court in Berkovitz held that a federal mandate must "specifically prescribe" conduct in order to overcome the discretionary function exception, it reasoned by analogy from official immunity precedent, underscoring that the two standards are to be read in tandem. See 486 U.S. at 536 (citing Westfall v. Erwin, 484 U.S. 292, 296-97 (1988)).

The limit on discretionary functions described in Berkovitz and later cases is thus not triggered by every allegation of unlawful conduct, as plaintiffs contend (Supp. Br. 12-19), but only by a showing that discretion was cabined by a specific, mandatory directive. See, e.g., Freeman v. United States, 556 F.3d 326, 339 (5th Cir.) ("'Statements made at this level of generality do not satisfy Gaubert's and Berkovitz's specific prescription requirement.'" (citing cases)), cert. denied, 130 S. Ct. 154 (2009); Elder v. United States, 312 F.3d 1172, 1177 (10th Cir. 2002) ("The issue before us is whether the guidelines are sufficiently specific to remove decisionmaking under them from the discretionary function exception."); Sutton v. Earles, 26 F.3d 903, 909 (9th Cir. 1994) (same) (quoting Berkovitz, 486 U.S. at 544); C.R.S. by D.B.S. v. United States, 11 F.3d 791, 799 (8th Cir. 1993) (same) (citing Berkovitz, 486 U.S. at 536, 544)); Fazi v. United States, 935 F.2d 535, 538 (2d Cir. 1991) (same);

Dube v. Pittsburgh Corning, 870 F.2d 790, 794 (1st Cir. 1989) (same).[3] This requirement of specificity applies to constitutional, statutory, and regulatory obligations alike. The exception's purpose, "to prevent judicial second-guessing of legislative and administrative decisions . . . through the medium of an action in tort," Gaubert, 499 U.S. at 323 (quotation marks omitted), is implicated in equal measure whether the mandatory duty alleged to remove an officer's conduct from the ambit of the exception is based on a statute, regulation, or constitutional provision. Indeed, plaintiffs acknowledge (Supp. Br. 20-21) that the exception must be read to treat constitutional prescriptions in like fashion to statutory and regulatory ones.

A constitutional mandate, no less than a federal statutory or regulatory one, can eliminate an official's discretion when it is sufficiently specific. See Pl. Supp. Br. 18-19, 28-29 (citing cases). It does not follow, however, that the discretionary function exception can be overcome by any alleged constitutional violation, however vague. The cases on which plaintiffs rely, although broadly worded, do not hold otherwise. Many do not

[3]Whatever narrower meaning of discretion may apply in suits seeking declaratory relief from the exercise of agency regulatory authority, see Pl. Supp. Br. 17 n.7 (citing cases), the same view does not hold in suits for money damages involving federal employees. See, e.g., Baie v. Sec'y of Def., 784 F.2d 1375, 1376-77 (9th Cir. 1986) (holding that "whether the Assistant Secretary's administrative interpretation" of a statute "was arbitrary or contrary to law may not be tested in an action under the FTCA" because "interpretation of the statute is a plainly discretionary administrative act"); Golden Pac. Bancorp v. Clarke, 837 F.2d 509, 512 (D.C. Cir. 1988) (similar).

involve unconstitutional conduct at all.[4] To the extent the remainder offer any analysis, they do not engage whether constitutional violations that are not clearly established are sufficient to overcome the exception. See also Nurse v. United States, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor"). This Court, by contrast, has rejected a blanket rule that would "render[] the discretionary function exception inapplicable" to all cases where unconstitutional conduct is alleged simply because "'no one has discretion to violate another's constitutional rights.'" Santos v. United States, 2006 WL 1050512, at *3 (5th Cir. 2006) (per curiam) (unpublished opinion).

Plaintiffs note that municipalities may not avail themselves of common law immunity under 28 U.S.C. § 1983, and infer that such immunity is available to "only government employees, and not governments themselves." Pl. Supp. Br. 27 (citing Pearson v. Callahan, 129 S. Ct. 808, 822 (2009)). That conclusion does not flow from its premise. Common law immunity is unavailable to municipalities under Section 1983 because Congress, in enacting

[4]Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001); U.S. Fidelity & Guaranty Co. v. United States, 837 F.2d 116, 122 (3d Cir. 1988); K.W. Thompson Tool Co. v. United States, 836 F.2d 721, 726-29 (1st Cir. 1988); Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187, 1196-98 (D.C. Cir. 1986); Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986); In re Tex. City Disaster Litig., 197 F.2d 771, 776-77 (5th Cir. 1952).

that provision, did not intend to afford municipalities such immunity. See Owen v. City of Independence, 445 U.S. 622, 650 (1980). The FTCA, by contrast, specifically preserved sovereign immunity for federal officers' exercise of their discretionary functions. "Congress very deliberately used the words 'discretionary function or duty' in the Exceptions to the Act with the intent that they should convey the same meaning traditionally accorded by the courts." Coates v. United States, 181 F.2d 816, 818 (8th Cir. 1950). See also Gray v. Bell, 712 F.2d 490, 509 (D.C. Cir. 1983) ("[T]he discretionary function exception merely reflects a congressional belief that courts would continue to apply preexisting common law doctrine barring claims against discretionary governmental acts."). That doctrine, incorporated by the FTCA, forecloses liability not only for unambiguously lawful acts, but also for acts governed by legal mandates not clearly established.

A contrary approach would undermine not only the purpose of the discretionary function exception, but also the limits of qualified immunity that apply in Bivens actions against federal officials. Plaintiffs may recover under Bivens only where a constitutional violation was clearly established when the conduct took place. As Judge Smith's dissent explains, to allow a plaintiff to recover in an FTCA suit against the United States by alleging a constitutional violation that is not clearly established would accordingly "turn[] Bivens on its head," by

providing that "the United States may be liable for conduct even where its officers cannot be." Castro, 560 F.3d at 394.

Plaintiffs offer no reason for allowing such a result. Their contention that FDIC v. Meyer does not preclude "parallel Bivens and FTCA actions," Pl. Supp. Br. 22, attacks a straw man. Neither the government nor Judge Smith's dissent suggests that a plaintiff is precluded from pursuing FTCA and Bivens actions based on the same conduct. Indeed, one of the difficulties with plaintiffs' argument is that it invokes constitutional claims to obtain recovery under the FTCA where no parallel Bivens action is available. As the panel dissent explains, that result would allow plaintiffs to defeat the discretionary function exception through "artful pleading" of alleged constitutional violations, even when the allegations are so thin as to fail under Bivens itself. Castro, 560 F.3d at 394.[5]

[5]Plaintiffs' reading of the discretionary function exception would create a discrepancy between the FTCA and Bivens not only in the scope of liability, but also in the burdens of litigation. The doctrine of qualified immunity generally permits courts to avoid deciding whether an officer's conduct violated a constitutional right where it is plain that any such right was not clearly established, thereby avoiding extensive litigation that resolving the constitutional claim would require--and that would largely defeat the purpose of the immunity from suit. See Pearson v. Callahan, 129 S. Ct. 808, 818 (2009). A rule that makes the constitutionality of an official's conduct a threshold requirement for asserting the discretionary function exception, by contrast, would force courts to resolve constitutional issues at the initial immunity inquiry, creating the very litigation burdens avoided in a Bivens suit. See Sutton v. United States, 819 F.2d 1289, 1299 (5th Cir. 1987) (holding that the exception, like other official immunities, "is a defense to the burdens of litigation, not just the burdens of liability").

Plaintiffs note (Supp. Br. 24-26, 30) that 28 U.S.C. § 2680(h) permits suit under the FTCA for certain intentional torts committed by law enforcement. But as plaintiffs concede, Congress enacted Section 2680(h) "as a counterpart to the Bivens case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens." Carlson v. Green, 446 U.S. 14, 20 (1980) (quoting S. Rep. No. 93-588, at 3 (1973)). Plaintiffs do not explain why Congress, in creating a "counterpart" to Bivens, would have intended to subject the United States to broader liability than that of its individual employees; nor do plaintiffs point to any evidence supporting such an interpretation. See also Carlson 446 U.S. at 19-20 ("[T]he congressional comments accompanying [Section 2680(h)] made it crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action."); Sutton, 819 F.2d at 1293 (noting that the discretionary function exception does not apply in the case of "the classic Bivens-style tort").

FTCA suits, no less than actions against private officers, "threaten careers and reputations, divert official time and resources, and imperil impartial decisionmaking." Sutton, 819 F.2d at 1301 (Jones, J., concurring). See also Comment, The Federal Tort Claims Act, 56 Yale L.J. 534, 545 (1947) (noting that the discretionary function exception "is justified because

of the danger to independent and fearless action by discretionary agents which would result from the threat of actions in tort"). To allow suits to proceed in one context but not the other would undermine the longstanding purposes of official immunity. As Chief Judge Jones has explained, "[t]he doctrines of absolute prosecutorial and qualified official immunity from personal liability are essential to shield the law enforcement community from unwarranted interference with their vital functions. The discretionary function exception to the [FTCA] should perform a similar role as the courts continue to interpret the law enforcement proviso." Sutton, 819 F.2d at 1301 (Jones, J., concurring) (citation omitted). See also id. at 1299 (barring discovery in an FTCA suit by analogy to the immunity principles of Harlow v. Fitzgerald); Gray, 712 F.2d at 509-11 (recognizing the similar origins and purposes of the exception and common law immunity doctrines). The discretionary function exception, no less than these other doctrines, accordingly precludes liability for alleged constitutional violations not clearly established.[6]

[6]Plaintiffs assert that if the discretionary function exception can be overcome only by clearly established unconstitutional conduct, they must "be afforded an opportunity to prove that the constitutional rights at issue here were clearly established." Pl. Supp. Br. 32 n.17. Plaintiffs had ample opportunity to prove any clearly established constitutional violations before the district court, and declined to do so. Indeed, plaintiffs did not argue that any constitutional violation--clear or otherwise--could overcome the discretionary function exception, and the district court rendered its decision based on the arguments that plaintiffs did present. See ROA 814-839 (Pl. Amended Resp. To Def. Mot. To Dismiss). In such a (continued...)

II. The Border Patrol's Actions Fall Squarely Within The FTCA's Discretionary Function Exception.

To qualify under the discretionary function exception, an officer's conduct must entail "an element of judgment or choice" and be "susceptible to policy analysis." Gaubert, 499 U.S. at 322, 325. Plaintiffs do not contest that the Border Patrol's actions were susceptible to policy analysis. Rather, they contend (Supp. Br. 36) that they have established "plausible constitutional violations" and "plausible violations of several statutes" and policies that place the officers' actions beyond the scope of discretionary conduct.

The federal agents' conduct in this case did not violate any constitutional, statutory, or regulatory mandate, let alone one that "specifically prescribes a course of action for an employee to follow." Gaubert, 499 U.S. at 322. As the district court explained, Castro's choice "not to be present at the time of the arrest" and "not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico" presented the Border Patrol with "an untenable decision: either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to

[6](...continued)
circumstance, remand is not warranted to afford plaintiffs another opportunity to press their claims.

Mexico." ROA 1010, 1014 (Order at 19, 23). In making that decision, "[t]here was no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action," ROA 1011 (Order at 20), nor did the Constitution compel a particular result.

The Immigration and Nationality Act vests the Secretary of Homeland Security and his designated agents with responsibility for "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1); 8 C.F.R. § 2.1. The Act grants the Secretary the power and duty "to control and guard the boundaries and borders of the United States against the illegal entry of aliens," to "appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper," and to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3), (5). Plaintiffs do not dispute that when federal agents took Omar Gallardo to the Border Patrol station, held him for processing, and returned him to Mexico, the officers did so pursuant to this authority under the Immigration and Nationality Act. In so doing, the officers were also called upon to accommodate the infant child in Gallardo's care, a necessary incident to the authority conferred upon the officers by the Act and its accompanying regulations.

Plaintiffs point to no mandatory statutory or regulatory duty that dictated the officers' actions in such a circumstance. They contend that Border Patrol agents lack the authority to "detain known U.S. citizens," Pl. Supp. Br. 39-41, 43-47,[7] but the officers' actions here did not contravene that principle. As Judge Smith's dissent emphasizes, R.M.G. herself "was not arrested, detained, held in custody, or deported--she was with her father and with his consent." Castro, 560 F.3d at 396. Gallardo's insistence that his daughter remain in his care does not transform the agents' acts into a "detention" or "deportation."

Plaintiffs' contentions regarding the Hague Convention on the Civil Aspects of International Child Abduction, the International Parental Kidnapping Crime Act, and Department of State passport regulations (Supp. Br. 48-51) are similarly without merit. These authorities were not raised before the district court or the panel, and this Court should not consider them for the first time now. See United States v. Brace, 145 F.3d 247, 261 (5th Cir. 1998) (en banc) (emphasizing that the en

[7]Plaintiffs have consistently admitted, both before the district court and before the panel, that "[t]here are no mandatory federal statutes, regulations or policies prescribing the actions of a Border Patrol Agent when he or she encounters a foreign national with lawful custody of his or her minor, U.S. citizen child with respect to the minor child." ROA 1011 (Order at 20 & n.11); Pl. Opening Br. 27. Although plaintiffs now contend that Border Patrol policy prohibits placing known United States citizens in "immigration detention," Pl. Supp. Br. 39-40, such a policy would have no relevance here, where no detention occurred.

banc Court will not consider an argument "not presented on appeal to the panel").

In any event, none of these sources of law precluded the actions of the federal officers here. The Hague Convention, implemented by the International Child Abduction Remedies Act, does not regulate the Border Patrol's transportation of children, but only provides a forum for civil actions in which parents may seek return of or access to children wrongfully removed from their home country. 42 U.S.C. §§ 11601-11; Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 342-43 (5th Cir. 2004). The International Parental Kidnapping Crime Act prohibits the removal of a child from the United States "with intent to obstruct the lawful exercise of parental rights," 18 U.S.C. § 1204(a); plaintiffs offer no authority that acquiescence to a parent's lawful assertion of custody violates the Act, nor any evidence in this case of an intent to obstruct parental rights. Plaintiffs likewise do not explain how the Border Patrol agents could have violated the State Department's regulations governing the conditions for issuing passports to minors, 22 C.F.R. § 51.28, when no such documents were issued by the agents here.[8]

[8]Plaintiffs also contend that the officers violated agency policy by transporting R.M.G. without a safety restraint. Pl. Supp. Br. 47. That contention was not presented to the panel, and thus should not be considered by the en banc Court. Brace, 145 F.3d at 261. The record contains no evidence, moreover, that any such alleged policy violation resulted in injury to R.M.G. A state tort claim premised on such a violation would accordingly fail regardless of the discretionary function exception.

Plaintiffs' alleged constitutional violations are of no greater substance. Plaintiffs assert (Supp. Br. 51) that the Border Patrol violated R.M.G.'s "Fourth Amendment right to remain free from unreasonable detention" as well as Castro and R.M.G.'s "Fifth Amendment right to family integrity."

Gallardo's expressed desire to keep his infant daughter with him, and his consent on her behalf, dispenses with the allegation that the Border Patrol's actions constituted an involuntary detention in violation of the Fourth Amendment. As Judge Smith's dissent explains, "parents can consent to conduct that would otherwise constitute a violation of a child's core Fourth Amendment rights." Castro, 560 F.3d at 395 n.6. Plaintiffs contend that the cases on which the dissent relies "all involve conduct by the child that justifies the challenged government action." Pl. Supp. Br. 51 n.24. But those cases are not so limited, and the principle that a parent may validly consent to conduct on behalf of his child cannot be seriously disputed--especially where, as here, the child is not of sufficient age to express her own consent. See Dubbs v. Head Start, Inc., 336 F.3d 1194, 1207 (10th Cir. 2003) ("[I]f the trier of fact concluded that the parents in this case, on behalf of their minor children, actually consented to the examinations, there would be no Fourth Amendment violation.").

Plaintiffs do not suggest that the Border Patrol's actions were inconsistent with Texas custody law, or that Castro

possessed a superior right to determine where her daughter should remain during Gallardo's detention and subsequent removal to Mexico. Particularly in those circumstances, the Border Patrol's refusal to upset the status quo of custody over R.M.G., allowing the child to remain with her father rather than removing her to Castro's possession, cannot be characterized as an unlawful seizure of the child. Certainly, it is not clear "how a reasonable agent could have known that his conduct was violating a 'specific and intelligible' constitutional mandate" in such circumstances. Castro, 560 F.3d at 395 n.3 (Smith, J., dissenting).

Plaintiffs similarly fail to identify any process that Castro and R.M.G. were entitled to yet not afforded. Plaintiffs suggest that R.M.G. could not be allowed to accompany Gallardo without some degree of procedure; but any process for determining whether Castro had a superior claim to custody could be provided only by state authorities, as both the Border Patrol and state and local officials had explained to Castro previously. Plaintiffs contend (Supp. Br. 37-39, 53-54) that the Border Patrol misled Castro and failed to inform her of the need to obtain a court order. But when Castro first visited the Border Patrol, the agency contacted the local sheriff's department, was informed that "the best thing for [Castro] to do was obtain a court order from a Judge ordering her husband to release the child to her," and advised Castro to take such action "as soon as

possible." ROA 242-43 (Sanchez Decl. at 2-3); ROA 862 (Sanchez Dep. at 115-16); ROA 952 (Sanchez Mem. at 2); ROA 996 (Order at 5). The evidence cited by plaintiffs does not contradict that account.[9]

Texas authorities had likewise made clear how Castro should proceed, but she declined to do so. Instead of pursuing state remedies, Castro reported Gallardo's unlawful status to the Border Patrol. Having proceeded in this manner, Castro cannot assert that the Border Patrol failed to provide the process she could have obtained from state authorities.

Gallardo's expressed desire, as a parent, was to keep his daughter in his company. It is not contested that Gallardo asked for his daughter to remain with him at the Border Patrol station and to join him when he was taken to Mexico. Gallardo was concededly the child's father and had lawful custody of her. Especially in light of the respect for the parent-child relationship under the laws and traditions of this country, there was no apparent reason why Gallardo could not keep his daughter with him when he went to Mexico, whatever her citizenship status. The Border Patrol agents' refusal to upset the status quo and interfere with state custody matters does not offend any constitutional proscription, clear or otherwise.

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[9]Even if there were a dispute over agents' representations to Castro concerning her rights to custody of R.M.G., any cause of action based on such statements would be barred by the FTCA's misrepresentation exception, 28 U.S.C. 2680(h). See, e.g., McNeily v. United States, 6 F.3d 343, 347-49 (5th Cir. 1993).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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DECEMBER 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2009, I filed and served the foregoing brief by causing twenty paper copies, along with an electronic version, to be sent to this Court by Federal Express overnight. I also caused two paper copies and an electronic version of the brief to be sent by overnight delivery to:

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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in monospaced Courier New font of no more than 10.5 characters per inch. The brief from Statement of Jurisdiction to Conclusion contains 7041 words according to the count of this office's word processing system.

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