No. 19-1082

In the Supreme Court of the United States

STEPHEN LINDER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's tort claims against the United States are barred by 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."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 937 F.3d 1087. The district court's order granting the government's motion to dismiss (Pet. App. 13-54) is unreported, but is available at 2015 WL 739633.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12) was entered on September 9, 2019. A petition for rehearing en banc was denied on November 1, 2019 (Pet. App. 55). On January 14, 2020, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including March 2, 2020, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, enacted in 1946, generally waives the sovereign immunity of the United States and creates a cause of action for damages against the United States with respect to certain torts of federal employees, acting within the scope of their employment, under circumstances in which a private individual would be liable under state law. See 28 U.S.C. 1346(b)(1). The FTCA contains various 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 a proviso 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 law enforcement proviso states that "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" that is based on "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h).

2. In July 2010, petitioner Stephen Linder, a Deputy U.S. Marshal with the U.S. Marshals Service (USMS), was in Cicero, Illinois searching for a fugitive wanted for murder. Pet. App. 16. As part of the investigation, petitioner questioned Santiago Solis, the fugitive's father, in the back seat of a passenger van. *Ibid.* Secret Service Agent Eric Petkovic and fellow Deputy U.S. Marshal Harry Sims were seated in the front seat of the van. *Ibid.* Two days later, Sims told his friend, Deputy U.S. Marshal Lorne Stenson, that he had seen petitioner strike Solis. *Ibid.* A few days after that, Sims prepared a report alleging that petitioner had used excessive force during his interview with Solis, which he submitted to Deputy U.S. Marshal Ken Robinson. *Ibid.* Sims allegedly later told Stenson that he had "jumped the gun" by filing the report and that he had not filed an accurate and complete report, but petitioner does not allege that Sims or Stenson relayed those concerns to Robinson or anyone else. *Ibid.*

Robinson referred the report to U.S. Marshal Darryl McPherson and Chief Deputy U.S. Marshal John O'Malley, and O'Malley subsequently referred it to the USMS Office of Inspection, which is responsible for the initial intake of complaints of misconduct by Marshals Service employees. Pet. App. 16. Per Marshals Service policy, the USMS Office of Inspection forwarded the report of misconduct to the Department of Justice's Office of the Inspector General (OIG). *Id.* at 17. On July 26, 2010, OIG officially advised the Marshals Service

that it would conduct a joint criminal investigation, along with the Department of Justice's Civil Rights Division, into the allegations against petitioner. *Ibid.*

On January 12, 2012, a grand jury indicted petitioner on two counts of excessive force and two counts of obstruction of justice. Pet. App. 1, 18. Following the indictment, McPherson sent an email to all USMS staff in the Northern District of Illinois providing "guidance" and instructing them on "specific rules that must be adhered to by USMS employees during the pendency of federal criminal proceedings against a [Deputy U.S. Marshal] from our district." *Id.* at 19; see *id.* at 18-19. Among other things, the email instructed USMS staff to restrict personal contact and socialization with petitioner and instructed them to not discuss the case with petitioner's attorneys without prior approval from USMS management. *Id.* at 19. On February 2, 2012, a second email was sent from McPherson's office, with his approval, that "supplemented the original guidance and warned USMS staff that failure to comply with the original guidance would 'be dealt with through the U.S. Marshals Service's official discipline process and Employee Relations.'" *Ibid.* McPherson took those actions after consulting with the Marshals Service's General Counsel and in accordance with USMS policy directives on misconduct investigations. *Id.* at 6. Petitioner was placed on indefinite suspension without pay on March 13, 2012. *Id.* at 19.

On April 20, 2012, petitioner moved to dismiss the indictment, alleging that McPherson's instructions had prevented his defense team from interviewing nine potential witnesses, in violation of his Fifth and Sixth Amendment rights. Pet. App. 2, 7, 19. In response to petitioner's motion, Special Agent Kevin Shirley, who

led the criminal investigation, prepared affidavits for a number of USMS employees, each asserting that the employee did not have information that could be helpful to the defense. *Id.* at 19. Petitioner now alleges that, with regard to two employees, those assertions were knowingly false. *Ibid.*

On March 5, 2013, the United States District Court for the Northern District of Illinois dismissed the indictment against petitioner. Pet. App. 2. As relevant here, the court found that McPherson's no-contact-without-approval order had violated petitioner's Sixth Amendment right to compulsory process of witnesses. *Id.* at 2, 7.

3. Petitioner then filed this suit in the Northern District of Illinois, pleading claims against the United States under the FTCA, and against McPherson and Shirley individually (as well as two prosecutors) under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Pet. App. 14-15. Petitioner's FTCA claims alleged the torts of malicious prosecution and intentional infliction of emotional distress, based on two acts: (1) McPherson's instructions to USMS employees directing them not to meet with petitioner's attorney without prior approval; and (2) Shirley's alleged subornation of perjury in the affidavits that he submitted in response to petitioner's motion to dismiss his criminal indictment. See *id.* at 34-35. Petitioner's *Bivens* claims alleged that the individual defendants had deprived him of constitutional rights. See *id.* at 14.

The district court dismissed petitioner's claims. Pet. App. 13-54. With respect to petitioner's *Bivens* claims, the court assumed that a *Bivens* remedy was available

for each claim, but concluded that the claims failed because petitioner had not alleged facts demonstrating that the individual defendants had violated his constitutional rights. *Id.* at 27-34.

With respect to petitioner's FTCA claims against the United States, the district court dismissed those claims on the ground that petitioner's allegations fell within the discretionary function exception to the FTCA's waiver of sovereign immunity. Pet. App. 34-54. The court rejected petitioner's argument that the law enforcement proviso in Section 2680(h) precludes the application of the discretionary function exception in cases where the plaintiff alleges intentional torts, including malicious prosecution, committed by law enforcement officers. *Id.* at 37-41. The court likewise rejected petitioner's argument that the discretionary function exception was inapplicable simply because he alleged that McPherson and Shirley had violated his constitutional rights. *Id.* at 42-45.

4. The court of appeals affirmed. Pet. App. 1-11. Petitioner did not appeal the district court's dismissal of his *Bivens* claims, thereby abandoning his claims that the individual officers had violated his constitutional rights. *Id.* at 2.

Regarding petitioner's FTCA claims, the Seventh Circuit agreed with the district court that petitioner's claims based on McPherson's actions were barred by the discretionary function exception. The court of appeals observed that the discretionary function exception applies where: (1) "the assertedly wrongful conduct * * * entail[s] an element of judgment or choice"; and (2) that discretion is "based on considerations of public policy." Pet. App. 6 (citing *Gaubert*, 499 U.S. at 322). The court concluded that McPherson's actions satisfied

both requirements. *Ibid.* As the court explained, "[a] U.S. Marshal has discretion to decide how personnel under his command interact with suspended officers (including those facing criminal charges)," and "that discretion rests on [policy] judgments about how best to operate the Marshals Service so that it achieves its functions with a minimum of internal discord." *Ibid.*

The court of appeals rejected petitioner's "principal argument" on appeal that the FTCA's discretionary function exception is categorically inapplicable to malicious prosecution claims that fall within the terms of the law enforcement proviso to the intentional tort exception, 28 U.S.C. 2680(h). Pet. App. 3; see *id.* at 3-5. The court relied on the plain text of the law enforcement proviso, which states that "'the provisions of this chapter and section 1346(b) of this title *shall apply* to any claim' * * * for malicious prosecution arising out of a law enforcement officer's acts." *Id.* at 4 (quoting 28 U.S.C. 2680(h)). Because the discretionary function exception is part of "this chapter" of the FTCA, the court held, it prevents FTCA liability based on "*discretionary* acts by law-enforcement personnel * * * , even though the proviso allows other malicious-prosecution suits." *Ibid.* The court explained further that petitioner's interpretation "would make a hash of the statute" by rendering a number of FTCA provisions inapplicable to malicious prosecution claims arising out of law enforcement activity—a result that Congress could not have intended. *Id.* at 5. The Seventh Circuit observed that the Fourth, Fifth, Ninth, and D.C. Circuits have all reconciled the two FTCA exceptions in the same manner, with only the Eleventh Circuit having accepted petitioner's proposed interpretation. *Id.* at 4-5.

The court of appeals also rejected petitioner's contention that the discretionary function exception was inapplicable because he had alleged that McPherson's actions violated his Sixth Amendment right to compulsory process of witnesses. Pet. App. 7. In the first place, like the district court, the court of appeals found no clear constitutional violation in this case. The court of appeals noted that the right to compulsory process is a trial right, and petitioner was never tried. *Ibid.* Furthermore, the court stated that "the Constitution does not entitle a criminal defendant to interview potential witnesses or take their depositions before trial." *Ibid.* (citing *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561 (1977) and *United States* v. *Ruiz*, 536 U.S. 622, 629 (2002)). In addition, the court stressed that the FTCA is based on alleged violations of *state law*, see 28 U.S.C. 1346(b)(1), and does not apply to constitutional torts at all, which must instead be pursued through *Bivens* actions—though petitioner here chose not to pursue his *Bivens* claims on appeal. Pet. App. 7-8.

Turning to petitioner's FTCA claims directed at Shirley's alleged subornation of perjury, the court of appeals agreed with petitioner that law enforcement officers lack discretion to commit perjury, and the discretionary function exception therefore does not apply to such conduct. Pet. App. 10. But the court held that petitioner's claims nonetheless failed as a matter of law because petitioner was not harmed by Shirley's alleged misfeasance. *Ibid.* As the court explained, Shirley allegedly committed perjury in responding to petitioner's motion to dismiss his indictment, and petitioner "*prevailed* in his effort to have the indictment dismissed." *Ibid.* "No harm, no tort." *Ibid.* (citing *Saunders-El* v. *Rohde*, 778 F.3d 556, 561 (7th Cir. 2015)).

ARGUMENT

Petitioner seeks review (Pet. 11-24) of whether the FTCA's discretionary function exception, 28 U.S.C. 2680(a), can apply in cases where a plaintiff alleges: (1) constitutional violations; or (2) an intentional tort that falls within the law enforcement proviso of 28 U.S.C. 2680(h). The court of appeals' decision below is correct. Because the United States has retained sovereign immunity in petitioner's case through the plain text of the discretionary function exception, petitioner's FTCA claims are not subject to federal jurisdiction under Section 1346(b)(1) simply because he alleges a violation of his constitutional rights or a tort covered by the law enforcement proviso. Although some disagreement exists among the courts of appeals on those issues, petitioner overstates the extent of the disagreement, and that disagreement has had little practical significance. This Court has denied multiple prior petitions for a writ of certiorari raising similar issues. See *Campos* v. *United States*, 139 S. Ct. 1317 (2019) (No. 18-234); *Castro* v. *United States*, 562 U.S. 1168 (2011) (No. 10-309); *Welch* v. *United States*, 546 U.S. 1214 (2006) (No. 05-529). The Court should follow the same course here.

1. The court of appeals correctly determined that the discretionary function exception bars petitioner's FTCA claims based on McPherson's conduct.[1] As noted, the discretionary function exception limits the FTCA's waiver of the United States' sovereign immunity by

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[1] The court of appeals also correctly concluded that petitioner's FTCA claims directed at Shirley's alleged subornation of perjury failed on the merits because petitioner did not show harm. Petitioner does not challenge that conclusion in the petition for a writ of certiorari.

providing that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to * * * [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.

McPherson's directions to USMS employees regarding how to conduct themselves in light of a colleague's criminal indictment satisfied the *Gaubert* standard. As the court of appeals explained:

> [T]he investigation of (potential) crimes, and the management of a federal workforce in which one employee is a (potential) criminal, are discretion-laden subjects. There is no one right way to investi-

> gate an allegation of crime, no one right way for federal employees to relate to their colleagues who have been suspended pending the resolution of criminal charges.

Pet. App. 9. Instructing USMS employees about the consequences of petitioner's indictment was "a task associated with 'day-to-day management,' which 'regularly requires judgment as to which of a range of permissible courses is the wisest.'" *Id.* at 51 (quoting *Gaubert*, 499 U.S. at 325). No constitutional provision, statute, regulation, or policy specifically prescribed a course of action for McPherson to follow.

McPherson's conduct likewise satisfies the second component of *Gaubert*'s two-part inquiry, because his decisions on how to manage his workforce during an ongoing criminal investigation of one of his employees involved judgment "of the kind that the discretionary function exception was designed to shield," 499 U.S. at 322-323 (citation omitted). As the court of appeals explained, McPherson's actions "reste[d] on [policy] judgments about how best to operate the Marshals Service so that it achieves its functions with a minimum of internal discord." Pet. App. 6. Petitioner has at no point argued otherwise. See *id.* at 53 (finding that petitioner had not argued that McPherson's conduct was not grounded in policy considerations, and that petitioner had "done nothing to rebut th[e] presumption" that McPherson's conduct was susceptible to policy analysis).

2. Petitioner contends (Pet. 12-18) that the discretionary function exception is inapplicable to his FTCA claims based on McPherson's conduct simply because he alleges that the no-contact-without-approval order

violated his Sixth Amendment right to compulsory process.

a. Petitioner is incorrect that alleging a Sixth Amendment or other constitutional violation necessarily renders the discretionary function exception inapplicable. The text of the discretionary function exception is unambiguous and categorical: the FTCA "*shall not apply* to * * * [a]ny claim" that arises from a discretionary function. 28 U.S.C. 2680(a) (emphasis added). Congress left no room for the extra-textual "constitutional claims" exclusion that petitioner now advocates. See *Millbrook* v. *United States*, 569 U.S. 50, 56-57 (2013) (applying "[t]he plain text" of the FTCA and "declin[ing] to read * * * a limitation into unambiguous text"). The incompatibility of petitioner's suggested exclusion with the FTCA's remedial scheme is reinforced by the fact that, as the court of appeals observed, Congress did not create the FTCA to address constitutional violations at all, but rather to address violations of *state tort law* committed by federal employees. Pet. App. 7-8; see *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994) (recognizing that "§ 1346(b) does not provide a cause of action for" a "constitutional tort claim").

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. 16-18) 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 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).

This 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."); see also, *e.g.*, *Wilson* v. *Layne*, 526 U.S. 603. 614-615 (1999) (applying the "discretionary function[]" formulation and holding that officers were entitled to qualified immunity because, although their conduct violated the Fourth Amendment, the law was not clearly established at the time); cf. *Messerschmidt* v. *Millender*, 565 U.S. 535, 553 (2012) (finding it unnecessary to decide whether the facts alleged "actually establish 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 reasonably 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 this 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. 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, *e.g.*, *Bryan* v. *United States*, 913 F.3d 356, 364 (3d Cir. 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 a government 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). As mentioned above, the FTCA is not based on alleged constitutional violations, and a plaintiff cannot circumvent the limitations on constitutional tort actions under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—including the qualified immunity doctrine—by recasting the same allegations as common law tort claims under the FTCA.

b. The circuit court cases on which petitioner relies (Pet. 13-15), although broadly worded, do not hold otherwise. Three did not involve allegations of unconstitutional conduct at all. See *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001); *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 122-123 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *Sutton* v. *United States*, 819 F.2d 1289, 1292 (5th Cir. 1987). Another reasoned that the FTCA and *Bivens* are "co-

extensive causes of action," which suggests that, if the plaintiff's *Bivens* claim failed because of qualified immunity, then his FTCA claim would also fail. *Denson* v. *United States*, 574 F.3d 1318, 1336 (11th Cir. 2009), cert. denied, 560 U.S. 952 (2010). The remainder of the cases cited by petitioner either do not offer any analysis or do not address whether alleged constitutional violations that were not clearly established are sufficient to overcome the discretionary function exception. See *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"); *Limone* v. *United States*, 579 F.3d 79, 100-102 (1st Cir. 2009) (declining to apply the discretionary function exception to conduct that the court had previously found "stated a clear violation of due process"); *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").

Petitioner has not identified any case in which a court has held that the Sixth Amendment specifically directed a supervising federal official like McPherson

regarding how to instruct personnel to conduct themselves in response to the indictment of a colleague on criminal charges. Indeed, petitioner has not alleged any plausible constitutional violation at all arising from McPherson's conduct. As the court of appeals explained, the Sixth Amendment right to compulsory process is a trial right, and petitioner was never tried. Pet. App. 7 (citing *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561 (1977); *United States* v. *Ruiz*, 536 U.S. 622, 629 (2002)). Moreover, "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford*, 429 U.S. at 559. Thus, even assuming, as petitioner contends, that McPherson's no-contact-without-prior-approval order "'intimidated potential defense witnesses'" or "prevent[ed] defense access to [those] witnesses," McPherson's order did not violate his Sixth Amendment right to confront those witnesses at trial. Pet. 9 (citation omitted). The district court reached the same conclusion in dismissing petitioner's *Bivens* claims—a determination that petitioner notably did not appeal. See Pet. App. 28 (explaining that "the Sixth Amendment right to compulsory process of witnesses is tied to a defendant's ability to tell his story as part of a fair trial"). Petitioner's failure to allege any plausible constitutional violation regarding McPherson's actions is reason sufficient by itself to deny the petition for a writ of certiorari on the question of whether and under what circumstances an alleged constitutional violation can override the discretionary function exception.

3. a. 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 one of the torts listed in 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 an amendment 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. And the conclusion that the proviso relates only to the preceding clause of subsection (h) is reinforced by the proviso's reference specifically to some (but not all) of the intentional torts excepted in that prior clause. See 28 U.S.C. 2680(h) ("*Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States," the FTCA "shall apply" to claims alleging one of the select named intentional torts.). Moreover, the final sentence of Section 2680(h) furnishes,

"[f]or the purpose of this subsection," a definition of the term "'investigative or law enforcement officer.'" *Ibid.* (emphasis added). Because that term appears only in the law enforcement proviso, the final sentence in subsection (h) thereby links the proviso exclusively to the intentional tort exception in "this subsection" in that additional way as well.

Further still, as the court of appeals emphasized (Pet. App. 4), the law enforcement proviso expressly states that "the provisions of [Chapter 171] * * * *shall apply*" to claims described within the proviso, 28 U.S.C. 2680(h) (emphasis added), and the discretionary function exception in 28 U.S.C. 2680(a) is one of the provisions of Chapter 171. See *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1848 (2016) (interpreting the FTCA and holding that, "[a]bsent persuasive indications to the contrary," the Court will "presume Congress says what it means and means what it says"). Therefore, given the text and placement of the law enforcement proviso in the statute, the proviso is properly read as a modification only of the first clause of Section 2680(h)—the clause excepting altogether certain intentional torts from the FTCA.

Petitioner's broader reading of the law enforcement proviso—as a limitation not only upon the intentional tort exception but also upon the other exceptions in Section 2680—would allow tort suits against the United States that Congress plainly intended to bar. Under petitioner's interpretation, a plaintiff alleging an 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 prohibits all tort claims "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).[2] The language and structure of Section 2680 as a whole do 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. In short, petitioner's interpretation "would make a hash of the statute." Pet. App. 5.

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 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*." *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. 12-15, *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

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[2] Petitioner argues (Pet. 20, 22-23) that the law enforcement proviso supersedes the discretionary function exception because the former is more modern and more specific. But the FTCA's foreign-country exception likewise is older than the law enforcement proviso, and in some sense more general.

Carlson, 446 U.S. at 19-20 ("[T]he congressional comments accompanying [the law enforcement proviso in Section 2680(h)] made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.").

The construction of the FTCA adopted by the Seventh Circuit and several other courts of appeals is therefore the construction that best gives effect to every provision of the statute. The Seventh Circuit's construction does not leave the law enforcement proviso without effect, because many claims arising from the intentional torts of law enforcement officers do not implicate discretionary functions at all. See, *e.g.*, Pet. App. 9 (explaining that it is clearly established that law enforcement officers do not have discretion to commit perjury). The United States will not be shielded by the discretionary function exception under the FTCA for the conduct of federal law enforcement officers if they act in violation of a clearly established constitutional, statutory, or regulatory directive, just as individual officers are not entitled to qualified immunity under *Bivens* when they violate clearly established law.

b. 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 Fourth, Fifth, Ninth, and D.C. Circuits would all have resolved this case the same way the Seventh Circuit did. See *Campos* v. *United States*, 888 F.3d 724, 736 (5th Cir. 2018) (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 type of "egregious, intentional misconduct" that led Congress to enact the proviso), cert. denied, 139 S. Ct. 1317 (2019); *Medina*, 259 F.3d at 226, 228-229 (4th Cir.) (where the discretionary function exception applies, it controls, even if the plaintiff alleges intentional torts within the law enforcement proviso); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983) (same), cert. denied, 465 U.S. 1100 (1984); see also *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 because the claim arises from the detention of goods by a customs officer, that exception controls notwithstanding the law enforcement proviso), cert. denied, 515 U.S. 1144 (1995).

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*, 574 F.3d at 1336 ("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."). 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, as a practical matter, from the decision below or the decisions of the other courts of appeals. Thus, further percolation in the Eleventh Circuit is warranted and may show that no meaningful conflict exists among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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