No. 06-_____

IN THE SUPREME COURT OF THE UNITED STATES

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

JEAN-CLAUDE ANDRE
Counsel of Record
Ivey, Smith & Ramirez
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

PETER K. STRIS
Whittier Law School
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141, xt. 460

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QUESTION PRESENTED

Under 28 U.S.C. 2680(c), the Federal Tort Claims Act's waiver of sovereign immunity does not extend to "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The question presented, over which ten circuits are divided six-to-four is:

Whether the term "other law enforcement officer" is limited to officers acting in a tax, excise, or customs capacity.

PARTIES TO THE PROCEEDINGS

Petitioner is Abdus-Shahid M.S. Ali.

Respondents are the Federal Bureau of Prisons (BOP); Harley Lappin (Director of the BOP), R. Wiley (Warden of United States Penitentiary in Atlanta (USP Atlanta)), Daniel Quinones (Inmate Systems Officer at USP Atlanta), and the United States.

R.E. Holt (Director of the Southeast Region of BOP) was originally named as a defendant in the district court but was removed in petitioner's amended complaint, was not an appellee in the court of appeals, and is not a respondent here.

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JURISDICTION

The judgment of the court of appeals was entered on October 19, 2006. On January 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, 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)(1).

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
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> * * * * *
>
> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> > (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
> >
> > (2) the interest of the claimant was not forfeited;
> >
> > (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
> >
> > (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

28 U.S.C. § 2680(c).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the sovereign immunity of the United States with respect to certain tort

suits and renders it liable for injuries caused by the tortious acts of federal employees "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. This "broad waiver of sovereign immunity" is qualified by various exceptions set forth in 28 U.S.C. 2680 – thirteen in all – when applied to certain categories of claims.[1] Smith v. United States, 507 U.S. 197, 206-07 (1993). If one of the exceptions applies, the bar of sovereign immunity remains. The subsection at issue in this case is Section 2680(c), which reserves sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."[2]

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[1] For example, there are exceptions for claims involving the mishandling of mail (Section 2680(b)), the imposition or establishment of a quarantine (Section 2680(f)), damages caused by the fiscal operations of the Treasury or by regulation of the monetary system (Section 2680(i)), the combatant activities of the military (Section 2680(j)), the activities of the Tennessee Valley Authority or the Panama Canal Company (Section 2680(*l*) and (m)), and the activities of federal land banks (Section 2680(n)).

[2] Prior to 2000, when Congress passed the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, Section 2680(c) provided that the FTCA does not apply to a claim arising out of the detention of "any goods or merchandise." 28 U.S.C. 2680(c) (1994). CAFRA struck from Section 2680(c) the words "any goods or

2. Petitioner is a prisoner in the custody of the United States Bureau of Prisons (BOP). He currently is incarcerated at United States Penitentiary Big Sandy (USP Big Sandy) in Inez, Kentucky, to which he was transferred on December 3, 2003, after spending twenty-eight months at United States Penitentiary Atlanta (USP Atlanta). App., infra, 9a.

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merchandise" and inserted "any goods, merchandise, or other property" in their stead. CAFRA § 3(a)(1), 114 Stat. at 211. CAFRA also added at the end of Section 2680(c) an exception to the exception, which clarified that the United States' immunity is waived for:

> any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

28 U.S.C. 2680(c).

Before being transferred, petitioner put his property in two duffel bags and brought them to USP Atlanta's Receiving and Discharge Unit (R&D Unit), where the property was to be inventoried, packaged, and sent to USP Big Sandy. See BOP Program Statement No. 5800.12, Receiving and Discharge Manual, Ch. 4 (Dec. 31, 1997) <http://www.bop.gov/policy/progstat/5800_012.pdf>. The officer in charge, respondent Daniel Quinones, told petitioner to leave his property with him at the R&D Unit and that he would "get to it in a day or so and ship everything to USP Big Sandy." App., infra, 9a. Petitioner complied. He closed and locked the two duffle bags and left them in the R&D Unit with respondent Quinones. He was not present when his items finally were inventoried, packaged, and shipped to USP Big Sandy on or about December 8, 2003. Id. at 9a-10a.

When petitioner's duffle bags were returned to him at USP Big Sandy's R&D Unit, he noticed that several religious and personal items were missing and so informed the R&D staff.[3] Staff members told him "to sign for what he got because that was all that they had been sent." Id. at 10a. Petitioner was also "informed that if some of his property

[3] The district court provided a specific list of items missing from petitioner's property at App., infra, 10a-11a.

was missing then he should file a Federal tar [sic] claim" and was given the standard Form 95 for property claims. Ibid. Petitioner did as he was told. He signed for his property and recorded the missing items. He also reviewed the inventory slip filled out by respondent Quinones at USP Atlanta and discovered that the missing property was never inventoried in Atlanta. Ibid.

3. Petitioner filed an administrative tort claim with the BOP's Southeast Regional Office Director on December 30, 2003, to recover the value of his missing items. On August 11, 2004, he received a letter from the Southeast Regional Office, stating that his administrative tort claim was denied. Id. at 12a-13a.[4]

4. On October 12, 2004, petitioner filed this action alleging that respondents were liable under the FTCA for the loss of his property.[5] Id. at 8a, 13a. The district

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[4] Respondents have conceded that petitioner exhausted his FTCA administrative remedies. App., infra, 18a.

[5] Petitioner also brought claims alleging that respondents violated his rights under (1) the Religious Freedom Restoration Act of 1995, 42 U.S.C. 2000bb et seq.; (2) the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc et seq.; and (3) the First, Fourth, and Fifth Amendments to the United States Constitution. App., infra, 2a, 8a & n.1, 13a.

The district court dismissed these claims without prejudice on the basis that petitioner failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act. Id. at 17a. The court of appeals

court dismissed petitioner's FTCA claim with prejudice for lack of subject matter jurisdiction. It held that "the [Bureau of Prisons] and USP-Atlanta employees had detained [his] property within the meaning of 28 U.S.C. § 2680(c)," and, therefore, his FTCA "claim against the United States was not authorized by the FTCA," because it "is barred by the doctrine of sovereign immunity and must be dismissed for lack of subject matter jurisdiction." Id. at 16a-17a.

5. The court of appeals affirmed the dismissal of this claim. Id. at 2a-4a. The court held that "the officers who handled [petitioner's] property fall within the [detention of goods] exception found in 28 U.S.C. § 2680(c)" and that the district court properly dismissed petitioner's FTCA claim "for want of subject matter jurisdiction." Id. at 4a-5a. In so holding, the court followed its prior decision in Schlaebitz v. United States Department of Justice, 924 F.2d 193, 195 (CA11 1991) (per curiam), in which the court held that United States Marshals, who were allegedly negligent in releasing a

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vacated the dismissal of and remanded the claims for further proceedings. Id. at 5a-7a. These claims will not be before this Court if certiorari is granted. Nor will they affect the issue before the Court or be affected by any decision on the question presented. As explained infra (at 25-26), this is a case where the interlocutory status of petitioner's other claims should have no bearing on this Court's decision whether to grant certiorari.

parolee's luggage to a third party, were "law-enforcement officers" under Section 2680(c) and consequently immune. Id. at 4a. In that case, the Eleventh Circuit expressly refused to "construe the phrase 'or any other law enforcement officer' as supplementing the tax and customs context of the exception," such that the exception would be limited to "other officials assisting the customs or tax collection." Schlaebitz, 924 F.2d at 194. Instead, the court found persuasive the holdings of other courts of appeals – holdings with which four courts of appeals now disagree – that the term "'other law enforcement officer' may include officers in other agencies performing their proper duties" that involve detaining, storing, or handling a person's property even if there is no nexus to customs or tax enforcement. Id. at 194–95 (citing cases involving the Immigration and Naturalization Service (INS), the Drug Enforcement Agency (DEA), the United States Department of Agriculture (USDA), and the United States Marshals and Federal Bureau of Investigation (FBI)).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for a writ of certiorari and decide whether the term "other law enforcement officer" in 28 U.S.C. 2680(c) is a narrow exception defined by its specific context and extending to

only the detention of property by officers acting in tax, excise, and customs capacities or, instead, a broad exception that preserves sovereign immunity for claims arising out of the detention of property by all federal law enforcement officers acting in any capacity. As at least six courts of appeals have explicitly acknowledged, the circuits are divided on this very question. See Andrews v. United States, 441 F.3d 220, 227–28 (CA4 2006); Bramwell v. United States Bureau of Prisons, 348 F.3d 804, 808 (CA9 2003), cert. denied, 543 U.S. 811 (2004); Ortloff v. United States, 335 F.3d 652, 659–60 (CA7 2003), cert. denied, 540 U.S. 1225 (2004); United States v. Bein, 214 F.3d 408, 415 (CA3 2000), cert. denied, 534 U.S. 943 (2001); Bazuaye v. United States, 83 F.3d 482, 483 (CADC 1996); Kurinsky v. United States, 33 F.3d 594, 598 (CA6 1994), cert. denied, 514 U.S. 1082 (1995).[6] This division, which now involves

[6] Commentators have likewise recognized the existence of this conflict. See, e.g., Donald T. Kramer, Construction and Application of Federal Tort Claims Act (FTCA) Exception in 28 U.S.C.A. § 2680(c), Concerning Claims Arising in Respect of Assessment or Collection of Any Tax or Customs Duty, or Detention of Goods or Merchandise by Any Officer of Customs or Excise or Any Other Law Enforcement Officer, 173 A.L.R. Fed. 465 §§ 7a–17 (2001 & 2006 Supp.); Sarah Lahlou-Amine, Comment, The Improper Expansion of Law Enforcement Officers' Immunity Under the Federal Tort Claims Act Detention of Property Provision: Why Immunity Should Not Extend to Bureau of Prisons Officials, 35 Stetson L. Rev. 559, 560, 570–85 (2006).

ten of the thirteen circuits, shows no signs of resolving itself, as it has existed for over a dozen years and continues to widen notwithstanding Congress' modest alterations to Section 2680(c) in 2000.[7] See supra note 2. Resolution of this conflict is warranted in view of the critical interests involved in FTCA litigation, the recurring nature of the question presented, and the need to ensure the FTCA's uniform application.

Over the last four years, the United States repeatedly has asked the Court to delay consideration of the question presented (and the Court has agreed) despite the question's recurring nature and importance because, according to the United States, no circuit adopting the narrow construction of Section 2680(c) (the minority view that petitioner advances and rejected below) had interpreted the statute as amended by CAFRA in 2000. Recently, however, two circuits have explicitly adopted the narrow interpretation of the statute and, in doing so, expressly rejected the United States' argument that the 2000 CAFRA amendments are in any way relevant to the question presented. Accordingly, there is no need to defer review again, and because this case is

[7] The current version of the statute governs the question presented, as the conduct underlying this dispute post-dates CAFRA's August 23, 2000, effective date. See CAFRA § 21, 114 Stat. at 225.

an appropriate vehicle with which to address the question presented, the Court should do so now.

A. The Circuits Are Intractably Divided Six-to-Four on Whether the Term "Other Law Enforcement Officer" in 28 U.S.C. 2680(c) Is Limited to Officers Acting in a Tax, Excise, or Customs Capacity

Section 2680(c) deprives federal courts of jurisdiction to consider "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." While the Court has interpreted Section 2680(c) to apply both to claims for damage to property caused by a detention itself and to claims for damage caused by the "negligent handling or storage" of property, the Court has expressly declined to decide "what kinds of 'law-enforcement officer[s],' other than customs officials, are covered by the exception." Kosak v. United States, 465 U.S. 848, 852 n.6 (1984). The courts of appeals are intractably divided six-to-four on that question.

Four courts of appeals have adopted the narrow interpretation of Section 2680(c) urged by petitioner. The Fourth, Sixth, Seventh and District of Columbia Circuits hold that the term "any other law enforcement officer" is

limited by its context in the statute and applies to only law enforcement officers acting in a customs or excise capacity. See Andrews, 441 F.3d at 224–227 (CA4) (rejecting argument that BOP officers are exempt); Kurinsky, 33 F.3d at 596–598 (CA6) (rejecting argument that FBI agents are exempt); Ortloff, 335 F.3d at 656–660 (CA7) (rejecting argument that BOP officers are exempt); Bazuaye, 83 F.3d at 483–86 (CADC) (rejecting argument that postal inspectors are exempt).

By contrast, the Fifth, Eighth, Ninth, Tenth, Eleventh, and Federal Circuits have endorsed a broad interpretation of Section 2680(c) and extended that exception to law enforcement officers other than those engaged in tax- or customs-related duties. See Halverson v. United States, 972 F.2d 654, 656 (CA5 1992) (per curiam) (INS agents exempt), cert. denied, 507 U.S. 925 (1993); Chapa v. United States Dep't of Justice, 339 F.3d 388, 390 (CA5 2003) (per curiam) (BOP officers exempt); Cheney v. United States, 972 F.2d 247, 248 (CA8 1992) (per curiam) (federal drug enforcement task force agents exempt); United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 397 (CA9 1979) (Federal Aviation Administration (FAA) agents

exempt);[8] Bramwell, 348 F.3d at 806–07 (CA9) (BOP officers exempt); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1491 (CA10) (USDA inspectors exempt), cert. denied, 469 U.S. 825 (1984); Hatten v. White, 275 F.3d 1208, 1210 (CA10 2002) (BOP officers exempt); Schlaebitz, 924 F.2d at 195 (CA11) (United States Marshals and the United States Parole Commission exempt); Ysasi v. Rivkind, 856 F.2d 1520, 1525 (CAFC 1988) (United States Border Patrol agents exempt).[9]

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[8] But see A–Mark, Inc. v. United States Secret Service, 593 F.2d 849, 851 (CA9 1978) (Tang, J., concurring) (arguing "that § 2680(c) should be limited to detentions of goods by law-enforcement officers acting in a customs or tax capacity.").

[9] Of the thirteen circuits, only three (the First, Second, and Third Circuits) have not reached the question presented. Although the Second Circuit's decision in Formula One Motors, Ltd. v. United States, 777 F.2d 822 (1985), and the Third Circuit's decision in Bein are cited frequently by other courts as having held that Section 2680(c) should apply broadly to the activities of all law enforcement officers regardless whether there is a nexus to tax or customs activities, neither court so held. The Second Circuit stated expressly that it was not "determining whether the exemption would apply to searches by law enforcement officers with no relationship to the customs or excise functions." Formula One, 777 F.2d at 823–34; but see id. at 825 (Oakes, J., concurring) (arguing that "those cases applying the exception to law enforcement officers acting out of the excise/customs context to be wrongly decided" and citing the Ninth Circuit's decision in Lockheed as an example of cases wrongly decided). The Third Circuit in Bein, 214 F.3d at 415–16, merely noted that several other courts had interpreted Section 2680(c)'s law enforcement official phrase broadly and then used this observation in dicta to buttress its decision that a

B. The Conflict Among the Circuits Is Untenable

As the United States has repeatedly acknowledged, both the FTCA generally[10] and the exceptions contained in Section 2680 are important.[11] The Section 2680 exceptions mark "'the boundary between Congress' willingness to impose tort liability upon the United States,'" Molzof v. United States, 502 U.S. 301, 311 (1992) (quoting United States v. Varig Airlines, 467 U.S. 797, 808 (1984)), so as to "avoid injustice to those having meritorious claims hitherto barred by sovereign immunity," United States v. Muniz, 374

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plaintiff could not recover damages for negligent handling or loss of property by FBI agents under Federal Rule Criminal Procedure 41(e).

[10] See U.S. Cert. Pet. at 20, Will v. Hallock, 126 S. Ct. 952 (No. 04-1332) ("This Court should grant review to correct the court of appeals' erroneous limitation of this important federal statute."); U.S. Cert. Pet. at 8, United States v. Olson, 546 U.S. 43 (No. 04-759) ("Review by this Court is warranted to * * * address an important and recurring issue that is basic to Congress's limited waiver of sovereign immunity for tort claims based on conduct of federal employees acting within the scope of their employment.")

[11] See, e.g., U.S. Merits Br. at 11, Molzof v. United States, 502 U.S. 301 (No. 90-838) (acknowledging that Section 2680(a) – the so-called discretionary function exception – is an "important exception"); U.S. Cert. Br. at 4, Sheridan v. United States, 487 U.S. 392 (No. 87-626) (acquiescing to review "because the petition presents an important issue" relating to the proper construction of Section 2680(h), which excepts "[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").

U.S. 150, 154 (1963), and the "protect[ion of] certain important governmental functions and prerogatives from disruption * * * 'that would seriously handicap efficient government operation,'" Molzof, 502 U.S. at 311 (quoting Muniz, 374 U.S. at 163).

The deep and long-standing circuit split over the question presented is particularly troubling because of the frequency with which the question recurs, the broad range of claims to which it applies, and the fact that the question is often outcome determinative of plaintiffs' FTCA property claims. In 2006 alone, the question presented was addressed in at least sixteen district court decisions available on Westlaw.[12] Of course, these sixteen library-

[12] See Harding v. United States, No. 04-CV-255-HRW, 2006 WL 3193377, at *4 (E.D. Ky. Nov. 1, 2006); Mendez v. United States, No. 05-1716(NLH), 2006 WL 2990470, at *1-*2 (D.N.J. Oct. 19, 2006); Marlin v. Fontenot, No. CIV A 06-1017-LC, 2006 WL 3313743, at *2 (W.D. La. Oct. 4, 2006); Lester v. United States, No. 5:05-cv-153(DCB)(JCS), 2006 WL 2811249, at *2 (S.D. Miss. Sept. 28, 2006); Lawal v. United States, No. 06-10, 2006 WL 2714442, at *2-*3 (W.D. La. Aug. 9, 2006); Munoz v. Attorney for United States Executive Office, No. 4:03-CV-03-2293, 2006 WL 2246413, at *2 (M.D. Pa. Aug. 4, 2006); Stafford v. Brown, No. 2:05CV00178 SWW/HDY, 2006 WL 2091795, at *3 (E.D. Ark. July 25, 2006); Wynn v. Missouri Highway Patrol, No. 06-0203-CV-W-NKL, 2006 WL 1875411, at *2 (W.D. Mo. June 30, 2006); Gibson v. Sadowski, No. 04-242, 2006 WL 1785563, at *2 (W.D. Pa. June 26, 2006), on reconsideration, 2006 WL 3308442, at *1 (W.D. Pa. Oct 17, 2006); Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL 1662663, at *52-*53 (E.D.N.Y. June 14, 2006); Solis-Alarcon v. United States, 432 F. Supp. 2d 236, 248-51

accessible decisions likely represent but a small fraction of the cases in which the question presented was addressed by district courts. See Margo Schlanger & Denise Liberman, Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse, 75 Mo. K.C. L. Rev. 155, 164–65 (2006) (reporting that "only a small percentage of cases have any library-accessible opinions at all" and that in 2004, only 8.7% of all district court "terminations" – decisions disposing of a case – were available on Westlaw).

The question presented also implicates a plaintiff's ability to seek redress for property offenses committed by all types of federal law enforcement officers,[13] and where

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(D.P.R. 2006); Bruscino v. Pugh, No. 02 CV 02362 LTB PAC, 2006 WL 980580, at *4 (D. Colo. Apr. 11, 2006); Turnbull v. United States, No. 1:05 CV 1818, 2006 WL 1453044, at *2–*3 (W.D. La. Apr. 4, 2006); Smith v. United States, No. Civ. 03-0932(RBK), 2006 WL 231663, at *2–*4 (D.N.J. Jan. 30, 2006); Kimball v. United States, No. Civ.A. 1:04CV188, 2006 WL 722144, at *1–*2 (E.D. Tex. Jan 23, 2006); Parrott v. United States, No. 2:03-CV-0026 RLYWGH, 2006 WL 146626, at *3–*4 (S.D. Ind. Jan. 19, 2006).

[13] Section 2680(c) has already been applied by the courts of appeals in cases involving:

- Border Patrol agents: Ysasi, 856 F.2d at 1525 (CAFC) (exempted)
- BOP officers: Andrews, 441 F.3d at 228 (CA4) (not exempted); Chapa, 339 F.3d at 390) (CA5) (exempted); Ortloff, 335 F.3d at 660 (CA7) (not exempted); Parmelee v. Carlson, 77 F.3d 486 (Table), 1996 WL 64701, at *1 (CA8 1996) (not exempted); Bramwell, 348

Section 2680(c) is applied, it operates as an absolute bar to suit, foreclosing permanently a plaintiff's opportunity to sue. See Frigard v. United States, 862 F.2d 201, 204 (CA9 1988) (per curiam) (noting that unlike an "[o]rdinar[y] * * * case dismissed for lack of subject matter jurisdiction * * * without prejudice so that a plaintiff may reassert his claims in a competent court," cases dismissed under one of the FTCA's exceptions must be

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F.3d at 807 (CA9) (exempted); Hatten, 275 F.3d at 1210 (CA10) (same); App., infra, 4a–5a (CA11) (same)

- DEA/Drug task-force agents: Peak v. United States, 972 F.2d 352 (Table), 1992 WL 182229, at * 1 (CA7 1992) (exempted); Cheney, 972 F.2d at 248 (CA8) (same); United States v. $149,345 United States Currency, 747 F.2d 1278, 1283 (CA9 1984) (same)
- FAA agents: Lockheed, 656 F.2d at 397 (CA9) (exempted)
- FBI agents: Kurinsky, 33 F.3d at 598 (CA6) (not exempted); O'Ferrell v. United States, 253 F.3d 1257, 1271 (CA11 2001) (exempted)
- FDA officials: United States v. 1500 Cases, More or Less, 249 F.2d 382, 384 (CA7 1957) (exempted), rejected as dicta by Ortloff, 335 F.3d at 657 n.5
- INS/Bureau of Citizenship and Immigration Services agents: Halverson, 972 F.2d at 656 (CA5) (exempted); Kyei v. Beebe, 121 Fed. Appx. 689, 691 & n.4 (CA9 2005) (same)
- Postal inspectors: Bazuaye, 83 F.3d at 486 (CADC) (not exempted)
- USDA inspectors: 2,116 Boxes of Boned Beef, 726 F.2d at 1491 (CA10)
- U.S. Marshals: Schlaebitz, 924 F.2d at 195 (CA11) (exempted)

For a comprehensive tabulation of cases – including district court decisions – applying Section 2680(c) to officers other than tax or customs officers, see Kramer, supra, §§ 7a–17.

dismissed with prejudice because "the bar of sovereign immunity is absolute [and] no other court has the power to hear the case"), cert. denied, 490 U.S. 1098 (1989). To this end, the Seventh Circuit observed in Ortloff, 335 F.3d at 659, that an overly broad reading of "any other law enforcement officer" could potentially render much of the FTCA's waiver of sovereign immunity meaningless because it "would swallow up Congress's waiver of immunity, given the potential number of federal law enforcement officials in our modern government's alphabet soup – i.e., the DEA, EPA, FBI, FDA, FTC, INS, OSHA, SEC, or USDA, to name a few."

Rather than allow the lower courts to continue to resolve inconsistently these many cases seeking redress for property torts committed by government officers working in such diverse capacities, the Court should promptly resolve the entrenched conflict among the circuits.

C. The Basis for the United States' Opposition to Past Petitions on the Question Presented Is No Longer Valid

Although this Court has denied review of the question presented seven times since 2003,[14] in none of those cases

[14] See Rigsby v. United States, 543 U.S. 955 (2004); Corbeil v. United States, 543 U.S. 822 (2004); Bramwell, 543 U.S. at 811; Conrod v. Moore, 542 U.S. 905 (2004); Greer v. United States, 541 U.S. 1087 (2004); Ames v. Pontesso, 538 U.S. 1058 (2003); Miller v. United States, 538 U.S. 1036 (2003).

did the United States dispute the recurring nature or importance of the question presented. Nor did the United States dispute the longstanding split among the circuits.[15] Instead, the United States' argument against review of those cases was that CAFRA eliminated the deep and long-standing division among the courts of appeals on the reach of Section 2680(c) immunity. Specifically, the United States argued that the courts of appeals "holding that Section 2680(c) is limited to detentions by an officer acting in a tax, excise, or customs capacity all interpreted the version of Section 2680(c) in effect before Congress amended it" through CAFRA in 2000 and those courts may not "interpret the current version the same way,

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[15] See U.S. BIO at 5 n.3, Rigsby v. United States, 543 U.S. 955 (No. 03-11038) (hereinafter "Rigsby BIO"); U.S. BIO at 5-6, Corbeil v. United States, 543 U.S. 822 (No. 03-9719) (hereinafter "Corbeil BIO"); U.S. BIO at 5-7, Bramwell v. United States Bureau of Prisons, 543 U.S. 811 (No. 03-1519) (hereinafter "Bramwell BIO"); U.S. BIO at 8 n.6, Greer v. United States, 541 U.S. 1087 (No. 03-9002) (hereinafter "Greer BIO"); U.S. BIO at 6-7, Conrod v. Moore, 542 U.S. 905 (No. 03-8804) (hereinafter "Conrod BIO"); U.S. BIO at 5-7, Ames v. Pontesso, 538 U.S. 1058 (No. 02-8538) (hereinafter ("Ames BIO"); U.S. BIO at 5-7, Miller v. United States, 538 U.S. 1036 (No. 02-8505) (hereinafter ("Miller BIO").

because the two versions differ in respects that are relevant to the issue."[16]

The United States' suggestion that CAFRA superseded the courts of appeals' pre-CAFRA Section 2680(c) jurisprudence was misplaced then and would be even more misplaced now. Since this Court last denied review of the question presented in 2004, see Rigsby, 543 U.S. at 955, both courts of appeals urged by the United States to adopt the broad reading of Section 2680(c)'s "any law enforcement officer" phrase have not only refused to do so but also found CAFRA entirely irrelevant to the question presented. See Dahler v. United States, --- F.3d ---, 2007 WL 79697, at *2 (CA7 Jan. 12, 2007) (per curiam) ("[W]e conclude that the new language in § 2680(c) does not affect the meaning of the phrase 'any law enforcement officer.'"); Andrews, 441 F.3d at 226-27 ("The Government also contends that the amendment to § 2680(c) in [CAFRA] compels us to conclude that BOP officers are "law enforcement officer[s]" for purposes of § 2680(c). * * * We disagree.").

The Fourth Circuit in Andrews, 441 F.3d at 227-28, squarely rejected the United States' argument that interpreting "law enforcement officer" to encompass only

[16] Corbeil BIO at 5-6; accord, Bramwell BIO at 6; see also Rigsby BIO at 5-6; Conrod BIO at 10-11; Greer BIO at 9; Ames BIO at 11-13; Miller BIO at 9.

those law enforcement officers acting in a tax or customs capacity would render the CAFRA amendments superfluous "because adequate remedies already existed for property damage claims arising from tax and customs enforcement." According to that court,

> [t]he remedy created by CAFRA is different from the historical remedy against customs and tax officers. To recover against the United States through the historical remedy, a plaintiff must show, inter alia, that the customs or tax officer acted without probable cause. The CAFRA remedy, however, has no such requirement. Instead, if a plaintiff satisfies CAFRA's four-part showing, he only need show that the customs or tax officer acted negligently.

Id. at 228 (comparing 28 U.S.C. 2006 with 28 U.S.C. 2680(c)).[17]

Consistent with this view, the Seventh Circuit in Dahler rejected the United States' invitation to overrule its prior decision in Ortloff, which had adopted the narrow construction of 2680(c)'s "other law enforcement officer" language under the pre-CAFRA version of the statute. Dahler, 2007 WL 79697 at *2 ("In Ortloff * * * we construed the version of § 2680(c) that existed before CAFRA's amendments."). The Seventh Circuit reasoned that "CAFRA

[17] 28 U.S.C. 2006 provides that, in an action brought against a revenue or customs officer for negligent loss of goods, if it is established that the seizure was made with probable cause the judgment may not be executed against the individual officer but "shall be paid out of the proper appropriation by the Treasury."

merely ensures that § 2680(c) does not foreclose claims related to property that has been seized for forfeiture in the enumerated circumstances" and that "[t]he text of CAFRA says nothing about the type of activities in which law enforcement officers must be engaged in order for § 2680(c) to initially apply and thus immunize the government from suit."[18] Ibid.

Even if the United States had been correct in its prior oppositions to certiorari that CAFRA created a jurisprudential tabula rasa on Section 2680(c)'s proper construction, review would still be warranted now over the proper interpretation of the current (i.e., post-CAFRA) version of the statute. Since CAFRA's enactment, six courts of appeals have addressed the question presented under the current version of Section 2680(c) and aligned themselves in a four-to-two split. Indeed, as the United States itself acknowledged in Corbeil and Bramwell, four courts of appeals "ha[ve] addressed the issue under the

[18] These courts likewise found CAFRA's legislative history unhelpful to the United States' position. The Fourth Circuit observed that the phrase "any other law enforcement officer" is "original" to Section 2680(c) and, therefore, "it is the intent of the Congress that enacted the original subsection that controls." Andrews, 441 F.3d at 227 n.8. The Seventh Circuit, which did analyze CAFRA's legislative history, found that "Congress intended the amendment to apply only to forfeitures – not to every detention – of property." Dahler, 2007 WL 79697 at *2.

current [post-CAFRA] version of Section 2680(c) [and] concluded * * * that it extends to detentions by a law enforcement officer acting outside the tax, excise, and customs contexts."[19] Corbeil BIO at 6; Bramwell BIO at 6. The Fourth Circuit and the Seventh Circuit subsequently rejected this line of cases, thereby resolving any doubt that the courts of appeals are presently divided. See Dahler, 2007 WL 797697 at *2 (rejecting Chapa and Bramwell); Andrews, 441 F.3d at 228 (rejecting, inter alia, Chapa, Bramwell, and Hatten).

This conflict will not be resolved absent this Court's intervention, as evidenced by the fact that the two most recent published court of appeals decisions on the issue – by the Fourth Circuit in Andrews and the Seventh Circuit in

[19] The Fifth Circuit in Chapa, 339 F.3d at 390, reaffirmed its pre-CAFRA decision in Halverson, 972 F.2d at 656, extending Section 2680(c) to law enforcement officers acting outside the tax, excise, and customs contexts and applied it to the current version of the statute. Likewise, the Ninth Circuit in Bramwell, 348 F.3d at 807, reaffirmed its pre-CAFRA decision in Lockheed, 656 F.2d at 397, and applied it to the current version of Section 2680(c). In endorsing the broader reading of the current version of Section 2680(c), the Tenth Circuit's post-CAFRA decision in Hatten, 275 F.3d at 1210, relied on the Southern District of Mississippi's decision in Crawford v. United States Dep't of Justice, 123 F. Supp. 2d 1012, 1013 (S.D. Miss. 2000), which had itself relied on the current version of the statute. Finally, the Eleventh Circuit in O'Ferrell, 253 F.3d at 1271, reaffirmed its pre-CAFRA decision in Schlaebitz, 924 F.2d at 194, and applied it to the current version of Section 2680(c).

Dahler – have rejected the majority view and widened the conflict among the circuits. Nor will this Court's decisional process be aided by allowing the issue to percolate further in the courts of appeals. Contrast McCray v. New York, 461 U.S. 961, 962–63 (1983) (Stevens, J., respecting denial of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow" an issue to "receive[] further study" in other courts "before it is addressed by this Court."). The issue has now been vetted by ten of the thirteen courts of appeals (including six post-CAFRA) with multiple thorough decisions explicating both sides of the jurisprudential debate. Compare, e.g., Chapa, 339 F.3d at 390–91, and Bramwell, 348 F.3d at 806–07, with, e.g., Andrews, 441 F.3d at 223–28, and Dahler, 2007 WL 79697 at *1–*3. The only thing that will result from delaying consideration of this issue is waste of litigants' and lower courts' resources as the courts of appeals continue to apply their settled law in divergent ways and as litigants battle for victories in the three circuits where the question presented remains open.[20]

[20] In the last year, the United States has filed at least two Federal Rule of Civil Procedure 59 motions for reconsideration of district court decisions adopting the narrow construction of Section 2680(c). Both of those motions urged reconsideration in light of intervening non-binding precedents because the question presented was not

D. This Case Is an Appropriate Vehicle to Resolve the Conflict Among the Circuits.

In the decision below, the court of appeals conclusively held that petitioner was not entitled to pursue his FTCA claim against the United States because the BOP officers who handled his property were "law enforcement officers" within the meaning of the Section 2680(c) exception.[21] App., infra, 4a-5a. Although petitioner did assert additional claims, the pending status of which render this petition interlocutory,[22] these additional

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resolved by controlling circuit precedent. See U.S. Mot. for Reconsideration at 2-6, Mendez v. United States, No. 05-1716(NLH) (D.N.J. Nov. 2, 2006) (hereinafter "Mendez Reconsideration Mot."); U.S. Mot. for Reconsideration at 2-6, Gibson v. Sadowski, No. 04-242 (W.D. Pa. July 11, 2006).

[21] The United States cannot possibly dispute that the question presented was squarely resolved below. Indeed, the United States has already relied on the court of appeals' decision in this case as persuasive authority on the question presented in another case. See, e.g., Mendez Reconsideration Mot. at 1, 3.

[22] Petitioner is mindful that the interlocutory posture of a case "of itself alone furnishe[s] sufficient ground for the denial" of a petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see also Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition). But interlocutory status is by no means fatal to review of a recurring and important question squarely answered below. Just three weeks ago, the Court granted review in BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C., --- S. Ct. ---, 2007 WL 30546, 75 U.S.L.W. 3106 (U.S. Jan. 5, 2007), notwithstanding the United States' argument that the case "would constitute a poor vehicle for addressing any conflict because it arises in an interlocutory posture,"

claims will not affect the issues before the Court or be affected by any decision of the Court on the question presented. Nothing about the posture of – or the record in – this case would impede the Court from reaching and resolving that frequently recurring and important question, and only this Court can reinstate petitioner's right to seek relief under the FTCA. Put simply, the interlocutory status of this case does not militate against a grant of certiorari.[23]

U.S. BIO at 12–13, BCI Coca–Cola Bottling Co. of Los Angeles v. E.E.O.C., (No. 06–341).

[23] The United States frequently recommends that the Court grant – and the Court often does grant – petitions seeking review of interlocutory decisions presenting questions of law not likely to be sharpened by further proceedings. See, e.g., U.S. Cert. Br. at 10, Osborn v. Haley, 126 S. Ct. 2017 (No. 05–593) (review warranted "on balance" despite interlocutory posture); U.S. Cert. Br. as Amicus Curiae at 17–18, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (No. 92–854) (review warranted despite interlocutory posture because "[t]he issue of law presented in this case is not likely to be sharpened by factual elaboration at trial"); U.S. Cert. Br. as Amicus Curiae at 17 n.23, Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65 (No. 89–1493) (review warranted despite interlocutory posture because "the court of appeals has finally determined the applicable legal standard"). Because the court of appeals conclusively resolved petitioner's FTCA claim, the question presented cannot possibly be sharpened by further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEAN-CLAUDE ANDRE
Counsel of Record
Ivey, Smith & Ramirez
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

PETER K. STRIS
Whittier Law School
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141, xt. 460

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