No. 18-___

IN THE

Supreme Court of the United States

GUADALUPE CHAIDEZ CAMPOS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act's law enforcement proviso, 28 U.S.C. § 2680(h), waives the United States' sovereign immunity for "[a]ny claim" arising out of an enumerated list of intentional common-law torts committed by federal law enforcement officers. The question presented is whether, and to what extent, the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), restricts that proviso.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
INTRODUCTION 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 10

I. The courts of appeals have adopted wildly different approaches to reconciling the law enforcement proviso and the discretionary function exception 11

II. The discretionary function exception does not strip federal courts of subject-matter jurisdiction over false-arrest and false-imprisonment claims that fall within the law enforcement proviso 16

III. This case is the right vehicle for resolving the question presented 24

CONCLUSION 25

APPENDICES

Appendix A, Judgment of the U.S. Court of Appeals for the Fifth Circuit, filed April 24, 2018 .... 1a

Appendix B, Opinion of the U.S. Court of Appeals for the Fifth Circuit, filed April 24, 2018 .... 3a

APPENDICES, cont'd.

Appendix C, Order of the U.S. District Court for the Western District of Texas granting Defendant's Motion to Dismiss, October 28, 2016 .... 28a

Appendix D, 28 U.S.C. § 2680(a), Exceptions 44a

TABLE OF AUTHORITIES

Page(s)

Cases

Berkovitz v. United States,
486 U.S. 531 (1988) 20, 21

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 10, 20, 24

Bloate v. United States,
559 U.S. 196 (2010) 17

Caban v. United States,
671 F.2d 1230 (2d Cir. 1982)......................... 13, 14

Casillas v. United States,
2009 WL 735193 (D. Ariz. 2009).................... 15-16

Dolan v. U.S. Postal Serv.,
546 U.S. 481 (2006) 22-23

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 18

FDIC v. Meyer,
510 U.S. 471 (1994) 20

Garcia v. United States,
826 F.2d 806 (9th Cir. 1987) 19

Garling v. EPA,
849 F.3d 1289 (10th Cir. 2017) 12

Gasho v. United States,
39 F.3d 1420 (9th Cir. 1994), *cert. denied*,
515 U.S. 1144 (1995) 7, 15

Gonzalez v. United States,
2018 WL 1597384 (E.D.N.Y. 2018)..................... 14

Gray v. Bell,
712 F.2d 490 (D.C. Cir. 1983), *cert. denied*,
465 U.S. 1100 (1984) 7, 14, 15

Martinez v. United States,
2018 WL 3359562 (D. Ariz. July 10, 2018)......... 15

Medina v. United States,
259 F.3d 220 (4th Cir. 2001) ....*passim*

Millbrook v. United States,
569 U.S. 50 (2013) ....*passim*

Milligan v. United States,
670 F.3d 686 (6th Cir. 2012) 12

Myers & Myers Inc. v. U.S. Postal Serv.,
527 F.2d 1252 (2d Cir. 1975)............................... 21

Nguyen v. United States,
556 F.3d 1244 (11th Cir. 2009) ....*passim*

Nguyen v. United States,
65 Fed. Appx. 509 (5th Cir. 2003) (per
curiam)... 16

NLRB v. SW Gen., Inc.,
137 S. Ct. 929 (2017) 17

Nurse v. United States,
226 F.3d 996 (9th Cir. 2000) 22

Olaniyi v. D.C.,
763 F. Supp. 2d 70 (D.D.C. 2011) 15

Owen v. City of Independence,
445 U.S. 622 (1980) 20

Pierson v. Ray,
386 U.S. 547 (1967) 20

Pooler v. United States,
787 F.2d 868 (3d Cir.), *cert. denied*, 479
U.S. 849 (1986) 19

Raz v. United States,
343 F.3d 945 (8th Cir. 2003) 21

Santos v. United States,
2006 WL 1050512 (5th Cir. 2006) (per curiam) 22

Spotts v. United States,
613 F.3d 559 (5th Cir. 2010) 8, 10, 22

Sutton v. United States,
819 F.2d 1289 (5th Cir. 1987) 7, 9, 10, 16

Thames Shipyard & Repair Co. v. United States,
350 F.3d 247 (1st Cir. 2003), *cert. denied*, 542 U.S. 905 (2004) 21

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005) 18

Tsolmon v. United States,
841 F.3d 378 (5th Cir. 2016) 9

U.S. Fidelity & Guar. Co. v. United States,
837 F.2d 116 (3d Cir.), *cert. denied*, 487 U.S. 1235 (1988) 21, 22

United States v. Gaubert,
499 U.S. 315 (1991) 18, 19, 21

Wal-Mart Stores, Inc. v. Rodriguez,
92 S.W.3d 502 (Tex. 2002)..................................... 5

Wallace v. Kato,
549 U.S. 384 (2007) 19-20

Welch v. United States,
409 F.3d 646 (4th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006) 15

Constitutional Provisions

U.S. Const., amend. IV 8, 10, 20, 22

U.S. Const., amend. V.. 22

U.S. Const., amend. VIII 22

Statutes

8 U.S.C. § 1101(a)(15)(U)... 4
8 U.S.C. § 1101(a)(15)(U)(i)(III) 4
8 U.S.C. § 1184(p)(3)(B)... 4
8 U.S.C. § 1184(p)(6).. 4
8 U.S.C. § 1255(m) 4
8 U.S.C. § 1326.. 3
8 U.S.C. § 1357(a) 9
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1346(b) 2, 3, 17, 20
28 U.S.C. § 1346(b)(1)... 2
28 U.S.C. § 2674.. 1, 5
28 U.S.C. § 2680.. 2, 15, 23
28 U.S.C. § 2680(a) ....*passim*
28 U.S.C. § 2680(h) ....*passim*

Rules and Regulations

8 C.F.R. § 214.14(c)(5)(i) 4

Legislative Materials

S. Rep. No. 93-588, 93d Cong., 2d Sess. (1973-1974) 23, 24

Other Authorities

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Restatement (Second) of Torts (1965)....................... 19

Scalia, Antonin & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) 18

PETITION FOR A WRIT OF CERTIORARI

Petitioner Guadalupe Chaidez Campos respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, Pet. App. 3a, is reported at 888 F.3d 724. The district court's order granting defendant's motion to dismiss, Pet. App. 28a, is reported at 226 F. Supp. 3d 734.

JURISDICTION

The judgment for the United States Court of Appeals for the Fifth Circuit was entered on April 24, 2018. Pet. App. 1a. On July 16, 2018, Justice Alito granted an extension of the time within which to file a petition for writ of certiorari to August 22, 2018. No. 18A55. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

A provision of the Federal Tort Claims Act, 28 U.S.C. § 2674, provides, in pertinent part, that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Section 1346(b)(1) of Title 28 provides, in pertinent part, that:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The full text of 28 U.S.C. § 2680—the list of exceptions to jurisdiction under the Federal Tort Claims Act—is set out in Appendix D. Pet. App. 44a. Section 2680 provides, in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United

> States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

INTRODUCTION

This case involves a recurring and important question of federal law: how to construe the "law enforcement proviso" of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), which waives the United States' sovereign immunity with respect to an enumerated list of intentional torts when committed by federal law enforcement officers. Despite the Fifth Circuit's acknowledgment that petitioner's claim falls squarely within the law enforcement proviso, that court affirmed the dismissal of her complaint because it found that the officers' conduct also fit within the "discretionary function exception" of 28 U.S.C. § 2680(a). This decision solidifies a three-way split among the circuits on the application of the law enforcement proviso.

STATEMENT OF THE CASE

1. Petitioner Guadalupe Chaidez Campos is a Mexican national. In late March 2013, she pleaded guilty to attempted illegal reentry into the United States, 8 U.S.C. § 1326, and was sentenced to a short

prison term and three years of non-reporting supervised release.

In the fall of 2013, the Department of Homeland Security (DHS) issued her a nonimmigrant "U visa." *See* Pet. App. 14a; 8 U.S.C. § 1101(a)(15)(U). U status is conferred by DHS on noncitizens who have been the victims of specified crimes, and who have been (or are likely to be) "helpful" to federal, state, or local law enforcement agencies in "investigating or prosecuting criminal activity" specified in the statute, *id.* § 1101(a)(15)(U)(i)(III). A U visa entitles its holder lawfully to remain in the United States (normally for four years, *id.* § 1184(p)(6)), and ultimately to seek lawful permanent residence status, *see id.* § 1255(m). A U visa also entitles noncitizens ordered removed by DHS to cancellation of any order of deportation, exclusion, or removal. Pet. App. 15a; *see also* 8 C.F.R. § 214.14(c)(5)(i).

Federal law requires the Attorney General to issue U visa holders an "employment authorization" document during their time of "lawful temporary resident status." 8 U.S.C. § 1184(p)(3)(B). This document (referred to as an "EAD") indicates the holder's name, birthdate, alien registration number, legal basis for employment authorization, and period of validity. *See* Pet. App. 5a, 15a.

On November 14, 2013, petitioner reported as required to the federal probation office in El Paso, Texas. Pet. App. 4a, 29a. She was accompanied by her one-year-old child and her child's father. *Id.* at 4a.

While petitioner was at the probation office, she was confronted by a Customs and Border Protection

(CBP) officer. Petitioner showed the officer her EAD and explained that she was legally entitled to remain in the United States. Nonetheless, the officer seized petitioner, separated her from her child, and took petitioner to the Paso del Norte port-of-entry in El Paso, Texas. *See* Pet. App. 5a. There, CBP agents searched her and that afternoon deported her by "walking her across the nearby bridge into Mexico." *Id.* at 20a. After several unsuccessful attempts, petitioner was finally able to return to the United States and reunite with her child in January 2014. *Id.* at 6a.

2. After exhausting her administrative remedies, petitioner brought suit against the United States in federal district court. She invoked the Federal Tort Claims Act, which waives the United States' sovereign immunity with respect to "tort claims" to the "same extent" that a "private individual" would be liable "under like circumstances," 28 U.S.C. § 2674. She alleged that in arresting her, the CBP officer "lacked any probable cause" to believe that she "was in the United States in violation of any immigration law." First Amended Complaint, ¶ 33, *Campos v. United States*, Case 3:16-cv-00151-PRM (W.D. Tex. Aug. 1, 2016), ECF No. 13. Thus, the CBP's actions constituted false arrest and false imprisonment, both torts under Texas law. *Id.* ¶ 40. *See Wal-Mart Stores, Inc. v. Rodriguez,* 92 S.W.3d 502, 506 (Tex. 2002) (describing elements of these torts under Texas law).

The United States moved to dismiss the complaint for lack of subject matter jurisdiction. It asserted that the "discretionary function exception" to the FTCA barred petitioner's claims. That

exception, laid out in 28 U.S.C. § 2680(a), rescinds the Government's waiver of sovereign immunity with respect to claims based on a government agent's exercise or performance of "a discretionary function or duty."

The district court agreed, and dismissed petitioner's complaint with prejudice. Pet. App. 43a. The court acknowledged that petitioner's claim fell squarely within the scope of the FTCA's law enforcement proviso, 28 U.S.C. § 2680(h). *See* Pet. App. 35a. As is relevant here, that provision expressly waives the Government's sovereign immunity with respect to claims of "false imprisonment" or "false arrest" involving the "acts or omissions of investigative or law enforcement officers of the United States Government." The district court was "sure" that "CBP agents qualify as 'law enforcement officers.'" *Id.* And it recognized that "Plaintiffs' [sic] FTCA claim is grounded in her false arrest and false imprisonment allegations—intentional torts specifically enumerated in the law enforcement proviso." *Id.*

At the same time, the district court explained that "[t]he interplay between § 2680(a) and § 2680(h) has resulted in a circuit split." Pet. App. 36a. It pointed in particular to the Eleventh Circuit's rule that if a claim falls within the law enforcement proviso, "sovereign immunity is waived in any event" without regard to the discretionary function exception. *Id.* (quoting *Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009)). By contrast, it identified three other circuits that required plaintiffs both to show that their claim falls within the law enforcement proviso and to overcome the

discretionary function exception. *Id.* (citing *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001); *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995); and *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)).

The district court saw the Fifth Circuit as having adopted a "centrist position" between the two categorical approaches, Pet. App. 37a—one that looks to "the specific facts of each situation," Pet. App. 37a (quoting *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987)). The district court posited that *Sutton*'s otherwise "unmoored fact-intensive inquiry" should be "anchored" in a "bad-faith framework." *Id.* at 40a. Starting from the premise that decisions about immigration arrests and detentions inherently involve "discretionary conduct" in the form of judgment calls about probable cause and likelihood of flight, *id.* at 33a, the district court declared that cases falling within the law enforcement proviso can proceed only when the plaintiff's factual allegations "rise to the level of intentional misconduct or bad faith," *id.* at 41a.

Here, the district court did not believe that petitioner had satisfied that standard. "Although Plaintiff's situation was unfortunate," she had been "detained and deported the same day." Pet. App. 41a. Given that the Fifth Circuit had applied the discretionary function exception to cases involving "more egregious circumstances," such as an erroneous detention lasting fifteen months or the deportation of an actual citizen, the discretionary function exception should apply here as well. *Id.*

Petitioner had also argued that "where a federal officer exceeds her authority under the Constitution or federal law, those federal actions will not be protected by the discretionary function exception" in any event. Pl. Resp. to Def't's Mot. to Dismiss at 9, *Campos v. United States*, Case 3:16-cv-00151-PRM (W.D. Tex. Sept. 12, 2016), ECF No. 25. She explained that in this case, not only was petitioner's arrest and detention without probable cause a tort under Texas law; it also constituted a "violation of the Fourth Amendment." *Id.* at 11.

The district court declined to address this argument. It recognized that it was an open question in the Fifth Circuit whether a constitutional violation "precludes the application of the discretionary function exception." Pet. App. 40a (quoting *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010)). But it treated petitioner's reference to the Fourth Amendment as an untimely attempt to "shoehorn[] a Fourth Amendment violation claim" into her FTCA case, Pet. App. 42a, rather than simply an explanation of why the discretionary function exception should not apply to her claims under Texas law.

3. The Fifth Circuit affirmed the district court's holding that the discretionary function exception deprived the court of subject-matter jurisdiction.[1]

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[1] It held, however, that the district court had erred in dismissing the claims with prejudice. Pet. App. 27a. It therefore remanded the case so the district court could enter a revised order. *Id.*

The court of appeals agreed that the law enforcement proviso applied to petitioner's case: "The CBP officers were law enforcement officers whose acts or omissions are claimed to have caused one of the relevant six torts." Pet. App. 26a. But the court of appeals rejected petitioner's argument that federal courts always have jurisdiction over a claim that falls within the plain language of the law enforcement proviso. That argument, it declared, was "foreclosed by this court's precedent." Pet. App. 11a (citing for this proposition *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987)). "Despite the absolute nature of the language" in the law enforcement proviso, the Fifth Circuit emphasized it had long "applied the proviso with considerable caution." *Id.* at 23a.

The court of appeals then turned to the discretionary function exception. It saw the provision authorizing CBP officers to effect warrantless arrests if they have "reason to believe" an alien is unlawfully in the United States and likely to escape before they obtain a warrant, 8 U.S.C. § 1357(a), as sufficiently "judgment-laden" to make CBP arrest and detention decisions necessarily discretionary, Pet. App. 18a (quoting *Tsolmon v. United States*, 841 F.3d 378, 384 (5th Cir. 2016)). And it saw "no regulation or statute" declaring the legal significance of petitioner's EAD "in such a way as to remove the CBP officer's discretion." *Id.* at 18a; *see also id.* at 20a (stating that the officers had "failed to find a justification *that they understood* had cancelled" petitioner's removal order) (emphasis added).

The Fifth Circuit reiterated *Sutton*'s statement that it was both "impossible" and "inappropriate" to "state in a principled way" how to reconcile the

discretionary function exception and the law enforcement proviso. Pet. App. 11a (quoting *Sutton*, 819 F.2d at 1298). But it then held that when a situation fits both Section 2680(a) and Section 2680(h), "[w]hat would not be shielded from liability is defined by the *Sutton* court's focus on Collinsville and *Bivens* situations," Pet. App. 26a—Collinsville being the location of one of the "abusive, illegal, and unconstitutional 'no-knock' raids" that motivated enactment of the proviso. *See Sutton*, 819 F.2d at 1295 (quoting the Senate Report that accompanied the amendments enacting the law enforcement proviso). The court of appeals declared it "enough to hold, and we do, that the conduct alleged here in no respect sinks to the necessary level." Pet. App. 26a. Thus, the discretionary function exception controlled.[2]

REASONS FOR GRANTING THE WRIT

The plain language of the law enforcement proviso in 28 U.S.C. § 2680(h) "extends the waiver of sovereign immunity," *Millbrook v. United States*, 569 U.S. 50, 52-53 (2013), to "[a]ny claim" of "false imprisonment" or "false arrest" by federal law enforcement officers. "Nothing in the text [of the law enforcement proviso] further qualifies the category of

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[2] The court of appeals once again declined to address the question whether a constitutional violation "precludes the application of the discretionary function exception." Pet. App. 21a (quoting *Spotts*, 613 F.3d at 569). It believed petitioner's mention of the Fourth Amendment in her response to the Government's motion to dismiss did not squarely present the issue.

'acts or omissions' that may trigger FTCA liability." *Id.* at 55. The Fifth Circuit nonetheless inserted a requirement into the statute that plaintiffs allege intentional misconduct or bad faith on the part of the officers. Otherwise, that court treats claims that fall within the law enforcement proviso as foreclosed by the discretionary function exception laid out in 28 U.S.C. § 2680(a).

This Court resolved one aspect of the "Circuit split concerning the circumstances under which intentionally tortious conduct by law enforcement officers can give rise to an actionable claim under the FTCA" in *Millbrook*, 569 U.S. at 54. But it has not yet resolved an additional question on which the courts of appeals are fractured: whether, or under what circumstances, the discretionary function exception can limit the law enforcement proviso. This case provides the right vehicle for this Court to apply the plain language of the law enforcement proviso and to clarify that, for claims of false arrest or false imprisonment, the discretionary function exception cannot bar suits involving arrests and detentions made by line-level officers.

I. The courts of appeals have adopted wildly different approaches to reconciling the law enforcement proviso and the discretionary function exception.

As the Fourth Circuit noted in *Medina v. United States,* 259 F.3d 220, 224 (4th Cir. 2001), the federal courts of appeals have "struggled" in deciding the "unsettled" question "whether and how to apply the [discretionary function] exception in cases brought under the intentional tort proviso found in § 2680(h)."

This struggle has not produced consensus. A decade after *Medina*, the Sixth Circuit adverted to being "cognizant of the disagreement." *Milligan v. United States*, 670 F.3d 686, 695 n.2 (6th Cir. 2012). In its brief to this Court in *Millbrook v. United States*, 569 U.S. 50 (2013), the Government acknowledged the circuit split. Brief for the United States Supporting Reversal and Remand 26-27 n.5. And last year, the Tenth Circuit became the most recent court to "recognize the disagreement." *Garling v. EPA*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017).

1. The rule in the Eleventh Circuit is straightforward and categorical: "[S]overeign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244, 1256-57 (11th Cir. 2009). "[I]f a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event." *Id.* at 1257. Thus, in a false arrest, false imprisonment, and malicious prosecution case based on the DEA's investigation of the plaintiff's medical practice, the Eleventh Circuit rejected the Government's claim that the discretionary function exception applied because agents made a series of judgments about how to conduct the investigation. Instead, it held that "to the extent of any overlap and conflict between [the law enforcement] proviso and subsection (a), the proviso wins." *Id.* at 1252-53.

The Eleventh Circuit based its conclusion on "[t]wo fundamental canons of statutory construction, as well as the clear Congressional purpose behind the

§ 2680(h) proviso." *Id.* at 1252. First, Section 2680(h), "which applies only to six specified claims arising from acts of two specified types of government officers, is more specific than the discretionary function exception in § 2680(a)," and "a specific statutory provision trumps a general one." 556 F.3d at 1253. Second, Section 2680(h) was amended after the enactment of Section 2680(a), and "[w]hen subsections battle, the contest goes to the younger one." 556 F.3d at 1253.

In light of the text and purpose of Section 2680(h), *see Nguyen*, 556 F.3d at 1253-57 (discussing the history of the provision), the court saw no justification for "rewriting the words 'any claim' in the proviso to mean only claims based on the performance of non-discretionary functions," *id.* at 1256.

The Second Circuit took a similarly categorical approach, at least with respect to claims involving arrests and detentions, in *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982). That case, like petitioner's, involved a false-imprisonment claim arising out of a mistaken immigration-related detention. The Second Circuit held that "the activities of the INS agents who detained appellant do not fall within the purview of § 2680(a) because the activities are not the kind that involve weighing important policy choices." *Id.* at 1233. While the court recognized that immigration officials exercise a type of judgment in determining whether a particular alien meets statutory criteria for detention, it warned that treating this judgment as sufficiently discretionary to trigger the discretionary function exception in cases involving line-level arrest and

detention decisions would "jeopardize a primary purpose for enacting § 2680(h)." *Id.* at 1234. The backdrop and legislative history of the law enforcement proviso showed that it was squarely intended to cover "the decision of a narcotics agent as to whether there is probable cause to search, seize, or arrest." *Id.* at 1235. Thus, "a fortiori" the law enforcement proviso should be construed to waive the Government's sovereign immunity for analogous decisions by immigration officers. *Id.*[3]

2. At least three other circuits take the opposite approach. These courts adhere to a rule that courts lack jurisdiction to hear claims arising under the law enforcement proviso unless the plaintiff can also defeat the discretionary function exception.

The D.C. Circuit adopted this rule in *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). There, the court squarely rejected the plaintiff's claim that the discretionary function exception did not apply to suits "authorized by the 'investigative or law enforcement officer' proviso of section 2680(h)." *Id.* at 507. In the court's view, Section 2680(a) is "unambiguous" in applying "to '*any* claim' based on a discretionary function." *Id.* Thus, the D.C. Circuit held that a plaintiff "must clear the

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[3] District courts within the Second Circuit regularly apply *Caban*'s analysis to the "day-to-day activities of law enforcement officers," seeing "no indication" that these officers' decisions are "grounded in public policy considerations or susceptible to policy analysis" of the kind that triggers the discretionary function exception. *See, e.g.*, *Gonzalez v. United States*, 2018 WL 1597384, at *9 (E.D.N.Y. 2018).

'discretionary function' hurdle *and* satisfy the 'investigative or law enforcement officer' limitation to sustain" an FTCA claim for one of the enumerated torts. *Id.* at 508. *See also Olaniyi v. D.C.*, 763 F. Supp. 2d 70, 91 (D.D.C. 2011) (applying *Gray*'s holding).

The Fourth Circuit adopted the D.C. Circuit's rule in *Medina*, *supra*. The case involved a suit arising out of INS agents' confrontation with the plaintiff. The court acknowledged that INS agents fit within Section 2680(h). But it sua sponte invoked the discretionary function exception to hold that Medina's claims for assault, false arrest, and malicious prosecution—each torts enumerated in Section 2680(h)—were nonetheless barred. 259 F.3d at 224. *See also Welch v. United States*, 409 F.3d 646, 651-52 (4th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006).

The Ninth Circuit has also aligned itself with the D.C. Circuit. *See Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995). The Ninth Circuit held that when there is "interplay" between the law enforcement proviso and the exceptions contained in the remainder of Section 2680, the other exceptions control. *Id.* at 1433. It did so despite recognizing that this rule would "effectively ba[r] any remedy" for some of the claims authorized by the proviso. *Id.* Accordingly, courts within the Ninth Circuit apply the discretionary function exception to conduct by line-level officers that falls within the law enforcement proviso. *See, e.g.*, *Martinez v. United States*, 2018 WL 3359562, at *6 (D. Ariz. July 10, 2018) ("[E]ven where the law enforcement proviso applies, the discretionary

function exception trumps the proviso."); *Casillas v. United States*, 2009 WL 735193, at *15 (D. Ariz. 2009) (same).

3. The Fifth Circuit takes yet a third position. It has repeatedly refused to "declare categorically—or try to state in a principled way—the circumstances in which either the discretionary function exception or the law enforcement proviso governs to the exclusion of the other." Pet. App. 11a (quoting *Sutton v. United States*, 819 F.2d 1289, 1298 (5th Cir. 1987)). Instead, courts must "harmonize[]" the "tension" between Sections 2680(a) and (h) "in each individual case." *Nguyen v. United States*, 65 Fed. Appx. 509, at *1 (5th Cir. 2003) (per curiam). To the extent it is possible to glean a general rule from the Fifth Circuit's cases, it seems to be that the law enforcement proviso controls only in those cases where the facts show intentional misconduct or bad faith. *See* Pet. App. 25a. Otherwise, the discretionary function exception deprives courts of jurisdiction even in cases involving "false arrest" or "false imprisonment" by "investigative or law enforcement officers."

II. The discretionary function exception does not strip federal courts of subject-matter jurisdiction over false-arrest and false-imprisonment claims that fall within the law enforcement proviso.

In *Millbrook v. United States*, 569 U.S. 50 (2013), this Court explained that "[t]he plain language of the law enforcement proviso answers when a law enforcement officer's 'acts or omissions' may give rise to an actionable tort claim under the FTCA." *Id.* at

55. Thus, the Court rejected the attempt of "lower courts [to] nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso." *Id.* This Court should therefore hold that federal courts have subject matter jurisdiction over cases within the law enforcement proviso even if law enforcement agents are exercising some sort of judgment or "discretion" in making decisions about arrests and detentions.

1. Straightforward principles of statutory construction require this result. First, the language of Section 2680(h) is "unambiguous." *Millbrook*, 569 U.S. at 57. It provides that "with regard to acts or omissions" by law enforcement officers, 28 U.S.C. § 1346(b), which confers subject-matter jurisdiction on the federal district courts, "*shall* apply to *any* claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" (emphasis added). It does not distinguish between ministerial and discretionary acts.

Second, as this Court has repeatedly held, a "specific provision" in a statute "controls one[s] of more general application." *Bloate v. United States*, 559 U.S. 196, 207 (2010); *see also, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (describing this principle as "a commonplace of statutory construction"). The law enforcement proviso of Section 2680(h) pinpoints an enumerated list of torts committed by a discrete group of government employees. It is thus far more specific than the discretionary function exception. *See Nguyen v. United States*, 556 F.3d 1244, 1253 (11th Cir. 2009).

That the law enforcement proviso was passed later in time reinforces the conclusion that it should control. As this Court has often explained, in applying the canon that a later-enacted, specific statute should govern over an earlier and more general statute, it is "particularly" the case that a "later statute" takes precedence when "the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). *See also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts §§ 28, 55 (2012) (discussing and applying these two canons).

2. Applying the discretionary function exception to false-arrest and false-imprisonment cases that fall within the law enforcement proviso would eviscerate the proviso. This Court has recognized our Nation's "well established tradition of police discretion" with respect to decisions regarding whether to effect arrest and detention. *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760 (2005). Virtually always, there is "room for choice," *United States v. Gaubert*, 499 U.S. 315, 324 (1991), in deciding whether to seize or arrest an individual. If that sort of discretion were enough to trigger Section 2680(a), then the class of false arrests and false imprisonments actionable under the law enforcement proviso would be a null set. The discretionary function exception would simply swallow up the law enforcement proviso.[4]

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[4] Prior to *Gaubert*, several courts tried to harmonize the law enforcement proviso and the discretionary function

3. At least with respect to claims for false arrest or false imprisonment, there is yet another route to the conclusion that the discretionary function exception cannot deprive plaintiffs like petitioner of their right to bring cases that fall within the law enforcement proviso: Law enforcement officers lack discretion to commit the torts of false arrest or false imprisonment because by definition such acts violate the Constitution.[5]

The central element of the torts of false arrest and false imprisonment, beyond their restriction of an individual's liberty, is that the arrest or detention lacked probable cause. *See Pierson v. Ray,* 386 U.S. 547, 557 (1967). When the arrest or detention without probable cause is conducted under color of federal law, it not only constitutes a state-law tort,

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exception by suggesting that law enforcement officers were "operational" actors whose work simply did not involve exercises of discretion. *See, e.g.*, *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987); *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir.), *cert. denied*, 479 U.S. 849 (1986). But *Gaubert* held that the discretionary function exception "is not confined to the policy or planning level," but can reach some "operational" conduct as well. 499 U.S. at 325. And this Court has unanimously rejected the Third Circuit's approach in *Pooler* as lacking "any support in the text of the statute." *Millbrook*, 569 U.S. at 56.

[5] There is at least one tort enumerated within the law enforcement proviso—"assault"—as to which this argument would not necessarily apply. The tort of assault can include acts such as causing another person to have "imminent apprehension" of an "offensive" contact, Restatement (Second) of Torts § 21, that do not necessarily establish a constitutional violation.

but it violates the Fourth Amendment as well. *See Wallace v. Kato*, 549 U.S. 384, 397 (2007) (referring to the claim in a § 1983 action as being for "false arrest in violation of the Fourth Amendment"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 n.4 (1971) (pointing to claims for false imprisonment as capable of being "based on state common law or directly on the Fourth Amendment" when the detention is conducted by federal officers).

To be sure, the FTCA does not permit a plaintiff to bring a constitutional claim. Pet. App. 42a. "[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims." *FDIC v. Meyer*, 510 U.S. 471, 478 (1994). But when, as in petitioner's case, the facts alleged with respect to the plaintiff's state-law tort claim also support the conclusion that the defendant's conduct violated the Fourth Amendment (or some other constitutional provision), the alleged conduct falls outside the discretionary function exception.[6]

This Court long ago declared that governments have "no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). Not surprisingly, then, in *Berkovitz*

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[6] The district court's failure to understand this point, *see* Pet. App. 41a-42a (treating petitioner's argument that the discretionary function exception should not apply as an attempt to "shoehorn[] a Fourth Amendment violation claim" into the case) infected both its analysis of petitioner's argument and the Fifth Circuit's subsequent resolution, *id.* at 21a.

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

Consistent with that directive, six courts of appeals have held that the discretionary function exception does not shield "actions that are unauthorized because they are unconstitutional." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254-55 (1st Cir. 2003), *cert. denied*, 542 U.S. 905 (2004). *See also, e.g.*, *Myers & Myers Inc. v. U.S. Postal Serv.,* 527 F.2d 1252, 1261 (2d Cir. 1975) ("a federal official cannot have discretion to behave unconstitutionally"); *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir.) ("conduct cannot be discretionary if it violates the Constitution"), *cert. denied*, 487 U.S. 1235 (1988); *Medina v. United States,* 259 F.3d 220, 225 (4th Cir. 2001) ("[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes") (quoting *U.S. Fidelity*); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (agents' actions fell

"outside" the exception because the plaintiff "alleged they were conducted in violation of his First and Fourth Amendment rights"); *Nurse v. United States,* 226 F.3d 996, 1002-03 (9th Cir. 2000) (finding jurisdiction over false imprisonment claim because the plaintiff alleged conduct that was both tortious and discriminatory in violation of the Fifth Amendment).

The Fifth Circuit, however, has repeatedly declined to adopt this consensus position, and it refused to apply it here. *See, e.g.,* Pet. App. 21a; *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010) ("This court has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception."); *Santos v. United States*, 2006 WL 1050512, at *3 (5th Cir. 2006) (per curiam) (rejecting plaintiff's "attempt to save his claims from the discretionary function exception" by arguing that "the acts of which he complains not only constitute negligence, but also violate the Eighth Amendment"). This Court should grant review at least to clarify that allegedly unconstitutional actions that fall within the law enforcement proviso cannot be shielded by the discretionary function exception.

4. Limiting the law enforcement proviso only to cases where the alleged tort was committed in bad faith, as the Fifth Circuit has done, *see* Pet. App. 25a, not only inserts conditions into the law enforcement proviso that are found nowhere in the text but also defies Congress's clearly expressed intent.

The "central purpose" of the Federal Tort Claims Act overall was to "waiv[e] the Government's

immunity from suit in sweeping language." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (internal quotation marks omitted)). The exceptions to jurisdiction the Act provides in Section 2680 must be construed in light of that purpose. *Id.*

Originally, the Act retained the United States' immunity with respect to the list of intentional torts enumerated in 28 U.S.C. § 2680(h). That list included "false arrest" and "false imprisonment." But in 1974, "Congress carved out an exception to § 2680(h)'s preservation of the United States' sovereign immunity for intentional torts." *Millbrook*, 569 U.S. at 52. Section 2680(h) now "extends the waiver of sovereign immunity" for the enumerated intentional torts, as long as the claim is "based on the 'acts or omissions of investigative or law enforcement officers.'" *Millbrook*, 569 U.S. at 52-53.

The Senate Report accompanying the addition of the law enforcement proviso to Section 2680(h) explained that the proviso

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

S. Rep. No. 93-588, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 2789, 2791 (emphasis added). Congress thus expressly acquiesced to suit even in cases that would otherwise fall within the discretionary function exception. *See also* Jack Boger, Mark Gitenstein, & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Tort*

Amendment: An Interpretive Analysis, 54 N.C.L. Rev. 497, 515 (1976) (reviewing the legislative history of the proviso at length and explaining that the proponents were "clearly insistent" that the FTCA be available even in cases where plaintiffs could not bring *Bivens* actions).

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

III. This case is the right vehicle for resolving the question presented.

1. There is no question that petitioner's complaint falls within the terms of the law enforcement proviso. Both courts below recognized that the Government employees involved in petitioner's arrest and detention were "law enforcement officers" within the meaning of the proviso. Pet. App. 26a, 35a. And they agreed that petitioner's claim involved "intentional torts specifically enumerated in the law enforcement proviso." *Id.* at 35a; *see also id.* at 26a.

There is also no question that petitioner at every stage of this case pressed her argument that the discretionary function exception should not bar her case. Both the district court and the court of appeals squarely addressed that argument.

2. The question presented is outcome determinative of petitioner's claim. If petitioner's case had arisen in the Eleventh Circuit, there clearly would have been subject-matter jurisdiction over her claims of false arrest and false imprisonment because

"sovereign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244, 1256-57 (11th Cir. 2009). So, too, in the Second Circuit, which does not treat line-level arrests and detentions, like the one petitioner has challenged here, as involving the sort of discretion protected by discretionary function exception. *See supra* pages 13-14.

CONCLUSION

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

Respectfully submitted,

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August 22, 2018

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-51476

United States
Court of Appeals
FILED
April 24, 2018
Lyle W. Cayce
Clerk

D.C. Docket No. 3:16-CV-151

GUADALUPE CHAIDEZ CAMPOS,
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,
Defendant – Appellee

Appeal from the United States District Court for the
Western District of Texas

Before WIENER, ELROD, and SOUTHWICK, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed, vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

[SEAL: USCA-5]
Certified as a true copy and issued as the mandate on Jun 18, 2018

Attest:

/s/ Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B

REVISED April 25, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-51476

United States Court of Appeals
FILED
April 24, 2018
Lyle W. Cayce
Clerk

GUADALUPE CHAIDEZ CAMPOS,
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,
Defendant – Appellee

Appeal from the United States District Court for the Western District of Texas

[OPINION]

Before WIENER, ELROD, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

Guadalupe Chaidez Campos sued the Government for false arrest and false imprisonment under the Federal Tort Claims Act. The district court dismissed her claims for lack of subject matter jurisdiction. We AFFIRM the district court's dismissal but VACATE and REMAND so that the court may revise its final judgment to dismiss Campos's claims without prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2012, Campos entered the United States without legal authority. United States Customs and Border Protection ("CBP") officers issued her a Notice and Order of Expedited Removal. Prior to Campos's removal, though, she pled guilty to one count of attempted illegal reentry, in violation of 8 U.S.C. § 1326. Campos was sentenced to 11 months of imprisonment and three years of supervised release. While she was incarcerated, Campos applied for and was granted U nonimmigrant status. We will discuss the purpose and effect of that status later.

We will set out the factual events of the dispute by quoting from the first amended complaint. We start here because of the district court's statement that it "has not considered the *substance or value* of any of the Government's exhibits" offered in its motion to dismiss:[1]

> On or about November 14, 2013, Ms. Chaidez Campos reported to the federal probation office for the Western District of Texas, El Paso Division, in El Paso, Texas with her one-year-old child, Emmanuel Ochoa, and Emmanuel's father, Jesus M. Ochoa Perez.
>
> At that time, Ms. Chaidez Campos was in the United States in lawful immigration status because the Secretary of Homeland Security, through the U.S. Citizenship and Immigration

[1] Omitted from our quotations of the factual section of the complaint are the paragraph numbers and also the intermittent paragraphs that detail legal arguments.

Services (USCIS), granted her U nonimmigrant status as a victim of a crime.

When Ms. Chaidez Campos arrived for her appointment with her federal probation officer, she was made to wait and then was met by a Customs and Border Protection (CBP) officer.

The CBP officer separated Ms. Chaidez Campos from her child.

Ms. Chaidez Campos pleaded with the CBP officer, telling the officer that Ms. Chaidez Campos was not deportable because she had been granted U nonimmigrant status.

Ms. Chaidez Campos then presented the CBP officer with proof of Ms. Chaidez Campos' lawful temporary resident status in the form of her Employment Authorization Document (EAD).

On its face, Ms. Chaidez Campos' EAD contained the correct spelling of her name, correct alien number (A#), correct birth date, country of origin, and nonimmigrant status.

The CBP officer continued to detain Ms. Chaidez Campos after she presented the officer the EAD showing that Ms. Chaidez Campos was in the United States with lawful temporary residency status.

The CBP took Ms. Chaidez Campos into custody and transferred her to the Paso del Norte (PDN) Port–of–Entry in El Paso Texas.

At the PDN Port–of–Entry, CBP searched Ms. Chaidez Campos, held her in a cold room,

> and eventually removed her to Mexico that same day, November 14, 2013.
>
> Ms. Chaidez Campos attempted at least two times to return to the United States but was denied admission. She remained outside the United States until January 17, 2014.

What these allegations do not address is what the CBP officers did to investigate Campos's immigration status, what they found, and why they decided to remove her. Though the district court in its order dismissing the complaint stated that it did not consider the "substance or value" of the exhibits the Government attached to its motion to dismiss, the court did indicate that it considered "for context" that she pled guilty to attempted illegal re-entry after being previously removed, was sentenced by this same district judge, and served 11 months in prison.

Campos filed suit in the United States District Court for the Western District of Texas against the United States, alleging violations of her civil rights and requesting relief under the Federal Tort Claims Act ("FTCA"). Campos claimed that she was falsely arrested and imprisoned by the CBP officers because the officers detained her after she presented them with an EAD, which in her view conclusively showed entitlement to remain in the United States.

The Government filed a motion to dismiss, contending that the district court lacked subject matter jurisdiction over Campos's FTCA claims because the CBP officers' actions fell within the "discretionary function exception" to the FTCA's waiver of sovereign

immunity. The district court agreed and dismissed. Campos timely appealed.

DISCUSSION

We are reviewing a district court's dismissal of a suit due to the absence of subject matter jurisdiction. *See* FED R. CIV. P. 12(b)(1). Our review of such a dismissal is *de novo*, applying the same standard as the district court. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The party asserting jurisdiction bears the burden of proof. *Id.* In resolving a motion under Rule 12(b)(1), the district court

> has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (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.

St. Tammany Par., ex rel. Davis v. Fed. Emergency Mgmt. Agency, 556 F.3d 307, 315 (5th Cir. 2009) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

The district court did not resolve any disputed facts. As to undisputed facts, the Government attached to its motion to dismiss affidavits of two CBP officers involved with the investigation on the day of Campos's removal and three documents related to Campos's 2013 conviction that sent her to prison for 11 months and also led to an order for her removal that would be enforced at the end of her incarceration. Some and perhaps most of the information in those exhibits would have been undisputed. As mentioned earlier,

though, the court declared that it had not considered the "substance" of the exhibits. Instead, it considered for contextual reasons only the evidence of Campos's prior conviction, about which the complaint was completely silent.

We conclude that the district court, by its reference to using the conviction information for context, necessarily meant that it considered the undisputed record of Campos's conviction and its effects. This included the order for removal that gave the CBP officers a basis for a reasonable belief that she was impermissibly in the country and was subject to being removed.[2] We reach that conclusion due to the district court's explaining in its order dismissing the case that a CBP officer has statutory authority to arrest without a warrant when "the agent has 'reason to believe' that the person is in the United States in violation of any immigration laws or regulations and is 'likely to escape before a warrant can be obtained for [her] arrest.'" *See* 8 U.S.C. § 1357(a)(2). When the court then held that these CBP officers had used this authority, there must have been information that provided a reason to believe, even if incorrectly, that Campos was present improperly. CBP officers do not have discretion to conduct an investigation, find nothing, and deport anyway.

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[2] Campos filed a motion to strike some but not all of the exhibits. One exhibit that she urged be used by the district court was the removal order itself, saying it would "assist the [c]ourt in determining whether it ha[d] jurisdiction." Thus, both as a matter of seeking the contextual information and because Campos sought the order's consideration, the 2012 order for Campos's removal is properly considered on appeal.

When a district court does not detail the factual determinations it made to support its ruling, "an appellate court may determine for itself, on the basis of the record and any statements made by the district court ... what, if any, implicit factual findings it made." *Williamson*, 645 F.2d at 414. As will become clear, the only implied factual findings in the district court's order deal with Campos's prior conviction that led to an order that she be removed at the end of her prison term. Our analysis of the district court's ruling does not reveal any reliance on the affidavits of the CBP officers.

Thus, this dismissal was based on the complaint plus the undisputed facts of Campos's criminal history and of the removal order. "In such a circumstance, our review is limited to determining whether the district court's application of the law is correct and whether the facts are indeed undisputed." *Ynclan v. Dep't of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991).

Campos presents three arguments. First, she argues the district court erred in concluding that her claims fell within the discretionary function exception because the law enforcement proviso controls over the exception. Second, Campos asserts the district court erred in applying the discretionary function exception because it is inapplicable here. Finally, Campos contends the district court erred in not applying the law enforcement proviso to her FTCA claims.

We first discuss the pertinent statutory provisions and then address each of Campos's arguments.

I. *The Federal Tort Claims Act*

"Courts consider whether the FTCA applies via a Rule 12(b)(1) motion, because whether the government has waived its sovereign immunity goes to the court's subject matter jurisdiction." *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016).

The FTCA waives the Government's sovereign immunity and permits suit against it for certain tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The Act also provides federal district courts with exclusive jurisdiction over monetary damage claims against the Government for "personal injury ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Id.* § 1346(b)(1).

The Government's liability for such claims is not absolute. Section 2680 of the FTCA outlines exceptions that block the FTCA's waiver of the Government's sovereign immunity. If an exception applies, a plaintiff's FTCA claim is barred, and a federal court is without subject matter jurisdiction over the claim. *See, e.g.*, *Castro v. United States*, 608 F.3d 266, 268 (5th Cir. 2010) (en banc).

Two subsections of Section 2680 are relevant. One is Section 2680(a), commonly referred to as the "discretionary function exception," which excepts any claim that is based upon a Government employee's performance of a "discretionary function or duty ... whether or not the discretion involved be abused." The other is Section 2680(h). It excepts from the waiver of

immunity certain tort claims, including false arrest and false imprisonment, committed by a Government investigative or law enforcement officer. *Id.* Section 2680(h), though, does allow suits based on "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). This second quoted portion of Section 2680(h) is often labeled the "law enforcement proviso." *See Tsolmon*, 841 F.3d at 381.

II. *Relationship between the exception and the proviso*

Campos contends the district court erred in considering the discretionary function exception. Campos argues the district court's consideration of the exception was error because "properly alleged claims under the law enforcement proviso always trump the discretionary function exception and thus, there is no need to determine whether the discretionary function [exception] shields the government from liability."

Campos's argument is foreclosed by this court's precedent. Neither the discretionary function exception nor the law enforcement proviso "exist[s] independently of the other nor does one predominate over the other." *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). "[I]t is both impossible and certainly inappropriate for us to declare categorically—or try to state in a principled way—the circumstances in which either the discretionary function exception or the law enforcement proviso governs to the exclusion of the other." *Id.* at 1298.

Thus, we turn to the circumstances here to resolve how the two parts of Section 2680 function in this case.

III. Applicability of the discretionary function exception

We use a two-part test to determine whether government officials' actions fall within the discretionary function exception. *See Tsolmon*, 841 F.3d at 382. The plaintiff has the burden of establishing that the test is not satisfied. *See id.* First, the relevant employees' conduct must be a "matter of choice." *Id.* (quoting *Spotts v. United States*, 613 F.3d 559, 567 (5th Cir. 2010)). Second, the choice or "judgment must be of the kind that the discretionary function exception was designed to shield." *Id.* (alterations and citation omitted).

The district court determined that the discretionary function exception applied. Campos has challenged the district court's conclusion only as to whether the CBP officers had a choice regarding their actions. Thus, because it is uncontested, we accept for purposes of this appeal that if the conduct was a matter of choice, it was the kind of choice that the discretionary function exception was designed to shield. *See, e.g.*, *United States v. Elashyi*, 554 F.3d 480, 494 n.6 (5th Cir. 2008).

Government officials do not have relevant discretion when "a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.' " *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S.

531, 536 (1988)). "In other words, the discretionary function exception does not apply if the challenged actions in fact violated a federal statute, regulation, or policy." *Spotts*, 613 F.3d at 567.

Campos argues that the exception does not apply because the Government "points to no statute or regulation to support its position that [Campos's] EAD is not proof of immigration status." This argument reverses the proper legal inquiry. Campos, not the Government, must direct us to authority that the officer was required to allow Campos to remain upon being presented with an EAD under the circumstances of this case. *See Tsolmon*, 841 F.3d at 382.

Campos's basic point is that the EAD is unequivocal proof of the right to remain in the United States. She argues that clarity comes from federal regulations, a federal statute, and the Fourth Amendment.

In deciding what was clear, we start with the regulations. Campos's counsel was asked at oral argument to identify the regulation that provided for an EAD to operate as proof of a person's lawful immigration status and removed an officer's discretion to detain an individual who presented an EAD.[3] Campos's counsel cited 8 C.F.R. § 264.1(b). That regulation is entitled "Registration and fingerprinting," lists forms, and states that these "forms constitute evidence of registration." § 264.1(b). The form designation for an EAD is I-766. *Id.* Campos's EAD is

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[3] http://www.ca5.uscourts.gov/OralArgRecordings/16/16-51476_12-6-2017.mp3 at 1:43–1:56; 3:40–4:10; 5:10–5:25; 6:07–6:60; 7:25–7:34; 8:37–8:50.

in the record. It has "Employment Authorization Card" printed across the top, contains her photograph, and resembles to some extent a driver's license. In bold letters on the bottom is the phrase "Not Valid for Reentry to the U.S." We examine what "registration" means in order to understand what an I-766 evidences.

Aliens are required to register with the Government. 8 U.S.C. § 1302. Once an alien is registered, the Government issues to the alien "a certificate of alien registration or an alien registration receipt card." *Id.* § 1304(d). An alien's failure to maintain possession of the certificate of alien registration or alien registration receipt card is punishable as a misdemeanor with a fine not to exceed $100, imprisonment of not more than thirty days, or both. *Id.* § 1304(e). When the I-766 form of an EAD was approved by a final rule promulgated in 1996, it was described as a centrally-issued, more secure proof of employment authorization that would replace paper documents. 61 Fed. Reg. 46,534, 46,536.

It appears that Campos's EAD, whose commencement date is October 1, 2013, was issued because Campos, while still in prison, was granted a U-1 nonimmigrant visa. Such a visa is issued if the Secretary of the Department of Homeland Security determines an alien has suffered substantial physical or mental abuse as a victim of criminal activity. *See* 8 U.S.C. § 1101(a)(15)(U).

A regulation entitled "Alien Victims of Certain Qualifying Criminal Activity" provides the procedure, the specifics of eligibility, and the benefits that arise from a U-1 nonimmigrant visa. 8 C.F.R. § 214.14. One benefit is automatic entitlement to work: any "alien

granted U-1 nonimmigrant status is employment authorized incident to status," and an EAD is issued automatically. *Id.* § 214.14(c)(7). That regulation follows from a statute on which Campos relies providing that those who have U nonimmigrant status must be granted authorization to work. 8 U.S.C. § 1184(p)(3).

The information on the EAD includes a section entitled "Category." On Campos's card is printed "A19." According to Campos, that refers to the classes of aliens authorized to accept employment listed in Section 274a.12 of the regulations. Subpart (a)(19) of that section is for an "alien in U-1 nonimmigrant status, pursuant to 8 CFR 214.14, for the period of time in that status, as evidenced by an employment authorization document issued by USCIS to the alien." 8 C.F.R. § 274a.12(a)(19). We see the logic of Campos's representation, but we have not been directed to any regulation that explains the "A19" on Campos's card.

Eligibility for a U-1 visa can exist even for someone like Campos who was subject to a final order of removal. *Id.* § 214.14(c)(1)(ii). Importantly to Campos's arguments here, a regulation provides that any "order of exclusion, deportation, or removal issued by the Secretary ... [is] deemed canceled by operation of law as of the date of USCIS' approval of Form I-918," which is the form on which an application for a U-1 visa is made. *Id.* § 214.14(c)(5)(i).

Our question, however, is not whether there was any correlation between "A19" in the "Category" section of the EAD and a statute indicating an alien's particular status. Instead, we ask whether there was any statute or regulation that "specifically prescribes a

course of action" that removed all discretion from CBP officers upon being presented with an EAD card because "officers are unprotected [from liability] only when they use their discretion to act in violation of a statute or policy that specifically directs them to act otherwise." *Tsolmon*, 841 F.3d at 382, 384.

Before seeking to pull all this together, we examine the statute Campos has cited, which she says prohibits her arrest because of the EAD:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant –
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States[.]

8 U.S.C. § 1357(a)(1)–(2). The Government relies on the statutory right to arrest when the officer has reason to believe the alien is improperly present and is likely to escape before a warrant can be obtained. *Id.* § 1357(a)(2).

Our analysis of this statute starts with a recent opinion applying the discretionary function exception to the decision that CBP officers made to detain an alien. *Tsolmon*, 841 F.3d at 384. There, the alien did not have possession of any documentation showing his lawful status. *Id.* at 380. Officers searched for some time in computer records to find what the alien said was his H-1B nonimmigrant worker visa; they were unsuccessful. *Id.* at 380–81. Without any record in his possession or that the CBP officers could locate, Tsolmon was detained for a day and a half. *Id.* Finally, an officer, who may have been more proficient in computer searches but who still needed several hours of work, found the evidence of Tsolmon's H-1B. *Id.* at 381. The district court held that the discretionary function exception applied to the claim based on the original officer's investigation into Tsolmon's immigration status. *Id.* at 383. We held that the thoroughness of an investigation is a central decision for law enforcement officers to make, one that is inherently discretionary. *Id.*

Like Campos, Tsolmon relied on Section 1357(a)(2) to contend that the officers' conduct did not fall within the discretionary function exception. *Id.* at 382–83. We agreed with Tsolmon's broad characterization of the exception as not affording protection to officers who break the law or exceed their authority. *Id.* at 384. We explained, though, that the exception leaves officers

unprotected only when a statute or policy specifically directs them to act in a particular manner but the officers use their discretion to act in violation of that statute or policy. *Id.* We rejected Tsolmon's argument that the officers exceeded their authority under Section 1357(a)(2) when they detained him because "Section 1357(a)(2), with its judgment-laden 'reasonable belief' standard," is not a statute that gives specific direction to officers. *Id.* at 384.

The investigation in *Tsolmon* failed to uncover the needed documentation to show the alien's status. *Id.* at 380–81. According to Campos, that was not the problem here, as she had with her the documentation she needed. Campos argues that her removal was due to a failure by the investigating CBP officer to understand the legal effect of what was known even before any factual investigation was conducted. The CBP officer who initially met with Campos was Luis Oliva, who had been called by a probation officer after Campos presented herself at the probation office.

We perceive two ways to view where we are. One is to say that the case presents the issue of whether the failure to know the legal effect of documents that were in hand is in essence a failure to investigate the legal points more thoroughly. If so, does the discretionary function exception apply just as it does to a truncated investigation that did not uncover relevant facts? We do not rule from that perspective and leave that issue open. Another perspective is to say that regardless of what the EAD is best understood as meaning, no regulation or statute existed to indicate that meaning in such a way as to remove the CBP officer's discretion. We proceed down the path we see from that viewpoint.

The discretionary function exception would fail to protect the CPB officers if Section 1357(a)(2) specifically directed them to act in a particular manner but they used their discretion to act in violation of the statute. *Tsolmon*, 841 F.3d at 384. Campos contends that the officers violated Section 1357(a)(2) when they detained her because she presented them with a valid EAD that unequivocally established her lawful presence and because there was no factual basis to support that she was likely to escape, as she was present at the probation office on her own volition and was accompanied by her daughter and her daughter's father.

Campos has not presented us with a regulation or other authority that indicates that the "Category" section of an EAD reflects which subparagraph of 8 C.F.R. § 274a.12 is the source of the employment authorization. Even if such a regulation or directive in some other form exists, though, there was no regulation or other guidance to Oliva that "specifically prescribe[d] a course of action" when he was presented with an EAD, such that he had no discretion to conduct further investigation. *See Gaubert*, 499 U.S. at 322. Any shortcomings in the search for evidence of a visa fall in the category of investigatory discretion identified in *Tsolmon*.

Campos has also not shown how her voluntary presence at the probation office with her family precluded the CBP officers from having reason to believe that she was likely to escape. Before Oliva went to the probation office to meet with Campos, he reviewed documents that were associated with Campos's case, including the 2012 order of expedited

removal, and was led to believe that Campos should have been removed from the country when she was released from prison. That Campos was, from Oliva's perspective, again impermissibly present in the United States would plausibly have given Oliva a reasonable belief that Campos would disappear before a warrant could be obtained.

Moreover, the 2012 order of expedited removal issued to Campos by an immigration officer provided for her expedited removal under Section 235(b)(1) of the Immigration and Nationality Act. 8 U.S.C. § 1225(b)(1). As that statute details, removal is without the benefit of a hearing or further review absent a claim for asylum (no such claim made here). *Id.* Once Campos was in the custody of these CBP officers, and after they failed to find a justification that they understood had cancelled that order, they enforced the removal order they discovered by walking her across the nearby bridge into Mexico. Whether that was the correct action to take or not, we do not see that the issue of probability of escape has any relevance here.

As discussed before, the discretionary function exception applies if the relevant decision was a matter of choice and was "of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. We conclude that what Campos insists was certain from the EAD and removed all discretion was, in reality, sufficiently uncertain as to leave discretion in the hands of the CBP officers. The discretionary function exception exists to leave sovereign immunity in place unless the official had clear guidance on what to do when presented with what is argued to be the relevant evidence.

We conclude that the discretionary function exception applied.

Campos also argues that her Fourth Amendment rights were violated. "This court has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception." *Spotts*, 613 F.3d at 569. We need not decide the issue here because we find the question not to be sufficiently raised. Campos cursorily mentioned the Fourth Amendment in her response to the Government's motion to dismiss. That passing reference did not address whether a Fourth Amendment violation barred the application of the discretionary function exception.

The inadequate presentation of the issue to the district court means any argument of error by the district court on the issue is waived on appeal. *Id.*

IV. The law enforcement proviso

We have already discussed Campos's argument that the "law enforcement proviso" of Section 2680(h) should control, and her suit for false arrest and false imprisonment should proceed under its terms. We noted that in this circuit, the proviso and the discretionary function exception each have to be considered. Now that we have held that the discretionary function exception is applicable, we need to determine if the proviso is as well.

Before reaching Campos's argument, we remind that the proviso is part of a subparagraph that first identifies an intentional tort exception. The intentional torts there identified are statutorily excepted from the

FTCA unless the proviso applies. The Government, though, has not relied on the exception in Section 2680(h). In its motion in district court, the Government sought dismissal based only on the discretionary function exception. The motion mentioned the law enforcement proviso, but it did not seek dismissal under the intentional tort exception. The Government did at least explain that the latter part of the FTCA retains sovereign immunity for claims involving false arrest and false imprisonment.

The only claims Campos identifies in her complaint are that she "was falsely arrested and falsely imprisoned by federal officers without [her] consent and without authority of law." The intentional tort exception states that sovereign immunity is not waived for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). Thus, under the FTCA as initially enacted, those intentional torts were not actionable against the United States. *Sutton*, 819 F.2d at 1294. After troubling incidents of perceived misconduct by law enforcement officers, in 1974 Congress limited the exception by allowing suits that satisfy this proviso:

> That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious

> prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h); *see also Sutton*, 819 F.2d at 1295–97.

We start with what this Circuit has already held about the proviso, then address an important Supreme Court precedent that postdates our holdings and causes us to modify some of what we have previously held.

Despite the absolute nature of the language—seemingly unwaiving sovereign immunity for much of what was earlier waived in the same subsection—since 1987 this court has applied the proviso with considerable caution. *Cf. Sutton*, 819 F.2d at 1298. As we already described, *Sutton* treated the discretionary function exception and the law enforcement proviso as needing to coexist, as neither "exist[s] independently of the other nor does one predominate over the other." *Id.* at 1295. In that case, we focused on two events that led to Congress's adoption of the proviso: "The Senate Committee report states that the proviso was added to the FTCA in response to 'abusive, illegal, and unconstitutional "no-knock" raids' engaged in by federal narcotics agents in the Collinsville raids and in *Bivens* [*v. Six Unknown Named Agents of the Fed. Bureau of Investigation,* 403 U.S. 388 (1971).]" *Id.*

One way to interpret our holding is that the law enforcement proviso, allowing for suits to proceed, only

applies in situations in which the kinds of egregious, intentional misconduct occurs that was present in the events that prompted Congress to adopt the proviso:

> The law enforcement proviso waives sovereign immunity and makes the United States responsible to citizens who are injured by law enforcement officers in situations like the Collinsville raids when relief was otherwise unavailable.

Id. at 1298.[4] Besides that statement, though, *Sutton* also referred to the "categorical and unqualified" language of the proviso, such that there is government liability "whenever its agents commit constitutional torts and in any case in which a Federal agent commits acts which under accepted tort principles constitute one of the intentional torts enumerated in the proviso." *Id.* at 1296 (emphasis removed).

A later interpretation by this court of the proviso was in an opinion cited by the district court. There a panel stated: "In harmonizing the two provisions in this case, [*i.e.*, the discretionary function exception and the law enforcement proviso,] it is significant that the

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[4] Courts have continued to apply the intentional tort exception that precedes the proviso. *See, e.g.*, *Snow-Erlin v. United States*, 470 F.3d 804, 808–09 (9th Cir. 2006) (holding claim that the plaintiff-decedent's release date was negligently calculated, leaving him in prison almost a year beyond when he should have been released, was barred by Section 2680(h)); *see also Gaudet v. United States*, 517 F.2d 1034, 1035 (5th Cir. 1975) (concluding that the court's task is to determine whether the pleadings are clear that "the substance of [the] complaint is precisely the kind of tort enumerated in § 2680(h)," such as false imprisonment or arrest).

[Immigration and Naturalization Service] officers did not commit a constitutional violation nor did they engage in any conduct that could be described as in bad faith." *Nguyen v. United States*, No. 02-10013, 2003 WL 1922969, at *2 (5th Cir. Mar. 31, 2003).

Here, the district court relied on *Sutton* and *Nguyen* in concluding that "*Sutton*'s unmoored fact-intensive inquiry is anchored by *Nguyen*'s bad-faith framework." The district court applied its understanding of our caselaw to conclude that the discretionary function exception applied, not the law enforcement proviso.

What neither the district court nor the parties' briefing discussed is a United States Supreme Court decision handed down after both *Sutton* and *Nguyen*. *See Millbrook v. United States,* 569 U.S. 50 (2013). We conclude that it controls our interpretation of the law enforcement proviso, meaning we can leave some of what *Sutton* meant unresolved. We now know other circuits' interpretive limits on the proviso were invalid. *Id.* at 55–57. The Court held there to be no implicit limits on the statutory language; the proviso "extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." *Id.* at 57. The criteria for application of the proviso are *only* that the defendant have the right status, namely, that of an "investigative or law enforcement officer," and that acts or omissions of such an officer caused one of the six intentional torts to be committed. *Id.* at 54–55.

Though neither party cited *Millbrook* in the district court or here, it is a significant clarification of the law that should not be ignored. We apply *Millbrook*'s refusal to allow limitations to be placed on the law enforcement proviso to the law of this Circuit. That law, unaffected on this point, is that both the proviso and the discretionary function exception must be read together. *Sutton*, 819 F.2d at 1295. In other words, one does not moot the other when both cover a fact pattern. *Id.* at 1297.

The best way to blend the "on the one hand," with the "on the other" nature of these dueling provisions, is first to determine if the law enforcement proviso applies. It does. The CBP officers were law enforcement officers whose acts or omissions are claimed to have caused one of the relevant six torts. Having made that decision, we turn to the discretionary function exception. We already analyzed that exception and held the officers' decisions to have been matters of choice that traditionally would be shielded from liability. What would not be shielded from liability is defined by the *Sutton* court's focus on Collinsville and *Bivens* situations. We leave that much of *Sutton* undisturbed because under this Circuit's rule of orderliness, a prior opinion remains binding except to the extent of the Supreme Court's change in the law. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

It is enough to hold, and we do, that the conduct alleged here in no respect sinks to the necessary level. At worst, what occurred were failures to understand the import of various immigration documents and regulations. Reading the discretionary function

exception in conjunction with the law enforcement proviso, we conclude the district court was correct in holding there is no subject matter jurisdiction.

The district court did err, though, in dismissing Campos's FTCA claims with prejudice. Though Campos has not raised this issue, we agree with a prior opinion from this court that such an error cannot be waived. *Cox, Cox, Filo, Camel & Wilson, L.L.C. v. Sasol N. Am., Inc.*, 544 Fed.Appx. 455, 456 (5th Cir. 2013). We agree with our prior cases that have precluded district courts from dismissing plaintiffs' claims with prejudice when the basis for the dismissal is lack of subject matter jurisdiction under Rule 12(b)(1). *See, e.g.*, *Nevarez Law Firm, P.C. v. Dona Ana Title Co.*, 708 Fed.Appx. 186, 187 (5th Cir. 2018). The district court was without jurisdiction over Campos's FTCA claims; thus, it was without authority to dismiss the claims with prejudice because "[a] dismissal with prejudice is a final judgment on the merits" of a case. *Brooks v. Raymond Dugat Co. L C*, 336 F.3d 360, 362 (5th Cir. 2003).

We AFFIRM as to the dismissal of the complaint but VACATE and REMAND so that the district court may enter a revised order and final judgment that dismisses the suit without prejudice.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GUADALUPE CHAIDEZ CAMPOS,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

[FILED 10/28/2016]

EP-16-CV-151-PRM

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

On this day, the Court considered Defendant United States of America's (the "Government") "Motion to Dismiss Plaintiff's First Amended Complaint" (ECF No. 15) [hereinafter "Motion"], filed on August 15, 2016, Plaintiff Guadalupe Chaidez Campos's "Response to Defendant's Motion to Dismiss" (ECF No. 25) [hereinafter "Response"], filed on September 12, 2016, and Defendant's "Corrected Reply in Support of its Motion to Dismiss Plaintiff's First Amended Complaint" (ECF No. 30) [hereinafter "Reply"], filed on October 3, 2016, in the above-captioned cause. After due consideration, the Court is of the opinion that Defendant's Motion should be granted for the reasons that follow.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an arrest of an alien lawfully in the United States. Plaintiff alleges that on November 14, 2013, she reported to the United States

Probation Office for the Western District of Texas in El Paso, Texas. First Am. Compl. 2, Aug. 1, 2016, ECF No. 13 [hereinafter "Complaint"].[1] At the time of her probation visit, Plaintiff had secured a U nonimmigrant visa ("U–Visa"). Compl. 2.[2]

At the Probation Office, Plaintiff "was made to wait and then was met by a [United States] Custom and Border Protection" ("CBP") Agent. *Id.* at 4.[3] Plaintiff presented her Employment Authorization Document ("EAD"), which Plaintiff asserts is "prima facie evidence" of U–Visa non-immigrant status, to the CBP Agent. *Id.* at 4–5. Plaintiff alleges that the CBP Agent disregarded the EAD. *Id.* Plaintiff was subsequently removed from the United States that same day. *Id.* at 6.

Plaintiff seeks relief asserting a Federal Tort Claims Act ("FTCA") cause of action alleging that the Government, via the CBP Agent, falsely arrested and imprisoned her. *Id.* at 7. The Government contends

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[1] Although Plaintiff does not articulate her basis for her visit to the Probation Office, she previously pleaded guilty to violating 8 U.S.C. § 1326 for attempted illegal re-entry. See J. in a Crim. Case, *United States v. Guadalupe Chaidez Campos*, EP–13–CR–10–PRM (W.D. Tex. Mar. 27, 2013), ECF No. 26. The Court had previously sentenced Plaintiff to eleven months of imprisonment with three years of non-reporting supervised release. *See id.*

[2] A U–Visa is a type of visa that "can be granted to victims of certain listed crimes who later help United States law enforcement officials investigate or prosecute those crimes." *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 224 (5th Cir. 2010); *see also* 8 U.S.C. § 1101(a)(15)(U).

[3] Plaintiff does not articulate why the CBP Agent arrived at the Probation Office.

that it has not waived immunity and is therefore not subject to liability due to the discretionary function exception to the FTCA. Mot. 6.

II. LEGAL STANDARD

Sovereign immunity is jurisdictional in nature. *F.D.I.C. v. Meyer*, 510 U.S. 471, 474 (1994). "The question of whether the United States has waived sovereign immunity pursuant to the FTCA goes to the court's subject-matter jurisdiction ... and may therefore be resolved on a Rule 12(b)(1) motion to dismiss." *Willoughby v. U.S. ex rel U.S. Dep't of the Army,* 730 F.3d 476, 479 (5th Cir. 2013) (internal citations omitted).

Pursuant to Federal Rule of Civil Procedure 12(b)(1), "[a] case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014) (quoting *Krim v. pcOrder.com*, *Inc.*, 402 F.3d 489, 494 (5th Cir. 2005)).

"[T]he burden on a rule 12(b)(1) motion is on the party asserting jurisdiction." *Castro v. United States*, 608 F.3d 266, 268 (5th Cir. 2010) (en banc). Under appropriate circumstances, the Court may determine the issue of subject matter jurisdiction based upon "(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." *Ballew v. Cont'l Airlines*, *Inc.*, 668 F.3d 777, 781 (5th Cir. 2012) (quoting *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)).

III. DISCUSSION

The Government argues that the discretionary function exception to the Governments' waiver of sovereign immunity bars Plaintiff's FTCA claim. Mot. 6.

Generally, the FTCA waives the Government's sovereign immunity in tort claims against the United States. *Spotts v. United States*, 613 F.3d 559, 566 (5th Cir. 2010) (citing 28 U.S.C. § 2674). Nevertheless, this waiver is subject to exceptions. Two subsections of the FTCA, § 2680, (a) and (h), are relevant here.

A. Discretionary Function Exception

Pursuant to subsection (a), also known as the discretionary function exception, the Government withdraws its consent to be sued for actions "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).

Courts employ a two-part test to determine whether the discretionary function exception applies. *See United States v. Gaubert*, 499 U.S. 315, 322–23 (1991); *Spotts*, 613 F.3d at 567. "Under the first prong, the conduct must be a 'matter of choice for the acting employee.' " *Spotts*, 613 F.3d at 567 (quoting *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). "Under the second prong of the test, even assuming the challenged conduct involves an element of judgment, and does not violate a nondiscretionary duty, [the Court] must still decide

whether the judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 568 (internal quotations omitted).

1. First Prong: Whether the CBP Agent's Challenged Conduct Involved an Element of Judgment or Choice

Plaintiff challenges the manner in which the CBP Agent "wrongfully arrested [her] not how the [CBP] [A]gent[ ] investigated her." Resp. 4. Plaintiff argues that the discretionary function exception is inapplicable because the CBP Agent "exceed[ed] the scope of her authority by arresting [Plaintiff] without probable cause." Resp. 9.

Plaintiff is correct that the discretionary function exception does not apply if the government official's conduct was governed by a "statute, regulation or policy giving specific direction as to any of these functions in a way that would make [the acts] non-discretionary." *Guile v. United States*, 422 F.3d 221, 231 (5th Cir. 2005) (citing *Gaubert*, 499 U.S. at 321). Yet, "[i]f a statute, regulation, or policy leaves it to a federal agency to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary." *Spotts*, 613 F.3d at 567 (citing *Gaubert*, 499 U.S. at 329).

To be sure, "[n]o regulation or statute prevent[s] the [CBP] agents from pursuing deportation proceedings against [aliens] based on the information available to them." *Nguyen v. United States*, 65 Fed.Appx. 509, 2003 WL 1922969, at *1 (5th Cir. Mar. 31, 2003) (per curiam). Notably, the Fifth Circuit has recognized that a CBP agent's decisions

are discretionary when that agent investigates a plaintiff's immigration status. *See id.* ("Regulations expressly allow [CBP] agents to make arrests if the agent has reason to believe that the person to be arrested ... is an alien illegally in the United States." (quotation omitted)).

A CBP agent has the "power" to arrest someone without a warrant in the United States if the agent has "reason to believe" that the person is in the United States in violation of any immigration laws or regulations and "is likely to escape before a warrant can be obtained for [her] arrest." 8 U.S.C. § 1357(a)(2).

Thus, the CBP Agent's conduct during her investigation of Plaintiff's immigration status and the conclusions drawn from her investigation are considered discretionary conduct. *See Tsolmon v. United States*, No. CIV.A. H–13–3434, 2015 WL 5093412, at *8 (S.D. Tex. Aug. 28, 2015) appeal docketed No. 15–20609 (5th Cir. Oct. 23, 2015) (similarly holding that CBP agents have discretion to arrest). Therefore, the Government has satisfied the first prong.

2. Second Prong: Whether the CBP Agent's Decisions were of the Kind the Discretionary Function Exception was Designed to Shield

Having concluded that the Government has satisfied the first prong of the discretionary function exception, the Court must now determine if, under the second *Gaubert* prong, the CBP Agent's challenged conduct was based on considerations of public policy, and thus was the kind of conduct the

discretionary function exception was designed to shield. *See Gaubert*, 499 U.S. at 321.

"[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Spotts*, 613 F.3d at 568 (quoting *Gaubert*, 499 U.S. at 324).

The CBP Agent's "decision to arrest [Plaintiff] was clearly clothed in public policy considerations." *See Medina v. United States*, 259 F.3d 220, 229 (4th Cir. 2001) (finding that the former agency, Immigration Naturalization Service, had discretionary function to arrest former foreign diplomat). The CBP Agent is "concerned with obtaining evidence of illegal activities against [Plaintiff] [and] ... this objective correlates with the public policy goal of punishing and deterring those who violate federal laws." *Crenshaw v. United States*, 959 F.Supp. 399, 402 (S.D. Tex. 1997) (finding that the discretionary function exception to FTCA applied to exclude contractor's negligent investigation claims).

The CBP Agent's discretionary actions in investigating [Plaintiff's] immigration status [and] interpreting the information received ... were susceptible to policy analysis." *See Tsolmon*, 2015 WL 5093412, at *11. Therefore, the discretionary function exception's second prong has also been satisfied.

Given that both prongs are satisfied, the Court concludes that the discretionary function exception applies in the instant action.

B. Intentional Tort Exception and Law Enforcement Proviso

1. Law Enforcement Proviso Background and Circuit Split

Another exception, the law enforcement proviso, may undercut the discretionary function exception. Pursuant to subsection (h), the Government withdraws its consent to be sued for specified intentional torts, *inter alia*, false imprisonment and false arrest. § 2680(h). "However, there is an exception to this exception." *Milligan v. United States*, 670 F.3d 686, 695 (6th Cir. 2012). These enumerated torts were not actionable against the Government until Congress amended § 2680(h) to include the "law enforcement proviso"—an allowance to the FTCA intentional-torts exception. *Sutton v. United States*, 819 F.2d 1289, 1294 (5th Cir. 1987). The law enforcement proviso "waives sovereign immunity for the intentional torts of law enforcement and investigative officers." *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009), *on reh'g en banc*, 608 F.3d 266 (5th Cir. 2010) (citing § 2680(h)).

To be sure, CBP agents qualify as "law enforcement officers." *See Medina*, 259 F.3d at 224 ("We are satisfied that the INS agents involved meet this definition."). Moreover, Plaintiffs' FTCA claim is grounded in her false arrest and false imprisonment allegations—intentional torts specifically enumerated in the law enforcement proviso. *See* § 2680(h).

Therefore, the inquiry before the Court is whether the § 2680(h) law enforcement proviso overrides any claim arising from acts that are immune from suit under the § 2680(a) discretionary

function exception. The interplay between § 2680(a) and § 2680(h) has resulted in a circuit split. *Compare Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009) ("[The Eleventh Circuit is not persuaded] to abandon [the] conclusion that if a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event."), *with Medina*, 259 F.3d at 226 ("[The Fourth Circuit] therefore conclude[s] that the actions underlying intentional tort allegations described in § 2680(h), if authorized and implemented consistent with federal law and the Constitution of the United States, may be considered discretionary functions under § 2680(a), even if they would otherwise constitute actionable torts under state law."); *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994) ("If a defendant can show that the tortious conduct involves a 'discretionary function,' a plaintiff cannot maintain an FTCA claim, even if the discretionary act constitutes an intentional tort under § 2680(h)."); *Gray v. Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983) ("[W]e believe that [the plaintiff] must clear the 'discretionary function' hurdle and satisfy the 'investigative or law enforcement officer' limitation to sustain the ... FTCA claim.").

2. Fifth Circuit Cases Analyzing Law Enforcement Proviso

The Fifth Circuit has analyzed §§ 2680(a) and 2680(h). In *Sutton*, the Fifth Circuit adopted a centrist position to harmonize §§ 2680(a) and 2680(h) by requiring courts to "synthesize][ ] the policies behind §§ 2680(a) and (h) as applied to the specific

facts of each situation." *Sutton*, 819 F.2d at 1295; *see also Tsolmon*, 2015 WL 5093412, at *12 (recognizing that the Sutton court "adopted a middle ground"). *Sutton* instructs courts to "giv[e] effect to both [§§ 2680(a) and 2680(h)] in accordance with their legislative purpose" and that any conflicts between the sections "must be reconciled to achieve the legislative purpose expressed in the words of the statute and in light of existing law and policy behind the statute." *Id.* at 1300.

With this framework in mind, the *Sutton* court reversed and remanded the case to the district court because, *inter alia*, the disposition did not articulate whether a Postal Service investigator was an "investigative law enforcement officer within the definition § 2680(h)." *Id.* Because the *Sutton* court found the disposition inadequate, it did not apply its own fact-intensive inquiry to the facts of that case. *See id.*

Although the Fifth Circuit has had the opportunity to expand the interplay between §§ 2680(a) and (h) in two post-*Sutton* cases, both are problematic for different reasons: one case is unpublished and another is an en banc decision that opted not to conduct a thorough analysis. *See Castro*, 608 F.3d at 268; *Nguyen*, 65 Fed.Appx. 509, 2003 WL 1922969.

In *Nguyen*, officers of the Immigration and Naturalization Service ("INS") instituted deportation proceedings against a plaintiff and detained him for fifteen months before discovering that the plaintiff had a valid derivative claim to United States citizenship. *Nguyen*, 65 Fed.Appx. 509, 2003 WL

1922969, at *1.[4] In discussing the interplay of §§ 2680(a) and 2680(h), the *Nguyen* court found it significant that "the INS officers did not commit a *constitutional violation* nor did they engage in any conduct that could be described as in bad faith," and that "[n]o regulation or statute prevented the INS agents from pursuing deportation proceedings against [the plaintiff] based on the information available to them." *Id.* at, 2003 WL 1922969, at *2 (emphasis added). The *Nguyen* court concluded that the plaintiff's "detention [wa]s not of a character for which a court should refer to § 2680(h) for an exception to the discretionary function" because it was not conducted in bad faith. *Id.*

Another Fifth Circuit panel later relied on *Sutton* to hold that the discretionary function exception was inapplicable to conduct that a plaintiff alleged violated the Fourth and Fifth Amendments. *See Castro v. United States*, 560 F.3d 381, 389–90 (5th Cir. 2009) (subsequent history omitted). In *Castro*, the plaintiff brought suit against the United States on behalf of herself and her daughter, both of whom were United States citizens, after CBP agents deported her daughter, although they were aware, at the time, that the daughter was a United States citizen. *Id.* at 384–85. The plaintiff alleged violations of the Fourth and Fifth Amendments to the United States Constitution as well as tort claims of negligence, intentional infliction of emotional

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[4] On March 1, 2003, the functions of legacy INS were transferred to three separate agencies within the Department of Homeland Security: the Bureau of Citizenship and Immigration Services, the Bureau of Immigration and Customs Enforcement, and CBP.

distress, false imprisonment, abuse of process, and assault under the FTCA. *Id.* at 385. The district court dismissed the plaintiff's tort claims after finding that the discretionary function exception barred those claims. *Id.* On appeal, the Fifth Circuit reversed the district court, holding that the district court had failed to consider whether the CBP agents had exceeded the scope of their authority. *Id.* at 388–89. The *Castro* panel stated that "the discretionary function exception of § 2680(a)" is inapplicable "when governmental agents exceed the scope of their authority as designated by statute or the Constitution." *Id.* (quoting *Sutton*, 819 F.2d at 1293). While "governmental actors have wide discretion to carry out their statutory and regulatory obligations, courts have never interpreted delegated authority so broadly as to infringe upon constitutionally-protected rights and freedoms." *Id.* at 391.

Nevertheless, the Fifth Circuit, en banc, summarily vacated the *Castro* panel decision, but failed to address resolve, and provide lower courts with guidance regarding the interplay between constitutional allegations and the discretionary-function exception. *See Castro*, 608 F.3d at 268–69. Rather, the en banc court adopted the prior district court opinion that the Government had satisfied both *Gaubert* prongs, remaining silent on the import of the plaintiff's constitutional allegations.

To date, the Fifth Circuit has "not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception." *Spotts*, 613 F.3d at 569.

3. Analysis of Law Enforcement Proviso to Instant Case

Presently, the Fifth Circuit has not, as Plaintiff suggests, permitted the law enforcement proviso to corrode the discretionary function exception. *Cf.* Resp. 9 (noting that the "[a]pplication of the Fifth Circuit's decision in *Sutton v. United States* compels the conclusion that Plaintiff's false arrest claim is not barred by the discretionary function exception"). When presented with the opportunity in two post-*Sutton* instances, the Fifth Circuit has elected to permit the discretionary function exception to stand and disallowed FTCA claims against the Government. *Sutton's* unmoored fact-intensive inquiry is anchored by *Nguyen's* bad-faith framework. *See Castro*, 608 F.3d at 268; *Nguyen*, 65 Fed.Appx. 509, 2003 WL 1922969. Two other district courts have also reached similar conclusions. *See Tsolmon*, 2015 WL 5093412, at *14 (holding that plaintiff's failure to allege "intentional misconduct or bad faith" did not warrant law enforcement proviso's application when CBP agents detained and arrested that plaintiff); *Camacho v. Cannella*, Civ. Action No. EP–12–CV–40–KC, 2012 WL 3719749, at *9 (W.D. Tex. Aug. 27, 2012) (holding that "when the alleged conduct crosses the line from negligent conduct to intentional misconduct or bad faith, the discretionary exception yields to the law enforcement proviso, and the lawsuit can proceed"). The *Camacho* court found bad faith when the plaintiff alleged that the federal agent "lied and intentionally mischaracterized evidence" rather than alleging that the "officer's investigation was sloppy or that [the] officer should

have investigated the case more thoroughly." *Camacho*, 2012 WL 3719749, at *10.

Plaintiff alleges that the "CBP officer knew or should have known that [Plaintiff] was not in the United States in violation of any immigration law and could not be arrested without a warrant, probable cause or some other legal justification." Compl. 6. Regardless of how Plaintiff couches her allegations, they do not rise to the level of intentional misconduct or bad faith. *See id.* Instead, Plaintiff's allegations amount to "complain[ing] that an officer's investigation was sloppy or that an officer should have investigated the case more thoroughly"—a standard woefully short of *Nguyen*'s bad-faith framework. *See Camacho*, 2012 WL 3719749, at *10 (citing *Nguyen*, 65 Fed.Appx. 509, 2003 WL 1922969, at *2.

Although Plaintiff's situation was unfortunate, the Fifth Circuit in *Nguyen* and *Castro* found that the discretionary function exception—and not the law enforcement proviso—applies under more egregious circumstances. In *Castro* CBP detained and deported the plaintiff's minor child while in *Nguyen* CBP agents detained the plaintiff for fifteen months. *See Castro*, 608 F.3d at 268; *Nguyen*, 65 Fed.Appx. 509, 2003 WL 1922969. Here, Plaintiff was detained and deported the same day.

Indeed, Plaintiff's Complaint is devoid of any constitutional violation allegations. *See* Compl. Instead, Plaintiff shoehorns a Fourth Amendment violation claim in her Response. Resp. 11 ("Such arrest was in violation the Fourth Amendment and 8

U.S.C. § 1357(a)(2).").[5] The Court does not construe new allegations raised in motions and responses as it would for a pro se party. *Cf. Cash v. Jefferson Assocs., Inc.*, 978 F.2d 217, 218 (5th Cir. 1992) ("When a pro se plaintiff raises a new claim for the first time in response to a motion to dismiss, the district court should construe the new claim as a motion to amend the complaint under Fed. R. Civ. P. 15(a)."). Even if Plaintiff had properly included the Fourth Amendment claim, the Supreme Court has held—in an opinion seven years after *Sutton*—that "the United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims." *See Meyer*, 510 U.S. at 478 (holding that *Bivens* allows a suit against government agents, but not against government agencies).

Accordingly, the Court concludes that, under the Fifth Circuit's balancing test in *Sutton*, read in conjunction with *Nguyen's* bad-faith framework, the claims in this case are not of the kind that Congress intended to be actionable under the law enforcement proviso of § 2680(h). Rather, Plaintiff's FTCA claim arises from discretionary conduct that Congress intended to exempt from the FTCA's waiver of sovereign immunity under § 2680(a). Consequently, the Court lacks subject matter jurisdiction over Plaintiff's FTCA claim and will dismiss her cause.

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[5] Section 1357(a)(2) permits CBP agents to arrest aliens that are unlawfully present in the United States.

IV. CONCLUSION

Accordingly, **IT IS ORDERED** that Defendant United States of America's "Motion to Dismiss Plaintiff's First Amended Complaint" (ECF No. 15) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Guadalupe Chaidez Campos's First Amended Complaint is **DISMISSED WITH PREJUDICE** for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that all settings in this matter are **VACATED**.

IT IS FURTHER ORDERED that all pending motions filed in the above-captioned cause, if any, are **DENIED AS MOOT**.[6]

IT IS FINALLY ORDERED that the **CLERK** of the Court shall **CLOSE** this matter.

SIGNED this 28th day of **October, 2016.**

/s/

PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE

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[6] Plaintiff seeks to strike various exhibits, which are attached to the Government's Motion. *See* PL's Mot. to Strike Def.'s Exs., Sept. 2, 2016, ECF No. 22. While the Court did reference one of Defendant's exhibits—Plaintiff's past criminal history—for context, the Court has not considered the *substance or value* of any of the Government's exhibits in reaching its conclusion. As previously noted, the Court may reference "the complaint supplemented by undisputed facts plus the court's resolution of disputed facts" in determining whether there is subject matter jurisdiction. *See Ballew*, 668 F.3d at 781. Therefore, Plaintiff's "Motion to Strike Defendant's Exhibits" (ECF No. 22) is moot.

APPENDIX D

Title 28. Judiciary and Judicial Procedure
Part VI. Particular Proceedings
Chapter 171. Tort Claims Procedure
28 U.S.C. A. § 2680

2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

(**1**) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(**2**) the interest of the claimant was not forfeited;

(**3**) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(**4**) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(**d**) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(**e**) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(**f**) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(**g**) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(**h**) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to

acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(**i**) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(**j**) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(**k**) Any claim arising in a foreign country.

(**l**) Any claim arising from the activities of the Tennessee Valley Authority.

(**m**) Any claim arising from the activities of the Panama Canal Company.

(**n**) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

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