No. 11-10362

In The Supreme Court of the United States

KIM MILLBROOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

1. Whether 28 U.S.C. §§1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of federal law."

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute champions accountability of the government for abuses of power. It is particularly important that responsibility extend to the intentional torts of corrections officers, such as sexual assault, upon the person of sentenced inmates who are at the mercy of such officers. The government must have every incentive to prevent and punish those who commit sadistic and perverted acts upon those under their control.

SUMMARY OF THE ARGUMENT

Read together, 28 U.S.C. §§1346(b) and 2680(h) (herein the "Exception Clauses") waive the sovereign immunity of the United States for the intentional torts of prison guards when they are

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief, and letters indicating that consent have been submitted with this brief.

acting within the scope of their employment. The text of the Exception Clauses is plain, unambiguous, and must be applied and enforced as written. Judicial amendment, by reading in words that limit the activities to which the intentional torts waiver applies, results in a distortion of the statutory text that contravenes the intent of Congress. The Federal Torts Claim Act (herein the "FTCA") waives immunity for specifically enumerated intentional torts committed by investigative or law enforcement officials acting within the scope of his or her office or employment, provided two conditions are met: (1) the perpetrator's wrongful act fits into one the enumerated intentional torts, such as assault and battery; and (2) the perpetrator falls within the class of federal employees or office holders that is invested with the legal powers to make arrests for violations of federal law, to seize evidence or to execute searches, such as a prison guard. Nothing in the text of the Exception Clauses requires that the wrongful act must occur in the execution of specified duties, *i.e.,* making an arrest, seizing evidence, or executing a search. The Third Circuit erred in continuing to follow the circuit precedent established in *Pooler v. United States*, 787 F.2d 868 (3d 1986), and should have followed authority from other circuits that has properly construed the Exception Clauses. *See Ignacio v. United States*, 674 F.3d 252, 255 (4th Cir. 2012), *Reynolds v. United States*, 549 F.3d 1108, 1114 (7th Cir. 2008), *Ortiz v. United States*, 88 F. Supp. 2d 151 (S.D.N.Y. 2000), and *Harris v. United States*, 677 F. Supp. 403 (W.D.N.C. 1988).

ARGUMENT

The *Pooler* Interpretation of the Exception Clauses Violates Fundamental Canons of Statutory Construction.

The Court in Pooler began with a plain and unambiguous legal text and added in the words "in the course of" to extend immunity for wrongful intentional torts and to narrowly construe the Exception Clauses. Not only does the *Pooler* interpretation of the Exception Clauses deny justice to victims of sexual assault committed by brutal prison guards, the *Pooler* approach violates fundamental canons of statutory construction. This leads to absurd results. Indeed, *Pooler* eliminates the waiver of immunity for malicious prosecution, since malicious prosecution must occur "in the course of" making an arrest, seizing evidence, or executing a search.

In *Pooler*, Circuit Judge Gibbons barred claims brought under the FTCA on the ground the Exception Clauses did not apply to a law enforcement officer's tortious acts that were not done "in the course of" performing specified duties. In reaching this conclusion, Judge Gibbons disregarded the plain meaning of the Exception Clauses and proceeded directly to a consideration of the "sparse legislative history" relating to the 1974 amendments to the FTCA that enacted the Exception Clauses. Judge Gibbons wrote as follows:

> In this case, Pooler's and Bradley's complaints, read in the light most favorable to them, charge that Kimmel is an officer of the United States

"empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law." 28 U.S.C. § 2680(h). No matter how generously we read them, however, the complaints do not charge that Kimmel committed an intentional tort while executing a search, seizing evidence, or making an arrest. We read the 1974 amendment to section 2680(h) as addressing the problem of intentionally tortious conduct occurring in the course of the specified government activities. It is in the course of such activities that government agents come most directly in contact with members of the public. The government places them in such a position, thereby exposing the public to a risk that intentionally tortious conduct may occur. That Congress intended to deal only with conduct in the course of a search, a seizure, or an arrest is confirmed by the sparse legislative history of the 1974 amendment. The Senate Report on the amendment states that the proviso was enacted to provide a remedy against the United States in situations where law enforcement officers conduct "no-knock" raids or otherwise violate the fourth amendment. *See* S.Rep. No. 588, 93d Cong., 2d Sess. 2-3 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789, 2790-91.

> Reading the intentional tort proviso as limited to activities in the course of a search, a seizure or an arrest as a practical matter largely eliminates the likelihood of any overlap between section 2680(a) and section 2680(h). It is hard to imagine instances in which the activities of officers engaging in searches, seizures or arrests would be anything other than operational. When this court is presented with an instance to the contrary, it can address the question answered by the District of Columbia Court of Appeals in *Gray[v. Bell*, 712 F.2d 490 (D.C. Cir. 1983)]. For present purposes, we hold only that the Pooler and Bradley complaints do not state claims falling within the proviso to section 2680(h) because no federal officer is charged with a tort in the course of a search, a seizure, or an arrest.

Not everyone on the *Pooler* panel agreed fully with Judge Gibbons. In a concurring opinion, Judge Seitz took issue with Judge Gibbons's reasoning and reached the opposite conclusion regarding the effect of the Exception Clauses, writing that "Congress intended § 2680(h) to encompass activities outside the arrest, search, and seizure context." *Pooler*, 787 F.2d at 874 (Seitz, J., concurring).

In *Ortiz v. United States*, *supra*, District Court Judge Kimba M. Wood adopted the entirety of a magistrate's report and recommendation which rejected the *Pooler* court's reconstruction of the

Exception Clauses. The magistrate judge set forth his reasons as follows:

> [T]his Court finds itself in disagreement with *Pooler,* since, without any principled underpinning, the Third Circuit's view would render Section 2680(h) inapplicable to many legitimate complaints that corrections officers used excessive force against inmates in circumstances which do not involve a search, seizure or arrest. It also distorts the plain language of the statute, which, on its face, does not require that the law enforcement officer be engaged in one of the enumerated acts at the time of the alleged wrongdoing. The statute is unambiguous in waiving the Government's immunity with respect to any claim arising out of an assault committed by a federal law enforcement officer. It only references searches, seizures and arrests in attempting to define who may be considered a federal law enforcement officer. It would have been easy enough for Congress to have provided that it was waiving immunity with regard to acts of law enforcement officers only *while* such officers are executing searches, seizures or arrests. Congress failed to do so, choosing instead to waive immunity for certain intentional torts, including assaults, committed by law enforcement officers who have the authority to make searches, seizures and arrests.

> Moreover, as another court has observed, under the *Pooler* interpretation, the provision of the statute waiving immunity as to claims of malicious prosecution would be rendered meaningless, because it is difficult to conceive of how a federal official could commit the acts constituting malicious prosecution in the course of an arrest, search or seizure.
>
> Furthermore, because the language of § 2680(h) is unambiguous, the sparse legislative history that the Third Circuit relied upon in reaching a contrary position is irrelevant. It is black letter law that a court should not resort to legislative history unless a statute is ambiguous. *See Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999); *Greenery Rehabilitation Group, Inc. v. Hammon*, 150 F.3d 226, 231 (2d cir. 1998).

Ortiz, 88 F. Supp. 2d at 164-65.

District Court Judge Wood emphatically declared her agreement with the magistrate judge that *Pooler* was wrongly decided:

> The Court adopts the Report's thoroughly reasoned conclusion that the FTCA's waiver of sovereign immunity for law enforcement officers' intentional torts is not limited to torts committed in

the course of a search, seizure, or arrest. First, the plain language of the provision at issue distinguishes between the *acts* for which immunity is waived—"assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution"—and the class of *persons* for whose acts immunity is waived—officers "empowered by law to execute searches, to seize evidence, or to make arrests." 28 U.S.C. § 2680(h); *accord Crown v. United States*, 659 F. Supp. 556, 570 (D. Kan. 1987); *Harris v. United States*, 677 F. Supp. 403, 405 (W.D.N.C. 1988). Second, the legislative history makes clear that Congress did not intend to limit the waiver to torts arising from activities subject to Fourth Amendment scrutiny, notwithstanding the fact that the legislation was motivated by particular instances of such activity. *See* S. Rep. No. 93-588 at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 (noting that the provision "would submit the Government to liability whenever its agents . . . injure the public through [illegal] search and seizures" but that the "amendment should not be viewed as limited to constitutional tort situations"); *Harris*, 677 F. Supp. at 404-05; *cf. Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1988)("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is

> ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").
>
> The authorities cited by defendants do not compel another result. Defendants rely on the Third Circuit's decision in *Pooler v. United States*, 787 F.2d 868 (3d Cir. 1986), which held that § 2680(h) addresses only "conduct in the course of a search, a seizure, or an arrest." *Id.* at 872. For the reasons stated above and discussed fully in the Report, the Court concludes that *Pooler* was wrongly decided and instead follows the broader interpretation given § 2680(h) by all other federal courts to consider the issue, including the D.C. Circuit. *See Sami v. United States*, 617 F.2d 755, 764-65 (D.C. Cir. 1979); *Employers Ins. Of Wausau v. United States*, 815 F. Supp. 255 (N.D. Ill. 1993); *Harris*, 677 F. Supp. 403; *Crow*, 659 F. Supp. 556.

Ortiz, 88 F. Supp. 2d 154-55.

In *Harris v. United States*, *supra*, Chief Judge Potter of the Western District Court of North Carolina, permitted the mother of an inmate to sue the government under the FTCA for the wrongful death of her son, allegedly as a consequence of an assault committed by a prison guard. The government moved for summary judgment to dismiss the claim, citing *Pooler* and the fact that the prison guard was not making an arrest, seizing

evidence or executing a search in connection with the assault. The Chief Judge Potter rejected *Pooler*, on the primary ground of erroneous statutory construction:

> The language of the proviso itself supports a construction contrary to that taken by the Third Circuit. It would have been an easy matter for Congress to have worded the proviso "That, with regard to acts or omissions of law enforcement officers of the United States Government occurring while such officers are executing searches, seizures, or arrests. . . ." Such wording would have clearly limited the waiver of sovereign immunity as the Third Circuit has interpreted it. But Congress did not so limit the proviso. Rather, it provided that the Government waives sovereign immunity against liability for certain intentional torts committed by any of its agents who have the authority to execute searches, seize evidence, or make arrests. There is no limitation on the particular context in which the tort is committed. The only requirements are that the act complained of constitute one of the enumerated intentional torts, and that the officer committing the act fit the definition of "investigative or law enforcement officer." Both requirements are satisfied here.

Harris, 677 F. Supp. at 405. In denying the government's motion, Chief Judge Potter referred to

other District Courts that also disapproved of *Pooler* and the idea that the Exception Clauses only allow FTCA intentional tort claims against law enforcement officers engaged in searches, seizures, or arrests. *Harris*, 677 F. Supp. at 406 (citing *Crow*, 659 F. Supp. at 570-71, and *Picariello v. Fenton*, 491 F. Supp. 1026, 1037 (M.D. Pa. 1980)).

The most recent authority on the proper construction of the Exception Clauses is the Fourth Circuit's decision in *Ignacio v. United States*, *supra*. There, a civilian government security contractor who alleged he was assaulted by a Pentagon police officer. Circuit Judge Floyd held that the Exception Clauses waive sovereign immunity whether or not the law enforcement officer was in the course of making an arrest, seizing evidence, or executing a search, when that officer commits an assault in the course of his or her employment or office. Judge Floyd observed that the starting point for analyzing the scope and effect of the Exception Clauses is the statutory text:

> We review questions of statutory interpretation de novo. *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010). "The starting point for any issue of statutory interpretation . . . is the language of the statute itself." *United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007). "In that regard, we must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute . . . and our inquiry must cease if the statutory language is

> unambiguous and the statutory scheme is coherent and consistent." *Id.* (omission in original) (quoting *United States v. Hayes*, 482 F.3d 749, 752 (4th Cir. 2007), *rev'd on other grounds,* 555 U.S. 415 (2009)) (internal quotation marks omitted). "We determine the 'plainness or ambiguity of statutory language . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *United States v. Thompson-Riviere*, 561 F.3d 345, 354-55 (4th Cir. 2009) (omission in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))."

Ignacio, 674 F.3d at 254.

In a direct rebuke of the *Pooler* Court, Judge Floyd strongly condemned courts that inject words of their own choosing into the text of a statute that is clear and unambiguous, by surmising what the legislature may have intended:

> "[C]ourts must construe statutes as written, [and] not add words of their own choosing," *Barbour v. Int'l Union*, 640 F.3d 599, 623 (4th Cir. 2011) (en banc) (Agee, J., concurring in the judgment); *see also United State v. Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926, 929 (4th Cir. 1975) ("[W]e do not think it permissible to construe a statute on the basis of a mere surmise as to what the

> Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated." (quoting *Vroon v. Templin*, 278 F.2d 345, 348-49 (4th Cir. 1960)) (internal quotation marks omitted)). Accordingly, we decline to import a requirement that an officer commit the tort in the course of an investigative or law enforcement activity and hold instead that the law enforcement proviso waives immunity whenever the two conditions specified by the plain language are satisfied.

Ignacio, 674 F.3d at 255.

In a concurring opinion Judge Diaz fully agreed that established principles of statutory construction that prevents limiting the waiver of immunity contained in the law enforcement proviso: absent an ambiguity in the words of a statute, "our analysis begins and ends with the statute's plain language." *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004)." *Ignacio*, 674 F.3d at 257 (Diaz, J., concurring). Judge Diaz added that "[w]here as here, the text of the statute is unambiguous, we should not engage in an analysis of legislative history to fabricate ambiguity." *Id.* at 258.

The cases rejecting *Pooler* adhere to and are consistent with accepted canons of statutory construction that place the language use by the legislature as the "pole star" in determining the meaning and effect of a statute. These canons include the following:

The Supremacy of Text Principle

"The words of a governing text are of paramount concern, and what they convey, in their context, is what the text says." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, p. 56 (Thomson/West, 2012). One cardinal rule applicable to this fundamental principle is that "the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires." *Id.* at 56.

Semantic Canon

"Words are to be understood in their ordinary, everyday meanings – unless the context indicates they bear a technical sense." *Id.* at 69.

Contextual Canon

The Absurdity Doctrine states: "A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." *Id.* at 234.

In this case, the Exception Clauses are clear, express, and unambiguous. To import the words "in the course of" into the context of the Exception Clauses re-introduces sovereign immunity into a law that is created to permit litigation for selected intentional torts against a narrow class of defendants. This kind of judicial legislation offends against all of the above canons and basic rules of statutory construction. We argue that the great weight of authority, in both case law, and traditional

rules of textual interpretation, all demand the disapproval of *Pooler* and the reversal of the judgment below.

CONCLUSION

There is an urgent need to resolve the conflicting lines of authority on which interpretation of the Exception Clauses is correct. *Amicus* urges this Court to overrule *Pooler*. To decide otherwise is to grant prison guards in Pennsylvania immunity to sodomize and rape inmates. Judicial activism that resurrects sovereign immunity contributes to wrongful inconsistent applications of the federal law that result in injustice to a party whose case is dismissed on the ground of sovereign immunity. It is only right and just that this Court rectify this deplorable state and permit Millbrook his day in court.

Respectfully submitted,

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