No. 21- _____

Supreme Court of the United States

LILLIAN J. CUADRADO-CONCEPCION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented

1. Whether the discretionary function inquiry under Gaubert applies to voluntarily adopted State-law obligations with State-law defined "due care" performance standards?

2. Whether the discretionary-function exception of the FTCA is an affirmative defense, or a threshold subject-matter jurisdiction issue?

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IV. Petition for Writ of Certiorari

Lillian J. Cuadrado-Concepción, by and through Javier A. Morales-Ramos, Counsel of Record, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

V. Opinions Below

The District Court's Judgment granting the government's motion to dismiss was entered on August 10, 2020. The Court of Appeals for the Eleventh Circuit affirmed on April 16, 2021. *See:* App. at 1.

VI. Jurisdiction

The Court of Appeals for the Eleventh Circuit issued its Opinion on April 16, 2021. This Honorable Court has jurisdiction under 28 U.S.C. § 1254, and Rule 13(1) of the Rules of the Supreme Court, insofar that the petition is being filed within 90 days after entry of judgment.

VII. Statutory Provisions Involved

The statutory provisions involved in this case are the pertinent jurisdictional statute 28 U.S.C. § 1346(b), and the Federal Tort Claims Act ("F.T.C.A."), 28 U.S.C. §§2671 *et seq.*, in particular, the sections on defenses and exceptions, as follows:

> [T]he district courts, . . . , shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b);

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
> . . .
> With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2674; and,

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, **or** based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a)(emphasis ours).

VIII. Statement of the Case

Lillian Cuadrado married a government employee (US Army sergeant) who initially was a good husband. After being on tour outside of the US he returned "broken" - suffering from PTSD. His behavior changed and he became violent, at a certain point requiring Lillian to call the local police department, who arrested him and charged him with assault. The government (a certain US Army 1LT) appeared in the scene, asked her to drop the charges and reassured her that they (government) would take care of the matter and that she need not be afraid. She believed the 1LT's assurances and was subsequently raped by her husband.

Under many state jurisdictions, Georgia included, the figure of "special relation" is recognized when: (a) assurances of care (or other acts on behalf of the injured party) are given; (b) knowledge that lack of care (or other required acts) could lead to harm; and, (c) there is justifiable and detrimental reliance by the injured party in the assurances.

Georgia State law defines the standard of care, that of the prudent person. The prudent person standard does not specify a certain conduct - there is no mandatory federal statute, regulation, or policy; it is a State law standard that applies in multiple scenarios and is malleable, subject to the nature and conditions at a given time. State case law has amply discussed the figure of the prudent person in various multiple scenarios, thus establishing a recognized standard of care. The State standard of care does not impede government operations, it merely requires persons to act reasonably in response to their State imposed duty of care. The State standard of care does not revolve around federal regulatory schemes nor other governmental activities, it revolves around foreseeing the result of negligence in the performance of the State imposed duty. With respect to State imposed

duties, outside of governmental regulated functions, the government should be treated just like any other person.

Rayonier, Inc., v. United States, 352 U.S. 315, 319 (1957), noted that "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." Said case took into consideration the burden on individual injured persons who may be left "destitute or grievously harmed." *Id.* at 320. Such is the case here.

Petitioner contends that United States v. Gaubert, 499 U.S. 315 (1991), and similar cases that deal with federal regulatory issues, do not serve as a proper standard in the evaluation of state created duties when there are applicable state performance standards (even if said standard is a general one, such as the prudent person). The Eleventh Circuit erred in applying the two part discretionary-function test, and related agency case law, to circumstances that should be analyzed under State law.

We submit to this Court's consideration that the first section of 28 U.S.C. § 2680(a) has been basically wiped out by the lower court's use

of the Gaubert standard in non regulated scenarios, where State law applies. In a case such as this one, where a federal employee adopts a State law duty, the pertinent performance standard is that of "due care" as required by the FTCA. This case presents clear facts that define the conflict between the first and second parts of § 2680(a), and how the first part is not even considered in the lower court's analysis.

On the procedural side, petitioner challenges the Eleventh Circuit's placement of the burden on disproving the applicability of the discretionary-function exception on Cuadrado. The Gaubert presumption utilized by some federal circuits to place the burden on plaintiff should not apply in cases where State law provides the pertinent standard of care. The circuit split on whether the discretionary-function exception is jurisdictional or merely a defense should be addressed and resolved by this Honorable Court.

IX. Reasons for Granting the Writ

A. *The FTCA contains a "due care" standard that should be applied to Federal employees who voluntarily adopt, or are otherwise subjected to, State-law obligations outside of the Gaubert regulatory scenario.*

1. FTCA and State standard of care

Under the Federal Tort Claims Act ("FTCA") the United States can be held liable for injury caused by the negligent act of an employee under circumstances where 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). Note also:

> [T]he Federal Tort Claims Act states that the "United States shall be liable" in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. That provision is most naturally understood to make the United States liable in the same way as a private individual at any given time. See *Richards v. United States*, 369 U.S. 1, 6–7, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Such "same as" provisions dot the statute books, and federal and state courts commonly read them to mandate ongoing equal treatment of two groups or objects.

Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 768 (2019).

As noted not so long ago: "[T]he FTCA treats the United States more like a commoner than like the Crown. The FTCA's jurisdictional provision states that courts may hear suits "under circumstances where the United States, if a private person, would be liable to the claimant." 28 U.S.C. § 1346(b). And when defining substantive liability for torts, the Act reiterates that the United States is accountable "in the same manner and to the same extent as a private individual." § 2674." United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1637-38 (2015). "[T]he extent of the United States' liability under the FTCA is generally determined by reference to state law." Molzof v. United States, 502 U.S. 301, 305 (1992). The "whole law" of the State where the act or omission occurred is the one to be applied. Richards v. United States, 369 U.S. 1, 11 (1962)("[W]e conclude that a reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred."]. [1]

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[1] Berkovitz, one of the principal precedents in relation to the FTCA, is distinguishable by the particular federal regulatory nature of said case - "We granted certiorari, 484 U.S. 1003 (1988), to resolve a conflict in the Circuits regarding the effect of the discretionary function exception on claims arising from the Government's regulation of polio vaccines. " Berkovitz v. United States, 486 U.S. 531, 534-35 (1988). Such "regulatory

The FTCA recognizes the need for "exercising due care" in order for the defense/exception to apply. 28 U.S.C. § 2680(a). Herein lies a crucial distinction between what should be defined as "discretionary" and apply Gaubert's test, and conduct that is subject to a "due care" test under the applicable State performance standard. We submit that "exercising due care" is the standard when the government adopts State law duties of care that fall outside the federal regulatory regimes.

2. Georgia State Law

The applicable "due care" required by 28 U.S.C. § 2680(a), as well as the cause of action, and related standards, are found under the laws

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activities of federal agencies" scenario is not applicable to Cuadrado's case. Berkovitz is limited in scope: "The question in this case is whether the governmental activities challenged by petitioners are of this discretionary nature." Berkovitz, 486 U.S. at 539 (Underlining Ours).

Note also: "In my view, our FTCA caselaw has distorted the analysis under *Berkovitz v. United States,* ... I see no reason to assume that in waiving the federal government's sovereign immunity to tort claims, which are creatures of state law, Congress did not expect state-law duties to have mandatory effect. ... To interpret *Berkovitz* otherwise allows the government to avoid common-law duties of care, so long as it does not codify those duties in a federal publication employing mandatory language." Garcia v United States, 533, F.3d 1170, 1182 (10th Cir. 2008)(Circuit Judge Lucero, concurrent opinion with separate disagreement).

of the of the State of Georgia. Georgia law clearly defines the elements required for a cause of action based on negligence ("Every person may recover for torts committed to themselves." Ga. Code Ann. §51-1-9; and, "The "special relation" creates a private legal right which is enforceable under Georgia law." Ga. Code Ann. §51-1-1). The duty created under Georgia law is analyzed under classic general tort standards of conduct ("The standard of care expected is that which is exercised by ordinarily prudent persons under the same or similar circumstances." Ga. Code Ann. §51-1-2).

The elements defining a "special relation" giving rise to a legal duty under Georgia law have been defined as follows:

> In order to determine whether such a special relationship exists, we adopt the following requirements:
>
> (1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party;
>
> (2) knowledge on the part of the municipality that inaction could lead to harm; and,
>
> (3) justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking.

City of Rome v. Jordan, 263 Ga. 26, 29, 426 S.E.2d 861 (Ga. 1993). *Note*

also: "For a special relationship to exist, there must be (1) an explicit assurance by the governmental unit, through promises or actions, that it would act on behalf of the injured party; (2) knowledge on the part of the governmental unit that inaction could lead to harm; and (3) justifiable and detrimental reliance by the injured party on the governmental unit's affirmative undertaking." Partain v. Oconee, 293 Ga. App. 320, 321, 667 S.E.2d 132 (Ga. Ct. App. 2008).

Georgia law recognizes that a "special relation" is an exception to the general norm that there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another. The Restatement's "Special Relation" doctrine, as one of the exceptions to the general norm, has been amply recognized by various courts throughout the federal circuits. In Fraser v. U.S., 30 F.3d 18, 19 (2nd Cir. 1994) the Second Circuit recognized "the duty to control the conduct of others". *See also*: Assurance Co. v. York Intern, 305 F. App'x 916, 926 (4th Cir. 2009)(On Maryland's adoption of the Restatement (Second) of Torts, which "articulates the general rule that `there is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) . . . , or (b) a special

relation exists between the actor and the other which gives to the other a right to protection."); and, Doe v. U.S., 838 F.2d 220, 225 (7th Cir. 1988) "[W]e hold that where the government affirmatively assumes a duty to protect a person prior to and independent of any assault, and where an alleged breach of that duty leads to an assault on the person, whether or not by a government employee, the claim arises out of the government's negligence, and 28 U.S.C. § 2680(h) does not bar the cause of action." Other cases, such as, McCloskey v. Mueller, 446 F.3d 262, 268 (1st Cir. 2006); Cox v. Washington, 913 F.3d 831, 839 (9th Cir. 2019)(using the term "entrustment for the protection of a vulnerable victim"); Fredericks v. Jonsson, 609 F.3d 1096, 1102 (10th Cir. 2010); and, Comm. of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 950 (D.C. Cir. 1988), also make reference to the duty under the concept of special relation.

28 U.S.C. § 2680(a) has two sections. As we have pointed out, the first section - requiring "due care" - is the section that should apply to cases like Cuadrado's. In the absence of an exercise of "due care" the exception does not apply. We may go as far as noting that calling §2680(a) the "discretionary function exception" misreads the statute

insofar said name totally forgets the first requirement clearly identified by Congress, the need for "due care." 28 U.S.C. § 2680(a) has two clauses, the first of "due care exception" - which we understand to be applicable to duties under State law; and the second, the "discretionary function" - which we understand to fall under Gaubert's federal agency regulatory analysis. After Gaubert, the first clause is dormant.

3. Distinction between the US Army-JAG, Jr relation and the Separate State Duty/ relation towards Cuadrado (a non government employee)

Once the government adopted a legal duty under Georgia law, and undertook responsibility for the safety of Cuadrado, the execution of said responsibility was not subject to the discretionary function exception under the FTCA, for it is Georgia's "whole law" that controls the analysis of the tortious conduct. Contrary to Gaubert's regulatory scenario, where it was said: "For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." Gaubert, 499 U.S. at 324-25, in this case there is no applicable regulatory regime. The first

part of 28 U.S.C. § 2680(a) - the "due care" part - should apply. The State created duty applicable to the government, which should be "same as" as applied to a private individual, requires evaluation of compliance / performance along State defined expected standards of conduct.

Under Georgia law the Army assumed the duty to protect Cuadrado, a matter distinct and separate from the Army-JAG, Jr. relationship. The fact that the Army had legal, physical, or custodial control over JAG, Jr because of his position as soldier does not eliminate the Army's State-law duty towards Cuadrado.[2] This "independent duty" arose under Georgia law and it fell upon the Army to exercise prudent and reasonable measures - "due care" - to protect

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[2] Note these particular lower court cases directly on point: "The alleged conduct of the United States was sufficiently directed towards Chang-Williams to justify reliance." Chang-Williams v. Department Of Navy, 766 F. Supp. 2d 604, 623 (D. Md. 2011); and, "While the Fifth Circuit has not spoken on this exact question, the Court finds the Sixth Circuit's rationale: that factual assurances by the Army to Dawn Larson Giffa regarding her protection from her husband, heard by or relayed to the Farinas, are sufficient to create such an "independent, antecedent duty unrelated to the employment relationship between [SPC Giffa] and the United States" persuasive." Kristensen v. United States, 372 F. Supp. 3d 461, 467 (W.D. Tex. 2019).

Cuadrado.[3] The Army knew or should have known that JAG, Jr. was likely to cause damage to Cuadrado; in that "independent duty" that arose from the Army's adoption of Georgia's duties under the "special relation", it fell upon the Army to take action and render reasonable care as to prevent harm to Cuadrado at the hands of JAG, Jr. The Army knew, or should have known, that JAG, Jr. was a danger to Cuadrado. JAG, Jr. had even been arrested because of his violent conduct, and 1LT Burch removed him from the civilian side arrest and placed him under the Army's control. 1LT Burch told Cuadrado not to be afraid, and gave other assurances of protection upon which she relied and acted upon by removing the assault charges from her husband. These assurances - trusted and acted upon - are crucial to the understanding of the application of the government's duty under Georgia law to Cuadrado's circumstances, they created a private legal right subject to state law standards of conduct. Said assurances

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[3] We note that in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), a case regarding conflict of laws, this Court noted: "The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the 'place of wrong.' " *Id.*, at 707, n. 3.

removed from the potential victim (Cuadrado) the need to seek shelter and take other preventive measures to avoid being harmed; they offered a false sense of security.

Re-paraphrasing from Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955): The government (via 1LT Burch) need not undertake the duty imposed by Georgia's special relation doctrine. But once it exercised its discretion to offer assurances of safety to Cuadrado, and engendered reliance on said assurances, it was obligated to use due care in the performance of the State duty adopted. If the government failed in its duty and damage was thereby caused to Cuadrado, the United States is liable under the Tort Claims Act.

We share Circuit Judge Lucero's concerns that the government is avoiding common-law duties of care, so long as it does not codify those duties in a federal publication employing mandatory language. This Honorable Court's clarification of the applicability of federal regulatory

analysis of *Varig*[4] */ Berkowitz*[5] */ Gaubert*[6] to State law obligations and State law standards of performance is necessary in order to allow the FTCA to fulfill its *raison d'être*. Federal regulatory matters - and the applicability of the discretionary function exception in said cases, should be separated from State imposed duties subject to the prudent and reasonable person standard - a basic standard of care commonly recognized by all the States. We believe that this Honorable Court must pay attention to the first part of 28 U.S.C. § 2680(a), the "due care" section. This Honorable Court's guidance clarifying these matters is needed and is hereby respectfully requested. The writ should be granted.

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[4] Regarding possible "negligence of the Federal Aviation Administration in certificating certain aircraft for use in commercial aviation." United States v. Varig Airlines, 467 U.S. 797, 799 (1984).

[5] Dealing with "whether the determination that a vaccine product complies with each of these regulatory standards involves judgment of the kind that the discretionary function exception protects." Berkovitz v. United States, 486 U.S. 531, 545 n.11 (1988)

[6] "The FHLBB Resolution quoted above, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators exercised their discretion to choose from various courses of action in supervising IASA." United States v. Gaubert, 499 U.S. 315, 332 (1991)

B. *Whether the discretionary-function exception of the FTCA is an affirmative defense, or a threshold subject-matter jurisdiction issue?*

Petitioner Cuadrado met the requirements of the statutory grant of federal-court subject matter jurisdiction, 28 U. S. C. §1331[7], and the FTCA applicable jurisdictional statute, 28 U.S.C. §1346(b) (as well as meeting the plausibility standard). The statutory liability of the United States for the claims presented in the FTCA complaint arises under §2674, from which we note: "With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled. . . ." 28 U.S.C. § 2674 (Underlining Ours). The question here, as in Arbaugh, is whether the availability of a § 2674 defense is a jurisdictional factual question, or whether it relates

[7] "A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim "arising under" the Constitution or laws of the United States. *See Bell v. Hood*, 327 U. S. 678, 681-685 (1946)." Arbaugh v. Y H Corp., 546 U.S. 500, 513 (2006).

to the merits of the FTCA claim.

Chief Justice Warren, on discussing 28 U.S.C. §2680, noted: "We simply note that the Government is not without defenses." United States v. Muñiz, 374 U.S. 150, 163 (1963)(Underlining Ours). Justice Scalia also called the exceptions a "defense": "Contrariwise, action "outside the purview" of the relevant policy does not necessarily fail to qualify for the discretionary function defense. If the action involves policy discretion, and the officer is authorized to exercise that discretion, the defense applies even if the discretion has been exercised erroneously, so as to frustrate the relevant policy. *See* 28 U.S.C. § 2680(a) (discretionary function exception applies "whether or not the discretion involved be abused.")." Gaubert, 499 U.S. at 338 (J. Scalia, concurring)(Underlining Ours).

The statutory language and the references in Muñiz & Gaubert support an inference that the FTCA exceptions are defenses. If so, it is well known that the burden of proving the defenses in on the proponent. In this case Cuadrado properly invoked federal jurisdiction and the lower courts erred in finding that there was no subject matter jurisdiction and in placing the burden on Cuadrado to prove the FTCA

exceptions did not apply. To the contrary, common federal practice in the area of defenses places on the government the burden of proving their defenses; it is not plaintiff's duty to raise a defendant's defense and show how it does not apply to his/her particular case.

This Honorable Court has noted the problems with certain jurisdictional issues:

> "Jurisdiction," this Court has observed, "is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 90 (1998) (internal quotation marks omitted). This Court, no less than other courts, has sometimes been profligate in its use of the term.

Arbaugh v. Y H Corp., 546 U.S. 500, 510 (2006).

In Feres v. United States, 340 U.S. 135, 139 (1950) this Court went as far as recognizing "Congress, as author of the confusion" in FTCA matters. Still, within said confusion, the statutory language of the FTCA points to the burden on the government and not on Cuadrado. The references in Muñiz & Gaubert to the exceptions as "defenses" also supports Cuadrado's legal theory.

As recently summarized by Circuit Judge Guy, Jr.:

> Where statutory exceptions to an immunity waiver are at issue, however, we have said that "if the complaint is facially outside the exceptions" then the "the burden fall[s]

> on the government to prove the applicability of a specific" exception to the immunity waiver. *Carlyle v. U.S., Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982); *accord Keller v. United States*, 771 F.3d 1021, 1023 (7th Cir. 2014); *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012); *Morales v. United States*, 895 F.3d 708, 713 (9th Cir. 2018); *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). *But see Blueport Co., LLC v. United States*, 533 F.3d 1374, 1381 (Fed. Cir. 2008). The basic rationale for treating sovereign immunity exceptions as affirmative defenses is that a plaintiff should not be required to prove a negative for each enumerated exception, and the government will generally possess the relevant facts to prove that a particular exception does apply. *See Abunabba*, 676 F.3d at 333 n.2; *Prescott*, 973 F.2d at 702.

Gaetano v. United States, No. 20-1902, at *10 (6th Cir. Apr. 9, 2021).

The lower courts that are in disagreement with the above require that plaintiff disprove the application of the discretionary function exception is misplaced. The First Circuit places the burden on plaintiff: ""[T]he law presumes that the exercise of official discretion implicates policy judgments," so Plaintiffs "bear the burden . . . of demonstrating that the [Corps'] conduct was not at least susceptible to policy related judgments." *Wood v. United States*, 290 F.3d 29, 37 (1st Cir. 2002). " Montijo-Reyes v. U.S., 436 F.3d 19, 25 n.7 (1st Cir. 2006). The Tenth Circuit seems to follow the same reasoning as the First Circuit. Kiehn v. U.S., 984 F.2d 1100, 1105 (10th Cir. 1993). The

Fourth Circuit places the burden on plaintiff without much discussion: "it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim.") Welch v. U.S., 409 F.3d 646, 651 (4th Cir. 2005). The Eleventh Circuit placed the burden on Cuadrado in this case, but in Autery v. U.S., 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) it did recognize the circuit split.[8]

Cuadrado's position is that the jurisdictional burden was complied with by the references to the proper jurisdictional statutes, pleading of the applicable state tort causes of action, meeting Twombly/Iqbal pleading standards, and thus it was defendant's burden to show how its FTCA defenses, if any, applied. The lower courts are in error when they turn §2680 affirmative defenses/ exceptions under the FTCA into jurisdictional questions and place the burden of proof on the plaintiff.

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[8] We note, however, that the cited presumption is not absolute, it applies only "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines" are involved and allow discretion. Gaubert, 499 U.S. at 324. An "official" who undertakes State law duties is not conferred such a presumption, and therefore the burden should not be on plaintiff in such cases. It all goes back to Gaubert's interpretation of the second part of 28 U.S.C. § 2680(a); it left a void in relation to the first part of the statute.

Inverting the burden of proof constitutes a legal error, there is a clear circuit split, and the writ should be granted in order for Cuadrado to further address this controversy.

X. CONCLUSION

This Petition requests this Honorable Court to decide two FTCA issues that are in need of addressing. On the first issue, we share Circuit Judge Lucero's concerns about the current rigid interpretation of the FTCA limiting access to plaintiffs rightful claims in cases not involving federally regulated schemes. The series of cases that dealt with specific federal regulated activity are not applicable to tort cases based on State law and State performance standards. Courts have rigidly applied a two inquiry test that was developed in relation to federal regulatory issues to matters of State law. Courts have missed Gaubert's warning that "[t]here are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." Gaubert, 499 U.S. at 325 n.7

(driving as an example). Clearly, the two step analysis would not be a proper test to determine negligence of that driver mentioned by this Honorable Court in Gaubert. Similarly, in Cuadrado's case the government chose to adopt a State duty under the special relation doctrine; as such, no regulatory scheme is involved, and the pertinent performance standard is that established by Georgia - the prudent person standard. The applicable "due care" required by the first section of 28 U.S.C. § 2680(a) supports Cuadrado's position. Said section, which has been buried by the lower courts, must be resurrected.

The second issue is more of a procedural question, but that does not make it less important. The treatment of the discretionary function exception as a jurisdictional bar is incorrect. The courts have jurisdiction and the discretionary function exception should be treated as an affirmative defense. In *Indian Towing* "the Government did not even claim the benefit of the exception." Gaubert, 499 U.S. at 326; the defendant United States should be the one raising or not raising said defense.

The writ should be granted.

Respectfully submitted,

In San Juan, Puerto Rico, this 17th of August 2021.

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XI. APPENDIX

APPENDIX A

Court of Appeals' Judgment April 16, 2021

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13747
Non-Argument Calendar

D.C. Docket No. 4:19-cv-00305-WTM-CLR

LILLIAN J. CUADRADO-CONCEPCION,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(April 16, 2021)

Before ROSENBAUM, JILL PRYOR, and LUCK, Circuit Judges.

PER CURIAM:

Lillian Cuadrado-Concepcion ("Cuadrado") appeals the dismissal of her complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Her complaint alleged negligence claims against the United States under the Federal Tort Claims Act ("FTCA"), based on the failure to protect her from her husband, a U.S. Army servicemember, when he returned a "changed man" from a tour in Iraq. The government moved to dismiss the complaint based on the discretionary-function and intentional-tort exceptions to the FTCA's waiver of sovereign immunity, and the district court granted that motion. On appeal, Cuadrado argues that these exceptions do not apply here because she alleged the existence of a "special relationship" between her and the Army and that the district court improperly shifted the burden to her to prove that the exceptions did not apply. After careful review, we affirm the dismissal of Cuadrado's complaint.

I.

We take the following facts from Cuadrado's complaint, accepting them as true for purposes of this appeal. In April 2009, Cuadrado married Juan A. Guzmán, Jr., an enlisted member in the U.S. Army. Later that year, Guzmán was deployed to Iraq. He returned the next year a "changed man." Before, Guzmán had been a "gentleman," respectful and romantic. Upon his return, Guzmán was disrespectful, aggressive, and violent.

On January 5, 2011, Cuadrado notified her husband's Army superior, Captain Humphrey, that she was concerned about her husband's behavior and her own safety. The Army referred them to marriage counseling and had Guzmán receive psychiatric evaluation and treatment.

The counseling sessions did nothing to improve matters. During a session on February 11, 2011, Guzmán abruptly left when Cuadrado raised concerns about his alcohol abuse, anger, and emotional instability. After Guzmán left, Cuadrado told the counselor that she feared her husband's reaction when she returned home, and that he often looked at her as "the enemy." In other counseling sessions, her husband "displayed unexplained anger." And at home, he threatened to kill her if she kept disclosing details about their home life.

On April 13, 2011, Cuadrado called the police on her husband, who appeared to be having a bad reaction to his medications. The police took her husband to a hospital, but an Army officer, First Lieutenant Burch, intervened and took him back to the base. A few days later, Cuadrado again called the police on her husband after he raised his fist and threatened to punch her. He was arrested for simple assault.

After her husband's arrest, Burch appeared at Cuadrado's home and insisted that she bail out her husband and drop the charges. Burch assured her that the Army would take care of Guzmán, that he would not return to the home until he was stable,

and that she should not be afraid. No military protection order was issued at that time, however, nor were other safety measures taken.

On June 10, 2011, Cuadrado was raped by Guzmán. Soon after, she notified the Army marriage counselor, who took no action.

Guzmán's aggressive and threatening conduct continued unabated. On August 29, 2011, after Guzmán had threatened her, Cuadrado contacted an Army victim advocate, who helped her to refer her husband's threats to the commander and to request a military protection order, which issued on August 30, 2011. Guzmán then violated the military protection order multiple times, despite assurances from the Army that it would take care of the situation. Scared and frustrated with the Army's failure to protect her, Cuadrado also obtained a family-violence protection order from a civil court on September 27, 2011. Guzmán violated both protection orders on October 21, 2011, when an Army chaplain contacted her on her husband's behalf. Guzmán was arrested, and he was eventually convicted of disorderly conduct. Cuadrado later separated from Guzmán and divorced him.

II.

Cuadrado filed this lawsuit under the FTCA, alleging that the United States was liable for the Army's failure to act on her complaints of verbal and physical

abuse and to protect her from her husband.[1] She claimed that, as a result of the Army's acts and omissions, she had suffered physical injuries and severe emotional distress, including post-traumatic stress disorder, major depressive disorder, battered spouse syndrome, and a voice disorder.

The government moved to dismiss Cuadrado's complaint for lack of subject-matter jurisdiction under the FTCA's discretionary-function and intentional-tort exceptions. Cuadrado responded that these exceptions did not apply, relying on the "Georgia doctrine of special relationship."

The district court granted the government's motion to dismiss. The court explained that Cuadrado's claims were all based on the same conduct: "the Army's negligent handling of her complaints regarding [Guzmán's] conduct and threats against Plaintiff, the failure to act promptly to the complaints made by Plaintiff, and the failure to supervise [Guzmán]."

Applying the two-part test for the discretionary-function exception, the district court first found that Cuadrado had failed to show that the challenged conduct was a result of a failure to comply with a statute, regulation, or policy. So, the court found that the challenged conduct involved the exercise of discretion or judgment. Turning to the second part of the test, the court concluded that such judgment was

[1] In Count 4 of the complaint, Cuadrado also alleged that an Army chaplain violated the protection orders by contacting her on her husband's behalf. But Cuadrado states that she "agree[s] with the [d]istrict [c]ourt as to the dismissal of Count 4," so we do not address this claim further.

of the kind that the exception was designed to shield. The court elaborated that "[t]he decision of whether, and how, to protect a victim necessarily involves numerous policy considerations including resources, the seriousness of the allegations, and the soldier's privacy and rights, among others." So too did the determination of "whether, and how, to supervise or monitor a soldier returning from deployment and how to handle a reported domestic violence situation."

As for Cuadrado's reliance on the "special relationship" doctrine, the district court found that it did not alter the analysis because there was no promise of "specific action that depart[ed] from later discretionary decisions." Rather, in the court's view, the Army made general promises to protect her and to monitor Guzmán, so its discharge of any special duty still involved judgments grounded in public policy.

Additionally, the district court concluded that Cuadrado's claims were independently barred by the intentional-tort exception. The court found that her claims arose out of an assault or battery by Guzmán and were related to her husband's employment relationship with the Army, despite Cuadrado's claim of a special duty unrelated to Guzmán's employment status. Cuadrado now appeals.

III.

"In reviewing the district court's dismissal of [Cuadrado's] complaint, we accept the allegations in the complaint as true, and we review *de novo* the district court's application of the discretionary-function exception to the FTCA's waiver of

sovereign immunity." *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1156–57 (11th Cir. 2020). We likewise review *de novo* the application of the intentional-tort exception to the FTCA. *Alvarez v. United States*, 862 F.3d 1297, 1301 (11th Cir. 2017).

As a sovereign entity, the United States is immune from suit unless it consents to be sued. *Zelaya v. United States*, 781 F.3d 1315, 1321 (11th Cir. 2015). In general, through the FTCA, Congress has waived "sovereign immunity from suit in federal courts for its employees' negligence." *Foster Logging*, 973 F.3d at 1157; *see* 28 U.S.C. § 1346(b)(1).

"Congress, however, has carved out certain exceptions to that limited waiver, including the discretionary-function exception in 28 U.S.C. § 2680(a)." *Foster Logging*, 973 F.3d at 1157. Section 2680(a) provides that the government retains its sovereign immunity as to "[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). The 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) (quotation marks omitted).

We apply a two-part test to determine whether challenged conduct falls within the discretionary-function exception. *Douglas v. United States*, 814 F.3d 1268, 1273 (11th Cir. 2016). First, we consider the nature of the conduct at issue and determine whether it is a matter of judgment or choice for the acting employee. *Swafford v. United States*, 839 F.3d 1365, 1370 (11th Cir. 2016). "Challenged conduct is not discretionary when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow because the employee has no rightful option but to adhere to the directive." *Id.* (quotation marks omitted).

Second, "[i]f the conduct involves an element of judgment and is discretionary, the court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* (quotation marks omitted). Because the discretionary-function exception "is designed to prevent judicial second guessing of decisions grounded in social, economic, and political policy," it "protects only governmental actions and decisions based on considerations of public policy." *Id.* (quotation marks omitted). In other words, "[t]he discretionary function exception applies only to conduct that involves the *permissible exercise of policy judgment*." *Id.* (emphasis in *Swafford*) (quotation marks omitted). However, "[t]his inquiry is not concerned with the subjective intent of the government employee or whether he or she actually weighed social, economic, and political policy considerations before acting." *Foster Logging*, 973 F.3d at 1158.

Here, both parts of the discretionary-function test are met. Cuadrado does not identify a statute, regulation, or policy that "specifically prescribes a course of action for an employee to follow," so the district court correctly found that the challenged conduct involved an element of judgment or choice. *See Swafford*, 839 F.3d at 1370. Moreover, Cuadrado does not meaningfully dispute the court's analysis that the challenged conduct involved judgments grounded in considerations of public policy. *See id.* The court observed, and our precedent requires us to agree, that the decision of whether, and how, to protect a victim of domestic violence by a servicemember "necessarily involves numerous policy considerations including resources, the seriousness of the allegations, and the soldier's privacy and rights, among others." *See Ochran v. United States*, 117 F.3d 495, 501 (11th Cir. 1997) (holding that the decision as to "how to protect a victim that has been threatened by a suspected offender is susceptible to policy analysis"); *Cohen v. United States*, 151 F.3d 1338, 1342 (11th Cir. 1998) ("[E]ven if [18 U.S.C.] § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception."). Thus, we conclude that the challenged conduct involved an element of judgment "of the kind that the discretionary function exception was designed to shield." *Swafford*, 839 F.3d at 1370.

In response, Cuadrado maintains that this analysis is irrelevant because, in her view, the discretionary-function exception simply does not apply here. According to Cuadrado, the discretionary-function exception is not applicable because her claim arose from a "special duty" that developed between her and the Army under Georgia law, thereby inducing her reliance on the Army for protection.

But binding precedent forecloses Cuadrado's argument. In *Ochran*, we rejected the argument that "the discretionary function exception does not bar a cause of action alleging negligent failure to protect because [a government employee] voluntarily assumed the duty to protect [the plaintiff], thereby inducing [the plaintiff's] reliance." 117 F.3d at 505. We explained that two requirements must be satisfied for the district court to have jurisdiction: "(1) there must be a state-law duty and (2) the discretionary function exception must not apply." *Id.* "[T]he special relationship theory of liability only serves to create a state-law duty to the plaintiff." *Id.* But "if the discharge of this state-law duty involves judgments grounded in considerations of public policy, the discretionary function exception bars suit against the United States." *Id.*

Here, even assuming Cuadrado established the existence of a special relationship between her and the Army under Georgia law, that "only serves to create a state-law duty to the plaintiff." *Id.* But that alone is not enough because, according

to *Ochran*, the discretionary-function exception still applies "if the discharge of this state-law duty involves judgments grounded in considerations of public policy." *Id.*

Nor do the complaint's allegations plausibly show the voluntary assumption of a specific duty that involved no policy judgments. *See id.* at 506 n.7. In *Ochran*, we noted that, while there may have been a special relationship in that case, there was no "promise to perform specific actions on [the plaintiff's] behalf." *Id.* But we observed that if a government employee had "voluntarily assumed a specific duty that involved no policy judgments" and then negligently failed to follow through, such negligence might be "actionable under the FTCA." *Id.* Here, though, no government employee "voluntarily assum[ed] a specific duty that involved no policy judgments." *Id.* Rather, we agree with the district court that the only duties voluntarily assumed—to take care of her husband, to ensure he would not go back to the home until stable, and to protect her—were general in nature and still involved judgments grounded in considerations of public policy. *See id.*

Finally, Cuadrado argues that the district court erred by requiring her to prove that the discretionary-function exception did not apply. She maintains that this exception is a defense on the merits, not a matter of subject-matter jurisdiction, so the government should bear the burden of proving that it applies.

Again, though, Cuadrado argues against binding precedent. First, we have consistently treated the discretionary-function exception to the FTCA's waiver of

sovereign immunity as a matter affecting the district court's subject-matter jurisdiction. *See Foster Logging*, 973 F.3d at 1167 ("Because the discretionary-function exception applies here, the United States has not unequivocally waived its sovereign immunity, and the district court therefore lacked jurisdiction over Plaintiffs' FTCA claims against Defendant United States."); *Swafford*, 839 F.3d at 1369 ("If the [discretionary-function] exception were to apply to Swafford's claims, we would lack jurisdiction over this action."); *Zelaya*, 781 F.3d at 1322 (11th Cir. 2015) ("[W]hen an exception applies to neutralize what would otherwise be a waiver of immunity, a court will lack subject matter jurisdiction over the action."). Although Cuadrado suggests that our precedent is wrong, she does not identify any Supreme Court decision that "actually abrogate[s] or directly conflict[s] with, as opposed to merely weaken[s]," this precedent. *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009). The Supreme Court's decision in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), does not meet that standard because it involved the FTCA's procedural time limitations, not substantive provisions limiting the scope of the government's sovereign immunity. *See id.* at 407–12 (noting that "most time bars are nonjurisdictional").

Second, and relatedly, we have generally placed the burden on the plaintiff to "prove that the discretionary function exception does not apply" when the government asserts a lack of subject-matter jurisdiction. *OSI, Inc. v. United States*,

285 F.3d 947, 951 (11th Cir. 2002) ("[S]ince the government has asserted lack of subject matter jurisdiction, OSI must prove that the discretionary function exception does not apply to the disposal of the landfill material."); *see also Foster Logging*, 973 F.3d at 1159 ("To survive dismissal, Plaintiffs were required to allege a plausible claim that falls outside the discretionary function exception." (quotation marks omitted)); *Douglas*, 814 F.3d at 1276 ("At the pleading stage, Mr. Douglas must allege a plausible claim that falls outside the discretionary function exception."). In any case, "[t]he allocation of burdens is not significant when the relevant facts are undisputed," which is the case here. *Hughes v. United States*, 110 F.3d 765, 768 n.1 (11th Cir. 1997) (declining to resolve whether "the plaintiff bears the burden of showing that the government's conduct is not protected by the discretionary function exception").

For these reasons, Cuadrado has failed to show that the district court erred in granting the government's motion to dismiss for lack of jurisdiction based on the discretionary-function exception.

IV.

In sum, we affirm the district court's dismissal of Cuadrado's complaint for lack of subject-matter jurisdiction based on the discretionary-function exception to the FTCA's waiver of sovereign immunity. We therefore need not and do not

resolve whether her claims would also be barred by the FTCA's intentional-tort exception.

AFFIRMED.

APPENDIX B

District Court's Opinion August 10, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

LILLIAN J. CUADRADO-CONCEPCIÓN, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	CASE NO. CV419-305

O R D E R

Before the Court are Defendant's Motion to Dismiss for Lack of Subject Matter jurisdiction (Doc. 37) and the parties Consent Motion to Stay (Doc. 38). For the reasons that follow, Defendant's Motion to Dismiss (Doc. 37) is **GRANTED** and parties Consent Motion to Stay (Doc. 38) is **DISMISSED AS MOOT.**

BACKGROUND

The issue in this case is whether Plaintiff's claims properly fall into exceptions with the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2679 et seq. According to the complaint, Plaintiff married her husband, Juan A. Guzmán, Jr. ("JAG, Jr."), an enlisted service member, in 2009. (Doc. 5 at ¶¶ 4-5.) She moved in with him and later in 2009, JAG, Jr. was deployed to Iraq. (Id. at ¶¶ 7; 11.) Plaintiff claims that when JAG, Jr. returned from deployment, he demonstrated changes in his behavior including an alcohol addiction, disrespectfulness,

aggression, unresponsiveness, and other behaviors. (Id. at ¶ 14.) During 2010 and 2011, Plaintiff notified the Army of her husband's problems and requested help, however, on or about January 4, 2011, JAG, Jr. left their home and moved to the base unexpectedly. (Id. at ¶¶ 16, 17.) Plaintiff notified her husband's superior, CPT Humphrey, of her concerns about her safety and her husband's behavior and the Army referred them to marriage counseling. (Id. at ¶¶ 18, 19.) At some point, JAG, Jr. received psychiatric evaluation and treatment. (Id. at ¶ 19.) During one marital counseling session, JAG, Jr. walked out of the session and Plaintiff informed the therapist that she was afraid of how her husband would respond to her when she got home. (Doc. 5 at ¶ 22.) Plaintiff alleged that JAG, Jr. displayed anger at the counseling sessions and the Army noticed the anger or should have noticed the anger. (Id. at ¶ 23.) Plaintiff also alleged that her husband was angry at her at home and threatened her life for disclosing their home life in their counseling sessions. (Id. at ¶ 24.)

On April 13, 2011, Plaintiff called Savannah-Chatham Metropolitan Police because her husband appeared to be having a bad reaction to his medications. (Id. at ¶ 27.) He was transported by the police to a hospital where the Army intervened and further transported him to the base. (Id. at ¶¶ 29, 30.) Then, on April 16, 2011, Plaintiff called the police

because JAG, Jr. became hostile towards her for no reason, raised his fist to her and threatened to punch her in the throat. (Id. at ¶ 31.) JAG, Jr. admitted to the police that he had threatened his wife, he used medication, he was in the Army, he had been deployed to the Middle East and he was being treated for Post-Traumatic Stress Disorder ("PTSD"). (Id. at ¶ 32.) JAG, Jr. was arrested on that date for simple assault. (Id. at ¶ 33.)

After he was arrested, 1LT Burch came to Plaintiff's home and asked her to bail JAG, Jr. out of jail and requested she drop the charges. (Id. at ¶¶ 34; 38.) No military protection order was issued at the time, or other safety measures, and Plaintiff trusted Burch's representations that the Army would care for JAG, Jr. and that he would not return to their home until he was stable. (Id. at ¶¶ 35-37.) Plaintiff complied. (Id. at ¶ 38.) On or about June 10, 2011, Plaintiff was raped by JAG, Jr. and she notified the Army marriage counselor of the rape on or about June 13, 2011. (Id. at ¶¶ 39, 40.) The Army counselor took no action upon report of the rape. (Id. at ¶ 42.) Plaintiff notified the Installation Victim Advocate of her husband's verbal threats of violence on August 29, 2011. (Doc. 5 at ¶ 43.)

On August 30, 2011, a military protection order ("MPO") was issued for Plaintiff's safety and well being and was effective until December 1, 2011. (Id. at ¶ 45.) However, JAG, Jr. violated the MPO by contacting her numerous times by telephone.

(Id. at ¶ 46.) Plaintiff contacted Army Victim Advocate Ochoa, who in turn contacted CPT Byerly, regarding the MPO violations and Ochoa assured Plaintiff that the situation would be taken care of. (Id. at ¶ 47.) However, on the same day, JAG, Jr. came to their home. (Id. at ¶ 49.) Plaintiff called the police about her husband's presence at the home but was informed that they could not enforce the MPO. (Id. at ¶ 50.) Plaintiff then sought and received a family violence protective order from the Superior Court of Chatham County on September 27, 2011. (Doc. 5 at ¶ 51.) On October 21, 2011, JAG, Jr. violated the MPO and the family violence protective order by contacting her through a third party, Tony Turbin, an Army chaplain. (Id. at ¶¶ 52-53.) Plaintiff notified the police and JAG, Jr. was arrested. Plaintiff and JAG, Jr. ultimately divorced in 2015. (Id. at ¶ 60.)

Plaintiff filed this action against Defendant the United States of America ("the Government") alleging that the Government breached its duty to protect Army dependents, that the Government was negligent in handling her complaints about JAG, Jr., the Government negligently supervised JAG, Jr., and negligently inflicted emotional distress. (Doc. 5 at 9-12.) Plaintiff alleges that she suffers multiple damages as a result of the acts and omissions by the Government, including conversion reaction with motor symptoms, PTSD, Major Depressive

Disorder, Battered Spouse Syndrome, and Severe Voice disorder secondary to partial bilateral vocal cord paralysis. (Id. at ¶ 61.)

STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction challenges the authority of the court to hear and decide the case before it. Attacks on subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) come in two forms: "facial attacks" and "factual attacks." Murphy v. Sec'y, U.S. Dep't of Army, 769 F. App'x 779, 781 (11th Cir. 2019) (citing Morrison v. Amway Corp., 323 F.3d 920, 924 n.5 (11th Cir. 2003)). A facial attack on the complaint "requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction." Id. (citing Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980)). A factual attack, on the other hand, "challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." Id. A court is "permitted to look beyond the pleadings to evaluate the merits of the jurisdictional claims, despite the existence of disputed material facts." Glob. Aerospace, Inc. v. Platinum Jet Mgmt., LLC, 488 F. App'x 338, 340 n.2 (11th Cir. 2012) (citing Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990)). In the instant

case, the Government challenges the Court's subject matter jurisdiction without disputing any of the alleged facts in the Complaint and without raising matters outside of the pleadings. Therefore, the Government has brought a facial attack on subject matter jurisdiction, and, accordingly, the Court will consider the allegations of the Complaint as true for purposes of deciding this issue. See Lawrence, 919 F.2d at 1529. A court must dismiss an action if it determines at any time that it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3). The burden of proof on a motion to dismiss for lack of subject-matter jurisdiction is on the party asserting jurisdiction. Murphy, 769 F. App'x at 782.

ANALYSIS

In its motion to dismiss, the Government argues that some of the FTCA's exceptions, namely the discretionary-function and intentional-tort exceptions, apply and that, because the Government retains its sovereign immunity, most of Plaintiff's claims must be dismissed for lack of subject matter jurisdiction. (Doc. 37 at 6.) Further, the Government argues that Plaintiff's fourth claim is also barred by the Government's sovereign immunity because there is no analogous private party liability under state law. (Id.)

I. THE DISCRETIONARY-FUNCTION EXCEPTION TO THE FTCA AND ITS APPLICATION TO COUNTS 1, 2, 3, AND 5

The FTCA waives the United States' sovereign immunity from suit in federal courts for its employees' negligence. See 28 U.S.C. § 1346(b). However, the discretionary function exception provides that the United States' sovereign immunity is not waived as to "[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). The discretionary-function exception is applied by answering two questions. " 'First, we consider the nature of the conduct and determine whether it involves 'an element of judgment or choice.' " Douglas v. United States, 814 F.3d 1268, 1273 (11th Cir. 2016) (quoting Ochran v. United States, 117 F.3d 495, 499 (11th Cir. 1997)). "[C]onduct does not involve an element of judgment or choice, and thus is not discretionary, 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." Id. (internal quotation marks and citations omitted). " 'Second, if the conduct at issue involves the exercise of judgment, we must determine whether that judgment is grounded in considerations of public policy.' " Id. (quoting Ochran, 117 F.3d at 499).

Plaintiff's first cause of action, the Government's breach of the duty to protect Army dependents, is based upon a "special relationship" between Plaintiff and the Government and is premised on the Army's handling of her complaints of JAG, Jr.'s actions, specifically the Army's referral to marital counseling, the services at the Installation Victim Advocate, the issuance of the MPO, and Burch's assurances about the Army's handling of JAG, Jr. (Doc. 5 at 9.) Plaintiff states that the Army's knowledge that inaction and/or negligent handling of the situation could lead to harm. (Id.) Plaintiff's second, third, and fifth counts are based on the same conduct: the Army's negligent handling of her complaints regarding JAG, Jr.'s conduct and threats against Plaintiff, the failure to act promptly to the complaints made by Plaintiff, and the failure to supervise JAG, Jr. (Id. at 10-11.)

In its motion, the Government first argues that Plaintiff fails to demonstrate that the conduct complained of was a result of failure to comply with a federal statute, regulation, or policy. (Doc. 37 at 8.) The Court agrees that Plaintiff has not met her burden on this point. Plaintiff cites to no statute, regulation, or policy that mandated certain actions be taken by the Army after a domestic violence situation was reported. In the absence of such evidence, the Court finds that the

challenged actions were discretionary. Swafford v. United States, 839 F.3d 1365, 1370 (11th Cir. 2016).

The Court must now consider whether that judgment is grounded in considerations of public policy. Id.; Mesa v. United States, 123 F.3d 1435, 1438 (11th Cir. 1997). "The exception is designed to prevent judicial second guessing of decisions grounded in social, economic, and political policy." Swafford, 839 F.3d at 1370 (internal quotation marks and citations omitted). The Government argues that the decisions and choices that the Army made, by and through its agents, are based on or at least susceptible to policy considerations. (Doc. 37 at 11.) The Government argues that the decisions the Army took including "Captain Humphrey's decision to refer Guzmán to counseling and psychiatric treatment rather than pursue issuance of a MPO in response to [Plaintiff's] concerns" was "based on competing policy considerations . . . including the seriousness and credibility of the threat, the availability and effectiveness of resources needed to protect the potential victim, the military's course of dealing with the soldier, and the soldier's individual rights." (Id.) The Court agrees. The decision of whether, and how, to protect a victim necessarily involves numerous policy considerations including resources, the seriousness of the allegations, and the soldier's privacy and rights, among others. See Ochran, 117 F.3d at 501 (holding that the AUSA's decisions

on how to provide protection to a victim and whether to inform other components of the Justice Department of a threat to a victim fall within the discretionary function exception); Shuler v. United States, 448 F. Supp. 2d 13, 21 (D.D.C. 2006), aff'd, 531 F.3d 930 (D.C. Cir. 2008); Wilburn v. United States, 616 F. App'x 848, 861 (6th Cir. 2015) ("The government's management of its resources and response to threats invokes policy concerns about soldiers' privacy, discipline, and the safety of the military community."). Plaintiff's other claims, including the claim for negligent supervision of JAG, Jr., also involve policy considerations that the Army must weigh including the need for supervision or treatment and at what level, the seriousness and imminence of the risk posed by the solider, the Army's resources, and the rights of the soldier. All these factors come into play when determining whether, and how, to supervise or monitor a solider returning from deployment and how to handle a reported domestic violence situation.

Plaintiff argues and relies on the "special relationship" between Plaintiff and the Army. The Court acknowledges that many courts have found that where the Government assumes a specific duty—thus engendering detrimental reliance on that promise of specific action—the discretionary-function exception is limited. See Ochran, 117 F.3d at 506 n.7 (suggesting that had the AUSA promised "to perform specific actions on [plaintiff's] behalf,"

then a different result might have been reached in the case due to the voluntary assumption of specific duty that involved no policy judgments); Wilburn, 616 Fed. Appx. at 861 ("But a direct representation by the government to a domestic violence victim that it will take certain action, followed by a failure to take that action, is not subject to the same policy analysis."). However, the Court is not persuaded that such is the case here. Plaintiff contends in her complaint that the Army breached its duty to her and was negligent due to its handling of her complaints of JAG, Jr.'s actions, specifically the Army's referral to marital counseling, the services at the Installation Victim Advocate, the issuance of the MPO, and Burch's assurances about the Army's handling of JAG, Jr. (Doc. 5 at 9.) In her response, Plaintiff focuses on her detrimental reliance on the assertions by Burch that "the Army would take care of her husband, he would not go back to the house until stable, and that she should not be afraid." (Doc. 39 at 3.) None of these statements promise specific action that departs from later discretionary decisions. The only arguable statement Plaintiff could use would be the Army's statement that JAG, Jr. would not return until stable but even this statement does not include a definitive action—e.g. a promise that the Army would confine JAG, Jr. for treatment and he would not be released until cleared. Moreover, "[t]he discretionary function exception still

applies and bars suit against the United States 'if the discharge of this state law duty involves judgments grounded in considerations of public policy.' " Downs v. U.S. Army Corps of Eng'rs, 333 F. App'x 403, 408 (11th Cir. 2009) (quoting Ochran, 117 F.3d at 505). Accordingly, the Court finds that Plaintiff's Counts 1, 2, 3, and 5 must be dismissed due to the FTCA's discretionary-function exception.

II. THE INTENTIONAL-TORT EXCEPTION TO THE FTCA AND ITS APPLICATION TO COUNTS 1, 2, 3, AND 5

Although Counts 1, 2, 3, and 5 are dismissed above, the Court further considers the Government's argument for dismissal under the intentional-tort exception and finds that these counts are likewise barred by this exception. Pursuant to 28 U.S.C. § 2680(h), the government's sovereign immunity is not waived for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." The Government contends that this exception bars Counts 1, 2, 3, and 5 in Plaintiff's complaint because Plaintiff's negligence actions are based upon an underlying claim for an intentional tort. (Doc. 37 at 16.) In response, Plaintiff again argues that the special relationship imposed an independent duty upon the Government and the intentional-tort exception does not apply. (Doc. 39 at 16, 19.)

The Court finds that the intentional-tort exception bars Counts 1, 2, 3, and 5 in Plaintiff's complaint. First, it is clear that, in this circuit, a plaintiff cannot avoid the intentional-tort exception "by recasting a complaint in terms of a negligent failure to prevent assault or battery because § 2680(h) bars any claim 'arising out of' assault or battery." Reed v. U.S. Postal Serv., 288 F. App'x. 638, 639-40 (11th Cir. 2008). Second, despite Plaintiff's argument to the contrary, the Court finds that Sheridan v. United States, 487 U.S. 392, 403, 108 S. Ct. 2449, 2456, 101 L. E. 2d 352 (1988), is inapplicable to this case. "Sheridan stands for the proposition that where the United States would be liable to a plaintiff whether or not the tortfeasor was an employee, the claim is not barred by § 2680(h)." Acosta v. United States, 207 F. Supp. 2d 1365, 1368-69 (S.D. Fla. 2001), aff'd sub nom. Mendoza v. United States, 52 F. App'x 485 (11th Cir. 2002), and aff'd, 52 F. App'x 486 (11th Cir. 2002). In Sheridan, the

> Supreme Court permitted plaintiffs to bring a negligence claim against the United States when the government purportedly had been negligent in failing to prevent an off-duty employee from leaving a government hospital intoxicated and with a loaded weapon. The Court held that, although plaintiff's injuries stemmed from the battery committed by the employee, the negligence claim did not arise out of the battery because the government's duty was independent of any employment relationship between the employee and the government.

Reed, 288 F. App'x at 640. The Supreme Court held that it was "the negligence of other Government employees who allowed a foreseeable assault and battery to occur" that furnished a basis for Government liability that was entirely independent of the tortfeasor's employment status and identified two areas that created that independent liability: (1) the voluntarily adopted regulations that prohibited the possession of firearms on the naval base and required all personnel to report the presence of any such firearm, and (2) the voluntary assumption of providing care to a drunk and incapacitated individual.[1] Sheridan, 487 U.S. at 401, 108 S. Ct. at 2455.

This case, like in Acosta, is not a case where the employment status of the assailant has nothing to do with imposing liability on the Government. Here, Plaintiff alleges that the Government had a duty to protect her and faults the Army's handling of her complaints of JAG, Jr.'s actions, the failure to act promptly to the complaints made by Plaintiff, and the failure to supervise JAG, Jr. (Doc. 5 at 10-11.) Plaintiff relies on the fact that the Government was JAG, Jr.'s employer and had some measure of control over him as such. Thus, like the Eleventh Circuit explained in Reed,

[1] The Supreme Court, however, noted that it was not discussing whether there was a valid state law claim but left it to the discretion of the district court to pass upon whether the complaint stated a cause of action under Maryland law.

> the only basis here for liability to attach to the United States as a result of [Plaintiff's] assailant's actions would be via the employment relationship itself. Were the government aware of the assailant's purportedly violent history, it would only be as a result of the knowledge it gained as his employer and any liability on the part of the government would inure solely because of its status as [] the assailant's employer.

288 F. App'x at 640. Again, as stated, the Government was only aware and made aware by Plaintiff of JAG, Jr.'s actions because of his status as a solider—an employee of the Government. This information arose due to the employment relationship between JAG, Jr. and the Government, not because of an independent duty like that in Sheridan.

Finally, the allegation that there was a special duty undertaken by the Government does not disturb this analysis. Plaintiff bases her "special duty" on Georgia law which requires, by her admission, a situation in which the defendant had control over the third party who injured the plaintiff. (Doc. 39 at 10.) In this case, the only avenue by which Plaintiff's has alleged an ability by the Government to control JAG, Jr. is the employment relationship. Plaintiff brought her concerns and complaints to the Army because they were JAG, Jr.'s superiors and had authority due to the employment relationship to take action against him. Thus, the intentional-tort exception applies and Counts 1, 2, 3, and 5 are barred by the FTCA.

III. COUNT 4 AND THE UNAVILABILITY OF CORRESPONDING PRIVATE PARTY LIABILITY UNDER GEORGIA LAW

In Count 4, Plaintiff claims the Army Chaplain, Tony Turbin, contacted Plaintiff at JAG, Jr.'s request and thereby violated the MPO and the family violence protective order. (Doc. 5 at 4-5.) Plaintiff claims that the Government willingly and willfully allowed such violations. (Id. at 4.) The Government argues that Count 4 of Plaintiff's complaint must be dismissed because it fails to allege a cause of action under Georgia law. (Doc. 37 at 20.) The Government also argues that, even if the count did state a breach of a duty owed to Plaintiff, the claim is due to be dismissed because Plaintiff has failed to allege a physical impact, as required under Georgia law for claims of negligence. (Id. at 22.) In response, Plaintiff includes for the first time a reference to O.C.G.A. § 51-1-6 and § 51-1-8 and argues that the Chaplain's violation of the protective orders constitutes negligence per se. (Doc. 38 at 17.)

First, "[t]he FTCA creates liability for the United States only if the act at issue is a tort in the state where the conduct occurred." Miles v. Naval Aviation Museum Found., Inc., 289 F.3d 715, 722 (11th Cir. 2002). Thus, this Court looks to Georgia law to determine whether Plaintiff's fourth claim is actionable against the Government. See Martin v. United States, No. 16-23042-CIV, 2017 WL 5571573, at *2 (S.D. Fla. Nov. 20,

2017). Plaintiff contends that O.C.G.A. § 51-1-6 and § 51-1-8 provide a cause of action in this case.

O.C.G.A. § 51-1-6 provides that:

> When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.

O.C.G.A. § 51-1-8 provides that the violation of a private duty, which may arise from either a statute or from contractual relations, gives rise to a cause of action. Plaintiff also cites to O.C.G.A. § 16-5-95, a penal statute that criminalizes the violation of a civil family violence order, and contends that there is an open question in Georgia law about whether a penal statute can form an underlying duty that can give rise to liability under O.C.G.A. § 51-1-6 and § 51-1-8. (Doc. 38 at 13.) Plaintiff cites to Reilly v. Alcan Aluminum Corp., 181 F.3d 1206, 1209 (11th Cir. 1999), and the Eleventh Circuit's statement that "Georgia courts thus far have not spoken on the extent to which a plaintiff may identify a state penal statute as the underlying duty that can give rise to liability under §§ 51-1-6 and 8."[2]

[2] In Reilly v. Alcan Aluminum Corp., 221 F.3d 1170, 1171 (11th Cir. 2000), the Georgia Supreme Court answered the certified question and informed the Eleventh Circuit that the General Assembly did not create a civil remedy for age discrimination

In Georgia, "[w]here the breach of a statutory duty can result in criminal liability, the statute is penal in nature and the violation of a penal statute does not automatically give rise to a civil cause of action on the part of one who is [purportedly] injured thereby." Murphy v. Bajjani, 282 Ga. 197, 201, 647 S.E.2d 54, 58 (2007) (internal quotation marks and citation omitted). "[C]ivil liability may be authorized where the legislature has indicated a strong public policy for imposing a civil as well as criminal penalty for violation of a penal statute." Id. "There is no indication that the legislature intended to impose civil liability in addition to the criminal sanctions set forth in a statute where, as here, nothing in the provisions of the statute creates a private cause of action in favor of the victim purportedly harmed by the violation of the penal statute." Murphy, 282 Ga. at 201, 647 S.E.2d at 58. See also Smith v. Chemtura Corp., 297 Ga. App. 287, 294, 676 S.E.2d 756, 763 (Ga. Ct. App. 2009); Jastram v. Williams, 276 Ga. App. 475, 476, 623 S.E.2d 686, 687 (Ga. Ct. App. 2005) ("We find nothing in the language of the statutes or in the criminal statutory scheme that provides a basis to infer that the legislature intended to create an implicit civil cause of action for damages caused by violation of the statutes.").

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under the statute in question, O.C.G.A. § 34-1-2, but only allowed a criminal penalty.

O.C.G.A. § 16-5-95(b) provides that

> A person commits the offense of violating a civil family violence order or criminal family violence order when such person knowingly and in a nonviolent manner violates the terms of such order issued against that person, which:
> (1) Excludes, evicts, or excludes and evicts the person from a residence or household;
> (2) Directs the person to stay away from a residence, workplace, or school;
> (3) Restrains the person from approaching within a specified distance of another person; or
> (4) Restricts the person from having any contact, direct or indirect, by telephone, pager, facsimile, e-mail, or any other means of communication with another person, except as specified in such order.

Any person convicted of a violation of subsection (b) is guilty of a misdemeanor. O.C.G.A. § 16-5-95(c).

The Court finds that, in absence of Georgia law to the contrary, O.C.G.A. § 16-5-95 does not provide a private right of action. Nothing in the text of the statute indicates the General Assembly's intent to create a private right of action. The Court finds support in this conclusion in Troncalli v. Jones, 237 Ga. App. 10, 12, 514 S.E.2d 478, 481 (Ga. Ct. App. 1999), in which the Georgia Court of Appeals held that O.C.G.A. § 16-5-90, a criminal stalking statute in the same statutory framework as O.C.G.A. § 16-5-95, does not contain a private cause of action. Thus, the Court finds that O.C.G.A. § 16-5-95 does not create a civil cause of action and Plaintiff's fourth count in her complaint is due to be dismissed.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss (Doc. 37) is **GRANTED**. As a result, the parties Consent Motion to Stay (Doc. 38) is **DISMISSED AS MOOT**. Plaintiff's complaint is **DISMISSED WITH PREJUDICE**. The Clerk of Court is **DIRECTED** to close this case.

SO ORDERED this 10th day of August 2020.

WILLIAM T. MOORE, JR., JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA