1   IN THE SUPREME COURT OF THE UNITED STATES

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3   KIM MILLBROOK,   :

4   Petitioner   :   No. 11-10362

5   v.   :

6   UNITED STATES   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, February 19, 2013

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:25 a.m.

14   APPEARANCES:

15   CHRISTOPHER J. PAOLELLA, ESQ., Washington, D.C.; on

16   behalf of Petitioner; appointed by the Court.

17   ANTHONY A. YANG, ESQ., Assistant to the Solicitor

18   General, Department of Justice, Washington, D.C.;

19   on behalf of Respondent, supporting reversal and

20   remand.

21   JEFFREY S. BUCHOLTZ, ESQ., Washington, D.C.; for amicus

22   curiae in support of the judgment below; appointed by

23   this Court.

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1   C O N T E N T S

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

2   (10:25 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 11-10362, Millbrook v. United

5   States.

6   Mr. Paolella.

7   ORAL ARGUMENT OF CHRISTOPHER J. PAOLELLA,

8   FOR PETITIONER, APPOINTED BY THIS COURT

9   MR. PAOLELLA: Mr. Chief Justice, and may it

10   please the Court:

11   The plain language of Section 2680(h) is law

12   enforcement provides a waiver of sovereign immunity in

13   clear, precise and unambiguous terms. It extends the

14   waiver to any claim for one of the six enumerated torts

15   committed by a Federal investigative or law enforcement

16   officer acting within the scope of his or her

17   employment.

18   And it defines investigative or law

19   enforcement officer as any officer of the United States

20   who is quote, "empowered by law," unquote, to carry out

21   searches, seizures or arrests.

22   JUSTICE GINSBURG: Would that include, say,

23   a meat -- a meat inspector? There is a wide range of

24   Federal employees that have arrest or search or

25   seizure --

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1   MR. PAOLELLA: The proviso doesn't any

2   employee of the United States who is authorized to carry

3   out a search, seizure, or arrest. It used the term "any

4   officer of the United States." And I believe that the

5   term "officer" carries some water here. If we look at a

6   spectrum of individuals who have powers -- for example,

7   to carry out searches -- we can envision on the one hand

8   very traditional core of law enforcement officers.

9   Let's take a DEA officer who can carry out

10   arrests, do searches and seizures, is authorized to use

11   force. At the other end of the spectrum, we have

12   something like a meat inspector or an OSHA inspector,

13   who may have a limited ability to carry out searches,

14   but these are searches that are in really a law

15   enforcement capacity -- an administrative capacity as

16   opposed to a core law enforcement capacity.

17   So the government raises the argument, and

18   we think it's a plausible interpretation, that by using

19   the term "officer" rather than any employee of the

20   United States, that there was some limiting factor

21   imported into the statute, thereby the statute's plain

22   language.

23   And I would trust my colleague from the

24   Solicitor General's office to map the boundaries of

25   that. I would say that in any case, a correctional

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1   officer, who are the individuals who are involved here

2   in committing the complained-of acts, certainly falls

3   much closer to core law enforcement on that spectrum

4   than to the administrative side.

5   JUSTICE KENNEDY: As a general matter, first

6   in the States and then in the Federal Government, is a

7   correctional officer or prison guard usually deemed to

8   be a peace officer?

9   MR. PAOLELLA: The -- yes. In many States

10 that use the term "peace officer" in the statutes

11 defining a peace officer for things -- for example,

12 authorizing the use of force or authorizing the carriage

13 of weapons -- many States -- it's not uniform, but many

14 States include correctional officers within that ambit.

15   The Federal Government typically does not

16 use the term "peace officer" in its statutes, but if you

17 look at Federal statutes that use the term "law

18 enforcement officer," which is the very term that's used

19 in subsection (h), many -- many of those other statutory

20 schemes expressly include correctional officers. So,

21 for example, for purposes of civil service pay, for

22 purposes of death benefits, of retirement benefits.

23   JUSTICE SCALIA: That doesn't prove that

24 they're officers. I mean, that's -- that's not the test

25 for an officer, how much you're paid. The test is

1   whether you exercise significant authority under the

2   laws of the United States. That's a pretty fuzzy line,

3   but I'm not sure that a prison guard exercises

4   significant authority under the laws of the United

5   States.

6   MR. PAOLELLA: I would think in the context

7   of the prison, it's hard to imagine how a prison guard

8   could exercise any more authority than they do. In

9   addition to their correctional function, prison

10   correctional officers are essentially the police force

11   for the prison.

12   They are charged with maintaining order, and

13   they're charged with enforcing the laws of the United

14   States within the confines of the prison, and indeed in

15   some specified cases, outside the prison walls. For

16   example, they are explicitly authorized under Section

17   3050 of Title 18 of the U.S. Code not just to carry out

18   arrests in prison for violations of Federal law, both by

19   prisoners and visitors, but to carry out arrests outside

20   the prison walls to prevent prisoner escapes or to

21   prevent assaults on other law enforcement officers. So

22   there's quite expressly an arrest authority granted to

23   correctional officers. In addition, they have the power

24   to search for contraband, both in the context of

25   visitors to prison and prisoners themselves.

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1   JUSTICE SOTOMAYOR: Counsel, you've argued

2   something slightly different than I took from your

3   briefs. Earlier, in response I think to

4   Justice Ginsburg, you were queueing closer to the

5   Solicitor General's position that this has to be limited

6   in some way. And you said you'll let them establish the

7   boundaries. I don't want to let them establish the

8   boundaries.

9   I want you to tell me, is it criminal law

10 enforcement agents, is it law enforcement agents with --

11 acting -- as the Ninth Circuit says -- acting within a

12 law enforcement activity? Because I am finding it hard

13 to figure out why we shouldn't permit tort liability on

14 an OSHA inspector, who, in inspecting whatever he or she

15 is inspecting punches someone or does some intentional

16 assaultive act, why they should be permitted to do that.

17 Assuming it falls within the definition of a law

18 enforcement activity.

19   MR. PAOLELLA: Justice Sotomayor, let me

20 begin answering that question by making a distinction

21 which I think is an important distinction here, between

22 the definition of status and the definition of the

23 conduct that's implied here. Because I think this is a

24 crucial difference between the amicus's argument on one

25 hand and the Solicitor General's office on the other

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 1   hand.

 2   The amicus would limit the type of conduct

 3   that's covered by the statute. They would limit it to

 4   actions that occur in a law enforcement capacity. So

 5   I'm not sure exactly what that means. I think that gets

 6   passed along with ---

 7   JUSTICE SOTOMAYOR: I think they're saying

 8   is arrests, search and seizure, and whatever the third

 9   was.

10   MR. PAOLELLA: Or some other similar

11   activities, which, again, I'm not sure addresses the

12   topic --

13   JUSTICE SOTOMAYOR: But let's define it more

14   broadly. Let's assume I was willing to define it to

15   include all of the activities that a law enforcement

16   agent would engage in, including protective services,

17   security services, like your officers.

18   MR. PAOLELLA: Yes, Your Honor.

19   JUSTICE SOTOMAYOR: Let's assume that we've

20   defined it more broadly. What's the problem with their

21   position?

22   MR. PAOLELLA: The problem with their

23   position is -- with the amicus --

24   JUSTICE SOTOMAYOR: And of -- yes, with

25   amicus's or the government's, meaning, instead of

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1   limiting it to criminal activity, limited to law

2   enforcement activities broadly defined.

3   MR. PAOLELLA: The problem with amicus's

4   requirement is that it has no textual basis in the

5   statute. The statute is very precise.

6   JUSTICE SCALIA: Well, I will give you --

7   I'll give you a textual basis. Why is it if all the

8   statute is concerned about is the status of being a law

9   enforcement -- investigative or law enforcement

10   officer -- why is it that the exception it makes does

11   not eliminate the exemption for libel, slander,

12   misrepresentation, deceit or interference with contract

13   rights?

14   There is excepted from the provisions of the

15   Tort Claims Act any claim arising out of assault,

16   battery, false imprisonment, false arrest, malicious

17   prosecution, abusive process, libel, slander,

18   misrepresentation, deceit or interference with contract

19   rights.

20   However, for -- for purposes of this

21   exemption from the exemption -- the exception from the

22   exemption, they leave out the latter part. Why did they

23   only put in the others? I think the reason they only

24   put in the others is that those are the kind of torts

25   that would be conducted in the course of conducting a --

9

1   what's the words -- investigative or law enforcement

2   activity.

3   MR. PAOLELLA: Well, Your Honor --

4   JUSTICE SCALIA: The others would not --

5   would not occur.

6   MR. PAOLELLA: I think that that is a

7   limiting factor that is not just implicit but explicit

8   in the statutory text.

9   JUSTICE SCALIA: Yes, but it's -- it's a

10   limiting factor that -- that shows, that displays an

11   intent to limit the -- the activities of investigative

12   or law enforcement officers to those activities

13   conducted in the course of investigating or enforcing

14   the law.

15   MR. PAOLELLA: Well, the fact that Congress

16   was so explicit about categorizing precisely the kind of

17   torts that are covered here -- that sort of conduct --

18   and the fact that Congress was so precise about

19   cross-referencing Section 1346(b), which incorporates of

20   the scope of employment requirement, suggests to me that

21   when Congress wanted to confine the capacity in which

22   the acts occurred, it could do so, and it did in fact do

23   so.

24   JUSTICE GINSBURG: I understand --

25   JUSTICE SCALIA: Why would it leave out

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1   those other ones? That's what I'm asking you. What

2   possible reason is there to leave out libel, slander,

3   misrepresentation, deceit, or interference with contract

4   rights?

5   MR. PAOLELLA: That was the policy judgment

6   that Congress made, that it would not --

7   JUSTICE SCALIA: I -- I didn't deny that

8   it's the judgment. What reason could there be for that

9   judgment?

10   MR. PAOLELLA: That it didn't think that

11   those sorts of torts in this context -- and I think we

12   all agree this is a law enforcement-oriented provision.

13   It's called the law enforcement proviso.

14   JUSTICE SCALIA: I give you a reason.

15   MR. PAOLELLA: Yes.

16   JUSTICE SCALIA: The reason -- the reason

17   they left it out is that they don't think those torts

18   would be committed in the course of investigating or

19   enforcing the law.

20   MR. PAOLELLA: I think that's right,

21   Your Honor, but that doesn't mean that from that we

22   ought to draw an entirely extra-textual additional

23   limitation that goes beyond the specific line that

24   Congress did, in fact, draw here.

25   JUSTICE GINSBURG: Your view is that the

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1   limitation is scope of employment.

2   MR. PAOLELLA: That's right.

3   JUSTICE GINSBURG: The scope of employment

4   is, and you don't add on anything else to that. You

5   don't add arrest, search and seizure.

6   But does this whole issue have an academic

7   flavor, because how in the world could the conduct

8   involved in this case qualify as within the scope of

9   employment?

10   MR. PAOLELLA: First of all, Your Honor, I

11   think that the question of scope of employment was

12   something that was conceded below. It was never

13   litigated. It was never briefed before the Respondents'

14   brief. And from my reading of the question presented as

15   this Court formulated it, it was excluded from the

16   question presented. So I don't think this Court needs

17   to address it. It's more properly addressed on remand

18   if it's important.

19   But here I think that there is an argument

20   that's within the scope of employment. And if you look

21   at cases, for example the Mary M. case out of the

22   California Supreme Court, there the California Supreme

23   Court held that a sexual assault by a law enforcement

24   officer of an individual who was subject to that

25   officer's authority could be held to be within the scope

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1   of employment, because an officer is vested with

2   authority and it is reasonably foreseeable that that

3   authority can sometimes be abused if it happens when the

4   officer is in uniform, on job hours, dealing with

5   someone who that individual is authorized to use

6   appropriate force against.

7   And even in Pennsylvania, you see cases

8   where people do outrageous things, like a private

9   detective shooting a picketing protester, where the

10   Pennsylvania courts have held that that's within the

11   scope of employment.

12   It's a complicated issue. It's an issue of

13   State law and it will be different in every State, which

14   is why I would suggest it's more appropriate for this to

15   be handled on remand rather than have a ruling by this

16   Court on a narrow issue of Pennsylvania State law. But

17   I think it is hardly implausible that Pennsylvania

18   courts would find this within the scope of employment.

19   Your Honor, if there's no further questions,

20   I will reserve the remainder of my time.

21   CHIEF JUSTICE ROBERTS: Thank you, counsel.

22   Mr. Yang.

23   ORAL ARGUMENT OF ANTHONY A. YANG,

24   FOR RESPONDENT, SUPPORTING REVERSAL AND REMAND

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

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1   please the Court:

2   The text and structure of the law

3   enforcement proviso in the Federal Tort Claims Act more

4   generally make clear that the proviso unambiguously

5   waives sovereign immunity for claims arising under the

6   six intentional torts listed for acts or omissions of

7   persons qualifying as Federal law enforcement officers

8   while acting within their scope of employment.

9   Nothing in the statute supports amicus's

10   additional limit, which would require such officers to

11   be acting in a law enforcement capacity or by exercising

12   law enforcement authority, neither of which phrase

13   occurs within the statute itself. Quite the contrary --

14   JUSTICE KAGAN: What are the kinds of

15   things, Mr. Yang, that would be within the scope of

16   employment, but would not be acting within a law

17   enforcement capacity for a law enforcement officer?

18   What's the difference between those two standards for a

19   law enforcement officer?

20   MR. YANG: Well, this is complicated by the

21   fact that for the Federal Tort Claims Act, scope of

22   employment is a question that turns on State law. As a

23   result it will vary. Some States have a rather broad

24   understanding of scope of employment and sometimes in

25   fact will encompass within the scope of employment

1   rather egregious intentional torts. It's not

2   necessarily what the Court might think of as within the

3   scope of one's Federal law enforcement authority.

4   So with respect to law enforcement

5   authority, I mean, this -- that makes the question a

6   little more difficult because that is not something that

7   actually appears in the statute and it's not something

8   that the United States embraces as a test because it is

9   a creation of the amicus.

10   What the statute here does, the only term --

11   the only place that it uses law enforcement is in the

12   defined term "investigative or law enforcement officer"

13   and then what it does in defining that term --

14   JUSTICE KAGAN: But you can't give me just a

15   couple of examples of how the difference would matter,

16   you know, in some States, where something would be --

17   would meet the scope of employment test, but not meet

18   the acting as a law enforcement officer test, for a law

19   enforcement officer again.

20   MR. YANG: Again, acting as a law

21   enforcement officer test is not something that appears

22   in the statute and it's not something that even amicus

23   has tried to meet the limitations of. It could mean

24   various things. It could mean, for instance, something

25   as limited as executing a search, seizing evidence or

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

2   rationale.

3   It could be something incident to that,

4   writing a report, as amicus suggests. It could be other

5   things. Law enforcement officers often aren't doing the

6   very things that we're talking about. They go on

7   patrol, they talk to kids in schools. There are all

8   types of things that law enforcement officers might do

9   that don't fall within what might thing -- what one

10   might think of as what, you know, you see on television

11   when officers are making contact with the public in

12   rather high stakes incidents.

13   So it's difficult both because we have a

14   State law term that varies and a term that doesn't even

15   appear in the statute and that we don't embrace. So

16   again, it's difficult to provide examples in any

17   definitive way because both of the comparators shift

18   depending on what we're talking about.

19   JUSTICE GINSBURG: Mr. Yang, even if --

20   if -- it depends on State law, that's clear. But does

21   the United States sometimes concede scope of authority

22   so it can represent -- it can be the sole defendant in

23   the case, the individual officer is off the hook, so

24   that the United States could make the argument: It

25   never happened; the officer didn't do what the plaintiff

16

1   charged?

2   MR. YANG: I believe, if I understand your

3   question correctly, the answer is yes, but let me

4   qualify that. This came up in a case called

5   Osborne v. Haley. And the question about scope of

6   employment for purposes of the Westfall Act turns on

7   whether at the time of the alleged incident the officer,

8   or employee in many cases, was acting within the scope

9   of his or her employment.

10   Now, when the United States investigates,

11   this is authority that is delegated to the Attorney

12   General, which is in turn redelegated to the U.S.

13   Attorney's offices, investigates the relevant

14   circumstances and determines that the allegations are

15   just false, not correct at all, in fact it never

16   happened, the employee was sitting at his or her desk

17   beavering away at important Federal matters, in that

18   instance, the Government will say that the employee was

19   in fact acting within the scope of his or her employment

20   and can explain that the reason for that is the

21   Government rejects the underlying factual assertion.

22   That's something that then is litigated if

23   the Plaintiff seeks to challenge the scope

24   determination. And the Court's decision in Osborne

25   explains that this is how the situation will play out,

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1   is that then the merits of the case ultimately condense

2   into a challenge to the scope certification of the

3   Attorney General.

4   So, no, we don't simply say they were within

5   scope for no reason. We determine whether they were

6   within scope by evaluating the circumstances at issue

7   and if the alleged circumstances did not occur and the

8   employee was acting within the scope properly, we will

9   certify that the employee was acting within the scope.

10   JUSTICE SOTOMAYOR: Could you go back and

11   tell me, yet again -- you give a limiting principle, but

12   I'm not sure how it applies. You seem to be saying --

13   do you agree with your -- with the Petitioner that law

14   enforcement officer includes correction officers?

15   MR. YANG: It does.

16   JUSTICE SOTOMAYOR: And why? Because they

17   have all of those other powers, so how is that different

18   from those in the civil area who have similar powers to

19   arrest, search and seize, to --

20   MR. YANG: Well, I guess there are two

21   elements to the definition of investigative or law

22   enforcement officer within the statute. First, they

23   have to be an officer of the United States. And the

24   term "officer" when we are talking about Federal

25   officers, the dictionary definition that most commonly

18

1   and comfortably applies here, are ones that we're

2   talking about like sheriffs, constables, bailiffs,

3   people who have normal Federal criminal law enforcement

4   -- well, not Federal but criminal law enforcement

5   responsibilities.

6   That -- you know, when you back out to the

7   second criteria, we think that reinforces --

8   JUSTICE SOTOMAYOR: How about Customs

9   agents?

10   MR. YANG: Customs agents? I don't know if

11   they have criminal -- I believe if we assume that they

12   are simply doing a civil function, Custom agents would

13   not fall within the term "officer" as normally applied.

14   Let me give you an example that the amicus

15   raises, Federal forest employees -- Forest Service

16   employees. Forest Service employees, the clerks that

17   work in D.C. are not what one would normally think of as

18   an officer, particularly when we are talking about the

19   phrase "law enforcement officer."

20   JUSTICE SOTOMAYOR: My problem is park

21   employees I think of as officers when you meet them at

22   the parks. They are guarding the parks.

23   MR. YANG: Some, some --

24   JUSTICE SOTOMAYOR: Or they may also be

25   giving tours. They are usually doing sort of a mixture

1   of --

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

3   is --

4   JUSTICE SOTOMAYOR: -- duties.

5   MR. YANG: -- that's correct, Your Honor.

6   The Forest Service, as other park -- the Park Service,

7   has different roles for various individuals within their

8   employ. And there are, in fact, law enforcement

9   officers in the Park Service, and there are law

10   enforcement officers in the Forest Service, and their

11   duties are what one would traditionally think of as law

12   enforcement.

13   JUSTICE SCALIA: Mr. Yang, the United States

14   didn't take this position below, right?

15   MR. YANG: That is correct.

16   JUSTICE SCALIA: This is a change of heart.

17   How long ago was it that the United States took the

18   opposite position, the position argued by amicus here?

19   MR. YANG: Well, this is the Orsay position,

20   which is not the Pooler position I believe the Court is

21   talking about. Pooler, the Government has not taken the

22   view that the Third Circuit was correct and Pooler, as

23   far as I can tell, except within the Third Circuit, is

24   binding precedent.

25   Now, when we take a step back and abandon

1   Pooler's limited approach and apply a more amorphous law

2   enforcement capacity, law enforcement authority, the

3   Government has done that in a number of lower cases,

4   including several courts of appeals --

5   JUSTICE SCALIA: So it couldn't be that

6   obvious, I guess?

7   MR. YANG: Well, I think in those cases the

8   Government took a position that never was a position

9   that made it to the Solicitor General's office. And

10   when we took this -- both in the Reynolds case when

11   there was an adverse decision to the United States and

12   in this case, we determined that the position was not

13   one that could be -- was not correct under the text.

14   And I think, as amicus's -- amicus does, I

15   think, a valiant job of trying to defend that position,

16   but at the end of the day, there simply is not a textual

17   argument to get to that outcome.

18   JUSTICE KENNEDY: I think it is true that

19   there is a strong textual argument for your position.

20   But let me ask this: Are there any studies or any

21   statistics we can look at to see as a predictive matter

22   how many prison suits against the government this ruling

23   that you propose would -- would cause? It seems to me

24   we have close to 200,000 Federal prisoners, I think, and

25   this prison work, there is a lot of shoving, guards have

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1   to break up fights.

2   So there is going to be any number of

3   instances where the question is did the guard overreach.

4   And if I make the assumption, and it's just an

5   assumption because I haven't looked at any statistics,

6   but there is -- this is going to vastly expand the

7   number of cases in which the Government is the

8   defendant. Doesn't that bear on the likelihood of the

9   congressional intent to adopt your position?

10   MR. YANG: I guess there is a few parts to

11   that question. On the statistics, I am not aware of any

12   statistics that we would be able to reliably extrapolate

13   to see what this would mean. I think there may well be

14   some additional cases. However, there are other tools,

15   as we explain in our reply brief, including the Prison

16   Litigation Reform Act, which requires the prisoners both

17   pay their filing fees and if they obtain three strikes,

18   must in fact -- they lose IFP status and must pay that

19   filing fee in advance, and it's a substantial amount of

20   money for many prisoners, given what they earn.

21   So we think that it's not a reason to ignore

22   what we think is the plain text, particularly where

23   Congress here has in the proviso specifically referenced

24   Section 1346(b). Section 1346(b) makes clear that the

25   waiver of sovereign immunity applies to acts or

1   omissions committed within the scope of employment.

2   JUSTICE SCALIA: Can you suggest why

3   Congress might have left out libel, slander,

4   misrepresentation?

5   MR. YANG: Yes. I think --

6   JUSTICE SCALIA: Why -- why would they leave

7   that out if they are only looking at the office and not

8   at the function that the person is performing?

9   MR. YANG: Well, I think that those torts

10   serve as a rough approximation of what Congress

11   anticipated would be the areas where it thought the

12   United States should be liable, when we are talking

13   about Federal law enforcement officers. And I think in

14   fact --

15   JUSTICE SCALIA: Right. I mean, that's the

16   point. So what you are saying is that it suggests that

17   they mean Federal law enforcement officers engaged in

18   law enforcement.

19   MR. YANG: Well, not -- I don't know that

20   that is the case, Justice Scalia. Certainly there is

21   some correlation between those torts and how we should,

22   for instance, understand "officer of the United States,"

23   things like false imprisonment, false arrest, malicious

24   prosecution. All evoke Federal criminal law employment

25   ideas. However, when we look at the text that Congress

                              23

1   used to implement the statute, the text is not like any

2   of the other instances within the Federal Tort Claims

3   Act, where Congress has limited the waiver to particular

4   types of activities or carved out certain activities.

5   In fact, what Congress did was reference

6   back to the general waiver provision which explains that

7   the waiver applies to acts within the scope of

8   employment.

9   If Congress had wanted, for instance, to say

10   only within law enforcement capacity, it would have used

11   very different language. The language of sections --

12   the other provisions in Sections 2680, for instance,

13   subsections (a), (b), and (c), which limit -- which

14   carve out the execution of a statute or regulation,

15   exercise of discretionary functions, the laws of

16   miscarriage or negligent transmission of postal matter,

17   assessment or collection of taxes or customs duties, (f)

18   specifically directs -- carves out the imposition or

19   establishment of a quarantine, (j) carves out the

20   combatant activities of military forces. If Congress

21   wanted to use similar language like law enforcement

22   activities of a law enforcement officer, it would have

23   done that.

24   And the United States -- I don't want to

25   bang the drums too loudly here. We did take a contrary

24

1   position previously, but when our office reviewed the

2   case, we simply determined that the position could not

3   be one that would square to the test.

4   JUSTICE SOTOMAYOR: Let's assume we adopted

5   the definition Justice Scalia just proposed, law

6   enforcement officer engaged in law enforcement

7   activities. Would correction officers be engaged in law

8   enforcement activities?

9   MR. YANG: Well, yes -- maybe yes, maybe no.

10   What we are talking about is an undefined term and the

11   term does not even -- does not appear in the statute.

12   JUSTICE SOTOMAYOR: Well, you can look at it

13   both ways. Are correction officers as officers who are

14   protecting or securing prisoners, are they acting in a

15   law enforcement capacity in your -- forget about what

16   act, what tort they commit, but do they function --

17   MR. YANG: There could be many answers to

18   that question.

19   JUSTICE SOTOMAYOR: Okay.

20   MR. YANG: You could, as the amicus or as

21   the Petitioner suggests, say that the enforcement of a

22   criminal sentence is part of law enforcement capacity,

23   so anything that they do is law enforcement.

24   You could think of law enforcement capacity

25   as more like arrests, you know, searches for violations

1   of Federal criminal law, and that sort of thing. Those

2   might be exercises that the Court would have to engage

3   in if Congress had actually used text directing the

4   Court to look at that.

5   CHIEF JUSTICE ROBERTS: Thank you, counsel.

6   MR. YANG: Thank you.

7   CHIEF JUSTICE ROBERTS: Mr. Bucholtz.

8   ORAL ARGUMENT OF JEFFREY S. BUCHOLTZ,

9   FOR AMICUS CURIAE, IN SUPPORT OF THE JUDGMENT BELOW,

10   APPOINTED BY THIS COURT

11   MR. BUCHOLTZ: Mr. Chief Justice and may it

12   please the Court:

13   I hope to convince the Court of two things

14   today. First is about our reading of the law

15   enforcement proviso as limited to conduct of

16   investigative or law enforcement officers acting as

17   such. The first is that that reading is textually

18   plausible. It is a reasonable reading of what Congress

19   enacted in light of the structure of the statute and in

20   light of ordinary English usage.

21   JUSTICE GINSBURG: May I ask, in light of

22   your opening statement, are you then abandoning your

23   position that it must be either arrest, search or

24   seizure? You have used the Ninth Circuit formula.

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

1   not really clear how different the Ninth Circuit and the

2   Third Circuit are from each other, because there haven't

3   been cases that have arisen that have really tested the

4   proposition that the Third Circuit meant only, literally

5   only, the execution of a search, the seizure of

6   evidence, or the making of an arrest, and that would

7   exclude conduct very closely incident to one of those

8   things. Those cases just haven't arisen.

9   So the courts have used different

10 formulations. They appear to mean slightly different

11 things by them, but I wouldn't want to exaggerate the

12 differences between the Third Circuit and the Ninth

13 Circuit. Both are trying to capture what Congress was

14 getting at here, which was the law enforcement proviso

15 was about law enforcement activity. It was about

16 covering the United States under the FTCA for abuses of

17 law enforcement authority like had occurred in

18 Collinsville, which was the national scandal that

19 prompted the enactment of the proviso.

20   So I think the answer to, Justice Ginsburg,

21 to your question, is: We think that if you take the

22 Third Circuit's language in Pooler, which of course is

23 not this case, but if you take the Pooler language

24 literally and you say that the only conduct covered is

25 conduct in the course of -- that's language the Court

27

1   used a few times in Pooler -- in the course of a search,

2   an arrest, or a seizure of evidence, that's problematic

3   because it's clear that Congress was trying to cover

4   abuses of law enforcement authority, including malicious

5   prosecution and abuse of process, which we know because

6   Congress included those torts in the exception to the

7   exception. And if you had a situation where an officer

8   conducted a search and then wrote a false report about

9   the search that he had conducted, the writing of the

10   report wouldn't literally be in the course of the

11   search. So if you take those words in Pooler literally,

12   that would be excluded. That can't be right.

13   So to that extent we agree with the Ninth

14   Circuit position rather than the Third Circuit position.

15   But again I'm not really sure that it's fair to

16   attribute that extreme position to the Third Circuit.

17   JUSTICE KAGAN: Mr. Bucholtz, the statute

18   itself has a kind of conduct-based limitation in it. It

19   says law enforcement officers acting within the scope of

20   their employment.

21   So I guess my question is, given that there

22   is that conduct-based limitation in the statute, why one

23   would substitute for it law enforcement officers acting

24   as law enforcement officers? Why wouldn't one use just

25   the conduct-based limitation that's already there?

 1   MR. BUCHOLTZ: Justice Kagan, I don't think

 2   it's a substitution. I think it's an addition if it's

 3   anything. But really the reason is that under ordinary

 4   English usage, when there's a reference to somebody

 5   defined by their status, it's fair to assume that the

 6   reference to the person defined by their status is

 7   really just intended to cover things they do in that

 8   relevant status and not things they do in some other

 9   capacity.

10   What we're asking the Court to do here is

11   exactly what the Court did in Lane v. Pena. In Lane v.

12   Pena, the statute at issue was the Rehabilitation Act.

13   It waived sovereign immunity and provided a damages

14   remedy against Federal providers of funding. The

15   Department of Transportation clearly was a Federal

16   provider of funding. It gave out all sorts of funding

17   to all sorts of recipients.

18   But that's not what the case was about. The

19   case was about the Merchant Marine Academy and somebody

20   who was dismissed from it. And what the Court said is

21   the reference to Federal funding providers like the

22   Department of Transportation had to be read as limited

23   to Federal funding providers acting as such. Those were

24   the Court's words, "acting as such."

25   JUSTICE KENNEDY: Okay. And then -- then

1   take that theory and track through the statute to show

2   me how that theory works, which is what your opening

3   argument was going to do?

4   MR. BUCHOLTZ: Justice Kennedy, in the first

5   sentence of the proviso, the operative provision,

6   Congress referred to acts or omissions of investigative

7   or law enforcement officers of the United States.

8   Congress didn't say any acts or omissions of

9   investigative or law enforcement officers were covered.

10   It didn't say all were covered. It just said acts or

11   omissions of law enforcement officers in the same way

12   that the statute at issue in Lane referred to conduct of

13   a Federal funding provider.

14   And so what this Court should do, we submit,

15   is construe acts or omissions of investigative or law

16   enforcement officers of the United States as limited to

17   acts or omissions of those defined -- that defined class

18   of persons in the relevant capacity, when they're acting

19   as law enforcement officers.

20   JUSTICE KAGAN: But again, it's not just any

21   acts of law enforcement officers. It's acts of law

22   enforcement officers acting within the scope of their

23   authority. And now you're saying acting as a law

24   enforcement officer. I mean, one question I suppose I

25   have, which is the same question that I gave to Mr.

                              30

 1   Yang, is what's the difference between those two things?

 2   And I guess the second question is: Why would we

 3   substitute one phrase about how they have to be acting

 4   for the phrase that Congress actually used?

 5   MR. BUCHOLTZ: Congress didn't, in the

 6   proviso, Justice Kagan, Congress did not actually use

 7   the phrase "scope of employment." It did not actually

 8   incorporate scope of employment as a limitation

 9   explicitly in the proviso. It -- it incorporated

10   1346(b), which contains the scope requirement. But the

11   proviso -- in the proviso, Congress did not actually

12   speak in terms of scope of employment as the operative

13   limitation. So I don't think we'd be substituting the

14   acting as such limitation for anything that actually

15   appears in the proviso.

16   JUSTICE GINSBURG: Is it a limitation? Is

17   scope a limitation? I thought that you -- you didn't

18   question that, that scope is a limitation on the conduct

19   that's covered, right?

20   MR. BUCHOLTZ: Justice Ginsburg, we

21   certainly agree that -- that the conduct that's covered

22   has to be within the scope of the Federal officer's

23   employment. The only point I was trying to make a

24   moment ago in response to Justice Kagan is that

25   requirement exists in 1346, not in the proviso by its

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 1   terms. We certainly agree with that, and as we've

 2   argued in our brief, we think that one way the Court

 3   could affirm the judgment below is to hold that the

 4   officers here were not acting within the scope of their

 5   employment, taking the allegations as true, as they have

 6   to be at this stage of the case.

 7   But to return to Justice Kagan, to your

 8   question about why Congress would have wanted to -- the

 9   Court to -- to interpret "acts or omissions of law

10   enforcement officers" as acting as such, it's because --

11   in part the answer is because scope turns on State law.

12   So Congress doesn't know when it enacts the proviso

13   what's going to be covered if the only limitation is

14   scope, because that turns on 50 different States' laws.

15   And -- and I think that it's fair to say that there are

16   actual meaningful differences between different States'

17   laws as to scope as we -- as we point out in our brief.

18   But the other past of the answer is the --

19   is the second part of this Court's analysis in Lane v.

20   Pena, which is it's entirely possible literally to read

21   the Rehabilitation Act in Lane, and I would grant that

22   it's possible literally to read the words in the

23   proviso, as covering everything that a defined law

24   enforcement officer does within the scope of employment.

25   But the Court said in Lane: We can't read the statute

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1   that way, because we're talking about a waiver of

2   immunity, and waivers of immunity, even if you don't

3   have to put a heavy thumb on the scales and even if you

4   don't have to require that it be unequivocal -- we're

5   not going that far here -- you can't interpret it more

6   broadly than there's any reason to think Congress meant.

7   JUSTICE BREYER: What does it leave out?

8   What does it leave out, your theory? A policeman's a

9   law enforcement officer. What does he do on his job

10   that isn't in a law enforcement role?

11   MR. BUCHOLTZ: Well, there may be certain

12   types of law enforcement officers, Justice Breyer, who

13   generally aren't engaged in law enforcement activity

14   when they're within the scope of employment. But that's

15   not the case with respect to correctional officers like

16   are at issue here.

17   JUSTICE BREYER: Oh, I see.

18   MR. BUCHOLTZ: And the reason for that is --

19   and other types of officers, which hopefully I'll be

20   able to get to, but correctional officers first since

21   that's what this case is about. 18 U.S.C. 3050 is what

22   makes correctional officers fall within the second

23   sentence of the proviso, the definition that Congress

24   provided of investigative or law enforcement officers.

25   It's what gives them the authority to execute --

1   JUSTICE BREYER: So your idea here is a park

2   policeman who is engaged in law enforcement some of the

3   time, but engaged in giving tours the rest of the time.

4   You're saying what you would do is say when he's engaged

5   in the law enforcement he's covered, but not when he's

6   engaged in the tour.

7   MR. BUCHOLTZ: That's right, because he

8   meets the status-based definition that Congress

9   provided, but there's no reason to think Congress

10 intended that he be covered when he's not engaged in law

11 enforcement activity.

12   JUSTICE SOTOMAYOR: I'm sorry. What -- what

13 is it about a corrections officer other than the act

14 that was committed here, which was an alleged sexual act

15 which nobody could, except by some definition of State

16 law, think that that ever happens naturally in the

17 course. But that's an intentional assault. The very

18 definition of the crimes that are covered assumes that

19 it's not an act that's licensed. So, why isn't the

20 correction officer acting in a law enforcement capacity

21 when he's restraining people and securing them?

22   MR. BUCHOLTZ: Because the correctional

23 officer essentially has two capacities. 18 U.S.C.

24 3050, which is the only source of law that anyone has

25 pointed to, to make correctional officers fall within

1   the definition of law enforcement officers in the first

2   place, it has nothing to do with correctional officers'

3   daily interaction with already incarcerated prisoners.

4   It authorizes correctional officers to arrest escaped

5   inmates and to arrest visitors to prisons. It has no

6   application to their daily interaction with

7   prisoners who are already incarcerated.

8   JUSTICE GINSBURG: What about the takedown

9   that occurred here and I -- it's not uncommon. The --

10   your definition includes three things, arrest, search,

11   seizure. And correctional officers do engage in

12   searches of cells for contraband, and they do engage in

13   seizures. Those are not -- this isn't like arrest,

14   which you point out the arrest is unusual; it's an

15   escapee or a visitor. But that's not true of search and

16   seizure.

17   MR. BUCHOLTZ: Justice Ginsburg,

18   correctional officers do search prisoners' cells on a

19   routine basis as part of their duty to maintain order

20   and security within the prisons. That responsibility

21   comes not from 18 U.S.C. 3050, but from 18 U.S.C. 4001

22   and following, which is an entirely different set of

23   legal authorities that has to do with the Attorney

24   General's management of the Bureau of Prisons under his

25   supervision and correctional officers -- and 28 C.F.R.

1   Part 552, which is where the correctional officers get

2   their authority from to search prisoner cells, et

3   cetera.

4   We think that when -- when correctional

5   officers are engaged in that kind of activity, they're

6   acting in a security capacity to maintain order and

7   security within the prison. They're not acting in their

8   very narrow law enforcement capacity conferred by 18

9   U.S.C. 3050. This case doesn't have --

10   JUSTICE SOTOMAYOR: Well, what happens --

11   what happens in the police precinct when police officers

12   are holding pretrial detainees? Are they acting as

13   police officers or as security people? Or even when a

14   prisoner comes back to court for a court appearance and

15   there are U.S. marshals who guard them rather than

16   correction officers, what are they serving as in your

17   mind?

18   MR. BUCHOLTZ: Well, as I said before,

19   Justice Sotomayor, I think there are certain types of

20   law enforcement officers who generally when they're

21   acting within the scope of employment are engaged in law

22   enforcement activity. And deputy U.S. marshals would

23   probably fall within that. But the important point

24   about this case is it doesn't, Justice Ginsburg, involve

25   an allegation about a search. So whatever the Court

36

 1   might think the right way to look at correctional

 2   officers when they're engaged in searches might be, this

 3   case isn't about a search.

 4   JUSTICE BREYER: Well, why isn't this -- why

 5   isn't what the prison guard does law enforcement? I

 6   mean, the law says these people are going to be locked

 7   up and he's enforcing that.

 8   MR. BUCHOLTZ: The law is already --

 9   JUSTICE BREYER: He's going to be in prison

10   under these da, da, da, da, da. You know, all that da,

11   da, da means the conditions of the prison, et cetera,

12   they're all regulations, rules, statutes. He's

13   enforcing them, why not?

14   MR. BUCHOLTZ: Justice Breyer, I think we

15   can tell from the definition in the proviso what

16   Congress was focused on when it -- when it referred to

17   law enforcement officers. We can tell what Congress --

18   JUSTICE BREYER: Well, so now you're saying

19   what those three things could provide the definition?

20   MR. BUCHOLTZ: And -- and -- and other

21   conduct that --

22   JUSTICE BREYER: And are you saying that?

23   MR. BUCHOLTZ: -- I used before is yes, with

24   the caveat, and I think it's an important one, that it's

25   not just those three things, only what occurs in the

                              37

1   course of those three things the way Pooler could

2   possibly be read, but also conduct that's closely

3   incident to those things.

4   JUSTICE SCALIA: Well, you don't think the

5   EPA is engaged in law enforcement when it enforces

6   statutes and regulations, do you?

7   MR. BUCHOLTZ: It depends, Justice Scalia,

8   it depends --

9   JUSTICE SCALIA: Would an officer of the EPA

10   be a law enforcement officer when he writes a letter to

11   a company saying, You know, you are violating section

12   such-and-such of the statute? Is that a law enforcement

13   officer?

14   MR. BUCHOLTZ: Well, the person who writes

15   the letter may qualify as a law enforcement officer

16   under the definition, but that's a different question, I

17   would submit, than whether that -- whether that act

18   constitutes law enforcement activity.

19   I think the answer to that question,

20   Justice Scalia, is probably no, but the important

21   follow-up is if that person meets the definition of law

22   enforcement officer because he's an EPA agent, and after

23   the letter he follows up and goes to the premises of the

24   recipient of the letter, knocks down the door and

25   conducts an illegal search, that's what Congress was

38

1   trying to cover.

2   JUSTICE BREYER: Yeah, but EPA is not what

3   I'm thinking of, I don't think they are. I am thinking

4   of police. Okay. Now, one basic job of a policeman is

5   to patrol, but not arresting people, not searching and

6   not seizing evidence. They are on patrol. That's

7   basically what they do. All right? Is that a law

8   enforcement activity?

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

10   JUSTICE BREYER: Yeah, yeah, yeah, but I

11   mean in places -- it's Federal, I understand. So I'm

12   sure we can find analogies in the Federal situation to

13   ordinary policemen.

14   MR. BUCHOLTZ: Justice Breyer, the answer --

15   the answer -- well, it might not be so easy to find an

16   analogy to an ordinary policeman --

17   JUSTICE BREYER: All right. But FBI agents,

18   who are the federal police, they're people on Federal

19   enclaves, for example, there are -- they are on Federal

20   enclaves, they act like policemen, okay.

21   MR. BUCHOLTZ: Sure. And when they are

22   engaged in patrols, I think it's fair to say that's

23   probably law enforcement activity --

24   JUSTICE BREYER: Okay. That's fair. I

25   mean, what I'm thinking of is either you can have a

1   broad definition or one that's going to get into trouble

2   when we consider real policemen. So if you have a broad

3   one, then I don't see how prison guards get out of it.

4   If you have a narrow one, my guess is we could find lots

5   of Federal policemen who really are policemen who aren't

6   doing what falls -- who are doing what falls outside

7   your narrow definition. I wish I could think of better

8   examples, but I came up with the ones I did.

9   MR. BUCHOLTZ: Then maybe I should try to

10   return to some of the examples that other Justices have

11   given. So there was talk earlier about an OSHA

12   inspector. The Government's position -- and I think

13   this is an important difference between our position and

14   the Government's -- the Government would say that

15   because OSHA isn't a criminal law in the traditional

16   sense and an OSHA inspector or an OSHA agent isn't

17   enforcing criminal law in the colloquial sense, that

18   that shouldn't be covered.

19   But if the OSHA inspector knocks down your

20   door and conducts an illegal search and batters you, why

21   shouldn't that be covered? We know that's a law

22   enforcement abuse, and we know that law enforcement

23   abuse is exactly what Congress is trying to get at. The

24   Government, it's like it's trying to relitigate Marshall

25   against Barlows where this Court held that OSHA

1   inspectors have to have a warrant even though you could

2   think of OSHA as being administrative or civil as

3   opposed to criminal. That's the argument that the

4   Government made there a generation ago and they lost.

5   JUSTICE KENNEDY: So how does that argument

6   help your case?

7   MR. BUCHOLTZ: Because, Justice Kennedy, the

8   point in this case is that we agree that correctional

9   officers fall within the plain language of the

10   definition that Congress provided. Again, the structure

11   of the proviso is there are two sentences, an operative

12   provision and the definition.

13   We are trying to get the Court to construe

14   the operative provision, the first sentence, in the same

15   way the Court did in Lane against Pena. The Government

16   is trying to get the Court to construe the definition,

17   the second sentence. What Congress said in the

18   definition, what the term means, the Court has much less

19   scope to construe that in some way other than the

20   literal language that Congress provided where Congress

21   said what the term means.

22   So we agree under the plain language of the

23   definition that correctional officers are investigative

24   or law enforcement officers because of 18 U.S.C. 3050,

25   which gives them the power under limited, and

41

1   inapplicable here, circumstances to arrest.

2   We think that if you look at correctional

3   officers under 18 U.S.C. 3050 or under the different

4   authorities under 18 U.S.C. 4001 and following and the

5   regulations, that they wear two hats. Sometimes they

6   act in a law enforcement capacity, but not usually,

7   because that only applies in the narrow context of

8   escapes or visitors. When they are dealing with already

9   incarcerated prisoners, like in the allegations here,

10   they are really not acting in that capacity at all.

11   They are wearing a different hat.

12   JUSTICE SCALIA: You are saying that the

13   Government is trying to minimize the consequences of

14   coming out its way by providing a definition of the

15   officers covered, which will not hold. You think it

16   does cover a broader category of officers including OSHA

17   inspectors, but it does not cover them when they are not

18   engaged in law enforcement activities.

19   MR. BUCHOLTZ: Justice Scalia, you have

20   absolutely perfectly encapsulated our position. Thank

21   you.

22   (Laughter.)

23   MR. BUCHOLTZ: The reason why we think that

24   that difference between our position and the

25   Government's is important is that the Government's

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1   position would render the proviso severely

2   underinclusive. We know Congress was trying to get at

3   law enforcement abuses and provide a remedy. And

4   Congress -- the Government would say that if it's not a

5   traditional law enforcement officer in the colloquial

6   sense of like a constable, that it's not covered. But

7   all sorts of agents of the United States from OSHA to

8   FDA to all sorts of other agencies, to EPA, engage in

9   law enforcement activity like the three things we know

10   Congress was focused like a laser beam on: Executing

11   searches, seizing evidence, making arrests for

12   violations of Federal law. And I don't see any basis

13   consistent with the text or our understanding of what

14   Congress intended, to the extent it's different from the

15   text, to say that that's not covered.

16   JUSTICE SOTOMAYOR: One other advantage of

17   your definition is that it takes us out of workplace

18   fights between two employees, because presumably the

19   officers who punch each other out, if that incident

20   occurs, aren't acting in a law enforcement capacity. I

21   am assuming that is part of your argument as well.

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

23   right.

24   JUSTICE SOTOMAYOR: All right. Then it goes

25   back to the question I asked one of your adversaries,

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1   which is all of this depends on how broadly or narrowly

2   we define law enforcement activities.

3   If we take it as broadly as the Government

4   is suggesting, at moments, it would -- we could very

5   well say, you are right, it's a law enforcement

6   activity, but not as narrowly as some would have it be.

7   It would include securing or detaining people, or

8   securing or detaining people. And it would include the

9   Park Service person who stops a visitor and punches them

10 out. It would include the military personnel who stops

11 someone and does an intentional tort against them, even

12 though they may just be walking on the grounds rather

13 than serving as security that particular day.

14   So the point is, why should we give it the

15 narrow reading you are giving, and not the broader

16 reading the Government seems to be suggesting?

17   MR. BUCHOLTZ: Well, two parts to the

18 answer, Justice Sotomayor. The first is the Government

19 is trying to give the first sentence the broader

20 reading, which it recognizes then creates a problem that

21 it tries to solve by narrowing the second sentence in a

22 way that we think won't hold.

23   But the other part of the answer,

24 Justice Sotomayor, is it's about congressional intent.

25 Justice Kennedy asked earlier about whether the

1   Government's interpretation or the Petitioner's

2   interpretation would unleash a flood of suits by

3   prisoners and whether it's fair to think that Congress

4   would have intended that. If you look at the

5   legislative history of the proviso, there is absolutely

6   no indication that anyone in Congress contemplated that

7   the proviso would or could or should apply in the prison

8   situation. All Congress was focused on was providing a

9   remedy for the kinds of raids that had occurred in

10   Collinsville.

11   And so I think when somebody has two hats,

12   like a prison guard has, because, again, there is two

13   different sources of legal authority that they are

14   exercising, 18 U.S.C. 3050 versus 4001, or a military

15   policeman who has two hats, in the cases of Holian that

16   we describe in our briefs where the Government made the

17   argument that where a military policeman is engaged in a

18   military function, not a law enforcement function, that

19   they are not covered.

20   We think where somebody who meets the

21   definition that Congress provided of an investigative or

22   law enforcement officer has two distinct hats, two

23   distinct capacities. When they are not acting in the

24   law enforcement one, they are not covered. There is no

25   reason to think that Congress intended that military

1   police or prison guards be covered when they are

2   maintaining order on a military base or within a prison.

3   That's not what Congress was trying to get at.

4   And we think again a severe disadvantage of

5   the Government's position, they are trying to solve --

6   in a sense they are trying to solve the same problem

7   that we are with our acting as such interpretation, but

8   they are trying to solve it through the wrong part of

9   the statute and in a way that -- in a way ends up with

10 the worst of both worlds.

11   You end up with broader coverage of the kind

12 of conduct that's covered, broader than there is any

13 reason to think Congress intended, conduct that doesn't

14 involve law enforcement activity at all, but a narrower

15 class of people whose conduct is covered. Where that

16 excludes people like OSHA inspectors, FDA agents, EPA

17 agents and in the rare circumstance where the Forest

18 Service employee is acting as a law enforcement officer

19 rather than as a botanist or an entomologist or

20 something like that, we think Congress intended to cover

21 them.

22   We know from the definition that there were

23 three exercises of law enforcement authority that

24 Congress was focused like a laser beam on: Executing

25 searches, seizing evidence and making arrests. Where

1   somebody meets the definition of law enforcement officer

2   and they are doing one of those three things, there is

3   no basis not to say that they are covered.

4   We think it's better to interpret the first

5   sentence of the proviso the same way the Court did in

6   Lane against Pena as limited to acts or omissions of

7   investigative or law enforcement officers acting as

8   such, and keep the definition that Congress provided the

9   way Congress provided it.

10   JUSTICE GINSBURG: Then scope becomes kind

11   of a surplusage.

12   MR. BUCHOLTZ: Not surpluses necessarily,

13   Justice Ginsburg, because it varies among States. There

14   could be States where scope is narrower or broader, and

15   there could always be situations where State law is such

16   that the easiest way to resolve a case is under scope,

17   and not under the concept of acting as a law enforcement

18   officer.

19   JUSTICE GINSBURG: It has to be a law

20   enforcement function. Give -- give me an example of a

21   case where -- where scope would also be relevant, would

22   also be applicable -- if you -- if there is a law

23   enforcement function, then it fits. So what does scope

24   add?

25   MR. BUCHOLTZ: Well, if an officer is

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 1   executing a search but he's doing so because of a

 2   personal vendetta against the person whose premises he's

 3   searching, and he's -- and he's not -- under whatever

 4   the State -- State's law that is applicable, if there is

 5   a relatively narrow conception of scope so that you have

 6   to be trying to serve your employer, which is the

 7   traditional rule, and not just sort of on the job in a

 8   loose sense, which is what the D.C. rule has come to be,

 9   an officer who is engaged in a search or making --

10   making an arrest for a completely inappropriate reason,

11   not trying to serve the employer, not in any way that's

12   authorized by the employer, might not be within the

13   scope, but might be engaged in one of the three law

14   enforcement activities that Congress specified. And the

15   other --

16   JUSTICE KENNEDY: A prisoner -- a prisoner

17   is supposed to be back in his cell block at 6:00 in the

18   evening, he isn't, he's on the recreation yard, he's

19   somewhat recalcitrant, and two guards carry him back to

20   the cell block. Is that an arrest?

21   MR. BUCHOLTZ: No, Justice Kennedy, it's not

22   an arrest, for, among other reasons, the reason that

23   prison guards don't have any legal authority to make an

24   arrest in that circumstance.

25   The prisoner's already been arrested.

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

2   JUSTICE KENNEDY: Well, he's violating the

3   prison regulations.

4   MR. BUCHOLTZ: Yes. And 28 CFR part 552

5   sets out the authorities that prison guards have to

6   enforce prison regulations to maintain security and

7   order within the prison, like in that circumstance.

8   That's not making an arrest. The prison guards have the

9   authority --

10   JUSTICE KENNEDY: And that's not a law

11   enforcement function as contemplated by the statute, in

12   your view?

13   MR. BUCHOLTZ: That's correct,

14   Justice Kennedy. That -- that may involve the use of

15   force and I -- you know, you can make an argument that

16   -- that when you pick somebody up like in your

17   hypothetical, that that's like an arrest at common law.

18   There's no reason to think Congress was getting at that,

19   was trying to cover that in the proviso.

20   Where somebody has two different distinct

21   capacities as a matter of law, the way Bureau of Prisons

22   guards do, and they're acting in the one and not the

23   other, then I think that's the simple answer, is that --

24   JUSTICE SOTOMAYOR: What's the difference

25   between the officer who punches the prisoner to get him

1 on the ground and pick him up? Would it apply to the

2 officer who files an arrest complaint against the

3 prisoner, and not to the security officer who just

4 merely carries him back to his cell?

5   MR. BUCHOLTZ: Justice Sotomayor, the

6 hypothetical is --

7   JUSTICE SOTOMAYOR: Or does some physical

8 injury that's substantial. So the intentional assault

9 gets treated as an exception to this only when the

10 security officer actually files an arrest complaint? Or

11 would it at all?

12   MR. BUCHOLTZ: Are you talking about a

13 Bureau of Prison guard filing the arrest complaint?

14   JUSTICE SOTOMAYOR: Yes.

15   MR. BUCHOLTZ: Well, I think -- one thing to

16 point out is the government informs the Court in its

17 reply brief that in a situation where there has been a

18 violation of prison rules that may also be a violation

19 of Federal law that may also be a crime, such that, you

20 know, in ordinary English usage, you could refer to the

21 prison guard as conducting an investigation for

22 violation of a Federal crime.

23   What happens is the BOP guards don't do that

24 themselves. They call in the FBI. That's what the

25 government says in its reply brief. So I think that

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1   itself is an indication of the distinction between

2   prison guards who are law enforcement officers as

3   Congress has defined the term, but who are not

4   traditional law enforcement officers, as the government

5   seeks to define -- redefine the term, and in that

6   capacity are not acting as law enforcement officers.

7   JUSTICE KAGAN: Mr. Bucholtz, I'm sure you

8   have done this already, so I apologize, but could you

9   just state your definition of what it means to be acting

10   as a law enforcement officer? What activities other

11   than the three listed get included?

12   MR. BUCHOLTZ: Well, Justice Kagan, it's

13   hard to give a simple comprehensive answer that applies

14   to all different types of law enforcement officers. Let

15   me start by saying that the three things that have to be

16   included are the three things that Congress specified,

17   and that's one of the problems with the government's

18   definition, is that it reads out cases involves those

19   three activities, involving, in the government's view --

20   kinds of officers.

21   JUSTICE KAGAN: But you don't have your own

22   -- so what else gets in the mix? How would you define

23   it generally?

24   MR. BUCHOLTZ: So -- in a case that involves

25   one of those three things but also something else that's

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1   incident to or related to those three things, we think

2   it would probably be artificial. And you can imagine

3   all sorts of hypos, but it might well be artificial to

4   separate the writing of the -- of the report about the

5   arrest and the arrest itself. So conduct incident to

6   one of these three specified activities we think is

7   probably covered. We also think that maybe when you are

8   talking about a type of law enforcement officer like an

9   FBI agent who is wearing his law enforcement hat all the

10   time, doesn't have a second distinct capacity as a

11   matter of law, like a military policeman or correctional

12   officer, that maybe a broader definition is appropriate,

13   that maybe the FBI agent who is --

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

15   when or --

16   MR. BUCHOLTZ: Well, I mean, Justice Kagan,

17   in fairness, this case doesn't present that question,

18   because it doesn't involve any law enforcement activity.

19   JUSTICE KAGAN: But if we're going to adopt

20   your definition, we have to have some understanding of

21   where it's taking us.

22   MR. BUCHOLTZ: Of course. Of course. And

23   where I think it would be taking the Court is that as

24   always, there could be hard cases that could arise that

25   the lower courts would have to grapple with, but I think

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1   the important concept is, that where somebody has two

2   hats, a law enforcement capacity and some other

3   capacity, then it's easy to draw that line, in concept.

4   Again, there could be hard cases, but as a concept, it's

5   easy to draw that line.

6   Where somebody doesn't have two hats, they

7   only have one hat, like an FBI agent, and they are on

8   the job and they are engaged in what normal people would

9   think of as law enforcement activity, maybe that's

10   covered. I don't really have a -- have a problem with

11   that.

12   I think -- I think that's probably

13   consistent with what Congress was getting at. And maybe

14   the way to think about it is, Congress defined "law

15   enforcement officer" with reference to the three

16   specified kinds of exercises of law enforcement

17   authority, but when the FBI agent is interviewing a

18   witness or potential suspect but hasn't yet gotten to

19   the point of arresting a person or conducting a search,

20   you can think of that as preliminary to an exercise of

21   one of the three specified authorities, because after

22   all, that's what the FBI agent has the authority to do,

23   it's what his job entails.

24   And depending on how the initial questioning

25   goes, that might be the next step. And so it's never

1   far from the scene, when an FBI agent is engaged in what

2   you would normally think of as law enforcement activity,

3   that one of the three specified law enforcement

4   activities could be in the offing.

5   That's very different when you're talking

6   about Forest Service employees who technically meet the

7   definition but usually are not doing anything within a

8   million miles of what normal people would think of as

9   law enforcement activity.

10   So I think it's important to distinguish

11   between different kinds of people who fall within the

12   definition. And -- I understand the Court wants to try

13   to figure out what the implications of this

14   interpretation would be. I think that in the prison

15   context, the answer is clear, because there are two

16   distinct capacities. And that's a hugely important

17   context as a practical matter, given the point that

18   Justice Kennedy made about the likelihood of an enormous

19   number of claims that Congress probably didn't intend.

20   In the military police context, where there

21   are also two distinct capacities, it's probably pretty

22   easy to draw the line. In other cases, it will be

23   case-by-case whether something that the Plaintiff

24   alleges should be thought of as law enforcement activity

25   or law enforcement officer acting as such. We don't

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1   have a problem with the broad interpretation of law

2   enforcement activity acting as such, dealing with the

3   traditional law enforcement officer in a context that

4   it's clear Congress intended.

5   CHIEF JUSTICE ROBERTS: Thank you, counsel.

6   MR. BUCHOLTZ: Thank you very much, Your

7   Honor.

8   CHIEF JUSTICE ROBERTS: Mr. Paolella, you

9   have 3 minutes remaining.

10   REBUTTAL ARGUMENT OF CHRISTOPHER J. PAOLELLA,

11   FOR PETITIONER, APPOINTED BY THIS COURT

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

13   Let me begin by addressing Justice Kennedy's

14   point, his question regarding the possibility of a flood

15   of lawsuits from prisoners. I think it's important to

16   keep in mind that right now, Pooler and Orsay are the

17   minority rules. Most Federal courts have adopted a

18   broad interpretation of the law enforcement proviso.

19   So if adopting a broader interpretation here

20   would open the flood gates, the flood gates are already

21   open, and they have been for 40 years in most of the

22   country. And we haven't seen a flood of FTCA suits

23   brought by prisoners, especially since the passage of

24   the PLRA --

25   JUSTICE KAGAN: Have they also adopted the

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1 government's view of what counts as an officer, or have

2 they not?

3   MR. PAOLELLA: I -- I don't think that the

4 issue has really been litigated in the Federal courts.

5 It simply hasn't come up. And I think that that's an

6 indication that it's -- it's a workable test. It's --

7 it's not something -- that there are many, many cases,

8 the vast majority of cases, involve individuals who will

9 be by any reasonable definition core law enforcement

10 officers. As far as I am aware, every Federal court to

11 address the issue has defined correctional officers as

12 law enforcement officers. You know -- as officers, as

13 that term is used.

14   So I think that these things are really

15 ultimately noncontroversial.

16   JUSTICE SCALIA: You -- you support the

17 government's position on who's an officer, right? So it

18 wouldn't include EPA. Is that --

19   MR. PAOLELLA: I think that the word

20 "officer" carries some water in this statute, and it

21 means something other than "employee."

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

23   MR. PAOLELLA: Yes.

24   Justice Scalia, let me return to your

25 earlier point about inferring congressional intent from,

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1   for example, from the list of enumerated torts. And I

2   think it's important to keep in mind that the best

3   evidence of Congress's intent is the text of the

4   statute. And the fundamental problem with amicus's

5   position is that he very ably uses tools for construing

6   ambiguous statutes to construe a statute that at its

7   core is not ambiguous, it's precise and it's definite.

8   Now, the coverage that is created by the

9   literal words of the statute may be debatable as a

10   policy matter. Maybe it makes sense to include

11   correctional officers, maybe it doesn't. But it's not

12   absurd. And this Court's rule is when you were

13   construing a non-ambiguous statute, Congress gets to

14   draw that policy line, not the Court, as long as the

15   result is not absurd.

16   And we would argue that Congress drew that

17   policy line here. It very specifically provided that

18   any claim based on enumerated tort by a federal law

19   enforcement officer acting within the scope of his or

20   her employment, is where it drew that line, that's what

21   the statute literally says. There is no argument about

22   that. And I think that all of the results, the parade

23   of horribles that amicus has raised, again, may be

24   debatable as a policy matter, but not one of them is an

25   absurd exercise of Congress's responsibility. And as a

1   result, we would urge the Court to reverse.

2   CHIEF JUSTICE ROBERTS: Thank you, counsel.

3   Mr. Bucholtz, this Court appointed you as an

4   amicus curiae to brief and argue the case in support of

5   the judgment below, and you have ably discharged that

6   responsibility for which the Court is grateful.

7   Thank you. The case is submitted.

8   (Whereupon, at 11:26 a.m., the case in the

9   above-entitled matter was submitted.)

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