No. 24-362

In the Supreme Court of the United States

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

v.

UNITED STATES, ET AL.,
Respondents.

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

BRIEF OF PROFESSOR GREGORY C. SISK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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March 14, 2025

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INTERESTS OF AMICUS CURIAE[1]

Professor Gregory Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). For more than three decades, his scholarly work has focused on civil litigation with the Federal Government. He has published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (West Academic Press, 2d ed., 2023) (hornbook); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 3d ed., 2023). Sisk has also written several articles on statutory waivers of federal sovereign immunity, including *Immunity for Imaginary Policy in Tort Claims Against the Federal Government*, 100 Notre Dame L. Rev. 729 (2025), and *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 Notre Dame L. Rev. 1789 (2021).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Federal Tort Claim Act (FTCA) case arises from a mistaken raid by federal law enforcement officers into a private dwelling, during which officers destroyed property, terrorized and restrained the occupants, and threatened them with brandished weapons. According to the civil complaint, these officers had failed to determine the correct address for execution of an arrest warrant and thus committed

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[1] No counsel for a party authored any portion of this brief, and no person or entity other than amici or its counsel made any monetary contribution to its preparation or submission. Both parties were timely notified in advance of the filing of this brief.

assault, battery, and false imprisonment against innocent persons.

The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of the FTCA action, holding that claims for both negligent and intentional torts otherwise permitted by the FTCA's law enforcement proviso were nonetheless barred by the Supremacy Clause, U.S. Const., art. VI, cl. 2. Pet. App. 18a. Viewing this federal law enforcement action as having "some nexus with furthering federal policy," the court believed this lawsuit implicated the Supremacy Clause. Pet. App. 19a. Under Eleventh Circuit precedent, FTCA claims are barred under the Supremacy Clause whenever federal employees "were acting within the scope of their discretionary duty." *Kordash v. United States*, 51 F.4th 1289, 1294 (11th Cir. 2022) (citation and quotation omitted).

In granting certiorari, this Court has asked the parties to address "[w]hether the Constitution's Supremacy Clause bars claims under the Federal Tort Claims Act when the negligent or wrongful acts of federal employees have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law."

The argument that the Supremacy Clause by independent force elevates federal law enforcement actions to paramount immunity collides directly with the constitutionally salient fact that Congress itself chose to afford compensation from the United States to those harmed by wrongful acts of law enforcement. Indeed, through the Law Enforcement Proviso to the FTCA, Congress specifically made the United States

liable not only for ordinary negligence but also for such intentional torts as assault, battery, false arrest, and false imprisonment when committed by "investigative or law enforcement officers" of the federal government. 28 U.S.C. § 2680(h).

When in the exercise of its legislative powers Congress has chosen to waive federal sovereign immunity to compensate those harmed by federal government wrongdoing—and further has chosen to accomplish this purpose by measuring liability under state tort law—then the resulting federal statute is itself entitled to respect under the Supremacy Clause. This is not an instance in which a State has intruded into or posed an obstacle to the exercise of duly authorized federal power. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (describing the Supremacy Clause as preempting state law "to the extent of any conflict with a federal statute"). Congress, not a State, made the choice here, creating a federal statutory right of action which defines liability in terms of state tort law.

Importantly, Congress itself has set the boundaries for policy immunity when an action sounding in tort is brought against the federal government. Congress established that defined policy protection inside the FTCA itself by enacting an exception from liability for a "discretionary function." 28 U.S.C. § 2680(a). Through the discretionary function exception, Congress protects the federal government only when it has acted affirmatively and thereby declared a policy prerogative, not when one can simply imagine, often after the fact, the possibility that the federal government may someday do so. The statute leaves no

room for judicially devised supplements to that custom-made policy protection.

In this case and in its precedent, the Eleventh Circuit has improperly circumvented the carefully tailored policy immunity that Congress deliberately included in the FTCA. The Eleventh Circuit has invoked the Supremacy Clause to "import immunity back into a statute designed to limit it"—an exercise in judicial activism that this Court has expressly rejected in the very context of the FTCA. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

Just as the Supremacy Clause uplifts an otherwise constitutionally legitimate choice by Congress to expand the sweep of federal law and federal power, the Supremacy Clause secures Congress's conscious choice to restrain governmental prerogatives by setting boundaries on policy immunity from liability. Through the discretionary function exception to the FTCA, Congress has established a simultaneously powerful and circumscribed protection of federal executive policy from liability. Again, Congress left no room for courts to fabricate broader immunity for hypothetical or imaginary federal policy, whether through mistaken citation to the Supremacy Clause or by a textually unmoored enlargement of the discretionary function exception.

The misplaced invocation of the Supremacy Clause in this context is best appreciated by recognizing the nature of the FTCA as an affirmative waiver of federal sovereign immunity and by understanding that the statute protects federal policy prerogatives through its limited exception for discretionary functions.

The discretionary function exception, by its terms, precludes liability for the actions of government actors only if those actions are "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Each of these phrases in the statutory exception is suffused with meaning, drawing on terms of art chosen by Congress to set the boundaries of this waiver of sovereign immunity and, by extension, avoid the sweep of the Supremacy Clause. See generally Gregory C. Sisk, *Immunity for Imaginary Policy in Tort Claims Against the Fed. Gov't*, 100 Notre Dame L. Rev. 729, 753-65 (2025). As the government stated in its earliest brief to this Court on the question, the discretionary function exception protects "executive conduct which *actually* involves the exercise of judgment, choice, and discretion, and requires the *weighing in the public interest* of competing considerations." Brief for the United States at 190, *Dalehite v. United States*, 346 U.S. 15 (1953) (No. 308), 1953 WL 78664 (emphases added).

But relying on a misreading of this Court's decision in *United States v. Gaubert*, 499 U.S. 315, 325 (1991), lower courts have held that government action need only be "susceptible to policy analysis" to fall under the discretionary function exception. *See Sánchez ex. rel. D.R.–S. v. United States*, 671 F.3d 86, 93 (1st Cir. 2012) (declaring for purposes of the discretionary function exception that if "some plausible policy justification could have undergirded the challenged conduct," then "it is not relevant whether" any actual

policy analysis occurred); *Baum v. United States*, 986 F.2d 716, 721 (4th Cir. 1993) (for the application of the discretionary function exception, whether "government agents . . . did or did not engage in a deliberative process before exercising their judgment" is "largely irrelevant"); *Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) (saying that, for application of the discretionary function exception, the court does not "ask whether policy analysis is the *actual* reason for the decision in question.") (citation and quotation omitted).

To the contrary, the defining boundary of the discretionary function exception to the FTCA and, thus, the extent of the Supremacy Clause's reach, is marked by a genuine, non-hypothetical governmental act of policy judgment:

First, there is no "Dormant" Supremacy Clause by which state law, especially when incorporated into a federal compensatory regime, is displaced by federal policy judgments that could have been, but were not, made by federal law enforcement agencies. To say otherwise allows federal law enforcement to rise into the world of imagination, elevating the mere possibility of federal law enforcement policy choices—which, given the expansive nature of federal law, could reach nearly every aspect of American life—beyond the reach of even of Congress and into the realm of constitutional omnipresence. But, as this Court has warned, "[t]he Supremacy Clause gives priority to 'the Laws of the United States,' not the criminal law enforcement priorities or preferences of federal officers." *Kansas v. Garcia*, 589 U.S. 191, 212 (2020); *see also Bldg. & Constr. Trades Council v. Associated*

Builders & Contractors, 507 U.S. 218, 224 (1993) (stating that the Court is "reluctant to infer pre-emption" when Congress has not explicitly so provided).

Second, turning to the FTCA, both its *text* (by requiring an exempt decision to be "based upon" a "discretionary function") and the *purpose* (to prevent judicial second-guessing of policy choices) premise the exception on an actual and not merely hypothetical policy judgment. The historical understanding of this term of art—a "discretionary function"—means that the limited immunity reserved by the FTCA's discretionary function exception and, necessarily, the Supremacy Clause's protection of federal prerogatives do not come into play unless there has been a policy judgment that actively weighs values to pursue a government objective.

In this case, which alleges simple carelessness by federal law enforcement officers in ascertaining the correct house for an armed predawn raid, the government acknowledges that the Federal Bureau of Investigation "does not have any policies that govern how to locate or navigate to a targeted address." Brief for the Respondents in Opposition at 3, No. 24-362; *see also* Pet. App. 15a.

The Supremacy Clause's protection of sovereign immunity does not compel federal courts to effectively invalidate Congress's decision to waive much of that same immunity by its enactment of the FTCA. Yet that is precisely what the Eleventh Circuit has done. When, as here, government officials have exercised no policy judgment that would be immunized by the

discretionary function exception, the Supremacy Clause is not implicated by evaluating governmental actions according to ordinary tort standards as directed by Congress through the FTCA. "This case does not call on us to judge the wisdom of any social, economic, or political policy, but rather simply to perform the familiar role of determining whether the government agent exercised reasonable care." *Cf. Lam v. United States*, 979 F.3d 665, 688 (9th Cir. 2020) (Hurwitz, J., dissenting). This Court should reverse the judgment below and remand for further consideration.

ARGUMENT

I. CONGRESS ENACTED THE FTCA AS A BROAD WAIVER OF SOVEREIGN IMMUNITY, GENEROUSLY AFFORDING COMPENSATION TO THOSE HARMED BY WRONGFUL GOVERNMENTAL CONDUCT

Congress waived the sovereign immunity of the United States for state tort claims in 1946, when it enacted the FTCA. As this Court confirmed in one of its earliest decisions concerning the statute, the FTCA "was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24 (1953). The FTCA, this Court explained, "was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope." *Id.* at 25; *see also United States v. Muniz*, 374 U.S. 150, 154 (1963) (explaining that the FTCA "was designed . . . to avoid

injustice to those having meritorious claims hitherto barred by sovereign immunity").

The FTCA creates a federal right of action to seek money damages defined by state-law tort remedies. As this Court has explained, "[t]he Tort Claims Act was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Richards v. United States*, 369 U.S. 1, 6 (1962). The FTCA provides that the "United States shall be liable [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also id.* § 1346(b)(1) (holding the United States liable "if a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

As this Court explained in *Rayonier Inc. v. United States*, 352 U.S. 315 (1957), Congress understood that "when the entire burden [of government wrongdoing] falls on the injured party it may leave him destitute or grievously harmed." *Id.* at 320. By instead charging such losses "against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight." *Id.*

When Congress acts within constitutional boundaries to promote a federal policy interest that displaces state protections, even to the point of arguably causing harm to citizens, the Supremacy

Clause elevates that congressional enactment to supreme law. Likewise, when Congress chooses to enact a limited waiver of sovereign immunity like the FTCA to provide a federal remedy for official carelessness, the Supremacy Clause demands judicial respect for that compensatory goal—even if Congress chooses to define that waiver using state tort law standards.

II. CONGRESS PRESERVED SOVEREIGN IMMUNITY UNDER THE FTCA'S DISCRETIONARY FUNCTION EXCEPTION ONLY FOR ACTS GROUNDED IN SOCIAL, ECONOMIC, AND POLITICAL POLICY

This Court has emphasized the "central purpose" of the FTCA to "waive[] the Government's immunity from suit in sweeping language." *Dolan v. U.S.P.S.*, 546 U.S. 481, 492 (2006) (citation omitted). But even though it has proven to be the most significant waiver of federal sovereign immunity for damages claims against the United States, the FTCA is not limitless. The federal government's amenability to tort liability under the Act is restricted by a series of statutory exceptions. Rejecting the argument that these exceptions should be construed in favor of the government as limitations on the waiver of sovereign immunity, this Court has warned that "unduly generous interpretations of the exceptions run the risk of defeating the [FTCA's] central purpose" of compensating victims of government tortious misconduct. *Id.* at 492 (citation and quotations omitted).

The Eleventh Circuit's peculiar Supremacy Clause theory is designed to protect federal law enforcement policy initiatives. But the FTCA's waiver of sovereign immunity limits that protection to government policy judgment—genuine policy judgments—from judicial interference in tort litigation. This Court has described the discretionary function exception as preventing "judicial 'second-guessing' of legislative and administrative decisions *grounded in social, economic, and political policy* through the medium of an action in tort." *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984) (emphasis added). In this way, the limitation on the FTCA's waiver of sovereign immunity "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id*. at 808.

The Supremacy Clause would respect, not undermine, Congress's deliberate decisions both (1) to carve out policy immunity from the otherwise expansive waiver of sovereign immunity in the FTCA *and* (2) to set boundaries on the scope of that policy immunity through the textual design of the discretionary function exception. Congress chose to preserve immunity for the exercise of a discretionary function—understood in historical legal context to mean a deliberate choice by a federal official in which "a substantial factor entering into his selection of a particular course of conduct is an interest special to the United States as a government." Brief for the United States at 192, *Dalehite*, 1953 WL 78664. By requiring an actual policy judgment, rather than a

post hoc hypothetical policy justification, Congress chose to immunize the government from liability thus far, but no farther. That choice also declares the supreme law of the land.

Unfortunately, Congress's careful limitation of discretionary function immunity to actual policy judgment has unraveled in the lower federal courts, thereby negating much of the FTCA's intended *sweeping waiver* of sovereign immunity. *See Dolan*, 546 U.S. at 491–92. This Court's use of a single phrase—"susceptible to policy analysis"—in *Gaubert*, 499 U.S. at 325, set the discretionary function exception on an entirely new and unintended course, erupting into flights of fancy by judges imagining policy choices that might have been but never were made. In the more than thirty years since *Gaubert*, lower courts have relied on the phrase "susceptible to policy analysis" to hold that post-hoc, conjectural, or hypothetical justifications of government decisions fall within the scope of the exception, contrary to Congress's intent. *See, e.g.*, *Sanchez*, 671 F.3d at 93 (requiring only "some plausible policy justification" that "could have undergirded the challenged conduct") (citation and quotations omitted); *Jude v. Comm'r of Soc. Sec.*, 908 F.3d 152, 159 (6th Cir. 2018) ("the decision need only have been theoretically susceptible to policy analysis"); *Chadd v. United States*, 794 F.3d 1104, 1113 (9th Cir. 2015) ("[T]he challenged decision need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis.") (emphasis, citation and quotation marks omitted).

But *Gaubert*, properly understood, was hardly revolutionary. *Gaubert* applied the discretionary function exception in the context of a challenge to the federal takeover of a bank, during which federal regulators had pressed the bank's merger with another, demanded the replacement of its management and board, influenced its day-to-day operations, and eventually ordered its closure. *Gaubert*, 499 U.S. at 317–20. Given the "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines" that had granted federal regulators the discretion to seize the bank, the post-seizure decisions' implication of that same policy was inevitable. *Id.* at 324–25. Only with the benefit of this context did this Court then explain that the "focus of the inquiry is not on the agent's subjective intent"—*i.e.*, it did not matter whether the decision to replace management was intended to rescue the bank or to punish its management—but instead on "the nature of the actions taken and on whether they are susceptible to policy analysis"—which, in *Gaubert*, was satisfied by the fact that each decision was "grounded in the policy of the regulatory regime." *Id.* at 325.

Gaubert's discussion of policy susceptibility thus cannot be divorced from the policy-infused nature of the federal regulation of financial institutions. *See Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (describing bank regulation as "fully grounded in regulatory policy") (citation omitted). This Court understood that the entire operation following the obviously policy-driven decision to seize control of the bank, including its influence on "day-to-

day 'operational' decisions," was "undertaken for policy reasons of primary concern to the regulatory agencies." *Gaubert*, 499 U.S. at 332; *see also id.* at 338 (Scalia, J., concurring) (crediting link between regulatory decisions and "policy-based decision" to seize bank). This Court accordingly was "convinced that each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield." *Id.* at 332.

Indeed, *Gaubert* comports with this Court's longstanding conception of the discretionary function exception both as a bulwark against "liability arising from acts of a governmental nature or function," *Dalehite*, 346 U.S. at 28, and as a fortress around "the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Varig Airlines*, 467 U.S. at 813–14.

This Court in *Gaubert* also understood that being "susceptible to policy analysis" does not mean simply having any reasonably articulable, even if only theoretical, relationship to a matter of social, economic, or political importance. Even in the regulation-rich world of *Gaubert*, which affirmed the regulatory decisions implementing the seizure decision as part and parcel of the policy-saturated whole, this Court recognized that certain collateral actions will lack any meaningful policy justification and, thus, fall outside the exception's protection. *See* 499 U.S. at 324–25. This Court illustrated this limitation using the example of a federal regulator driving a car "on a mission connected with his official duties" and negligently causing an accident. *Id.* at 325

n.7. "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." *Id.* Despite being connected and arguably even essential to the regulator's execution of those statutory and regulatory responsibilities to which the exception undoubtedly applies, the "nature" of careless driving cannot be categorized as "susceptible to policy analysis." *See id.* at 325.

It is past time to return to the plain text of the discretionary function exception and recapture the original meaning of this carefully crafted carveout from the FTCA's otherwise expansive waiver of sovereign immunity. As Professor Cornelius Peck explained, the exception to liability in the FTCA comes into play only when the claim "necessarily brings into question the decision of one who, with the authority to do so, determined that the acts or omission involved should occur or the risk that eventuated should be encountered for the advancement of governmental objectives." Cornelius J. Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 Stan. L. Rev. 433, 452 (1957).

III. THE FTCA'S PLAIN TEXT, READ IN LIGHT OF THE ORIGINAL UNDERSTANDING, PROTECTS EXECUTIVE ACTION THAT ACTUALLY INVOLVES THE EXERCISE OF POLICY JUDGMENT IN WEIGHING THE PUBLIC INTEREST

In its earliest submission to this Court on the subject, the government rightly said the discretionary function exception to the FTCA applies to "executive

conduct which *actually* involves the exercise of judgment, choice, and discretion, and requires the *weighing in the public interest* of competing considerations." Brief for the United States at 190, *Dalehite*, 1953 WL 78664 (emphasis added).

The text of the discretionary function exemption reads, in full:

> 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.

28 U.S.C. § 2680(a).

By requiring a government actor's decision to be "based upon" a "discretionary function" to be exempt from the FTCA's otherwise "broad waiver of sovereign immunity," *Millbrook v. United States*, 569 U.S. 50, 52 (2013), the text requires an actual—and not merely hypothetical—policy judgment.

A. "Based Upon"

Of the thirteen continuing exceptions to governmental liability under the FTCA, nine are defined by whether the claim "arises" out of a category of government activity, specified causes of action, or a

foreign geographic area. 28 U.S.C. § 2680(b), (c), (e), (h), (j), (k), (l), (m), (n). The discretionary function exception, by contrast, demands an even tighter fit. The exception is triggered only when the claim is "*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." *Id*. § 2680(a) (emphasis added).

Simply put, a government decision to act or refuse to act cannot be "based upon" something that never happened, plainly excluding a hypothetical policy judgment that was never made.

The text of the discretionary function exception is not open-ended; instead, it uses direct causal language. In *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), this Court looked at the phrase "based on" in another federal statute and agreed that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Id.* at 63. Under this "most natural" reading of the phrase, the discretionary function exception applies only when a policy judgment was a "necessary condition" to the government's allegedly tortious decision. *Id.*

By requiring that the excepted government act be "based upon" the exercise or failure to exercise a discretionary function, the text of the statute requires a supporting policy judgment. When deliberately choosing to exercise a function that is discretionary or deliberately refraining from that exercise, the

government actor makes a choice "grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. Based on such public policy factors, the government agent may choose whether to employ that discretionary power. By contrast, if no policy judgment supports the government action or inaction, then no discretionary function was brought into play and, accordingly, the fundamental prerequisite to application of the exception is missing.

In sum, the FTCA exception is triggered by the actual employment of discretionary judgment that weighed competing policy goals against the public interest.

B. "Discretionary Function or Duty"

The phrase "discretionary function" was a legal term of art that Congress borrowed from the law of mandamus and damages suits against government officials. In its first discretionary function opinion, this Court identified "the discretion of the executive or the administrator to act according to one's judgment of the best course" as "a concept of substantial historical ancestry in American law." *Dalehite*, 346 U.S. at 34. This Court then cited to decisions involving discretionary functions in the context of mandamus proceedings and damages claims against federal officials. *Id.* at 34 n.30. As this Court later recognized for another provision of the FTCA, which precludes an award of "punitive damages" against the United States, the choice of a term of art in this statute reflects Congress's adoption of the existing

understanding of the concept. *Molzof v. United States*, 502 U.S. 301, 305–12 (1992).

One historical example, with which Congress must have been familiar, arises in mandamus law. In the then-classic mandamus case of *United States ex rel. Alaska Smokeless Coal Co. v. Lane*, 250 U.S. 549 (1919), this Court refused mandamus in circumstances where "[m]anifestly judgment in all cases must be exercised-judgment not only of the law but what was done under the law, and its sufficiency to avail of the grant of the law." *Id.* at 555.

Similarly, in *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930), this Court ruled that, while the "chief use" of mandamus is to compel the performance of a ministerial duty, "[i]t also is employed to compel action, when refused, in matters involving judgment and discretion." *Id.* at 218. The court may not "direct the exercise of judgment or discretion in a particular way," but it may demand that a policy judgment be made. *Id.* Earlier, in *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), this Court explained that the essence of non-ministerial executive duties lies in the duty of the government official to "exercise his judgment." *Id.* at 515.

A second historical analogy is a damages claim against an individual government officer, which points in the same direction. In *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845), this Court stated that public officers are not liable for errors where "the act to be done is not merely a ministerial one," and is instead a

situation where the officer must "exercise judgment and discretion." *Id.* at 98.

Likewise, in *Johnston v. District of Columbia*, 118 U.S. 19 (1886), this Court described the discretionary function immunity from liability of certain officers as "involving the exercise of deliberate judgment and large discretion" based on public considerations. *Id.* at 21.

Based on the "light" of these historical data points, the government itself in the briefing to this Court in the very first discretionary function exception case agreed that a "function or duty is 'discretionary'" when "a substantial factor entering into [the official's] exercise of that discretion is an interest special to the United States as a government." Brief for the United States at 35–36, *Dalehite*, 1953 WL 78664.

C. "The Exercise or Performance or the Failure to Exercise or Perform a Discretionary Function or Duty"

Importantly, the discretionary function exception protects against claims based on not only the exercise but also "the failure to exercise" a "discretionary function." 28 U.S.C. § 2680(a). In this way, a decision to refrain from taking action is also protected from second-guessing via tort action. However, a claim that invades governmental policy discretion cannot be "based upon" the absence of policy judgment. It *can* be "based upon" the deliberate policy judgment to refrain from an action—that is, the "failure to exercise or perform a discretionary function or duty." *Id.*

The *Chadd* case, illustrates this crucial difference. In that case, a hiker was killed by an aggressive mountain goat in Olympic National Park. The staff at the park knew the mountain goat was a threat to hikers, but failed to take action to eradicate it. 794 F.3d at 1117. Had the National Park Service made the decision not to remove or destroy the dangerous animal because of a policy judgment to preserve an iconic wild species for tourists to enjoy, the claim arising from the death of the hiker arguably would have been "based upon" the "failure to exercise" discretion in favor of public safety. Of course, no such policy existed because it would have contradicted the park's written policy manual that regarded the mountain goat as a nuisance species that could be eradicated for public safety. *Id.* at 1110. The true reason for inaction was bureaucratic inertia, not policy judgment.

Congress's adoption of "discretionary function" as a legal term of art disallows expansion of the FTCA exception to ordinary governmental neglect. Drawing from decisional law concerning discretionary governmental acts in mandamus and damages claims against government officials, scholars of the period leading up to the enactment of the FTCA defined "discretionary function" as necessarily involving genuine choices. Edwin W. Patterson, *Ministerial and Discretionary Official Acts*, 20 Mich. L. Rev. 848, 854 (1922). And, in briefing on the issue, the United States government concurred that, based on the bodies of existing law when the FTCA was enacted, the "fundamental criterion" of the discretionary function exception is whether the government actor "has been

endowed with the power of choice, and a substantial factor entering into his selection of a particular course of conduct is an interest special to the United States as a government." Brief for the United States at 192, *Dalehite*, 1953 WL 78664. Only under these considered circumstances, the government concluded, "the function or duty is a 'discretionary' one." *Id.*

At bottom, delinquency in attention to a matter is not the "failure to exercise" a "discretionary function." Rather, simple neglect is the *absence* of a "discretionary function" and, therefore, lies beyond any theoretical application of the Supremacy Clause.

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Taking the Supremacy Clause seriously means also taking seriously a congressional enactment like the FTCA that "'waives the Government's immunity from suit in sweeping language.'" *Dolan*, 546 U.S. at 492 (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)).

As discussed above, to fall within the limited policy immunity preserved by the FTCA, the text of the discretionary function exception requires a causal link to a considered policy judgment. A link is not only demanded by the text of the statute but is commended by multiple statements in this Court's FTCA decisions. This Court has repeatedly articulated the standard in terms that focus on concrete policymaking choices. And it has steadfastly tied the policy immunity preserved by the discretionary function exception to that which is "grounded" in policy, *Varig Airlines*, 467 U.S. at 814, "based on considerations of

public policy," *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 537 (1988), or involving the "'exercise of policy judgment.'" *Gaubert*, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3). This Court's repeated declarations that the discretionary function exception involves policy judgment, is grounded in policy, and is based on policy considerations preclude an interpretation that exalts imagination over reality.

Accepting after-the-fact rationales in the name of protecting government policymaking from judicial intrusion undermines Congress's prerogative to waive sovereign immunity and, in turn, subordinates the FTCA to the Supremacy Clause that is supposed to uphold it. As one court of appeals recognized in applying the FTCA's discretionary function exception, "where there is no policy judgment, courts would be 'second-guessing' by implying one." *Dube v. Pittsburgh Corning*, 870 F.2d 790, 800 (1st Cir. 1989). Likewise, an approach to the Supremacy Clause that looks beyond the defined terms of a statute to endorse imagined purposes "impermissibly rests on judicial guesswork about broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law." *See Kansas*, 589 U.S. at 214 (Thomas, J., concurring) (citation and quotations omitted).

CONCLUSION

This Court should reverse the judgment below and remand for further consideration.

Respectfully Submitted,

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March 14, 2025