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

REPLY BRIEF FOR PETITIONERS

Lisa C. Lambert
LAW OFFICE OF
LISA C. LAMBERT
245 N. Highland Ave.,
Suite 230-139
Atlanta, GA 30307

Patrick Jaicomo
Counsel of Record
Anya Bidwell
Dylan Moore
Jared McClain
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org

Counsel for Petitioners
Additional counsel listed on inside cover.

Zack Greenamyre
MITCHELL SHAPIRO
GREENAMYRE & FUNT
881 Piedmont Ave.
Atlanta, GA 30309

Jeffrey R. Filipovits
SPEARS & FILIPOVITS
315 W. Ponce de Leon Ave.,
Suite 865
Decatur, GA 30030

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This Court granted certiorari to address two questions.

QP1: 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.

The answer is no, and the parties agree. Court-appointed amicus attempts to import the Supremacy Clause into the FTCA through the concept of preemption. But that doctrine has no relationship to the Eleventh Circuit's Supremacy Clause bar, which baselessly renders the FTCA unconstitutional unless a plaintiff can prove a violation of clearly established constitutional law as a precondition to a tort claim.

QP2: Whether the discretionary-function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional torts exception.

The answer is yes. As Petitioners have explained, resolving QP2 requires the Court to assess whether two provisions of 28 U.S.C. 2680—the discretionary-function exception and the law-enforcement proviso—conflict. Pet. Br. 21–22. If they do not, the Court need not go further. *Id.* at 39–40. And if they do, the Court can resolve the conflict by applying familiar canons of statutory interpretation. *Id.* at 40.

Rather than address QP2, the government asks the Court to answer a different question: "whether the law enforcement proviso * * * removes [its] claims from the scope of the FTCA's 12 other exceptions[.]" Gov't Br. 6 see also *id.* at 21, 24, 34–35 (similar). To answer this revised QP2, the government contends that the Court must: (1) *assume* that the exception necessarily conflicts with the law-enforcement proviso; and then (2) decide whether the proviso trumps *each* "of the FTCA's other exceptions, including the discretionary function exception[.]" *Id.* at 34–35.

But this Court did not ask the question the government now attributes to it—and for good reason. The government's approach would require the Court to begin by assuming that the discretionary-function exception barred Petitioners' claims below (a false premise) and conclude by settling all potential conflicts between the proviso and the other provisions of Section 2680 (a question far beyond the scope of this case). See pp. 5–9, *infra*. On both ends, the government discards basic tenets of statutory interpretation and distorts FTCA jurisprudence.

In the process, the government advances a theory of the discretionary-function exception so expansive that it threatens to swallow the proviso entirely. Gov't Br. 36–37, 41–43. To avoid total nullification, the government advances an atextual, ahistorical carve-out from the discretionary-function exception that would require plaintiffs to successfully plead a *Bivens* claim to recover for ordinary torts under the FTCA. *Id.* at 36–37.

Petitioners, meanwhile, rely on text and precedent. The discretionary-function exception protects only "legislative and administrative decisions grounded in social,

economic, and political policy[.]" *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (citation omitted). This categorically excludes intentional torts committed by law-enforcement officers. Petitioners' approach allows the Court to harmonize the discretionary-function exception and the law-enforcement proviso by applying its precedent and answering only the questions presented.

Still, if the Court finds that the two provisions conflict, it should hold that the law enforcement proviso prevails. Resolving conflict in the proviso's favor honors the text Congress enacted and ensures that the 1974 amendment to the FTCA is not eviscerated in its core applications—like when federal officers raid the wrong house.

I. The parties agree that the answer to QP1 is no.

The government and Petitioners agree that the answer to QP1 begins and ends with the name of the statute: the *Federal* Tort Claims Act. Pet. Br. 47–51; Gov't Br. 47. As the government explains, "when [a] federal law" like the FTCA "waives the United States' immunity and authorizes the government to be sued, the Supremacy Clause instructs courts to permit those suits." Gov't Br. 47.

The Eleventh Circuit's Supremacy Clause bar creates a free-floating regime of qualified sovereign immunity whenever an officer's actions "have some nexus with furthering" amorphous "federal policy[.]" *Kordash* v. *United States*, 51 F.4th 1289, 1293 (11th Cir. 2022) (citation omitted). But here, there is no conflict between state and federal law. The FTCA "was designed primarily to remove the sovereign immunity of the United

States" when a federal employee violates incorporated state tort law. *Richards* v. *United States*, 369 U.S. 1, 6 (1962).

To defend the ruling below, Court-appointed amicus improperly conflates federal preemption with the Supremacy Clause bar. See Amicus Br. 19–23, 26–32. Preemption can preclude tort suits against private parties "if [state] law actually conflicts with federal law[.]" *Cipollone* v. *Liggett Grp.*, 505 U.S. 504, 516 (1992). But because the elements of proviso torts hinge on an act's unlawfulness, preemption plays no role. See pp. 13–14 & n.4, *infra*. Even if negligence claims were involved, preemption on the merits would be a far cry from the Supremacy Clause bar. *E.g.*, *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (specific preemption clause in federal statute barred negligence claims against medical-device manufacturer). In any event, the parties agree that the discretionary-function exception—not the Supremacy Clause—expresses Congress's judgment about how the FTCA interacts with the rest of federal law. Pet. Br. 48; Gov't Br. 47; BIO 20–21.

Amicus's other argument, which hinges on the government's authorization to invoke "any * * * defenses to which the United States is entitled," 28 U.S.C. 2674, fares no better. Congress added that language through the Westfall Act to clarify that the United States can assert "ordinary tort defenses" in FTCA suits. H.R. Rep. No. 100-700, at 5 (1988). It does not revive defenses that the FTCA otherwise forecloses. Contra Amicus Br. 24–25, 40.

II. The government refuses to answer QP2.

The government rewrites QP2 to ask "whether the law enforcement proviso * * * removes [its] claims from the scope of the FTCA's 12 other exceptions[.]" Gov't Br. 6; see also *id.* at 21, 24, 34–35. By doing so, the government urges the Court to assume two things: *First*, that the discretionary-function exception and the law-enforcement proviso *necessarily* conflict (such that there is no need to construe the discretionary-function exception). *Second*, that all 12 exceptions in Section 2680 interact with the proviso identically (such that the proviso's failure to overcome one exception renders it unable to overcome any exception). Neither assumption is warranted.

A. Assessing the discretionary-function exception's scope is necessary to decide QP2.

The government has buyer's remorse about the question it asked the Court to consider: "Whether the discretionary function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional torts exception." BIO 21.

Linguistically, the answer to this question can be yes for two reasons: Either because the category of claims barred by the discretionary-function exception does not encompass the category of claims allowed by the law-enforcement proviso (the harmony approach), or—if the categories overlap—because the proviso exempts its claims from the discretionary-function exception (the hostility approach). See Pet. Br. 21–22. Under either approach, QP2 cannot be answered without assessing whether the exception applies to the claims the proviso

allows. Still, this inquiry does not require the Court "to define with precision every contour of the discretionary function exception." *United States* v. *Varig Airlines*, 467 U.S. 797, 813 (1984). It merely asks whether two discrete categories overlap.

By rewriting QP2 to ask whether the proviso "removes [its] claims" from the discretionary-function exception, Gov't Br. 6, the government incorrectly presumes that the harmony approach is off the table.[1] But the courts should read statutory provisions "in harmony, not set them at cross-purposes." *Jones* v. *Hendrix*, 599 U.S. 465, 478 (2023).

The government goes further. Not only does it urge this Court to *assume* the discretionary-function exception applies here, Gov't Br. 40–41, but it also implores the Court to *affirm on that basis*, *id.* at 24. This combination asks the impossible. The courts below did not hold that Petitioners' proviso claims were barred by the discretionary-function exception. Pet. App. 18a–19a (Eleventh Circuit holding proviso claims were barred by the Supremacy Clause, not the discretionary-function exception); Pet. App. 26a–27a (district court holding the same). Nor could they—such a holding would defy circuit precedent. *Nguyen* v. *United States*, 556 F.3d 1244, 1257 (11th Cir. 2009). But see Gov't Br. 39 (claiming that "[t]he courts below determined that petitioners'

[1] A similar question could be "whether regulations governing gas-powered vehicles are categorically inapplicable to vehicles made by Tesla." The answer is yes. Because Tesla makes only electric vehicles, resolving the question does not require the assumption that gas-powered-car regulations apply to Tesla unless some provision removes Tesla vehicles from the regulations. Tesla vehicles never fell within the regulations in the first place.

[proviso claims] fall within * * * the discretionary function exception").

If the government had urged the Court to grant certiorari to address whether the proviso "removes [its] claims" from the discretionary-function exception, Gov't Br. 6, Petitioners would have objected to that framing—the QP would have assumed a holding that was never made below, see Pet. App. 18a–19a. In any event, that is not what QP2 asks. Given the decisions below and the language of QP2, the only way for the Court to find that Petitioners' proviso claims are barred by the discretionary-function exception is to *hold* that Petitioners' proviso claims are barred by the discretionary-function exception.

B. The proviso's interaction with Section 2680's other exceptions is beyond the scope of QP2.

By broadening the question presented to "the FTCA's 12 other exceptions," Gov't Br. 6, the government asks the Court to issue an advisory opinion on the scope of every exception in Section 2680 without even analyzing if, let alone how, these exceptions might conflict with the proviso. But this Court does not address "any issues other than those fairly comprised within the question presented," absent exceptional circumstances. *Lake Country Ests., Inc.* v. *Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 398 (1979).

Each of the FTCA's exceptions requires its own textual analysis because, again, the Court's role is to avoid inter-statutory conflict, not presume it. True, some of Petitioners' textual arguments may apply to the other

exceptions. But others would not. Either way, other conflicts within Section 2680 are beyond the scope of this case. Cf. *Simmons* v. *Himmelreich*, 578 U.S. 621, 629 (2016) ("If the Government is right about the other provisions of Chapter 171, the Court may hold so in the appropriate case.").

Although the government asks the Court to settle every potential dust-up between the proviso and the rest of Section 2680, it can only identify a single hypothetical conflict: the foreign-country exception. Gov't Br. 29–30 (citing 28 U.S.C. 2680(k)). The government implies that, unless the proviso can defeat the foreign-country exception, it cannot overcome the discretionary-function exception. *Ibid.* But that result does not follow.

The foreign-country exception codifies an established canon of construction: Domestic statutes do not apply internationally unless Congress explicitly says so. See, *e.g.*, *Smith* v. *United States*, 507 U.S. 197, 204 (1993) (explaining that the "longstanding" "presumption against extraterritorial application of United States statutes * * * is doubly fortified by the language of" the FTCA (cleaned up)). This presumption may prevent the proviso from reaching extraterritorially, even without Section 2680(k). Cf. *Abitron Austria GmbH* v. *Hetronic Int'l, Inc.*, 600 U.S. 412, 420 (2023) ("[E]ven statutes . . . that expressly refer to '*foreign* commerce' * * * are not extraterritorial." (citation omitted)). As a result, the presumption against extraterritoriality could support the argument that the foreign-country exception overrides the proviso should the Court find that those provisions conflict in an appropriate case. But extraterritoriality has nothing to do with

potential conflict between the proviso and the discretionary-function exception.

III. The best way to answer QP2 is to harmonize the exception and proviso.

The simplest way to resolve QP2 is to hold that the discretionary-function exception is categorically inapplicable to claims under the law-enforcement proviso because each subsection addresses a distinct category of claims. The discretionary-function exception reinstates sovereign immunity for claims that disguise policy disputes as tort suits. The law enforcement proviso, meanwhile, waives sovereign immunity for intentional torts that are necessarily unlawful. The two do not overlap, and this Court has never held that they do.[2]

1. "Discretionary function" is a legislative term of art that cannot be disentangled from regulatory policy. Pet. Br. 24–28; see also *Gaubert*, 499 U.S. at 325 ("the policy of the regulatory regime"). Congress used this term of art precisely because it refers to administrative discretion vested in the executive by law. See Sisk Amicus Br. 18; Pet. Br. 27–28; 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 (1956) (Peck).

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[2] By our count, this Court has interpreted the discretionary-function exception eight times, including *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). Pet. Br. 28–30. In the only case that did not involve negligence—*Hatahley* v. *United States*, 351 U.S. 173 (1956)—the Court held that the discretionary-function exception did not cover federal employees' intentional torts.

Moreover, when Congress specified that a claim must be "based upon" the exercise or the failure to exercise such a discretionary function—as opposed to "arising" out of some act, as in the rest of Section 2680 (see Pet. Br. 26)—it created a causality requirement. Cf. *Babb* v. *Wilkie*, 589 U.S. 399, 405 (2020) ("[T]he phrase 'based on' indicates a but-for causal relationship." (citation omitted)). For a claim to fall within the exception, then, the plaintiff's injury must have resulted from the federal employee's exercise of a "legislative [or] administrative" power that was delegated to the employee to further some "social, economic, [or] political policy." *Gaubert*, 499 U.S. at 323. An act disconnected from policy cannot be based on it. See Peck at 228.

The government does not respond to these arguments. Instead, it merely claims that "[d]iscretionary conduct is not confined to the policy or planning level." Gov't Br. 44 (quoting *Gaubert*, 499 U.S. at 325). But not all exercises of discretion are "discretionary functions." As *Gaubert* teaches, protected conduct—even at the operational level—must still be rooted in "established governmental policy." 499 U.S. at 324. If no statute, regulation, or agency guideline confers discretion on an employee to make policy determinations, the discretionary-function exception cannot protect his action. *Ibid.*; see also Pet. Br. 30–31.

2. Rather than engage with Petitioners' arguments about the discretionary-function exception, the government urges the Court to import the doctrine of qualified immunity into *Gaubert*'s first prong, Gov't Br. 36–37, and disregard its second, *id.* at 42–43 (conceding that line-level police do not make policy). Under the government's theory, federal employees exercise discretion

under *Gaubert*'s first prong whenever their actions involve an "element of judgment or choice," unless "clearly established statutory or constitutional" law "*specifically prescribes* a course of action[.]" *Id.* at 36–37 (mashing together *Gaubert* and *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). And the exercise of that discretion satisfies *Gaubert*'s second prong anytime an officer merely *executes* federal policy. *Id.* at 42–43. But see 28 U.S.C. 2680(h) (waiving immunity when officers "empowered * * * to *execute* searches" commit enumerated torts (emphasis added)). The upshot is that—unless a law-enforcement officer violates a mandatory statute or clearly established constitutional law—the discretionary-function exception swallows the proviso. See Gov't Br. at 37.

The government's interpretation defies text, history, and the linear nature of time. The discretionary-function exception, which Congress enacted in 1946, predates this Court's creation of the clearly-established test by nearly four decades. See Public Accountability Amicus Br. at 19. Yet the government asks this Court to find that the FTCA's drafters clairvoyantly embedded qualified sovereign immunity "into a statute designed to limit" immunity. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955). Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994) ("[T]he United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims.").

The government offers no textual justification for its interpretation because there is none. The FTCA makes the United States liable for its employees' torts "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674; see

also 28 U.S.C. 1346(b)(1). Private individuals, of course, do not enjoy qualified immunity. *Wyatt* v. *Cole*, 504 U.S. 158, 168 (1992). And it makes no sense to superimpose a doctrine that defends officers against *individual* liability onto a statute that assumes *government* liability. *Xi* v. *Haugen*, 68 F.4th 824, 839–840 (3d Cir. 2023) ("[T]he chilling effect and social costs" associated with individual liability "are absent in the FTCA context[.]"); see also *Meyer*, 510 U.S. at 485 (noting qualified immunity would not be available to a federal agency).

No circuit court has ever adopted the government's position, though several have rejected it. *E.g.*, *Xi*, 68 F.4th at 839–840; *Torres-Estrada* v. *Cases*, 88 F.4th 14, 22 (1st Cir. 2023); see also *Loumiet* v. *United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) (declining to incorporate the clearly-established test into the discretionary-function exception without settling the issue). Even the Seventh and Eleventh Circuits, which the government cites in its favor, have not accepted its qualified immunity theory. *Shivers* v. *United States*, 1 F.4th 924 (11th Cir. 2021); *Linder* v. *United States*, 937 F.3d 1087 (7th Cir. 2019).

This case illustrates the absurd results that flow from the government's theory. The government would have the Court hold that, when a federal law-enforcement officer obtains a warrant commanding him to search a specific place, (1) the officer nevertheless retains discretion to search a different place,[3] and (2) the

[3] The government's suggestion that Agent Guerra had even colloquial "discretion" to raid Petitioners' home is puzzling. Federal law does not give officers discretion to execute warrants wherever they'd like. See Fed. R. Crim. P. 41(e)(2)(A) (warrant must "identify

exercise of that discretion is the sort of policy decision Congress intended to immunize. Gov't Br. 44–45 (applying the government's understanding of the exception to the facts of this case). As we have explained, this is a far cry from the "legislative and administrative decisions grounded in social, economic, and political policy" that this Court has found the exception to protect. *Gaubert*, 499 U.S. at 323 (citation omitted). See Pet. Br. 28–33.

3. The government argues that straying from its all-inclusive interpretation of the discretionary-function exception would allow state tort law to reach the actions of federal police, whose job it is to "engage in activities that could be tortious if engaged in by a private person[.]" Gov't Br. 43. This fear is unfounded.

The United States does not need the discretionary-function exception to shield it from liability for lawful law-enforcement actions. All FTCA cases begin with Section 1346(b)(1), which waives the government's sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant" under state law. 28 U.S.C. 1346(b)(1). Thus, to invoke the FTCA's initial waiver of immunity, a plaintiff must satisfy the elements of the relevant state tort. If he fails to do so, the United States' sovereign immunity remains intact; there is no need to consider the FTCA's exceptions. See *Sheridan* v. *United States*, 487 U.S. 392,

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the person or property to be searched" and "command the officer to * * * execute the warrant" there). Here, the warrant commanded Guerra and his SWAT team to search 3741 Landau Lane; they were not empowered to instead search Petitioners' house at 3756 Denville Trace. D. Ct. Doc. 83-6, at 10. Guerra did not harm Petitioners by picking one permissible course of action over another—he failed to comply with a court's mandatory directive.

400 (1988) (FTCA exceptions "should * * * be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity.").

Congress understood that the elements of state tort law prevent runaway FTCA liability. Consider the elements of a battery in Georgia. To prevail, a plaintiff must prove his injury was not "justified under some rule of law." Ga. Code Ann. 51-1-13. If an officer entered a house for which he had a warrant and arrested the suspect inside, there would be no tort under Georgia law. See *Haile* v. *Pittman*, 389 S.E.2d 564, 566 (Ga. Ct. App. 1989) (no claim for battery against security guard and police officers who had probable cause to arrest alleged trespassers). Thus, the suspect's FTCA claim would fail—not because the discretionary-function exception reinstates sovereign immunity, but because Section 1346(b) never waived it.[4] In other words, lawful police actions are not spared by the discretionary-function exception. Liability—whether attributable to the United States or individual officers—never existed to begin with.

At bottom, the government appears concerned about paying for officers' mistakes in "circumstances that are tense, uncertain, and rapidly evolving." Gov't Br. 42

[4] The other proviso torts work the same way. Under Georgia law, for example, assault is only actionable if it's "illegal" or "violent," Ga. Code Ann. 51-1-14; false imprisonment covers only "unlawful detention," Ga. Code Ann. 51-7-20; false arrest and malicious prosecution must lack "probable cause," Ga. Code Ann. 51-7-1, 51-7-40; and abuse of process can only be committed "[w]ithout substantial justification," Ga. Code Ann. 51-7-81. If a plaintiff cannot prove that the officer acted unlawfully, Section 1346(b) stops an FTCA claim at the front door, so there is no need to atextually reinforce the back door.

(quoting *Graham* v. *Connor*, 490 U.S. 386, 397 (1989)). That was also Congress's concern in 1946, when it excepted intentional torts from the FTCA's coverage. As the Department of Justice put it at the time, the intentional-torts exception would kick in when "some agent of the Government gets in a fight with some fellow . . . [a]nd socks him." *United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion) (citation omitted).

This history imparts two lessons that support Petitioners' arguments. *First*, when the FTCA was drafted, Congress viewed intentional torts and discretionary functions as categorically distinct concepts, each meriting its own exception. *Second*, in 1974, Congress changed its mind about the scope of the intentional-torts exception. After the Collinsville raids, Congress decided that avoiding responsibility for a police officer's unlawful decision to "sock a fellow" is unjust. So it assumed responsibility for six specific torts when committed by "law enforcement officers of the United States Government." 28 U.S.C. 2680(h).

Had Congress believed that proviso claims for wrong-house raids would be instantly defeated by the discretionary-function exception, it wouldn't have bothered. Aware of this, the government engrafts a clearly-established-law carve-out onto the discretionary-function exception to curtail its statutory obligations without rendering the proviso a *complete* nullity. But this carve-out is nowhere to be found in the text of the FTCA.

If Congress shares the government's concerns, it can amend the FTCA again. But the courts cannot. *Rayonier Inc.* v. *United States*, 352 U.S. 315, 320 (1957).

IV. If the Court finds the exception and proviso conflict, the proviso should still prevail.

Alternatively, if the Court finds that the law-enforcement proviso and the discretionary-function exception conflict, the FTCA's text and structure resolve the conflict in the proviso's favor. See Pet. Br. 40–47. The government's arguments to the contrary fail as a matter of statutory interpretation and would require the Court to ignore why the proviso was passed in the first place.

A. The government's arguments defy the text of the FTCA and render the proviso a nullity.

Invoking the FTCA's grammar and the general nature of provisos, the government contends that "the proviso in subsection (h) modifies only the exception in subsection (h)," so it does not affect "the 12 other subsections" of 2680. Gov't Br. 26–27. But the government's argument faces two overarching problems: the text of the statute and the rule against surplusage.

1. As we have explained, the proviso's text mirrors—and negates—the jurisdiction-stripping language in Section 2680's preamble, indicating that the proviso rewaives sovereign immunity for "any claim" arising under it. Pet. Br. 42. The government concedes that Section 2680's three references to "[t]he provisions of this chapter and section 1346(b) of this title" are "perhaps most naturally read to refer to" sections of the FTCA "*other than Section 2680 itself*[.]" Gov't Br. 33 n.3. Under this "most natural[]" reading, the discretionary-

function exception is not one of "[t]he provisions" that "shall apply" to proviso claims.[5] See Pet. Br. 42.

Still, the government asks the Court to hold that the proviso negates only the intentional-torts exception in Section 2680(h). Gov't Br. 25. This argument runs headlong into the Court's decision in *Alaska* v. *United States*, 545 U.S. 75 (2005). There, interpreting the Alaska Statehood Act (ASA), the Court held that a proviso in one statutory exception overcame another exception. *Id.* at 102–109.

The ASA split ownership of Alaskan lands between the newly formed state and the federal government. *Alaska*, 545 U.S. at 104. Under Section 5 of the ASA, the default rule was that Alaska had title to all lands in the Alaskan Territory other than those to which the United States already had title. *Ibid.* Section 6, however, laid out various exceptions to this rule. One exception, Section 6(m), gave Alaska presumptive title to lands covered by the Submerged Lands Act. *Id.* at 79. A separate exception, Section 6(e), gave Alaska title over lands identified by three other federal statutes. *Id.* at 104–105. But Section 6(e) also included a proviso: "*Provided*, That such transfer shall not include lands * * * set apart as refuges or reservations for the protection of wildlife[.]" *Id.* at 105.

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[5] The government's alternative reading would require the Court to interpret three instances of the same language to mean different things. But absent "persuasive countervailing evidence," this Court does not presume that "Congress meant to adopt one meaning of [a] term in" one subpart of a statute "and a different one next door[.]" *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 389 (2021).

Alaska sought title to Glacier Bay National Park, a piece of land that fell within Section 6(m)'s presumption of state title but that had also been "set apart" as a "refuge or reservation," triggering Section 6(e)'s proviso. *Alaska*, 545 U.S. at 80–81. Just as the government argues here, Alaska claimed that "the proviso applie[d] only to [lands] set aside under the three * * * statutes named in [Section 6(e)]"—the subsection in which the proviso sat—and extended no further. *Id.* at 106.

The Court rejected Alaska's argument. Because Section 6(e)'s proviso operated "affirmatively and independently, as an expression of Congress' intent" to retain ownership over certain land, the proviso was not cabined to Section 6(e) alone. *Alaska*, 545 U.S. at 108. Such a "broad statement of intent," the Court concluded, "applies with just as much force to [lands] that fall within § 6(e)'s initial clause as to those that do not." *Ibid.*

The dispute in *Alaska* mirrors the dispute here. Like Alaska, the government argues that "if Congress had intended to create a general rule applicable" beyond Section 2680(h), "it would not have attached the proviso to a particular exception." Gov't Br. 27. But in *Alaska*, Congress's decision to attach the proviso to a single subsection did not negate the independent force of its text. 545 U.S. at 108. Furthermore, in both the ASA and FTCA, the relevant proviso is introduced with a colon, and "Congress separated the proviso from every other exception by ending each subsection with a period." Gov't Br. 27–28. But neither of these factors led the *Alaska* Court to cabin Section 6(e)'s proviso. Even Justice Scalia, who dissented in *Alaska*, agreed that provisos can reach beyond their preceding language when they modify a different antecedent and announce a free-

standing rule. 545 U.S. at 114–115 (Scalia, J., dissenting in part). As we have explained, the law-enforcement proviso does both. See Pet. Br. 23, 42.

The government does not explain why its arguments are meaningfully different than those this Court rejected in *Alaska*. But it nevertheless asks this Court to ignore the proviso's text to reach a result that Congress plainly did not intend—the dismissal of proviso claims arising out of a federal wrong-house raid.

2. By ignoring the plain text, the government's interpretation of the FTCA renders the proviso surplusage. The government's interpretation of "discretionary function," which effectively encompasses every government decision that is not specifically prescribed, Gov't Br. 36, 42, poses a problem: If left unchecked, it would nullify the proviso when it should uncontroversially apply. See Pet. Br. 44; *Carlson* v. *Green*, 446 U.S. 14, 20 (1980) (explaining it was "crystal clear" that the proviso was enacted so "innocent individuals who are subjected to raids * * * will have a cause of action against * * * the Federal government" (citation omitted)).

The government recognizes this problem. It concedes, as it must, that the discretionary-function exception did not bar the victims of the Collinsville raids from recovering; "the intentional torts exception did." Gov't Br. 37. Yet its expansive theory of the discretionary-function exception would preclude even the Collinsville victims from suing today. See *id.* at 37, 42–43. To avoid this absurdity, the government divines a clearly-established-law carve-out. *Id.* at 36–37. But this carve-out has no basis in the text or history of the FTCA. No circuit has ever held otherwise. See pp. 10–12, *supra*. That's because the government's theory requires plaintiffs to

plead a *Bivens* claim as a precondition to bringing tort claims. But the FTCA is not a means to adjudicate constitutional torts. *Meyer*, 510 U.S. at 478.

Without the clearly-established-law carve-out, the government's two premises in this case—that the discretionary-function exception is all-encompassing, and that the proviso is limited to 2680(h) alone—compel the conclusion that the proviso is useless.[6] That cannot be. See *United States* v. *Hayes*, 555 U.S. 415, 427 (2009); Cong. Amicus Br. 25 (government's theory "would nullify [the proviso's] effect in its heartland case"). And even with the carve-out, the government's interpretation would extinguish many claims for non-proviso torts routinely covered by the FTCA. See, *e.g.*, *Gaubert*, 499 U.S. at 325 n.7 (negligently operating a vehicle); *Molzof* v. *United States*, 502 U.S. 301 (1992) (medical negligence in VA hospital).

3. The government's remaining arguments fail. To begin, the government overgeneralizes the principle that waivers of sovereign immunity should be strictly construed. Gov't Br. 31, 35. The Court has consistently rejected this canon's application in FTCA cases. *E.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 491–492 (2006); *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951).

The government's attempt to leverage the definition of "investigative or law enforcement officer" in Section 2680(h) similarly falls flat. Although it contends that the

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[6] The government's approach would limit the FTCA so severely that Court-appointed amicus suggests we return to private bills. Amicus Br. 43. Given that Congress enacted the FTCA to relieve itself of that very kludge, *Molzof* v. *United States*, 502 U.S. 301, 304–305 (1992), this result would be counterproductive.

definition supports its position, it does not explain why. See Gov't Br. 27. Nor does it explain why the em dash's "distribution" of Section 2680's preamble, *id.* at 32, avoids the war between the "anys" the Eleventh Circuit settled in the proviso's favor, see *Nguyen*, 556 F.3d at 1252.

The government also references Section 2680(c)'s re-waiver of sovereign immunity, but that provision supports Petitioners' position. 28 U.S.C. 2680(c). The government invokes *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008), to suggest that, because Section 2680(c)'s re-waiver of sovereign immunity "modifies only the exception in the same subsection," so too should the proviso. Gov't Br. 29. But the interaction between the re-waiver in subsection (c) and the other provisions of Section 2680 was not at issue in *Ali*, so that case does not meaningfully inform the Court's construction of the proviso. See 552 U.S. at 215–216 (Court's objective was to define "any other law enforcement officer"—a phrase that appears in only Section 2680(c)).

The government's interpretation of the proviso, if applied to the similar language in subsection (c), would invalidate the latter. Subsection (c)'s re-waiver of sovereign immunity is triggered only if "property was seized for the purpose of forfeiture under any provision of Federal law[.]" 28 U.S.C. 2680(c). Federal civil-forfeiture law allows officers to choose when to initiate forfeiture proceedings and how to manage the storage of forfeited goods. 18 U.S.C. 981(b); 19 U.S.C. 1605. Under the government's theory of the FTCA, those choices are protected by the discretionary-function exception unless a plaintiff can show that the forfeiture of his property (or damage done to his property wrongly forfeited) violated

clearly established law. See Gov't Br. 36–37. Such a reading would dismantle Section 2680(c)'s re-waiver of sovereign immunity just as it would dismantle the proviso's.

Finally, the government contends that the proviso cannot reach beyond subsection (h) because proviso torts are a subset of those included in the intentional-torts exception. Gov't Br. 28. But the proviso's text is not dependent on subsection (h). It would still independently and affirmatively waive sovereign immunity even if the rest of subsection (h) did not exist.

B. Although the FTCA's historical context is not the law, it confirms the meaning of the Act's text.

Context confirms that Congress enacted the law-enforcement proviso to allow claims like Petitioners'. Unsurprisingly, then, the government asks the Court to ignore all context. Gov't Br. 35. But Petitioners do not reference extra-textual materials to support an interpretation "that the statutory language does not seem to address." Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 369 (2005). Instead, Petitioners offer this evidence to "confirm[] that" Congress's "choice of language was no accident." *Warger* v. *Shauers*, 574 U.S. 40, 48 (2014); see also William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1090 (2017) ("[T]he right way to read a text, in a given circumstance, depends on our reasons for reading it in the first place."); Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 995 (2021) ("The statements of individual legislators and of committees may summarize, reflect, or

interact with the debate preceding the legislative action.").

As this Court has recognized, the congressional intent behind the proviso is "crystal clear[.]" *Carlson*, 446 U.S. at 20. The evidence of this intent (Pet. Br. 8–11) reinforces the proviso's text—"the ring" that the proviso's words "would have had to a skilled user of words at the time, thinking about the same problem." Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 61 (1988). If there is one thing the nation *was* thinking about when Congress enacted the proviso, it was wrong-house raids like the one Petitioners suffered. *E.g.*, Andrew H. Malcolm, *Drug Raids Terrorize 2 Families—by Mistake*, N.Y. Times (Apr. 29, 1973).

* * *

When Congress undertook the "legislative endeavor" to waive sovereign immunity through the FTCA, see *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022), it did not hinge the government's liability on a violation of constitutional rights—clearly established or otherwise. And when Congress amended the FTCA to include the law-enforcement proviso, it explicitly "pemit[ted] private damages recoveries for intentional torts committed by federal law enforcement officers[.]" *Carlson*, 446 U.S. at 33 (Rehnquist, J., dissenting) (rejecting extension of *Bivens*). "Our constitutional structure does not permit this Court to rewrite the statute that Congress has enacted." *National Ass'n of Mfrs.* v. *DOD*, 583 U.S. 109, 124 (2018) (cleaned up).

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, and remand this case for further proceedings.

Respectfully submitted on April 22, 2025,

Lisa C. Lambert
LAW OFFICE OF
LISA C. LAMBERT
245 N. Highland Ave.,
Suite 230-139
Atlanta, GA 30307

Zack Greenamyre
MITCHELL SHAPIRO
GREENAMYRE & FUNT
881 Piedmont Ave.
Atlanta, GA 30309

Jeffrey R. Filipovits
SPEARS & FILIPOVITS
315 W. Ponce de Leon Ave.
Suite 865
Decatur, GA 30030

Patrick Jaicomo
Counsel of Record
Anya Bidwell
Dylan Moore
Jared McClain
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org

Counsel for Petitioners