No. 11-1367

In the Supreme Court of the United States

TOMAS RIVAS LOPEZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' claim that the United States Marshals Service negligently failed to inspect a Texas correctional center before entering into a formal agreement for the housing and care of federal prisoners at that facility.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute and rule:

Miscellaneous: Page

In the Supreme Court of the United States

No. 11-1367

TOMAS RIVAS LOPEZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-17a) is not published in the *Federal Reporter* but is reprinted in 455 Fed. Appx. 427. The opinion of the district court (Pet. App. 18a-44a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 21, 2011. A petition for rehearing was denied on February 17, 2012 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on May 10, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, waives the sovereign immunity of the

United States from liability for torts caused by government employees acting within the scope of their employment, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). That waiver of immunity is limited by several exceptions, including an exception for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

2. a. To expand its limited incarceration capacity, the United States Marshals Service (USMS) has long placed federal prisoners in state and local facilities pursuant to intergovernmental service agreements. An intergovernmental service agreement is a formal, written agreement under which state and local facilities agree to provide housing and care to federal prisoners in exchange for a fixed per diem payment for each federal prisoner held. Pet. App. 7a.

The claims in this case concern the Crystal City Correctional Center (CCCC) in Crystal City, Texas, a local detention facility operated by BRG Security Services, Inc. (BRG). For several years, the USMS housed federal prisoners at the CCCC pursuant to a rider to an intergovernmental service agreement between Crystal City and the Immigration and Naturalization Service (later Immigration and Customs Enforcement (ICE)). Pet. App. 7a; Gov't C.A. Br. 18. In 2003, USMS negotiated its own intergovernmental service agreement with Crystal City. Under the agreement, the CCCC was required to comply with certain mandatory conditions of

confinement, including the provision of 24-hour emergency medical care for prisoners. Pet. App. 9a.

b. USMS Policy Directives set out a series of procedures for the award of intergovernmental agreements. The Policy Directives provide that "[e]ach [United States Marshal] will," among other things, "[i]dentify potential state/local detention facilities that meet USMS detention standards"; "[c]ontact detention facilities by location, capability and types of detention services provided to determine if they are interested in housing federal prisoners"; and "[c]onduct an initial on-site inspection of detention facilities to determine the facility's level of compliance with USMS inspection guidelines." *United States Marshals Service Policy Directives* § 9.26(A)(3)(a) (2003) (*Policy Directives*), Gov't C.A. R.E. App. D; see Pet. App. 7a.[1]

Under a Jail Inspection Pilot Program, USMS accepted inspection forms from state regulatory authorities in States (including Texas) with jail standards at least as high as USMS minimum standards, in place of annual intergovernmental service agreement facility inspections. See Pet. App. 7a-8a. An internal memorandum concerning the pilot program noted that "[i]t will

---

[1] The current version of the USMS Policy Directives is available at *USMS Policy Directives*, http://www.usmarshals.gov/foia/Directives-Policy/USMS%20Directives.htm. The current version of the directive concerning inspection of detention facilities provides that detention facilities will be inspected "at least once a year." *Id.* § 9.2. It further clarifies that "[a]n on-site inspection will be conducted before awarding an [intergovernmental service agreement] to a detention facility the USMS has not used previously." *Ibid.* Although the 2003 version of that directive does not appear to have been entered into the record in this case, the provision concerning the timing of inspections has not been substantively changed since that time. Compare *ibid.* with *Policy Directives* § 9.28(B).

still be necessary to inspect a facility upon the initial award of a new [intergovernmental service agreement]." Memorandum from Eduardo Gonzalez, Director, USMS, to U.S. Marshals et al., Jail Inspection Pilot Program 2 (Aug. 4, 1994) (1994 Memorandum), Pet. C.A. R.E. App. E, Attach. 1, Exh. A; see *id.* at 1 ("All of these institutions need to be inspected before the award of an [intergovernmental service agreement] and subsequently inspected annually."); see Pet. App. 8a.

c. This case involves allegations that USMS did not conduct an initial inspection of the CCCC when it entered its agreement with Crystal City in 2003, see Pet. 6, having already housed federal prisoners at the CCCC for several years, see Pet. App. 7a. Under the pilot inspection program, USMS accepted reports of the Texas Commission on Jail Standards (TCJS) certifying CCCC's compliance with state jail standards in 2004 and 2005. *Id.* at 8a. The CCCC failed its annual Texas certification in November 2006, after the events that gave rise to this case, because it had several times been used to house inmates in excess of its approved capacity. *Id.* at 8a, 37a.

3. Petitioners are the parents of Julio Rivas-Parada, who became ill in May 2006 while illegally crossing the United States-Mexico border with his brother. Pet. App. 5a, 48a. Rivas-Parada turned himself in, pleaded guilty to misdemeanor illegal entry, and received a 90-day sentence. *Id.* at 5a-6a.

USMS placed Rivas-Parada in the CCCC. Pet. App. 7a. Although no signs of illness were documented in an initial medical screening, Rivas-Parada later sought treatment for complaints including diarrhea, vomiting, and weakness. *Id.* at 6a. CCCC's medical staff provided treatment including an antiemetic and antibiotics. *Ibid.*

Rivas-Parada was later treated for a seizure accompanied by borderline low blood pressure. *Ibid.*; see *id.* at 24a. That night, Rivas-Parada was found in his cell, too weak to move and complaining of shortness of breath. *Id.* at 6a. CCCC staff sent Rivas-Parada to the emergency room, where he died hours later from a heart attack precipitated by an electrolyte imbalance resulting from malnutrition, diarrhea, and vomiting. *Id.* at 6a-7a.

4. Petitioners filed suit in the United States District Court for the Western District of Texas against BRG, the facility operator, and its affiliates, as well federal entities and officials. Pet. App. 19a, 48a. Petitioners settled their claims with the BRG defendants. *Id.* at 9a.

The United States was substituted for the federal defendants, and petitioners asserted negligence claims under the FTCA. Petitioners alleged, *inter alia*, that USMS had failed to properly inspect, audit, or supervise the operation of the CCCC to ensure that USMS standards, policies, and procedures were properly implemented. Pet. App. 9a, 20a.

The government moved for summary judgment. Construing the motion as a motion to dismiss, the district court dismissed the suit under Rule 12(b)(1) of the Federal Rules of Civil Procedure, holding that petitioners' negligence claims were barred by the FTCA's discretionary function exception. Pet. App. 18a-44a.

5. The court of appeals affirmed. Pet. App. 4a-17a.

On appeal, petitioners argued, among other things, that USMS had a nondiscretionary duty to inspect the CCCC before awarding the intergovernmental service agreement in 2003, and that the FTCA's discretionary function therefore did not bar their claim that USMS had negligently failed to inspect the CCCC at that time. Pet. App. 10a. The court of appeals rejected that argu-

ment. The court acknowledged that the USMS directive stated that USMS "will" conduct initial inspections of intergovernmental service agreement facilities, and that the 1994 Memorandum spoke of a "need" to conduct inspections before the award of an intergovernmental service agreement. *Id.* at 12a-13a. The court noted, however, that "many policy statements couched in seemingly mandatory language ultimately present only 'generalized, precatory, or aspirational language that is too general to prescribe a specific course of action for an agency or employee to follow,'" *id.* at 13a (quoting *Freeman* v. *United States*, 556 F.3d 326, 338 (5th Cir.), cert. denied, 130 S. Ct. 154 (2009)), and therefore "fail[] to establish a nondiscretionary duty," *id.* at 14a.

The court of appeals concluded that the language of the USMS inspection directives fell into that category. The court noted that the directives "provided no guidance, or even mention, on a variety of topics relating to this inspection obligation." Pet. App. 14a. The court further explained that the USMS's decision to rely on state annual inspections, "especially when taken against the backdrop of the facility's historical use in housing federal detainees, [was] imbued with policy and discretionary factors," and that "the decision to retain a contractor is a policy-based discretionary decision." *Ibid.* The court accordingly held that "the USMS inspection directive did not impose a 'nondiscretionary' duty to inspect CCCC as opposed to merely mandating best practices before and after the award of an [intergovernmental service agreement]." *Ibid.*

The court of appeals further held that, even assuming that USMS had a mandatory duty to inspect the CCCC in 2003, petitioners' claim fails because they failed to allege facts that would establish "a plausible

causal relationship between the nondiscretionary duty and [Rivas-Parada's] death." Pet. App. 14a n.1. Even if USMS had a duty to inspect CCCC in 2003, the court explained, "it is difficult to conceive of how such a failure plausibly led to [Rivas-Parada's] death in 2006 from specific failures of medical care by CCCC's designees." *Ibid.*

Judge Haynes concurred in the judgment. Pet. App. 17a. She would have affirmed solely on the basis that petitioners failed to plead a plausible causal connection between the lack of USMS inspection in 2003 and Rivas-Parada's death in 2006. *Ibid*.

ARGUMENT

Petitioners contend (Pet. 27-31) that the court of appeals erred in adopting a rule that "discretion in performing a mandatory duty can give employees discretion to forgo its performance altogether." Pet. 13. The court of appeals did not, however, adopt such a rule. It instead held that USMS had no mandatory duty to inspect the CCCC when, after several years of housing federal prisoners at the facility pursuant to another agency's intergovernmental service agreement, it entered into its own agreement with Crystal City in 2003. The court of appeals' unpublished, non-precedential decision does not conflict with any decision of this Court or of any other court of appeals.

Because the court of appeals never had occasion to address the question petitioners raise, this would not be a suitable vehicle for its resolution. In any event, as the court below correctly held, petitioners' claim fails for the independent reason that they have failed to allege a plausible causal connection between the lack of USMS

inspection in 2003 and Rivas-Paradas's death in 2006. Further review is accordingly unwarranted.

1. a. The FTCA's discretionary function exception is designed to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (quoting *United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984)). An action comes within the discretionary function exception if (1) it "involves an element of judgment or choice," and (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid*. The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325.

b. The court of appeals in this case correctly held that the USMS's decisions about how and whether to conduct inspections of the CCCC in 2003 are covered by the discretionary function exception.

By the time USMS negotiated its intergovernmental service agreement with Crystal City in 2003, it had already housed federal prisoners in the CCCC for several years pursuant to a rider to an ICE intergovernmental service agreement. Pet. App. 7a; Gov't C.A. Br. 18. CCCC was, moreover, regularly inspected by Texas regulatory authorities, whose jail standards met or exceeded USMS minimum standards. Pet. App. 7a-8a. As the court of appeals noted, "[t]he decisions how to conduct an inspection and whether to rely on annual state inspections, especially when taken against the backdrop

of the facility's historical use in housing federal detainees, were imbued with policy and discretionary factors." *Id.* at 14a.

That discretion was not negated by either the USMS Policy Directive concerning intergovernmental service agreement awards or the 1994 Memorandum concerning the Jail Inspection Pilot Program. Pet. App. 7a-8a; see Pet. 4-5. Although the USMS Policy Directive provides that U.S. Marshals "will" take a variety of steps, including pre-award inspections, before awarding an intergovernmental service agreement, each of those steps appears to be addressed to a situation in which USMS was entering a new contractual relationship with a facility in which USMS prisoners had not previously been housed. See *Policy Directives* § 9.26(A)(3)(a) (providing that U.S. Marshals "will," among other things, identify potential facilities that meet USMS detention standards and determine whether the facilities are interested in housing federal prisoners).[2]

And although the 1994 Memorandum noted that "[i]t will still be necessary to inspect a facility upon the initial award of a new [intergovernmental service agreement]" under the Jail Inspection Pilot Program, the Memorandum did not purport to establish a new requirement applicable to even those facilities in which USMS had pre-

---

[2] As noted above, see note 1, *supra*, although the 2003 version of USMS's directive concerning facility inspections does not appear to have been entered into the record in this case, the current version both establishes that detention facilities are to be inspected annually and clarifies that "[a]n on-site inspection will be conducted before awarding an [intergovernmental service agreement] to a detention facility *the USMS has not used previously*." *USMS Policy Directives* § 9.2, http://www.usmarshals.gov/foia/Directives-Policy/USMS%20Directives.htm (emphasis added).

viously housed federal prisoners pursuant to agreements with another federal agency that encompassed the housing of prisoners on behalf of USMS. Thus, although couched in "seemingly mandatory language," see Pet. App. 13a, Pet. 29-30, the USMS materials contained no specific direction requiring pre-award inspections of state and local facilities already used to house USMS prisoners, nor did they contain specific direction about whether USMS could rely on inspections conducted by other regulatory authorities applying the same or more stringent requirements. See Pet. App. 13a-14a.

c. Petitioners argue (Pet. 27-31) that this Court's review is warranted to correct a supposed error by the court of appeals in "adopting the rule that discretion in performing a mandatory duty can give employees discretion to forgo its performance altogether." Pet. 13. But the court below adopted no such rule. It instead rejected the very premise of the argument: it held that USMS was under no mandatory duty to conduct a pre-award inspection of the CCCC in 2003, given the facility's "historical use in housing federal detainees," CCCC's regular inspections by state authorities, and the generalized, non-specific nature of the policy statements concerning pre-award facility inspections. Pet. App. 13a-14a.

Petitioners offer no response, other than to note in passing that the Policy Directive and 1994 Memorandum use words "such as 'will' and 'shall.'" Pet. 29. But as the court of appeals explained, the use of such "seemingly mandatory language" may, in context, be merely "generalized, precatory, or aspirational" language that creates no mandatory duty. Pet. App. 13a (quoting *Freeman* v. *United States*, 556 F.3d 326, 338-339 (5th Cir.), cert. denied, 130 S. Ct. 154 (2009)); cf. *Ochran* v. *United*

States, 117 F.3d 495, 500-501 (11th Cir. 1997) (although guidelines governing the conduct of Assistant United States Attorneys used the word "shall," the court concluded that the guidelines "leave room for responsible officials to exercise choice or judgment in discharging their responsibilities"). For the reasons explained above, the court of appeals' case-specific conclusion that the USMS Policy Directives and 1994 Memorandum created no mandatory duty for USMS to conduct a pre-award inspection in this case is correct and it does not warrant further review.

2. This Court's review is likewise unwarranted to resolve any conflict between the Fifth Circuit and other courts of appeals. See Pet. 13-20. In each of the court of appeals decisions on which petitioners rely, the court held that a federal regulation or policy created a mandatory duty, even though fulfillment of that duty might have involved elements of judgment or discretion. See, *e.g.*, *Myers* v. *United States*, 652 F.3d 1021, 1029-1030 (9th Cir. 2011) (concluding that a Navy manual "'specifically prescribe[d] a course of conduct,' leaving nothing to the Navy's discretion," and "[e]ven supposing that the Navy had some discretion in the fulfillment of its duty * * *, it had no discretion * * * about whether or not to [inspect] * * * *at all*"); *Miles* v. *Naval Aviation Museum Found.*, 289 F.3d 715, 722 (11th Cir. 2002) (concluding that federal regulations created a mandatory duty by explicitly defining a specific course of conduct for government mechanics conducting inspections); *Appley Bros.* v. *United States*, 164 F.3d 1164, 1171-1172 (8th Cir. 1999) (concluding that a United States Department of Agriculture handbook created a mandatory duty for an inspector to investigate the status of out-of-

condition grain, even though the inspector had discretion about how to carry out that duty).

In this case, by contrast, the Fifth Circuit concluded that USMS policy did not create a mandatory duty to inspect the CCCC upon the award of the intergovernmental service agreement in 2003, but rather permitted USMS to exercise its discretion in determining how to ensure that the CCCC—a facility that had already housed federal prisoners for several years and that was subject to regular inspection by state authorities—met USMS standards. Pet. App. 13a-14a. Similarly, in *Freeman*, *supra*, the Fifth Circuit concluded, based on extensive analysis of the National Response Plan, that the plaintiffs in that case had identified no provision of the Plan that prescribed a "specific, nondiscretionary function or duty that does not involve an element of judgment or choice." 556 F.3d at 338. The court did not, as petitioners suggest, conclude that, "so long as line-level officials are given discretion in how to execute a prescribed duty, the discretionary function exception bars suit even when the officials do not perform the duty at all." Pet. 19.

The cases cited by petitioners demonstrate that different courts have reached different conclusions about whether different agency policies created mandatory duties or instead left room for the exercise of judgment and choice. Such factbound differences do not, however, establish a circuit conflict that merits this Court's review.

3. Because the court of appeals rejected the premise that USMS had a mandatory duty to inspect the CCCC in 2003, it never had occasion to address the question petitioners present: whether "a government employee's outright failure to perform a mandatory act [is] shielded

by the discretionary function exception on the theory that performance of the act permits some exercise of judgment." Pet. i. For that reason, even if the question presented otherwise merited this Court's review, this case would be an unsuitable vehicle for its resolution.

This case would be an unsuitable vehicle for the additional reason that, as all of the judges below agreed, even if USMS did have a mandatory duty to inspect the CCCC in 2003, petitioners failed to allege a plausible causal relationship between the lack of USMS inspection in 2003 and Rivas-Parada's death in 2006. See Pet. App. 14a n.1; *id.* at 17a (Haynes, J., concurring in the judgment). As the court noted, "it is difficult to conceive of how such a failure plausibly led to [Rivas-Parada's] death in 2006 from specific failures of medical care" by CCCC staff. *Id.* at 14a n.1.

In their petition for a writ of certiorari, petitioners contend that "[i]f the USMS had conducted a pre-[award] inspection, marshals would have discovered the gaping deficiencies at CCCC and either required their correction or refused to enter into an [intergovernmental service agreement]." Pet. 26. But petitioners do not dispute that the CCCC was regularly inspected by state regulatory authorities, who certified CCCC's compliance with state jail standards in 2004 and 2005. Nor does their petition for a writ of certiorari challenge USMS's decision to rely on the results of the TCJS inspections as part of its Jail Inspection Pilot Program. Petitioners do not specify what deficiencies USMS would have uncovered in 2003 that would not have been uncovered in subsequent inspections by the TCJS, nor do they explain how any such deficiencies caused their injuries. For that reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

STUART F. DELERY
Acting Assistant Attorney General

MARK B. STERN
ABBY C. WRIGHT
Attorneys

AUGUST 2012