No. 24-362

IN THE

Supreme Court of the United States

CURTRINA MARTIN, INDIVIDUALLY
AND AS PARENT AND NEXT FRIEND OF
G. W., A MINOR, *et al.*,

Petitioners,

v.

UNITED STATES, *et al.*,

Respondents.

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

BRIEF OF PUBLIC ACCOUNTABILITY, THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF D.C., AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Public Accountability is a nonpartisan, nonprofit organization that promotes access to civil justice for people harmed by the government. As part of its mission, Public Accountability has developed deep expertise in immunity doctrines and related gatekeeping mechanisms for civil-rights claims. Public Accountability uses its expertise to help individuals, to inform lawmakers, to educate the public, and—through briefs like this one—to advise the courts. Because this petition raises the specter of importing qualified immunity into the Federal Tort Claims Act, Public Accountability offers a perspective that will help inform the Court's decision.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit organization that has sought to defend and advance civil liberties in the United States since 1920. The ACLU of the District of Columbia is the ACLU's Washington, D.C. affiliate. The ACLU of Georgia is the ACLU's Georgia affiliate. The ACLU frequently appears in this Court, as counsel for parties and as amicus curiae, in cases concerning individuals' access to accountability for violations of their rights and liberties through the federal courts, including in Federal Tort Claims Act cases. *See, e.g.*, *Brownback v. King*, 592 U.S. 209

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici, its members, or its counsel contributed money intended to fund the preparation or submission of the brief.

(2021) (amicus); *Simmons v. Himmelreich*, 578 U.S. 621 (2016) (amicus).

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

INTRODUCTION AND SUMMARY OF ARGUMENT

Curtrina Martin and her partner were injured and terrorized during a violent pre-dawn FBI raid on their house, all because the FBI agents went to the wrong address. Fifty years ago, in response to similar wrong-house raids, Congress enacted the law-enforcement proviso in the Federal Tort Claims Act ("FTCA"). That provision specifically ensures that Petitioners have a remedy under the FTCA for the harm the government inflicted on them.

1. The law-enforcement proviso embraces claims like Petitioners' and brings them within the FTCA's waiver of sovereign immunity. Petitioners brought claims for assault, battery, false imprisonment, and false arrest. The law-enforcement proviso says that "the provisions of this chapter and section 1346(b) of this title"—that is, the FTCA's waiver of sovereign immunity—"shall apply" when law-enforcement officers commit assault, battery, false imprisonment, false arrest, and other intentional torts. 28 U.S.C. § 2680(h). It means what it says: The FTCA's waiver of sovereign immunity applies to Petitioners' claims.

2. The government argues that Petitioners' claims cannot proceed because they are blocked by the FTCA's discretionary-function exception, which excludes claims arising from a "discretionary function or duty" of a federal employee. 28 U.S.C. § 2680(a). This argument fails because the law-enforcement proviso, which by its plain terms effectuates a waiver of sovereign immunity, is both more specific and more recently enacted than the discretionary-function

exception. Thus, under traditional tools of statutory construction, if the discretionary-function exception bars a claim but the law-enforcement proviso authorizes it, the law-enforcement proviso prevails.

3. In any event, the discretionary-function exception cannot bar Petitioners' claims because that provision does not and cannot apply to unconstitutional conduct. The great weight of authority, including decisions of this Court, hold that the government has no discretion to violate the Constitution. So, when the government violates constitutional rights, there is no discretion to protect, and the FTCA's waiver of sovereign immunity controls.

The government suggests that the FTCA "incorporates" qualified immunity, even though the FTCA's function is to *waive* immunity. The government offers no authority for that proposition, and the FTCA's text, structure, and history, as well as the precedents construing it, all refute the government's view. Qualified immunity is a judge-made doctrine created in the context of suits against state and local officials under 42 U.S.C. § 1983. It has been widely criticized by jurists and scholars across the jurisprudential spectrum for vitiating § 1983's text, eroding constitutional rights, and denying individuals the relief Congress enacted. The Court should decline to import this hornets' nest into the FTCA.

ARGUMENT

The FTCA's text, structure, and purpose, and the precedents interpreting it, show that Congress has waived sovereign immunity for and authorized claims like Petitioners'.

I. THE FTCA WAIVES SOVEREIGN IMMUNITY FOR LAW-ENFORCEMENT TORTS.

The FTCA's core operative provision is its waiver of sovereign immunity. Under 28 U.S.C. § 1346(b), federal courts have jurisdiction over tort claims against the federal government when federal employees commit acts that would be tortious under state law. A parallel provision, 28 U.S.C. § 2674, makes the government liable for such claims.

The FTCA also includes thirteen express exceptions to the sovereign-immunity waiver. 28 U.S.C. § 2680(a)–(n). Two are relevant here: the discretionary-function exception, § 2680(a), which reinstates immunity for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty," and the intentional-tort exception, § 2680(h), which reinstates 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."

In 1974, Congress amended the FTCA in response to a spree of "abusive, illegal and unconstitutional 'no-knock' raids," the "most notorious" of which were two

wrong-house raids just like the one Petitioners experienced. S. Rep. No. 93-588, at 2 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2790. To address these raids, Congress inserted the following text, commonly known as the "law-enforcement proviso," into § 2680(h):

> *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

An Act to Amend Reorganization Plan of 1973, Pub. L. No. 93-253, 88 Stat. 50 (1974) (codified as amended at 28 U.S.C. § 2680(h)).

This case raises a question about the scope of this proviso: Does it merely negate the intentional-tort exception for law-enforcement torts, or does it affirmatively restore the FTCA's default waiver of sovereign immunity for such torts? Three aspects of the text compel the latter conclusion. First, the proviso states that "the provisions of this chapter and section 1346(b) of this title shall apply" to law-enforcement torts, thus expressly applying the FTCA's waiver of sovereign immunity to those torts. Second, the same text also mirrors and negates the language at the top of § 2680 that introduces the exceptions: Where § 2680 states that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to [the enumerated exceptions]," the proviso responds that they "shall

apply" to the enumerated torts when committed by law-enforcement officers. And third, despite its textual location within the intentional-tort exception, the proviso does *not* carve law-enforcement torts out of that exception. Rather than state that "the provisions of *this subsection* shall *not* apply" to such torts, it states that "the provisions of *this chapter and section 1346(b)* of this title"—that is, the FTCA's sovereign immunity waiver—"*shall* apply" (emphasis added). 28 U.S.C. § 2680(h).

In short, the proviso means what it says: When a plaintiff brings claims against the United States arising from a law-enforcement officer's covered intentional torts, the FTCA's waiver of sovereign applies. Petitioners brought claims for assault, battery, false imprisonment, and false arrest. All four torts are covered by the law-enforcement proviso. Thus, under the proviso's plain text, the FTCA's waiver of sovereign immunity "shall apply." 28 U.S.C. § 2680(h).

II. THE DISCRETIONARY - FUNCTION EXCEPTION IS CATEGORICALLY INAPPLICABLE TO LAW-ENFORCEMENT TORTS.

Despite the law-enforcement proviso's plain text, the government argues that carrying out a raid is a discretionary function and that Petitioners' claims are thus precluded under the discretionary-function exception. The government is mistaken. Claims falling within the law-enforcement proviso of the FTCA are not subject to the discretionary-function exception, as two canons of construction make clear.

Under the general/specific canon, courts read specific provisions as exceptions to more general ones, especially when the two are closely positioned and interrelated. And under the later-in-time canon, a later-enacted provision overcomes an earlier provision. Here, the law-enforcement proviso prevails under both canons: It is both more specific, relating to six specific torts committed by one specific type of officer, and more recent, enacted nearly thirty years after the discretionary-function exception. Both canons show that Congress placed claims covered by the law-enforcement proviso outside the bounds of the discretionary-function exception.

The conflict (if there is one) between the law-enforcement proviso and the discretionary-function exception arises out of what the Eleventh Circuit called "the war between the 'anys'" in the two sections. *Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009). While § 2680(a) reaches "[a]ny" claim based on the performance of a discretionary function, § 2680(h) covers "any" claim arising from the law-enforcement torts it enumerates. 28 U.S.C. § 2680(a), (h). If a law-enforcement tort can also arise out of the performance of a discretionary function, one of the "anys" must yield. Amici agree with Petitioners that day-to-day law-enforcement rarely if ever involves "discretionary" acts because such acts, properly construed, must have a "direct connection" to a "regulatory or policy goal." Pet'rs' Br. 24–28. But if the Court construes "discretionary" more broadly than that, then when the two provisions conflict, the law-enforcement proviso prevails under traditional tools of statutory construction.

Start with the general/specific canon: Courts read specific provisions as exceptions to more general rules. "[I]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992)); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 183 (2012) ("[T]he specific provision is treated as an exception to the general rule."). The Court has repeatedly affirmed that the "[g]eneral language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment," even when the general provision is "broad enough to include" the more specific matter. *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932); *see also, e.g.*, *NLRB. v. SW Gen., Inc.*, 580 U.S. 288, 304–05 (2017) (holding that "[t]he general prohibition on acting service by nominees [in 5 U.S.C. § 3345(b)(1)] yields to the more specific authorization [in subsection (c)(1)] allowing officers up for reappointment to remain at their posts."); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (applying similar analysis to two regulations under the Fair Labor Standards Act).

Applying that canon here, the more specific law-enforcement proviso governs Petitioners' claims. The discretionary-function exception casts a broad net, excluding from the FTCA's waiver of sovereign immunity all claims based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. § 2680(a). It applies regardless of the kind of officer or the

generality of the act. *United States v. Gaubert*, 499 U.S. 315, 325 (1991). The law-enforcement proviso, by contrast, governs just six types of claims—assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution—and it subjects only "investigative or law-enforcement officers," and no other federal employees, to these enumerated tort claims. 28 U.S.C. § 2680(h). By amending the FTCA to re-waive sovereign immunity for specific intentional torts committed by specific federal officers, Congress made clear that it intended the FTCA to be available to individuals harmed by such torts.

Another settled canon teaches that in a contest between two conflicting statutes, the later-enacted one prevails. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 519 (2019); *United States v. Est. of Romani*, 523 U.S. 517, 532 (1998).

The Court's decision in *HCSC-Laundry v. United States*, 450 U.S. 1 (1981) (per curiam), shows how the later-in-time canon and the general/specific canon converge to dictate the result when reconciling two subsections of the same statute, one later-enacted and more specific than the other. There, the Court compared the general tax exemption for nonprofits in 26 U.S.C. § 501(c)(3) and the later-enacted, more specific exemption for cooperative hospital services organizations in § 501(e). *HCSC-Laundry*, 450 U.S. at 6. Applying the canon that a specific statute "controls over a general provision . . . particularly when the two are interrelated and closely positioned"—and especially when the more specific provision was enacted after the general one—the Court held that a laundry service shared by local hospitals was

governed by the more specific and younger § 501(e). 450 U.S. at 6–8.

So, too, here. Congress adopted the discretionary-function exception when it passed the FTCA in 1946; it amended the FTCA to add the law-enforcement proviso nearly 30 years later. When it did, it used language that was more specific than the general exception for discretionary functions. And the law-enforcement proviso is "interrelated and closely positioned" with the earlier-enacted and more general discretionary-function exception. *Cf. HCSC-Laundry*, 450 U.S. at 6. All these traditional tools of statutory construction point to the same conclusion: In enacting the law-enforcement proviso, Congress made clear its intent to waive sovereign immunity for intentional torts committed by federal law enforcement officers—just like Petitioners' claims.

Still, the government argues that the law-enforcement proviso affects only the intentional-tort exception, which immediately precedes it. Resp'ts' Opp'n Br. 15 (citing *United States v. Morrow*, 266 U.S. 531, 535 (1925), and Scalia & Garner, *supra*, at 154). It's true that Congress located the law-enforcement proviso in the same statutory subsection as the intentional-tort exception. 28 U.S.C. § 2680(h). But "a proviso is not always limited in its effect to the part of the enactment with which it is immediately associated." *McDonald v. United States*, 279 U.S. 12, 21 (1929) (citing *United States v. Babbit*, 66 U.S. (1 Black) 55 (1861); *Springer v. Gov't of Philippine Islands*, 277 U. S. 189, 207 (1928)). In fact, a proviso can just as easily modify something "several clauses earlier" or even "state a general, independent rule."

Scalia & Garner, *supra*, at 154; *Alaska v. United States*, 545 U.S. 75, 106 (2005).[2]

And more important, the law-enforcement proviso is not an appendage that qualifies some previous clause or clauses; by its plain terms, it affirmatively states an independent rule: When federal law enforcement officers commit covered intentional torts, the FTCA's waiver of sovereign immunity "shall apply." 28 U.S.C. § 2680(h). Nothing in the proviso's text suggests any intent to circumscribe that general, independent rule. *See* Part I, *supra*.

Finally, the government resorts to the general presumption against waivers of sovereign immunity. Resp'ts' Opp'n Br. 15. But this Court has repeatedly instructed that the presumption is "unhelpful" in construing the exceptions to the FTCA. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491–92 (2006) (quoting *Kosak v. United States*, 465 U.S. 843, 853 n.9 (1984)). The FTCA's "central purpose" is to waive sovereign immunity, the Court has explained, so its exceptions should not be expanded "by refinement of construction." *Id.*; *Block v. Neal,* 460 U.S. 289, 298 (1983) (quoting *Anderson v. Hayes Constr. Co.,* 243 N.Y. 140, 147 (1926) (Cardozo, J.)). In fact, given the "sweeping language" of the FTCA, it is the *exceptions*—not the waiver—that must be "narrowly construed." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33–34 (1992) (quotation marks omitted). That is

[2] As a result, this Court rarely applies the presumption about provisos the government asserts here, and it more often mentions it only to explain that it does not apply. *See, e.g.*, *Alaska*, 545 U.S. at 106; *Republic of Iraq v. Beaty*, 556 U.S. 848, 858 (2009) (same).

the rule that governs here, and it supports Petitioners' and amici's reading of the statute.

Consider one last canon: Statutory text must be construed "in light of the context from which the statute arose." *Bond v. United States*, 572 U.S. 844, 845 (2014); *see also CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 298 (2011) (Thomas, J., dissenting) (construing provision to give it "a reach consistent with the problem the statute addressed."). Here, Congress enacted the law enforcement proviso to ensure that "innocent individuals who are subjected to [wrong-house] raids will have a cause of action." *Carlson v. Green*, 446 U.S. 14, 120 (1980) (quoting S. Rep. No. 93-588, at 3 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791). In other words, not only is the law-enforcement proviso more specific and later in time than the discretionary-function exception, but also it is tailor-made to address the problem in this case. So, it governs Petitioners' claims and waives the federal government's sovereign immunity for them.

III. EVEN IF THE DISCRETIONARY-FUNCTION EXCEPTION APPLIES TO LAW-ENFORCEMENT TORTS, IT DOES NOT SHIELD UNCONSTITUTIONAL CONDUCT OR IMPORT QUALIFIED IMMUNITY INTO THE FTCA.

Even if the discretionary-function exception might apply to law-enforcement torts, the exception does not shield conduct that violates the Constitution, because the government has no discretion to violate the Constitution. Nor, contrary to the government's argument, does the discretionary-function exception

somehow codify qualified immunity by shielding violations of rights that are not "clearly established." The text of the FTCA offers no basis for qualified immunity. The policy rationales for qualified immunity have no purchase here. And qualified immunity's perverse outcomes weigh heavily against importing it from the § 1983 context to the FTCA. The Court should reaffirm that whatever policymaking latitude the FTCA may offer, it does not offer discretion to violate the Constitution.

A. The federal government has no discretion to violate constitutional rights.

Start with an uncontroversial proposition: The discretionary-function exception does not shield the government from suit when it violates federal law. For the exception to apply, the challenged act or omission must "involve[] an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). There is no room for judgment or choice if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz*, 486 U.S. at 536. Thus, when an officer violates a federal statute or regulation, "there is no discretion in the conduct for the discretionary-function exception to protect." *Id.*; *accord Gaubert*, 499 U.S. at 324 (violation of a mandatory regulation falls outside the discretionary-function exception).

A fortiori, there is no discretion for the discretionary-function exception to protect when

government conduct violates the Constitution. As this Court has held in the context of municipal liability under § 1983, the government "has no 'discretion' to violate the Federal Constitution." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). In the context of prospective relief, too, the Court has explained that "[a]n injunction to prevent [an officer] from doing that which he has no legal right to do is not an interference with [his] discretion." *Ex parte Young*, 209 U.S. 123, 159 (1908). And likewise at common law, an officer generally exceeded the bounds of lawful discretion by violating the Constitution and lost the defense of acting in an official capacity. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506–07 (1987).

So too under the FTCA. To hold otherwise would mean that the FTCA permits tort claims against the government for conduct that violates statutory or regulatory requirements while immunizing conduct that violates the Constitution. *Cf. Gaubert*, 499 U.S. at 324. Put differently, it would mean that the FTCA puts constitutional prescriptions on lesser footing than statutory or regulatory ones. As the D.C. Circuit has observed, that would be "illogical." *Loumiet v. United States*, 828 F.3d 935, 944–45 (D.C. Cir. 2016). And nothing in the text of the FTCA compels or even suggests such a result.

That is why nearly every circuit to consider the issue has held that the discretionary-function exception does not shield unconstitutional conduct from the FTCA's waiver of sovereign immunity. *See Loumiet*, 828 F.3d at 943; *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009); *Myers & Myers, Inc.*

v. USPS, 527 F.2d 1252, 1261 (2d Cir. 1975); *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987);[3] *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nieves Martinez v. United States*, 997 F.3d 867, 877 (9th Cir. 2021). This consensus is not only broad but longstanding. *Xi v. Haugen*, 68 F.4th 824, 839 (3d Cir. 2023) ("[O]ver thirty years of binding circuit precedent holds that the discretionary exception does not apply to conduct that violates the Constitution[.]"); *Myers & Myers*, 527 F.2d at 1261 (so holding in 1975, one year after the addition of the law-enforcement proviso to the FTCA).[4]

The main holdout is the Seventh Circuit, and its rationale doesn't bear scrutiny. In that court's view, whether an officer has discretion to violate the Constitution is irrelevant because the FTCA "applies to [state-law] torts," not constitutional violations. *Linder v. United States*, 937 F.3d 1087, 1090 (7th Cir. 2019); *see also Shivers v. United States*, 1 F.4th 924, 932–33 (11th Cir. 2021).[5] But no one suggests that a

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[3] The Fifth Circuit has since suggested that the question is open, *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010), but it did not cite, and thus appears to have overlooked, its prior decision in *Sutton*.

[4] The Sixth and Tenth Circuits have avoided the issue. *See Mynatt v. United States*, 45 F.4th 889, 897 (6th Cir. 2022) (noting but not weighing in on the circuit split); *Martinez v. United States*, 822 F. App'x 671, 676 n.3 (10th Cir. 2020) (same).

[5] The Eleventh Circuit used to agree that the government lacks discretion to violate constitutional rights. *See Denson v. United*

constitutional violation is *itself* actionable under the FTCA. Liability under the FTCA is undoubtedly measured by state law. 28 U.S.C. § 2674. The presence of a constitutional violation goes, instead, to immunity: If the government's tortious act violated the Constitution, it was by definition acting beyond the scope of any discretion, and thus the tort comes within the FTCA's general waiver of sovereign immunity. Even so, however, the plaintiff must still prove that the government violated his rights under state tort law. 28 U.S.C. § 2674; *see, e.g.*, *Loumiet*, 828 F.3d at 945–46. So, under the majority view, the FTCA still "applies to [state-law] torts." *Cf. Linder*, 937 F.3d at 1090.

In sum, both this Court and the majority of circuits have held, consistent with common sense, that whatever discretion the government may have, it does not have discretion to violate the Constitution. So the discretionary-function exception's force ends where the Constitution's prohibitions begin. It does not shield tortious actions in violation of the Constitution. The government violated Petitioners' Fourth Amendment rights here, so it must face liability under the FTCA.

States, 574 F.3d 1318, 1337 & n.55 (11th Cir. 2009). That court subsequently reversed course in an opinion notable chiefly for its misunderstanding of the basic structure and operation of the FTCA; the court retreated from its prior position in part because it thought the majority rule too complex for a jury, *see Shivers*, 1 F.4th at 934—overlooking that FTCA cases are tried to judges, not juries. *See* 28 U.S.C. § 2402; *Carlson*, 446 U.S. at 22.

B. The government's bid to import qualified immunity into the FTCA is at odds with the FTCA's text, structure, and purpose, and this Court's precedents.

Against this weight of authority, the government asserts discretion even to disobey the Constitution. It argues that it is entitled to sovereign immunity unless the constitutional right it violates was "clearly established." Resp'ts' Opp'n Br. 13, 17–18. In other words, the government argues that the FTCA "incorporate[s]" qualified immunity. *Id.* at 17–18. But the government offers no authority for that proposition, and it contradicts the FTCA's text, structure, and history, as well as precedents construing it.

Text. The FTCA's liability provision makes the United States liable for its employees' torts "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Its waiver of sovereign immunity similarly ties jurisdiction to whether a "private person" would be liable for similar conduct, 28 U.S.C. § 1346(b), and private persons do not generally enjoy qualified immunity. *See Wyatt v. Cole*, 504 U.S. 158, 168 (1992). And the law enforcement proviso applies that waiver, without qualification, "to *any claim* arising . . . out of [a law-enforcement officer's] assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h) (emphasis added); *see generally Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 227–28 (2008) (explaining that "any" is naturally read expansively).

In light of this express waiver of sovereign immunity, the government's effort to read a qualified immunity defense into the text of the discretionary-function exception must fail. Whatever interpretive difficulties the exception may present elsewhere, *cf. Xi*, 68 F.4th at 842–43 (Bibas, J., concurring) (listing the several circuit splits), it nowhere suggests the government's rule here—that the government has discretion to violate constitutional rights as long as they're not "clearly established." Nor is there any textual reason to think Congress intended, when it enacted the FTCA in 1946, to incorporate modern qualified immunity doctrine into the discretionary-function exception decades before this Court first enunciated the "clearly established" standard. *Cf. Wood v. Strickland*, 420 U.S. 308, 322 (1975) (debuting the "clearly established" standard). "Discretion" as this Court has explained, suggests "choice or judgment" from a "range of *permissible* courses." *Gaubert*, 499 U.S. at 325 (emphasis added). Violating the Constitution's commands is, by definition, *im*permissible—and thus outside the government's discretion. *Owen*, 445 U.S. at 649; *Xi*, 68 F.4th at 838 ("[G]overnment officials never have discretion to violate the Constitution[.]").

Structure. The centerpiece of the FTCA is its waiver of sovereign immunity. *Kosak*, 465 U.S. at 853 n.9; *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955). Accordingly, this Court has rightly rejected attempts to "import immunity back into [it]." *Indian Towing*, 350 U.S. at 69.

What's more, to prevent abuse and limit the government's exposure, the Act was "drawn with

numerous substantive limitations and safeguards," including the discretionary-function and intentional-tort exceptions at issue here. *See Indian Towing*, 350 U.S. at 68; 28 U.S.C. § 2680. That Congress created such detailed exceptions to the waiver shows that it did not intend other, unlisted ones. Courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005). That reluctance is even greater "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Id.* Congress's enactment of thirteen express exceptions precludes the judicial insertion of additional, implicit exceptions.

Purpose. Reading qualified immunity into the FTCA also conflicts with the FTCA's purpose. The enactment of the FTCA "mark[ed] the culmination of a long effort" to "compensate the victims of negligence in the conduct of governmental activities." *Feres v. United States*, 340 U.S. 135, 139 (1950); *Indian Towing*, 350 U.S. at 68. Accordingly, the Court has cautioned that courts must not afford its exceptions "unduly generous interpretations," lest the "central purpose of the statute"—"to mitigate unjust consequences of sovereign immunity from suit"—be defeated. *Kosak*, 465 U.S. at 853 n.9; *Feres*, 340 U.S. at 139.

Decades later, Congress enacted the law-enforcement proviso in response to—and to provide relief for—wrong-house raids just like the one that took place here. *See generally* John C. Boger *et al.*, *The Federal Tort Claims Act Intentional Torts*

Amendment, 54 N.C. L. Rev. 497, 499–517 (1976). During enactment, the Senate committee that reported on the legislation wrote that although "individual government defendants" may assert the defense of "good faith and reasonable belief"—which is what qualified immunity was called at the time, *cf. Pierson v. Ray*, 386 U.S. 547, 555 (1967)—"[i]t is not the intention of this amendment to allow" such defenses "to be asserted [by] the government." *Sutton*, 819 F.2d at 1296 (quoting Senate Comm. on Gov't Operations, *Memorandum on No-Knock Legislation* 5 (Aug. 28, 1973)) (some alterations in original). That is, Congress considered and rejected the notion of allowing qualified immunity in the FTCA.

In short, reading qualified immunity into the FTCA, in a case under the law-enforcement proviso, is at odds with Congress's specific purpose of providing a remedy for injuries inflicted by federal law-enforcement agents—including, specifically, in wrong-house raid cases.

Precedent. In the analogous context of municipal liability, this Court has held that the government has no discretion to violate constitutional rights. *Owen*, 445 U.S. at 649. Because municipal discretionary immunity and the FTCA's discretionary-function exception are so closely related, this Court's reasoning in *Owen* applies equally here.

Municipalities enjoy immunity under the common law for their discretionary activities. *Id.* at 644. Like the discretionary-function exception, this form of municipal immunity shields acts that involve "some measure of discretion" from judicial scrutiny,

especially when they have a "public or legislative character." *Id.* at 648 (quotation marks omitted). Like the discretionary-function exception, municipal immunity is born of a "concern for the separation of powers" and a desire to "ensure against any [judicial] invasion into the legitimate sphere of [governmental] policymaking processes." *Id.* at 648–50; *cf. United States v. Varig Airlines*, 467 U.S. 797, 814 (1984) (explaining the discretionary-function exception's rationale in similar terms). And naturally, given the other similarities, municipal immunity presents the same line-drawing problems as the discretionary-function exception. *Owen*, 445 U.S. at 648 n.31.

But when it comes to constitutional violations, the Court laid down a bright line: The government "has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Id.* at 649. A court passing judgment on whether the government has overstepped its discretion isn't "second-guess[ing] the 'reasonableness' of the [government's] decision" or its "resolution of competing policy considerations." *Id.* It's answering a question uniquely reserved for judicial inquiry: Whether the government "has conformed to the requirements of the Federal Constitution and statutes." *Id.* at 649–50.

Just so here. The federal government has no more discretion to violate the federal Constitution than municipalities do. So, when the government crosses a constitutional line, "there is no discretion . . . for the discretionary-function exception to protect." *See Berkovitz*, 486 U.S. at 536. *Owen*'s rationale, faithfully applied, precludes importing qualified immunity into the discretionary-function exception.

Given *Owen*'s clear command, every court of appeals to have confronted the government's argument has—unsurprisingly—rejected it. In 2016, the D.C. Circuit surveyed the field and "found no precedent in any circuit holding as the government urges." *Loumiet*, 828 F.3d at 946. It declined to become the first. *Id.* In 2023, the First Circuit still could find no authority in any circuit for the government's argument and thus it too rejected it. *Torres-Estrada v. Cases*, 88 F.4th 14, 22 (1st Cir. 2023). So did the Third Circuit, reasoning that injecting the "clearly established" requirement into the FTCA would be "unmoored from both precedent and purpose." *Xi*, 68 F.4th at 839. Put simply, the reason the government cites no authority for its proposal is that there is none.

C. The FTCA is incompatible with the policies behind qualified immunity.

Qualified immunity was initially rationalized as an application of the canon that statutes in derogation of the common law should be strictly construed. "[W]e presume," the Court explained, "that Congress would have specifically so provided had it wished to abolish [common-law immunities]." *Pierson*, 386 U.S. at 555. "Almost immediately," however, "the Court abandoned this approach." *Baxter v. Bracey*, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting from denial of certiorari). Today, it is widely acknowledged that the Court's "policy preferences" are what drive the doctrine's continuing vitality. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J.) (quotation marks omitted).

In particular, the doctrine is animated by the Court's concern for the "policeman's lot." *Pierson*, 386 U.S. at 555. It would be unfair, the Court has posited, to subject an officer to the threat of being "mulcted in damages" for acting in a manner that he "reasonably believed" to be constitutional. *Id.* And relatedly, the Court has worried that the risk of damages liability might "dampen the ardor" of public officials or even dissuade people from public service entirely. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

These concerns do not apply in the FTCA context, as FTCA actions lie against the government, not individual officers. 28 U.S.C. § 2674. Individual officers in fact have absolute immunity from tort claims. *Id.* § 2679(b). If they are sued in their individual capacity, they are entitled to have the United States "substituted as the party defendant." *Id.* § 2679(d).

When the "threat of personal liability is removed," so too is the "justification[] for immunizing officials from personal liability." *Owen*, 445 U.S. at 653 n.37, 656. An official's decision-making is unlikely to be chilled when the damages award "comes not from the official's pocket, but from the public treasury." *Id.* at 653 n.37, 654. And given the official's personal immunity, the fairness concerns run the other way—"it is the public at large which enjoys the benefits of the government's activities," and thus it is "fairer" to allocate any resulting loss to "the inevitable costs of government borne by all the taxpayers." *Id.* at 655. Thus, the policy justifications for qualified immunity, which are about individuals, cannot support

importing it into the FTCA, which provides for government liability.

In fact, these policy justifications—and, indeed, the doctrinal foundation of qualified immunity itself—has come under persuasive attack from jurists and commentators of all ideological stripes.

Professor William Baude, a prominent scholar of originalism, has examined the professed legal bases of qualified immunity and determined that none of them "can sustain the modern doctrine."[6] Professor Joanna Schwartz, a leading expert on police-misconduct litigation, has described qualified immunity as "a doctrine unmoored to common-law principles, unable or unnecessary to achieve the Court's policy goals, and unduly deferential to government interests."[7] And Professor Alexander Reinert explains that this Court's use of the derogation canon to read qualified immunity into § 1983, *see Pierson*, 386 U.S. at 555, is misplaced: The canon was disfavored in the years surrounding Reconstruction, so the public meaning of the statute at the time of its enactment would not have incorporated common-law immunities.[8]

Members of the Court both past and present have also criticized the modern state of qualified immunity. Justice Kennedy inveighed against the doctrine

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[6] William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 51 (2018).

[7] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018).

[8] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 218–21, 227–28 (2023).

because it had "diverged to a substantial degree from the historical standards." *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring). Justice Thomas has repeatedly called for overruling the doctrine, concluding that it "cannot be located in § 1983's text and may have little basis in history." *Hoggard*, 141 S. Ct. at 2421 (statement of Thomas, J.); *Baxter*, 140 S. Ct. at 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *Ziglar v. Abbasi*, 582 U.S. 120, 157–60 (2017) (opinion of Thomas, J.). Justice Gorsuch, too, has expressed skepticism of the more stringent interpretations of the "clearly established" requirement. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015). And Justice Sotomayor has objected that the Court's most recent applications of the doctrine involve "nothing right or just under the law." *Kisela v. Hughes*, 584 U. S. 100, 121 (2018) (Sotomayor, J., dissenting).

Judges in nearly every federal court of appeals have reached similar conclusions. *See, e.g.*, *McKinney v. City of Middletown*, 49 F.4th 730, 756 (2d Cir. 2022) (Calabresi, J., dissenting) ("[T]he doctrine of qualified immunity—misbegotten and misguided—should go.").[9] So have scholars and advocacy organizations of

[9] *See also, e.g.*, *Justiniano v. Walker*, 986 F.3d 11, 14–15 & n.1 (1st Cir. 2021) (citing *Jamison v. McClendon*, 476 F. Supp. 3d 386, 390–92 (S.D. Miss. 2020)); *Jefferson v. Lias*, 21 F.4th 74, 87, 93–94 (3d Cir. 2021) (McKee, J., joined by Restrepo, J. & Fuentes, J., concurring); *R.A. v. Johnson*, 36 F.4th 537, 547 n.2 (4th Cir. 2022) (Motz, J., concurring); *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring); *Reich v. City of Elizabethtown*, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Moore, J., dissenting); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir.

every ideological persuasion. Reinert, 111 Cal. L. Rev. at 203 n.1 (collecting sources). Perhaps only the *Feres* doctrine—itself an "atextual" immunity from FTCA claims—has been as "universally condemned." *Carter v. United States*, 145 S. Ct. 519, 519, 521 (U.S. 2025) (mem.) (Thomas, J., dissenting from denial of certiorari).

A brief survey of some of qualified immunity's most sordid applications shows why it has come under such sustained fire:

- In *Jessop v. City of Fresno*, police officers stole hundreds of thousands of dollars in seized cash. 936 F.3d 937, 940 (9th Cir. 2019). The Ninth Circuit granted the officers qualified immunity, holding that while the theft was "deeply disturbing," a reasonable officer would not have known that it offended the Fourth Amendment. *Id.* at 941–42.
- In *Riley's American Heritage Farms v. Elsasser*, a school district severed longstanding ties with a field-trip site after parents complained that one of the site's owners was posting conservative opinions on social media. 32 F.4th 707, 716–17 (9th Cir. 2022). The Ninth Circuit held that even

2018); *Goffin v. Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, J., concurring); *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part); *Cox v. Wilson*, 971 F.3d 1159, 1165 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from denial of rehearing en banc); *Schantz v. DeLoach*, No. 20-10503, 2021 WL 4977514, at *12 (11th Cir. Oct. 26, 2021) (Jordan, J., concurring).

though the site had made out a clear-cut case of retaliation, its right against such retaliation was not "clearly established" and granted qualified immunity. *Id.* at 723–30.

- In *Corbitt v. Vickers*, an officer shot twice at a nonthreatening dog. 929 F.3d 1304, 1308 (11th Cir. 2019). He missed the dog—both times—but the second time he hit a ten-year-old child lying face-down on the ground. *Id.* The Eleventh Circuit granted his request for qualified immunity. *Id.* at 1318–19.
- In *Baxter v. Bracey*, an officer ordered a police dog to bite a suspect who had already surrendered and had his arms in the air. 751 F. App'x 869, 870 (6th Cir. 2018). The Sixth Circuit was unable to "say that [the officer] violated any clearly established law." *Id.* at 872. This Court denied Baxter's petition for certiorari with Justice Thomas dissenting. *Baxter*, 140 S. Ct. at 1863.
- In *Ramirez v. Guadarrama*, officers watched a man douse himself in gasoline, commented that he'd catch fire if they tased him, and then tased him. 3 F.4th 129, 132 (5th Cir. 2021) (per curiam). He caught fire and burned to death. *Id.* The district court denied qualified immunity, but the officers took an interlocutory appeal and the Fifth Circuit reversed. *Id.* at 132, 136–37. Judge Willett vigorously dissented from denial of rehearing en banc, denouncing qualified immunity as an "atextual, judge-created doctrine" that

> "largely nullif[ies] § 1983." *Ramirez v. Guadarrama*, 2 F.4th 506, 524 (5th Cir. 2021) (Willett, J., dissenting from denial of reh'g en banc).

These are just a few examples. Cases in which qualified immunity gives a pass to "conscience-shocking abuse" fill the pages of the Federal Reporter. *Id.*

And extending qualified immunity to the federal government would insulate such conduct even further. The federal bureaucracy abounds with "investigative or law enforcement officers." *See* 28 U.S.C. § 2680(h). Officials "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," *id.*, serve in the Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service ("FWS"), and many other agencies. *See* 18 U.S.C. § 3063(a) (authorizing EPA officials to "execute and serve any warrant or other process" and "make arrests without warrants"); 29 U.S.C. § 657(a)(1) (authorizing OSHA employees to enter workplaces for investigatory purposes); U.S. Fish and Wildlife Service, *Searches and Seizures*, 445 FW 1, 1.3 (Oct. 23, 2007) (collecting FWS search-and-seizure authorities).[10] When these officials engage in misconduct, the FTCA—by way of the law-enforcement proviso—offers a remedy. The government's interpretation takes that remedy away: The discretionary-function exception, turbocharged by qualified immunity, would almost invariably shut the

[10] Available at https://perma.cc/3SFV-CZ42.

courthouse door, even to claims of egregious misconduct.

Small wonder that judges and commentators all over the jurisprudential spectrum have called for qualified immunity to be overruled. This case, of course, doesn't present that question. But it does present an opportunity for the Court to take Professor Baude's advice: "[S]top expanding the legal error." 106 Cal. L. Rev. at 88. Qualified immunity is bad enough where it is. The Court should not import it into the FTCA.

CONCLUSION

For all these reasons, and for those described by Petitioners, this Court should reverse.

Respectfully submitted,

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