No. 24-362

In the Supreme Court of the United States

CURTRINA MARTIN, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF G.W., A MINOR, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

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

BRIEF FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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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.

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INTEREST OF *AMICUS CURIAE*

This Court invited Christopher Mills to brief and argue this case as *amicus curiae* in support of the judgment below as to the first question presented.*

INTRODUCTION

The Federal Tort Claims Act waives the United States's sovereign immunity for certain state-law tort claims. But it is agnostic about whether the government is liable, leaving that issue to state law. The statute thus presents "two 'analytically distinct' inquiries": "whether there has been a waiver of sovereign immunity," and whether state substantive law "provides an avenue for relief." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). The primary question here is whether the United States may assert a Supremacy Clause defense to state-law liability even if it otherwise waives sovereign immunity for a claim.

The answer is yes, for two reasons.

First, the FTCA says that the "United States shall be liable" "to the same extent as a private individual under like circumstances," while preserving "any other defenses to which the United States is entitled." 28 U.S.C. § 2674. Under the Supremacy Clause, any private defendant can assert that federal law displaces state liability. So can the United States. Otherwise, it would not "be liable" "to the same extent" *and* would lose a defense "to which [it] is entitled." *Ibid.*

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* No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and his law firm made a monetary contribution to it.

Second, the rest of the statute confirms this answer. If the FTCA waives sovereign immunity for a claim, the merits are governed by state law. 28 U.S.C. § 1346(b)(1). The statute directs federal courts to step in the shoes of state courts and apply the whole state substantive law, including applicable federal law. A state rule that conflicts with federal law is preempted.

The Petitioners' sole argument is that the Supremacy Clause is categorically irrelevant in FTCA cases "because the FTCA is a federal statute." Br. 47. This mistakes the FTCA's jurisdictional waiver of sovereign immunity for a federal remedial scheme that eliminates state substantive law. In fact, the FTCA tells federal courts to look to state law for substantive liability. Preempted state law cannot give rise to liability—even on the Petitioners' view of the FTCA as incorporating this liability answer into federal law.

An example shows the flaw in the Petitioners' theory. Say a federal law authorizes anyone to make arrests, and two people—a private person and a federal employee—make arrests under that law. The facts and resulting state-law false arrest claims are identical. The private person defeats liability based on the Supremacy Clause. On the Petitioners' theory, the government cannot offer that defense, so it is liable.

That cannot be a plausible reading of a statute that makes the United States liable only "to the same extent as a private individual" *and* preserves "any" of its other defenses. 28 U.S.C. § 2674. Imposing liability on the United States for otherwise lawful conduct would "visit [it] with novel and unprecedented liabilities" contrary to the FTCA. *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 671 (1977).

Applying the FTCA's command that the United States may assert a Supremacy Clause defense to state-law liability just like private persons, the remaining issue is the proper application of that defense. But the Petitioners offer only a categorical challenge to *any* Supremacy Clause defense in FTCA cases. They do not challenge the defense's articulation or application by the Eleventh Circuit. Thus, the Court can leave the contours of the Supremacy Clause defense for another day. At any rate, the Eleventh Circuit properly looked to whether the challenged acts had some nexus with furthering federal policy and could reasonably be characterized as complying with the full range of federal law. That articulation is consistent with this Court's Supremacy Clause precedents dating back more than a century.

The Court should affirm the judgment below.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause 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.

The Federal Tort Claims Act provides that:

> [T]he 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). It also provides that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for

> interest prior to judgment or for punitive damages.
>
> . . .
>
> With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2674.

These provisions, however, "shall not apply to" thirteen types of claims, including:

> (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.

and

> (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.

28 U.S.C. § 2680.

STATEMENT OF THE CASE

A. Legal framework

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Meyer*, 510 U.S. at 475. Before the FTCA's enactment in 1946, "a plaintiff could sue a federal employee directly for damages, but sovereign immunity barred suits against the United States, even if a similarly situated private employer would be liable under principles of vicarious liability." *Brownback* v. *King*, 592 U.S. 209, 211 (2021). Thus, "Congress passed private bills that awarded compensation to persons injured by Government employees." *Ibid.*

The FTCA "streamlined litigation for parties injured by federal employees acting within the scope of their employment" by "waiv[ing] the sovereign immunity of the United States for certain torts." *Id.* at 211–12. The FTCA gives federal district courts "exclusive jurisdiction of civil actions on claims against the United States" for injuries "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).

The FTCA, however, is not a blank check. Because of several limitations, it does "not assure injured persons damages for all injuries caused by [federal] employees." *Dalehite* v. *United States*, 346 U.S. 15, 17 (1953).

First, "Congress was careful to except . . . several important classes of tort claims," so the statute waives sovereign immunity only for some torts. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). The FTCA's sovereign immunity waiver is "subject to 13 enumerated exceptions." *Kosak* v. *United States*, 465 U.S. 848, 852 (1984) (citing 28 U.S.C. § 2680(a)–(n)). These include a discretionary function exception and an exception for (mostly) intentional torts. 28 U.S.C. § 2680(a), (h). The intentional tort exception, however, is subject to its own exception, known as the law enforcement proviso: "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." *Id.* § 2680(h).

The FTCA also contains several procedural limitations. Those include an exhaustion requirement, *id.* § 2675(a), a two-year statute of limitations, *id.* § 2401, and attorney's fee limitations, *id.* § 2678. The FTCA's remedy "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim," with exceptions for federal constitutional and statutory claims. *Id.* § 2679(b).

Of most relevance to the first question presented here, even "[a]s to claims falling within th[e] [FTCA's] jurisdictional grant," *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 485 (2006), "[t]he United States shall be

liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674. And the government is "entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled." *Ibid.*

As § 2674 "makes clear, in conjunction with the jurisdictional grant over FTCA cases in 28 U.S.C. § 1346(b), the extent of the United States' liability under the FTCA is generally determined by reference to state law." *Molzof* v. *United States*, 502 U.S. 301, 305 (1992). Substantive liability "depend[s] upon whether a private individual under like circumstances would be liable under state law." *United States* v. *Muniz*, 374 U.S. 150, 153 (1963).

Taking to heart this Court's teachings about the FTCA's "two 'analytically distinct' inquiries" of "waiver of sovereign immunity" and "substantive law" liability, *Meyer*, 510 U.S. at 484, the Eleventh Circuit has held that the government may assert in appropriate cases both "(1) a jurisdictional defense provided by 28 U.S.C. § 2680(a)—the discretionary function exception; and (2) an affirmative defense under the Supremacy Clause of the Constitution." *Denson* v. *United States*, 574 F.3d 1318, 1345 (CA11 2009). The test that the Eleventh Circuit uses to "determine[] if the Supremacy Clause bars state-law liability is whether a federal official's acts 'have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law.'" *Kordash* v. *United States*, 51

F.4th 1289, 1293–94 (CA11 2022) (quoting *Denson*, 574 F.3d at 1348). This test is "deriv[ed]" (*ibid.*) from *In re Neagle*, 135 U.S. 1, 57 (1890). If the government satisfies this test, it "may not be held liable under state tort law." *Denson*, 574 F.3d at 1348.

B. Facts and proceedings below

1. This case arose out of the FBI's Operation Red Tape, which targeted "violent gang activity in Georgia." Pet. App. 4a. The Operation led to a criminal indictment and warrants for several people, including Joseph Riley, a gang member with a "violent history and gun possession." *Id.* at 3a–5a. The FBI assigned special agent Lawrence Guerra to lead a SWAT team and execute the search and arrest warrants at Riley's home in Atlanta, located at 3741 Landau Lane SW. *Id.* at 4a; see *id.* at 35a.

"Shortly before the warrant execution, Guerra and another FBI agent" "conducted a site survey of 3741 Landau Lane during daylight hours." *Id.* at 5a. Guerra took photographs and "documented specific physical features" of the house. *Ibid.*

"On the day of the warrant execution," Guerra and another agent "conducted a pre-raid drive-by of 3741 Landau Lane." *Id.* at 6a. "It was completely dark outside when they conducted the pre-raid drive-by." *Ibid.* "Guerra used his personal GPS device to navigate," and "[a]lthough he entered 3741 Landau Lane" into the device, it directed him three houses away to 3756 Denville Trace SW—the Petitioners' house. *Id.* at 4a, 6a. Because the Petitioners' house "had many of the same features that he noted for

[Riley's] address during his site survey," Guerra did not notice the mistake. *Id.* at 6a.

"Based on the FBI's determination that Riley posed a high risk of violence," the SWAT team planned to "enter Riley's home and secure it for other FBI personnel to execute the warrants." *Id.* at 36a. "[W]hile it was still dark," the team mistakenly arrived at the Petitioners' house. *Id.* at 7a. Guerra "knocked and announced the presence of law enforcement before an agent breached the front door," and another "deployed a flashbang." *Id.* at 7a–8a.

The SWAT team entered and found Curtrina Martin and Hilliard Toi Cliatt hiding in a closet. *Id.* at 8a. Agents pointed guns at them and handcuffed Cliatt. *Ibid.* "Guerra entered the bedroom and realized that Cliatt did not have the same face and neck tattoos" as Riley, so he asked Cliatt for his name and address." *Ibid.* Another agent "noticed a piece of mail" and told Guerra that "they were at the wrong address." *Ibid.* "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." *Id.* at 8a–9a. Martin's child, G.W., was in another room. See *id.* at 90a. Other than Cliatt's knee being "a little sore," the Petitioners suffered no physical injuries. CA11 Dkt. 25-1, at 79; CA11 Dkt. 25-2, at 114. "The agents were in the home for no more than five minutes." Pet. App. 39a.

The SWAT team then executed the warrant at Riley's house and arrested him. Pet. App. 9a. (He was later sentenced to 17 years in prison for violent gang activities. See Judgment, *United States* v. *Riley*,

No. 16-cr-427, Dkt. 1594 (N.D. Ga. May 16, 2022).) Afterward, Guerra returned to the Petitioners' house, "apologized to them, documented the damages caused by the mistaken raid, provided them with the contact information for his supervisor, and advised them that the FBI would handle the damage repairs." Pet. App. 9a.

2. The Petitioners brought suits that were later consolidated against Guerra, other FBI agents who participated in the raid, and the United States. *Ibid.* Against the individual defendants, they brought a *Bivens* claim "alleging that Guerra and the agents' mistaken execution of the search warrant at their house violated their Fourth Amendment rights." *Ibid.* "They also brought state law claims for negligence, negligent/intentional infliction of emotional distress, trespass and interference with private property, false arrest/false imprisonment, and assault and battery against the United States under the FTCA." *Ibid.*

The Respondents moved for summary judgment. On the Petitioners' Fourth Amendment claim against Guerra, the district court noted that the Petitioners "do not dispute that Guerra was acting within the scope of his discretionary authority." *Id.* at 46a. The court found that "Guerra's overall preplanning" "constitute[d] significant precautionary measures to avoid mistake" and was "reasonable." *Id.* at 52a (internal quotation marks omitted). According to the court, "Guerra simply made a mistake." *Id.* at 53a. The court concluded "that the law was not clearly established" "that Guerra's preparatory steps would be insufficient," so he was entitled to qualified immunity. *Ibid.*

On the Petitioners' claims against the United States, the court held that the FTCA's discretionary function exception barred most of them. *Id.* at 60a. The court found that "Guerra's efforts in preparing to execute the warrant at 3741 Landau involved judgment and choice," with "multiple independent decisions regarding how to investigate the location where the warrant was to be served and direct the team in executing [it]." *Id.* at 57a.

The district court held that the Petitioners' remaining claims against the United States—for false arrest/false imprisonment and assault and battery—could proceed under the FTCA's law enforcement proviso, 28 U.S.C. § 2680(h). Pet. App. 60a.

The United States moved for reconsideration based on an Eleventh Circuit decision issued a month after the court's prior order, *Kordash* v. *United States*, 51 F.4th 1289 (CA11 2022). Pet. App. 22a. The district court found that *Kordash* clarified "the question of whether the Supremacy Clause bars the [remaining] FTCA claims." *Id.* at 25a. The court applied the Eleventh Circuit's two-pronged Supremacy Clause defense and considered "whether (i) Guerra's actions had 'some nexus with furthering federal policy'; and (ii) his actions 'can reasonably be characterized as complying with the full range of federal law.'" *Ibid.* (cleaned up) (quoting *Kordash*, 51 F.4th at 1293). The court noted that the Petitioners "do not dispute that Guerra was acting within the scope of his discretionary authority," which suffices under *Kordash* to satisfy the first prong. *Id.* at 26a. On the second prong, the court explained its previous order as finding "that Guerra did not violate the law." *Id.* at

27a. Thus, the court held that the Supremacy Clause barred the Petitioners' remaining claims. *Id.* at 27a, 32a.

3. The Eleventh Circuit affirmed in an unpublished opinion. *Id.* at 19a. First, the court agreed that qualified immunity protected Guerra, as "the decisions that Guerra made—albeit mistaken—in the rapidly-changing and dangerous situation of executing a high-risk warrant at night constitute the kind of reasonable mistakes that the Fourth Amendment contemplates." *Id.* at 14a.

Next, the court concluded that the FTCA's discretionary function exception barred the Petitioners' claims for trespass and interference with private property, negligent/intentional infliction of emotional distress, and negligence. *Id.* at 17a. The court held that "Guerra enjoyed discretion in how he prepared for the warrant execution" and that his discretion was influenced by a "policy analysis." *Id.* at 17a–18a.

Last, the court held that the Supremacy Clause barred the remaining claims. *Id.* at 18a. Applying circuit precedent on the Supremacy Clause defense, the court held that "there is no doubt that Guerra acted within the scope of his discretionary authority when he prepared for and executed the search warrant," and that his "actions did not violate the Fourth Amendment." *Id.* at 19a. The court denied a petition for rehearing. *Id.* at 71a.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly held that the Supremacy Clause may displace state tort law liability under the FTCA.

I. The United States may assert a Supremacy Clause defense to state tort liability in FTCA cases. Though the statute waives sovereign immunity for some claims, the government's substantive liability is a distinct issue that the FTCA leaves to state tort law. And state tort law can be preempted. The United States's Supremacy Clause defense thus follows from the FTCA's text and structure.

A. The FTCA makes the United States liable only "to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. A similarly situated private tort defendant could defend based on a conflict between state liability and federal law, so the government can too. Any doubt is resolved by the rest of § 2674, which says that "the United States shall be entitled to assert" "any other defenses" to liability. The statutory text shows that the United States can assert a Supremacy Clause defense.

B. The FTCA's structure confirms the availability of this defense. The statute confers jurisdiction and waives sovereign immunity for some claims. But to answer liability questions, it puts federal courts into the shoes of state courts. Wearing those shoes, federal courts must apply the whole state substantive law, including its choice-of-law rules and applicable federal law. If the state rule of liability is void because of a conflict with federal law, it cannot be applied to the United States any more than another tort defendant.

C. The Petitioners' contrary view ignores § 2674's limitations on the United States's liability.

The Petitioners treat the FTCA's limited waiver of sovereign immunity as overriding any substantive defense. This "reasoning conflates two 'analytically distinct' inquiries"—sovereign immunity and substantive liability. *Meyer*, 510 U.S. at 484. Under the FTCA, state tort law decides liability, and that law can be preempted. Indeed, even on the Petitioners' theory that the FTCA incorporates state law into federal law, § 2674's provisions would still offer a preemption defense to liability under an incorporated state rule. So on any view, the United States has a Supremacy Clause defense.

The Petitioners' policy arguments cannot overcome the statutory text, especially since the FTCA balances interests beyond providing redress. And the Petitioners do not justify their theory's outcomes: treating the United States worse than similarly situated defendants and imposing liability for lawful activities by federal officers, dampening law enforcement.

II. The Court of Appeals properly articulated and applied the Supremacy Clause defense. The Petitioners do not contend otherwise. They offer only a categorical argument that the Supremacy Clause cannot defeat FTCA claims. Thus, this Court need not resolve other issues, including the contours of the defense. In any event, the Eleventh Circuit's test follows this Court's precedents prohibiting states from regulating officers who further federal policy and comply with the full range of federal law. *Neagle*, 135 U.S. at 75. The Petitioners do not dispute that the United States satisfies that test here. The Court should affirm.

ARGUMENT

I. The United States may assert a Supremacy Clause defense in FTCA cases.

The FTCA's text and structure show that the United States may assert a Supremacy Clause defense. Not only does the statute reserve the United States "any" defense, it makes the United States liable only "to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. And a private individual could defend against a state tort claim based on conflicting federal law. Such federal law voids state liability to the extent of the conflict.

The FTCA implicates two distinct issues—a waiver of sovereign immunity and substantive liability. Though it provides a federal jurisdictional hook by waiving immunity for some claims, it leaves substantive liability questions to state law. The relevant state law is the whole state law, including applicable federal law that may supersede the usual state rule.

The Petitioners' reading ignores § 2674's limitations on the government's liability, conflates the FTCA's waiver of sovereign immunity with its substantive liability rule, and replaces Congress's careful scheme with the Petitioners' preferred policy.

A. Section 2674 allows the United States to assert any defense, including under the Supremacy Clause.

The FTCA operates as a limited waiver of sovereign immunity, treating the United States as a private person to the extent of the statute's waiver. It also treats the United States like a private person in terms of liability defenses, tailoring the United States's liability to that of a private person in like circumstances. And it preserves any other defense the United States may be entitled to. Because any defendant can assert an available Supremacy Clause defense to a state tort claim, the FTCA's text mandates that the United States can, too.

The statute confers jurisdiction "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). It also says that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674. And it adds that "[w]ith respect to any claim under this chapter, the United States shall be entitled to assert" "any other defenses." *Ibid.*

Putting these together, "the United States should be treated as an individual defendant would be under like circumstances," *Richards* v. *United States*, 369 U.S. 1, 11 n.23 (1962), while also entitled to all available defenses. Each of these aspects establishes the government's Supremacy Clause defense.

1. A private person in like circumstances would have a Supremacy Clause defense, so the government does too.

In private suits, parties can raise "federal preemption . . . as a defense" to state tort claims. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). "The Supremacy Clause establishes that federal law 'shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 617 (2011) (quoting U.S. Const. art. VI, cl. 2). Under this Clause, "state law is naturally preempted to the extent of any conflict with" federal law. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). This extends to state tort law. As this Court has repeatedly explained, "state regulation can be effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Kurns* v. *R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (cleaned up) (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); see *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008).

Thus, this Court's caselaw is replete with instances of private tort defendants defeating liability based on the Supremacy Clause. See, *e.g.*, *Kurns*, 565 U.S. 625; *PLIVA*, 564 U.S. 604; *Riegel*, 552 U.S. 312. Preemption defenses have also been successfully raised by private litigants against the specific types of claims in the law enforcement proviso of the FTCA's "intentional torts" exception, 28 U.S.C. § 2680(h). See, *e.g.*, *Gore* v. *Trans World Airlines*, 210 F.3d 944, 950 (CA8 2000) (false

arrest claim preempted); *Smith* v. *Comair, Inc.*, 134 F.3d 254, 259 (CA4 1998) (false imprisonment claim preempted); *Talbott* v. *C.R. Bard, Inc.*, 865 F. Supp. 37, 52 (D. Mass. 1994) (battery claim preempted), *aff'd*, 63 F.3d 25 (CA1 1995).

Because a private tort litigant faced with similar claims could defend based on the Supremacy Clause, so can the United States. The FTCA makes the United States liable only "to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; see *Muniz*, 374 U.S. at 153 ("Whether a claim could be made out would depend upon whether a private individual under like circumstances would be liable under state law . . . ."). The statutory text establishes that the United States is "on equal footing" with private defendants, so it may invoke available Supremacy Clause defenses, too. *Jam* v. *Int'l Fin. Corp.*, 586 U.S. 199, 208 (2019).

This Court has "consistently adhered to this 'private person' standard," even when the standard has required analogizing—sometimes hypothetically. *United States* v. *Olson*, 546 U.S. 43, 46 (2005). For instance, "[i]n *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955), this Court rejected the Government's contention that there was 'no liability for negligent performance of 'uniquely governmental functions.'" *Olson*, 546 U.S. at 46. In *Indian Towing*, that function was operating a lighthouse, and the Court compared the government to a private person "who undertakes to warn the public of danger and thereby induces reliance." 350 U.S. at 64–65. The Court emphasized that "if the United States were to permit the operation of private lighthouses—not at all

inconceivable—the Government's basis of [trying to avoid liability] would be gone." *Id.* at 66. The Court refused to "attribut[e] bizarre motives to Congress" by "hold[ing] that it was predicating liability on such a completely fortuitous circumstance—the presence of identical private activity." *Id.* at 67.

Likewise, in *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957), the Court looked to a roughly analogous private person, rejecting the argument that the scope of liability for the "uniquely governmental" function of firefighting depended on whether state law "imposes liability on municipal or other local governments for the negligence of their agents acting in" like circumstances. *Id.* at 318–19. It made no difference that "[p]rivate organizations, except as community volunteers, for fire fighting were hardly known." *Id.* at 321 (Reed, J., dissenting).

In *Olson*, this Court stuck "to this 'private person' standard." 546 U.S. at 46. The Court summarized its precedents as holding that the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing the Government's liability," even as to "the performance of activities which private persons do not perform." *Ibid.* (cleaned up). And even though *Indian Towing* and *Rayonier* "involved Government efforts to *escape* liability," the Court said there was no "reason for treating differently a plaintiff's effort to *base* liability" on this private-public distinction. *Ibid.* As Judge Easterbrook put it, "[t]his gate swings both ways." *Carter* v. *United States*, 982 F.2d 1141, 1144 (CA7 1992).

Here, the FTCA forecloses treating the United States differently from private litigants when it comes to an available Supremacy Clause defense to liability. As the Court said in *Olson*, "'like circumstances' do not restrict a court's inquiry to the *same circumstances*, but require it to look further afield." 546 U.S. at 46 (citing *Indian Towing*, 350 U.S. at 64). Whether a private person would have a Supremacy Clause defense in the exact circumstances is irrelevant. As shown, a private person *can* have a Supremacy Clause defense to similar torts. And it is "not at all inconceivable" that the federal government could authorize a private person to, for instance, perform functions traditionally associated with law enforcement. *Indian Towing*, 350 U.S. at 66; cf. D.C. Code § 23-582(b) (2025) (providing that "[a] private person may arrest another" in some circumstances). Under this Court's precedents, what matters is that in *like* circumstances—an analogous tort and available defenses—a private person could defend based on the Supremacy Clause. That means the United States can too.

The government has explained how this works using an example of "a trespass action against a Federal law enforcement officer for entering upon [a person's] land." Tr. of Oral Arg. in *Olson*, O. T. 2005, No. 04-759, p. 5 (Oct. 12, 2005). Courts "would apply the same State law as it relates to trespass claims against private persons," and those claims may "have a defense of lawful authority to enter." *Ibid.* When considering lawful authority, courts could "look to Federal law to determine whether or not the officer had authority to enter, but [they] would still be

applying the principles of private-person liability." *Ibid.*; see *id.* at 7–8.

Courts of Appeals agree that "the 'like circumstances' inquiry requires only that the United States be analogized to a similarly situated private party." *Nationwide Mut. Ins. Co.* v. *United States*, 3 F.3d 1392, 1396 (CA10 1993). For the United States to assert a defense, "there need not be an *actual* private party 'under like circumstances' as the United States; the statute merely requires [courts] to analogize to a hypothetical private party that could stand in the shoes of the United States 'under like circumstances.'" *Bush* v. *Eagle-Picher Indus., Inc.*, 927 F.2d 445, 452 (CA9 1991); see, *e.g.*, *In re FEMA Trailer Formaldehyde Prods. Liab. Litig. (Miss. Plaintiffs)*, 668 F.3d 281, 288–89 (CA5 2012) ("[T]he Government is entitled to raise any and all defenses that would potentially be available to a private citizen or entity under state law."); *Haceesa* v. *United States*, 309 F.3d 722, 726 (CA10 2002); *Carter*, 982 F.2d at 1144; *Caban* v. *United States*, 728 F.2d 68, 74 (CA2 1984).

No state could withhold a Supremacy Clause defense from any litigant. If an available Supremacy Clause defense exists, the United States can assert it, no different from a "private person in like circumstances." 28 U.S.C. § 2674. Any other rule would "create[] a mismatch between the [government's] liability and a private defendant's" "in a similar suit"—contravening the statutory text. *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 114–15 (2022) (interpreting parallel language in 28 U.S.C. § 1606).

2. The statute also entitles the government to any other defenses.

If there were any doubt about § 2674's similarly situated private party rule and a Supremacy Clause defense, the rest of the statute eliminates it. The statute provides that "the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled." The Supremacy Clause is a "defense" to which any defendant, including the United States, may be entitled. *Caterpillar*, 482 U.S. at 392.

In the FTCA, as in other statutes, the Court generally gives the term "any" "a broad meaning." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 218–19 (2008). "No language . . . in the statute purports to restrict" a Supremacy Clause defense that is available to the United States. *United States* v. *Smith*, 499 U.S. 160, 173 (1991). "Had Congress intended to restrict" one defense—under the Supremacy Clause—"it would have done so expressly." *Gallardo ex rel. Vassallo* v. *Marstiller*, 596 U.S. 420, 430 (2022) (cleaned up).

Further, giving the United States "any other defenses" must expand its defenses beyond those already available to private persons, or else the phrase "becomes meaningless" and "does no independent work" in § 2674. *Pulsifer* v. *United States*, 601 U.S. 124, 142 (2024); accord H.R. Rep. No. 100-700, p. 8 (1988), 1988 U.S.C.C.A.N. 5945, 5952 (explaining that this language "authorize[s] the United States to utilize

all of the defenses to which it is independently entitled").

This understanding of "any other defenses" is buttressed by the preceding reference to "judicial or legislative immunity"—defenses that would *not* be available to private persons. Catchall clauses like this "are to be read as bringing within a statute" at least "categories similar in type to those specifically enumerated." *Paroline* v. *United States*, 572 U.S. 434, 447 (2014). The phrase "any other defenses" includes defenses available only to the United States, too.

Thus, § 2674 entitles the government to any available Supremacy Clause defense.

B. The FTCA's application of the whole state law, including relevant federal law, confirms this Supremacy Clause defense.

That the United States has a Supremacy Clause defense in FTCA cases follows not only from "the language of § 2674" but also from "the structure of the Act" as prescribed by its jurisdictional provision, § 1346(b)(1). *Molzof*, 502 U.S. at 312. That provision directs federal courts to assess liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). This assessment is not limited to "the internal law," but encompasses the "whole law of the State." *Richards*, 369 U.S. at 10–11. In effect, a federal court considering a state tort claim under the FTCA steps into the shoes of a state court. Like a state court considering a tort claim, the federal court will primarily apply state law. But under the Supremacy Clause, courts "must not give effect to state laws that conflict with federal laws." *Armstrong*

v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). So, like the state court whose shoes it wears, the federal court cannot impose FTCA liability based on a state rule that is displaced by federal law and void.

1. The FTCA applies the whole state law, including applicable federal law.

The FTCA's conferral of federal jurisdiction in § 1346(b)(1) "was designed primarily to remove the sovereign immunity of the United States," and it looks to state law to assess the government's liability in tort. *Richards*, 369 U.S. at 6. These are "two 'analytically distinct' inquiries." *Meyer*, 510 U.S. at 484 (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983)). "The first inquiry is whether there has been a waiver of sovereign immunity." *Ibid.* "If there has been such a waiver," "the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Ibid.*; see also *United States* v. *Neustadt*, 366 U.S. 696, 705 n.15 (1961) ("[W]hen a claim is not barred by one of the Act's exclusionary provisions, the liability of the Government must be determined 'in accordance with the law of the place where the act or omission occurred.'").

"[T]he source of substantive liability under the FTCA" is the "law of the State." *Meyer*, 510 U.S. at 478 (collecting cases). This Court has repeatedly said that "the extent of the United States' liability under the FTCA is generally determined by reference to state law." *Molzof*, 502 U.S. at 305. A claimant must show "that 'the United States, if a private person, would be liable to the claimant' *under state law*." *Brownback*,

592 U.S. at 218 (emphasis added); see also *Carlson* v. *Green*, 446 U.S. 14, 23 (1980) ("[A]n action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward."); *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972) (explaining that the FTCA makes the government "liable according to state law under the doctrine of *respondeat superior*"); *Exec. Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 273 n.25 (1972) ("[I]n [an FTCA] suit the federal court will apply the substantive tort law of [the state]," not "federal substantive law.").

The Courts of Appeals agree:

- "[A] tort claim under the FTCA substantively follows state law liability." *Morales-Melecio* v. *United States (Dep't of Health & Hum. Servs.)*, 890 F.3d 361, 365 n.9 (CA1 2018).
- "[S]tate law is the source of substantive liability under the FTCA." *Corley* v. *United States*, 11 F.4th 79, 85 (CA2 2021) (internal quotation marks omitted).
- "[T]he FTCA does not itself create a substantive cause of action against the United States; rather, it provides a mechanism for bringing a state law tort action against the federal government in federal court." *Lomando* v. *United States*, 667 F.3d 363, 372 (CA3 2011).
- "A substantive cause of action is not created by 28 U.S.C. § 1346(b). This section is jurisdictional only." *Jarrett* v. *United States*, 874 F.2d 201, 203 (CA4 1989).

- "[T]he FTCA waives sovereign immunity and permits suits against the United States sounding in state tort for money damages." *Freeman* v. *United States*, 556 F.3d 326, 335 (CA5 2009).
- "[I]n a FTCA action," "state law always supplies the rules of decision." *Gallivan* v. *United States*, 943 F.3d 291, 295 (CA6 2019).
- "In FTCA cases, state law applies to substantive questions and federal rules govern procedural matters." *Gil* v. *Reed*, 535 F.3d 551, 558 n.2 (CA7 2008).
- "The law of the state in which the alleged tort occurred . . . governs all substantive issues in a Federal Tort Claims case." *Kruchten* v. *United States*, 914 F.2d 1106, 1107 (CA8 1990).
- "State substantive law applies in FTCA actions[.]" *Liebsack* v. *United States*, 731 F.3d 850, 856 (CA9 2013).
- "[T]he source of the government's substantive liability under the FTCA is state law." *Boehme* v. *U.S. Postal Serv.*, 343 F.3d 1260, 1264 (CA10 2003).
- "The FTCA addresses violations of state law[.]" *Shivers* v. *United States*, 1 F.4th 924, 928 (CA11 2021).
- "[T]he FTCA, by its terms, does not create new causes of action; rather, it makes the United States liable in accordance with applicable local tort law." *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1157 (CADC 1985).

That the FTCA uses state law as its substantive rule of decision is underscored by the fact that it initially "expressly ma[de] the Federal Rules of Civil Procedure applicable" to decide procedural issues. *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 553 (1951). The provision was later "omitted as unnecessary because the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." *Id.* at 553 n.9 (cleaned up).

In this sense, FTCA cases operate not unlike federal diversity cases under 28 U.S.C. § 1332: they "apply state substantive law and federal procedural law." *Gasperini* v. *Ctr. for Humans., Inc.*, 518 U.S. 415, 427 (1996); see *Corley*, 11 F.4th at 88 (applying this rule to the FTCA); *Pledger* v. *Lynch*, 5 F.4th 511, 522 (CA4 2021) (same); *Arpin* v. *United States*, 521 F.3d 769, 776 (CA7 2008) (same); see also *DeJesus* v. *U.S. Dep't of Veterans Affs.*, 479 F.3d 271, 279 (CA3 2007).

Indeed, this Court has said that "where Congress directly or impliedly directs the courts to look to state law"—as it did in the FTCA—the rule of *Erie R. Co.* v. *Tompkins* "will ordinarily provide the framework for doing so." *DelCostello* v. *Int'l Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983). Under *Erie*, the substantive "law to be applied" "is the law of the state." 304 U.S. 64, 78 (1938).

The "substantive law" that the FTCA requires courts to apply is not the state's law in a vacuum, but its "whole law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 710 & n.8 (2004). This means that a federal court in an FTCA case must step into the shoes of a state court and decide whether the state "would be required to apply [the law in question] if this were an action

between private parties." *Hess* v. *United States*, 361 U.S. 314, 318 n.7 (1960).

The "whole law" of a state "includes such rules of federal law as are binding upon it." Restatement (Second) of Conflict of Laws § 4 cmt. b (1971). In *Hess*, for example, this Court refused to apply the local tort law of the state to an FTCA claim arising from a death on navigable waters. 361 U.S. at 318. Because "a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law," the Court explained, the state "would be required to apply maritime law if this were an action between private parties." *Id.* at 318 n.7. And because the FTCA permits liability on the government only "to the same extent as a private individual," the Court held that the claim was governed by maritime law rather than a state statute. *Id.* at 318 & n.7. In other words, federal law applied as part of the state's "whole law" under the FTCA because federal law contained the rules that the state courts would have applied "under like circumstances." 28 U.S.C. § 2674; accord *Muniz*, 374 U.S. at 164–65 (explaining in an FTCA negligence action against prison officials that "the duty of care, owed . . . to federal prisoners is fixed by [a federal statute], independent of an inconsistent state rule").

In short, the FTCA calls for the application of the whole state substantive law, as it would be applied in state court. Applying the whole law of the state "enables the federal courts to treat the United States as a 'private individual under like circumstances.'" *Richards*, 369 U.S. at 11, 13 (quoting 28 U.S.C. § 2674).

2. Applying the whole state law can lead to preemption.

The Supremacy Clause "creates a rule of decision" that prohibits courts from "giv[ing] effect to state laws that conflict with federal laws." *Armstrong*, 575 U.S. at 324. This rule is no less applicable when a federal court, rather than a state court, applies state substantive law. For instance, federal diversity cases applying state substantive law are commonly resolved on preemption grounds. See, *e.g.*, *Kurns*, 565 U.S. 625 (removed on diversity jurisdiction, see *Kurns* v. *A.W. Chesterton Inc.*, 620 F.3d 392, 393 (CA3 2010)); *PLIVA*, 564 U.S. 604 (same, see *Mensing* v. *Wyeth, Inc.*, 2008 WL 4724286, at *5 (D. Minn. Oct. 27, 2008)).

When it comes to the FTCA, a state's applicable "whole law" includes the "choice-of-law rules [of] the State in which the [tort] occurred." *Richards*, 369 U.S. at 13. Faced with a conflict between the state's rules and those of another sovereign, a state court must choose which rules to apply. And *Richards* instructs a federal court in an FTCA case to adopt the same conflict-resolution approach as the state court.

The Supremacy Clause "instructs courts what to do when state and federal law clash," *Armstrong*, 575 U.S. at 325—they are to "nullif[y]" the state rule to the extent of the conflict. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000). The state rule "becomes inoperative," *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 156 (1942), and "void," *Foster* v. *Love*, 522 U.S. 67, 74 (1997). Cf. A. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 29 & n.204 (2005) (collecting authorities describing the Supremacy Clause as "a fundamental conflict of laws rule").

Thus, under the FTCA, if a state court would have to disregard the "law of the State" as preempted, the FTCA requires that a federal court do the same—even if that discards any "source of substantive liability." *Meyer*, 510 U.S. at 478. State law is inoperative to the extent it conflicts with a federal rule. An inoperative law cannot be applied or passed through to create liability. Instead, the federal rule becomes part of the "law of the place." 28 U.S.C. § 1346(b)(1). If the federal rule does not allow liability, then the "law of the place" does not impose liability.

In sum, because the Supremacy Clause applies in state tort cases, federal courts standing in state courts' shoes under the FTCA must consider it as well. If the state rule that would be applied is void because of a Supremacy Clause conflict, "a private person" would *not* "be liable" under "the law of the place"—and neither is the government. 28 U.S.C. § 1346(b)(1). Imposing state-law liability for conduct protected by federal law—liability that would *not* be imposed by a state court in like circumstances—would "visit the Government with novel and unprecedented liabilities." *Stencel*, 431 U.S. at 671.

The FTCA's text and structure show that the United States may assert a Supremacy Clause defense.

C. The Petitioners gloss over the statutory text and misunderstand the FTCA.

The Petitioners argue that the Supremacy Clause could never be a defense to "FTCA claims because the FTCA is a federal statute." Br. 47. They demand a categorical "hold[ing] that the Supremacy Clause does

not bar claims under the FTCA." *Id.* at 51. This argument contradicts statutory text and precedent.

First, the Petitioners disregard § 2674's instruction that the United States can be liable only "to the same extent" as a similarly situated private person and is entitled to "any" defense. *Second*, the Petitioners misunderstand the FTCA more broadly, wrongly conceiving of it as imposing a federal substantive rule that eliminates a Supremacy Clause defense to state-law liability. *Third*, the Petitioners' policy arguments cannot overcome the statutory text and structure, especially since it is the Petitioners' reading that would impose novel liability for otherwise lawful actions and treat the government worse than a similarly situated private person.

1. The Petitioners disregard the United States's limited liability under § 2674.

To start, the Petitioners ignore § 2674's commands that the United States be liable only "to the same extent as a private individual under like circumstances" *and* be entitled to "any other defenses." They have no explanation for how depriving the United States of a defense—especially one available to a private individual in like circumstances—is consistent with this statutory text. As shown, it is not.

The Petitioners' theory would not only fail to treat the United States as a private person in like circumstances, it would even treat the United States differently in *identical* circumstances. Again, the Petitioners' theory hinges on the fact that "the FTCA is a federal statute," which purportedly eliminates any

"Supremacy Clause bar." Br. 47. On this theory, if the same federal law protected the conduct of both a federal employee and a private person, and an FTCA claim and a private tort action arose from two factually identical circumstances implicating the federal law, the government would be denied the exact Supremacy Clause defense that could free the private person of liability. See *supra* p. 2.

Section 2674 forecloses this "mismatch." *Cassirer*, 596 U.S. at 115. And even if a private person would *not* have a Supremacy Clause defense in like circumstances, the statute *still* entitles the government to "any" defense. Especially "when dealing with a statute subjecting the Government to liability for potentially great sums of money"—and potentially dampening its law enforcement—"this Court must not promote profligacy by careless construction." *Indian Towing*, 350 U.S. at 69.

2. The Petitioners misunderstand the waiver of sovereign immunity as a new federal substantive liability rule.

The Petitioners' lead argument is that allowing the United States a Supremacy Clause defense "impermissibly usurps Congress's sole authority to waive sovereign immunity" by "prevent[ing] Congress from waiving sovereign immunity." Br. 5, 48. But this "reasoning conflates two 'analytically distinct' inquiries." *Meyer*, 510 U.S. at 484. As discussed, "[t]he first inquiry is whether there has been a waiver of sovereign immunity," and "[i]f there has been such a waiver," "the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Ibid.*

The Supremacy Clause fits within the second inquiry, as it "instructs courts what to do when state and federal law clash, but is silent regarding who may enforce [particular] laws in court, and in what circumstances they may do so." *Armstrong*, 575 U.S. at 324–25.

So even if a claimant shows that "sovereign immunity ha[s] been waived, there [i]s the further, separate question whether the [government] [i]s subject to the substantive liability." *U.S. Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 743 (2004). That the United States might prevail in this "two-step analysis" (*ibid.*) at the second step does not "usurp" any congressional determination about the first step of sovereign immunity. It simply means that the claim fails on the merits under state law.

In practice, courts routinely keep the two inquiries separate—making preemption part of the second inquiry. See, *e.g.*, *Treasurer of N.J.* v. *U.S. Dep't of Treasury*, 684 F.3d 382, 395–412 (CA3 2012) (holding that the Administrative Procedure Act, 5 U.S.C. § 702, waived the government's sovereign immunity but finding state claims preempted); *Perry Cap. LLC* v. *Mnuchin*, 864 F.3d 591, 621–22, 630 (CADC 2017) (finding waiver of sovereign immunity and separately considering preemption); *North Carolina ex rel. Cooper* v. *Tenn. Valley Auth.*, 515 F.3d 344, 350–53 (CA4 2008) (similar). The same approach is proper here.

Next, the Petitioners argue that the FTCA "incorporate[s] state tort elements into federal law." Br. 18. Relying on two solo concurring opinions, the Petitioners appear to suggest that the FTCA elevates

state tort law to "truly federal" law, so that "there can be no conflict" with other federal laws. *Id.* at 49 (bracket omitted). One of these opinions mentions the FTCA only in passing with a murky "cf." citation that could be read to *reject* the Petitioners' argument. See *Ass'n of Westinghouse Salaried Emps.* v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 463 (1955) (Reed, J., concurring) (citing the FTCA after describing another statute's "jurisdictional grant" in which "causes of action . . . were created and governed solely by state law"). In any event, the Petitioners' argument is unavailing for several reasons.

First, the Petitioners' suggestion that state tort law *becomes* federal law is inconsistent with the statutory text. The FTCA's primary provision gives district courts "exclusive jurisdiction" to decide cases within its scope "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). This jurisdictional provision contains no hint that it is announcing a new substantive standard that formally incorporates state tort elements into federal law. Rather, it simply directs federal courts to apply state law. Section 2674 echoes this direction to the state-law liability of "a private individual under like circumstances."

This Court's precedents have reflected the same understanding. Under the FTCA, "the federal court will apply the substantive tort law of [the state]," not "federal substantive law." *Exec. Jet Aviation*, 409 U.S. at 273 n.25; see also *supra* pp. 26–28 (collecting cases). In *Meyer*, for instance, the Court held that the FTCA does not subject the government to liability for

constitutional torts, reasoning that "federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." 510 U.S. at 478. And "state law"—*not* federal law—is "the source of substantive liability under the FTCA." *Ibid.* As this Court has said, "it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act." *Richards*, 369 U.S. at 9.

The "legislative material" too confirms "that Congress thought in terms of state law being applicable," with federal courts stepping into state courts' shoes. *Id.* at 14 n.29 (collecting citations). Giving exclusive jurisdiction to federal district courts was justified on the ground that "the district court sits in only one State and is familiar with the local laws and decisions which are to govern the determination of tort claims against the United States." Hearings on H. R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess. 61 (1942). And "the local law" would be "applicable not only to the merits of the claim, but also to the defenses." *Ibid.*; see *id.* at 26–27 ("local law applies"); *id.* at 30 ("This bill provides explicitly for the application of local law.").

Congress knows how to turn state law *into* federal law when it wants to. In the Outer Continental Shelf Lands Act, for example, Congress said that, "[t]o the extent that they are applicable and not inconsistent with" other federal laws, "the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States." 43 U.S.C. § 1333(a)(2)(A). Thus,

"the only law on the OCS is federal law." *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 587 U.S. 601, 609 (2019).

In FTCA cases, by contrast, state law—statutory and decisional—generally governs substantive liability. No FTCA provision purports to adopt state tort elements into federal law. Rather, an FTCA claimant must allege and then prove "that 'the United States, if a private person, would be liable to the claimant' under state law." *Brownback*, 592 U.S. at 218. The Petitioners are right that adjudication of FTCA cases will be under Article III's "federal judicial power" (Br. 49) thanks to the FTCA's jurisdictional provision, but that is no different from federal diversity cases. As discussed, the Supremacy Clause is accepted as a defense in those cases. *Supra* p. 31. And it is accepted as a defense in state tort cases, including those involving torts listed in the FTCA's law enforcement proviso. *Supra* pp. 19–20. Because the FTCA directs courts to consider whether "a private person" "would be liable to the claimant in accordance with" state law—and to make the United States liable "to the same extent," preserving "any other defenses"—the Supremacy Clause remains a valid defense in FTCA cases. 28 U.S.C. §§ 2674, 1346(b)(1).

The Petitioners briefly point to this Court's decision in *Moor* v. *County of Alameda* for the proposition that Congress often uses state law "to fill the interstices of federal law." 411 U.S. 693, 701 & n.11 (1973) (Br. 49). But *Moor* was not about the FTCA, and its footnoted dictum about "federal adoption of state law" in the FTCA does not address the distinction between formal incorporation of state

law and federal court application of state law. *Id.* at 701 n.11.

The Petitioners' *amici* claim that "it is well settled" "that an FTCA claim 'aris[es] under' federal law" per 28 U.S.C. § 1331. Members of Congress Br. 16; see Public Citizen Br. 4 (similar). That's wrong. Section 1331 is "an independent jurisdictional base," *Finley* v. *United States*, 490 U.S. 545, 547 (1989), and the Court of Appeals cited by *amici* has explained that jurisdiction in FTCA cases does "*not* come from the general grant of federal-question jurisdiction of 28 U.S.C. § 1331." *CNA* v. *United States*, 535 F.3d 132, 140 (CA3 2008). Rather, § 1346(b) "grants the federal district courts jurisdiction" over FTCA claims. *Meyer*, 510 U.S. at 477; see *Dolan*, 546 U.S. at 484 (§ 1346(b)(1) "confers federal-court jurisdiction"); accord 28 U.S.C. § 1402(b) (venue provision for "[a]ny civil action on a tort claim against the United States under subsection (b) of section 1346").

The decision cited by *amici* also refutes the Petitioners' overarching argument. That decision explained that the Courts of Appeals have "interpreted *Meyer* and its progeny to mean that state law supplies '[t]he cause of action in an FTCA claim.'" *Wilson* v. *United States*, 79 F.4th 312, 317 (CA3 2023); see *supra* pp. 27–28 (collecting cases, all of which would be abrogated by the Petitioners' reading).

All this shows that the FTCA provides a jurisdictional waiver of sovereign immunity, while state law provides the cause of action and rule of substantive liability. And state law can be preempted under the Supremacy Clause.

Even if one were to disregard the weight of authority and view the FTCA as creating a substantive "*federal* rule of decision," Public Citizen Br. 12, the availability of a Supremacy Clause defense would not change. In the Petitioners' view, the FTCA "incorporate[s] state tort law into federal law *to the extent stated in that statute*." Br. 49 (emphasis added) (quoting *Denson*, 574 F.3d at 1352 (Carnes, J., concurring)). As discussed, the statute permits the United States to assert at least the same defenses to state-law liability as a similarly situated private person—including a Supremacy Clause defense. All that could be "incorporated" into federal law, then, is a simple answer on whether the United States "shall be liable." 28 U.S.C. § 2674. Either a private person would be liable under state law in like circumstances—also considering "any other defenses" of the government's—or not. *Ibid.* That decides the government's liability under the FTCA. See *id.* § 1346(b)(1). And because the Supremacy Clause would have been an available defense to the liability of a private person or the United States under state law, the United States may assert it under § 2674.

Whether one calls that a federal statutory defense that hinges on the Supremacy Clause or simply a Supremacy Clause defense makes no "practical difference." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 n.3 (1988). The point is that disregarding conflicts between state-law liability and federal law would make the United States liable to a greater extent than a similarly situated private person *and* deprive it of a defense guaranteed by statute.

Even if all this were wrong and the FTCA inexplicably excludes any Supremacy Clause defense, the Petitioners still fail to justify their disregard of other federal laws. "[W]hen two statutes are capable of co-existence," "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 533 (1995). But the Petitioners' reading forces "the FTCA into conflict with" federal laws that would otherwise support a Supremacy Clause defense, without resolving that conflict. *Tekle* v. *United States*, 511 F.3d 839, 857 (CA9 2007) (Fisher, J., concurring in part and concurring in judgment). These laws and the FTCA "could easily be harmonized by reading the FTCA to impose liability only when the officers have exceeded the bounds" of their federal authority. *Ibid.* That determination, however, would require the same analysis disavowed by the Petitioners.

Yet this thought experiment is unnecessary because, properly understood, the FTCA simply invokes state substantive law as its liability rule. And if that law does not implicate specific conduct because of a superseding federal law, it cannot result in liability. A Supremacy Clause defense is thus available to the United States in FTCA cases.

3. The Petitioners' policy arguments contradict the text and are unavailing.

In the end, the Petitioners and their *amici* resort to policy-based arguments. The Petitioners say that "[w]hether in form or substance, courts should not 'import immunity back into a statute designed to limit it.'" Br. 50 (quoting *Indian Towing*, 350 U.S. at 69).

Their *amici* say that recognizing a Supremacy Clause defense "contravenes Congress's policy in passing the law-enforcement proviso," which *amici* say was "providing redress for victims of wrong-house raids by federal agents." Members of Congress Br. 10, 13.

Yet again, the law enforcement proviso and the FTCA's other sovereign immunity provisions are "analytically distinct" from the government's substantive liability under state law. *Meyer*, 510 U.S. at 484. Even if the government had waived sovereign immunity unreservedly, the question of state-law liability would remain. The FTCA does "not assure injured persons damages for all injuries caused by [government] employees." *Dalehite*, 346 U.S. at 17. As this Court has explained, "[i]f Congress had meant to alter or supplant the legal relationships developed by the States, it could specifically have done so to further the limited objectives of the Tort Claims Act." *Richards*, 369 U.S. at 7. But it chose to make the United States liable "to the same extent" as a private person in like circumstances under state law—and preserve all other defenses. 28 U.S.C. § 2674.

"[N]o amount of policy-talk can overcome [this] plain statutory command." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 171 (2021). Though "it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre," *PLIVA*, 564 U.S. at 625, allowing a Supremacy Clause defense is *not* bizarre. If anything, that reading "avoid[s] an absurd result: that federal officers acting lawfully may nonetheless" make the government "civilly liable." *Tekle*, 511 F.3d at 858 (Fisher, J., concurring in part and concurring in judgment). And

it is the Petitioners' reading that would strangely treat the United States worse than similarly situated private persons.

The Petitioners and their *amici* also overstate the supposedly negative consequences of recognizing a Supremacy Clause defense. To begin, "no legislation pursues its purposes at all costs," *Am. Exp. Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013), and the many limitations on FTCA actions show that providing redress is not the statute's all-consuming purpose. Among other things, its remedy is "left to the vagaries of the laws of the several States," *Carlson*, 446 U.S. at 23; it denies a jury trial, 28 U.S.C. § 2402; it does not provide pre-judgment interest or punitive damages, *id.* § 2674; and it exempts many claims from its sovereign immunity waiver, *id.* § 2680.

At any rate, as discussed below, the Supremacy Clause defense *does* allow claimants to recover if federal employees act unreasonably by not complying with the full range of federal law. In those circumstances, the FTCA would (barring an exception) waive the government's sovereign immunity *and* allow a victim to recover under state tort law. Outside the FTCA, other remedies remain available in appropriate cases, including claims against individual government officials and private bills from Congress. See R. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. St. Thomas L.J. 398, 400 n.11 (2011) (listing examples showing that "Congress has often provided compensation in situations where the courts have

found that the FTCA . . . provides no relief"); see also *Buchanan* v. *Barr*, 71 F.4th 1003, 1016 (CADC 2023) (Walker, J., concurring) (suggesting that the FTCA "preserv[es] state tort suits against federal officers for constitutional violations"); 18 U.S.C. § 242 (criminalizing certain official misconduct).

Even if the Petitioners' and *amici*'s contention that the FTCA should not "den[y] an effectual remedy" in cases like this one had "force," "it is properly addressed to Congress, not to this Court." *Kosak*, 465 U.S. at 862. If Congress is concerned about remedies available against the federal government, it can depart from the default rule of *no* relief by statute. "[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." *Hernandez* v. *Mesa*, 589 U.S. 93, 101 (2020); see *Dalehite*, 346 U.S. at 30 ("[N]o action lies against the United States unless the legislature has authorized it.").

The selection of government liability policy "involves a host of considerations that must be weighed," which "is more appropriately for those who write the laws, rather than for those who interpret them." *United States* v. *Gilman*, 347 U.S. 507, 512–13 (1954). Beyond "[t]he financial burden placed on the United States," *id.* at 510, other considerations include the notion that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits." *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973). Those suits "consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Ibid.*

So while the public has interests in protecting "individual citizen[s] against pecuniary damage caused by oppressive or malicious action," it also has significant interests in "shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits." *Ibid.* How to balance crosswise interests is up to Congress.

Last, the Petitioners' suggestion that the Supremacy Clause defense "is just the discretionary-function exception with an added constitutional-violation requirement" has no bearing on the availability of that defense. Br. 48; see *id.* at 50. Any sovereign immunity waiver is "analytically distinct" from substantive liability. *Meyer*, 510 U.S. at 484. And the Petitioners' suggestion depends on the contours of the Supremacy Clause defense, an issue that the Petitioners do not meaningfully address. In all events, Congress "believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction," and it added "the specific exception" only "to make clear" the point. *Varig Airlines*, 467 U.S. at 810.

* * *

The Eleventh Circuit followed the statutory text in holding that the United States may assert a Supremacy Clause defense to state-law liability in an FTCA case, no different than private tort defendants who routinely invoke that defense in similar cases. The FTCA strips the United States of no defenses. And though it confers federal court jurisdiction and waives sovereign immunity for some claims, it leaves

substantive questions of liability for those claims to state law. State law is inoperative to the extent it conflicts with federal law, regardless of the defendant's public or private identity or function. Holding otherwise would subject the government to liability for lawful actions of its officers. The courts below rightly permitted the government to defend against the Petitioners' claims based on the Supremacy Clause. See Pet. App. 18a–19a.

II. The Court of Appeals properly articulated the scope of the Supremacy Clause defense.

Because the Supremacy Clause *can* serve as a defense to state-law liability under the FTCA, the only remaining issues are whether the Court of Appeals properly articulated the contours of that defense and properly applied it. But the Petitioners do not offer any substantive argument on those issues. They broadly argue "that the Supremacy Clause does not bar claims under the FTCA." Br. 51. As shown, that categorical argument is wrong. Because the Petitioners offer no further argument, this Court need not go further, either. The Court generally declines to "decide [a] question based on such scant argumentation." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 224 (1997). When a party "fail[s] to address [an] issue in its brief on the merits," the party "therefore has abandoned it." *United States* v. *Int'l Bus. Machs. Corp.*, 517 U.S. 843, 855 n.3 (1996).

Thus, it suffices to hold that the Supremacy Clause can be invoked as a defense in FTCA cases, thereby resolving the Petitioners' argument, and to affirm the judgment below on that basis. Review of the contours of the Supremacy Clause defense can await a future

case, presumably after "further percolation [that] may assist [the Court's] review of this issue of first impression" under the FTCA. *Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 587 U.S. 490, 496 (2019) (Thomas, J., concurring); see also S. Waxman & T. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2200 (2003) (emphasizing "the paucity of case law and scholarly commentary on Supremacy Clause immunity").

In any event, the Supremacy Clause defense articulated by the Court of Appeals simply recapitulates this Court's precedent. Under that defense, "[t]he government may invoke the Supremacy Clause against state-tort liability if it demonstrates that the government 'official's acts have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law.'" Pet. App. 17a (quoting *Kordash*, 51 F.4th at 1293, in turn quoting *Denson*, 574 F.3d at 1348). The Court of Appeals "deriv[ed] this test" from this Court's precedents. *Kordash*, 51 F.4th at 1293–94.

Starting in *McCulloch* v. *Maryland*, this Court recognized that "there is a plain repugnance in conferring on one government a power to control the constitutional measures" of a "supreme" government. 17 U.S. (4 Wheat.) 316, 431 (1819). Even absent an "express provision" of federal law, the Court held that "states have no power . . . to retard, impede, burden, or in any manner control" the federal government's "execution" of its powers. *Id.* at 426, 436.

Several decades later in *Tennessee* v. *Davis*, the Court reiterated that "the execution and enforcement

of the laws of the United States" "are confided to" the federal government, "and to that extent the sovereignty of the State is restricted." 100 U.S. 257, 267 (1879). Emphasizing that the government "can act only through its officers and agents," the Court recognized a federal constitutional interest in protecting officers "acting . . . within the scope of their authority" and in a way "warranted by the Federal authority they possess." *Id.* at 263. The Court thus upheld a statute permitting removal of state criminal cases related to a federal officer's exercise of federal authority. See *id.* at 271; see also 28 U.S.C. § 1442(a)(1).

The Court expressly recognized a stand-alone Supremacy Clause defense in *In re Neagle*, 135 U.S. 1 (1890). The question was whether a U.S. deputy marshal tasked with protecting Justice Stephen Field could be subjected to state prosecution after he shot and killed a spurned litigant who was attacking the Justice. The Court's answer was no. Relying on *Davis* and other precedents, the Court explained that "the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." *Id.* at 60. The Court rejected the notion that these federal duties are "limited to the enforcement of acts of congress or of treaties of the United States according to their express terms." *Id.* at 64. Rather, the Court held that federal authority "include[s] the rights, duties, and obligations growing out of the constitution itself . . . and all the protection implied by the nature of the government." *Ibid.*

Thus, the Court in *Neagle* applied the Supremacy Clause to mean that if a federal officer "is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as [officer] of the United States," "and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state." *Id.* at 75; see *id.* at 61. Later cases cited *Neagle* in vindicating similar Supremacy Clause defenses. See *Johnson* v. *Maryland*, 254 U.S. 51, 56–57 (1920); see also *Hunter* v. *Wood*, 209 U.S. 205, 210 (1908).

The same principles apply when the threatened liability is via "state tort law." *Boyle*, 487 U.S. at 511. "[T]he activities of the Federal Government are free from regulation by any state," *Mayo* v. *United States*, 319 U.S. 441, 445 (1943), and as noted, "state regulation can be effectively exerted through an award of damages," *Kurns*, 565 U.S. at 637 (cleaned up). "[D]isplacement of state law" purporting to impose "civil liability o[n] federal officials for actions taken in the course of their duty" has thus been required in "many" cases. *Boyle*, 487 U.S. at 505.

In a thorough discussion, the Eleventh Circuit canvassed this history and held that courts confronted with a Supremacy Clause defense to a state tort claim under the FTCA should consider "whether the officer's acts have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law." *Denson*, 574 F.3d at 1348. The decision below applied that test. Pet. App. 17a–19a.

That test is consistent with this Court's precedents. The first prong—some nexus with federal policy—restates *Neagle*'s inquiry of a federal law authorization and duty. The Eleventh Circuit explained the nexus prong as focusing on "whether the [employees] were acting within the outer perimeter of their line of duty" or "outside the scope of [their] authority." *Denson*, 574 F.3d at 1347 (cleaned up). Though the Eleventh Circuit condensed "the elements of the *Neagle* test for simplicity's sake," *ibid.*, there is no substantive difference. Cf. *Nat'l Pork Producers Council* v. *Ross*, 598 U.S. 356, 374 (2023) (emphasizing that judicial opinions "must be read with a careful eye to context," not "parsed" like "a statute"). This first prong ensures that the relevant action was "done in pursuance of a law of the United States, and by virtue of its authority." *Neagle*, 135 U.S. at 70; see *Ohio* v. *Thomas*, 173 U.S. 276, 284 (1899) (assessing the federal officer's "duty" "in and by virtue of valid federal authority").

The second prong—whether the action can reasonably be characterized as complying with the full range of federal law—mirrors *Neagle*'s inquiry of whether the officer did no more than was necessary and proper. Applying this prong, the Eleventh Circuit has looked to whether federal officers did "no more than was essential to carrying out their duties." *Denson*, 574 F.3d at 1348; see also *id.* at 1349 (rearticulating *Neagle*'s "necessary and proper" prong). "As other circuits have found, the Court in *Neagle* was granting immunity for federal agents who *reasonably* believed that their acts were *necessary* to perform their duties" under federal law. *Wyoming* v.

Livingston, 443 F.3d 1211, 1221 (CA10 2006) (McConnell, J.); see *id.* at 1220 (collecting cases); see also Waxman & Morrison, *supra*, at 2237 (explaining that "[c]ourts have generally regarded *Neagle* as establishing a two-prong test"); S. Cobb, *Jettisoning "Jurisdictional": Asserting the Substantive Nature of Supremacy Clause Immunity*, 103 Va. L. Rev. 107, 120 & n.92 (2017) (collecting cases).

The Petitioners do not assert that the Eleventh Circuit's test is incorrect or contradicts *Neagle*. They do not point to any daylight between *Neagle* and the Eleventh Circuit's rearticulation. They do not argue that their case would have been resolved differently on some other (unstated) articulation. They do not contend that any other court disagrees with the Eleventh Circuit's articulation. See *id.* at 122 n.100 (*Denson* "applied the standard two-prong test."). And they do not say that the Eleventh Circuit wrongly applied its test in this case.

Rather, the Petitioners offer one footnoted aside. They point to the FTCA's coverage of acts "within the scope of [a federal employee's] office or employment" and assert that this Supremacy Clause defense could "squelch[] most" FTCA claims. Br. 50 n.16. But any overlap between a statute's jurisdictional limitations and one prong of a constitutional defense has no bearing on the validity of that defense.

Beyond that, the Supremacy Clause defense does not preempt claims when the federal employee does not reasonably comply with federal law. See *Denson*, 574 F.3d at 1347–48. Indeed, courts have denied similar Supremacy Clause defenses in the face of "a conflict of evidence as to whether" it could "reasonably

be claimed that" the action was taken "in the performance of a duty imposed by the Federal law." *U.S. ex rel. Drury* v. *Lewis*, 200 U.S. 1, 8 (1906); see also, *e.g.*, *Morgan* v. *California*, 743 F.2d 728, 732–33 (CA9 1984) (actions of apparently intoxicated officers); *Birsch* v. *Tumbleson*, 31 F.2d 811, 816 (CA4 1929) (game warden shooting of hunters); *Castle* v. *Lewis*, 254 F. 917, 925–26 (CA8 1918) (officer shooting during warrantless arrest).

Plus, "[t]here are obviously discretionary acts performed by a Government agent that are within the scope of his employment" but that "cannot be said to be based on the purposes [of] the regulatory regime" and thus lack a nexus with federal policy. *United States* v. *Gaubert*, 499 U.S. 315, 325 n.7 (1991) (discussing negligent driving). And "[t]here is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment." *Hatahley* v. *United States*, 351 U.S. 173, 181 (1956).

Experience belies the Petitioners' concern, too. The Eleventh Circuit has applied the Supremacy Clause defense three times in over fifteen years of FTCA cases. Equally rare has been consideration of the defense in the district courts—where it typically has been rejected. See *Ohome* v. *United States*, 2023 WL 6201375, at *8–9 (N.D. Ga. Sept. 22, 2023); *Harris* v. *United States*, 2012 WL 13326289, at *5 (N.D. Ala. Mar. 20, 2012). And the Petitioners' concern is hard to square with their equivalence of the Supremacy Clause defense with "the discretionary-function exception," Br. 48, as that exception has not led to the demise of FTCA claims, either.

Next, one of the Petitioners' *amici* demands a "specific[]" "constitutional text" or "federal statute" "that does the displacing" of state law. Public Citizen Br. 10. But since *McCulloch* this Court has rejected the notion that an "express provision" is needed to find preemption in the context of execution of federal law. 17 U.S. (4 Wheat.) at 426; see *Neagle*, 135 U.S. at 64; *Osborn* v. *Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 865 (1824) (explaining that "[i]t is no unusual thing for an act of Congress to imply, without expressing, [an] exemption from State control").

Regardless, there *are* specific federal law authorities underlying the FBI's actions here. 18 U.S.C. §§ 3052, 3107; 28 U.S.C. § 533; see also *Neagle*, 135 U.S. at 64 (noting the President's constitutional duty to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3). Plus, law enforcement was "commanded" by a federal court to execute the warrants. CA11 Dkt. 25-1, at 129–30. The Supremacy Clause protects "act[s] done pursuant to an order, process, or decree of a court or judge of the United States." *Hunter*, 209 U.S. at 210. And the courts below held that the agents "did not violate the Fourth Amendment" in executing those warrants simply by making "the kind of reasonable mistake[] that the Fourth Amendment contemplates." Pet. App. 19a, 14a; cf. *Neagle*, 135 U.S. at 53 (Justice Field's assailant, shot by the marshal, turned out to have been unarmed).

Again, the Petitioners do not engage on any of this, so there is no need for the Court to decide more than that a Supremacy Clause defense is available to the United States in FTCA cases. But if the Court does go

further, the Court of Appeals properly analyzed the United States's Supremacy Clause defense in holding that the Petitioners' state-law claims under the FTCA are preempted.

CONCLUSION

For these reasons, the Court should affirm.

Respectfully submitted,

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