No. 05-529

In the Supreme Court of the United States

RICARDO ANTONIO WELCH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, excludes from its waiver of sovereign immunity, *inter alia*, "[a]ny 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." 28 U.S.C. 2680(a). The FTCA also excludes from its waiver claims arising out of specified intentional torts including false imprisonment, but makes this intentional tort exception inapplicable to certain intentional tort claims with respect to the "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h). The questions presented are:

1. Whether the due care exception set forth in 28 U.S.C. 2680(a) bars all tort actions against the United States when a government actor follows the dictates of a mandatory statute, regardless of whether the statute is subsequently declared unconstitutional as applied.

2. Whether an FTCA claim arising from an allegedly false imprisonment by a federal law enforcement officer is subject to the due care exception set forth in 28 U.S.C. 2680(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 409 F.3d 646. The order of the district court (Pet. App. 13a-21a) is reported at 316 F. Supp. 2d 252.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2005. A petition for rehearing was denied on July 26, 2005 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on October 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, generally waives

the sovereign immunity of the United States with respect to torts of federal employees, acting within the scope of their employment, under circumstances where a private individual would be liable. Certain exceptions to the FTCA's waiver of sovereign immunity, and limitations on the substantive scope of the United States' liability, are set forth in Section 2680. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1) (incorporating "the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671-2680). The two exceptions at issue in this case are the due care exception in Section 2680(a) and the intentional tort exception in Section 2680(h).

The due care exception provides that the FTCA is not applicable to "[a]ny 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." 28 U.S.C. 2680(a). The intentional tort exception generally provides that the FTCA does not apply to "[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). In 1974, however, Congress added an exception to the intentional tort exception, known as the "law enforcement proviso." See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. Under that proviso, with regard to the acts or omissions of federal investigative or law enforcement officers, "the provisions of this chapter [*i.e.*, 28 U.S.C. 2671-2680] 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." 28 U.S.C. 2680(h).

2. Petitioner Ricardo Welch is a citizen of Panama who has been a permanent legal resident of the United States since he was ten years old. Pet. App. 2a. In 1994, petitioner pleaded guilty to several state felonies, including assault and weapons charges, and he was sentenced to five years in prison. *Id.* at 3a. Petitioner was released in October 1996 after serving three years in a Maryland state correctional facility. *Ibid.*

In August 1997, an immigration judge ordered petitioner deported to Panama pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), which authorizes deportation of an alien who is convicted of an "aggravated felony." Pet. App. 3a. In October 1998, after the Board of Immigration Appeals denied petitioner's appeal and the removal order thereby became final, the Department of Justice (DOJ) took petitioner into custody pending his deportation. *Ibid*; see 8 U.S.C. 1231(a) (providing for post-final-order detention pending deportation).[1]

On April 22, 1999, while petitioner remained in detention, the state charges for which he had pleaded guilty were vacated on collateral review, and he pleaded guilty instead to several misdemeanor charges, including one charge of illegally wearing or carrying a handgun. Pet. App. 4a. DOJ subsequently moved to reopen petitioner's removal proceedings on the ground that, although the vacated felony charges no longer supported deportation, he was deportable as a result of his new plea agreement pursuant to 8 U.S.C. 1227(a)(2)(C), which authorizes deportation for unlawful possession of a firearm. Pet. App. 4a. On October 28, 1999, the Board of Immigration Appeals granted DOJ's motion to reopen the deportation proceedings. *Ibid.*

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[1] This period of detention is not at issue in this Court.

Meanwhile, because petitioner was now back in removal proceedings, DOJ detained petitioner "based upon the Immigration and [Nationality] Act's mandate of such detention pending a final removal determination." Pet. App. 4a (citing 8 U.S.C. 1226(c)). Section 1226(c) requires, in relevant part, that "[t]he Attorney General *shall* take into custody any alien who * * * is deportable by reason of having committed any offense covered in section 1227(a)(2) * * *(C) * * * of this title." 8 U.S.C. 1226(c)(1) (emphasis added). The Attorney General may release an alien taken into custody under Section 1226(c)(1) "*only if* the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2) (emphases added).

On June 6, 2000, in a separate proceeding, the United States District Court for the District of Maryland granted petitioner's petition, pursuant to 28 U.S.C. 2241, for a writ of habeas corpus. See *Welch* v. *Reno*, 101 F. Supp. 2d 347 (D. Md. 2000), aff'd, 293 F.3d 213 (4th Cir. 2002). The district court held that petitioner's mandatory detention under 8 U.S.C. 1226(c) violated what it found to be petitioner's substantive due process right to receive a bail hearing, and it ordered the Immigration and Naturalization Service (INS) to provide petitioner with a bail hearing before an immigration judge to de-

termine his flight risk and threat to the community. *Id.* at 356. The immigration judge thereafter conducted a bail hearing and ordered petitioner released. Pet. App. 4a.

The Fourth Circuit affirmed the district court's decision in petitioner's habeas case. Although the Fourth Circuit rejected petitioner's facial challenge to 8 U.S.C. 1226(c), it held that the provision was unconstitutional as applied to petitioner. *Welch* v. *Ashcroft*, 293 F.3d 213, 223-227 (4th Cir. 2002). In so holding, however, the court of appeals observed that petitioner's "14-month detention without a bond hearing did not contravene the dictates of § 236(c)." *Id.* at 228. In a separate case, this Court subsequently rejected a constitutional challenge to 8 U.S.C. 1226(c), holding that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons * * * be detained for the brief period necessary for their removal proceedings." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

On July 15, 2002, an immigration judge granted petitioner's application for the discretionary relief of cancellation of removal, and the INS did not appeal, effectively ending the threat of deportation. Pet. App. 5a.

3. On June 4, 2002, petitioner presented an administrative claim to the INS, seeking damages for his allegedly unlawful imprisonment from April 22, 1999, until June 7, 2000. Pet. App. 5a. On April 23, 2003, petitioner's administrative claim was denied. *Ibid.*

On October 15, 2003, petitioner filed a complaint against the United States under the FTCA, alleging false imprisonment. Pet. App. 5a. The United States moved to dismiss for lack of subject matter jurisdiction

because petitioner failed to present a written claim to the appropriate federal agency within two years after his alleged FTCA claim accrued, see 28 U.S.C. 2401(b), and because his claim was barred by the FTCA's due care exception, 28 U.S.C. 2680(a). Pet. App. 5a-7a, 14a.

The district court granted the motion to dismiss. Pet. App. 13a-21a. The court held that the due care exception barred petitioner's claim for money damages. The court concluded that, because petitioner "has alleged nothing more than the dutiful execution of a mandatory federal statute, the FTCA makes no waiver of sovereign immunity with respect to his claim." *Id.* at 20a. Given that holding, the district court did not decide whether petitioner had presented his claim within two years of its accrual. *Id.* at 14a.

The court of appeals affirmed. Pet. App. 1a-12a. The court reasoned that the text of 8 U.S.C. 1226(c)(1)(B) "prescribes a course of action to be followed by officers of the United States" and that "an individual officer cannot deviate from its enforcement." Pet. App. 9a. Because petitioner made no allegation that the officers carried out the mandate of Section 1226(c)(1)(B) "in an inappropriate manner, or in any way deviated from the statute's requirements," the court concluded that "it cannot be said that the officers acted with anything other than due care." *Id.* at 9a-10a. The court thus held that the officers' conduct fell squarely within the due care exception and that the United States had not waived its sovereign immunity with respect to petitioner's claim for money damages. *Ibid.* That was so, the court of appeals concluded, even though it had held in petitioner's habeas proceeding that Section 1226(c)(1)(B) was unconstitutional as applied to petitioner, because the due care exception expressly ap-

plies "whether or not such statute or regulation be valid." *Id.* at 10a (quoting 28 U.S.C. 2680(a)).

The court of appeals also rejected petitioner's contention that the law enforcement proviso of 28 U.S.C. 2680(h) rendered the due care exception inapplicable to claims based upon intentional torts by law enforcement officers. Pet. App. 7a-8a. The court held that when Congress amended Section 2680(h) in 1974 to permit certain intentional tort claims based upon the conduct of law enforcement officers, "it knew the effect of § 2680(a)" and "the exceptions to the Act already in existence were intended to remain in effect." *Id.* at 8a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or that of any other court of appeals. The petition for a writ of certiorari should be denied.

1. As the courts below concluded, the plain text of the FTCA's due care exception bars petitioner's claim. As noted, that provision excludes from the United States' waiver of its sovereign immunity "[a]ny 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." 28 U.S.C. 2680(a).

Petitioner's claim falls squarely within this exception. His false imprisonment claim is based on his detention by federal officers, without the opportunity for a bail hearing, pending the resolution of his removal proceedings. But the federal officers who detained petitioner were executing the terms of a federal statute, 8 U.S.C. 1226(c), that mandated that they detain petitioner without a bail hearing. Section 1226(c)(1)(B) pro-

vides that the "Attorney General *shall* take into custody any alien who * * * is deportable by reason of having committed an offense covered in section 1227(a)(2) * * * (C)," which authorizes deportation for unlawful possession of a firearm. 8 U.S.C. 1226(c)(1)(B) (emphasis added). The statute further provides that the Attorney General may release an alien taken into custody only under certain conditions that do not apply—and petitioner does not contend apply—to petitioner. See 8 U.S.C. 1226(c)(2). As the Fourth Circuit recognized on appeal in petitioner's habeas case, Section 1226(c) "categorically bars the Attorney General from 'releas[ing] from custody' any alien convicted of an aggravated felony or firearm offense who is not in the federal witness protection program." *Welch*, 293 F.3d at 217. Thus, as the court of appeals held here, petitioner's detention without a bail hearing was "statutorily required," and the federal officers had no discretion to deviate from that statutory mandate. Pet. App. 9a-10a.

Moreover, the federal officers executed their statutorily prescribed obligation to detain petitioner "with due care" under 28 U.S.C. 2680(a). Indeed, petitioner does not contend that the officers failed to comply with the terms of the statute. Pet. App. 9a-10a; see *Welch*, 293 F.3d at 228 (noting, in petitioner's habeas case, that his detention "did not contravene the dictates of § 236(c)"). Rather, petitioner contends that the officers failed to act with due care because, even though the officers followed the statutory mandate, the detention was "outside the bounds of acceptable constitutional conduct." Pet. 20.

As the court of appeals concluded (Pet. App. 10a-11a), the plain text of the statute forecloses that argument. The due care exception expressly applies "whether or not" the statute the federal officers are exe-

cuting is "valid." 28 U.S.C. 2680(a). By its terms, this provision expressly retains the United States' sovereign immunity as to claims for money damages that are based upon acts or omissions of federal officers who are faithfully performing their obligations in accordance with federal statutes or regulations, even if those statutes or regulations are subsequently found to be invalid. Accordingly, the fact that the Fourth Circuit held, subsequent to petitioner's detention, that Section 1226(c) was unconstitutional (*i.e.*, invalid) as applied to petitioner cannot support petitioner's FTCA claim. Although petitioner asserts that courts "have struggled with when and how to apply" the due care exception, Pet. 19, he cites no case in which a court's application of the due care exception conflicts with the decision below.[2]

Indeed, if petitioner's reading of the due care exception were correct, challenges to the constitutionality of statutes could be brought by way of an FTCA action.[3]

[2] There is no merit to petitioner's suggestion (Pet. 21-22) that application of the due care exception to the enforcement of an unconstitutional statute conflicts with certain decisions holding that the discretionary function exception does not apply to unconstitutional conduct. Those decisions are based upon the view that "[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes." *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001) (quoting *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 120 (3d Cir.), cert. denied, 487 U.S. 1235 (1988)). Whatever the merit or limits of that principle, it has no application to the non-discretionary conduct at issue in this case or to the distinct due care exception in Section 2680(a), which applies whether or not the statute pursuant to which the officer acted is unconstitutional.

[3] As petitioner notes (Pet. 26-27), he first challenged the constitutionality of Section 1226(c) through a petition for a writ of habeas corpus. At bottom, however, as the court of appeals recognized, petitioner's complaint in this FTCA action is "with the statute itself." Pet. App. 10a.

But, as this Court has made clear, the due care exception "bars tests by tort action of the legality of statutes and regulations." *Dalehite* v. *United States*, 346 U.S. 15, 33 (1953); see also *United States* v. *Gaubert*, 499 U.S. 315, 336 (1991) (Scalia, J., concurring) (noting that the Court has construed the due care exception "to mean that regulations '[can]not be attacked by claimants under the Act'") (quoting *Dalehite*, 346 U.S. at 42); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942) (explaining that it is not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort").

In effect, petitioner is arguing for an interpretation of the FTCA under which, for the United States to avoid tort liability, federal officers would have to substitute their judgment for that of Congress, and violate the requirements of binding federal statutes and regulations, whenever they believe those requirements might be unconstitutional as applied to a given individual. Nothing in the FTCA supports such an outcome, nor is there any reason to believe that Congress intended federal officers in the field to second-guess its clear directives. Cf. *Cheek* v. *United States*, 498 U.S. 192, 206 (1991) (concluding that Congress did not contemplate that a taxpayer who believes the tax laws are unconstitutional "could ignore the duties imposed upon him" and refuse to pay his taxes). Petitioner was afforded an opportunity to challenge the constitutionality of Section 1226(c), and he successfully obtained judicial relief and thereby secured his release. But the text of the FTCA forecloses his attempt to obtain money damages for the actions of Executive Branch officers who were complying with

their obligation faithfully to execute laws enacted by Congress.[4]

2. a. The court of appeals likewise correctly concluded that the law enforcement proviso of 28 U.S.C. 2680(h) does not render inapplicable the due care excep-

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[4] As the United States suggested in the district court (but did not press at this stage of the proceedings), see, *e.g.*, C.A. App. 56, 115, there is a substantial question whether the Fourth Circuit's holding in petitioner's habeas case that Section 1226(c) was unconstitutional as applied to petitioner survives this Court's subsequent decision in *Demore*. As noted above, *Demore* upheld Section 1226(c) against constitutional challenge. 538 U.S. at 513. Although the court below stated without analysis that its decision in petitioner's habeas case "remains the final authoritative ruling" with respect to this case, Pet. App. 2a n.1, this Court's intervening decision in *Demore* represents a change in the controlling law such that neither preclusion principles nor the "law of the case" doctrine bars reconsideration of the earlier decision in the habeas case in this new, separate action for money damages. See, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 600 (1948); *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997).

Moreover, although the United States cited the Fourth Circuit's decision in petitioner's habeas case in its brief in *Demore* as illustrating that "exceptional circumstances that present special due process concerns can be addressed on a case-by-case basis," Gov't Br. at 48-49, *Demore*, *supra* (No. 01-1491), the United States did not state (contrary to petitioner's suggestion, see Pet. 4) that petitioner's as-applied challenge was a meritorious one. Indeed, the United States criticized the approach endorsed by two of the members of the Fourth Circuit panel—under which there would be a rebuttable presumption that detention could not last beyond six months—as "lack[ing] a specific foundation in the text or history of Section 1226(c)." Gov't Br. at 48, *Demore*, *supra*. Furthermore, to the extent an as-applied challenge would lie under *Demore* in truly exceptional cases, it would be necessary for the alien to show a significant departure from the time that reasonably would be expected to conduct the hearings and appeals that were called for in the particular case, and to exclude from consideration any delays attributable to the alien. The Fourth Circuit did not conduct any such analysis in its decision on the habeas appeal.

tion of 28 U.S.C. 2680(a). Indeed, the plain text and structure of the FTCA preclude petitioner's interpretation of the proviso. When Congress enacted the law enforcement proviso in 1974, it placed the proviso *within* the intentional tort exception, Section 2680(h).[5] Although provisos sometimes have a broader import, it is customary to use a proviso to refer only to things covered by the preceding clause. See *United States* v. *Morrow*, 266 U.S. 531, 535 (1925) ("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."); 82 C.J.S. *Statutes* § 370, at 494 (1999) ("The operation of a proviso usually is confined to the clause or distinct portion of the enactment which immediately precedes it, or to which it pertains, or is attached.") (footnotes omitted); see also *Alaska* v. *United States*, 125 S. Ct. 2137, 2159 (2005), judgment, 2006 WL 152590 (entered Jan. 23, 2006). Here, the text and structure of Section 2680 strongly reinforce the conclusion that the proviso has the customary scope of modifying only the preceding clause.

Significantly, Congress did not make the law enforcement proviso an exception to any of the other exceptions that are contained in Section 2680, such as the due care exception, which it reasonably could have done if it had

[5] Section 2680(h) excepts from the FTCA's provisions: "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." 28 U.S.C. 2680(h).

intended to modify those preexisting exceptions as well. Moreover, the text of the proviso relates only to the preceding clause of subsection (h) and, referring specifically to some (but not all) of the intentional torts excepted in that prior clause, negates the prior clause's application in certain defined instances. See 28 U.S.C. 2680(h). And finally, the proviso expressly states that all provisions of "this chapter"—which includes the due care exception in Section 2680(a)—shall apply to claims brought under the proviso. 28 U.S.C. 2680(h). In short, given its text and placement in the statute, the law enforcement proviso is properly read as an exception only to the first clause of Section 2680(h)—the clause excepting certain intentional torts from the FTCA's coverage.

To read the law enforcement proviso more broadly, as a limitation not only upon the intentional tort exception but also upon the other Section 2680 exceptions, would allow tort suits against the United States that Congress plainly intended to bar. For example, there is nothing in the language or structure of the law enforcement proviso that suggests Congress intended to permit any intentional tort suits with respect to acts or omissions of law enforcement officers for claims arising in a foreign country. Such a claim, even if it fell within one of the specified intentional tort claims permitted by the law enforcement proviso, would nevertheless be barred by Section 2680(k), which prohibits all tort claims "arising in a foreign country." Cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 699-712 (2004) (holding that foreign country exception barred FTCA claim for false arrest); cf. also *Gasho* v. *United States*, 39 F.3d 1420, 1433-1434 (9th Cir. 1994) (holding that conduct falling within the law enforcement proviso of Section 2680(h) is not exempt from the "detention of goods" exception to the

FTCA set forth in Section 2680(c)), cert. denied, 515 U.S. 1144 (1995); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983) (holding that conduct falling within the law enforcement proviso of Section 2680(h) is not exempt from the discretionary function exception to the FTCA), cert. denied, 465 U.S. 1100 (1984); *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001) (same).

Moreover, contrary to petitioner's assertion (Pet. 16-18), reading the law enforcement proviso as an exception only to the intentional tort exception of Section 2680(h) does not render the law enforcement proviso meaningless. Rather, as petitioner appears to recognize (Pet. 18), it simply means that *some* claims that fall within the law enforcement proviso will nevertheless be barred by some other provision of the FTCA.

b. Petitioner cites no court of appeals decision that conflicts with the decision below. Indeed, petitioner cites no other decision by any other court of appeals that even addresses the question presented here: whether the due care exception of Section 2680(a) applies if the law enforcement proviso of Section 2680(h) also applies. To the contrary, petitioner candidly acknowledges that "the decision below is the *first* case to analyze the law enforcement proviso's interplay with § 2680(a)'s due care provision." Pet. 8-9 (emphasis added).

Petitioner nevertheless seeks this Court's review based on an asserted conflict (Pet. 9-15) among the courts of appeals as to whether the *discretionary function* exception of Section 2680(a) applies where the law enforcement proviso of Section 2680(h) also applies. Even if this Court was inclined to review the interplay between the discretionary function exception and the law enforcement proviso, this case does not present that question. The due care and discretionary function ex-

ceptions, while set forth in the same subsection, pertain to different types of conduct. See 28 U.S.C. 2680(a). As explained above, the due care exception applies when a federal employee is executing a federal statute or regulation. The discretionary function exception, by contrast, applies when a federal employee is acting pursuant to discretion conferred upon him or her, such that no mandatory federal statute, regulation, or policy prescribes a specific course of action. *E.g.*, *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988) (discretionary function exception does not apply where mandatory and specific statutes or regulations leave no "element of judgment or choice" such that "[t]he employee has no rightful option but to adhere to the directive").

More importantly, the reasoning in the cases upon which petitioner relies as purportedly in conflict with the decision below turns on the nature of the discretionary function exception. For example, in refusing to hold that the discretionary-function hurdle must be met in all cases, the Fifth Circuit in *Sutton* v. *United States*, 819 F.2d 1289 (5th Cir. 1987), applied this Court's decision in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), regarding the scope of the discretionary function exception. See *Sutton*, 819 F.2d at 1294, 1298. Moreover the *Sutton* court relied upon its concern that the discretionary function exception could "result in judicial repeal of the law enforcement proviso" with respect to malicious prosecution cases, which often involve discretionary acts and for which the Fifth Circuit believed Congress intended to allow an FTCA claim. *Id.* at 1295; contra *Gray*, 712 F.2d at 507 (finding "no serious incongruity between" the immunity afforded under the discretionary function exception and the waiver of immunity set forth

in the law enforcement proviso). But the *Sutton* court's reasoning, whatever its merit in the context of the discretionary function exception, has no application with respect to the due care exception, which is triggered not by the exercise of discretion but by the execution of a federal statute or regulation.[6]

But even if this were a case involving the interplay between the discretionary function exception and the law enforcement proviso, further review would be unwarranted. Although there is some disagreement in reasoning among the circuits as to the interrelationship of those two FTCA provisions, that disagreement does not rise to the level of a conflict warranting review by this Court at this time.

The D.C. Circuit decision cited by petitioner is fully in accord with the rule in the Fourth Circuit, and thus presents no conflict. See Pet. App. 8a.[7] Likewise, the decisions of the Second and Third Circuits cited by petitioner do not establish a conflict. The Second Circuit, by petitioner's own characterization, merely "intimated" in *Caban* v. *United States*, 671 F.2d 1230 (1982), "that § 2680(a) should not bar a valid § 2680(h) claim." Pet. 13. And, as petitioner also recognizes, the Third Circuit

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[6] To be sure, the court below saw no reason for treating the due care exception differently than the discretionary function exception, see Pet. App. 8a, but that does not mean that other circuits would apply their different reasoning with respect to the discretionary function exception to a due-care case such as this one.

[7] Compare *Gray*, 712 F.2d at 507 ("We * * * reject the contention that intentional tort claims based on the acts of 'investigative or law enforcement officer[s]' may never come within the purview of the discretionary function exception to section 2680(a)") with *Medina*, 259 F.3d at 225 ("[W]e are convinced that the D.C. Circuit resolved this question correctly in its decision in *Gray*."). Accord *Gasho*, 39 F.3d at 1433, 1435-1436.

in *Pooler* v. *United States*, 787 F.2d 868, cert. denied, 479 U.S. 849 (1986), "did not specifically answer whether § 2680(a)'s discretionary function exception presents a hurdle to § 2680(h) claims generally." Pet. 15. Rather, the Second Circuit held in *Caban* that the alleged acts did not fall within the discretionary function exception, see 671 F.2d at 1233, and the Third Circuit held in *Pooler* that the claims before it did not fall within the terms of the law enforcement proviso, see 787 F.2d at 872. Finally, although the Fifth Circuit's decision in *Sutton*, which was rendered more than 18 years ago, contains reasoning that is at odds with the approach taken by the Fourth and D.C. Circuits, the Fifth Circuit did not purport to "declare categorically * * * the circumstances in which either the discretionary function exception or the law enforcement proviso governs to the exclusion of the other." *Sutton*, 819 F.2d at 1298.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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