No. 18-234

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government concedes, once again, that there is "disagreement" among the courts of appeals on the question whether the specific waiver of sovereign immunity in the law enforcement proviso is limited by the discretionary function exception. BIO 8, 21. Previously, the Government successfully urged this Court to deny two petitions seeking resolution of that important and recurring question because of case-specific vehicle problems.[1] The Government now invokes those denials and asserts that the Court should "follow the same course." BIO 8. But in stark contrast to its past briefs, the Government does *not* deny that this case is an ideal vehicle for resolving the question presented. Nor could it: That question is preserved, squarely raised, and outcome-determinative. Pet. 24-25.

Lacking any vehicle objection, the Government strives to downplay the conceded circuit split and devotes the bulk of its brief to arguing the merits. But the Government cannot paper over the widely recognized disagreement among the courts of appeals. And its merits arguments—which *no* circuit has adopted—only underscore the need for this Court to resolve the conflict.

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[1] Br. in Opposition at 13, *Castro v. United States*, 562 U.S. 1168 (2011) (No. 10-309) (the "questions presented were neither passed on below nor properly pressed"); Br. in Opposition at 14, *Welch v. United States*, 546 U.S. 1214 (2006) (No. 05-529) (the case "does not present" the question on which the circuits disagree).

I. The Government's attempt to minimize the acknowledged circuit split is unpersuasive.

The petition demonstrated that the courts of appeals are intractably divided on the question presented. Pet. 11-16. The courts themselves have long recognized that "disagreement among the circuits." *Milligan v. United States*, 670 F.3d 686, 695 n.2 (6th Cir. 2012). So has the Government. *See, e.g.*, Brief for the United States Supporting Reversal and Remand 26-27 n.5, *Millbrook v. United States*, 569 U.S. 50 (2013). Nevertheless, the Government now labors to minimize the conflict, asserting that the law in the Eleventh Circuit is unsettled and that the differences among the rules applied by the circuits have "little practical significance." BIO 21-24. That sanguine account bears no resemblance to the law as it is understood and applied by the lower courts.

1. There is no dispute about the rule in the Fourth, Ninth, and D.C. Circuits. As the Government recognizes (BIO 22), those courts categorically hold that if the conduct at issue "involves a 'discretionary function,' a plaintiff cannot maintain an FTCA claim, even if the discretionary act constitutes an intentional tort" subject to the law enforcement proviso. *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994); *see Medina v. United States*, 259 F.3d 220, 225-26 (4th Cir. 2001); *Gray v. Bell*, 712 F.2d 490, 507-08 (D.C. Cir. 1983).

2. There is also no dispute that the Eleventh Circuit adopted precisely the opposite rule in *Nguyen v. United States*, 556 F.3d 1244 (2009). *Nguyen* held that "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." *Id.* at 1256-57. In so doing, the Eleventh Circuit specifically rejected the "different approach" followed by the Fourth, Ninth, and D.C. Circuits. *Id.* at 1257 (citing *Medina*, *Gasho*, and *Gray*).

The Government acknowledges "*Nguyen*'s conclusion that the law enforcement proviso is not cabined by the discretionary function exception." BIO 23. But it asserts that dicta in *Denson v. United States*, 574 F.3d 1318 (11th Cir. 2009), created "uncertainty" by suggesting that *Nguyen*'s holding "may apply only in contexts in which federal law enforcement officers commit clear constitutional violations." BIO 23.

Denson did no such thing. In the footnote on which the Government relies, the *Denson* panel recognized that although the underlying tortious conduct in *Nguyen* undoubtedly amounted to a constitutional violation, *Nguyen*'s holding indicated that the discretionary function exception "would not apply even had the agents not violated the plaintiff's constitutional rights." 574 F.3d at 1337 n.55. That is manifestly correct: Nothing in *Nguyen* turned on the presence of a constitutional violation in addition to the common-law tort. Instead, *Nguyen* categorically held, as a matter of statutory construction, that "[t]he later and more specific statement in subsection (h) permitting the listed claims trumps the earlier and more general one in subsection (a)." 556 F.3d at 1253.

The *Denson* panel could not have departed from that interpretation, *see United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), and it did not purport to do so. Instead, the panel merely observed that the FTCA claims in *Denson* did not present the question "whether § 2680(a) is implicated where . . .

government officials properly discharged their statutory and regulatory duties within the bounds fixed by the Constitution." 574 F.3d at 1337 n.55.

The Government does not cite—and we have not found—any decision construing that passing dicta to raise any question about the scope of the rule laid down in *Nguyen*. To the contrary, no other Eleventh Circuit panel has even cited *Denson* in an FTCA case. Instead, courts both inside and outside the Eleventh Circuit recognize that *Nguyen* established the law in that circuit that "the discretionary function exemption . . . does not apply" to claims within the law enforcement proviso. *Williams v. United States*, 2010 WL 1408398, at *10 n.35 (M.D. Fla. 2010); *see, e.g.*, *Garling v. EPA*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017); *Bonilla v. United States*, 652 Fed. Appx. 885, 890 (11th Cir. 2016); *Milligan*, 670 F.3d at 695 n.2; *Linder v. McPherson*, 2015 WL 739633, at *11 (N.D. Ill. 2015); *Moher v. United States*, 875 F. Supp. 2d 739, 766 (W.D. Mich. 2012); *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1297-98 (M.D. Ga. 2012).

3. Even without more, the square conflict between the Eleventh Circuit and the Fourth, Ninth, and D.C. Circuits would amply demonstrate the need for this Court's review—and would be of enormous "practical significance" (BIO 8) to the FTCA plaintiffs around the country who are denied compensation even though they would have been allowed to recover in the Eleventh Circuit. But as we explained, the Second and Fifth Circuits have deepened the split by adopting still other approaches to the question presented. Pet. 13-14, 16.

The Government asserts that the Second Circuit's decision in *Caban v. United States*, 671 F.2d 1230 (1982), "had no occasion to address" the question presented because it held that "the discretionary function exemption did not apply" to the arrest at issue there. BIO 23-24. That misses the point. The Second Circuit narrowly construed the exception *because* the court recognized that it should not "be read to eviscerate" the law enforcement proviso, which "clearly allows the government to be sued" for tortious arrests. *Caban*, 671 F.2d at 1234-35. Unlike the Eleventh Circuit, the Second Circuit read the proviso to narrow, rather than supersede, the exception. But its approach is likewise irreconcilable with the Fourth, Ninth, and D.C. Circuits' conclusion that "the two sections of the statute exist independently." *Medina*, 259 F.3d at 225.

Although the Government acknowledges that the Fifth Circuit has adopted an idiosyncratic approach to the question presented, it asserts that the results have been equivalent to the categorical rule applied by the Fourth, Ninth, and D.C. Circuits. BIO 22. But for more than three decades, the Fifth Circuit has declined to embrace that rule—or any other. Instead, it has steadfastly refused to "try to state in a principled way" how the law enforcement proviso and discretionary function exception interact. Pet. App. 11a (quoting *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987)). The Fifth Circuit's professed inability to choose a side in the conflict—or to adopt *any* "principled" interpretation of an important and oft-litigated federal statute—powerfully illustrates the need for this Court's intervention.

II. The Government's merits arguments only reinforce the need for this Court's review.

The Government devotes most of its brief to arguing that the Fourth, Ninth, and D.C. Circuits (and the results the Fifth Circuit has reached) are correct on the merits. BIO 8-21. But the Government does not defend the reasoning of the Fourth, Ninth, and D.C. Circuits, which simply relied on the broad language of the discretionary function exception. *See Medina*, 259 F.3d at 225; *Gasho*, 39 F.3d at 1433-35; *Gray*, 712 F.2d at 507-08. Instead, the Government offers new arguments that *no* circuit has adopted. Scrutinizing those arguments only further confirms that certiorari is warranted.

1. The law enforcement proviso specifies that the FTCA's waiver of sovereign immunity "shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" by a law enforcement officer. 28 U.S.C. § 2680(h). That plain text unambiguously waives sovereign immunity where, as here, a plaintiff seeks to recover for one of the enumerated torts. And well-settled interpretive canons dictate that the proviso's later-enacted, specific waiver prevails over the discretionary function exception's earlier, more general reservation of immunity. Pet. 17-18.

The Government does not dispute that the law enforcement proviso is later-enacted and more specific. And none of its new arguments justifies departing from the proviso's plain text.

First, the Government asserts that "it is customary to use a proviso to refer only to things covered by the preceding clause" and that the law

enforcement proviso should therefore be construed only to modify the intentional tort exception in Section 2680(h)—not as an independent waiver of sovereign immunity. BIO 17. But the "[u]se of a proviso 'to state a general, independent rule' . . . is hardly a novelty." *Republic of Iraq v. Beaty*, 556 U.S. 848, 858 (2009) (citation omitted). This Court has thus emphasized that "generalizations about the relationship between a proviso and a preceding clause prove to be of little help" when a proviso's text indicates that it has broader effect. *Alaska v. United States*, 545 U.S. 75, 106 (2005).

This is such a case. Congress could have framed the proviso as a narrow limitation on the intentional tort exception in Section 2680(h). Indeed, it has done exactly that in other statutes, specifying that "the provisions of section 2680(h) . . . shall not apply" to particular claims. 10 U.S.C. § 1089(e); *see, e.g.*, 22 U.S.C. § 2702(e); 38 U.S.C. § 7316(f). In the law enforcement proviso, by contrast, Congress did not merely limit the application of the intentional tort exception. Instead, it affirmatively and unequivocally directed that the FTCA's waiver of sovereign immunity "shall apply to any claim" arising from the enumerated torts. 28 U.S.C. § 2680(h). That directive states a "general, independent rule" entitled to independent effect. *Beaty*, 556 U.S. at 858 (citation omitted).

Second, the Government notes (BIO 18) that the law enforcement proviso specifies that "the provisions of this chapter . . . shall apply" to the specified torts. 28 U.S.C. § 2680(h). It argues that "this chapter"—Chapter 171 of Title 28—includes the discretionary function exception in Section 2680(a), and it posits

that claims authorized by the law enforcement proviso are therefore subject to the exception.

That argument misunderstands the language on which it relies. Section 2680, entitled "Exceptions," limits the FTCA's waiver of sovereign immunity by directing at the outset that the "[t]he provisions of this chapter and [28 U.S.C. § 1346(b)] shall not apply" to 13 specified categories of claims. In other words, Section 2680 uses "the provisions of this chapter and [28 U.S.C. § 1346(b)]" to refer to the FTCA's general waiver of sovereign immunity and the accompanying procedures for adjudicating tort claims against the Government. By using identical language in the law enforcement proviso, Congress made clear that the waiver and accompanying procedures *do* apply to claims within the proviso's terms. The Government's contrary view would require reading "the provisions of this chapter and [28 U.S.C. § 1346(b)]" to mean something different at the beginning of Section 2680 than it does in Section 2680(h).

Third, the Government errs in asserting (BIO 19) that adhering to the law enforcement proviso's plain text would allow plaintiffs to bring claims arising in foreign countries notwithstanding Section 2680(k)'s reservation of immunity. The proviso is an independent waiver of sovereign immunity, but it is subject to the familiar rule that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). Because the proviso "gives no clear indication of an extraterritorial application, it has none." *Id.* (citation omitted). Courts in the Eleventh Circuit thus preserve immunity for law enforcement

torts abroad. *See, e.g.*, *Lyttle*, 867 F. Supp. 2d at 1297-98, 1301 n.18.

2. As we explained (Pet. 19-22), there is yet another reason to conclude that the discretionary function exception does not limit the proviso's waiver of immunity for claims of "false imprisonment" and "false arrest." 28 U.S.C. § 2680(h). Those torts are not within the discretionary function exception at all because they necessarily violate the Fourth Amendment, and federal officers have no discretion to violate the Constitution.[2]

The Government's response is startling. It insists that federal officers *do* have discretion to violate the Constitution, because a "constitutional mandate . . . can eliminate an official's discretion" only if "an authoritative construction with sufficient specificity was clearly established before the officer acted." BIO 15-16. The Government thus contends that the

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[2] The Government is wrong to assert (BIO 12) that petitioner failed to present this argument below. The district court concluded that petitioner had not pleaded an independent Fourth Amendment claim, Pet. App. 41a-42a, and the court of appeals relied on that conclusion, *id.* at 21a. But petitioner does not seek to assert a separate constitutional *claim*; instead, she relies on the Fourth Amendment as an additional *argument* in support of her statutory claim that the discretionary function exception does not bar suits for false arrest or false imprisonment. Petitioner presented that argument below. Pet. C.A. Br. 17-18, 25-26. And even if she had not, "parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted). Instead, "once a federal claim is properly presented, a party can make any argument in support of that claim." *Id.* (brackets and citation omitted).

FTCA's discretionary function exception should be read to incorporate the qualified immunity standard that applies to damages suits against *individual* government officials. That argument is wrong from start to finish.

This Court's qualified immunity decisions shield officials from personal financial liability unless their conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citation omitted). That standard "protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (citation omitted). But the Government goes badly astray when it implies that an officer shielded by that forgiving standard has "discretion" to violate the Constitution—instead, he is merely excused from personal financial liability for a prohibited act. And the considerations that justify that shield against *personal* liability are wholly inapplicable to the FTCA, which imposes liability exclusively on *the United States*. *See* 28 U.S.C. § 2674; *cf. Carlson v. Green*, 446 U.S. 14, 21 n.7 (1980).

Decades ago, moreover, this Court emphatically rejected the Government's assertion (BIO 14-15) that the existence in tort law of a "common-law immunity for 'discretionary' functions," *Owen v. City of Independence*, 445 U.S. 622, 649 (1980), somehow confers qualified immunity on governmental entities. "That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no 'discretion' to violate the Federal Constitution." *Id.* The Court was rejecting an

argument made by a municipality, but it could have been responding to the Government's brief in this case: The federal government has no more "discretion" to violate the Constitution than its municipal counterparts.

The Government makes no attempt to reconcile its position with *Owen*. Instead, it quotes (BIO 13-14) this Court's statement that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). But the Court's unremarkable observation that a policy affirmatively "*prescrib[ing]*" an official's duties may leave discretion unless it is "specific[]" does not imply that the Constitution's *proscription* of certain conduct affords discretion as well. Officials have no discretion to transgress those "absolute and imperative" boundaries. *Owen*, 445 U.S. at 649. Tellingly, the Government cites no decision endorsing its contrary view.[3]

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[3] The Government quotes (BIO 15) the Third Circuit's decision in *Bryan v. United States*, 913 F.3d 356 (2019), which recited the "clearly established" standard. *Id.* at 364. But the court's abbreviated discussion neither analyzed the issue nor purported to depart from the Third Circuit's prior recognition that conduct is not within the discretionary function exception "if it violates the Constitution." *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (1988).

CONCLUSION

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

Respectfully submitted,

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