No. 18-234

In the Supreme Court of the United States

GUADALUPE CHAIDEZ CAMPOS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
GERARD SINZDAK
Attorneys

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

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), which provides that the federal government's tort liability does not extend to claims "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," does not apply where the plaintiff pleads a claim within 28 U.S.C. 2680(h), which waives the government's sovereign immunity for certain intentional torts committed by federal law enforcement officers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) is reported at 888 F.3d 724. The order of the district court granting the government's motion to dismiss (Pet. App. 28a-43a) is reported at 226 F. Supp. 3d 734.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 24, 2018. On July 16, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 22, 2018, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, generally waives the sovereign immunity of the United States and cre-

ates a cause of action against the United States with respect to torts of federal employees, acting within the scope of their employment, under circumstances in which a private individual would be liable. The FTCA contains certain exceptions that limit the waiver of sovereign immunity and the substantive scope of the United States' liability, including an exception for 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." 28 U.S.C. 2680(a). This discretionary function exception, which has been part of the FTCA since its enactment, serves "to prevent judicial 'second-guessing' of legislative and administrative decisions * * * through the medium of an action in tort." *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (citation omitted).

The FTCA also excludes from its waiver of sovereign immunity most intentional torts: "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). In 1974, however, Congress added an exception to the intentional tort exception, known as the "law enforcement proviso." See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. The proviso excludes from the intentional tort exception claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" based on "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h).

2. In December 2012, petitioner entered the United States without legal authority. Pet. App. 4a. Officers of United States Customs and Border Protection (CBP) determined that petitioner did not have authorization to enter the United States and issued her a Notice and Order of Expedited Removal, pursuant to Section 235(b)(1) of the Immigration and Nationality Act, 8 U.S.C. 1225(b)(1). Pet. App. 4a, 20a. Before she was removed, petitioner pleaded guilty to one count of attempted illegal re-entry, in violation of 8 U.S.C. 1326, and was sentenced to 11 months of imprisonment and three years of supervised release. Pet. App. 4a. Under the order of expedited removal, petitioner ordinarily would have been removed from the United States immediately upon her release from prison, without any hearing or opportunity for further review. *Id.* at 20a; see 8 U.S.C. 1225(b)(1)(A)(i).

During petitioner's term of imprisonment, she applied for and received "U" nonimmigrant status, which authorized her to live and work in the United States and resulted in her being issued an Employment Authorization Document (EAD). Pet. App. 4a, 14a-15a; see also 8 U.S.C. 1101(a)(15)(U) (2012 & Supp. V 2017); 8 C.F.R. 214.14. Upon petitioner's receipt of U status, the order of expedited removal to which she was subject was "deemed canceled by operation of law." 8 C.F.R. 214.14(c)(5)(i).

Petitioner alleges that, in November 2013, she reported to the United States Probation Office in El Paso, Texas. Pet. App. 4a. The probation officer telephoned CBP Enforcement Officer Luis Oliva, who reviewed documents associated with petitioner's case, including the 2012 order of expedited removal. *Id.* at 18a-20a. That review led him to believe that petitioner

was subject to prompt removal from the United States. *Ibid.* Oliva then traveled to the probation office to meet with petitioner. *Id.* at 19a. Upon Oliva's arrival, petitioner presented him with an EAD and claimed that she was not subject to removal from the country. *Id.* at 5a. The CBP officer and his colleagues, however, did not view the EAD as definitive proof that petitioner was not still subject to expedited removal. *Id.* at 20a. Accordingly, CBP officers took petitioner into custody and eventually removed her to Mexico the same day through a port of entry in El Paso. *Id.* at 5a-6a. Approximately two months later, petitioner was readmitted to the United States. *Id.* at 6a.

3. Petitioner brought this action against the United States under the FTCA. Pet. App. 6a. She alleged that the CBP officers had subjected her to false arrest and false imprisonment by arresting and detaining her without probable cause after she presented them with the EAD, "which in her view conclusively showed entitlement to remain in the United States." *Ibid.*

The government moved to dismiss, invoking the FTCA's discretionary function exception. In response, petitioner reiterated that her complaint is deliberately narrow: "[n]othing in the complaint" challenges "how the agents investigated her" removability or their actions in light of their conclusion that she was removable; she instead "complains about having been wrongfully arrested" without "any legal authority." D. Ct. Doc. 21, at 4 (Sept. 2, 2016); see *id.* at 1 ("[Petitioner] does not challenge the arresting officer's conclusions or their investigation. The crux of this case is whether the federal agents had authority to arrest [her].").

The district court granted the government's motion to dismiss, holding that the discretionary function exception barred petitioner's claim. Pet. App. 28a-43a. The court observed that federal law gives CBP officers the "power" to arrest "any alien," "without warrant," when the officer has "reason to believe that the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained." 8 U.S.C. 1357(a)(2); see Pet. App. 33a. The court determined that a "CBP Agent's conduct during her investigation of [an alien's] immigration status and the conclusions drawn from her investigation are * * * discretionary" acts that involve an element of judgment or choice. Pet. App. 33a. The court also found that the officers' actions here were "clothed in public policy considerations," including the "public policy goal of punishing and deterring those who violate federal laws." *Id.* at 34a (citations omitted).

The district court rejected petitioner's argument that the discretionary function exception is categorically inapplicable to her FTCA case because of the law enforcement proviso to the FTCA's intentional tort exception. Pet. App. 35a-40a (citing, among other cases, *Sutton* v. *United States*, 819 F.2d 1289 (5th Cir. 1987)). The court found that, although it may be possible in some cases for a plaintiff whose claim fits within both the discretionary function exception and the law enforcement proviso to proceed with her suit, petitioner's allegations here "do not rise to the level of intentional misconduct or bad faith" as would be necessary under Fifth Circuit precedent. *Id.* at 41a. Instead, the court found that petitioner's complaint alleged "discretionary conduct that Congress intended to exempt from the FTCA's waiver of sovereign immunity under § 2680(a)." *Id.* at 42a.

4. The court of appeals affirmed. Pet. App. 3a-27a.

The court of appeals observed that an FTCA plaintiff has the burden to establish that the discretionary function exception does not apply, Pet. App. 12a (citing *Tsolmon* v. *United States*, 841 F.3d 378, 382 (5th Cir. 2016)), and additionally observed that Section 2680(a) bars an FTCA action unless, applying the two-step standard outlined by this Court in *Gaubert*, 499 U.S. at 322, "a statute or policy specifically directs [the federal officials] to act in a particular manner but the officers use their discretion to act in violation of that statute or policy," Pet. App. 17a-18a (citing *Tsolmon*, 841 F.3d at 384).

Applying that standard to petitioner's allegations, the court of appeals determined that the CBP officers' decision to arrest and detain her in order to investigate her immigration status involved an element of judgment or choice and was not specifically foreclosed in the circumstances of this case. Pet. App. 18a-21a. The court found that 8 U.S.C. 1357(a)(2), by granting CBP officers authority to arrest an alien when they have "reason to believe" the alien is unlawfully present and likely to escape before a warrant can be obtained, *ibid.*, establishes a "judgment-laden" standard that provides no "specific direction to officers." Pet. App. 17a-18a. The court rejected petitioner's argument "that the EAD [was] *unequivocal* proof of the right to remain in the United States," *id.* at 13a (emphasis added), finding instead that petitioner had identified "no regulation or other guidance * * * that 'specifically prescribed a course of action'" when the officers were "presented with an EAD," such that they "had no discretion to conduct further investigation," *id.* at 19a (quoting *Gaubert*, 499 U.S. at 322). See *id.* at 20a (the implication of the EAD for petitioner's order of expedited removal was

"sufficiently uncertain as to leave discretion in the hands of the CBP officers"). And because the issue had been "uncontested" by petitioner, the court assumed "for purposes of this appeal" that the CBP officers' arrest and investigatory detention of petitioner "was the kind of choice that the discretionary function exception was designed to shield." *Id.* at 12a.

The court of appeals declined to consider petitioner's argument that the discretionary function exception does not apply to her case because she alleges that the CBP officers' conduct violated her Fourth Amendment rights. Pet. App. 21a. Because petitioner had only "cursorily mentioned" the issue in her briefing to the district court, the court of appeals found that petitioner had forfeited the argument on appeal. *Ibid.*

The court of appeals also rejected petitioner's contention that the FTCA's law enforcement proviso in 28 U.S.C. 2680(h) overrides the discretionary function exception. Pet. App. 21a. The court determined that petitioner's suit fits within the proviso's terms because she alleges torts of false arrest and false imprisonment arising from the actions of federal law enforcement officers. *Id.* at 26a. But the court further determined that where (as here) a plaintiff's claim also falls within Section 2680(a)'s retention of sovereign immunity for discretionary functions, the claim will be barred unless the plaintiff alleges the "kinds of egregious, intentional misconduct * * * that was present in the events that prompted Congress to adopt the [law enforcement] proviso," those events being the Collinsville raids and the searches conducted in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 24a; see *id.* at 26a (citing *Sutton*, *supra*, and *Millbrook* v. *United States*, 569 U.S. 50

(2013)). Because the court found that the officers' conduct alleged in this case "in no respect [sank] to the necessary level," but instead involved "failures to understand the import of various immigration documents and regulations," the court held that petitioner's claim is barred by the FTCA. *Id.* at 26a; see *id.* at 27a.[1]

ARGUMENT

Petitioner seeks review (Pet. 10-25) of the question whether the FTCA's discretionary function exception, 28 U.S.C. 2680(a), can apply in cases where a plaintiff alleges torts that fall within the law enforcement proviso to the FTCA's intentional tort exception in 28 U.S.C. 2680(h). The court of appeals correctly determined that, because the United States has retained sovereign immunity through the discretionary function exception, petitioner's claim is not subject to federal jurisdiction simply because she alleges torts covered by the law enforcement proviso. Although some disagreement exists among the courts of appeals regarding how to reconcile the discretionary function exception and the law enforcement proviso, that disagreement has had little practical significance. This Court has denied prior petitions for a writ of certiorari raising similar issues, see *Castro* v. *United States*, 562 U.S. 1168 (2011) (No. 10-309), *Welch* v. *United States*, 546 U.S. 1214 (2006) (No. 05-529), and it should follow the same course here.

1. The court of appeals correctly determined that the discretionary function exception bars petitioner's

[1] Although petitioner had not raised the issue, the court of appeals concluded that the district court should not have dismissed her claim *with prejudice* for lack of subject matter jurisdiction, so the court of appeals remanded for entry of a revised judgment of dismissal without prejudice. Pet. App. 27a.

FTCA claim. As noted, the discretionary function exception excludes from the FTCA's waiver of the United States' sovereign immunity "[a]ny 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." 28 U.S.C. 2680(a).

This Court has established a two-part inquiry to guide application of the discretionary function exception. *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991). First, a court must determine whether the conduct challenged by the plaintiff was "discretionary in nature"—that is, whether it involved "'an element of judgment or choice.'" *Id.* at 322 (citation omitted). "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Ibid.* (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). Second, a court must evaluate "whether that judgment is of the kind that the discretionary function exception was designed to shield," *id.* at 322-323 (quoting *Berkovitz*, 486 U.S. at 536), meaning it is "susceptible to policy analysis," *id.* at 325. This Court has held that, "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.* at 324.

a. The CBP officers' conduct alleged by petitioner in this case satisfies the *Gaubert* standard. Petitioner made clear in the district court that her claim is narrow:

she complains only about the officers' decision to arrest and detain her while they attempted to ascertain whether she was subject to an order of expedited removal from the United States; she expressly "does not challenge" whether the officers took appropriate steps to investigate her immigration status or the "conclusions" they drew from that investigation. D. Ct. Doc. 21, at 1; see also *id.* at 4 ("[Petitioner] complains about having been wrongfully arrested, not how the agents investigated her. Nothing in the complaint raises the issue of the agents' investigation.").

The first part of *Gaubert*'s two-part inquiry concerning application of the discretionary function exception is satisfied in this case because the particular actions that petitioner challenges—her arrest and detention—were "discretionary in nature." 499 U.S. at 322. When CBP officers reviewed petitioner's case file and saw that an order of expedited removal had been entered against her, Pet. App. 19a-20a, their decision to arrest and detain her in order to further examine her immigration status was a discretionary judgment that federal law committed to the officers. See 8 U.S.C. 1357(a)(2) (authorizing immigration officers to arrest a suspected unlawful alien whenever they have "reason to believe" that she is not lawfully present in the United Sates and is "likely to escape before a warrant can be obtained."). By conferring authority to arrest based on what the CBP officers had "reason to believe," *ibid.*, the statute called for the officers to exercise an "'element of judgment or choice'" regarding the arrest that was "discretionary in nature." *Gaubert*, 499 U.S. at 322 (citation omitted). The lower courts' recognition of that discretion in this case accords with courts' findings in other cases that "'[d]ecisions on when, where, and how to

investigate and whether to prosecute' have long been found to be core examples of discretionary conduct for which the United States maintains its immunity." *Tsolmon* v. *United States*, 841 F.3d 378, 383 (5th Cir. 2016) (citation omitted); see also *Medina* v. *United States*, 259 F.3d 220, 227 (4th Cir. 2001) ("Since prosecutorial discretion is, by definition, a 'choice,' we are satisfied that the decision to arrest Medina and institute deportation proceedings satisfies the first prong of the [discretionary function] test.").

Petitioner contends (Pet. 5) that the officers lacked discretion to arrest her once she presented them with a facially valid EAD in her name. But the court of appeals correctly observed that petitioner did not identify any federal statute, regulation, or policy providing that, when a CBP officer has reason to believe that an alien is immediately removable, the alien's production of an EAD means that the officer may not arrest the alien or detain her long enough to resolve her status. Pet. App. 19a; see *id.* at 20a (finding that the EAD left the officers "sufficiently uncertain" whether she was authorized to remain in the United States so "as to leave discretion in the hands of the CBP officers"). The court's conclusions applying the discretionary function exception in the particular circumstances of this case are factbound and do not warrant further review.

Under the second part of *Gaubert*'s two-part inquiry, a CBP officer's decision to arrest and detain an alien is a judgment "of the kind that the discretionary function was designed to shield." 499 U.S. at 322-323. Petitioner did not contest this point below, and the court of appeals therefore assumed for purposes of the appeal that the officers' actions involved the type of choice that the discretionary function exception was designed to protect.

Pet. App. 12a. That assumption was correct in any event. Because 8 U.S.C. 1357(a)(2) "allows a [CBP] agent to exercise discretion" in making arrests, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. And indeed, an immigration officer's "decision to arrest [an alien] [is] clearly clothed in public policy considerations." *Medina*, 259 F.3d at 229. As the district court emphasized, the decision to detain an alien believed to be in the country unlawfully "correlates with the public policy goal of punishing and deterring those who violate federal laws." Pet. App. 34a (citation omitted). When deciding whom to detain for investigatory reasons, moreover, immigration officers must consider those public policy goals in light of resource and other limitations, and then act accordingly. Thus, the decision to arrest and detain an alien who may be in the country unlawfully in order to resolve her status is the type of discretionary act that the FTCA's discretionary function exception was designed to shield from second-guessing through a tort action.

b. Petitioner contends (Pet. 19-22) that the discretionary function exception is inapplicable to her FTCA claim based on false arrest and false imprisonment because the CBP officers' conduct allegedly violated the Fourth Amendment. But both the court of appeals and the district court concluded that petitioner forfeited that argument by failing to adequately present it below. Pet. App. 21a; *id.* at 41a-42a. Accordingly, the argument was neither passed on below nor properly pressed, and thus does not merit this Court's review. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not

ordinarily consider them.") (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).[2]

In any event, petitioner is incorrect in asserting (Pet. 19) that alleging a Fourth Amendment violation within the law enforcement proviso necessarily renders the discretionary function exception inapplicable. There is no dispute among the courts of appeals that, when a federal officer acts contrary to a *specific* prescription in federal law, be it constitutional, statutory, or regulatory, the discretionary function exception does not apply. As noted, this Court has explained that when a "federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow," there is no further discretion to exercise. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536) (emphasis added).

Petitioner misconstrues this Court's precedent, however, in contending (Pet. 19-21) that a federal officer's conduct cannot fall within the discretionary function exception whenever it is alleged to be unconstitutional or otherwise contrary to law. That contention is at odds with this Court's repeated statements that the discretionary function exception applies unless a source of

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[2] Petitioner takes issue (Pet. 20 n.6) with the lower courts' conclusion that she forfeited her argument based on an alleged constitutional violation, arguing that the courts misunderstood what she was required to plead. But the court of appeals found that petitioner had failed to *brief* the argument adequately to preserve it for appeal. See Pet. App. 21a ("[W]e find the question not to be sufficiently raised. [Petitioner] cursorily mentioned the Fourth Amendment in her response to the Government's motion to dismiss. * * * The inadequate presentation of the issue to the district court means any argument of error by the district court on the issue is waived on appeal.").

federal law "specifically prescribes" a course of conduct, and with the principles of official immunity that formed the backdrop to the FTCA and that were incorporated by Congress into the statute. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). The Court has long recognized that conduct may be discretionary even if it is later determined to have violated the Constitution. The common law doctrine of official immunity thus applies to the exercise of "discretionary functions" even when the conduct violated the Constitution, as long as the constitutional right was not defined with sufficient specificity that the official should have known the act was prohibited. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing *discretionary functions*[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known.") (emphases added); cf. *Messerschmidt* v. *Millender*, 565 U.S. 535, 553 (2012) (finding it unnecessary to decide whether the facts alleged "actually establish[ed] probable cause" for a search because "[q]ualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments'") (citation omitted); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) ("[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonable believe to be lawful—should not be held personally liable.").

The FTCA provided plaintiffs with a claim against the United States in place of claims against federal employees personally. In enacting the FTCA, Congress

did not set aside recognized principles of official immunity. See Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 545 (1947). Instead, Congress included an explicit discretionary function exception "to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984) (explaining that "[i]t was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added"). When the Court in *Berkovitz* held that a federal mandate must "specifically prescribe[ ]" conduct in order to overcome the discretionary function exception, it referred to official immunity precedent, underscoring that the two standards operate in tandem. See 486 U.S. at 536 (citing *Westfall* v. *Erwin*, 484 U.S. 292, 296-297 (1988)). As a result, jurisdiction over an FTCA claim is not triggered by every allegation of unlawful or unconstitutional conduct, but only by a showing that the government official's discretion was cabined by a specific, clearly established directive, accompanied by plausible assertions that the specific directive was violated. See *Bryan* v. *United States*, No. 17-1519, 2019 WL 255011, at *6 (3d Cir. Jan. 18, 2019) ("Because * * * the CBP officers did not violate clearly established constitutional rights, the FTCA claims also fail" under the discretionary function exception).

A constitutional mandate, no less than a federal statutory or regulatory one, can eliminate an official's discretion when it is sufficiently specific or when an authoritative construction with sufficient specificity was clearly

established before the officer acted. It does not follow, however, that the discretionary function exception can be overcome by any allegation of a constitutional violation at a high level of generality. Cf. *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) ("reiterat[ing] the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'" but "must be 'particularized' to the facts of the case") (citations omitted).

The cases on which petitioner relies (Pet. 21-22), although broadly worded, do not hold otherwise. Two did not involve allegations of unconstitutional conduct at all. See *Medina*, 259 F.3d at 225; *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 122-123 (3d Cir.), cert. denied, 487 U.S. 1235 (1988). To the extent the remainder offer any analysis, they do not address whether alleged constitutional violations that were not clearly established are sufficient to overcome the exception. See *Thames Shipyard & Repair Co.* v. *United States*, 350 F.3d 247, 258 n.9, 259-260 (1st Cir. 2003) (concluding that the Coast Guard's actions were consistent with the Fourth Amendment), cert. denied, 542 U.S. 905 (2004); *Raz* v. *United States*, 343 F.3d 945, 948 (8th Cir. 2003) (per curiam) (concluding, without analysis, that the discretionary function exception was inapplicable because the plaintiff alleged that the officers violated the Constitution); *Nurse* v. *United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor"); *Myers & Myers, Inc.* v. *United States Postal Serv.*, 527 F.2d 1252, 1262 (2d Cir. 1975) (leaving for remand whether the Postal Service improperly denied a hearing to the plaintiff that

"was required by either the Constitution or Postal Service regulations"); accord *Loumiet* v. *United States*, 828 F.3d 935, 946 (D.C. Cir. 2016) (leaving open "whether the FTCA immunizes exercises of policy discretion in violation of constitutional constraints that are not already clear").

Petitioner has not identified any case in which a court has held that the Fourth Amendment specifically prohibited immigration officers from exercising their authority under 8 U.S.C. 1357(a)(2) under circumstances like those presented here, where several pieces of information available to the officers (including a recent illegal re-entry conviction and a less-than-one-year-old order of expedited removal) suggested that petitioner was subject to immediate removal. In short, petitioner's unadorned allegation that the CBP officers violated her Fourth Amendment rights would not have overcome the discretionary function exception even if she had adequately preserved the argument below.

2. The court of appeals also correctly concluded that the discretionary function exception in 28 U.S.C. 2680(a) is not categorically inapplicable simply because petitioner alleges claims within the law enforcement proviso in Section 2680(h). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). When Congress enacted the law enforcement proviso in 1974, it placed the proviso within the intentional tort exception, Section 2680(h), and thereby modified that particular exception to the FTCA. Although provisos sometimes have a broader import, it is customary to use a proviso to refer only to things covered by the preceding clause. See *United States* v. *Morrow*, 266 U.S. 531, 535 (1925)

("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."); 82 C.J.S. *Statutes* § 504 (2018) ("The operation of a proviso usually is confined to the clause or distinct portion of the enactment which immediately precedes it, or to which it pertains, or is attached.") (footnotes omitted). Here, the text, structure, and history of Section 2680 all strongly reinforce the conclusion that the law enforcement proviso has the customary scope of modifying only the preceding clause.

Significantly, Congress did not make the law enforcement proviso applicable to any of the other exceptions in Section 2680, such as the discretionary function exception, which it could have done if it had intended to modify those preexisting exceptions as well. Moreover, the text of the proviso relates only to the preceding clause of Subsection (h) and, by referring specifically to some (but not all) of the intentional torts excepted in that prior clause, negates the prior clause's application in certain defined instances. See 28 U.S.C. 2680(h) ("*Provided*, That, with regard to acts of omissions of investigative or law enforcement officers of the United States," the FTCA "shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."). Further still, the proviso expressly states that all provisions of "this chapter"—which includes the discretionary function exception in Section 2680(a)—shall apply to claims covered by the proviso. *Ibid.* Given its text and placement in the statute, the law enforcement proviso is properly read as an exception only to the first clause of Section 2680(h)—the clause excepting certain intentional torts from the FTCA's coverage.

Petitioner's broader reading of the law enforcement proviso—as a limitation not only upon the intentional tort exception but also upon the other Section 2680 exceptions—would allow tort suits against the United States that Congress plainly intended to bar. Under petitioner's interpretation, a plaintiff alleging an enumerated intentional tort with respect to acts or omissions of law enforcement officers could bring an FTCA claim arising in a foreign country notwithstanding 28 U.S.C. 2680(k), which excludes from the FTCA "[a]ny claim arising in a foreign country." See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 699-712 (2004) (holding that foreign country exception barred FTCA claim for false arrest). That FTCA exception is older than the law enforcement proviso and in some sense more general. Cf. Pet. 17-18 (arguing that the law enforcement proviso supersedes the discretionary function exception because the former is more modern and more specific). But the language and structure of Section 2680 as a whole does not support the counterintuitive suggestion that Congress intended to override foundational compromises in the FTCA and permit suits arising abroad, or from discretionary functions, simply because the plaintiff's claim involves an alleged tort by a law enforcement officer.

Congress's purpose in enacting the law enforcement proviso further demonstrates that it was not intended to negate the discretionary function exception. Congress adopted the proviso "as a *counterpart* to [*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Carlson* v. *Green*, 446 U.S. 14, 20

(1980) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)). As noted above, defendants in *Bivens* actions are entitled to immunity when their actions do not violate clearly established constitutional proscriptions, and that same kind of immunity is incorporated into the discretionary function exception. See pp. 13-16, *supra*. Accordingly, the Congress that provided a counterpart to a *Bivens* action likewise would have intended the discretionary function exception to apply to that counterpart. See *Carlson*, 446 U.S. at 19-20 ("[T]he congressional comments accompanying [Section 2680(h)] made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.").

Petitioner is also incorrect that "[a]pplying the discretionary function exception to false-arrest and false-imprisonment cases that fall within the law enforcement proviso would eviscerate the proviso," rendering it "null." Pet. 18. Many claims arising from intentional torts of law enforcement officers do not implicate discretionary functions at all. And the conduct of federal law enforcement officers will not be shielded by the discretionary function exception if they act in violation of a clearly established constitutional, statutory, or regulatory directive, just as individual officers are not entitled to qualified immunity when they violate clearly established law.

Finally, contrary to petitioner's contention (Pet. 16-17), the court of appeals' decision below is fully consistent with this Court's decision in *Millbrook* v. *United States*, 569 U.S. 50 (2013). The Court in *Millbrook* rejected suggested limitations on the scope of the law enforcement proviso that are not found in the text of Section 2680(h). See *id.* at 55-57. But the plaintiff's claim in *Millbrook* was not barred by the discretionary

function exception or any other FTCA exception, so the Court had no occasion to determine how the FTCA applies where, as here, a plaintiff's claim falls within the law enforcement proviso but is also barred by another subsection of Section 2680. The court of appeals below studiously adhered to *Millbrook* and "refus[ed] to allow limitations to be placed on the law enforcement proviso." Pet. App. 26a. The court simply (and correctly) observed that nothing in *Millbrook* suggests that the preservation of sovereign immunity in the discretionary function exception is categorically inapplicable when the plaintiff alleges a claim within the law enforcement proviso. *Ibid.*

3. Although there is some disagreement among the courts of appeals regarding the interplay of the discretionary function exception and the law enforcement proviso to the intentional tort exception, that disagreement has had little practical significance and does not warrant this Court's review. The decisions of the Fourth, Ninth, and D.C. Circuits cited by petitioner (Pet. 14-16) are consistent with the result the Fifth Circuit reached here. See *Medina*, 259 F.3d at 226, 228-229 (4th Cir.) (where the discretionary function exception applies, it controls over the law enforcement proviso); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (same); *Gasho* v. *United States*, 39 F.3d 1420, 1433-1434 (9th Cir. 1994) (where the FTCA exception in 28 U.S.C. 2680(c) applies for claims arising from the detention of goods by a customs officer, that exception controls over the law enforcement proviso), cert. denied, 515 U.S. 1144 (1995).

While the Fifth Circuit's analysis differs somewhat from that of those other three courts of appeals, the difference is not meaningful in practice. Consistent with

the analysis set forth above, see pp. 17-19, *supra*, the Fourth, Ninth, and D.C. Circuits have each held that the discretionary function exception is independent from the law enforcement proviso and that a plaintiff seeking to invoke the proviso must "clear the § 2680(a) discretionary function hurdle." *Medina*, 259 F.3d at 226. The court of appeals below, relying on its previous decision in *Sutton* v. *United States*, 819 F.2d 1289 (5th Cir. 1987), held that the discretionary function exception will typically preserve the United States' sovereign immunity notwithstanding the law enforcement proviso, except in cases where officers engage in the "kinds of egregious, intentional misconduct" that occurred during the Collinsville raids and in the *Bivens* case, and that led Congress to enact the proviso. Pet. App. 24a, 26a. But the type of "abusive, illegal, and unconstitutional" conduct that occurred in the Collinsville and *Bivens* cases, *id.* at 23a (citation omitted), will almost surely fall outside the scope of the discretionary function exception. Indeed, since the Fifth Circuit first set forth its reasoning on the interplay between the two provisions in *Sutton* in 1987, the court has not once concluded that the law enforcement proviso permitted a suit to proceed that would otherwise have been barred by the discretionary function exception.

The Eleventh Circuit in *Nguyen* v. *United States*, 556 F.3d 1244 (2009), indicated that the law enforcement proviso is not limited by the discretionary function exception; but at the same time it acknowledged that the proviso "should be viewed as a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*."

Id. at 1256 (citation omitted); see *id.* at 1256-1257; see also *Denson* v. *United States*, 574 F.3d 1318, 1336 (11th Cir. 2009) ("As co-extensive causes of action, *Bivens* and FTCA claims necessarily arise from the same wrongful acts or omissions of a government official. By the same token, the same set of facts determines the theories available to the United States in defending the FTCA case."), cert. denied, 560 U.S. 952 (2010). For that reason, the Eleventh Circuit later suggested that *Nguyen*'s conclusion that the law enforcement proviso is not cabined by the discretionary function exception may apply only in contexts in which federal law enforcement officers commit clear constitutional violations, as the court had found in *Nguyen*. See *Denson*, 574 F.3d at 1337 n.55. If the Eleventh Circuit adheres to that view of *Nguyen*'s holding, its reconciliation of the discretionary function exception and the law enforcement proviso would not differ in any significant respect from the decision below or, as a practical matter, from the decisions of the other courts of appeals. In light of the uncertainty over the scope of the Eleventh Circuit's decision in *Nguyen*, further percolation in that circuit is warranted and may show that no meaningful conflict exists among the circuits.

Contrary to petitioner's assertion (Pet. 13-14), the Second Circuit's decision in *Caban* v. *United States*, 671 F.2d 1230 (1982), does not conflict with the decision below or with the decisions of the other courts of appeals. The plaintiff in *Caban* brought suit for false imprisonment after INS agents detained him upon his arrival at John F. Kennedy Airport from an overseas flight. *Id.* at 1230-1232. The Second Circuit concluded that the discretionary function exception did not apply to the agents' conduct in that case because "the basic[ ]

mechanical duty [of] ascertain[ing] whether an applicant meets the minimal standards for entry into this country" was not the kind of activity "that involve[d] weighing important policy choices." *Id.* at 1233-1234.

In this case, by contrast, petitioner did not dispute that the CBP officers' actions were susceptible to policy analysis, and as a result the court of appeals assumed for purposes of the appeal that the officers' actions were of a type that the discretionary function exception was designed to shield. Pet. App. 12a. Thus, the ground on which the Second Circuit rested its conclusion applying the discretionary function exception in *Caban* was neither presented to, nor decided by, the court below. Moreover, because the Second Circuit determined that the discretionary function exception was inapplicable, it had no occasion to address whether the law enforcement proviso was cabined by that provision—the central issue that petitioner raises here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
GERARD SINZDAK
Attorneys

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