No. 11-1351

In the Supreme Court of the United States

STEVEN ALAN LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) contains an exception for certain intentional torts, including battery. 28 U.S.C. 2680(h). The Gonzalez Act immunizes military and other covered medical personnel from claims arising out of the performance of their health care functions by designating the FTCA as the exclusive remedy for such claims. 10 U.S.C. 1089(a).

The question presented is whether the Gonzalez Act unequivocally waives sovereign immunity and amends the FTCA to authorize a battery claim against the United States by providing that Section 2680(h) does not apply "[f]or purposes of [the Gonzalez Act]." 10 U.S.C. 1089(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 663 F.3d 1059. The opinion of the district court (Pet. App. 14a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2011. A petition for rehearing was denied on February 15, 2012 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on May 8, 2012, and it was granted on September 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) provides a limited waiver of the government's sovereign immunity for tort claims against the United States. See 28

U.S.C. 1346(b), 2671-2680. The FTCA contains a number of exceptions. As relevant here, the FTCA does not waive sovereign immunity for certain intentional-tort claims, including battery. See 28 U.S.C. 2680(h) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of * * * battery."). That exception was enacted as part of the original FTCA in 1946, and has been amended only once (in 1974) to cabin its scope—specifically, to waive sovereign immunity for a subset of intentional-tort claims arising out of the conduct of federal law enforcement officials. See FTCA, ch. 753, § 421(h), 60 Stat. 846; Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50.

b. The main provision of the Gonzalez Act (Act), Pub. L. No. 94-464, § 1(a), 90 Stat. 1985, states:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel * * * of the armed forces, the National Guard while engaged in training or duty under [specified statutes], the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such [medical personnel] whose act or omission gave rise to such action or proceeding.

10 U.S.C. 1089(a). Section 1089(a) thus confers personal immunity on military and certain other government medical personnel from tort claims arising out of performance of their healthcare duties by making the FTCA remedy against the United States "exclusive." If covered medical personnel are sued individually, the Act provides, upon certification by the Attorney General that the individual was acting within the scope of employment, for the substitution of the United States as defendant and removal to federal court. 10 U.S.C. 1089(c). In the provision most directly at issue here, the Act further provides

> For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

10 U.S.C. 1089(e).

2. a. Petitioner alleges that he suffered injuries as the result of a cataract surgery performed by a United States Navy doctor. Although petitioner provided informed consent and signed consent forms after discussing the surgery with his doctor, he alleges that he orally withdrew his consent in the operating room shortly before the surgery began. Pet. App. 2a-3a, 15a-16a.

b. Petitioner filed an administrative claim with the agency as required by the FTCA, see 28 U.S.C. 2675(a). Because his claim was not favorably resolved in the administrative process, petitioner then sued the United States for negligence and battery in the United States District Court for the District of Guam. Petitioner also named as a defendant the Navy doctor in his individual capacity. The government certified that the doctor was

acting in the scope of his employment, and moved to substitute the United States as defendant, as authorized by both the Gonzalez Act, 10 U.S.C. 1089(c), and the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly referred to as the Westfall Act), 28 U.S.C. 2679(b)(1). The court granted the unopposed motion. Pet. App. 3a, 16a-17a & n.1.

The district court then granted the government's motion for summary judgment as to petitioner's negligence claim, in light of the absence of any expert evidence that the medical treatment failed to satisfy the relevant standard of care. Pet. App. 3a, 16a-17a. Petitioner did not appeal that ruling. *Id.* at 4a. Accordingly, the only claim remaining in the case is the battery claim against the United States under the FTCA.

c. As to that claim, petitioner argued that, even if the doctor's conduct was not negligent, the operation constituted battery because petitioner had orally withdrawn his consent to surgery. The district court denied the government summary judgment on the battery claim on the ground that a genuine issue of material fact existed based on petitioner's own affidavit. 05-00008 Docket entry (Dist. Ct. Dkt.) No. 84, at 4-5 (Sept. 12, 2008); see Pet. App. 3a, 17a. It ultimately held, however, that the claim was barred by 28 U.S.C. 2680(h) and thus dismissed it for lack of subject matter jurisdiction. Pet. App. 4a, 21a-40a.

The court began by noting petitioner's acknowledgment that "his action is not tenable under the FTCA, because the FTCA 'specifically does not extend the federal government's waiver of sovereign immunity to actions arising out of battery.'" Pet. App. 24a-25a (quoting Dist. Ct. Dkt. No. 92, at 1 (Oct. 22, 2008)). The court then rejected petitioner's contention that the subse-

quently enacted Gonzalez Act—in particular, 10 U.S.C. 1089(e)—nevertheless authorizes his battery claim against the United States. Pet. App. 25a-38a. Noting that waivers of sovereign immunity must be "unequivocally expressed," the court explained that the Gonzalez Act was not designed to waive the government's sovereign immunity. *Id.* at 26a (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). Rather, its "only apparent purpose is to render medical personnel of the Armed Forces immune from all possible types of malpractice liability." *Id*. at 27a. Because Section 2680(h) makes an FTCA remedy for battery claims unavailable against the United States, the court reasoned, "it could be argued that the plain language of Section 1089(a) leaves open the possibility of bringing such claims against individual Armed Forces medical workers." *Id.* at 28a. The court explained that Section 1089(e) forecloses that possibility "by stating, in effect, that * * * it is to be assumed that a remedy against the United States for intentional torts is available under the FTCA, but *only* in order to bolster the medical worker's protection—that is, *only* 'for purposes of this section.'" *Ibid.* (quoting 10 U.S.C. 1089(e)).

3. Petitioner appealed the dismissal of his battery claim. The court of appeals affirmed. Pet. App. 1a-13a.

The court of appeals, for two reasons, rejected petitioner's interpretation of 10 U.S.C. 1089(e) as negating the FTCA's preservation of sovereign immunity against battery claims in 26 U.S.C. 2680(h). Pet. App. 6a-9a. First, although acknowledging that petitioner's interpretation is plausible "at first blush," the court concluded that "the best reading" of Section 1089(e) is "not as a *waiver of sovereign immunity* for battery claims brought against the United States, but as an *expression*

of personal immunity from battery claims brought against military medical personnel." *Id.* at 6a-7a. The court pointed to the provision's restrictive opening clause ("For purposes of this section"), in combination with the Gonzalez Act's purpose of protecting military medical personnel from liability. *Ibid.* Against that backdrop, the court explained, Section 1089(e) is best read to foreclose the potential argument that a battery remedy must exist against the individual military healthcare provider because the FTCA provides no "remedy against the United States." *Id.* at 7a (quoting 10 U.S.C. 1089(a)). Rather than go so far as to waive sovereign immunity, the court reasoned, Section 1089(e) disregards the FTCA's preservation of sovereign immunity only "for purposes of" the Gonzalez Act, *i.e.*, to ensure that Section 1089(a) confers immunity on military medical personnel without actually creating an FTCA remedy for malpractice claims pleaded as battery. *Id.* at 8a.

Second, the court of appeals concluded that petitioner could not overcome the principle that waivers of sovereign immunity cannot be implied but "must be unequivocally expressed." Pet. App. 8a (quoting *King*, 395 U.S. at 4). The court found that petitioner's reading, at best, suggested an implied waiver of sovereign immunity: "that if the FTCA's *preservation* of immunity 'shall not apply,' then a concomitant *waiver* of immunity *shall* apply, even if no such waiver is mentioned anywhere in the Gonzalez Act or its legislative history." *Id.* at 9a. Such a "circular reading—where one statute references another statute to reach a result expressed by neither—cannot result in a waiver when nothing short of an unequivocal expression will do." *Ibid.*

The court of appeals also rejected petitioner's reliance on the Tenth Circuit's decision in *Franklin* v. *United States*, 992 F.2d 1492 (1993), which interpreted a different provision, 38 U.S.C. 7316(f) (former 38 U.S.C. 4116(f) (1988)), as a waiver of sovereign immunity for battery claims premised on conduct of healthcare employees of the Veterans Administration (VA). The court stated that *Franklin* incorrectly presumed that a statute waives sovereign immunity simply because it does not clearly state the contrary proposition. Pet. App. 11a-12a. The court further observed that *Franklin*'s reasoning—that "extensions of VA personal immunity should be contingent on the government's correlative assumption of FTCA liability" (992 F.2d at 1500)—was rejected by this Court in *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991). Pet. App. 12a.[1]

SUMMARY OF ARGUMENT

The Gonzalez Act, 10 U.S.C. 1089, does not unequivocally waive sovereign immunity for battery claims against the United States arising out of medical care provided by covered personnel.

A. This Court has repeatedly held that waivers of sovereign immunity "must be 'unequivocally expressed' in statutory text" and that "[l]egislative history cannot supply a waiver that is not clearly evident from" that text. *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citing, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)). Congress will not be deemed to have waived sovereign immunity if

[1] The court of appeals rejected petitioner's additional argument that the provision at issue in *Franklin* (38 U.S.C. 7316) governs this case, "[b]ecause [petitioner's] surgery was performed by Navy personnel, not employees of the [VA]." Pet. App. 13a. Petitioner does not challenge that aspect of the decision below.

"there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Ibid.* The narrow exception to that strict canon of construction—for interpreting the scope of an FTCA exception in 28 U.S.C. 2680, see, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 492 (2006)—is inapplicable. Here, the Court need not determine the scope of an FTCA exception enacted alongside the FTCA's original waiver of sovereign immunity, but rather must determine whether a subsequent Congress in separate legislation has abrogated the preexisting sovereign immunity undisputedly preserved by Section 2680(h).

B. 1. Particularly in light of the requirement to adopt any plausible reading of a statute that would not waive sovereign immunity, Section 1089(e) is best read simply to assume the inapplicability of Section 2680(h) "[f]or purposes of this section," *i.e.*, the Gonzalez Act. That is, Section 1089(e) calls for acting as if a remedy against the United States were available in order to guard against the negative inference that, if no remedy against the United States were available for a medical battery claim, a remedy against an individual defendant must exist. The government and the Court-appointed amicus supporting petitioner[2] (amicus) agree that Section 1089(e) was enacted to eliminate any doubt that Section 1089(a)'s conferral of individual immunity would extend to medical battery claims, and no one disputes that the government's reading accomplishes that objective.

Amicus reads the text of Section 1089(e), however, to go much further: as actually abrogating Section 2680(h) so as to waive the United States' sovereign immunity for medical battery committed by covered personnel. But

[2] Petitioner has not filed a separate opening brief on the merits.

Congress would have been expected to express such an intent more clearly given the "unequivocal waiver" requirement. Indeed, Congress did so in the specific context of medical battery claims in a separate statute addressing claims against VA medical personnel. See 38 U.S.C. 7316(f).

Contrary to amicus's argument, neither Section 1089(c) nor Section 1089(f) supports the contention that the Gonzalez Act contemplates a remedy against either the individual or the United States for every alleged tort arising out of covered conduct. Congress did not adopt that either/or approach in the context of the Westfall Act, 28 U.S.C. 2679(b), see *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991); and it did not do so in the Gonzalez Act either. Even if amicus's interpretation of those ancillary provisions were correct, that would only underscore the need for Section 1089(e) as construed by the government: to ensure that covered medical personnel can avail themselves of the personal immunity conferred by Section 1089(a) even when sued under an intentional-tort theory, without at the same time providing an actual FTCA remedy against the United States.

Because this Court's precedents foreclose reliance on legislative history to supply a waiver of sovereign immunity, amicus's discussion of the Gonzalez Act's legislative history is irrelevant. In any event, the snippets amicus cites are in tension with other snippets from the legislative history of both the Gonzalez Act and a parallel provision, 10 U.S.C. 1054.

2. Amicus's reading would create two significant anomalies that Congress would not have intended without saying so far more expressly. First, it would permit an FTCA remedy against the United States if a battery claim were brought against covered medical personnel

individually, but presumably—and incongruously—not if the identical claim were instead brought against the United States under the FTCA directly. Because the Gonzalez Act applies only to tort suits initially brought against individuals, the Act is not implicated in the latter situation and Section 2680(h) thus would still bar the suit.

Second, amicus's reading would create a disparity between plaintiffs bringing a battery claim against covered medical personnel and those bringing an identical claim against other federal medical personnel covered only by Westfall Act. The former would have an FTCA remedy, but, because the subsequently enacted Westfall Act does not include a provision like Section 1089(e), the latter do not. That result would imply that while Congress expanded the waiver of sovereign immunity when enacting the Gonzalez Act and various agency-specific immunity statutes, it later changed course in the Westfall Act and, for the first time, immunized individual federal employees (including Bureau of Prisons (BOP) medical personnel) from tort suits without providing plaintiffs a new FTCA remedy for battery claims. But neither the text nor legislative history of the Westfall Act describes any such departure.

3. In suggesting that Congress could not have intended to bar an FTCA remedy for consent-based claims sounding in intentional tort while permitting one for malpractice claims sounding in negligence, amicus disregards the FTCA's fundamental distinction between intentional torts and negligence embodied in Section 2680(h) itself. As the FTCA's legislative history indicates, Section 2680(h) was designed to protect the United States from liability for certain intentional torts that would be easy to allege but difficult to defend. That

rationale has full salience in the present context, where, unlike ordinary medical negligence claims, lack-of-consent claims for medical battery do not require expert testimony. As the facts of this case demonstrate, such claims can evade summary judgment based solely on a plaintiff's affidavit.

Amicus likewise errs in arguing that variation in state law concerning consent-based torts compels according battery claims the same sovereign immunity waiver applicable to negligence claims. Contrary to amicus's assumption, the determination of whether a consent-based claim arises out of negligence or battery for purposes of Section 2680(h) is a matter of federal law independent of the claim's state-law label. See *United States* v. *Neustadt*, 366 U.S. 696, 705-706 (1961). State laws, moreover, uniformly treated lack (or withdrawal) of consent as battery at the time of the Gonzalez Act's enactment, and informed-consent claims have increasingly been treated as negligence. In any event, any anomaly concerning the treatment of battery claims and negligence claims under the government's reading already exists for claims against other federal medical personnel under the Westfall Act.

ARGUMENT

THE GONZALEZ ACT DOES NOT UNEQUIVOCALLY WAIVE SOVEREIGN IMMUNITY FOR BATTERY CLAIMS AGAINST THE UNITED STATES ARISING OUT OF CARE PROVIDED BY COVERED MEDICAL PERSONNEL

The Gonzalez Act provision at issue, 10 U.S.C. 1089(e), in conjunction with 10 U.S.C. 1089(a), serves a single function: consistent with the Act's overarching purpose, it ensures that military and other covered medical personnel may not be sued in their individual

capacities for conduct within the scope of their employment even if a plaintiff alleges a battery as part of his malpractice claim. Section 1089(a) categorically prohibits tort claims against covered medical personnel acting within the scope of employment by making the remedy against the United States under the FTCA "exclusive." But that provision, without more, could leave a negative inference that certain intentional tort claims that cannot be raised against the United States under the FTCA, see 28 U.S.C. 2680(h), may still be brought individually against covered medical personnel. To eliminate that possibility, Congress enacted Section 1089(e), which renders Section 2680(h) inapplicable only "[f]or purposes of this section," *i.e.*, for purposes of the Gonzalez Act. Section 1089(e) thus makes clear that covered medical personnel are personally immune from suit regardless of the nature of the malpractice claim.

Amicus does not dispute that understanding. But he asserts that Section 1089(e) must be read to go a substantial step further: to waive the government's sovereign immunity by abrogating Section 2680(h)'s exception for battery and related claims arising out of care provided by covered medical personnel. Even if Section 1089(e), standing alone, could be read that way, this Court's precedents require much more: the waiver of sovereign immunity must be "unequivocal," such that no other "plausible" reading exists. *E.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). Petitioner cannot satisfy that exacting standard. To the contrary, consistent with the purpose of the Gonzalez Act and the longstanding "intentional tort" exception, Section 1089(e) is better read as *assuming* that a remedy against the United States for intentional torts is available under the FTCA only "[f]or purposes of this sec-

tion," *i.e.*, to ensure the Gonzalez Act's conferral of personal immunity, not actually to abrogate Section 2680(h). Under that reading, sovereign immunity continues to bar petitioner's battery claim against the United States.

A. Section 1089(e) Can Amend The FTCA To Permit Battery Claims Against The United States Only If It Unequivocally Waives Sovereign Immunity Such That No Other Plausible Reading Exists

When Congress enacted the FTCA in 1946, it included an exception for intentional torts—now codified at 28 U.S.C. 2680(h)—that preserved the United States' sovereign immunity from "[a]ny [tort] claim arising out of assault, battery," or any of nine additional specified torts. Since that time, with the single exception of a law-enforcement proviso added to Section 2680(h) in 1974, that congressional preservation of immunity has fully "protect[ed] the Federal Government from liability when its agents commit[] intentional torts." *United States* v. *Shearer*, 473 U.S. 52, 56 (1985) (plurality opinion) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)) (first brackets in original); see p. 2, *supra*.

Amicus contends that Congress displaced that longstanding preservation of sovereign immunity in the Gonzalez Act by operation of 10 U.S.C. 1089(e). Amicus nevertheless disavows application of the settled legal framework governing waivers of sovereign immunity. That is not surprising: under this Court's established precedents, such waivers are subject to an exacting standard of clarity that Section 1089(e) cannot meet.

1. A waiver of sovereign immunity must be unequivocal by its terms to the exclusion of any other plausible interpretation

As this Court has repeatedly held, and recently reaffirmed, waivers of sovereign immunity "must be 'unequivocally expressed' in statutory text." *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citing, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); *Nordic Village*, 503 U.S. at 33; *Irwin* v. *Department of Veteran Affairs*, 498 U.S. 89, 95 (1990)). "Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Ibid.* (internal citations omitted). Although an unequivocal waiver does not require Congress to use "magic words," "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Ibid.*; see also *id.* at 1455 n.12 (rejecting "plausible" interpretation of statutory waiver because it was not "unavoidable"); *Nordic Village*, 503 U.S. at 37 (holding that "plausible" alternative readings are "enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted").

This Court has also consistently held that "[l]egislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statute." *Cooper*, 132 S. Ct. at 1448 (citing *Lane*, 518 U.S. at 192). Such extrinsic guides to congressional intent ordinarily become relevant when the statutory text is ambiguous. But, in the sovereign-immunity context, statutory text that does not "unambiguous[ly]" waive immunity necessarily forecloses a conclusion of waiver. *Nordic Village*, 503 U.S. at 37. Accordingly, as

long as an otherwise plausible reading of non-waiver exists, "legislative history has no bearing on the ambiguity point." *Ibid.* ("The 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."); see *id.* at 41 (Stevens, J., dissenting) (acknowledging Court's rejection of legislative history that made Congressional intent to waive sovereign immunity "pellucidly clear").

2.* Dolan*'s narrow exception is inapplicable to this case

Citing *Dolan* v. *USPS*, 546 U.S. 481, 492 (2006), and similar cases involving the scope of other FTCA exceptions, amicus suggests (at 40-43) that he need not identify any unambiguous waiver of sovereign immunity in this case because petitioner's cause of action arises under the FTCA. But the limited exception to the "unequivocal waiver" rule recognized in those cases—concerning the construction of contemporaneously enacted exceptions in the FTCA itself to the FTCA's broad waiver of sovereign immunity—is inapposite here.

In *Dolan*, this Court indicated that the interpretive canon requiring a strict construction of the scope of statutory waivers of immunity does not apply when construing one of the contemporaneously enacted exceptions (set forth in 28 U.S.C. 2680) to the FTCA's waiver of sovereign immunity. The Court reasoned that "unduly generous interpretations of the [FTCA's] exceptions [would] run the risk of defeating the central purpose of the [FTCA]," which "waives the Government's immunity from suit in sweeping language." *Dolan*, 546 U.S. at 491-492 (quoting *Kosak* v. *United States*, 465 U.S. 848, 853 n.9 (1984), and *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)). That rationale does not apply

where, as here, the Court is not asked to evaluate the scope of an original FTCA exception in 28 U.S.C. 2680 enacted alongside the FTCA's waiver of sovereign immunity. There is no dispute that petitioner's battery claim falls within the exception in Section 2680(h). Accordingly, there is no risk of "defeating the central purpose" of the FTCA as reflected in its "sweeping language," *Dolan*, 546 U.S. at 492, because the Congress that enacted the FTCA expressly *preserved* sovereign immunity from such intentional-tort claims, see *Shearer*, 473 U.S. at 56-57 (plurality opinion).

The analytically distinct question now before the Court is whether Section 1089(e), which a different Congress passed to ensure personal immunity for military medical personnel, abrogated the preexisting sovereign immunity preserved in Section 2680(h). In other words, petitioner's position is premised on the notion that the Gonzalez Act creates an additional waiver of sovereign immunity beyond those contained in the FTCA itself. The text of that later enactment must be judged on its own terms and, pursuant to the normal canon, must unequivocally waive sovereign immunity to authorize monetary recovery against the United States. Cf. *Foster* v. *United States*, 522 F.3d 1071, 1079 (9th Cir. 2008) (rejecting application of the *Dolan* interpretive principle to 2000 amendment adding an exception to the FTCA exception in Section 2680(c), because the amendment constitutes a "re-waiver of sovereign immunity" subject to "the general rule that waivers of sovereign immunity are construed in favor of the sovereign").

B. Section 1089(e) Assumes The Inapplicability Of Section 2680(h) Only For Purposes Of Ensuring The Gonzalez Act's Conferral of Personal Immunity

The text and structure of the Gonzalez Act support a reading under which Section 1089(e) serves Congress's goal of ensuring personal immunity by assuming the inapplicability of Section 2680(h) "[f]or purposes of [the Act]" only—a reading that also avoids anomalous results that Congress would not have intended without a more explicit directive. Under the established principles for waivers of sovereign immunity, amicus's contrary reading can prevail only if the *sole* plausible interpretation of Section 1089(e) is that it waives the government's sovereign immunity from suit by actually amending the longstanding "intentional tort" exception in Section 2680(h). Amicus cannot satisfy that high bar.

1. The text, structure, and purpose of the Gonzalez Act support the Government's reading

a. Section 1089(e)'s text, read in light of the Act's purpose, supports the Government's interpretation

The Gonzalez Act confers immunity to covered medical personnel for tort claims arising out of the performance of their healthcare duties by providing that the "remedy against the United States" under the FTCA is "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). The subsidiary provision of the Act on which amicus relies provides that "*[f]or purposes of this section*, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies

and investigations)." 10 U.S.C. 1089(e) (emphasis added).

When a provision applies by terms only "[f]or purposes of this section," the content of the provision affects the operation only of the statutory section in which it appears. It should not be read to affect the operation of other statutes found elsewhere in the United States Code, much less a statute involving a waiver of sovereign immunity. Here, Section 1089(e) does not expressly amend the FTCA itself, or otherwise unequivocally expand the recovery available against the United States under the FTCA. Section 1089(e), in conjunction with Section 1089(a), should be read instead as modestly and exclusively serving the Act's undisputed purpose of ensuring that covered medical personnel are accorded personal immunity from all tort suits.

Because the FTCA permits a "remedy against the United States" for ordinary medical negligence claims, no doubt exists that Section 1089(a) bars such claims against individual military personnel. The FTCA, however, affords no remedy against the United States for certain intentional-tort claims, including medical battery claims. See 28 U.S.C. 2680(h). To the extent Section 1089(a) might leave doubt whether its bar to individual liability would extend to medical battery claims, in view of the absence of an FTCA remedy against the United States for such claims, Section 1089(e) eliminates that doubt. For example, if a malpractice claim constituted a claim for battery within the meaning of federal law (see pp. 37-38, *infra*), a plaintiff could have potentially argued—in the absence of Section 1089(e)—that Section 1089(a) did not confer immunity on an individual defendant because no "remedy against the United States" would be available under the FTCA. By deeming Sec-

tion 2680(h) inapplicable "[f]or purposes of" the immunity inquiry under Section 1089(a)—and thus treating the United States as if it were subject to liability—Section 1089(e) forecloses that line of argument.

That concern was not just hypothetical. Before the Gonzalez Act's enactment, the Federal Drivers Act, 28 U.S.C. 2679(b) (1976), by terms nearly identical to those used in Section 1089(a), had made the FTCA remedy against the United States the exclusive remedy for injury resulting from a federal employee's operation of a motor vehicle.[3] Disputes had arisen under that Act regarding whether an action could proceed against an individual federal employee in circumstances in which no FTCA remedy would be available against the United States (because, in suits brought by other federal employees, another statute barred an FTCA action). *See, e.g.*, *Carr* v. *United States*, 422 F.2d 1007, 1011 (4th Cir. 1970); *Van Houten* v. *Ralls*, 411 F.2d 940, 943 (9th Cir.), cert. denied, 396 U.S. 962 (1969); *Vantrease* v. *United States*, 400 F.2d 853, 855 (6th Cir. 1968).

Section 1089(e) ensures that no similar dispute could arise under the Gonzalez Act with respect to intentional-tort claims against covered medical personnel. As the court of appeals concluded (Pet. App. 7a-8a), by assum-

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[3] At that time, the Federal Drivers Act read as follows:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

28 U.S.C. 2679(b) (1976).

ing the availability of an FTCA remedy only "[f]or purposes of this section," Section 1089(e) acts in conjunction with Section 1089(a) to confirm that no military medical provider may be sued individually, even if the claim is one for battery as to which no remedy against the United States exists.

Amicus reads Section 1089(e) to go a substantial step further. Under his reading, Section 1089(e) implements the Act's purpose of ensuring immunity for covered personnel by actually abrogating the intentional-tort exception so to provide an FTCA remedy against the United States for medical battery. In particular, amicus argues (at 14-15) that the introductory clause "[f]or purposes of this section" functions to limit the abrogation of Section 2680(h) to claims arising out of the conduct of military (and specified agency) medical personnel, as opposed to that of other government medical personnel, and not to assume Section 2680(h)'s inapplicability only for purposes of Section 1089(a)'s conferral of personal immunity. Insofar as that is a plausible reading of Section 1089(e)'s introductory clause, it is not the *only* plausible one—which it must be to carry the day given that it would read the provision to effect a waiver of sovereign immunity.

Amicus further argues (at 17-19) that Congress would have used different language, such as "deemed" or "considered," if it had intended Section 1089(e) to treat Section 2680(h) as inapplicable only for the purpose of ensuring Section 1089(a)'s conferral of personal immunity.[4]

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[4] To be sure, Congress could have been more explicit in Section 1089(e) by, *e.g.*, adding the italicized words as follows: "For purposes of this section, *assume that* the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of [covered conduct]." But such words are often omitted in common parlance when a

But the same could be said for amicus's reading: Congress would have used different language if it had meant to amend the FTCA to waive sovereign immunity, and thereby expand the liability of the United States, with respect to intentional-tort claims against covered medical personnel. Congress, for example, could have directly amended Section 2680(h) itself—as Congress did in 1974 when it enacted the law-enforcement proviso to waive sovereign immunity for suits against the United States for a subset of intentional tort claims otherwise covered by Section 2680(h) (see p. 2, *supra*).[5]

Indeed, Congress has demonstrated that it can speak more clearly when attempting to abrogate Section 2680(h) in the specific context of medical battery claims. In addition to the Gonzalez Act, Congress has enacted four agency-specific statutes conferring personal immunity on federal medical personnel, and all contain provisions parallel to Section 1089(e). 22 U.S.C. 2702(e);

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hypothetical assumption is intended. For example, someone might say during a moot court: "For purposes of this moot court, I am Justice X." Obviously that does not mean that the speaker has actually become Justice X (or thinks he actually is Justice X); rather, the statement is properly understood to mean "for purposes of the moot court, *assume that* I am Justice X."

[5] As amicus acknowledges (at 29), Congress attempted such an amendment of Section 2680(h) in an earlier proposed bill containing provisions analogous to the Gonzalez Act. S. 1078, 92d Cong., 1st Sess. (1971); see 117 Cong. Rec. 4519 (1971) (proposed bill text: "Section 2680 * * * is amended by striking out the period at the end of paragraph (h) and inserting in lieu thereof a comma and the following: 'except claims within the provisions of [precursor to Section 1089(a)] of title 10 arising out of assault or battery.'"). If enacted, the proposed bill would have accomplished the waiver petitioner now seeks to read into Section 1089(e). But that proposal failed to become law, and the Gonzalez Act cannot be construed to effectuate the waiver that Congress never enacted.

38 U.S.C. 7316(f); 42 U.S.C. 233(e); 51 U.S.C. 20137(e). Three of the provisions contain materially identical language—including the same introductory clause ("[f]or purposes of this section")—to that used in Section 1089(e). See 22 U.S.C. 2702(e); 42 U.S.C. 233(e); 51 U.S.C. 20137(e). The text of the fourth, Section 7316(f), which appears in the statute covering VA medical personnel, differs from the others in a material respect: it omits the introductory clause "[f]or purposes of this section." Instead, it provides that "[t]he exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission" by VA medical personnel. 38 U.S.C. 7316(f).[6] That provision, enacted after the others in 1988 (Pub. L. No. 100-322, § 203, 102 Stat. 509), directly expresses an intent to abrogate Section 2680(h) for medical battery claims against covered personnel in a manner that the other provisions, including Section 1089(e), do not.

b. The structure of the Gonzalez Act, consistent with the Court's interpretation of the Westfall Act, does not require a remedy in all circumstances

The other provisions of the Gonzalez Act reinforce the conclusion that Section 1089(e) serves solely to further the Act's overarching aim of protecting covered medical personnel from personal liability, and not also to

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[6] Section 7316(f) states in its entirety:

> The exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission of any person described in subsection (a) in furnishing medical care or treatment (including medical care or treatment furnished in the course of a clinical study or investigation) while in the exercise of such person's duties in or for the Administration.

create a new remedy against the United States for certain intentional torts allegedly committed by those personnel. Relying primarily on Sections 1089(c) and 1089(f), amicus asserts (at 21-26) that the Gonzalez Act generally preserves tort suits against individual employees when an FTCA remedy is unavailable. From that premise, amicus concludes that the Gonzalez Act necessarily contemplates a remedy against either the individual or the United States for every alleged tort arising out of the conduct of covered medical personnel. Both the premise and conclusion are erroneous.

i. As an initial matter, even if amicus's construction of Sections 1089(c) and 1089(f) were correct, it would not help petitioner. Amicus interprets those provisions to contemplate the availability of a remedy against an individual defendant whenever an FTCA exception bars a remedy against the United States. That a covered employee otherwise might be subject to personal liability because an FTCA exception applies, however, only underscores the undisputed purpose of Section 1089(e): to ensure that covered medical personnel can avail themselves of the personal immunity conferred by Section 1089(a) even when sued under an intentional-tort theory. It does not compel the conclusion that Section 1089(e) actually provides an FTCA remedy, rather than just assume one for purposes of Section 1089(a).

For similar reasons, amicus's distinction of the Westfall Act (at 45-47), as construed by this Court in *Smith*, is both mistaken and irrelevant. The Westfall Act, which is applicable to all federal employees, contains essentially the same operative provision as Section 1089(a).[7] In *Smith*, the plaintiffs claimed to have been

[7] The Westfall Act amended 28 U.S.C. 2679(b) in 1988. See Pub. L. No. 100-694, § 5, 102 Stat. 4564. Section 2679(b)(1) provides, in terms

injured abroad by a military doctor. 499 U.S. at 162. Because the FTCA contains an exception to its waiver of sovereign immunity for injuries sustained abroad, thus precluding suit against the United States, the plaintiffs sought to proceed against the doctor personally. *Id.* at 162-163; see 28 U.S.C. 2680(k). This Court rejected the plaintiffs' assertion, renewed by amicus here, that they must have a remedy either against the employee individually or against the United States. To the contrary, the Court held that the Westfall Act bars "recovery against a Government employee" even "where the FTCA itself does not provide a means of recovery." *Smith*, 499 U.S. at 166; see *id.* at 165 (Section 2679(b)(1) "immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government.").[8]

In the unlikely event the Gonzalez Act were construed to reach the opposite conclusion, however, that would only substantiate the need for Section 1089(e) as interpreted by the government: to assume the availabil-

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analogous to Section 1089(a), that "[t]he remedy against the United States" under the FTCA "is exclusive of any other civil action or proceeding for money damages * * * against the employee."

[8] Amicus notes (at 15-16) that the government's brief in *Smith* expressed the view that Section 1089(e) provides an FTCA remedy against the United States for medical malpractice claims sounding in intentional tort. The government does not adhere to the statements in that brief. The meaning of Section 1089(e) was not at issue in *Smith*, and the Court's statement in *Smith* that the Gonzalez Act "does not create rights in favor of malpractice plaintiffs" (499 U.S. at 172) calls into question the correctness of the statements in the government's brief in that case. Perhaps most notably, the government's brief in *Smith* did not mention the strict construction rule for waivers of sovereign immunity. Application of that rule to Section 1089(e) favors the interpretation pressed by the government in this litigation and accepted by both courts below.

ity of an FTCA remedy "[f]or purposes of [the Gonzalez Act]" and its conferral of personal immunity. Indeed, on the government's theory, Section 1089(e) was enacted out of caution in light of that very possibility.

ii. In any event, amicus's interpretation of Sections 1089(c) and 1089(f) is flawed. Section 1089(c) does not permit an individual tort suit whenever no FTCA remedy exists. Section 1089(c) provides for removal to federal court of a state court suit against a covered individual for claims described in Section 1089(a), but also provides that if a district court determines "that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court." 10 U.S.C. 1089(c). The latter "remand" clause does not mean that a state court remedy must be available against a covered individual employee anytime an exception to the FTCA applies or the suit is otherwise barred under the FTCA. That view would significantly undercut the manifest purpose of the Gonzalez Act to protect against personal liability. Under such a reading, covered individuals would be subject to personal liability in any number of circumstances, "including the running of the statute of limitations under the Federal Tort Claims Act." *Vantrease*, 400 F.2d at 855 & n.2. The better interpretation of Section 1089(c)'s remand clause is that it applies only where the district court has determined that the individual was not acting within the scope of his or her employment and thus falls outside the scope of Section 1089(a) itself. See *ibid.* (construing analogous provision of former Federal Drivers Act in same way); *Carr*, 422 F.2d at 1011 (same).

Section 1089(f) similarly does not indicate a lack of personal immunity whenever no FTCA remedy exists.

Section 1089(f)(1) provides that the government may indemnify or insure a covered employee for claims described in Section 1089(a) if the employee is assigned to a foreign country or detailed for service to a non-federal entity, or if circumstances are likely to preclude a FTCA remedy of third parties. 10 U.S.C. 1089(f)(1). Although amicus is correct that indemnification and insurance are necessary only where personal immunity might be inapplicable, amicus fails to appreciate the specific situations enumerated in Section 1089(f)(1): namely, where covered medical personnel are deployed to foreign countries or detailed to non-federal institutions. Providing for indemnification or insurance makes sense in limited circumstances borne out of those situations—*e.g.*, where a military doctor is sued in a foreign court (where Section 1089(a) would be wholly inapplicable) or while working for a non-federal entity (where the conduct might no longer fall "within the scope of [federal] duties or employment" for purposes of Section 1089(a) even if within the scope of his assigned duties). See *United States* v. *Smith*, 499 U.S. 160, 172 n.15 (1991) (noting Section 1089(f) "serves to protect foreign-based military personnel against malpractice suits in *foreign* courts") (citing *Powers* v. *Schultz*, 821 F.2d 295, 297 (5th Cir. 1987)). Relying on the residual prong concerning remedies of third parties, amicus speculates (at 23) that Section 1089(f)(1) extends to *any* "state-law suits against covered medical personnel based on claims that fall within an FTCA exclusion." But that broad reading calls into question the need for Section 1089(e) at all (since covered personnel could be indemnified for intentional tort claims anyway), and it would render superfluous the other two prongs of Section 1089(f)(1) itself.

c. The Act's legislative history cannot supplement the text to effectuate a waiver of sovereign immunity

Amicus's discussion of the legislative history of the Gonzalez Act (at 29-32) is misplaced. As explained above (pp. 14-15, *supra*), this Court has consistently held that "[l]egislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statute." *Cooper*, 132 S. Ct. at 1448 (citing *Lane*, 518 U.S. at 192); see also *Nordic Village*, 503 U.S. at 37. Those precedents foreclose any reliance on the legislative history to discern whether Congress intended to waive the government's sovereign immunity through its enactment of Section 1089(e).

In any event, the legislative history is not as clear as amicus suggests. The bulk of the legislative history merely confirms that the Gonzalez Act was designed to protect covered medical personnel from suit—the singular purpose served by Section 1089(e), in conjunction with Section 1089(a), as construed by the government. The Senate Report accompanying the Gonzalez Act explained that its purpose was to provide "protection from individual liability to certain medical personnel while acting within the scope of their official duties." S. Rep. No. 1264, 94th Cong., 2d Sess. 1 (1976) (*Senate Report*). It observed that "defense medical personnel would be immunized from malpractice suits," which would "eliminate the need of malpractice insurance for all such medical personnel." *Ibid.*

In its discussion of Section 1089(e) specifically, the Senate Report stated (in its entirety): "Subsection (e) would nullify a provision of the [FTCA] which would otherwise exclude any action for assault and battery from the coverage of the [FTCA]. In some jurisdictions it might be possible for a claimant to characterize negli-

gence or a wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity * * * simply as a result of how he pleaded his case. In short, subsection (e) makes the [FTCA] the exclusive remedy for any action, including assault and battery, that could be characterized as malpractice." *Senate Report* 9-10. That limited discussion does not shed much light on—let alone unequivocally resolve—the key question here: whether Congress intended by virtue of Section 1089(e) simply to ensure personal immunity from medical assault or battery claims (by deeming Section 2680(h) inapplicable only for purposes of the Section 1089(a) inquiry), or also to expand the United States' liability under the FTCA for such claims (by actually abrogating Section 2680(h) to waive sovereign immunity).

Amicus does cite (at 30-32) select snippets at various stages of the legislative process supporting amicus's interpretation of Section 1089(e). But at least one passage, from the chairman (Representative Lucien Nedzi) of the subcommittee that held hearings on the Gonzalez Act and reported to the full House Committee on Armed Services, cuts the other way.[9] Similar statements supporting the government's interpretation exist in the legislative history for the nearly identical statute, 10 U.S.C. 1054 (including a parallel subsection (e)), accord-

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[9] Here is the relevant exchange from the report on full Committee consideration:

> Mr. White: I am sure this goes without saying, but I presume [the bill] does not affect the tort liability of the U.S. Government.
>
> Mr. Nedzi: No; I don't see why it would affect the tort liability. It eliminates the individual liability of the doctors.

House Comm. on Armed Servs., No. 70, 94th Cong., 2d Sess. 8 (1976).

ing personal immunity from tort claims to the legal staff of the Department of Defense. See H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 543 (1986) ("This provision is not intended to create a new cause of action. It is merely intended to provide protection for Department of Defense lawyers similar to that provided for doctors in section 1089 of title 10, United States Code."). Even assuming the legislative history were "pellucidly clear" in amicus's favor, *Nordic Village*, 503 U.S. at 41 (Stevens, J., dissenting), that would not be enough to provide an unequivocal waiver of sovereign immunity absent in the text of Section 1089(e) and, as discussed next, rendered dubious by the consequences flowing from that interpretation.

2. Amicus's interpretation would create anomalous distinctions as to the availability of an FTCA remedy arising out of the provision of medical care

Amicus's reading of Section 1089(e) creates two significant anomalies. First, it would permit an FTCA remedy against the United States if a claim were brought against covered medical personnel individually, but presumably not if the identical claim were instead brought against the United States under the FTCA directly. Second, it would create a disparity between plaintiffs bringing a medical battery claim against covered medical personnel and those bringing an identical claim against other federal medical personnel covered only by the later enacted Westfall Act; the former would have an FTCA remedy but the latter do not. There is no reason to conclude that Congress intended either result unless the statute admits of no other reading.

a. By its terms, the Gonzalez Act applies only to tort suits initially brought against covered medical personnel individually. See 10 U.S.C. 1089(a) (conferring personal

immunity from covered suits); 10 U.S.C. 1089(b) ("The Attorney General shall defend any civil action or proceeding brought in any court against any [covered] person."); 10 U.S.C. 1089(c) (requiring substitution of the United States); 10 U.S.C. 1089(f) (providing for indemnification or insurance for covered individuals who are sued). If the interpretation of Section 1089(e) advocated by amicus were correct, then once the United States is substituted for the individual defendant (see 10 U.S.C. 1089(c)), the United States could not invoke the FTCA's intentional-tort exception as a bar to suit for a medical battery (or other similar) claim.

But if the same plaintiff brought the identical battery claim directly against the United States under the FTCA, the Gonzalez Act is never implicated. In that situation, the FTCA's intentional-tort exception presumably still would be available to the United States as a bar to suit. A plaintiff would have no basis to invoke Section 1089(e), even if construed as petitioner's amicus urges, because that provision applies only "[f]or purposes of this section," *i.e.*, with respect to tort claims brought against covered medical personnel. There is no reason Congress would have desired to accord favored treatment to a claim merely because it once began as a claim against an individual. Put otherwise, Congress would not have wanted to *encourage* suits against covered medical personnel—suits that would be barred and thus futile—but that is presumably the effect of petitioner's interpretation of Section 1089(e).

b. The Gonzalez Act, like other similar statutes predating the Westfall Act (see pp. 21-22, *supra*), confers personal immunity on medical personnel from specified agencies. The Westfall Act extends personal immunity to all federal employees, including medical personnel not

previously covered by those agency-specific statutes (*e.g.*, BOP medical personnel). See 28 U.S.C. 2679(b)(1) (quoted in note 7, *supra*). The Westfall Act, however, does not include a provision like Section 1089(e). To the contrary, the Westfall Act expressly reinforces the applicability of the FTCA's exceptions (including Section 2680(h)) where the United States is substituted for an individual defendant under that Act (which also covers personnel covered by the Gonzalez Act). See 28 U.S.C. 2679(d)(4) ("Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.").

Accordingly, if a suit for medical battery were brought by a plaintiff against BOP medical personnel, the United States would be substituted as a defendant pursuant to the Westfall Act, see 28 U.S.C. 2679(d)(1), and then could invoke the intentional-tort exception in Section 2680(h) to bar the suit. Under petitioner's interpretation of Section 1089(e), the identical claim would proceed against the United States if the underlying care were provided by medical personnel covered under the Gonzalez Act (or by other medical personnel, such as Public Health Service employees, who work alongside BOP medical personnel but are covered under separate immunity statutes, see, *e.g.*, 42 U.S.C. 233). That regime would have the unusual effect of making the availability of recovery under the FTCA depend on the agency employing the responsible medical personnel.

Amicus's position implies that, while Congress expanded the United States' waiver of sovereign immunity when enacting various agency-specific immunity stat-

utes, it later changed course in the Westfall Act and, for the first time, immunized individual federal employees (including, for example, BOP medical personnel) from tort suits without providing plaintiffs a new remedy against the United States for medical battery claims. But neither the text of the Wesftfall Act nor its legislative history provides any hint that Congress believed it was adopting any such departure. Cf. H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988) (House Report accompanying Westfall Act citing the Gonzalez Act as "precedent"). The sounder inference is that Congress had not intended abrogation of Section 2680(h) for medical battery claims under the Gonzalez Act any more than under the Westfall Act.

3. Amicus's policy arguments fail to account for the purpose of Section 2680(h) and its federal definition of excluded claims

Amicus argues (at 33-39) that the Gonzalez Act must treat battery claims the same as negligence claims because (1) "Congress could not have intended to disfavor" plaintiffs alleging consent-based torts, and (2) state laws vary on the proper label for consent-based torts. Neither justification can bear the weight amicus places on it.

a. *The rationales underlying Section 2680(h) apply in the medical malpractice context*

In suggesting that Congress could not have intended to bar an FTCA remedy for consent-based claims sounding in intentional tort when permitting one for malpractice claims sounding in negligence, amicus fails to grapple with the FTCA's fundamental distinction between intentional torts and negligence embodied in Section 2680(h) itself. The rationales underlying that longstand-

ing FTCA exception remain salient in the present context.

i. The history of Section 2680(h) is instructive. The so-called "intentional tort" exception first appeared in a draft tort claims bill, accompanied by an explanatory report, prepared in 1931 by Special Assistant to the Attorney General Alexander Holtzoff. See *Kosak*, 465 U.S. at 855-857 & nn. 12-13; *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 245-246 (2008) (Breyer, J., dissenting); see also Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* (1931) (*Holtzoff Report*). The report contains the following explanation for the intentional-tort exception: "This exception is new. The necessity for it appears obvious on its face. It is required in order to stem a flood of claims of little or no merit, with which the Government might otherwise be confronted. Again, if an exceptionally meritorious claim should arise, recourse could be had to Congress for a special act." *Holtzoff Report* 20. In a 1932 hearing before Congress, Assistant Attorney General Charles B. Rugg provided the following explanation for the proposed exceptions collectively (including the intentional-tort exception): "[W]e have provided a list of 13 exceptions to liability and responsibility of the United States for tort actions. Those were prepared quite thoughtfully after a conference with every department and independent establishment in Washington, and receiving their suggestions, to meet any case where there might be an opportunity for fraudulent and excessive claims and where there was not any genuine moral responsibility on the part of the Government." *General Tort Bill: Hearing on H.R. 5065 Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932).

During a 1940 Senate hearing, Holtzoff offered substantially the same rationale for the intentional-tort exception (which appeared in a subsequent tort claims bill): "Clause 9 proposes to exclude from the cognizance of the law claims arising out of assault, battery, false imprisonment, false arrest, and so forth, a type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 3d Sess. 39 (1940) (*1940 Senate Hearings*); see *Tort Claims Against the United States: Hearings on H.R. 7236 before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (describing approach to "take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to defend, or in respect to which it would be unjust to make the Government liable") (*1940 House Hearings*); see also *Shearer*, 473 U.S. at 59 (citing Holtzoff's House testimony); *Sheridan* v. *United States*, 487 U.S. 392, 410-411 (1988) (O'Connor, J., dissenting) (citing Holtzoff's Senate and House testimony). The intentional-tort exception appeared in subsequent bills, and was ultimately enacted by Congress as part of the original FTCA in 1946. Ch. 753, § 421(h), 60 Stat. 846.

ii. The considerations informing enactment of Section 2680(h)'s intentional-tort exception in the first place apply equally to the context of medical malpractice. In contrast to ordinary medical negligence claims, which almost always require support by expert testimony, lack

of consent (*i.e.*, medical battery) is "easily exaggerated" and "difficult to defend." *1940 Senate Hearings* 39; *1940 House Hearings* 22; see, *e.g.*, Major Thomas A. Knapp, *Problems of Consent in Medical Treatment*, 62 Mil. L. Rev. 105, 110-111 (1973) ("Unlike the malpractice action based on negligence, expert testimony need not be provided by the plaintiff in a battery action. In the battery action the only issue is whether the patient consented and not whether the doctor reasonably should have informed his patient of the risks involved. A patient may, therefore, rely entirely on nonexpert testimony in a battery action.").

The facts of this case demonstrate that reality. In his complaint, petitioner alleged both that his cataract surgery was performed negligently and that it was performed without his consent. Because petitioner (despite many extensions) was unable to come forward with any expert testimony supporting his negligence claim, the district court granted the government summary judgment on that claim. Pet. App. 3a, 17a. Had petitioner established that the Navy doctor performed the cataract surgery negligently, a burden which he did not come close to meeting, petitioner undisputedly would have had a remedy against the United States under the FTCA.

Instead, petitioner proceeded on his battery claim for lack of consent. As the courts below noted, petitioner, after discussing the cataract procedure with the Navy doctor, provided his informed consent to the procedure on multiple occasions and signed two consent forms to that effect. Pet. App. 2a, 15a. Petitioner nevertheless alleged, comprising one sentence of his complaint, that "[a]fter entering the operating room, before the cataract surgery was commenced, [he] withdrew and revoked his

consent to the surgery." Dist. Ct. Dkt. No. 1, para. 10 (Mar. 2, 2005); see Pet. App. 3a, 15a-16a. Finding a genuine issue of fact based solely on petitioner's affidavit reiterating that allegation, the district court denied summary judgment on the battery claim. *Id.* at 17a; see Dist. Ct. Dkt. No. 84, at 4-5 (relying on petitioner's affidavit stating that "[w]hile [he] initially gave consent for the surgery, [he] withdrew that consent at least twice before surgery commenced") (alterations in original).

Accordingly, as this case shows, a medical battery claim is easy to allege but difficult to disprove—at least without burdensome discovery and perhaps even trial. Rather than depart from the approach it had taken since the FTCA (and its intentional-tort exception) became law in 1946, Congress might well have wished to avoid exposing the government to the specter of liability—and the burdens of defending against it—in such circumstances.

By the same token, amicus's policy objections to application of Section 2680(h) in the medical malpractice context—*i.e.*, that it "eliminate[s] remedies for many of the victims who appeared to be most deserving" and leaves persons "without a remedy for what could be very serious wrongs" (at 34, 39)—also apply to the existence of Section 2680(h) generally. An understanding of Congress's motivations underlying Section 2680(h)—*i.e.*, to protect the government from claims easy to allege but "difficult to defend," and from an employee's intentional departure from basic legal norms for which the government should not be regarded as "moral[ly] responsib[le]" (see pp. 33-34, *supra*)—explains the FTCA's stricter treatment of intentional torts (relative to negligence) committed by federal employees that may seem at first to be counterintuitive. Regardless, Section

2680(h) remains a core component of the FTCA. Indeed, in the Westfall Act, Congress has implemented the very scheme that amicus claims "Congress could not have intended" for other federal medical personnel—allowing malpractice claims sounding in negligence while preserving sovereign immunity for malpractice claims sounding in battery. See pp. 31-32, *supra*; see also H.R. Rep. No. 700, *supra*, at 6 ("[S]uits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery," and in particular "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee.").

b. Any variation in State law treatment of consent-based claims is insignificant

Amicus's concern about State law distinctions as to whether consent-based claims constitute battery or negligence is both irrelevant and overstated.

i. As a threshold matter, citing 28 U.S.C. 1346(b)(1) (specifying liability "in accordance with the law of the place where the act or omission occurred"), amicus assumes (at 37-39) that whether a particular consent-based claim is treated as a claim arising out of "battery" under Section 2680(h) turns on State law. That assumption is mistaken. The determination of whether such a claim sounds in negligence or battery for purposes of Section 2680(h) is a matter of federal law, which operates independent of the claim's state-law label.

In *United States* v. *Neustadt*, 366 U.S. 696 (1961), the Court held that an FTCA action for "negligent misrepresentation" qualified as a claim "arising out of * * * misrepresentation" and was thus barred by Section 2680(h). The Court deemed it irrelevant "[w]hether or not this analysis accords with the law of States" and

explained it "need not" determine how the relevant State law classified the tort because "whether this claim is outside the intended scope of the [FTCA] * * * depends solely upon what Congress meant by the language it used in [Section] 2680." *Id.* at 705-706 & n.15. The Court stated that Congress would have been aware of the "traditional and commonly understood legal definition of the tort," which governed the interpretation under federal law. *Id.* at 706-707. Accordingly, while it is established that "the extent of the United States' liability under the FTCA is generally determined by reference to state law," *Molzof* v. *United States*, 502 U.S. 301, 305 (1992) (citing, *inter alia*, 28 U.S.C. 1346(b)), the scope of Section 2680(h) is a question of federal law, *Neustadt*, 366 U.S. at 706. The FTCA's exceptions define "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), and the interpretation of such federal statutory terms is "by definition a federal question," *Molzof*, 502 U.S. at 305.

There is no dispute here that the type of withdrawal-of-consent claim alleged by petitioner is properly characterized as "arising out of * * * battery" within the meaning of Section 2680(h), and that conclusion would not change even if the underlying State law differed. The arbitrariness that amicus posits is thus illusory. Amicus's suggestion that some other type of consent-based claims (*i.e.*, lack of informed consent) might be subject to different classifications as a matter of State law—without regard to whether those torts would be classified as "battery" for purposes of Section 2680(h)—

provides no basis for exposing the government to liability for the medical battery alleged in this case.

ii. In any event, the State law governing consent-based malpractice claims was fairly uniform at the time of the Gonzalez Act's enactment in 1976 and remains so now. Under common-law doctrine, a medical procedure performed without consent (never given or withdrawn) is a battery. See, *e.g.*, *Mims* v. *Boland*, 138 S.E.2d 902, 906 (Ga. Ct. App. 1964); W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* (*Prosser and Keeton)* § 18, at 118-119 (5th ed. 1984). Medical mistakes or treatment below the standard of care, by contrast, sounded in negligence. See, *e.g.*, R. Crawford Morris & Alan R. Moritz, *Doctor and Patient and the Law* 326-331 (5th ed. 1971); Restatement (Second) of Torts § 299A (1965). The definition of both types of torts was well settled as of 1976, and there is "no warrant for assuming that Congress was unaware of established tort definitions" when it passed the Gonzalez Act, *Neustadt*, 366 U.S. at 707.

As noted above, lack (or withdrawal) of consent claims have always been treated as battery, and amicus cites only two state court decisions holding otherwise. Amicus Br. 35-36 (citations omitted). Notably, both those States recognized actions for medical battery based on a lack of consent at the time the Gonzalez Act was enacted. See *Beck* v. *Lovell*, 361 So. 2d 245, 249 (La. Ct. App. 1978) ("A surgeon who performs an operation without the consent of a patient, or some authorized person, commits a trespass on the body of the patient, in the nature of a battery."); *Hook* v. *Rothstein*, 316 S.E. 2d 690, 700-701 (S.C. Ct. App. 1984) (similar).

The only type of malpractice claim in any degree of flux at that time was one for lack of informed consent.

The doctrine of "informed consent," under which courts asked whether the plaintiff had consented to a procedure after being made aware of the relevant risks, began developing in the 1950s and 1960s. See *Prosser and Keeton* § 32, at 189-190. The majority of jurisdictions analyzed such claims as negligence claims, asking whether the physician satisfied a reasonable standard of care in the information provided. *Ibid.* (recognizing that while the earliest cases treated informed consent as battery claims, "negligence has now generally displaced battery as the basis for liability" in such suits). As amicus acknowledges, that trend has continued such that only two States now require bringing informed consent claims as battery. Amicus Br. 35 (citations omitted).

To the extent that minimal degree of State-law variation poses any problem, the same problem persists for other medical personnel covered only by the Westfall Act—something that did not deter Congress from preserving Section 2680(h)'s applicability to medical malpractice claims there. See pp. 31-32, *supra*. This Court has recognized, moreover, that even if the interpretation of a statute to effect no waiver of sovereign immunity gives rise to certain anomalies, that is not enough to compel a conclusion of waiver. See *Lane*, 518 U.S. at 196 ("The statutory scheme [under a reading of non-waiver] is admittedly somewhat bewildering. But the lack of perfect correlation in the various provisions does not indicate, as [petitioner] suggests, that the reading proposed by the Government is entirely irrational.").

* * * * *

If this were an ordinary case of statutory interpretation, the Court might struggle with discerning Congress's precise intent in the Gonzalez Act. But it is not. "While [petitioner's] analysis has superficial appeal, it

overlooks [the] critical requirement * * * that [a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Lane*, 518 U.S. at 192 (internal citations omitted).

This Court faced a similar situation in *Nordic Village, supra.* Although the bankruptcy provision at issue in that case,[10] standing alone, was arguably more naturally read to waive sovereign immunity, the Court rejected that reading. See 503 U.S. at 34-37; see also *id.* at 41 (Stevens, J., dissenting) (contending that the "literal text of the Act unquestionably forecloses the defense of sovereign immunity"). The Court relied on the existence of other "plausible" interpretations as defeating the "unequivocal waiver" requirement. It reasoned that under those others readings, the provision, "though not authorizing claims for monetary relief, would nevertheless perform a significant function." *Id.* at 36.

The same is true here. Under the government's reading, Section 1089(e), though not authorizing an FTCA remedy, undisputedly performs the significant function of securing personal immunity for covered medical personnel when a plaintiff alleges a medical

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[10] The relevant provision, Section 106(c) of the Bankruptcy Code, stated:

> Except as provided in subsections (a) and (b) of this section *and notwithstanding any assertion of sovereign immunity*—
>
> (1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. 106(c) (1988) (emphasis added).

battery. As this Court has recognized, "[t]he Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs." *Smith*, 499 U.S. at 172.[11] Under petitioner's reading, however, Section 1089(e) would do just that—without any unequivocal waiver of the government's sovereign immunity with respect to intentional-tort claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[11] Amicus attempts (at 47-48) to parse the Court's recognition of the Gonzalez Act's singular purpose in *Smith* by asserting that the plaintiff in that case argued that "the Gonzalez Act itself *created* a remedy against the employee," whereas here "the issue is whether Section 1089(e) removes an exception to a remedy created by the FTCA elsewhere." Whether the Gonzalez Act expands liability by creating a new remedy or by abrogating an exception to a previously unavailable remedy does not matter; either one would require an unequivocal waiver of sovereign immunity absent in that Act.