No. 24-362

In The
Supreme Court of the United States

CURTRINA MARTIN, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether the Constitution's Supremacy Clause bars claims under the Federal Tort Claims Act 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 discretionary-function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional torts exception.

PARTIES TO THE PROCEEDING

Petitioners are Plaintiffs Curtrina Martin, individually and as parent and next friend of G.W., a minor, and Hilliard Toi Cliatt. Respondents are Defendants the United States of America, Lawrence Guerra, and Six Unknown FBI Agents.

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Opinions Below

The Eleventh Circuit's opinion, Pet. App. 1a, is unreported but available as *Martin* v. *United States*, 2024 WL 1716235 (11th Cir. Apr. 22, 2024). The district court's opinion, granting the government reconsideration and dismissing the case, Pet. App. 20a, is unreported but available as *Martin* v. *United States*, 2022 WL 18263039 (N.D. Ga. Dec. 30, 2022), and the district court's original opinion, granting the government summary judgment in part, Pet. App. 33a, is reported as *Martin* v. *United States*, 631 F. Supp. 3d 1281 (N.D. Ga. 2022).

Jurisdiction

The Eleventh Circuit entered its opinion below on April 22, 2024, and denied rehearing on May 30. Justice Thomas granted a 30-day extension of the period for filing a petition for a writ of certiorari. Petitioners timely filed their petition on September 27 and invoked this Court's jurisdiction under 28 U.S.C. 1254(1). This Court granted the petition on January 27, 2025.

Constitutional and Statutory Provisions Involved

The Supremacy Clause of the United States Constitution 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.

U.S. Const. art. VI, cl. 2.

One such law of the United States is the Federal Tort Claims Act. It provides:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on 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 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.

28 U.S.C. 1346(b)(1). But:

> 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.

*   *   *

> (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 * * * 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(a), (h).

STATEMENT OF THE CASE

Petitioners are the innocent victims of an FBI wrong-house raid, during which federal law enforcement officers committed assault, battery, and false imprisonment. Congress amended the Federal Tort Claims Act to permit individuals like Petitioners to bring these claims through the law-enforcement proviso. 28 U.S.C. 2680(h); *Carlson* v. *Green*, 446 U.S. 14, 19–20 (1980). Yet the Eleventh Circuit dismissed Petitioners' claims, reinstating the sovereign immunity Congress waived through the FTCA.

This incongruous result grows from a distortion of the separation of powers. As this Court recently ex-

plained, "creating a cause of action is a legislative endeavor" because "Congress is far more competent than the Judiciary to weigh [] policy considerations." *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022) (cleaned up). Through the law-enforcement proviso, Congress did just that.[1] But the lower courts have overridden the legislature's prerogative by restricting or—as here—outright barring the cause of action Congress provided. In the process, they have undermined our constitutional structure and created statutory conflict where none exists.

This Court has never found any overlap between the law-enforcement proviso, 28 U.S.C. 2680(h), and the discretionary-function exception, 28 U.S.C. 2680(a). While this exception reclaims sovereign immunity from the FTCA when claims are based on policy functions, the proviso waives sovereign immunity for certain intentional torts committed by law enforcement officers, which do not require courts to consider policy at all. Yet most circuit courts have concluded that the provisions conflict, and all but one have resolved the conflict in favor of the exception.

This is wrong for two reasons: First, the discretionary-function exception reaches only acts authorized by an established agency policy. It does not reach common-law torts committed outside agency policy. Properly

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[1] See *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting) (calling "for a workable remedy" from Congress for "error and deliberate misconduct by law enforcement officials"); *Butz* v. *Economou*, 438 U.S. 478, 524 (1978) (Rehnquist, J., concurring in part) ("Congress, making just these sorts of judgments * * * , has amended the Federal Tort Claims Act * * * to allow suits against the United States on the basis of certain intentional torts[.]").

understood, the exception addresses a class of conduct that is categorically distinct from the class covered by the intentional torts in the law-enforcement proviso. Second, in the rare instance that the exception and proviso could conceivably intersect, the FTCA's text, structure, and history show that the proviso exempts its claims from Section 2680's reinstatement of sovereign immunity.

The Eleventh Circuit—relying on the second reason above—is the only circuit to correctly conclude that the discretionary-function exception does not apply to law-enforcement proviso claims. *Nguyen* v. *United States*, 556 F.3d 1244, 1257 (2009). But shortly after it did, the circuit careened back in the wrong direction—holding that the Constitution's Supremacy Clause paradoxically prevents Congress from waiving sovereign immunity through a federal statute. See, *e.g.*, *Denson* v. *United States*, 574 F.3d 1318, 1348 (2009).

The Eleventh Circuit and its sister courts now find themselves in territory uncharted by Congress. If victims of a wrong-house raid cannot find a remedy under the FTCA, the law-enforcement proviso is lost. This Court should correct course.

I. The Federal Tort Claims Act waives sovereign immunity for federal employees' tortious acts, including police raids.

Passed in 1946, the Federal Tort Claims Act "was not an isolated and spontaneous flash of congressional generosity." *Feres* v. *United States*, 340 U.S. 135, 139 (1950). Rather, the Act was "the culmination of a long effort to mitigate unjust consequences of sovereign

immunity from suit" and address the "multiplying number of remediless wrongs * * * which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government." *Id.* at 139–140.

To accomplish these purposes, the FTCA provides a federal cause of action for damages, "allow[ing] a plaintiff to bring certain state-law tort suits against the Federal Government." *Brownback* v. *King*, 592 U.S. 209, 210–211 (2021). The Act includes a broad grant of jurisdiction and a broad waiver of sovereign immunity for claims that satisfy six criteria:

> Subject to the provisions of chapter 171 of this title,[2] the district courts * * * shall have exclusive jurisdiction of civil actions on claims [1] against the United States, [2] for money damages, * * * [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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); see also *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994); 28 U.S.C. 2674 ("The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances[.]").

"Any claim" that satisfies Section 1346(b)(1) may still

[2] Chapter 171 of Title 28 includes 28 U.S.C. 2671–2680.

be defeated by sovereign immunity, however, if it falls within the "Exceptions" in Section 2680, for which "[t]he provisions of [chapter 171] and section 1346(b) of this title shall not apply[.]" 28 U.S.C. 2680. These exceptions exclude from the FTCA's waiver of sovereign immunity the 13 categories of claims listed in 28 U.S.C. 2680(a)–(n).[3]

Among these exceptions are the so-called discretionary-function and intentional-torts exceptions,[4] 28 U.S.C. 2680(a), (h).

The discretionary-function exception reinstates sovereign immunity for "[a]ny claim * * * 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[.]" 28 U.S.C. 2680(a). This discretionary-function exception precludes claims for acts based on federal regulations, *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991), or legally conferred discretion "based on considerations of

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[3] In margin comments to the original 1946 enactment of the FTCA, the exceptions were described as: (a) ("Act, etc., in execution of statute."); (b) ("Loss of letters, etc."); (c) ("Assessment of tax, etc."); (d) ("Suits in admiralty."); (e) ([no description]); (f) ("Quarantine."); (g) ("Injury to vessels, etc." [since repealed]); (h) ("Assault, etc."); (i) ("Fiscal operations of Treasury."); (j) ("Combatant activities."); (k) ("Foreign country."); (l) ("TVA."); (m) ([not in original Act]); (n) ([not in original Act]). Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, 845–846 (1946).

[4] Neither shorthand description is apt. See *United States* v. *Gaubert*, 499 U.S. 315, 324–325 & n.7 (1991) (2680(a) includes some non-discretionary acts and excludes some discretionary ones); *Levin* v. *United States*, 568 U.S. 503, 507 n.1 (2013) (2680(h) includes some negligent acts and excludes some intentional ones).

public policy," *id.* at 322–323 (cleaned up). For acts in the latter category, just any discretion will not do. Because the exception concerns policy judgments, there "are obviously discretionary acts" that do not trigger the exception because they are not "based on the purposes that [a] regulatory regime seeks to accomplish." *Id.* at 325 n.7.

The intentional-torts exception reinstates sovereign immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]" 28 U.S.C. 2680(h). This intentional-torts exception does not, however, remove from the FTCA's waiver of sovereign immunity "all intentional torts, *e.g.*, conversion and trespass," and the exception also reinstates sovereign immunity for "certain torts, *e.g.*, misrepresentation, that may arise out of negligent conduct." *Levin* v. *United States*, 568 U.S. 503, 507 n.1 (2013) (citing *United States* v. *Neustadt*, 366 U.S. 696, 702 (1961)); see also *United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion) (noting that 2680(h) covers claims that "sound in negligence but stem from a battery").

In 1974, Congress amended the FTCA in response to a pair of federal wrong-house raids in Collinsville, Illinois, that made national news the year before.[5] This

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[5] See, *e.g.*, Andrew H. Malcolm, *Drug Raids Terrorize 2 Families—by Mistake*, N.Y. Times (Apr. 29, 1973); Linda Eardley, *Drug Agents Sued After Raid on Home*, St. Louis Post-Dispatch (Apr. 25, 1973); Dennis Montgomery, *The Night of Terror: "We Made a Mistake"*, Wash. Post (Apr. 30, 1973); see also 119 Cong. Rec. 23217, 23242–23258 (1973) (cataloging news reports); *Hearings on*

amendment added the law-enforcement proviso to the FTCA. Act to Amend Reorganization Plan No. 2 of 1973, Pub. L. No. 93-253, 88 Stat. 50 (1974). The proviso is an exception to the FTCA's exceptions. It re-waives the sovereign immunity otherwise reinstated in Section 2680 "to create a cause of action against the United States for intentional torts committed by federal law enforcement officers." *Carlson*, 446 U.S. at 19–20. The proviso is located in Section 2680(h), which provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> *　　*　　*
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *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. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the

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Reorganization Plan No. 2 of 1973 before the Subcomm. on Reorganization, Rsch., and Int'l Organizations of the S. Comm. on Gov't Operations, 93d Cong., 1st Sess., pt. 3, at 461–483 (1973) (testimony from victims of Collinsville raids); see also generally John C. Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment*, 54 N.C. L. Rev. 497, 499–517 (1976).

> United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

See also *Millbrook* v. *United States*, 569 U.S. 50, 54 (2013) (assembling Section 2680(h) as above, less the final sentence).

The point of the proviso is to ensure that "innocent individuals who are subjected to raids [of the type conducted in Collinsville and *Bivens*] will have a cause of action against * * * the Federal Government." *Carlson*, 446 U.S. at 20 (quoting S. Rep. No. 93-588, at 3 (1973)).

The Senate Report cited in *Carlson* clarifies the proviso's operation. Although public outrage toward the Collinsville raids spurred Congress to act, it did not cabin the proviso to the facts—or the torts—at issue in those raids. See S. Rep. 93-588, at 3–4. Instead, the language Congress enacted provides a remedy for a swath of tortious conduct by federal law enforcement officers that the FTCA could not otherwise address due to its intentional-torts exception. See *id.* at 1 (explaining that the purpose of the bill containing the proviso was "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers").

To achieve this purpose, Congress (in conjunction with the Department of Justice) crafted the proviso as a statutory "counterpart to * * * *Bivens*" that extends beyond "constitutional tort situations[.]" S. Rep. 93-588, at 3–4; see also *Carlson*, 446 U.S. at 20 ("Congress views FTCA and *Bivens* as parallel, complementary causes of action[.]"). When the proviso was enacted, both the legislative and executive branches understood it to "submit

the Government to liability" in "any case in which a Federal law enforcement agent commit[s]" an enumerated "tort while acting within the scope of his employment or under color of Federal law." S. Rep. 93-588, at 4.

This case presents quintessential proviso claims.

II. The FBI raided an innocent family's home.

In suburban Atlanta sits a house at 3756 Denville Trace. Built on a quarter-acre lot in 2000, the four-bedroom, three-bathroom home has an attached two-car garage, tasteful landscaping, and a manicured lawn. In 2017, it was home to a family: Petitioners, Hilliard Toi Cliatt; his partner, Curtrina Martin; and her seven-year-old son, G.W.

Before dawn on October 18, 2017, FBI Special Agent Lawrence Guerra led a six-agent SWAT team to 3756 Denville Trace. J.A. 4, 21. Failing to confirm the address clearly visible on the mailbox, Guerra mistakenly believed he had arrived at 3741 Landau Lane—the home of gang member Joseph Riley and the address for which Guerra had a search warrant. Guerra knew that the target house had its address on the mailbox. He also knew that neither Riley nor his associates were known to drive a black Camaro; yet when Guerra saw a black Camaro in Petitioners' driveway that morning, he used the car as a landmark for his team to identify their target. Pet. App. 3a–5a, 7a, 38a & n.3.

Ignoring these and other conspicuous features that would have averted their mistake, the heavily armed SWAT team smashed in the front door of 3756 Denville Trace with a battering ram, detonated a flashbang grenade in the home's entryway, and rushed inside. Pet.

App. 7a–8a; J.A. 5, 22.

The explosion startled Petitioners awake. The family immediately believed criminals were invading their home. Martin's first instinct was to run to her son's room to shield him from the intruders, but Cliatt, acting to protect his partner, grabbed Martin and pulled her into a walk-in closet. Meanwhile, seven-year-old G.W. hid under his covers, as his mother screamed, "I need to go get my son, * * * I need to go get my son." Pet. App. 8a, 39a, 76a–77a, 88a; J.A. 5–6, 22–23.

Masked FBI agents shoved open the door to the closet where Cliatt and Martin had barricaded themselves. Agents dragged Cliatt out and handcuffed him. And Martin—half naked—fell to the floor in front of a room full of hostile strangers. As Martin pleaded with one of the agents to let her see her son, the SWAT team pointed guns at her and Cliatt. Pet. App. 8a, 88a–89a; J.A. 5–6, 22–23.

The agents aggressively questioned Cliatt. But when he told them his address—3756 Denville Trace—"all the noise just ended." Pet. App. 8a, 79a. Realizing the SWAT team had raided the wrong house, Agent Guerra allowed Cliatt to stand up, unshackled him, and said, "I'll be right back." *Id.* at 9a, 79a–80a; see also J.A. 7, 24.

Guerra and his team then went down the block to 3741 Landau Lane, where they conducted another raid at the correct address. Guerra returned to 3756 Denville Trace, apologized, documented the property damage he caused, handed Cliatt a business card with his supervisor's information, and left the family in stunned disbelief. Pet. App. 9a, 82a–83a.

* * *

Guerra would later claim that, while he had input "3741 Landau Lane" into his GPS, it had directed him to 3756 Denville Trace instead. But Guerra could not prove this—he threw the GPS away before Petitioners could examine it in discovery. Pet. App. 6a, 9a, 40a–41a.

III. The lower courts granted the government sovereign immunity for the wrong-house raid.

1. Petitioners sued the United States under the FTCA for the tortious acts of the FBI agents who raided their home, pleading five counts.[6] Pet. App. 60a; J.A. 8–14, 25–30. Citing the discretionary-function exception, 28 U.S.C. 2680(a), the government moved for summary judgment. The district court granted it in part. Pet. App. 67a.

The district court applied Eleventh Circuit precedent holding that the discretionary-function exception does not bar claims that fall within the FTCA's law-enforcement proviso. See *Nguyen*, 556 F.3d at 1260 ("[W]here * * * the § 2680(h) proviso applies to waive sovereign immunity, the exception to waiver contained in § 2680(a) is of no effect."). So the court broke Petitioners' FTCA claims into two groups: four proviso claims

[6] Martin and G.W. filed suit separately from Cliatt, but the district court consolidated the cases. Petitioners also asserted a claim against Guerra under *Bivens*, but the Eleventh Circuit granted Guerra qualified immunity on the basis that "the law at the time did not clearly establish that Guerra's preparatory steps before the warrant execution would violate the Fourth Amendment." Pet. App. 15a. The questions before the Court concern only Petitioners' FTCA claims.

(false arrest, false imprisonment, assault, and battery, J.A. 8–10, 25–27) and three non-proviso claims (negligence, trespass, and infliction of emotional distress, J.A. 10–14, 27–30). Pet. App. 59a–60a.

The district court denied summary judgment for three of the four proviso claims. It held that the record did not support a claim for false arrest, Pet. App. 63a, but did support a claim for false imprisonment because the record "shows that the 3741 Landau and Riley warrants were void as to Plaintiffs, and defendants have not demonstrated that the arrest was otherwise legal," *id.* at 65a. Petitioners' assault and battery claims likewise could proceed because the FBI agents had unlawfully touched Petitioners. *Id.* at 65a–67a.

But the district court granted summary judgment on the non-proviso claims under the discretionary-function exception. Because "Guerra's efforts in preparing to execute the warrant at 3741 Landau involved judgment and choice" and "no statute, regulation or even internal operating procedure prescrib[ed] Guerra's course of action," the district court concluded that his decision "involve[d] policy considerations and should not be subject to judicial second-guessing." Pet. App. 57a–58a (citations omitted).

2. A month after the district court allowed Petitioners' proviso claims to proceed, the Eleventh Circuit issued *Kordash* v. *United States*, 51 F.4th 1289 (11th Cir. 2022). *Kordash* extended earlier circuit precedent holding that the Supremacy Clause bars an FTCA claim if the government employee's acts had "some nexus with furthering federal policy" and could "reasonably be characterized as complying with the full range of federal law." *Id.* at 1293–1294 (quoting *Denson*, 574 F.3d at

1348).

The government moved for reconsideration based on *Kordash* (though it had not raised the Supremacy Clause as an affirmative defense), and the district court granted it. Pet. App. 25a. "Because Guerra was acting within the scope of his discretionary duty, and his actions did not violate the Fourth Amendment," the district court concluded that the Supremacy Clause barred Petitioners' remaining FTCA claims. *Id.* at 27a.

3. Petitioners appealed, but the Eleventh Circuit affirmed. Like the district court, the circuit court separated Petitioners' proviso and non-proviso claims. It then held that the discretionary-function exception barred the non-proviso claims and the Supremacy Clause barred the proviso claims.

According to the circuit court, "[t]he discretionary function exception applies *unless* a source of federal law 'specifically prescribes' a course of conduct." Pet. App. 16a (quoting *Shivers* v. *United States*, 1 F.4th 924, 931 (11th Cir. 2021)). No federal prescription existed here, the court found, because "the FBI did not have stringent policies or procedures in place that dictate *how* agents are to prepare for warrant executions." Pet. App. 17a–18a; *id.* at 18a ("[T]he preparatory actions Guerra took before the warrant execution" were "'susceptible to policy analysis.'" (citation omitted)). "Although it is unfortunate that * * * Guerra executed the warrant at the wrong house," the court concluded, "his actions, nevertheless, 'fall squarely within the discretionary function exception.'" *Id.* at 18a (quoting *Shivers*, 1 F.4th at 929).

As for Petitioners' proviso claims, the court explained that, "[s]imilar to the discretionary function

exception, the Supremacy Clause ensures that states do not impede or burden the execution of federal law." Pet. App. 16a–17a (citing *Denson*, 574 F.3d at 1336–1337). Because Guerra "acted within the scope of his discretionary authority" in conducting the raid and was otherwise entitled to qualified immunity, the court held that the Supremacy Clause foreclosed Petitioners' proviso claims. Pet. App. 19a.

4. The Eleventh Circuit denied rehearing, and Petitioners requested this Court's review. Although, in the government's view, the Eleventh Circuit answers both questions presented incorrectly, the government opposed certiorari. BIO at 8, 21–22. Because it believes the decision below "correctly held that petitioners' claims are barred, and no court of appeals * * * would have reached a different result," the government argued that the Court should deny review. *Id.* at 8.

This Court granted the petition.

SUMMARY OF THE ARGUMENT

The Court should restore the will of Congress expressed in the text of the FTCA and eliminate the judge-made exceptions that bar recovery for proviso claims—here, assault, battery, and false imprisonment.

Congress originally excluded intentional torts, like assault and battery, from the FTCA. But after the Collinsville raids, Congress reversed course. Through the law-enforcement proviso, Congress waived sovereign immunity for certain intentional torts by law enforcement officers. Congress meant what it said in the proviso, and neither the discretionary-function exception

nor the Supremacy Clause stands in the way.[7]

I. The discretionary-function exception is categorically inapplicable to claims arising under the law-enforcement proviso. Over the years, however, lower courts have expanded the discretionary-function exception, creating conflict with the proviso where none exists. These interpretations have strayed so far from the FTCA's text that even claims arising out of a wrong-house raid—the exact scenario Congress created the proviso to address—are now excluded.

The Court can solve the problem in one of two ways: *First*, by holding that the sort of claims that arise under the proviso do not implicate the discretionary-function exception. *Second*, by holding that the proviso removes its claims from Section 2680's reinstatement of sovereign immunity.

A. The law-enforcement proviso and discretionary-function exception do not conflict. The former waives sovereign immunity for ordinary common-law torts committed by law enforcement officers that are not based on policy. The latter reinstates sovereign immunity to prevent judicial policy-making via tort suits, with particular "emphasis upon protection for regulatory activities[.]" *United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984). Both the statutory text and this Court's cases interpreting it emphasize the exception's regulatory nature. Indeed, this Court has never observed the

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[7] Petitioners address the questions presented in reverse order because the government has declined to defend the first question presented and because we believe, following the Court's refinement of the second question presented, the issues flow more logically in this order.

discretionary-function exception to overlap with the intentional-torts exception, let alone the law-enforcement proviso.

B. If the provisions did conflict, the law-enforcement proviso should prevail for six reasons. (1) The proviso's text expressly negates the reinstatement of sovereign immunity in Section 2680's preamble. The preamble provides that the FTCA "shall not apply" to certain claims, but the proviso retorts that the FTCA "shall apply" to claims arising out of it. (2) Similarly, unlike the definition of "investigative or law enforcement officer" in Section 2680(h), the proviso does not just apply "for the purpose of this subsection." The proviso (3) is more specific and (4) was enacted more recently than the exception. (5) Applying the exception (as interpreted by the lower courts) to proviso claims would undermine the proviso in its core applications. (6) It would also defeat the FTCA's order of operation, which gives the proviso the last word.

II. The Supremacy Clause cannot restrict legislative enactments of Congress. The Eleventh Circuit's holding to the contrary upends our constitutional design. In the FTCA, Congress incorporated state tort elements into federal law. This incorporation means that there can be no conflict between federal employees' actions that have "some nexus with furthering federal policy" and an actual federal law—the FTCA—that waives immunity for many of those actions. But the Eleventh Circuit created an exception to Congress's power to determine the law of the land in the name of preserving that power. The Court should make sure that the legislative prerogative stays with Congress.

ARGUMENT

While executing a raid at the wrong house, federal law enforcement officers subjected Petitioners to assault, battery, and false imprisonment. These claims fall squarely within the FTCA's law-enforcement proviso that Congress enacted to provide a remedy for federal wrong-house raids. On this point, the statutory text is unmistakable:

> [W]ith regard to acts or omissions of investigative or law enforcement officers of the United States Government, [the FTCA] shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

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

At the government's urging, however, the lower courts have effectively read the law-enforcement proviso out of the FTCA. We offer the Court several paths to restore the cause of action Congress enacted.

I. The discretionary-function exception is categorically inapplicable to claims arising out of the law-enforcement proviso.

Congress designed the FTCA "to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962); 28 U.S.C. 1346(b)(1), 2680. Two exceptions are relevant here: the discretionary-function exception, 28 U.S.C. 2680(a); and the intentional-torts

exception, 28 U.S.C. 2680(h). Both have been part of the FTCA since its original enactment in 1946. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, 845–846 (1946).

These exceptions serve different purposes. Through the discretionary-function exception, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814. At its core, the exception shields against tort suits that can be resolved only by forcing the judiciary to assess "the validity of legislation or discretionary administrative action," like decisions "of a regulatory nature," "the expenditure of Federal funds," or "the execution of a Federal project[.]" *Dalehite* v. *United States*, 346 U.S. 15, 27 (1953) (citation omitted).

"On the other hand, the common law torts of employees of regulatory agencies, as well as of other Federal agencies," are "within the scope of" the FTCA. *Varig Airlines*, 467 U.S. at 810 (citation omitted). These "ordinary common-law torts" were "[u]ppermost in the collective mind of Congress" when it passed the FTCA. *Dalehite*, 346 U.S. at 28 & n.19.

Still, Congress did not permit all such torts. To preclude recovery for certain intentional torts, Congress enacted the intentional-torts exception, 28 U.S.C. 2680(h), which was designed to cover, among others, claims "where some agent of the Government gets in a fight with some fellow . . . [a]nd socks him." *Shearer*, 473 U.S. at 55 (citation omitted).

But after the Collinsville raids, Congress saw the

error of its ways: If a federal law enforcement officer does tortiously sock a fellow, it is only right that the government should provide a remedy. So Congress amended the FTCA to revive certain intentional-tort claims arising out of "deliberate attacks" by federal police. *Shearer*, 473 U.S. at 55. This amendment—the law-enforcement proviso—"extends the waiver of sovereign immunity" to claims for "'acts or omissions of investigative or law enforcement officers.'" *Millbrook*, 569 U.S. at 52–53 (quoting 28 U.S.C. 2680(h)).

Read together, the FTCA plays out like a tennis point: Sovereign immunity applies when the government serves. If a plaintiff can return the ball with Section 1346(b) (waiving immunity), she may be able to score. If, however, the government can volley back with Section 2680 (reinstating immunity), the plaintiff loses—unless the law-enforcement proviso allows her to send the ball back across the net (re-waiving immunity). The remainder of the point plays out like a typical tort suit.

But the lower courts have thrown out the rules. They have expanded the discretionary-function exception beyond its text and purpose.[8] As a result, the courts have created an unnecessary and unjustified conflict within Section 2680.

The Court has two paths to fix this problem: It can restore the proper balance to the FTCA by clarifying that, properly understood, the discretionary-function exception and the law-enforcement proviso address

[8] The different ways in which the circuits have expanded the discretionary-function exception are the subject of multiple circuit splits. See *Xi* v. *Haugen*, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J., concurring).

categorically different classes of acts, so the exception does not bear on the proviso. See Part I(A), *infra.* Or the Court could adopt a straightforward textual analysis under which the proviso overrides the discretionary-function exception if the two conflict. See Part I(B), *infra*.

Both paths lead to the same outcome in this case: Petitioners' claims arising out of the assault, battery, and false imprisonment that Agent Guerra and his SWAT team committed as they reenacted the Collinsville raids must be allowed to proceed under the proviso Congress enacted to permit these exact claims.

A. Claims based on discretionary functions do not arise out of the law-enforcement proviso.

After decades of consideration, the Court has never suggested that the discretionary-function exception, Section 2680(a), and the law-enforcement proviso, Section 2680(h), overlap. This is because Sections 2680(a) and (h) address categorically distinct claims. And any interplay that may exist disappears entirely when the claims are limited to those in the proviso.

i. The exception does not reach intentional torts like those the proviso permits.

To understand why the discretionary-function exception is inapplicable to claims arising out of the law-enforcement proviso, we must understand both provisions. So we "start with the text of the statute[.]" *Babb* v. *Wilkie*, 589 U.S. 399, 404 (2020).

1. ***The text of the law-enforcement proviso.*** Under the intentional-torts exception, the FTCA "shall not

apply" to:

> 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, however, the FTCA "shall apply" to "any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution," "with regard to acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h).

This proviso re-waives sovereign immunity. Its language is comprehensive and mandatory: The FTCA shall apply to the specified claims if committed by a federal police officer. Congress created the proviso after the Collinsville raids exposed a gap in the law: While the FTCA waived sovereign immunity if a "mail truck driver * * * negligently runs down a citizen on the street[,]the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal 'no-knock' raid." S. Rep. 93-588, at 3.

Congress placed the proviso in 2680(h)—the intentional-torts exception. This structural choice communicates that Congress understood 2680(h) to be the barrier to liability, not just for whatever remains after the discretionary-function exception is applied, but every time law enforcement officers "act under color of law so as to injure the public through search[es] and seizures[.]" S. Rep. 93-588, at 4; see *Cope* v. *Cope*, 137 U.S. 682, 688–689 (1891) (exception created in a later-enacted proviso

showed that Congress did not think a broader, prior-enacted provision in the statute already barred recovery).

Moreover, it would be nonsensical for Congress to carve certain police torts out of Section 2680(h), knowing full well that the same torts would be doomed by Section 2680(a). See *Kosak* v. *United States*, 465 U.S. 848, 858 (1984) ("[O]ur interpretation of the plain language of the provision accords with what we know of Congress' general purposes in creating exceptions to the Tort Claims Act."). If any ambiguity existed about the overlap of Sections 2680(a) and (h), the law-enforcement proviso put it to rest.

2. ***The text of the discretionary-function exception.*** Proviso claims are not encompassed by Section 2680(a), which provides that the FTCA "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.

28 U.S.C. 2680(a) (discretionary-function exception underlined).

The discretionary-function exception is restricted to claims "based upon" a "discretionary function" "on the part of a federal agency or an employee," which indicates that it is cabined to the actions of the government in promulgating and administering a regulatory policy for four reasons:

First, "discretionary function" is a term of art. Exercising a "discretionary function" requires the use of power conferred by law in certain circumstances to fulfill a definite, policy-based end. In the legal context, "[w]hen applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances[.]" *Black's Law Dictionary* 587 (3d ed. 1933). And "function" means, "[o]ffice; duty; fulfillment of a definite end or set of ends by correct adjustment of means." *Id.* at 827. See also *Molzof* v. *United States*, 502 U.S. 301, 307 (1992) ("[W]here Congress borrows a term of art * * * it presumably knows and adopts the cluster of ideas that were attached to each borrowed word[.]" (citation omitted)).

Second, the exception's focus on administrative discretion is confirmed by the structure of the whole provision. The first half of 2680(a) (the due-care exception) refers to an "act or omission of an employee" executing a statute or regulation. The second half (the discretionary-function exception), which builds from the first, is limited to "a discretionary function or duty on the part of a federal agency or an employee[.]" 28 U.S.C. 2680(a). Congress's choice of language shows that the discretion at issue does not include the everyday choices of government employees, but the broader regulatory or policy discretion vested by law. See *Xi* v. *Haugen*, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J., concurring) ("These words suggest that courts should look at the *kind* of activity * * * not the action itself."). Indeed, Section 2680(a) is the only exception in the FTCA that refers to an "agency." This is reinforced by the exception's requirement that the claim must be "based upon" the performance of a discretionary-function—rather than "ari-

sing" out of some act. Compare 28 U.S.C. 2680(a) (claim "based upon"), with (b)–(c), (e), (h), (j)–(n) (claim "arising"). The "discretionary function" an employee performs, therefore, must be "based upon" advancing the underlying regulatory or policy goal. An act without a direct connection to the policy goal cannot be based on it. See Cornelius J. Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 Wash. L. Rev. & State Bar J. 207, 212–213, 228–229 (1956) (Peck).

Third, because the first half of the discretionary-function exception itself (discretion "on the part of a federal agency") concerns administrative policy, the second half of the exception (discretion "on the part of * * * an employee of the Government") should be construed as limited to an agency's policy decisions. See *Fischer* v. *United States*, 603 U.S. 480, 487 (2024) (avoiding an interpretation of a general term that is broader than the provision's other terms). Just as plaintiffs cannot bring an FTCA claim based on agency policy itself (the first half), they cannot bring a claim based on the judgment calls employees are legally empowered to make in furtherance of that policy (the second half).

Fourth, the historical context in which Congress adopted the discretionary-function exception confirms this technical understanding. In the two years preceding the FTCA's enactment, Congress passed two other statutes concerned with administrative functions that show that a reader in 1947 would have understood "discretionary function" to mean agency action in furtherance of some policy. See Reorganization Act of 1945, Pub. L. No. 79-263, 59 Stat. 613 (1945); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

In the Reorganization Act, instructing the President to reorganize federal agencies, Congress repeatedly used the word "function" to describe the power vested by law in an agency. *E.g.*, 59 Stat. at 615, Sec. 5(a)(4) (a reorganization plan could not extend "any function beyond the period authorized by law for its exercise"). The President understood "function" this same way. *E.g.*, Reorg. Plan No. 1 of 1947, § 101(a), 5 U.S.C. App. 1 ("[A]ll functions vested by law in the Alien Property Custodian * * * are transferred to the Attorney General[.]").

In the APA, Congress required the separation of certain "functions" within federal agencies. 5 U.S.C. 554(d). As with the discretionary-function exception, the APA excluded from judicial review certain claims concerning "agency action [] committed to agency discretion by law." 5 U.S.C. 701(a)(2). Then-Attorney General Robert Jackson explained that the point was to limit judicial interference with the types of policy determinations vested in the agencies' discretion. Off. of Att'y Gen., *Final Report of the Attorney General's Committee on Administrative Procedure* 119 (1941). The examples he gave—such as the likelihood that certain equipment will reduce locomotive accidents and the amount of fertilizer that can safely remain on apples—track the type of discretionary functions Section 2680(a) exempts from FTCA liability. *E.g.*, *Dalehite*, 346 U.S. at 37 ("[T]he cabinet-level decision to institute the fertilizer export program was a discretionary act[.]").

Taken together, the text of Section 2680(a) indicates that the discretionary-function exception applies *only* when a claim requires a court to evaluate an employee's exercise of some power conferred on him to fulfill the

definite ends of an administrative regime. This limited exception does not bear on suits alleging proviso torts committed in workaday law enforcement.

3. ***The Court's interpretation of the discretionary-function exception.*** The Court's jurisprudence confirms that "discretionary function" is a legislative term of art that cannot be disentangled from regulatory policy. In its earliest case construing the discretionary-function exception, the Court stressed Congress's focus on "discretionary *administrative* action" and "acts of a governmental nature or function." *Dalehite*, 346 U.S. at 27–28 (emphasis added).

Over the decades, the Court has repeatedly applied this understanding of "discretionary function" to determine whether the FTCA waives sovereign immunity—all but one, negligence cases:

- *Dalehite* v. *United States* (1953): Discretionary-function exception protected cabinet-level decision to use wartime ingredients to manufacture fertilizer for Europe, and the manufacturing that caused an explosion was excepted from the FTCA because it was done consistent with the agency's written specifications. 346 U.S. at 38–41.
- *Indian Towing Co.* v. *United States* (1955): Once the Coast Guard "exercised its discretion to operate a light[house]," it had a duty to do so with due care. 350 U.S. 61, 69; see also *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318–321 (1957) (allowing FTCA claims against the Forest Service for negligently allowing a wildfire to spread after agreeing to fight the fire and exercising control over the scene).

- *United States* v. *United States Trust Co.* (1955): Negligent operation of an air-traffic control tower was not a discretionary function because the government exercised its discretion "when it [] decided to operate the tower, but the tower personnel had no discretion to operate it negligently." *Eastern Air Lines, Inc.* v. *Union Tr. Co.*, 221 F.3d 62, 77 (D.C. Cir. 1955), aff'd sub nom. *United States Tr. Co.*, 350 U.S. 907 (mem.).
- *Hatahley* v. *United States* (1956): Federal agents' seizure of horses outside of agency procedures was not a discretionary function because their "acts were wrongful trespasses not involving discretion on the part of the agents[.]" 351 U.S. 173, 181.
- *United States* v. *Varig Airlines* (1984): Pursuant to discretion vested by Congress to prescribe an inspection regime for airplanes, the FAA adopted a detailed "spot-check" system. 467 U.S. at 817. "[T]he acts of FAA employees in executing the 'spot-check' program in accordance with agency directives are protected by the discretionary function exception[.]" *Id.* at 820.
- *Berkovitz* v. *United States* (1988): Discretionary-function exception barred claims that challenged an agency's policy about the appropriate way to regulate vaccines but did not bar claims alleging that the agency approved vaccines without following a specific statutory and regulatory directive. 486 U.S. 531, 544–547.
- *United States* v. *Gaubert* (1991): Discretionary-function exception protected actions taken by

> banking regulators, consistent with a formal agency policy and adopted pursuant to a statutory grant of authority, under which the agency authorized individual regulators to weigh the appropriateness of the agency's supervisory actions on a case-by-case basis. 499 U.S. at 330–334.

These cases distinguish between claims that require courts to evaluate administrative policy decisions (which are barred) and those that do not (which may proceed). The guiding principle is the separation of powers: "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814; *id.* at 813–814 (emphasizing the exception's focus on the government acting as a regulator). If it sounds obvious that such claims should be barred, it is; the discretionary-function exception was added as a "clarifying amendment" to spell out basic principles of judicial construction. *Dalehite*, 346 U.S. at 26–27.

Ultimately, the Court's application of the discretionary-function exception shakes out into four buckets: (1) "[I]f a regulation mandates particular conduct, and the employee obeys the direction," 2680(a) reinstates sovereign immunity, and the claim is barred. (2) If "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion," 2680(a) presumptively reinstates sovereign immunity, and the claim is barred if the agent exercises discretion to further the established policy. (3) "If [an] employee violates [a] mandatory regulation," 2680(a) does not reinstate sovereign immunity, and the claim can proceed. (4) If no statute,

regulation, or agency guideline confers discretion on an employee to take an action, 2680(a) does not reinstate sovereign immunity, and the claim can proceed. *Gaubert*, 499 U.S. at 324.

This final bucket contains ordinary common-law torts, unmoored from "established" policy concerns.[9] These include, as *Gaubert* explains, even torts involving "obviously discretionary acts." These torts do not trigger the exception because they are not committed while exercising any discretion "based on the purposes that [a] regulatory regime seeks to accomplish." 499 U.S. at 325 n.7; see also *id.* at 335–337 (Scalia, J., concurring in part). Absent an established policy that confers discretion to take the action at issue, the separation-of-powers concerns central to the discretionary-function exception fall away, and the case is ripe for adjudication.

4. ***The differences between the exception and the proviso.*** Of course, federal regulatory policy does not confer discretion on government functionaries to commit intentional torts like assault and battery. This exposes the discretionary-function exception's categorical inapplicability to proviso claims: At its core, the exception is a shield against suits sounding in negligence that can be resolved only by forcing the judiciary to assess "the validity of legislation or discretionary administrative action." *Dalehite*, 346 U.S. at 27 (citation omitted). The government's political calculus in setting policies

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[9] See Peck 230–231 (explaining that, "where the act or omission involved is not one which was directed, or a risk knowingly, deliberately, or necessarily encountered in the furtherance of the objectives or purposes for which authority was given, * * * courts are free to use the ordinary principles of negligence" to decide the claim).

and federal officials' concomitant discretionary decisions implementing them are too close for comfort—a concern that is not present when a plaintiff has the burden to meet the elements of an intentional tort.

It is no coincidence, then, that the only time this Court considered the interaction between an intentional tort and the discretionary-function exception, sovereign immunity did not apply. *Hatahley*, 351 U.S. at 181. In *Hatahley*, plaintiffs claimed that government agents illegally sold or destroyed their horses. *Id.* at 174. Even though the agents acted "to enforce a federal statute which they administer," the Court concluded that their acts were "wrongful trespasses." *Id.* at 180–181. The agents' wrongful trespasses meant they—like federal police executing a warrant at the wrong address—had "no statutory authority" for their actions. *Id.* at 180. And because the agents lacked statutory authority, the Court did not need to consider the validity of the statute under which the agents purported to act. *Ibid.* This, in turn, meant there was no risk that the Court would second-guess congressional decision-making by applying the elements of trespass to the case. *Id.* at 181. The discretionary-function exception did not apply. *Ibid.*

Other examples abound. The easiest is driving: "Although driving requires the constant exercise of discretion," this discretion "can hardly be said to be grounded in regulatory policy." *Gaubert*, 499 U.S. at 325 n.7. Consider, too, the example of a U.S. Army B-29 airplane crashing into the Empire State Building.[10] If the crash

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[10] This real-life example occurred in 1945 and may have been the final impetus for Congress's passage of the FTCA. Gregory C. Sisk,

had resulted from a military policy that required pilots to fly in a straight line below 1,000 feet to preserve fuel, the policy decision and its consequences (though both terrible) would not be appropriate for judicial adjudication under the FTCA. But if the military set no flight path or altitude policy, the pilot's decision to fly low and in bad weather through Manhattan would be actionable because it would involve no evaluation of policy. Clearer still, if the pilot had *intentionally* steered his plane into the building—perhaps because his wife's lover worked on the 80th floor—his "conduct [would] not involve any permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 538 n.3.

5. ***Applying the differences.*** Like flying a plane, driving a car, or stealing a horse, the day-to-day acts of line-level federal law enforcement officers—though suffused with mundane discretion—are not "grounded in regulatory policy." *Gaubert*, 499 U.S. at 325 n.7; see also *Hatahley*, 351 U.S. at 181. As noted above, this becomes concrete when the elements of a proviso tort are stacked up against the separation-of-powers concerns that animate the discretionary-function exception. Take Petitioners' claim for battery. Under Georgia law, "any unlawful touching is a physical injury to the person and is actionable." *Vasquez* v. *Smith*, 576 S.E.2d 59, 62 (Ga. Ct. App. 2003) (citation omitted). And an "unlawful touching" is one that "would be offensive to an ordinary

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The Continuing Drift of Federal Sovereign Immunity Jurisprudence, 50 Wm. & Mary L. Rev. 517, 536 (2008) (discussing how the FTCA was made retroactive because Congress wanted to provide recovery for the Empire State Building crash victims); see also 28 U.S.C. 1346(b)(1) (making the FTCA effective for claims "accruing on and after January 1, 1945").

person not unduly sensitive as to his dignity." *Ibid.* (citation omitted). See also Ga. Code Ann. 51-1-13.[11]

To determine whether the government is liable for battery during a wrong-house raid, a court need not evaluate the legitimacy of any governmental policies. We know this, in large part, because the FBI *has no* policies governing the execution of SWAT raids. See Pet. App. 18a; BIO at 10. And no law gives the FBI discretion to raid a house in the absence of a warrant or an exception to the warrant requirement. So any discretion Guerra had in executing the raid was untethered from an "established governmental policy" that the discretionary-function exception was intended to shield. *Gaubert*, 499 U.S. at 324. As a result, a judgment in Petitioners' favor does not require a judicial inquiry into any regulatory regime—there is no policy to attack "through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814; see also *Hatahley*, 351 U.S. at 180–181 (declining to apply the exception when a federal agent had "no statutory authority" to take the tortious action).

ii. The lower courts' expansion of the exception creates needless conflict with the proviso.

The discretionary-function exception and law-enforcement proviso address different categories of claims. So the provisions do not conflict. But the lower

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[11] The district court held that Petitioners satisfied these elements. See Pet. App. 66a–67a.

courts have needlessly created conflicts by expanding the reach of the discretionary-function exception.

1. Since its earliest cases addressing the FTCA, the Court has warned the Act must not be "whittle[d]down by refinements" or—to the same effect—strictly construed in favor of sovereign immunity. *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 548 n.5, 550 (1951); see also *Kosak*, 465 U.S. at 853 n.9 (warning against "unduly generation interpretations of the [FTCA's] exceptions"). "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949) (citation omitted).

Even so, most lower courts have expanded the discretionary-function exception beyond what its text, its purpose, or this Court's precedent allow. They have done this, in large part, by misapplying the rule this Court laid out in *Gaubert*. There, the Court created a two-step test to distinguish between discretionary functions and run-of-the-mill torts. Step one asks "whether the challenged actions [involved an element of judgment or choice], or whether they were instead controlled by mandatory statutes or regulations." *Gaubert*, 499 U.S. at 328 (citing *Berkovitz*, 486 U.S. at 536). If the actions involved an element of judgment, step two asks "whether that judgment is of the kind that the discretionary function exception was designed to shield," which is to say, "decisions based on considerations of public policy." *Id.* at 322–323 (citing *Berkovitz*, 486 U.S. at 536–537).

Before *Gaubert*, the lower courts "had difficulty in

applying th[e] test" for assessing whether a claim falls within Section 2680(a). *Gaubert*, 499 U.S. at 335 (Scalia, J., concurring in part). Three decades later, "courts are still struggling." *Xi*, 68 F.4th at 842 (Bibas, J., concurring). Third Circuit Judge Stephanos Bibas recently observed that there is still "significant confusion about how to apply the test," leading to "at least three longstanding, recurring circuit splits involving the discretionary-function exception." *Id.* at 843. Cf. *Carter* v. *United States*, 604 U.S. ___, 145 S. Ct. 519, 524 (2025) (mem.) (Thomas, J., dissenting from denial of cert.) ("Faced with almost four decades of silence from this Court on the *Feres* doctrine, lower courts have developed an array of tests for determining when it is triggered, leading to inconsistent results on similar facts.").

2. The Eleventh Circuit's decision in *Shivers* v. *United States* illustrates the circuit confusion surrounding *Gaubert*'s application.

In *Shivers*, the court converted Section 2680(a) from a limited exception into a default rule by holding that "the discretionary function exception applies *unless* a source of federal law 'specifically prescribes' a course of conduct." 1 F.4th at 931 (citing *Gaubert*, 499 U.S. at 322; *Berkovitz*, 486 U.S. at 536). But this badly misstates the Court's precedent, as explained above. See *C.M.* v. *United States*, 672 F. Supp. 3d 288, 334 (W.D. Tex. 2023) (explaining that "neither cited Supreme Court case [in *Shivers*] uses 'unless' in that context"). Federal agencies have no discretion beyond that specifically granted by law. See *West Virginia* v. *EPA*, 597 U.S. 697, 723 (2022) ("Agencies have only those powers given to them by Congress[.]"). Under *Shivers*'s interpretation of Section 2680(a), *Gaubert*'s permissive first step all but swallows

its restrictive second step.[12]

Because lower courts have trouble assessing "the types of conduct the § 2680(a) discretionary function exception protects[,]" they have unnecessarily forced themselves to consider "whether and how to apply the exception in cases brought under the intentional tort proviso[.]" *Medina* v. *United States*, 259 F.3d 220, 224 (4th Cir. 2001). They have then adopted varying interpretations of both the discretionary-function exception and law-enforcement proviso to resolve the conflicts they have created by adopting varying interpretations of both the discretionary-function exception and the law-enforcement proviso.

The Seventh Circuit, for example, resolved the conflict by holding that the proviso waives immunity only for "the part of § 2680(h) that precedes the proviso" and that the discretionary-function exception applies to even unconstitutional acts. *Linder* v. *United States*, 937

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[12] The Eleventh Circuit is not alone in over-relying on *Gaubert*'s first prong to diminish its second. See, *e.g.*, *Medina* v. *United States*, 259 F.3d 220, 228 (4th Cir. 2001) ("[I]f a government employee has discretion under the first *Gaubert* prong, it 'must be presumed' that his acts 'are grounded in policy when exercising that discretion[.]'" (citation omitted)); *Campos* v. *United States*, 888 F.3d 724, 735 (5th Cir. 2018) ("The discretionary function exception exists to leave sovereign immunity in place unless the official had clear guidance on what to do when presented with what is argued to be the relevant evidence."); *Dykstra* v. *Bureau of Prisons*, 140 F.3d 791, 795–796 (8th Cir. 1998) (where "[n]o regulatory mandate exists," "'it must be presumed that the agent's acts are grounded in policy'" (citation omitted)); *Esquivel* v. *United States*, 21 F.4th 565, 574 (9th Cir. 2021) ("Where the government agent is exercising discretion, 'it must be presumed that the agent's acts are grounded in policy when exercising that discretion.'" (citation omitted)).

F.3d 1087, 1089–1090 (7th Cir. 2019). Meanwhile, the Fourth Circuit resolved the conflict by holding the opposite—that the discretionary-function exception is inapplicable to unconstitutional acts. *Medina*, 259 F.3d at 226. See *Xi*, 68 F.4th at 838 & n.10 (noting the circuit split).

Notwithstanding these errors, some courts have attempted to resolve this judge-made conflict by moving in the right direction—narrowing the discretionary-function exception to "exclude[] most of the actions of rank and file federal law enforcement officers." *Nguyen*, 556 F.3d at 1257.

- The Second Circuit determined that the actions of INS agents who wrongly detained an individual were "not the kind that involve weighing important policy choices." *Caban* v. *United States*, 671 F.2d 1230, 1233 (2d Cir. 1982).
- The D.C. Circuit explained that, "if the 'investigative or law enforcement officer' limitation in section 2680(h) is read to include primarily persons (such as police officers) whose jobs do not typically include discretionary functions, it will be rare that a suit permissible under the proviso to section 2680(h) is barred by section 2680(a)." *Gray* v. *Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983).
- The Third Circuit noted that "[i]t is hard to imagine instances in which the activities of officers engaging in searches, seizures or arrests would" fall within Section 2680(a). *Pooler* v. *United States*, 787 F.2d 868, 872 (3d Cir. 1986), abrogated by *Millbrook*, 569 U.S. 50.
- The Ninth Circuit found that, "[w]hile law enfor-

> cement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability." *Garcia* v. *United States*, 826 F.2d 806, 809 (9th Cir. 1987).

As the Fifth Circuit recognized, a broad reading of the discretionary-function exception would effectively render the law-enforcement proviso a nullity: "[I]f actions under the proviso must also clear the hurdle of the discretionary function exception * * * even *Bivens* and Collinsville would not pass muster and the law enforcement proviso would fail to create the effective legal remedy intended by Congress." *Sutton* v. *United States*, 819 F.2d 1289, 1296 (5th Cir. 1987).

This case proves the point—the facts are Collinsville by another name. Federal police investigating drug crimes raided an innocent family's home, incorrectly believing it to be their target. In doing so, the agents did not exercise (or abuse) any policy-conferred discretion—they just made a mistake that inflicted ordinary common-law torts on Petitioners. Congress enacted the proviso to remedy these torts. See *Carlson*, 446 U.S. at 20. Surely, Congress did not create this cause of action only for it to be rendered instantly meaningless by the discretionary-function exception. See *Duncan* v. *Walker*, 533 U.S. 167, 175 (2001) (noting the "duty to 'give each word some operative effect' where possible" (citation omitted)). So if the exception bars this case, something has gone wrong.

The simplest way to resolve this conflict is to hold that the discretionary-function exception is categorical-

ly inapplicable to the law-enforcement proviso because they cover different government actions.

B. If the discretionary-function exception and law-enforcement proviso conflict, the proviso prevails.

Properly understood, the discretionary-function exception and law-enforcement proviso do not conflict. But there's also a second path for the Court to take: To the extent a government functionary could commit an intentional tort while exercising the government's lawful administrative discretion, the proviso overrides the discretionary-function exception. The text, structure, and history of the FTCA confirm that Congress enacted the law-enforcement proviso to spare the claims it permits from the exceptions in Section 2680.

The text of the proviso is unequivocal: The FTCA "shall apply to any claim" arising under the proviso. 28 U.S.C. 2680(h). But so, too, is the text of the discretionary-function exception: The FTCA "shall not apply to any claim" that is based on a discretionary function. 28 U.S.C. 2680(a) (condensed). To figure out "what happens when two 'anys' face off," we must turn to the structure of the FTCA and canons of construction. *Nguyen*, 556 F.3d at 1252.

The Eleventh Circuit is the only circuit to correctly hold that, if the provisions conflict, the law-enforcement proviso prevails. In *Nguyen* v. *United States*, Judge Ed Carnes wrote for the court that, "if a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any

event." 556 F.3d at 1257. In reaching this conclusion, *Nguyen* relied on the general/specific canon, the earlier/later canon, and the congressional purpose of the law-enforcement proviso, which *Nguyen* drew from an extended review of the Collinsville raids and the congressional record. *Id.* at 1252–1257.

The text of the intentional-torts exception confirms that *Nguyen* is correct. Read in full, Section 2680(h) contains three sentences:

The Preamble

> The provisions of this chapter and section 1346(b) of this title shall not apply to—(h) Any claim arising out of assault, battery, false imprisonment, [etc.]:

The Proviso

> *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, [etc.]

The Definition

> 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.

Engaging with this text provides six reasons why the discretionary-function exception is inapplicable to claims arising under the law-enforcement proviso:

First, the proviso's text cancels out the preamble. This is important because the preamble reinstates immunity for the exceptions: If "[a]ny claim" falls into the exception, the preamble provides that the FTCA "shall not apply," triggering sovereign immunity for the claim. But the proviso counteracts this operation. By drafting the proviso to mirror the preamble—only changing "shall not" to "shall"—Congress designed the proviso to re-waive the sovereign immunity that the preamble reinstates. Compare:

Section 2680

> The provisions of this chapter and section 1346(b) of this title <u>shall not apply</u>.

Section 2680(h)

> The provisions of this chapter and section 1346(b) of this title <u>shall apply</u>.

(Emphasis added, cleaned up.) This inversion of the operative language also makes clear that the preamble is the proviso's antecedent. See *Alaska* v. *United States*, 545 U.S. 75, 115 (2005) (Scalia, J., concurring in part and dissenting in part); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 154–155 (2012) (*E.g.*, "[T]he authorization or imposition that [a proviso] modifies is often found not immediately before but several clauses earlier." (citing, *inter alia*, *Pennington* v. *United States*, 48 Ct. Cl. 408, 411, 415 (1913))).

Second, the proviso reaches beyond Section 2680(h) to cover all of Section 2680, including the discretionary-function exception. This follows from the point above, as well as the text of Section 2680(h)'s definition. Unlike

the proviso, the definition only applies "[f]or the purpose of this subsection."[13] 28 U.S.C. 2680(h). Had Congress intended to similarly limit the proviso, it would have placed this limiting prepositional phrase *before* the proviso.[14] Instead, Congress placed it *after* the proviso, communicating that the proviso applies beyond Section 2680(h). See *Millbrook*, 569 U.S. at 57 (explaining that, "[h]ad Congress intended to further narrow the scope of the proviso," it could have "adopted [the] similar limitations [it used] in neighboring" language). The structure and words Congress chose must be given meaning. See *Simmons* v. *Himmelreich*, 578 U.S. 621, 627 (2016).

Third, the proviso is more specific than the discretionary-function exception. When a statute contains "a general permission or prohibition [that] is contradicted by a specific prohibition or permission, * * * the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012); see also *Department of Com.* v. *New York*, 588 U.S. 752, 830 (2019) (Alito, J., concurring in part) ("[I]f there is tension between a specific provision * * * and a general one * * * the specific provision must take precedence."). Section 2680(a)

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[13] This makes sense. If the definition were not so limited, it would have given "law enforcement officer" conflicting meanings in Sections 2680(c) and (h). See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227–228 (2008) (construing "any other law enforcement officer" in Section 2680(c) more broadly than the definition in Section 2680(h)).

[14] In this alternate reality, the proviso would read: "*Provided*, That, for the purpose of this subsection, 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 * * * ."

creates a general prohibition against claims based on discretionary functions, while Section 2680(h) provides specific permission for claims arising out of six enumerated torts when committed by an "investigative or law enforcement officer." Thus, if the provisions conflict, the proviso pierces the exception.

Fourth, the proviso was enacted 28 years after the discretionary-function exception. It is an "established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature[.]" *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 588 U.S. 504, 519 (2019). If there is a conflict between the provisions, again, the law-enforcement proviso "takes precedence."

Fifth, applying the discretionary-function exception to the proviso threatens to invalidate the latter when it should uncontroversially apply. See *United States* v. *Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring in part and concurring in the judgment) ("Congress presumably does not enact useless laws."). This threat is exacerbated by the state of play in the lower courts, where discretionary-function exception jurisprudence "has gone off the rails." *Chadd* v. *United States*, 794 F.3d 1104, 1114 (9th Cir. 2015) (Berzon, J., concurring). The application of the exception to proviso claims will lock those claims inside the labyrinth of circuit splits interpreting the exception. At best, this will render recovery under the proviso inconsistent, circuit-dependent, and random. At worst, it will completely nullify the proviso in its core applications. Either way, subjecting proviso claims to the discretionary-function exception would flout the text, context, and history of the proviso to reach "a result that Congress * * * did not intend."

POM Wonderful LLC v. *Coca-Cola Co.*, 573 U.S. 102, 116 (2014).

Sixth, the structure of the FTCA sets an order of operation that ends with the law-enforcement proviso's waiver of sovereign immunity for "any claim" arising under it. By default, the government is entitled to sovereign immunity at step one. At step two, Section 1346(b)(1) waives this immunity. At step three, Section 2680's preamble reinstates sovereign immunity. And at step four, the law-enforcement proviso re-waives immunity once and for all.

This sequence answers a natural question about the proviso's scope: If the proviso states that "the provisions of this chapter * * * shall apply," and Section 2680(a) is a provision of the chapter, does the proviso reincorporate the discretionary-function exception?[15] No, because the proviso has the last word. See *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

Otherwise, any claim that triggers both the proviso and any exception would set off an infinite loop, vacillating between granting and waiving immunity: Section 2680(a) applies, so "the provisions of this chapter * * *

[15] See *Simmons*, 578 U.S. at 627 (holding that the FTCA's judgment bar, 28 U.S.C. 2676, "shall not apply" when a claim falls within Section 2680 because the judgment bar is one of the "provisions of this chapter"); accord *Thacker* v. *TVA*, 587 U.S. 218, 223 (2019) ("Nor does the FTCA's exception for discretionary functions apply the TVA," which is exempted by Section 2680(l).).

shall not apply"; provided, the proviso applies, so "the provisions of this chapter * * * shall apply"; Section 2680(a) is a provision of this chapter, so Section 2680(a) applies, so "the provisions of this chapter * * * shall not apply"; provided, the proviso applies, etc.

Taken together, this all leads to the conclusion that, if the provisions conflict, the discretionary-function exception is categorically inapplicable to claims arising under the law-enforcement proviso. This interpretation is consistent with the text and maintains the FTCA as a coherent statutory scheme.

Bolstering this textual analysis, all persuasive indications from Congress's enactment of the law-enforcement proviso point in one direction: Congress expected the proviso to "submit the Government to liability" in "any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law." S. Rep. 93-588, at 4. Such a robust waiver of sovereign immunity would, of course, also apply "whenever [federal] agents * * * injure the public through search[es] and seizures that are conducted without warrants or with warrants issued without probable cause." *Ibid.*; see generally John C. Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. Rev. 497 (1976) (providing a thorough contemporary discussion of the events surrounding the enactment of the law-enforcement proviso).

* * *

Agent Guerra and his FBI SWAT team injured Petitioners through a search and seizure conducted

without a warrant—at least for Petitioners' home. The FTCA provides them the right to submit the government to liability for the federal agents' assault, battery, and false imprisonment. Whichever path it takes to this conclusion, the Court should honor the text Congress enacted.

II. The Supremacy Clause does not bar FTCA claims because the FTCA is a federal statute.

As explained above, *Nguyen* v. *United States* is the only circuit-court decision that correctly answers the second question presented. Had the Eleventh Circuit simply applied *Nguyen*'s straightforward rule below, it would have allowed Petitioners' proviso claims to proceed. But to circumvent that rule just months after it was created, the Eleventh Circuit created the Supremacy Clause bar in *Denson* v. *United States*. Under this bar, the FTCA "has no effect" whenever a government employee's action "ha[s] some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law." *Denson*, 574 F.3d 1318, 1348 (11th Cir. 2009). No other circuit has adopted this bar, and the government does not defend it before this Court. That's because the bar finds no support in even the faintest penumbras of American constitutional design.

1. Key to our federal system, the Supremacy Clause provides: "This Constitution, and the Laws of the United States * * * shall be the supreme Law of the Land[.]" U.S. Const. art. VI, cl. 2. To state the obvious, the Federal Tort Claims Act is a federal law. This means that it is a manifestation of "the supreme Law of the Land" the founders designed the Supremacy Clause to

safeguard. Thus, the FTCA does not—it cannot—conflict with the Supremacy Clause.

Even so, the Eleventh Circuit created the Supremacy Clause bar believing it would "promote[] sound social policy and provide[law enforcement officers] a degree of flexibility and protection[.]" *Denson*, 574 F.3d at 1344. The court's theory began from the premise that "an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law." *Id.* at 1347 (drawing a "broader application" from *In re Neagle*, 135 U.S. 1, 57 (1890)). And because the FTCA provides relief "in accordance with the law of the place where the act * * * occurred," 28 U.S.C. 1346(b)(1)—typically, state tort law—the Eleventh Circuit concluded that "liability simply cannot attach to the acts taken by federal officers in the course of their duties and committed in compliance with federal law[.]" *Denson*, 574 F.3d at 1349.

The Eleventh Circuit recently expanded the bar by holding that there is a sufficient federal nexus to preclude FTCA claims whenever a federal employee acts within the scope of his "discretionary authority." *Kordash* v. *United States*, 51 F.4th 1289, 1294 (11th Cir. 2022); see also Pet. App. 25a–26a. In effect, the Supremacy Clause bar is just the discretionary-function exception with an added constitutional-violation requirement. See *Kordash*, 51 F.4th at 1294.

2. The Eleventh Circuit's Supremacy Clause bar impermissibly usurps Congress's sole authority to waive sovereign immunity. This Court has made clear that Congress "has full power to endow [] an entity with the government's immunity from suit," and it also has "full power to waive that immunity and subject the entity to

the judicial process to whatever extent it wishes." *Thacker* v. *TVA*, 587 U.S. 218, 226 (2019) (cleaned up). When Congress does so, it "raises no separation of powers problems." *Ibid.* "The right governmental actor (Congress) is making a decision within its bailiwick (to waive immunity) that authorizes an appropriate body (a court) to render a legal judgment." *Ibid.* If Congress's waiver of immunity based on political decisions does not offend the horizontal separation of powers, it certainly does not offend the federal government's power to create the supreme law of the land.

Judge Carnes (who had authored *Nguyen* just five months earlier) pointed this out in his *Denson* concurrence: "[U]nder the FTCA, there can be no [conflict between state and federal law] because the sovereign has incorporated state tort law into federal law to the extent stated in that statute." 574 F.3d at 1352. "It is, of course, not uncommon for Congress to direct that state law be used to fill the interstices of federal law." *Moor* v. *County of Alameda*, 411 U.S. 693, 701 & n.11 (1973) (listing several examples, including the FTCA). And when Congress incorporates elements of state law in a federal cause of action, it does not matter "[w]hether the rules of substantive law applied by the federal courts are derived from federal or state sources." *Association of Westinghouse Salaried Emps.* v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 463–464 (1955) (Reed, J., concurring) (referencing the FTCA). Federal incorporation means that "[t]he rules are truly federal, not state[,]" and the "cause of action aris[es] under federal law, the source of federal judicial power under Art. III of the Constitution." *Id.* at 464. And if federal judicial power exists, courts have a "duty to exercise it[.]" *Second*

Emps.' Liab. Cases, 223 U.S. 1, 58 (1912).

3. The government suggests, and we agree, that the Eleventh Circuit created the Supremacy Clause bar in *Denson* to neutralize the effect of its earlier decision in *Nguyen*. Compare BIO at 20 (noting as *Denson*'s premise that "Congress could not have intended that the United States would be held liable for the actions of its law enforcement officers that are discretionary and within the scope of their official duties"), with *Nguyen*, 556 F.3d at 1260 (holding that, where "the [law-enforcement] proviso applies to waive sovereign immunity, the [discretionary-function exception] is of no effect"). Because *Nguyen* made it impossible to otherwise pare back the FTCA's waiver of sovereign immunity, the Eleventh Circuit simply created another exception to the Act, ruling it unconstitutional in most of its core applications.[16]

Although the government does not defend this position before the Court, it nevertheless contends that the Supremacy Clause bar reaches the correct outcome—the denial of Petitioners' FTCA claims. BIO at 21. This ignores the Court's clear guidance: Whether in form or substance, courts should not "import immunity back into a statute designed to limit it." *Indian Towing*, 350 U.S.

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[16] Given that the FTCA creates liability for actions taken by federal employees "within the scope of [their] office or employment," 28 U.S.C. 1346(b)(1), it is difficult to imagine many scenarios that satisfy that requirement but do not have "*some nexus* with furthering federal policy and *can[not] reasonably be characterized* as complying with the full range of federal law," *Denson*, 574 F.3d at 1348 (emphasis added). At minimum, the Supremacy Clause bar squelches most of the claims Congress enacted the FTCA to permit. See *Dalehite*, 346 U.S. at 28.

at 69. That is true no matter whether immunity is imported through the expansion of the discretionary-function exception, the restriction of the law-enforcement proviso, or the creation of the Supremacy Clause bar.

Congress has provided Petitioners with a cause of action for the torts committed against them by the FBI agents who wrongfully raided their home, but the Eleventh Circuit has taken it away. This Court should return it. "If the Act is to be altered that is a function for the same body that adopted it." *Rayonier*, 352 U.S. at 320.

CONCLUSION

The Court should reverse the Eleventh Circuit, hold that the Supremacy Clause does not bar claims under the FTCA, hold that the discretionary-function exception is categorically inapplicable to claims arising under the law-enforcement proviso to the intentional-torts exception, and remand this case for further proceedings.

Respectfully submitted on March 7, 2025,

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