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

## BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF THE *AMICI CURIAE*[1]

The National Police Accountability Project (NPAP) was founded in 1999 to address allegations of misconduct by law-enforcement officers and their employers. NPAP's approximately six hundred attorney members practice in every region of the United States, litigating the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. It provides training and support for these attorneys and other legal workers, public education and information on issues related to law enforcement misconduct and accountability, and resources for nonprofit organizations and community groups involved with victims of such misconduct. NPAP also supports legislative efforts aimed at increasing law enforcement and detention facility accountability, and appears regularly as *amicus curiae* in cases such as this, that present issues of particular importance for its member lawyers and their clients.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Because this case involves the proper remedy for law enforcement misconduct, an area in which *amici* have significant experience and a deep interest, they submit this brief to assist the Court in the resolution of this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a violent and destructive search of the wrong house conducted by federal law enforcement officers. Although the search caused significant injury to innocent persons, the court below dismissed the plaintiffs' action under the Federal Tort Claims Act (FTCA), using a standard that will make it virtually impossible for those injured by federal law enforcement errors to obtain a remedy. That decision should not stand. Law enforcement misconduct of the sort committed in this case is alarmingly frequent and enormously harmful. For that reason, Congress enacted the so-called law enforcement proviso to the FTCA, seeking to allow for liability in just these circumstances. There is a compelling reason for liability in such cases: to incentivize federal law enforcement officers and their supervisors to limit abusive police acts.

I. Wrong-house searches and similar errors by law enforcement officers—including, as in this case, federal officers—occur frequently, as documented by judicial decisions and news reports of such actions. These mistakes often cause profound physical and psychological damage to the victims. It is imperative

that there be a meaningful remedy under the FTCA for this sort of harm.

II. Requiring that claims challenging law enforcement misconduct survive application of the FTCA discretionary-function exception would effectively bar such claims entirely. Congress adopted the FTCA law enforcement proviso with this precise concern in mind: it wanted to provide victims of mistaken police raids—like the one at issue here—with an effective legal remedy. Shortly after adoption of the proviso, lower courts interpreted it in a manner consistent with this statutory purpose, rejecting the Government's early attempts to use the discretionary-function exception to evade the proviso's meaning. But many lower courts have since expanded the discretionary-function exception to include nearly all law enforcement activities, including investigatory decisions, the timing of arrests, and how to execute a warrant. That reading, urged by the government, would preclude liability for federal law enforcement misconduct in all but the most egregious cases, frustrating the clear congressional intent.

III. FTCA liability in this case is not only compelled by the congressional purpose, but also advances effective law enforcement policy and training. The Court has found qualified immunity for individual law enforcement officers to be justified on the ground that personal liability may chill an officer's exercise of lawful and legitimate authority. But that concern does not arise under the FTCA because the statute subjects the United States—not individual officers—to liability for tortious behavior. At the same time, imposing liability on the government for torts committed by law enforcement officers gives federal officials an

incentive to adopt policies and practices that will prevent wrongful police behavior.

## ARGUMENT

### I. Wrong-address home raids cause enormous harm to blameless victims.

The need for an effective remedy with which to challenge wrong-address home raids is compelling: such raids, which occur with alarming frequency, may turn into nightmarish assaults on unsuspecting families who are often asleep when heavily armed federal agents storm their homes. For the victims, the experience causes serious damage and leaves lasting scars.

#### A. High-profile wrongful-raid cases involving federal officers illustrate the lasting harm caused by such errors.

Wrong-address raids inflict devastating harm, as shown by the following sampling of such cases:

1. A representative example is *Carter* v. *United States,* 725 F. Supp. 2d 346 (E.D.N.Y. 2010), aff'd in part, rev'd in part, 494 F. App'x 148 (2d Cir. 2012). Here, an employee of the United States Postal Service negligently transcribed her handwritten notes identifying a location in New York City to be searched. *Id.* at 350. Four federal officers executed a warrant for Kinte Carter at the home of *Lillian* Carter and her family. *Id.* at 351. But Kinte Carter was completely "unknown to Lillian * * * and had never been in their home." *Id.* Nevertheless, in the early morning hours the officers pounded on Lillian's door and then searched her house, room by room. Lillian, "honestly—although incorrectly—believed that one of the officers had a gun to her back throughout the search." *Ibid.* At trial, the medical experts presented by the

United States and Lillian agreed that Lillian suffered PTSD from the raid. The Court found "the incident was, and continues to be, a principal cause of her PTSD and its negative effect on her quality of life." 725 F. Supp. 2d at 352. Lillian remained terrified that her family might be harmed. *Ibid.*

In Lillian Carter's case, the officers knocked before entry. More often, wrong-address home raids result from no-knock warrants, which deprive the victims of any chance to correct the mistake; these raids catch victims in private moments and intimate settings. In *Powell* v. *Nunley*, for example, a federal agent and local police captain used a rough description to identify 110 W. Osage as the location to be searched. 682 F. Supp. 2d 1260, 1264–1265 (W.D. Okla. 2010). But they then mistook *106* W. Osage for 110 W. Osage. *Id.* at 1265. The tactical team "broke open the front door" with firearms drawn and shouted instructions for the warrant's intended subject. *Ibid.* Instead, they found Mr. and Ms. Powell, "in bed, unclothed and asleep." *Ibid.* The couple was held naked at gunpoint until the officers realized they had invaded the wrong house. Only then were the Powells permitted to don their clothes. *Ibid.*

Similarly, in *Jimerson* v. *Lewis*, Drug Enforcement Administration agents partnered with a local SWAT (Special Weapons and Tactics) team in Texas to execute a search warrant on a suspected methamphetamine stash house with a street number of 573, but the SWAT team commander recklessly led officers to house number 583 and then to 593, where officers deployed a flashbang grenade, broke the front windows, and breached the door of a home belonging to Karen Jimerson, James Parks, and their two young sons and daughter. 94 F.4th 423, 425-27 (5th Cir.

2024) (involving a 42 U.S.C. § 1983 claim against the local SWAT team commander). Officers began a protective sweep and told two family members to get on the ground before officers realized it was the wrong house. *Id.* at 427. An internal investigation by the local police department determined that "'reasonable and normal protocol was completely overlooked,'" and the SWAT team commander was suspended for two days without pay. *Ibid.*

And in *Castro* v. *United States*, federal and state agents conducted a narcotics raid on the home of an elderly widow, Maria Castro, in Amsterdam, New York. 34 F.3d 106 (2d Cir. 1994). After searching her person, the agents toppled furniture, stripped mattresses, and emptied containers throughout her apartment. *Id.* at 107. Castro reported she "became frightened, experienced heart palpitations and was subjected to extreme embarrassment, humiliation, and social opprobrium." *Ibid.*

A wrong-address raid can even occur *after* federal agents have executed the warrant at the correct location. In *McElroy* v. *United States*, federal agents, local officers, and a SWAT team executed a no-knock warrant at 6:00 a.m. in Travis County, Texas. 861 F. Supp. 585, 588 (W.D. Tex. 1994). The task force "rammed through the castle doors" of George Rodriguez's apartment. During the subsequent sweep, the officers noticed another side of the building, and—despite finding there were no internally connecting doors—took the battering ram to the second entrance. *Ibid.* But the building was a duplex, and Steve McElroy, who lived on the other side, had "no connection" to Rodriguez. *Ibid.* McElroy had lived in the adjoining property through the entirety of the federal investigation. *Ibid.*

McElroy awoke to "terrifying sounds of crashing and screaming" and thought "his neighbors were being murdered." *McElroy*, 861 F. Supp. at 588. He assumed he would have to flee "to save his own life." *Ibid.* But before he could escape, the SWAT team "poured into the foyer and pounced on him," "ripp[ing] out some of his artificially implanted hair" and "pinn[ing] him to the floor with a gun to his head." *Id.* at 589. When McElroy, "obviously terrified," implored the black-clad figures to identify themselves, "they answered with nonresponsive obscenities." *Ibid.*

Some mistaken addresses are divided by time rather than walls. See*, e.g.*, *Adams* v. *Springmeyer*, Civil Action No. 11-790, 2012 WL 1865736 (W.D. Pa. May 22, 2012). In *Adams*, a federal/local task force executed a no-knock warrant on a property where the target had not resided for nearly two years. *Id.* at *1. After breaking down the door, the officers forced plaintiffs—including seven minor children—outside into the "freezing cold" with profanities and assault weapons. *Id.* at *2, *13.[2]

These wrong-address raids may be based on information that is known to be unreliable, or may even occur *despite* an informant's cautions. See*, e.g.*, Michael Cooper, *Raids, and Complaints, Rise as City Draws on Drug Tips*, N.Y. Times, May 26, 1998, at B5 (a "wrong door" raid on an elderly couple following an unverified tip from an informant with an accuracy

[2] For an analogous case involving only state officers, see *Atkins* v. *City of Carrollton*, Civil Action No. 95–CV–1424, 1997 WL 160297 (N.D.Tex. Mar. 27, 1997) (failing to verify the address, police raided the Atkins home seeking a prior resident and forced at gunpoint Angela Mow Atkins—then seven months pregnant—to the floor on her stomach.)

record of only 44% genuine tips); Charlie Leduff, *What Killed Aiyana Stanley-Jones*, Mother Jones (Nov./Dec. 2010), https://perma.cc/9ND2-W63C (police shot and killed a seven-year-old child in a raid on the wrong apartment, despite the informant warning that children lived in the general vicinity and police finding toys strewn about the lawn).

These botched home raids can inflict grievous harms. Kenneth Wayne Jamar suffered "severe personal injuries" after federal agents directed a SWAT team to his home at 13*889* Honey Way, rather than 13*355*, in Madison, Alabama. *Jamar* v. *United States*, Civil Action No. CV-08-S-1145, 2009 WL 10703417, at *1, *6 (N.D. Ala. Aug. 28, 2009). The SWAT team battered into Jamar's home with assault weapons and protective combat gear. The officers firing at the plaintiff in his bed delivered "life-threatening gun shot wounds." *Id.* at *7. Jamar alleged injuries of "several gun shot wounds to his body; surgical intervention and repairs; loss and removal of his genitalia; permanent physical injuries; past medical bills and costs; and, pain and suffering, mental anguish, emotional distress, and loss of the enjoyment of life." *Ibid.* He also suffered damage to his home and personal property and faced daunting future medical costs. *Ibid.*

2. Federal courts have recognized the danger of no-knock raids executed at incorrect addresses. In *Solis* v. *City of Columbus*, for instance, the Southern District of Ohio noted over a hundred newspaper articles over a four-year period involving federal no-knock warrants, each "recounting no-knock horror stories." 319 F. Supp. 2d 797, 807 (S.D. Ohio 2004). The court

identified an array of news stories[3] and cases[4] involving federal and local law enforcement involved in wrong-address home raids.[5]

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[3] The *Solis* court detailed instances including a California man "shot 15 times before either he or his wife knew who was breaking into their home or why;" "[an] innocent woman and her 15-year-old daughter who were forced to kneel, in handcuffs, in their underwear for 45 minutes during [a] no-knock raid of their home"; and "several [other] incidents * * * ending in tragedy." 319 F. Supp. 2d at 807-808. The court cites "law enforcement officials in North Carolina and New Mexico as saying that raids of incorrect houses happen 'every day in this business' and 'all the time.'" *Id.* at 808 (citing Joe Hallinan, *Drug Wars: Fervor Often Injures the Innocent*, New Orleans Times-Picayune, Sept. 26, 1993, at A20).

[4] In *Solis* itself, the Columbus SWAT team executed a search warrant on the wrong house after failing to corroborate the informant's tip. 319 F. Supp. 2d at 800 ("Looking at the houses, Cox realized that the house described in his search warrant affidavit might not be the house that was described to him by the confidential informant."). In the targeted home were the eight-and-a-half-months-pregnant Nicole Solis and her twelve-year-old daughter Carmen. The SWAT team detonated a "flashbang," and upon entering, "held guns to Nicole and Carmen Solis's heads, forced them to the ground, handcuffed them, and subjected them to verbal abuse." *Ibid.* They were "eventually permitted to kneel." *Ibid.* The *Solis* court then identified a half dozen cases that "addressed factual situations that bear uncanny resemblance to the facts here." *Id.* at 808.

[5] State and local officers have also been involved in numerous cases with wrong-address raids that did not involve federal officers. See*, e.g.*, *Phelps* v. *City of Ecorse*, No. CIV. 09-12311, 2010 WL 728782 (E.D. Mich. Feb. 25, 2010) (describing how police confused the third and fourth dwelling on Jefferson Street); *Chidester* v. *Utah County*, 268 F. App'x 718 (10th Cir. 2008) (describing how police tackled the target's next-door neighbor); *Fullard* v. *City of Philadelphia*, No. CIV. A. 95-4949, 1996 WL 195388

Federal officers have also made mistakes that are closely analogous to wrong-address raids after misidentifying the named individuals on search warrants. See*, e.g., Diaz-Nieves* v. *United States*, 29 F. Supp. 3d 71, 73-74 (D.P.R. 2014) (describing an instance when, after mistaking the target individual, officers conducted a 4:00 a.m. wrong-house raid and then forced the victim to stand naked at gunpoint in the street); *Kerns* v. *United States*, No. CV-04-01937, 2007 WL 552227, at *1 (D. Ariz. Feb. 21, 2007), rev'd and remanded, No. 07-15769, 2009 WL 226207 (9th Cir. Jan. 28, 2009) (describing an instance when federal agents confused Scott Michael Kernes and Scott Curtis Kerns and thus executed a narcotics raid on the house of "not the right Scott"); and *Mesa* v. *United States*, 837 F. Supp. 1210, 1212 (S.D. Fla. 1993), aff'd, 123 F.3d 1435 (11th Cir. 1997) (describing an instance when federal agents arrested the wrong Pedro Pablo Mesa).

### B. Wrong-address home raids are common and highly dangerous.

The exact number of wrong-house raids, or of those by federal law enforcement officers in particular, is not available. Commentators have lamented the lack of reliable data. See Graham Rayman, *Tracking Errors; Board Asked to Focus on Wrong-Door Raids*, Newsday, June 12, 2003, at A17. But there are important clues to the problem's scope suggesting that no-knock warrant executions are susceptible to frequent law enforcement errors with very serious consequences. The examples described above indicate that

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(E.D. Pa. Apr. 22, 1996) (describing how police raided the adjacent house after a clerical error).

a meaningful number of such cases involve federal officers.

Kevin Sack, in over a year of reporting, produced the most thorough investigation of no-knock raids.[6] Sack identified 81 civilians and 13 police officers killed in no-knock or barely-knock raids from 2010 to 2015. Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, New York Times (Mar. 18, 2017), https://perma.cc/Q7E7-EVQB. As Sack summarized his findings, SWAT deployments have "led time and again to avoidable deaths, gruesome injuries, and costly legal settlements." *Ibid.* Such avoidable deaths include "attacks on wrong addresses." *Ibid.* Over the same five-year period, Sack found an average of 30 federal civil rights lawsuits filed annually after dynamic home raids. *Ibid.* ("Many of the complaints depict terrifying scenes in which children, elderly residents and people with disabilities are manhandled at gunpoint, unclothed adults are rousted from bed and houses are ransacked without recompense or apology.")

In a more recent accounting, a *Washington Post* investigation found that least 22 people were killed in no-knock warrants across the country from 2015 to 2022. Nicole Dungca & Jenn Abelson, *No-Knock Raids Have Led to Fatal Encounters and Small Drug Seizures*, Washington Post (Apr. 15, 2022), https://perma.cc/E4L6-5UBF. In these fatal raids, little inculpatory evidence was recovered. *Ibid.* Another study of raids conducted during that period found

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[6] For an account of this year-long reporting project, see Stephen Hiltner, *How a Grenade in a Playpen Led to an Investigative Project*, New York Times (Mar. 18, 2017), https://perma.cc/29US-38NP.

"nearly one-third of [no-knock] investigations * * * turn up minimal quantities of drugs or none at all." Brian Dolan, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 St. John's L. Rev. 201, 225 (2019).

News articles documenting wrong-address, no-knock raids are legion. To give just a few examples, see, *e.g.*, Sean Campbell, *This Cop Unleashed a Reign of Terror, Say the Wrongfully Accused*, Rolling Stone (Apr. 9, 2023), https://perma.cc/S2S7-AU9D (describing how officers wrongfully burst through Yolanda Irving's door, brandishing weapons and demanding that her disabled son get on the floor, before chasing her other sons' friends into a neighbor's home where they held a pregnant woman and autistic child at gunpoint); Maria Cramer, *Chicago Woman Who Was Handcuffed Naked Receives $2.9 Million Settlement*, New York Times (Dec. 15, 2021), https://perma.cc/F96K-6MWA (describing how officers committed numerous acts of misconduct in a mistaken-house search in which they held Maria Cramer naked and handcuffed); Sack, *Door-Busting*, *supra* (describing how officers raided an upstairs apartment, instead of the downstairs target, and fired upon Iyanna Davis with a bullet that entered her right breast and exited her abdomen); and Tom Finnegan, *Wrong-House Bust Brings Suit; A Kauai Couple Claims They Were Manhandled in Their Home by Officers Looking for Marijuana*, Honolulu Star-Bulletin (Jan. 12, 2006) (describing how officers hit consecutive wrong doors; in one raid, officers threw grandparents to the floor in front of their grandchildren and the grandfather began to thrash after an implanted spinal-shock device malfunctioned from the trauma of his body hitting the ground).

Almost twenty years ago, Radley Balko of the Cato Institute created a compendium of botched paramilitary raids. Surveying the cases, Balko concluded: "Because of shoddy police work, overreliance on informants, and other problems, each year hundreds of raids are conducted on the wrong address, bringing unnecessary terror and frightening confrontation to people never suspected of a crime." Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, Cato Institute 4 (July 17, 2006).[7] And, as mentioned above, the court in *Solis* noted "law enforcement officials in North Carolina and New Mexico as saying that raids of incorrect houses happen 'every day in this business' and 'all the time.'" 319 F. Supp. 2d at 808 (citing Joe Hallinan, *Drug Wars: Fervor Often Injures the Innocent*, New Orleans Times-Picayune, Sept. 26, 1993, at A20). The examples detailed above suggest that the problem has not diminished during the intervening period.

High-risk searches and botched raids also disproportionately affect minority communities. Thirteen of the 22 people fatally shot from 2016 to 2022 in no-knock raids identified by the *Washington Post* were Black or Hispanic. Dungca & Abelson, *No-Knock Raids*, *supra*. The *New York Times*' investigation similarly found about half of the civilian deaths in its tally to be from minority groups. Sack, *Door-Busting Raids*,

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[7] As an illustrative case, Balko relates an incident in which a half dozen officers with riot shields and assault weapons arrived at the Brooklyn apartment of octogenarians Leona and Martin Goldberg. Upon entering, the police pushed Mr. Goldberg aside and ordered him to the floor. "'They charged in like an army,' Goldberg, a decorated World War II veteran, told the *New York Post*. 'They knocked pictures off the wall.'" Balko, *Overkill*, *supra* at 4.

*supra*. And the American Civil Liberties Union surveyed 20 cities and found that, of people subjected to SWAT raids, 42% were Black and 12% Hispanic. American Civil Liberties Union, *War Comes Home: The Excessive Militarization of American Police* (June 23, 2014), https://perma.cc/3G8Y-ZB4B.[8]

### C. Wrong-address home raids create a need for legal redress.

Often executed in the small hours of the night and without warning, no-knock home raids are designed to strike individuals at their most vulnerable. *See Bravo* v. *City of Santa Maria*, 665 F.3d 1076, 1086 (9th Cir. 2011) (such raids represent "much greater intrusions on one's privacy * * * and carry a much higher risk of injury to persons and property."). The home is "first among equals," *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013), and the "very core" of private space, held free from government intrusion, *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). The extraordinary power of a home raid therefore makes it imperative that law enforcement officers exercise diligence to identify the correct home. See *Solis* v. *City of Columbus*, 319 F. Supp. 2d 797, 809 (S.D. Ohio 2004) (imploring officers to be "particularly vigilant in

[8] Specific to wrong-address raids, a 2020 study of Chicago police data found that Black and Latino neighborhoods were disproportionately impacted by wrong-address raids. Dave Savini, Samah Assad & Michele Youngerman, *'They Had The Guns Pointed At Me;' Another Chicago Family Wrongly Raided, Just 1 Month After Police Created Policy To Stop Bad Raids*, CBS News (June 10, 2020), https://perma.cc/V23F-FF28.

executing an extraordinarily intrusive search").[9] That is why Congress in the FTCA provided redress for victims if federal officers cause such injury in what this Court has described as the "sanctity of the home," *Kyllo v. United States*, 533 U.S. 27, 37 (2001). Requiring claims arising out of the law enforcement proviso to clear the discretionary-function hurdle would effectively bar those claims.

## II. Requiring claims arising out of the law enforcement proviso to clear the discretionary-function hurdle would effectively bar those claims.

Although it is essential that there be an effective remedy for wrong-house law enforcement raids, the government's position would have the effect of barring virtually all such claims—and, thus, of departing from the clear purpose of the FTCA law enforcement proviso. Congress enacted the proviso in response to a police raid that was factually identical to the one in this case. By doing so, Congress intended to provide a legal remedy to victims who suffer property, physical, or emotional damage from such law enforcement failures. In the first fifteen years after the proviso's adoption, lower courts therefore read it in harmony with

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[9] No-knock entries should not be "undertaken in the ordinary course." *Penate* v. *Sullivan*, 73 F.4th 10, 19 (1st Cir. 2023). Requiring police to knock and announce their presence safeguards "human life and limb, because an unannounced entry may provoke violence in supposed self-defense." *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006); see also *Miller* v. *United States*, 357 U.S. 301, 313 n.12 (1958) ("Compliance [with knock-and-announce] is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder.")

the FTCA discretionary-function exception, giving effect to both provisions.

Over the subsequent decades, however, courts have increasingly read the discretionary-function exception to immunize essentially all law-enforcement activities, including investigative decisions and conduct relating to the effectuation of warrants. That app oach—advocated for by the government here—would block nearly all intentional tort claims arising out of federal law enforcement activities, rendering the law enforcement proviso largely meaningless.

### A. Congress enacted the law enforcement proviso to provide a remedy to victims of mistaken police raids.

Congress enacted the law enforcement proviso to target police raids identical to the one at issue here. In 1973, Congress heard testimony from two families—the Giglottos and Askews—whose homes in Collinsville, Illinois were mistakenly raided by federal narcotics agents. Just like Petitioners here, Herbert Giglotto awoke to a loud "crashing sound" and feared that criminals were breaking into his home. *Hearings on Reorganization Plan No. 2 of 1973 Before the Subcomm. on Reorganization, Rsch., and Int'l Orgs. of the Senate Comm. on Gov't Operations*, 93d Cong. 461 (1973) (testimony of Mr. and Mrs. Herbert Joseph Giglotto, Collinsville, Ill.) (*Hearings on Reorganization Plan NO. 2)*; J.A. 4–5, 21–22. Just as the SWAT agents in this case "dragged Mr. Cliatt * * * onto the floor of the bathroom and handcuffed him," J.A. 6, 23, narcotics agents handcuffed both Mr. Giglotto and his wife on their bed while the officers screamed obscenities and threatened to kill them. *Hearings on Reorganization Plan No. 2* 462-464. And when Mr.

Giglotto pleaded with the men, the narcotics agents did the same thing that the SWAT agents did here: pointed their guns at the innocent victims. *Ibid.*; see also J.A. 5–6, 22–23. In the aftermath of the agents' "mistakes," these families suffered damage to their homes and severe emotional distress. J.A. 9–13, 26–30.

Congress adopted the law enforcement proviso to provide victims of such mistaken police raids adequate redress for abusive governmental errors. Senator Charles Percy—one of the proviso's principal sponsors—described the "absence of an effective legal remedy" as "[o]ne of the most shocking aspects" of the Collinsville raids. S. Rep. No. 93–469, at 35 (1973). Accordingly, Congress amended the FTCA to provide "innocent individuals who are subjected to raids of the type conducted in Collinsville" with a cause of action against the federal government. S. Rep. No. 93–588, at 3 (1973). The law was designed to compensate for "actual physical damage, * * * pain, suffering and humiliation" inflicted by law enforcement officers. *Id.* at 2.

The government attempts to distinguish the Collinsville raids from the one at issue here by emphasizing the warrantless nature of the former. But Congress never intended the law-enforcement proviso to be so limited. Although recognizing the Fourth Amendment issues in Collinsville, Congress cautioned that the proviso should "not be * * * limited to constitutional tort situations," but instead would broadly "apply to any case in which a Federal law enforcement agent commit[s] the tort while acting in the scope of his employment." S. Rep. No. 93–588, at 4. So, if a case like this one that is factually identical to the Collinsville raids may not proceed—even though the

Collinsville raids were the impetus for the proviso's adoption—it is likely that no claim would be actionable under the proviso.

### B. Lower courts historically interpreted the law enforcement proviso and discretionary-function exception harmoniously.

Notably, in the years immediately following enactment of the law enforcement proviso, lower courts applied it in a manner that was faithful to Congress's intent, rejecting the government's early attempts to minimize the proviso. Instead, courts interpreted the proviso and discretionary-function exception harmoniously, giving meaningful effect to both provisions. In *Sutton* v. *United States,* 819 F.2d 1289 (5th Cir. 1987), for example, the Fifth Circuit observed that requiring all actions under the law enforcement proviso to clear the discretionary-function hurdle "would result in judicial repeal" of the proviso. *Id.* at 1295. A broad application of the exception would prevent "even * * * Collinsville [from] pass[ing] muster." *Id.* at 1296.

Other courts of appeals took a similar approach, harmonizing the two FTCA provisions by adopting a narrow view of the discretionary-function exception. To ensure the exception did not "eviscerate" the proviso, the Second Circuit refused to classify as discretionary a border patrol agent's "mechanical duty" of determining whether an applicant met the minimal standards for entry into the country. *Caban* v. *United States*, 671 F.2d 1230, 1234 (2d Cir. 1982). A contrary view would "jeopardize a primary purpose" for enacting the law enforcement proviso. *Ibid.* The D.C. Circuit likewise observed that the two provisions would "rare[ly]" come into conflict if courts read the proviso

"to include primarily persons (such as police officers) whose jobs do not typically include discretionary functions." *Gray* v. *Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983); see also *Wright* v. *United States*, 719 F.2d 1032, 1035 (9th Cir. 1983) (limiting the discretionary-function exception "to decisions made at a planning rather than an operational level"). And although the Third Circuit found it unnecessary to resolve the issue in *Pooler* v. *United States*, 787 F.2d 868, 872 (3d Cir. 1986), abrogated by *Millbrook* v. *United States*, 569 U.S. 50, 57 (2013), it noted that limiting the proviso to searches, seizures, and arrests "largely eliminates" the conflict between the two provisions because those activities are operational, not discretionary. *Ibid.* These near-contemporaneous decisions demonstrate courts' understanding that the proviso must be given meaningful reach to accomplish the manifest congressional goal.

### C. The Government's rule would bar nearly all claims arising from the law enforcement proviso.

More recently, however, lower courts have been receptive to the government's urgings to expand the discretionary-function exception to reach nearly all law enforcement activities, effectively narrowing the reach of the law enforcement proviso. These courts presume that law enforcement decisions are inherently based on considerations of public policy. Six courts of appeals, in addition to the court below in this case, have held that a law enforcement officer's investigatory decisions are discretionary in nature. For example, the Ninth Circuit now presumes that an officer's acts related to a criminal investigation "are grounded in policy." *Nieves Martinez* v. *United States*, 997 F.3d 867, 880 (9th Cir. 2021) (quoting *Gonzalez* v.

*United States*, 814 F.3d 1022, 1028 (9th Cir. 2016)). That court will exempt law enforcement investigations from the discretionary-function exception only when an officer's actions have "no legitimate policy rationale." *Id.* at 881 (quoting *Sabow* v. *United States*, 93 F.3d 1445, 1454 (9th Cir. 1996)); see also, *e.g.*, *Suter* v. *United States*, 441 F.3d 306, 311–12 (4th Cir. 2006) (concluding that investigatory choices are grounded in public policy considerations); *Campos* v. *United States*, 888 F.3d 724, 733 (5th Cir. 2018) (classifying thoroughness of an investigation as "inherently discretionary"); *Mynatt* v. *United States*, 45 F.4th 889, 896 (6th Cir. 2022) (classifying investigatory decisions as within the scope of the exception because they "involve difficult considerations" (quoting *Milligan* v. *United States*, 670 F.3d 686, 694 (6th Cir. 2012))); *Reynolds* v. *United States*, 549 F.3d 1108, 1113 (7th Cir. 2008) (recognizing challenges to the quality of an investigation are generally barred under the exception).

Courts have also treated an officer's on-the-spot decisions, such as how to execute a warrant, as discretionary and therefore immune. See *Milligan*, 670 F.3d at 695 (verification of a suspect); *Hart* v. *United States*, 630 F.3d 1085, 1090 (8th Cir. 2011) ("effectuat[ing] an arrest—including how * * * to restrain, supervise, control, or trust an arrestee"); *Shuler* v. *United States*, 531 F.3d 930, 934 (D.C. Cir. 2008) (timing of arrests); *Mesa* v. *United States*, 123 F.3d 1435, 1438 (11th Cir. 1997) (locating, identifying, and verifying the subject of arrest warrant); *Awad* v. *United States*, 807 F. App'x 876, 881 (10th Cir. 2020)(weapon choice, investigative techniques, surveillance methods, and warrant execution tactics). This understanding of the exception covers nearly all of the activities

that may arise from law enforcement officers' interactions with the citizenry, blocking all of these claims. These courts' formulation of the doctrine leaves without recourse the exact people Congress wanted to protect when it adopted the law enforcement proviso, offering them no remedy for their emotional, physical, and economic harms.

That is the necessary consequence of the government's approach: its understanding of the FTCA would effectively write the law enforcement proviso out of the statute. In the government's view, an officer's act need "not be actually grounded in policy considerations" to qualify as discretionary "so long as it is, 'by its nature, susceptible to a policy analysis.'" U.S. Opp. at 11(quoting *Miller* v. *United States*, 163 F.3d 591, 593 (9th Cir. 1998)). This approach posits that only a constitutional mandate, federal statute, or regulation that is "sufficiently specific" can destroy an officer's discretion. *Id.* at 13. The government asserts that "many claims arising from the intentional torts of law enforcement officers do not implicate discretionary functions" under this standard. *Id.* at 18. As its only example, however, the government observes that law enforcement officers do not have discretion to commit perjury (*ibid.*)—an example that seemingly limits the law enforcement proviso to actions that the officer *must* have known were illegal. And that in fact is how the Government has understood the FTCA to apply. See*, e.g.*, U.S. Br. at 29-30, *Campos*, 888 F.3d 724, 2017 WL 2180122, at *21-22 (No. 16-51476) (arguing that the discretionary-function exception is inapplicable only in cases of "intentional or outrageous misconduct"); Appellee Br. at 10, *Nieves Martinez*, 997 F.3d 867, 2020 WL 3884807, at *3 (No. 19-16953) (arguing that claims "that officers were incompetent * *

* careless, abusive, or just got it wrong" fall within the exception). This would bar claims identical to those that Congress had in mind when it enacted the proviso.

## III. Holding the government liable for intentional torts committed by law enforcement officers will advance the goals of the FTCA.

Finally, it bears emphasis that applying the FTCA as Congress intended is wholly consistent with effective law enforcement. Although courts have been concerned that subjecting *individual* officers to legal liability may chill officers from responding to and preventing crime, that concern is not implicated here: the United States—not any individual officer—is liable under the FTCA. Moreover, substantial research demonstrates that law enforcement officers in practice are rarely concerned about legal liability even when they may be subject to it directly, which strongly suggests that vigorous law enforcement actions are unlikely to be deterred by officers' fear of becoming involved indirectly in FTCA litigation. At the same time, lawsuits like this one create powerful incentives for the government to adopt policies that reduce the risk of injury. If claims like the one in this case may not proceed, the government will have much less reason to rein in abusive police conduct.

### A. Government liability under the FTCA for wrong-house raids will not discourage law enforcement officers from vigorous performance of their jobs.

This Court has reasoned that qualified immunity for law enforcement officers is justified on the ground that fear of personal liability may chill officers from exercising their lawful authority. See*, e.g.*, *Elder* v.

*Holloway*, 510 U.S. 510, 514 (1994) ("The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" (quoting *Harlow* v. *Fitzgerald,* 457 U.S. 800, at 806 (1982))); *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) ("This accommodation for reasonable error [under qualified immunity] exists because 'officials should not err always on the side of caution' because they fear being sued." (quoting *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984))).

That fear is inapplicable here. Under the FTCA, Congress imposed liability for certain intentional torts committed by law enforcement officers on the United States, not on the officers. 28 U.S.C. § 2680(h). Because of this, an officer in the field need not hesitate or second-guess his or her actions out of fear of personal liability in an FTCA action. Even in instances where federal officers commit an intentional tort, the government will foot the bill for any judgment or settlement growing out of that action.

And there is no need for concern that law enforcement officers will be chilled in their duties out of concern that they will be caught up in an FTCA suit as a witness or the subject of testimony. Empirical evidence shows that, although "some have claimed that the fear of being sued may negatively affect law enforcement practice, research seems to suggest otherwise." Victor E. Kappeler, Critical Issues in Police Civil Liability 7 (4th ed. 2006). And if officer initiative is not chilled even when *direct* officer liability is at stake, that surely also is so when officers are involved in litigation more indirectly.

The existing research on this topic shows that law enforcement officers rarely—if ever—think about the risk of litigation as they perform their duties. One survey found that 87% of state police officers, 95% of municipal police officers, and 100% of university police officers did *not* consider the risk of liability to be one of their "top ten thoughts" when pulling over a vehicle or confronting an individual. Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 Police Stud. Int'l Rev. Police Dev. 19, 26 (1995). Another survey reported similar findings, concluding that its "results support the findings of earlier studies which found that the majority of police officers are not significantly concerned about the impact of lawsuits on police activities." Anthony P. Chiarlitti, *Civil Liability and the Response of Police Officers: The Effect of Lawsuits on Police Discretionary Actions* (Aug. 2016) (doctoral dissertation, St. John Fischer University), https://perma.cc/J7YQ-9NCM. In fact, officers who have been sued are generally *more* aggressive after the lawsuit than officers who have not been sued. Kenneth J. Novak et al., *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 Policing: Int'l J. Police Strategies & Mgmt. 352, 360 (2003).

Officers may lack concern over litigation because they are rarely required to contribute to judgments or settlements for wrongful conduct, even when they may face personal liability in theory. One study examined 9,225 civil rights damages actions that resolved in the plaintiff's favor and found that officers' "contributions amounted to just .02% of the over $730 million spent by cities, counties, and states" in those cases. Joanna C. Schwartz, *Police Indemnification,* 89

N.Y.U. L. Rev. 885, 890 (2014). Another study found that in successful *Bivens* claims against Federal Bureau of Prisons employees, employees and their insurers contributed to the settlement in less than 5% of cases, a share that amounted to just .32% of the total amount paid to plaintiffs. James E. Pfander, et al., *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 Stan. L. Rev. 561, 579 (2020).

The bottom line is clear: because law enforcement officers' actions are not chilled by the threat of litigation even when facing the risk of personal liability, there is no reason to believe that their initiative will be impaired by fear of an FTCA action, where there is no risk of personal liability at all.

### B. FTCA liability gives the government an incentive to prevent tortious acts.

On the other side of the equation, governmental liability *does* give the liable party—in an FTCA suit, the United States—an incentive to improve the performance of government employees. The United States paid over half a billion dollars in FTCA claims in the 2022 fiscal year alone. See Michael D. Contino & Andreas Kuersten, Cong. Rsch. Serv., R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview* 2 n.14 (2023). These significant payouts should encourage the government to adopt policies that will reduce exposure to future liability. See*, e.g.*, Peter H. Schuck, *Suing Government: Civilian Remedies for Official Wrongs* 16-19, 135-146 (1983). So almost certainly, if the Government faces meaningful liability for wrong-house raids, it will be inclined to take actions to ensure that officers execute searches on the correct homes.

In addition to direct economic incentives, FTCA liability creates political incentives for constructive governmental reform in at least two ways. First, the cost of litigation and liability can create political pressure for reform, especially when those economic costs are great. Elected officials are highly motivated to maximize the allocation of public benefits while minimizing the public's tax burden, but those goals would be undermined by substantial governmental liability for law enforcement officer torts. See, *e.g.*, Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 832 (2007). This is particularly true when "the cost of avoiding an injury is small, the likelihood of injury is great, and the impact on the government's budget is likely to be large." *Id.* at 842 All of that typically will be true of wrong-house raids.

Second, liability creates political incentives for action by exposing and attracting public attention to governmental failings. Lawsuits give plaintiffs a mechanism with which to discover and expose government wrongdoing, while substantial monetary awards against the government may attract significant press coverage. But without the prospect of liability under the FTCA, many lawsuits that would otherwise create political incentives for elected federal officials to act would not be filed in the first place.

The Los Angeles Sheriff's Department (LASD) is illustrative of the ways that liability can incentivize and improve governmental accountability. In 1991, the Los Angeles County Board of Supervisors ordered an independent investigation after a string of high-profile and expensive settlements and judgments. See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 849 (2012). The Board

also appointed a special counsel to oversee the implementation of the investigator's recommendations. As a result of the investigation, the LASD began tracking legal claims brought against it and the settlements and judgments paid out. *Ibid.* Through this tracking, the LASD noticed that certain issues kept recurring, including deputies failing to go to the right address in response to a call. *Id.* at 854.

The Department acted to fix these failings. Schwartz, 33 Cardozo L. Rev. at 854. For example, at the suggestion of an auditor, the LASD implemented enhanced supervision techniques to improve accuracy when responding to calls. *Ibid.* Many of these strategies worked. By adopting these and other techniques, the LASD reduced litigation costs by over $30 million in the five years of the special counsel's tenure *Id.* at 860. Without the imposition of liability, it is unlikely that the LASD would have engaged in these valuable and successful reforms. In fact, it might not even have known what areas *to* reform without the valuable information gained by tracking legal claims made against it.

The data and history from the LASD provide a lesson that is applicable to this case. Government liability will not discourage desirable law enforcement activity by federal officers. But precluding government liability for harmful and undesirable officer action will reduce the prospect that officials take steps to curb future abuses. That preclusion of liability also, of course, leaves victims of misconduct with no meaningful remedy. The Court should reject the government's request to embrace such an outcome in this case.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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