No. 11-10362

In the Supreme Court of the United States

KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

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Neither the United States nor the Court-appointed amicus ("Amicus") is willing to defend *Pooler*'s idiosyncratic reading of the law enforcement proviso, which would limit the government's waiver of sovereign immunity to conduct occurring in the course of a search, seizure, or arrest. Instead, Amicus argues that the proviso should apply "only when the tortfeasor acts in an investigative or law-enforcement *capacity*." Amicus Br. 5 (emphasis in original).

This reading, while broader than *Pooler*,[1] is equally unmoored from the text. Indeed, Amicus admits that its construction would require this Court to add words to the statute, effectively changing the phrase "acts or omissions of an investigative or law enforcement officer" to "acts or omissions of an investigative or law enforcement officer *acting as such*." *Id.* at 10 (emphasis added). The Court should reject this invitation to judicial legislation, which is supported by neither the statutory text, nor the legislative history, nor common sense.

I. Sovereign Immunity Principles Do Not Support Amicus's Interpretation Of The Statute.

1. The FTCA "waives the Government's immunity from suit in sweeping language." *Dolan* v. *Postal Serv.*, 546 U.S. 481, 492 (2006) (citation omitted). As a consequence, the interpretation of an FTCA exception does "not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed

[1] Amicus does not define what he means by "investigative or law-enforcement capacity," other than to opine that it includes searches, seizures, arrests, "and closely related exercises of investigative or law-enforcement authority." Amicus Br. 5. It would presumably be up to the federal courts to fill this empty vessel.

* * * in favor of the sovereign.' " *Ibid.* (quoting *Lane* v. *Peña*, 518 U.S. 187, 192 (1996)).

Amicus argues that the *Dolan* principle does not apply here because "there is no occasion to construe any FTCA exception in this case." Amicus Br. 44. Not true. The law enforcement proviso is, both textually and structurally, part and parcel of the intentional-tort exception codified at 28 U.S.C. § 2680(h). When the proviso was enacted in 1974, its sole effect was to modify the scope of the exception. It is a basic principle of statutory interpretation that "[a] statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there." *Blair* v. *City of Chicago*, 201 U.S. 400, 446 (1906) (citation omitted); see also *Natural Resources Defense Council* v. *EPA*, 656 F.2d 768, 781 (D.C. Cir. 1981). And when Congress amended the intentional-tort exception, it was already well established that the scope of such exceptions would be construed in accordance with ordinary rules of statutory construction, rather than strictly in favor of the government. See, *e.g.*, *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953); *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547–549 (1951).

Because the law enforcement proviso is an integral part of the intentional-tort exception, any interpretation of the proviso's scope necessarily requires an interpretation of the exception's scope. Since "'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,'" the proper approach is to "identify 'those circumstances that are within the words and reason of the exception'—no less and no more." *Dolan*, 546 U.S. at 492 (quoting *Kosak* v. *United States*, 465 U.S. 848, 853 n.9 (1984)). In construing the scope of law enforcement proviso—and, consequently, of the intentional-tort exception—there is no warrant for

this Court to place its thumb on one end of the interpretative scale.

2. Even if this Court were to disregard *Dolan* and apply a rule of strict construction, it would not change the result. To give effect to a waiver of sovereign immunity, the Court need only find that "the scope of Congress' waiver [is] clearly discernable from the statutory text in light of traditional interpretive tools." *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012). It is only when "[i]t is not" that the Court "take[s] the interpretation most favorable to the Government." *Ibid.*

Here, petitioner's interpretation of § 2680(h) is not just "clearly discernible" from the statutory text, it is the only interpretation consistent with a plain reading of that text. As the government acknowledges, "[t]he text of that proviso and the broader structure of the FTCA unambiguously establish" that the United States waived sovereign immunity for *any* enumerated tort committed by an investigative or law enforcement officer within the scope of his or her employment. Government Br. at 18–19. "There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008).

II. The Law Enforcement Proviso's Scope Is Not Limited To Torts Committed By A Federal Officer While Acting In A Law Enforcement Capacity.

Amicus admits that the "law enforcement capacity" limitation it urges is not explicitly set forth in the text of § 2680(h). Instead, it urges the Court to *imply* the restriction, arguing that "statements referring to persons by their status are often implicitly limited to situations where the person acts in their relevant capacity." Amicus Br. 5. The Court should reject that argument.

A. The statutory text does not support the implied law enforcement capacity requirement.

1. Section 2680(h) is clear not only in what it says, but also in what it does not say: It doesn't require that the conduct covered by the law enforcement proviso be undertaken in a "law enforcement capacity." But it is not silent as to the capacity in which a tortfeasor must act in order to waive sovereign immunity: It specifies that the provisions of § 1346(b) shall apply to such tort claims. Section 1346(b), in turn, restricts the waiver to injuries caused by government employees "while acting within the scope of [their] office or employment." 28 U.S.C. § 1346(b). Congress thus extended the waiver to any of the enumerated torts committed within the scope of an officer's employment—not just to torts committed while acting in a law enforcement capacity.

"Statutory definitions control the meaning of statutory words," *Burgess* v. *United States*, 553 U.S. 124, 129 (2008) (citation and internal quotation marks omitted), and "[i]t is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term," *Meese* v. *Keene*, 481 U.S. 465, 484 (1987). Thus, "[a]s a rule, a definition which declares what a term 'means' * * * excludes any meaning that is not stated." *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979) (omission in original, alteration and internal quotation marks omitted).

Here, Congress expressly and unambiguously addressed the capacity in which a law enforcement officer must act in order to waive sovereign immunity. It limited the waiver to conduct occurring within the scope of employment, but imposed no further restriction. Nothing in the statute's text supports the additional "law enforcement capacity" requirement that Amicus seeks to engraft onto the law.

2. Amicus next appeals to "common usage," arguing that "courts often read statutory references to a role or status as limited to actions taken in the relevant capacity, even when the literal statutory text could be read to extend more broadly." Amicus Br. 11. He relies primarily on *Pegram* v. *Hedrich*, 530 U.S. 211 (2000), an ERISA case construing the term "fiduciary." But the holding in *Pegram* was based on express statutory language that has no counterpart in the law enforcement proviso.

Section 2680(h) provides that " 'investigative or law enforcement officer' means any officer of the United States who is *empowered by law*" to carry out searches, seizures, or arrests. 28 U.S.C. § 2680(h) (emphasis added). This definition, by its terms, hinges on the officer's *legal authority* to carry such activities, and not on whether that power is being exercised at any particular time.

In contrast, the ERISA provision at issue in *Pegram* expressly ties the definition of "fiduciary" to specific conduct, by providing that "a person is a fiduciary with respect to a plan *to the extent*" that he or she (among other things) "*exercises* any discretionary authority or discretionary control respecting management of such plan or *exercises* any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(a)(i) (emphasis added). *Pegram* relied heavily on this language in construing the scope of the term "fiduciary":

> "[T]he statute does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only 'to the extent' that he acts in such a capacity in relation to a plan. In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether * * * that person was acting

> as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."

Pegram, 530 U.S. at 225–226 (2000) (citation omitted). However, *Pegram* expressly reserved judgment as to whether the mere possession of discretionary authority to administer a plan could be enough, in itself, to qualify a person as a fiduciary:

> "Although we are not presented with the issue here, it could be argued that Carle is a fiduciary insofar as it has discretionary authority to administer the plan, and so it is obligated to disclose characteristics of the plan and of those who provide services to the plan."

Id. at 227 n.8. The law enforcement proviso, unlike ERISA's definition of a fiduciary, does not expressly tie coverage to the "exercis[e]" of law enforcement—or any other—authority. To the contrary, the proviso's only language regarding the capacity in which the officer must act refers back to § 1346(b), which requires only that the actions take place in the course of employment. And *Pegram* itself recognizes that the mere possession of legal authority may be enough to bring a person within the scope of a statute, where the text so provides. That is precisely the case here.

3. More instructive than *Pegram* is *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008), which construed the meaning of the term "law enforcement office" as used in § 2680(c) of the FTCA, which excepts from the waiver of sovereign immunity "[a]ny claim arising in respect of * * * the detention of any * * * property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). The petitioner in *Ali* urged the Court to exclude prison officials from the exception's scope, arguing that the statutory phrase "'any other law enforce-

ment officer' includes only law enforcement officers acting in a customs or excise capacity." *Ali*, 552 U.S. at 218. The Court rejected this conduct-based interpretation as inconsistent with the plain language of the statute:

> "The phrase 'any other law enforcement officer' suggests a broad meaning. * * * In the end, we are unpersuaded by petitioner's attempt to create ambiguity where the statute's text and structure suggest none. Had Congress intended to limit § 2680(c)'s reach as petitioner contends, it easily could have written 'any other law enforcement officer *acting in a customs or excise capacity.*' Instead, it used the unmodified, all-encompassing phrase 'any other law enforcement officer.' Northing in the statutory context requires a narrowing construction—indeed, as we have explained, the statute is most consistent and coherent when 'any other law enforcement officer' is read to mean what it literally says."

Id. at 218–219, 227–228 (citations omitted; emphasis in original). The same reasoning controls here. Had Congress intended to limit the scope of § 2680(c)'s waiver, it easily could have confined it to claims arising from the "acts or omissions of an investigative or law enforcement officer *acting as such.*" Cf. Amicus Br. 10. Instead, it extended the waiver to "any claim" arising out of one of the enumerated torts "with regard to acts or omissions of investigative or law enforcement officers." 28 U.S.C. § 2680(h). As in *Ali*, nothing in these words requires a narrowing construction; the most coherent reading both provisions' language is the literal one. See also, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (refusing to construe "any * * * term of imprisonment" to mean any *federal* term of imprisonment); see *Maine* v. *Thiboutot*, 448 U.S. 1, 4, 6 (1980) (refusing to read the term "laws" in 42 U.S.C.

§ 1983 to be limited to "civil rights or equal protection laws").

B. "Common sense" does not support the implied law enforcement capacity requirement.

1. Finding little support for his position in the statutory language, Amicus spends much of his brief arguing that "common sense" compels his atextual, conduct-based reading. Specifically, he argues that the "law enforcement capacity" requirement would prevent "at least two types of anomalies that Congress could not have intended." Amicus Br. 13.

Amicus's appeal to "common sense" is, at its core, a request that this Court adopt policy judgments that Amicus considers wise, but that were never enacted by Congress. The problem with this reasoning is that it requires the Court to legislate, not interpret. Even "if the literal text of the statute produces a result that is, arguably, somewhat anomalous[,] we are not simply free to ignore unambiguous language because we can imagine a preferable version." *Sigmon Coal Co., Inc.* v. *Apfel*, 226 F.3d 291, 308 (4th Cir. 2000), aff'd sub nom. *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438 (2000); see also *North Haven Bd. of Ed.* v. *Bell*, 456 U.S. 512, 535 n.26 (1982) ("These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of [the statute] even were we to disagree with the legislative choice.").

In any case, neither of the "anomalies" that Amicus cites to support his rewriting of the statute even remotely justifies such drastic judicial surgery.

2. The first "anomaly" is the claim that a literal reading of the law enforcement proviso "would make the United States' liability for workplace torts * * * depend on whether the tortfeasor had the legal authority to

search, seize evidence, or make arrests." Amicus Br. 13–14. But there are rational reasons for this distinction, and even if there were not, such claims represent a miniscule proportion of the conduct covered by the proviso.

It is hardly "inconceivable" (Amicus Br. 14) that Congress would choose to permit an additional avenue for the redress of workplace torts committed by federal law enforcement officers, as opposed to other federal employees. Federal law enforcement officers are typically authorized to carry weapons, to arrest and detain individuals, and to use lawful force in the execution of their duties. As a result, even a routine workplace dispute involving an armed law enforcement officer could escalate into the kind of serious confrontation that Congress might reasonably have considered more worthy of redress from the Treasury. Indeed, the leading case proponing the "law enforcement capacity" restriction involved just such an escalation. See *Orsay* v. *United States Dep't of Justice*, 289 F.3d 1129 (9th Cir. 2002) (workplace dispute involving supervising federal marshall threatening and pointing loaded gun at subordinates).

Moreover, Amicus acknowledges that the public trust reposed in law enforcement officers carries a corollary: that such officers are often held to a higher standard of workplace behavior than their civilian counterparts. Rather than challenge this unobjectionable fact, Amicus questions the efficacy of the FTCA remedy, under which, he argues, "neither federal law-enforcement officers individually nor the agencies that employ them have any concrete [financial] incentive to try to avoid FTCA liability." Amicus Br. 15–16.

This argument misapprehends the dual purpose of law enforcement proviso. The FTCA's waiver of sovereign immunity fulfills the same function that the Court

attributed to the private cause of action created by 48 U.S.C. § 1983: It "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well." *Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 651–652 (1980). Exposing the Treasury to monetary liability "may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood" of such abuses, even if individual tortfeasors are not themselves held liable. *Id.* at 652.

But even if the Court is unconvinced of these rationales, it would still have no warrant to rewrite the plain language of the law enforcement proviso. In the nearly 40 years that the proviso has been in effect, Amicus can identify only a small handful of cases in which its waiver of sovereign immunity was invoked in connection with a workplace tort claim. Engrafting a wholly extra-textual, and ill-defined, "law enforcement capacity" requirement onto the statute to solve this non-problem would be an extreme case of the tail wagging the dog.

"The process of legislating often involves tradeoffs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of Congress' ends does not render it irrational." *Preseault* v. *ICC*, 494 U.S. 1, 18 (1990). Rather than rewrite the statute, this Court should follow the more measured approach it took in *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546, 565 (2005). There, like here, the Court faced an potential "anomaly" in the statutory scheme: Congress' supplemental jurisdiction statute permitted the exercise of such jurisdiction over parties permissively joined in a lawsuit, but withheld supplemental jurisdiction over parties subject to compulsory joinder. The Court noted that the reason for the disparity was "not immediately obvious" and speculated that it

might have resulted from "an unintended drafting gap." *Ibid.* (citation and internal quotation marks omitted). But in the end, it concluded that "[i]f that is the case, it is up to Congress rather than the courts to fix it." *Ibid.* If Congress is troubled by the disparate treatment of workplace torts in a handful of cases, it could do the same here.

3. The second "anomaly" identified by Amicus is the proviso's inclusion of "federal employees [who] possess one of the proviso's enumerated authorities but rarely if ever exercise that authority." Amicus Br. 17. Amicus asserts that there is "not a shred of evidence" that Congress intended the proviso to cover such "non-traditional" law enforcement officers. *Id.* at 22.

Of course, "the plain language of a statute is the best evidence of Congressional intent." *McMellon* v. *United States*, 387 F.3d 329, 339 (4th Cir. 2004); see also *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, (1985). Here, Congress's definition of "law enforcement officer" is precise and unambiguous: "*any* officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law." 28 U.S.C. § 2680(h) (emphasis added). This definition controls even if it might conflict with Amicus's amorphous conception of what constitutes a "traditional" law enforcement officer. See *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000) ("[w]hen a statute includes an explicit definition," the court should follow that definition, "even if it varies from that term's ordinary meaning").

Moreover, many of Amicus's "anomalous" federal employees in fact carry out prototypical law enforcement functions. For example, the U.S. Forest Service has a large staff of uniformed officers and special agents who carry out primary law enforcement functions throughout

almost 200 million acres of federal lands. See U.S.D.A. Forest Service Law Enforcement and Investigations website, *available at* http://www.fs.fed.us/lei/.[2] In the course of carrying out their duties, Forest Service officers "carry firearms, defensive equipment, make arrests, execute search warrants, complete reports and testify in court." *Ibid.*

Similarly, federal prison guards are "law enforcement officers" under the ordinary meaning of the phrase, and have long been recognized as such by both Congress and the courts. As Justice Alito recently observed, "'law enforcement purposes' involve more than just investigation and prosecution." *Milner* v. *Department of Navy*, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring). In that vein, Black's Law Dictionary, for example, defines "law enforcement" as the "detention *and punishment* of violations of the law." Black's Law Dictionary 964 (9th ed. 2009) (emphasis added). There is no question that "[p]risons perform as their principal function one of the most important duties pertaining to the enforcement of criminal laws, *i.e.*, the execution of sentences in criminal cases." *Jordan* v. *United States Dep't of Justice*, 668 F.3d 1188, 1194 (10th Cir. 2011) (quoting *Duffin* v. *Carlson*, 636 F.2d 709, 713 (D.C. Cir. 1980)). As the government successfully argued to this Court in *Ali*, "[Bureau of Prisons] officials plainly constitute 'law enforcement officers' under any definition of that phrase." Government

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[2] For example, the Forest Service has an active drug interdiction program that eradicated over 1,462,300 marijuana plants from 19,380 national forest sites between 1996 and 1999—taking the equivalent of over 3.25 million pounds of illegally produced marijuana off the streets. U.S.D.A. Forest Service Law Enforcement and Investigations website, *available at* http://www.fs.fed.us/lei.

Br. 15, *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (No. 06-9130), 2007 WL 2808467.

In accord with this understanding, Congress has classified prison officials as "law enforcement officials" in many other statutory contexts. See, *e.g.*, 5 U.S.C. § 552a(j)(2) (Privacy Act); 5 U.S.C. § 5541(3) (civil service pay); 5 U.S.C. § 8331(20) (retirement benefits); 5 U.S.C. § 8401(17)(D)(i) (survivorship annuities); 18 U.S.C. § 3592(c)(14)(D) (aggravating factor for federal death penalty); 42 U.S.C. § 3796(b)(5) (death benefits); see generally *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003). Federal courts have done the same. See, *e.g.*, *Ali*, 552 U.S. 214 (FTCA § 2860(c)); *Jordan*, 668 F.3d at 1194–1195 (FOIA); *United States* v. *Paul*, 614 F.2d 115 (6th Cir. 1980) (Federal Wiretap Act); see also *Tucker* v. *Department of Justice*, 70 Fed. Appx. 548, 551 (Fed. Cir. 2003) ("Correctional officers are law enforcement personnel holding positions vested with great trust and responsibility.").

In short, there is nothing "anomalous" about classifying prison guards as law enforcement officers under § 2680(h). Not only are they authorized to carry out arrests and seizures—thereby satisfying the statutory requirements of the law enforcement proviso—they also "enforce" the "law" under any ordinary reading of that term. See *Jordan*, 668 F.3d at 1195. It would be entirely natural for Congress to expect prison guards to fall within the scope of the proviso's waiver.

4. Nor should this Court be deterred by Amicus's wholly unsupported speculation that reading the statute according to its terms would unleash a flood of "frivolous claims" and "retributive litigation" by prisoners. Amicus Br. 20. History gives lie to this fear. The law enforcement proviso has been in effect for almost four decades. During

that time, there is no evidence that courts in circuits that have applied its waiver broadly have experienced any litigation explosion. To the contrary, federal prisoners remain reluctant to turn to the courts to seek justice for even egregious violations of their rights—a tragic consequence of the systemic legal and practical obstacles they face. See Lewisburg Prison Project Br. 17–23; Lambda Legal Defense and Education Fund ("Lambda") Br. 15–30.

There is no reason to credit Amicus's inchoate "threat" of frivolous claims. We have a market test of that theory, and nothing suggests that courts in the Fourth or the Seventh Circuit, which have expressly rejected *Pooler* and embraced the broad waiver set forth in the proviso's text, face any more frivolous prisoner claims than the Third or the Ninth Circuit.

C. The legislative history does not support the implied law enforcement capacity requirement.

Amicus acknowledges that the legislative history confirms Congress's intent that the law enforcement proviso "apply to any case in which a federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law." S. Rep. No. 93-588 (1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790. But he reads the phrase "any case" simply to refer merely to "common-law torts as well as constitutional violations." Amicus Br. 28. This reading is implausible.

As an initial matter, Congress's expansive language—"any case"—sweeps in far more than just "common-law torts." Cf. *Ali*, 520 U.S. at 220 (reading "any claim" to mean a claim "of any kind"). The passage makes explicit that the proviso would cover "any case" involving

an enumerated tort committed by a federal law enforcement officer "while acting within the scope of his employment." There is absolutely no requirement that the tort, whether constitutional or common law, be committed while the officer was acting in a law enforcement *capacity*. See *Sami* v. *United States*, 617 F.2d 755, 764 (D.C. Cir. 1979). The Report's "categorical and unqualified" language makes clear that "the government is to be liable *whenever* its agents commit constitutional torts and *in any case* in which a Federal agent commits acts which under accepted tort principles constitute one of the intentional torts enumerated in the proviso." *Sutton* v. *United States*, 819 F.2d 1289, 1296 (5th Cir. 1987) (emphasis in original).

The Court should also decline to infer a law enforcement capacity requirement from the House of Representatives' *absence* of "criticism that the bill would create liability for a large number of torts that have no connection to law enforcement." Amicus Br. 29. Where the statutory language is "unambiguous, silence in the legislative history cannot be controlling." *Dewsnup* v. *Timm*, 502 U.S. 410, 419–420 (1992). In any case, the Representatives' silence is more plausibly attributable to their uncontroversial acceptance of the proviso's application to law enforcement officers such as prison guards than to any confusion over the proviso's scope.

D. Reading the statute faithfully does not produce absurd results.

"This case is a far cry from the rare one where the effect of implementing the ordinary meaning of the statutory text would be 'patent absurdity.'" *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 563 (1994) (citation omitted). *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504

(1994), on which Amicus relies, demonstrates the wide gulf between this case and a truly absurd statutory text.

In *Green*, the Court construed Federal Rule of Evidence 609, whose language (as then formulated) required courts to admit prior felony convictions to impeach civil plaintiffs, but granted discretion to exclude such evidence when used against a civil defendant. This result was more than merely "anomalous." As the Court noted, the disparity in treatment between litigants raised serious due process concerns. *Green*, 490 U.S. at 510–511; see also *id.* at 527 (Scalia, J., concurring) (literal reading of the statute "produces an absurd, and perhaps unconstitutional, result"). Moreover, the Court recognized that the use of the unadorned term "defendant" created ambiguity as to whether the Rule was intended to apply to civil as well as criminal defendants. See *id.* at 508–509; 527 (Scalia, J., concurring).

A literal reading of the law enforcement proviso, in contrast, presents no threat of unconstitutionality. Cf. *Crooks* v. *Harrelson,* 282 U.S. 55, 61 (1930) ("[U]nless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it has done so in plain terms * * * it is not within the province of the court to modify the law by construction."). Moreover, there is nothing at all ambiguous about the text of § 2860(h): the law enforcement proviso is laid out in exceptionally clear and precise terms. Cf. *Barnhart*, 534 U.S. at 459 (courts "rarely" invoke the absurd results test "to override unambiguous legislation"). And the two "anomalies" on which Amicus bases his absurdity argument hardly justify interpreting the words of the law enforcement proviso "against their literal meaning." Amicus Br. 47; see II.B, *supra*.

Perhaps the best argument against absurdity, though, is a simple roll call of the jurists and advocates who have endorsed petitioner's position. Petitioner's plain-language reading of the statute has been adopted by several federal courts of appeals, and numerous district courts. See Petitioner's Br. 4 n.1. It has been endorsed by this Court in dicta. *Carlson* v. *Green*, 446 U.S. 14, 20 (1980). It is supported by the legislative history. And, most strikingly, it has been embraced by government, which, after initially opposing certiorari in the case, confessed error and filed a brief *in support of petitioner's position*. It would be strange indeed for so many observers to sign on to petitioner's position if it were, in fact, absurd.

III. The Guards Acted Within The Scope Of Their Employment And In A Law Enforcement Capacity.

1. At every stage in this litigation, the government has conceded that the guards were acting within the scope of their employment J.A. 55, 85; Government Br. 30. Amicus responds that "executive branch officials cannot waive sovereign immunity." Amicus Br. 56 (citation omitted). That is true, but also irrelevant. Congress already acted to waive sovereign immunity in 1974, when it enacted the law enforcement proviso. The scope of employment question relates not to whether the United States has waived sovereign immunity—all parties agree that it has—but rather to whether the conduct alleged in this case fall within the scope of that waiver. That is a factual question not for congressional legislation, but for judicial determination. *United States* v. *County of Cook*, 167 F.3d 381, 387 (7th Cir. 1999) ("A court with authority to consider and reject an invocation of sovereign immunity also has authority to enter judgment adverse to the interests of the United States without 'waiving' (or violat-

ing) that immunity."). And it is a question that the United States, as the defendant in this case, may choose either to contest or to concede.

Just as a party may concede the presence of diversity or the satisfaction of an amount-in-controversy requirement without doing harm to Congress's power to establish federal subject-matter jurisdiction, so too may the executive branch concede that its employee was acting within the scope of his employment without usurping Congress's power to waive sovereign immunity. Courts routinely give effect to such concessions, as should this Court. See *Gutierrez de Martinez* v. *Lamagno,* 515 U.S. 417, 427 (1995) (where United States certifies that an employee was acting within the scope of his employment, "the United States, by certifying, is * * * exposing itself to liability as would any other employer at common law who admits that an employee acted within the scope of his employment.").

2. Even if the government's concession was not effective, the allegations of this case demonstrate clearly that the prison guards were acting both within the scope of their employment and (if the Court deems it relevant) in a law enforcement capacity.

a. The facts alleged by petitioner paint a disturbing picture of prison guards using physical and sexual assault, carried out under color of their law enforcement authority, as tool to maintain control over inmates.

After an altercation with his cellmate, petitioner was removed from his cell and placed in a shower area. J.A. 35, 70. Officer Pealer—one of the guards who would be involved in the assault—told petitioner that he was "tired of [petitioner's] fucking crying" because petitioner had complained that "my life and safety were in danger." J.A. 71. Officer Pealer accused petitioner of "mouthing off to

staff" and told him "[w]e are going to show you what Lewisburg is all about." J.A. 35.

Pealer then moved petitioner to a basement holding area, outside the range of surveillance cameras. J.A. 12, 35, 71. Pealer and another prison official placed petitioner in a chokehold, forced him to his knees, and sexually assaulted him, while the third guard stood watch. J.A. 35, 71–72. One guard called petitioner "a little snitch bitch," and the officers threatened to kill him if he told anyone what had happened. J.A. 36, 72.

b. As an initial matter, under Pennsylvania law, the question of whether an employee is acting within the scope of employment is ordinarily a question of fact for the jury. *Nelson* v. *City of Philadelphia*, 613 A.2d 674, 679 (Pa. Cmwlth. 1994) (citing *Iandiorio* v. *Kriss & Senko Enterprises,* 517 A.2d 530 (Pa. 1986)). It would therefore be inappropriate to bar petitioner's suit at this stage of the proceedings, before discovery has even taken place.

Pennsylvania courts take the scope-of-employment determination away from the jury only in very narrow circumstances—specifically, where the assault "is committed for personal reasons or in an outrageous manner." *Fitzgerald* v. *McCutcheon*, 410 A.2d 1270, 1272 (Pa. Super. 1979).[3] Neither of those circumstances is present here.

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[3] The facts of *Fitzgerald*—the only Pennsylvania law enforcement case cited by Amicus—are miles away from the facts of this case. In *Fitzgerald*, the court held that a police officer's shooting of his neighbor while off duty and outside the workplace was outside the scope of the officer's employment, where the shooting was "motivated by reasons personal to himself." Here, in contrast, the assault occurred at the prison, during the guards' working hours. The victim

Petitioner's allegations demonstrate that the torts at issue were not committed solely for personal reasons, but rather were motivated at least in part by a desire to serve the officers' employer, the Federal Bureau of Prisons. The guards' statements—accusing petitioner of being a "snitch," complaining about his "crying" and "mouthing off to staff," and telling him that "[w]e are going to show you what Lewisburg is all about"—suggest that the officers were using "the threat of sexual violence to control inmates." Lambda Br. 24–25. Such conduct is reprehensible, but it is not purely personal. This conduct, which occurred on prison grounds during work hours, and was directed toward a prison inmate, should be considered within the scope of employment. See, *e.g.*, *Orr* v. *William J. Burns Int'l Detective Agency*, 12 A.2d 25 (Pa. 1940) (private detective who shot picketing striker was acting within scope of employment); *Sebastianelli* v. *Cleland Simpson Co.*, 31 A.2d 570 (Pa. Super. 1943) (same for detectives who assaulted suspected shoplifter, causing miscarriage); *McHale* v. *Bensalem Country Club*, No. 90–11160–16–2, 1993 WL 722303 (Pa. Com. Pl. Jan. 14, 1993) (same for doormen who pushed bar patron down stairs, restrained him, and took turns brutally punching and kicking him); see also *Straiton* v. *Rosinsky*, 133 A.2d 257 (Pa. Super. 1957).

Nor, given the context, is the conduct alleged here so "outrageous" as to be outside the scope of employment as

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was a federal inmate—one of the class of individuals who the tortfeasors were required to monitor and supervise. And the officers' statements before and during the assault strongly suggest that they were motivated not by personal reasons, but rather by a desire to exercise control over a prisoner who they had deemed a "snitch" and a troublemaker.

a matter of law. Rape and assault of inmates by prison guards is, tragically, not a rare or unforeseeable occurrence. See Lambda Br. 16-28. And, while the Pennsylvania courts do not appear to have ruled on the issue, many jurisdictions hold that sexual assault by a law enforcement officer can be within the scope of employment. See *id.* at 13 n.4. The Pennsylvania cases cited above—which hold that assaults ranging from shootings to miscarriage-inducing beatings can fall within the scope of employment—establish a baseline that could comfortably encompass the conduct at issue here.

c. Finally, to the extent that the Court deems it relevant, the conduct at issue here was within the prison guard's law enforcement function. As explained above, the guards' conduct took place on prison grounds, during their work hours, and was directed at securing compliance (albeit in a brutal and horrific way) from an inmate. This case involves "allegations of abuse and intentional tortious conduct by a government official authorized to use necessary and reasonable force in carrying out his law enforcement duties." *Flores-Romero v. United States*, No. 07–3269–SAC, 2011 WL 4526771, *5 (D. Kan. Sept. 28, 2011). That is precisely the kind of conduct the law enforcement proviso was intended to address.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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