RECORD NO. 21-2798

In The
United States Court of Appeals
For The Third Circuit

XIAOXING XI, *et al.*,

***Plaintiffs – Appellants*,**

v.

FBI SPECIAL AGENT ANDREW HAUGEN, *et al.*,

***Defendants – Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS–APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit legal center dedicated to defending the foundations of free society. Because qualified immunity and related doctrines limit access to federal courts and drastically hinder enforcement of important constitutional rights, IJ litigates government immunity and accountability cases nationwide. The district court decision below marks a clear expansion of the qualified immunity doctrine into a new area: the Federal Tort Claims Act (FTCA). This expansion narrows one of the few avenues for individuals to receive compensation for injuries inflicted by federal employees. The expansion is unwarranted as qualified immunity is a judicially created doctrine based entirely on policy considerations—mainly the perceived unfairness of holding government officials personally liable for their constitutional violations—that are nonexistent in the FTCA context. IJ has a strong interest in advocating that this Court firmly reject the district court's attempt to expand qualified immunity analysis into the FTCA.

[1] No party's counsel authored any portion of this brief. No party or person—other than *amicus*—contributed money intended to fund preparing or submitting this brief. Both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case involves the discretionary function exception to the Federal Tort Claims Act (FTCA).[2] The FTCA is a limited waiver of the government's sovereign immunity under which the United States can be held liable for certain torts committed by its employees. The discretionary function exception is the main exception to this limited waiver. Under it, the government will not be held liable if the tort results from a discretionary action or inaction of an employee. Below, the district court held that an employee's "discretion" extends even to actions that also constitute constitutional violations, unless the action violated a "clearly established" constitutional right. This decision was incorrect for two distinct reasons.

First, this Court's longstanding precedent is clear that government employees do not have the discretion to violate the Constitution. Thus, if a government employee takes any action that violates the Constitution, then the conduct is no

[2] While this brief takes no position on the *Bivens* claims pressed by Plaintiffs-Appellants, if this Court declines to recognize a *Bivens* action in this instance than tort claims under the FTCA will be the only path for Xi to receive a remedy for the legal harms suffered in this case. If this Court also determines the FTCA claims are unavailable due to the discretionary function exception, then Xi will be left without a remedy. But as the Supreme Court has long recognized "every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). A rule that procedurally bars both the *Bivens* and the FTCA claims here would be a rule that Xi's legal rights are outside the protection of the federal courts.

longer discretionary. This Court's rule finds substantial support in the Supreme Court's precedent.

The Supreme Court in *United States v. Gaubert*, 499 U.S. 315 (1991), and *Berkovitz v. United States*, 486 U.S. 531 (1988), held that if a government employee violates a statute or regulation, the discretionary function exception does not apply. It would defy logic to hold that the exception does not apply when the alleged tortious action violated a statutory or regulatory mandate but does apply when the alleged tortious conduct violates the Constitution. Such a holding would mean that statutes and regulations are more binding than the Constitution.

In keeping with the Supreme Court's doctrine, most circuits have agreed with this Court's rule. The First, Second, Fourth, Eighth, Ninth, and D.C. Circuits have all come to similar conclusions. Only the Seventh and Eleventh Circuits have held that the discretionary function exception applies even when the tort constitutes a constitutional violation. This circuit split stems from a misunderstanding of the role the Constitution plays in determining the applicability of the discretionary function exception. Both the Seventh and Eleventh Circuits held that the exception applies even if a tort constitutes a constitutional violation because the FTCA compensates state tort law violations—not constitutional violations. This is certainly true. But it is also beside the point. The relevance of a constitutional violation is that an action that violates the Constitution cannot be a discretionary one. Government

employees—and the government itself—simply do not possess the discretion to violate the Constitution. The Constitution's only role then is to rebut the applicability of the discretionary function exception, which then leaves the individual with the ability to prove the elements of their state law tort claim.

This structure mirrors the role the Constitution consistently played in pre-FTCA tort claims against government officials. Before Congress enacted the FTCA, an individual's main recourse was to sue a federal employee directly for that employee's tortious action. The Constitution would come into play in rebutting a federal employee's defense that they were authorized to take the action due to their official role. If the action violated the Constitution, the employee's authorization defense would fail because they exceeded the scope of any authorization by violating the Constitution. Congress would have been aware of this role of the Constitution in tort suits over a federal employee's tortious conduct and nothing in the FTCA displaces this traditional role for the Constitution.

Second, the district court erred by holding that an employee's action is only unlawful when it violates a "clearly established" constitutional right. The district court held that the discretionary function exception applied because no action violated Xi's clearly established constitutional rights. The importation of qualified immunity's clearly established analysis is misguided both because the policy justifications behind qualified immunity are irrelevant in the FTCA context and

because whether a federal employee violated a "clearly established" right is a distinct question from whether that employee violated the Constitution.

The Supreme Court created qualified immunity based on policy considerations not relevant in the FTCA context. The Court created qualified immunity to protect federal employees from being held personally liable for claims brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court later expanded qualified immunity into the Section 1983 realm where, again, government actors were held personally liable for constitutional violations. But under the FTCA it is the government itself that will be held liable and required to pay damages, not the individual employee. And as qualified immunity has come under recent criticism from the Supreme Court, lower courts, and academics in its core area of protecting individual government officials from being held personally liable as lacking any historical, textual, or legal justifications, it makes little sense to expand it to new areas of law.

Additionally, whether an action violates a "clearly established" constitutional right is distinct from whether an action violates the Constitution. An action can violate the Constitution without violating a clearly established constitutional right. And in the discretionary function exception context, the Constitution is relevant insofar as an employee necessarily is acting outside their permitted discretion if the employee acts in a way that violates the Constitution.

This Court should reject the district court's attempt to import qualified immunity analysis into this new context. Qualified immunity's clearly established analysis has no role in FTCA litigation. Its introduction serves only to undermine this Court's longstanding rule that the discretionary function exception is inapplicable when the alleged tortious conduct also constitutes a constitutional violation because federal employees lack the discretion to violate the Constitution. Thus, this Court should reverse the district court and reaffirm its longstanding rule.

ARGUMENT

Part I of this brief explains that government employees lack the discretion to violate the Constitution. Part II explains that the relevant question in determining if the discretionary function exception applies is whether the action that gave rise to the tort also constitutes a violation of the Constitution, not whether the action violated a "clearly established" constitutional right.

I. This Court should reaffirm its precedent that government officials do not possess the discretion to violate the Constitution.

The FTCA is a limited waiver of the government's sovereign immunity. It allows an individual to sue the federal government directly for certain torts committed by federal employees. Under the FTCA the government—in essence—steps into the shoes of the federal employee and "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This was revolutionary in that it allowed individuals to sue the

federal government directly. But in doing so, Congress also enacted some limited exceptions that preserved the government's sovereign immunity in certain circumstances.

The most notable exception is the discretionary function exception. Under this exception "[a]ny claim . . . based upon the 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). While this exception applies when the discretion is abused, it does not apply when a government official goes beyond their discretion, as when a federal official violates the Constitution.

This Court's longstanding rule is that the discretionary function exception to the FTCA is inapplicable when the tort also constitutes a constitutional violation, because officials do not possess the discretion to violate the Constitution. *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988). But since this Court announced the rule a circuit split has been created. Recently, both the Seventh and Eleventh Circuits have held that the exception applies even when the tort constitutes a constitutional violation.

This Court should firmly reaffirm its rule for at least three reasons. First, this Court's rule finds support in Supreme Court precedent. Second, while the Seventh and Eleventh Circuits have recently created a circuit split, their decisions both show a misunderstanding of the role the Constitution plays in determining the applicability

of the discretionary function exception. Third, this Court's rule is supported by the history of tort suits against federal officials before the passage of the FTCA.

A. This Court's rule that the discretionary function exception is inapplicable when the tort also constitutes a constitutional violation is supported by subsequent Supreme Court precedent.

The clear rule dating back over three decades is that the discretionary function exception to the FTCA is inapplicable when the alleged tort also constitutes a Constitutional violation. In *U.S. Fidelity & Guaranty Co. v. United States*, this Court distilled certain principles from Supreme Court precedent about the applicability of the discretionary function exception. 837 F.2d 116, 120 (3d Cir. 1988). This Court held that "conduct cannot be discretionary if it violates the Constitution." *Id*. Putting a finer point on it, it explained: "[f]ederal officials do not possess discretion to violate constitutional rights." *Id*.

This rule finds support in the two main Supreme Court decisions considering the exception since *U.S. Fidelity & Guaranty Co.* First, in *Berkovitz v. United States*, the Court held that the discretionary function exception did not bar a claim against the government for its negligent approval of a specific lot of a polio vaccine. 486 U.S. 531 (1988). The Court explained that the exception does "not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* at 536. The Court clarified explaining: "[t]he discretionary function exception applies only to conduct that involves the *permissible* exercise of

policy judgment." *Id.* at 539 (emphasis added). The Court focused on the "permissible" exercise of policy judgment that includes considerations of social, economic, and political policy. But government officials, like governmental entities, have no power to violate the Constitution. *Owen v. City of Independence*, 445 U.S. 622, 649 (1980) ("[A] municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."). Thus, the best reading of *Berkovitz* is that the focus on "permissible" excludes any decision that also violates the Constitution.

Then, three years later in *United States v. Gaubert*, the Supreme Court reaffirmed the key aspects of *Berkovitz*. 499 U.S. 315 (1991). The suit, brought by insolvent bank shareholders, alleged that the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas were negligent in supervising a now-insolvent savings and loan association. *Id.* at 318. The Court held that the actions fell within the discretionary function exception. *Id*. In explaining the applicability of the discretionary function exception, the Court held that the exception does not apply "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.'" *Id.* at 322. The Court added that even if choice were involved, the applicability still turns on "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 322–23.

The discretionary function exception was intended to shield "decisions grounded in social, economic, and political policy" from judicial second-guessing. *Id*. at 323. But nothing in the opinion supports a conclusion that Congress, through the discretionary function exception, can shield unconstitutional actions. Nothing supports the argument that a government official must follow a specifically prescribed course of action in a statute, regulation, or even a policy, but can freely disregard the command of the Constitution which is supreme over all statutes, regulations, or policies. Such a holding would defy logic. It would be like asserting that "the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid." The Federalist No. 78, at 380 (Alexander Hamilton) (Dover ed. 2014). Such a holding would turn Supreme Court precedent on its head.

This Court should be comfortable in reaffirming its longstanding rule that the discretionary function exception is inapplicable when the alleged tortious conduct also constitutes a constitutional violation as this rule is supported by Supreme Court precedent.

B. <u>The recent circuit split results from a misunderstanding of the role the Constitution plays in discretionary function exception litigation.</u>

Most of this Court's sister circuits have adopted the same rule: the discretionary function exception is inapplicable when the tort also constitutes a

constitutional violation.[3] This is unsurprising as Supreme Court precedent has made clear that an action cannot be discretionary if it violates a statute or regulation. *Berkovitz v. United States*, 499 U.S. 315, 322 (1991). Logically then, conduct cannot be discretionary if it violates the Constitution, which is of a higher order than statutes or regulations. The First Circuit has even called this proposition "elementary." *See Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009). And the Second Circuit has explained "[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority." *Myers & Myers, Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975). Unfortunately, not all circuits have come to this conclusion.

The Seventh and Eleventh Circuits have recently departed from the norm in *Linder v. United States*, 937 F.3d 1087, 1090 (7th Cir. 2019), and *Shivers v. United*

[3] *See Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009) ("It is elementary that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statute or regulation. Nor does it shield conduct that transgresses the Constitution."); *Myers & Myers, Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("[W]e begin with the principle that '[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes.'"); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nieves Martinez v. United States*, 997 F.3d 867, 877 (9th Cir. 2021) ("Even if the agents' actions involved elements of discretion, agents do not have discretion to violate the Constitution."); *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) ("We hold that the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription.").

States, 1 F.4th 924, 930 (11th Cir. 2021). Both circuits held that the discretionary function exception applies even when the tort also constitutes a constitutional violation. These decisions misconstrued the role of the Constitution in FTCA litigation.

Both decisions rested on the belief that the Constitution was irrelevant to the applicability of the discretionary function exception because the FTCA compensated only state tort law violations. *Shivers*, 1 F.4th at 932–33. The Seventh Circuit contended in *Linder*, "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations." 937 F.3d at 1090. The Seventh Circuit explained that the FTCA centered on state tort law and that the FTCA is inapplicable to constitutional torts. *Id*. The Eleventh Circuit came to a similar conclusion explaining: "Congress did not create the FTCA to address constitutional violations at all but, rather, to address violations of *state tort law* committed by federal employees." *Shivers*, 1 F.4th at 930. Neither circuit was factually wrong that the FTCA does not remedy constitutional violations. But that misses the point. A tort can both violate state tort law *and* the Constitution, and individuals *can* recover under the FTCA for the state tort violation, even when it is also a constitutional violation. And if the tort is a constitutional violation, it cannot be a discretionary action.

The role of the Constitution in FTCA litigation is to remove any question of discretion in the first place. The Constitution only comes in as a preliminary matter to rebut the applicability of the exception. If an individual can show that the Constitution was violated by the same action alleged to be tortious, then the government employee necessarily exceeded—not abused—their discretion, and the exception is unavailable to the government. *See Owen v. City of Independence*, 445 U.S. 622, 649 (1980) ("[A] municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative.").

If a government official acts unlawfully and violates the Constitution, all that means is the discretionary function exception is inapplicable because government officials necessarily lack the discretion to violate the Constitution. There still must be a state law tort claim that fits the circumstances. If there is no tort claim available under state law, then the fact that an action violated the Constitution is of no consequence. But if the action violated the Constitution, the litigation continues and the individual has the chance to prove the elements of the state law tort claim and receive compensation under the FTCA.

In short, while the Seventh and Eleventh Circuits are correct in that the FTCA does not remedy constitutional violations, they were both incorrect in holding that it was of any consequence. The Constitution is only relevant to rebut the claim that the discretionary function exception precluded an individual's FTCA claim from

proceeding. This Court should therefore reaffirm its commitment to the longstanding majority rule and reject the position recently adopted by the Seventh and Eleventh Circuits.

C. This Court's longstanding rule finds support in the history of tort litigation against federal employees for their tortious conduct.

The role that the Constitution plays in determining the applicability of the discretionary function exception to FTCA litigation is supported by the history of tort litigation against government officials. Long before the passage of the FTCA, individuals who were wronged by government officials sued those officials in tort. In those cases (just like under the FTCA) the plaintiffs sought compensation for torts, not for constitutional violations. And in those cases (just like under this Court's interpretation of the FTCA) the constitutionality of the official's conduct mattered only to the extent the official sought to defend his actions as legally authorized.

Before the FTCA, an individual injured by a federal employee's tort could sue the employee directly. In the normal course of these suits the Constitution would come into play if the federal employee pleaded authorization based on their position in defense of the suit. If the tort violated the Constitution, then authorization was no defense. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506–07 (1987). If such a violation was proven, the individual employee was held liable and—if appropriate—required to pay damages out of their own pocket. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Wise v. Withers*, 7 U.S. (3 Cranch)

331 (1806); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *Bates v. Clark*, 95 U.S. 204 (1877).

In other words, the Constitution plays the same role in litigation against federal officials as it does in litigation against the federal government. This is unsurprising. Congress did not enact the FTCA to overhaul the nature of suits over a government employee's tortious conduct. The FTCA allowed an individual to sue the federal government directly, and places certain additional limits on suits against the government.[4] But no limit in the FTCA displaces this role of the Constitution in tort suits over a government employee's tortious conduct.

Thus, the historical role of the Constitution in lawsuits against federal employees supports this Court's rule that the discretionary function exception is inapplicable when the alleged tort also constitutes a constitutional violation. This Court should reaffirm its long-standing rule and use this opportunity to make clear again that government officials do not possess the discretion to violate the Constitution.

[4] When Congress enacted the FTCA in 1946 it was not exclusive. It provided a new party that an individual could sue. But individuals could still sue federal employees for their tortious conduct individually. It was not until the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) that the FTCA became the exclusive remedy for torts committed by federal employees.

II. Qualified immunity analysis is irrelevant for purposes of the FTCA.

While acknowledging that circuit precedent holds that the discretionary-function exception does not apply to conduct that violates the Constitution, the district court nonetheless held that Haugen's conduct was not unconstitutional because it did not violate "clearly established constitutional rights." *Xi v. Haugen*, Civil Action No. 17-2132, 2021 WL 1224164, at *29 (E.D. Pa. Apr. 1, 2021). In doing so, the district court imported the judicially created doctrine of qualified immunity into the FTCA. While the district court cited no precedent for this "clearly established" test, it does find some support in this Court's dicta. *See Bryan v. United States*, 913 F.3d 356, 364 (3d Cir. 2019) ("Because . . . the CBP officers did not violate clearly established constitutional rights, the FTCA claims also fail."). But neither the lower court nor the panel in *Bryan* offered any reasons for introducing qualified immunity analysis into FTCA litigation, and this Court should expressly decline to do so here.

As shown below, this importation of qualified immunity's "clearly established" analysis into the FTCA is wrong for at least two reasons. First, the Supreme Court created qualified immunity based on policy considerations that are not present in FTCA litigation. Second, whether an action violated a "clearly established" constitutional right does not fully answer whether the action violated the Constitution.

A. The Supreme Court explicitly invented qualified immunity for policy reasons that are not present in FTCA litigation.

The doctrine of qualified immunity is expressly grounded in policy concerns about individual government officials' exposure to litigation. The Supreme Court created qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In creating qualified immunity, the Court explained that it would be unfair to hold officials liable for "conduct not previously identified as unlawful." *Id.* at 818. The Court did this because "claims [of wrongdoing] frequently run against the innocent as well as the guilty." *Id.* at 814. And based on the fear that such lawsuits under *Bivens* could cripple the working of the government and prevent employees from carrying out their duties. *Id*. The Court worried that the "social costs" of liability under *Bivens* would be costly to the individual, require attention from the individuals drawing them away from their employment, could deter some from accepting federal employment, and would "dampen the ardor of all but the most resolute, or the irresponsible." *Id.* at 813–15. The Court in creating qualified immunity was "attempt[ing] to balance competing values" of ensuring individuals could receive compensation while shielding government officials from personal liability. *Id*. at 807. In short, the Court focused on policy, not law in crafting qualified immunity.

But these policy considerations are irrelevant under the FTCA. After all, only the federal government may be sued under the FTCA, not any individual officer. 28 U.S.C. § 2674. Because none of the policy concerns animating qualified immunity

are present in FTCA litigation, there is no reason to import the doctrine into the FTCA.

Moreover, this Court should hesitate to expand the scope of qualified immunity because the doctrine is deeply controversial even in the situations for which it was specifically created. Justice Thomas has argued several times that qualified immunity lacks any historical or textual justifications. *See Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017) (Thomas, J., concurring). And Justice Sotomayor has argued the way the Court has applied qualified immunity has created an "absolute shield for law enforcement officers." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). The doctrine has not been immune from criticism in the lower courts either. *See, e.g.*, *Villarreal v. City of Laredo*, 17 F.4th 532 (5th Cir. 2021). Academics have also called the legal standing of the Supreme Court's qualified immunity jurisprudence into question in recent years. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 88 (2018) (explaining that qualified immunity "lacks legal justification, and the Court's justifications are unpersuasive"); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1836 (2018) ("Qualified immunity doctrine is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law.").

Simply put, Congress in enacting the FTCA made a policy decision to allow individuals to hold the government liable for certain tortious conduct of federal employees. This policy decision should control, and this Court should respect that decision.

B. Whether a right is clearly established is a separate question from whether an action violated the Constitution.

The district court held that the discretionary function exception applied because Agent "Haugen did not violate Xi's clearly established constitutional rights." *Xi v. Haugen*, Civil Action No. 17-2132, 2021 WL 1224164, at *29 n.29. (E.D. Pa. Apr. 1, 2021). In doing so the court below held that it need not consider this Court's long-standing rule that "conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation because federal officials do not possess discretion to violate constitutional rights or federal statutes." *Id*. (cleaned up). The lower court was incorrect.

In coming to this conclusion, it unnecessarily conflated two distinct issues: whether an action violates the Constitution and whether an action violates a "clearly established" constitutional right. While any action that violates a "clearly established" constitutional right will also count as an action that violates the Constitution, not every action that violates the Constitution will also be an action that violates a "clearly established" constitutional right. But the only question relevant in this context is whether an action violated the Constitution.

As explained in Section I.B., the Constitution is relevant to FTCA litigation only insofar as a court must determine whether an official was acting within his discretion. If his actions were unlawful—whether because they violated the Constitution or a simple regulation—they were outside his discretion. It is the mere fact that an action violates the Constitution that makes the discretionary function exception inapplicable. Yet the district court narrowed this broad category of constitutional violations to only those actions which violated a clearly established right. A federal employee can violate the Constitution without violating a clearly established right because not all constitutional rights are immediately "clearly established."

This fact is reflected by the two-part structure of the Supreme Court's qualified-immunity test. Under qualified immunity's two-part test, a court first determines whether the alleged conduct violated the Constitution. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). A court then turns to whether the right at issue was "clearly established" at the time of the incident. *Id.* While the Supreme Court allows lower courts to sometimes skip the first question, it has acknowledged that it is a separate and still important question. *Id*. at 236.

There is, then, a clear distinction between asking whether something *violates the Constitution* and asking whether that *violation is "clearly established."* This case concerns only the first question because this Court has already held that the

discretionary function exception does not apply so long as an official's conduct violates the Constitution. The district court therefore erred by even asking the second question, and the decision below should be reversed.

CONCLUSION

This Court should reverse the decision below and reaffirm its rule that the discretionary function exception is categorically inapplicable when the tort also constitutes a constitutional violation.

Dated: February 11, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify the following:

1. Every attorney whose names appear on the brief is a member of the bar of this court.

2. This brief complies with the type-volume limitation of Rule 29(a)(5) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains [[4,907]] words.

3. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

4. A virus detection program, Webroot Secure Anywhere Endpoint Protection Version 9.0.30.75, has been run on the electronic file and no virus was detected.

5. An identical copy of this brief was e-filed using the Court's CM/ECF electronic filing system.

Dated: February 11, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, I caused the foregoing BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS to be filed electronically with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: February 11, 2022

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