No. 18-___

IN THE

Supreme Court of the United States

GUADALUPE CHAIDEZ CAMPOS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act's law enforcement proviso, 28 U.S.C. § 2680(h), waives the United States' sovereign immunity for "[a]ny claim" arising out of an enumerated list of intentional common-law torts committed by federal law enforcement officers. The question presented is whether, and to what extent, the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), restricts that proviso.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Guadalupe Chaidez Campos respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, Pet. App. 3a, is reported at 888 F.3d 724. The district court's order granting defendant's motion to dismiss, Pet. App. 28a, is reported at 226 F. Supp. 3d 734.

JURISDICTION

The judgment for the United States Court of Appeals for the Fifth Circuit was entered on April 24, 2018. Pet. App. 1a. On July 16, 2018, Justice Alito granted an extension of the time within which to file a petition for writ of certiorari to August 22, 2018. No. 18A55. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

A provision of the Federal Tort Claims Act, 28 U.S.C. § 2674, provides, in pertinent part, that:

> 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.

Section 1346(b)(1) of Title 28 provides, in pertinent part, that:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . 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.

The full text of 28 U.S.C. § 2680—the list of exceptions to jurisdiction under the Federal Tort Claims Act—is set out in Appendix D. Pet. App. 44a. Section 2680 provides, in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United

> States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . 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.

INTRODUCTION

This case involves a recurring and important question of federal law: how to construe the "law enforcement proviso" of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), which waives the United States' sovereign immunity with respect to an enumerated list of intentional torts when committed by federal law enforcement officers. Despite the Fifth Circuit's acknowledgment that petitioner's claim falls squarely within the law enforcement proviso, that court affirmed the dismissal of her complaint because it found that the officers' conduct also fit within the "discretionary function exception" of 28 U.S.C. § 2680(a). This decision solidifies a three-way split among the circuits on the application of the law enforcement proviso.

STATEMENT OF THE CASE

1. Petitioner Guadalupe Chaidez Campos is a Mexican national. In late March 2013, she pleaded guilty to attempted illegal reentry into the United States, 8 U.S.C. § 1326, and was sentenced to a short

prison term and three years of non-reporting supervised release.

In the fall of 2013, the Department of Homeland Security (DHS) issued her a nonimmigrant "U visa." *See* Pet. App. 14a; 8 U.S.C. § 1101(a)(15)(U). U status is conferred by DHS on noncitizens who have been the victims of specified crimes, and who have been (or are likely to be) "helpful" to federal, state, or local law enforcement agencies in "investigating or prosecuting criminal activity" specified in the statute, *id.* § 1101(a)(15)(U)(i)(III). A U visa entitles its holder lawfully to remain in the United States (normally for four years, *id.* § 1184(p)(6)), and ultimately to seek lawful permanent residence status, *see id.* § 1255(m). A U visa also entitles noncitizens ordered removed by DHS to cancellation of any order of deportation, exclusion, or removal. Pet. App. 15a; *see also* 8 C.F.R. § 214.14(c)(5)(i).

Federal law requires the Attorney General to issue U visa holders an "employment authorization" document during their time of "lawful temporary resident status." 8 U.S.C. § 1184(p)(3)(B). This document (referred to as an "EAD") indicates the holder's name, birthdate, alien registration number, legal basis for employment authorization, and period of validity. *See* Pet. App. 5a, 15a.

On November 14, 2013, petitioner reported as required to the federal probation office in El Paso, Texas. Pet. App. 4a, 29a. She was accompanied by her one-year-old child and her child's father. *Id.* at 4a.

While petitioner was at the probation office, she was confronted by a Customs and Border Protection

(CBP) officer. Petitioner showed the officer her EAD and explained that she was legally entitled to remain in the United States. Nonetheless, the officer seized petitioner, separated her from her child, and took petitioner to the Paso del Norte port-of-entry in El Paso, Texas. *See* Pet. App. 5a. There, CBP agents searched her and that afternoon deported her by "walking her across the nearby bridge into Mexico." *Id.* at 20a. After several unsuccessful attempts, petitioner was finally able to return to the United States and reunite with her child in January 2014. *Id.* at 6a.

2. After exhausting her administrative remedies, petitioner brought suit against the United States in federal district court. She invoked the Federal Tort Claims Act, which waives the United States' sovereign immunity with respect to "tort claims" to the "same extent" that a "private individual" would be liable "under like circumstances," 28 U.S.C. § 2674. She alleged that in arresting her, the CBP officer "lacked any probable cause" to believe that she "was in the United States in violation of any immigration law." First Amended Complaint, ¶ 33, *Campos v. United States*, Case 3:16-cv-00151-PRM (W.D. Tex. Aug. 1, 2016), ECF No. 13. Thus, the CBP's actions constituted false arrest and false imprisonment, both torts under Texas law. *Id.* ¶ 40. *See Wal-Mart Stores, Inc. v. Rodriguez,* 92 S.W.3d 502, 506 (Tex. 2002) (describing elements of these torts under Texas law).

The United States moved to dismiss the complaint for lack of subject matter jurisdiction. It asserted that the "discretionary function exception" to the FTCA barred petitioner's claims. That

exception, laid out in 28 U.S.C. § 2680(a), rescinds the Government's waiver of sovereign immunity with respect to claims based on a government agent's exercise or performance of "a discretionary function or duty."

The district court agreed, and dismissed petitioner's complaint with prejudice. Pet. App. 43a. The court acknowledged that petitioner's claim fell squarely within the scope of the FTCA's law enforcement proviso, 28 U.S.C. § 2680(h). *See* Pet. App. 35a. As is relevant here, that provision expressly waives the Government's sovereign immunity with respect to claims of "false imprisonment" or "false arrest" involving the "acts or omissions of investigative or law enforcement officers of the United States Government." The district court was "sure" that "CBP agents qualify as 'law enforcement officers.'" *Id.* And it recognized that "Plaintiffs' [sic] FTCA claim is grounded in her false arrest and false imprisonment allegations—intentional torts specifically enumerated in the law enforcement proviso." *Id.*

At the same time, the district court explained that "[t]he interplay between § 2680(a) and § 2680(h) has resulted in a circuit split." Pet. App. 36a. It pointed in particular to the Eleventh Circuit's rule that if a claim falls within the law enforcement proviso, "sovereign immunity is waived in any event" without regard to the discretionary function exception. *Id.* (quoting *Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009)). By contrast, it identified three other circuits that required plaintiffs both to show that their claim falls within the law enforcement proviso and to overcome the

discretionary function exception. *Id.* (citing *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001); *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995); and *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)).

The district court saw the Fifth Circuit as having adopted a "centrist position" between the two categorical approaches, Pet. App. 37a—one that looks to "the specific facts of each situation," Pet. App. 37a (quoting *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987)). The district court posited that *Sutton*'s otherwise "unmoored fact-intensive inquiry" should be "anchored" in a "bad-faith framework." *Id.* at 40a. Starting from the premise that decisions about immigration arrests and detentions inherently involve "discretionary conduct" in the form of judgment calls about probable cause and likelihood of flight, *id.* at 33a, the district court declared that cases falling within the law enforcement proviso can proceed only when the plaintiff's factual allegations "rise to the level of intentional misconduct or bad faith," *id.* at 41a.

Here, the district court did not believe that petitioner had satisfied that standard. "Although Plaintiff's situation was unfortunate," she had been "detained and deported the same day." Pet. App. 41a. Given that the Fifth Circuit had applied the discretionary function exception to cases involving "more egregious circumstances," such as an erroneous detention lasting fifteen months or the deportation of an actual citizen, the discretionary function exception should apply here as well. *Id.*

Petitioner had also argued that "where a federal officer exceeds her authority under the Constitution or federal law, those federal actions will not be protected by the discretionary function exception" in any event. Pl. Resp. to Def't's Mot. to Dismiss at 9, *Campos v. United States*, Case 3:16-cv-00151-PRM (W.D. Tex. Sept. 12, 2016), ECF No. 25. She explained that in this case, not only was petitioner's arrest and detention without probable cause a tort under Texas law; it also constituted a "violation of the Fourth Amendment." *Id.* at 11.

The district court declined to address this argument. It recognized that it was an open question in the Fifth Circuit whether a constitutional violation "precludes the application of the discretionary function exception." Pet. App. 40a (quoting *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010)). But it treated petitioner's reference to the Fourth Amendment as an untimely attempt to "shoehorn[] a Fourth Amendment violation claim" into her FTCA case, Pet. App. 42a, rather than simply an explanation of why the discretionary function exception should not apply to her claims under Texas law.

3. The Fifth Circuit affirmed the district court's holding that the discretionary function exception deprived the court of subject-matter jurisdiction.[1]

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[1] It held, however, that the district court had erred in dismissing the claims with prejudice. Pet. App. 27a. It therefore remanded the case so the district court could enter a revised order. *Id.*

The court of appeals agreed that the law enforcement proviso applied to petitioner's case: "The CBP officers were law enforcement officers whose acts or omissions are claimed to have caused one of the relevant six torts." Pet. App. 26a. But the court of appeals rejected petitioner's argument that federal courts always have jurisdiction over a claim that falls within the plain language of the law enforcement proviso. That argument, it declared, was "foreclosed by this court's precedent." Pet. App. 11a (citing for this proposition *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987)). "Despite the absolute nature of the language" in the law enforcement proviso, the Fifth Circuit emphasized it had long "applied the proviso with considerable caution." *Id.* at 23a.

The court of appeals then turned to the discretionary function exception. It saw the provision authorizing CBP officers to effect warrantless arrests if they have "reason to believe" an alien is unlawfully in the United States and likely to escape before they obtain a warrant, 8 U.S.C. § 1357(a), as sufficiently "judgment-laden" to make CBP arrest and detention decisions necessarily discretionary, Pet. App. 18a (quoting *Tsolmon v. United States*, 841 F.3d 378, 384 (5th Cir. 2016)). And it saw "no regulation or statute" declaring the legal significance of petitioner's EAD "in such a way as to remove the CBP officer's discretion." *Id.* at 18a; *see also id.* at 20a (stating that the officers had "failed to find a justification *that they understood* had cancelled" petitioner's removal order) (emphasis added).

The Fifth Circuit reiterated *Sutton*'s statement that it was both "impossible" and "inappropriate" to "state in a principled way" how to reconcile the

discretionary function exception and the law enforcement proviso. Pet. App. 11a (quoting *Sutton*, 819 F.2d at 1298). But it then held that when a situation fits both Section 2680(a) and Section 2680(h), "[w]hat would not be shielded from liability is defined by the *Sutton* court's focus on Collinsville and *Bivens* situations," Pet. App. 26a—Collinsville being the location of one of the "abusive, illegal, and unconstitutional 'no-knock' raids" that motivated enactment of the proviso. *See Sutton*, 819 F.2d at 1295 (quoting the Senate Report that accompanied the amendments enacting the law enforcement proviso). The court of appeals declared it "enough to hold, and we do, that the conduct alleged here in no respect sinks to the necessary level." Pet. App. 26a. Thus, the discretionary function exception controlled.[2]

REASONS FOR GRANTING THE WRIT

The plain language of the law enforcement proviso in 28 U.S.C. § 2680(h) "extends the waiver of sovereign immunity," *Millbrook v. United States*, 569 U.S. 50, 52-53 (2013), to "[a]ny claim" of "false imprisonment" or "false arrest" by federal law enforcement officers. "Nothing in the text [of the law enforcement proviso] further qualifies the category of

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[2] The court of appeals once again declined to address the question whether a constitutional violation "precludes the application of the discretionary function exception." Pet. App. 21a (quoting *Spotts*, 613 F.3d at 569). It believed petitioner's mention of the Fourth Amendment in her response to the Government's motion to dismiss did not squarely present the issue.

'acts or omissions' that may trigger FTCA liability." *Id.* at 55. The Fifth Circuit nonetheless inserted a requirement into the statute that plaintiffs allege intentional misconduct or bad faith on the part of the officers. Otherwise, that court treats claims that fall within the law enforcement proviso as foreclosed by the discretionary function exception laid out in 28 U.S.C. § 2680(a).

This Court resolved one aspect of the "Circuit split concerning the circumstances under which intentionally tortious conduct by law enforcement officers can give rise to an actionable claim under the FTCA" in *Millbrook*, 569 U.S. at 54. But it has not yet resolved an additional question on which the courts of appeals are fractured: whether, or under what circumstances, the discretionary function exception can limit the law enforcement proviso. This case provides the right vehicle for this Court to apply the plain language of the law enforcement proviso and to clarify that, for claims of false arrest or false imprisonment, the discretionary function exception cannot bar suits involving arrests and detentions made by line-level officers.

I. The courts of appeals have adopted wildly different approaches to reconciling the law enforcement proviso and the discretionary function exception.

As the Fourth Circuit noted in *Medina v. United States,* 259 F.3d 220, 224 (4th Cir. 2001), the federal courts of appeals have "struggled" in deciding the "unsettled" question "whether and how to apply the [discretionary function] exception in cases brought under the intentional tort proviso found in § 2680(h)."

This struggle has not produced consensus. A decade after *Medina*, the Sixth Circuit adverted to being "cognizant of the disagreement." *Milligan v. United States*, 670 F.3d 686, 695 n.2 (6th Cir. 2012). In its brief to this Court in *Millbrook v. United States*, 569 U.S. 50 (2013), the Government acknowledged the circuit split. Brief for the United States Supporting Reversal and Remand 26-27 n.5. And last year, the Tenth Circuit became the most recent court to "recognize the disagreement." *Garling v. EPA*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017).

1. The rule in the Eleventh Circuit is straightforward and categorical: "[S]overeign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244, 1256-57 (11th Cir. 2009). "[I]f a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event." *Id.* at 1257. Thus, in a false arrest, false imprisonment, and malicious prosecution case based on the DEA's investigation of the plaintiff's medical practice, the Eleventh Circuit rejected the Government's claim that the discretionary function exception applied because agents made a series of judgments about how to conduct the investigation. Instead, it held that "to the extent of any overlap and conflict between [the law enforcement] proviso and subsection (a), the proviso wins." *Id.* at 1252-53.

The Eleventh Circuit based its conclusion on "[t]wo fundamental canons of statutory construction, as well as the clear Congressional purpose behind the

§ 2680(h) proviso." *Id.* at 1252. First, Section 2680(h), "which applies only to six specified claims arising from acts of two specified types of government officers, is more specific than the discretionary function exception in § 2680(a)," and "a specific statutory provision trumps a general one." 556 F.3d at 1253. Second, Section 2680(h) was amended after the enactment of Section 2680(a), and "[w]hen subsections battle, the contest goes to the younger one." 556 F.3d at 1253.

In light of the text and purpose of Section 2680(h), *see Nguyen*, 556 F.3d at 1253-57 (discussing the history of the provision), the court saw no justification for "rewriting the words 'any claim' in the proviso to mean only claims based on the performance of non-discretionary functions," *id.* at 1256.

The Second Circuit took a similarly categorical approach, at least with respect to claims involving arrests and detentions, in *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982). That case, like petitioner's, involved a false-imprisonment claim arising out of a mistaken immigration-related detention. The Second Circuit held that "the activities of the INS agents who detained appellant do not fall within the purview of § 2680(a) because the activities are not the kind that involve weighing important policy choices." *Id.* at 1233. While the court recognized that immigration officials exercise a type of judgment in determining whether a particular alien meets statutory criteria for detention, it warned that treating this judgment as sufficiently discretionary to trigger the discretionary function exception in cases involving line-level arrest and

detention decisions would "jeopardize a primary purpose for enacting § 2680(h)." *Id.* at 1234. The backdrop and legislative history of the law enforcement proviso showed that it was squarely intended to cover "the decision of a narcotics agent as to whether there is probable cause to search, seize, or arrest." *Id.* at 1235. Thus, "a fortiori" the law enforcement proviso should be construed to waive the Government's sovereign immunity for analogous decisions by immigration officers. *Id.*[3]

2. At least three other circuits take the opposite approach. These courts adhere to a rule that courts lack jurisdiction to hear claims arising under the law enforcement proviso unless the plaintiff can also defeat the discretionary function exception.

The D.C. Circuit adopted this rule in *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). There, the court squarely rejected the plaintiff's claim that the discretionary function exception did not apply to suits "authorized by the 'investigative or law enforcement officer' proviso of section 2680(h)." *Id.* at 507. In the court's view, Section 2680(a) is "unambiguous" in applying "to '*any* claim' based on a discretionary function." *Id.* Thus, the D.C. Circuit held that a plaintiff "must clear the

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[3] District courts within the Second Circuit regularly apply *Caban*'s analysis to the "day-to-day activities of law enforcement officers," seeing "no indication" that these officers' decisions are "grounded in public policy considerations or susceptible to policy analysis" of the kind that triggers the discretionary function exception. *See, e.g.*, *Gonzalez v. United States*, 2018 WL 1597384, at *9 (E.D.N.Y. 2018).

'discretionary function' hurdle *and* satisfy the 'investigative or law enforcement officer' limitation to sustain" an FTCA claim for one of the enumerated torts. *Id.* at 508. *See also Olaniyi v. D.C.*, 763 F. Supp. 2d 70, 91 (D.D.C. 2011) (applying *Gray*'s holding).

The Fourth Circuit adopted the D.C. Circuit's rule in *Medina*, *supra*. The case involved a suit arising out of INS agents' confrontation with the plaintiff. The court acknowledged that INS agents fit within Section 2680(h). But it sua sponte invoked the discretionary function exception to hold that Medina's claims for assault, false arrest, and malicious prosecution—each torts enumerated in Section 2680(h)—were nonetheless barred. 259 F.3d at 224. *See also Welch v. United States*, 409 F.3d 646, 651-52 (4th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006).

The Ninth Circuit has also aligned itself with the D.C. Circuit. *See Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995). The Ninth Circuit held that when there is "interplay" between the law enforcement proviso and the exceptions contained in the remainder of Section 2680, the other exceptions control. *Id.* at 1433. It did so despite recognizing that this rule would "effectively ba[r] any remedy" for some of the claims authorized by the proviso. *Id.* Accordingly, courts within the Ninth Circuit apply the discretionary function exception to conduct by line-level officers that falls within the law enforcement proviso. *See, e.g.*, *Martinez v. United States*, 2018 WL 3359562, at *6 (D. Ariz. July 10, 2018) ("[E]ven where the law enforcement proviso applies, the discretionary

function exception trumps the proviso."); *Casillas v. United States*, 2009 WL 735193, at *15 (D. Ariz. 2009) (same).

3. The Fifth Circuit takes yet a third position. It has repeatedly refused to "declare categorically—or try to state in a principled way—the circumstances in which either the discretionary function exception or the law enforcement proviso governs to the exclusion of the other." Pet. App. 11a (quoting *Sutton v. United States*, 819 F.2d 1289, 1298 (5th Cir. 1987)). Instead, courts must "harmonize[]" the "tension" between Sections 2680(a) and (h) "in each individual case." *Nguyen v. United States*, 65 Fed. Appx. 509, at *1 (5th Cir. 2003) (per curiam). To the extent it is possible to glean a general rule from the Fifth Circuit's cases, it seems to be that the law enforcement proviso controls only in those cases where the facts show intentional misconduct or bad faith. *See* Pet. App. 25a. Otherwise, the discretionary function exception deprives courts of jurisdiction even in cases involving "false arrest" or "false imprisonment" by "investigative or law enforcement officers."

II. The discretionary function exception does not strip federal courts of subject-matter jurisdiction over false-arrest and false-imprisonment claims that fall within the law enforcement proviso.

In *Millbrook v. United States*, 569 U.S. 50 (2013), this Court explained that "[t]he plain language of the law enforcement proviso answers when a law enforcement officer's 'acts or omissions' may give rise to an actionable tort claim under the FTCA." *Id.* at

55. Thus, the Court rejected the attempt of "lower courts [to] nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso." *Id.* This Court should therefore hold that federal courts have subject matter jurisdiction over cases within the law enforcement proviso even if law enforcement agents are exercising some sort of judgment or "discretion" in making decisions about arrests and detentions.

1. Straightforward principles of statutory construction require this result. First, the language of Section 2680(h) is "unambiguous." *Millbrook*, 569 U.S. at 57. It provides that "with regard to acts or omissions" by law enforcement officers, 28 U.S.C. § 1346(b), which confers subject-matter jurisdiction on the federal district courts, "*shall* apply to *any* claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" (emphasis added). It does not distinguish between ministerial and discretionary acts.

Second, as this Court has repeatedly held, a "specific provision" in a statute "controls one[s] of more general application." *Bloate v. United States*, 559 U.S. 196, 207 (2010); *see also, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (describing this principle as "a commonplace of statutory construction"). The law enforcement proviso of Section 2680(h) pinpoints an enumerated list of torts committed by a discrete group of government employees. It is thus far more specific than the discretionary function exception. *See Nguyen v. United States*, 556 F.3d 1244, 1253 (11th Cir. 2009).

That the law enforcement proviso was passed later in time reinforces the conclusion that it should control. As this Court has often explained, in applying the canon that a later-enacted, specific statute should govern over an earlier and more general statute, it is "particularly" the case that a "later statute" takes precedence when "the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). *See also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts §§ 28, 55 (2012) (discussing and applying these two canons).

2. Applying the discretionary function exception to false-arrest and false-imprisonment cases that fall within the law enforcement proviso would eviscerate the proviso. This Court has recognized our Nation's "well established tradition of police discretion" with respect to decisions regarding whether to effect arrest and detention. *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760 (2005). Virtually always, there is "room for choice," *United States v. Gaubert*, 499 U.S. 315, 324 (1991), in deciding whether to seize or arrest an individual. If that sort of discretion were enough to trigger Section 2680(a), then the class of false arrests and false imprisonments actionable under the law enforcement proviso would be a null set. The discretionary function exception would simply swallow up the law enforcement proviso.[4]

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[4] Prior to *Gaubert*, several courts tried to harmonize the law enforcement proviso and the discretionary function

3. At least with respect to claims for false arrest or false imprisonment, there is yet another route to the conclusion that the discretionary function exception cannot deprive plaintiffs like petitioner of their right to bring cases that fall within the law enforcement proviso: Law enforcement officers lack discretion to commit the torts of false arrest or false imprisonment because by definition such acts violate the Constitution.[5]

The central element of the torts of false arrest and false imprisonment, beyond their restriction of an individual's liberty, is that the arrest or detention lacked probable cause. *See Pierson v. Ray,* 386 U.S. 547, 557 (1967). When the arrest or detention without probable cause is conducted under color of federal law, it not only constitutes a state-law tort,

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exception by suggesting that law enforcement officers were "operational" actors whose work simply did not involve exercises of discretion. *See, e.g.*, *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987); *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir.), *cert. denied*, 479 U.S. 849 (1986). But *Gaubert* held that the discretionary function exception "is not confined to the policy or planning level," but can reach some "operational" conduct as well. 499 U.S. at 325. And this Court has unanimously rejected the Third Circuit's approach in *Pooler* as lacking "any support in the text of the statute." *Millbrook*, 569 U.S. at 56.

[5] There is at least one tort enumerated within the law enforcement proviso—"assault"—as to which this argument would not necessarily apply. The tort of assault can include acts such as causing another person to have "imminent apprehension" of an "offensive" contact, Restatement (Second) of Torts § 21, that do not necessarily establish a constitutional violation.

but it violates the Fourth Amendment as well. *See Wallace v. Kato*, 549 U.S. 384, 397 (2007) (referring to the claim in a § 1983 action as being for "false arrest in violation of the Fourth Amendment"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 n.4 (1971) (pointing to claims for false imprisonment as capable of being "based on state common law or directly on the Fourth Amendment" when the detention is conducted by federal officers).

To be sure, the FTCA does not permit a plaintiff to bring a constitutional claim. Pet. App. 42a. "[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims." *FDIC v. Meyer*, 510 U.S. 471, 478 (1994). But when, as in petitioner's case, the facts alleged with respect to the plaintiff's state-law tort claim also support the conclusion that the defendant's conduct violated the Fourth Amendment (or some other constitutional provision), the alleged conduct falls outside the discretionary function exception.[6]

This Court long ago declared that governments have "no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). Not surprisingly, then, in *Berkovitz*

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[6] The district court's failure to understand this point, *see* Pet. App. 41a-42a (treating petitioner's argument that the discretionary function exception should not apply as an attempt to "shoehorn[] a Fourth Amendment violation claim" into the case) infected both its analysis of petitioner's argument and the Fifth Circuit's subsequent resolution, *id.* at 21a.

v. United States, 486 U.S. 531 (1988), and *Gaubert*, this Court clearly limited the discretionary function exception to choices made within the bounds of federal law. In *Berkovitz*, it emphasized that the "range of choice" available to a Government employee exercising discretion is constrained "by federal policy and law." *Id.* at 538. Thus, actions outside that range cannot qualify for the exception, which only "insulates the Government from liability if the action challenged in the case involves the *permissible* exercise of policy judgment." *Id.* at 537 (emphasis added). In *Gaubert*, the Court reaffirmed that conduct qualifies for the exception only when it involves choice or "judgment as to which of a range of *permissible* courses is the wisest." 499 U.S. at 325 (emphasis added).

Consistent with that directive, six courts of appeals have held that the discretionary function exception does not shield "actions that are unauthorized because they are unconstitutional." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254-55 (1st Cir. 2003), *cert. denied*, 542 U.S. 905 (2004). *See also, e.g.*, *Myers & Myers Inc. v. U.S. Postal Serv.,* 527 F.2d 1252, 1261 (2d Cir. 1975) ("a federal official cannot have discretion to behave unconstitutionally"); *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir.) ("conduct cannot be discretionary if it violates the Constitution"), *cert. denied*, 487 U.S. 1235 (1988); *Medina v. United States,* 259 F.3d 220, 225 (4th Cir. 2001) ("[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes") (quoting *U.S. Fidelity*); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (agents' actions fell

"outside" the exception because the plaintiff "alleged they were conducted in violation of his First and Fourth Amendment rights"); *Nurse v. United States,* 226 F.3d 996, 1002-03 (9th Cir. 2000) (finding jurisdiction over false imprisonment claim because the plaintiff alleged conduct that was both tortious and discriminatory in violation of the Fifth Amendment).

The Fifth Circuit, however, has repeatedly declined to adopt this consensus position, and it refused to apply it here. *See, e.g.,* Pet. App. 21a; *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010) ("This court has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception."); *Santos v. United States*, 2006 WL 1050512, at *3 (5th Cir. 2006) (per curiam) (rejecting plaintiff's "attempt to save his claims from the discretionary function exception" by arguing that "the acts of which he complains not only constitute negligence, but also violate the Eighth Amendment"). This Court should grant review at least to clarify that allegedly unconstitutional actions that fall within the law enforcement proviso cannot be shielded by the discretionary function exception.

4. Limiting the law enforcement proviso only to cases where the alleged tort was committed in bad faith, as the Fifth Circuit has done, *see* Pet. App. 25a, not only inserts conditions into the law enforcement proviso that are found nowhere in the text but also defies Congress's clearly expressed intent.

The "central purpose" of the Federal Tort Claims Act overall was to "waiv[e] the Government's

immunity from suit in sweeping language." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (internal quotation marks omitted)). The exceptions to jurisdiction the Act provides in Section 2680 must be construed in light of that purpose. *Id.*

Originally, the Act retained the United States' immunity with respect to the list of intentional torts enumerated in 28 U.S.C. § 2680(h). That list included "false arrest" and "false imprisonment." But in 1974, "Congress carved out an exception to § 2680(h)'s preservation of the United States' sovereign immunity for intentional torts." *Millbrook*, 569 U.S. at 52. Section 2680(h) now "extends the waiver of sovereign immunity" for the enumerated intentional torts, as long as the claim is "based on the 'acts or omissions of investigative or law enforcement officers.'" *Millbrook*, 569 U.S. at 52-53.

The Senate Report accompanying the addition of the law enforcement proviso to Section 2680(h) explained that the proviso

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

S. Rep. No. 93-588, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 2789, 2791 (emphasis added). Congress thus expressly acquiesced to suit even in cases that would otherwise fall within the discretionary function exception. *See also* Jack Boger, Mark Gitenstein, & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Tort*

Amendment: An Interpretive Analysis, 54 N.C.L. Rev. 497, 515 (1976) (reviewing the legislative history of the proviso at length and explaining that the proponents were "clearly insistent" that the FTCA be available even in cases where plaintiffs could not bring *Bivens* actions).

The most sensible reading of Section 2680(h) therefore recognizes that the law enforcement proviso creates subject-matter jurisdiction over the enumerated list of state-law claims when they arise in the course of federal law enforcement activity.

III. This case is the right vehicle for resolving the question presented.

1. There is no question that petitioner's complaint falls within the terms of the law enforcement proviso. Both courts below recognized that the Government employees involved in petitioner's arrest and detention were "law enforcement officers" within the meaning of the proviso. Pet. App. 26a, 35a. And they agreed that petitioner's claim involved "intentional torts specifically enumerated in the law enforcement proviso." *Id.* at 35a; *see also id.* at 26a.

There is also no question that petitioner at every stage of this case pressed her argument that the discretionary function exception should not bar her case. Both the district court and the court of appeals squarely addressed that argument.

2. The question presented is outcome determinative of petitioner's claim. If petitioner's case had arisen in the Eleventh Circuit, there clearly would have been subject-matter jurisdiction over her claims of false arrest and false imprisonment because

"sovereign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244, 1256-57 (11th Cir. 2009). So, too, in the Second Circuit, which does not treat line-level arrests and detentions, like the one petitioner has challenged here, as involving the sort of discretion protected by discretionary function exception. *See supra* pages 13-14.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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