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IN THE SUPREME COURT OF THE UNITED STATES

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KIM MILLBROOK, :

Petitioner : No. 11-10362

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Tuesday, February 19, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:25 a.m.

APPEARANCES:

CHRISTOPHER J. PAOLELLA, ESQ., Washington, D.C.; on behalf of Petitioner; appointed by the Court.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent, supporting reversal and remand.

JEFFREY S. BUCHOLTZ, ESQ., Washington, D.C.; for amicus curiae in support of the judgment below; appointed by this Court.

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1 P R O C E E D I N G S

2 (10:25 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-10362, Millbrook v. United
5 States.

6 Mr. Paolella.

7 ORAL ARGUMENT OF CHRISTOPHER J. PAOLELLA,
8 FOR PETITIONER, APPOINTED BY THIS COURT

9 MR. PAOLELLA: Mr. Chief Justice, and may it
10 please the Court:

11 The plain language of Section 2680(h)'s is law
12 enforcement proviso waives sovereign immunity in
13 clear, precise and unambiguous terms. It extends the
14 waiver to any claim for one of the six enumerated torts
15 committed by a Federal investigative or law enforcement
16 officer acting within the scope of his or her
17 employment.

18 And it defines investigative or law
19 enforcement officer as any officer of the United States
20 who is quote, "empowered by law," unquote, to carry out
21 searches, seizures or arrests.

22 JUSTICE GINSBURG: Would that include, say,
23 a meat -- a meat inspector? There is a wide range of
24 Federal employees that have arrest or search or
25 seizure --

1 MR. PAOLELLA: The proviso doesn't say any
2 employee of the United States who is authorized to carry
3 out a search, seizure, or arrest. It used the term "any
4 officer of the United States." And I believe that the
5 term "officer" carries some water here. If we look at a
6 spectrum of individuals who have powers -- for example,
7 to carry out searches -- we can envision on the one hand
8 very traditional core law enforcement officers.

9 Let's take a DEA officer who can carry out
10 arrests, do searches and seizures, is authorized to use
11 force. At the other end of the spectrum, we have
12 something like a meat inspector or an OSHA inspector,
13 who may have a limited ability to carry out searches,
14 but these are searches that are in really a law
15 enforcement capacity -- an administrative capacity as
16 opposed to a core law enforcement capacity.

17 So the government raises the argument, and
18 we think it's a plausible interpretation, that by using
19 the term "officer" rather than any employee of the
20 United States, that there was some limiting factor
21 imported into the statute, thereby the statute's plain
22 language.

23 And I would trust my colleague from the
24 Solicitor General's office to map the boundaries of
25 that. I would say that in any case, a correctional

1 officer, who are the individuals who are involved here
2 in committing the complained-of acts, certainly falls
3 much closer to core law enforcement on that spectrum
4 than to the administrative side.

5 JUSTICE KENNEDY: As a general matter, first
6 in the States and then in the Federal Government, is a
7 correctional officer or prison guard usually deemed to
8 be a peace officer? Do you know?

9 MR. PAOLELLA: The -- yes. In many states
10 that use the term "peace officer" in the statutes
11 defining a peace officer for things -- for example,
12 authorizing the use of force or authorizing the carriage
13 of weapons -- many States -- it's not uniform, but many
14 States include correctional officers within that ambit.

15 The Federal Government typically does not
16 use the term "peace officer" in its statutes, but if you
17 look at Federal statutes that use the term "law
18 enforcement officer," which is the very term that's used
19 in subsection (h), many -- many of those other statutory
20 schemes expressly include correctional officers. So,
21 for example, for purposes of civil service pay, for
22 purposes of death benefits, of retirement benefits.

23 JUSTICE SCALIA: That doesn't prove that
24 they're officers. I mean, that's -- that's not the test
25 for an officer, how much you're paid. The test is

1 whether you exercise significant authority under the
2 laws of the United States. That's a pretty fuzzy line,
3 but I'm not sure that a prison guard exercises
4 significant authority under the laws of the United
5 States.

6 MR. PAOLELLA: I would think in the context
7 of the prison, it's hard to imagine how a prison guard
8 could exercise any more authority than they do. In
9 addition to their correctional function, prison
10 correctional officers are essentially the police force
11 for the prison.

12 They are charged with maintaining order, and
13 they're charged with enforcing the laws of the United
14 States within the confines of the prison, and indeed in
15 some specified cases, outside the prison walls. For
16 example, they are explicitly authorized under Section
17 3050 of Title 18 of the U.S. Code not just to carry out
18 arrests in prison for violations of the Federal law, both by
19 prisoners and visitors, but to carry out arrests outside
20 the prison walls to prevent prisoner escapes or to
21 prevent assaults on other law enforcement officers. So
22 there's quite expressly an arrest authority granted to
23 correctional officers. In addition, they have the power
24 to search for contraband, both in the context of
25 visitors to prison and prisoners themselves.

1 JUSTICE SOTOMAYOR: Counsel, you've argued
2 something slightly different than I took from your
3 briefs. Earlier, in response I think to
4 Justice Ginsburg, you were queueing closer to the
5 Solicitor General's position that this has to be limited
6 in some way. And you said you'll let them establish the
7 boundaries. I don't want to let them establish the
8 boundaries.

9 I want you to tell me, is it criminal law
10 enforcement agents, is it law enforcement agents with --
11 acting -- as the Ninth Circuit says -- acting within a
12 law enforcement activity? Because I am finding it hard
13 to figure out why we shouldn't permit tort liability on
14 an OSHA inspector, who, in inspecting whatever he or she
15 is inspecting punches someone or does some intentional
16 assaultive act, why they should be permitted to do that.
17 Assuming it falls within the definition of a law
18 enforcement activity.

19 MR. PAOLELLA: Justice Sotomayor, let me
20 begin answering that question by making a distinction
21 which I think is an important distinction here, between
22 the definition of status and the definition of the
23 conduct that's implied here. Because I think this is a
24 crucial difference between the amicus's argument on one
25 hand and the Solicitor General's office on the other

1 hand.

2 The amicus would limit the type of conduct
3 that's covered by the statute. They would limit it to
4 actions that occur in a law enforcement capacity. So
5 I'm not sure exactly what that means. I think that gets
6 passed along with ---

7 JUSTICE SOTOMAYOR: I think they're saying
8 is arrests, search and seizure, and whatever the third
9 was.

10 MR. PAOLELLA: Or some other similar
11 activities, which, again, I'm not sure addresses the
12 topic --

13 JUSTICE SOTOMAYOR: But let's define it more
14 broadly. Let's assume I was willing to define it to
15 include all of the activities that a law enforcement
16 agent would engage in, including protective services,
17 security services, like your officers.

18 MR. PAOLELLA: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: Let's assume that we've
20 defined it more broadly. What's the problem with their
21 position?

22 MR. PAOLELLA: The problem with their
23 position is -- with the amicus --

24 JUSTICE SOTOMAYOR: And of -- yes, with
25 amicus's or the government's, meaning, instead of

1 limiting it to criminal activity, limited to law
2 enforcement activities broadly defined.

3 MR. PAOLELLA: The problem with amicus's
4 requirement is it has no textual basis in the
5 statute. The statute is very precise.

6 JUSTICE SCALIA: Well, I will give you --
7 I'll give you a textual basis. Why is it if all the
8 statute is concerned about is the status of being a law
9 enforcement -- investigative or law enforcement
10 officer -- why is it that the exception it makes does
11 not eliminate the exemption for libel, slander,
12 misrepresentation, deceit or interference with contract
13 rights?

14 There is excepted from the provisions of the
15 Tort Claims Act any claim arising out of assault,
16 battery, false imprisonment, false arrest, malicious
17 prosecution, abusive process, libel, slander,
18 misrepresentation, deceit or interference with contract
19 rights.

20 However, for -- for purposes of this
21 exemption from the exemption -- the exception from the
22 exemption, they leave out the latter part. Why did they
23 only put in the others? I think the reason they only
24 put in the others is that those are the kind of torts
25 that would be conducted in the course of conducting a --

1 what's the words -- investigative or law enforcement
2 activity.

3 MR. PAOLELLA: Well, Your Honor --

4 JUSTICE SCALIA: The others would not --
5 would not occur.

6 MR. PAOLELLA: I think that that is a
7 limiting factor that is not just implicit but explicit
8 in the statutory text.

9 JUSTICE SCALIA: Yes, but it's -- it's a
10 limiting factor that -- that shows, that displays an
11 intent to limit the -- the activities of investigative
12 or law enforcement officers to those activities
13 conducted in the course of investigating or enforcing
14 the law.

15 MR. PAOLELLA: Well, the fact that Congress
16 was so explicit about categorizing precisely the kind of
17 torts that are covered here -- that sort of conduct --
18 and the fact that Congress was so precise about
19 cross-referencing Section 1346(b), which incorporates
20 the scope of employment requirement, suggests to me that
21 when Congress wanted to confine the capacity in which
22 the acts occurred, it could do so, and it did in fact do
23 so.

24 JUSTICE GINSBURG: I understand --

25 JUSTICE SCALIA: Why would it leave out

1 those other ones? That's what I'm asking you. What
2 possible reason is there to leave out libel, slander,
3 misrepresentation, deceit, or interference with contract
4 rights?

5 MR. PAOLELLA: That was a policy judgment
6 that Congress made, that it would not --

7 JUSTICE SCALIA: I -- I didn't deny that
8 it's the judgment. What reason could there be for that
9 judgment?

10 MR. PAOLELLA: That it didn't think that
11 those sorts of torts in this context -- and I think we
12 all agree this is a law enforcement-oriented provision.
13 It's called the law enforcement proviso.

14 JUSTICE SCALIA: I give you a reason.

15 MR. PAOLELLA: Yes.

16 JUSTICE SCALIA: The reason -- the reason
17 they left it out is that they don't think those torts
18 would be committed in the course of investigating or
19 enforcing the law.

20 MR. PAOLELLA: I think that's right,
21 Your Honor, but that doesn't mean that from that we
22 ought to draw an entirely extra-textual additional
23 limitation that goes beyond the specific line that
24 Congress did, in fact, draw here.

25 JUSTICE GINSBURG: Your view is that the

1 limitation is scope of employment.

2 MR. PAOLELLA: That's right.

3 JUSTICE GINSBURG: The scope of employment
4 is, and you don't add on anything else to that. You
5 don't add arrest, search and seizure.

6 But does this whole issue have an academic
7 flavor, because how in the world could the conduct
8 involved in this case qualify as within the scope of
9 employment?

10 MR. PAOLELLA: First of all, Your Honor, I
11 think that the question of scope of employment was
12 something that was conceded below. It was never
13 litigated. It was never briefed before the Respondents'
14 brief. And from my reading of the question presented as
15 this Court formulated it, it was excluded from the
16 question presented. So I don't think this Court needs
17 to address it. It's more properly addressed on remand
18 if it's important.

19 But here I think that there is an argument
20 that's within the scope of employment. And if you look
21 at cases, for example the Mary M. case out of the
22 California Supreme Court, there the California Supreme
23 Court held that a sexual assault by a law enforcement
24 officer of an individual who was subject to that
25 officer's authority could be held to be within the scope

1 of employment, because an officer is vested with
2 authority and it is reasonably foreseeable that that
3 authority can sometimes be abused if it happens when the
4 officer is in uniform, on job hours, dealing with
5 someone who that individual is authorized to use
6 appropriate force against.

7 And even in Pennsylvania, you see cases
8 where people do outrageous things, like a private
9 detective shooting a picketing protester, where the
10 Pennsylvania courts have held that that's within the
11 scope of employment.

12 It's a complicated issue. It's an issue of
13 State law and it will be different in every State, which
14 is why I would suggest it's more appropriate for this to
15 be handled on remand rather than have a ruling by this
16 Court on a narrow issue of Pennsylvania State law. But
17 I think it is hardly implausible that Pennsylvania
18 courts would find this within the scope of employment.

19 Your Honor, if there's no further questions,
20 I will reserve the remainder of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Yang.

23 ORAL ARGUMENT OF ANTHONY A. YANG,

24 FOR RESPONDENT, SUPPORTING REVERSAL AND REMAND

25 MR. YANG: Mr. Chief Justice and may it

1 please the Court:

2 The text and structure of the law
3 enforcement proviso in the Federal Tort Claims Act more
4 generally make clear that the proviso unambiguously
5 waives sovereign immunity for claims arising under the
6 six intentional torts listed for acts or omissions of
7 persons qualifying as Federal law enforcement officers
8 while acting within their scope of employment.

9 Nothing in the statute supports amicus's
10 additional limit, which would require such officers to
11 be acting in a law enforcement capacity or by exercising
12 law enforcement authority, neither of which phrase
13 occurs within the statute itself. Quite the contrary --

14 JUSTICE KAGAN: What are the kinds of
15 things, Mr. Yang, that would be within the scope of
16 employment, but would not be acting in a law
17 enforcement capacity for a law enforcement officer?
18 What's the difference between those two standards for a
19 law enforcement officer?

20 MR. YANG: Well, this is complicated by the
21 fact that for the Federal Tort Claims Act, scope of
22 employment is a question that turns on State law. As a
23 result it will vary. Some States have a rather broad
24 understanding of scope of employment and sometimes in
25 fact will encompass within the scope of employment

1 rather egregious intentional torts. It's not
2 necessarily what the Court might think of as within the
3 scope of one's Federal law enforcement authority.

4 So with respect to law enforcement
5 authority, I mean, this -- that makes the question a
6 little more difficult because that is not something that
7 actually appears in the statute and it's not something
8 that the United States embraces as a test because it is
9 a creation of the amicus.

10 What the statute here does, the only term --
11 the only place that it uses law enforcement is in the
12 defined term "investigative or law enforcement officer"
13 and then what it does in defining that term --

14 JUSTICE KAGAN: But you can't give me just a
15 couple of examples of how the difference would matter,
16 you know, in some States, where something would be --
17 would meet the scope of employment test, but not meet
18 the acting as a law enforcement officer test, for a law
19 enforcement officer again.

20 MR. YANG: Again, acting as a law
21 enforcement officer test is not something that appears
22 in the statute and it's not something that even amicus
23 has tried to meet the limitations of. It could mean
24 various things. It could mean, for instance, something
25 as limited as executing a search, seizing evidence or

1 making an arrest. That would be the Pooler type of
2 rationale.

3 It could be something incident to that,
4 writing a report, as amicus suggests. It could be other
5 things. Law enforcement officers often aren't doing the
6 very things that we're talking about. They go on
7 patrol, they talk to kids in schools. There are all
8 types of things that law enforcement officers might do
9 that don't fall within what might thing -- what one
10 might think of as what, you know, you see on television
11 when officers are making contact with the public in
12 rather high stakes incidents.

13 So it's difficult both because we have a
14 State law term that varies and a term that doesn't even
15 appear in the statute and that we don't embrace. So
16 again, it's difficult to provide examples in any
17 definitive way because both of the comparators shift
18 depending on what we're talking about.

19 JUSTICE GINSBURG: Mr. Yang, even if --
20 if -- it depends on State law, that's clear. But does
21 the United States sometimes concede scope of authority
22 so it can represent -- it can be the sole defendant in
23 the case, the individual officer is off the hook, so
24 that the United States could make the argument: It
25 never happened; the officer didn't do what the plaintiff

1 charged?

2 MR. YANG: I believe, if I understand your
3 question correctly, the answer is yes, but let me
4 qualify that. This came up in a case called
5 Osborne v. Haley. And the question about scope of
6 employment for purposes of the Westfall Act turns on
7 whether at the time of the alleged incident the officer,
8 or employee in many cases, was acting within the scope
9 of his or her employment.

10 Now, when the United States investigates,
11 this is authority that is delegated to the Attorney
12 General, which is in turn redelegated to the U.S.
13 Attorney's offices, investigates the relevant
14 circumstances and determines that the allegations are
15 just false, not correct at all, in fact it never
16 happened, the employee was sitting at his or her desk
17 beavering away at important Federal matters, in that
18 instance, the Government will say that the employee was
19 in fact acting within the scope of his or her employment
20 and can explain that the reason for that is the
21 Government rejects the underlying factual assertion.

22 That's something that then is litigated if
23 the Plaintiff seeks to challenge the scope
24 determination. And the Court's decision in Osborne
25 explains that this is how the situation will play out,

1 is that then the merits of the case ultimately condensed
2 into a challenge to the scope certification of the
3 Attorney General.

4 So, no, we don't simply say they were within
5 scope for no reason. We determine whether they were
6 within scope by evaluating the circumstances at issue
7 and if the alleged circumstances did not occur and the
8 employee was acting within the scope properly, we will
9 certify that the employee was acting within the scope.

10 JUSTICE SOTOMAYOR: Could you go back and
11 tell me, yet again -- you give a limiting principle, but
12 I'm not sure how it applies. You seem to be saying --
13 do you agree with your -- with the Petitioner that law
14 enforcement officer includes correction officers?

15 MR. YANG: It does.

16 JUSTICE SOTOMAYOR: And why? Because they
17 have all of those other powers, so how is that different
18 from those in the civil area who have similar powers to
19 arrest, search and seize, to --

20 MR. YANG: Well, I guess there are two
21 elements to the definition of investigative or law
22 enforcement officer within the statute. First, they
23 have to be an officer of the United States. And the
24 term "officer" when we are talking about Federal
25 officers, the dictionary definition that most commonly

1 and comfortably applies here, are ones that we're
2 talking about like sheriffs, constables, bailiffs,
3 people who have normal Federal criminal law enforcement
4 -- well, not Federal but criminal law enforcement
5 responsibilities.

6 That -- you know, when you back out to the
7 second criteria, we think that reinforces --

8 JUSTICE SOTOMAYOR: How about Customs
9 agents?

10 MR. YANG: Customs agents? I don't know if
11 they have criminal -- I believe if we assume that they
12 are simply doing a civil function, Custom agents would
13 not fall within the term "officer" as normally applied.

14 Let me give you an example that the amicus
15 raises, Federal forest employees -- Forest Service
16 employees. Forest Service employees, the clerks that
17 work in D.C. are not what one would normally think of as
18 an officer, particularly when we are talking about the
19 phrase "law enforcement officer."

20 JUSTICE SOTOMAYOR: My problem is park
21 employees I think of as officers when you meet them at
22 the parks. They are guarding the parks.

23 MR. YANG: Some, some --

24 JUSTICE SOTOMAYOR: Or they may also be
25 giving tours. They are usually doing sort of a mixture

1 of --

2 MR. YANG: Actually, I don't think that
3 is --

4 JUSTICE SOTOMAYOR: -- duties.

5 MR. YANG: -- that's correct, Your Honor.
6 The Forest Service, as other park -- the Park Service,
7 has different roles for various individuals within their
8 employ. And there are, in fact, law enforcement
9 officers in the Park Service, and there are law
10 enforcement officers in the Forest Service, and their
11 duties are what one would traditionally think of as law
12 enforcement.

13 JUSTICE SCALIA: Mr. Yang, the United States
14 didn't take this position below, right?

15 MR. YANG: That is correct.

16 JUSTICE SCALIA: This is a change of heart.
17 How long ago was it that the United States took the
18 opposite position, the position argued by amicus here?

19 MR. YANG: Well, this is the Orsay position,
20 which is not the Pooler position I believe the Court is
21 talking about. Pooler, the Government has not taken the
22 view that the Third Circuit was correct and Pooler, as
23 far as I can tell, except within the Third Circuit, is
24 binding precedent.

25 Now, when we take a step back and abandon

1 Pooler's limited approach and apply a more amorphous law
2 enforcement capacity, law enforcement authority, the
3 Government has done that in a number of lower cases,
4 including several courts of appeals --

5 JUSTICE SCALIA: So it couldn't be that
6 obvious, I guess?

7 MR. YANG: Well, I think in those cases the
8 Government took a position that never was a position
9 that made it to the Solicitor General's office. And
10 when we took this -- both in the Reynolds case when
11 there was an adverse decision to the United States and
12 in this case, we determined that the position was not
13 one that could be -- was not correct under the text.

14 And I think, as amicus's -- amicus does, I
15 think, a valiant job of trying to defend that position,
16 but at the end of the day, there simply is not a textual
17 argument to get to that outcome.

18 JUSTICE KENNEDY: I think it is true that
19 there is a strong textual argument for your position.
20 But let me ask this: Are there any studies or any
21 statistics we can look at to see as a predictive matter
22 how many prison suits against the government this ruling
23 that you propose would -- would cause? It seems to me
24 we have close to 200,000 Federal prisoners, I think, and
25 this prison work, there is a lot of shoving, guards have

1 to break up fights.

2 So there is going to be any number of
3 instances where the question is did the guard overreach.
4 And if I make the assumption, and it's just an
5 assumption because I haven't looked at any statistics,
6 but there is -- this is going to vastly expand the
7 number of cases in which the Government is the
8 defendant. Doesn't that bear on the likelihood of the
9 congressional intent to adopt your position?

10 MR. YANG: I guess there is a few parts to
11 that question. On the statistics, I am not aware of any
12 statistics that we would be able to reliably extrapolate
13 to see what this would mean. I think there may well be
14 some additional cases. However, there are other tools,
15 as we explain in our reply brief, including the Prison
16 Litigation Reform Act, which requires the prisoners both
17 pay their filing fees and if they obtain three strikes,
18 must in fact -- they lose IFP status and must pay that
19 filing fee in advance, and it's a substantial amount of
20 money for many prisoners, given what they earn.

21 So we think that it's not a reason to ignore
22 what we think is the plain text, particularly where
23 Congress here has in the proviso specifically referenced
24 Section 1346(b). Section 1346(b) makes clear that the
25 waiver of sovereign immunity applies to acts or

1 omissions committed within the scope of employment.

2 JUSTICE SCALIA: Can you suggest why
3 Congress might have left out libel, slander,
4 misrepresentation?

5 MR. YANG: Yes. I think --

6 JUSTICE SCALIA: Why -- why would they leave
7 that out if they are only looking at the office and not
8 at the function that the person is performing?

9 MR. YANG: Well, I think that those torts
10 serve as a rough approximation of what Congress
11 anticipated would be the areas where it thought the
12 United States should be liable, when we are talking
13 about Federal law enforcement officers. And I think in
14 fact --

15 JUSTICE SCALIA: Right. I mean, that's the
16 point. So what you are saying is that it suggests that
17 they mean Federal law enforcement officers engaged in
18 law enforcement.

19 MR. YANG: Well, not -- I don't know that
20 that is the case, Justice Scalia. Certainly there is
21 some correlation between those torts and how we should,
22 for instance, understand "officer of the United States,"
23 things like false imprisonment, false arrest, malicious
24 prosecution. All evoke Federal criminal law enforcement
25 ideas. However, when we look at the text that Congress

1 used to implement the statute, the text is not like any
2 of the other instances within the Federal Tort Claims
3 Act, where Congress has limited the waiver to particular
4 types of activities or carved out certain activities.

5 In fact, what Congress did was reference
6 back to the general waiver provision which explains that
7 the waiver applies to acts within the scope of
8 employment.

9 If Congress had wanted, for instance, to say
10 only within law enforcement capacity, it would have used
11 very different language. The language of sections --
12 the other provisions in Sections 2680, for instance,
13 subsections (a), (b), and (c), which limit -- which
14 carve out the execution of a statute or regulation,
15 exercise of discretionary functions, the loss,
16 miscarriage or negligent transmission of postal matter,
17 assessment or collection of taxes or customs duties, (f)
18 specifically directs -- carves out the imposition or
19 establishment of a quarantine, (j) carves out the
20 combatant activities of military forces. If Congress
21 wanted to use similar language like law enforcement
22 activities of a law enforcement officer, it would have
23 done that.

24 And the United States -- I don't want to
25 bang the drums too loudly here. We did take a contrary

1 position previously, but when our office reviewed the
2 case, we simply determined that the position could not
3 be one that would square to the test.

4 JUSTICE SOTOMAYOR: Let's assume we adopted
5 the definition Justice Scalia just proposed, law
6 enforcement officer engaged in law enforcement
7 activities. Would correction officers be engaged in law
8 enforcement activities?

9 MR. YANG: Well, yes -- maybe yes, maybe no.
10 What we are talking about is an undefined term and the
11 term does not even -- does not appear in the statute.

12 JUSTICE SOTOMAYOR: Well, you can look at it
13 both ways. Are correction officers as officers who are
14 protecting or securing prisoners, are they acting in a
15 law enforcement capacity in your -- forget about what
16 act, what tort they commit, but do they function --

17 MR. YANG: There could be many answers to
18 that question.

19 JUSTICE SOTOMAYOR: Okay.

20 MR. YANG: You could, as the amicus or as
21 the Petitioner suggests, say that the enforcement of a
22 criminal sentence is part of law enforcement capacity,
23 so anything that they do is law enforcement.

24 You could think of law enforcement capacity
25 as more like arrests, you know, searches for violations

1 of Federal criminal law, and that sort of thing. Those
2 might be exercises that the Court would have to engage
3 in if Congress had actually used text directing the
4 Court to look at that.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. YANG: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Bucholtz.

8 ORAL ARGUMENT OF JEFFREY S. BUCHOLTZ,
9 FOR AMICUS CURIAE, IN SUPPORT OF THE JUDGMENT BELOW,
10 APPOINTED BY THIS COURT

11 MR. BUCHOLTZ: Mr. Chief Justice and may it
12 please the Court:

13 I hope to convince the Court of two things
14 today. First is about our reading of the law
15 enforcement proviso as limited to conduct of
16 investigative or law enforcement officers acting as
17 such. The first is that that reading is textually
18 plausible. It is a reasonable reading of what Congress
19 enacted in light of the structure of the statute and in
20 light of ordinary English usage.

21 JUSTICE GINSBURG: May I ask, in light of
22 your opening statement, are you then abandoning your
23 position that it must be either arrest, search or
24 seizure? You have used the Ninth Circuit formula.

25 MR. BUCHOLTZ: Well, Justice Ginsburg, it's

1 not really clear how different the Ninth Circuit and the
2 Third Circuit are from each other, because there haven't
3 been cases that have arisen that have really tested the
4 proposition that the Third Circuit meant only, literally
5 only, the execution of a search, the seizure of
6 evidence, or the making of an arrest, and that would
7 exclude conduct very closely incident to one of those
8 things. Those cases just haven't arisen.

9 So the courts have used different
10 formulations. They appear to mean slightly different
11 things by them, but I wouldn't want to exaggerate the
12 differences between the Third Circuit and the Ninth
13 Circuit. Both are trying to capture what Congress was
14 getting at here, which was the law enforcement proviso
15 was about law enforcement activity. It was about
16 covering the United States under the FTCA for abuses of
17 law enforcement authority like had occurred in
18 Collinsville, which was the national scandal that
19 prompted the enactment of the proviso.

20 So I think the answer to, Justice Ginsburg,
21 to your question, is: We think that if you take the
22 Third Circuit's language in Pooler, which of course is
23 not this case, but if you take the Pooler language
24 literally and you say that the only conduct covered is
25 conduct in the course of -- that's language the Court

1 used a few times in Pooler -- in the course of a search,
2 an arrest, or a seizure of evidence, that's problematic
3 because it's clear that Congress was trying to cover
4 abuses of law enforcement authority, including malicious
5 prosecution and abuse of process, which we know because
6 Congress included those torts in the exception to the
7 exception. And if you had a situation where an officer
8 conducted a search and then wrote a false report about
9 the search that he had conducted, the writing of the
10 report wouldn't literally be in the course of the
11 search. And so if you take those words in Pooler literally,
12 that would be excluded. That can't be right.

13 So to that extent we agree with the Ninth
14 Circuit position rather than the Third Circuit position.
15 But again I'm not really sure that it's fair to
16 attribute that extreme position to the Third Circuit.

17 JUSTICE KAGAN: Mr. Bucholtz, the statute
18 itself has a kind of conduct-based limitation in it. It
19 says law enforcement officers acting within the scope of
20 their employment.

21 So I guess my question is, given that there
22 is that conduct-based limitation in the statute, why one
23 would substitute for it law enforcement officers acting
24 as law enforcement officers? Why wouldn't one use just
25 the conduct-based limitation that's already there?

1 MR. BUCHOLTZ: Justice Kagan, I don't think
2 it's a substitution. I think it's an addition if it's
3 anything. But really the reason is that under ordinary
4 English usage, when there's a reference to somebody
5 defined by their status, it's fair to assume that the
6 reference to the person defined by their status is
7 really just intended to cover things they do in that
8 relevant status and not things they do in some other
9 capacity.

10 What we're asking the Court to do here is
11 exactly what the Court did in Lane v. Pena. In Lane v.
12 Pena, the statute at issue was the Rehabilitation Act.
13 It waived sovereign immunity and provided a damages
14 remedy against Federal providers of funding. The
15 Department of Transportation clearly was a Federal
16 provider of funding. It gave out all sorts of funding
17 to all sorts of recipients.

18 But that's not what the case was about. The
19 case was about the Merchant Marine Academy and somebody
20 who was dismissed from it. And what the Court said is
21 the reference to Federal funding providers like the
22 Department of Transportation had to be read as limited
23 to Federal funding providers acting as such. Those were
24 the Court's words, "acting as such."

25 JUSTICE KENNEDY: Okay. And then -- then

1 take that theory and track through the statute to show
2 me how that theory works, which is what your opening
3 argument was going to do.

4 MR. BUCHOLTZ: Justice Kennedy, in the first
5 sentence of the proviso, the operative provision,
6 Congress referred to acts or omissions of investigative
7 or law enforcement officers of the United States.
8 Congress didn't say any acts or omissions of
9 investigative or law enforcement officers were covered.
10 It didn't say all were covered. It just said acts or
11 omissions of law enforcement officers in the same way
12 that the statute at issue in Lane referred to conduct of
13 a Federal funding provider.

14 And so what this Court should do, we submit,
15 is construe acts or omissions of investigative or law
16 enforcement officers of the United States as limited to
17 acts or omissions of those defined -- that defined class
18 of persons in the relevant capacity, when they're acting
19 as law enforcement officers.

20 JUSTICE KAGAN: But again, it's not just any
21 acts of law enforcement officers. It's acts of law
22 enforcement officers acting within the scope of their
23 authority. And now you're saying acting as a law
24 enforcement officer. I mean, one question I suppose I
25 have, which is the same question that I gave to Mr.

1 Yang, is what's the difference between those two things?
2 And I guess the second question is: Why would we
3 substitute one phrase about how they have to be acting
4 for the phrase that Congress actually used?

5 MR. BUCHOLTZ: Congress didn't, in the
6 proviso, Justice Kagan, Congress did not actually use
7 the phrase "scope of employment." It did not actually
8 incorporate scope of employment as a limitation
9 explicitly in the proviso. It -- it incorporated
10 1346(b), which contains the scope requirement. But the
11 proviso -- in the proviso, Congress did not actually
12 speak in terms of scope of employment as the operative
13 limitation. So I don't think we'd be substituting the
14 acting as such limitation for anything that actually
15 appears in the proviso.

16 JUSTICE GINSBURG: Is it a limitation? Is
17 scope a limitation? I thought that you -- you didn't
18 question that, that scope is a limitation on the conduct
19 that's covered, right?

20 MR. BUCHOLTZ: Justice Ginsburg, we
21 certainly agree that -- that the conduct that's covered
22 has to be within the scope of the Federal officer's
23 employment. The only point I was trying to make a
24 moment ago in response to Justice Kagan is that
25 requirement exists in 1346, not in the proviso by its

1 terms. We certainly agree with that, and as we've
2 argued in our brief, we think that one way the Court
3 could affirm the judgment below is to hold that the
4 officers here were not acting within the scope of their
5 employment, taking the allegations as true, as they have
6 to be at this stage of the case.

7 But to return to Justice Kagan, to your
8 question about why Congress would have wanted to -- the
9 Court to -- to interpret "acts or omissions of law
10 enforcement officers" as acting as such, it's because --
11 in part the answer is because scope turns on State law.
12 So Congress doesn't know when it enacts the proviso
13 what's going to be covered if the only limitation is
14 scope, because that turns on 50 different States' laws.
15 And -- and I think that it's fair to say that there are
16 actual meaningful differences between different States'
17 laws as to scope as we -- as we point out in our brief.

18 But the other part of the answer is the --
19 is the second part of this Court's analysis in *Lane v.*
20 *Pena*, which is it's entirely possible literally to read
21 the Rehabilitation Act in *Lane*, and I would grant that
22 it's possible literally to read the words in the
23 proviso, as covering everything that a defined law
24 enforcement officer does within the scope of employment.
25 But the Court said in *Lane*: We can't read the statute

1 that way, because we're talking about a waiver of
2 immunity, and waivers of immunity, even if you don't
3 have to put a heavy thumb on the scales and even if you
4 don't have to require that it be unequivocal -- we're
5 not going that far here -- you can't interpret it more
6 broadly than there's any reason to think Congress meant.

7 JUSTICE BREYER: What does it leave out?
8 What does it leave out, your theory? A policeman's a
9 law enforcement officer. What does he do on his job
10 that isn't in a law enforcement role?

11 MR. BUCHOLTZ: Well, there may be certain
12 types of law enforcement officers, Justice Breyer, who
13 generally aren't engaged in law enforcement activity
14 when they're within the scope of employment. But that's
15 not the case with respect to correctional officers like
16 are at issue here.

17 JUSTICE BREYER: Oh, I see.

18 MR. BUCHOLTZ: And the reason for that is --
19 and other types of officers, which hopefully I'll be
20 able to get to, but correctional officers first since
21 that's what this case is about. 18 U.S.C. 3050 is what
22 makes correctional officers fall within the second
23 sentence of the proviso, the definition that Congress
24 provided of investigative or law enforcement officers.
25 It's what gives them the authority to execute --

1 JUSTICE BREYER: So your idea here is a park
2 policeman who is engaged in law enforcement some of the
3 time, but engaged in giving tours the rest of the time.
4 You're saying what you would do is say when he's engaged
5 in the law enforcement he's covered, but not when he's
6 engaged in the tour.

7 MR. BUCHOLTZ: That's right, because he
8 meets the status-based definition that Congress
9 provided, but there's no reason to think Congress
10 intended that he be covered when he's not engaged in law
11 enforcement activity.

12 JUSTICE SOTOMAYOR: I'm sorry. What -- what
13 is it about a corrections officer other than the act
14 that was committed here, which was an alleged sexual act
15 which nobody could, except by some definition of State
16 law, think that that ever happens naturally in the
17 course. But that's an intentional assault. The very
18 definition of the crimes that are covered assumes that
19 it's not an act that's licensed. So, why isn't the
20 correction officer acting in a law enforcement capacity
21 when he's restraining people and securing them?

22 MR. BUCHOLTZ: Because the correctional
23 officer essentially has two capacities. 18 U.S.C.
24 3050, which is the only source of law that anyone has
25 pointed to, to make correctional officers fall within

1 the definition of law enforcement officers in the first
2 place, it has nothing to do with correctional officers'
3 daily interaction with already incarcerated prisoners.
4 It authorizes correctional officers to arrest escaped
5 inmates and to arrest visitors to prisons. It has no
6 application to their daily interaction with
7 prisoners who are already incarcerated.

8 JUSTICE GINSBURG: What about the takedown
9 that occurred here and I -- it's not uncommon. The --
10 your definition includes three things, arrest, search,
11 seizure. And correctional officers do engage in
12 searches of cells for contraband, and they do engage in
13 seizures. Those are not -- this isn't like arrest,
14 which you point out the arrest is unusual; it's an
15 escapee or a visitor. But that's not true of search and
16 seizure.

17 MR. BUCHOLTZ: Justice Ginsburg,
18 correctional officers do search prisoners' cells on a
19 routine basis as part of their duty to maintain order
20 and security within the prisons. That responsibility
21 comes not from 18 U.S.C. 3050, but from 18 U.S.C. 4001
22 and following, which is an entirely different set of
23 legal authorities that has to do with the Attorney
24 General's management of the Bureau of Prisons under his
25 supervision and correctional officers -- and 28 C.F.R.

1 Part 552, which is where the correctional officers get
2 their authority from to search prisoner cells, et
3 cetera.

4 We think that when -- when correctional
5 officers are engaged in that kind of activity, they're
6 acting in a security capacity to maintain order and
7 security within the prison. They're not acting in their
8 very narrow law enforcement capacity conferred by 18
9 U.S.C. 3050. This case doesn't have --

10 JUSTICE SOTOMAYOR: Well, what happens --
11 what happens in the police precinct when police officers
12 are holding pretrial detainees? Are they acting as
13 police officers or as security people? Or even when a
14 prisoner comes back to court for a court appearance and
15 there are U.S. marshals who guard them rather than
16 correction officers, what are they serving as in your
17 mind?

18 MR. BUCHOLTZ: Well, as I said before,
19 Justice Sotomayor, I think there are certain types of
20 law enforcement officers who generally when they're
21 acting within the scope of employment are engaged in law
22 enforcement activity. And deputy U.S. marshals would
23 probably fall within that. But the important point
24 about this case is it doesn't, Justice Ginsburg, involve
25 an allegation about a search. So whatever the Court

1 might think the right way to look at correctional
2 officers when they're engaged in searches might be, this
3 case isn't about a search.

4 JUSTICE BREYER: Well, why isn't this -- why
5 isn't what the prison guard does law enforcement? I
6 mean, the law says these people are going to be locked
7 up and he's enforcing that.

8 MR. BUCHOLTZ: The law is already --

9 JUSTICE BREYER: It says he's going to be in
10 prison under these da, da, da, da, da. You know, all that
11 da, da, da means the conditions of the prison, et cetera,
12 they're all regulations, rules, statutes. He's
13 enforcing them, why not?

14 MR. BUCHOLTZ: Justice Breyer, I think we
15 can tell from the definition in the proviso what
16 Congress was focused on when it -- when it referred to
17 law enforcement officers. We can tell what Congress --

18 JUSTICE BREYER: Well, so now you're saying
19 what those three things could provide the definition?

20 MR. BUCHOLTZ: And -- and -- and other
21 conduct that --

22 JUSTICE BREYER: And are you saying that?

23 MR. BUCHOLTZ: -- I used before is yes, with
24 the caveat, and I think it's an important one, that it's
25 not just those three things, only what occurs in the

1 course of those three things the way Pooler could
2 possibly be read, but also conduct that's closely
3 incident to those things.

4 JUSTICE SCALIA: Well, you don't think the
5 EPA is engaged in law enforcement when it enforces
6 statutes and regulations, do you?

7 MR. BUCHOLTZ: It depends, Justice Scalia,
8 it depends --

9 JUSTICE SCALIA: Would an officer of the EPA
10 be a law enforcement officer when he writes a letter to
11 a company saying, you know, you are violating section
12 such-and-such of the statute? Is that a law enforcement
13 officer?

14 MR. BUCHOLTZ: Well, the person who writes
15 the letter may qualify as a law enforcement officer
16 under the definition, but that's a different question, I
17 would submit, than whether that -- whether that act
18 constitutes law enforcement activity.

19 I think the answer to that question,
20 Justice Scalia, is probably no, but the important
21 follow-up is if that person meets the definition of law
22 enforcement officer because he's an EPA agent, and after
23 the letter he follows up and goes to the premises of the
24 recipient of the letter, knocks down the door and
25 conducts an illegal search, that's what Congress was

1 trying to cover.

2 JUSTICE BREYER: Yeah, but EPA is not what
3 I'm thinking of, I don't think they are. I am thinking
4 of policemen. Okay. Now, one basic job of a policeman is
5 to patrol, but not arresting people, not searching and
6 not seizing evidence. They are on patrol. That's
7 basically what they do. All right? Is that a law
8 enforcement activity?

9 MR. BUCHOLTZ: If it's an FBI agent?

10 JUSTICE BREYER: Yeah, yeah, yeah, but I
11 mean in places -- it's Federal, I understand. So I'm
12 sure we can find analogies in the Federal situation to
13 ordinary policemen.

14 MR. BUCHOLTZ: Justice Breyer, the answer --
15 the answer -- well, it might not be so easy to find an
16 analogy to an ordinary policeman --

17 JUSTICE BREYER: All right. But FBI agents,
18 who are the federal police, they're people on Federal
19 enclaves, for example, there are -- they are on Federal
20 enclaves, they act like policemen, okay.

21 MR. BUCHOLTZ: Sure. And when they are
22 engaged in patrols, I think it's fair to say that's
23 probably law enforcement activity --

24 JUSTICE BREYER: Okay. That's favorable. I
25 mean, what I'm thinking of is either you can have a

1 broad definition or one that's going to get into trouble
2 when we consider real policemen. So if you have a broad
3 one, then I don't see how prison guards get out of it.
4 If you have a narrow one, my guess is we could find lots
5 of Federal policemen who really are policemen who aren't
6 doing what falls -- who are doing what falls outside
7 your narrow definition. I wish I could think of better
8 examples, but I came up with the ones I did.

9 MR. BUCHOLTZ: Then maybe I should try to
10 return to some of the examples that other Justices have
11 given. So there was talk earlier about an OSHA
12 inspector. The Government's position -- and I think
13 this is an important difference between our position and
14 the Government's -- the Government would say that
15 because OSHA isn't a criminal law in the traditional
16 sense and an OSHA inspector or an OSHA agent isn't
17 enforcing criminal law in the colloquial sense, that
18 that shouldn't be covered.

19 But if the OSHA inspector knocks down your
20 door and conducts an illegal search and batters you, why
21 shouldn't that be covered? We know that's a law
22 enforcement abuse, and we know that law enforcement
23 abuses is exactly what Congress is trying to get at. The
24 Government, it's like it's trying to relitigate Marshall
25 against Barlows where this Court held that OSHA

1 inspectors have to have a warrant even though you could
2 think of OSHA as being administrative or civil as
3 opposed to criminal. That's the argument that the
4 Government made there a generation ago and they lost.

5 JUSTICE KENNEDY: So how does that argument
6 help your case?

7 MR. BUCHOLTZ: Because, Justice Kennedy, the
8 point in this case is that we agree that correctional
9 officers fall within the plain language of the
10 definition that Congress provided. Again, the structure
11 of the proviso is there are two sentences, an operative
12 provision and the definition.

13 We are trying to get the Court to construe
14 the operative provision, the first sentence, in the same
15 way the Court did in Lane against Pena. The Government
16 is trying to get the Court to construe the definition,
17 the second sentence. What Congress said in the
18 definition, what the term means, the Court has much less
19 scope to construe that in some way other than the
20 literal language that Congress provided where Congress
21 said what the term means.

22 So we agree under the plain language of the
23 definition that correctional officers are investigative
24 or law enforcement officers because of 18 U.S.C. 3050,
25 which gives them the power under limited, and

1 inapplicable here, circumstances to arrest.

2 We think that if you look at correctional
3 officers under 18 U.S.C. 3050 or under the different
4 authorities under 18 U.S.C. 4001 and following and the
5 regulations, that they wear two hats. Sometimes they
6 act in a law enforcement capacity, but not usually,
7 because that only applies in the narrow context of
8 escapes or visitors. When they are dealing with already
9 incarcerated prisoners, like in the allegations here,
10 they are really not acting in that capacity at all.
11 They are wearing a different hat.

12 JUSTICE SCALIA: You are saying that the
13 Government is trying to minimize the consequences of
14 coming out its way by providing a definition of the
15 officers covered, which will not hold. You think it
16 does cover a broader category of officers including OSHA
17 inspectors, but it does not cover them when they are not
18 engaged in law enforcement activities.

19 MR. BUCHOLTZ: Justice Scalia, you have
20 absolutely perfectly encapsulated our position. Thank
21 you.

22 (Laughter.)

23 MR. BUCHOLTZ: The reason why we think that
24 that difference between our position and the
25 Government's is important is that the Government's

1 position would render the proviso severely
2 underinclusive. We know Congress was trying to get at
3 law enforcement abuses and provide a remedy. And
4 Congress -- the Government would say that if it's not a
5 traditional law enforcement officer in the colloquial
6 sense of like a constable, that it's not covered. But
7 all sorts of agents of the United States from OSHA to
8 FDA to all sorts of other agencies, to EPA, engage in
9 law enforcement activity like the three things we know
10 Congress was focused like a laser beam on: Executing
11 searches, seizing evidence, making arrests for
12 violations of Federal law. And I don't see any basis
13 consistent with the text or our understanding of what
14 Congress intended, to the extent it's different from the
15 text, to say that that's not covered.

16 JUSTICE SOTOMAYOR: The one other advantage of
17 your definition is that it takes us out of workplace
18 fights between two employees, because presumably the
19 officers who punch each other out, if that incident
20 occurs, aren't acting in a law enforcement capacity. I
21 am assuming that is part of your argument as well.

22 MR. BUCHOLTZ: That's part of it, that's
23 right.

24 JUSTICE SOTOMAYOR: All right. Then it goes
25 back to the question I asked one of your adversaries,

1 which is all of this depends on how broadly or narrowly
2 we define law enforcement activities.

3 If we take it as broadly as the Government
4 is suggesting, at moments, it would -- we could very
5 well say, you are right, it's a law enforcement
6 activity, but not as narrowly as some would have it be.
7 It would include securing or detaining people, or
8 securing or detaining people. And it would include the
9 Park Service person who stops a visitor and punches them
10 out. It would include the military personnel who stops
11 someone and does an intentional tort against them, even
12 though they may just be walking on the grounds rather
13 than serving as security that particular day.

14 So the point is, why should we give it the
15 narrow reading you are giving, and not the broader
16 reading the Government seems to be suggesting?

17 MR. BUCHOLTZ: Well, two parts to the
18 answer, Justice Sotomayor. The first is the Government
19 is trying to give the first sentence the broader
20 reading, which it recognizes then creates a problem that
21 it tries to solve by narrowing the second sentence in a
22 way that we think won't hold.

23 But the other part of the answer,
24 Justice Sotomayor, is it's about congressional intent.
25 Justice Kennedy asked earlier about whether the

1 Government's interpretation or the Petitioner's
2 interpretation would unleash a flood of suits by
3 prisoners and whether it's fair to think that Congress
4 would have intended that. If you look at the
5 legislative history of the proviso, there is absolutely
6 no indication that anyone in Congress contemplated that
7 the proviso would or could or should apply in the prison
8 situation. All Congress was focused on was providing a
9 remedy for the kinds of raids that had occurred in
10 Collinsville.

11 And so I think when somebody has two hats,
12 like a prison guard has, because, again, there is two
13 different sources of legal authority that they are
14 exercising, 18 U.S.C. 3050 versus 4001, or a military
15 policeman who has two hats, in the cases like Holian that
16 we describe in our briefs where the Government made the
17 argument that where a military policeman is engaged in a
18 military function, not a law enforcement function, that
19 they are not covered.

20 We think where somebody who meets the
21 definition that Congress provided of an investigative or
22 law enforcement officer has two distinct hats, two
23 distinct capacities. When they are not acting in the
24 law enforcement one, they are not covered. There is no
25 reason to think that Congress intended that military

1 police or prison guards be covered when they are
2 maintaining order on a military base or within a prison.
3 That's not what Congress was trying to get at.

4 And we think again a severe disadvantage of
5 the Government's position, they are trying to solve --
6 in a sense they are trying to solve the same problem
7 that we are with our acting as such interpretation, but
8 they are trying to solve it through the wrong part of
9 the statute and in a way that -- in a way ends up with
10 the worst of both worlds.

11 You end up with broader coverage of the kind
12 of conduct that's covered, broader than there is any
13 reason to think Congress intended, conduct that doesn't
14 involve law enforcement activity at all, but a narrower
15 class of people whose conduct is covered. Where that
16 excludes people like OSHA inspectors, FDA agents, EPA
17 agents and in the rare circumstance where the Forest
18 Service employee is acting as a law enforcement officer
19 rather than as a botanist or an entomologist or
20 something like that, we think Congress intended to cover
21 them.

22 We know from the definition that there were
23 three exercises of law enforcement authority that
24 Congress was focused like a laser beam on: Executing
25 searches, seizing evidence and making arrests. Where

1 somebody meets the definition of law enforcement officer
2 and they are doing one of those three things, there is
3 no basis not to say that they are covered.

4 We think it's better to interpret the first
5 sentence of the proviso the same way the Court did in
6 Lane against Pena as limited to acts or omissions of
7 investigative or law enforcement officers acting as
8 such, and keep the definition that Congress provided the
9 way Congress provided it.

10 JUSTICE GINSBURG: Then scope becomes kind
11 of a surplusage.

12 MR. BUCHOLTZ: Not surpluses necessarily,
13 Justice Ginsburg, because it varies among States. There
14 could be States where scope is narrower or broader, and
15 there could always be situations where State law is such
16 that the easiest way to resolve a case is under scope,
17 and not under the concept of acting as a law enforcement
18 officer.

19 JUSTICE GINSBURG: It has to be a law
20 enforcement function. Give -- give me an example of a
21 case where -- where scope would also be relevant, would
22 also be applicable -- if you -- if there is a law
23 enforcement function, then it fits. So what does scope
24 add?

25 MR. BUCHOLTZ: Well, if an officer is

1 executing a search but he's doing so because of a
2 personal vendetta against the person whose premises he's
3 searching, and he's -- and he's not -- under whatever
4 the State -- State's law that is applicable, if there is
5 a relatively narrow conception of scope so that you have
6 to be trying to serve your employer, which is the
7 traditional rule, and not just sort of on the job in a
8 loose sense, which is what the D.C. rule has come to be,
9 an officer who is engaged in a search or making --
10 making an arrest for a completely inappropriate reason,
11 not trying to serve the employer, not in any way that's
12 authorized by the employer, might not be within the
13 scope, but might be engaged in one of the three law
14 enforcement activities that Congress specified. And the
15 other --

16 JUSTICE KENNEDY: A prisoner -- a prisoner
17 is supposed to be back in his cell block at 6:00 in the
18 evening, he isn't, he's on the recreation yard, he's
19 somewhat recalcitrant, and two guards carry him back to
20 the cell block. Is that an arrest?

21 MR. BUCHOLTZ: No, Justice Kennedy, it's not
22 an arrest, for, among other reasons, the reason that
23 prison guards don't have any legal authority to make an
24 arrest in that circumstance.

25 The prisoner's already been arrested.

1 That's how he got to jail in the first place.

2 JUSTICE KENNEDY: Well, he's violating the
3 prison regulations.

4 MR. BUCHOLTZ: Yes. And 28 CFR part 552
5 sets out the authorities that prison guards have to
6 enforce prison regulations to maintain security and
7 order within the prison, like in that circumstance.
8 That's not making an arrest. The prison guards have the
9 authority --

10 JUSTICE KENNEDY: And that's not a law
11 enforcement function as contemplated by the statute, in
12 your view?

13 MR. BUCHOLTZ: That's correct,
14 Justice Kennedy. That -- that may involve the use of
15 force and I -- you know, you can make an argument that
16 -- that when you pick somebody up like in your
17 hypothetical, that that's like an arrest at common law.
18 There's no reason to think Congress was getting at that,
19 was trying to cover that in the proviso.

20 Where somebody has two different distinct
21 capacities as a matter of law, the way Bureau of Prisons
22 guards do, and they're acting in the one and not the
23 other, then I think that's the simple answer, is that --

24 JUSTICE SOTOMAYOR: What's the difference
25 between the officer who punches the prisoner to get him

1 on the ground and pick him up? Would it apply to the
2 officer who files an arrest complaint against the
3 prisoner, and not to the security officer who just
4 merely carries him back to his cell?

5 MR. BUCHOLTZ: Justice Sotomayor, the
6 hypothetical is --

7 JUSTICE SOTOMAYOR: Or does some physical
8 injury that's substantial. So the intentional assault
9 gets treated as an exception to this only when the
10 security officer actually files an arrest complaint? Or
11 would it at all?

12 MR. BUCHOLTZ: Are you talking about a
13 Bureau of Prison guard filing the arrest complaint?

14 JUSTICE SOTOMAYOR: Yes.

15 MR. BUCHOLTZ: Well, I think -- one thing to
16 point out is the government informs the Court in its
17 reply brief that in a situation where there has been a
18 violation of prison rules that may also be a violation
19 of Federal law that may also be a crime, such that, you
20 know, in ordinary English usage, you could refer to the
21 prison guard as conducting an investigation for
22 violation of a Federal crime.

23 What happens is the BOP guards don't do that
24 themselves. They call in the FBI. That's what the
25 government says in its reply brief. So I think that

1 itself is an indication of the distinction between
2 prison guards who are law enforcement officers as
3 Congress has defined the term, but who are not
4 traditional law enforcement officers, as the government
5 seeks to define -- redefine the term, and in that
6 capacity are not acting as law enforcement officers.

7 JUSTICE KAGAN: Mr. Bucholtz, I'm sure you
8 have done this already, so I apologize, but could you
9 just state your definition of what it means to be acting
10 as a law enforcement officer? What activities other
11 than the three listed get included?

12 MR. BUCHOLTZ: Well, Justice Kagan, it's
13 hard to give a simple comprehensive answer that applies
14 to all different types of law enforcement officers. Let
15 me start by saying that the three things that have to be
16 included are the three things that Congress specified,
17 and that's one of the problems with the government's
18 definition, is that it reads out cases involves those
19 three activities, involving, in the government's view --
20 kinds of officers.

21 JUSTICE KAGAN: But you don't want to limit it
22 to those -- so what else gets in the mix? How would you
23 define it generally?

24 MR. BUCHOLTZ: So -- in a case that involves
25 one of those three things but also something else that's

1 incident to or related to those three things, we think
2 it would probably be artificial. And you can imagine
3 all sorts of hypos, but it might well be artificial to
4 separate the writing of the -- of the report about the
5 arrest from the arrest itself. So conduct incident to
6 one of these three specified activities we think is
7 probably covered. We also think that maybe when you are
8 talking about a type of law enforcement officer like an
9 FBI agent who is wearing his law enforcement hat all the
10 time, doesn't have a second distinct capacity as a
11 matter of law, like a military policeman or correctional
12 officer, that maybe a broader definition is appropriate,
13 that maybe the FBI agent who is --

14 JUSTICE KAGAN: Maybe? I mean, yes or no or
15 when or --

16 MR. BUCHOLTZ: Well, I mean, Justice Kagan,
17 in fairness, this case doesn't present that question,
18 because it doesn't involve any law enforcement activity at all.

19 JUSTICE KAGAN: But if we're going to adopt
20 your definition, we have to have some understanding of
21 where it's taking us.

22 MR. BUCHOLTZ: Of course. Of course. And
23 where I think it would be taking the Court is that as
24 always, there could be hard cases that could arise that
25 the lower courts would have to grapple with, but I think

1 the important concept is, that where somebody has two
2 hats, a law enforcement capacity and some other
3 capacity, then it's easy to draw that line, in concept.
4 Again, there could be hard cases, but as a concept, it's
5 easy to draw that line.

6 Where somebody doesn't have two hats, they
7 only have one hat, like an FBI agent, and they are on
8 the job and they are engaged in what normal people would
9 think of as law enforcement activity, maybe that's
10 covered. I don't really have a -- have a problem with
11 that.

12 I think -- I think that's probably
13 consistent with what Congress was getting at. And maybe
14 the way to think about it is, Congress defined "law
15 enforcement officer" with reference to the three
16 specified kinds of exercises of law enforcement
17 authority, but when the FBI agent is interviewing a
18 witness or potential suspect but hasn't yet gotten to
19 the point of arresting a person or conducting a search,
20 you can think of that as preliminary to an exercise of
21 one of the three specified authorities, because after
22 all, that's what the FBI agent has the authority to do,
23 it's what his job entails.

24 And depending on how the initial questioning
25 goes, that might be the next step. And so it's never

1 far from the scene, when an FBI agent is engaged in what
2 you would normally think of as law enforcement activity,
3 that one of the three specified law enforcement
4 activities could be in the offing.

5 That's very different when you're talking
6 about Forest Service employees who technically meet the
7 definition but who usually are not doing anything within
8 a million miles of what normal people would think of as
9 law enforcement activity.

10 So I think it's important to distinguish
11 between different kinds of people who fall within the
12 definition. And -- I understand the Court wants to try
13 to figure out what the implications of this
14 interpretation would be. I think that in the prison
15 context, the answer is clear, because there are two
16 distinct capacities. And that's a hugely important
17 context as a practical matter, given the point that
18 Justice Kennedy made about the likelihood of an enormous
19 number of claims that Congress probably didn't intend.

20 In the military police context, where there
21 are also two distinct capacities, it's probably pretty
22 easy to draw the line. In other cases, it will be
23 case-by-case whether something that the Plaintiff
24 alleges should be thought of as law enforcement activity
25 or law enforcement officer acting as such. We don't

1 have a problem with the broad interpretation of law
2 enforcement activity acting as such, dealing with the
3 traditional law enforcement officer in a context that
4 it's clear Congress intended.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. BUCHOLTZ: Thank you very much, Your
7 Honors.

8 CHIEF JUSTICE ROBERTS: Mr. Paolella, you
9 have 3 minutes remaining.

10 REBUTTAL ARGUMENT OF CHRISTOPHER J. PAOLELLA,
11 FOR PETITIONER, APPOINTED BY THIS COURT

12 MR. PAOLELLA: Thank you, Mr. Chief Justice.

13 Let me begin by addressing Justice Kennedy's
14 point, his question regarding the possibility of a flood
15 of lawsuits from prisoners. I think it's important to
16 keep in mind that right now, Pooler and Orsay are the
17 minority rules. Most Federal courts have adopted a
18 broad interpretation of the law enforcement proviso.

19 So if adopting a broader interpretation here
20 would open the flood gates, the flood gates are already
21 open, and they have been for 40 years in most of the
22 country. And we haven't seen a flood of FTCA suits
23 brought by prisoners, especially since the passage of
24 the PLRA --

25 JUSTICE KAGAN: Have they also adopted the

1 government's view of what counts as an officer, or have
2 they not?

3 MR. PAOLELLA: I -- I don't think that the
4 issue has really been litigated in the Federal courts.
5 It simply hasn't come up. And I think that that's an
6 indication that it's -- it's a workable test. It's --
7 it's not something -- that there are many, many cases,
8 the vast majority of cases, involve individuals who will
9 be by any reasonable definition core law enforcement
10 officers. As far as I am aware, every Federal court to
11 address the issue has defined correctional officers as
12 law enforcement officers. You know -- as officers, as
13 that term is used.

14 So I think that these things are really
15 ultimately noncontroversial.

16 JUSTICE SCALIA: You -- you support the
17 government's position on who's an officer, right? So it
18 wouldn't include EPA. Is that --

19 MR. PAOLELLA: I think that the word
20 "officer" carries some water in this statute, and it
21 means something other than "employee."

22 JUSTICE SCALIA: Is that a yes or a no?

23 MR. PAOLELLA: Yes.

24 Justice Scalia, let me return to your
25 earlier point about inferring congressional intent from,

1 for example, from the list of enumerated torts. And I
2 think it's important to keep in mind that the best
3 evidence of Congress's intent is the text of the
4 statute. And the fundamental problem with amicus's
5 position is that he very ably uses tools for construing
6 ambiguous statutes to construe a statute that at its
7 core is not ambiguous, it's precise and it's definite.

8 Now, the coverage that is created by the
9 literal words of the statute may be debatable as a
10 policy matter. Maybe it makes sense to include
11 correctional officers, maybe it doesn't. But it's not
12 absurd. And this Court's rule is when you were
13 construing a non-ambiguous statute, Congress gets to
14 draw that policy line, not the Court, as long as the
15 result is not absurd.

16 And we would argue that Congress drew that
17 policy line here. It very specifically provided that
18 any claim based on enumerated tort by a federal law
19 enforcement officer acting within the scope of his or
20 her employment, is where it drew that line, that's what
21 the statute literally says. There is no argument about
22 that. And I think that all of the results, the parade
23 of horrors that amicus has raised, again, may be
24 debatable as a policy matter, but not one of them is an
25 absurd exercise of Congress's responsibility. And as a

1 result, we would urge the Court to reverse.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Bucholtz, this Court appointed you as an
4 amicus curiae to brief and argue the case in support of
5 the judgment below, and you have ably discharged that
6 responsibility for which the Court is grateful.

7 Thank you. The case is submitted.

8 (Whereupon, at 11:26 a.m., the case in the
9 above-entitled matter was submitted.)

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