No. 20-426

In the Supreme Court of the United States

WILLIAM L. HUNTRESS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort claims against the United States are barred by 28 U.S.C. 2680(a), which provides that the federal government's tort liability does not extend to claims "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."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 810 Fed. Appx. 74. The opinion of the district court (Pet. App. 7a-21a) is not published in the Federal Supplement but is available at 2019 WL 1434572.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2020. A petition for rehearing was denied on July 1, 2020 (Pet. App. 22a). The petition for a writ of certiorari was filed on September 30, 2020. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, generally waives the sovereign immunity of the United States and creates a cause of action for damages against the United States with respect to certain

torts of federal employees, acting within the scope of their employment, under circumstances in which a private individual would be liable. See 28 U.S.C. 1346(b). The FTCA contains various exceptions that limit the waiver of sovereign immunity and the substantive scope of the United States' liability, 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). This discretionary function exception, which has been part of the FTCA since the statute's enactment in 1946, serves to "prevent judicial 'second-guessing' of legislative and administrative decisions * * * through the medium of an action in tort." *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (citation omitted).

The FTCA also excludes from its waiver of sovereign immunity most intentional torts: "[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 the "law enforcement proviso" to the intentional tort exception. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. The law enforcement proviso states that "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" that is based on "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h).

2. William L. Huntress is the President and Sole Managing Member of Acquest Development, LLC. Pet. App. 7a-8a. Acquest Development owns two pieces of

land known as the "Transit Property" and the "Wehrle Property," and Huntress manages two separate companies, Acquest Transit LLC, and Acquest Wehrle, LLC. *Id.* at 8a-9a.

In 2009, the Environmental Protection Agency (EPA) brought civil actions against petitioners, Acquest Transit, and Acquest Wehrle for violations of the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* (Clean Water Act). Pet. App. 8a-9a. The district court granted the government preliminary injunctive relief in the Transit Property suit, which remains pending. *Ibid.* The government voluntarily dismissed the suit concerning the Wherle Property in 2017. *Id.* at 9a.

In 2011, petitioners and Acquest Transit were indicted for conspiracy, obstruction of justice, concealment of material facts, and violations of the Clean Water Act. Pet. App. 9a. The indictment was later dismissed without prejudice on the ground that the government interfered with the grand jury's independence by disclosing a judicial finding of probable cause that environmental crimes had been committed. 932 F. Supp. 2d 453, 457, 459-462.

In 2013, a new grand jury returned a second indictment against petitioners and Acquest Transit. That indictment excluded the original charges for violations of the Clean Water Act. See 2015 WL 631976, at *1. The defendants moved to dismiss the indictment, arguing in part that the prosecution was vindictive. *Id.* at *16-*17. The district court denied the motion and determined that the "[i]ndictment adequately allege[d] that the EPA had the authority to make the requisite inquiries underlying the charges asserted." *Id.* at *4. Thereafter, Acquest Transit pleaded guilty to criminal con-

tempt, admitted to willfully violating a district court injunction, and agreed to pay a maximum potential fine of $500,000. Pet. App. 9a; 13-cr-199 D. Ct. Doc. 77, at 2 (Nov. 5, 2015). The government dismissed the remaining charges. Pet. App. 10a.

3. In 2018, petitioners brought this action against the United States under the FTCA. Pet. App. 10a. They asserted causes of action for malicious prosecution, intentional infliction of emotional distress, and abuse of process, alleging that EPA wrongfully procured and prosecuted the indictments against them. *Id.* at 7a. The United States moved to dismiss contending, as relevant, that the suit was barred by the FTCA's discretionary function exception.

a. The district court granted the motion to dismiss and held that the discretionary function exception barred petitioners' claims. Pet. App. 11a-20a. The court first noted that it was "difficult" to determine "what the alleged government misconduct is" because of "inconsistencies" between petitioners' complaint and their brief in opposition to the motion to dismiss. *Id.* at 13a. While the complaint relied "entirely on the Government's alleged procurement and prosecution of the two indictments," petitioners' opposition to the motion to dismiss affirmatively abandoned "reliance on any 'prosecutorial decisions'"—a "new position" that seemed "irreconcilable" with the complaint. *Id.* at 13a-14a (citation omitted). The court nonetheless elected to accept petitioners' new construction of their allegations, under which the sole remaining factual basis for their claims was the alleged "conduct of EPA agent Walter Mugdan, who was responsible for the referral" of the Clean Water Act violations to EPA's "'Criminal Investigati[on] Division . . . for indictment.'" *Id.* at 14a. (citation omitted).

The district court concluded that Agent Mugdan's actions fell within the FTCA's discretionary function exception. First, the court determined that the referral "involved 'an element of judgment or choice,'" and petitioners had not identified "any 'federal statute, regulation, or policy [that] specifically prescribes a course of action' Mugdan was required to follow in making a referral recommendation." Pet. App. 14a-15a (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536-537 (1988)) (brackets in original). Second, the court found that the referral "involved policy considerations 'that the discretionary function exception was designed to shield.'" *Id.* at 15a (citation omitted). The court further noted that, "[t]o the extent [petitioners] challenge the decision to institute prosecution against them," that decision likewise falls "'under the discretionary function exception.'" *Id.* at 14a n.4 (citation omitted).

The district court also rejected petitioners' argument that the discretionary function exception was inapplicable on the ground that Agent Mugdan's conduct "was illegal, unconstitutional, and . . . outside of the scope of the EPA's jurisdiction," and was undertaken "to coerce compliance . . . with EPA demands that the EPA had no jurisdiction to make." Pet. App. 16a (citation and emphases omitted). The court "agree[d]" with petitioners that "the discretionary function exception does not shield official conduct that is either unconstitutional or clearly outside the scope" of an official's authority. *Ibid.* But the court found that petitioners "fail[ed] to show that [Mudgdan's] conduct was so far beyond [his] authority that [he] could not have been exercising a function which could in any proper sense be called discretionary." *Id.* at 17a (citation and internal quotation marks omitted).

The district court explained that petitioners' contention that the EPA agent's conduct was unlawful rested on the premise that "in light of the Supreme Court's decision in [*Rapanos* v. *United States*, 547 U.S. 715 (2006)], the state of the law surrounding the [Clean Water Act] '*prior to and during* the time of the alleged wrongful conduct [was too vague to have] *clearly provided* that the EPA had jurisdiction'" over the Transit Property. Pet. App. 17a (quoting Compl. ¶ 34). But the court found that petitioners erred in asserting that *Rapanos* rendered the Clean Water Act so vague that EPA could not constitutionally exercise jurisdiction over the Transit Property. *Ibid.* Rather, the court observed that petitioners had ample notice that the Transit Property was subject to Clean Water Act jurisdiction in light of two prior cease-and-desist orders advising them of prior violations, and that several post-*Rappanos* courts had found jurisdiction in similar circumstances. *Id.* at 18a. The court also observed that, in arguing that the scope of the Clean Water Act is difficult to discern, petitioners undercut any argument that Mugdan had "clearly violated" a legal or constitutional mandate. *Id.* at 20a.

In a footnote, the district court also rejected petitioners' assertion that "applying the discretionary function exception * * * would conflict with the law-enforcement-officer proviso to 28 U.S.C. § 2680(h)." Pet. App. 20a n.7. The court explained that it "agree[d] with the majority of th[e] Circuits," which have held that the law enforcement proviso does not apply if conduct falls within the discretionary function exception. *Ibid.* The court explained that because it had already determined that EPA's conduct fell within the discretionary function exception, it did not "need" to decide whether the

conduct would otherwise be covered by the law enforcement proviso. *Ibid.*

b. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-6a. The court observed that "the gravamen of [the] complaint is that EPA agents wrongfully procured and prosecuted indictments against [petitioners]." *Id.* at 4a. But "'an agency's decision . . . to prosecute or enforce, whether through civil or criminal process,' clearly involve[s] 'decision[s] generally committed to an agency's absolute discretion.'" *Id.* at 5a (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985)). The court held that such "quintessential examples of governmental discretion" are "immune under the discretionary function exception." *Ibid.* (quoting *Gray* v. *Bell*, 712 F.2d 490, 513 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984)).

Turning to petitioners' argument that the discretionary function exception does not bar claims "alleging unconstitutional or illegal conduct," the court of appeals agreed with petitioners' framework, reasoning that "'a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.'" Pet. App. 5a (citation omitted). But the court explained that "mere conclusory assertions of unconstitutionality cannot carry [petitioners'] burden of establishing jurisdiction" under the FTCA. *Id.* at 5a-6a. Here, the court determined, the "complaint, construed in the light most favorable to [petitioners], fails to provide * * * factual allegations that would permit the Court to find that the alleged conduct f[alls] outside the scope of the discretionary function exception." *Id.* at 6a.

Finally, the court stated that it had "reviewed the remainder of petitioners' arguments—including that [their] claims fall within and are specifically authorized

by the law enforcement proviso of the intentional tort exception—and f[ou]nd them to be without merit." Pet. App. 6a.

ARGUMENT

Petitioners seek review (Pet. 19-33) of whether the FTCA's discretionary function exception, 28 U.S.C. 2680(a), applies in cases where a plaintiff alleges that (1) a government official has committed an intentional tort that falls within the law enforcement proviso of 28 U.S.C. 2680(h), or (2) an agency action falls outside the scope of its jurisdiction. The court of appeals' unpublished, summary order correctly concluded that the discretionary function exception applies to this case. Although some disagreement exists among the courts of appeals on the underlying issues, petitioners overstate the extent of the disagreement, and this case would be a very poor vehicle to address the questions presented because of petitioners' shifting allegations and arguments, and because of the court of appeals' summary and nonprecedential rejection of petitioners' contentions. This Court has denied numerous prior petitions for a writ of certiorari raising similar issues. See *Linder* v. *United States*, No. 19-1082 (June 29, 2020); *Chaidez Campos* v. *United States*, 139 S. Ct. 1317 (2019) (No. 18-234); *Castro* v. *United States*, 562 U.S. 1168 (2011) (No. 10-309); *Welch* v. *United States*, 546 U.S. 1214 (2006) (No. 05-529). The Court should follow the same course here.

1. The lower courts correctly held that the discretionary function exception bars petitioners' FTCA claims. As those courts explained, the discretionary function exception excludes from the FTCA's waiver of the United States' sovereign immunity "[a]ny 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).

This Court has established a two-part inquiry to guide application of the discretionary function exception. *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991). First, a court must determine whether the conduct challenged by the plaintiff was "discretionary in nature"—that is, whether it involved "'an element of judgment or choice.'" *Id.* at 322 (citation omitted). "The requirement of judgment or choice is not satisfied if 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.'" *Ibid.* (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). Second, a court must evaluate "whether that judgment is of the kind that the discretionary function exception was designed to shield," *id.* at 322-323 (quoting *Berkovitz*, 486 U.S. at 536), meaning it is "susceptible to policy analysis," *id.* at 325.

The lower courts correctly found that, under the *Gaubert* analysis, petitioners' allegations are barred by the discretionary function exception. As the court of appeals explained, Pet. App. 5a, the allegations of malicious prosecution and enforcement found in the complaint plainly involve government conduct that is "discretionary in nature," and official judgments that are "susceptible to policy analysis." *Gaubert*, 499 U.S. at 322, 325. Indeed, agency enforcement decisions are a paradigmatic example of choices that are "committed to [the] agency's absolute discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985).

Moreover, the district court explained that, in opposing the government's motion to dismiss, petitioners appeared to have "retract[ed]" any "reliance" on government conduct beyond Agent Mugdan's referral of petitioners' Clean Water Act violations to EPA's Criminal Investigation Division. Pet. App. 14a. Under that more circumscribed construction of petitioners' allegations, it is apparent that the discretionary function exception applies: Mugden's referral was clearly a discretionary act. See *K.W. Thompson Tool Co.* v. *United States*, 836 F.2d 721, 729 (1st Cir. 1988) (a referral "reflect[s] the decision-maker's judgment of how best to enforce compliance and to deter misconduct in others"). And it was "susceptible to policy analysis," *Gaubert*, 499 U.S. at 325, because whether to investigate entails policy considerations such as the seriousness of the violations, the "need to maximize compliance," and the "efficient allocation of agency resources," *Berkovitz*, 486 U.S. at 538 (citation omitted).

2. Petitioners do not dispute the lower courts' application of the *Gaubert* analysis. Instead, they contend that the court of appeals erred in declining to hold that the law enforcement proviso to the intentional tort exception in Section 2680(h) renders the discretionary function exception inapplicable to this case. That contention lacks merit, and the issue does not warrant this Court's review.

a. Petitioner errs in asserting (Pet. 25-28) that the law enforcement proviso limits the application of the discretionary function exception. "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). When Congress enacted the law enforcement proviso in 1974, it placed

the proviso within the intentional tort exception, Section 2680(h), thereby modifying that particular exception to the FTCA. While 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* § 504 (2020) ("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.") (citations omitted). Here, there are multiple indications that the law enforcement proviso has a proviso's customary, narrow scope: It limits the application of the intentional tort exception, but it does not apply at all to the discretionary function exception or any other exception to the FTCA.

To begin, the text of the proviso gives no indication that it is intended to apply to other exceptions in the FTCA. To the contrary, the text of the proviso relates only to the preceding clause of Subsection (h), negating the intentional tort exception's application in some—but not all—instances. See 28 U.S.C. 2680(h) ("*Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States," the FTCA "shall apply" to claims alleging one of the select named intentional torts.). And the proviso states that "this chapter"—which includes the discretionary function exception in Section 2680(a)—"shall apply" to claims covered by the proviso. *Ibid.* That texts indicates that the discretionary function exception continues to "apply" to claims that fall within the proviso. *Ibid.*

Moreover, reading the law enforcement proviso to apply to exceptions beyond Subsection (h) would allow tort suits against the United States that Congress plainly intended to bar. For example, under petitioners' interpretation, a plaintiff alleging an enumerated intentional tort with respect to the acts or omissions of law enforcement officers could bring an FTCA claim arising in a foreign country notwithstanding 28 U.S.C. 2680(k), which excludes from the FTCA "[a]ny claim arising in a foreign country." But in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that the foreign country exception barred FTCA claims for false arrest, which would clearly fall within the proviso. See *id.* at 699-712.

Congress's purpose in enacting the law enforcement proviso further demonstrates that it was not intended to negate the discretionary function exception. Congress adopted the proviso "as a *counterpart to* [*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)). Defendants in *Bivens* actions are entitled to immunity when their actions do not violate clearly established constitutional proscriptions. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing *discretionary functions*[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known.") (emphases added). That same kind of immunity is provided for FTCA claims through

the discretionary function exception. Accordingly, Congress plainly intended for the discretionary function exception to apply broadly to track the broad immunity available in *Bivens* actions. See *Carlson*, 446 U.S. at 19-20 ("[T]he congressional comments accompanying [Section 2680(h)] made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.").

b. Although there is some disagreement among the courts of appeals regarding the interplay of the discretionary function exception and the law enforcement proviso, that disagreement has little practical significance and does not warrant this Court's review. Notably, petitioners have identified no court of appeals that would have reached a different conclusion in this case, where petitioners have done nothing more than advance "conclusory assertions" that EPA officials acted unlawfully. Pet. App. 5a-6a.

The Fourth, Seventh, Ninth, and D.C. Circuits would all have resolved this case the same way the Second Circuit did, because they have found that where the discretionary function exception applies, it controls, even if the plaintiff alleges intentional torts that fall within the law enforcement proviso. See *Linder* v. *United States*, 937 F.3d 1087, 1089 (7th Cir. 2019), cert. denied, No. 19-1082 (June 29, 2020); *Medina* v. *United States*, 259 F.3d 220, 226 (4th Cir. 2001); *Gasho* v. *United States*, 39 F.3d 1420, 1433-1434 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

The Fifth Circuit, too, would have reached the same conclusion. Although that court has suggested that the law enforcement proviso might override the discretionary function exception where officials have engaged in

the sort of "egregious, intentional misconduct" that led Congress to enact the proviso in the first place, no such conduct is involved here. *Chaidez Campos* v. *United States*, 888 F.3d 724, 736 (2018), cert. denied, 139 S. Ct. 1317 (2019). Indeed, the lower courts found that petitioners failed to set forth any convincing allegations that EPA officials had acted unlawfully or unconstitutionally. See Pet. App. 5a-6a; 17a-19a.

The Eleventh Circuit in *Nguyen* v. *United States*, 556 F.3d 1244 (2009), indicated that the law enforcement proviso is not limited by the discretionary function exception; but at the same time it acknowledged that the proviso "should be viewed as a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Id.* at 1256 (citation omitted); see *id.* at 1256-1257; see also *Denson* v. *United States*, 574 F.3d 1318, 1336 (11th Cir. 2009) ("As co-extensive causes of action, *Bivens* and FTCA claims necessarily arise from the same wrongful acts or omissions of a government official. By the same token, the same set of facts determines the theories available to the United States in defending the FTCA case."), cert. denied, 560 U.S. 952 (2010). For that reason, the Eleventh Circuit later suggested that *Nguyen*'s conclusion that the law enforcement proviso is not cabined by the discretionary function exception may apply only in contexts in which federal law enforcement officers commit clear constitutional violations, as the court had found in *Nguyen*. See *Denson*, 574 F.3d at 1337 n.55. If the Eleventh Circuit adheres to that view of *Nguyen*'s holding, its reconciliation of the discretionary function exception and the law enforcement proviso

would not differ in any significant respect from the decision below or, as a practical matter, from the decisions of the other courts of appeals. Thus, further percolation in the Eleventh Circuit is warranted and may show that no meaningful conflict exists among the circuits.

Finally, petitioners err in suggesting (Pet. 23-24) that the decision below departs from the Second Circuit's own prior precedent in *Caban* v. *United States*, 671 F.2d 1230 (1982). In *Caban*, the plaintiff brought suit for false imprisonment after law enforcement agents detained him upon his arrival at John F. Kennedy International Airport from an overseas flight. *Id.* at 1230-1232. The Second Circuit concluded that the discretionary function exception did not apply to the agents' conduct in that case because "the basic[ ] mechanical duty [of] ascertain[ing] whether an applicant meets the minimal standards for entry into this country" was not the kind of activity "that involve[d] weighing important policy choices." *Id.* at 1233-1234. Here, petitioners have alleged decisions that plainly involve policy choices, see pp. 9-10, *supra*, and so the ground on which the Second Circuit rested its conclusion in *Caban* is not applicable. Moreover, because the Second Circuit in *Caban* determined that the discretionary function exception was inapplicable, *Caban* had no occasion to address whether the law enforcement proviso was cabined by that provision.

c. In any event, this case would be an exceedingly poor vehicle for considering this issue because the Second Circuit rejected petitioners' contentions with respect to the law enforcement proviso in a single sentence, stating that the arguments that their "claims fall within and are specifically authorized by the law enforcement proviso of the intentional tort exception" are

"without merit." Pet. App. 6a. That phrasing suggests that, in the Second Circuit's view, petitioners' claims do not "fall within" the law enforcement proviso at all, such that the case does not present the issue of how the proviso and the discretionary function exception should interact. And, even setting that difficulty aside, review would be complicated by the uncertainty regarding which of petitioners' allegations are properly before this Court. See p. 10, *supra*.

3. Petitioners also contend (Pet. 28-31) that this Court should grant certiorari to consider whether the discretionary-function exception applies when government officials act outside their jurisdiction. For several reasons, that contention fails.

a. As a threshold matter, the complaint and the petition for certiorari set forth very different accounts of the alleged defect in EPA's jurisdiction. In the complaint, petitioners allege that EPA acted unlawfully because "*prior to and during* the time of the alleged wrongful conduct" it was "*not clear* that the EPA, via the [Clean Water Act], had *actual authority* over the Transit Road land," and the asserted ambiguity created a constitutional vagueness problem. Pet. App. 57a. The complaint further alleges that "at no point in time, prior to or during the conduct at issue * * * or even since then, has the Supreme Court ever been able to determine whether lands like the Transit Road land are part of the 'waters of the United States.'" *Id.* at 49a. And the complaint specifically alleges that *Rapanos* v. *United States*, 547 U.S. 715 (2006), left the scope of the CWA's applicability to the Transfer Property "unclear as a matter of law"; that there "had been no clarification even by the time" of *Sackett* v. *EPA*, 566 U.S. 120 (2012);

and that there has been no "clarification since." Pet. App. 52a-54a.

Petitioners have now abandoned those allegations. In their petition to this Court, they assert that "[a]fter *Rapanos*—and certainly after *Sackett*—EPA officials were on notice" that they lacked jurisdiction over petitioners' Transit Property because that property does not "abut[] navigable waters." Pet. 29. Moreover, despite the complaint's repeated allegations that EPA's jurisdiction over the Transit Property was "*not clear*," Pet. App. 57a, petitioners now contend that the absence of jurisdiction was made plain by *Rapanos* and *Sackett*, Pet. I, 6, 12, 29. This Court should not grant review to consider an argument that conflicts with allegations in petitioners' own complaint.

b. Even if the Court were to overlook this threshold flaw, certiorari would be unwarranted because neither of the two iterations of petitioners' argument has merit. As the district court explained, the question whether the Clean Water Act conferred jurisdiction over the Transit Property was not so unclear as to trigger constitutional vagueness concerns. Pet. App. 17a-18a. To the contrary, contemporaneous decisions from courts of appeals had found jurisdiction where defendants had some knowledge of the possibility that their properties contain waters of the United States. *Id.* at 18a (citing cases). And petitioners cite no record evidence to support their belated assertion that EPA clearly lacked jurisdiction over the Transit Property because it is "miles from navigable waters." Pet. 12. Indeed, in 2009, the district court considering the related civil action observed that EPA had found that the Transit "Property has a continuous surface connection to traditionally navigable waters." 2009 WL 2157005, at *7. Although the

defendants in the civil action contested that assertion, they had presented "no countervailing facts or legal analysis." *Id.* at *8.

c. Because petitioners have not set forth plausible allegations that EPA acted without any authority, there is no reason for this Court to consider whether such allegations would defeat the application of the discretionary function exception. Nor has petitioner pointed to any conflict in the courts of appeals on this issue. There is no dispute that the discretionary function exception gives way when a federal officer acts contrary to a *specific* prescription in federal law. See *Gaubert*, 499 U.S. at 322 (explaining that where a "federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow," there is no further discretion to exercise) (emphasis added; citation omitted). Here, however, the allegations in petitioners' own complaint defeat the assertion that EPA was acting in violation of a "specific[]" statutory mandate, see pp. 16-17, *supra*, and no court of appeals has held that the discretionary function exception is displaced by implausible or conclusory allegations of unlawful or unconstitutional conduct.

The cases petitioner cites (Pet. 29), although broadly worded, are not to the contrary. Three did not involve allegations of extra-jurisdictional or unconstitutional conduct at all. See *Medina*, 259 F.3d at 225; *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 122-123 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *Sutton* v. *United States*, 819 F.2d 1289, 1292 (5th Cir. 1987). The remainder of the cited decisions addressed allegations of unconstitutional conduct, but they did not concern allegations that an agency acted outside its jurisdiction, nor did they offer any compelling analysis re-

garding when allegations of such conduct might displace the discretionary function exception. See *Thames Shipyard & Repair Co.* v. *United States*, 350 F.3d 247, 258 n.9, 259-260 (1st Cir. 2003) (concluding that the Coast Guard's actions were consistent with the Fourth Amendment), cert. denied, 542 U.S. 905 (2004); *Raz* v. *United States*, 343 F.3d 945, 948 (8th Cir. 2003) (per curiam) (concluding, without analysis, that the discretionary function exception was inapplicable because the plaintiff alleged that the officers violated the Constitution); *Nurse* v. *United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor"); *Myers & Myers, Inc.* v. *United States Postal Serv.*, 527 F.2d 1252, 1262 (2d Cir. 1975) (leaving for remand whether the Postal Service improperly denied a hearing to the plaintiff that "was required by either the Constitution or the Postal Service regulations").

Accordingly, petitioners have offered no persuasive reason for this Court to grant certiorari. Still less have they offered a reason for this Court to overlook the numerous obstacles that would complicate review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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