No. 11-1351

In the Supreme Court of the United States

STEVEN ALAN LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) contains an exception for intentional torts, including battery. 28 U.S.C. 2680(h). The Gonzalez Act immunizes military medical personnel from claims arising out of the performance of their health care functions by designating the FTCA as the exclusive remedy for such claims. 10 U.S.C. 1089(a).

The question presented is whether the Gonzalez Act amends the FTCA to authorize a battery claim against the United States by providing that the FTCA's intentional-tort exception does not apply "[f]or purposes of [the Gonzalez Act]." 10 U.S.C. 1089(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 663 F.3d 1059. The opinion of the district court (Pet. App. 14a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2011. A petition for rehearing was denied on February 15, 2012 (Pet. App. 42a-43a). The petition for certiorari was filed on May 8, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) provides a limited waiver of the government's sovereign immunity for certain tort claims. See 28 U.S.C. 1346(b), 2671-2680. The FTCA contains a number of exceptions. As

relevant here, the FTCA does not waive sovereign immunity for intentional-tort claims, including battery. See 28 U.S.C. 2680(h) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of * * * battery.").

b. The Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985 (1976), immunizes military medical personnel from individual suit by providing that, for claims alleging negligent or wrongful conduct, the FTCA remedy against the United States is "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). As relevant here, the Gonzalez Act further provides

> For purposes of this section [*i.e.*, the Gonzalez Act], the provisions of section 2680(h) of title 28 [*i.e.*, the FTCA's intentional-tort exception] shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

10 U.S.C. 1089(e).

2. a. Petitioner alleges that he suffered injuries as the result of a cataract surgery performed by a U.S. Navy doctor. Petitioner claims that although he had signed forms consenting to the surgery, he orally withdrew his consent before the surgery began. Pet. App. 3a-4a.

After submitting the requisite administrative claim, see 28 U.S.C. 2675, petitioner sued the United States and the Navy surgeon for negligence and battery in the United States District Court for the District of Guam. The government certified that the surgeon was acting in the scope of his employment, and therefore moved to

substitute the United States as defendant.[1] Petitioner did not oppose the substitution request, and the district court granted it. The district court subsequently granted the government's summary judgment motion on the negligence claim. Pet. App. 3a, 16a-17a.[2]

b. In the ruling at issue here, the district court dismissed the battery claim for lack of subject-matter jurisdiction. Pet. App. 21a-40a. The court started with petitioner's acknowledgment that "his action is not tenable under the FTCA, because the FTCA 'specifically does not extend the federal government's waiver of sovereign immunity to actions arising out of battery.'" *Id.* at 24a-25a (quoting Dist. Ct. Dkt. No. 92, at 1).

The court then rejected petitioner's contention that the Gonzalez Act—in particular, 10 U.S.C. 1089(e)—nevertheless authorizes his battery claim. Pet. App. 25a-38a. Noting that waivers of sovereign immunity must be "unequivocally expressed," the court explained that the Gonzalez Act was not designed to waive the government's sovereign immunity. *Id.* at 26a (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). Rather, its "only apparent purpose is to render medical personnel of the Armed Forces immune from all possible types of malpractice liability." *Id.* at 27a. Because Section 2680(h) makes an FTCA remedy for battery claims unavailable against the United States, the court reasoned,

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[1] Under both the Gonzalez Act (10 U.S.C. 1089(c)) and the Westfall Act (28 U.S.C. 2679(d)(1)), if the government certifies that an employee was acting within the scope of his employment when the claim arose, the United States is substituted as defendant and the action is treated as an FTCA action against the United States.

[2] Petitioner did not appeal that portion of the district court's judgment and does not press a negligence claim before this Court. See Pet. 5; Pet. App. 4a.

"it could be argued that the plain language of Section 1089(a) leaves open the possibility of bringing such claims against individual Armed Forces medical workers." *Id.* at 28a. The court explained that Section 1089(e) forecloses that possibility "by stating, in effect, that * * * it is to be assumed that a remedy against the United States for intentional torts is available under the FTCA, but *only* in order to bolster the medical worker's protection—that is, *only* 'for purposes of this section.'" *Ibid.* (quoting 10 U.S.C. 1089(e)).

c. Proceeding pro se,[3] petitioner appealed the dismissal of his battery claim for lack of subject-matter jurisdiction. The court of appeals affirmed. Pet. App. 1a-13a.

The court of appeals, for two reasons, rejected petitioner's interpretation of 10 U.S.C. 1089(e) as negating the FTCA's preservation of sovereign immunity against battery claims. Pet. App. 6a-9a. First, the court concluded that "the best reading" of Section 1089(e) is "not as a *waiver of sovereign immunity* for battery claims brought against the United States, but as an *expression of personal immunity* from battery claims brought against military medical personnel." *Id.* at 7a. The court pointed to the provision's opening clause ("For purposes of this section"), in combination with the Gonzalez Act's primary purpose of protecting military medical personnel from liability. *Id.* at 6a-7a. Against that backdrop, the court explained that Section 1089(e) is best read to foreclose the potential argument that a battery remedy must exist against the individual military healthcare provider because the FTCA provides no

[3] The court of appeals attempted to appoint pro bono counsel for petitioner, but he objected to appointed counsel and the court thus vacated its order appointing counsel. See 7/28/10 C.A. Order.

"remedy against the United States" (10 U.S.C. 1089(a)). Pet. App. 7a. Rather than waiving sovereign immunity, the court reasoned, Section 1089(e) nullifies the FTCA's preservation of sovereign immunity only "for purposes of" the Gonzalez Act, *i.e.*, to preserve military medical personnel's individual immunity from artfully pled malpractice claims, including battery claims. *Id.* at 8a.

Second, the court of appeals concluded that petitioner could not overcome the principle that waivers of sovereign immunity cannot be implied but "must be unequivocally expressed." Pet. App. 8a (quoting *King*, 395 U.S. at 4). The court found that petitioner's reading, at best, suggested an implied waiver of sovereign immunity: that if the FTCA's preservation of immunity "shall not apply," then a concomitant waiver of immunity shall apply. *Id.* at 9a. But such a chain of inferences, the court held, "cannot result in a waiver when nothing short of an unequivocal expression will do." *Ibid.*

The court of appeals also rejected petitioner's reliance on the Tenth Circuit's decision in *Franklin* v. *United States*, 992 F.2d 1492 (1993), which interpreted a similar provision, 38 U.S.C. 7316(f) (former 38 U.S.C. 4116(f) (1988)), as a waiver of sovereign immunity for battery claims premised on conduct of employees of the Veterans Health Administration (VHA). The court stated that *Franklin* incorrectly presumed that a statute waives sovereign immunity simply because it does not clearly state the contrary proposition. Pet. App. 11a-12a. The court further observed that *Franklin*'s reasoning—that "extensions of VA personal immunity should be contingent on the government's correlative assumption of FTCA liability" (992 F.2d at 1500)—was

rejected by this Court in *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991). Pet. App. 12a.[4]

ARGUMENT

Petitioner contends (Pet. 7-13) that the court of appeals erred in holding that 10 U.S.C. 1089(e) does not waive the sovereign immunity of the United States for battery claims arising from healthcare provided by military medical personnel. The decision of the court of appeals, however, is correct. That decision does not directly conflict with any decision of this Court or of another court of appeals, and, in any event, the other decisions cited by petitioner (Pet. 14 n.18) are based on reasoning inconsistent with the Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1991). Further review is not warranted.

1. The decision below is correct. "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (citations omitted). The FTCA's limited waiver of sovereign immunity for certain tort claims undisputedly does not encompass battery claims. See 28 U.S.C. 2680(h) (providing that FTCA's waiver of sovereign immunity "shall not apply to * * * [a]ny claim arising out of * * * battery"). Accordingly, in order for petitioner to prevail, Section 1089(e) would have to

[4] The court of appeals rejected petitioner's additional argument that the provision at issue in *Franklin* (38 U.S.C. 7316) governs this case, "[b]ecause [petitioner's] surgery was performed by Navy personnel, not employees of the VHA." Pet. App. 13a. Petitioner does not challenge that aspect of the decision below.

"unequivocally" waive sovereign immunity with respect to petitioner's battery claim. It does not do so.

The Gonzalez Act provides that, in cases involving alleged negligent or wrongful provision of healthcare by military medical personnel, the FTCA "remedy against the United States" is "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). That provision precludes malpractice plaintiffs from suing individual military medical personnel and instead requires them to pursue an FTCA remedy against the United States. Because the FTCA permits a "remedy against the United States" for ordinary medical negligence claims, there is no doubt that Section 1089(a) bars such claims against individual military personnel.

The FTCA, however, affords no remedy for intentional-tort claims, including medical battery claims. See 28 U.S.C. 2680(h). To the extent Section 1089(a) might leave doubt whether its bar on individual liability would extend to medical battery claims, in view of the absence of an FTCA remedy for such claims, Section 1089(e) eliminates that doubt.[5] Section 1089(e) provides: "For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in

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[5] The accompanying Senate Report confirms this concern and Subsection (e)'s role in addressing it: "In some jurisdictions it might be possible for a claimant to characterize negligence or a wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity * * * simply as a result of how he pleaded his case. In short, subsection (e) makes the [FTCA] the exclusive remedy for any action, including assault and battery, that could be characterized as malpractice." S. Rep. No. 1264, 94th Cong., 2d Sess. 9-10 (1976).

the performance of medical, dental, or related health care functions (including clinical studies and investigations)." By deeming Section 2680(h) inapplicable "[f]or purposes of this section," the Gonzalez Act operates *as if* the FTCA provided a remedy against the United States for battery claims. But it does not take the further step of actually waiving the United States' sovereign immunity to provide one. As the court of appeals concluded (Pet. App. 7a-8a), by assuming the availability of an FTCA remedy "[f]or purposes of this section," Subsection (e) acts in conjunction with Subsection (a) simply to ensure that no military medical provider may be sued individually, even if the claim is pled as an intentional tort.

Petitioner proposes reading Section 1089(e) to actually abrogate Section 2680(h) and thereby make available an FTCA remedy for battery claims arising out of healthcare provided by military medical personnel. But the court of appeals' more restrained reading is better for several reasons. First, as noted above (pp. 7-8, *supra*), Section 1089(e) opens with the phrase "[f]or purposes of this section," which suggests that its treatment of Section 2680(h) is *only* for the purpose of ensuring the individual immunity provided by Section 1089(a), not to alter the broader FTCA scheme. Second, even without that proviso, it would be odd for Congress in the Gonzalez Act to have amended the FTCA—essentially by repealing Section 2680(h) with respect to the type of claim at issue—to provide a new remedy. The Gonzalez Act, a discrete statute, was designed "solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs." *Smith*, 499 U.S. at 172. Third, to the extent Section 1089(e) is at least ambiguous on this question, it cannot

be construed to have "unequivocally" waived the United States' sovereign immunity against petitioner's battery claim and others like it. *Lane*, 518 U.S. at 192. Indeed, Section 1089(e) contains no express waiver of immunity at all.

2. Petitioner cites (Pet. 14 n.18) three courts of appeals cases for the proposition that Section 1089(e) and other similar provisions effectuate a waiver of sovereign immunity. See *Franklin* v. *United States*, 992 F.2d 1492 (10th Cir. 1993); *Keir* v. *United States*, 853 F.2d 398 (6th Cir. 1988); *Lojuk* v. *Quandt*, 706 F.2d 1456 (7th Cir. 1983), cert. denied, 474 U.S. 1067 (1986). The decision below does not conflict with any of them. *Lojuk* and *Keir* address the issue only in dicta, and *Franklin* involves a different statute that is distinguishable by its terms. In any event, those cases rely on reasoning that is inconsistent with the Court's holding in *Smith*, and thus the other circuits should be permitted to reconsider their views in light of *Smith* and the decision below.

a. In *Lojuk*, the Seventh Circuit held that VHA medical personnel are not immune from suit for battery under former 38 U.S.C. 4116(a). 706 F.2d at 1462-1464. In reaching that conclusion, the court compared that statute to several other statutes, including the Gonzalez Act, and opined—in dicta—that Section 1089(e) "waiv[es] the immunity of the United States for battery." *Id.* at 1463; see also Pet. App. 26a-27a (describing *Lojuk* as "suggesting *in dicta* that 10 U.S.C. 1089(e) permits battery claims against United States") (emphasis added). In *Keir*, the Sixth Circuit, in an FTCA case about the scope of Section 2680(h) itself, stated—again in dicta—that Section 1089(e) "was intended to include a waiver of immunity for malpractice actions even though, under state law, they might technically be characterized as a bat-

tery." 853 F.2d at 410 (citing *Lojuk*, *supra*). Even petitioner appears to recognize that the statements in those cases about Section 1089(e) amount only to dicta. See Pet. 14.

In *Franklin,* the Tenth Circuit considered the amended VHA statute, now codified at 38 U.S.C. 7316(f), which states that "[t]he exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission" by VHA medical personnel. The court held that Section 7316(f) authorized a battery claim against the United States notwithstanding Section 2680(h). *Franklin*, 992 F.2d at 1500-1502; see also *id.* at 1501 (citing, *e.g.*, *Lojuk* and *Keir* in comparing Section 7316(f) to Section 1089(e)). *Franklin* is distinguishable from this case, however, because Section 7316(f) differs from Section 1089(e) in a relevant respect: Section 7316(f) does not include the opening proviso "[f]or purposes of this section," which strongly reinforces the court of appeals' interpretation of Section 1089(e). See pp. 7-8, *supra.* Indeed, the decision below substantially relies on that proviso. See Pet. App. 6a-8a. Moreover, the legislative history of Section 1089(e), on which the decision below also relied, differs significantly from that of Section 7316(f), which the Tenth Circuit considered as supporting its reading. Compare *id.* at 7a-8a with *Franklin*, 992 F.2d at 1500. Accordingly, *Franklin* would not preclude the Tenth Circuit from reaching the same conclusion as the decision below in a case involving the Gonzalez Act.

b. In any event, *Franklin* rests largely on the premise that "extensions of * * * personal immunity should be contingent on the government's correlative assumption of FTCA liability." 992 F.2d at 1500; see also *Lojuk*, 706 F.2d at 1463 ("Congress did not intend to immu-

nize officials from battery claims * * * unless a plaintiff had an alternative remedy against the United States under the FTCA."). In other words, the Tenth Circuit assumed that, to accomplish Congress's goal of immunizing individuals from battery claims, the statute had to permit battery claims against the United States. As the decision below explains (Pet. App. 12a), however, that premise was repudiated in *Smith*. See *Smith*, 499 U.S. at 165 (holding that the Westfall Act, 28 U.S.C. 2679(b)(1), "immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government").[6] Both *Lojuk* and *Keir* were decided before *Smith*, and *Franklin*'s reasoning cannot be reconciled with *Smith*.[7]

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[6] Section 2679(b)(1) provides, in terms analogous to Section 1089(a), that "[t]he remedy" against the United States under the FTCA "is exclusive of any other civil action or proceeding for money damages * * * against the employee." In *Smith*, the plaintiffs claimed to have been injured abroad by a military doctor. 499 U.S. at 162. Because the FTCA contains an exception to its waiver of sovereign immunity for injuries sustained abroad, thus precluding suit against the United States, the plaintiffs sought to proceed against the doctor personally. *Id.* at 162-163; see 28 U.S.C. 2680(k). This Court rejected the plaintiffs' assertion that they must have a remedy either against the employee individually or against the United States, holding that Section 2679(b)(1) bars "recovery against a Government employee" even "where the FTCA itself does not provide a means of recovery." 499 U.S. at 166.

[7] Under the court of appeals' reading, Section 1089(e) is arguably superfluous in light of the Court's holding in *Smith*. Cf. Pet. 9. Under *Smith*, Section 1089(a) alone confers immunity on military medical personnel from all claims (including battery) arising out of medical care, notwithstanding the operation of 28 U.S.C. 2680(h), so Section 1089(e) is presumably unnecessary. But, as the legislative history indicates (see note 5, *supra*), Congress was uncertain of that conclusion at the time the Gonzalez Act was enacted, and thus enacting Section 1089(e) made sense as a matter of caution.

In sum, no court of appeals has considered the text of the Gonzalez Act after *Smith* and reached a result different from the one correctly reached below. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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