No. 11-10362

In the Supreme Court of the United States

KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES
SUPPORTING REVERSAL AND REMAND

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
MARK B. STERN
JONATHAN H. LEVY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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."

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 101-104) is not published in the *Federal Reporter* but is reprinted at 477 Fed. Appx. 4. The opinion of the district court (J.A. 89-97) is not published in the *Federal Supplement* but is available at 2012 WL 526000.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2012. The petition for a writ of certiorari was filed on May 10, 2012, and the petition was granted on September 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an inmate in the custody of the Federal Bureau of Prisons (BOP). In 2007, a federal jury

found petitioner guilty on one count of possessing a firearm after having been convicted of a felony, one count of possessing with intent to distribute cocaine base, three counts of witness tampering, and one count of witness retaliation. See *United States* v. *Millbrook*, 553 F.3d 1057, 1059-1060 (7th Cir. 2009); J.A. 23. The district court sentenced petitioner to 372 months of imprisonment, to be followed by eight years of supervised release. 553 F.3d at 1059; J.A. 23-24. While incarcerated before his trial and after his conviction, petitioner filed multiple administrative complaints and district court actions falsely alleging misconduct by correctional officers.[1]

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[1] See, *e.g.*, *Millbrook* v. *United States*, No. 2:10-cv-245, 2012 WL 1014977, at *5 (S.D. Ind. Mar. 23, 2012) (concluding that petitioner's sworn allegations of misconduct by correctional officers at the United States Penitentiary (USP) at Terre Haute, Indiana were "utterly discredited by the video record of the incident" such that "no reasonable jury could believe [petitioner's] version of what occurred"); *Millbrook* v. *Cosby*, No. 4:07-cv-4023, 2009 WL 2913449, at *9 (C.D. Ill. Sept. 4, 2009) (concluding that "medical records belie [petitioner's] claim" of deliberate indifference by medical personnel and that petitioner provided nothing to support "his bare accusation" that his "medical records have been altered"); *Millbrook* v. *Prine*, No. 4:06-cv-4043, 2007 WL 2937129, at *2, *5 (C.D. Ill. June 28, 2007) (concluding that videotape evidence, which showed that correctional officers did not use excessive force, directly contradicted petitioner's assertion that officers slammed his head into an elevator door and "choke[d] him to the point that he almost passed out"). Cf. J.A. 14 (petitioner's statement that he has been "constantly writing complaints on staff" at USP Lewisburg); J.A. 48 (noting petitioner's pretrial incarceration began January 10, 2006).

Petitioner additionally has several pending actions seeking damages for alleged misconduct by government officials. *E.g.*, *Millbrook* v. *Potter*, No. 3:12-cv-1284 (M.D. Pa.) (filed July 5, 2012); *Millbrook* v. *United States*, No. 3:12-cv-421 (M.D. Pa.) (filed Mar. 7, 2012); *Millbrook* v. *Swick*, No. 2:10-cv-246 (S.D. Ind.) (filed Sept. 13, 2010).

a. In this case, petitioner alleges that he was physically and sexually assaulted at the United States Penitentiary at Lewisburg, Pennsylvania (USP Lewisburg), by BOP Correctional Officer Jeffrey Pealer and Lieutenant Mathew Edinger in the presence of Correctional Officer Kevin Gemberling. J.A. 11-12; cf. J.A. 33-34. BOP operates USP Lewisburg as a Special Management Unit (SMU) for inmates who are "difficult to manage in typical high security institutions," including gang leaders and "highly disruptive" inmates. BOP, U.S. Dep't of Justice, *State of the Bureau 2010*, at 5 (2012), http://www.bop.gov/news/PDFs/sob10.pdf. The conditions of confinement at an SMU are more restrictive than those at institutions for general-population inmates, but inmates transferred to an SMU may later be redesignated to another facility if they successfully complete the SMU program. BOP, U.S. Dep't of Justice, *Program Statement No. 5217.01, Special Management Units* §§ 1, 5-6 (2008), http://www.bop.gov/policy/progstat/5217_001.pdf.[2]

The summary judgment record shows that, in 2009, while petitioner was incarcerated at the United States Penitentiary at Terre Haute, Indiana, BOP designated petitioner for transfer to an SMU over his objection, based on petitioner's "history of serious and disruptive disciplinary infractions" and his "participat[ion] in or * * * associat[ion] with activity such that greater management of [his] interaction with other persons [was] necessary." J.A. 19; see J.A. 69, 73. Compare J.A. 76 (noting that petitioner was in a Special Housing Unit at USP Terre Haute) with 28 C.F.R. 541.20-541.33 (special-

[2] BOP operates five SMUs nationally, with USP Lewisburg as its only institution operated primarily as an SMU. *State of the Bureau 2010*, at 5.

housing-unit regulations). On March 1, 2010, BOP transferred petitioner to the SMU at USP Lewisburg. J.A. 14, 69.

A few days later, in the early morning of March 4, 2010, petitioner came to blows with his cellmate in their cell. J.A. 25, 78. BOP officers promptly separated the two by temporarily placing them in shower areas; examined both inmates for injuries around 5:00 a.m.; and photographed the inmates around 5:45 a.m. J.A. 25-26.

That same morning, BOP personnel conducted an area search (colloquially known as a "shakedown") of the G-Block at USP Lewisburg by moving inmates out of their cells, searching the cells, and then returning the inmates. J.A. 27, 29, 31. Officers Pealer and Brian Wert were assigned to the unit's second floor. J.A. 27, 29. During the search, Officers Pealer and Wert followed instructions to escort an inmate who had engaged in disruptive behavior (Inmate #2) to a basement holding cell. J.A. 28, 30. It also appears that petitioner was moved from the shower area to a basement holding cell near Inmate #2 during the area search.

b. The next morning (March 5), petitioner reported to BOP personnel that, after his fight with his cellmate the day before, he had been moved to a shower area and then to a basement holding cell, where one BOP officer allegedly "choked [petitioner] until he almost lost consciousness" and Officer Pealer allegedly forced petitioner to perform a sex act on the officer before allegedly threatening to kill petitioner if he reported the incident. J.A. 38, 45-46; see J.A. 35-37 (petitioner's March 5, 2010 affidavit).

Petitioner's allegations triggered a series of actions by BOP consistent with BOP's procedures for the prompt intervention by officials and the appropriate in-

vestigation of allegations of sexual abuse. See BOP, U.S. Dep't of Justice, *Program Statement No. 5324.06, Sexually Abusive Behavior Prevention and Intervention Program* (2005) (rescinded 2012).[3] First, at approximately 9:30 a.m. on March 5, petitioner was brought from his cell to USP Lewisburg's health services clinic, where the institution's clinical director assessed petitioner for trauma. J.A. 38; see J.A. 45. The doctor's contemporaneous report indicates that petitioner repeated his allegations three times before a BOP Captain and Special Investigative Agent, altering the time of the alleged assault "with each telling." J.A. 38. The examination identified bruising and a hematoma "around [petitioner's] left eye from [his] cell fight [the] day before," but, despite petitioner's assertion that officers had "choked [him] until he almost lost consciousness," the doctor found "[n]o evidence of any trauma to [petitioner's] neck," which "had no signs of bruising or abrasions." J.A. 38, 41, 44.

After the medical examination, a BOP Special Investigative Supervisory Lieutenant interviewed petitioner and a BOP psychologist was summoned to conduct an evaluation. J.A. 45. The psychologist interviewed petitioner at approximately 10:00 a.m. on March 5. *Ibid.* In her contemporaneous report, the psychologist noted that petitioner had alleged "a very similar incident" of

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[3] In 2012, BOP updated its policies governing the handling and investigation of allegations of sexual assault. See BOP, U.S. Dep't of Justice, *Program Statement No. 5324.09, Sexually Abusive Behavior Prevention and Intervention Program* (2012), http://www.bop.gov/policy/progstat/5324_009.pdf; see also 77 Fed. Reg. 37,197-37,232 (2012) (promulgating regulations at 28 C.F.R. Pt. 115); cf. 42 U.S.C. 15607(a) and (b) (requiring Attorney General to publish a rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape that would apply to BOP).

sexual assault by three officers in July 2009 at USP Terre Haute; identified symptoms that normally would be expected "for someone like this inmate who has reported experiencing a previous similar trauma"; but concluded that petitioner "does not appear to display these symptoms." J.A. 46-47. "On the contrary," the psychologist explained, petitioner "exhibit[ed] a strong emotional reaction (anger)"; "d[id] not appear to have marked anxiety or noticeably increased arousal"; and "appear[ed] to have no difficulty discussing the [alleged] event in great detail" with clinical and investigative staff. J.A. 47.

As part of the initial investigation, petitioner signed an affidavit memorializing his allegations. J.A. 35-37. Among other things, petitioner's March 5 affidavit states that, after the alleged assault and while petitioner was still in the basement, petitioner observed the "same officers" escort Inmate #2 to the basement and "rough him up." J.A. 36.

c. BOP officials reported petitioner's allegations to the Department of Justice's Office of the Inspector General (OIG), which conducted its own independent investigation. J.A. 31. OIG interviewed petitioner, who repeated his allegations and identified Inmate #2 as a witness. *Ibid.* OIG interviewed Inmate #2, who "reported that he did not witness [Officer] Pealer or any other BOP employee assault [petitioner]." J.A. 32.

OIG interviewed Officer Pealer, who executed a sworn affidavit stating that he was familiar with petitioner because of his "numerous fights since his arrival" at USP Lewisburg; specifically denying petitioner's assault allegations; and stating that he did not recall dealing with petitioner the day of the March 4 search. J.A. 27-28, 32-33. OIG also interviewed several BOP officers

who participated in the March 4 search, including Lieutenant Edinger and Officers Wert and Gemberling, none of whom "reported seeing [Officer] Pealer or any other BOP employee use excessive force against [petitioner] or sexually assault him." J.A. 32; see J.A. 33-34 (listing interview memoranda).

OIG determined that, unlike other incidents in which videotape evidence disproved petitioner's allegations of officer misconduct (see p. 2 n.1, *supra*), no cameras monitored the basement holding-cell area at the time of the alleged assault in this case. J.A. 32; cf. J.A. 12 (petitioner's complaint noting that "no video footage" captured his alleged assault). OIG noted petitioner's "history of making allegations that he was sexually assaulted by BOP staff." J.A. 32. Ultimately, OIG issued a report stating that its "investigation did not substantiate [petitioner's] allegations." *Ibid.*

2. In January 2011, petitioner filed this action under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346(b), 2671-2680. J.A. 3. In his *pro se* complaint, petitioner "seeks to be transferred" out of USP Lewisburg and $1.5 million in damages. J.A. 12.

a. Since its enactment in 1946, the FTCA has waived the United States' sovereign immunity from suits seeking damages for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of an employee of the federal 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); see FTCA, ch. 753, §§ 401-424, 60 Stat. 842-847. The Act, however, excepts 13 categories of claims from that waiver of sover-

eign immunity. 28 U.S.C. 2680. The FTCA, for instance, excepts from its provisions claims involving the exercise or performance of a discretionary function, 28 U.S.C. 2680(a), and, as a general matter, claims arising out of intentional torts, 28 U.S.C. 2680(h). The latter exception, known as the intentional-tort exception, provides that the FTCA "shall not apply" to "[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 right." *Ibid.*

In 1974, Congress amended the intentional-tort exception by adding a proviso that waived the United States' sovereign immunity from certain claims arising out of six of the 11 torts listed in the exception. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. More specifically, the proviso specifies "[t]hat, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 U.S.C. 2671 to 2680] and section 1346(b) of [Title 28] shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h). The proviso adds that, "[f]or the purpose of [Section 2680(h)], '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." *Ibid.*

b. Petitioner alleges in his complaint that federal employees were negligent "in failing to exercise reasonable care to protect [him]" and that, "[a]s a result * * * , [petitioner] suffered physical injury" when he was "sexually assaulted and battered." J.A. 9; see J.A.

9-10 (alleging that petitioner's "injury was caused by federal employee's negligence"). The complaint adds that petitioner's claim that he "was sexually assaulted and battered maliciously with evil intent by [O]fficers Pealer, Edinger, and G[e]mberling" is "a claim of sexual assault and battery and negligen[ce]." J.A. 12. Under petitioner's negligence theory, Officer Gemberling "owed [petitioner] a duty of care to protect [him] from the [alleged] sexual assault and battery of staff members Pe[a]ler and Edinger," but negligently breached that duty by standing "at the [basement] door" and doing "nothing or sa[ying] anything to stop Edinger or Pe[a]ler." J.A. 60-61, 65-66; see J.A. 66 (arguing that FTCA liability exists "not for [the] intentional tort, but for [the] negligence that precipitated [it]"). Under his intentional-tort theory, petitioner further argued that his alleged assault is actionable as "torts of assault and battery or intentional infliction of emotional distress." J.A. 65.

The government moved to dismiss or, alternatively, for summary judgment (J.A. 50-58), arguing that petitioner's negligence allegation (J.A. 55-58) and intentional-tort allegation (J.A. 53-55) were insufficient to state viable claims under the FTCA. As relevant here, the government argued that the FTCA did not waive the United States' sovereign immunity from suit on petitioner's intentional-tort claim, because it fell within the intentional-tort exception in 28 U.S.C. 2680(h). J.A. 54-55. The government explained that Section 2680(h)'s law-enforcement proviso, which serves as an exception to the FTCA's intentional-tort exception, did not apply to this case under the Third Circuit's binding precedent in *Pooler* v. *United States*, 787 F.2d 868, 872, cert. denied, 479 U.S. 849 (1986), which interpreted the proviso

as applying only to tortious conduct by federal officers during the course of an arrest, a search, or a seizure of evidence. J.A. 54; see J.A. 84-85. The government stated that there is "no dispute that [the] correctional officers [here] are law enforcement officers" under the proviso and that "Officer Pe[a]ler was acting within the scope of his employment when the alleged assault occurred." J.A. 54-55; see J.A. 84-85. But under *Pooler*, the government concluded, the law-enforcement proviso applies only when an officer's alleged misconduct occurs "during the course of an arrest, search, or seizure" and, in this case, the alleged assault "did not involve an arrest, search, or seizure." J.A. 54-55.

Petitioner responded by acknowledging that when an FTCA claim is premised on intentionally tortious conduct, the tort "has to be [committed] in the course of an arrest, search, and 'seizure.'" J.A. 66 (citing *Pooler*, 787 F.2d at 872). But petitioner argued that *Pooler* did not preclude his claim, because "the most common type of seizure is an arrest which results in detention"; petitioner was allegedly "detained" when he was "forced to commit a sexual act"; and he therefore "was seized by [federal] employees" at the time of the alleged assault as required by *Pooler*. *Ibid.*

3. The district court granted summary judgment to the government. J.A. 89-97. First, the district court concluded that petitioner did not "state[] a negligence claim upon which relief can be granted," because "it is clear that the alleged assault and battery was intentional." J.A. 96-97. Second, the district court held that petitioner's intentional-tort claim was not actionable, because it fell within the FTCA's intentional-tort exception. J.A. 94-96. The court explained that the Third Circuit in *Pooler* had construed Section 2680(h)'s law-

enforcement proviso to permit suits based on an intentional tort by a federal law enforcement officer only when the officer "execut[es] a search, seiz[es] evidence, or mak[es] an arrest." J.A. 94 (quoting *Pooler*, 787 F.2d at 872). And because a "seizure" is actionable under *Pooler*'s understanding of 28 U.S.C. 2680(h) only when it involves "the seizure of evidence," the court rejected petitioner's contention that the alleged "seizure" of his person was sufficient to make his intentional-tort claim actionable. J.A. 96.

4. The court of appeals ordered that the case be submitted to a panel for a determination whether a summary disposition without briefing by the parties would be appropriate. J.A. 99-100. The court then summarily affirmed without briefing in a nonprecedential decision. J.A. 101-104.

The court of appeals agreed with the district court that petitioner had failed to "state a negligence claim upon which relief could be granted," because "it is clear that the alleged actions were intentional," not negligent. J.A. 104 n.1 (emphasizing that petitioner alleged that he "was 'sexually assaulted and battered maliciously with evil intent by [the three correctional] officers'" (quoting J.A. 12)). The court of appeals also agreed with the district court that petitioner had failed to show that his intentional-tort claim was actionable under *Pooler*. J.A. 103-104. The court explained that *Pooler* limits Section 2680(h)'s law-enforcement proviso to cases in which an investigative or law enforcement officer commits an intentional tort "while executing a search, seizing evidence, or making arrests." J.A. 103 (citing *Pooler*, 787 F.2d at 872). The court thus concluded that petitioner's claim that he himself was unconstitutionally "seized" was insufficient to fall within the proviso, because

"*Pooler* limits the term 'seizure' to the seizure of evidence." J.A. 105.

5. Petitioner filed a *pro se* petition for a writ of certiorari that presented two questions involving his "negligence claim." Pet. i, 9-10, 12. The government opposed certiorari on the ground that the court of appeals' disposition of that claim was correct and did not implicate a division of authority. Br. in Opp. 4-5. The government noted that although petitioner "has not challenged *Pooler*'s interpretation of the law-enforcement [proviso] to the intentional-tort exception in Section 2680(h)," the courts of appeals were divided on that issue. *Id.* at 6. The government therefore explained that that division of authority might "eventually warrant this Court's review" but that review was unwarranted in this case because the petition did not implicate it. *Ibid.*

This Court granted certiorari, limited to the following question as formulated by the Court:

> 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."

133 S. Ct. 98. By letter dated November 9, 2012, the United States subsequently informed the Court that it would not defend the judgment of the court of appeals with respect to that question.

SUMMARY OF ARGUMENT

The law-enforcement proviso to Section 2680(h) applies to claims arising out of the proviso's six listed intentional torts with regard to the wrongful acts or omis-

sions of an "investigative or law enforcement officer" while acting within the scope of his employment. The Third Circuit erred in concluding that the proviso applies only to such conduct by the officer while executing a search, seizing evidence, or making an arrest for a violation of federal law. The text of Section 2680(h), the statutory structure, and the legislative history unambiguously demonstrate that no such limitation exists.

The law-enforcement proviso in Section 2680(h) waives the United States' sovereign immunity from specified intentional tort claims. The scope of that waiver must therefore be strictly construed in favor of immunity. With respect to the question presented, however, the scope of the proviso's waiver of immunity unambiguously extends to acts or omissions by investigative or law enforcement officers while acting within the scope of their employment, whether or not they occur during a search, a seizure of evidence, or an arrest.

A. Four textual and structural features establish as much. First, the proviso's text includes only three criteria defining its scope: (1) The tort claim must arise out of any of six listed intentional torts; (2) the claim must be based on the "acts or omissions" of a tortfeasing federal employee who qualifies as an "investigative or law enforcement officer"; and (3) the claim must satisfy the requirements for a valid FTCA claim under Sections 1346(b) and 2671 to 2680 of Title 28, including the requirement that the acts or omissions must be by an officer "while acting within the scope of his office or employment," 28 U.S.C. 1346(b). Second, by applying the proviso to "acts or omissions" taken by an officer "while acting within the scope of his office or employment," Congress defined the scope of the acts or omissions addressed by the proviso without further limiting them to

acts or omissions that occur "while" the officer executes a search, seizes evidence, or makes an arrest. Third, Section 2680(h)'s definition of "investigative or law enforcement officer" itself depends on whether the officer is "empowered by law" to execute searches, seize evidence, or make arrests, not on any particular exercise of that authority. And finally, the broader structure of Section 2680(h) demonstrates that, when Congress intends to exclude from the FTCA's waiver of sovereign immunity certain categories of activities of federal employees, it does so by expressly specifying the activities that lie outside that waiver. Nothing in Section 2680(h)'s text or the broader statutory structure thus supports restricting the proviso to acts or omissions that occur during searches, seizures of evidence, or arrests.

B. The legislative history of the law-enforcement proviso confirms that reading. The report of the Senate committee that drafted the proviso's text shows that the proviso was introduced in response to particular instances of egregious law-enforcement conduct involving searches and seizures by federal narcotics agents, but that it was drafted to apply beyond such circumstances. The committee was clear that the proviso would "apply to *any case* in which a Federal law enforcement agent committed the tort while acting within the scope of his employment" and would therefore "waive[] the defense of sovereign immunity" in "cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the [six torts listed in the proviso]." S. Rep. No. 588, 93d Cong., 1st Sess. 3-4 (1973) (emphasis added).

C. The Third Circuit's analysis in *Pooler* does not withstand scrutiny. The court's partial reliance on Section 2680(h)'s language cannot be squared with the text

itself, and its description of the proviso's legislative history is contradicted by the very source on which the court relied. Indeed, in the 26 years since the Third Circuit interpreted the law-enforcement proviso (without the benefit of briefing by the government on the issue), no other court of appeals has followed its lead.

D. Petitioner's intentional-tort claim falls within the scope of Section 2680(h)'s law-enforcement proviso and Section 1346(b)'s waiver of sovereign immunity. First, his claim for "assault" and "battery" invokes two of the intentional torts expressly listed in the proviso. Second, the government conceded below that the BOP officers in this case qualify as "investigative or law enforcement officers." And finally, the government conceded that Officer Pealer was acting within the scope of his employment at the time of the alleged tort. As a result, this case was not correctly resolved below based on *Pooler*'s interpretation of Section 2680(h). A remand is therefore warranted for further proceedings on petitioner's intentional-tort claim.

ARGUMENT

THE WAIVER OF SOVEREIGN IMMUNITY IN THE LAW-ENFORCEMENT PROVISO TO SECTION 2680(h) IS NOT LIMITED TO TORTIOUS CONDUCT THAT OCCURS DURING A SEARCH, A SEIZURE OF EVIDENCE, OR AN ARREST

In 1974, Congress waived the United States' sovereign immunity from tort claims seeking damages for injuries caused by the wrongful acts or omissions of "investigative or law enforcement officers" of the United States Government while acting within the scope of their employment when those claims arise out of, *inter alia*, assault or battery. 28 U.S.C. 2680(h); see 28 U.S.C. 1346(b)(1). The court of appeals in this case applied its existing precedent in *Pooler* v. *United States*, 787 F.2d

868, 872 (3d Cir.), cert. denied, 479 U.S. 849 (1986), which held that the 1974 waiver of sovereign immunity in Section 2680(h) extends only to wrongful acts or omissions of "investigative or law enforcement officers" committed while such officers "execut[e] a search, seiz[e] evidence, or mak[e] arrests for violations of federal law." J.A. 103. That is incorrect. The text of Section 2680(h), the statutory structure, and the legislative history demonstrate that the wrongful acts or omissions of an "investigative or law enforcement officer" acting within the scope of his employment can trigger FTCA liability of the United States for assault and battery, whether or not the officer's tortious conduct occurs while he is executing a search, seizing evidence, or making an arrest.

A. The Text And Statutory Context Of The Law-Enforcement Proviso Unambiguously Waive Immunity From Intentional-Tort Claims Based On Acts And Omissions Of Investigative Or Law Enforcement Officers Acting Within The Scope Of Their Employment

When Congress passed the FTCA in 1946, it included in the Act an exception for intentional torts—now codified at 28 U.S.C. 2680(h)—that preserved the United States' sovereign immunity from "[a]ny [tort] claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process," or any of five other specified torts. 28 U.S.C. 2680(h) (1970); see FTCA, ch. 753, § 421(h), 60 Stat. 846. For nearly three decades, that statutory preservation of immunity fully "protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts." *United States* v. *Shearer*, 473 U.S. 52, 56 (1985) (plurality opinion) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)) (brackets in original). In 1974, however, Con-

gress passed new legislation that for the first time "waive[d] sovereign immunity for [certain] claims arising out of the intentional torts of law enforcement officers." *Ibid.*

The 1974 legislation amended Section 2680(h) by adding what is known as the law-enforcement proviso. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. Notwithstanding the FTCA's preservation of sovereign immunity for matters covered by Section 2680(h)'s intentional-tort exception, the proviso effectuates a limited waiver of that immunity by specifying that, "with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [28 U.S.C. 2671 to 2680] and section 1346(b) of [Title 28] shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h).

1. This Court has long held that "any ambiguities in the scope of a waiver" of sovereign immunity must be strictly "construed in favor of immunity," because the reach of such statutory waivers "must be 'unequivocally expressed' in statutory text." *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citations omitted); *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); cf. *Dolan* v. *USPS*, 546 U.S. 481, 491 (2006) (recognizing this "general rule" of "strictly construu[ing]" the scope of statutory waivers of immunity) (citation omitted). A strict construction of the limited waiver of sovereign immunity in Section 2680(h)'s law-enforcement proviso is necessary to ensure that "the Government's consent to be sued is n[ot]

enlarged beyond what a fair reading of the text requires." *Cooper*, 132 S. Ct. at 1448.[4]

In this case, with respect to the question presented, the scope of the proviso's limited immunity waiver is "clearly discernable from the statutory text in light of traditional interpretive tools." *Cooper*, 132 S. Ct. at 1448. The text of that proviso and the broader structure of the FTCA unambiguously establish that Congress waived sovereign immunity from claims (1) arising out of the proviso's six listed intentional torts (2) with regard to the "acts or omissions" of employees of the United States who qualify as "investigative or law enforcement officers" (28 U.S.C. 2680(h)) when (3) they are "acting within the scope of [their] * * * employment" (28

[4] This Court has determined that the interpretive canon requiring strict construction of the scope of statutory waivers of sovereign immunity does not apply when "constru[ing] one of the subsections of 28 U.S.C. § 2680," in those contexts in which "unduly generous interpretations of the [FTCA's] exceptions [would] run the risk of defeating the central purpose of the [FTCA]," which "waives the Government's immunity from suit in sweeping language." *Dolan*, 546 U.S. at 491-492 (quoting *Kosak* v. *United States*, 465 U.S. 848, 853 n.9 (1984), and *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)). That interpretive principle, however, does not apply where, as here, the Court is not asked to evaluate the scope of an original FTCA exception in Section 2680. In this case, there is no risk of "defeating the central purpose" of the FTCA as reflected in its "sweeping language" (*ibid.*), because the Congress that enacted the FTCA expressly *preserved* immunity from intentional-tort claims, see *Shearer*, 473 U.S. at 56 (plurality opinion). The analytically distinct question now before the Court is the proper scope of the law-enforcement proviso, which a different Congress passed in 1974 legislation that for the first time "waive[d] sovereign immunity for [certain] claims arising out of the intentional torts of law enforcement officers," *ibid.* The text of that later enactment must be judged on its own terms and, like any normal waiver of sovereign immunity, must be strictly construed in favor of the sovereign.

U.S.C. 1346(b)), not just when they execute a search, seize evidence, or make an arrest.

2. The text of the law-enforcement proviso and the broader structure of the FTCA are unambiguous with respect to the question presented. In particular, four textual and structural features make clear that Congress did not, as the Third Circuit has held, limit the law-enforcement proviso's waiver of sovereign immunity to acts or omissions occurring in the course of executing a search, seizing evidence, or making an arrest.

First, Congress applied the proviso's waiver of immunity to the acts or omissions of federal "investigative or law enforcement officers" by specifying that, "with regard to [the] acts or omissions" of such officers, "the provisions of this chapter [28 U.S.C. 2671 to 2680] and section 1346(b)" shall apply to "any claim" arising out of any one of six specified intentional torts. 28 U.S.C. 2680(h). That text includes only three criteria to trigger the proviso's waiver of immunity: (a) The tort claim must arise out of any of the six listed intentional torts; (b) the claim must be based on the "acts or omissions" of a tortfeasing federal employee who qualifies as an "investigative or law enforcement officer"; and (c) the claim must also satisfy the requirements for a valid FTCA claim under Sections 1346(b) and 2671 to 2680 of Title 28. Nothing in the statutory text suggests any further limitation on the types of "acts or omissions" triggering FTCA liability.

Second, Congress's direction that "[S]ection 1346(b) * * * shall apply" to the tort claims identified by the law-enforcement proviso to 28 U.S.C. 2680(h) underscores that the proviso applies to the "acts or omissions" of investigative or law enforcement officers whenever the officers are acting within the scope of their employ-

ment. Section 1346(b) expressly limits the types of "act[s] or omission[s]" governed by the FTCA's waiver of sovereign immunity by conferring jurisdiction over certain tort "claims against the United States" for "injury * * * 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*." 28 U.S.C. 1346(b) (emphasis added). Although that waiver of sovereign immunity does not generally extend to the claims covered by the Act's intentional-tort exception, see 28 U.S.C. 2680(h), Congress's 1974 enactment of the law-enforcement proviso to that exception expressly extended Section 1346(b)'s waiver to six intentional-tort claims "with regard to acts or omissions of investigative or law enforcement officers." *Ibid.* In other words, for claims arising out of any of the six enumerated intentional torts, the proviso makes actionable the "acts or omissions" of federal investigative or law enforcement officers "while acting within the scope of [their] office or employment" but does not further limit the category of "acts or omissions" triggering FTCA liability.

Had Congress intended to restrict further the liability-triggering acts or omissions of investigative or law enforcement officers acting within the scope of their employment to just those that occur during searches, seizures of evidence, or arrests, it would have provided some limiting text to that effect. Indeed, the fact that the law-enforcement proviso incorporates Section 1346(b)'s textual restriction on actionable "acts or omissions" of federal employees—a restriction limiting the acts or omissions to those that occur "while [such employees are] acting within the scope of [their] office or employment"—shows that the proviso was intended to reach the specified torts arising out of *all* such acts or

omissions of investigative or law enforcement officers acting within the scope of their employment. Cf. *Dean* v. *United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Third, the definition of "investigative or law enforcement officers" in Section 2680(h) focuses on officers' status, not the types of actions in which they engage at the time of the acts or omissions that give rise to a tort claim. Congress specified that the term "'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) (emphasis added). The immunity determination depends on a federal officer's legal authority to execute searches, seize evidence, or make arrests, not on any particular exercise of that power. An officer "empowered" with such authority "by law" thus remains an "investigative or law enforcement officer" under Section 2680(h) even when he is not actually performing one of those three functions, so long as the conduct is within the scope of his employment as an investigative or law enforcement officer. For that reason, the law-enforcement proviso's application to "acts or omissions of investigative or law enforcement officers," *ibid.*, does not turn on whether the officers are actually conducting a search, seizing evidence, or making an arrest at the time of the act or omission giving rise to an intentional-tort claim.

Finally, the broader structure of Section 2680 demonstrates that, when Congress intended to limit the FTCA's waiver of sovereign immunity to exclude certain categories of activities of federal employees, Congress used statutory text that—unlike the law-enforcement proviso—expressly identifies the activities falling outside of the waiver. Congress, for instance, excluded certain tort claims "based upon an act or omission of an employee of the Government * * * in the execution of a statute or regulation," 28 U.S.C. 2680(a); claims based on "the exercise or performance * * * [of] a discretionary function or duty," *ibid.*; and claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. 2680(b). Congress similarly preserved immunity for claims "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." 28 U.S.C. 2680(c); see *Ali* v. *BOP*, 552 U.S. 214, 217-221 (2008). In contrast, Section 2680(h)'s law-enforcement proviso contains no text narrowing the types of "acts or omissions" by law enforcement officers that fall within its scope. Congress instead used text that turns on the status of the employees as "investigative or law enforcement officers" and subjects the United States to suit for the "acts or omissions of [such] investigative or law enforcement officers," 28 U.S.C. 2680(h), so long as their acts or omissions occur "while acting within the scope of [their] office or employment," 28 U.S.C. 1346(b).

In short, the waiver of sovereign immunity unambiguously expressed in Section 2680(h)'s statutory text and the structure of the FTCA is not limited to intentional-tort claims based on federal officers' acts or omissions during searches, seizures of evidence, or arrests.

B. The Legislative History Confirms The Scope Of The Proviso's Unambiguous Text

This Court has repeatedly held that "[l]egislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statut[ory text]." *Cooper*, 132 S. Ct. at 1448 (citing *Lane*, 518 U.S. at 192); see *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). Such extrinsic guides to congressional intent normally become relevant only when the statutory text is itself ambiguous. But, in the sovereign-immunity context, if there is a "plausible" reading of the text that does not waive immunity in the circumstances at issue, the statutory text does not "unambiguous[ly]" waive immunity and thus cannot properly be construed to do so. *Id.* at 37 ("[L]egislative history has no bearing on the ambiguity point."); see *Cooper*, 132 S. Ct. at 1448, 1453, 1455 n.12.

A sufficiently clear expression of congressional intent to *preserve* immunity that is plainly expressed in the legislative history may nevertheless be relevant in contexts in which the statutory text standing alone might initially be viewed as effectuating a waiver of sovereign immunity. The Court need not address that possibility in this case, however, because the law-enforcement proviso's legislative history confirms that Congress did not limit the proviso's waiver of immunity to the acts or omissions of investigative or law enforcement officers during searches, seizures of evidence, or arrests. Indeed, that history shows that although Congress sought to waive immunity from intentional-tort claims arising from searches, seizures of evidence, and arrests, it specifically designed the proviso to extend beyond those contexts.

The law-enforcement proviso originated in the Senate in 1973 as a response to warrantless and unlawful no-knock raids by federal narcotics agents who mistakenly targeted the homes of several innocent individuals. See S. Rep. No. 588, 93d Cong., 1st Sess. 2-3 (1973) (*Senate Report*). The most notorious of those raids occurred in April 1973 in Collinsville, Illinois, *id.* at 2, when groups of federal narcotics agents forcibly entered the homes of two innocent families without arrest or search warrants in misguided pursuit of suspects in an alleged cocaine-distribution ring. *Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Gov't Operations, Pt. 3*, 93d Cong., 1st Sess. 446, 549-550 (1973); see *id.* at 461-475 (family's testimony that armed agents entered their home at night without warning, handcuffed them, searched for evidence, and subjected them to abusive treatment).

In response to that egregious conduct, a Senate committee drafted the law-enforcement proviso as an amendment to a bill that had already passed the House, see *Senate Report* 2, and Congress subsequently passed the proviso with the committee's text. See 120 Cong. Rec. 5285, 5290 (1974); 119 Cong. Rec. 38,968-38,969 (1973). The committee explained that the proviso would make the "Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),]" and thus would give a monetary remedy to "innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois," *i.e.*, individuals injured during the course of unlawful "search[es] and seizures" within their own homes. *Senate Report* 3-4. The Committee

emphasized, however, that the proviso "should not be viewed as limited to constitutional tort situations," but rather 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." *Id.* at 4 (emphasis added). The Committee thus explained that the proviso would "waive[] the defense of sovereign immunity" in "cases in 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." *Id.* at 3.

That legislative understanding of the proviso directly parallels the unambiguous scope of the proviso's text. Both confirm that Congress waived the United States' sovereign immunity from intentional-tort claims based on the "acts or omissions" of investigative or law enforcement officers acting within the scope of their employment, regardless whether those acts or omissions occur during searches, seizures of evidence, or arrests.

C. The Third Circuit's Reading Of The Law-Enforcement Proviso Cannot Be Reconciled With The Statutory Text And Structure Or With The Proviso's Legislative History

The Third Circuit's reading of the law-enforcement proviso, which the court of appeals developed in its 1986 decision in *Pooler*, cannot be reconciled with the text of Section 2680(h), the statutory structure, or the legislative history. Since *Pooler*, all other courts of appeals to have addressed the question have properly declined to adopt the Third Circuit's view that the proviso applies only when investigative or law enforcement officers commit intentional torts while conducting a search, seizing evidence, or making an arrest.

In *Pooler*, the plaintiffs alleged that they were unlawfully arrested and prosecuted for selling marijuana on the premises of a Veterans Administration (VA) hospital, because a VA police officer based his investigation of them on an informant who they claimed was unreliable and submitted the charges to state prosecutors without disclosing the alleged deficiencies in his investigative methods. 787 F.2d at 869. The Third Circuit concluded that the VA officer's investigative methods and decision to file complaints with state authorities fell within the FTCA's discretionary-function exception in Section 2680(a). *Id.* at 870-871. The plaintiffs, however, additionally argued on appeal that the discretionary-function exception did not apply to claims falling within Section 2680(h)'s law-enforcement proviso, *id.* at 872. The government, in turn, took the position that the district court had properly rejected that contention. See Gov't Br. at 19-23, *Pooler*, *supra* (No. 85-1335), available at 1985 WL 1167182.

Rather than decide the appeal as briefed by the parties, the panel majority declined to resolve "the interrelationship between the discretionary function exception and the intentional tort proviso." *Pooler*, 787 F.2d at 872.[5] The majority instead held (without the benefit of

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[5] Most courts of appeals that have addressed the question have concluded that Section 2680(h)'s law-enforcement proviso does not narrow the scope of Section 2680(a)'s discretionary-function exception to the FTCA's waiver of immunity. See *Medina* v. *United States*, 259 F.3d 220, 225-226 (4th Cir. 2001) (concluding that the two provisions "exist independently" and that Section 2680(h)'s proviso does not "overr[i]de" the discretionary-function exception); *Gasho* v. *United States*, 39 F.3d 1420, 1433, 1435 (9th Cir. 1994) (discretionary-function exception will apply "even if the discretionary act constitutes an intentional tort" subject to Section 2680(h)'s intentional-tort proviso), cert. denied, 515 U.S. 1144 (1995); *Gray* v. *Bell*, 712 F.2d 490, 507-

briefing on the issue by the government) that the law-enforcement proviso did not apply to the plaintiffs' claims, because, in the majority's view, the proviso applies only to intentional-tort claims in which federal investigative or law enforcement officers are "executing a search, seizing evidence, or making an arrest." *Ibid.*

The *Pooler* majority appears to have reached that conclusion in light of Section 2680(h)'s definition of "investigative or law enforcement officer," which defines the term 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." 787 F.2d at 872 (quoting 28 U.S.C. 2680(h)). The majority explained that it read the proviso "as addressing the problem of intentionally tortious conduct occurring in the course of *the* specified government activities" in the definition, because those particular activities place government agents "most directly in contact with members of the public" and "thereby expos[e] the public to a risk that intentionally tortious conduct may occur." *Ibid.* (emphasis added). The majority stated that its conclusion that "Congress intended to deal only with conduct in the course of a search, a seizure, or an arrest" was "confirmed" by legislative history indicating that Congress enacted the proviso to provide a remedy "in situations where law enforcement officers conduct 'no-knock'

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508 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); cf. *United States* v. *Morrow*, 266 U.S. 531, 535 (1925) ("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."). But see *Nguyen* v. *United States*, 556 F.3d 1244, 1252-1257 (11th Cir. 2009); *Denson* v. *United States*, 574 F.3d 1318, 1337 n.55 (11th Cir. 2009) (suggesting that *Nguyen*'s discretionary-function holding may apply only in contexts in which federal law enforcement officers violate the Constitution), cert. denied, 130 S. Ct. 3384 (2010).

raids or otherwise violate the [F]ourth [A]mendment." *Ibid.* (citing *Senate Report* 2-3). Judge Seitz concurred in the result but emphasized his disagreement with the majority's view that Congress intended the law-enforcement proviso "to be limited in scope to the types of behavior that provided the initial motivation for its passage." *Id.* at 874.

Pooler's reading cannot be reconciled with the statute or its legislative history. Nothing in the text of the statute limits the proviso to intentional torts of federal officers occurring during a search, a seizure of evidence, or an arrest. To the contrary, as explained above, the statutory text applies to the "acts or omissions" of federal "investigatory or law enforcement officers" acting within the scope of their employment, without limiting those "acts or omissions" to those that occur during a search, a seizure, or an arrest. The proviso's definition of "investigatory or law enforcement officers," moreover, turns simply on the legal authority of those officers to execute searches, seize evidence, or make arrests, not on their actual exercise of that authority at the time of the alleged tort. See pp. 19-21, *supra*. And notwithstanding the *Pooler* majority's view that the proviso's legislative history reflects a congressional intent to "deal *only* with conduct" during searches, seizures, or arrests, 787 F.2d at 872 (emphasis added), the Senate Report on which the majority relied contradicts that conclusion. See p. 22, *supra*. The report specifically emphasizes that the proviso "should not be viewed as limited" to the situations that motivated its adoption but rather extends to "any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment." *Senate Report* 4.

No other court of appeals has adopted *Pooler*'s interpretation of the law-enforcement proviso. The Seventh Circuit, in expressly rejecting *Pooler*'s holding, recognized that *Pooler*'s analysis has been repeatedly criticized as lacking "any principled underpinning." *Reynolds* v. *United States*, 549 F.3d 1108, 1114 (2008) (observing that the government "opted not to contest" the argument that the district court erred in adopting *Pooler*'s interpretation of Section 2680(h)). The Fourth Circuit likewise rejected *Pooler*'s interpretation as inconsistent with Section 2680(h)'s "unambiguous" text. *Ignacio* v. *United States*, 674 F.3d 252, 255 (2012); cf. Gov't Br. at 13-14, *Ignacio*, *supra* (No. 10-2149) (arguing that the court of appeals "need not read the proviso [as] narrowly" as *Pooler* to accept the government's position), available at 2011 WL 568765. And although the Ninth Circuit has construed the proviso to "apply only when [a] federal official acts in his or her investigative or law enforcement capacity," *Orsay* v. *DOJ*, 289 F.3d 1125, 1133 (2002) (quoting *Arnsberg* v. *United States*, 757 F.2d 971, 978 n.5 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986)), that reading, unlike *Pooler*'s, does not limit the proviso only to those acts or omissions occurring in the course of conducting searches, seizing evidence, or making arrests. See *id.* at 1133-1136 (holding that the proviso did not waive sovereign immunity from assault claim where law enforcement officer was acting in a supervisory capacity at the time of the alleged tort and not in an investigative or law-enforcement capacity).

D. The Law-Enforcement Proviso Waives Sovereign Immunity From Petitioner's Assault And Battery Claim In This Case

Although the government relied on *Pooler* as binding circuit precedent in litigation before the district court in

this case, see pp. 9-10, *supra*, for the reasons above, the government concludes that *Pooler*'s interpretation of Section 2680(h) is erroneous. The law-enforcement proviso applies the FTCA's provisions to (1) any claim arising out of assault, battery, or four other intentional torts (2) with respect to the "acts or omissions" of "investigative or law enforcement officers" who are acting within the scope of their employment. 28 U.S.C. 2680(h); see pp. 15-22, *supra*. Petitioner's intentional-tort claim falls within the scope of that proviso and Section 1346(b)'s waiver of sovereign immunity.

1. Petitioner's intentional-tort claim rests on his contention that BOP correctional officers committed the state-law torts of assault and battery by sexually assaulting and strangling him in the basement of USP Lewisburg. See J.A. 11-12.[6] Both "assault" and "battery" claims are expressly contemplated by the law enforcement proviso. 28 U.S.C. 2680(h). Moreover, the United States conceded in district court that the BOP officers who allegedly assaulted petitioner qualify as "law enforcement officers" under Section 2680(h) and that Officer Pealer "was acting within the scope of his employment when the alleged assault occurred." J.A. 54-55; see J.A. 84-85. Petitioner's allegations thus fall within the scope of Section 2680(h)'s law-enforcement proviso.

2. In light of the United States' concession below that the BOP officers in this case qualify as "investiga-

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[6] Petitioner timely filed an administrative FTCA claim for the alleged assault and battery and exhausted his administrative remedies before timely filing this FTCA action in January 2011. See 28 U.S.C. 2401(b), 2675(a); see also Dist. Ct. Doc. 1, at 11, 13 (BOP determination dated December 29, 2010, denying petitioner's administrative FTCA claim received July 8, 2010).

tive or law enforcement officers," this case does not present an occasion to interpret Section 2680(h)'s definition of that term. We note, however, that in the government's view, the term is limited to federal agents who are authorized by law to conduct the traditional law-enforcement functions of executing law-enforcement searches (often pursuant to a warrant), seizing evidence of a criminal offense, or making arrests for violations of federal criminal law. BOP correctional officers satisfy the definition because they are empowered by law, *inter alia*, to make arrests for federal criminal offenses. 18 U.S.C. 3050; 28 C.F.R. 511.18.

Other federal employees who conduct inspections and non-evidentiary seizures of a regulatory or administrative nature outside of traditional law-enforcement contexts are not properly included within Section 2680(h)'s definition of "investigatory or law enforcement officers," which must be strictly construed in favor of immunity. See pp. 17-18 & n.4, *supra* (discussing sovereign immunity canon); see, *e.g.*, *Matsko* v. *United States*, 372 F.3d 556, 560 (3d Cir. 2004) (holding that "employees of administrative agencies, no matter what investigative conduct they are involved in, do not come within the § 2680(h) exception"); *EEOC* v. *First Nat'l Bank*, 614 F.2d 1004, 1007-1008 (5th Cir. 1980) (EEOC agents authorized to investigate civil employment-discrimination claims are not investigative or law enforcement officers), cert. denied, 450 U.S. 917 (1981); *Weinraub* v. *United States*, No. 5:11-cv-651, 2012 WL 3308950, at *5-*7 (E.D.N.C. Aug. 13, 2012) (agreeing with the majority of district courts to have addressed the issue that airport security screeners employed by the Transportation Security Administration are not investigative or law enforcement officers). A broader reading of that statutory

definition would incorrectly sweep within its scope federal employees whose positions would not fall within the natural meaning of "investigative or law enforcement officers" and who Congress never contemplated would be covered by that statutory term. Cf. *Arnsberg*, 757 F.2d at 978 n.5 (dicta noting argument that federal judges and magistrates might be "investigative or law enforcement officers" because 18 U.S.C. 3041 authorizes them to make arrests by issuing warrants); cf. also *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341 n.7 (1985) (contrasting searches conducted by school officials with searches conducted for law-enforcement agencies). The meaning of "investigative or law enforcement officer," as noted, is not a question properly before this Court.

In short, this case was not correctly resolved below based on *Pooler*'s interpretation of Section 2680(h). A remand is therefore warranted to permit further proceedings on petitioner's intentional-tort claim.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
MARK B. STERN
JONATHAN H. LEVY
Attorneys

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APPENDIX

1. 28 U.S.C. 1346(b) provides:

(b)(1) 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.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

2. 28 U.S.C. 2401(b) provides:

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

3. 28 U.S.C. 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

4. 28 U.S.C. 2674 provides in pertinent part:

Liability of United States

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.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * * * *

5. 28 U.S.C. 2680 provides:

Exceptions

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.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) 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.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]

(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.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

6. Section 2 of the Act of March 16, 1974, Pub. L. No. 93-253, 88 Stat. 50, provides:

SEC. 2. Section 2680(h) of title 28, United States Code, is amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: "*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.".