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 OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Constitution's Supremacy Clause bars claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, when the negligent or wrongful acts of federal employees have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law.

2. Whether the FTCA's discretionary function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional tort exception.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are Curtrina Martin, individually and as parent and next friend of G.W., a minor; and Hilliard Toi Cliatt.

Respondents (defendants-appellees below) are the United States of America, Lawrence Guerra, and six unknown FBI agents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is available at 2024 WL 1716235. The order of the district court granting in part and denying in part respondents' motion for summary judgment (Pet. App. 34a-68a) is reported at 631 F. Supp. 3d 1281. The order of the district court granting the United States' motion for reconsideration (Pet. App. 21a-32a) is available at 2022 WL 18263039.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2024. A petition for rehearing was denied on May 30, 2024 (Pet. App. 70a-71a). On July 22, 2024, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 27, 2024, and the petition was filed on that date. The pe-

tition for a writ of certiorari was granted on January 27, 2025, limited to the questions specified by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1346(b)(1) of Title 28 provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680 of Title 28 provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *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, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means 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.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

INTRODUCTION

As sovereign, the United States is generally immune from suits seeking money damages. In the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346(b), 2671 *et seq.*, Congress waived that immunity for certain tort claims. At the same time, Congress recognized that too broad a waiver could expose the United States to claims that would disrupt "important governmental functions and prerogatives." *Molzof* v. *United States*, 502 U.S. 301, 311 (1992). So Congress enacted various exceptions, thereby "retain[ing]" the United States' "sovereign immunity with respect to certain governmental functions that might otherwise be disrupted by FTCA lawsuits." *Id.* at 312 (emphasis omitted).

Today, the FTCA's waiver of sovereign immunity is subject to 13 separate exceptions, one set forth in each

subsection of 28 U.S.C. 2680. As relevant here, the discretionary function exception in subsection (a) preserves the United States' immunity for claims challenging judgments made in the exercise of discretion. And the intentional tort exception in subsection (h) preserves the United States' immunity for claims arising out of assault, battery, and other specified torts.

This case is about a proviso that Congress added to subsection (h) in 1974. That proviso is known as the law enforcement proviso, and it covers certain claims arising out of the wrongful conduct of federal investigative or law enforcement officers. There is no dispute that the proviso removes those claims from the scope of the intentional tort exception in subsection (h), such that the intentional tort exception does not preserve the United States' immunity for those claims. The question is whether the law enforcement proviso also removes those claims from the scope of the FTCA's 12 other exceptions, such that those other exceptions cannot preserve the United States' immunity either.

The answer is no: The law enforcement proviso in subsection (h) does not modify any exception other than the intentional tort exception in subsection (h). Congress placed the proviso in subsection (h), where one would naturally expect the proviso to apply only to subsection (h). And various other textual and structural features of Section 2680 confirm that Congress did not intend the proviso to reach beyond that subsection. Petitioners' contrary view would expose the United States to tort claims that Congress plainly intended to bar, including claims inviting judicial second-guessing of policy judgments that would otherwise be covered by the discretionary function exception.

In this case, petitioners brought claims for assault, battery, and false imprisonment based on the conduct of federal law enforcement officers. Those claims fall within the law enforcement proviso in subsection (h), but they also satisfy the discretionary function exception in subsection (a). Thus, if the law enforcement proviso does not reach beyond subsection (h), the discretionary function exception preserves the United States' immunity for those claims. Petitioners dispute whether their claims satisfy the discretionary function exception in the first place. But this Court declined to grant review of that issue, and in any event, petitioners' claims fall squarely within that exception because they challenge policy judgments made in the execution of warrants. Accordingly, petitioners' claims should be dismissed because the discretionary function exception preserves the United States' immunity.

The court of appeals dismissed petitioners' claims for a different reason: It held that they are barred by the Supremacy Clause. But the court resorted to the Supremacy Clause only because, under circuit precedent, the law enforcement proviso modifies the discretionary function exception and thus renders that exception inapplicable to petitioners' claims. If this Court rejects that view, it should simply affirm on the ground that the discretionary function exception preserves the United States' immunity, without reaching the Supremacy Clause issue.

STATEMENT

A. The Federal Tort Claims Act

The United States, "as sovereign, is generally immune from suits seeking money damages." *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 48 (2024). The FTCA, enacted in 1946, contains

a "limited waiver" of that immunity. *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). The Act's provisions appear in two places in Title 28 of the United States Code: Section 1346(b) and Chapter 171.

"Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity." *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994). "Subject to the provisions of chapter 171" of Title 28, that category encompasses "claims against the United States, for money damages," for "injury or loss of property, or personal injury or death," "caused by the negligent or wrongful act or omission" of a federal employee "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Section 1346(b)'s "reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA." *Meyer*, 510 U.S. at 478. Section 1346(b) thus waives the United States' sovereign immunity "under circumstances" where state law would make a "private person" liable in tort. 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674; *United States* v. *Olson*, 546 U.S. 43, 44 (2005).

The FTCA's remaining provisions appear in Chapter 171 of Title 28. As quoted above, Section 1346(b) expressly makes its waiver of the United States' sovereign immunity for specified tort claims "[s]ubject to the provisions of chapter 171." 28 U.S.C. 1346(b)(1). The provisions of that chapter include 28 U.S.C. 2680, entitled "Exceptions." Act of June 25, 1948, ch. 646, 62 Stat. 984. Section 2680 excepts "certain categories of claims (13 in all)" from the FTCA's waiver of sovereign immunity.

Dolan v. *United States Postal Serv.*, 546 U.S. 481, 485 (2006). "The § 2680 exceptions are designed to protect certain important governmental functions and prerogatives from disruption." *Molzof* v. *United States*, 502 U.S. 301, 311 (1992). The exceptions do so by preserving the United States' sovereign immunity for the claims that they encompass. "If one of the exceptions applies, the bar of sovereign immunity remains." *Dolan*, 546 U.S. at 485.

Section 2680 takes the form of a "tabulated list." Lawrence E. Filson & Sandra L. Strokoff, *The Legislative Drafter's Desk Reference* § 23.4, at 318 (2d ed. 2008) (Filson & Strokoff). It begins with the following lead-in language: "The provisions of this chapter and section 1346(b) of this title shall not apply to—." 28 U.S.C. 2680. Section 2680 then distributes that language to 13 subsections, starting with (a) and ending with (n),[1] to create 13 separate exceptions to "[t]he provisions of this chapter and section 1346(b)," which include the FTCA's waiver of sovereign immunity. *Ibid.*; see *Dolan*, 546 U.S. at 485-486.

Section 2680's lead-in language thus distributes to subsection (a) to create the "discretionary function exception":

> The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a fed-*

[1] There is no subsection (g) because Congress repealed it in 1950. See Act of Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.

> *eral agency or an employee of the Government, whether or not the discretion involved be abused*.

28 U.S.C. 2680(a) (emphasis added); see *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984). The discretionary function exception is meant to "prevent judicial 'second-guessing'" of "'governmental actions and decisions based on considerations of public policy.'" *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (citations omitted).

Section 2680's lead-in language likewise distributes to Section 2680's other subsections to create the postal exception, see 28 U.S.C. 2680(b) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."); the quarantine exception, see 28 U.S.C. 2680(f) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States."); the combatant activities exception, see 28 U.S.C. 2680(j) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."); the foreign country exception, see 28 U.S.C. 2680(k) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising in a foreign country."); and numerous other exceptions.

One of those other exceptions is the "intentional tort exception" in subsection (h). *Levin* v. *United States*, 568 U.S. 503, 507 (2013) (citation omitted). That exception states: "The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [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). As this Court has noted, the name "intentional tort exception" is "not entirely accurate." *Levin*, 568 U.S. at 507 & n.1 (citation omitted). Subsection (h) "does not remove from the FTCA's waiver all intentional torts, *e.g.*, conversion and trespass, and it encompasses certain torts, *e.g.*, misrepresentation, that may arise out of negligent conduct." *Id.* at 507 n.1.

In 1974, Congress added a so-called "law enforcement proviso" to subsection (h). *Millbrook* v. *United States*, 569 U.S. 50, 52 (2013); see Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. The proviso covers claims alleging particular torts (*i.e.*, "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution") based on the "acts or omissions of investigative or law enforcement officers." 28 U.S.C. 2680(h). The proviso "carve[s] out" those claims from the scope of the intentional tort exception, such that the intentional tort exception does not "preserv[e]" the United States' immunity for those claims. *Millbrook*, 569 U.S. at 52.

As amended, subsection (h) states in full:

> The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [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: *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, on or after the date

> of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means 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.

28 U.S.C. 2680(h).

B. Factual Background

1. In 2015, the Federal Bureau of Investigation (FBI) initiated Operation Red Tape—an operation concerning violent gang activity in Georgia. Pet. App. 4a. The operation resulted in the criminal indictment of 30 gang members and associates for participating in a racketeer influenced corrupt organization (RICO) conspiracy. *Id.* at 35a; D. Ct. Doc. 83-6, at 8 (Aug. 27, 2021). After the charges were filed, officers obtained warrants to arrest 17 of the defendants, including Joseph Riley. D. Ct. Doc. 83-6, at 8, 19. Officers also obtained warrants to search seven locations, including Riley's home at 3741 Landau Lane SW in Atlanta. *Id.* at 10, 19.

The FBI prepared an Operation Plan to execute the warrants simultaneously at 5 a.m. on October 18, 2017. D. Ct. Doc. 83-6, at 17, 19. The FBI also prepared a Special Weapons and Tactics (SWAT) Addendum with further details about executing the search and arrest warrants at Riley's home. *Id.* at 25-48. The Addendum called for a SWAT team to "knock and announce at [the] front door," to "mechanically breach the front door and initiate entry" if there was "no answer," and to "clear the target residence and arrest [Riley]." *Id.* at 34.[2] The

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[2] Contrary to the court of appeals' description, the search warrant was not a "no-knock" warrant. Pet. App. 3a; see D. Ct. Doc. 83-6, at 10.

Addendum further stated that "[f]lash bangs may be deployed at the discretion of the team leader" to protect the team's "safety." *Ibid.*

The Addendum identified various objectives for the mission, including "[c]onduct[ing] a well coordinated operation to safely and efficiently serve Federal arrest and search warrants," "[m]aintain[ing] a high level of operational security," and "achiev[ing] a near simultaneous start to ensure surprise." D. Ct. Doc. 83-6, at 26. In addition, the Addendum included a description of 3741 Landau Lane, a color photograph of the front of the house, directions to the property from downtown Atlanta, an overhead image of the neighborhood with a pin marking the property, a description and photograph of Riley, and information about Riley's history of violence and gun possession. *Id.* at 32-35; Pet. App. 36a.

2. The FBI assigned Special Agent Lawrence Guerra to lead the SWAT team responsible for executing the search and arrest warrants at 3741 Landau Lane. Pet. App. 36a. Guerra took several steps in preparation for the execution of the warrants. *Id.* at 36a-38a. In addition to reviewing the Operation Plan and the SWAT Addendum, Guerra conducted a site survey of 3741 Landau Lane during daylight hours. *Id.* at 5a. As part of the survey, Guerra took photographs of the house and noted various features of the property. *Ibid.* Guerra observed that the house was beige and split-level, that it had a narrow stairway and stoop leading to a front door with windows on both sides, that it was located on a corner lot with a large tree in the front yard, that it had a side-entry garage with a driveway running perpendicular to the front door, and that the house number appeared on a small mailbox on the side of the house, rather than on the front of the house itself. *Id.* at 5a, 36a-37a; D. Ct.

Doc. 17-2, at 4-5 (Dec. 21, 2019). Guerra noted that the narrow stairway and stoop, with windows on both sides of the front door, "would make tactical entry difficult and leave agents vulnerable in case of gunfire." Pet. App. 37a.

After completing the site survey, Guerra identified a nearby parking lot for the SWAT team to use as a staging area. Pet. App. 37a. Guerra also wrote tactical notes and attended an operational briefing that included photographs of Riley and his house. *Id.* at 6a, 37a.

3. At approximately 3:30 a.m. on October 18, 2017, Guerra conducted a further drive-by with Michael Lemoine, another FBI agent. Pet. App. 37a. Navigating in complete darkness, Guerra used his personal Garmin GPS device, which he kept in his vehicle, to get to 3741 Landau Lane. *Id.* at 6a; D. Ct. Doc. 17-2, at 6; Gov't C.A. Br. 8. When the Garmin alerted that they had arrived at that address, Guerra observed what he believed to be the same house he had seen during his previous site survey: The house was beige and split-level, it had a narrow stairway and stoop leading to a front door with windows on both sides, it was located on a corner lot with a large tree in the front yard, and it had a side-entry garage with a driveway running perpendicular to the front door. Pet. App. 6a-7a, 38a; D. Ct. Doc. 17-2, at 7. Guerra also observed a black Camaro in the driveway. Pet. App. 7a.

Unbeknownst to Guerra and Lemoine, however, the Garmin GPS device had directed them to a different house—3756 Denville Trace SW—where petitioners Curtrina Martin, her seven-year-old son G.W., and her partner Hilliard Toi Cliatt lived. Pet. App. 6a, 8a. The house was approximately 436 feet from Riley's, and although it had an address on Denville Trace, the front of the house faced Landau Lane. *Id.* at 6a. The house

number appeared only on a mailbox at the end of the driveway on Denville Trace, where it could not be seen while viewing the house from Landau Lane. *Id.* at 7a, 38a.

4. After conducting the drive-by, Guerra and Lemoine traveled to the nearby staging area. Pet. App. 38a. Shortly before 5 a.m., while it was still dark outside, Guerra, Lemoine, and the rest of the SWAT team, dressed in full tactical gear and armed with rifles and handguns, left for Riley's house in a caravan of vehicles. *Id.* at 7a, 38a. Guerra identified what he believed to be 3741 Landau Lane based on the presence of the black Camaro and his prior preparation. *Id.* at 7a; Gov't C.A. Br. 10. At his direction, his vehicle stopped in front of the house, and the other vehicles did the same. Pet. App. 7a, 38a.

After the members of the SWAT team went to their assigned positions, Guerra knocked and announced the presence of law enforcement. Pet. App. 7a-8a. When there was no answer, an agent breached the front door, and another agent deployed a flash bang. *Id.* at 8a, 39a. The team then entered the home. *Id.* at 39a.

The commotion woke up Martin and Cliatt, who had been asleep in their bedroom. Pet. App. 76a, 86a. As Martin started to run out of the bedroom to get G.W., who was in a different room, Cliatt pulled Martin into their bedroom closet, where Cliatt kept a shotgun for protection. *Id.* at 8a. From the closet, Cliatt could hear the agents saying "clear, clear" as they secured the house. *Id.* at 78a. That "police ta[lk]" made Cliatt think that it was not a "home invasion." *Ibid.*

Upon reaching the bedroom, the agents announced the presence of law enforcement. Pet. App. 78a. After Cliatt called out from the closet, the agents pulled him out and placed him in handcuffs. *Id.* at 8a, 78a. They

also instructed Martin to keep her hands up. *Id.* at 8a. Guerra then noticed that Cliatt did not match Riley's physical description and asked Cliatt to provide his name and address. *Ibid.* Around the same time, Lemoine noticed mail that bore an address different from 3741 Landau Lane. *Ibid.*

"Upon realizing that they were at the wrong house, Guerra immediately ended the raid: an agent lifted Cliatt off the ground and uncuffed him; Guerra told Cliatt that he would come back later and explain what happened; and the agents left the house." Pet. App. 8a-9a. "The agents were in the home for no more than five minutes." *Id.* at 39a.

At approximately 5:07 a.m., the SWAT team executed the warrants at the correct address and arrested Riley as he attempted to flee. Pet. App. 9a, 39a; D. Ct. Doc. 83-12, at 4 (Aug. 27, 2021). Afterward, Guerra returned to 3756 Denville Trace, where he apologized to Martin, G.W., and Cliatt; provided his business card and the name of his supervisor; documented the damage caused by the forced entry; and stated that the FBI would pay for the repairs. Pet. App. 9a, 39a-40a, 90a. Riley was eventually convicted of participating in a RICO conspiracy and sentenced to 204 months of imprisonment. Judgment at 1-2, *United States* v. *Riley*, No. 16-cr-427 (N.D. Ga. May 16, 2022).

C. Procedural History

1. In 2019, Martin and G.W. brought suit against the United States and Guerra, seeking damages for the execution of the warrants "at the wrong home." J.A. 2; see J.A. 2-17. Cliatt filed a similar suit, J.A. 19-34, and the cases were consolidated, Pet. App. 35a n.1. Against Guerra, petitioners asserted a Fourth Amendment claim under *Bivens* v. *Six Unknown Named Agents of Fed-*

eral Bureau of Narcotics, 403 U.S. 388 (1971). J.A. 14-16, 31-32. Against the United States, petitioners asserted various Georgia state-law claims under the FTCA, including assault, battery, false imprisonment, false arrest, negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, trespass, and interference with private property. J.A. 8-14, 25-30.

2. The district court granted in part and denied in part the United States' and Guerra's motion for summary judgment. Pet. App. 34a-68a.

The district court first held that Guerra was entitled to qualified immunity on petitioners' *Bivens* claim. Pet. App. 44a-53a. The court explained that "[t]he doctrine of qualified immunity protects government officials from civil liability for actions taken within the scope of their discretionary authority unless their conduct violated a plaintiff's federal constitutional rights as demonstrated by clearly established law." *Id.* at 44a. The court recognized that the doctrine would not protect an officer who "did *nothing* to make sure that he was leading the other officers to the correct residence." *Id.* at 49a (citation omitted). But the court found that Guerra had taken "significant 'precautionary measures' to avoid mistake," *id.* at 52a (citation omitted), and it declined "to play Monday morning quarterback and dictate what additional steps Guerra should have taken," *id.* at 53a. The court specifically rejected the suggestion that Guerra should have checked the house number on the mailbox before executing the warrants, explaining that the "delay" from doing so "could have been problematic because the warrant was being served on a dangerous individual under the cover of darkness, and the simultaneous execution of multiple related warrants was important to the overall operation." *Id.* at 52a. Having

found that "Guerra simply made a mistake," the court held that his actions "did not violate clearly established law." *Id.* at 53a.

The district court next held that all of petitioners' FTCA claims fell within Section 2680(a)'s discretionary function exception. Pet. App. 54a-58a. Applying the test articulated in this Court's decision in *Gaubert*, the court determined that Guerra's "decisions regarding how to investigate the location where the warrant was to be served" involved an element of "judgment and choice" rooted in "policy considerations" about "'the urgency of apprehending the subject,'" "'the potential threat the subject pose[d] to public safety,'" and the proper allocation of resources. *Id.* at 56a-57a (citation omitted). The court therefore concluded that it "lack[ed] jurisdiction to consider [petitioners'] tort claims unless they are permitted by another provision of the FTCA." *Id.* at 58a.

The district court identified no provision of the FTCA that would allow it to consider petitioners' claims for negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, trespass, and interference with private property. Pet. App. 60a. But the court reached a different conclusion as to petitioners' claims for assault, battery, false imprisonment, and false arrest. *Ibid.* The court concluded that those claims fell within the law enforcement proviso in Section 2680(h), *ibid.*, which circuit precedent treated as a carve-out not only from the intentional tort exception in subsection (h), but also from the discretionary function exception in subsection (a), *id.* at 59a; see *Nguyen* v. *United States*, 556 F.3d 1244, 1256 (11th Cir. 2009). The court therefore held that it had jurisdiction to consider petitioners' claims for assault, battery, false imprisonment, and false arrest, even though those claims otherwise fell

within the discretionary function exception. Pet. App. 60a. The court then held that although petitioners' claim for false arrest failed as a matter of Georgia state law, the United States was not entitled to summary judgment on petitioners' claims for assault, battery, and false imprisonment. *Id.* at 60a-67a.

3. The United States moved for reconsideration, citing the court of appeals' intervening decision in *Kordash* v. *United States*, 51 F.4th 1289 (11th Cir. 2022). In *Kordash*, the court of appeals held that the Supremacy Clause bars state-law claims under the FTCA when a federal officer's acts (1) "have some nexus with furthering federal policy," and (2) "can reasonably be characterized as complying with the full range of federal law." *Id.* at 1293 (quoting *Denson* v. *United States*, 574 F.3d 1318, 1348 (11th Cir. 2009)). *Kordash* further clarified that the first requirement is satisfied when an officer is found to have been acting within the scope of his discretionary authority for purposes of qualified immunity. *Id.* at 1294. The United States argued that *Kordash* required dismissal of petitioner's claims for assault, battery, and false imprisonment. Pet. App. 22a.

The district court agreed. Pet. App. 21a-32a. The court found "both prongs of the Supremacy Clause analysis" in *Kordash* satisfied because "Guerra was acting within the scope of his discretionary duty," and because his "mistake [wa]s not a basis to find that he acted unreasonably and in violation of" the Fourth Amendment. *Id.* at 27a. The court therefore granted the United States' and Guerra's motion for summary judgment in full and dismissed the complaints. *Id.* at 32a.

4. The court of appeals affirmed. Pet. App. 2a-19a.

With respect to petitioners' *Bivens* claim, the court of appeals agreed that Guerra was entitled to qualified

immunity because his actions had not violated clearly established Fourth Amendment law. Pet. App. 15a. With respect to petitioners' FTCA claims, the court agreed that the discretionary function exception was satisfied because "Guerra enjoyed discretion in how he prepared for the warrant execution," and because that discretion was "'susceptible to policy analysis.'" *Id.* at 17a-18a (citation omitted). The court therefore upheld the dismissal of petitioners' claims alleging negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, trespass, and interference with private property. *Id.* at 17a.

The court of appeals then held that the Supremacy Clause barred petitioners' remaining claims alleging assault, battery, and false imprisonment. Pet. App. 18a-19a. The court stated that the Supremacy Clause, "[s]imilar to the discretionary function exception," "ensures that states do not impede or burden the execution of federal law." *Id.* at 16a. And like the district court, the court of appeals found that the government had "satisfied both elements of the Supremacy Clause analysis." *Id.* at 19a.

5. Petitioners filed a petition for a writ of certiorari presenting two questions. The first question asked whether the court of appeals had misapplied the Supremacy Clause to bar petitioners' claims alleging assault, battery, and false imprisonment, while the second question asked whether the court had wrongly concluded that "the FTCA's discretionary-function exception bars claims for torts arising from wrong-house raids and similar negligent or wrongful acts by federal employees." Pet. i.

The United States opposed certiorari, but took the view that if this Court were to grant review of the Su-

premacy Clause question, it should also direct the parties to address an additional question: "Whether the discretionary function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional torts exception." Br. in Opp. 21. The United States explained that the courts below were bound by Eleventh Circuit precedent to treat the law enforcement proviso as a carve-out from the discretionary function exception, but that every other circuit to have considered the question has rejected that interpretation. *Id.* at 19-20. Because the courts below had resorted to the Supremacy Clause only because circuit precedent had deemed the discretionary function exception categorically inapplicable, the United States urged this Court not to grant review of the Supremacy Clause question without granting review of the "threshold" statutory question as well. *Id.* at 21-22. The Court then granted certiorari limited to the Supremacy Clause question and the threshold statutory question the United States had identified. 2025 WL 301915, at *1.

SUMMARY OF ARGUMENT

I. The threshold statutory question in this case concerns the law enforcement proviso in 28 U.S.C. 2680(h), which covers certain claims arising out of the wrongful conduct of federal investigative or law enforcement officers. It is undisputed that the proviso removes those claims from the scope of the intentional tort exception in subsection (h), such that the intentional tort exception does not preserve the United States' immunity for those claims. The question is whether the proviso also removes those claims from the scope of Section 2680's 12 other exceptions, including the discretionary function exception in subsection (a). As every circuit to consider the issue (aside from the Eleventh) has correctly

recognized, the proviso in subsection (h) modifies only the exception in subsection (h).

That conclusion follows from traditional tools of statutory construction. Congress placed the proviso in a particular subsection: subsection (h). When Congress places material in a particular subpart, that material presumptively relates only to that subpart. Likewise, when Congress attaches a proviso to a particular provision, the proviso presumptively modifies only that provision. Both of those principles point to the conclusion that the law enforcement proviso applies only to subsection (h).

Other features of Section 2680's text and structure confirm that the proviso does not reach beyond subsection (h). Congress provided a definition for the term "investigative or law enforcement officer," which appears in the proviso, but made the definition applicable only "[f]or the purpose of this subsection"—indicating that the proviso itself, in which the defined term appears, is likewise applicable only to subsection (h). 28 U.S.C. 2680(h). In addition, Congress connected the proviso to the intentional tort exception with a colon, yet ended each subsection with a period. That punctuation indicates that the proviso is merely part of the intentional tort exception, and does not reach beyond subsection (h).

Reading the law enforcement proviso as modifying only subsection (h) also ensures that the proviso is given the same reach as a similar carve-out in subsection (c). And it avoids exposing the United States to tort claims that Congress plainly intended to bar, such as claims requiring the application of substantive foreign law under subsection (k), and claims inviting judicial second-guessing of policy judgments in subsection (a). To the extent any ambiguity remains, the sovereign immunity

canon counsels in favor of interpreting the proviso narrowly, as modifying only subsection (h).

II. Petitioners contend (Br. 22-40) that the courts below erred in concluding that petitioners' claims satisfy the discretionary function exception in the first place. But that issue is not properly before this Court, which declined to grant review of it. In any event, the courts below correctly determined that petitioners' claims satisfy the discretionary function exception. Pet. App. 17a-18a, 54a-58a. Petitioners contend (Br. 33) that the exception does not reach "the day-to-day acts of line-level federal law enforcement officers." But this Court in *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991), rejected the notion that day-to-day activities cannot satisfy the exception. Petitioners also contend (Br. 31) that the exception does not reach conduct that gives rise to what state law characterizes as an intentional tort. But state tort law cannot eliminate the element of judgment or choice in a federal employee's activity.

III. If this Court holds that the discretionary function exception is not subject to the law enforcement proviso—and that petitioners' claims for assault, battery, and false imprisonment therefore fall within that exception—the Court should affirm on the ground that the exception preserves the United States' immunity, without reaching the Supremacy Clause question that the lower courts decided. If this Court does reach that question, however, it should reject the lower courts' view that the Supremacy Clause bars petitioners' claims. Contrary to the lower courts' analysis, that Clause simply instructs courts to follow federal law (here, the FTCA). But to the extent this Court has serious doubts about the constitutionality of allowing petitioners' claims to proceed, that is all the more reason to interpret the

law enforcement proviso as modifying only the intentional tort exception in subsection (h).

ARGUMENT

The court of appeals rightly held that petitioners' claims alleging assault, battery, and false imprisonment should be dismissed—but for the wrong reason. Those claims should be dismissed not because they are barred by the Supremacy Clause, but rather because they satisfy the FTCA's discretionary function exception, which preserves the United States' sovereign immunity for those claims. Accordingly, this Court should affirm the dismissal of petitioners' claims on sovereign immunity grounds.

I. THE LAW ENFORCEMENT PROVISO DOES NOT MODIFY THE FEDERAL TORT CLAIMS ACT'S DISCRETIONARY FUNCTION EXCEPTION

The FTCA's waiver of sovereign immunity is subject to 13 separate exceptions, each codified in one of 28 U.S.C. 2680's subsections, starting with (a) and ending with (n). In 1974, Congress enacted a proviso known as the law enforcement proviso. Congress placed the proviso in subsection (h), and everyone agrees that the proviso limits the scope of the intentional tort exception in subsection (h) by carving out certain claims that arise out of the wrongful conduct of federal investigative or law enforcement officers. The intentional tort exception therefore does not preserve the United States' immunity for claims that the proviso covers.

The threshold statutory question in this case is whether the law enforcement proviso in subsection (h) also limits the scope of Section 2680's 12 other exceptions, including the discretionary function exception in subsection (a). The answer is no. As every circuit to

consider the issue (besides the Eleventh) has correctly recognized, the proviso in subsection (h) modifies only the exception in subsection (h). See *Medina* v. *United States*, 259 F.3d 220, 225-226 (4th Cir. 2001); *Joiner* v. *United States*, 955 F.3d 399, 406 (5th Cir. 2020); *Linder* v. *United States*, 937 F.3d 1087, 1088-1089 (7th Cir. 2019); *Gasho* v. *United States*, 39 F.3d 1420, 1433-1434 (9th Cir. 1994); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983).

As a result, when a claim falls within the law enforcement proviso in subsection (h), an exception in one of Section 2680's other subsections may still apply and thus preserve the United States' sovereign immunity for that claim. That is the case here. The proviso covers petitioners' claims for assault, battery, and false imprisonment, but that just means that the intentional tort exception in subsection (h) does not apply. Another exception may still apply and preserve the United States' immunity—as the discretionary function exception does here.

A. The Law Enforcement Proviso In Subsection (h) Modifies Only The Intentional Tort Exception In Subsection (h)

Congress enacted 13 separate exceptions to the FTCA's waiver of sovereign immunity—one in each subsection of Section 2680. The law enforcement proviso appears in one of those subsections: subsection (h). Given Congress's choice to put the proviso in subsection (h), one would naturally presume that the proviso applies only to that subsection. And indeed, traditional tools of statutory construction confirm that the proviso does not reach beyond subsection (h).

1. As a general principle, "[m]aterial within an indented subpart relates only to that subpart." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 156 (2012) (*Reading Law*); see

Reed Dickerson, *The Fundamentals of Legal Drafting* § 6.3, at 116-117 (2d ed. 1986) ("[I]f the draftsman wishes to show that particular language applies to some, but not all, of the items [in a tabulated list], he includes it as part of each item to which it is intended to apply and omits it elsewhere."). That principle captures what a reader would naturally expect: that because the law enforcement proviso appears within subsection (h), it relates only to subsection (h).

If Congress had intended the proviso to relate not only to subsection (h), but to the 12 other subsections as well, Congress would have put the proviso elsewhere. One obvious alternative would have been to put the proviso in its own paragraph, after all of the subsections. See *Reading Law* 156 ("[M]aterial contained in unindented text relates to all the * * * preceding indented subparts."). That is where generally applicable provisos appear in other statutes. See, *e.g.*, 42 U.S.C. 1383(a)(2)(F)(ii)(II); 42 U.S.C. 6928(f)(2). As petitioners acknowledge (Br. 23), however, Congress made the "structural choice" to place the law enforcement proviso in subsection (h). And one would hardly expect to find a universal proviso in the seventh item of a 13-item list.

The "presumption" that a proviso "refers only to the provision to which it is attached" reinforces the limited reach of the proviso here. *United States* v. *Morrow*, 266 U.S. 531, 535 (1925); see *Reading Law* 154 ("A proviso conditions the principal matter that it qualifies—almost always the matter immediately preceding."). Because Congress attached the proviso to the intentional tort exception, the proviso presumptively "refers only" to that exception. *Morrow*, 266 U.S. at 535. To be sure, "it is also possible to use a proviso to state a general, independent rule." *Alaska* v. *United States*, 545 U.S. 75, 106

(2005). But if Congress had intended to create a general rule applicable to all the exceptions, it would not have attached the proviso to a particular exception.

The text of subsection (h)'s second sentence confirms that the proviso itself is applicable only to subsection (h). In providing a definition of "investigative or law enforcement officer"—a term that appears in the proviso—Congress specified that the definition was only "[f]or the purpose of this subsection," *i.e.*, subsection (h). 28 U.S.C. 2680(h). Congress chooses its cross-references carefully. See *Cyan, Inc.* v. *Beaver County Employees Ret. Fund*, 583 U.S. 416, 428 (2018) (recognizing that "when Congress wants to refer only to a particular subsection," "it says so") (brackets and citation omitted). And if Congress had intended the proviso (along with its use of the defined term) to reach beyond subsection (h), Congress would not have chosen a phrase expressly tied to subsection (h).

Congress's choice of punctuation further shows that the proviso modifies only the intentional tort exception in subsection (h). See *Facebook, Inc.* v. *Duguid*, 592 U.S. 395, 403 (2021) (interpreting a statute to "heed[] the commands of its punctuation") (citation omitted); *Reading Law* 161 ("Punctuation is a permissible indicator of meaning."). When Congress enacted the proviso in 1974, Congress "str[uck] out the period at the end" of subsection (h) and "insert[ed] in lieu thereof a colon"; Congress then put the proviso after the colon. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. A "colon * * * ordinarily indicates specification of what has preceded." *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 189 (1995); see Bryan A. Garner, *Garner's Modern English Usage* 896 (5th ed. 2022) (explaining that a colon "promises the completion of something just begun").

And what precedes the colon here is the intentional tort exception. The colon thus indicates that the proviso is a further "specification" of (*i.e.*, a limitation on) the claims covered by that exception, rather than the articulation of a general, independent rule. *Asgrow Seed*, 513 U.S. at 189.

Just as Congress made the proviso a part of the intentional tort exception by connecting the two with a colon, Congress separated the proviso from every other exception by ending each subsection with a period. The period at the end of each subsection renders each exception, when "read together" with Section 2680's lead-in language, its own "complete grammatical sentence." Filson & Strokoff 318. As such, each subsection stands as "a structurally discrete statutory provision," which "may be understood completely without reading any further." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 344 & n.4 (2005). The discretionary function exception in subsection (a) may therefore be understood "without regard to" Section 2680's other subsections, including the law enforcement proviso. Filson & Strokoff 318. And because that proviso appears in a "structurally discrete" subsection (h), *Jama*, 543 U.S. at 344 n.4, the proviso does not modify anything other than the intentional tort exception in that subsection.

Indeed, if Congress had intended the proviso to reach beyond subsection (h), one might expect to see some indication of that in the proviso's scope itself. In particular, one might expect to see the proviso cover some set of claims that fall *outside* the intentional tort exception, but *within* one of the other exceptions. But no such claim exists. The proviso references only claims that would otherwise fall within the intentional tort exception —claims alleging "assault, battery, false imprisonment,

false arrest, abuse of process, or malicious prosecution" based on the "acts or omissions of investigative or law enforcement officers." 28 U.S.C. 2680(h). Because the proviso references a specified subset of claims otherwise encompassed by the intentional tort exception, the proviso's scope provides no suggestion that it reaches beyond subsection (h).

2. Reading the law enforcement proviso as modifying only subsection (h) also "ensure[s] that the statutory scheme is coherent and consistent." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 222 (2008). Subsection (h) has a structure parallel to that of subsection (c), which contains a carve-out similar to the law enforcement proviso. Like subsection (h), subsection (c) begins by identifying a category of claims to which "[t]he provisions of this chapter and section 1346(b) shall not apply"—namely, claims arising out of the detention of property, among other things. 28 U.S.C. 2680(c). Then, like subsection (h), subsection (c) identifies a subset of claims to which "the provisions of this chapter and section 1346(b) of this title [shall] apply"—namely, certain claims based on the seizure of property for civil forfeiture. *Ibid.* That carve-out modifies only the exception in the same subsection, *i.e.*, subsection (c). See *Ali*, 552 U.S. at 222 (describing the carve-out in subsection (c) as "cancel[ing] the exception"); *id.* at 239 (Kennedy, J., dissenting) (describing the carve-out as "limit[ing] the operation of § 2680(c)'s exception"). Interpreting the law enforcement proviso in the same way—as modifying only the exception in the subsection to which the proviso is appended, *i.e.*, subsection (h)—thus gives consistent meaning to the subsections' parallel structure.

Interpreting the proviso as modifying only subsection (h) also avoids exposing the United States to tort

claims that Congress plainly intended to bar. The foreign country exception in subsection (k), for instance, prohibits any tort claim "arising in a foreign country." 28 U.S.C. 2680(k). Under the FTCA, the United States' liability is determined by "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). "[U]nwilling to subject the United States to liabilities depending upon the laws of a foreign power," *United States* v. *Spelar*, 338 U.S. 217, 221 (1949), Congress enacted the foreign country exception to "avoid application of substantive foreign law," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 707 (2004). Yet, if the law enforcement proviso were read to limit the scope of that exception, the FTCA would require the application of substantive foreign law in any suit arising abroad alleging certain torts by a federal investigative or law enforcement officer. There is no indication that Congress countenanced that counterintuitive result. See *id.* at 699-712 (holding that the foreign country exception barred an FTCA claim for false arrest by a federal law enforcement officer in Mexico, without suggesting that the law enforcement proviso might apply).

Likewise, Congress enacted the discretionary function exception in subsection (a) to "prevent judicial 'second-guessing'" of "'governmental actions and decisions based on considerations of public policy.'" *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (citations omitted). Yet, if the law enforcement proviso were read to limit the scope of that exception, it would open the door to judicial second-guessing of policy judgments made by federal investigative or law enforcement officers. There is no indication that Congress intended to invite judicial second-guessing of *any* policy judgments—let alone policy judgments made in the exercise of the

law enforcement function, which "fulfills a most fundamental obligation of government to its constituency." *Foley* v. *Connelie*, 435 U.S. 291, 297 (1978); see pp. 42-43, *infra*.

3. Finally, "a waiver of the Government's immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). This Court has declined to apply that canon in construing Section 2680's *exceptions* to the FTCA's waiver. See *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 491-492 (2006). But the issue here is the interpretation of a *proviso*, which, as petitioners acknowledge, "re-waives" the United States' sovereign immunity in certain circumstances. Pet. Br. 9; see *id.* at 4, 16, 23, 45. Indeed, the Court itself has described the law enforcement proviso as a "waiver," *Millbrook* v. *United States*, 569 U.S. 50, 57 (2013), so any ambiguity should be resolved in favor of interpreting the proviso narrowly, as modifying only the intentional tort exception in subsection (h).

B. Petitioners Cannot Justify Interpreting The Proviso As Reaching Beyond Subsection (h)

Petitioners attempt to defend the Eleventh Circuit's view that the law enforcement proviso in subsection (h) limits the scope of the discretionary function exception in subsection (a). Pet. Br. 40-46; see *Nguyen* v. *United States*, 556 F.3d 1244, 1256 (11th Cir. 2009). But petitioners' arguments find no support in text, history, or canons of construction.

1. Petitioners' interpretation of the proviso finds no support in the statutory text

a. Petitioners begin by observing (Br. 18) that while Section 2680's lead-in language provides that "the FTCA 'shall not apply,'" the law enforcement proviso provides

that "the FTCA 'shall apply' to claims arising out of it." Based on that observation, petitioners infer (Br. 42) that the proviso "cancels out" Section 2680's lead-in language (which they call "the preamble").

But as explained above, Section 2680 works by distributing the lead-in language 13 different times, once to each subsection. See pp. 9-11, *supra*; see *Pulsifer* v. *United States*, 601 U.S. 124, 134 (2024); U.S. Gov't Printing Office, *Style Manual: An Official Guide to the Form and Style of Federal Government Publishing* § 8.68, at 206 (2016) (noting the use of an em-dash "[a]fter an introductory phrase" to "indicat[e] repetition of such phrase" when reading each of the lines that "follow[]"). That distribution creates 13 "structurally discrete" sentences, *Jama*, 543 U.S. at 344 n.4, each beginning with the clause "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to—," 28 U.S.C. 2680. The law enforcement proviso appears in one of those sentences, created by distributing Section 2680's lead-in language to subsection (h):

> The provisions of this chapter and section 1346(b) of this title *shall not apply* to [claims arising out of certain torts]: *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 [a subset of those torts].

28 U.S.C. 2680(h) (emphases added).

The law enforcement proviso thus counteracts Section 2680's lead-in language in that one sentence, formed by distributing the lead-in language to subsection (h). But the proviso does not counteract the lead-in language in any of the 12 other exceptions, including the discretionary function exception: "The provisions of

this chapter and section 1346(b) of this title *shall not apply* to * * * [a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. 2680(a) (emphasis added). Instead, the proviso leaves those 12 other applications of the lead-in language undisturbed.

The law enforcement proviso thus works in the same way as the carve-out in subsection (c). Like the proviso, that carve-out counteracts Section 2680's lead-in language by making "the provisions of this chapter and section 1346(b) of this title apply" to certain claims that would otherwise be covered by subsection (c). 28 U.S.C. 2680(c). But like the proviso, the carve-out leaves untouched the 12 other applications of the lead-in language to Section 2680's other subsections. See p. 29, *supra*. Petitioners' reliance on the text of the proviso is therefore misplaced.[3]

b. Petitioners next contend (Br. 42-43) that if Congress had intended the law enforcement proviso to modify only subsection (h), Congress would have included the phrase "[f]or the purpose of this subsection" in the proviso, just as it did in the sentence defining "investi-

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[3] Section 2680's various references to the "provisions of this chapter" are perhaps most naturally read to refer to the provisions of Chapter 171 *other than Section 2680 itself*, so as to avoid a situation in which Section 2680 defeats its own application by directing that Section 2680 "shall not apply." 28 U.S.C. 2680. But an alternative reading is possible: The "provisions of this chapter" could be read to refer to the provisions of Chapter 171 *other than the particular subsection of Section 2680 being construed*. On that reading, petitioners' construction of the law enforcement proviso would fail for an additional reason: The discretionary function exception would be among the "provisions of this chapter" that the proviso says "shall apply." 28 U.S.C. 2680(h); see *Linder*, 937 F.3d at 1089 (Easterbrook, J.) (adopting that reasoning).

gative or law enforcement officer." 28 U.S.C. 2680(h). But there was no need for Congress to include that phrase in the proviso. Congress placed the proviso not just in the same subsection, but in the same sentence, as the intentional tort exception, with a colon connecting the two. See pp. 25-28, *supra*. Congress thus made clear that the proviso modifies only the intentional tort exception, without the need for any additional language. Cf. 28 U.S.C. 2680(c) (including a carve-out that likewise modifies only the exception in subsection (c), without using the phrase "[f]or the purpose of this subsection").

In contrast, Congress needed to specify that the definition of "investigative or law enforcement officer" was "[f]or the purpose of this subsection" in order to give the term "law enforcement officer" a different meaning in the proviso than in subsection (c). 28 U.S.C. 2680(h); see Pet. Br. 43 n.13; *Ali*, 552 U.S. at 220 (interpreting "any other law enforcement officer" in subsection (c) to mean "law enforcement officers of whatever kind"). And Congress's choice of words in limiting the definition's reach—*i.e.*, its use of "this subsection" instead of a phrase not expressly tied to subsection (h)—reinforces that Congress did not envision the proviso reaching beyond subsection (h). See p. 27, *supra*.

c. Petitioners also assert (Br. 45) that the "structure of the FTCA sets an order of operation" that gives the law enforcement proviso "the last word." But that just raises the question: the last word on what? Everyone agrees that the proviso has the last word on what claims fall within the intentional tort exception in subsection (h). But the question here is whether the proviso has anything to say about the application of the FTCA's other exceptions, including the discretionary function excep-

tion in subsection (a). For the reasons above, the answer is no. See pp. 25-31, *supra*.

2. Petitioners err in relying on legislative history

Citing legislative history, petitioners note (Br. 8-9) that Congress enacted the law enforcement proviso in response to two raids in Collinsville, Illinois, conducted by federal narcotics agents in 1973. See S. Rep. No. 588, 93d Cong., 1st Sess. 2 (1973). Petitioners argue (Br. 44, 46) that unless the proviso is read as a limitation on the discretionary function exception, the proviso will fail to serve its purpose of permitting tort claims against the United States for raids like the ones in Collinsville.

Petitioners' reliance on legislative history is misplaced. "[L]egislative history is not the law." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 523 (2018). It therefore cannot trump the FTCA's text, which, as explained above, makes clear that the law enforcement proviso applies only to subsection (h). See *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 436 (2019); pp. 24-31, *supra*. And even if the text were ambiguous, legislative history would still have no role to play because any ambiguity would need "to be construed in favor of immunity." *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 49 (2024) (citation omitted); see p. 31, *supra*.

In any event, petitioners misread the legislative history. Unlike Guerra's actions in this case, see Pet. App. 27a, 44a-53a, the Collinsville raids violated clearly established Fourth Amendment rights. The agents who conducted the Collinsville raids had no warrant when they broke into someone's home looking for a suspect. See *Askew* v. *Bloemker*, 548 F.2d 673, 675 (7th Cir. 1976). And no reasonable agent under the circumstances could have thought that entering the home was justified by probable cause or exigent circumstances. See *id.* at

680 (holding that there could not be "any doubt that the agents had no probable cause to believe that their targeted suspect was within" the home). The Fourth Amendment therefore clearly and specifically prohibited what the agents in Collinsville did. See *Anderson* v. *Creighton*, 483 U.S. 635, 640-641 (1987).

When the Constitution or other federal law or binding policy clearly and specifically prohibits a course of conduct, it eliminates the "element of judgment or choice" in the employee's activity and thus negates the applicability of the discretionary function exception. *Gaubert*, 499 U.S. at 322 (citation omitted). To be sure, the discretionary function exception applies "whether or not the discretion involved be abused," 28 U.S.C. 2680(a), so the mere fact that an employee violated the Constitution or other federal law or policy cannot be dispositive. See *Shivers* v. *United States*, 1 F.4th 924, 930-935 (11th Cir. 2021) (rejecting a "constitutional-claims exclusion" to the discretionary function exception); *Linder*, 937 F.3d at 1090 ("[T]he theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act.").

Instead, the question is whether the Constitution or other federal law or policy "*specifically prescribes* a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322 (emphasis added; citation omitted). If it does, "the employee has no rightful option but to adhere to the directive," and the discretionary function exception does not apply. *Ibid.* (citation omitted). The scope of the exception thus mirrors the doctrine of qualified immunity, under which "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or consti-

tutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); see *Carlson* v. *Green*, 446 U.S. 14, 20 (1980) (noting that Congress viewed the "FTCA and *Bivens* as parallel, complementary causes of action").

Because the Fourth Amendment clearly and specifically prohibited the agents' actions during the Collinsville raids, those actions did not fall within the discretionary function exception. But while the discretionary function exception did not stand in the way of FTCA liability for those raids, the intentional tort exception did, by preserving the United States' immunity for claims alleging assault, battery, false imprisonment, and false arrest—the very claims one would bring under state law to challenge an unlawful raid. So, as petitioners themselves acknowledge (Br. 23), Congress enacted the law enforcement proviso to remove that "barrier to liability."

The legislative history thus supports interpreting the proviso as applicable only to the intentional tort exception. Because that was the only exception that stood as a barrier to liability for the Collinsville raids, there was no need for Congress to enact a proviso that reached any other exception.

3. Petitioners' interpretation of the proviso finds no support in canons of construction

Finally, petitioners invoke (Br. 43-44) two canons of construction: (1) the general/specific canon, which holds that "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails," *Reading Law* 183; and (2) the later-in-time canon, which holds that when two provisions are in "irreconcilable conflict," the later-enacted provision prevails, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (citation omitted). According to petitioners (Br. 43-44), the proviso is the more specific and later-enacted provi-

sion. Petitioners thus contend (*ibid.*) that the proviso should be read to limit the scope of the discretionary function exception.

Petitioners' reliance on both canons is misplaced. A proviso, by definition, presumptively limits the scope of the provision to which it applies. *Morrow*, 266 U.S. at 534. That is not because the specific governs the general, or because a later-enacted provision prevails over an earlier-enacted one. It is simply how provisos work. See *ibid.* ("The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation."). There is thus no dispute that *if* the proviso applied to the discretionary function exception, it would limit the scope of that exception—just as it limits the scope of the intentional tort exception. But the question here is whether the proviso even applies to the discretionary function exception. Neither the general/specific canon nor the later-in-time canon speaks to that antecedent question about the proviso's reach.

Petitioners nevertheless contend (Br. 44) that the two canons can help resolve an asserted "conflict" between "two 'anys'": one in the law enforcement proviso, which says that "[t]he FTCA 'shall apply to any claim' arising under the proviso," and the other in the discretionary function exception, which says that "[t]he FTCA 'shall not apply to any claim' that is based on a discretionary function." Pet. Br. 40 (citations omitted). But there could be a conflict between those two "anys" only if the proviso applies to the discretionary function exception. And again, neither the general/specific canon nor the later-in-time canon speaks to whether the proviso does. Petitioners' attempts to defend the Eleventh

Circuit's view that the discretionary function exception is subject to the proviso thus fail.

* * * * *

The courts below determined that petitioners' claims for assault, battery, and false imprisonment fall within both the discretionary function exception and the law enforcement proviso. Pet. App. 17a-18a, 54a-60a. But because the discretionary function exception is not subject to the proviso, the fact that those claims fall within the proviso does not matter. Congress has preserved the United States' immunity so long as a claim satisfies any one of the FTCA's 13 exceptions. *Dolan*, 546 U.S. at 485. And because petitioners' claims satisfy the discretionary function exception, Congress has preserved the United States' immunity for those claims. Accordingly, the claims should be dismissed on that ground.

II. PETITIONERS' ALTERNATIVE ARGUMENT ABOUT THE SCOPE OF THE DISCRETIONARY FUNCTION EXCEPTION IS NOT PROPERLY PRESENTED AND IS ERRONEOUS IN ANY EVENT

In the alternative, petitioners contend (Br. 22-40) that their claims do not satisfy the discretionary function exception in the first place. That issue is not properly before this Court, because the Court declined to grant review of the second question presented in the certiorari petition, which raised that very issue. In any event, the courts below correctly determined that petitioners' claims satisfy the discretionary function exception. Pet. App. 17a-18a, 54a-58a.

A. The Court Should Decline To Consider Whether Petitioners' Claims Satisfy The Discretionary Function Exception In The First Place

Petitioners' certiorari petition presented two questions: one about the Supremacy Clause, and the other about whether petitioners' claims (and others "arising from wrong-house raids" and "similar" conduct) satisfy the discretionary function exception. Pet. i. This Court granted review of the first question, but not the second. 2025 WL 301915, at *1. Accordingly, whether petitioners' claims (and others like them) satisfy the discretionary function exception in the first place is not an issue properly before this Court. See *Warner Chappell Music, Inc.* v. *Nealy*, 601 U.S. 366, 371 n.1 (2024).

At the United States' suggestion, the Court also granted review of the threshold statutory question addressed in Part I of this brief, about whether the discretionary function exception is subject to the law enforcement proviso. 2025 WL 301915, at *1; see Br. in Opp. 21. But that question assumes that petitioners' claims *do* satisfy the discretionary function exception and asks whether the proviso nevertheless carves certain claims out of that exception—a question on which there is a circuit split. See Br. in Opp. 19-20; pp. 24-39, *supra*. In contrast, petitioners' alternative argument challenges the lower courts' determination that petitioners' claims satisfy the discretionary function exception in the first place. Pet. App. 17a-18a, 54a-58a. And in doing so, petitioners ask this Court to adopt an interpretation of that exception that no circuit has embraced. So while petitioners try to frame the issue in terms of the statutory question the Court granted, the issue is not "fairly included" within that question. Sup. Ct. R. 14.1(a).

The Court should therefore decline to consider petitioners' argument that their claims (and others like them) do not satisfy the discretionary function exception in the first place. See *Warner Chappell*, 601 U.S. at 371 n.1. Instead, the Court should assume that petitioners' claims satisfy the discretionary function exception and decide only the statutory question addressed above, about whether the proviso nevertheless renders that exception inapplicable. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 462 n.3 (1980) (per curiam) (deciding a question "on the assumption" that a claim satisfied the exception in subsection (c)).

B. If The Court Considers The Issue, It Should Reject Petitioners' View Of The Discretionary Function Exception

Petitioners' alternative argument (Br. 22) is that the discretionary function exception and the law enforcement proviso cover "categorically different classes of acts." That argument lacks merit. By its terms, the proviso covers particular conduct (*i.e.*, the conduct of federal "investigative or law enforcement officers") that gives rise to particular torts (*i.e.*, "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution"). 28 U.S.C. 2680(h). Neither the conduct the proviso covers, nor the torts the proviso references, are categorically beyond the scope of the discretionary function exception.

1. The conduct of federal investigative or law enforcement officers may satisfy the discretionary function exception

Whether "the discretionary function exception applies" depends on "the nature of the conduct, rather than the status of the actor." *Gaubert*, 499 U.S. at 325

(citation omitted). There is no merit to petitioners' suggestion (Br. 28) that the conduct of "workaday law enforcement" can never satisfy the discretionary function exception. To the contrary, federal investigative or law enforcement officers often engage in conduct that satisfies the discretionary function exception under the two-part inquiry this Court has articulated. *Gaubert*, 499 U.S. at 322-323.

First, the conduct of federal investigative or law enforcement officers often involves "an element of judgment or choice." *Gaubert*, 499 U.S. at 322 (citation omitted); see *Foley*, 435 U.S. at 297 (observing that police officers "exercise an almost infinite variety of discretionary powers"). After all, such officers are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. 2680(h); see, *e.g.*, 18 U.S.C. 3052 (authorizing FBI agents to make arrests and serve warrants); 18 U.S.C. 3107 (authorizing FBI agents "to make seizures under warrant"). And the exercise of that kind of "police authority calls for a very high degree of judgment and discretion," *Foley*, 435 U.S. at 298, especially when "mak[ing] split-second judgments" in "circumstances that are tense, uncertain, and rapidly evolving," *Graham* v. *Connor*, 490 U.S. 386, 397 (1989).

Second, the judgment that federal investigative or law enforcement officers are called upon to exercise is often judgment "of the kind that the discretionary function exception was designed to shield," *Gaubert*, 499 U.S. at 322-323 (citation omitted)—which is to say, judgment that is "susceptible to policy analysis," *id.* at 325. Although "[p]olice officers in the ranks do not formulate policy, *per se*," they "very clearly fall within the category of 'important non-elective . . . officers who partic-

ipate directly in the . . . *execution* . . . of broad public policy.'" *Foley*, 435 U.S. at 297, 300 (citation omitted).

That the actions of federal investigative or law enforcement officers may often satisfy the FTCA's discretionary function exception should come as no surprise. The FTCA "waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort." *United States* v. *Olson*, 546 U.S. 43, 44 (2005). In "the exercise of their discretion," however, investigative or law enforcement officers often engage in activities that could be tortious if engaged in by a private person, such as "invad[ing]" an individual's "privacy," "break[ing] down a door to enter a dwelling or other building," or using force in the course of making an arrest or other seizure. *Foley*, 435 U.S. at 297. Subjecting the exercise of such discretion to a "private person" standard, 28 U.S.C. 1346(b)(1), would thus undermine "one of the basic functions of government": law enforcement. *Foley*, 435 U.S. at 297. And in the absence of an FTCA exception protecting the exercise of discretionary functions, the United States would be exposed to negligence and other claims seeking to impose a "private person" standard on federal investigative or law enforcement officers through the medium of state tort law. It thus makes sense that the discretionary function exception that Congress enacted covers those officers' exercises of discretion.

Petitioners nevertheless contend (Br. 33) that "the day-to-day acts of line-level federal law enforcement officers" can never satisfy the discretionary function exception. According to petitioners (Br. 25), the exception covers "the broader regulatory or policy discretion vested by law," not "the everyday choices of government employees." But the respondent in *Gaubert* similarly

argued that "the discretionary function exception protects only those acts of negligence which occur in the course of establishing broad policies, rather than individual acts of negligence which occur in the course of day-to-day activities." 499 U.S. at 334. This Court readily "disposed of that submission." *Ibid.* The Court explained that "[d]iscretionary conduct is not confined to the policy or planning level." *Id.* at 325. And it found no "dichotomy between discretionary functions and operational activities." *Id.* at 326. The Court therefore rejected the notion that "[d]ay-to-day" activities can never satisfy the discretionary function exception. *Id.* at 325; see *id.* at 331.

Petitioners also argue (Br. 24) that the discretionary function exception extends only to conduct grounded in a "regulatory policy." If, by "regulatory policy," petitioners mean a formal regulation, they are mistaken. The Court in *Gaubert* rejected any requirement that the government identify "formal regulations governing the conduct in question." 499 U.S. at 329. Indeed, any such requirement would render the discretionary function exception superfluous, because the first clause of subsection (a) already excepts from the FTCA's waiver "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute *or regulation*." 28 U.S.C. 2680(a) (emphasis added).

Petitioners' factbound contention (Br. 34) that Guerra's conduct in this case did not satisfy the discretionary function exception fares no better. Contrary to petitioners' contention, Guerra's conduct was of a kind that is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. The SWAT Addendum explained that the purposes of the mission were to "[c]onduct a well coordi-

nated operation to safely and efficiently serve Federal arrest and search warrants," to "[m]aintain a high level of operational security," and to "achieve a near simultaneous start to ensure surprise." D. Ct. Doc. 83-6, at 26. The Addendum thus "established governmental policy which is presumed to have been furthered" when Guerra "exercised [his] discretion to choose from various courses of action" in executing the warrants. *Gaubert*, 499 U.S. at 332.

Because "it must be presumed that [Guerra's] acts [we]re grounded in policy when exercising that discretion," *Gaubert*, 499 U.S. at 324, "an action in tort" would necessarily involve "judicial 'second-guessing'" of policy judgments, *id.* at 323 (citation omitted). Petitioners suggest (Br. 11), for example, that Guerra should have checked the "address on the mailbox" before entering petitioners' home. But as the district court found, the "delay" from checking the mailbox "could have been problematic because the warrant was being served on a dangerous individual under the cover of darkness, and the simultaneous execution of multiple related warrants was important to the overall operation." Pet. App. 52a. Deciding how to identify and approach the right house as part of executing the warrants thus "require[d] judgment as to which of a range of permissible courses [wa]s the wisest" in light of various policy considerations. *Gaubert*, 499 U.S. at 325. Accordingly, petitioners cannot show that Guerra's actions in this case—let alone the actions of federal investigative or law enforcement officers across the board—fall outside the discretionary function exception.

2. Actions that give rise to intentional torts may satisfy the discretionary function exception

Petitioners also assert (Br. 31) that federal investigative or law enforcement officers never have the "discretion" to "commit [the] intentional torts" listed in the proviso, "like assault and battery." But state tort law cannot eliminate the "element of judgment or choice" in a federal employee's activity. *Gaubert*, 499 U.S. at 322. Only a "*federal*" source of law or policy can do so, by "specifically prescrib[ing] a course of action for an employee to follow." *Ibid.* (emphasis added; citation omitted); see pp. 36-37, *supra*. The fact that state law would characterize the challenged conduct as an intentional tort therefore says nothing about whether the conduct involved the kind of judgment that "the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-323 (citation omitted).

To ask whether Guerra had the discretion to commit an intentional tort is thus to ask the wrong question. From the vantage of federal law, the discretion at issue here is not the discretion to commit an intentional tort, but the discretion to decide how to identify and approach a target residence as part of executing a warrant. It was Guerra's exercise of that discretion that led him to mistakenly execute the warrants at the wrong house. Pet. App. 53a. And it was that mistake that gave rise to petitioners' claims for assault, battery, and false imprisonment. J.A. 2, 19. The courts below were therefore correct to conclude that those claims satisfy the discretionary function exception, even though they are also covered by the law enforcement proviso. Pet. App. 17a-18a, 54a-60a. Petitioners' contention (Br. 22) that those two provisions "address categorically distinct claims" is incorrect.

III. THIS COURT NEED NOT REACH THE SUPREMACY CLAUSE QUESTION

Because the discretionary function exception preserves the United States' immunity for petitioners' claims, this Court need not consider whether the Supremacy Clause would otherwise bar those claims. The courts below conducted a Supremacy Clause analysis only because circuit precedent required them to treat the law enforcement proviso as a limit on the scope of the discretionary function exception. But if this Court holds that the discretionary function exception is not subject to the proviso, then petitioners' claims fall within that exception, and they should be dismissed because that exception preserves the United States' immunity—thus eliminating any need to reach the Supremacy Clause question. See *Matal* v. *Tam*, 582 U.S. 218, 231 (2017) (reaffirming that the Court "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable") (citation omitted); Pet. Br. 17 n.7 (acknowledging that the Court should address the statutory question first).

If the Court does reach the question, it should reject the lower courts' view that the Supremacy Clause bars petitioners' claims. The Supremacy Clause instructs courts to follow federal law. See U.S. Const. Art. VI, Cl. 2; *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-325 (2015). So when federal law waives the United States' immunity and authorizes the government to be sued, the Supremacy Clause instructs courts to permit those suits. The Eleventh Circuit seemed to think that because Congress made state law "the source of substantive liability under the FTCA," *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994), the Supremacy Clause may stand in the way of such liability when the application of

state law would "conflict" with "federal objectives," *Denson* v. *United States*, 574 F.3d 1318, 1349 (11th Cir. 2009). But under the FTCA, state law is the source of substantive liability only because federal law says it is. 28 U.S.C. 1346(b)(1). And nothing in the Supremacy Clause bars federal law from authorizing such suits.

To the extent the Court has serious doubts about the constitutionality of allowing petitioners' claims to proceed, however, that is all the more reason to interpret the law enforcement proviso as modifying only the intentional tort exception in subsection (h). See pp. 24-39, *supra*. "When 'a serious doubt' is raised about the constitutionality of an Act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Jennings* v. *Rodriguez*, 583 U.S. 281, 296 (2018) (citation omitted). Interpreting the proviso as modifying only the intentional tort exception is at least fairly possible and would avoid any Supremacy Clause concerns that might exist.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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