

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

ARMANDO NIEVES MARTINEZ;  
AMELIA PESQUEIRA ORTEGA, on  
their behalf and on behalf of R.N.P.;  
ARMANDO NIEVES PESQUEIRA,  
*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA,  
*Defendant-Appellee.*

No. 19-16953

D.C. No.  
4:13-cv-00955-  
CKJ-LAB

OPINION

Appeal from the United States District Court  
for the District of Arizona  
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted December 9, 2020  
San Francisco, California

Filed May 11, 2021

Before: William A. Fletcher and Sandra S. Ikuta, Circuit  
Judges, and Karen E. Schreier,\* District Judge.

Opinion by Judge Schreier;  
Dissent by Judge W. Fletcher

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\* The Honorable Karen E. Schreier, United States District Judge for  
the District of South Dakota, sitting by designation

**SUMMARY\*\***

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**Federal Tort Claims Act**

The panel dismissed an appeal for lack of jurisdiction pursuant to the discretionary function exception under the Federal Tort Claims Act (“FTCA”) in a case alleging tort claims against the United States.

Plaintiffs alleged tortious actions by government officials during a criminal investigation related to a border crossing. Plaintiffs’ vehicle was subject to a dog sniff test at a border checkpoint, and border patrol agents used several field test kits to test the windshield wiper fluid for illegal substances. Armando Nieves Martinez and his family were detained due to these tests; and Armando, following his interrogation by border agents, spent forty days in custody. Laboratory tests eventually found no drugs in the vehicle, and the United States moved to dismiss the complaint against Nieves Martinez. Plaintiffs filed suit under the FTCA alleging causes of action for assault, negligence and gross negligence, false imprisonment, and intentional infliction of emotional distress.

The FTCA constitutes a limited waiver of sovereign immunity in certain suits against government employees. The waiver, however, is limited under the discretionary function exception, which prohibits suit in any claim where a government employee’s acts or omissions were in the

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

discretionary function or duty of a federal agency or government employee.

The panel applied a two-step analysis to determine whether the alleged conduct fell within the discretionary function exception.

At step one of the test, the panel held that the border agents' acts were discretionary. Specifically, the panel held that the agents were not subject to a mandatory federal protocol when they used the test kits to test the windshield wiper fluid, and their action was discretionary under the first prong of the discretionary function exception test. The panel further held that there was no mandatory policy or procedure for the dog sniff test. Concerning the agents' interview and detention of plaintiffs, the panel held that the United States did not act unconstitutionally when interviewing, arresting, and subsequently detaining Nieves Martinez. Because Nieves Martinez's detention was based on a valid finding of probable cause and no violation of the Constitution was shown, the district court properly found that the agents' acts were discretionary under the first prong of the test.

At step two of the discretionary function exception test, the panel considered whether the investigative actions involved considerations of social, economic, or political policy. The panel held that, here, the agents were carrying out a criminal investigation when they detained the Nieves family. Because the investigation involved policy judgments at the core of the executive branch, the agents' conduct clearly involved the type of policy judgment protected by the discretionary function exception. The panel held that whether the agents negligently carried out the liquid drug test and dog sniff was immaterial to the analysis under the discretionary

function exception. The panel also held that even though one of the agent's actions may have been negligent and even abusive, the actions were not completely lacking legitimate policy rationale and they were shielded by the discretionary function exception. Because the agents' discretionary judgments involved social, economic, or political considerations, and their actions did not violate Nieves Martinez's constitutional rights, the panel affirmed the district court's discretionary function exception determination as it related to claims arising out of the alleged assault, negligence and gross negligence, and false imprisonment of Nieves Martinez and his family.

The panel held that the discretionary function exception applied to bar the Nieves family's intentional infliction of emotion distress claim because plaintiffs did not have a valid constitutional challenge to the interrogation. The panel held further that the Nieves family's challenge to the district court's judgment as to this claim following the bench trial also failed for another reason: their failure to include key trial testimony.

Judge W. Fletcher dissented, and he would hold that the discretionary function exception was not available as a defense. He would hold that Agent Mendez made a discretionary decision, as part of his criminal investigation, to use a field drug test kit to test the windshield washer fluid in the Nieves' vehicle. The kit specified a mandatory protocol for testing fluids for drugs. Mendez failed to follow the mandatory protocol when he performed Test A, and he failed entirely to perform the mandated Test U. After negligently performing the drug test, Agent Mendez reported erroneously to Agent Casillas that the drug test had detected methamphetamine, and Agent Casillas then arrested Nieves

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Martinez. Nieves Martinez, an innocent man, was imprisoned for forty days based on Mendez's mistake. Because Mendez failed to follow the mandatory protocol of the drug test kit, the discretionary function exception was not available as a defense.

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### COUNSEL

David L. Abney (argued), Ahwatukee Legal Office P.C., Phoenix, Arizona, for Plaintiffs-Appellants.

Dennis C. Bastron (argued), Assistant United States Attorney; Christina M. Cabanillas, Deputy Appellate Chief; Michael Bailey, United States Attorney; United States Attorney's Office, Tucson, Arizona; for Defendant-Appellee.

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