No. 08-477

# In the Supreme Court of the United States

JOHN STEVEN LEROSE, ET AL., PETITIONERS

*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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## QUESTION PRESENTED

Whether petitioners' tort suit against the United States, for negligent hiring, supervision, and retention of a Bureau of Prisons officer, is barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unreported. The memorandum opinion and order of the district court (Pet. App. A13-A55) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 10, 2008. The petition for a writ of certiorari was filed on October 8, 2008. 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. 1346(b), 2671-2680, waives the sovereign immunity of the United States and renders the United States liable in damages for the "negligent or wrongful act or omis-

sion 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 * * * in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Congress has expressly excluded from that waiver of liability a number of categories of cases, including 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." 28 U.S.C. 2680(a). As this Court has explained, that provision is designed "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort," and accordingly excepts from the FTCA's jurisdiction any official action that involves "an element of judgment or choice" and is "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 322-323, 325 (1991) (internal quotation marks and citation omitted).

2. a. Following convictions for various offenses, all but one of the petitioners were incarcerated at a federal correctional facility in Morgantown, West Virginia.[1] Pet. App. A14-A15. Petitioners contend that during that period, William Coger, then a guard at the facility, attempted to extort money and property from them. *Id.* at A3. Coger was ultimately convicted for violating 18 U.S.C. 872, which prohibits extortion by an employee of the United States. Pet. App. A25.

Petitioners brought suit in federal district court against the United States under the FTCA, alleging that

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[1] The other petitioner is a daughter of one of the incarcerated petitioners. Pet. App. A15.

the Bureau of Prisons (BOP) had negligently hired, supervised, and retained Coger, and that the United States was vicariously liable for Coger's intentional infliction of emotional distress on petitioners. Pet. App. A2-A3. Following discovery, the United States moved to dismiss petitioners' FTCA claim under Federal Rule of Civil Procedure 12(b)(1) on the basis of the discretionary function exception, 28 U.S.C. 2680(a), and for summary judgment under Rule 56(c) on petitioners' vicarious liability claim on the basis of state law.[2]

b. The district court granted the motions. Pet. App. A13-A55. After noting that petitioners bore the burden of proof, *id.* at A31-A32, but drawing all reasonable inferences from the alleged facts in petitioners' favor, *id.* at A34, the district court held that Section 2680(a) barred petitioners' FTCA claim. See *id.* at A29-A48. The district court reasoned that "[c]ourts have repeatedly held that government employers' hiring and supervisory decisions are discretionary functions." *Id.* at A46 (quoting *Suter* v. *United States*, 441 F.3d 306, 312 n.6 (4th Cir.), cert. denied, 549 U.S. 887 (2006)). The court likewise granted summary judgment on petitioners' vicarious liability claim, holding that under governing state law, Coger's misconduct was "entirely outside the scope of his BOP employment." *Id.* at A54. On March 6, 2007, the court entered final judgment in favor of the United States pursuant to Federal Rule of Civil Procedure 54(b), and petitioners appealed. Pet App. A11-A12.

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[2] Petitioners also sued Coger himself in the same suit, alleging intentional infliction of emotional distress and a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. A25. That portion of the suit remains pending in district court.

c. The court of appeals affirmed. Pet. App. A1-A10. It held that petitioners bore the burden of proving that the discretionary function exception did not bar their FTCA claim. *Id.* at A5-A6. The court of appeals further held that "government employers' hiring and supervisory decisions are discretionary functions," and concluded that "BOP's decisions regarding the hiring, supervision and retention of Coger are precisely the type of decisions that are protected under the discretionary function exception." *Id.* at A8. The court also affirmed the dismissal of petitioners' vicarious liability claim, holding that Coger's actions could not be imputed to the United States because they "were not designed to further the management and operation of the BOP but rather for [Coger's] own personal interests," and thus did not fall within the scope of employment. *Id.* at A10.

**ARGUMENT**

The unpublished decision of the court of appeals is correct and does not merit further review. The discretionary function exception bars tort suits against the United States for any act "that involves choice or judgment" and is "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991). The types of employment actions that form the basis of petitioners' FTCA claim fit squarely within that description. The courts of appeals consistently have held that Section 2680(a) bars suits against the United States over the hiring, retention, and assignment of federal officers—a conclusion that holds equally whether the burden for establishing the exception's applicability is placed on the government or on petitioners. Accordingly, any circuit conflict on the latter issue is not implicated here. In any event, because the exception would deprive the court of

subject-matter jurisdiction, the court of appeals correctly placed on petitioners the burden of proving that it did not apply. The petition for a writ of certiorari therefore should be denied.[3]

1. As the court of appeals explained, "BOP's decisions regarding the hiring, supervision and retention of Coger" are "precisely the type of decision[s] that Congress intended to shield from liability through the discretionary function exception" in the FTCA. Pet. App. A8. That conclusion is in accord with the precedent of the Fourth Circuit as well as the other courts of appeals. See, *e.g.*, *Suter* v. *United States*, 441 F.3d 306, 312 n.6 (4th Cir.), cert. denied, 549 U.S. 887 (2006); *Claude* v. *Smola*, 263 F.3d 858, 861 (8th Cir. 2001), cert. denied, 534 U.S. 1144 (2002); *Nurse* v. *United States*, 226 F.3d 996, 1001-1002 (9th Cir. 2000); *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997); *Richman* v. *Straley*, 48 F.3d 1139, 1146 (10th Cir. 1995); *Attallah* v. *United States*, 955 F.2d 776, 784 (1st Cir. 1992); *Radford* v. *United States*, 264 F.2d 709, 710-711 (5th Cir. 1959) (per curiam).[4]

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[3] Petitioners do not ask this Court to review the dismissal of their vicarious liability claim.

[4] Petitioners cite (Pet. 26) *Tonelli* v. *United States*, 60 F.3d 492 (8th Cir. 1995), for the proposition that certain claims of negligent hiring, supervision, and retention are not excluded by the FTCA's discretionary-function exception. The court in that case permitted supervision and retention claims to proceed on the narrow premise that the employer was on actual notice of the employee's illegal conduct on the job, such that retention decisions were no longer discretionary. See *id.* at 496. To the extent petitioners allege that similar, discretion-abrogating cir-

Those cases hold that the federal government's selection, supervision, and retention of its employees involve "an element of judgment * * * of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). As the court of appeals explained, such determinations "involve[] several public policy considerations including the weighing of the qualifications of candidates, weighing of the backgrounds of applicants, consideration of staffing requirements, evaluation of the experience of candidates, and assessment of budgetary and economic considerations." Pet. App. A8. That analysis, which turns on matters of agency policy, is exactly the sort that Congress intended to protect from "judicial 'second-guessing'" by enacting Section 2680(a). *Gaubert*, 499 U.S. at 323 (quoting *United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984)).

2. Petitioners acknowledge (Pet. 24) that "[t]his broad construction of the discretionary function exception * * * has become the norm," and do not ask this Court to intervene on that ground. Rather, they con-

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cumstances were present here, they essentially seek correction of the district court's contrary factbound determination (Pet. App. A32-A45).

Moreover, the court in *Tonelli* rejected the hiring claim and recognized that all such claims "generally involve the permissible exercise of policy judgment and fall within the discretionary function exception." 60 F.3d at 496. The Eighth Circuit also has made clear in subsequent cases that personnel decisions are "common example[s]" of activities involving discretionary policy judgments squarely covered by the FTCA's discretionary-function exception. *Claude*, 263 F.3d at 861; see, *e.g.*, *Red Elk* v. *United States*, 62 F.3d 1102, 1107 (8th Cir. 1995). Any intra-circuit conflict does not justify this Court's review, and, in any event, petitioners do not seek a writ of certiorari to resolve any purported conflict on the *scope* of the discretionary-function exception as applied to negligent hiring, supervision, and retention claims.

tend (Pet. 11-12) that the courts of appeals are divided over another issue—whether a plaintiff or the government bears the burden of establishing the applicability of the discretionary function exception. Although there appears to be some disagreement among the courts of appeals on that latter question (see Pet. 11), its resolution would not alter the outcome of this case.

Despite "extensive discovery" and "a complete factual record" (Pet. 3, 13), petitioners offered no evidence to establish a mandatory duty that would remove the BOP's employment actions from their ordinary classification as discretionary functions. Petitioners contend (Pet. 14) that the BOP failed to adequately investigate Coger in light of an "issue code" flag in his background investigation file, and that this "dispositive factual issue turn[s] entirely on which party bears the burden of proof." But petitioners' "issue code" argument was considered by the district court and rejected as "speculative and unreasonable," Pet. App. A36, despite the fact that the court expressly drew all reasonable inferences from the alleged facts in petitioners' favor, *id.* at A34. Petitioners do not explain how shifting the burden of proof to the government would matter given that the district court already gave them the benefit of all reasonable inferences from the factual allegations.[5]

[5] It is also far from clear whether the BOP program statement referred to by petitioners (Pet. 7)—which states only that certain cases (based on a particular issue code) "will be forwarded through the regional director or assistant director to the [security and background investigation section]" (Pet. App. A34 n.9 (brackets in original))—would place any mandatory duty on the agency, even if petitioners had succeeded in establishing a viable inference that the issue code had been present in Coger's file.

Petitioners also suggest (Pet. 14, 28) that the BOP should not have permitted Coger to transfer to BOP's Morgantown facility before

Where, as here, petitioners have had full resort to discovery and have offered no viable evidence to establish a mandatory duty on the part of a federal agency, it is immaterial whether the government or petitioners bear the burden of establishing the applicability of the discretionary-function exception. Even decisions that place the ultimate burden on the United States to prove the application of the FTCA's exceptions recognize that "the plaintiff bears the burden of coming forth with sufficient evidence to establish there are genuine issues of material fact regarding the applicability of the discretionary function exception." *Miller* v. *United States*, 163 F.3d 591, 594 (9th Cir. 1998). Accordingly, in circumstances such as those present in this case, there is no conflict among the circuits. Dismissal is the appropriate result regardless of which party bears the burden of proof.

3. In all events, the court of appeals' analysis on the burden of proof issue is correct. Section 1346(b)(1), which waives the sovereign immunity of the United States and grants district courts subject-matter jurisdiction to adjudicate FTCA claims, is expressly "[s]ubject to the provisions of [28 U.S.C. 2671-2680]." 28 U.S.C. 1346(b)(1). Section 2680, in turn, provides that the provisions of the FTCA—and, in particular, the jurisdictional grant in Section 1346—"shall not apply to" claims falling within Section 2680's enumerated exceptions, including the discretionary function exception. 28 U.S.C. 2680. Those provisions, referred to elsewhere in the FTCA as "limitations and exceptions applicable" to "any action * * * pursuant to [S]ection 1346(b),"

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an ongoing investigation into alleged extortion by Coger had been formally concluded, but they point to no mandatory duty that would have prohibited such a transfer.

28 U.S.C. 2679(d)(4), constitute not only substantive limits on recovery but also restrictions on the FTCA's grant of jurisdiction to the federal courts.[6]

The burden of establishing that a case lies within a statutory grant of jurisdiction rests on the party invoking jurisdiction. See, *e.g.*, *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Here, that is petitioners. To place the burden instead on the United States, requiring it to disprove the existence of jurisdiction, would contradict the fundamental presumption that "a cause lies outside [federal courts'] limited jurisdiction" absent established evidence to the contrary. *Ibid.*

Petitioners appear to acknowledge (Pet. 16) that they would bear the burden of proof if "the discretionary function exception is treated as a prerequisite to subject matter jurisdiction." For the reasons discussed above, the text and structure of the FTCA compel precisely that conclusion. Petitioners suggest (Pet. 18) that Section 2680 cannot be jurisdictional because Congress enacted it as a separate provision from 28 U.S.C. 1346(b)(1), incorporating its limitations by mutual cross-

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[6] See, *e.g.*, *Medina* v. *United States*, 259 F.3d 220, 223-224 (4th Cir. 2001); *JBP Acquisitions, LP* v. *United States*, 224 F.3d 1260, 1263-1264 (11th Cir. 2000); *Tippett* v. *United States*, 108 F.3d 1194, 1196-1197 (10th Cir. 1997); *Richardson* v. *United States*, 943 F.2d 1107, 1112-1114 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *Fazi* v. *United States*, 935 F.2d 535, 537 (2d Cir. 1991); *Hydrogen Tech. Corp.* v. *United States*, 831 F.2d 1155, 1161, 1162 n.6 (1st Cir. 1987), cert. denied, 486 U.S. 1022 (1988); *Ford* v. *American Motors Corp.*, 770 F.2d 465, 466-467 (5th Cir. 1985); *Broadnax* v. *United States Army*, 710 F.2d 865, 866-867 (D.C. Cir. 1983) (per curiam); *Carlyle* v. *United States Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982); *Gibson* v. *United States*, 457 F.2d 1391, 1392 n.1 (3d Cir. 1972); *Konecny* v. *United States*, 388 F.2d 59, 62-63 (8th Cir. 1967); but see *Parrott* v. *United States*, 536 F.3d 629, 634-635 (7th Cir. 2008).

references in the two statutory sections. But where "Congress has enacted a separate provision that expressly restricts application of a jurisdiction-conferring statute," that choice does not alter the jurisdictional nature of the provision in question. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006).

Petitioners are thus incorrect in asserting (Pet. 17) that the discretionary function exception instead "should be viewed as the raising of affirmative defenses." Even *O'Toole* v. *United States*, 295 F.3d 1029 (9th Cir. 2002), on which petitioners rely (Pet. 17), recognizes that the FTCA exceptions in Section 2680 are jurisdictional. See *O'Toole*, 295 F.3d at 1033 ("Where an exception to the FTCA under [Section] 2680 applies, the United States has elected not to waive its immunity from suit, and courts are without jurisdiction over such claims."). Contrary to petitioners' assertion (Pet. 17), this Court's decisions in *Feres* v. *United States*, 340 U.S. 135 (1950), and *Gaubert*, 499 U.S. 315, do not suggest otherwise. *Feres* did not even involve the Section 2680 exceptions, and *Gaubert*, while properly recognizing that an FTCA claim cannot prevail if an exception applies, does not question the exceptions' jurisdictional effect. Indeed, the Court's analysis of the discretionary-function exception in *Gaubert* implies that a plaintiff has the burden of proving its applicability. See *id.* at 329-330. And elsewhere this Court has affirmed dismissals for lack of subject-matter jurisdiction based on the inapplicability of an FTCA exception under Section 2680. See, *e.g.*, *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 834 (2008); *Smith* v. *United States*, 507 U.S. 197, 199 (1993).[7]

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[7] This Court has also affirmed the dismissal of an FTCA claim for failure to state a claim based on the applicability of a Section 2680 ex-

Practical considerations (Pet. 20-28) do not support a different result. Petitioners' proposed rule would require the United States to disprove the existence of any mandatory duty that might ostensibly apply to the actions alleged by a tort plaintiff. That is not a sensible manner for litigation to proceed, especially on a jurisdictional issue. Petitioners contend that discovery will be needed in order for plaintiffs to establish a mandatory duty (Pet. 22-23), but that contention fails to distinguish suits under the FTCA from any other litigation in which a plaintiff bears the burden of establishing facts that may not be wholly within his personal knowledge. Insofar as the question here entails a waiver of sovereign immunity, that simply reinforces the allocation of the burden of proof to petitioners.

Nor is there any purchase to petitioners' assertion (Pet. 25) that an "unpredictab[le]" discretionary-function exception would be better defined if the government were to bear the burden of proof. Petitioners cite cases reflecting the varying outcomes in discretionary function suits (Pet. 24-25), but those opinions simply demonstrate that Section 2680(a)'s application turns largely on the nature and circumstances of each particular claim. This Court has repeatedly set forth the general principles needed to analyze claims under Section 2680(a). See, *e.g.*, *Gaubert*, 499 U.S. at 322-323; *Berkovitz*, 486 U.S. at 536-539; *Varig Airlines*, 467 U.S. at 808-814. Those principles remain the touchstone of discretionary-function analysis, and may be applied with

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ception. See *Kosak* v. *United States*, 465 U.S. 848, 851 (1984). That further suggests that FTCA exceptions are not affirmative defenses but rather that they function as elements of the claim, such that the plaintiff bears the ultimate burden of proving the inapplicability of the relevant exception.

equal coherence regardless of which party bears the burden of proof on factual issues relevant to application of the exception. Petitioners fail to explain how placing the burden of proof on the United States would result in further uniformity in application of the exception.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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