No. 13-1465

In the Supreme Court of the United States

JESSE DUPRIS, ET AL., PETITIONERS

v.

PERRY PROCTOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Bureau of Indian Affairs agents were entitled to qualified immunity because the agents could have reasonably concluded there was probable cause to arrest petitioners for a series of sexual assaults on the White Mountain Apache Indian Reservation based on the totality of evidence and authorization of the tribal prosecutor.

2. Whether sovereign immunity bars petitioners' suit against the United States because, absent evidence supporting a malicious prosecution claim, the federal Bureau of Indian Affairs agents' decision to arrest petitioners fell within the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a).

3. Whether the court of appeals reviewed the district court's grant of summary judgment under the correct standard of review by viewing the evidence in the light most favorable to petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 554 Fed. Appx. 570. The opinion of the district court (Pet. App. 9-42) is not published in the *Federal Supplement* but is available at 2012 WL 210722.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2014. A petition for rehearing was denied on March 11, 2014 (Pet. App. 43-44). The petition for a writ of certiorari was filed on June 9, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2006, the Bureau of Indian Affairs (BIA) established the Operation Mountain Line Task Force to investigate a rash of sexual assaults on the White Mountain Apache Indian Reservation in Whiteriver, Arizona. Of the 15 victims, the majority were minor females who were assaulted at night on a trail near an abandoned house on the Reservation. The victims described the perpetrators as a man or men who posed as police or security officers. Pet. App. 10-11.

During the course of the investigation, the Task Force discovered evidence suggesting possible involvement in the attacks by petitioners Jesse Dupris and Jeremy Reed. The Task Force learned that Dupris, who served as a security guard for the White Mountain Apache Housing Authority (WMAHA), had access to the locations and equipment used by the attacker. Around the time of one of the attacks, Dupris had been observed running from a trail to his vehicle to change out of a shirt with the word "security" on it and back into his WMAHA uniform. Two victims identified Dupris from a photo lineup, as did an eyewitness to another assault. While there were certain inconsistencies in the victims' accounts, some victims provided physical details of their attacker that matched Dupris's characteristics, and an examiner with the Federal Bureau of Investigation deemed Dupris's polygraph answers "deceptive." Pet. App. 21-22.

Reed, like Dupris, had worked as a WMAHA security guard and had access to the locations and equipment used by the attacker. One victim identified Reed from a photo lineup, and Reed matched the height, weight, facial characteristics, and speech characteris-

tics described by some victims and witnesses. According to Reed's supervisor, Reed was the only security guard who had a flashlight with a blue light, matching the description of the attacker's flashlight in at least one sexual assault. Pet. App. 22-23.

In October 2006, Respondents Michael McCoy and Warren Youngman, BIA agents who had been assigned to the Task Force, presented this evidence to the tribal prosecutor to see if the White Mountain Apache Tribe (Tribe) wished to pursue charges against petitioners. Pet. App. 11. The prosecutor indicated that the Tribe would charge the petitioners and gave permission to McCoy and Youngman to have petitioners arrested on tribal charges. *Id.* at 39. Perphelia Massey and Joshua Anderson, tribal officers from the White Mountain Apache Police Force, then made the arrests. *Ibid.*

In November 2006, Reed and Dupris were released on bond. Later that month, after concluding that the evidence would not support a conviction, the tribal prosecutor moved to dismiss the charges against petitioners. Pet. App. 12.

2. Petitioners each filed suit against the two tribal police officers[1] and several BIA agents in their individual capacities for civil rights violations under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and against the United States, seeking damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et. seq.*, which generally waives the sovereign immunity of the United States for tort suits involving "injury or loss of property, or personal injury or death caused by

[1] The United States Department of Justice does not represent the tribal police officers, Perphelia Massey and Joshua Anderson.

the negligent or wrongful act or omission" of federal employees acting within the scope of their employment, 28 U.S.C. 1346(b)(1). Petitioners did not add respondents McCoy and Youngman as defendants until the Fourth Amended Complaint, filed in February 2011. C.A. E.R. 2, 107-187.

3. The district court dismissed the claims against McCoy and Youngman as time-barred, see C.A. E.R. 1-8; Pet. App. 14 n.2, and petitioners conceded that the claims against respondent Daniel Hawkins should be dismissed as well, Pet. App. 14 n.2. The court granted summary judgment with respect to the claims against the remaining individual federal defendants—BIA agents Perry Proctor, Tino Lopez, and Molly Hernandez—because petitioners did not allege that any of these officers "as individuals, played any role in the decisions to arrest and prosecute [petitioners]." *Id.* at 16-17. The court noted that tribal officers Massey and Anderson "did personally participate in the arrests," *Id.* at 19, but granted them qualified immunity because the officers could reasonably have believed the arrests were supported by probable cause along with the authorization of the trial prosecutor, *id.* at 19-25.

The district court granted summary judgment to the United States with respect to petitioners' FTCA claims. The court held first that the FTCA claim was barred by the "discretionary function exception," which maintains the federal government's immunity from suit where the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C.

2680(a). The court noted that, generally, investigations by federal law enforcement officers, such as the one conducted by the BIA Task Force, require "the type of policy judgments protected by the discretionary function exception." Pet. App. 31. The court held that the discretionary function exception barred petitioners' challenge to alleged "investigative deficiencies," because "Congress did not intend to provide for judicial review of the quality of investigative efforts." *Id.* at 32 (quoting *Pooler* v. *United States*, 787 F.2d 868, 871 (3d Cir.), cert. denied, 479 U.S. 849 (1986)). The district court further found that petitioners' allegations of "bad faith" were not "supported by the record" and were not "relevant," given the court's conclusion "that probable cause existed to arrest and prosecute [petitioners]." *Id.* at 33. The court thus concluded that petitioners' "criticisms of the Task Force investigation, to the extent they are supported by the record, allege nothing more than the kind of negligence that is subject to protection under the discretionary function doctrine." *Id.* at 34.

The district court held (Pet. App. 35-37) that Arizona state law, Ariz. Rev. Stat. Ann. § 13-3620(A) and (J) (2010), established another bar to the suit against the United States. As the court noted correctly, "The government is only liable to the same extent as a private person would be under state law." Pet. App. 35. See *United States* v. *Olson*, 546 U.S. 43, 46 (2005) (FTCA "requires a court to look to the state-law liability of private entities * * * when assessing the Government's liability."); see also 28 U.S.C. 2674. Arizona law provides immunity from civil or criminal liability to any person, including a law enforcement officer, who "participates in * * * [an] investigation,"

Ariz. Rev. Stat. Ann. § 13-3620(J) (2010), resulting from a report of sexual assault against minors, unless the "person acted with malice," *i.e.*, acted with a "wish to vex, annoy or injure another person, or an intent to do a wrongful act," Ariz. Rev. Stat. Ann. § 1-215(20) (2002). The court rebuffed petitioners' allegations that the Task Force officers acted with malice or "ulterior motives," finding such claims "conclusory, speculative, and unsupported in the record." Pet. App. 36.

4. The court of appeals affirmed the district court's grant of summary judgment in an unpublished opinion. Pet. App. 1-8.

As to the individual defendants, the court of appeals upheld the dismissal of the claims against McCoy and Youngman on statute of limitations grounds. Pet. App. 3. The court found qualified immunity protected the remaining individual officers, because "[a]t the time of the arrests, the Task Force had identifications by witnesses, corroborating circumstantial evidence, and authorization from the tribal prosecutor for the arrest." *Id.* at 4. Given these factors, the court held petitioners failed to show the Task Force officers "knew or should have known that they lacked probable cause" at the time of their arrest. *Id.* at 4-5. Having found that the officers could reasonably have believed that probable cause supported petitioners' arrests, the court of appeals had no need to address the district court's finding that the lack of individual participation was yet a further reason to grant qualified immunity to federal defendants Proctor, Lopez, and Hernandez. *Id.* at 1-8.

As to the FTCA claim against the United States, the court of appeals affirmed the district court's ruling that the suit was barred because "on this record

* * * the Task Force's determinations of whom to arrest and when to arrest them came within the discretionary function exception." Pet. App. 7.

ARGUMENT

The court of appeals correctly affirmed the dismissal and grant of summary judgment as to the individual defendants on statute of limitations or qualified immunity grounds. Moreover, the court appropriately upheld the FTCA's jurisdictional bar to suit against the United States because the decision to arrest petitioners fell within the scope of the discretionary function exception, 28 U.S.C. 2680(a), where the evidence did not support a malicious prosecution claim. The court's unpublished opinion is correct and does not conflict with any precedent of this Court or any other court of appeals. Further review is not warranted.

1. The courts below properly disposed of the claims against the individual federal defendants.

Petitioners do not dispute that their claims against McCoy and Youngman were time-barred and thus properly dismissed on statute of limitations grounds. As to the other individual federal defendants, summary judgment on qualified immunity grounds was appropriate. As the court of appeals correctly held, a reasonable officer could reasonably have believed that probable cause supported petitioners' arrests.

Petitioners claim (Pet. 21-26) the court of appeals erred by holding that an "officers' consultation with [the tribal prosecutor] was, standing alone, sufficient to provide the officers with qualified immunity" for participating in their arrests. Pet. 24. But the court held no such thing. Rather, the court explained that qualified immunity was appropriate based on the totality of the evidence, including the eyewitness iden-

tifications and other circumstantial evidence, in combination with the tribal prosecutor's authorization. Pet. App. 4.

Petitioners' attempt (Pet. 8-14) to discount the reliability of the eyewitnesses' identification was also properly rejected by the courts below, which examined the factual record and found that the identifications supported probable cause for petitioners' arrests. See Pet. App. 24 (finding that Task Force officers had "no reason to believe the witnesses were lying or mistaken in their identifications and descriptions of the suspects"); see also *Tangwall* v. *Stuckey,* 135 F.3d 510, 516 (7th Cir. 1998) ("The identification itself establishes probable cause to make an arrest, even where other witnesses' descriptions of the alleged perpetrator differ from the physical appearance of the individual so identified.").

Similarly, petitioners' reliance (Pet. 7-8) on the arrest of a local resident for several nearby sexual assaults ignores the fact that this suspect was never connected with the vast majority of the sexual assaults under investigation. Moreover, many of the sexual assaults were allegedly perpetrated by more than one individual. See Gov't C.A. Br. 24-25 (citing record evidence). That arrest therefore did not necessarily negate the evidence implicating petitioners in the assaults.

The court of appeals thus determined that petitioners failed to show that "members of the Task Force knew or should have known that they lacked probable cause when [petitioners] were arrested." Pet. App. 4-5. This fact-bound holding is consistent with the cases cited by petitioners (Pet. 22-24), that authorization by

a prosecutor is one factor to consider in the qualified immunity calculus.

This case is, moreover, a poor vehicle in which to consider any alleged error by the court of appeals in affirming the grant of qualified immunity based on its analysis of probable cause. As the district court correctly concluded, the only remaining federal defendants—Proctor, Lopez, and Hernandez—had insufficient personal involvement in petitioners' arrest. Pet. App. 16-17 ("[Petitioners] do not allege that Hernandez, Lopez, or Proctor, as individuals, played any role in the decisions to arrest and prosecute [them]."). That lack of personal involvement provides an independent basis for qualified immunity here.[2]

2. The court of appeals correctly invoked the FTCA's discretionary function exception, 28 U.S.C. 2680(a), to preclude petitioners' claims against the United States.

"Absent a waiver, sovereign immunity shields" the United States and its agencies from suit, a bar which is "jurisdictional in nature." *Federal Deposit Ins. Corp.* v. *Meyer*, 510 U.S. 471, 475 (1994).

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[2] The petition for a writ of certiorari obscures each individual officer's role in the arrests by making reference to the "Task Force" or the "officers" collectively. See, *e.g.*, Pet. 8-10, 24. But any alleged flaw in McCoy and Youngman's presentation of evidence to the prosecutor is not relevant to the liability of the other officers, who were not privy to that conversation. See *Stearns* v. *Clarkson*, 615 F.3d 1278, 1286 (10th Cir. 2010) (finding deputy police officer who assisted in an arrest was entitled to qualified immunity where he reasonably relied on other officers' probable cause determination); see also *Ashcroft* v. *Iqbal*, 556 U.S. 662, 676 (2009) (holding that for a *Bivens* action, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution").

The FTCA waives the sovereign immunity of the United States for certain tort suits involving negligence by federal employees acting within the scope of their employment. 28 U.S.C. 1346(b)(1). This waiver of immunity is subject to certain exceptions. See 28 U.S.C. 2680(a)-(n). The "discretionary function" exception maintains the federal government's immunity from suit based on acts that are "discretionary in nature," and "involv[e] an element of judgment or choice." *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991) (brackets in original) (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)); see also 28 U.S.C. 2680(a). This exception, which has been part of the FTCA since its enactment, serves "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort." *Gaubert*, 499 U.S. at 323 (citation and internal quotation marks omitted). If the discretionary function exception applies, the FTCA claim must be dismissed for lack of subject matter jurisdiction.

The Act also excludes most intentional torts from the FTCA's waiver of sovereign immunity. 28 U.S.C. 2680(h). In 1974, Congress qualified the intentional torts exception, by adding the "law enforcement proviso" that waives sovereign immunity for six intentional torts claims—assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution—that arise from "acts or omissions of investigative or law enforcement officers." *Ibid.*; see also Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. This proviso defines "investigative or law enforcement officer" to mean "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); see *Millbrook* v. *United States*, 133 S. Ct. 1441, 1442 (2013).

Petitioners acknowledge (Pet. 17) that they "never disputed" the federal officers' conduct of the investigation "was a discretionary decision," but yet, they claim, for the first time in this petition for a writ of certiorari (Pet. 18-21), that liability may still attach under the law enforcement proviso, 28 U.S.C. 2680(h), if the Task Force officers arrested them without probable cause.

As a threshold matter, the court of appeals did not address the applicability of the law enforcement proviso, because the petitioners made only passing reference to the proviso in any court below. See Pet. Resp. to Mot. for Summ. Judgment 1-19; Pet. C.A. Br. 1-51; Pet. for Reh'g 1-15.[3] Petitioners have therefore waived this argument, and, in any event, the absence of any consideration of the question in the decision below would make this case a poor vehicle for determining the relationship between the proviso and discretionary function exception.

There were also good reasons why the courts below would have found the law enforcement proviso inapplicable to this case. The proviso applies only to intentional torts by law enforcement officers such as malicious prosecution or false arrest, and the lack of malice or intent is fatal to these claims. Pet. App. 33-35 (finding allegations of bad faith to be unsupported

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[3] In the court of appeals, petitioners cited the law enforcement proviso, 28 U.S.C. 2680(h), in arguing that Massey and Anderson were federal law enforcement officers whose actions could give rise to FTCA liability, see Pet. C.A. Br. 46-48; however, petitioners did not raise the argument presented here (Pet. 16-21) that the proviso otherwise limits the FTCA's discretionary function exception.

in the record). Arizona state law provides immunity to individuals, including police, who investigate sexual assaults of a minor unless malice is proven. Ariz. Rev. Stat. Ann. § 13-3620(A) and (J) (2010); see 28 U.S.C. 1346(b)(1) (providing that sovereign immunity is waived only if a "private person[] would be liable * * * in accordance with the law of the place where the act or omission occurred"). In addition, the district court and court of appeals found the record did not show that the Task Force officers knew or should have known probable cause was deficient, a finding which defeats a malicious prosecution claim under Arizona law.[4] Pet. App. 4-5; *id.* at 20-25 (outlining the basis for probable cause); see also *Moore* v. *Hartman*, 571 F.3d 62, 66 (D.C. Cir. 2009) ("The lack of probable cause is an essential element in * * * malicious prosecution claims."); *Bradshaw* v. *State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1319 (Ariz. 1988) (same, as matter of Arizona state law).

This case does not therefore constitute a "sharp break with the law from other circuits," as petitioners contend, Pet. 21, because the absence of malice, Arizona state immunity, and evidence supporting probable cause distinguish this case from those involving malicious acts where courts found the law enforcement proviso conferred FTCA jurisdiction. See *Reynolds* v. *United States*, 549 F.3d 1108, 1113 (7th

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[4] The actions of tribal officers Massey and Anderson in effectuating the arrest cannot give rise to FTCA liability as they were not federal law enforcement officers as defined by 28 U.S.C. 2680(h). Pet. App. 39-41. The fact that petitioners' arrests were ultimately made by tribal officers, pursuant to tribal (not federal) law, is yet another basis for barring FTCA liability in this case. Gov't C.A. Br. 34-36.

Cir. 2008) (distinguishing the discretionary decision to prosecute from the intentional "decision to lie under oath"); *Nguyen* v. *United States*, 556 F.3d 1244, 1256-1257 (11th Cir. 2009) (finding plaintiff stated a claim for malicious prosecution based on allegations that agent knowingly submitted a false affidavit and no probable cause supported plaintiff's arrest).[5]

For these reasons, the courts below correctly granted summary judgment to the United States, and further review is not warranted.

3. Petitioners contend (Pet. 26-28) that the court of appeals failed to view the evidence in the light most favorable to petitioners, and they ask this Court to review its decision under *Tolan* v. *Cotton*, 134 S. Ct. 1861 (2014) (per curiam). The district court expressly considered the facts in the light most favorable to the non-moving party, Pet. App. 12-13, and the court of appeals decided the case without reliance on materially disputed facts, *id.* at 4-5. The courts below therefore applied the appropriate standard of review.

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[5] *Nguyen* and *Reynolds*, *supra*, arose at the motion to dismiss stage. In this case, the district court granted summary judgment after extensive discovery, in which no support was found for the petitioners' claim of malice or intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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