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 *EN BANC* BRIEF FOR APPELLANT MONICA CASTRO

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons or entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The parties are as follows:

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R.M.G., a minor child

Defendant-Appellee:

United States of America

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Appellant Monica Castro submits this supplemental *en banc* brief in compliance with this Court's August 28, 2009 order. This brief focuses upon the reasoning and authority cited by Appellee United States of America (Government) in its April 2009 Petition for Rehearing *En Banc* (Petition), which tracks the dissent to the now-vacated panel opinion. *See Castro v. United States*, 560 F.3d 381, 392-98 (5th Cir. 2009) (Smith, J., dissenting).

QUESTIONS PRESENTED

I. Whether the illegal acts of federal employees are outside the scope of the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

II. Whether under Rule 12(b)(1), Ms. Castro can prove any plausible set of facts to support subject-matter jurisdiction over her claim that federal immigration agents acted illegally when they detained her baby, whom they knew to be a United States citizen, and then removed the baby to Mexico.

STANDARD OF REVIEW

I. The scope of the discretionary function exception in 28 U.S.C. § 2680(a) is a matter of statutory interpretation that this Court decides *de novo*. *Texas v. United States*, 497 F.3d 491, 495 (5th Cir. 2007).

II. This Court reviews the district court's dismissal under Rule 12(b)(1) *de novo*, and determines for itself whether the facts, viewed in the light most favorable to the plaintiff, can plausibly support any claim for relief. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

STATEMENT OF THE CASE

This appeal concerns the actions of federal immigration officials. Federal officials are invested with limited powers—they can only act pursuant to those powers delegated by Congress and allowed by the U.S. Constitution. If federal officials act beyond their authority, they risk subjecting themselves and the United States to liability. At issue in this case is whether federal immigration officials were authorized to detain a baby, whom the knew to be a United States citizen, in a holding cell and remove her to Mexico against the express wishes of her U.S.-citizen mother.

Monica Castro is a United States citizen. R-815.[1] Omar Gallardo is a Mexican national who has repeatedly entered the United States illegally. R-861-63, 881 and 918-19. The biological child of Ms. Castro and Mr. Gallardo is R.M.G., a baby girl (baby). R-845, 849, 885, and 967. The baby, a citizen of the

[1] Ms. Castro's cites to the appellate record are "R-###" followed by the bate-stamped number of the record on appeal. Cites to the dissent are to the slip opinion as corrected on February 27, 2009. Cites to the district court opinion are to the opinion page number in Appellants' Record Excerpts.

United States, was born in Lubbock, Texas on December 4, 2002. *Id*. After a domestic dispute on November 28, 2003, Ms. Castro fled her home. Mr. Gallardo prevented her from taking the baby with her. R-848, 886-87 and 951.

On Monday, December 1, 2003, Ms. Castro met with U.S. Border Patrol Agent Manuel Sanchez to request assistance in recovering her baby daughter. R-849-50, 862-64, 887-88, 896 and 951-52. After Agent Sanchez told Ms. Castro that the Border Patrol could not deport the baby if she were a U.S. citizen, Ms. Castro provided Agent Sanchez with Mr. Gallardo's name. R-849-50, 863-64 and 887. Agent Sanchez immediately recognized the name, and informed Ms. Castro that Mr. Gallardo was wanted in connection with an Amarillo homicide, of which Ms. Castro knew nothing before. R-863-64. Agent Sanchez told Ms. Castro that he would deliver the baby to her if she accompanied agents on their immigration raid. R-850, 863-65, 867, and 887-88. Ms. Castro declined out her fear for her safety from members of Mr. Gallardo's family. Agent Sanchez responded by telling Ms. Castro that, if she was not present at the raid, the Border Patrol would have to take the baby to the station, but that he would call Ms. Castro and deliver the child to her at the station. R-851; 887-88. Agent Sanchez never informed Ms. Castro during that December 1 meeting that the Border Patrol would require a court order to deliver the baby to her, either at the raid site or at the Border Patrol station. R-849-50 and 887-89.

At approximately 7:00 a.m. on December 3, 2003, immigration agents seized both Mr. Gallardo and the baby, while Ms. Castro observed from across the street. R-851, 865, and 888. After waiting one hour for the telephone call that Agent Sanchez promised her, Ms. Castro went to the Border Patrol station to recover the baby. *Id*. There, federal agents (Agents) had placed Mr. Gallardo, the other detained adults, and the baby in a single holding cell. R-868-69 and 877. At the station, federal agents denied Ms. Castro's request to visit her baby. R-851-53, 870, 888-89, and 930. From the lobby, Ms. Castro could hear her baby crying in another room. R-852, 889, and 975. The Agents refused to release the baby to her, telling her for the first time that they would require a court order before they would release the baby to her. R-888-89.

Once Ms. Castro learned this, she located an attorney, Lisa Trevino. R-853-55, 889, 904-05, and 949. Ms. Trevino notified the Agents at about 1:30 p.m. that she had prepared the necessary documents and was attempting to locate an available judge to sign an order granting Ms. Castro the temporary right to possess the baby. R-949. Ms. Trevino called the Agents several times to notify them that the only available judge was temporarily occupied in another hearing, but that she would soon be heard. R-906-07 and 949. Despite knowing this, at about 3:15 p.m. the Agents put both the baby and Mr. Gallardo on a bus to Mexico. *Id*. By then, the baby had been detained in a holding cell for over seven hours. R-860.

Federal agents drove the baby on a bus for over seven hours to the international border with Mexico and delivered her to Mexican officials. R-860, 916. The Agents did not provide any child safety restraints for the baby as required by both Texas statute and agency policy. R-879, 899, and 916. The baby had no U.S. passport or state-issued birth certificate, and the immigration agents recorded no information about Mr. Gallardo's address other than "Ciudad Juarez." R-918-19, 921, 923 and 933. Consequently Ms. Castro did not see her baby for the next three years.

At all times, Border Patrol officials believed both Ms. Castro and her baby to be citizens of the United States. R.-863-64, 870, 877, 914, 919, 932, 948, and 967. Border Patrol agents also testified that they knew that they were not authorized to detain U.S. citizens and that they were not authorized to make any decisions related to child custody matters. R.-864, 877, 914, and 931-33

Ms. Castro and her baby sued the Government for money damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq*. The FTCA waives the sovereign immunity of the United States when the conduct of federal employees would be actionable under state tort law. *Id*. at § 1346(b). Ms. Castro alleges that the Agents' conduct in detaining her baby daughter in a cell and removing the baby from the United States is actionable under the Texas torts of negligence, intentional

infliction of emotional distress, false imprisonment, abuse of process, and assault. R-110-14

While the FTCA waives the Government's sovereign immunity, it also contains a list of exceptions that result in retained immunity for the Government. 28 U.S.C. §§ 2680(a)-(n). The Government moved to dismiss all of Ms. Castro and her baby's FTCA claims ("Castro's claims") under Fed. R. Civ. P. 12(b)(1) . The Government's motion argued that the "discretionary function exception" of 28 U.S.C. § 2680(a) retained the Government's sovereign immunity as to all of Ms. Castro's FTCA claims on behalf of herself and her baby.

On February 9, 2007, the district court accepted the Government's interpretation of the discretionary function exception in § 2680(a), and dismissed all of Ms. Castro's FTCA claims under Rule 12(b)(1) based upon § 2680(a) alone. The district court agreed that 28 U.S.C. § 2680(h) also applies to Ms. Castro's claims, but the district court did not apply it. R-1005 n.9.

Ms. Castro appealed. A panel majority of this Court reversed and remanded for the district court to consider in the first instance whether the Agents' conduct was illegal, and therefore outside the scope of the discretionary function exception. *Castro*, 560 F.3d at 392. Judge Smith dissented on the ground that some illegal conduct of federal employees may be within the scope of the discretionary function

exception, and in any event, the Agents did not act illegally in this case. *Id.* at 392-98 (Dissent).

The Government petitioned for reconsideration *en banc*. Petition at 1. This Court granted the Petition on August 28, 2009, vacating the panel majority opinion. The district court's February 9, 2007 order granting the Government's Rule 12(b)(1) motion is presently under review by this Court *en banc*.

SUMMARY OF ARGUMENT

For sixty years, courts have consistently held that illegal conduct is not within the "discretionary functions" of federal employees under 28 U.S.C. § 2680(a). *See Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) ("courts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, proscribed by statute, or exceed the scope of an official's authority"). The Government argues that *FDIC v. Meyer*, 510 U.S. 471 (1994) should now be read to preclude all constitutional claims for money damages against the United States under the FTCA, but this argument is foreclosed by *Carlson v. Green*, 446 U.S. 14 (1980). Also, for the reasons described by the Eleventh Circuit, the text of § 2680(a) cannot be read to prohibit what the text of § 2680(h) allows. *See Nguyen v. United States*, 556 F.3d 1244, 1250-57 (11th Cir. 2009).

The Government next invites this Court to conflate the qualified immunity described in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) into sovereign immunity under § 2680(a). No court has done so before. Qualified immunity is for officials sued in their individual capacities, and is not available to governments. *See Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009). In *Carlson*, the Supreme Court refused to construe federal remedies against individual officers who violate constitutional rights in a manner that is consistent with FTCA remedies against the Government. *Carlson* holds that Congress controls the scope of FTCA remedies, which differ from judicially created remedies for violations of the Constitution. *Carlson*, 446 U.S. at 20.

Finally, the Government argues that the Border Patrol Agents did not violate any clearly established constitutional rights by detaining Ms. Castro's baby and transporting her to Mexico. Due Process "liberty interest ... of parents in the care, custody, and control of their [children] is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 520 U.S. 57, 65 (2000). The district court misapplied Rule 12(b)(1) when it held that disputed facts are not disputed, and when it failed to construe all of the undisputed facts in Ms. Castro's favor. Proper consideration of the Rule 12(b)(1) facts shows that the Government gave Ms. Castro inadequate notice, and inadequate

opportunity to be heard before they interfered with her undisputed right to family integrity.

Apart from the Constitution, the Rule 12(b)(1) facts show that the Agents violated several additional legal requirements, including: (a) the Non-Detention Act, 18 U.S.C. § 4001(a); (b) the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), which prohibits the removal of any child from the United States with the intent to obstruct the lawful exercise of parental rights; and (c) the Border Patrol's own agency policy.

ARGUMENT

The Government sought *en banc* review to argue that: (a) under 28 U.S.C. § 2680(a), at least some constitutional violations can be within the "discretionary functions" of federal employees; and (b) the facts in this case do not show any constitutional violation that is sufficiently clear to survive the Government's Rule 12(b)(1) motion to dismiss. Petition at Unnumbered Page Following Cover.

In Part I below, Ms. Castro shows that the Supreme Court has foreclosed all of the Government's arguments about the scope of the discretionary function exception as it applies to constitutional violations. In Part II, Ms. Castro shows that (a) the applicable Rule 12(b)(1) standard is whether the facts viewed in the light most favorable to Ms. Castro show *any* plausible violation of law, not whether Ms. Castro has actually proved a violation; and (b) the Rule 12(b)(1) facts

demonstrate several plausible violations of law, including but not limited to violations of the Constitution.

Violations of law that do not involve the Constitution include: (a) the Non-Detention Act, 18 U.S.C. § 4001(a), forbids federal agents from detaining any U.S. citizen *except* as authorized by statute, and the Immigration and Nationality Act, 8 U.S.C. § 1001, *et seq*. does not authorize federal immigration agents to detain known U.S. citizens; (b) the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), ratified by Congress and enforced by federal and Texas statutes, *see, e.g.*, 42 U.S.C. § 11601, *et seq.* and Tex. Fam. Code § 153.501, *et seq*.. prohibits the removal of any child from the United States with the intent to obstruct the lawful exercise of parental rights; and (c) the Border Patrol's own agency policy, which categorically forbade any transport of a baby without the safety seat required by Texas statute, and which forbade the Agents from detaining the baby or removing her from the United States. The unauthorized nature of the conduct at issue here is only confirmed by the Government's own investigation, which reveals that in over 180,000 removals of alien parents between fiscal year ("FY") 1997 and FY 2007 "there were *no* instances of detaining U.S. citizen children and that [Immigration and Customs Enforcement] would not knowingly hold a U.S. citizen child in detention." U.S. Dept. of Homeland Security, Office of Inspector General, Removals Involving

Parents of United States Citizen Children, OIG-09-15 at 11 (Jan. 2009) (emphasis added), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf [hereinafter "OIG Report"].

The constitutional violations at issue include detention and removal of the baby without the probable cause required by the Fourth Amendment, and without respect for the baby's Due Process right to family integrity under the Fifth Amendment. The Government cites Mr. Gallardo's consent as its defense to these two claims, but Mr. Gallardo's consent is not dispositive of the baby's Fourth or Fifth Amendment claims under existing law. Moreover, Mr. Gallardo's consent is irrelevant to whether the Border Patrol Agents violated Ms. Castro's well-established Due Process right to family integrity by giving her inadequate notice and opportunity to prevent the Government from placing her baby in a country where she had no practical ability to enforce her undisputed parental rights under Texas law. *See Suboh v. District Attorney's Office*, 298 F.3d 81, 92 (1st Cir. 2002) ("[The mother's] claim is that [government agents] effectively decided the custody dispute by turning the child over to [persons] while knowing [the persons] were about to leave the country with the child; thus [the agents] effectively deprived [the mother] of her parental right to the care and custody of her child without providing her with due process procedures."). These plausible constitutional violations show that § 2680(a) does not bar Ms. Castro's claims, and § 2680(h) specifically allows

them. *See* Addendum (reproducing in full all statutory and regulatory text at issue as required by Fed. R. App. P. 28(f)).

Only the State of Texas—and not federal agents—had the power to decide the baby's fate on December 3, 2003. *See Johns v. Dept. of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1981) ("Federal immigration authorities lack authority to determine custody of a child or to enforce the custodial rights of others."). Only the State of Texas has the power and the infrastructure necessary to resolve thousands of disputes involving children each year, Solomonic as each one may be.

The Government is correct that the Agents did not deprive Ms. Castro of her parental right to seek a custody order, even after they put her baby on a bus to Mexico. Rather, by putting the baby on the bus, the Agents deprived Ms. Castro of any practical means of enforcing any Texas court order governing possession or custody. Ms. Castro sought her baby, not a legal document for its own sake. The Agents separated her from her baby for three years, and the question before this Court is whether the Agents were authorized to do so under law.

I. ILLEGAL CONDUCT IS OUTSIDE THE SCOPE OF THE DISCRETIONARY FUNCTION EXCEPTION

Illegal conduct is not within the discretionary functions of federal employees. For six decades, courts have consistently read the term "discretionary function" in 28 U.S.C. § 2680(a) to exclude illegal conduct. Part A, *infra.* The

Government sought *en banc* review to argue that at least some violations of the Constitution may yet fall within the discretionary function exception. Petition at 1. No reason or authority supports the Government's position. Part B, *infra*.

A. Settled Law Establishes That Federal Employees Lack Discretion to Act Illegally

The "proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak v. United States,* 464 U.S. 848, 854 (1984). The statute at issue here provides that the Government retains sovereign immunity 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).[2]

The leading case on illegal conduct and the scope of § 2680(a) is *Berkovitz v. United States*, 486 U.S. 531 (1988). There, a unanimous Supreme Court rejected the Government's claim that the discretionary function exception protects all conduct that is "regulatory" in nature, regardless of whether that conduct is illegal:

> In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's

2 The complete text of § 2680(a) contains two distinct exceptions to FTCA liability. Only the second of these exceptions, quoted above, is at issue in this case. *See* Addendum, attached.

> argument, pressed both in this Court and the Court of Appeals, that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies.
> ...
> To the extent we have not already put the Government's argument to rest, we do so now. The discretionary function exception applies only to conduct that involves the *permissible* exercise of policy judgment.

Id. at 538-39. The Court derives its "permissible" limitation on the scope of the discretionary function exception from the text of § 2680(a). *Id*. (The Government's "argument is rebutted first by the language of the exception, which protects 'discretionary' functions, rather than 'regulatory' functions.").[3] The Court holds that its "permissible" requirement is supported by Congress's reason for the discretionary function exception. *Id.* at 536-37.[4] The *Berkovitz* Court repeatedly

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3 The Court's reading of "discretionary function" as "within the bounds allowed by law" comports with contemporary, common understanding of this term. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004) (common usage at the time of enactment is used to interpret statutory meaning); *Coates v. United States*, 181 F.2d 816, 818 (8th Cir. 1950) ("[T]he term 'discretionary function or duty' has a long history of precise meaning in a legal sense.... [It protects federal agents who are] acting within the scope of their authority ....").

4 The Court states:

> The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. *See Dalehite v. United States*, [346 U.S.] at 36 ("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the *permissible* exercise of policy judgment.

Berkovitz, 486 U.S. at 536-37 (emphasis added). Only two years after the FTCA's enactment, the Eighth Circuit traces this same view of the reason behind the discretionary function exception to separation of powers:

applies its "permissible" qualifier. *See, e.g., id.* at 546 ("The discretionary function exception ... does not apply if the acts complained of do not involve the permissible exercise of policy discretion.").[5]

The Supreme Court again discussed illegal conduct and § 2680(a) in *United States v. Gaubert*, 499 U.S. 315 (1991). No illegal conduct was found in *Gaubert,* so the Court there had no occasion to decide the extent to which illegal conduct can be outside the scope of the discretionary function exception. "The authority of the [federal agents] to take the actions that were taken in this case, although not guided

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> the term 'discretionary function or duty' has a long history of precise meaning in a legal sense and there is nothing in the Federal Tort Claims Act to indicate that the criteria for distinguishing a discretionary function from administrative action or performance of an identified task or job of work, shall differ from that employed in other contexts. The Congress had a sound basis for the use of the words in the Exceptions of the Act and used them in recognition of the separation of powers among the three branches of the government ...
>
> Instances in which the courts have had occasion to consider the meaning of 'discretionary functions' and to disclaim judicial power to interfere with, to enjoin or mandamus, or inquire into the wisdom or unwisdom or 'negligence' in their performance *within the scope of authority lawfully granted* are shown in the following cases: *Marbury v. Madison*, 1802, 1 Cranch 137, 170, 2 L.Ed. 60.

Coates v. United States, 181 F.2d 816, 817-18 (8th Cir. 1950) (emphasis added).

[5] At issue in *Berkovitz* was whether federal employees violated various statutes, regulations, and agency policies concerning the distribution of polio vaccine. *Berkovitz* compares each challenged action to each claimed violation of law. *Id*. at 539-48. Where the violation is clear, the Court holds that the discretionary function exception does not apply. *Id*. at 542-43. Where the violation is not clear, either because the allegation of wrongdoing is insufficiently clear, *id*. at 543, or because the law is "abstruse," *id*. at 546, the Court remands for further development of facts and law to determine whether a violation of law occurred. *Id*.

by regulations, [was] unchallenged" in the lower courts. *Id*. at 321. The *Gaubert* Court nonetheless chose to address one challenge to the legality of the conduct of federal employees there at issue: whether failure to begin formal proceedings deprived regulators of authority to take informal actions. *Id*. at 328-29. To do so, the *Gaubert* Court simply applies *Berkovitz* and its holding that only "permissible" acts of discretion are protected from FTCA liability. *Id*. at 325, 328.[6] The Court rejected the single claim that the federal agents acted outside their authority by holding that no prohibition of the informal actions at issue can be found in the statutory text or structure, or anywhere else:

> Although the statutes provided only for formal proceedings, there is nothing in the language or structure of the statutes that prevented the regulators from invoking less formal means of supervision of financial institutions. Not only was there no statutory or regulatory mandate which compelled the regulators to act in a particular way, but there was no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation.

Id. at 330.

Under the discretionary function exception, conduct is "permissible" when it is "lawful." *Berkovitz*, 486 U.S. at 534 ("employees of regulatory agencies have no discretion to violate the command of federal statutes or regulations"); *Gaubert*,

[6] *Gaubert's* central holding is that regulators who allegedly negligently managed a troubled institution, acted within the scope of the discretionary function exception despite the fact that they acted at the operational rather than the planning level of federal policymaking. *Id*. at 325-26; *see also Griggs v. Washington Metro. Area Transit Auth.*, 232 F.3d 917, 923 (D.C. Cir. 2000).

499 U.S. at 338 (Scalia, J., concurring) ("If the action involves policy discretion, *and the officer is authorized to exercise that discretion*, the defense applies ....) (emphasis added); *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254-55 (1st Cir. 2003) ("courts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, proscribed by statute, or exceed the scope of an official's authority") (citations omitted).[7] The district court's basic error in this case was that it did not mention, let alone address, the legality of the Agents' conduct when applying *Berkovitz* and *Gaubert*, despite Ms. Castro's specific argument that the applicability of the discretionary function exception in this case depends upon the legality of the Agents' conduct. *Compare* R-992 *with* R-823-30.

Indeed, for 60 years since the FTCA's enactment, courts have read "discretionary" in § 2680(a) to exclude all illegal conduct. Ten of the twelve

[7] Even outside the context of the FTCA, the Supreme Court and this Court categorically refuse to consider illegal conduct to be within the discretionary functions of federal agencies. *See Massachusetts v. EPA*, 549 U.S. 497 (2007) ("[U]se of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits."); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (Agency compliance with statutes is a "discretionless obligation."); *Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking."); *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998) ("A mission agency's discretion to make the final substantive decision under its program authorities does not mean that the agency has unlimited, unreviewable discretion."); *Abourezk v. Reagan*, 785 F.2d 1043, 1061-62 (D.C. Cir. 1986) ("The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations."), *aff'd*, *Reagan v. Abourezk*, 484 U.S. 1 (U.S. 1987).

regional courts of appeals read § 2680(a) this way, and no case on the matter appears in the other two (the Sixth and Tenth Circuits). *See Denson v. United States*, 574 F.3d 1318, 1337 (11th Cir. 2009) ("government officials lack discretion to violate constitutional rights"); *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008) (While a decision to prosecute is discretionary, "providing knowingly false information *en route* to a criminal prosecution is sufficiently separable from the protected discretionary decision."). *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) ("surveillance activities fall outside the FTCA's discretionary-function exception because [the plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights"); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("federal officials do not possess discretion to violate constitutional rights or federal statutes"); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("Governmental conduct cannot be discretionary if it violates a legal mandate."); *U.S. Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988) ("[C]onduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation. Federal officials do not possess discretion to violate constitutional rights or federal statutes."); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[W]e have not hesitated to conclude that ... action does not fall within the discretionary function of § 2680(a) when governmental agents exceed the scope of their

authority as designated by statute or the Constitution. For example, we recently held that violation of agency regulations represents conduct outside the discretionary function exception, and thus, outside sovereign immunity."); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986) (per Bork, J.) ("[A] decision cannot be shielded from liability if the decisionmaker is acting without actual authority. A government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers. An employee of the government acting beyond his authority is not exercising the sort of discretion the discretionary function exception was enacted to protect."); *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority."); *In re Texas City Disaster Litigation*, 197 F.2d 771, 778 (5th Cir. 1952) ("[T]he term 'discretionary function or duty' has a long history of precise meaning in a legal sense. It was meant to continue to exclude judicial authority from interference with *lawful* legislative and executive action.") (emphasis added, citations omitted). These cases cite many additional cases holding the same thing throughout the appellate and district courts.[8]

[8] *See, e.g. Nguyen v. United States*, 556 F.3d 1244, 1256 (11th Cir. 2009); *Prisco v. Talty*, 993 F.3d 21, 26 n.14 (3d Cir. 1993); *K.W. Thompson Tool Co. v. United States*, 836 F.2d 721, 727 n.4 (1st Cir. 1988); *Rosas v. Brock*, 826 F.2d 1004, 1008 & n.2 (11th Cir. 1987); *Pooler v.*

B. The Government Names No Reason or Authority for Disturbing Settled Law

The Government now argues that this body of law should be limited to prevent: (1) all disguised constitutional claims for money damages against the United States; (2) at minimum, claims based upon constitutional rights that have not been "clearly established;" and (3) "evisceration" of the discretionary function exception. Petition at 3, 8-11. None of these arguments has merit.

1. The Discretionary Function Exception Does Not Differentiate Among Constitutional, Statutory, Regulatory, or Policy Violations

The Government argues that the panel majority's interpretation of the discretionary function exception "converts the FTCA into an avenue for litigating constitutional claims, an outcome flatly at odds with the statute." Petition at 2. But this argument itself is at odds with the Government's own prior understanding of the law. *See Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1037 (N.D. Ill. 2003) ("As the United States concedes, [the discretionary function exception] does not apply to any conduct that violates the Constitution. *Garcia v. United States*, 896 F. Supp. 467, 473 (E.D. Pa. 1995)"), *rev'd in part on unrelated grounds*, *Garcia v.*

United States, 787 F.2d 868, 871 (3d Cir.), *cert. denied*, *Pooler v. United States*, 479 U.S. 849 (1986); *Birnbaum v. United* States, 588 F.2d 319, 329 (2d Cir. 1978); *Appleton v. United States*, 98 F. Supp. 2d 30, 36 (D.D.C. 2000).

United States, 355 F.3d 1021 (7th Cir. 2004).[9] The Government's argument is also at odds with its statement to this Court, a statement with which Ms. Castro agrees:

> There is no reason to think that Congress intended a broader waiver of sovereign immunity for constitutional prescriptions than for those established by statute. The exception's purpose, ... 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.

Petition at 9.

Even so, now argues that the law always has been the opposite of what the Government said the law was before. The Government points to *FDIC v. Meyer*, 510 U.S. 471 (1994) and argues that "the United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims." Dissent at 20 (citing *Meyer*, 510 U.S. at 478); Petition at 3.[10] This misread Meyer. *Meyer* did not involve the FTCA or any state-law tort as required by the FTCA; *Meyer* simply refused to imply a *Bivens* cause of action directly against the United States.

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[9] The concession cited by in *Cornejo* appears in the Government's brief: "The discretionary function exception does not encompass conduct which violates the Constitution, a statute, or an applicable regulation. *Garcia*, 896 F. Supp. at 473." Doc. 381 at Page 34 of 35, Civil Action No. 1:97-cv-7556 (N.D. Ill., filed June 21, 2002).

[10] The Dissent also cites *Gaubert*, observing that "[t]he omission of 'Constitution' from the Court's explicit list of sources that can create a 'mandate' that nullifies the discretionary function exception should be dispositive here." Dissent at 19-20., *Gaubert* compels the opposite conclusion, for there, the Court explicitly considered not only the statute and the regulations to determine whether the challenged conduct was unauthorized, but also whether *any other* prohibition of the conduct existed outside the statute and regulations. *Gaubert*, 499 U.S at 330. No constitutional claims were ever made in *Gaubert* or *Berkovitz*, so the Court had no reason to explicitly mention the Constitution in either case.

Meyer, 510 U.S. at 473 ("In [*Bivens*] we implied a cause of action for damages against federal agents who allegedly violated the Constitution. Today we are asked to imply a similar cause of action directly against [the Government. We] decline to take this step."). The Government and Dissent argue that if constitutional violations place conduct outside the discretionary function exception of § 2860(a), this will allow the very constitutional claims that *Meyer* forbade to be disguised as state tort claims, rendering *Meyer* "effectively voided." Petition at 3; Dissent at 20.

But the Supreme Court has already held otherwise in a case that *Meyer* cites with approval, so *Meyer* cannot have the sweeping effect sought by the Government. *Meyer* cites *Carlson v. Green*, 446 U.S. 14 (1980) with approval. *Meyer*, 510 U.S. at 485. Subsequently, the Supreme Court cites *Carlson* and *Meyer* as consistent cases. *Correction Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001).

The Government claims here that *Meyer* forbids parallel *Bivens* and FTCA actions. Petition at 6; Dissent at 22 ("Allow[ing] nearly every *Bivens* action also to be an action against the United States [is] contrary to *Meyer*.") (citing *Bivens v. Six Unkonwn Fed. Narcotics Agents*, 403 U.S. 388 (1971)). But *Carlson* specifically allows parallel *Bivens* and FTCA actions:

> [The FTCA] contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have

> an action under the FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

Carlson, 446 U.S. at 20. Indeed, *Carlson's* most important feature is that it specifically cites the requirement of proving a state tort claim under the FTCA as an important *difference* between the FTCA and a direct constitutional claim for money damages against the United States, which *Meyer* later prohibited. *Id*. at 23. Thus, *Carlson* rejects the very disguise argument made by the Government and the Dissent here, and holds that parallel *Bivens* and FTCA claims premised on the same unconstitutional conduct may be pursued by a plaintiff. *Id*. So holds the Eleventh Circuit. *Denson*, 574 F.3d at 1336-37 & n.55.[11]

This Court, *en banc*, has similarly rejected the Government's disguise argument. Just as *Meyer* observes the uncontroversial fact that the FTCA does not render the Government "directly" liable for *constitutional* violations, 510 U.S. at 473, this Court held that violation of a federal *statute* alone is insufficient to state an FTCA claim. *Johnson v. Sawyer*, 47 F.3d 716, 728 (5th Cir. 1995) (*en banc*). In so holding, however, this Court approved *as acceptable* the very practice that the Government here claims to be so obnoxious: combining a proof of a violation

[11] *Accord, e.g., Limone v. United States*, 271 F. Supp. 2d 345, 355 n.11 (D. Mass. 2003) ("[T]he fact that defendants also happened to violate the Constitution does not preclude *other* claims that *are* actionable under the FTCA. Plaintiffs do not predicate FTCA liability on constitutional torts. Rather, they point out that constitutional violations defeat any 'discretionary function' argument.").

of federal law *with* proof of a state-tort cause of action to show that FTCA's waiver of sovereign immunity applies. This Court approved this procedure equally as to the Constitution, statutes, and regulations. *See id.* at 727 ("[E]ven a violation of the United States Constitution, actionable under *Bivens*, is not within the FTCA unless the complained of conduct is actionable under the local law of the state where it occurred."); *id*. at 728 (same for statutes and regulations); *see also Sanchez v. Rowe*, 870 F.2d 291, 296 (5th Cir. 1989) (parallel constitutional claims are allowed against the United States under the FTCA and against individual officers under *Bivens*, but the prevailing plaintiff may be required to elect which of these differing remedial schemes to use to satisfy a judgment.).

Independently devastating to the Government's *Meyer* argument is the text and history of 28 U.S.C. § 2680(h).[12] In 1974, Congress amended § 2680(h) to allow constitutional claims to be made against the United States in precisely the way that the Government now claims is objectionable under *Meyer*:

[12] This FTCA exception retains the Government's sovereign immunity for some claims and waives it for others, as follows:

> 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, on or after the date of the enactment of this proviso [March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

28 U.S.C. § 2680(h).

> [§ 2680(h)] should be viewed as a counterpart to the *Bivens* case and its progeny [which allows claims for money damages to be made against federal employees in their individual capacities for violations of federal constitutional rights], 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*.

S. Rep. 93-588, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code & Ad. News 2789, 2791. *Carlson* relies upon this legislative history. *Carlson*, 446 U.S. at 20. The Eleventh Circuit thoroughly parses the text and history of both § 2680(a) and § 2680(h), applies all of the proper canons of statutory construction, and provides an accurate and detailed explanation of why when § 2680(h) allows a claim against the United States, § 2680(a) does not prohibit the claim. *Nguyen v. United States*, 556 F.3d 1244, 1250-57 (11th Cir. 2009); *accord Sutton v. United States*, 819 F.2d 1289, 1295-97 (5th Cir. 1987); *id*. at 1301 (Jones, J., concurring) ("I write separately to emphasize what I believe is the most salient in the majority's careful exposition of 28 U.S.C. §§ 2680(a) and (h): these sections of the FTCA must be harmonized.").

Meyer was decided twenty years after Congress amended § 2680(h), yet *Meyer* does not discuss any FTCA exception in 28 U.S.C. § 2680. This only confirms that Congress's intent as to each exception, and not *Meyer*, governs the extent to which each exception precludes constitutional claims against the United States that are also grounded in state tort law.

Simply put, *Meyer* does not add a new FTCA exception for all constitutional claims against the United States. The text and history of § 2680(h) confirm that Congress rejected such an exception. Section 2680(a) cannot be read to imply such an exception.[13]

2. Federal Employees Have No Discretion to Violate Laws That Are Somehow Insufficiently Clear

As an explicit fallback position, the Government argues that even if constitutional violations can place the conduct of federal employees outside the discretionary function exception, "at a minimum [this Court] ought to require that the constitutional 'mandate' be clearly established with particularity." Petition at 7, 10-11 (quoting Dissent at 21-22). This argument relies upon *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There, the Court used the following language to hold that executive officials who are sued in their individual capacities enjoy common-law qualified immunity to *Bivens* actions:

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[13] The Dissent asserts that Ms. "Castro does not allege that § 2680(h) has any bearing on this case." Dissent at 19 n.2. Not so. For the same reasons stated by the Eleventh Circuit in *Nguyen*, 556 F.3d at 1250-57, Ms. Castro maintains that § 2680(a) cannot be read to disallow any claim that § 2680(h) allows. The district court held that the Agents whose conduct is at issue here are "law enforcement officers" within the meaning of § 2680(h). R-1005; *see also Ysasi v. Rivkind*, 856 F.2d 1520, 1524-25 (Fed. Cir. 1988) (Border Patrol agents are law enforcement officers for purposes of the FTCA.). Plaintiffs alleged the specific state-law intentional torts cited in § 2680(h). *See, e.g.,* R-111-13 (assault, false imprisonment). Therefore, under *Nguyen*, the district court erred by interpreting § 2680(a) so broadly that it eclipsed the government's explicit waiver of sovereign immunity in § 2680(h). The issue before this Court has always been whether the district court erroneously expanded the scope of § 2680(a). The text and history of § 2680(h) is bound up with that very question of law.

> [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.

Id. at 818. This statement does not purport to interpret § 2680(a). Any such interpretation would effect a sea change in FTCA law and contradict three distinct lines of Supreme Court authority. *See, e.g.*, *Maria Castro v. United States*, 34 F.3d 106, 111 (2d Cir. 1994) (The United States may not defend FTCA suits based upon the qualified immunity of its agents.).

a. *Harlow* Protects Individuals, Not Governments

The Supreme Court recently confirmed that only government employees, and not governments themselves, may claim *Harlow's* qualified immunity. *Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009); *see also Owen v. City of Independence*, 445 U.S. 622, 638 (1980) ("We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under [42 U.S.C.] § 1983."). *Harlow* itself rejects any distinction between municipal, state, and federal employees for purposes of qualified immunity: "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials [under *Bivens*]." *Harlow*, 457 U.S. at 818 n.30; *accord Butz v. Economou*, 438 U.S. 478, 504 (1978).

Here, just as in *Owen*, the absence of a history of deciding discretionary function cases based upon whether an alleged violation of law is "clearly established," should be dispositive. *Owen*, 445 U.S. at 641 ("in the hundreds of cases from that era awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers").[14] No court has held that a constitutional right was established with insufficient clarity for a violation of that right to survive the discretionary function exception.[15] The Government suggests otherwise when it faults the panel majority for failing to "identify any decision of a court holding discretion to be precluded on the basis of alleged constitutional violations stated at the level of generality here." Petition at 9.

But many such decisions are cited in Part I.A., *supra*.. *See, e.g*. *Nurse*, 226 F. 3d at 1002 ("[T]he complaint alleges that the [federal agents] promulgated discriminatory, unconstitutional policies which they had no discretion to create. In general, governmental conduct cannot be discretionary if it violates a legal mandate. Because of the bare allegations of the complaint, we cannot determine at

[14] A "clearly established right" requirement is so fraught with procedural difficulties that it would have generated many cases if it ever applied in the FTCA context. *See Pearson*, 129 S. Ct. at 808.

[15] The Dissent cites *Nurse*, 226 F.3d at 1002 n.2. Dissent at 22 n.5. But *Nurse* declines to say anything about whether or how the argument should be decided. 226 F.3d at 1002 n.2. The holding in *Nurse*, however, is precisely what Ms. Castro seeks here. *See id.* at 1001-03.

this stage of the proceedings whether the acts of the [agents] violated the Constitution, and, if so, what specific constitutional mandates they violated. These are questions that will be fleshed out by the facts as this case proceeds toward trial."); *Rosas v. Brock*, 826 F.2d at 1008 & n.2 (11th Cir. 1987) ("There is no reason to believe that Congress ever intended to commit to an agency's discretion the question of whether or not to act constitutionally. The law ... is that adherence to constitutional guidelines is not discretionary it is mandatory. ... The defendants urge us to dismiss [the plaintiffs'] constitutional claims as insubstantial. We decline to do so....").

b. *Bivens* Is Distinct From the FTCA

The Government's explicit objective for its proposed "clearly established" rule is to conform the remedies available under the FTCA to those available under *Bivens*. Petition at 11. But the Supreme Court rejects this conformity argument:

> it [is] crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action [to redress violations of constitutional rights.]

Carlson, 446 U.S. at 19-20. The Court cites important differences between the remedies available under the FTCA and under *Bivens*. *Id*. at 20-23 (discussing punitive damages, jury availability, deterrent effect, and requirement of a state cause of action in addition to the FTCA). Rather than conform the FTCA and

Bivens remedies, the Court recognizes that they vary in important respects because of their varying origins. *Id*.

Of course *Bivens* is a creature of the judiciary and the FTCA is a creature of Congress. Congress amended the FTCA three years after *Bivens* specifically to *allow* parallel claims for money damages both against the United States under the FTCA, and against individual federal employees under *Bivens* for the same unconstitutional conduct. *Id*. at 20. Critically, when Congress did so, it did not choose to incorporate *Bivens* into the FTCA. Congress chose an entirely different course: it explicitly waived sovereign immunity for the intentional state-law torts of all federal law enforcement officers. *See* 28 U.S.C. § 2680(h).

The Government's proposed "clearly established" rule is flatly inconsistent with the text of § 2680(h), and with Congress's specific intent as to the relationship between § 2680(h) and *Bivens*. The fact that the Government proposes to introduce a "clearly established" rule through § 2680(a) rather than § 2680(h) makes no difference to the analysis because the outcome sought by the Government—retained sovereign immunity—would be the same, and just as contrary to the specific intent of Congress in enacting § 2680(h) as reported in *Carlson*.

c. Under *Berkovitz*, A Law's Mandatory Character, Not Its Clarity, Determines Whether the Discretionary Function Exception Applies

Finally, the Government's qualified immunity argument is inconsistent with *Berkovitz*. There, the Supreme Court held that the discretionary function exception does not protect conduct that violates the law, even if the law at issue is "abstruse." 486 U.S. at 545; *see also Hatahley v. United States*, 351 U.S. 173, 181 (1956) (The discretionary function exception does not shield the Government from liability *even* where the Supreme Court disagrees with the federal court of appeals on the meaning of the underlying law.). The question under *Berkovitz* is whether a law imposes a mandatory requirement that has been violated, not whether a violated requirement was stated with sufficient clarity.[16] But when a violation of the law is proved, nothing in *Berkovitz* or any prior or subsequent case allows the violation to be excused as a "discretionary function" simply because the violation was not, or somehow should not have been, apparent to the agents at the time.

[16] Similarly, in *Gaubert*, the Court evaluated not only the text of the statute there at issue, which would presumably be all that could be considered under a "clear law" requirement, but also its "structure" and any other "prohibition" that the Court could find. 499 U.S. at 330; *see also id*. at 328. The *Gaubert* Court held that the statute at issue was not violated; it did not hold that the statute was insufficiently clear so that the discretionary function exception excused any violation. *Id* at 330.

For all of these reasons, the Government fails to name any reason or authority to support importing qualified immunity into FTCA litigation.[17]

3. The Government Alone Seeks Evisceration of Existing Law

The Government argues that the panel majority opinion in this case would "eviscerat[e] much of the discretionary function exception, holding that whenever a Border Patrol officer violates the Constitution—even if he has no reason to know he is doing so—he necessarily acts beyond his discretion." Petition at 3; Dissent at 18. But while the score stands at dozens of cases to two, it is not difficult to see who proposes evisceration.

Only two opinions disagree with the body of caselaw cited above in Part A, and both are demonstrably weak. The most recent is this Court's unpublished decision in *Santos v. United States*, 2006 WL 1050512 at *8-9 (5th Cir. 2006). *Santos* relies exclusively upon *Meyer*, and reads *Meyer* to hold that federal inmates may only redress constitutional violations through *Bivens*, and that the FTCA never permits a federal inmate to sue the United States for money damages based upon a state tort claim that is grounded in an Eighth Amendment violation. *Id.* *Santos* thus contradicts *Carlson*, where the Supreme Court held that the FTCA allows a federal inmate to pursue a state tort claim grounded in an Eighth

[17] Before any such rule could be applied in this case, Ms. Castro must at minimum be afforded an opportunity to prove that the constitutional rights at here were clearly established. *See Suboh*, 298 F.3d at 94-95.

Amendment violation *in addition to* a parallel *Bivens* claim. *Carlson*, 446 U.S. at 20. Because *Meyer* cites *Carlson* with approval and suggests no limitation on *Carlson, see* 510 U.S. at 485, and because *Malesko* subsequently reads *Meyer* to be consistent with *Carlson,* the *Santos* court necessarily misread *Meyer*. *See* 534 U.S. at 68-69. Moreover, *Santos* "is not precedent." 2006 WL 1050512 at *1; 5th Cir. R. 47.5.4.

The second case is *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972). There the court held that the final clause of § 2680(a)—"whether or not the discretion involved be abused"—meant that all unconstitutional conduct is protected under the discretionary function exception. *Id*. at 628. The only court that cited this holding refused to follow it because it is inconsistent with *Simons v. United States*, 413 F.2d 531 (5th Cir. 1969). *See Avery v. United States*, 434 F. Supp. 937, 944 (D. Conn. 1977). The broad holding of *Kiiskila* would protect all illegal conduct, for its reading of the last clause of § 2680(a) does not distinguish among constitutional, statutory, or regulatory violations. *Kiiskila* predates *Berkovitz* by fifteen years, and *Carlson* by eight years, and is inconsistent with both. The Seventh Circuit now follows *Berkovitz* and holds that conduct must be "permissible" to be within the scope of the discretionary function exception. *See Reynolds v. United States*, 549 F.3d 1108, 1112-13 (7th Cir. 2008) ("At oral argument we asked the government whether a law-enforcement officer involved in

a criminal investigation has discretion to report information that the officer knows to be false. To our surprise, counsel answered yes .... But that cannot be right.... Therefore, the discretionary-function exception has no application here.") (citations omitted). District courts in the Seventh Circuit do not follow *Kiiskila*. *See Cornejo*, 284 F. Supp. 2d at 1037 (The discretionary function exception "does not apply to any conduct that violates the Constitution.").

Finally, Justice Scalia quotes the same final clause of § 2680(a) that the *Kiiskila* court purported to interpret, and reads that text to be *subject to* the requirement that the conduct at issue be authorized under law:

> If the action involves policy discretion, *and the officer is authorized to exercise that discretion,* the defense applies even if the discretion has been exercised erroneously, so as to frustrate the relevant policy. *See* 28 U.S.C. § 2680(a) (discretionary function exception applies "whether or not the discretion involved be abused").

Gaubert, 499 U.S. at 338 (Scalia, J., concurring) (emphasis added). This statement is inconsistent with *Kiiskila's* reading of the last clause of § 2680(a) as a blanket exemption for any illegal conduct by federal employees. *Id.*; *accord Ayer v. United States*, 902 F.2d 1038, 1041 (1st Cir. 1990) (In § 2680(a), "whether or not discretion involved be abused" means that "if" a discretionary function is involved, "the fact that critical factors were not considered or that the decision was negligently made will not bring the challenged conduct outside the exception.").

Illegal conduct is not within the discretionary functions of federal employees. This much is now settled in discretionary function exception litigation. No reason or authority supports creating a circuit split on this question now. *See Denson*, 574 F.3d at 1337 & n.55 (citing cases).

II. PLAUSIBLE VIOLATIONS OF LAW PRECLUDE RULE 12(B)(1) DISMISSAL IN THIS CASE

Courts apply Fed. R. Civ. P. 12(b)(1) to decide challenges to subject matter jurisdiction. The district court entered the Rule 12(b)(1) order at issue based on its misunderstanding of which facts are disputed, and it did not hold an evidentiary hearing or decide facts that the district court understood to be disputed. R-993. This Court therefore reviews the entire record *de novo* and in the light most favorable to Ms. Castro. *Lane*, 529 F.3d at 557. Ms. Castro prevails if the facts are consistent with *any* plausible violation of law that would place the Agents' conduct outside the scope of the discretionary function exception. *Id*.; *Garcia v. United States*, 896 F. Supp. 467, 475-76 (E.D. Pa. 1995); *McElroy v. United States*, 861 F. Supp. 585, 593-94 (W.D. Tex. 1994).

The facts presently before this Court show plausible constitutional violations. Importantly, however, the facts also show plausible violations of several federal statutes, and of agency policy exactly as held in *Berkovitz*. None of these latter violations are barred by the Government's constitutional arguments, *supra*, and they alone show that the district court erred in dismissing Ms. Castro's claims. *See Spector Motor Serv., Inc. v. McLaughin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.").

A. The District Court Misapplied Rule 12(b)(1)

Two distinct standards govern appellate review of Rule 12(b)(1 dismissals. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Which one applies depends upon whether the district court based its Rule 12(b)(1) dismissal upon its decision of disputed facts. *Id.* at 413.

Here, the district court issued its order based entirely upon what it understood to be undisputed facts. R-993 ("The following facts are not in dispute ...."). Nowhere did the district court ever attempt to resolve any facts that it understood to be disputed. *See, e.g.*, R-995 (refusing to decide a disputed issue). Although Ms. Castro sought denial of the Rule 12(b)(1) motion and a trial (R-830),

the district court instead dismissed the case without resolving the fact disputes described in some detail by Ms. Castro. *See* R-831-38.

Because the district court based its Rule 12(b)(1) decision upon its misunderstanding of which facts are undisputed, this Court's review is *de novo* and "limited to determining [1] whether the district court's application of the law is correct and [2] whether [the] facts are indeed undisputed." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996); *see also Lane*, 529 F.3d at 557 (citing *Barrera-Montenegro* and *de novo* review). The district court erred on both counts.

1. The District Court Erred by Deeming Disputed Material Facts to be Undisputed

This Court reviews whether the material Rule 12(b)(1) facts are indeed undisputed. *Wagstaff v. U.S. Dept. of Educ.*, 509 F.3d 661, 663 (5th Cir. 2007) ("In our *de novo* review ... we apply the same standard as does the district court ...."). The record establishes at least two instances where the district court incorrectly held material facts to be undisputed when the record shows those facts to be disputed.

a. The Parties Dispute Whether Agent Sanchez Misled Ms. Castro About the Need for A Court Order on December 1

The district court relied exclusively upon the deposition of Agent Sanchez to hold that the parties do not dispute that on December 1, 2003, Agent Sanchez told

Ms. Castro that she needed to get a custody order. *See* R-996 ("At this initial meeting, Agent Sanchez informed Ms. Castro that she needed to get a court order for temporary custody of R.M.G. (Sanchez Dep., 115:24-116:6)."). Ms. Castro thoroughly disputes this in her deposition. She testified that on December 1, Agent Sanchez led her to believe that all she needed to do was wait until the raid was over to recover the baby at the station, R-850, and that the Agents misled her when they invented a custody order requirement on December 3:

> A. [by Ms. Castro] I waited for Manuel's call because he told me he was going to call me as soon as they got to the station with Omar and the baby and whoever else was with them and…
>
> Q [by AUSA]. Okay. When did he tell you that?
>
> A. He told me that on the 1st when I went to the station with my [aunt].
>
> Q. Okay. Then what happened?
>
> A. And I called him [on December 3]. I waited at least 45 to an hour and I called him, and he changed his story and told me that the baby was going to stay with Omar, that I couldn't do nothing about it, and *he had a change in plans*, that the baby was going to stay there with Omar, the baby was going to be boarded off with Omar and that there was nothing I could do about it.

R-851 (emphasis added). Before the district court can decide this critical issue of fact against Ms. Castro, it must hear testimony. *See Williamson*, 645 F.2d at 414 ("[A] judge may be required to hear oral testimony where the facts are complicated and testimony would be helpful" before deciding disputed material facts about

jurisdiction under Rule 12(b)(1) .). The district court erred by pretending that no dispute exists on this critical issue.

b. The Parties Dispute Whether Agency Policy Prohibited Detention and Removal of the Baby.

The district court held that Ms. Castro conceded that on December 3, 2003, the Border Patrol had no policy governing detention and removal of U.S.-citizen children who are apprehended with illegal aliens. R-1011 n.11; *Castro*, 560 F.3d at 388 n.5. Ms. Castro's concession, however, was always explicitly and exclusively based upon the Government's sworn statements that no such policy existed. R-958-59. While this case was pending on appeal, however, the Government issued reports and statements to Congress that appear to contradict the sworn statements that the Government filed in this case:

> *Known U.S. citizens are not placed in immigration detention.* ICE officials said that if CBP 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

See OIG Report at 11.

The OIG Report analyzed data from the period between FY 1998 and FY 2007; R.M.G. was detained and removed on December 3, 2003. In its review of more than 180,000 instances of removal of alien parents with U.S. citizen children, the OIG tells Congress that "there were *no* instances of detaining U.S. citizen children and that [Immigration and Customs Enforcement] would not knowingly

hold a U.S. citizen child in detention." *Id*. at 11 (emphasis added). The OIG Report continues to set forth the Department's policy regarding the apprehension of an alien parent in the possession of a U.S. citizen child:

> *Known U.S. citizens are not placed in immigration detention.* ICE officials said that if [Border Patrol] 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.

An immigration official described the same policy in sworn testimony before Congress:

> At no time did ICE knowingly or willfully place a U.S. citizen in detention. ICE immediately releases individuals who are U.S. citizens…
> ...
>
> A review of known facts revealed that the [six-year-old U.S. citizen child who was with his alien father when arrested] was never detained but he was instead transported to an ICE office until custody arrangements could be made for him. ICE Officers were in Mr. Reyes' home for more than an hour trying to make arrangements for the child, but Mr. Reyes refused to make a call and claimed he had no friends or relatives in the U.S. Once in the ICE office, officers resumed requesting that Mr. Reyes cacll a relative. *The child was at no time confined to a cell.* The child and the father were kept in the juvenile area and provided food and drinks. Only when advised that ICE *would have no choice* but to turn the child over to Child Protective Services, did Mr. Reyes agreed [sic] to ask the uncle to take custody of the child. The uncle was immediately contacted and the child was placed into the care of the uncle within an hour.

U.S. Immigration and Customs Enforcement, Statement of Gary E. Mead, Deputy Director, Office of Detention and Removal Operations Regarding a Hearing on "Problems with ICE Interrogation, Detention and Removal Procedures" before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Feb. 24, 2008 at 3, 8, *available at* http://judiciary.house.gov/hearings/pdf/Mead080213.pdf [hereinafter "Mead Statement"].

These statements qualify or contradict the evidence that the Government presented to the district court. To the extent that the Government's affidavits filed in this case were ambiguous or in error, so was Ms. Castro's concession, because it was based entirely upon those affidavits. Whether the Government's affidavits were false or ambiguous, Ms. Castro should be allowed to use the evidence cited above to dispute whether the agency had a policy prohibiting what the Agents did in this case.

2. The District Court Erred by Failing to Consider All of the Rule 12(b)(1) Facts and Failing to Construe Them in the Light Most Favorable to Ms. Castro

To decide whether the district court properly applied the law, this Court: (a) considers all of the facts alleged by Ms. Castro and all of the undisputed record facts; (b) construes all of these facts in the light most favorable to Ms. Castro; and (c) decides whether the facts are consistent with *any* plausible violation of law by

the Agents. *Lane*, 529 F.3d at 557 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

Lane shows that the Government is wrong to suggest that Ms. Castro's claims can be dismissed because Ms. Castro failed to plead them with sufficient "particularity." Petition at 7; Dissent at 22-23 & n.7. Any "particularity" requirement would not only be inconsistent with *Lane's* expansive statement of the facts that must be considered under Rule 12(b)(1), but also with *Twombly's* express holding. *See Twombly*, 550 U.S. at 569 n.14 ("[W]e do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'"). Thus, under *Lane*, Ms. Castro may allege that federal immigration agents acted "illegally" when they detained and removed from the United States her baby, whom they knew to be a U.S. citizen. *See, e.g.*, R-111-12. Ms. Castro may survive a Rule 12(b)(1) challenge to subject-mater jurisdiction by supplementing the allegations in her complaint with undisputed record facts to show any plausible illegal conduct by the agents, which overcomes the discretionary function exception. *Lane*, 529 F.3d at 557 (A Rule 12(b)(1) motion to dismiss may be granted only if it appears certain that plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction.).[19]

[19] Thus, the Dissent is incorrect to assert that because Complaint ¶ 36 is insufficiently

B. The Plausible Violations of Law at Issue Include, But Are Not Limited To, Constitutional Violations

Proper application of Rule 12(b)(1) under *Lane* requires consideration of many more facts than those considered by the district court, and consideration of those facts in the light most favorable to Ms. Castro.

1. The Immigration and Nationality Act ("INA") Did Not Authorize the Agents to Detain Or Remove a Known U.S. Citizen

The Non-Detention Act of 1971 prohibits federal employees from detaining of any person "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Under this Act, immigration agents cannot detain known U.S. citizens. *See Flores-Torres v. Mukasey*, 548 F.3d 708, 710-12 (9th Cir. 2008) ("There is no dispute that if Torres is a citizen the government has no authority under the [Immigration and Nationality Act] to detain him, as well as no interest in doing so, and that his detention would be unlawful under the Constitution and under the Non-Detention Act."). By detaining the baby without authority conferred by the INA, and in

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specific about "what alleged actions were taken in supposed violation of the Constitution," the issue is "waived." Dissent at 23 at n.23. Under *Lane*, greater specificity may come from record undisputed facts viewed in light of legal authority showing a violation of law, as argued to the district court, *e.g.* R-821-30, or argued below in case this Court decides to conduct *de novo* review under Rule 12(b)(1). *See Nurse*, 226 F.3d at 1002.

Nor is any waiver supported by any failure to make a specific legal argument before the original panel of this Court, *see Scoop-Gonzalez v. INS*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001) ("A court's decision to rehear a case *en banc* effectively means that the original three-judge panel never existed."), or before the district court where the district court failed to properly apply Rule 12(b)(1).

violation of the Non-Detention Act, the agents acted outside the scope of their discretionary functions, rendering § 2680(a) inapplicable to this case.

The primary source of authority—and only relevant source here—available to the Agents is the INA, 8 U.S.C. § 1104, *et seq*. The INA specifically enumerates the "Powers of Immigration Officers and Employees." *See* 8 U.S.C. § 1357. All of these powers are limited to actions involving "aliens" and "foreign nationals." *Id*. Nothing in the INA authorizes federal employees to generally detain or remove people who they know to be U.S. citizens. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (Immigration agents may not detain "persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens."); *Arevalo v. Woods*, 811 F.2d 487, 489 n.2 (9th Cir. 1987) (immigration detention of a known U.S. citizen can form the basis of a *Bivens* and FTCA claim).

The Government argues that the Agents were authorized to detain the baby pursuant to the "general provisions" of the INA. *See* Appellee Br. at 16, Dissent at 396. This is incorrect. The INA specifies but one instance where immigration agents may hold a U.S. citizen: where a crime is committed in the agent's presence (which is not at issue here). 8 U.S.C. § 1357(a)(5). *See In re Globe Bldg.*

Materials, Inc., 463 F.3d 631, 635 (7th Cir. 2006) ("This is a straightforward application of the concept *expressio unius est exlusio alterius*, 'to express or include the one thing implies the exclusion of the other . ...' BLACK'S LAW DICTIONARY 620 (8th ed. 2004); *see also Dersch Energies, Inc. v. Shell Oil Co.,* 314 F.3d 846, 861 (7th Cir. 2002). ("In interpreting the statute we will not invent missing language."). This specific provision necessarily means that the INA does not authorize the detention of a known U.S. citizen.[21] *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

Before the district and the panel, the Government relied on two INA provisions that it claims confer authority upon its employees to detain and transport the baby, but such reliance is misplaced for the reasons recognized by the panel majority. *See Castro*, 560 F.3d at 391 (discussing 8 U.S.C. § 1103(a)(3) and 8 C.F.R. § 240.25(b) and finding the regulation to be irrelevant and the Government's broad reading of the statute "untenable"). Consistent with lack of authority under the INA, the Agents testified that they *knew* that they had no authority to detain a U.S. citizen. R-870, 914-15, 931. Equally consistent is the Government's recent testimony to Congress, which confirms that immigration

[21] Moreover, the "general provisions" section of the INA specifically limits the authority of immigration officials to "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).

officials cannot detain known U.S. citizens, specifically *including* minor U.S. citizen children of detainable alien parents. *See* Part II(A)(1)(b), *supra*; *see also Powers v. United States*, 996 F.2d 1121, 1125-26 (11th Cir. 1993) (appellate courts judicially notice such facts in deciding discretionary function exception applicability under Rule 12(b)(1)).

2. The Agents Violated Agency Policy

Similarly, the discretionary function exception does not apply, and Rule 12(b)(1) dismissal is inappropriate where at the conduct of federal employees violates agency policy. As *Berkovitz* explains:

> *If … allegations of violation of agency policy are correct -- that is, if the Bureau's policy did not allow the official who took the challenged action to release a noncomplying lot on the basis of policy considerations—the discretionary function exception does not bar the claim.* Because petitioners may yet show, on the basis of materials obtained in discovery or otherwise, that the conduct challenged here did not involve the permissible exercise of policy discretion, the invocation of the discretionary function exception to dismiss petitioners' lot release claim was improper.

486 U.S. at 547-48 (emphasis added). Two identical grounds exist for reversing the district court's judgment in this case.

First, agency policy in December 2003, consistent with absence of authority under the INA, forbade the Agents from detaining or removing any known United States citizen, and the employees here violated this policy. Ms. Castro's claim is supported by facts gathered by the agency's own Inspector General, covering long

before and long after the date in question here, which reveal that in the case of more than 180,000 alien parents deported between FY 1998 and FY 2007, "there were no instances of detaining U.S. citizen children and [the Office of Immigration and Customs Enforcement] would not knowingly hold a U.S. citizen child in detention." OIG Report at 11. The agency has sworn this to Congress. *See Mead Statement* ("ICE immediately releases individuals who are U.S. citizens ....").

Second, according to the immigration service's written policy, "[a]ll children must be transported in accordance with state and federal laws governing the use of child safety restraints." R-899. Texas law prohibited transportation of the baby on December 3, 2003 without an approved child safety seat. Tex. Transp. Code § 545.412(a) (all children under age 5 and weighing less than 36 pounds must be restrained in an approved safety seat). Yet in direct violation of that policy, the agents drove the baby for over seven hours on Texas highways without any child safety restraint at all, traveling from Lubbock to Midland, Pecos, Marfa, and finally Presidio, picking up other deportees bound for Mexico along the way. R-916. Ms. Castro raised this plain violation of agency policy before the district court, but the district court ignored it. R-818, 992 *passim*.

3. The Agents Illegally Transported a Child Outside of the United States During a Known Dispute Over Possession of the Child

The Government argues that "Texas law is opaque on what to do when two parents with equal right disagree about where a child should live, but the better

reading of Texas law is that the parent with possession is authorized to choose." Petition at 12-13; Dissent at 25. This is wrong. The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) is implemented by federal and Texas statutes.[22] It provides that one parent lacks the authority to move a child over an international border without the consent of the other parent *unless* a custody order specifically allows such an international move. *Sealed v. Sealed*, 394 F.3d 338, 343 (5th Cir. 2004) (per Barksdale, J.). Absence of *any* custody order combined with absence of both parents' consent means that a move across an international border is illegal. *Id*. (absent any court orders, both parents must consent to move a child across an international border); *see also United States v. Cummings*, 281 F.3d 1046, 1052 (9th Cir. 2002) (comparing the criminal sanctions found in 18 U.S.C. § 1204 and the civil remedies found in the Hague Convention).

The Hague Convention "operates to restore the *status quo* as it existed before the wrongful removal of a child in a signatory nation." *Vernor*, 94 S.W.3d

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[22] Congress ratified the Hague Convention in 1988, and it governs all federal and Texas authorities. *Sealed v. Sealed*, 394 F.3d 338 (5th Cir. 2004) (per Barksdale, J.); *see also* 51 Fed. Reg. 10494, U.S. Dept. of State, *Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction* (Appendix C); *In re Axel Michael Sigmar*, 270 S.W.3d 289, 296-97 (Tex. Civ. App.—Waco 2008) (describing Texas statutes designed in accord with the Hague Convention to prevent risks that are associated with removal of children across international borders without both parents' consent); TEX. FAM. CODE §§ 153.501-503 (detailing Texas custody rules to prevent international parental abduction.).

at 207 (citing *England v. England*, 264 F.3d 268, 271 (5th Cir. 2002)). The Hague Convention is not "designed to settle international custody disputes, but rather to restore the *status quo* prior to any wrongful removal [from the country of habitual residence], and to deter parents from engaging in international forum shopping in custody cases." *In the Interest of J.J.L.-P.*, 256 S.W. 3d 363, 368 (Tex. App.—San Antonio 2008) (citing *Karkkainen v. Kovalchuck*, 445 F.3d 280, 287 (3d Cir. 2006)). The Hague Convention and its implementing statutes decimates the Government's unsupported argument that the lawful *status quo* was defined exclusively by Mr. Gallardo's possession of the baby on December 3, 2003. *See* Petition at 14; Dissent at 24 & n.11. This authority establishes as a matter of law that the *status quo* to be protected under both federal and Texas law was the baby's presence in Texas unless and until a Texas court ordered otherwise.

Immigration officials are uniquely positioned and trained to investigate kidnapping, child trafficking, and other types of criminal activity involving transportation of children across international boundaries. *See, e.g., United States v. Cabrera*, 288 F.3d 163, 173 (5th Cir. 2002); *see also* Press releases from

Customs and Border Protection, downloaded at http://www.cbp.gov/xp/cgov/newsroom/news_releases/10192009_4.xml (describing the arrest of a woman wanted on kidnapping charges at the Hidalgo, Texas Port of Entry) and http://www.cbp.gov/xp/cgov/newsroom/news_releases/september_2009/09102009_4.xml (describing the apprehension of a runaway juvenile in the company of a 55-year old man at an interior immigration checkpoint in New Mexico).

Second, the International Parental Kidnapping Crime Act ("IPKCA"), 18 U.S.C. § 1204 prohibits any attempt to remove a child from the United States with intent to obstruct the lawful exercise of parental rights. *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 44 (1st Cir. 2004) . A custody order need not be in place for a violation of this statute to occur. *United States v. Sardana*, 101 Fed. Appx. 851, 853-54 (2nd Cir. 2004). This prohibition extends to the agents who had Castro's baby in their possession and transported her to Mexico at the precise time Ms. Castro was attempting to exercise her undisputed parental rights—with or without a custody order. R-826.

Finally, consistent with § 1204 and the express purpose of the Hague Convention, the U.S. Department of State requires the consent of both parents when issuing a U.S. passport for a child. *See* 22 C.F.R. § 51.28; *See Butterbaugh v. DOJ*, 336 F.3d 1332, 1338-39 (Fed. Cir. 2003). Here, no custody order existed

on December 3, 2003. Both parents did not consent to the baby's removal from the United States on that date; instead, the agents knew that Ms. Castro objected to her baby's transportation to Mexico by Border Patrol agents. R-852-53, 855, 867, 888-89, 930-32, and 948-49. Because federal officers lack discretion to violate these laws, their acts here are not discretionary.

4. The Agents Violated the Constitution, Particularly Ms. Castro's Due Process Right to Family Integrity

In addition to the baby's Fourth Amendment right to remain free from unreasonable detention and the baby's Fifth Amendment right to family integrity, Ms. Castro's Fifth Amendment right to family integrity remains at issue. Even if Mr. Gallardo could consent on behalf of the baby to detention and removal that would otherwise violate her constitutional rights,[24] the Government names no reason or authority to suggest that he can effectively consent to violation of *Ms. Castro's* constitutional rights.

Due Process "liberty interest ... of parents in the care, custody, and control of their [children] is perhaps the oldest of the fundamental liberty interests recognized

[24] Ms. Castro maintains that even if, *arguendo,* Mr. Gallardo had custody rights to the baby and consented to the baby's detention and removal with him, his consent does not establish the constitutionality of the Agents' detention and removal of the baby. The cases cited for efficacy of parental consent all involve conduct *by the child* that justifies the challenged government action. *See* Dissent at 22 n.6 (citing cases). Here, the Government's only reason for detaining the baby was Mr. Gallardo's conduct. Under the Dissent's reading of the Fourth and Fifth Amendments, a parent could constitutionally elect to take his 10-year-old child to prison with him despite the child's natural objection. *Cf.* R-852, 889, at 975.

by [the Supreme] Court." *Troxel v. Granville*, 520 U.S. 57, 65 (2000); *accord Littlefield v. Forney Ind. Sch. Dist.*, 268 F.3d 275, 288 (5th Cir. 2001). Due Process protects each parent's right to make important decisions about where their children live and how they are reared. *Troxel*, 520 U.S. at 65-66; *see also Papakonstantinou v. Civiletti*, 496 F. Supp. 105, 111 (E.D.N.Y. 1980) (where biological parents disagree, state law should determine which parent has the right to determine where the child lives). Deprivation of this right occurs "only when the government directly acts to sever or otherwise affect [a parent's] legal relationship with a child." *De Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006).

Before the Government may legitimately diminish a parent's liberty interest in raising a child, procedural due process, consisting of both notice and the opportunity to be heard, must be afforded to that parent. *Stanley v. Illinois*, 405 U.S. 645, 651 (1944). Notice of the Government's proposed deprivation must be provided using a time, form, and means of delivery that are actually effective in apprising each affected person of how to challenge the proposed deprivation. *Id*. The opportunity to be heard "must be granted at a meaningful time in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The quality of process that is constitutionally due varies depending upon the nature of the deprivation at issue. *See Goss v. Lopez*, 419 U.S. 565 (1975);

Mathews v. Eldridge, 424 U.S. 319 (1976); *Santosky v. Kramer*, 455 U.S. 475 (1982). The deprivation at stake here was grave, for the "rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and rights far more precious ... than property." *Stanley v. Illinois*, 405 U.S. 645, 651 (1944). Notice and an opportunity to be heard *of commensurate quality* were due Ms. Castro.

The notice provided Ms. Castro was deficient as to content, timing, and form. The content of the Government's notice was misleading, for on December 1, 2003, Agent Sanchez led Ms. Castro to believe that his only requirement for giving her the baby was that she accompany him on the immigration raid. R-850-51. Ms. Castro declined out of fear then and there. *Id*. Upon Ms. Castro's, the refusal agents *still* led Ms. Castro to believe that they would give her the baby after the raid. *Id*. The content of the Government's December 1 notice misled Ms. Castro into actually believing, both on Monday December 1 when she called the Agents, and on Wednesday December 3 when she went to the border patrol station with a diaper bag in her hand, that all the Government required for her to get the baby was for her to appear at the station. R-851.

The Agents never informed Ms. Castro that *they* required a custody order until the morning of December 3, 2003. R-851 and 887-888.[25] This new notice was neither written nor provided pursuant to any written policy, R-851, so it appeared to Ms. Castro as a barrier of uncertain terms that Agents capriciously erected to punish her. *Id.*[26]

The opportunity to be heard that was provided by the Agents was not "meaningful" as required by Due Process, and certainly not so in light of the nature of the deprivation at issue. The Agents' requirement that Ms. Castro find a lawyer within hours by extension also meant that she had to find one (a) who she could afford and trusted, and (b) who was willing to immediately undertake the administrative tasks necessary to commence representation, gather the facts, analyze this intersection of Texas family law and federal immigration law, prepare necessary legal documents, and go to court to seek an emergency custody order.

Also, the opportunity to be heard provided by the Agents depended on something entirely outside Ms. Castro's control: the availability of a Texas judge.

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[25] The fact that Texas agencies told Ms. Castro on Friday, November 28, 2003 that *they* would require a custody order to intervene on her behalf does not put Ms. Castro on any notice, let alone adequate notice, of what the Border Patrol would require. Much to the contrary, on Monday, December 1, the Agents led Ms. Castro to believe that a court order was *not* required.

[26] The absence of specific, written terms was critical. For example, the Government now claims that Ms. Castro could have sought her custody order during the hours that the bus carrying her baby was *en route* to Mexico. Response Br. at 14. But the Agents never told Ms. Castro this at the time, in writing or otherwise.

The only opportunity to be heard afforded by the Agents was plausibly, and even patently, inadequate because it only existed for a few hours, and it required things that cannot be reliably or reasonably completed within a few hours. The Government's only explanation for why it did not wait another day was roughly $200 in detention costs. R-934. This pales in comparison to the costs that the Agents required of Texas courts and Ms. Castro, but most importantly, in comparison to the rights at stake.

After the bus departed, no court order would have been useful to Ms. Castro, particularly since the Agents failed to inquire, let alone record and provide to Ms. Castro, where the baby would be domiciled in Mexico, or what Mr. Gallardo planned for the baby's care. R-918-19; *see also* Part II.B.3., *supra*, at n. 22 U.S. Dept. of State, *Report* (discussed in Part II.A.1.b., *supra*); *In re Sigmar*, 270 S.W.3d at 296-97 (discussing the need to protect children engaged in international travel due to practical unenforceability of custody orders in Mexico).

CONCLUSION

This Court should reverse the district court's Rule 12(b)(1) judgment of dismissal and remand for the district court to decide in the first instance whether the Agents engaged in illegal conduct that caused a three-year separation of mother from baby.

Respectfully submitted,

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Dated: November 3, 2009

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I hereby certify that on the 3rd day of November, 2009, a true and correct copy of the foregoing was delivered to Counsel for Defendant-Appellee United States of America, Eric Fleisig-Greene, via Federal Express overnight delivery, tracking number **867544581540** to:

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