No. 24-362

In The
Supreme Court of the United States

CURTRINA MARTIN, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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

PATRICK JAICOMO
Counsel of Record
ANYA BIDWELL
DYLAN MOORE
JARED MCCLAIN
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org

Counsel for Petitioners
Additional counsel listed on inside cover.

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

REPLY ARGUMENT

The government agrees that the circuits are split over both questions presented:

QP 1: "Petitioners correctly observe that the [Eleventh Circuit]'s reasoning for rejecting [claims under the Supremacy Clause] differs from the approach of other circuits[.]" BIO 8.

QP 2: "As petitioners acknowledge * * * , every court of appeals—except the Eleventh Circuit—to consider the issue has held that the discretionary function exception applies to tort claims listed in the law enforcement proviso[.]" *E.g.*, BIO 19.

And the government does not dispute their importance. On the contrary, it insists (BIO 22) that resolving the latter split is "necessary to a proper construction of the FTCA."

Even though the government agrees that the Eleventh Circuit is wrong about both the Supremacy Clause (BIO 20–21) and the discretionary-function exception (BIO 13–20), it urges this Court to leave the splits in place. In its view, this case is a bad vehicle because: (1) circuits other than the Eleventh Circuit apply the discretionary-function exception to law-enforcement proviso claims; (2) the exception, as interpreted by the government, is expansive enough to snuff out nearly all proviso claims; and, based on this interpretation, (3) "no court of appeals * * * would have reached a different result" than the Eleventh Circuit did below. BIO 8.

There are two problems with this vehicle argument. First, it hinges on a circuit split—one that caused the

Eleventh Circuit to create the Supremacy Clause bar and that, according to the government (BIO 22), the Court must resolve to properly construe the FTCA. Second, no court of appeals has adopted the government's all-encompassing interpretation of the discretionary-function exception. Many, however, have rejected it.

Because FBI Special Agent Lawrence Guerra's actions were unconstitutional, careless, and unmoored from actual policy (Pet. 23–34), Petitioners' claims would have proceeded under one theory or another in eight circuits. And were it not for the Eleventh Circuit's unique Supremacy Clause bar, Petitioners' proviso claims would have proceeded below. Pet. App. 17a–19a, *Martin* v. *United States,* 2024 WL 1716235, at *6–8 (11th Cir. Apr. 22, 2024).

Rather than mark this case as a bad vehicle, the BIO merely offers the government's merits arguments about how the Court should resolve the splits. As a result, the BIO complements the petition at the certiorari stage: Both agree that the Eleventh Circuit is on the wrong side of important circuit splits, and both show that this Court's intervention is necessary. Granting certiorari will not only allow the Court to resolve the splits, but also to address the apparent problem of unaccountable wrong-house raids in this country. See also *Jimerson* v. *Lewis*, petition for cert. pending, No. 24-473 (1983 claims barred by qualified immunity).

I. But for the Supremacy Clause bar, Petitioners' claims under the law-enforcement proviso would have proceeded.

As we have explained (Pet. 25–28), Congress enacted the FTCA's law-enforcement proviso in response to a pair of federal wrong-house raids in Collinsville, Illinois, just like the raid here. See also Members of Congress Amici Br. 4–13 (*e.g.*, observing that this case "aris[es] under the precise circumstances that motivated Congress to enact the law-enforcement proviso"); 28 U.S.C. 2680(h). But the Eleventh Circuit held that the FTCA violates the Supremacy Clause in this case. Pet. App. 16a–19a.

While the government agrees that the Eleventh Circuit's application of the Supremacy Clause to the FTCA is wrong (BIO 20–21), it argues that any error is harmless. This is incorrect. Under Eleventh Circuit precedent, Petitioners' proviso claims would have proceeded but for the Supremacy Clause bar, which effectively holds that large swaths of the FTCA are unconstitutional. This holding, alone, merits the Court's review.

1. In the Eleventh Circuit, Congress's waiver of sovereign immunity violates the Supremacy Clause whenever it applies to acts of federal employees that "have some nexus with furthering federal policy" (for instance, if officers act "within their discretionary authority") "and can reasonably be characterized as complying with the full range of federal law." Pet. App. 17a (quoting *Kordash* v. *United States*, 51 F.4th 1289, 1294 (11th Cir. 2022), and citing *Denson* v. *United States*, 574 F.3d 1318, 1348 (11th Cir. 2009)). Although the government agrees that the Supremacy Clause does not bar FTCA claims,

it nonetheless contends (BIO 20) that the Eleventh Circuit's "premise is sound." It is not.

Borrowing from its BIO in *Denson,* BIO at 25, *Denson* v. *United States*, 560 U.S. 952 (2010) (mem.), the government argues here (BIO 20) that "Congress could not have intended that the United States would be held liable for the actions of its law enforcement officers that are discretionary and within the scope of their official duties, because such conduct would ordinarily be privileged." But the government overlooks that in this case, unlike in *Denson*, the district court rejected the government's assertion of state-law privilege to extinguish Petitioners' proviso claims. Compare Pet. App. 63a–65a, *Martin* v. *United States*, 631 F. Supp. 3d 1281, 1299–1300 (N.D. Ga. 2022) (rejecting Georgia-law privilege arguments), with *Denson* v. *United States*, 2005 WL 8160747, at *7 (S.D. Fla. Aug. 9, 2005) (accepting Florida-law privilege arguments). Only after the district court rejected the government's privilege argument did it move for reconsideration here, raising the Supremacy Clause bar for the first time. Pet. App. 22a–23a, *Martin* v. *United States*, 2022 WL 18263039, at *1 (N.D. Ga. Dec. 30, 2022). So even if Congress somehow intended to exclude law-enforcement-privileged acts from the FTCA, but see 28 U.S.C. 1346(b)(1) (accepting "private person" liability); 28 U.S.C. 2680(h); S. Rep. No. 93-588 (1973), Guerra's acts were not privileged. The only thing standing between Petitioners and their ability to proceed on their proviso claims in the Eleventh Circuit is the Supremacy Clause bar.

2. Whatever interpretation of the discretionary-function exception ultimately emerges from the multiple circuit splits, two things are clear: This case invokes the

cause of action Congress created through the FTCA, and the Eleventh Circuit has held that cause of action unconstitutional under the Supremacy Clause.

This Court's review is needed because the Eleventh Circuit has imposed a constraint on Congress's power to waive sovereign immunity—a constitutional issue of "obvious importance." *Gonzales* v. *Raich*, 545 U.S. 1, 9 (2005). As the Members of Congress note (Br. 20), the Eleventh Circuit's application of this constraint "effectively declared the FTCA unconstitutional in its core applications." This Court regularly grants review when a lower court "exercise[s] * * * the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965); see, *e.g.*, *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding * * * invalidated a portion of an Act of Congress, we granted certiorari.").

The Supremacy Clause bar is independently worthy of this Court's review, if not summary reversal.

II. The discretionary-function exception would not have barred Petitioners' claims in most other circuits.

The government further argues (BIO 8) that, even if the Eleventh Circuit had not invoked the Supremacy Clause and had not excluded the proviso claims from the discretionary-function exception—that is to say, if the law of the Eleventh Circuit were the opposite of what it is—the errors in this case would be harmless. That's because, in the government's view, Petitioners' claims otherwise fall under the discretionary-function exception.

This is incorrect under any of the four splits we have identified (Pet. 23–34). Just as Petitioners' proviso claims would have proceeded in the Eleventh Circuit but for the Supremacy Clause bar, Petitioners' claims would have proceeded under the varying interpretations of the discretionary-function exception in most other circuits.

1. *Unconstitutional Conduct.* Because the wrong-house raid was unconstitutional, Petitioners' claims would have proceeded in seven circuits. Pet. 31–33. The Third Circuit recently explained, "we—and nearly every other circuit to have considered the issue—have held that 'conduct cannot be discretionary if it violates the Constitution[.]'" *Xi* v. *Haugen*, 68 F.4th 824, 838 (3d Cir. 2023). But the Eleventh and Seventh Circuits hold that the Constitution imposes no limits on an officer's discretionary acts. See Pet. 32 & n.13.

The government does not dispute this split. In fact, it agrees with Petitioners—but not the Eleventh Circuit—that the Constitution *can* curb discretion. It nevertheless argues (BIO 12–13) that this case does not implicate the split because the Eleventh Circuit held that Guerra did not violate the Fourth Amendment. And even if he did, the government asserts, only clearly established constitutional principles can limit discretion under the FTCA.

The government is wrong on the first point (a vehicle argument), and no circuit has ever adopted its position on the second (a merits argument), though two have explicitly rejected it.

First, the Eleventh Circuit did not reach the merits of Petitioners' Fourth Amendment claims. The govern-

ment cherry-picks several quotes to suggest otherwise, claiming that the panel "held that 'Guerra's actions did not violate the Fourth Amendment," BIO 13 (quoting Pet. App. 19a), and "'constitute[d] the kind of reasonable mistakes that the Fourth Amendment contemplates,'" *ibid.* (quoting Pet. App. 14a). It also contends that the panel "considered as part of its Supremacy Clause analysis whether Guerra 'complied with the full range of the Fourth Amendment.'" *Id.* at 13 n.2 (quoting Pet. App. 19a).

But the government omits language from the opinion below that expressly forecloses its interpretation. In the *Bivens* section of the opinion, the panel clarified that "the sole issue for our resolution is whether [Guerra's] actions violated clearly established law." Pet. App. 12a. The panel's constitutional discussion flows from this premise. Accordingly, the panel concluded—after addressing Guerra's "reasonable mistakes"—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 14a–15a. Further, the full-range-of-the-Fourth-Amendment quote comes from the panel's Supremacy Clause analysis, where the panel explained that the supremacy question involved "the same inquiry as the inquiry we employed in the qualified immunity analysis"—whether the law was clearly established. *Id.* at 19a.

Second, the government attempts to import a clearly-established-law requirement into the statutory analysis. It offers (BIO 13) a poisoned chalice: "The government agrees that a constitutional mandate * * * can eliminate a government official's discretion when it * * * *was clearly established before the officer acted*."

(Emphasis added.) To support this proposition, the government says (BIO 13) that "[m]any of the cases that petitioners cite are consistent with that position, as the government explained in its brief in opposition (at 8–11) in *Shivers* v. *United States*, 142 S. Ct. 1361 (2022) (No. 21-682)."

This is incorrect. No circuit has ever imported a clearly-established-law requirement into its discretionary-function analysis. When the government has invited circuits to do so, they have unanimously declined—as the government concedes. BIO 13 n.3 (citing *Torres-Estrada* v. *Cases*, 88 F.4th 14, 22 (1st Cir. 2023) ("We agree with the Third Circuit [in *Xi*] and decline to import the 'clearly established' requirement into the discretionary-function analysis.")); see also *Xi*, 68 F.4th at 839–840.

It is also worth noting that the government's position that the Constitution *can* limit the discretionary function exception is a change of course. In *Shivers*, the government recently defended the Eleventh Circuit's holding that "Congress left no room for [an] extra-textual 'constitutional-claims exclusion.'" *Shivers* v. *United States*, 1 F.4th 924, 930 (11th Cir. 2021); see, *e.g.*, *Shivers* BIO 4. But now, the government agrees (BIO 13) that the Eleventh Circuit is wrong. So rather than defend the *Shivers* rule here, the government offers its own views on how the exception and the Constitution intersect. This shift on the merits illustrates the deep confusion over the proper scope of the FTCA and further highlights the need for this Court's intervention. Cf. *Xi*, 68 F.4th at 843 (Bibas, J., concurring).

2. *Actual Policy Grounding.* Because raiding the wrong house is an act without "ground[ing] in the policy of [any] regulatory regime," Petitioners' claims would

have proceeded in the Third Circuit. *Cestonaro* v. *United States*, 211 F.3d 749, 753 (3d Cir. 2000). There, unlike in the Eleventh Circuit and others, hypothetical policy bases will not suffice. See Pet. 28–31.

Rather than dispute this split, the government mischaracterizes our position. The government argues (BIO 11) that Petitioners advocate the consideration of an "agent's subjective intent," whereas *United States* v. *Gaubert* requires consideration of an officer's acts alone. 499 U.S. 315, 325 (1991). From there, the government claims that the Eleventh Circuit correctly focused on Guerra's acts because the "'decision as to how to locate and identify the subject of an arrest warrant' is the kind of act that requires discretion." (Quoting Pet. App. 18a.) The government's argument is misdirected and circular.

First, we do not advocate for the consideration of subjective intent. Rather, we explain (Pet. 29–30) that the Third Circuit evaluates "the act"—not intent—of a government employee to assess whether there is "a 'rational nexus' between the act at issue 'and social, economic and political concerns[.]'" Pet. 30 (quoting *Cestonaro*, 211 F.3d at 759). Thus, the government is simply mistaken. Our position is that, if the Eleventh Circuit had considered whether a line-level FBI agent's act of leading a raid on the wrong house is one with an actual policy grounding in some social, economic, or political concern, the panel would have reached a different outcome.

Second, the government's opposition is unsound by its own logic. The parties agree that the discretionary-function exception extends only to acts "susceptible to policy analysis" and thus "of the kind that the discretionary function exception was designed to shield." BIO 11;

Pet. 24 (both quoting *Gaubert*, 499 U.S. at 322–323). From there, the government spins a circular conclusion. It defends the decision below because Guerra's failed attempt to locate the correct house to raid "is the kind of act that requires discretion." (Citing Pet. App. 18a.) But this conclusion says nothing about policy—actual or hypothetical—and disregards *Gaubert*'s second prong.

The Eleventh Circuit committed a similar error. There's no way to square its conclusion with *Gaubert*'s statement that even "obviously discretionary acts"—like driving—can fall outside the exception because, although they require the "constant exercise of discretion" they are acts that "can hardly be said to be grounded in regulatory policy." 499 U.S. at 325 n.7. The same is true for raiding a house and most other workaday law-enforcement acts.

3. *Carelessness*. Because raiding the wrong house is an inherently careless act, Petitioners' claims would have proceeded in the Second, Fourth, and Seventh Circuits. See also, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68–69 (1955) (holding that careless maintenance of a lighthouse triggered liability). The Eleventh Circuit has not adopted these circuits' approach. See Pet. 34.

Again, the government does not dispute the split. It responds (BIO 14) that "[p]etitioners did not argue in the court of appeals that Guerra had acted carelessly" and, anyway, that the Eleventh Circuit concluded Guerra took "'reasonable' steps to correctly identify the target of the search warrant and simply made a mistake[.]" (Citing Pet. App. 14a.)

On the contrary, Petitioners have consistently argued that Guerra's "acts and the manner in which they occurred" were negligent. Pet. C.A. Br. 44. After all, Petitioners pleaded negligence claims under the FTCA. The circuits that do not apply the discretionary-function exception to careless acts have used negligence as a proxy. See *Coulthurst* v. *United States*, 214 F.3d 106, 111 (2d Cir. 2000) ("If the plaintiff can establish that negligence of this sort occurred, his claims are not barred by the DFE, and he is entitled to recover under the FTCA."). The panel, however, dismissed Petitioners' claims without considering how Guerra's negligence affects the discretionary-function exception.

4. *The Law-Enforcement Proviso.* Finally, under Eleventh Circuit precedent, the discretionary-function exception does not apply to claims embraced by the law-enforcement proviso. *Nguyen* v. *United States*, 556 F.3d 1244, 1260 (11th Cir. 2009). As discussed above, this means that if the Court removes the Supremacy Clause bar, Petitioners' proviso claims will proceed.

The Court has explained it was "crystal clear" to Congress that the law-enforcement proviso would ensure a cause of action for federal wrong-house raids. *Carlson* v. *Green*, 446 U.S. 14, 19–20 (1980). Congress enacted the proviso to "deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit * * * assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process." S. Rep. No. 93-588, at 3 (1973). The text of the proviso accomplishes this, extending liability for these intentional

torts "with regard to acts or omissions of investigative or law enforcement officers[.]" 28 U.S.C. 2680(h).

The government (BIO 15–19) offers several arguments for why the Eleventh Circuit is wrong to hold that the FTCA allows the claims that the law-enforcement proviso says it does. The government then concludes (BIO 17) that the proviso only allows claims that would otherwise be actionable under *Bivens*, subject to qualified immunity. These arguments and the government's conclusion are incorrect, but they are better left for merits briefing. We agree with the government (BIO 22) that determining how the proviso and exception interact is "necessary to a proper construction of the FTCA." But this split is just one of the several that Petitioners' case implicates.

Conclusion

This Court should grant the petition and confirm the availability of the cause of action Congress conferred.

Respectfully submitted on December 20, 2024,

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

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

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

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

Counsel for Petitioners