No. 11-10362

In the Supreme Court of the United States

KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., JUST DETENTION INTERNATIONAL, NATIONAL CENTER FOR TRANSGENDER EQUALITY, TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND, AND WOMEN'S PRISON ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

SUSAN L. SOMMER
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
120 Wall Street
19th Floor
New York, NY 10005
(212) 809-8585

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
One Metro Center
700 12th Street. N.W., Suite 900
Washington, D.C. 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

JULIAN HELISEK
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

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INTEREST OF AMICI[1]

Amici are organizations that seek justice for victims of the epidemic of sexual violence against inmates in detention settings, which especially targets members of particularly vulnerable groups, including women and those who are lesbian, gay, bisexual, or transgender.[2] Amici have engaged in considerable educational, advocacy, and litigation efforts to protect people in prisons from sexual violence and to afford legal remedies to victims of that violence. Amici believe that the context around sexual violence against prisoners, including the violence that petitioner alleges was committed against him, will assist the Court in resolving the question presented.

STATEMENT

This case arose following an alleged sexual assault at the United States Penitentiary in Lewisburg, Pennsylvania.[3] Petitioner Kim Millbrook was transferred

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[1] Respondent has consented to the filing of this amicus brief, and petitioner has filed a blanket consent to all amicus curiae briefs, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A description of each of the amici organizations is included in an appendix hereto.

[3] The record should be viewed in the light most favorable to petitioner for purposes of this appeal from the grant of a motion for summary judgment. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 n.26 (1982).

from the United States Penitentiary in Terre Haute, Indiana, to Lewisburg on March 1, 2010. J.A. 69. Petitioner had a reputation for being "disruptive" because, among other things, he had filed complaints alleging misconduct by Terre Haute prison officers. J.A. 19; U.S. Br. 2-3. Upon his arrival at Lewisburg, petitioner told prison authorities that he had been sexually assaulted by staff at Terre Haute, and that he had been threatened and attacked by inmates there. He requested measures to protect him from similar attacks in Lewisburg. J.A. 69-70. He was nonetheless placed with violent cellmates who, in petitioner's first days at Lewisburg, attacked him. J.A. 69-70.

On March 4, 2010, following a pre-dawn attack by a cellmate, petitioner was taken by prison staff to the facility's first floor shower area. J.A. 35, 70. Officer Pealer came to petitioner in the shower area and said "he was tired of" petitioner's "crying" to staff that petitioner's "life and safety were in danger." J.A. 71. Officer Pealer told petitioner that petitioner "was mouthing off to staff" and that "[w]e are going to show you what Lewisburg is all about." J.A. 35.

Officer Pealer then secreted petitioner from the shower area to a camera-less area in the basement. J.A. 12, 32, 35. There, Officer Pealer and two of his colleagues assaulted, battered, and raped petitioner. J.A. 71-72. While one officer restrained petitioner in a chokehold, a second stood watch. Officer Pealer stood in front of petitioner, unzipped his pants, and forced petitioner to perform oral sex on him. J.A. 11, 36, 71-72. Then one of the officers called petitioner "a little snitch bitch." J.A. 72. The officers told petitioner that if he were to relate what had happened that morning to anyone else, the officers would kill him. J.A. 36, 72. Peti-

tioner reported the sexual assault the next day. J.A. 73. An internal administrative review found that petitioner had failed to substantiate his claim of rape. J.A. 73.

After the administrative process concluded, petitioner sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671-2680. J.A. 9. The district court granted summary judgment in favor of the government on the ground that the suit was barred by the FTCA's intentional tort exception as construed by the Third Circuit in *Pooler* v. *United States*, 787 F.2d 868, 872 (3d Cir.), cert. denied, 479 U.S. 849 (1986). J.A. 89, 95. *Pooler* held that only claims arising out of an intentional tort committed by an investigative or law enforcement officer while that officer is executing a search, seizing evidence, or making arrests for violations of federal law are within the law enforcement proviso's waiver of sovereign immunity. In an unpublished per curiam opinion, the Court of Appeals for the Third Circuit affirmed. J.A. 101-102.

The United States has conceded that petitioner's intentional tort claim falls within Section 2680(h)'s law enforcement proviso and the FTCA's waiver of sovereign immunity, and that *Pooler* was incorrectly decided. See U.S. Br. 14-15.

SUMMARY OF ARGUMENT

A. Under the FTCA, Congress established a "broad waiver of sovereign immunity." *Kosak* v. *United States*, 465 U.S. 848, 852 (1984). Subject to a list of enumerated exceptions, the FTCA allows persons injured by the tortious acts of federal employees within the scope of their employment to pursue a claim for

money damages against the United States in federal district court. 28 U.S.C. 1346(b), 2671-2680. One such exception, known as the "intentional torts exception," provides that the United States retains immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). The exception is limited, in turn, by the so-called "law enforcement proviso," which states that the FTCA "shall apply to any claim arising" from "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" that is "with regard to acts or omissions of investigative or law enforcement officers of the United States Government." *Ibid.* The subsection 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.*

By the plain text of the statute, an aggrieved person's ability to sue the federal government under the law enforcement proviso depends on only two requirements: that (1) the claim arises out of one of the enumerated categories of tortious conduct; and (2) the employee who committed the act or omission at issue was a "law enforcement officer." The statute imposes no further limitation based on the particular activity in which the officer was engaged at the time of the tortious act.

Construing the statute according to its plain terms advances Congress's purpose in adopting the law enforcement proviso. Congress intended to provide a remedy for victims of torts committed by a class of employees whose job responsibilities, and the authority

and weapons with which they are armed, create a particularly acute risk that they will commit intentional torts within the scope of their employment.

The court of appeals' unjustifiably narrow construction of the proviso would not only eliminate the effective remedy that Congress intended persons who are intentionally injured by government actors to have against the United States, it would also, in many cases, eliminate *any* tort remedy whatsoever for injured persons. The Federal Employees Liability Reform and Tort Compensation Act (the "Westfall Act"), 28 U.S.C. 2679, immunizes federal employees from common law tort claims for most torts committed within the scope of their employment. That Act provides for substitution of the United States as defendant. If the United States also enjoys immunity under 28 U.S.C. 2680(h), prisoners who are battered or assaulted by prison officers may be precluded from seeking any relief, against the officer individually or the United States. The court of appeals' interpretation thus would frustrate the purposes of the FTCA.

B. It is especially critical that a claim be available under the FTCA for prison officers' assaults on prisoners. Due to the inherent nature of incarceration, prisoners are even more vulnerable to assault and battery by law enforcement officers abusing their state-sanctioned power than are other members of the public. In particular, sexual assaults on prisoners by prison officers are an all too common occurrence. In 2003, Congress found that at least 13% of prison inmates had been sexually assaulted while in prison. Frequently, this sexual abuse is carried out by the prison's own staff. The federal Bureau of Prisons has recognized sexual abuse by staff as a "significant problem," and the

federal Bureau of Justice Statistics estimates that one out of every hundred inmates has been compelled by physical force or threats of force to engage in sexual activity with prison staff. Such abuse is particularly high in certain facilities, suggesting that in those institutions' old attitudes that rape is part of an inmate's punishment have yet to be eradicated.

Although Congress has begun an effort to combat this terrible scourge by enacting the Prison Rape Elimination Act ("PREA"), 42 U.S.C. 15601 *et seq.*, certain inmate populations remain especially vulnerable to sexual abuse at the hands of those who are meant to guard them. In particular, men and women with non-heterosexual orientations, those who have been victimized previously (who are disproportionately women), and most of all transgender inmates, are especially vulnerable and likely to be subjected to sexual abuse by prison staff.

In some instances, prison officers use sexual assault as an illegitimate means to establish control over inmates. Petitioner's allegations are fully consistent with this sad reality. Petitioner alleges that during the course of the assault the perpetrators accused petitioner of being a "snitch" and "mouthing off to staff" and warned "we are going to show [petitioner] what Lewisburg is about." J.A. 32, 35, 72.

Where, as is often the case, a prison's administration has failed to implement a zero-tolerance policy for sexual abuse, and prisoners' administrative complaints are given little credence, a judicial action under the FTCA may be the prisoner's only means to hold the government accountable. Access to the courts is therefore critical to stemming the epidemic of prison sexual

abuse. Here, petitioner does not ask the Court to create a cause of action to remedy the wrong done to him. Rather, petitioner asks only that the FTCA be applied according to its terms and consistent with Congress's intent to provide a remedy for those who are victimized when law enforcement officers abuse their state-sanctioned authority to commit egregious assault or battery.

ARGUMENT

I. THE FTCA EXPRESSLY WAIVES IMMUNITY FOR SPECIFIED INTENTIONAL TORTS BY "LAW ENFORCEMENT OFFICERS," WITHOUT LIMITATION BASED ON THE CONTEXT OF THE TORTIOUS ACT

A. The Court Of Appeals Erred By Importing A Limit Into The Law Enforcement Proviso That The Text Does Not Support

Statutory analysis of course "begins with the plain language of the statute." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). The Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992); see also *Lewis* v. *City of Chicago*, 130 S. Ct. 2191, 2200 ("It is not for us to rewrite [a] statute so that it covers only what we think is necessary to achieve what we think Congress really intended."). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank*, 503 U.S. at 254 (internal quotation marks and citation omitted).

The language of the law enforcement proviso is clear: with regard to "acts or omissions" of "investigative or law enforcement officers," the FTCA "shall ap-

ply" to "any claim" arising out of specified intentional torts, including assault and battery. The text of the proviso thus identifies a *category* of federal officials whose conduct might subject the United States to suit. The subsection defines that category of officers according to the *legal authority* they wield. That is, the subsection applies to federal officials who are "*empowered by law* to execute searches, to seize evidence, or to make arrests." 28 U.S.C. 2680(h) (emphasis added). If the subsection had been intended to apply only to those officials based on the particular function they were fulfilling at the time of the tortious conduct, it instead would have been written to apply to federal officers' conduct "*in the execution* of searches, seizure of evidence, or making of arrests," which it does not. To the contrary, nothing in the text limits the "acts or omissions" of officers for which the United States may be sued to those made during a search, seizure, or arrest.

The court of appeals' attempt to read an activity-based limitation into the statutory phrase "law enforcement officer" is similar to the argument this Court considered and rejected in *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008). There, the Court construed Section 2680(c), which preserves immunity for certain claims arising out of the detention of goods by "any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). The Court held that the phrase "any other law enforcement officer" was unambiguous and included *all* law enforcement officers, not merely those acting in a customs or excise capacity. *Ali*, 552 U.S. at 218-219.

The text of Section 2680(h) affords no basis to limit the scope of the waiver of immunity to officers acting in

the course of executing a search warrant, seizing evidence, or making an arrest.

B. Congress Intended The Law Enforcement Proviso To Allow A Remedy Against The United States For Injuries Caused By Law Enforcement Officers' Abuse Of Their Unique Power

The impetus for the law enforcement proviso's passage was several highly publicized and widely criticized raids by federal narcotics officers in Collinsville, Illinois in 1973. See generally Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497 (1976) (describing raids, congressional reaction, and amendatory process). Twice in one evening, federal agents burst into residential homes unannounced, flashed their badges, brandished pistols, and held the unsuspecting homeowners at gunpoint while fellow agents ransacked the homes. The agents, it turned out, had the wrong addresses. See *id.* at 500-501. Neither family could pursue a remedy under the FTCA at the time because of the intentional tort exception. By enacting the law enforcement proviso, Congress sought to provide a judicial mechanism to compensate victims of abuses committed by powerful law enforcement officials. See *Daniels* v. *United States*, 470 F. Supp. 64, 67-68 (E.D.N.C. 1979) ("[T]he legislative background shows Congress intended to provide an effective remedy for innocent victims of federal law enforcement abuses through established FTCA procedures and analogous case law.").

Although the Collinsville raids may have been the immediate cause of Congress's decision to enact the law

enforcement proviso, the amendment was, more broadly, a response to a growing national consensus demanding more direct accountability for the abuses of government power. See Boger et al., *supra*, 498-499 (noting confluence in early 1970s of Kent State tragedy, May Day mass arrests in Washington, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and Attica prison debacle). Congress therefore did not limit the scope of the proviso to egregious no-knock searches or other specified activities, but rather lifted the government's immunity in "any case" involving the enumerated torts committed by law enforcement officers. A Senate committee report reflected this choice, noting that the amendment was not "limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of federal law." S. Rep. No. 93-588, 93d Cong., 2d Sess. (1974).

C. The Court Of Appeals' Narrow Reading Of The Proviso Would, In Many Cases, Deprive Aggrieved Persons Of Any Remedy, Thereby Frustrating The FTCA's Remedial Purpose

1. Congress intended the FTCA to provide a remedy to those injured by law enforcement officers' abuse of power

As a general matter, the Court strictly construes waivers of sovereign immunity in favor of the sovereign. See *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). The Court has recognized, however, that an unduly narrow construction of the FTCA, or an unduly broad reading of its exceptions, would defeat the very

purpose of the statute, which was to provide plaintiffs injured by federal employees an opportunity to recover directly against the government. See *Kosak*, 465 U.S. at 853 n.9 (noting that "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute"); *Feres* v. *United States*, 340 U.S. 135, 140 (1950) ("The primary purpose of the [FTCA] was to extend a remedy to those who had been without * * *."). As the Court has cautioned, when interpreting the FTCA, a judge should not, "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955).

The court of appeals' holding limiting the law enforcement proviso to tortious conduct committed during the course of a search, seizure, or arrest would frustrate the FTCA's purpose of providing a viable damages remedy to those injured at the hands of overzealous or irresponsible federal law enforcement officers. The federal government confers immense power on law enforcement officers: it arms them with weapons, authorizes them to use force that would be unlawful in other contexts, and places them in positions of authority where conflict is rife and members of the public or those who are detained are highly vulnerable to abuse. Congress therefore provided that the United States should be liable for claims arising out of specified tortious conduct by those officers. The court of appeals' cramped reading of the law enforcement proviso would, by contrast, leave many victims without any remedy at all, where Congress specified that the United States should be liable.

2. Because the Westfall Act will often bar suit against the individual officer, the FTCA may be the only remedy for a law enforcement officer's tort

Congress has, by statute, made the remedy against the United States under the FTCA the exclusive remedy in most cases for persons injured by a federal employee, and barred claims against the employees individually. Passed in 1988, the Westfall Act immunizes federal employees against personal liability for common law torts committed within the scope of their employment. The Westfall Act specifies that the remedy against the United States under the FTCA is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1).

In passing the Westfall Act, Congress reasoned that if there were no immunity from personal tort liability, the morale of the federal workforce would suffer, and federal agencies would be impeded in carrying out their missions. See 28 U.S.C. 2671 note. Thus, with the notable exception of claims for violation of the Constitution or of statutes that allow suits against individual employees, the Westfall Act provides that the United States shall be substituted as the defendant whenever the Attorney General certifies that the "employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1). If, however, "an exception to the FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995). See *United States* v. *Smith*, 499 U.S. 160, 166

(1991) (The Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability.").

As the law enforcement proviso recognizes, an officer's conduct in the course of his employment can give rise to claims of intentional tort. The situations in which claims for battery or assault might arise are not limited to the officer's execution of a search warrant, seizure of property, or making of an arrest. Indeed, prison officers provide a case in point. Their responsibilities place them in frequent physical contact with prisoners in situations in which the prisoner is particularly vulnerable and the officer's perception of the need for discipline and subservience may cause the officer to use excessive force. Under those circumstances, batteries would frequently satisfy the FTCA and Westfall Act's "scope of employment" requirement. Indeed, in this case, the government has conceded that the officers were acting within the scope of their employment at the time they allegedly raped petitioner, see U.S. Br. 10, 30, for purposes of "showing" him "what Lewisburg is about," J.A. 36.[4] Under the court of appeals' theory,

[4] For purposes of the FTCA, scope of employment is determined based on the law of the state where the conduct occurred. *Williams* v. *United States*, 350 U.S. 857 (1955) (per curiam). Many jurisdictions have held that even such egregious abuse as rape can be within the scope of employment, especially when the rape is carried out with the benefit of the "considerable power and authority that police officers possess." *Mary M.* v. *City of Los Angeles*, 814 P.2d 1341, 1350 (Cal. 1991). See, *e.g.*, *Red Elk* v. *United States*, 62 F.3d 1102, 1107-1108 (8th Cir. 1995) (holding tribal police officer's rape of thirteen-year old girl reasonably foreseeable "blatant violation of trust"); *Applewhite* v. *City of Baton Rouge*, 380

therefore, short of bringing a constitutional claim, the victim of a law enforcement officer's intentional tort would frequently be deprived of *any* remedy, either against the officer (by the Westfall Act) or against the United States (by Section 2680(h)).[5] That result is contrary to Congress's specific purpose to provide a remedy to such victims.

The opportunity for a prison officer, using the power and authority of the officer's position, to commit an assault or battery upon a prisoner is no less when that prisoner has been confined, as was the case here, than when the individual is first being taken into custody during an arrest. Indeed, the absolute control prison officers have over prisoners in locked prison facilities makes the opportunity for abuse even greater than when a law enforcement officer makes an arrest in public. The court of appeals' distinction thus lacks not only a textual basis, but also any policy justification.

So. 2d 119, 121 (La. Ct. App. 1979) (holding police officer was acting within scope of his authority when he was able to rape his victim "because of the force and authority of the position which he held"). As detailed below, see Part II, *infra*, rape of prisoners by prison staff is an all too common occurrence.

[5] Whereas a rape victim would presumably be able to bring a constitutional claim against the individual officer, which would not be barred by the Westfall Act, see 28 U.S.C. 2679(b)(2), lesser acts of battery might not reach the level of a constitutional violation or, if they did, might be subject to qualified immunity defenses.

II. ACCESS TO THE COURTS IS CRITICAL TO DETER SEXUAL ASSAULT OF INMATES BY PRISON OFFICERS, AN ACKNOWLEDGED NATIONAL PROBLEM ARISING FROM THE NEARLY ABSOLUTE POWER THAT PRISON OFFICERS WIELD

Nearly two decades ago this Court established in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), a case involving a transgender individual, that federal prison officials' deliberate indifference to the risk that an inmate will be raped violates the Eighth Amendment. The Court emphasized that, "[h]aving incarcerated" persons, "having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Id.* at 825. "Being violently assaulted in prison is simply 'not part of the penalty that criminal offenders pay for their offenses against society.'" *Ibid.* (quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981)).[6]

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[6] This case shares several links with *Farmer* that underscore the importance of affording petitioner his congressionally intended remedy under the FTCA to address the kind of brutal assault that continues to plague prisoners in federal custody. The prisoner in *Farmer* had been raped by another inmate at the U.S. Penitentiary in Terre Haute, Indiana, *Farmer*, 511 U.S. at 830, where petitioner alleges he too was sexually assaulted by a prison officer. J.A. 69-70. Notably, in *Farmer*, the then-warden of Lewisburg admitted that the transgender prisoner in *Farmer* would also be "unsafe" at his facility. *Farmer*, 511 U.S. at 848-849. Here, after being transferred to Lewisburg, petitioner requested protection from further assaults in light of his history and heightened risk of victimization, but was instead brutally raped by Lewisburg prison officers. Petitioner's experience suggests that deterring and responding to prison rape, including at these two penitentiaries, has remained an urgent government problem in the years since *Farmer*.

Despite *Farmer*'s spotlight on the government's tolerance of prison rape and ongoing violation of constitutional norms, sexual assaults of prisoners have continued at alarming rates. In 2009, the federally appointed National Prison Rape Elimination Commission reported that "[u]ntil recently, * * * the public viewed sexual abuse as an inevitable feature of confinement. Even as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff." Nat'l Prison Rape Elimination Comm'n, 108th Cong., *Report* 1 (2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf ("*Comm'n Report*").

The court of appeals' position, that Section 2680(h) of the FTCA preserves the government's immunity from tort liability when prison officers sexually assault inmates, strips vulnerable prisoners of a critical means to ensure that the government "is not free to let the state of nature take its course." The court of appeals' ruling frustrates the underlying purpose of the FTCA and should be rejected.

A. In The Prison Rape Elimination Act, Congress Acknowledged The Problem Of Prison Rape And The Government's Responsibility To Stop It

In 2003, Congress affirmed the government's responsibility to protect incarcerated persons from sexual assault, unanimously passing the Prison Rape Elimination Act, signed into law by President George W. Bush. PREA addressed entrenched institutional failures by

federal and state prison systems to prevent and respond to endemic sexual assaults against prisoners. According to Congress's findings in enacting PREA, "[m]embers of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates." 42 U.S.C. 15601(12).

Congress found that, by conservative estimates, at least 13% of inmates had been sexually assaulted in prison, and nearly 200,000 inmates incarcerated at that point "have been or will be the victims of prison rape." 42 U.S.C. 15601(2). Congress also found that "[m]ost prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults." 42 U.S.C. 15601(5). Moreover, victims "often receive inadequate treatment for the severe physical and psychological effects of sexual assault–if they receive treatment at all." 42 U.S.C. 15601(6).

PREA mandated a "zero-tolerance standard for the incidence of prison rape" in the United States. 42 U.S.C. 15602(1). It established the National Prison Rape Elimination Commission and a Review Panel on Prison Rape to investigate this national problem and recommend remedial standards, 42 U.S.C. 15603(b)(1), 15606(a); called for federal data collection, study, and reports on the epidemic of sexual assaults by both inmate and staff perpetrators in federal and state systems of confinement, 42 U.S.C. 15603-15604, 15606; and directed adoption of national standards, based on the PREA-mandated studies and findings, for the detection, prevention, reduction, and punishment of prison rape. 42 U.S.C. 15607. Congress further directed that, when issued, those standards would be immediately

binding on the federal Bureau of Prisons ("BOP"). 42 U.S.C. 15607(b).

The final PREA standards, issued by the Department of Justice ("DOJ") on May 12, 2012, include numerous provisions acknowledging and responding to the ongoing sexual victimization of inmates not only by other inmates but also by the very prison officers responsible for the inmates' safety. See, *e.g.*, 28 C.F.R. 115.6(2) (defining as "sexual abuse" a range of sexual acts committed by prison staff against inmates); 28 C.F.R. 115.15 (limiting cross-gender viewing and searches by prison staff); 28 C.F.R. 115.17 (prohibiting hiring prison staff with history of sexual abuse); 28 C.F.R. 115.51(a), 115.52(c), 115.67 (mandating mechanisms to report sexual abuse by staff and protect against retaliation); 28 C.F.R. 115.66 (prohibiting collective bargaining agreement restraints on ability of prisons, pending investigation, to remove staff alleged to have committed sexual abuse); 28 C.F.R. 115.76 (establishing disciplinary sanctions for staff committing sexual abuse).

B. Recent Studies Highlight The Enormity Of The Problem Of Sexual Abuse In Our Prisons

Government studies generated pursuant to PREA, as well as from other expert sources, demonstrate that the facts alleged in this case are far from unique to this petitioner. In fact, federal prisoners are sexually assaulted by prison staff in alarming numbers, with particularly vulnerable categories of prisoners especially targeted for sexual abuse. In prison environments, where the government exercises power over every aspect of inmates' lives, prison officers use sexual assault

and the threat of assault to control prisoners in their custody. Not surprisingly, prisoners face tremendous challenges in having their administrative reports of staff sexual assaults lead to conclusive findings and government sanctions against staff perpetrators. Access to the courts to bring civil tort suits against the government thus is critical to hold the government accountable for and deter endemic sexual victimization of prison inmates by correctional staff.

According to the DOJ Office of Inspector General ("OIG"), the BOP itself "has recognized that staff sexual abuse is a significant problem within its institutions," with a former BOP Director acknowledging that "sexual abuse of inmates was one of the most serious forms of misconduct by staff of BOP." Office of the Inspector Gen., U.S. Dep't of Justice, *Deterring Staff Sexual Abuse of Federal Inmates* 3 (2005), *available at* http://www.justice.gov/oig/special/0504/final.pdf ("*Deterring Staff Sexual Abuse*"). A 2009 OIG report found that from 2001 through 2008, allegations of staff sexual abuse were reported at 92 of the BOP's 93 prison sites. Evaluation and Inspections Div., U.S. Dep't of Justice, Office of the Inspector Gen., *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates* 19 (2009), *available at* http://www.justice.gov/oig/reports/plus/e0904.pdf ("*DOJ's Efforts*"). Allegations of criminal sexual abuse by prison staff more than doubled during this period, increasing "at a faster rate than either the growth in the prisoner population or the number of [BOP] staff." *Id.* at iv.

The Bureau of Justice Statistics ("BJS"), a division of DOJ, found that an estimated 1% of all inmates reported having been compelled by physical force or threats of force to engage in sexual activity with prison

staff. Bureau of Justice Statistics, U.S. Dep't of Justice, Office of Justice Programs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*, at 9 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf ("*BJS 2010*"). This rate of abuse translates into the horrific rape and assault of thousands of federal inmates by the officers who guard them. As of 2009, the BOP confined approximately 207,000 inmates, *DOJ's Efforts*, *supra*, at 5; thus, more than 2,000 federal prisoners in confinement at that point alone were sexually assaulted by prison staff using physical force or threats. Moreover, rates of sexual assault of prisoners by staff were as high as 10% at some facilities studied by the BJS, see *BJS 2010*, *supra*, at 9-10, suggesting that certain prison environments breed especially rampant staff sexual abuse of prisoners.

C. Certain Groups Of Inmates Are Particularly Vulnerable To Sexual Abuse, A Situation That Would Worsen If Court Access Were Curtailed

Federal studies confirm not only that staff sexual abuse of federal prisoners is a serious, widespread problem, but also that certain particularly vulnerable groups are at especially high risk of sexual victimization in prison. Limiting these victims' recourse to the courts for abuses by correctional staff leaves these inmate groups even more vulnerable to sexual assault within the prison system.

1. According to the National Prison Rape Elimination Commission, "[r]esearch on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations

(gay, lesbian, or bisexual) as well as individuals whose sex at birth and current gender identity do not correspond (transgender or intersex)." *Comm'n Report*, *supra*, at 73. Thus, for example, a BJS study found that "[i]nmates with a sexual orientation other than heterosexual reported significantly higher rates of * * * staff sexual misconduct," with 6.6% of lesbian, gay, and bisexual prison inmates but only 2.5% of heterosexual inmates reporting misconduct (including physically coerced and other forms of sexual misconduct). *BJS 2010*, *supra*, at 14. A recent BJS study of sexual victimization reported by state prisoners found that 8% of lesbian and bisexual female former inmates were sexually victimized by staff, more than double the rate for heterosexual females. Bureau of Justice Statistics, U.S. Dep't of Justice, Office of Justice Programs, *Sexual Victimization Reported by Former State Prisoners, 2008*, at 16 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf ("*BJS 2012*").

Negative attitudes held towards non-heterosexuals by prison officers no doubt fuel the special vulnerability of gay, lesbian, and bisexual prisoners to sexual abuse. As recently noted by the Review Panel on Prison Rape appointed under PREA, "[n]ational studies have found that a significant number of correctional officers believe that homosexual inmates should not be protected from rape or that if homosexual inmates are raped, they got what they deserved." Review Panel on Prison Rape, U.S. Dep't of Justice, *Report on Sexual Victimization in Prisons and Jails* 48 n.494 (G. J. Mazza ed., 2012), *available at* http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_2012.pdf ("*Review Panel*") (citing studies).

2. Transgender inmates are at particularly significant risk of sexual assault from other inmates or staff, as *Farmer* disturbingly illustrated. "Even when compared to other relatively vulnerable populations, transgender people are perilously situated." Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 Just. Q. 835, 858 (2010). For example, a 2007 study of California prisons found that transgender inmates were 13 times more likely to be sexually assaulted than non-transgender inmates, with a staggering 59% reporting sexual assaults. Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* 3 (2007), *available at* http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf.

3. Inmates who had already experienced sexual victimization before coming to the facility (as petitioner experienced at the Terre Haute facility prior to his arrival and rape at Lewisburg) are also far more likely than inmates without such a history to suffer sexual abuse. "A history of sexual victimization, either in the community or in the facility in which the person is incarcerated, tends to make people more vulnerable to subsequent sexual abuse." *Comm'n Report*, *supra*, at 8. Female inmates, in turn, are more likely than male inmates to have such histories of sexual abuse, with a 1999 BJS study finding that 23% of female inmates and 2% of male inmates in federal prisons reported having been sexually abused in the past. Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, Office of Justice Programs, *Prior Abuse Reported by Inmates and Probationers* 1 (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/parip.pdf.

These high rates of past sexual victimization in turn correlate with "increased risk of further exploitation" within prison. *Comm'n Report*, *supra*, at 71; see also, *e.g.*, *Peddle* v. *Sawyer*, 64 F. Supp. 2d 12 (D. Conn. 1999) (describing federal prison officer's repeated sexual abuse, abetted by other officers, of female prisoner with history of past abuse and ongoing vulnerability). "[I]t has become increasingly apparent that women in confinement face a substantial risk of sexual assault, most often by a small number of ruthless correctional staff who use terror, retaliation, and repeated victimization to coerce and intimidate confined women." Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 The Prison Rape Elimination Act of 2003*, 32 J. Legis. 142, 158 (2006).

4. According to BJS studies, an inmate's race also correlates with heightened risk of sexual abuse by prison staff. A BJS study found that prisoners identifying as two or more races (2.3%) or African-American (2.2%) are more likely than white prisoners (1.4%) to suffer sexual abuse by staff. *BJS 2010*, *supra*, at 18. A recent BJS study of former state inmates found an even greater correlation between prisoner race and staff sexual misconduct, with 11.3% of multi-racial and 6.5% of African-American inmates suffering staff sexual misconduct, compared to 4.5% of white inmates. *BJS 2012*, *supra*, at 16.

5. Younger prisoners are likewise at higher risk of sexual victimization by prison staff, with an estimated 4.7% of 18 and 19 year olds and 3.4% of 20 to 24 year olds targeted for abuse, as compared to 0.4% of inmates 55 or older. *BJS 2010*, *supra*, at 18.

D. Sexual Assault And The Threat Of Sexual Assault Are Improperly Used As Tools Of Control Over Inmates

Although staff sexual assault against a federal inmate constitutes a federal crime, 18 U.S.C. 2241-2244, and is not condoned under official prison policy, it is nonetheless commonly employed to exert dominance and abusive control over inmates. As the National Institute of Corrections has noted, "sexual assault is more of a power issue than a sexual issue." Nat'l Inst. of Corrs., U.S. Dep't of Justice, *Investigating Sexual Assaults in Correctional Facilities* 3 (2007), *available at* http://static.nicic.gov/Library/022444.pdf ("*Investigating Sexual Assaults*").

Indeed, the facts alleged in this case dramatically demonstrate that "rape in detention * * * perpetrated by staff * * * is a means to achieve power and control." Linda McFarlane & Melissa Rothstein, Cal. Coalition Against Sexual Assault, *Survivors Behind Bars: Supporting Survivors of Prison Rape and Sexual Assault* 5 (2010), *available at* http://calcasa.org/wp-content/uploads/2010/12/Survivors-Behind-Bars.pdf ("*Survivors Behind Bars*"). Petitioner alleges that his attackers accused him of being a "snitch" and "mouthing off to staff" and told him "[w]e are going to show you what Lewisburg is about." J.A. 32, 35, 72. "Showing" petitioner "what Lewisburg is about" entailed taking him to an area of the prison beyond range of video surveillance, placing him in a chokehold, raping him, and threatening to kill him if he reported the assault. J.A. 36.

As these allegations illustrate, correctional officers, like the perpetrators in this case, "use rape or the

threat of sexual violence to control inmates." Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 Prison J. 415, 416 (2000), *available at* http://www.wcl.american.edu/endsilence/documents/correctionalofficersperceptionshomosexuality.pdf ("*Correctional Officers and Their Perceptions*"). The "imbalance of power" between prison guards and inmates is "pivotal" in "enabling sexual misconduct" by staff. Brenda V. Smith & Jaime M. Yarussi, Nat'l Inst. of Corrs./Wash. Coll. of Law Project on Addressing Prison Rape, *Breaking the Code of Silence: Correctional Officers' Handbook on Identifying and Addressing Sexual Misconduct* 3 (2007), *available at* http://static.nicic.gov/Library/022473.pdf ("*Code of Silence*"); see also *Survivors Behind Bars*, *supra*, at 6 ("In women's prisons, a significant danger stems from the unchecked power of corrections staff.").

Staff sexual abuse of prisoners reflects a government-abetted prison culture that accepts sexual victimization of inmates. According to the National Prison Rape Elimination Commission, "[f]acilities in which administrators and management do not emphasize a zero-tolerance culture intrinsically tolerate some level of sexual abuse. An unclear or inconsistent policy sends mixed messages to staff * * * about the acceptability of sexual abuse in that setting." *Comm'n Report*, *supra*, at 54. Thus, for example, the federal Review Panel on Prison Rape has noted a correlation between a prison culture's tolerance of the use by correctional officers of verbal means to demean and harass inmates and a high incidence of staff-on-inmate sexual victimization. Review Panel, *supra*, at 24, 48. Prison officers' attitudes condoning the use of rape against troublesome or vul-

nerable prisoners further "contribute to a rape-prone culture." *Correctional Officers and Their Perceptions*, *supra*, at 416. Shockingly, almost half of surveyed Texas correctional officers "indicated that some inmates 'deserved' to be raped." *Id.* at 422.

E. The Government Has Inadequately Responded To Prisoners' Complaints Of Sexual Assault

The BOP has proven inadequate not only at eliminating conditions that foster staff sexual misconduct but also at investigating and redressing assaults once they have occurred. According to the OIG, "prison staff who sexually abuse inmates often do not believe they will be caught, and if they are caught do not believe they will be punished." *Deterring Staff Sexual Abuse*, *supra*, at 11-12. Many victims of staff sexual abuse do not report the crime out of fear that their attackers will retaliate with further violence and punitive measures, and that the prison system will leave them unprotected. See *Comm'n Report*, *supra*, at 11, 93-94, 101-106.

Inmates also fear that if they do report an assault, they will not be believed by prison officials, who will accept the account of a correctional officer over that of an inmate. See *Comm'n Report*, *supra*, at 102. As the National Prison Rape Elimination Commission found, "[e]ven when prisoners are willing to report abuse, their accounts are not necessarily taken seriously." *Ibid.*

Inmate and staff witnesses to staff sexual abuse are particularly reluctant to report the misconduct and cooperate in investigations. The "code of silence" prevailing in correctional settings dictates that prison staff and management ignore mistreatment of inmates and

refuse cooperation in investigations. Indeed, "[m]ost staff members would rather risk discipline than violate the code of silence within the correctional community; this silence protects wrongdoers." *Comm'n Report*, *supra*, at 102; see also *Investigating Sexual Assaults*, *supra*, at 3, 15. As the OIG found, prison staff may even "cover for correctional staff who commit sexual abuse by serving as alibis or lookouts," *Deterring Staff Sexual Abuse*, *supra*, at 12, just as the allegations in this case illustrate, J.A. 11, 71-72.

The challenges posed by investigating sexual abuse by staff lead to high rates of "unsubstantiated," *i.e.*, inconclusive, findings, *Comm'n Report*, *supra*, at 117—which was the result of the investigation into petitioner's administrative complaint. J.A. 102. Only 11% of the investigations of criminal sexual abuse completed by the BOP between 2001 and 2008 had conclusive outcomes, with the remaining 89% being deemed unsubstantiated. *DOJ's Efforts*, *supra*, at 60.

Significantly, as the National Prison Rape Elimination Commission has emphasized, "There is no reason to believe * * * that extremely low substantiation rates are attributable to a high number of false allegations." *Comm'n Report*, *supra*, at 118. Not only do staff perpetrators of sexual assault have tremendous inherent institutional advantages over inmates in the investigation process, but BOP investigative staff often lack adequate training, experience, and sensitivity to effectively investigate inmate reports of staff sexual abuse. *Id.* at 56-57; *Investigating Sexual Assaults*, *supra*, at 10, 15. A BOP Office of Internal Affairs review found that approximately one-third of staff sexual assault investigations by local BOP investigations were deficient. *DOJ's Efforts*, *supra*, at 57.

Troublingly, prosecutions of perpetrators of sexual abuse remain relatively infrequent. Over an eight year period, U.S. Attorneys accepted only 102 staff sexual abuse cases referred for prosecution by the OIG. *DOJ's Efforts*, *supra*, at 63-64. An OIG report found that many Assistant U.S. Attorneys "did not appreciate the significance of staff-on-inmate sexual abuse cases." *Id.* at 75. According to the National Prison Rape Elimination Commission, "some prosecutors do not view incarcerated individuals as members of the community and as deserving of their services as any other victim of crime." *Comm'n Report*, *supra*, at 120.

Ultimately, the sad reality is that many federal inmates sexually brutalized by correctional officers have found neither protection nor justice from the government. Sexually abusive prison staff simply "'get away with it.'" *Investigating Sexual Assaults*, *supra*, at 13. Systemic government failings have left inmates at risk of staff sexual assaults and perpetrators undeterred. As the National Prison Rape Elimination Commission has concluded, "[t]here has been too little accountability for too long." *Comm'n Report*, *supra*, at 13.

F. Access To The Courts For Victims Is Critical To Stem The Epidemic Of Prison Sexual Abuse

This Court recently noted the critical role played by the judiciary to address severe abuses of basic human rights by government prison systems. See *Brown v. Plata*, 131 S. Ct. 1910, 1928-1929 (2011). This is particularly true in the context of a prison culture that has done too little to deter and punish inmate rapes perpetrated by law enforcement officers. As the National Prison Rape Elimination Commission emphasized, "If

prisoners are sexually abused because the correctional facility failed to protect them, they have a right to seek justice in court." *Comm'n Report*, *supra*, at 92.

Access to the courts is essential not only to vindicate the right of an individual prisoner, like petitioner, to be free of sexual abuse, but also to spur the systemic change necessary to reform a culture in which prison rape has been too long tolerated as a means to control incarcerated individuals. Federal inmates like petitioner must have access to the courts to ensure that the BOP lives up to PREA's zero-tolerance standard for prison rape and the newly-adopted regulations promulgated under it. In the words of the National Prison Rape Elimination Commission, "court orders have had an enormous impact on the Nation's jails and prisons * * *. Beyond the reforms courts usher in, their scrutiny of abuses elicits attention from the public and reaction from lawmakers in a way that almost no other form of oversight can accomplish." *Comm'n Report*, *supra*, at 91.

The unanimous Congress that passed PREA in 2003 recognized that longstanding toleration of sexual assaults of prisoners both by other inmates and by prison staff has made this abuse a horrifically commonplace feature of incarceration. As the studies generated under PREA make clear, the days are over when prisoner allegations of rape by correctional officers can be disregarded as mere fabrications or a matter of no concern to the government that confines these inmates. Prisoner tort claims against the government for brutal sexual assaults by federal correctional employees cannot be dismissed wholesale as frivolous litigation to be barred at the courthouse door as a matter of sovereign immunity. As it is, the Prison Litigation Reform Act of 1995

("PLRA"), 42 U.S.C. 1997e *et seq.*, specifically enacted to "reduce the quantity and improve the quality of prisoner suits," *Porter* v. *Nussle*, 534 U.S. 516, 524-525 (2002), is a powerful check on unfounded prisoner sexual abuse claims. See, *e.g.*, *Comm'n Report*, *supra*, at 93 (PLRA hurdles "can block access to the courts for many victims of sexual abuse."). Interpreting Section 2680(h) contrary to its plain terms to foreclose tort claims for sexual assault against the U.S. government would cut off an important avenue of redress for well-founded claims of sexual abuse.

As Congress recognized in enacting PREA, the government bears responsibility for stemming staff sexual abuse of incarcerated individuals. Notably, the government itself acknowledges in this case that, under the terms of Section 2680(h) of the FTCA, the government has waived sovereign immunity from suits by federal inmates whose prison guards have raped them. Having "stripped" inmates "of self-protection and foreclosed their access to outside aid," *Farmer*, 511 U.S. at 825, the government should not be deemed immune from responsibility for sexual assaults by correctional officers wielding overwhelming power and control over all aspects of inmates' lives behind bars. Access to the courts to bring tort claims against the U.S. government is essential to vindicate the right of federal inmates to be safe from rape by their jailers.

CONCLUSION

The judgment of the court of appeals should be vacated and remanded.

Respectfully submitted,

SUSAN L. SOMMER
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
JULIAN HELISEK
ROPES & GRAY LLP

DECEMBER 2012

APPENDIX

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of people who are lesbian, gay, bisexual, or transgender ("LGBT") and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has appeared in numerous cases in this Court addressing the legal rights of LGBT and HIV-affected individuals, and advocates against the epidemic of sexual violence in detention settings targeting those who are LGBT.

Just Detention International ("JDI") is a human rights organization dedicated to putting an end to sexual violence in all forms of detention. JDI has three core goals for its work: (1) to ensure government accountability for prisoner rape; (2) to transform public attitudes about sexual violence in detention; and (3) to promote access to resources for those who have survived this form of abuse. The organization provides expertise to lawmakers, officials, counselors, advocates, and reporters on issues pertaining to inmate safety and the obligations of corrections officials to prevent and respond to sexual abuse.

National Center for Transgender Equality ("NCTE") is a national social justice organization devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. Since 2003, NCTE has been engaged in educating legislators, policymakers, and the public, and advocating for laws and policies that pro-

mote the health, safety, and equality of transgender people. NCTE provides informational referrals and other resources to thousands of transgender people every year, including many individuals in prisons, jails, and civil detention settings, and has been extensively involved in efforts to implement the Prison Rape Elimination Act and other efforts to address the vulnerability of transgender people in confinement settings.

Transgender Legal Defense & Education Fund ("TLDEF") is committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services, community organizing, and public policy efforts. Transgender people are among society's most vulnerable groups, and nowhere is this more true than in the prison system. Studies have found that transgender people face extraordinarily high levels of discrimination and violence in prison, including at the hands of prison employees. Transgender people are therefore very concerned about their ability to hold prisons responsible for intentional torts committed against them.

Women's Prison Association ("WPA"), an advocacy and service organization committed to helping women with criminal justice histories, advocates on behalf of incarcerated women, including those who have been sexually abused. Through its Institute on Women & Criminal Justice, the WPA pursues a rigorous policy, advocacy, and research agenda and seeks to assure that women's voices are included in public debates on women and criminal justice systems.