No. _____

In The
Supreme Court of the United States

CURTRINA MARTIN, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are the innocent victims of a wrong-house raid conducted by an FBI SWAT team in Atlanta, Georgia. Seeking a remedy for torts committed against them, Petitioners brought a cause of action against the United States under the Federal Tort Claims Act. In its opinion below, the Eleventh Circuit held that all of Petitioners' FTCA claims are barred by sovereign immunity supplied either through the Constitution's Supremacy Clause or the FTCA's discretionary-function exception.

In one or more ways, the opinion below conflicts with decisions from every other circuit.

The questions presented are:

1. Whether the Constitution's Supremacy Clause bars claims under the FTCA—a federal statute enacted by Congress—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." Pet. App. 17a (quotation omitted).

2. Whether the FTCA's discretionary-function exception bars claims for torts arising from wrong-house raids and similar negligent or wrongful acts by federal employees.

PARTIES TO THE PROCEEDING

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

Related Proceedings

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Martin v. *United States*,
Nos. 1:19-CV-4106, 4180 (Dec. 30, 2022)

Martin v. *United States*,
Nos. 1:19-CV-4106, 4180 (Sept. 23, 2022)

U.S. Court of Appeals for the Eleventh Circuit:

Martin v. *United States*,
No. 23-10062 (May 30, 2024)

Martin v. *United States*,
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Petition for a Writ of Certiorari

Curtrina Martin, individually and as parent and next friend of G.W., a minor, and Hilliard Toi Cliatt petition for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

Opinions Below

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

Jurisdiction

The Eleventh Circuit entered its opinion below on April 22, 2024, and denied a petition for rehearing on May 30. Justice Thomas granted a 30-day extension of the period for filing this petition, making it due on September 27. Petitioners timely file this petition and invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

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

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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

> The provisions of * * * section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a

> discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

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

INTRODUCTION

If the Federal Tort Claims Act provides a cause of action for anything, it's a wrong-house raid like the one the FBI conducted here. Congress amended the FTCA in 1974 to add the law-enforcement proviso and ensure a remedy for both negligent and intentional tortious acts by federal law enforcement officers. 28 U.S.C. 2680(h); see also 28 U.S.C. 1346(b)(1). This Court has said it's "crystal clear" that the proviso ensures that "innocent

individuals who are subjected to raids * * * will have a cause of action against * * * the Federal Government." *Carlson* v. *Green*, 446 U.S. 14, 19–20 (1980) (citing 28 U.S.C. 2680(h) and quoting S. Rep. No. 93-588, at 3 (1973)).

Petitioners are innocent individuals who were subjected to a federal wrong-house raid. Yet the opinion below holds that the FTCA provides them no cause of action against the government. How could the outcome of this case stray so far from the FTCA's stated purpose? According to the Eleventh Circuit, "the Supremacy Clause and the discretionary function exception bar [Petitioners'] claims." Pet. App. 19a. On these important issues, the Eleventh Circuit disregards Congress's legislative prerogative, splits from every one of its sister circuits, and clashes with this Court's decisions.

First, the opinion below holds that claims within the law-enforcement proviso to the FTCA—a federal statute—are barred by the Supremacy Clause, U.S. Const. art. VI, cl. 2, because the mistaken decision to raid the wrong house "ha[s] some nexus with furthering federal policy." Pet. App. 19a. The Eleventh Circuit is the only circuit to apply the Supremacy Clause to the FTCA and "import immunity back into a statute designed to limit it"—something this Court long ago warned courts not to do. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955).

Second, the opinion below holds that claims outside the proviso are barred by the FTCA's discretionary-function exception, 28 U.S.C. 2680(a), because "the FBI did not have stringent policies or procedures in place that dictate *how* agents are to prepare for warrant executions." Pet. App. 18a. A lack of specific agency

guidance means, the panel found, the mistakes that led the FBI to raid an innocent family's home were "susceptible to policy analysis." *Ibid.* (quotation omitted); *id.* at 16a ("The discretionary function exception applies *unless* a source of federal law 'specifically prescribes' a course of conduct" (citation omitted)). This is the sort of "unduly generous interpretation[] of the [FTCA's] exceptions" that the Court cautioned "run[s] the risk of defeating the central purpose of the statute." *Kosak* v. *United States*, 465 U.S. 848, 853 n.9 (1984).

Unlike with its Supremacy Clause bar, where the Eleventh Circuit stands alone, the circuits are badly split over the discretionary-function exception. As Third Circuit Judge Stephanos Bibas observed last year, there are multiple "longstanding, recurring circuit splits involving the discretionary-function exception," so "it might be time for the Supreme Court to revisit" the issue. *Xi* v. *Haugen*, 68 F.4th 824, 842–843 (3d Cir. 2023) (Bibas, J., concurring). We agree.

In a case like this one, a court's position on any of the splits may be dispositive. Taken together, however, the splits create a system so fractured that the circuits may as well be interpreting different statutes altogether. No more than two agree across the multiple splits. This means that a plaintiff's ability to recover under the FTCA depends not on the strength of her claims, but on where she brings them.

This Court should grant the petition to address these issues, and this case is a good vehicle to do so. There's no dispute that the FBI raided the wrong house. And the Eleventh Circuit's use of two complementary theories to deny Petitioners any FTCA cause of action provides a unique opportunity for the Court to clarify the

FTCA's application to wrong-house raids and similar wrongful or negligent acts by federal employees.

STATEMENT OF THE CASE

I. Through the Federal Tort Claims Act, Congress waived sovereign immunity to accept liability for the negligent and wrongful acts of federal employees.

The Federal Tort Claims Act is a federal statute. 28 U.S.C. 1346(b), 2671–2680. Passed in 1946, the FTCA was not "an isolated and spontaneous flash of congressional generosity." *Feres* v. *United States*, 340 U.S. 135, 139 (1950). Rather, the Act was "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit" and address the "multiplying number of remediless wrongs * * * which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government." *Id.* at 139–140.

To accomplish these purposes, the FTCA provides a federal cause of action for damages, "allow[ing] a plaintiff to bring certain state-law tort suits against the Federal government." *Brownback* v. *King*, 592 U.S. 209, 210–211 (2021). The Act provides a broad grant of jurisdiction to the federal courts and a broad waiver of sovereign immunity. Section 1346(b)(1) provides:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims [1] against the United States, [2] for money damages, * * * [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or

> wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

See also *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994).

Claims that satisfy Section 1346(b)(1) may still be defeated by sovereign immunity, however, if they fall within any of the exceptions listed in 28 U.S.C. 2680. Among these are the so-called discretionary-function and intentional-torts exceptions.

The discretionary-function exception bars claims "based upon the exercise or performance [of] a discretionary function." 28 U.S.C. 2680(a). This precludes claims arising from actions that "involve an element of judgment or choice" and are "based on considerations of public policy." *United States* v. *Gaubert*, 499 U.S. 315, 322–323 (1991) (cleaned up); see also *id.* at 325 & n.7 (*e.g.*, clarifying there "are obviously discretionary acts" that don't trigger the exception because they are not "based on the purposes that [a] regulatory regime seeks to accomplish").

The intentional-torts exception bars claims arising out of certain intentional torts. 28 U.S.C. 2680(h). But Congress amended the FTCA in 1974 to add a law-enforcement proviso to the exception:

> *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall

> apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

An Act to Amend Reorganization Plan of 1973, Pub. L. No. 93-253, 88 Stat. 50 (1974) (codified at 28 U.S.C. 2680(h)).

Congress enacted the proviso in response to wrong-house raids conducted by federal police in Collinsville, Illinois, in April 1973. See generally John C. Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment*, 54 N.C. L. Rev. 497, 499–517 (1976). Through the law-enforcement proviso, Congress guaranteed "innocent individuals who are subject to raids * * * a cause of action against * * * the Federal Government." *Carlson*, 446 U.S. at 19–20 (quoting S. Rep. No. 93-588, at 3 (1973)).

Petitioners are just such innocent individuals.

II. By an easily avoidable mistake, the FBI raided an innocent family's home.

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

* * *

In the pre-dawn hours of October 18, 2017, FBI Special Agent Lawrence Guerra led a six-agent SWAT team to 3756 Denville Trace. Failing to confirm the

address posted on the mailbox and using a black Chevrolet Camaro in the driveway as a landmark, Guerra mistakenly believed he had arrived at 3741 Landau Lane—the home of gang member Joseph Riley and the address for which Guerra had a search warrant. At the time, Guerra knew that the target house had its address posted on the mailbox and that neither Riley nor his associates were known to drive a black Camaro. Pet. App. 3a–5a, 7a, 38a & n.3.

Ignoring these and other conspicuous features that could have averted their mistake, the heavily armed FBI SWAT team smashed in the front door of 3756 Denville Trace, detonated a flashbang grenade in the home's entryway, and rushed inside. Pet. App. 7a–8a.

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

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

The agents aggressively questioned Cliatt. But when he told them his address—3756 Denville Trace—"all the noise just ended." Pet. App. 8a, 79a. Realizing the SWAT team had raided the wrong house, Agent Guerra picked Cliatt off the floor, unshackled him, and said, "I'll be right back." *Id.* at 9a, 79a–80a.

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

* * *

Guerra would later claim that, despite preparatory steps he purportedly took to survey the target location of his warrant, his personal GPS device had misled him. According to Guerra, while he had input "3741 Landau Lane" into his GPS, it had directed him to 3756 Denville Trace instead. Guerra could not prove this, however, because he threw away the GPS before Petitioners could examine it in discovery. Pet. App. 6a, 9a, 40a–41a.

III. The lower courts granted the government sovereign immunity for the mistaken raid of Petitioners' home.

1. Petitioners sued the United States under the FTCA for the negligent and wrongful acts of the FBI agents who raided their home, pleading five counts.[1] Pet.

[1] Martin (and G.W.) filed suit separately from Cliatt, but the district court consolidated the cases. Petitioners also asserted a

App. 60a. Citing the discretionary-function exception, 28 U.S.C. 2680(a), the government moved for summary judgment. The district court granted it in part. Pet. App. 67a.

The Eleventh Circuit had held years earlier that the discretionary-function exception does not apply to claims that fall within the FTCA's law-enforcement proviso. See *Nguyen* v. *United States*, 556 F.3d 1244, 1260 (11th Cir. 2009) ("[W]here * * * the § 2680(h) proviso applies to waive sovereign immunity, the exception to waiver contained in § 2680(a) is of no effect."). So the district court broke Petitioners' FTCA claims into two groups: proviso claims[2] and non-proviso claims.[3] Pet. App. 59a–60a (citing *Williams* v. *United States*, 314 Fed. Appx. 253, 258–259 (11th Cir. 2009)).

The district court denied summary judgment for three of the four proviso claims. Although the record did not support a claim for false arrest "because the arrest in this case was not executed pursuant to a warrant that named Plaintiffs," Pet. App. 63a, the district court held that it did support a claim for false imprisonment

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claim against Guerra under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), but the Eleventh Circuit granted Guerra qualified immunity on the basis that "the law at the time did not clearly establish that Guerra's preparatory steps before the warrant execution would violate the Fourth Amendment." Pet. App. 15a. This petition concerns only Petitioners' FTCA claims.

[2] These claims are false arrest/false imprisonment (Count I) and assault and battery (Count II).

[3] These claims are trespass/interference with private property (Count III), negligent/intentional infliction of emotional distress (Count IV), and negligence (Count V).

because "the record shows that the 3741 Landau and Riley warrants were void as to Plaintiffs, and defendants have not demonstrated that the arrest was otherwise legal," *id.* at 65a. Petitioners' assault and battery claims likewise could proceed because the FBI agents had unlawfully touched Petitioners. *Id.* at 65a–67a.

But the district court granted summary judgment on the non-proviso claims under the discretionary-function exception. Because "Guerra's efforts in preparing to execute the warrant at 3741 Landau involved judgment and choice" and "no statute, regulation or even internal operating procedure prescrib[ed] Guerra's course of action," the district court concluded that his decision "involve[d] policy considerations and should not be subject to judicial second-guessing." Pet. App. 57a–58a (citing *Zelaya* v. *United States*, 781 F.3d 1315 (11th Cir. 2015); *Mesa* v. *United States*, 123 F.3d 1435 (11th Cir. 1997)).

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

The government moved for reconsideration in light of *Kordash* (though it had not previously raised the Supremacy Clause as an affirmative defense), and the district court granted it. The district court then held that the Supremacy Clause barred Petitioners' proviso claims. Pet. App. 25a. "Because Guerra was acting within the scope of his discretionary duty, and his

actions did not violate the Fourth Amendment," the district court concluded that the Supremacy Clause barred Petitioners' remaining FTCA claims. *Id.* at 27a.

3. Petitioners appealed, and the Eleventh Circuit affirmed the district court's dismissal of Petitioners' FTCA claims. Like the district court, the circuit court divided the claims between proviso claims and non-proviso claims. It then held that the former were barred by the Supremacy Clause and the latter by the discretionary-function exception.

The panel explained that the application of the discretionary-function exception is determined by a two-part test assessing whether the government employee's act (1) "involved an element of judgment or choice" and (2) "represented the kind of conduct 'that the discretionary function exception was designed to shield.'" Pet. App. 16a (quoting *Swafford* v. *United States*, 839 F.3d 1365, 1370 (11th Cir. 2016)). "Similar to the discretionary function exception," the panel explained, "the Supremacy Clause ensures that states do not impede or burden the execution of federal law." Pet. App. 16a–17a (citing *Denson* v. *United States*, 574 F.3d 1318, 1336–1337 (11th Cir. 2009)). Because Guerra "acted within the scope of his discretionary authority" in conducting the raid and was otherwise entitled to qualified immunity,[4] the

[4] Addressing qualified immunity and *Bivens*, the panel emphasized that "the sole issue for our resolution is whether [Guerra's] actions violated clearly established law" under the second prong of the qualified immunity analysis. Pet. App. 12a. The panel concluded that "the law at the time did not clearly establish that Guerra's preparatory steps before the warrant execution would violate the Fourth Amendment." *Id.* at 15a. But the panel did not, contrary to a later imprecise statement in the opinion below, hold that Guerra's

Supremacy Clause barred Petitioners' proviso claims. Pet. App. 19a.

Petitioners' non-proviso claims were similarly barred, the panel explained, because "Guerra enjoyed discretion in how he prepared for the warrant execution" since "the FBI did not have stringent policies or procedures in place that dictate *how* agents are to prepare for warrant executions." Pet. App. 17a–18a; *id.* at 18a ("[T]he preparatory actions Guerra took before the warrant execution" were "'susceptible to policy analysis.'" (quoting *Mesa*, 123 F.3d at 1438)). According to the panel, "[t]he discretionary function exception applies *unless* a source of federal law 'specifically prescribes' a course of conduct." Pet. App. 16a (quoting *Shivers* v. *United States*, 1 F.4th 924, 931 (11th Cir. 2021)). "Although it is unfortunate that * * * Guerra executed the warrant at the wrong house," the panel concluded, "his actions, nevertheless, 'fall squarely within the discretionary function exception.'" Pet. App. 18a (quoting *Shivers*, 1 F.4th at 929).

The Eleventh Circuit denied rehearing, and this petition follows.

Reasons for Granting the Petition

Through the FTCA, Congress waived federal sovereign immunity to provide a cause of action for the negligent or wrongful acts of federal employees committed within the scope of their employment. 28 U.S.C.

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actions comported with the Fourth Amendment. Contra Pet. App. 19a ("As we already explained * * * Guerra's actions did not violate the Fourth Amendment[.]").

1346(b)(1). Congress later expanded the FTCA to reach even intentional wrongs through the law-enforcement proviso, 28 U.S.C. 2680(h), and ensure that "innocent individuals who are subjected to raids * * * have a cause of action against * * * the Federal Government." *Carlson*, 446 U.S. at 19–20 (quotation omitted).

Here, an FBI SWAT team committed a quintessentially negligent and wrongful act: It raided the wrong house. But the Eleventh Circuit denied Petitioners any cause of action. The court began from the premise that an FBI agent has the discretion to do anything or nothing at all to ensure he raids the correct house because the FBI "has no official policy or practice with respect to how agents are to locate or to navigate to the target address of a search warrant." Pet. App. 15a; *id.* at 17a–18a ("Guerra enjoyed discretion [because] the FBI did not have stringent policies or procedures in place that dictate *how* agents are to prepare for warrant executions."). The opinion below then held that Petitioners' FTCA claims under the law-enforcement proviso are barred by the Supremacy Clause and that the rest of Petitioners' claims are barred by the discretionary-function exception. *Id.* at 19a. These holdings usurp "Congress' policymaking role," *Egbert* v. *Boule*, 596 U.S. 482, 497 (2022), conflict with decisions of this Court, and contribute to multiple circuit splits. Indeed, because there are "longstanding, recurring circuit splits involving the discretionary-function exception," lower court judges have called on the Court to "revisit the test for when the FTCA's discretionary-function exception applies" and provide "clearer guidance." *E.g.*, *Xi*, 68 F.4th at 842–844 (Bibas, J., concurring).

This case is a good vehicle for the Court to do so. It's undisputed that Agent Guerra and his team committed an avoidable and dangerous mistake by raiding the wrong house. So there are no messy fact disputes. And the Eleventh Circuit's holdings on the questions presented leave Petitioners—and the many similarly situated plaintiffs who will come after them—entirely remediless. So the application of the law to this case will determine whether the FTCA applies at all. Finally, this Court has already staked out several limits to the discretionary-function exception and law-enforcement proviso and explained that the courts should not import sovereign immunity back into the FTCA—especially for cases arising from wrong-house raids.[5] So the answers to the questions presented can draw on principles this Court has already articulated.

This Court recently confirmed that "creating a cause of action is a legislative endeavor." *Egbert*, 596 U.S. at 491. The Court should grant the petition, resolve the splits, and ensure that the cause of action Congress created through the FTCA is not read out of existence by judicial decisions like the opinion below.

I. The Eleventh Circuit has created a unique Supremacy Clause bar to the FTCA that overrides congressional intent.

Congress enacted the FTCA to accept federal liability for the negligent or wrongful acts of government employees "within the scope of [their] office or

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[5] See, *e.g.*, *Gaubert*, 499 U.S. at 322–323 (exception); *Millbrook* v. *United States*, 569 U.S. 50, 56 (2013) (proviso); *Indian Towing*, 350 U.S. at 69 (immunity); *Carlson,* 446 U.S. at 19–20 (raids).

employment." 28 U.S.C. 1346(b)(1). But the Eleventh Circuit invokes the Supremacy Clause to immunize the government for the very same acts—those that have "some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law." *Kordash*, 51 F.4th at 1293 (quoting *Denson*, 574 F.3d at 1348).

No other circuit does this. The Eleventh Circuit rule denies a congressionally enacted cause of action in cases where the FTCA should uncontroversially apply. After all, the vast majority of negligent and wrongful acts by an "employee of the Government while acting within the scope of his office or employment," 28 U.S.C. 1346(b)(1), necessarily will have *some nexus* with federal policy and *could be characterized* as complying with federal law, Pet. App. 17a.

What Congress has given, the Eleventh Circuit has taken away.

A. In 2009, the Eleventh Circuit announced a Supremacy Clause bar to the FTCA.

Sixty-three years after Congress enacted the FTCA, the Eleventh Circuit discovered an enormous loophole in the statute: the Supremacy Clause. In *Denson* v. *United States*, the court announced "an affirmative defense [to the FTCA] under the Supremacy Clause of the Constitution." 574 F.3d at 1344–1345. If a federal employee's "acts [1] have some nexus with furthering federal policy and [2] can reasonably be characterized as complying with the full range of federal law," the Eleventh Circuit holds that they cannot be remedied under the FTCA. *Id.* at 1348. Thus, in the Eleventh Circuit, the

very same requirement that creates FTCA liability—the act of a federal employee within the scope of his employment—bars FTCA claims altogether.

In *Denson*, the court considered "a prolix, discursive" complaint that "lump[ed] together * * * a host of claims under the Constitution [*i.e.*, *Bivens* claims] and Florida tort law [*i.e.*, FTCA claims]." 574 F.3d at 1328. These claims were raised by a suspicious traveler detained at a South Florida airport. As the starting point for its decision, the Eleventh Circuit emphasized: "[W]e are ever mindful that this case involves the actions of federal officers charged with safeguarding the United States border—a locus where the federal interest rises to its zenith[.]" *Id.* at 1345. Thus, the Eleventh Circuit announced, its newly conceived Supremacy Clause bar would "promote[] sound social policy and provide[] Customs inspectors a degree of flexibility and protection as they work to secure our borders." *Id.* at 1344.

With these foundational concerns, the Eleventh Circuit pieced together a novel theory of supremacy purporting to explain how the FTCA—a federal law—"interfer[es] with or otherwise imped[es] federal officers as they perform their lawful duties." *Denson*, 574 F.3d at 1346. Citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *In re Neagle*, 135 U.S. 1 (1890), the Eleventh Circuit explained: "[T]he Supremacy Clause was designed to ensure that states do not 'retard, impede, burden, or in any manner control' the execution of federal law." *Denson*, 574 F.3d at 1345 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 436). This means that "[a]n officer of the United States cannot be held in violation of state law while simultaneously executing his duties prescribed by federal law." *Denson*, 574 F.3d at 1347

(drawing a "broader application" from *Neagle*, 135 U.S. at 57). And because the FTCA provides liability "in accordance with the law of the place where the act * * * occurred"—typically, state tort law—FTCA "liability simply cannot attach to the acts taken by federal officers in the course of their duties and committed in compliance with federal law[.]" *Denson*, 574 F.3d at 1349.

In 2022, the Eleventh Circuit expanded the Supremacy Clause bar in *Kordash* v. *United States*. There, the court addressed another South Florida airport detention. *Kordash* mechanically applied *Denson* to its similar facts, 51 F.4th at 1293–1294 (citing *Denson*, 51 F.3d at 1348), but *Kordash* then extended the bar. *Kordash* clarified that there is a sufficient federal nexus to bar FTCA claims whenever a federal employee acts within the scope of his discretionary authority. 51 F.4th at 1294; see also Pet. App. 25a–26a.

Finally, through the unpublished opinion below, the Eleventh Circuit demonstrates that its 15-year-old Supremacy Clause bar is both well-entrenched and applicable to *all* FTCA claims—not just those at sensitive border locations, where federal interests are at their "zenith." *Denson*, 574 F.3d at 1345; see also *Kordash*, 51 F.4th at 1293–1294. As this case makes clear, the Supremacy Clause bars all FTCA claims in the Eleventh Circuit for federal acts that "have some nexus with furthering federal policy." Pet. App. 17a. And this nexus exists whenever a federal employee "act[s] within the scope of his discretionary authority." *Ibid.*

The Eleventh Circuit's interpretation of the Supremacy Clause defeats Congress's waiver of sovereign immunity through the FTCA in general, 28 U.S.C. 1346(b)(1), and the law-enforcement proviso in

particular, 28 U.S.C. 2680(h); see also *Carlson*, 446 U.S. at 19–20; S. Rep. No. 93-588, at 3 (1973) ("[A]fter the date of enactment of [the proviso], innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action against * * * the Federal Government."). Although Congress extends a cause of action to innocent victims of federal raids like Petitioners and other individuals who are harmed by negligent or wrongful acts of federal law enforcement officers, the Eleventh Circuit has withdrawn that cause of action based on its own policy determinations. *Denson*, 574 F.3d at 1344 (citing "sound social policy").

The Eleventh Circuit's rule usurps "Congress' policymaking role," *Egbert*, 596 U.S. at 496, and shields through sovereign immunity many (if not most) of the acts Congress intended to cover through the FTCA. This Court recently observed that "[t]here are many reasons to think that Congress, not the courts, is better suited to authorize * * * a damages remedy." *Id.* at 499. Through the FTCA, it has—but the Eleventh Circuit deems that remedy unconstitutional in many cases.

B. It's axiomatic that a federal statute like the FTCA is the supreme Law of the Land and cannot conflict with the Supremacy Clause.

The Eleventh Circuit is the only circuit to adopt a Supremacy Clause bar or anything like it. And for good reason: The Supremacy Clause pronounces the "Constitution, and the Laws of the United States * * * the supreme Law of the Land." U.S. Const. art. VI, cl. 2. To state the obvious, the FTCA *is* a federal law. This means it is "the supreme Law of the Land" that the founders designed the Supremacy Clause to safeguard. The

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

Indeed, Eleventh Circuit Judge Edward Carnes pointed this out in *Denson*: "[U]nder the FTCA, there can be no [conflict between state and federal law] because the sovereign has incorporated state tort law into federal law to the extent stated in the statute." 574 F.3d at 1352 (Carnes, J., concurring); see also *Huddleston* v. *United States*, 485 Fed. Appx. 744, 746 (6th Cir. 2012) ("Because federal law incorporates state substantive law for the purposes of FTCA claims, applying [state law] does not run afoul of the Supremacy Clause."). And although no other circuit has directly addressed the Supremacy Clause bar, they have allowed plenty of FTCA claims to proceed that would be doomed by the bar in the Eleventh Circuit. See, *e.g.*, *Castro* v. *United States*, 34 F.3d 106, 110–111 (2d Cir. 1994) (allowing claims for a wrong-house raid); *Leuthauser* v. *United States*, 71 F.4th 1189, 1192 (9th Cir. 2023) (allowing non-raid, proviso claims); *S.R.P.* v. *United States*, 676 F.3d 329, 336 (3d Cir. 2012) (allowing non-raid, non-proviso claims). And the lower courts have generally confirmed that the Supremacy Clause has nothing to say in federal-vs-federal disputes.[6]

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[6] See, *e.g.*, *Britt* v. *Grovers Supply Co.*, 978 F.2d 1441, 1446–1447 (5th Cir. 1992) (conflict between federal statutes); *Exxon Shipping Co.* v. *Department of Interior*, 34 F.3d 774, 778 (9th Cir. 1994) (conflict between federal judiciary and federal executives); *Bible* v. *United Student Aid Funds, Inc.*, 799 F.3d 633, 660 (7th Cir. 2015) ("It is well settled that federal law does not preempt a federal law claim alleging a violation of another federal statute."); see also *Bramer* v. *United States*, 595 F.2d 1141, 1144 n.7 (9th Cir. 1979);

The Eleventh Circuit's Supremacy Clause bar thus represents a single-circuit-outlier-rule that has persisted for 15 years without another circuit even nodding favorably in its direction. Through the opinion below, the Eleventh Circuit confirms that the bar extends beyond airports and into homes and everywhere else. Because the Eleventh Circuit applies the Supremacy Clause bar whenever an official "act[s] within the scope of his discretionary authority," there is little—if anything—left of the law-enforcement proviso or, indeed, the FTCA's cause of action for "negligent or wrongful act[s]" "within the scope of [federal] employment." 28 U.S.C. 1346(b)(1).

As this Court explained when interpreting the FTCA nearly 75 years ago, courts should not "import immunity back into a statute designed to limit it." *Indian Towing*, 350 U.S. at 69. But that is precisely what the Eleventh Circuit has done. This Court should grant the petition to address this issue of exceptional importance and ensure that the FTCA provides the remedies Congress codified.

* * *

Alternatively, the Supremacy Clause bar issue is appropriate for summary reversal. See, *e.g.*, *Shoop* v. *Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting from denial of certiorari) (noting that summary reversal is appropriate when an appellate decision is "obviously wrong and squarely foreclosed by [Supreme Court] precedent" and "particularly appropriate" when the appeals court committed a "fundamental erro[r] that this

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Leaman v. *Ohio Dep't of Mental Retardation & Dev. Disabilities*, 825 F.2d 946, 961 (6th Cir. 1987) (en banc) (Merritt, J., dissenting).

Court has repeatedly admonished it to avoid" (quotations omitted)). The Eleventh Circuit's Supremacy Clause bar—which is so well entrenched that the court is using it to issue unpublished opinions—reimports immunity into the FTCA just as *Indian Towing* admonished courts not to.

The Supremacy Clause bar also denies a cause of action for a large number of FTCA claims that this Court's precedent instructs may proceed: *e.g.*, a mail truck driver crashing into a taxi cab, *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); a postal worker delivering mail in a way that creates a tripping hazard, *Dolan* v. *USPS*, 546 U.S. 481 (2006); or a member of the Coast Guard allowing a lighthouse to fall into disrepair, *Indian Towing*, 350 U.S. 61. In each example: (1) the acts have some nexus with federal policy and could be characterized as complying with federal law; (2) this Court allowed FTCA claims to proceed; but (3) the Eleventh Circuit would extend sovereign immunity to the claims.

II. The Eleventh Circuit and its sisters are hopelessly split over the FTCA's discretionary-function exception.

Unlike the Supremacy Clause bar, about which only the Eleventh Circuit is confused, all the circuits struggle to apply the FTCA's discretionary-function exception. The exception excludes from the FTCA's waiver of sovereign immunity any claim "based upon the exercise or performance [of] 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 last time this Court addressed the exception was 1991 in *United States* v. *Gaubert*. There, the Court articulated a two-part test. The discretionary-function exception applies if the acts at issue (1) "involv[e] an element of judgment or choice" and (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322–323 (internal quotation marks and citations omitted). Still, *Gaubert* cautioned that the exception "protects only government actions and decisions based on considerations of public policy." *Id.* at 323 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 537 (1988)). As a result, even "obviously discretionary acts" do not fall within the exception unless they are "based on the purposes that [some] regulatory regime seeks to accomplish." *Gaubert*, 499 U.S. at 325 n.7.

Before the Court decided *Gaubert*, "lower courts * * * had difficulty in applying th[e] test." *Gaubert*, 499 U.S. at 335 (Scalia, J., concurring in part). Three decades after *Gaubert*, "courts are still struggling." *Xi*, 68 F.4th at 842 (Bibas, J., concurring); see also *Chadd* v. *United States*, 794 F.3d 1104, 1114 (9th Cir. 2015) (Kleinfeld, J., dissenting) (noting that "the courts have had difficulty applying the rule" (quotation omitted)). As Judge Bibas observed last year, there is "significant confusion about how to apply the test" from *Gaubert*, leading to "at least three longstanding, recurring circuit splits involving the discretionary-function exception." *Xi*, 68 F.4th at 843 (Bibas, J., concurring).

We count at least four.

A. The circuits are split over whether the exception applies to claims brought under the law-enforcement proviso.

First, "there is a split over whether claims that fall within the * * * law-enforcement proviso must also fall outside the discretionary-function exception." *Xi*, 68 F.4th at 843 (Bibas, J., concurring). Six circuits (the Second, Fourth, Fifth, Seventh, Ninth, and D.C.) hold that plaintiffs seeking to sue for a proviso tort must still clear the discretionary-function hurdle.[7] But one (the Eleventh) holds that proviso claims are never subject to the discretionary-function exception. *Nguyen*, 556 F.3d at 1260.

This split is salient here because it explains why the opinion below divides Petitioners' claims into proviso and non-proviso categories and why the Eleventh Circuit had to create a Supremacy Clause bar to extinguish the former.

In *Nguyen* v. *United States*—decided just seven months before *Denson* announced the Supremacy Clause bar—the Eleventh Circuit held that the discretionary-function exception does not apply to FTCA claims Congress authorized through the law-enforcement proviso. *Nguyen*, 556 F.3d at 1260. Observing that the discretionary-function exception could conflict with the law-enforcement proviso whenever a proviso tort

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[7] *Caban* v. *United States*, 671 F.2d 1230, 1234 (2d Cir. 1982); *Medina* v. *United States*, 259 F.3d 220, 226 (4th Cir. 2001); *Joiner* v. *United States*, 955 F.3d 399, 406 (5th Cir. 2020); *Linder* v. *United States*, 937 F.3d 1087, 1089 (7th Cir. 2019); *Gasho* v. *United States*, 39 F.3d 1420, 1433 (9th Cir. 1994); *Gray* v. *Bell*, 712 F.2d 490, 507–508 (D.C. Cir. 1983).

simultaneously involves a discretionary function, *Nguyen* held that the exception must yield to the proviso. *Id.* at 1252–1260.

Interpreting the FTCA's text, the Eleventh Circuit employed "[t]wo fundamental canons of statutory construction, as well as the clear Congressional purpose behind the [law-enforcement] proviso[.]" *Nguyen*, 556 F.3d at 1252. First, the proviso is more specific than the exception. *Id.* at 1253. Second, the proviso was enacted 28 years after the exception. *Ibid.* And third, the "Congressional purpose behind the proviso * * * could not be clearer." *Ibid.*

As explained above, Congress enacted the law-enforcement proviso in response to "highly-publicized raids by federal narcotics agents on the homes of innocent families in Collinsville, Illinois." *Nguyen*, 556 F.3d at 1254. These raids were similar to the one Petitioners suffered: In each, heavily armed federal officers forced their way into an innocent family's home at night, damaged their property, and interrogated them at gunpoint before realizing that they had the wrong house. See 119 Cong. Rec. 23246 (1973). And as with the raid on Petitioners' home, the Collinsville raids were conducted "based on mistaken information[.]" *Nguyen*, 556 F.3d at 1254 (citation omitted).

After the Collinsville raids, two things became clear to Congress: First, because it did not waive sovereign immunity for most intentional torts, the FTCA often left victims of wrong-house raids remediless. *Nguyen*, 556 F.3d at 1255 ("There is no effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which the Collinsville families have been subjected." (citation

omitted)). And second, something had to be done. *Ibid.* ("The injustice of thi[s] provision should be manifest[.]" (citation omitted)). So Congress amended the FTCA in 1974 to include the law-enforcement proviso. *Carlson*, 446 U.S. at 19–20; *Nguyen*, 556 F.3d at 1255.

Congress intended the law-enforcement proviso to fill a gap in the remedy landscape. For as long as the FTCA had existed, individuals could bring negligence claims for the acts of federal officers. But to avoid liability, officers needed only to claim that their conduct was intentional.[8] Before the proviso:

> [U]nder the Federal Tort[] Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal "no-knock" raid.

Nguyen, 556 F.3d at 1255 (quoting S. Rep. No. 93-588, at 3 (1973)). Congress corrected this injustice through the proviso.

The upshot, the Eleventh Circuit explained, is that applying the discretionary-function exception to bar claims permitted by the law-enforcement proviso "would defeat * * * the clear purpose of the 1974 amendment." *Nguyen*, 556 F.3d at 1256. This explains why the opinion below splits Petitioners' claims

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[8] This is what happened in Collinsville. Eric Wang, Note, *Tortious Constructions*, 95 N.Y.U. L. Rev. 1943, 1954–1955 (2020) ("The FTCA at the time left the victims of the Collinsville raids without recourse *due to the intentional torts exception*; Congress acted swiftly in response." (emphasis added)).

between proviso and non-proviso claims and why the Eleventh Circuit has to employ the Supremacy Clause, rather than the discretionary-function exception, to defeat Petitioners' proviso claims.

In the circuits that apply the discretionary-function exception to proviso claims, Petitioners' claims would have risen or fallen based on the broader application of the exception. But the circuits are split over this application, too.

B. The circuits are split over whether the exception requires actual policy grounding.

The circuits also disagree over "whether [the actions taken] are *susceptible* to policy analysis." *Gaubert,* 499 U.S. at 325 (emphasis added). Nine circuits (the Eleventh, First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth) hold that a discretionary act "need not be actually grounded in policy considerations," so long as it is "by its nature, susceptible to a policy analysis."[9] In other words, to trigger the exception, an act "need only have been theoretically susceptible to policy analysis." *Jude* v. *Commissioner of Soc. Sec.*, 908 F.3d 152, 159 (6th Cir. 2018).

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[9] *Miller* v. *United States*, 163 F.3d 591, 593 (9th Cir. 1998); see also *Sánchez* v. *United States*, 671 F.3d 86, 93 (1st Cir. 2012); *Cangemi* v. *United States*, 13 F.4th 115, 133 (2d Cir. 2021); *Baum* v. *United States*, 986 F.2d 716, 721 (4th Cir. 1993); *Spotts* v. *United States*, 613 F.3d 559, 572–573 (5th Cir. 2010); *Jude* v. *Commissioner of Soc. Sec.*, 908 F.3d 152, 159 (6th Cir. 2018); *Herden* v. *United States*, 726 F.3d 1042, 1049 n.5 (8th Cir. 2014) (en banc); *Kiehn* v. *United States*, 984 F.2d 1100, 1105 (10th Cir. 1993); *Ochran* v. *United States*, 117 F.3d 495, 500 (11th Cir. 1997).

The Eleventh Circuit's opinion below illustrates this exception-swallows-the-rule interpretation. The discretionary-function exception applies "*unless* a source of federal law 'specifically prescribes' a course of conduct." Pet. App. 16a (quoting *Shivers*, 1 F.4th at 931). But see *C.M.* v. *United States*, 672 F. Supp. 3d 288, 334 (W.D. Tex. 2023) (explaining that "neither cited Supreme Court case [in *Shivers*] uses 'unless' in that context"). And because the FBI "has no official policy or practice with respect to how agents are to locate or navigate to the target address of a search warrant," the panel concluded that "[t]he FBI affords its agents discretion in preparing for warrant executions." Pet. App. 15a. Therefore, Guerra's actions are "susceptible to policy analysis," and the discretionary-function exception applies. *Id.* at 18a (citing *Mesa*, 123 F.3d at 1438). No bona fide policy consideration is required.

One circuit (the Third) takes a different approach—one supported by several dissenting and concurring judges from other circuits[10] and scholarship observing that the majority rule suffocates "the promise of the FTCA * * * beneath a blanket of fictional policy immunity that transforms ordinary carelessness into policy-based political choices." Gregory C. Sisk, *Immunity for Imaginary Policy in Tort Claims Against the Federal*

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[10] See, *e.g.*, *Chadd*, 794 F.3d at 1114 (Berzon, J., concurring) (criticizing *Miller,* 163 F.3d 591, and explaining that "nothing in *Gaubert* * * * switches the foundational question from whether the decision was 'based on considerations of public policy' to whether it hypothetically could have been"); *id.* at 1128 (Kleinfeld, J., dissenting); *Herden*, 726 F.3d at 1051 (Melloy, J., dissenting); *Gonzalez* v. *United States*, 814 F.3d 1022, 1038 (9th Cir. 2016) (Berzon, J., dissenting).

Government, 100 Notre Dame L. Rev. (forthcoming 2024) (manuscript at 6).[11] Unlike its sister circuits, the Third Circuit holds that "susceptibility analysis is not a toothless standard that the [G]overnment can satisfy merely by associating a decision with a regulatory concern." *S.R.P.*, 676 F.3d at 336 (quotation omitted). Instead, to ensure that the exception doesn't swallow the rule, the Third Circuit demands a "rational nexus" between the act at issue "and social, economic and political concerns" for the exception to apply. *Cestonaro* v. *United States*, 211 F.3d 749, 759 (3d Cir. 2000). To trigger immunity, a federal employee's acts must actually—not just hypothetically—"be grounded in the policy of the regulatory regime." *Id.* at 753 (quotation omitted).

The minority approach is consistent with the examples this Court has given over the years, while the majority approach is not. For instance, in *Gaubert*, the Court confirmed that even "obviously discretionary acts" can fall outside the exception. Take driving for example:

> If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Gaubert, 499 U.S. at 325 n.7. Justice Scalia noted in *Gaubert*, too, that the hiring decision of a low-level

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[11] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4749341.

federal officer "authorized to hire a bank consultant by applying ordinary standards of business judgment, and not authorized to consider matters of Government policy in the process" would not be covered by the exception, "even though some element of choice is involved." *Id.* at 337 (Scalia, J., concurring). And in *Indian Towing*, the Court held that the exception did not apply to the negligent upkeep of lighthouses, even though the deployment of maritime resources by a branch of the military is theoretically susceptible to policy analysis. 350 U.S. at 68–69.

The same logic applies to a case like this. A federal driver lacks the discretion to crash a car. A federal banking official lacks the discretion to make a bad hire. A member of the Coast Guard lacks the discretion to neglect a lighthouse. And an FBI agent lacks the discretion to raid the wrong house. Had the opinion below applied the Third Circuit's interpretation of the exception, Petitioners' claims would have survived. Agent Guerra's act of raiding an innocent family's home without confirming that the address matched his warrant lacks any nexus with "social, economic, and policy concerns" of any federal "regulatory regime." *S.R.P.*, 676 F.3d at 336.

C. The circuits are split over whether the exception covers unconstitutional conduct.

The circuits further disagree about "whether unconstitutional conduct necessarily falls outside the exception." *Xi*, 68 F.4th at 843 (Bibas, J., concurring). Seven circuits (the First, Second, Third, Fourth, Eighth, Ninth, and D.C.) hold that the discretionary-function exception does not apply when a federal officer's conduct

is unconstitutional.[12] These courts reason that "[f]ederal officials do not possess discretion to violate constitutional rights[,]" and when they do so, the discretionary-function exception does not affect a victim's ability to recover under the FTCA. *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 120 (3rd Cir. 1988).

On the other side of this split are two circuits (the Eleventh and Seventh), which hold that the discretionary-function exception can apply even when a federal officer violates the Constitution.[13] In these circuits, "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act[.]" *Linder* v. *United States*, 937 F.3d 1087, 1090 (7th Cir. 2019); see also *Shivers*, 1 F.4th at 930 ("Congress left no room for the extra-textual 'constitutional-claims exclusion' for which Shivers advocates." (citation omitted)).

If the Eleventh Circuit sided with most courts that have weighed in on this split, Petitioners' non-proviso claims would have survived below. The panel's constitutional analysis rested exclusively on whether Guerra violated clearly established law for purposes of qualified immunity. Pet. App. 12a ("[T]he sole issue for our resolution is whether [Guerra's] actions violated clearly

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[12] *Limone* v. *United States*, 579 F.3d 79, 102 (1st Cir. 2009); *Myers & Myers Inc.* v. *USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975); *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 120 (3d Cir. 1988); *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Raz* v. *United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nurse* v. *United States*, 226 F.3d 996, 1002 (9th Cir. 2000); *Loumiet* v. *United States*, 828 F.3d 935, 943 (D.C. Cir. 2016).

[13] *Linder* v. *United States*, 937 F.3d 1087, 1090 (7th Cir. 2019); *Shivers* v. *United States*, 1 F.4th 924, 930–934 (11th Cir. 2021).

established law."); see also p. 13 n.4, *supra*. Had the Eleventh Circuit used, for instance, the First or Third Circuit rule, the opinion below would have—at a minimum—had to directly address whether Guerra and his team violated the Fourth Amendment when they raided the wrong house without confirming its address or other conspicuous features. *Xi*, 68 F.4th at 839–840 (3d Cir.) ("[The] 'clearly established' requirement has no place [in the discretionary-function exception analysis], where it is unmoored from both precedent and purpose."); *Torres-Estrada* v. *Cases*, 88 F.4th 14, 22 (1st Cir. 2023) ("We agree with the Third Circuit and decline to import the 'clearly established' requirement into the discretionary-function exception analysis."). The raid here violated the Fourth Amendment, but the split allowed the Eleventh Circuit to sidestep this issue below.

D. The circuits are split over whether the exception shields careless acts.

Finally, "there is [also] a split over whether the exception applies when the challenged conduct was careless rather than a considered exercise of discretion." *Xi*, 68 F.4th at 843 (Bibas, J., concurring). Three circuits (the Second, Fourth, and Seventh) hold that—because careless action does not require the weighing of policy considerations—the exception cannot apply when an officer's sheer incompetence or laziness causes harm.[14] On the other side, three circuits (the Eighth, Ninth, and

[14] *Coulthurst* v. *United States*, 214 F.3d 106, 111 (2d Cir. 2000); *Rich* v. *United States*, 811 F.3d 140, 147 (4th Cir. 2015); *Palay* v. *United States*, 349 F.3d 418, 432 (7th Cir. 2003).

Tenth) allow careless acts to trigger the exception.[15] A federal employee's carelessness is always irrelevant in these circuits because "the government is not required to prove either that an affirmative decision was made, or that any decision actually involved the weighing of policy considerations, in order to claim immunity." *Gonzalez* v. *United States*, 814 F.3d 1022, 1033 (9th Cir. 2016).

Although the Eleventh Circuit has not taken a side in this split, the decision below treated Agent Guerra's mistaken decision to raid the wrong house as a choice within his discretion. But Agent Guerra blamed the mistake on his GPS and other basic oversights—not his weighing of policy considerations. The opinion below would have come out differently in the three circuits that exclude carelessness from the discretionary-function exception.

* * *

Unfortunately, the discretionary-function exception has become a jurisprudential quagmire, and the Court's attention is desperately needed: "With *Bivens* sharply limited, the stakes of clarifying the scope of the discretionary-function exception grow ever greater. Plaintiffs * * * must increasingly rely on the FTCA * * * . They, the government, and the courts would all benefit from clearer guidance." *Xi*, 68 F.4th at 844 (Bibas, J., concurring). This Court should grant the petition and provide it.

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[15] *Willis* v. *Boyd*, 993 F.3d 545, 549 (8th Cir. 2021); *Gonzalez* v. *United States*, 814 F.3d 1022, 1033 (9th Cir. 2016); *Kiehn* v. *United States*, 984 F.2d 1100, 1105 (10th Cir. 1993).

III. Because this case involves a wrong-house raid for which an innocent family has been left without a cause of action under the FTCA, it's a good vehicle to address the questions presented.

Given the entrenched, multifaceted disagreements among the circuits on the FTCA's interpretation, this case is as good a vehicle as is likely to come along. The core facts are clear; their application to the FTCA is straightforward; this Court has already provided its guidance on several related issues; and the questions presented are of great importance because they determine the extent to which the FTCA does—and can—waive federal sovereign immunity.

Circuit Confusion. As the previous section demonstrates, the discretionary-function exception jurisprudence "has gone off the rails." *Chadd*, 794 F.3d at 1114 (Berzon, J., concurring). There are so many splits on different but related issues that it's unlikely any single case will neatly raise them all; indeed, there are so many alternatives that only a rare case can cleanly present even one. For example, an FDA official might leave open a pasture gate, resulting in the death of livestock. There, the plaintiff might be able to invoke carelessness or lack of actual policy grounding, but not unconstitutionality or the law-enforcement proviso. Or a Customs and Border Protection commander might order a roadblock, causing the false imprisonment of an innocent motorist. There, the plaintiff could potentially rely on unconstitutionality or the proviso, but not carelessness or lack of policy grounding. No matter the scenario, interpretive whack-a-mole means that there will always be some other basis for how another circuit *might* have decided the case. As

a result, this petition can be criticized for similar reasons, but it gets as close to implicating all of the splits as any case is likely to.

Facts. Whatever the finer details of *why* Agent Guerra led his SWAT team to the wrong house and kicked in the door without confirming the address, the dispositive facts are undisputed: The FBI raided the wrong house, traumatizing an innocent family who had done nothing wrong. No factual disputes cloud the questions presented or their application to this case.

Application. Because the opinion below uses two separate legal doctrines to comprehensively deny Petitioners a remedy, the application of the FTCA to this case is straightforward. Under either question presented or both, the fundamental issue is whether Congress has provided a cause of action for wrong-house raids and other negligent or wrongful acts.

Importance. Relatedly, the Eleventh Circuit's stacking of the Supremacy Clause atop its unduly generous interpretation of the discretionary-function exception provides the opportunity for the Court to comprehensively address the FTCA's application to negligent or wrongful acts by federal law enforcement officers. If adopted across the country, the Eleventh Circuit's interpretation of the FTCA would mean that many—if not most—of the wrongs Congress enacted the FTCA to remedy would be left behind the shield of sovereign immunity. It would also mean that Congress is limited by the Supremacy Clause in its power to waive sovereign immunity. These are important issues.

Guidance. Although this petition presents two questions that the Court has never addressed directly, the

Court has already articulated several principles that will help answer them. *Carlson* clarified that the proviso was enacted to ensure a cause of action for federal raids. *Millbrook* addressed the general application of the law-enforcement proviso. *Gaubert* addressed the discretionary-function exception. And *Indian Towing* and *Kosak* explained that the courts should neither import immunity back into the FTCA nor interpret its exceptions so generously that it defeats the central purpose of the statute.

Conclusion

The Court should grant the petition and confirm the availability of the cause of action Congress conferred through the Federal Tort Claims Act.

Respectfully submitted on September 27, 2024,

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