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

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:

Plaintiffs-Appellants:

Monica Castro
R.M.G., a minor child

Defendant-Appellee:

United States of America

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Dated: July 10, 2007

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument in this case. The District Court's decision presents important questions concerning the applicability of the discretionary function exception to the Federal Tort Claims Act, specifically, whether a federal official's acts that exceed his authority and are unconstitutional are protected by the discretionary function exception. In addition, Appellants believe this to be a case of first impression on the facts.

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Texas had subject matter jurisdiction over the suit brought by Plaintiffs-Appellants Monica Castro and her minor child, R.M.G., pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the appeal from the District Court's order granting Defendant-Appellee's motion to dismiss. The present appeal is from a final judgment disposing of all claims by Plaintiffs-Appellants. 28 U.S.C. § 1291. The final judgment was entered on April 4, 2007. Plaintiffs-Appellants filed their Notice of Appeal with this Court on April 23, 2007, which is within the 60-day limit imposed by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Immigration and Naturalization Act (INA) authorizes federal immigration officials to detain an infant whom they know to be a U.S. citizen.

2. Whether the INA authorizes federal immigration officials to make decisions regarding child custody rights.

3. Whether the discretionary function exception applies to governmental decisions which exceed the scope of a federal official's authority.

4. Whether the discretionary function exception to the Federal Tort Claims Act bars suit against the United States for detaining a U.S. infant and for making a custody determination regarding that infant.

STATEMENT OF THE CASE

At issue in this case is whether the United States is liable when federal immigration officials detain a child they know to be a U. S. citizen and, in plain disregard of the child's U. S. citizen mother's parental claims, determine that her alien father has a superior right to decide the child's residence.

Plaintiff-Appellant, Monica Castro, a U.S. citizen, brought suit for herself and on behalf of her minor daughter, R.M.G., against the United States of America under the U.S. Constitution and the Federal Tort Claims Act ("FTCA") for damages arising from (1) the December 3, 2003 detention of her infant U.S. citizen child by U.S. Border Patrol and (2) the Border Patrol agents' child custody determination, which resulted in Appellant R.M.G.'s removal from the United States and the Appellants' three-year separation from one another.

On November 14, 2006, the United States filed a motion for dismissal pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or, alternatively, for summary judgment pursuant to Rule 56. *See Defendant's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion for Summary Judgment* (hereinafter "*Motion to Dismiss*"), Record, volume 1 at 146-285

(hereinafter "R. vol. __"). Castro filed her amended responsive motion on February 2, 2007. *See Plaintiffs' First Amended Response to Defendant's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion for Summary Judgment* (hereinafter "*Plaintiffs' Response*"), R. vol. 5 at 814-991.

On February 9, 2007, the District Court issued an opinion holding that the Defendant is protected from suit pursuant to 28 U.S.C. § 2680(a), the discretionary function exception of the FTCA. *See Order dated February 9, 2007* (hereinafter "*Opinion*"), R. vol. 5 at 992-vol. 6 at 1019. On April 4, 2007, the District Court entered a final judgment dismissing Plaintiffs' tort claims for lack of subject matter jurisdiction, and dismissing Appellants' constitutional claims as moot. *See Order dated April 4, 2007*, R. vol. 6 at 1029-36. Because the District Court granted dismissal pursuant to Rule 12(b)(1), it did not reach a decision on summary judgment. *See Opinion*, R. vol. 6 at 1019; *Final Judgment*, R. vol. 6 at 1037.

Appellants do not appeal the District Court's decision regarding their constitutional claims; appeal is limited to dismissal of all FTCA claims for lack of subject matter jurisdiction. Likewise, because the District Court did not reach a decision regarding the United States' request for summary judgment, that motion is not at issue in this appeal. Nor does this appeal present the question of whether there is a disputed fact issue on any of Plaintiffs' claims against Defendant. Accordingly, the Appellants have not briefed these issues, and respectfully request

notice from this Court if it intends to rule on these or any other issues not related to the District Court's dismissal pursuant to the FTCA's discretionary function exception.

STATEMENT OF THE FACTS

The facts relevant to this appeal are undisputed.[1] Appellant Monica Castro ("Castro") is the young mother of a minor child, Appellant R.M.G., and both are citizens of the United States. *See Plaintiffs' Response*, R. vol. 5 at 815; *see also Plaintiffs' First Amended Complaint* (hereinafter "*Complaint*"), R. vol. 1 at 104 ¶ 11; *Defendant's First Amended Answer* (hereinafter "*Answer*"), R. vol. 1 at 129 ¶ 11. Omar Gallardo ("Gallardo"), who is R.M.G.'s father, was a Mexican national illegally present in the United States during the relevant time period. *See Plaintiffs' Response*, Exhibit D: *Notice of Intent/Decision to Reinstate Prior Order Against Omar Gallardo*, R. vol. 5 at 881-83. Border Patrol agents also had information that Gallardo was wanted in connection with a homicide in Amarillo. *See Plaintiffs' Response*, Exhibit B: *Deposition of Manuel Sanchez*, R. vol. 5 at 863, 118:5-119:6; *id.*, Exhibit E: *Affidavit of Monica Castro*, R. vol. 5 at 887.

On December 3, 2003, U.S. Border Patrol agents in Lubbock, Texas seized Gallardo and took him and R.M.G. into federal custody. At the time of the child's

[1] Appellants note that the undisputed nature of the facts applies only to the limited issue on appeal. Plaintiffs-Appellants' full recitation of the facts appears at *Plaintiffs' Response*, R. vol. 4 at 815-20.

initial seizure and detention, she was in Gallardo's physical possession, and was one day shy of her first birthday.[2] *See Plaintiffs' Response*, Exhibit J: *Form I-213, Record of Deportable/Inadmissible Alien Omar Gallardo*, R. vol. 5 at 918-19; Exhibit V: *Certificate of Live Birth of R.M.G.*, R. vol. 5 at 967.

Castro knew of Gallardo's impending arrest, as she herself had informed the Border Patrol where he could be found. *See Plaintiffs' Response*, R. vol. 5 at 815-16; *Complaint*, R. vol. 1 at 105 ¶ 16; *Answer*, R. vol. 1 at 129 ¶ 16. After Gallardo refused to release R.M.G. to Castro following a violent argument, Castro sought assistance from local law enforcement agencies and Child Protective Services ("CPS") to recover her child. *Plaintiffs' Response*, Exhibit E: *Affidavit of Monica Castro*, R. vol. 5 at 886-87. Because no judicial custody orders were yet in place regarding the child, those efforts were unsuccessful.

Desperate for the return of her child, Castro then sought assistance from the Border Patrol, informing them that Gallardo was undocumented and that he had the infant.[3] *See Plaintiffs' Response*, Exhibit R: *Memorandum of Manuel Sanchez*, R.

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[2] Castro had long suffered physical abuse at the hands of Gallardo and had been forcibly driven from the house shortly before his arrest. *See Plaintiffs' Response*, Exhibit E: *Affidavit of Monica Castro*, R. vol. 5 at 885-86. During the relevant time frame, she had been making all possible efforts to obtain formal custody and control of her child. *See Plaintiffs' Response*, R. vol. 5 at 815-18.

[3] The District Court appeared troubled by the fact that two days elapsed between the time Castro was denied assistance from local authorities and when she went to the Border Patrol. *See Opinion*, R. vol. 6 at 1008-10. The court insinuated that Castro's failure to obtain a court order in the interceding days led to the removal of her child. *See id*. Of note, the interceding days—

vol. 5 at 951. Based on this information, the Border Patrol agents promised to deliver the infant to Castro when they arrested her husband, specifically citing their inability to deport a U.S. citizen. *See Plaintiffs' Response*, Exhibit B: *Deposition of Manuel Sanchez*, R. vol. 5 at 864.

Although they admitted that they had never invited a private citizen to an arrest, Border Patrol officials requested Castro to be present when Gallardo and his family members were detained. *See id*., R. vol. 5 at 865, 141:1-142:21. Citing fear and safety concerns, Castro declined to be present. *See id*., Exhibit A: *Deposition of Monica Castro*, R. vol. 5 at 850, 41:1-23; Exhibit E: *Affidavit of Monica Castro*, R. vol. 5 at 887. Border Patrol agents told Castro that they would bring the child to the station and that Castro could retrieve her daughter there. *See Plaintiffs' Response*, Exhibit E: *Affidavit of Monica Castro*, R. vol. 5 at 887-88.

Having witnessed the arrest from a nearby trailer home, Castro waited for the promised telephone call from Border Patrol confirming that they had her daughter and that she could pick her up. *See Plaintiffs' Response*, R. vol. 5 at 817; *id*., Exhibit A: *Deposition of Monica Castro*, R. vol. 5 at 851, 60: 5-10, 61:1-18. When she did not receive a call, Castro went directly to the Lubbock Border Patrol station and demanded that the agents release her child to her. *See Plaintiffs'*

November 29 and 30, 2003—were Saturday and Sunday, making appearance before a court impossible. Additionally, as discussed below, Castro's acts are irrelevant to the issue of discretionary function. *See* Section VII.B.1, infra.

Response, R. vol. 5 at 817; *see also Complaint*, R. vol. 1 at 105 ¶ 19; *Answer*, R. vol. 1 at 1129 ¶ 19. Rather than ending the detention of a known U.S. citizen, the Border Patrol agents then wrongfully and impermissibly decided that Gallardo enjoyed superior rights to custody.[4] Over Castro's stringent objections and demands that her daughter not be sent out of the United States, Appellee decided to remove the child with Gallardo to Mexico that same day, *de facto* severing Castro's fundamental parental rights of care, custody and control of her child. *Plaintiffs' Response*, R. vol. 5 at 817-19.

The agents made these decisions with full knowledge that they lacked authority to detain a U.S. citizen or to make child custody determinations. *See Plaintiffs' Response*, Exhibit B: *Deposition of Manuel Sanchez*, R. vol. 5 at 870, 167:3-10; *id.*, Exhibit M: *Deposition of Greg Kurupas*, R. vol. 5 at 931, 100:8-11. Further, the agents had actual knowledge that Castro was actively in pursuit of child custody orders by a court of competent jurisdiction. *See Plaintiffs' Response*, Exhibit R: *Memorandum of Patrol Agent in Charge Gregory L. Kurupas*, R. vol. 5 at 952. Indeed, Castro's attorney was frantically calling the Border Patrol agents from the courthouse as she attempted to appear before a state judge. *See Plaintiffs' Response*: Exhibit H: *Deposition of Lina Reyes Treviño*, R. vol. 5 at 906-07, 18:13-22:2

[4] "Custody," as it is generally thought of, is termed "conservatorship" under Texas law.

Despite multiple telephone calls from Castro's attorney to the Border Patrol informing them that an initial custody determination by a competent court was imminent, the Appellee did nothing other than respond that the child would be removed at 3:00 p.m. *Id*. at 905-07, 16:5 - 22:2. The government did, in fact, remove R.M.G. to Mexico that afternoon, and its actions resulted in a three-year separation of mother and child, during which time Castro had no knowledge of her child's whereabouts or condition. *See Plaintiffs' Response*, Exhibit E: *Affidavit of Monica Castro*, R. vol. 5 at 889.

STANDARD OF REVIEW

On appeal, a District Court's ruling on dismissal for lack of subject matter jurisdiction is a question of law reviewed *de novo*, and the reviewing court applies the same standard applicable to the District Court. *See Herbert v. United States*, 53 F.3d 720, 722 (5th Cir. 1995). The Court must accept the "well-pleaded allegations in the complaint as true and . . . construe those allegations in the light most favorable to the plaintiff." *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994). In deciding a motion to dismiss under Rule 12(b)(1), the Court may consider "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

If a jurisdictional issue is entwined with the merits of the case, determination of that issue must be postponed until trial. *Land v. Dollar*, 330 U.S. 731, 735, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947) (*overruled on other grounds*); *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 363 (5th Cir. 1967).

A motion to dismiss is properly granted "only if it appears certain that the plaintiff cannot prove any set of facts in support of [her] claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

SUMMARY OF THE ARGUMENT

This is an appeal from the District Court's decision to apply the discretionary function exception to Plaintiffs' claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, Pub. L. No. 79-601, Title IV, 60 Stat. 812, 842-47 (1946). Appellants sued the United States for damages arising from the unlawful detention of a minor U.S. citizen child, and for making an unauthorized child custody determination. In dismissing Appellants' case, the District Court unduly narrowed the coverage of the FTCA by improperly expanding the scope of the discretionary function exception. In so doing, the District Court seriously undermined the purposes of the FTCA. The discretionary function exception does not apply to actions that exceed the congressional grant of authority to the federal agency in question. The ruling in *United States v. Gaubert*,

499 U.S. 315, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991), confirms this long-standing jurisprudence, and weighs heavily in favor of the Appellant. Moreover, although the ability to obtain injunctive relief for Appellants' constitutional claims is now moot, the acts in question were nonetheless unconstitutional in nature, rendering the discretionary function exception inapplicable on this ground as well.

The District Court flatly disregarded the holdings of *Gaubert* and its predecessors. As an initial matter, the trial court failed to determine whether the Border Patrol acted within the scope of its authority. Had it done so, the court would have concluded that the discretionary function exception does not apply to the actions in question because Border Patrol agents exceeded their authority and violated the U. S. Constitution.

Additionally, the District Court wrongly interpreted and applied *Gaubert* in concluding that the Border Patrol agent's acts were the product of choice or judgment grounded in social or economic policy of their agency. The challenged governmental actions violated the Constitution, exceeded the scope of the agents' authority, and lacked any connection to the social or economic policy of the regulatory regime that establishes the authority of the Border Patrol. For these reasons, the District Court's dismissal must be reversed.

ARGUMENT

A. BECAUSE FEDERAL OFFICIALS ACTED IN EXCESS OF THEIR CONGRESSIONALLY DELEGATED AUTHORITY, THE DISCRETIONARY FUNCTION EXCEPTION IS INAPPLICABLE

1. The FTCA Authorizes Suits Against the United States for Damages, and the Exceptions to That Authorization Must be Read in Conformity with Statutory Purposes and Intent.

The FTCA is a general waiver of sovereign immunity, granting individuals a right to recover from the United States Treasury for torts committed by federal employees, if a private person would be liable under similar circumstances. *Berkovitz v. United States*, 486 U.S. 531, 535-36, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988); *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 68-69, 76 S. Ct. 122, 100 L. Ed. 48 (1955); *Dalehite v. United States*, 346 U.S. 15, 27-28, 73 S. Ct. 956, 97 L. Ed. 1427 (1953); *Sutton v. United States*, 819 F.2d 1289, 1292 (5th Cir. 1987). Through the FTCA, Congress sought to provide adequate compensation to persons injured as a result of the tortious actions of federal actors. *See Sutton*, 819 F.2d at 1292. Accordingly, the purpose of the FTCA is to provide broad and just relief. *Indian Towing*, 350 U.S. at 68-69.

Congress, however, was also concerned about the potential chilling effect on the government's decision making process, since the duties of many federal employees require the day-to-day exercise of discretion. To balance these concerns, Congress enacted certain exceptions to the general waiver of sovereign immunity. *See* 28 U.S.C. § 2680. One such exception bars liability under the

FTCA for discretionary acts. *See id*. at § 2680(a); *see also Berkowitz*, 486 U.S. at 535-36 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines*), 467 U.S. 797, 808, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984) (the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.")); *Sutton*, 819 F.2d at 1298 ("Immunity [under § 2680(a)] was retained to protect necessary, but necessarily imperfect, functions of government involving discretion on policy judgments and decisions from tort inspired judicial scrutiny."). In other words, the discretionary function exception is designed to "'prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy….'" *Gaubert*, 499 U.S. at 323 (citing *Berkovitz*, 486 U.S. at 537).

However, this and other exceptions must be narrowly construed. While a proper reading of the exception should not nullify it, "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Kosak v. United States*, 465 U.S. 848, 854 n.9, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984) (citing *United States v. Yellow Cab Co.*, 340 U.S. 543, 548 n. 5, 71 S. Ct. 399, 95 L. Ed. 523 (1951)). 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*, 464 U.S. at 854 (quoting *Dalehite*, 346 U.S. at 31).

2. The District Court's Failure to Determine Appellee's Scope of Authority Led to an Erroneous Conclusion That the Discretionary Function Exception Is Applicable in This Case.

The District Court misread *Gaubert* and the line of cases preceding it to conclude that the discretionary function exception bars Appellants from suing under the FTCA. The court's errors are traced to its narrow reading of the Supreme Court's decisions interpreting the exception, which have instructed lower courts to apply the discretionary function exception with special care so that the exception does not sweep too broadly. *See id*.

From *Dalehite* to *Gaubert*, the Supreme Court has established certain principles to determine whether the discretionary function exception applies to bar recovery under the FTCA. First, the decisions interpreting the scope of the exception teach that courts must, as an initial matter, examine the agency's congressionally delegated authority to determine whether the challenged acts fall within that grant of authority. *See, e.g.*, *Gaubert*, 499 U.S. at 318-19; 329-31 (engaging in a lengthy analysis of the Home Owners' Loan Act of 1933); *Berkovitz*, 486 U.S. at 540-43; 545 (providing in-depth discussion of regulations governing the licensing and release of polio vaccines); *Varig*, 467 U.S. at 804-07 (analyzing the Federal Aviation Act and its applicability for aircraft safety

requirements); *Dalehite*, 346 U.S. at 18-22 (tracing governmental interest in and regulation of Fertilizer Grade Ammonium Nitrate). This initial analysis is necessary to isolate and focus on the specific challenged acts and to evaluate whether they are encompassed by the agency's regulatory regime because where there is no authority to act, there cannot be any discretion. *See, e.g.*, *Birnbaum v. United States*, 588 F.2d 319, 329 (2nd Cir. 1978) ("A discretionary function can derive only from properly delegated authority. . . . Discretion may be as elastic as a rubber-band, but it, too, has a breaking point.") (citing *Hatahley v. United States*, 351 U.S. 173, 181, 76 S. Ct. 745, 100 L. Ed. 1065 (1956)); *see also Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187,1196 (D.C. Cir. 1986), *rev'd on other grounds*, 936 F.2d 1320 (D.C. Cir. 1991) ("a decision cannot be shielded from liability if the decisionmaker is acting without actual authority").

Second, the Supreme Court has eschewed a strict definition of the discretionary function exception. *See Varig*, 467 U.S. at 813 ("it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception."); *Dalehite*, 346 U.S. at 35 ("It is unnecessary to define, apart from this case, precisely where the discretion ends."). Rather, the Court instructs lower courts to examine the nature of the conduct of the offending federal official without regard for his or her status. *Gaubert*, 499 U.S. at 316. The challenged conduct must involve an element of judgment or choice that is plainly within the

power of the official. *Dalehite*, 346 U.S. at 34 (citing *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803)).

Third, the Supreme Court has by example described the easy cases: those where a federal statute, regulation or policy specifically prescribes a course of action for the federal official. In such instances, the official has no discretion to act and therefore the exception does not apply.

Recognizing, however, that there will not be a specific directive in every case, the Court directs lower courts to analyze the "general aims and policies" of the controlling statute governing the agency's regulatory regime to determine whether the statute entrusts such discretion to the agency or offending official. *Gaubert*, 499 U.S. at 324. If the controlling statute delegates discretion to an agency or official, then it may be presumed that the "agent's acts are grounded in policy when exercising that discretion." *Id*. However, acts within the scope of the agent's employment but disconnected from the "the purposes that the regulatory regime seeks to accomplish" are not deemed to fall within the discretionary function exception and the exception will not apply. *Id*. at 325 n.7.

The District Court failed to fully explore the scope of Border Patrol's statutory authority. Proper analysis demonstrates that Appellee had no authority to engage in the challenged acts, rendering the discretionary function exception inapplicable.

a. Long-Standing jurisprudence confirms that the powers of federal agencies must derive from congressional delegation of authority.

The discretionary function exception will indeed immunize many erroneous actions by a federal employee acting *within* the scope of his or her authority. However, there is no discretion at all to act beyond the limits of the agency's statutory grant of authority. *See Sutton*, 819 F.2d at 1293 ("[W]e have not hesitated to conclude that such action does not fall within the discretionary function of § 2680(a) when governmental agents exceed the scope of their authority as designated by statue or the Constitution."); *Red Lake*, 800 F.2d at 1196 ("a decision cannot be shielded from liability if the decisionmaker is acting without actual authority"), *Birnbaum v. United States*, 588 F. 2d at 329 ("A discretionary function can derive only from properly delegated authority.").

The Second Circuit confronted the discretionary function exception in a case where the Central Intelligence Agency ("CIA") opened and photocopied mail of U.S. citizens. *Birnbaum*, 588 F.2d at 321. No statute or regulation, however, authorized the CIA to conduct domestic intelligence gathering activities. *Id*. at 329. That being the case, the Second Circuit held that

> [a] discretionary function can derive only from properly delegated authority. Authority generally stems from a statute or regulation, or at least, from a jurisdictional grant that brings the discretionary function within the competence of the agency . . . . An act that is clearly outside the authority delegated cannot be considered as an "abuse of discretion."

Id.

The court concluded that "the CIA was acting so far beyond its authority that it could not have been exercising a function which could in any proper sense be called 'discretionary.'" *Id*. at 332.

Likewise, the Court of Appeals for the District of Columbia reviewed the claim that the Federal Bureau of Investigation ("FBI") unlawfully took command of policing activities on Indian reservations, ostensibly to quell a dispute between rival factions on the reservation. *Red Lake Band*, 800 F.2d at 1196. The parties jointly stipulated that the FBI had no statutory authority over the other law enforcement officers on Indian reservations. *Id*. at 1189. The court explained that

> …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.
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> *Id*. at 1196.

Accordingly, because the FBI's activities exceeded the scope of its authority, the discretionary function exception did not apply here. *Id*. at 1197. Even when preservation of human life is a potential policy consideration at stake, the *Birnbaum* court held that an agent's decision to act "is circumscribed by the rules that limit the bounds of his authority." *Id*. at 1197.

This Court also recognizes that discretionary function exception simply does not apply where the actions of a federal official exceed the scope of his or her authority. While the central issue in *Sutton*, an FTCA action arising from claims of prosecutorial misconduct, was the interplay between sections 2680(a) and 2680(h) of the FTCA, the *Sutton* Court clearly stated that the discretionary function exception does not apply "when governmental agents exceed the scope of their authority as designated by statue or the Constitution." *Sutton*, 819 F.2d at 1293.

The legal issues and policy concerns underlying these ruling are fundamental: a federal agency has only those powers granted to it by the U. S. Congress. Any actions exceeding the scope of those powers raise grave concerns regarding the separation of powers. "To permit an agency to expand its power in the face of a Congressional limitation on its jurisdiction would be to grant the agency power to override Congress…." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).

b. The Immigration and Naturalization Act grants authority to the U.S. Border Patrol.

A careful review of the relevant statute and regulations in this case makes it clear that the Border Patrol agents were acting far beyond the scope of any congressional grant of authority. Derived from the Constitution's grant of power to Congress to establish a uniform rule of naturalization, U.S. CONST. art. I § 8, cl. 4, the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101 *et seq.*,

remains the centerpiece of U.S. immigration law and the federal law that controls the Border Patrol's authority. Despite numerous important and extensive revisions to the INA over the past 55 years, Congress has not altered the INA's scope of authority: regulating the entry of aliens, their detention, their expulsion or removal, and naturalization.[5] *See* 8 U.S.C. § 1103(a)(1) (vesting the Secretary of Homeland Security with the administration and enforcement of "laws relating to the immigration and naturalization of aliens."); 8 U.S.C. § 1101(a)(17), (defining "immigration laws" as including "this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens"); 8 U.S.C. § 1101(a)(23) (defining "naturalization" as conferring nationality of a state upon a person after birth, by any means whatsoever). This delegation of authority is specific, well defined and clearly limited.

Under the INA, Congress has conferred upon federal immigration officials, including Border Patrol agents,[6] the power to inspect persons attempting to enter the United States, and to detain them for heightened inspection if officials question the validity of the person's ability to legally enter the country. *See* 8 U.S.C. §§

[5] "Alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

[6] The Bureau of Customs and Border Protection (commonly known as the U.S. Border Patrol) is an agency of the Department of Homeland Security, and is specifically included as a defined agency subject to the INA. *See* 8 C.F.R. § 1.1.

1221 *et seq*. Agents may also permissively—and under some circumstances are required to—detain *aliens* for removal proceedings. *See, e.g.*, *Demore v. Hyung Joon Kim*, 538 U.S. 510, 531, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003) (emphasis added) (recognizing that section 236(c) of the INA mandates the detention of an alien who is deportable by virtue of his conviction for one of a specified list of crimes). However, immigration officials must comply with the due process requirements of the Constitution when exercising their authority. *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 123 L Ed. 2d 1 (1993) (O'Connor, J. concurring).

Within this statutory grant of authority, federal immigration officials have broad discretion in making determinations in matters such as the detention, parole or deportation of *foreign nationals* illegally present in the United States. *See*, *e.g.*, *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30, 117 S. Ct. 350, 136 L. Ed. 2d 288 (1996) (confirming broad INS discretion in determining who, among a class of eligible *aliens*, may be granted relief from removal) (emphasis added); *Jean v. Nelson*, 472 U.S. 846, 853, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (recognizing broad discretion granted through the INA for paroling *foreign nationals* into the United States) (emphasis added).

Of critical importance here, while the INA provides federal immigration officials with broad discretion regarding *immigration and naturalization*, that

discretion is not without limits. "It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd* 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987).

Legal opinions issued by the Immigration and Naturalization Service and the Department of Justice reflect that the agencies themselves recognize constitutional and statutory limits on their scope of authority. *See* Limitations on Detention Authority of the Immigration and Naturalization Service, Legal Op. No. 03-1 n.1 (INS) (2003), *available at* http://www.usdoj.gov/olc/INSDetention.htm (stating that it is "implicit in the granting of any authority to an executive officer that it may not be exercised in a manner that is expressly constitutionally proscribed."); INS Exercise of Prosecutorial Discretion, Legal Op. No. 99-5, 2001 WL 1047687 (determining that the INS may not "pursue an enforcement action that might be entirely appropriate if done by some other agency, but is not within the legal jurisdiction of the INS.").

Judicial deference, moreover, shall not be accorded to immigration agency decisions that exceed the agency's expertise. *See Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) (finding Board of Immigration Appeals' statutory interpretation not entitled to deference where issue is one that is traditionally a matter for the

courts, not the agency, to decide); *Sandoval v. Reno*, 166 F.3d 225, 239 (3d Cir. 1999) (limiting judicial deference only to inquiries that "implicate agency expertise in a meaningful way"); *Coronado-Durazno v. INS*, 123 F.3d 1322, 1324 n.1 (9th Cir. 1997) (determining that deference to the INS is only "appropriate when a matter is consigned to the INS's discretion in the first place").

Accordingly, the INA grants authority to federal immigration officials acting within the realm of immigration and naturalization of aliens. It does not grant any further authority, and federal immigration officials are prohibited from unilaterally expanding the powers bestowed on them by Congress.

c. Absent express statutory language, INA authority to invade constitutionally-protected rights will not be presumed.

In interpreting an agency's statutory authority, courts must first look to the plain language of the statute. If the statute is ambiguous or silent, the court must then determine whether the agency's interpretation of the statute is reasonable. *See Chevron USA, Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under the canon of constitutional avoidance, a reasonable interpretation of the statute will not do violence to the Constitution. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-510, 504, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979) (…an "act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

When a constitutional right or other key issue is at stake, a delegation of power infringing on that right will not be presumed. A broad grant of general authority is insufficient. Rather, a more explicit statement is required in order to prevent individual federal agents from invading constitutionally-protected liberties. *See, e.g.*, *Kent v. Dulles*, 357 U.S. 116, 129, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958) (hesitating to find delegated authority in broad language of statute "to trench so heavily on the rights of citizens" when Fifth Amendment issues at stake).

A specific prohibition of the misconduct is not required. "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy limitless hegemony, a result plainly out of keeping with … the Constitution." *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d. 655, 671 (D.C. Cir. 1994).

> Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the [the agency] unbridled discretion to grant or withhold it….

Kent, 357 U.S. at 129 (internal citations omitted); s*ee also Gutkneckt v. U.S.*, 396 US 295, 306-307, 90 S. Ct. 506; 24 L. Ed. 2d 532 (1970) (reaffirming that any statutory interpretation of constitutional infringement must be narrowly construed). Any rulemaking authority delegated to administrative officials by Congress must be "specific to prevent intervention into protected activities of individuals."

Hander v. San Jacinto Jr College, 325 F. Supp. 1019, 1021 (S.D. Tex 1971) citing *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

The Fifth Circuit has upheld this axiom as well, quoting the *Kent* Court's admonishment that "when faced with 'an exercise by an American citizen of an activity included in constitutional protection,' it would not 'readily infer that Congress gave . . . unbridled discretion to grant or withhold it' . . . [and that] a court should 'construe narrowly all delegated powers that curtail or dilute them.'" *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990) (citing *Kent*, 357 U.S. at 129).

In this case, where the INA is silent as to detention of U.S. citizens and to federal immigration officials engaging in child custody determinations, the statute must be interpreted in a manner that is consistent with constitutional protections. The only reasonable interpretation is that because Congress did not specifically delegate these authorities in any way, much less with the necessary specificity to avoid constitutional infringement, the INA does not authorize federal immigration officials to engage in the complained-of conduct.

3. Because the Border Patrol Exceeded its Statutory Authority, the Discretionary Function Exception Does Not Apply as a Matter of Law, Requiring a Reversal of the District Court's Ruling.

Where, as here, the agency action is unrelated to immigration or naturalization, plenary immigration authority does nothing to save an otherwise impermissible action by the Border Patrol. Appellants do not complain that the

agents simply made the wrong decisions regarding R.M.G.'s detention or Castro and Gallardo's parental rights. Rather, Appellants contend that the Border Patrol had no authority at all to make either of the challenged decisions.

a. No statutory or other delegation of authority allows the U.S. Border Patrol to detain a United States citizen.

The INA speaks unambiguously about the detention of illegal *aliens*. See 8 U.S.C. § 1226 (emphasis added); 8 C.F.R. §§ 236.1-236.7. Its regulations also clearly authorize federal immigration officials to detain alien juveniles for immigration purposes. *See* 8 C.F.R. § 236.3. Importantly, a "juvenile" is defined as "an *alien* under the age of 18." 8 C.F.R. § 236.3(a) (emphasis added). Nothing in the INA authorizes Border Patrol agents to detain a known U.S. citizen.[7]

When detention is at issue in the context of immigration matters, citizenship of the detained person is of utmost importance.[8] A person born "in the United States and subject to the jurisdiction thereof is a national and citizen of United States at birth." 8 U.S.C. § 1401; *see also* U.S. CONST. amend. XIV § 1. The

[7] U.S. Border Patrol agents do possess general arrest authority for crimes other than immigration offenses committed in their presence. *See* 8 U.S.C. § 1357(a)(5). However, since R.M.G. was never accused of having committed an offense, this fact is not relevant here.

[8] Likewise, citizenship is of key importance in deportation or removal proceedings. *See*, e.g., *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S. Ct. 492, 66 L. Ed. 938 (1922) ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."); INS Exercise of Prosecutorial Discretion, Legal Op. 99-5, 2001 WL 1047687 ("[T]he INS cannot pursue a removal case against someone it knows to be a U.S. citizen because removing that individual is not an action within the substantive limits of the INA.").

Supreme Court recognizes the important distinction between U.S. citizens and aliens in the context of immigration law:

> In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry.
>
> *Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).

The Supreme Court instructs that the power of immigration officials to detain a U.S. citizen is quite limited. The Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." *United States v. Brigoni-Ponce*, 422 U.S. 873, 884 (1975). That prohibition applies to both adults and children, as "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Even "…the broad congressional power over immigration . . . cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." *Brigoni-Ponce*, 422 U.S. at 884.

Here, the agents admitted that they knew R.M.G. was a U.S. citizen, and nothing in the record indicates that the one-year-old infant was suspected of any criminal activity. *See Complaint*, R. vol. 1 at 104 ¶ 11; *Answer*, R. vol. 1 at 129 ¶

11. Thus, any decision by the Border Patrol to detain R.M.G. in a holding cell instead of releasing her from federal custody far exceeded its scope of authority.[9]

Moreover, there is no state or federal authority allowing a parent in criminal detention to consent to his or her minor child accompanying that parent while in state custody. In other words, had Gallardo been arrested for burglary or arson, no Texas or federal law would allow him to consent to R.M.G.'s being detained with him. Accordingly, without any independent ground to confine R.M.G., Gallardo was unable to consent to the child's detention by immigration officials.

Because Appellee did not possess any legal authority to hold a U.S. citizen child in detention, it is not protected from liability for having done so.

b. No statutory or other delegation of authority allows the U.S. Border Patrol to make child custody decisions.

No provision of the INA authorizes federal immigration officials to make custody decisions between two parents with competing claims regarding their child. Appellee itself directly conceded this fact in its Motion to Dismiss:

> [T]here are no policies, rules or statutes governing the apprehension and detention of a foreign national in lawful custody of his or her U.S. juvenile child…. There are no mandatory federal statues, 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.

[9] Castro does not complain that federal custody of R.M.G. was impermissible from the time Gallardo was apprehended in his trailer until Castro arrived at the Border Patrol station. Wrongful detention commenced when Border Patrol agents refused to release the U.S. citizen child from the holding cell once Castro arrived.

Motion to Dismiss, Exhibit G: *Affidavit of John J. Smietana, Jr.*, R. vol. 2 at page unnumbered in record, ¶ 3; *see also Opinion*, R. vol. 6 at 1011 n.11. In other words, the INA and its regulations are silent as to federal immigration officers' ability to detain U.S. citizens and to make custody decisions.

The scant judicial opinions that have examined similar, but not this precise issue, confirm that statutory silence does not provide Border Patrol agents with *carte blanche* to exceed its authority and allocate parental rights. *See, e.g.*, *Johns v. Dep't of Justice*, 653 F.2d 884 (5th Cir. 1981); *Thi Anh v. Levi*, 427 F. Supp. 1281 (E.D. Mich. 1977), *aff'd* 586 F.2d 625 (6th Cir. 1978). Indeed, this Court has expressly held that "[f]ederal [i]mmigration authorities lack the authority to determine the custody of a child or to enforce the custodian rights of others." *Johns*, 653 F.2d at 895 n.26 (5th Cir. 1981).

Moreover, questions of family law, in particular custody disputes, have always been deemed the exclusive province of the States.

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States. As to the right to the *control and possession* of this child . . . it is one in regard to which neither the Congress of the United States nor any authority of the Untied States has any special jurisdiction.
>
> *In re Burrus*, 136 U.S. 586, 593-94; 10 S. Ct. 850, 853; 34 L. Ed. 500, 503 (1890) (emphasis added).

The Supreme Court has also explained that "on the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 5 S. Ct. 172; 49 L. Ed. 390 (1904)). Recognizing the deeply-rooted tradition of deference to state expertise on issues of domestic relations, the Court concluded that before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests." *Id*. (quoting *United States* v. *Yazell*, 382 U.S. 341, 352, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966)).

In acceding to Gallardo's wishes and removing Appellant R.M.G. with her alien father, even as her U.S. citizen mother expressed contrary demands regarding that same child and contemporaneously sought a state judicial custody determination, the agents made a *de facto* custody decision. The District Court asserted that the "Border Patrol issued no custody order and made no determination that R.M.G. should remain permanently with either her mother or her father." *See Opinion*, R. vol. 6 at 1013. That no formal custody order was issued by the Border Patrol is irrelevant.

The District Court correctly noted that, in this case, "it is the Texas state courts that have jurisdiction to make an initial child custody order." *Opinion*, R. vol. 6 at 1013 n.14 (internal citations omitted). Under Texas law, only courts with specific jurisdiction to hear a suit affecting the parent-child relationship can make custody determinations. TEX. FAM. CODE § 160.104 (2003). Federal officials, therefore, lacked the authority or the competence to allocate rights between R.M.G.'s parents. *See Johns*, 653 F.2d at 884; *Thi Anh*, 427 F. Supp. at 1287.

It is important to address here the issues and fears raised by the trial court regarding the immigration officials and their custody decision. First, the court noted that the agents faced a difficult situation in deciding what to do with Appellant R.M.G. *Opinion*, R. vol. 6 at 1008-10. This concern, however, is based on a misconception of the Border Patrol's actual authority. The agents had no place in this decision making process at all. Nothing authorized them to disregard Castro's pleas and to decide unilaterally that Gallardo ultimately possessed the sole right to determine the residency of the child. This is not a case where federal immigration officials are sued for having relied upon the consent of the father because officials did not know the whereabouts of the mother. Rather, Castro had personally advised Border Patrol agents that she was the mother of the child and wanted her back. In addition, Border Patrol agents knew that Castro and her lawyer were attempting to assert Castro's parental rights in a state court. The

agents, therefore, were fully aware of competing claims to the child, and nevertheless assumed the authority to conclude that Gallardo alone could decide where the child would live.

The United States also argued, and the District Court agreed, that Border Patrol did not make a custody determination; rather, they characterized their actions as simply allowing Gallardo to remain in possession of his daughter. *Opinion*, R. vol. 6 at 1012-13. Both because possession and conservatorship of a child are legally distinct matters, and of the undeniable custodial effect of their actions, this analysis is untenable. Border Patrol was presented with two parents each asserting the right to determine where R.M.G. would reside. Appellee's decision to leave Gallardo in possession of R.M.G. and affirmatively assist him in removing the child from the United States effectively constituted a determination that Gallardo had the exclusive right to determine R.M.G.'s residence. This right is perhaps the most important of the enumerated rights of conservatorship under Texas law. *See, e.g.*, TEX. FAM. CODE § 151.001 ("Rights & Duties of Parents"). There is no escaping the fact that federal immigration officials allocated parental rights between Castro and Gallardo, a determination that they had absolutely no authority to make.

The District Court rejected Castro's argument that the Border Patrol "made an 'impermissible custody determination' in favor of Mr. Gallardo," and posited

that the release of the child into Castro's possession would also constitute a custody determination. *Opinion*, R. vol. 6 at 1012. But the District Court's reasoning was based on a flawed understanding of the agents' actual authority and the limitations of permissible actions that this authority imposed.

In this regard, the First Circuit's decision in *Suboh v. District Attorney's Office for Suffolk Dist.*, 298 F.3d 81 (1st Cir. 2002), is illuminating. There, a mother arrested by a state police officer sued the officer and another official for removing and delivering the mother's child to the grandparents against the mother's wishes. *See id*. at 85-88. The grandparents then fled the country and the mother lost all contact with her daughter. *See id.* at 88. As in the present case, the law enforcement official was fully aware that the custody of the child was intensely disputed. *See id.* at 95. Under these facts, the First Circuit easily concluded that the officer's actions plainly violated the mother's due process rights. *See id.* at 95-97. The court reasoned that where a public official knows that the custody of a child is disputed by parents, there is nothing reasonable, much less lawful, in the official's decision to disregard state family law and recognize that one parent has superior rights to the child. By taking it upon himself to decide which party had the superior claim to the child, the official in *Suboh*, much like federal immigration agents in this case, made a custody determination concerning the child. *See id.* at 96-97.

The Border Patrol agents had other courses of action available that would have comported with both their statutory grant of authority and their constitutional obligations. First, they could—and should—have released R.M.G. from federal detention. R.M.G.'s constitutional interest in remaining free is wholly independent from Gallardo's immigration status and to the competing custody claims between her parents. The agents could have delivered the child to her U.S. citizen mother, to her paternal aunt who had visited Gallardo while in detention, or affirmatively requested placement with CPS pending resolution of the custody dispute by the state court.[10]

Once the child was released from Border Patrol custody, any action the federal officials decided to then take regarding Gallardo was completely within their discretion, as Gallardo was an alien subject to the INA. The agents could have requested prosecution for illegal re-entry and continued his detention; they could have continued his detention long enough to afford him the opportunity to appear in the state court custody matter; or, they could have removed him that same day.

[10] Agents did, in fact, contact CPS. *See* Motion to Dismiss, Exhibit E: *Declaration of Debbie Perkins-McCall*, R. vol. 2 at unnumbered page; *Plaintiffs' Response*, Exhibit M: *Deposition of Greg Kurupas*, R. vol. 5 at 931, 98:4-11. However, CPS was asked whether it would get involved in the custody decision; Border Patrol did not request placement of R.M.G. in temporary state care.

Notably different from actual events, this course of action would not have subjected the United States to suit. First, the agents would have fully complied with their Fourth Amendment obligation toward R.M.G. Second, had they chosen to remove Gallardo that same day, the Border Patrol would not be liable to Gallardo because decisions related to removal of aliens are entirely within their discretion under the INA. Indeed, Congress has expressly eliminated any cause of action by an *alien* relating to the execution of his removal order, *see* 8 U.S.C. § 1252(g) (emphasis added). Moreover, the courts have consistently held that separation from U.S. citizen children incidental to deportation is not actionable, *see De Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006), nor does not it provide a claim to immigration relief, unless statutorily authorized.[11]

The course of action the Border Patrol *did* engage in was constitutionally impermissible, and was done merely for administrative convenience. *See Plaintiffs' Response*, Exhibit M: *Deposition of Greg Kurupas*, R. vol. 5 at 933, 113:4-7; 934, 117:19 – 118:16; *see also Opinion*, R. vol. 6 at 1016. Compared to the fundamental nature of the right to the care and custody of one's child, the administrative convenience of placing Gallardo on the afternoon bus is trivial.

[11] *See*, e.g., *Gallanosa v. United States*, 785 F.2d 116, 117 (4th Cir. 1986); *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984); *Urbano de Malaluan v. INS*, 577 F.2d 589 (9th Cir. 1978); *Acosta v. Gaffney*, 558 F.2d 1153, 1157-58 (3d Cir. 1977); *Gonzalez-Cuevas v. INS*, 515 F.2d 1222, 1224 (5th Cir. 1975); *Enciso-Cardozo v. INS*, 504 F.2d 1252 (2d Cir. 1974); *de Robles v. INS*, 485 F.2d 100, 102 (10th Cir. 1973); *Aalund v. Marshall*, 461 F.2d 710 (5th Cir. 1972); *Perdido v. INS*, 420 F.2d 1179 (5th Cir. 1969), *Mendez v. Major*, 340 F.2d 128, 131 (8th Cir. 1965).

Administrative convenience is never an adequate justification in such cases. *Thornburgh v. Abbott*, 490 U.S. 401, 433, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1988). Indeed, in situations that implicate due process protection, the Supreme Court has expressly held that

> [t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

Because, as discussed below, they had no authority to detain a U.S. citizen, R.M.G.'s release would have comported with the Border Patrol's statutory and constitutional obligations to the child.

4. Because the Challenged Acts Were Unconstitutional, the Discretionary Function Exception Is Inapplicable.

Federal agents have no discretion to violate the Constitution. The two acts in question here—detention of a U.S. citizen child by immigration officials and a child custody decision made by those same agents—have constitutional implications, both substantive and procedural. Because both challenged acts

violated Appellants' constitutional rights, such acts are not protected by the discretionary function exception. *See Sutton*, 819 F.2d at 1292.

a. Appellants are entitled to reversal because the detention of R.M.G. was unconstitutional.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Reno v. Flores*, 507 U.S. at 315-17 (citing *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)). The *Flores* Court specifically held that "bodily restraint" included detention cells as well as other forms of custodial institutions, "even if the conditions of confinement are liberal." *Flores*, 507 U.S. at 315.

The deprivation of an adult's liberty triggers the "protections of the Due Process Clause," requiring "heightened, substantive due process scrutiny." *Id*. at 316 (internal citations omitted). In the case of detention or other restraint of personal liberty, "[t]here must be a 'sufficiently compelling' governmental interest to justify such action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community." *Flores*, 507 U.S. at 316 (citing *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

The *Flores* Court went on to expressly apply Due Process protection to restrained children. Minors share the same liberty interest in remaining free from government confinement; children's constitutional interest in this respect is "no

narrower than an adult's." *Flores*, 507 U.S. at 316 (citing *In re Gault*, 387 U.S. at 17 (rejecting the notion "that 'a child, unlike an adult', has a right 'not to liberty but to custody'")). Because of this substantive right, children are also entitled to procedural due process protection *prior* to detention. "[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (emphasis added).

Thus, Border Patrol's detention of Appellant R.M.G. violated both her substantive and procedural due process rights. Appellee has presented no compelling governmental interest for detaining this minor U.S. citizen. Additionally, Appellee afforded no procedural protections to R.M.G. to ensure that her detention and subsequent removal were consistent with federal law. For these reasons, Appellee's detention of R.M.G. violated her constitutionally-protected liberty interests and cannot be shielded by the discretionary function exception.

b. Appellee's violation of appellants' constitutional right to family relations removes the protection of the discretionary function exception.

Rights of conservatorship are inherent, constitutionally guaranteed individual rights. *See Troxel v. Granville*, 520 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (holding that the "liberty interest . . . of parents in the care,

custody, and control of their child . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court"); *Stanley*, 405 U.S. at 651; *Littlefield v. Forney Ind. Sch. Dist.*, 268 F.3d 275, 288 (5th Cir. 2001) (recognizing the care, custody and control of children as fundamental liberty interests). The *Troxel* Court observed that the essence of this liberty interest was the right of parents to "make decisions" concerning the rearing of their children. *Troxel*, 520 U.S. at 66.

Specifically, due process rights of parents include making critical decisions regarding where their children live and how they are reared. *See id*. at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399-401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (establishing that the Due Process Clause protects the right of parents "to establish a home and bring up children.")). Deprivation of this fundamental right occurs "only when the government directly acts to sever or otherwise affect his or her legal relationship with a child." *De Fuentes v. Gonzales*, 462 F.3d at 505 (internal citations omitted).

Before a parent's liberty interest in their children (and conversely, a child's constitutional interest in his or her familial relation with a parent) can be diminished by state action, procedural due process must be afforded to that party. The Supreme Court has consistently held that Due Process requires "the opportunity to be heard. It is an opportunity that must be granted at a meaningful time in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct.

1187, 14 L. Ed. 2d 62 (1965). While the form of the hearing may vary depending on the right at issue, "the Court has traditionally insisted that . . . opportunity for that hearing must be provided before the deprivation at issue takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

Absent a court order to the contrary, parents have *equal* rights regarding their children. *Thornlow v. Thornlow*, 576 S.W.2d 697, 700 (Tex.App.—13th Dist., Corpus Christi 1979) (emphasis added). Should a dispute as to those rights arise, due process is protected through a hearing before a state court of competent jurisdiction, which has the authority to allocate rights of conservatorship between the parties according to state law and procedure. *See* TEX. FAM. CODE § 151.001 (Vernon 2003). As discussed above, no federal law authorizes any federal employee to make custody decisions, and the Border Patrol is not included as an enumerated competent entity to make such decisions. *See id.*

The District Court made the troubling assertion that Castro was not deprived of her parental rights; it stated that she was "free to seek a custody order at a later date," and notes that this is what Castro did and her daughter was returned to her. *See Opinion*, R. vol. 6 at 1013. This interpretation of Castro's constitutional interests falls woefully short of recognizing Castro's due process rights. Proper application of due process protection requires hearing or other safeguards *before* that right is invaded; in this case, Castro was entitled to process before the Border

Patrol unilaterally decided to remove R.M.G. to Mexico. *See Fuentes*, 407 U.S. at 82.

While it is true that Castro did, indeed, eventually gain sole managing conservatorship of her child, her child was not returned to her for three years. Moreover, Castro first obtained knowledge of R.M.G.'s whereabouts and possession of the child only after Gallardo was detained yet again on immigration charges and provided for the child's return when faced with criminal detention. *See Motion to Dismiss*, Exhibit K: *Stipulation Agreement and Release of Claims*, R. vol. 2 at 422-24 (pages unnumbered in record); *id.*, Exhibit H: *Deposition of Omar Gallardo Cadena*, R. vol. 2, page not numbered (deposition cover sheet indicating Gallardo's deposition taken at the Randall County Jail, Amarillo, Texas); *see also Plaintiffs' Unopposed Motion to Amend the Scheduling Order*, R. vol. 1 at 139 ¶ 3, 140 ¶ 5.

The Border Patrol agents erroneously concluded that because Appellant R.M.G. was in Gallardo's possession, Gallardo had legal custody of the child. The agents, however, mistakenly determined that lawful possession of a child and legal conservatorship are one and the same. *See Plaintiffs' Response*, Exhibit X: *Deposition of John Parum*, R. vol. 5 at 981: 31:9 – 982: 32:13 (stating the agent's belief that possession of a child is "nine-tenths" of custody law in Texas); *Cf.* TEX. FAM. CODE § 153.132 ("Rights & Duties of Parent Appointed Sole Managing

Conservator") and TEX FAM. CODE § 153.075 ("Rights & Duties During Periods of Possession"). A parent—or any other person—can be in legal possession of a child but yet have no or limited rights of conservatorship to that same child. For example, a parent can consent to a babysitter's possession of a child, but that possession does not confer custody rights in the caretaker.

Importantly, the Texas Family Code contains no provision establishing greater parental rights for the parent in actual possession of a child, and Texas courts do not consider actual possession as a factor when making custody determinations. *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976) (listing the factors considered in determining the best interests of a child). Whatever appeal the adage may have, possession of a child is not "nine-tenths" of custody law in Texas.

There is no denying that the Border Patrol agents impermissibly allocated superior custody rights to Gallardo by allowing him the sole ability to determine the child's residence. Indeed, such actions were unconstitutional and infringed on Castro and R.M.G.'s substantive and procedural due process rights. *See Flores*, 507 U.S. 315-17.

Because both challenged acts violated Appellants' constitutional rights, the discretionary function does not apply to this case, and the District Court's order should be reversed.

B. THE UNITED STATES IS NOT PROTECTED BY THE DISCRETIONARY FUNCTION BECAUSE IT CANNOT SATISFY THE REQUIREMENTS OF GAUBERT.

As discussed above, the court should analyze whether the complained of acts were within the agency's scope of authority, or impinged on constitutional rights. *See* Section VII.A.2., *supra*. On this basis alone, Appellee is not protected by the discretionary function exception, and a full *Gaubert* analysis is not necessary.

However, even if this Court were to determine that no preliminary analysis is required, Appellee cannot meet the requirements of *Gaubert*, and protection under the exception should be denied. *Gaubert* sets forth a two-prong test to aid courts in determining whether the discretionary function exception applies to and removes the Government from liability for acts committed by its employees. First, a court must examine whether the decision made required judgment or choice. *Gaubert*, 499 U.S. at 328 (citing *Berkovitz*, 486 U.S. at 536). If the answer is in the affirmative, the court must then determine whether that judgment or choice is grounded in the policies of the agency's regulatory regime. *Gaubert*, 499 U.S. at 329.

1. Because the Court Erroneously Considered the Nature of Castro's Acts, It Improperly Applied the Standard of Analysis Under *Gaubert.*

In determining whether the decision made required judgment or choice, the Supreme Court instructs that it is the nature of the *government actor* that is to be reviewed. *Id.* at 321 (citing *Varig*, 467 U.S. at 813 (holding that "it is the nature of

the conduct, rather than the status of the actor"—not the plaintiff—that determines whether the exception applies in a given case). Because it is difficult "to define with precision every contour of the discretionary function exception," the Supreme Court has instructed lower courts to inquire "whether the challenged acts of a Government *employee* . . . are of the nature and quality that Congress intended to shield from tort liability." *Varig*, 467 U.S. at 813 (emphasis added).

The District Court erred in concluding that the discretionary function applied to this case when it failed to fully consider the nature and quality of the actions of the offending federal immigration officials and instead gave decisive weight to the actions of Appellant Castro. Indeed, an entire section of the District Court's opinion is dedicated to "Actions of Ms. Castro [that] Led to Difficult Choice for Border Patrol Agents." *See Opinion*, R. vol. 6 at 1008.

At issue here are the actions of federal immigration officials in detaining a U.S. citizen child and their decision to resolve competing custody claims of the parents over that child. Contrary to the trial court's apparent assertion, the fact that Castro, for good reason, was not present at the moment when federal officials arrested Gallardo and that she did not yet have a custody order from a Texas family court are of no consequence here and are irrelevant to the discretionary function analysis.

Of sole relevance are the actions of the Border Patrol agents. It is undisputed that they detained a U.S. citizen child. It is clear that they allocated parental rights by allowing Gallardo alone to determine the residency of the child. These are the only acts under scrutiny and, as set forth above, both exceeded the agents' scope of authority and violated Appellants' constitutional rights. Under this analytical framework, acts by Castro—or Gallardo for that matter—are immaterial and cannot be considered. Because the District Court failed to employ the proper method of analysis, the decision must be reversed.

2. The Government Cannot Satisfy the First Prong of the *Gaubert* Test Because the Judgments or Choices Made by the Border Patrol Agents were Not Within Their Congressionally-Delegated Scope of Authority.

The *Gaubert* test, in any event, supports the Appellants in this case. The first prong of the test requires a court to determine whether the acts in question were discretionary or mandated by statutes and regulations. *Gaubert*, 499 U.S. at 322. Recognizing that succinctly defining "discretionary function" is difficult, the *Gaubert* Court offered ways in which a court can determine acts that may, in fact, be discretionary. *Id*. at 325. For example, if a statute or regulation specifically dictates a course of action, the federal employee does not have the discretion to ignore it and act in contrary to that statute or regulation. *Id*. at 322.

The District Court below decided that since the Border Patrol agents did not violate a mandatory statute, regulation or directive, their acts were discretionary

and, therefore, protected. *See Opinion*, R. vol. 6 at 1005. The logic employed by the trial court appears to find a bright line rule in the inverse of the teachings of *Gaubert*: as long as no statute, regulation, policy or rule expressly prohibits an act, then the act is permissible and is shielded by the discretionary function. This is not the holding of *Gaubert* or any other discretionary function case. Indeed, that is not the rule of statutory interpretation under our system of jurisprudence.

As discussed above, where a statute is silent or ambiguous regarding a specific matter, a court must determine whether the agency's interpretation "is based on a permissible construction of the statute." *Moosa v. INS*, 171 F.3d 994, 1005 (5th Cir. 1999) (citing *Chevron*, 467 U.S at 843). A reasonable interpretation of a statute must avoid constitutional repugnance. *Catholic Bishop of Chicago*, 440 U.S. at 499-510, 504. By way of example, if the District Court's interpretation of *Gaubert* were accepted, it would then appear that because the INA is also silent as to the approval of prescription drugs, the Border Patrol could, within its discretion, determine which medications should be placed on the market.

In other words, by interpreting *Gaubert* as broadly as the District Court here, federal agencies could, without innumerable specific prohibitions by Congress, engage in endless acts of their choice. This would eviscerate the separation of powers, and cannot be what the *Gaubert* Court intended. *See Railway Labor Executives' Ass'n*, 29 F.3d at 671 ("Were courts to presume a delegation of power

absent an express withholding of such power, agencies would enjoy limitless hegemony, a result plainly out of keeping with . . . the Constitution.")

Nevertheless, the agents here did, in fact, act contrary to a specific mandate: the U.S. Constitution. It is presumed that federal employees understand constitutional limitations in the scope of their duties. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 393-94, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Additionally, all agents involved in this matter testified that they understood that the Border Patrol does not have the authority to engage in custody determinations. *See Plaintiffs' Response*, Exhibit B: *Deposition of Manuel Sanchez*, R. vol. 5 at 584: 130:3-14; *Plaintiffs' Response*, Exhibit M: *Deposition of Greg Kurupas*, R. vol. 5 at 930: 96:17-19; 931: 100: 7-11; 933: 116:16-19.

Because the District Court employed improper statutory analysis and because violation of a mandated course of action—here, the U.S. Constitution—renders the discretionary function exception inapplicable, Appellee cannot meet the first prong of the *Gaubert* test.

3. Appellee Cannot Satisfy the Second Prong of *Gaubert* Because the Judgments or Choices at Issue Were Not Grounded in the Policy of the INA's Statutory Regime.

The second prong of the *Gaubert* test requires a determination as to whether or not the action in question involved a policy decision. *Gaubert*, 499 U.S. at 322-

23. Here again, what constitutes a "policy decision" is directly linked to the authority of the federal agency. As the *Gaubert* Court expressed, "to survive a motion to dismiss, [a complaint] must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be *grounded in the policy of the regulatory regime.*" *Gaubert*, 499 U.S. at 324-25 (emphasis added).

While there is little doubt that determinations of the proper custody of a child and the detention of a U.S. citizen involve many important and complex policy issues, those determinations are not grounded in policy under the regulatory scheme of the INA. As outlined above, the INA speaks only to the detention and removal of illegal aliens, not to the detention of U.S. citizens or to federal immigration officials' ability to make child custody determinations. It cannot, therefore, be said that the Border Patrol's conduct was "grounded in the policy of [its] regulatory regime." *Id*.

Moreover, the policy basis upon which the District Court appeared to rely was purely fiscal in nature. *See Opinion* R. vol. 6 at 1016. Even though it is true that the INA's delegated authority undoubtedly requires fiscal responsibility and allocation of government resources, this consideration is insufficient in the face of constitutional violations. *See Stanley*, 405 U.S. at 656. In addition, this Court has noted that "[v]irtually any decision to act or not to act could be characterized as a

decision grounded in economic, social or public policy and, thus, exempt. Although we construe the exception broadly, we have never construed it so that the exception swallows the rule." *Lively v. United States*, 870 F.2d 296 (5th Cir. 1989).

Because the INA does not authorize federal immigration officials to detain a U.S. citizen child and to make custody determinations regarding that child, the decisions made by Border Patrol cannot be grounded in the policy of the INA's regulatory scheme. In addition, construing fiscal policy concerns so broadly as to override constitutional interests and to subsume the purpose of the FTCA is improper and cannot be used to satisfy *Gaubert*. Appellee, thus, fails the second prong of the *Gaubert* test.

CONCLUSION

The District Court erred in dismissing this case on jurisdictional grounds. The acts in question in this case do not fall within the discretionary function exception of the Federal Tort Claims Act. The Border Patrol agents' actions went far beyond the congressional delegation of authority to their agency, and thus are non-discretionary as a matter of law. Moreover, the acts violated fundamental constitutional rights of the Appellants, again barring the application of the discretionary function exception.

For the foregoing reasons, the District Court's Order Granting dismissing Plaintiffs' claims for lack of subject matter jurisdiction should be reversed and the case be remanded to the District Court for further action in accordance with this Court's decision.

Respectfully submitted,

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Dated: July 10, 2007

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I hereby certify that on the 10th day of July, 2007, a true and correct copy of the foregoing was delivered to Counsel for Defendant-Appellee United States of America, John A. Smith, via Certified Mail, Return Receipt Requested No 7006 0810 0000 2098 3415 to:

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