No. 07-501

In the Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly applied "the law of the place where the act or omission occurred" to determine "scope of employment" under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 232 Fed. Appx. 419. The decision of the district court (Pet. App. 8a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2007. A petition for rehearing was denied on July 16, 2007. Pet. App. 6a-7a. The petition for a writ of certiorari was filed on October 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a claim that petitioners Marilyn and Raymond Shirley filed against the United States

government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking to recover damages arising from the sexual assault of Ms. Shirley by a corrections officer while she was incarcerated in a federal penitentiary.

1. The FTCA provides a limited waiver of sovereign immunity, allowing the United States to be held liable for torts committed by "any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see *United States* v. *Olson*, 546 U.S. 43, 44-45 (2005). The FTCA's waiver of sovereign immunity contains several exceptions, two of which are pertinent to this case.

First, the United States retains its sovereign immunity if 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 discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984). Because tort actions challenging discretionary policy judgments could "seriously handicap efficient government operations," *id.* at 814 (citation omitted), Congress retained the United States' sovereign immunity in that area. The exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and

political policy through the medium of an action in tort." *Ibid.*

Second, Congress excepted most intentional torts from the FTCA's waiver of sovereign immunity—*i.e.*, "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). In 1974, Congress carved out an exception to that immunity for intentional torts: "[W]ith regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." *Ibid.* Congress defined "investigative or law enforcement officers" to include "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." *Ibid.*

2. In 1998, Ms. Shirley entered a federal prison at the Federal Medical Center Carswell in Fort Worth, Texas, to begin serving a 37-month sentence for unlawful use of a communication device to facilitate the distribution of a controlled substance. Pet. App. 8a-9a. In 2000, Officer Michael Lawrence Miller, a correctional officer at the prison, sexually assaulted Shirley. *Id.* at 9a. After an investigation of the incident, Miller was assigned to other duties at the prison. *Ibid.* The United States subsequently brought criminal charges against Miller, and a jury ultimately convicted him of aggravated sexual abuse, sexual abuse of a ward, and abusive sexual contact. He was sentenced to a total of 150 months in prison. *Ibid.*; see *United States* v. *Miller*, 132

Fed. Appx. 10 (5th Cir.) (affirming conviction), cert. denied, 546 U.S. 939 (2005). Ms. Shirley also sued Miller in a *Bivens* action, and a jury awarded her $4 million in damages. Pet. App. 9a & n.1 (citing *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

3. Petitioners then brought the present action against the United States under the FTCA, raising claims for negligent hiring, training, supervision, and retention, as well as claims, under theories of vicarious liability and *respondeat superior*, for intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. Pet. App. 9a-10a. The district court granted the government's motion for summary judgment. *Id.* at 16a-17a.

First, the district court held that the United States is immune from suit for its discretionary decisions in selecting, training, and supervising its employees. Pet. App. 13a-14a (citing cases). Applying the standard set forth in *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991), the district court explained that no statute or regulation "limit[ed] or den[ied] the existence of discretion for implementing [any] specific [prison safety] policy," and "[i]mposing a duty with no specific designation of how to carry out such authority is the essence of discretion." Pet. App. 13a-14a.

Second, the district court held the United States immune from suit under petitioners' theories of vicarious liability and *respondeat superior*. The court explained that "the waiver of sovereign immunity in the FTCA only covers torts committed by government employees acting within the scope of their employment." Pet. App. 14a (citing *Sheridan* v. *United States*, 487 U.S. 392, 400-401 (1988)). Here, the parties agreed that scope of em-

ployment was determined by Texas law. See, *e.g.*, Pet. Summ. J. Br. 12 ("Thus, the substantive law of the State of Texas is controlling with respect to the liability of the defendant United States. * * * A review of the Texas case law regarding scope of employment for purposes of imposing vicarious liability/*respondeat superior* illustrates that Miller's conduct was plainly within the scope of his employment."). Applying Texas law, the court concluded that the United States could not be held liable because, in sexually assaulting an inmate, "Miller stepped aside from his employment to accomplish his own, rather than the United States', purpose." Pet. App. 15a.

4. On appeal, petitioners challenged only the district court's vicarious liability holding, and not its discretionary function holding. Pet. C.A. Br. 1, 6. As the court of appeals noted, petitioners further conceded that "the district court correctly articulated the general test for scope of employment in Texas," and were appealing only whether the district court properly applied the exceptions to that test as recognized under Texas law. Pet. App. 4a; see Pet. C.A. Br. 7 ("Texas law controls whether liability can be imputed on [*sic*] the United States for Miller's actions. * * * Under Texas law, an employer is vicariously liable for acts of its employee committed within the course and scope of his employment."). The court of appeals rejected petitioners' argument for vicarious liability because, unlike in the Texas state court cases on which petitioners relied, "Shirley fails to allege that a [] legitimate employment interest animated Miller's sexual assault in the instant case." Pet. App. 4a. The court of appeals thus affirmed the district court's judgment for the United States in an unpublished per curiam decision. *Id.* at 5a.

5. Petitioners filed a petition for rehearing and rehearing en banc, arguing that the panel erred by misconstruing Texas law governing scope of employment. See Pet. for Reh'g 5 ("The panel erred in determining that Texas would not allow liability in like circumstances."). The court of appeals denied petitioners' request for rehearing. No judge voted for rehearing or rehearing en banc. Pet. App. 6a-7a.

ARGUMENT

The unpublished decision of the court of appeals is correct on the merits and does not conflict with any decision of this Court or of any other court of appeals. Petitioners' sole argument is that scope of employment for FTCA purposes should not be determined by state law, but by a "uniform national standard of liability." Pet. 27. Because petitioners raise that argument for the first time in their petition for a writ of certiorari, and because petitioners' argument lacks merit, this Court's review is unwarranted.

1. As an initial matter, petitioners failed to raise before the district court or court of appeals the argument they now make in their petition for a writ of certiorari. Petitioners did not argue in either court that scope of employment for FTCA purposes should be determined by a national standard. Instead, petitioners asserted that "the substantive law of the State of Texas is controlling with respect to the liability of the defendant United States." Pet. Summ. J. Br. 12; see *ibid.* ("A review of the Texas case law regarding scope of employment for purposes of imposing vicarious liability/*respondeat superior* illustrates that Miller's conduct was plainly within the scope of his employment."); Pet. C.A. Br. 7 ("Texas law controls whether liability can be imputed on

the United States for Miller's actions * * * . Under Texas law, an employer is vicariously liable for acts of its employee committed within the course and scope of his employment."). Accordingly, this Court should decline to consider petitioners' current argument that the court of appeals erred in applying state law to determine scope of employment. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time on appeal by a party who advocated a contrary position in the court below); see also *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

2. Even if petitioners had preserved the argument, this Court's review would be unwarranted. This Court has long held, as petitioners concede, that the issue of scope of employment is controlled by the applicable state law of *respondeat superior*. See *Williams* v. *United States*, 350 U.S. 857, 857 (1955) (per curiam) ("This case is controlled by the California doctrine of respondeat superior.").[1] Both the district court and the court of appeals in the instant case properly applied the Texas law of *respondeat superior*, consistent with this Court's

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[1] In the original panel decision in *Williams*, the Ninth Circuit had crafted a special rule in FTCA cases involving tortious acts of a member of the armed forces, asking whether the soldier was acting in the line of duty. See *Williams* v. *United States*, 215 F.2d 800, 806-810 (9th Cir. 1954). Rejecting that special rule, this Court vacated and remanded the case, instructing the Ninth Circuit simply to apply the state rule. *Williams* thus established that scope of employment under the FTCA is a question of state, not federal, law. See *O'Toole* v. *United States*, 284 F.2d 792, 795 (2d Cir. 1960), cert. denied, 366 U.S. 927 (1961).

well-settled precedent, to determine that the correctional officer did not act within the scope of his employment.

Contrary to petitioners' assertions, see Pet. 12, 13, 15, 16, 19, 20, 22, 27, there is no conflict, confusion, or uncertainty regarding whether scope of employment for FTCA purposes is determined by "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Petitioners' main authority for any such "confusion" is an isolated district court decision, which was reversed by the Fifth Circuit on that specific question. See Pet. 13, 14, 15 (citing *Garcia* v. *United States*, 799 F. Supp. 674 (W.D. Tex. 1992), rev'd in relevant part, 62 F.3d 126 (5th Cir. 1995) (en banc) (per curiam)). Petitioners also point to a dissenting opinion in *Primeaux* v. *United States*, 181 F.3d 876 (8th Cir. 1999) (en banc), cert. denied, 528 U.S. 1154 (2000), apparently for the proposition that the 1974 amendment to the FTCA changed the scope-of-employment analysis for intentional torts committed by law enforcement officers. See Pet. 16, 19-20. That dissent, however, does not support petitioners' position. Rather, the dissent specifically took issue with the majority's interpretation of South Dakota state law on *respondeat superior*, and reaffirmed the general principle that, even in light of the 1974 amendment, "[i]t is evident from the legislative history of the FTCA and, more importantly, from the Supreme Court itself that scope of employment is defined by the fullest extent of state *respondeat superior* law." *Primeaux*, 181 F.3d at 885 (Lay, J., dissenting); see *id.* at 882 n.1 ("All of the circuits including this court have held that liability of the United States may be imposed under the Federal Tort Claims Act * * * if a private

employer would be liable under state law *respondeat superior* where the wrongful conduct took place.") .

Indeed, every circuit has reached the same conclusion: "[W]hether a particular federal employee was or was not acting within the scope of his employment is controlled by the law of the state in which the negligent or wrongful conduct occurred." *Garcia* v. *United States*, 62 F.3d 126 (5th Cir. 1995) (citing *Williams*, 350 U.S. 857); see *Nelson* v. *United States*, 838 F.2d 1280, 1282 (D.C. Cir. 1988); *Attallah* v. *United States*, 955 F.2d 776, 781 (1st Cir. 1992); *O'Toole* v. *United States*, 284 F.2d 792, 795 (2d Cir. 1960), cert. denied, 366 U.S. 927 (1961); *McSwain* v. *United States*, 422 F.2d 1086, 1088 (3d Cir. 1970); *Cooner* v. *United States*, 276 F.2d 220, 224 (4th Cir. 1960); *Flechsig* v. *United States*, 991 F.2d 300, 302 (6th Cir. 1993); *Duffy* v. *United States*, 966 F.2d 307, 314 (7th Cir. 1992); *Piper* v. *United States*, 887 F.2d 861, 863 (8th Cir. 1989); *Washington* v. *United States*, 868 F.2d 332, 334 (9th Cir.), cert. denied, 493 U.S. 992 (1989); *Pattno* v. *United States*, 311 F.2d 604, 607 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1542 (11th Cir. 1990), amended by 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991).[2]

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[2] Petitioners also assert that this case "conflicts with the decisions of this Court in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), and *United States* v. *Muniz*, 374 U.S. 150 (1963)." Pet. 12. Those cases, however, do not address the scope of employment for FTCA purposes. Instead, they reject the proposition that the FTCA incorporates state immunity laws for government actors—*i.e.*, "the casuistries of municipal liability for torts," *Indian Towing*, 350 U.S. at 65, and the "restrictive state rules of immunity," *Muniz*, 374 U.S. at 164.

Indian Towing and *Muniz* explain that the question under the FTCA is not whether a similarly situated *state government* actor would be held liable under like circumstances, but "whether a *private* individual

3. Unable to identify any genuine conflict, petitioners ask this Court to "revisit" its half-century-old decision in *Williams*, see Pet. 17 n.6, and thus overturn a precedent that has been uniformly adopted and applied by the federal courts of appeals. They argue that, since the 1974 addition of Section 2680(h), there has been "a growing divide among the state and federal courts with respect to the correct understanding of the scope of employment of law enforcement officers," Pet. 22, and "[t]here is no reason that the scope of [FTCA] liability should depend on the particular jurisdiction in which a federal officer commits an intentional tort." Pet. 25. Both the plain text of the statute and this Court's precedent, however, foreclose that argument.

a. Unlike other contexts in which uniform federal standards are imposed, Congress has expressly provided that FTCA liability depends on "the law of the

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under like circumstances would be liable under state law." *Muniz*, 374 U.S. at 153 (emphasis added); see *Indian Towing*, 350 U.S. at 68-69 ("The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable."); see also *Olson*, 546 U.S. at 44-45 ("[T]he United States waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort * * * . And we reverse a line of Ninth Circuit precedent permitting courts in certain circumstances to base a waiver simply upon a finding that local law would make a 'state or municipal entit[y]' liable."). In the instant case, the court of appeals' analysis was consistent with *Indian Towing* and *Muniz*. The court of appeals did not hold the United States immune from suit by relying on Texas law conferring blanket immunity for all claims against the state "arising out of assault, battery, false imprisonment, or any other intentional tort." Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (Vernon 2005). Instead, it asked whether a similarly situated private person would be held liable under Texas law. Pet. App. 3a-4a.

place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see *Williams*, 350 U.S. at 857 (FTCA scope of employment determined by state law); cf. Pet. 25, 26 & n.8 (citing *Bivens*, Title VII, and the National Labor Relations Act as "justification for a uniform national standard"). Liability under the FTCA based on a law enforcement officer's intentional tort is an exception to the general immunity for intentional torts that Congress preserved in the FTCA. See 28 U.S.C. 2680(h). And, in the statutory provision containing that exception, Congress specified that "the provisions of this chapter and section 1346(b) of this title shall apply to any [such] claim." *Ibid*. Therefore, the federal government may be held liable under the FTCA for a claim arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" if the conditions of both statutory sections are met: (1) the tort is committed by an "investigative or law enforcement officer[]," 28 U.S.C. 2680(h), and (2) the tort is committed by said officer "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). As discussed above, this Court and every court of appeals has recognized that the most natural reading of the plain text of Section 1346(b) incorporates state law to determine both whether an officer acts "within the scope of his employment" and whether he "would be liable to the claimant." *Ibid.* The 1974 addition of Section 2680(h) did nothing to change the text of Section 1346(b); there is therefore no reason to construe Section 1346(b) any differently in the intentional tort context.

b. Petitioners argue that, notwithstanding the plain text of the statute, FTCA liability for intentional torts committed by law enforcement officers should be based on "uniform rules of federal law," as is the case in the *Bivens* context with respect to constitutional claims. Pet. 26 (quoting *Bivens*, 403 U.S. at 409 (Harlan, J., concurring)). This Court, however, has already rejected that argument and has explained that the attempted FTCA/*Bivens* analogy is unavailing. In *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), the Court held that, in the context of intentional torts committed by prison officials, victims "shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." The Court left open the availability of a *Bivens* action because, even after the 1974 amendment to the FTCA,

> an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.

Id. at 23. The Court's decision in *Carlson* thus makes clear that the 1974 amendment to the FTCA did nothing to change Congress's determination that FTCA liability, including any question of scope of employment, turns on state law, and that that legislative policy judgment retains full force in the intentional tort context.

4. Because it is settled in this Court and in every federal court of appeals that state law defines the

FTCA's scope-of-employment prerequisite, all that could be left for review in this case is whether the court of appeals properly applied Texas law. Petitioners, however, do not raise that issue for review in their petition for a writ of certiorari. Nor do they identify any exceptional circumstance that would justify departure from the rule that this Court does not "normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996).

In any event, as petitioners have again conceded, the court of appeals properly articulated the general test for scope of employment under Texas law. See Pet. App. 4a (noting that petitioners conceded that "the district court correctly articulated the general test for scope of employment in Texas"); see also Pet. App. 3a & n.3 (citing *Ross* v. *Marshall*, 426 F.3d 745, 763-764 (5th Cir. 2005) (re-articulating the three-part test established by Texas state courts), cert. denied, 127 S. Ct. 1125 (2007)). The court of appeals also properly recognized that, under Texas law, Miller's actions fell outside the scope of employment because no "legitimate employment interest animated Miller's sexual assault." Pet. App. 4a; see *Mackey* v. *U.P. Enters.*, 935 S.W.2d 446, 453 (Tex. App. 1996) ("[W]hen the servant turns aside, for however a short time, from the prosecution of the master's work to engage in an affair wholly his own [there, assault], he ceases to act for the master, and the responsibility for that which he does in pursuing his own business or pleasure is upon him alone.") (citations omitted). Similarly, the court of appeals properly rejected petitioners' arguments based on foreseeability and apparent authority because "[n]one of the [state court] cases relied upon [by petitioners] are sufficiently analogous nor do they serve

to excuse a plaintiff in this context from making a showing that an employee's wrongful act grew out of a legitimate employment duty or goal." Pet. App. 4a. Because the courts below applied settled principles of state law to the particular facts of this case, that fact-bound assessment provides no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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