No. 24-362

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming judgment for the United States on petitioners' claims under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is available at 2024 WL 1716235. The order of the district court (Pet. App. 21a-32a) is available at 2022 WL 18263039. A prior order of the district court (Pet. App. 34a-68a) is reported at 631 F. Supp. 3d. 1281.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2024. A petition for rehearing was denied on May 30, 2024. (Pet. App. 70a-71a). On July 22, 2024, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 27, 2024, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, enacted in 1946, generally waives the sovereign immunity of the United States and creates a cause of action for damages against the United States with respect to certain torts of federal employees, acting within the scope of their employment, under circumstances in which a private individual would be liable under state law. See 28 U.S.C. 1346(b)(1). The FTCA contains various exceptions that limit the waiver of sovereign immunity and the substantive scope of the United States' liability, including an exception for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

The FTCA also excludes from its waiver of sovereign immunity most intentional torts: "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). In 1974, Congress added a proviso to the intentional tort exception, known as the law enforcement proviso. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. The law enforcement proviso states that "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" that is based on "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h).

2. In 2015, the Federal Bureau of Investigation (FBI) initiated an operation concerning violent gang activity in Georgia. Pet. App. 4a. The operation ultimately resulted in the criminal indictment of several individuals, including Joseph Riley. *Id.* at 3a-4a. Officers obtained warrants for Riley's arrest and for the search of his home at 3741 Landau Lane SW, Atlanta, Georgia 30331. *Id.* at 4a.

The FBI assigned Special Agent Lawrence Guerra to lead a Special Weapons and Tactics (SWAT) team in the execution of the search warrant. Pet. App. 4a-5a. The FBI has a standard operating procedure that requires its agents to conduct a site survey or a drive-by before executing a high-risk warrant, such as the one for Riley's arrest. *Id.* at 5a. The FBI, however, does not have any policies that govern how to locate or navigate to a target address. *Ibid.*

Guerra took several steps in preparation to execute the warrant. He reviewed information that other FBI agents had obtained through surveillance of Riley and 3741 Landau Lane. Pet. App. 4a-6a. He conducted a site survey of 3741 Landau Lane, during which he took photographs and identified specific features of the home so that he could locate the property when executing the warrant in the early morning. *Id.* at 5a. Guerra noted that the house was beige and split-level, located on a corner lot, had a driveway and garage facing a separate street that ran perpendicular to the front door, and had a large tree in the front corner of the property. *Ibid.* Guerra also wrote tactical notes outlining how his team would execute the warrant, and he attended an operational briefing, which included presentations on and photographs of Riley and 3741 Landau Lane. *Id.* at 6a.

In the pre-dawn hours of October 18, 2017, Guerra conducted a further drive-by with FBI Special Agent Michael Lemoine. Pet. App. 4a, 6a. Navigating in complete darkness, Guerra used his personal GPS device to locate 3741 Landau Lane. *Ibid.* When the GPS unit alerted that they had arrived at 3741 Landau Lane, Guerra observed what he believed to be the same house he had seen during his previous site survey: the home was beige and split-level, located on a corner lot, had a tight stairway and stoop leading to the front door with windows on either side, had a driveway and garage facing a separate street that ran perpendicular to the front door, and had a large tree in the front corner of the property. *Id.* at 6a-7a. Guerra also observed a black Camaro in the driveway, which he would later use as a reference point to locate 3741 Landau Lane. *Id.* at 7a.

Unbeknownst to Guerra and Lemoine, however, the GPS had directed them to a different home—3756 Denville Trace, petitioners' residence. Pet. App. 6a-7a. Petitioners' home at 3756 Denville Trace faces Landau Lane and is a few houses (approximately 436 feet) from 3741 Landau Lane. *Ibid.* The house number does not appear on the house itself; instead, it appears on the mailbox and is not visible from the street. *Id.* at 7a.

The same day—and while it was still dark out—Guerra, Lemoine, and other agents left for 3741 Landau Lane in a caravan of vehicles. Pet. App. 7a. Guerra identified what he believed to be 3741 Landau Lane based on the black Camaro, his prior preparation, and the morning drive-by. *Ibid.* He directed that his vehicle stop in front of the house, and the other vehicles followed suit. *Ibid.* The members of the SWAT team then assembled in their positions, and after Guerra knocked

and announced the presence of law enforcement, agents entered the home. *Id.* at 7a-8a.

The agents were in the home for approximately five minutes before realizing their mistake. Pet. App. 39a. During that time, the SWAT team members found petitioners Hilliard Toi Cliatt and Curtrina Martin in a closet, where Cliatt kept a shotgun for protection. *Id.* at 3a, 8a. With their guns pointed, agents pulled Cliatt out of the closet and placed him in handcuffs. *Id.* at 8a. A SWAT team member also pointed a gun at Martin while instructing her to keep her hands up. *Ibid.* Shortly after detaining Cliatt, however, the officers realized that they had entered the wrong house. *Ibid.* An agent immediately lifted Cliatt from the ground and uncuffed him. *Ibid.* Guerra advised petitioners that he would return to explain what had happened. *Id.* at 8a-9a.

The agents promptly executed the search warrant at 3741 Landau Lane, making an arrest of Riley as he attempted to flee. Pet. App. 9a. Once Riley and 3741 Landau Lane were secured, Guerra returned to petitioners' home, where he apologized, provided his business card and the name of his supervisor, documented the damage to the home, and advised petitioners that the FBI would handle the damages repairs. *Ibid.*

3. In September 2019, petitioners brought suit against the United States under the FTCA. Pet. App. 9a. Petitioners raised several claims based on state tort law, including, as relevant here, negligence, negligent/intentional infliction of emotional distress, trespass and interference with private property, false imprisonment, and assault and battery. *Ibid.*[1]

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[1] Petitioners also brought a claim against Guerra under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403

The district court granted in part the government's motion for summary judgment. Pet. App. 34a-68a. The court held that the discretionary function exception in the FTCA barred petitioners' claims for negligence, negligent/intentional infliction of emotional distress, trespass and interference with private property. *Id.* at 58a. The court denied summary judgment, however, with respect to two claims—for false imprisonment and for assault and battery—that involved torts listed in the law enforcement proviso. *Id.* at 59a-60a. The court explained that under Eleventh Circuit precedent, claims that implicate the law enforcement proviso may proceed even if the acts giving rise to the claim involve a discretionary function. *Ibid.*; see *Nguyen* v. *United States*, 556 F.3d 1244, 1256 (11th Cir. 2009).

Upon a motion for reconsideration, the district court granted the government's motion for summary judgment in full and dismissed the complaint. Pet. App. 21a-32a. In its reconsideration order, the court, applying recent Eleventh Circuit precedent, held that the Supremacy Clause of the Constitution precluded petitioners from bringing their false imprisonment and assault and battery claims against the United States. *Id.* at 26a-27a (citing *Kordash* v. *United States*, 51 F.4th 1289 (11th Cir. 2022)).

4. The court of appeals affirmed in an unpublished, per curiam decision. See Pet. App. 2a-19a.

The court of appeals first held that the discretionary function exception barred petitioners' claims for torts

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U.S. 388 (1971), alleging that Guerra's mistaken execution of the warrant at their house had violated their Fourth Amendment rights. Pet. App. 9a. The court of appeals affirmed the dismissal of that claim on qualified immunity grounds. *Id.* at 13a-15a. Petitioners do not seek review of that holding. See Pet. 10 n.1.

that were not listed in the law enforcement proviso, *i.e.*, "trespass and interference with private property, negligent/intentional infliction of emotional distress, and negligence." Pet. App. 17a. The court explained that the discretionary function exception to the FTCA "exempts from liability state-tort claims arising from a government official's performance of a duty or function that involves discretion." *Id.* at 16a. And here, the court observed, Guerra "enjoyed discretion" under FBI policies as to how to prepare for the execution of the warrant, and his decision was "'susceptible to policy analysis,'" *id.* at 17a-18a (quoting *Mesa* v. *United States*, 123 F.3d 1435, 1438 (11th Cir. 1997)).

The court of appeals also affirmed the dismissal of petitioners' false imprisonment and assault and battery claims. The court held that the Supremacy Clause, "[s]imilar to the discretionary function exception," "ensures that states do not impede or burden the execution of federal law." Pet. App. 16a. Under circuit precedent, "[t]he government may invoke the Supremacy Clause against state-tort liability" if it demonstrates that the official's acts (i) "'have some nexus with furthering federal policy'" and (ii) "'can reasonably be characterized as complying with the full range of federal law.'" *Id.* at 17a (quoting *Kordash*, 51 F.4th at 1293). The court held that Guerra's acts had a "'nexus with furthering federal policy'" because there was "no doubt that Guerra acted within the scope of his discretionary authority when he prepared for and executed the search warrant." *Id.* at 19a (citation omitted). And the court concluded that Guerra's actions complied with the "full range" of federal law because he did not "violate[] the Fourth Amendment." *Ibid.* The court explained that "an officer who makes 'reasonable effort[s] to ascertain and identify

the' target address of a valid search warrant complies with the Fourth Amendment," and "the decisions that Guerra made," while mistaken, were the "kind of reasonable mistakes that the Fourth Amendment contemplates," as they involved the execution of "a high-risk warrant" in a "rapidly-changing and dangerous situation." *Id.* at 13a-14a (citation omitted; brackets in original).

ARGUMENT

Petitioners contend (Pet. 23-34) that the court of appeals misapplied the discretionary function exception in Section 2680(a) to dismiss their claims for trespass, interference with private property, negligent/intentional infliction of emotional distress, and negligence. That contention lacks merit. The court of appeals correctly held (Pet. App. 15a-18a) that the discretionary function exception barred those claims, and its factbound and nonprecedential decision is consistent with decisions of this Court and other courts of appeals.

Petitioners further contend (Pet. 16-23) that the court of appeals erred in affirming the dismissal of their claims for false imprisonment and assault and battery. Petitioners correctly observe that the court's reasoning for rejecting those claims differs from the approach of other circuits, but that disagreement did not affect the proper disposition of the case. The court correctly held that petitioners' claims are barred, and no court of appeals to have addressed the issue would have reached a different result. Accordingly, this Court's review is not warranted.

1. The court of appeals correctly held that the discretionary function exception to the FTCA bars petitioners' claims for trespass and interference with pri-

vate property, negligent/intentional infliction of emotional distress, and negligence. Insofar as petitioners challenge that holding, they do so on fact-specific grounds, and their effort to identify relevant disagreements among the courts of appeals is without merit.

a. The FTCA's discretionary function exception provides that the United States' waiver of sovereign immunity does not apply to claims based on an employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty * * *, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The exception serves to "prevent judicial 'second-guessing' of legislative and administrative decisions * * * through the medium of an action in tort." *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (citation omitted).

This Court has established a two-part inquiry to guide application of the discretionary function exception. *Gaubert,* 499 U.S. at 322-323. First, a court must determine whether the conduct challenged by the plaintiff was "discretionary in nature"—that is, whether it involved "'an element of judgment or choice.'" *Id.* at 322 (citation omitted). "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Ibid.* (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). Second, a court must evaluate "whether that judgment is of the kind that the discretionary function exception was designed to shield," *id.* at 322-323 (quoting *Berkovitz*, 486 U.S. at 536), meaning it is "susceptible to policy analysis," *id.* at 325.

Guerra's conduct in executing the search warrant satisfied the *Gaubert* standard. As the court of appeals observed, the FBI did not have policies that "dictate[d] how agents are to prepare for warrant executions," and Guerra instead exercised discretion as to how to investigate the location. Pet. App. 18a (emphasis omitted). That decision required judgment: an agent must weigh, among other things, "the urgency of apprehending the subject," the need to "keep the investigation secret," and "available resources" in allocating agents across "the many investigations for which they are responsible." *Mesa* v. *United States*, 123 F.3d 1435, 1438 (11th Cir. 1997). Here, Guerra faced a "rapidly-changing and dangerous situation," Pet. App. 14a, and he exercised discretion to conduct his drive-by in the dark, with the headlights dimmed, to "avoid detection" before executing a high-risk warrant, *id.* at 37a. While Guerra did not have discretion to intentionally "raid the wrong house," Pet. 31, he did have discretion in determining the preparatory steps necessary to "locate and identify" the target address," Pet. App. 18a.

Guerra's conduct likewise satisfied the second component of *Gaubert*'s two-part inquiry because his "decision as to how to locate and identify the subject of an arrest warrant * * * is susceptible to policy analysis." Pet. App. 18a (quoting *Mesa*, 123 F.3d at 1438). The factors described above—which include competing considerations like officer and public safety, resource constraints, tactical considerations, and accuracy—are all "fundamentally rooted in policy considerations," for which "judicial second-guessing" is not appropriate. *Mesa*, 123 F.3d at 1438. The court of appeals therefore correctly held that Guerra's preparatory efforts here "f[e]ll

squarely within the discretionary function exception." Pet. App. 18a (citation omitted).

b. Petitioners briefly contend (Pet. 28-30) that the court of appeals erred in holding that Guerra's execution of the warrant was "susceptible to policy analysis" and thus "'of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323, 325 (citation omitted). In petitioners' view (Pet. 30), the proper inquiry asks whether a federal employee's acts "actually"—"not just hypothetically"—were grounded in policy analysis.

This Court has long since rejected the subjective standard that petitioners advocate. In *Gaubert*, this Court explained that the "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken." 499 U.S. at 325. Thus, the relevant question is not how an officer *thinks* about his or her conduct; the question is whether the conduct is of the "*kind*" that, by its nature, can be "grounded in the policy of the regulatory regime." *Ibid.* (emphasis added). Consistent with that approach, the Eleventh Circuit focused on the nature of Guerra's conduct, explaining that "a federal officer's 'decision as to how to locate and identify the subject of an arrest warrant'" is the kind of act that requires discretion. Pet. App. 18a (quoting *Mesa*, 123 F.3d at 1438).

Contrary to petitioners' assertion (Pet. 28-30), the courts of appeals are unanimous, not divided, in following this Court's guidance. Petitioners recognize that nine circuits have held that an official's act need "not be actually grounded in policy considerations," so long as it is, "by its nature, susceptible to a policy analysis." Pet. 28 (quoting *Miller* v. *United States*, 163 F.3d 591, 593

(9th Cir. 1998)). And contrary to petitioners' contention (Pet. 28-30), the Third Circuit likewise examines the "nature of the actions taken," not the "subjective intent" of the agent. *Baer* v. *United States*, 722 F.3d 168, 175 (2013) (quoting *Gaubert*, 499 U.S. at 325) (emphasis omitted); see *Middleton* v. *United States Fed. Bureau of Prisons*, 658 Fed. Appx. 167, 169-170 (3d Cir. 2016) (per curiam) (concluding that task was susceptible to policy analysis without considering whether officials actually engaged in such analysis).

c. Petitioners also maintain that review is warranted to resolve two disagreements among the courts of appeal as to how the discretionary function exception applies. That contention is meritless. To the extent any disagreements exists among the courts of appeals, this case does not implicate them.

i. Petitioners contend (Pet. 31-33) that the courts of appeals disagree on whether the discretionary function exception is applicable where a federal employee's conduct runs afoul of the Constitution. That question played no role in the court of appeals' decision. The court held that "Guerra's actions did not violate the Fourth Amendment." Pet. App. 19a. In particular, the Court concluded that that Guerra's actions "constitute[d] the kind of reasonable mistakes that the Fourth Amendment contemplates." *Id.* at 14a. Petitioners do not challenge that fact-bound determination, see Pet. i, and this case therefore presents no opportunity to resolve any differences among the courts of appeals as to the application of the discretionary function exception to unconstitutional conduct.[2]

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[2] Petitioners argue that the court of appeals spoke "imprecise[ly]" when it stated that "'Guerra's actions did not violate the Fourth

Petitioners also overstate the extent of disagreement on that question. The government agrees that a constitutional mandate, no less than a federal statutory or regulatory one, can eliminate a government official's discretion when it is sufficiently specific or when an authoritative construction and application with sufficient specificity was clearly established before the officer acted. Many of the cases that petitioners cite are consistent with that position, as the government explained in its brief in opposition (at 8-11) in *Shivers* v. *United States*, 142 S. Ct. 1361 (2022) (No. 21-682).[3] And this Court has repeatedly denied petitions for writs of certiorari raising similar issues. See *ibid.*; *Linder* v. *United States*, 141 S. Ct. 159 (2020) (No. 19-1082); *Chaidez Campos* v. *United States*, 139 S. Ct. 1317 (2019) (No. 18-234); *Castro* v. *United States*, 562 U.S. 1168 (2011) (No. 10-309); *Welch* v. *United States*, 546 U.S. 1214 (2006) (No. 05-529).

Amendment,'" and instead held only that Guerra's actions did not violate "'clearly established law,'" without reaching the question of whether there was a violation of substantive Fourth Amendment law. Pet. 13 n.4 (citations omitted); see Pet. 32-33. That is incorrect. In addition to "determin[ing] whether [Guerra's] actions violated the Fourth Amendment" in its qualified immunity analysis, the court also considered as part of its Supremacy Clause analysis whether Guerra "complied with the full range of the Fourth Amendment." Pet. App. 19a; see *id.* at 17a (describing inquiry "[w]hen faced with the determination whether the actions a law enforcement officer took comply with the Fourth Amendment"). It concluded that Guerra's actions did so. *Id.* at 19a.

[3] After the government's filing in *Shivers,* the First Circuit held that constitutional violations may preclude application of the discretionary function exception even if the violation in question was not clearly established. See *Torres-Estrada* v. *Cases*, 88 F.4th 14, 20-23 (2023).

ii. This case also does not implicate any conflict among the courts of appeals as to whether "careless acts" fall outside the discretionary function exception. See Pet. 34. As petitioners acknowledge (*ibid.*), the Eleventh Circuit has not addressed that question, and it had no occasion to do so in this case. Petitioners did not argue in the court of appeals that Guerra had acted carelessly. See Pet. C.A. Br. 34-53. And the court did not treat his acts as careless; on the contrary, it recognized that Guerra took "reasonable" steps to correctly identify the target of the search warrant and simply made a mistake in the "rapidly-changing and dangerous situation of executing a high-risk warrant at night." Pet. App. 14a. This case therefore would come out no differently regardless of whether careless acts fall outside the discretionary function exception.

2. The court of appeals also correctly affirmed the district court's dismissal of petitioners' claims for false imprisonment and assault and battery. Those claims are barred by the discretionary function exception, the same as petitioners' other state-law tort claims. Every other court of appeals to consider the issue would have resolved this case in the United States' favor on that basis. While the Eleventh Circuit used a different rationale to reach the same result, that methodological disagreement makes no practical difference and does not warrant this Court's review.

a. For the same reason that petitioners' other tort claims cannot proceed, see pp. 8-12, *supra*, the discretionary function exception precludes petitioners' claims for false imprisonment and assault and battery. In arguing otherwise, petitioners suggest (Pet. 26-27) that the exception is categorically inapplicable to torts listed

in the law enforcement proviso of Section 2680(h). That is wrong.

i. "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). When Congress enacted the law enforcement proviso in 1974, it placed the proviso within the intentional tort exception, Section 2680(h), and thereby modified that particular exception to the FTCA. Although provisos sometimes have a broader import, it is customary to use a proviso to refer only to things covered by the preceding clause. See *United States* v. *Morrow*, 266 U.S. 531, 535 (1925) ("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."); Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 154 (2012) ("A proviso conditions the principal matter that it qualifies—almost always the matter immediately preceding."). Here, the text, structure, and history of Section 2680 all strongly reinforce the conclusion that the law enforcement proviso has the customary scope of modifying only the preceding clause.

Significantly, Congress did not make the law enforcement proviso an amendment to any of the other exceptions in Section 2680, such as the discretionary function exception, which it could have done if it had intended to modify those preexisting exceptions as well. And the conclusion that the proviso relates only to the preceding clause of subsection (h) is reinforced by the proviso's reference specifically to some (but not all) of the intentional torts excepted in that prior clause. See 28 U.S.C. 2680(h) ("*Provided*, That, with regard to acts

or omissions of investigative or law enforcement officers of the United States," the FTCA "shall apply" to claims alleging one of the select named intentional torts.). Moreover, the final sentence of Section 2680(h) furnishes, *"[f]or the purpose of this subsection*," a definition of the term "'investigative or law enforcement officer.'" *Ibid.* (emphasis added). Because that term appears only in the law enforcement proviso, the final sentence in subsection (h) thereby links the proviso exclusively to the intentional tort exception in "this subsection" in that additional way as well. *Ibid.*

Further still, the law enforcement proviso expressly states that "the provisions of [Chapter 171 * * * *shall apply*" to claims described within the proviso, 28 U.S.C. 2680(h) (emphasis added), and the discretionary function exception in 28 U.S.C. 2680(a) is one of the provisions of Chapter 171. See *Simmons* v. *Himmelreich*, 578 U.S. 621, 627 (2016) (interpreting the FTCA and holding that, "[a]bsent persuasive indications to the contrary," the Court will "presume Congress says what it means and means what it says"). Given the text and placement of the law enforcement proviso in the statute, the proviso is properly read as a modification only of the first clause of Section 2680(h)—the clause excepting altogether certain intentional torts from the FTCA.

A broader reading of the law enforcement proviso—as a limitation not only upon the intentional tort exception but also upon the other exceptions in Section 2680—would allow tort suits against the United States that Congress plainly intended to bar. Under petitioners' interpretation, a plaintiff alleging an intentional tort with respect to acts or omissions of law enforcement officers could bring an FTCA claim arising in a foreign country notwithstanding 28 U.S.C. 2680(k),

which prohibits all tort claims "arising in a foreign country." See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 699-712 (2004) (holding that foreign country exception barred FTCA claim for false arrest). The language and structure of Section 2680 as a whole therefore do not support the counterintuitive suggestion that Congress intended to override foundational compromises in the FTCA and permit suits arising abroad, or from discretionary functions, simply because the plaintiff's claim involves an alleged tort by a law enforcement officer.

ii. Notwithstanding the plain text of the statute, petitioners (Pet. 26-27) and their amici (Members of Congress Amici Br. 4-13) contend that the government's position conflicts with Congress's purpose in enacting the law enforcement proviso. As this Court has recognized, it must "follow the text even if doing so will supposedly undercut a basic objective of the statute." *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 135 (2015) (citation and internal quotation marks omitted). But here, the history and context of the law enforcement proviso reinforce that it was not intended to negate the discretionary function exception.

Congress adopted the proviso "as a *counterpart* to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973) (Senate Report)). Defendants in *Bivens* actions are entitled to immunity when their actions do not violate clearly established constitutional proscriptions, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813-819 (1982), and as noted above,

that same kind of immunity is incorporated into the discretionary function exception, see p. 13, *supra*. The application of the discretionary function exception to conduct covered by the law enforcement proviso thus is consistent with the FTCA serving as a counterpart to *Bivens*. See *Carlson*, 446 U.S. at 19-20 ("[T]he congressional comments accompanying [the law enforcement proviso in Section 2680(h)] made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.").

The construction of the law enforcement proviso and discretionary function exception advanced by the government therefore best gives effect to every provision of the statute and does not leave the law enforcement proviso without effect. To start, many claims arising from the intentional torts of law enforcement officers do not implicate discretionary functions at all. See, *e.g.*, *Linder* v. *United States*, 937 F.3d 1087, 1091 (7th Cir. 2019), cert. denied, 141 S. Ct. 159 (2020) (explaining that it is clearly established that law enforcement officers do not have discretion to commit perjury). Likewise, the United States will not be shielded by the discretionary function exception under the FTCA for the conduct of federal law enforcement officers if they act in violation of a clearly established constitutional, statutory, or regulatory directive, just as individual officers are not entitled to qualified immunity under *Bivens* when they violate clearly established law.

The law enforcement proviso accordingly retains full force when law enforcement officers "act in bad faith or without legal justification," including when they conduct the type of "raids" that Congress intended the law enforcement proviso to deter. Senate Report 3. Congress added the proviso to create a cause of action for "the

same type of conduct that [wa]s alleged to have occurred in *Bivens*," *Carlson*, 446 U.S. at 20 (quoting Senate Report 3)—*i.e.*, the raid of a home "without cause, consent or warrant," *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 390 n.1 (1971) (citation omitted). That also was true of the Collinsville raids that petitioners cite (Pet. 26) as the basis for the law enforcement proviso. Those "'no-knock' raids * * * into two different homes," involving the "same Justice Department agents," were conducted "*without warrants*" and in an "abusive" fashion. Senate Report 2-3 (emphasis added). This case—involving an officer's "reasonable mistakes" when "executing a high-risk warrant" in a "rapidly-changing and dangerous situation"—bears no resemblance to those warrantless raids. Pet. App. 14a.

b. As petitioners acknowledge (Pet. 25), every court of appeals—except the Eleventh Circuit—to consider the issue has held that the discretionary function exception applies to the tort claims listed in the law enforcement proviso in Section 2680(h). See *Linder*, 937 F.3d at 1088-1089 (rejecting argument that the law enforcement "proviso overrides the rest of [Section] 2680"); *Joiner* v. *United States*, 955 F.3d 399, 406 (5th Cir. 2020) ("[T]he law enforcement proviso does not negate the discretionary function exception."); *Medina* v. *United States*, 259 F.3d 220, 228-229 (4th Cir. 2001) (where the discretionary function exception applies, it controls, even if the plaintiff alleges intentional torts within the law enforcement proviso); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983) (same), cert. denied, 465 U.S. 1100 (1984); *Caban* v. *United States*, 671 F.2d 1230, 1234 (2d Cir. 1982) (law enforcement proviso must

be read in conjunction with discretionary function exception); see also *Gasho* v. *United States*, 39 F.3d 1420, 1433-1434 (9th Cir. 1994) (where the FTCA exception in 28 U.S.C. 2680(c) applies, that exception controls notwithstanding the law enforcement proviso), cert. denied, 515 U.S. 1144 (1995). Because Guerra's conduct falls within the discretionary function exception, see pp. 8-12, *supra*, every other court of appeals would have upheld the district court's judgment on that basis.

c. The court of appeals affirmed the district court's judgment on a different rationale. The court of appeals stated that there was "no doubt that Guerra acted within the scope of his discretionary authority when he prepared for and executed the search warrant." Pet. App. at 19a. The court was bound, however, by circuit precedent holding that torts listed in the law enforcement proviso fall outside the scope of the discretionary function exception. See *Nguyen* v. *United States*, 556 F.3d 1244, 1256 (11th Cir. 2009). The court therefore affirmed dismissal of petitioners' false imprisonment and assault and battery claims on different grounds: It applied other circuit precedent holding that, "[s]imilar to the discretionary function exception, the Supremacy Clause ensures that states do not impede or burden the execution of federal law." Pet. App. 16a (citing *Denson* v. *United States*, 574 F.3d 1318, 1336-1337 (11th Cir. 2009), cert. denied, 560 U.S. 952 (2010)).

The court of appeals' premise is sound. Congress could not have intended that the United States would be held liable for the actions of its law enforcement officers that are discretionary and within the scope of their official duties, because such conduct would ordinarily be privileged. For the reasons explained above, however, that protection for the actions of law enforcement officers is

located in the FTCA itself, with no need to consider the Supremacy Clause. See pp. 14-19, *supra*. Although the court did not analyze the issue in that way, any error is irrelevant to the proper disposition of this case. As explained above, petitioners' claims must fail because they arise out of Guerra's exercise of a discretionary function. See pp. 8-12, *supra*.

Nor does the disagreement between the Eleventh Circuit and the other courts of appeals regarding the interplay of the discretionary function exception and the law enforcement proviso warrant this Court's review. The Eleventh Circuit "stands alone" in holding that the discretionary function exception is inapplicable to the torts listed in the law enforcement proviso. *Linder*, 937 F.3d at 1089. But the decision below rests on the same fundamental insight as the other courts of appeals: The United States cannot face liability for the acts of a law enforcement officer who "acted within the scope of his discretionary authority." Pet. App. 17a. Thus, the disagreement as to methodology has little practical significance, and the Court has previously denied petitions implicating the disagreement. See *Linder*, 141 S. Ct. at 159; *Denson* v. *United States*, 560 U.S. 952, 952 (2010). The same result is warranted here.

d. If the Court were to grant a writ of certiorari to review the Eleventh Circuit's application of the Supremacy Clause to bar certain FTCA claims, it should also direct the parties to address an additional question: Whether the discretionary function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional torts exception. As petitioners acknowledge (Pet. 25), the court of appeals reached the constitutional question only because it could not address the statutory question under circuit

law. Resolving that threshold question is therefore necessary to a proper construction of the FTCA. And, as the other courts of appeals to address the question have recognized, there is no sound basis for holding that a claim falls outside the scope of the discretionary function exception just because it is not separately barred by the enumerated torts exception. For the reasons given above, however, the Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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