No. 09-305

In the Supreme Court of the United States

SCOTT KERNS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Federal Tort Claims Act's exclusion for claims arising out of false arrest or imprisonment, 28 U.S.C. 2680(h), bars petitioner's tort action against the United States arising out of his mistaken arrest and imprisonment but alleging an alternative theory of liability under state law for "grossly negligent police investigation."

2. Whether the courts below correctly concluded that the record did not establish that the case analysts whose conduct is at issue were "investigative or law enforcement officers" within the meaning of 28 U.S.C. 2680(h).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation: Page

In the Supreme Court of the United States

No. 09-305

SCOTT KERNS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The opinion of the district court (Pet. App. 4-64) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2009. A petition for rehearing was denied on June 8, 2009 (Pet. App. 66). The petition for a writ of certiorari was filed on September 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*, provides a limited waiver of sovereign immunity for certain tort actions "where the United States, if a private person, would be liable to the claim-

ant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.").

The waiver of immunity and the scope of liability under the FTCA are limited by several exceptions. As relevant here, the FTCA provides that

> The provisions of this chapter and section 1346(b) of this title shall not apply to
>
> * * * * *
>
> (h) Any 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).

Section 2680(h) contains a carve-out from its exception to FTCA liability for the "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h). It states that, with respect to the conduct of such officers, "the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." *Ibid.* Section 2680(h) 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." *Ibid.*

2. a. Petitioner was misidentified as a participant in drug-trafficking operations during an investigation

conducted jointly by federal, state, and local law enforcement agencies in the area of Yuma, Arizona. Pet. App. 10. The misidentification apparently resulted from an error by one of the case analysts, who incorrectly spelled the name of the actual suspect when entering information about him in the investigative database. *Id.* at 11, 15-16, 20-21. The name in the database, as misspelled, matched petitioner's name and was not checked against other identifying information for the suspect. *Id.* at 24, 26-27. Before the mistake came to light, petitioner was indicted, arrested, and jailed for four days. *Id.* at 8-9. Petitioner was then released, and the charges against him were dismissed with prejudice. *Id.* at 9.

b. Petitioner filed this action against the United States under the FTCA, seeking damages for his wrongful arrest and detention resulting from the case analyst's mistake. Following a bench trial, the district court found the United States liable and entered judgment in favor of petitioner. Pet. App. 4-64. The court recognized that claims for false arrest and false imprisonment are explicitly barred by 28 U.S.C. 2680(h) and that petitioner's claim did not fall within Section 2680(h)'s carveout because petitioner had offered no evidence that the case analysts were "investigative or law enforcement officers" within the proviso's meaning. Pet. App. 43-45. The court concluded, however, that petitioner could recover damages based on a theory of "grossly negligent police investigation" that the Arizona courts have suggested might be applied to municipal entities. *Id.* at 30-43.

c. The court of appeals reversed in an unpublished, per curiam order. Pet. App. 1-3. The court of appeals, in agreement with the district court, first rejected petitioner's contention that the case analysts were "investi-

gative or law enforcement officers" within the meaning of Section 2680(h), holding that a plain reading of the statute indicated otherwise. *Id.* at 2. The court of appeals then held that the district court had erred by permitting petitioner to proceed in his action based on an alternative theory of negligent investigation. *Id.* at 2-3. Finding that "[t]he gravamen of [petitioner]'s claim is clearly the injury and damages resulting from his false arrest and imprisonment," the court explained that a plaintiff cannot circumvent the FTCA's exclusion of claims arising out of false arrest and imprisonment by bringing such a claim under the label of negligence. *Ibid.* (citing *Snow-Erlin* v. *United States*, 470 F.3d 804, 809 (9th Cir. 2006), cert. denied, 552 U.S. 811 (2007)).

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. The court of appeals correctly concluded that petitioner's claims are barred by the exclusion in the FTCA for tort claims against the United States "arising out of * * * false imprisonment [or] false arrest." 28 U.S.C. 2680(h). In limiting the FTCA's waiver of sovereign immunity, Congress explicitly excluded "any claim arising out of" enumerated intentional torts—not just the enumerated torts themselves. *Ibid.* The plain language of Section 2680(h) therefore bars claims that "aris[e] out of" false arrest and imprisonment, regardless of the particular form of the cause of action brought by a plaintiff to recover damages.

This Court's precedents confirm that plain-text interpretation of Section 2680(h). In *United States* v. *Neus-*

tadt, 366 U.S. 696 (1961), the Court rejected an argument that Section 2680(h)'s exclusion of claims arising out of misrepresentation would not apply "when the gist of the claim [lay] in *negligence* underlying the inaccurate representation." *Id.* at 703. Finding that such an argument was "nothing more than an attempt to circumvent § 2680(h)," *ibid.*, the Court concluded that the claim was one "*arising out of* misrepresentation" and thus barred under the FTCA, *id.* at 711 (emphasis added). Similarly, in *United States* v. *Shearer*, 473 U.S. 52 (1985), this Court found that a claim for negligent failure to prevent assault and battery was barred by Section 2680(h). *Id.* at 55. The Court noted that "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery"—language the Court read "to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee." *Ibid.* (emphasis in original). See also, *e.g.*, *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir.), cert. denied, 479 U.S. 930 (1986) ("[A] cause of action which is distinct from one of those excepted under § 2680(h) will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiff's claim.") (citation omitted); *Lambertson* v. *United States*, 528 F.2d 441, 444-445 (2d Cir. 1976) (plaintiff cannot circumvent Section 2680(h) by "'dressing up the substance' of battery in the 'garments' of negligence") (quoting *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972)).[1]

---

[1] That is not to say that all claims are precluded under Section 2680(h) just because there is some overlap between the claim and an

Here, as the court of appeals recognized, the basis for petitioner's claim is that he was erroneously arrested and imprisoned: "The gravamen of [petitioner]'s claim is clearly the injury and damages resulting from his false arrest and imprisonment." Pet. App. 3; see 2:04-cv-01937-NVW Docket entry No. 25 (D. Ariz. July 19, 2005) (Am. Comp. ¶ 20) (alleging negligence in the "failure to investigate the differences in the information provided in order to verify that the person eventually named in the warrant and arrested was the person implicated by the evidence"). Petitioner's claim for damages "aris[es] out of" his false arrest and imprisonment and is therefore barred whether premised on a cause of action alleging negligent or intentional conduct.[2]

---

enumerated tort. In *Block* v. *Neal*, 460 U.S. 289 (1983), this Court held that, distinct from a claim for intentional or negligent misrepresentation as to the status of construction, a claim for negligent supervision of construction was not barred by Section 2680(h), where "misrepresentation" was the relevant enumerated tort. *Id.* at 297-298. The Court explained that because "the Government's misstatements [we]re not essential to plaintiff's negligence claim," the negligent supervision claim did not "aris[e] out of" any misrepresentation. *Ibid.* (quoting 28 U.S.C. 2680(h)). The relevant question, therefore, is whether the conduct of the enumerated tort is essential to the additional claim, such that the additional claim "aris[es] out of" the specified conduct. As discussed in the text below, the false arrest and imprisonment are plainly essential to petitioner's negligent investigation claim.

[2] In any event, the cases identifying the alternative cause of action on which the district court premised liability—a claim of "grossly negligent police investigation" (Pet. App. 30-33)—indicate that the cause of action is cognizable (if at all) only against municipalities and not private persons. See *Landeros* v. *City of Tucson*, 831 P.2d 850, 851 (Ariz. Ct. App. 1992) ("It would appear that in Arizona *the city* may be liable if *its police officers* are grossly negligent in their investigation of a crime which results in an arrest.") (emphases added) (citing *Cullison* v. *City of Peoria*, 584 P.2d 1156, 1158-1160 (Ariz. 1978)). As this Court

The court of appeals' decision on the scope of Section 2680(h)'s exclusion does not appear to conflict with any decision of this Court or another court of appeals. Contrary to petitioner's suggestion (Pet. 21-22), the government does not dispute that its liability under the FTCA generally is determined by reference to state law principles. But the FTCA does not provide a cause of action at all where, as here, a claim is excluded by one of the statute's enumerated exceptions. None of the cases cited by petitioner, including *Johnson* v. *Sawyer*, 47 F.3d 716 (5th Cir. 1995) (en banc), is to the contrary. *Johnson*'s recognition that the "violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the offending federal employee or agency and the injured party is such that the former, if a private person or entity, would owe a duty under state law to the latter in a nonfederal context," *id.* at 728, is not at issue here. As discussed above, even assuming a viable state-law action for negligent investigation, Section 2680(h) bars FTCA recovery for the underlying conduct in this case. The decision below thus does not conflict with *Johnson* or call its reasoning into question. The other cases cited by petitioner do not speak to the scope of Section 2680(h) and therefore are similarly irrelevant. See Pet. 21 (citing circuit cases).

2. Petitioner additionally argues (Pet. 23-32) that, even if his claims "arise out of" false arrest and impris-

---

recently explained, a state's willingness to impose liability on a municipal entity does not give rise to an actionable claim under the FTCA. See *United States* v. *Olson*, 546 U.S. 43, 44-46 (2005). That is because the FTCA creates liability only "'under circumstances' where local law would make a '*private person*' liable in tort." *Id.* at 44 (quoting 28 U.S.C. 1346(b)(1)).

onment, they are not barred in light of Section 2680(h)'s carve-out (restoring FTCA liability) for claims based on the conduct of "investigative or law enforcement officers of the United States." 28 U.S.C. 2680(h). As the courts below correctly held (Pet. App. 2, 43), that proviso does not apply in this case because the case analysts whose conduct is at issue are not "investigative or law enforcement officers" as defined by Section 2680(h).

The FTCA defines "investigative or law enforcement officers" as those who are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. 2680(h). In this case, the district court found that petitioner's arrest was attributable to a spelling error by a case analyst leading to a mistaken indictment against petitioner. See Pet. App. 22-23. But the field agents, not the analysts, executed the arrest warrant. *Id.* at 8. The court of appeals correctly held that, because "[n]o evidence in the record establishes that the intelligence analyst defendants were 'empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law,'" they were not "investigative or law enforcement officer[s]" within the meaning of the FTCA. *Id.* at 2. Petitioner's factbound disagreement with that assessment of the record does not warrant this Court's review and, in any event, lacks merit.

Petitioner's principal contention (Pet. 26-29) is that the case analysts must have been delegated the power "to seize evidence" because they issued administrative subpoenas for information from telephone companies. Although the record shows that the analysts prepared the underlying paperwork, it does not show that they possessed the authority to issue or sign the subpoenas themselves. Indeed, the administrative subpoena, which

names the relevant special agent and is signed by the resident agent in charge, does not name the analyst. C.A. Supp. E.R. Tab 5. See also 28 C.F.R. Pt. 0, Subpt. R, App. § 4 (specifying Drug Enforcement Administration (DEA) and Federal Bureau of Investigations officials who "are authorized to sign and issue subpoenas," without mention of case analysts); *Metz*, 788 F.2d at 1532 (Section 2680(h)'s proviso "cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers").

Even if the analysts had the authority to issue subpoenas, that power is not tantamount to the power "to seize evidence." The Attorney General may issue administrative subpoenas, but such subpoenas may be enforced only once the Attorney General invokes a judicial proceeding. See 21 U.S.C. 876(a) and (c). Petitioner observes that the Attorney General may authorize DEA officers and employees to carry firearms, execute warrants, and make seizures of property. Pet. 27-28 (citing 21 U.S.C. 878(a)). But petitioner has not established that the Attorney General exercised that authority to grant any such powers to the case analysts. See generally 28 C.F.R. Pt. 0, Subpt. R, App. (delegation of authority).

In any event, petitioner does not allege any conflict with a decision of this Court or another court of appeals on whether case analysts are "investigative or law enforcement officers" within the meaning of the FTCA. Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys

JANUARY 2010