No. 09-1214

In the Supreme Court of the United States

BABAJIDE SOBITAN, PETITIONER

v.

LORI GLUD, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DOUGLAS N. LETTER
SHARON SWINGLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the exception to the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 28 U.S.C. 2679, for civil actions "brought for a violation of a statute of the United States" applies to a civil action alleging a violation of a treaty ratified by the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Constitution, treaty and statutes:

Statutes, regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 09-1214

BABAJIDE SOBITAN, PETITIONER

v.

LORI GLUD, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 589 F.3d 379. The opinion of the district court (Pet. App. 25a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2009. On March 2, 2010, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 8, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*,

which waives the United States' sovereign immunity and subjects it to liability in federal district court for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," if a private person in like circumstances would be liable under state law. 28 U.S.C. 1346(b)(1).

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, codified in relevant part at 28 U.S.C. 2679(b)(1). The Westfall Act amended the FTCA to provide a government employee with absolute immunity from civil liability "for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission" of the employee "while acting within the scope of his office or employment." The Westfall Act provides that for such injuries, the remedy available against the United States under the FTCA is "exclusive," and "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee * * * is precluded." *Ibid*. The only exceptions to this grant of immunity to individual government employees for claims arising out of negligent or wrongful official acts are for civil actions "brought for a violation of the Constitution of the United States," 28 U.S.C. 2679(b)(2)(A); and for civil actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized," 28 U.S.C. 2679(b)(2)(B).

When a claim of wrongful conduct is brought against a government official in his individual capacity, and it does not fall within one of Section 2679(b)(2)'s two exceptions to immunity, the Attorney General's certifica-

tion that the defendant "was acting within the scope of his office or employment at the time of the incident out of which the claim arose" requires substitution of the United States as the sole defendant. 28 U.S.C. 2679(d)(1). The suit then proceeds as if it had been filed against the United States under the FTCA. See 28 U.S.C. 2679(d)(4). If the claim does not fall within the United States' waiver of sovereign immunity because it is subject to one of the "limitations and exceptions" to the FTCA, it must be dismissed on the ground of sovereign immunity. See *ibid.*; see also *United States* v. *Smith*, 499 U.S. 160, 165-167 (1991). In addition, even if the claim might otherwise be brought under the FTCA, it is barred unless the plaintiff has first exhausted administrative remedies. See 28 U.S.C. 2675(a).

2. Petitioner is a Nigerian citizen who was detained by federal officials upon his arrival at O'Hare International Airport in 2003, and subsequently prosecuted and convicted for attempted illegal re-entry into the United States. See Pet. App. 27a. In 2006, petitioner filed this civil suit in the United States District Court for the Northern District of Illinois, alleging that he was not informed at the time of his arrest or during his subsequent detention and prosecution that he had a right under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, to contact the Nigerian consulate for assistance. See Pet. App. 27a. Petitioner named as defendants respondent Lori Glud, a U.S. Customs and Border Protection Enforcement officer, and respondent John Podliska, the Assistant United States Attorney who prosecuted him. He sought compensatory damages of $350,000 and punitive damages of $2.5 million from each respondent. See *id.* at 2a-3a, 27a-28a.

The Attorney General certified that respondents were acting within the scope of their employment at the time of the incidents giving rise to the claims, and the government moved to substitute the United States as the defendant in the case. See Pet. App. 2a. In addition, the government sought to dismiss the action on the ground that petitioner had failed to present his claim administratively to a federal agency prior to bringing suit. See *id.* at 25a.

The district court granted the motion to substitute and dismiss.[1] Pet. App. 25a-31a. The court held that the United States was properly substituted as defendant because petitioner's claim based on the Vienna Convention did not fall within either of the exceptions to federal-employee immunity that are set forth in Section 2679(b)(2). *Id.* at 29a-31a. The court also held that petitioner had not exhausted his administrative remedies as required under the FTCA, and dismissed the suit. *Id.* at 31a.

3. The court of appeals affirmed. The court rejected petitioner's argument that his action fell within Section 2679(b)(2)(B)'s exception to federal-employee immunity

---

[1] For purposes of the motion to dismiss, respondents did not contest the allegations in petitioner's complaint, and the district court assumed the allegations to be true. Pet. App. 26a. Respondents, however, do not concede the truth of petitioner's allegation that they failed to comply with Article 36 of the Vienna Convention. See Gov't C.A. Supp. Br. 4 n.1. Petitioner was informed of his right to contact consular officials to request assistance, and the Nigerian Consulate was notified of petitioner's detention. See *ibid.* Respondents' conduct in this regard was consistent with the United States' extensive and successful efforts to ensure that foreign nationals detained in this country are informed of their rights under Article 36 of the Vienna Convention. See *Mora* v. *New York*, 524 F.3d 183, 197 n.22 (2d Cir.) (describing federal government's compliance efforts), cert. denied, 129 S. Ct. 397 (2008).

for claims "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." Pet. App. 5a, 10a-20a. The court explained that "[t]he plain and ordinary meaning of the term 'statute of the United States' [in Section 2679(b)(2)(B)] is a bill enacted in accordance with the procedures set forth in Article I of the Constitution." *Id.* at 11a. Noting that this Court and lower courts regularly describe a statute as a bill passed by both Houses of Congress and signed by the President, the court of appeals emphasized that petitioner has not "come forward with any example, either in statutory or common law, that has defined or interpreted the term 'statute' to include treaties." *Id.* at 11a-12a. The court also rejected petitioner's argument that because both statutes and treaties may be given the force of law in the United States, the terms "statute" and "treaty" are "interchangeable with one another." *Id.* at 16a.

The statutory context also excluded petitioner's reading, the court held, because if petitioner were correct that the term "statute" was intended to include any enactment with the force of law, then the other exception to the Westfall Act's substitution provision, for actions "brought for a violation of the Constitution of the United States," 28 U.S.C. 2679(b)(2)(A), would have been unnecessary. Pet. App. 15a-16a. In addition, the court of appeals noted that "every court to consider the issue has determined that the Westfall Act's exemption for statutory claims does not include claims brought pursuant to a treaty." *Id.* at 17a-19a (discussing *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007), *Bansal* v. *Russ*, 513 F. Supp. 2d 264 (E.D. Pa. 2007), and *Turkmen* v. *Ashcroft*, No. 02-CV-2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006)).

The court therefore concluded that petitioner's claim for an alleged violation of his rights under the Vienna Convention did not fall within Section 2679(b)(2)(B)'s exception to the immunity conferred by the Westfall Act. The court held that the United States had been properly substituted as defendant, and it affirmed the district court's dismissal of the claims on the ground that the United States had not waived its sovereign immunity for claims alleging the violation of an international treaty. Pet. App. 20a-24a.

ARGUMENT

Petitioner renews his contention that his claim for an alleged violation of the Vienna Convention is a claim brought under a "statute of the United States" within the meaning of Section 2679(b)(2)(B), and therefore his action should have been permitted to go forward against the individual respondents. This Court's review is not warranted. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Further review is unnecessary because there is no conflict among the courts of appeals on the question presented. Petitioner has not cited any decision of any other court of appeals squarely considering whether a treaty claim is a claim for violation of a "statute of the United States" for purposes of Section 2679(b)(2)(B)'s exception to the immunity conferred by the Westfall Act. Nor are we aware of any.[2] Only district courts

[2] The D.C. Circuit has held, without discussing Section 2679(b)(2)(B), that claims brought against federal officials for alleged violations of a treaty were barred by Section 2679(b)(1), and that the United States was properly substituted as a defendant. See *Rasul* v. *Myers*, 512 F.3d 644, 660-663, vacated on other grounds, 129 S. Ct. 763 (2008).

have directly addressed the argument that petitioner raises, and those courts have held, in accord with the decision below, that treaty claims are not "brought for a violation of a statute of the United States" for purposes of Section 2679(b)(2)(B). See *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 112-115 (D.D.C. 2007) (*Detainees Litig.*); *Bansal* v. *Russ*, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007); *Turkmen* v. *Ashcroft*, No. 02-CV-2307, 2006 WL 1662663, at *50 (E.D.N.Y. June 14, 2006), vacated in part on other grounds, 589 F.3d 542 (2d Cir. 2009).

2. The court of appeals correctly held that petitioner's claim alleging a violation of the Vienna Convention does not fall within Section 2679(b)(2)(B)'s exception to the immunity conferred in Section 2679(b)(1).

a. Section 2679(b)(2)(B) excepts claims "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized" from the Westfall Act's grant of absolute immunity to federal employees against claims arising from actions taken within the scope of their employment. See 28 U.S.C. 2679(b)(1). As the court of appeals recognized, the ordinary and natural meaning of a "statute of the United States" is "a bill enacted in accordance with the procedures set forth in Article I of the Constitution, that is, passed by both houses of Congress and signed by the President." Pet. App. 11a; see *United States* v. *Vuitch*, 402 U.S. 62, 64-65 (1971) (stating that an enactment effective only in the District of Columbia was "nevertheless a 'statute' [for purposes of 18 U.S.C. 3731's grant of jurisdiction over certain appeals concerning the invalidity of a "statute"] in the sense that it was duly enacted into law by both Houses of Congress and was signed by the President"). *Black's Law Dictionary* confirms that

understanding, defining a "statute" as "[a] law passed by a legislative body," *i.e.*, "legislation enacted by any law-making body." *Black's Law Dictionary* 1542 (9th ed. 2009); see also *id.* at 982 ("legislation" is positive law enacted "by a branch of government constituted to perform this process").

Petitioner argues, relying on an excerpted quotation from a 1914 treatise that appears in the *Black's Law Dictionary* entry for "statute," that a statute is "any written law authorized by the sovereign" that has the force of law, including a treaty. Pet. 8-9 (citing *Black's Law Dictionary*, *supra*, at 1543 (quoting William M. Lile et al., *Brief Making and the Use of Law Books* 8 (3d ed. 1914)). To be sure, self-executing treaties may, like statutes, have binding domestic legal effect. See *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). But this does not suggest that any treaty is also a "statute," as that term is commonly understood or as it is used in the Westfall Act. Cf. U.S. Const. Art. VI (distinguishing between "the laws of the United States" and "treaties," both of which "shall be the supreme law of the land"). Indeed, courts have often distinguished between treaties and statutes. See *Whitney*, 124 U.S. at 194 (comparing a "treaty" with "legislation"); *Fujitsu Ltd.* v. *Federal Exp. Corp.*, 247 F.3d 423, 432-433 (2d Cir.) (stating that continuing effect of liabilities incurred under treaties is not governed by 1 U.S.C. 109, which applies to "statutes"), cert. denied, 534 U.S. 891 (2001).

Petitioner has identified no case in which a court has construed "statute of the United States" or a similar term to include a federal treaty. The cases on which petitioner relies—*American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946), and *Stevens* v. *Griffith*, 111 U.S. 48 (1884)—do not support his argument, because

both involved the distinct context of federal-court authority to review state "statutes." See Pet. App. 12a-14a. In *Watson*, the Court held that 28 U.S.C. 380, which permitted a three-judge court to enjoin "the enforcement, operation, or execution of any statute of a State," applied to injunctions against enforcement of a state constitution. In reaching this conclusion, the Court reasoned that it would be incongruous for Congress to have required review by a three-judge panel before a state statute could be enjoined, as a "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy," but not to provide the same protection against enjoining a state constitution. *Watson*, 327 U.S. at 591-593. In *Stevens*, the Court held that, when a state enforced a law of the Confederacy as a state law, that law would be treated as a state statute for purposes of the grant of appellate jurisdiction to review the decisions of state courts upholding the validity of a state law under the federal Constitution. 111 U.S. at 51. Thus, these cases reflect the Court's conclusion that in the context of certain statutes governing federal-court review of the validity of states' laws, Congress intended to treat all state positive enactments uniformly. See Pet. App. 14a ("At most, the cases relied on * * * demonstrate that, in some contexts, the term 'statute' may take on a special meaning."). They do not suggest that, whenever Congress uses the term "statute," it necessarily intends to encompass self-executing treaties.

b. Petitioner's construction of "statute" as encompassing any instrument with binding legal force also disregards Section 2679(b)(2)'s structure, as it would render superfluous Section 2679(b)(2)(A)'s exception for actions "brought for a violation of the Constitution of the

United States." There would have been no need for Congress to establish that separate exception to the immunity granted by Section 2679(b)(1) if, as petitioner argues, the exception for claims brought under a "statute of the United States" already encompassed any claim for violation of binding federal law.[3] See *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal quotation marks omitted)); Pet. App. 15a-16a. The fact that Congress established separate exceptions for claims for violation of "the Constitution of the United States" and claims for violation of certain "statute[s] of the United States" indicates that Congress viewed the Constitution of the United States and a statute of the United States as distinct from one another, consistent with the normal and accepted meaning of those terms.

c. Petitioner also argues (Pet. 10-11, 13-16) that the history and purpose of the Westfall Act indicate that Congress intended Section 2679(b)(1) to confer immunity on federal employees only for violations of state common law, and therefore Section 2679(b)(2)(B)'s exception for certain statutory claims should be construed to include treaty claims.

---

[3] Petitioner argues (Pet. 12) that because the exception to substitution in Section 2679(b)(2)(B) for violations of a "statute of the United States" is limited to federal statutes "under which such action against an individual is otherwise authorized," his interpretation does not render Section 2679(b)(2)(A) superfluous. Petitioner is incorrect. If "statute of the United States" included all federal legal instruments with the force of law, constitutional claims would be excepted from substitution both under Section 2679(b)(2)(A), with no limitation; and also under Section 2679(b)(2)(B)—but only to the extent the constitutional provision authorized an action against an individual.

The premise of petitioner's argument—that Section 2679(b)(1) is intended to confer immunity only for state common-law claims—is belied by the unambiguous text of Section 2679(b)(1). That provision broadly prescribes that an FTCA suit against the United States is the "exclusive" remedy for any injury arising from a federal employee's negligent or wrongful acts taken within the scope of employment, and that "any other civil action or proceeding for money damages" is barred. 28 U.S.C. 2679(b)(1). That language establishes a capacious rule of immunity for federal employees against "any" civil action—not simply the subset of actions based on state common law—that may arise from the employee's official conduct.[4] See *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1851 (2010) (holding that 42 U.S.C. 233(a), which uses "essentially the same language" as Section 2679(b)(1), broadly bars civil actions of *all* types arising out of an employee's official conduct). Section 2679(b)(1)'s language thus encompasses not only state common-law claims, but also claims based on treaties, as well as those based on federal statutes and constitutional provisions (which Section 2679(b)(2) subsequently exempts from the immunity conferred in Section 2679(b)(1)). Contrary to petitioner's argument, then, there is no basis for interpreting Section 2679(b)(2)(B)'s exception to include treaty claims in order to effectuate a supposed congres-

[4] Although Congress's primary focus in enacting the Westfall Act was overruling *Westfall* v. *Ervin*, 484 U.S. 292 (1988), which had limited federal employees' immunity in the context of a state tort claim, Congress chose to adopt the sweeping language of existing statutes that conferred immunity on certain categories of federal employees. H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988) (citing, among other statutes, 42 U.S.C. 233, which confers immunity on certain federal medical personnel for "any * * * civil action").

sional intent to limit the scope of federal-employee immunity to state common-law claims.

d. Finally, petitioner is incorrect to suggest (Pet. 15-16) that the Westfall Act should be construed not to preclude claims that would not be cognizable against the United States under the FTCA. It is well-established that Section 2679's substitution provisions and the FTCA's waiver of sovereign immunity are not co-extensive, and that the United States is to be substituted as a defendant if Section 2679(b)'s requirements are met, even if the plaintiff's claims are not cognizable against the United States under the FTCA. See *United States* v. *Smith*, 499 U.S. 160, 166-167 (1991); H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988) (stating that substitution provision applies even when the FTCA prevents recovery against the United States). Given the independence of the two provisions, there is no support for petitioner's contention that Section 2679(b)(2)(B) should be interpreted to permit treaty claims against federal employees because the FTCA would not permit such claims to be brought against the United States.

Accordingly, the lower courts have repeatedly and correctly recognized that the Westfall Act requires substitution of the United States as the sole defendant for claims brought under customary international law or international treaties, regardless of whether those claims are within the scope of the FTCA's waiver of sovereign immunity. See, *e.g.*, *Rasul* v. *Myers,* 512 F.3d 644, 660-663 (D.C. Cir.) (holding that claims against individual government officials for alleged Geneva Convention violations were barred by Section 2679(b)(1), the United States was properly substituted as defendant, and the claims were correctly dismissed under the FTCA), vacated on other grounds, 129 S. Ct. 763 (2008);

Alvarez-Machain v. *United States*, 331 F.3d 604, 631-632 (9th Cir. 2003) (en banc) (holding that international-law claims against individual government officials were precluded by Westfall Act), rev'd on other grounds, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004); *Detainees Litig.*, 479 F. Supp. 2d at 112-115; *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 37-39 (D.D.C. 2006), aff'd, 522 F.3d 413 (D.C. Cir. 2008).

In sum, the court of appeals correctly rejected petitioner's contention that his claim for an alleged violation of a treaty falls within the exception to federal-employee immunity for claims alleging a violation of a "statute of the United States," 28 U.S.C. 2679(b)(2)(B).[5] Further review is not warranted.

---

[5] Even if petitioner were correct that the phrase "statute of the United States" in Section 2679(b)(2)(B) includes a treaty ratified by the United States, that provision also requires that the "statute" in question be one "under which such action against an individual is otherwise authorized." Even if the Vienna Convention created any judicially enforceable individual right to consular notification and access—the Court has declined to resolve that issue, see *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 343 (2006), and most courts of appeals have correctly held that the Vienna Convention does not confer such rights, see, *e.g.*, *Mora* v. *New York*, 524 F.3d 183, 193-207 (2d Cir.), cert. denied, 129 S. Ct. 397 (2008)—petitioner would have to demonstrate that the Vienna Convention gives rise to a private right of action for damages. Nothing in the text or history of the Vienna Convention suggests that it was intended to create a private right of action for damages, and we are aware of no court of appeals that has upheld such a right. See Gov't C.A. Supp. Br. 18-26 (arguing that Vienna Convention does not give rise to a private right of action).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DOUGLAS N. LETTER
SHARON SWINGLE
Attorneys

JULY 2010