No. _____

In the Supreme Court of the United States

Steven Craig Patty,
Petitioner,

v.

United States of America,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the discretionary function exception to the Federal Torts Claims Act properly applies to insulate the Government from liability when a federally deputized, municipal law enforcement official commandeers a private citizen's truck for a Justice Department operation and neglects to inform the owner or otherwise to obtain his consent for the use of the truck?

PARTIES TO THE PROCEEDING

As reflected in the Caption, the only parties to this suit are Steven Craig Patty and the United States Government. Therefore, no corporate disclosure statement is required pursuant to Rules 14.1(a) and 29.6.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

RULES

PETITION FOR A WRIT OF CERTIORARI

Steven Craig Patty respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATIONS BELOW

The district court's decision granting the Government's Motion for Summary Judgment on the basis of the discretionary function exception of the Federal Torts Claims Act ["FTCA"] is reported only at *Patty v. United States*, No. CIV.A.H-13-3173, 2015 WL 1893584, at *1 (S.D. Tex. Apr. 27, 2015). The Fifth Circuit's per curiam affirmance is unpublished, but available at 633 F. App'x 238 (5th Cir. 2016).

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1346(b). The Fifth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. Its summary affirmance, judgment and mandate were issued on February 5, 2016. This Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Two sections of the Federal Tort Claims Act are at issue in this case: (a) The "rule" that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C.A. § 2674; and (b) the

"exception" precluding liability for a "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 the discretion involved be abused." 28 U.S.C.A. § 2680(a).

STATEMENT OF THE CASE

The facts of this case are straight out of a Hollywood movie, and, yet, are completely true and undisputed. They are laid out with reasonable objectivity in the district court's opinion. 2015 WL 1893584.

Craig Patty is a completely innocent, unknowing, private citizen. In 2011, he bought two tractor trailer trucks to go into business for himself. Patty was completely unaware that the man named Chapa, whom he hired to drive the second of his two trucks, was secretly working as a "confidential informant" for the Justice Department's DEA. His "handler" was a federally deputized Houston Police corporal named Villasana. Unbeknownst to Patty, Villasana got Chapa to drive Patty's truck to the Mexican border, load it with illegal drugs, and then drive back to Houston for a DEA "controlled delivery" sting operation. The Mexican bandito targets of the operation outwitted the DEA, killed Chapa, and riddled Patty's red truck with bullet holes. The Government refused to pay for the damage to Patty's truck or the damages to his person or his business as a result of this operation.

The threshold question in FTCA "discretionary function" cases is whether there was a governmental policy in play. There was. Villasana acknowledged in sworn testimony that the DEA's official policy was to obtain a vehicle owner's consent before using their property. Villasana also admitted that he knew Chapa was lying to Patty about the whereabouts of his truck, and that he could have easily identified Patty's identity and obtained his consent to use his property. But he did not follow this policy because he "didn't see the necessity of it."

Patty filed a pro se administrative claim under the FTCA which was left unaddressed for the statutory period. When he brought suit, the Government defended on the basis of the "discretionary function" exception. The district court granted summary judgment, and the Fifth Circuit affirmed in a one sentence per curiam.

REASONS FOR GRANTING CERTIORARI

Separate and apart from the fact that the result in the courts below is a complete miscarriage of justice, the implications of the lower courts' broad wielding of the "discretionary function" exception is to eviscerate the "rule," and ergo the purposes of Congress in enacting the FTCA in the first place. IF this case is truly the law, then law enforcement officials can seize the personal property of any citizen in America and the Government can escape liability simply by claiming that it has "discretion" to fight crime. In other words, the ends justify the means no matter the consequences suffered by innocent

civilians. This simply cannot be the law in a Republic purportedly controlled by a Constitution and system of Government that was expressly designed to protect its citizens from abusive Government practices.

Whether the discretionary function exception was meant to have such broad reaching applications is, thus, an "important question of federal law that has not been, but should be, settled by this Court," within the purview of Rule 10(c).

More importantly, the lower courts' interpretation and application of the discretionary function exception conflicts with the decisions of this Court in *United States v. Gaubert*, 499 U.S. 315 (1991) and *Berkovitz by Berkovitz v. United States*, 486 U.S. 531 (1988).

In *Gaubert,* this Court explained that "purpose of the exception is 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,'" and, thus, held that "the exception 'protects only governmental actions and decisions based on considerations of public policy.'" *Id*. at 323. It established the following two-pronged test for applicability of the exception: (1) there must be an element of discretionary judgment or choice; that (2) is based on considerations of public policy. *Gaubert, supra*, 499 U.S. at 325.

The first component is derived from *Berkovitz by Berkovitz v. United States*, 486 U.S. 531 (1988). In

that case, the Government argued, much as it does in this case, that "the exception precludes liability for any and all acts arising out of the regulatory programs of the federal agencies." *Id.* at 538. (emphasis added.) A simple substitution of the phrase "undercover law enforcement activities" for the phrase "regulatory programs" demonstrates the nature of the argument that the Government seeks to revive in this case. However, in *Berkovitz,* this Court pointed out that it had previously twice rejected the Government's purported broad reading of the discretionary function exception, and it bluntly chided the Government for trying to expand it once again in the face of those authorities:

> To the extent we have not already put the Government's argument to rest, we do so now. The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.

Id. at 539. This Court should be equally blunt with the Government's echo argument in this case.

In footnote 4 of the *Berkovitz* opinion, the Court cited legislative history in support of this more narrow interpretation of the legislative intent behind the statutory exception, emphasizing again that "Congress intended the discretionary function exception to apply to the *discretionary* acts of regulators, rather than to all regulatory acts." *Id.* at fn 4, citing HR Report.

With this background the *Berkovitz* court focused on the role of public *policy* in the analysis, observing that "the discretionary function exception will not apply when a federal statute, regulation, **or policy** specifically prescribes a course of action for an employee to follow." *Id.* at 536 (Emphasis added). The record in this case shows that the DEA did have a policy that "if we're going to use somebody else's vehicle, we have to have permission." It is, again, undisputed that Corporal Villasana knew this policy existed. He just chose not to follow it because he did not see the "necessity" of doing so. Thus, the first prong could not possibly have been met in this case.

The second prong of *Gaubert* is that the action in question must be "subject to a legitimate policy analysis." On this point, the question before the Court is clear: "is there ever any legitimate basis for a federal law enforcement official to knowingly and flagrantly violate the law he has sworn to protect by purposely ignoring or violating the constitutionally protected property rights of innocent private citizens?"

This Court's jurisprudence also makes clear that the question is not whether <u>any</u> species of discretion is involved. To trigger the exception, the discretion must involve considerations of public policy. The *Gaubert* court illustrated it with the following example:

> There 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. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

United States v. Gaubert, 499 U.S. at 325. This focus on liability for torts involving vehicles echoed a similar example from the Court's first major "discretionary functions" opinion following the 1946 enactment of the FTCA: "Uppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.'" *Dalehite v. United States,* 346 U.S. 15, 27-28 (1953).

Applying these examples to the case at bar, it is obvious that if Corporal Villasana merely drove Mr. Patty's truck himself, and collided with another vehicle, then the Government would be fully liable under the FTCA. From that perspective, the whole notion that the Government is immune to tort liability when, instead, Villasana secretly hires Chapa, persuades him to lie to Patty and to use Patty's truck without his permission, and then gets

the driver killed and the truck damaged in a road side shoot out caused by a Government operation gone wrong, is illustrated as unjust and non-sensical.

This Court has not revisited the discretionary function exception in the 25 years since *Gaubert*, although, as noted *infra,* it has declined in two instances to clarify the law in this important area. That brings us to the Circuit split and Rule 10(a).

A series of three circuit court opinions relied upon by the Government have wielded the "discretionary function" exception in a similar manner to the courts below, and, thereby, excluded various law enforcement activities from the ambit of the FTCA. This Court declined review in two of them. *Suter v. United States*, 441 F.3d 306 (4th Cir.), *cert. denied,* 549 U.S. 887 (2006); *Frigard v. United States,* 862 F.2d 201 (9th Cir. 1988), *cert. denied,* 490 U.S. 1098 (1989); *Georgia Cas. & Surety Co. v. United States,* 823 F.2d 260 (8th Cir. 1987).

On the other side of the issue, an example of the circuit split from a court that has faithfully followed this Court's precedents in *Berkovitz* and *Gaubert* is *Limone v. United States,* 579 F.3d 79, 101-102 (1st Cir. 2009), which, when confronted with extreme chicanery by the FBI, wrote that "[v]iewed from 50,000 feet, virtually any action can be characterized as discretionary. But the discretionary function exception requires that an inquiring court focus on the specific conduct at issue. . . . Here, when the FBI's conduct is examined in context, warts and all,

any illusion that the conduct was discretionary is quickly dispelled."

Unlike the plaintiffs in *Limone,* Craig Patty was not framed for murder by the U.S. Government. But, through negligence, if not intent, this innocent citizen's property was taken and his small business was decimated through the palpable neglect of a federally deputized law enforcement official.

CONCLUSION

The predictable, fair and just adjudication of FTCA claims is of monumental importance in this country. It is the only way that Congress has provided to right the wrongs caused by tortious actions of governmental officers.

Although both *Berkovitz* and *Gaubert* clearly state that the discretionary function exception to the rule of liability must be based on situations involving true discretion and genuine public policy concerns, the Government, just as it did before *Berkovitz*, continues to argue for an expansive and unjust application of the exception that is tantamount to swallowing the rule. It is time to end this Court's 25-year silence on the issue. This case presents a unique and compelling opportunity to do just that and present a dangerous, precedent that is clearly at odds with our system of Government and Constitution. We urge the Court to grant certiorari and to right an injustice to a completely innocent citizen.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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