No. 11-10362

In the Supreme Court of the United States

KIM MILLBROOK, PETITIONER

v.

UNITED STATES, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of federal law."

PARTIES TO THE PROCEEDINGS

Petitioner is Kim Millbrook. Respondent is the United States.

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The non-precedential opinion of the United States Court of Appeals for the Third Circuit is reported at 477 Fed. Appx. 4, and reprinted at J.A. 101–104. The unreported opinion of the United States District Court for the Middle District of Pennsylvania is reprinted at J.A. 89–97.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2012. No further rehearing was sought. The petition for a writ of certiorari was filed on May 10, 2012, and was granted on September 25, 2012. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq*. Section 1346(b)(1) of the FTCA provides:

> 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).

Section 2674 of the FTCA provides:

> 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.

28 U.S.C. § 2674.

Section 2680 of the FTCA provides, in relevant part:

> 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.
> >
> > * * *
> >
> > (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative

> or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(a), (h).

STATEMENT

Petitioner Kim Millbrook is an inmate in federal prison. His complaint alleges that he was physically assaulted, sexually abused, and verbally threatened by prison guards. The question presented is whether the FTCA waives sovereign immunity for such serious abuses by law enforcement officers when their conduct takes place outside the context of an arrest, search, or seizure.

1. The FTCA waives the United States' sovereign immunity for monetary claims "for * * * 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," to the extent that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place" where the conduct occurred. 28 U.S.C. § 1346(b)(1); see also 28 U.S.C. § 2674.

This "broad waiver of sovereign immunity" is limited by a series of exceptions set forth in 28 U.S.C. § 2680. *Smith* v. *United States*, 507 U.S. 197, 206–207 (1993). The "intentional-tort exception" at issue in this case is codified at 28 U.S.C. § 2680(h). It exempts from the general waiver of sovereign immunity "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h).

However, the intentional-tort exception is itself cabined by a statutory caveat—often referred to as the "law enforcement proviso"—which waives sovereign immunity for "any claim" of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" arising out of the acts or omissions of federal "investigative or law enforcement officers." *Ibid.* The statute defines "investigative or law enforcement officer" to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

Most federal courts, in accord with the statute's plain language, interpret this proviso to cover any of the enumerated torts committed by a federal law enforcement officer within the scope of his or her employment.[1] The Third Circuit, however—alone among the courts of appeals—holds that the proviso applies only to torts committed by law enforcement officials *in the course of a search, seizure, or arrest*. See *Pooler* v. *United States*, 787 F.2d 868, 872 (3d Cir. 1986). The court below applied

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[1] See, *e.g.*, *Ignacio* v. *United States*, 674 F.3d 252, 254–256 (4th Cir. 2012); *Reynolds* v. *United States*, 549 F.3d 1108, 1114 (7th Cir. 2008); *Sami* v. *United States*, 617 F.2d 755, 764–765 (D.C. Cir. 1979); *Flores-Romero* v. *United States*, No. 07–3269–SAC, 2011 WL 4526771, *3–*5 (D. Kan. Sept. 28, 2011); *King* v. *United States*, No. 2:09CV00163 JMM/HDY, 2010 WL 2710471, *2 (E.D. Ark. May 21, 2010); *Ortiz* v. *Pearson*, 88 F. Supp. 2d 151, 154–155 (S.D.N.Y. 2000); *Harris* v. *United States*, 677 F. Supp. 403, 404–406 (W.D.N.C. 1988); *Crow* v. *United States*, 650 F. Supp. 556, 569–571 (D. Kan. 1987). But see *Orsay* v. *United States Dep't of Justice*, 289 F.3d 1125, 1132–1136 (9th Cir. 2002) (limiting waiver to acts committed by law enforcement officers "in the course of investigative or law enforcement activities"); *Murphy* v. *United States*, 121 F. Supp. 2d 21, 24–25 (D.D.C. 2000) (same); *Employers Ins. of Wausau* v. *United States*, 815 F. Supp. 255, 259 (N.D. Ill. 1993) (same).

this rule to bar Petitioner's claim, and this Court granted certiorari to consider the viability of the Third Circuit's rule.

2. As both the district court and the court of appeals noted, the factual allegations of this case are "troubling." J.A. 96, 104.[2]

Petitioner Kim Millbrook is a prisoner incarcerated in the Special Management Unit at United States Penitentiary Lewisburg (USP Lewisburg). J.A. 10. On March 5, 2010, shortly after being transferred to USP Lewisburg, Millbrook was taken to a basement holding cell by a prison officer. J.A. 11, 35, 71. The officer who had transported Millbrook later returned with two other officers. J.A. 36, 71. Millbrook was placed in restraints and removed from the cell. J.A. 71. One officer placed Millbrook in a choke hold and forced him to his knees. J.A. 11, 36, 72. Millbrook was then forced to perform oral sex on the second officer. *Ibid.* Throughout the incident, the third officer "stood watch" by the door. J.A. 11, 71. The officers warned Millbrook that if he told anyone about the assault, they would kill him. J.A. 36, 72.

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[2] The facts recited here are taken from Millbrook's complaint (J.A. 9–13), his sworn affidavit made to Bureau of Prisons (BOP) investigators and submitted to the district court (J.A. 35–37), and his sworn declaration filed in opposition to the United States' motion to dismiss or, in the alternative, for summary judgment (J.A. 68–75). The district court granted summary judgment in favor of the United States as to all claims. In reviewing a decision granting summary judgment, a court "must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 n.26 (1982). Accordingly, to the extent that the record contains factual disputes, this Court must accept Millbrook's proffered evidence as true for purposes of this appeal.

3. Millbrook filed an administrative tort claim with the BOP, which was denied. J.A. 11. Millbrook's administrative appeals were also denied. *Ibid.*

4. On January 18, 2011, Millbrook filed a *pro se* complaint in the district court against the United States under the FTCA, asserting both negligence and the intentional torts of assault and battery. J.A. 3, 9–13. The United States moved to dismiss the suit or, in the alternative, for summary judgment. J.A. 3–4, 82–88.

The district court granted summary judgment for the United States as to all counts. J.A. 89–97. The court held that Millbrook's intentional tort claims were not actionable because they fell within the FTCA's intentional-tort exception. J.A. 94–96. The court recognized that the correctional officers alleged to have assaulted Millbrook were "law enforcement officers for purposes of the FTCA." J.A. 94. However, it read the Third Circuit's decision in *Pooler* to hold "that § 2680(h) waives the government's sovereign immunity only in those cases in which a law enforcement or investigative officer commits one of the enumerated intentional torts 'while executing a search, seizing evidence, or making an arrest.' " J.A. 94 (quoting *Pooler*, 787 F.2d at 872).

The court concluded that the alleged conduct did not take place in the course of an arrest or a search. J.A. 96. And, citing Third Circuit precedent holding that "seizure for purposes of § 2680(h) refers only to the seizure of evidence," it rejected Millbrook's argument that he had been "seized" when he was placed in restraints and taken

to the basement of the prison. J.A. 95–96 (citing *Pooler*, 787 F.2d at 872).[3]

5. The court of appeals summarily affirmed in a non-precedential, per curiam opinion. J.A. 101–104. Citing *Pooler*, the court stated that "we have limited claims that arise under § 2680(h) to cases in which an intentional tort is committed by a law enforcement or investigative officer while executing a search, seizing evidence, or making arrests for violations of federal law." J.A. 103. It held that Millbrook had not alleged that the officers' "conduct occurred in the course of an arrest * * * or during the course of a search," and that the "seizure" he alleged did not qualify because it was not a "seizure of evidence." J.A. 103–104. Consequently, the court of appeals concluded that, "while the alleged conduct is troubling, Millbrook has not shown that he is entitled to relief under the FTCA." J.A. 104.

SUMMARY OF ARGUMENT

I. Nothing in the text of § 2680(h)'s law enforcement proviso limits its waiver of sovereign immunity to conduct occurring in the course of an arrest, search, or seizure. To the contrary, the statute's plain language expressly extends the waiver to "*any* claim" arising from the commission of one of the enumerated intentional torts by a federal law enforcement officer acting within the scope of his or her employment—without limitation. The subsection's only reference to arrests, searches, or seizures is in a clause defining the statutory term "investigative or law enforcement officers." While that language identifies the class of individuals whose conduct is covered by the pro-

[3] The district court also concluded that Millbrook had not stated an actionable negligence claim because "it is clear that the alleged assault and battery was intentional." J.A. 96–97.

viso, it does not limit the type of conduct which is covered. Had Congress wished to restrict its waiver of sovereign immunity to conduct relating to arrests, searches, or seizures, it easily could have. But it did not.

Moreover, the Third Circuit's unduly narrow reading of the law enforcement proviso would effectively read two of the provision's enumerated torts—malicious prosecution and abuse of process—out of the statute. Both of these offenses typically involve conduct which occurs during the charging decision or after a formal criminal charge has been filed, while arrests, searches, and seizures are pre-indictment activities. It is difficult to imagine how a federal officer could commit either malicious prosecution or abuse of process in the course of carrying out an arrest, search, or seizure. Affirming the Third Circuit's interpretation would thus violate the basic canon that a statute should not be read in a way that would render any of its provisions void or inoperative.

II. While the statute's unambiguous text should be both the beginning and the end of this Court's interpretive inquiry, other tools of statutory construction reinforce its plain language.

The Third Circuit relied heavily on legislative history in restricting the scope of the law enforcement proviso. While it is true that the incidents which appear to have motivated the passage of the proviso involved unlawful searches, the legislative history makes clear that Congress did not intend to limit the scope of § 2680(h)'s waiver to such activities, but rather intended to cover "*any case* in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of federal law." S. Rep. No. 93-588 (1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790 (em-

phasis added). This apparent legislative intent is reflected in the inclusive language of the statute.

This Court's opinion in *Carlson* v. *Green*, 446 U.S. 14 (1980), further confirms petitioner's reading of the statute. The Court presumed that the petitioners in that case—who had brought a *Bivens* action challenging alleged intentional torts by prison officers outside the context of any arrest, search, or seizure—also had an action under the FTCA. Although *Carlson*'s discussion of § 2680(h) is dicta, it is significant that this Court, reading the plain language of the proviso not long after its enactment, found no suggestion that the scope of its waiver was limited to arrests, searches, or seizures.

III. The FTCA's "discretionary function exception," 28 U.S.C. § 2680(a), exempts from the statute's general waiver of sovereign immunity conduct by federal officers in which they exercise discretionary judgment grounded in considerations of public policy. The Third Circuit has attempted to justify its narrow interpretation of § 2680(h)'s law enforcement proviso as a means of harmonizing the two provisions. If § 2680(h)'s waiver is limited to conduct occurring in the course of arrests, searches, and seizures, the argument goes, it will minimize overlap with the type of "discretionary functions" exempted from waiver in § 2680(a)—and thus obviate the need to determine which provision trumps the other, an issue which has split the other courts of appeals.

This argument is both unpersuasive and irrelevant to the case before the Court. The Government never raised the discretionary function exception as a defense below. And even if it had, the exception would not apply to these facts. The conduct alleged here—like most operational, on-the-ground law enforcement decisions—does not involve the kind of public policy considerations required to

qualify for the exception. And the discretionary function exception does not extend to conduct which—like the physical and sexual assault alleged here—violates a legal mandate.

This Court should also reject the Third Circuit's decision to preemptively narrow the scope of the law enforcement proviso in order to "protect" it from possible conflict with the discretionary function exception. Most of what law enforcement officers do is on the operational—and not the policy-making—level, and therefore will not implicate the discretionary function exception. But even if this Court were to conclude that there is an irreducible conflict between the two provisions, the proper resolution would be to hold that the law enforcement proviso—the later-enacted, more specific provision—trumps the discretionary function exception.

IV. Finally, this Court should decline to follow the handful of federal courts which, relying on subjective policy preferences rather than statutory text, have chosen to split the difference between the inclusive plain language of § 2680(h) and the Third Circuit's restrictive reading by limiting the subsection's waiver to conduct occurring "in the course of investigative or law enforcement activities." See *Orsay* v. *United States Dep't of Justice*, 289 F.3d 1125, 1132–1136 (9th Cir. 2002).

This judicially-created restriction has no more textual pedigree than the Third Circuit's "arrest, search, or seizure" limitation: The plain language of § 2680(h) refers to "any claim" arising out of an intentional tort by a law enforcement officer; it is not limited to claims arising in the course of law enforcement *activities*. And the parade of horribles marched out to justify this unduly restrictive reading is, on closer examination, not all that horrible at all. At worst, giving the statutory language its natural

meaning would result in the occasional waiver of immunity in a workplace dispute involving law enforcement personnel. While such disputes are likely not the paradigm cases Congress had in mind when it enacted the proviso, the waiver of sovereign immunity in such infrequent cases is hardly the kind of absurd result that would justify a court rewriting the text of the statute. At any rate, the improper conduct alleged in this case is far closer to core "law enforcement activities" than to the workplace torts that would be excluded by this rule.

ARGUMENT

Section 2680(h)'s Law Enforcement Proviso Is Not Limited To Conduct That Occurs In The Course Of An Arrest, Search, Or Seizure.

While § 2680(h) exempts claims based on certain intentional torts from the FTCA's general waiver of sovereign immunity, the statute contains an exception to that exception. The law enforcement proviso provides that, "with regard to acts or omissions of investigative or law enforcement officers of the United States Government," sovereign immunity *is* waived for "any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h).

There is no dispute that the acts alleged here constitute assault and battery, two of the intentional torts enumerated in the proviso. Nor is there any dispute that the correctional officers whose conduct is at issue qualify as "investigative or law enforcement officers" under the FTCA, as the United States conceded and the courts below assumed. J.A. 54 (United States concedes that "[t]here is no dispute that a correctional officers [sic] are

law enforcement officers"), 94, 103.[4] And there is no dispute that the correctional officers, in carrying out those actions, were acting within the scope of their employment, as required by 28 U.S.C. § 1346(b)(1). J.A. 55 (United States concedes that officer "was acting within the scope of his employment when the alleged assault occurred"), 85 (same).[5]

This case therefore turns on whether the court of appeals was correct to limit the law enforcement proviso to conduct which occurs in the course of an arrest, search, or seizure. The plain language of the statute, its legislative history, and this Court's own precedent all demon-

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[4] See also, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. 140, 154 n.6 (1992) (noting "Attorney General's concession that corrections guards are 'law enforcement' officers within the meaning of the exception to the intentional-tort exception of the FTCA"); *ABC* v. *DEF*, 500 F.3d 103, 110 (2d Cir. 2007) (holding that federal prison officers are "law enforcement officers" under § 2680(h)), vacated and remanded on other grounds, 553 U.S. 1016 (2008); *Morrow* v. *Federal Bur. of Prisons*, 255 Fed. Appx. 378, 380 (11th Cir. 2007) (same); *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003) (same); *Hernandez* v. *Lattimore*, 612 F.2d 61, 64 n.7 (2d Cir. 1979) (same); *Sheppard* v. *United States*, 537 F. Supp. 2d 735, 791–792 (D. Md. 2008) (same); *Calderon* v. *Foster*, No. 5:05-cv-00696, 2007 WL 1010383, *14 (S.D.W. Va. March 30, 2007) (same); *McLittle* v. *United States*, No. 03-2870 B/V, 2005 WL 2436714, *4 (W.D. Tenn. Sept. 29, 2005) (same); 18 U.S.C. § 3050 (empowering officers and employees of the Bureau of Prisons to make arrests under specified circumstances); see also *Ali* v. *Federal Bur. of Prisons*, 552 U.S. 214 (2008) (holding that federal prison officers are "law enforcement officers" under § 2680(c) of the FTCA).

[5] "[T]he [law enforcement] proviso does not relax the FTCA's jurisdictional mandate requiring that torts be committed within the scope of employment, nor does it alter the FTCA's reliance on applicable state law, which also generally includes a scope of employment requirement, as the basis for defining an underlying cause of action." *Ignacio*, 674 F.3d at 255.

strate that such a reading is untenable. The Third Circuit's holding to the contrary must be reversed.

I. The Statutory Text Does Not Confine The Scope Of The Waiver To Conduct Occurring In The Course Of An Arrest, Search, Or Seizure.

A. The plain language of the law enforcement proviso contains no arrest, search, or seizure requirement.

1. "As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). Section 2680(h)'s text imposes only two requirements for the waiver of sovereign immunity: (1) that the act complained of constitute one of the enumerated intentional torts, and (2) that the individual committing the act fit the statutory definition of an "investigative or law enforcement officer." See *Ignacio*, 674 F.3d at 255. Where, as here, "the statutory language is plain," this Court "must enforce it according to its terms." *Jimenez*, 555 U.S. at 118; see also *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004).

The fact that this case involves a waiver of the United States' sovereign immunity does not alter this basic principle of statutory interpretation. The FTCA "waives the Government's immunity from suit in sweeping language." *Dolan* v. *Postal Serv.*, 546 U.S. 481, 492 (2006) (quoting *United States* v. *Yellow Cab Co.*, 540 U.S. 543, 547 (1951)). As a consequence,

> the general rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," * * * is unhelpful in the FTCA context, where "unduly gen-

> erous interpretations of the exceptions run the risk of defeating the central purpose of the statute."

Dolan, 546 U.S. at 491–492 (quoting *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *Kosak* v. *United States*, 465 U.S. 848, 853 n.9 (1984)); see also *United States* v. *Nordic Village*, Inc., 503 U.S. 30, 34 (1992) ("We have on occasion narrowly construed *exceptions* to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the FTCA.") (quoting *Yellow Cab*, 540 U.S. at 547) (emphasis added); *Block* v. *Neal*, 460 U.S. 289, 298 (1983) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (citation and internal quotation marks omitted); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 284 (2012) ("the rigor with which courts have applied the interpretive rule disfavoring waivers of sovereign immunity has abated—rightly so").

Rather, "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Dolan*, 546 U.S. at 853 (quoting *Kosak v. United States,* 465 U.S. 848, 853 n.9 (1984) (quoting *Dalehite v. United States,* 346 U.S. 15, 31 (1953))).

2. Here, the words of the law enforcement proviso are unambiguous. The statute's plain language does not state—or even suggest—that the proviso's waiver of sovereign immunity is limited to conduct that takes place in the course of an arrest, search, or seizure. To the contrary, the statute extends the waiver to "*any* claim" against

a federal law enforcement officer for one of the enumerated torts. 28 U.S.C. § 2680(h) (emphasis added).

Congress' reference to "any" claim demonstrates that the proviso's scope is "expansive" and "unqualified," and "undercuts the attempt to impose [a] narrowing construction." *Salinas* v. *United States*, 522 U.S. 52, 56–57 (1997). This Court has repeatedly recognized that use of the word "any" signifies a "broad" meaning and a "wide reach." See, *e.g.*, *Kasten* v. *Saint-Gobain Performance Plastics Corp.,* 131 S. Ct. 1325, 1332 (2011) ("'*any* complaint' suggests a broad interpretation that would include an oral complaint") (emphasis in original); *Boyle* v. *United States,* 556 U.S. 938, 954 (2009) ("[t]he term 'any' ensures that the definition has a wide reach"); *Republic of Iraq* v. *Beaty,* 556 U.S. 848, 856 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning,' giving us no warrant to limit the class of provisions of law that the President may waive.") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)); *Massachusetts* v. *EPA,* 549 U.S. 497, 528 (2007) (statute's "sweeping" definition of "air pollutant" "embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any' "); *Dep't of Housing & Urban Dev.* v. *Rucker,* 535 U.S. 125, 131 (2002) ("'any' has an expansive meaning"); *Gonzales*, 520 U.S. at 5 (statutory phrase "any other term of imprisonment" provides "no basis in the text for limiting [the provision] to federal sentences").

As this Court noted in a recent case construing another of § 2680's exceptions, "'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."' " *Ali*, 552 U.S. at 219 (quoting *Gonzales*, 520 U.S. at 5 (quoting Webster's Third New International Dictionary 97 (1976))). *Ali* involved § 2680(c)'s detention of property exception, which exempts from the FTCA's

waiver of sovereign immunity "[a]ny claim arising in respect of * * * the detention of any * * * property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). The petitioner argued that this language only barred claims against government officials with some nexus to customs or tax enforcement. The Court disagreed, concluding that "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of any kind." *Ali*, 520 U.S. at 220.

Here, too, the Court should read "any claim" to mean a claim "of any kind" arising from a law enforcement officer's commission of one of the enumerated torts—not just a claim arising from conduct occurring in the course of an arrest, search, or seizure. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' ") (citations omitted) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

3. Nothing in § 2680(h)'s text or structure militates against this plain reading. As one court of appeals construing the statute recently emphasized, "[n]otably absent is language requiring an officer to commit the tort in the course of an investigative or law enforcement activity or, for that matter, any language regarding the context in which an officer must commit the tort." *Ignacio*, 674 F.3d at 255.

The statute's only mention of arrests, searches, or seizures is in the clause defining the term "investigative or law enforcement officer":

> For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h). By its terms, this language only identifies the *class of individuals* whose conduct can trigger a waiver of sovereign immunity. It does not purport to define the *type of conduct* required for waiver.[6] Rather, the conduct requirements are set forth in the main clause of the proviso, which waives sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers of the United States Government * * * to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." The text imposes no requirement that the conduct take place in the course of an arrest, search, or seizure. *Ibid.*

Had Congress intended to so limit the scope of the waiver, it easily could have done so. For example, it could have worded the proviso as follows:

> That, with regard to acts or omissions of law enforcement officers of the United States Government *occurring while such officers are executing searches, seizures, or arrests* * * * *

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[6] "[T]he plain language of the provision at issue distinguishes between the *acts* for which immunity is waived—'assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution'—and the class of *persons* for whose acts immunity is waived—officers 'empowered by law to execute searches, to seize evidence, or to make arrests.' " *Ortiz*, 88 F. Supp. 2d at 154 (quoting 28 U.S.C. § 2680(h)).

Harris, 677 F. Supp. at 405 (emphasis added); see also *Ortiz*, 88 F. Supp. 2d at 151 ("It would have been easy enough for Congress to have provided that it was waiving immunity with regard to acts of law enforcement officers only *while* such officers are executing searches, seizures or arrests.") (emphasis in original). But it did not do so. Rather, § 2680(h) waived sovereign immunity for "*any claim*" based on an enumerated intentional tort committed by federal agents who are "empowered by law" to conduct arrests, searches, or seizures—regardless of the context in which the particular tort is committed.

In short, the plain language of § 2680(h) "does not require that a law enforcement officer commit the intentional tort while executing a search, seizing evidence, or making an arrest." *Reynolds*, 549 F.3d at 1114.

B. Imposing an arrest, search, or seizure requirement would render meaningless the proviso's references to malicious prosecution and abuse of process.

1. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, Statutes and Statutory Construction, § 46.06, at 194 (6th ed. 2000)); see also *Connecticut Nat'l Bank*, 503 U.S. at 253 ("courts should disfavor interpretations of statutes that render language superfluous").

The law enforcement proviso waives sovereign immunity for six enumerated intentional torts: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. 28 U.S.C. § 2680(h). It is difficult to imagine the circumstances under which two of these torts—malicious prosecution and abuse of process—could be committed in the course of an arrest,

search, or seizure. See *Ortiz*, 88 F. Supp. 2d at 165 ("under the *Pooler* interpretation, the provision of the statute waiving immunity as to claims of malicious prosecution would be rendered meaningless, because it is difficult to conceive of how a federal official could commit the acts constituting malicious prosecution in the course of an arrest, search or seizure"); *Crow*, 659 F. Supp. at 570 ("We are hard-pressed * * * to understand how an officer can commit the acts constituting malicious prosecution while conducting a search or seizure or while making an arrest."). Adopting the construction proponed by the Third Circuit would effectively read these two torts out of the statute.

2. The elements of the common law tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and, (4) actual malice. William L. Prosser, Law of Torts § 119, at 835 (4th ed. 1971); see also Restatement (Second) of Torts § 653 (1977). While precise formulations differ, numerous state courts have applied substantially these elements to malicious prosecution claims.[7]

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[7] See, *e.g.*, *Palazzo* v. *Alves,* 944 A.2d 144, 152 (R.I. 2008); *Kroger Tex. Ltd. P'ship* v. *Suberu,* 216 S.W.3d 788, 792 (Tex. 2006); *Heib* v. *Lehrkamp,* 704 N.W.2d 875, 884 n.8 (S.D. 2005); *Casa Herrera, Inc.* v. *Beydoun*, 83 P.3d 497, 500 (Cal. 2004); *Condere Corp.* v. *Moon,* 880 So.2d 1038, 1042 (Miss. 2004); *Smith-Hunter* v. *Harvey*, 734 N.E.2d 750, 752–753 (N.Y. 2000); *Adams* v. *Whitfield,* 290 So. 2d 49, 51 (Fla. 1974); *Hibernia Nat'l Bank of New Orleans* v. *Bolleter,* 390 So. 2d 842 (La. 1980); *Cook* v. *Lanier,* 147 S.E.2d 910, 913 (N.C. 1966); *Reynolds* v. *Menard, Inc.,* 850 N.E.2d 831, 837 (Ill. App. 2006).

These elements make clear that "[t]he common-law cause of action for malicious prosecution * * * unlike the related cause of action for false arrest or imprisonment, * * * permits damages for confinement imposed *pursuant to legal process*." *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994) (emphasis added). The tort is not complete until a criminal proceeding is actually commenced against the plaintiff. Indeed, most jurisdictions hold that a claim for malicious prosecution does not accrue for statute of limitations purposes until "the underlying criminal charges are filed"; a minority hold that it does not accrue until the criminal proceeding is favorably terminated. See *Genesis Ins. Co.* v. *City of Council Bluffs*, 677 F.3d 806, 812–813 & n.5 (8th Cir. 2012) (collecting cases).

It is difficult to conceive of how a malicious prosecution claim could arise from "activities in the course of a search, a seizure or an arrest." *Pooler*, 787 F.2d at 872. Searches, seizures, and arrests are pre-indictment activities, and a malicious prosecution claim can only arise after a criminal proceeding has been commenced. See *Albright* v. *Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring) ("Albright's reliance on a 'malicious prosecution' theory, rather than a Fourth Amendment theory, is anomalous. The principal player in carrying out a prosecution—in 'the formal commencement of a criminal proceeding,'—is not police officer but prosecutor.") (citation omitted).

The D.C. Circuit's reasoning in *Dellums* v. *Powell*, 566 F.2d 216 (D.C. Cir. 1977), is instructive. In that case, a congressman who was arrested during a mass demonstration on the steps of the Capitol sued the police chief who had supervised the arrests for false arrest and malicious prosecution. *Id.* at 218–219. The court of appeals affirmed the verdict of liability for false arrest, but concluded that "[t]he record will not * * * support Chief Wil-

son's liability for malicious prosecution." *Id.* at 219. It held that the chief's involvement in the arrest decision was not enough to support liability, absent any evidence that he had been involved in the decision to file criminal charges:

> Wilson's involvement other than his personal control and supervision of all Metropolitan Police participating in the arrests was limited to participation in the arrest decision * * * * There is no evidence linking Wilson to the meeting on the evening of May 5 at which Chief Powell and Attorney Zimmerman convinced Attorneys Hannon and Moore to file informations.

Ibid. The court of appeal concluded that "the critical event triggering liability for malicious prosecution is the filing of an information. Having failed to link Chief Wilson with that decision, plaintiffs did not make out a prima facie case, and the judgment against him insofar as it awards damages for malicious prosecution must be vacated." *Id.* at 220; see also *Hartman* v. *Moore*, 547 U.S. 250, 262–263 (2006) (noting that a "plaintiff seeking damages incident to her criminal prosecution would have to show that the police, who allegedly acted in violation of law in securing her arrest, unduly pressured or deceived prosecutors") (quoting *Barts* v. *Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989)); *Dellums* v. *Powell*, 566 F.2d 167, 192–193 (D.C. Cir. 1977) ("the chain of causation between Chief Powell and the filing of the informations against plaintiffs is broken thereby defeating tort liability if the decision made by Attorney Moore was independent of any pressure or influence exerted by Chief Powell and of any knowing misstatements which Powell may have made").

Thus, to make out a malicious prosecution claim against a law enforcement officer, a plaintiff ordinarily must point to some act apart from the arrest, search, or seizure—for example, providing false information to the prosecutor—that improperly influenced the charging decision. But such conduct would never be covered under *Pooler*'s narrow view of the law enforcement proviso. Because malicious prosecution claims do not ordinarily arise out of conduct incident to arrests, searches, or seizures, applying *Pooler*'s rule would effectively read Congress' express waiver of sovereign immunity against claims of malicious prosecution by investigative or law enforcement officials out of the statute.

3. The *Pooler* rule would also vitiate the proviso's reference to abuse of process. Abuse of process is typically even further removed than malicious prosecution from the pre-indictment activities of arrest, search, and seizure.

While "[m]alicious prosecution 'is concerned with maliciously causing process to issue,' * * * abuse of process 'is concerned with the improper use of process *after* it has been issued.'" *Advantor Cap. Corp.* v. *Yeary*, 136 F.3d 1259, 1264 (10th Cir. 1998) (quoting *Jackson & Scherer, Inc.* v. *Washburn*, 496 P.2d 1358, 1366 (Kan. 1972)) (emphasis added); see also *Cook* v. *Sheldon*, 41 F.3d 73, 80 (2d Cir. 1994) ("While malicious prosecution concerns the improper issuance of process, '[t]he gist of abuse of process is the improper use of process after it is regularly issued.'") (quoting 2 Committee on Pattern Jury Instructions, Ass'n of Supreme Court Justices, N.Y. Pattern Jury Instructions § 3:51, at 816 (1968)); Restatement (Second) of Torts § 682 (1977) ("[t]he subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed").

As with malicious prosecution, the tort of abuse of process ordinarily cannot be committed until after a prosecution has been commenced: "[T]he gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. Page Keeton *et al.*, Prosser & Keeton on the Law of Torts § 121, at 897 (5th ed. 1984) (footnote omitted). That is, a defendant must not only "secur[e] some process," but also, "after that process ha[s] been secured, us[e] it in an improper way." *Young* v. *Klass*, 776 F. Supp. 2d 916, 925 (D. Minn. 2011) (no abuse of process where "the 'process' at the heart of this case is simply Young's arrest and subsequent tab charge for disorderly conduct and trespassing," because "the facts do not support a separate claim that Klass abused that process *after* it was issued") (emphasis in original).

As with malicious prosecution, any post-indictment behavior that might constitute abuse of process would be barred by *Pooler*'s arrest, search, or seizure requirement. Because the Third Circuit's narrow reading of the law-enforcement proviso would effectively read the torts of malicious prosecution and abuse of process out of the statute, this Court should reject it.

C. *Pooler* and its progeny failed to confront the plain language of § 2680(h).

Neither the Third Circuit nor the handful of other courts following it made any serious attempt to analyze the plain language of § 2680(h) or to apply basic canons of statutory interpretation. Indeed, "[i]n *Pooler*, the Third Circuit did not address whether the statute was ambiguous but instead merely 'read' the limitation into the statute to better accord with its view of what 'Congress in-

tended.' " *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring). Compare *Brooks* v. *Silva*, No. 7:08–CV–105–KKC, 2009 WL 1211024, *7 (E.D. Ky. May 1, 2009) (applying *Pooler* rule based on "the purpose and intent of the general rule: that the United States is not liable when a federal employee intentionally commits an assault and battery on someone"); *Palmer* v. *Gonzales*, 2009 WL 4799205, No. 3:07 CV 31, *9 (N.D.W. Va. Dec. 7, 2009) (following *Pooler* "[b]ased on the underlying legislative history").

This methodology runs afoul of a basic principle: that the "first step" in statutory construction "'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997)). This first is often the last step: "The inquiry ceases 'if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."'" *Barnhart*, 534 U.S. at 450 (quoting *Robinson*, 519 U.S. at 340). That is the case here.

Neither *Pooler* nor the courts below could present any coherent explanation of why § 2680(h)'s text is ambiguous, or why its language defining the term "law enforcement officer" to include officials "empowered by law to execute searches, to seize evidence, or to make arrests" should be read to cabin the *categories of conduct* over which the proviso waives sovereign immunity. Their approach, which runs "run counter to the plain meaning of the subsection," *Crow*, 659 F. Supp. at 570, and lacks "any principled underpinning," *Ortiz*, 121 F. Supp. 2d 151, 164–65, should be rejected.

II. Other Tools Of Statutory Interpretation Confirm That Congress Did Not Intend To Limit The Scope Of The Waiver To Conduct Occurring In The Course Of An Arrest, Search, Or Seizure.

A. The legislative history supports a broad interpretation of the law enforcement proviso.

The legislative history of § 2680(h) confirms that Congress intended the law enforcement proviso to extend beyond conduct arising in the course of arrests, searches, or seizures of evidence. Of course, "reliance on legislative history is unnecessary" when a statute's language is "unambiguous," *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 130 S. Ct. 1324, 1332 n.3 (2010), and this Court has cautioned against "allowing ambiguous legislative history to muddy clear statutory language," *Milner* v. *Department of Navy*, 131 S. Ct. 1259, 1266 (2011). In this case, however, the legislative history of § 2680(h) does not muddy the inquiry; it simply confirms the plain meaning of the clear statutory text.

1. The law enforcement proviso to § 2680(h) was enacted in 1974. Pub. L. 93-253, § 2, 88 Stat. 50, 50 (1974).[8] The legislation was proposed in response to the "Collinsville raids," in which federal agents conducted forcible, no-knock entries of two houses, only to discover that they were at the wrong addresses. See S. Rep. No. 93-588

[8] Before the proviso was enacted, § 2680 "unequivocally barred (by excepting from sovereign immunity): 'Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.' " *Nguyen* v. *United States*, 556 F.3d 1244, 1251 (11th Cir. 2009) (quoting 28 U.S.C. § 2680(h) (1970)).

(1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790.[9] Under § 2680(h) as it then stood, sovereign immunity barred the victims of the Collinsville raids from recovering damages from the Government. *Id.* at 2789–2790. The Senate Report on the 1974 legislation, which was relied on by the Third Circuit in *Pooler* to support its restrictive reading of the proviso, described the amendment in broad terms:

> The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process.

Ibid. The Report did express particular concern over the kind of warrantless searches and seizures that had occurred in Collinsville:

> This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color

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[9] In the first Collinsville raid, federal agents smashed in the door of the Giglotto family's home, brandished pistols, subdued and handcuffed Mr. Giglotto, interrogated him at gunpoint, pointed a gun at Mrs. Giglotto as she pleaded for her husband's life, and ransacked the house. The agents later realized they were at the wrong address. Later that night, 25 agents from the same strike force forcibly entered the home of the Askew family. Mrs. Askew fainted as the agents searched the home and interrogated Mr. Askew at gunpoint. Once again, the agents later realized they were at the wrong address. See *Nguyen*, 556 F.3d at 1254–55 (citing 119 Cong. Rec. 14,084–14,085, 23,246).

> of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause.

Id. at 2790; see also *Pooler*, 787 F.2d at 872 ("The Senate Report on the amendment states that the proviso was enacted to provide a remedy against the United States in 'situations where law enforcement officers conduct "no-knock' raids or otherwise violate the fourth amendment.").

2. However, the very next sentence in the Senate Report—which the *Pooler* court, remarkably, ignored—made it clear that Congress did *not* intend to limit the law enforcement proviso to Fourth Amendment abuses in the context of searches, seizures, or arrests:

> However, the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to *any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of federal law.*

S. Rep. No. 93-588 (1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790 (emphasis added).

Congress expressly recognized that the law enforcement proviso would waive immunity as to conduct extending beyond the immediate controversy of no-knock raids. "While it is clear from the Senate Report that the Collinsville raids were the impetus for enacting the § 2680(h) proviso, it is equally as clear that the Report expresses the intent that the proviso not be limited to situations similar to the Collinsville raids." *Harris*, 677 F. Supp. at 405; see also *Ortiz*, 88 F. Supp. 2d at 154 ("the legislative history makes clear that Congress did not intend to limit the waiver to torts arising from activities subject to Fourth Amendment scrutiny, notwithstanding

the fact that the legislation was motivated by particular instances of such activity").

As this Court explained in *Oncale* v. *Sundowner Offshore Services*, 523 U.S. 75, 79 (1998), "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Here, the legislative history shows that the principal impetus for the enactment of the law enforcement proviso was the Collinsville raids. But it also shows that Congress intended, not to limit the proviso's waiver of immunity to Fourth Amendment abuses, but rather to extend it to "any case" in which a federal officer committed an enumerated intentional tort within the scope of his or her employment. This legislative intent perfectly tracks the plain language of the statute, which imposes no further restriction.

B. This Court's decision in *Carlson* v. *Green* supports a broad interpretation of the law enforcement proviso.

This Court has not yet squarely ruled on whether the law enforcement proviso's waiver should be limited to conduct occurring in the course of an arrest, search, or seizure. It has, however, spoken to the issue. In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court "implicitly assumed that the proviso of Section 2680(h) was not limited to acts committed while the agent is engaged in" an arrest, search, or seizure. *Harris*, 677 F. Supp. at 406.

In *Carlson*, the estate of a deceased federal prisoner brought a *Bivens*[10] action against prison officials who had

[10] See *Bivens* v. *Six Unknown Fed. Narc. Agents,* 403 U.S. 388 (1971) (recognizing an implied cause of action for certain constitutional vio-

allegedly failed to provide the prisoner with adequate medical care. The defendants argued that the *Bivens* claim was precluded by the existence of an FTCA claim under § 2680(h), which they asserted was "an alternative remedy which [Congress] explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18–19 (emphasis in original). While the Court rejected this argument, it indicated that it viewed the plaintiff's claims as falling within § 2680(h)'s waiver of sovereign immunity:

> In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint *shall have an action under FTCA* against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

446 U.S. at 20 (emphasis added). The Court expressed no concern that the actions complained of occurred outside the context of a search, seizure, or arrest.

Carlson's observations on this matter are dicta, but they are persuasive dicta. Neither the litigants nor this Court, reading the plain language of § 2680(h), even suggested that it confined the waiver of immunity to the narrow circumstances set forth in *Pooler*. That is because there is nothing in the statutory text to support such a narrow reading. *Carlson* represented a fresh-eyes reading of the law enforcement proviso, untainted by the Third Circuit's "distort[ion of] the plain language of the statute." *Ortiz*, 88 F. Supp. 2d at 151. The Court should

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lations by federal officials, regardless of the existence of a statutory or common-law remedy).

reaffirm this reading, which is supported by both the statute's text and its legislative history.

III. This Court Need Not Read The Law Enforcement Proviso Narrowly In Order To Reconcile It With The Discretionary Function Exception of 28 U.S.C. § 2680(a).

Ever since the law enforcement proviso was enacted in 1974, courts have attempted to harmonize its waiver of sovereign immunity with the FTCA's "discretionary function exception." That provision, codified at 28 U.S.C. § 2680(a), "generally shields the government from tort liability based on the acts or omissions of federal agencies and employees when they are exercising or performing a discretionary function." *Nguyen*, 556 F.2d at 1250 (citing *United States* v. *Gaubert*, 499 U.S. 315, 322–333 (1991)). The Third Circuit in *Pooler* relied in part on the need to accommodate this separate statutory provision to rationalize its narrow reading of the law enforcement exception:

> Reading the intentional tort proviso as limited to activities in the course of a search, a seizure or an arrest as a practical matter largely eliminates the likelihood of any overlap between section 2680(a) and section 2680(h). It is hard to imagine instances in which the activities of officers engaging in searches, seizures or arrests would be anything other than operational.

787 F.2d at 872. This Court should reject that rationale. The plain language of the law enforcement proviso can comfortably co-exist with the discretionary services exception without reading the Third Circuit's extra-textual limitations into the statute.

1. The discretionary function exception, set forth in subsection (a) of § 2680, revokes the FTCA's waiver of sovereign immunity for

> [a]ny 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). To determine whether a function is "discretionary," courts apply a two-step test. First, they ask whether the conduct "involv[es] an element of judgment or choice." *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz* v. *United States,* 486 U.S. 531, 536 (1988)). Second, they ask whether that judgment is grounded in "considerations of public policy." *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537).

2. Federal courts have grappled with "whether and how to apply the [discretionary function] exception in cases brought under the intentional tort proviso found in § 2680(h)." *Medina* v. *United States*, 259 F.3d 220, 224 (4th Cir. 2001). Some courts of appeals have held that even those claims specifically exempted by § 2680(h)'s law enforcement proviso are barred if they are based on the performance of discretionary functions within the meaning of § 2680(a).[11] Others have held that § 2680(h)'s waiver

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[11] See *Medina*, 259 F.3d at 224–226; *Garcia* v. *United States*, 826 F.2d 806, 809 (9th Cir. 1987); *Pooler*, 787 F.2d at 871–872; *Gray* v. *Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983); *Caban* v. *United States*, 671 F.2d 1230, 1234–1235 (2d Cir. 1982).

of sovereign immunity overrides the discretionary function exception.[12]

3. The Court need not resolve this circuit split in order to decide this case. The Government never raised the discretionary function exception as a defense in the proceedings below. And even if the exception were held to apply to claims falling within the law enforcement proviso, the conduct alleged in this case—the physical and sexual assault of a federal inmate by prison guards—is far outside its scope.

As an initial matter, operational, on-the-ground law enforcement decisions typically have not been held to involve the kind of discretionary judgment grounded in public policy analysis that is carved out by § 2680(a). See, *e.g.*, *Garcia*, 826 F.2d at 809 ("While law enforcement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability."); *Gray*, 712 F.2d at 508 ("[I]f the 'investigative or law enforcement officer' limitation in section 2680(h) is read to include primarily persons (such as police officers) whose jobs do not typically include discretionary functions, it will be rare that a suit under the proviso to section 2680(h) is barred by section 2680(a)."); *Caban*, 671 F.2d at 1234–1235 (INS officers' decisions about whether to detain an alien were not a discretionary function).

Moreover, the unlawful nature of the alleged conduct here takes it even further outside the ambit of the discre-

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[12] See *Nguyen*, 556 F.3d at 1250–1260; *Sutton* v. *United States*, 819 F.2d 1289, 1297 (5th Cir. 1987); see also *Moher v. United States*, — F. Supp. 2d. —, 2012 WL 2089849, *22–24 (W.D. Mich. June 8, 2012).

tionary function exception. It is well-recognized that the exception does not encompass conduct that is "unconstitutional, proscribed by statute, or exceed the scope of an official's authority." *Thames Shipyard & Repair Co.* v. *United States,* 350 F.3d 247, 254 (1st Cir. 2003); see also *Palay* v. *United States,* 349 F.3d 418, 431 (7th Cir. 2003) (discretionary function exception does not apply where prison officials have "acted in direct contravention of BOP regulations"); *Nurse* v. *United States,* 226 F.3d 996, 1002 (9th Cir. 2000) ("governmental conduct cannot be discretionary if it violates a legal mandate"); *Sutton*, 819 F.2d at 1293 ("[W]e have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."); *Gonzales* v. *United States*, No. 4:09CV00746 BSM/BD, 2010 WL 1407792, *2 (E.D. Ark. Feb. 11, 2010) (discretionary function exception does not apply where prison officials "failed to follow policy"). Engaging in the rape and assault of an inmate is far outside the discretion afforded to a federal prison official.

4. Nor should the existence of the discretionary function exception impel this Court to adopt an unduly narrow construction of § 2680(h)'s law enforcement proviso, as the Third Circuit did in *Pooler*. Even those courts that apply the discretionary function exception to law enforcement activities have emphasized that conflicts between subsections (a) and (h) are rare, given that operational law enforcement decisions rarely contain the element of policy judgment necessary to render them "discretionary." See *Garcia*, 826 F.2d at 809; *Gray*, 712 F.2d at 507–508; *Caban*, 671 F.2d at 1234–1235; see also *Wright* v. *United States,* 719 F.2d 1032, 1035 (9th Cir. 1983).

The rare claim which presents law enforcement conduct that rises to the level of a discretionary function can be decided on its own facts. Nothing warrants rewriting the plain language of § 2680(h)—adding an "arrest, search, or seizure" requirement for conduct that is nowhere mentioned in the statute's text—simply to eliminate the infrequent and minor conflicts that might occur between that provision and § 2680(a). The Third Circuit's misguided rule is an illustration of why it is neither appropriate nor desirable to hunt squirrels with a cannon.

5. Finally, if this Court were to conclude that there is an irreducible conflict between subsections (a) and (h), the proper resolution would be to conclude, as the Fifth and Eleventh Circuits have, that "sovereign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen*, 556 F.3d at 1256–1257.

As the Eleventh Circuit explained in *Nguyen*, "two fundamental canons of statutory construction * * * provide the answer, which is that to the extent of overlap between [the law enforcement] proviso and subsection (a), the proviso wins." *Id.* at 1252–1253. First, the law enforcement proviso, which applies only to claims for six specified torts arising from the acts of a defined subset of government officers, is more specific than the sweeping discretionary function exception. "[A] more specific statute will be given precedence over a more general one." *Corley* v. *United States*, 556 U.S. 303, 316 (2009) (quoting *Busic v. United States,* 446 U.S. 398, 406 (1980)); see also Scalia & Garner, *supra*, at 183. Second, the law enforcement proviso was enacted in 1974, while the discretionary function exception has been part of the FTCA since 1946. "When a statute specifically permits what an earlier statute prohibited, or prohibits what it permitted, the earlier

statute is (no doubt about it) implicitly repealed." *Id.* at 327; see also *Lockhart* v. *United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) ("[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs").

Thus, to the extent that the two subsections are incompatible, the Court should follow "the familiar principle of statutory construction that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute"—here, the law enforcement proviso of § 2680(h)—"to amend an earlier, more general statute." *Smith* v. *Robinson*, 468 U.S. 992, 1023 (1984).

IV. The Statutory Text Does Not Confine The Scope Of The Waiver To Conduct Occurring In The Course Of Investigative Or Law Enforcement Activities.

The question presented, as formulated by the Court, focuses on whether § 2680(h)'s waiver of sovereign immunity is limited to conduct occurring during the exercise of authority to carry out arrests, searches, or seizures. However, a handful of federal courts, while rejecting *Pooler*'s "arrest, search, or seizure" requirement, have nevertheless confined the law enforcement proviso's application to conduct that occurs "in the course of investigative or law enforcement activities." *Orsay*, 289 F.3d at 1132–1136; see also *Murphy*, 121 F. Supp. 2d at 24–25; *Employers Ins. of Wausau*, 815 F. Supp. at 259. This reading of the proviso, while somewhat more permissive than the Third Circuit's interpretation, is equally unsupported by the plain language of the statute.

1. As discussed above, the plain text of § 2680(h) imposes only two conditions for waiver: (1) that an "investigative or law enforcement official," defined as a federal

employee "authorized by law" to carry out arrests, searches, or seizures, (2) commit one of the six enumerated intentional torts. 28 U.S.C. § 2680(h). The only further limitation on the nature of the conduct covered is § 1346(b)'s generally-applicable requirement that it occur "within the scope of [the officer's] office or employment." 28 U.S.C. § 1346(b). Just as the statutory language imposes no requirement that the tort be committed in the course of an arrest, search, or seizure, it similarly imposes no requirement that the conduct occur in the course of law enforcement activities. Indeed, the phrase "investigative or law enforcement *activities*" appears nowhere in the statute.

This abandonment of the statute's plan language was made explicit by the district court in *Employers Insurance of Wausau*. Citing legislative history, the court argued that imposing a law enforcement activities requirement on § 2680(h) "is not only its most reasonable construction in common-sense terms, but it also avoids converting the statutory proviso into one that is triggered by mere status rather than by actual conduct." 815 F. Supp. at 259. But the plain text of the law enforcement proviso is quite clear as to both the status—an "investigative or law enforcement official," as defined in the text—and the conduct—"any claim" arising from the commission of one of the six enumerated intentional torts—required to waive immunity. A court's idiosyncratic view of "common sense" is no warrant for disregarding the plain language of the statute.

As the Fourth Circuit explained in rejecting this approach, the "law enforcement activities" requirement suffers from the same basic infirmity as *Pooler*'s "arrest, search, or seizure" requirement: "these courts relented to secondary modes of interpretation without first establishing the ambiguity of the statutory text." *Ignacio*, 674

F.3d at 255. The fact that *Orsay*, *Wausau*, and their ilk draw the extra-textual line at a different point than *Pooler* does not make that line any more justifiable.

2. The prudential reasons put forward for the "law enforcement activities" limitation are unpersuasive. In *Orsay*, for example, the Ninth Circuit expressed concern that applying the law enforcement proviso's waiver to "workplace torts" would impose a "bizarre" disparity between law enforcement officers and other federal employees:

> By singling out investigative and law enforcement officers in section 2680(h), Congress provided a remedy for this kind of intentionally tortious conduct that arises in the context of investigative and law enforcement activities. Congress did not create a remedy for torts arising outside of this context, like the workplace torts that Appellants allege. To construe section 2680(h) otherwise—as reaching these workplace torts—would create an arbitrary distinction between investigative and law enforcement officers and other federal employees, and produce the bizarre result that suit lies against the United States when one federal law enforcement officer punches another in the office, but not when other federal employees engage in the same conduct.

289 F.3d at 1134.

The problem with this approach is that it ignores the plain language of § 2680(h): "[i]n *Orsay*, the Ninth Circuit found that the statute was ambiguous because it was 'reasonably susceptible' to multiple meanings but failed to explain how the meaning of the language employed in the statute was anything other than plain." *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring) (quoting *Orsay*, 289 F.3d at 1134). Rather, "the court proceeded directly to a

discussion of Congress's intent and the legislative history, without addressing the plain language of the statute." *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring).

In any event, honoring the plain meaning of § 2680(h) "does not lead to absurd results requiring us to treat the text as if it were ambiguous." *Lamie*, 540 U.S. at 536. Even if the distinction Congress drew between law enforcement officers and other federal employees "may seem odd," it "is not absurd." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). As one jurist has explained, "it is certainly plausible that Congress intended to hold law enforcement officers to a higher standard"—even in the workplace context—"given the important trust society places in them." *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring); see also *Watson* v. *Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995) (in matters of employee discipline, "[l]aw enforcement officers are held to a higher standard of conduct than are other federal employees"); *Jones* v. *Department of Army,* 52 M.S.P.R. 501, 506 (1992) (same).

3. Even if this Court were inclined to reach beyond the statutory text to impose a law enforcement activities requirement, it would not affect the outcome of this case. The conduct alleged here—an assault by on-duty prison guards of a prisoner under their charge, occurring on prison grounds and under color of their federal authority—is fundamentally different than the "workplace torts" at issue in cases like *Orsay*.[13] "The instant action is thus

[13] *Orsay* concerned a workplace dispute involving a supervising federal marshal pointing a loaded gun at employees. 289 F.3d at 1136. *Murphy* similarly involved a workplace dispute in which a Secret Service supervisor allegedly assaulted an agent by "delivering a tirade of profanity" and "advancing toward Plaintiff and physically challenging him." 121 F. Supp. 2d at 23.

distinguishable from cases finding the proviso did not apply to allegations involving a federal employee in a workplace incident, or a federal employee acting at the time under a completely different authority or responsibility." *Flores-Romero*, 2011 WL 4526771, at *5 (holding that § 2680(h) waived sovereign immunity for prisoner's claim that he was physically assaulted by prison guard "for no reason").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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