No. _____

In the Supreme Court of the United States

GEORGE EVANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2009, Respondent the United States of America cut down twenty-five mature and valuable trees from the property of Petitioner George Evans incidental to the Asian Longhorned Beetle eradication program. But Evans' trees were not infested, and the government violated its own policy by not obtaining Evans' permission prior to removing his trees. Evans sued under the Federal Tort Claims Act. The courts below granted summary judgment to the government based on the discretionary-function exception to the Federal Tort Claims Act, incorrectly finding that the government's trespass onto Evans' property and destruction of his trees was authorized as a matter of discretion.

The questions presented are as follows:

1. Whether this Court's prior precedent applying the discretionary-function exception to the Federal Tort Claims Act to government employees acting on the operational level should be modified to accord with Justice Scalia's concurrence opinion in *United States v. Gaubert*, 499 U.S. 315 (1991).

2. Whether this Court should resolve the Circuit split regarding which party has the burden of proof under the discretionary-function exception to the Federal Tort Claims Act.

3. Whether *Gaubert* should be clarified to reaffirm that government policy as applicable to the discretionary-function exception may be established on a case-by-case basis and formed in partnership with a state government based on local conditions under that state's statute, regulation, or policy.

Petitioner George Evans respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this civil action.

PARTIES TO THE PROCEEDING

All parties to this proceeding are set forth in the caption of the case on the cover page. Petitioner Evans, being an individual, has no information to disclose under Rule 29.6.

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The December 4, 2017 opinion of the United States Court of Appeals for the First Circuit in Case No. 16-2423, is reported at 876 F.3d 375, and is attached hereto as Appendix A. App. 1–16. The September 30, 2016 order of the United States District Court, District of Massachusetts in Case No. 4:14-cv-40042-DHH, is available at 2016 U.S. Dist. LEXIS 135979, and is attached hereto as Appendix B. App. 17–40. The February 6, 2018 order of the United States Court of Appeals for the First Circuit in Case No. 16-2423 denying the petition for rehearing is attached hereto as Appendix C. App. 41–42. The January 9, 2009, Federal Order, Domestic Quarantine of a Portion of Worcester County, Massachusetts, for Asian Longhorned Beetle (*Anolophora glabripennis*), is attached hereto as Appendix D. App. 43–46. The December 10, 2008 Notice of Infestation and Treatment Order Regarding Asian Longhorned Beetle (Tree Removal) is attached hereto as Appendix E. App. 47–52.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the First Circuit and the United States District Court, District of Massachusetts, had jurisdiction pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1).

The United States Court of Appeals for the First Circuit issued its decision upholding the District Court's judgment on December 4, 2017, and thereafter denied rehearing on February 6, 2018. In compliance with Rule 13.3 of the Rules of the Supreme Court of the

United States, Petitioner timely filed this Petition prior to 90 days after the date of the denial of hearing, on or before May 7, 2018.

RELEVANT STATUTES AND REGULATIONS

28 U.S.C. § 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1346(b)(1):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

7 C.F.R. § 301.51-3(b):

> The Administrator or an inspector may temporarily designate any nonquarantined area as a quarantined area in accordance with the criteria specified in paragraph (a) of this section. The Administrator will give written notice of this designation to the owner or person in possession of the nonquarantined area, or, in the case of publicly owned land, to the person responsible for the management of the nonquarantined area. Thereafter, the interstate movement of any regulated article from an area temporarily designated as a quarantined area is subject to this subpart. As soon as practicable, this area either will be added to the list of designated quarantined areas in paragraph (c) of this section, or the Administrator will terminate the designation. The owner or person in possession of, or, in the case of publicly owned land, the person responsible for the management

> of, an area for which the designation is terminated will be given written notice of the termination as soon as practicable.

7 U.S.C. § 7751(a):

> In general. The Secretary may cooperate with other Federal agencies or entities, States or political subdivisions of States, national governments, local governments of other nations, domestic or international organizations, domestic or international associations, and other persons to carry out this title.

Mass. Gen. Laws ch. 132, § 8

> The chief superintendent, district supervisors, district superintendents and other employees and authorized agents of the bureau of shade tree management and pest control may enter upon any land within the commonwealth, and any local superintendent appointed under section thirteen and his employees and authorized agents may enter upon any land within his city or town, in accordance with the provisions of this chapter, for the purpose of determining the existence, over–all area and degree of infestation or infection caused by the public nuisances named in section eleven, suppressing and controlling said public nuisances and affixing signs to and removing, or causing to be removed, trees and wood infected with the Dutch elm disease or used as a breeding place of the beetles which spread said disease.

Mass. Gen. Laws ch. 242, § 7

> A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only.

STATEMENT OF THE CASE

The government came, they *sawed*, they conquered. In 2009, Respondent the United States of America cut down twenty-five trees from the property of Petitioner George Evans incidental to the Asian Longhorned Beetle eradication program. But Evans' trees were not infested, and the government violated its own policy by not obtaining Evans' permission prior to removing the trees. The government's mistake was not a discretionary choice; rather, it was a negligent error.

Evans sued under the Federal Tort Claims Act. However, the courts below granted summary judgment based on the discretionary-function exception, incorrectly finding that the government's trespass onto Evans' property and destruction of his trees was authorized as a matter of discretion.

This case presents numerous important questions regarding the federal government's liability under the Federal Tort Claims Act. The questions presented all relate to the application of the discretionary-function

exception. This Court should grant certiorari to review its holding in *Gaubert* consistent with Justice Scalia's concurrence in that case; to resolve the conflict among the Circuits regarding the burden of proof applicable to the discretionary-function exception; and to reaffirm that federal government policy may be established on a case-by-case basis and formed in partnership with a state government based on local conditions under that state's statute, regulation, or policy.

I. Introduction

This case involves a dispute between Petitioner George Evans ("Evans"), and Respondent the United States of America ("Respondent"). In February 2009, Respondent trespassed on Evans' real property without prior notice or consent, and, in violation of its own policy, cut down Evans' trees. Evans thereafter filed suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680. The FTCA provides a limited waiver of sovereign immunity for torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1).

In spite of the fact that Respondent's policy forbade the removal of Evans' uninfested trees without his express permission, the District Court granted summary judgment in Respondent's favor finding that there were no disputed issues of material fact, and the First Circuit Court of Appeals upheld that judgment, both holding that the discretionary-function exception barred Evans' claims, effectively granting the government authority to act where none existed.

A. This case presents serious questions of great national importance for at least three reasons.

First, the spread of the Asian Longhorned Beetle in the United States is a national problem with the potential to cause severe economic and environmental damage. Approximately 13 different species of hardwood trees are at risk, and forests in over 30 states are susceptible to infestation and destruction by the beetle. To be successful, the Asian Longhorned Beetle eradication program must maintain the confidence and trust of the affected property owners, and that confidence and trust are threatened by the decisions below.

Second, this case goes to the heart of the most fundamental rights of property. The questions presented directly relate to the government's ability to negligently trespass upon and destroy private property, and then to a property owner's ability to seek a remedy for such trespass and destruction. A serious erosion of private property rights related to the application of the Asian Longhorned Beetle eradication program will result without the Court's intervention.

Third, this case has national importance to future applications of the discretionary-function exception of the FTCA. The government's ability to run roughshod over fundamental property rights should not be based on the fiction that low-level employees have the same ability to establish government policy as the Secretary of Agriculture.

To resolve these important issues, this Court's precedent should be modified in accordance with Justice Scalia's concurrence opinion in *United States v. Gaubert*, 499 U.S. 315 (1991). This Court should also grant certiorari to resolve the conflict among the Circuits regarding the burden of proof applicable to the discretionary-function exception, and to reaffirm that government policy may be established on a case-by-case basis and formed in partnership with a state government based on local conditions under that state's statute, regulation, or policy.

II. Facts

Evans resides at 14 Randolph Road in Worcester, Massachusetts. In February 2009, Respondent trespassed upon his property and negligently cut down Evans' healthy and uninfested trees. In violation of the applicable policy and practice in place throughout the quarantined area in Worcester, Massachusetts, Respondent did not provide the required prior notice to Evans of the quarantine, and it did not request Evans' permission or acknowledgement to remove his trees. In effect, Respondent's invasion by surprise was a no-knock, no-warrant destruction of property. The restoration value of Evans' twenty-five destroyed trees is approximately $240,000, subject to treble damages under Massachusetts General Law ch. 242, § 7.

The case begins with the Asian Longhorned Beetle, which is an invasive insect that is destructive to hardwood trees, including maple, elm, ash, birch, poplar, and willow. App. 2. The beetles' spread has the potential to cause significant economic and environmental damage. App. 3. USDA declared Asian Longhorned Beetle infestation an emergency, and it

began working with state and local governments to eradicate the pest. App. 3.

Respondent's policy in place for the program in question in Worcester, Massachusetts, was to remove only infested trees. Uninfested trees were only to be removed with the property owner's authorization or permission. App. 5, 20. Part of the reasoning behind this policy decision was that the local community was not in favor of removing uninfested trees. App. 20. Owners were therefore given the choice of whether to allow the removal of uninfested trees. App. 20.

Respondent established and carried out this policy in partnership and consultation with the Massachusetts Department of Conservation and Recreation ("MDCR"), the City of Worcester, Massachusetts, and others. App. 4, 18–19. The decision makers included Christine Markham, the national director of the Asian Longhorned Beetle program, Jeff Daley, a senior policy advisor with MDCR, and Michael O'Brien, the City Manager for Worcester, Massachusetts, each of whom helped create the applicable policy based in part on the assessment of local conditions. MDCR issued an order of quarantine for the affected area on August 8, 2008. App. 3, 18; *see also* Mass. Gen. Laws ch. 132, § 8 (authorizing entry upon land to control the Asian Longhorned Beetle). USDA issued a quarantine order affecting portions of Worcester, Massachusetts, thereafter in September 2008. App. 3–4.

On December 22, 2008, USDA through its agency, APHIS, formally entered into a Cooperative Agreement with MDCR codifying a joint action to eradicate the Asian Longhorned Beetle from the quarantine zone.

App. 4, 18–19. Pursuant to the Cooperative Agreement, APHIS agreed to provide personnel to accomplish operational activities, and MDCR agreed to secure and manage a tree removal contract. App. 19. The policy in place under the partnership and pursuant to the Cooperative Agreement was that the removal of infested trees was obligatory, but the removal of uninfested trees was only encouraged, not required. App. 5.

To obtain property owners' permission, Respondent relied on a certain legal notification form, the Notice of Infestation and Treatment Order Regarding Asian Longhorned Beetle (Tree Removal) (the "Legal Notification Form") sent by MDCR. App. 5, 47–50. The officially endorsed Legal Notification Form informed property owners that MDCR and APHIS were working in cooperation to combat the Asian Longhorned Beetle. App. 5. It also informed affected property owners of the policy in place, namely that only infested trees were to be removed and uninfested trees would only be removed with the property owner's permission. App. 5, 20, 51–52. The Legal Notification Form further included an Acknowledgement and Permission form, which also specifically states that uninfested trees are not required to be removed, and that such uninfested trees will only be removed if property owners "request and authorize" such removal. App. 5, 20, 52.

To determine which trees to cut, Respondent maintained maps and charts indicating which property owners had authorized the removal of uninfested trees, which had authorized the removal of only infested trees, and which had not yet been contacted with a

Legal Notification Form or returned the attached Acknowledgement and Permission form. App. 5, 21. Respondent also maintained a list of properties that included notes on the permission status of each property in question. App. 21. Respondent used these maps and list to determine whether a property owner had given permission to enter his or her property or to cut uninfested trees and to determine which trees to cut. App. 21. Again, the policy in place was that Respondent would not enter any property for which the property owner had not previously given written permission. App. 21. Respondent, thus, could not cut uninfested trees without a property owner's permission. App. 5, 20, 21.

Crystal Franciosi was the Plant Protection and Quarantine technician with APHIS charged with oversight of Respondent's removal of Evans' trees at the operational level in February 2009. App. 22. Franciosi had no discretion to make policy for USDA or APHIS. *See* App. 22. Instead, she monitored and supervised the work of a tree cutting crew. App. 22. But Franciosi made an error in cutting Evans' trees, errantly disregarding the requisite two documents that directed her work, the map and list of properties. *See* App. 22.

Franciosi believed (incorrectly) that the map maintained by Respondent indicated that Evans had given permission to remove uninfested trees from his property. App. 6 n.3, 22. But the list of properties showed that Evans had not given such permission. App. 22. In fact, Evans never gave permission to enter his property or to remove any of his uninfested trees. App. 6, 22. Moreover, none of Evans' trees were

infested. App. 6. Franciosi made a negligent mistake in directing Evans' trees to be cut.

On February 21, 2009, approximately ten days after his trees were already cut and removed, Evans received a copy of the Legal Notification Form. App. 6, 22. The Legal Notification Form came too late. In spite of the policy in place, and in spite of the fact that Evans had not been notified of the quarantine or given his permission to remove any of uninfested trees on his property, Respondent trespassed onto Evans' property and removed twenty-five healthy and uninfested trees. Because Respondent violated its own policy in doing so, the discretionary-function exception is inapplicable.

III. The Decisions Below

The decisions below were decided upon summary judgment. App. 7, 22. The District Court granted summary judgment in Respondent's favor, holding that the discretionary-function exception barred Evans' claims. App. 7, 37. Upon de novo review, the First Circuit agreed. App. 9, 16.

Following the District Court's lead, the First Circuit held that the discretionary-function exception barred Evans' claims because "the decision about whether to remove a host tree without property owner permission was a judgment call." App. 11. The petition should be granted to address this decision for numerous reasons.

Relative to Justice Scalia's concurrence opinion in *Gaubert*, the courts below did not address the fact that Respondent's employee, Franciosi, who was a technician on the operational level, App. 22, had no discretion to act as she chose in removing uninfested trees from Evans' property, *see* App. 36. Franciosi's

lack of discretion would have been recognized, and not disregarded, if the First Circuit had followed Justice Scalia's direction that "the level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter *and* the office of the decisionmaker." *Gaubert*, 499 U.S. at 335. Because Justice Scalia's formulation of the applicable rule more correctly reflects this Court's prior reasoning and the reality of many situations where the discretionary-function exception arises, this Court's prior precedent should be modified to make that clear.

The First Circuit also was silent on the fact that the Circuit courts are split regarding which party has the burden of proof under the discretionary-function exception. *See* App. 15. As described in detail below, the Third, Seventh, and Ninth Circuits hold that the government has the burden of proving the applicability of the discretionary-function exception. In contrast, the First, Fourth, Fifth, Tenth, and Eleventh Circuits place the burden on the plaintiff. This is an important issue because the placement of the burden will often determine the outcome. In addition, the discretionary-function exception is an affirmative defense, and the government has access to the facts and evidence necessary to prove this defense. The petition should accordingly be granted to review this issue. This Court should clarify that the government bears the burden of proof in applying the discretionary-function exception.

The First Circuit also failed to follow this Court's decision in *Gaubert* regarding the fact that government policy as applicable to the discretionary-function exception may be established on a case-by-case basis.

See App. 10–14, 20. *Gaubert* recognized that some government agencies "establish policy on a case-by-case basis." 499 U.S. at 324. The First Circuit alters this precedent by disregarding the fact that Respondent's policy in the present situation, which was to only remove uninfested trees with the property owner's permission, was established on a case-by-case basis, based on local conditions in Worcester, Massachusetts. App. 20. This differs from how the program was run in other states or how it could have been theoretically run. The First Circuit instead held that the policy to secure a property owner's permission prior to cutting down uninfested trees was only a "courtesy," and that Respondent could have instead followed a different, theoretical situation. App. 13. But the federal employees who worked on the program understood the policy in place, and it was well documented in the program's writings and publications. Because this conclusion rejects *Gaubert*'s direction that a policy may be established by an agency on a case-by-case basis, 499 U.S. at 324, this Court should grant the petition to reaffirm that government policy may be established on a case-by-case basis.

Finally, the First Circuit failed to give credit to the fact that Respondent's policy was formed in partnership with the state government based partly on state statute, regulation, and policy. *See* App. 4, 10–14, 18–19. As evidenced by the Cooperative Agreement, the Legal Notification Form sent to the lawful property owners, and the removal of trees at the operational level, the reality of the present situation is that Respondent formed the applicable policy in close coordination and partnership with MDCR. App. 4, 18–19. But the First Circuit rejected this reality and

incorrectly drew a strict dividing line between federal and state policies. App. 10. This Court should accordingly clarify that where federal and state agencies act in coordination, state statute, regulations, and policies can be adopted as federal policy. Where a federal agency must rely on state authority as the legal justifications for its actions, it should equally be bound by those limitations and restrictions that the state places on itself.

For each of these reasons, and to correct the First Circuit's errors below, the petition should be granted.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant certiorari for several reasons.

The effect of the First Circuit's decision is that under the guise of a quarantine established to fight the Asian Longhorned Beetle, the federal government can enter upon anyone's private property and cut down uninfested trees without giving prior notice, and without seeking the property owner's permission, as the government did to Evans.

Apart from the fact that this result is manifestly unjust, the implications of the lower courts' rulings on the discretionary-function exception perverts Congress' intent in enacting the FTCA, and the exception swallows the rule. If the First Circuit's decision is allowed to stand, the federal government can trespass onto private property and destroy private property with no warning or notice, all upon the excuse of combating the Asian Longhorned Beetle. Such unfettered discretion should not be the law. The prior precedent that seemingly allowed this miscarriage of justice

should be reexamined, and the results should be overturned.

It has been over twenty-five years since this Court addressed the issue of the discretionary-function exception in *Gaubert*. *See* 499 U.S. 315 (decided March 26, 1991). The inexorable expansion of the federal government in that time, as evidenced by the program to combat the Asian Longhorned Beetle, necessitates clarification of the limits of the government's authority and to ensure that the FTCA operates as Congress intended.

The FTCA authorizes suits against the United States for damages to property "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *accord United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807–08 (1984). However, the FTCA does not waive sovereign immunity completely. *Varig Airlines*, 467 U.S. at 808. One such limit is the discretionary-function exception.

The discretionary-function exception states that the FTCA does not apply to "[a]ny claim . . . 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); *accord Varig Airlines*, 467 U.S. at 808; *Dalehite v. United States*, 346 U.S. 15, 33 (1953).

The Supreme Court has handed down a series of decisions clarifying the scope of the discretionary-function exception. The framework for evaluating particular conduct is laid out in *Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991). As these cases explain, the discretionary-function exception bars suit only if two conditions are met: (1) the act alleged to be negligent must be discretionary, in that it involves an "element of judgment or choice," and it is not compelled by statute or regulation, and (2) the judgment or choice in question must be grounded in "considerations of public policy" or be "susceptible to policy analysis." *Gaubert*, 499 U.S. at 322–23, 325; *Berkovitz*, 486 U.S. at 536–37; *see also* App. 8–9 ("The court must initially 'identify the conduct that is alleged to have caused the harm.' It must 'then determine whether that conduct can fairly be described as discretionary.' If so, it must proceed to 'decide whether the exercise or non-exercise of the granted discretion is actually or potentially influenced by policy considerations.'"). Therefore, the discretionary-function exception shields "legislative and administrative decisions grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. And "a court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. If a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," the discretionary-function exception does not apply because "the employee has no rightful option but to adhere to the directive." *Id.*

As established in detail below, this Court should grant certiorari and reverse the decision below for three reasons: (1) to adopt the standard explained in Justice Scalia's concurrence opinion in *Gaubert*; (2) to resolve the conflict among the Circuits regarding the burden of proof applicable to the discretionary-function exception; and (3) to reaffirm and clarify that government policy may be established on a case-by-case basis and formed in partnership with a state government based on local conditions under that state's statute, regulation, or policy.

I. Justice Scalia's concurrence opinion in *Gaubert* should be adopted as the governing standard when applying the discretionary-function exception on the operational level.

The First Circuit's decision below should first be overturned and this Court's prior precedent should be modified based on Justice Scalia's concurrence opinion in *United States v. Gaubert*, 499 U.S. 315, 334–39 (1991). The First Circuit held below that the discretionary-function exception bars Evans' claims because "the decision about whether to remove a host tree without property owner permission was a judgment call." App. 11. But the First Circuit did not analyze the fact that the federal employee that removed Evans' trees, based solely on a negligent mistake, was a low-level employee with no discretion to decide policy. *See* App. 10–14. The result of the First Circuit's holding is to give low-level field technicians working on the operational level authority to create policy that is equal to that of the Secretary of Agriculture. This analysis fails to comport with the

reality of our government's operations, and in this case and many others, injustice results. To cure this defect, this Court's prior precedent should be modified based on Justice Scalia's concurrence opinion in *Gaubert*.

Quoting the Court's earlier decision in *Varig Airlines*, the Court stated in *Gaubert* that "'it is the nature of the conduct, rather than the status of the actor' that governs whether the [discretionary function] exception applies." 499 U.S. at 322 (*quoting* 467 U.S. at 813). Similarly, this Court's prior decision in *Dalehite* states that the discretionary-function exception covers "[n]ot only agencies of government . . . but all employees exercising discretion." 346 U.S. at 33. "Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability." *Varig Airlines*, 467 U.S. at 813.

Based on this prior precedent, *Gaubert* held that the discretionary-function exception can protect negligence in the course of day-to-day activities. 499 U.S. at 334. But this should not mean that the status of the government employee in question is totally irrelevant. To the contrary, as explained in Justice Scalia's concurrence in *Gaubert*, "the level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter *and* the office of the decisionmaker." 499 U.S. at 335. Under this view, the discretionary-function exception applies "if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy

and is made by an officer whose official responsibilities include assessment of those considerations." *Id.* (emphasis added).

Justice Scalia's formulation of the applicable rule more correctly reflects this Court's prior reasoning and the reality of many situations where the discretionary-function exception arises. As Justice Scalia stated, "looking not only to the decision but also to the officer who made it, recognizes that there is something to the planning vs. operational dichotomy . . . ." *Id.* "Ordinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions." *Id.*

The outcome of this Court's past cases dealing with the discretionary-function exception accurately reflect Justice Scalia's formulation. For example, "[t]he dock foreman's decision to store bags of fertilizer in a highly compact fashion is not protected by this exception because, even if he carefully calculated considerations of cost to the Government versus safety, it was not his responsibility to ponder such things; the Secretary of Agriculture's decision to the same effect is protected, because weighing those considerations is his task." *Id.* at 335–36 (referencing the facts at issue in *Dalehite*). Similarly, for "the failure of Coast Guard maintenance personnel adequately to inspect electrical equipment in a light; though there could conceivably be policy reasons for conducting only superficial inspections, the decisions had been made by the maintenance personnel, and it was assuredly not their responsibility to ponder such things." *Id.* (referencing the facts at issue in *Indian Towing Co. v. United States*, 350 U.S.

61 (1955)). "This same factor explains why it is universally acknowledged that the discretionary function exception never protects against liability for the negligence of a vehicle driver." *Id.*

The language of the statute also supports Justice Scalia's formulation of the discretionary-function exception. Section 2680 explicitly excludes governmental liability for acts taken "exercising due care, in the execution of a . . . regulation, whether or not such . . . regulation be valid." *Id.*; 28 U.S.C. § 2680(a). As Justice Scalia explained, this represents "an absolute statutory presumption, so to speak, that all regulations involve policy judgments that must not be interfered with," which supports a similar presumption that decisions reserved to policymaking levels involve policy judgments, "and the higher the policymaking level, the stronger the presumption." *Gaubert*, 49 U.S. at 336–37.

Justice Scalia's formulation also provides evidence applicable to step two of the test for the discretionary-function exception. A government employees' close identification with policymaking can be strong evidence that "the subject matter of the decision is one that ought to be informed by policy considerations." *Id.* at 336. For example, it is much easier to believe that the manner of storing fertilizer raises economic policy concerns if the decision on that subject has been reserved to the Secretary of Agriculture himself. *Id.* (referencing the facts at issue in *Dalehite*). Justice Scalia's formulation further comports with the design/implementation distinction that some courts take in applying this step. *See, e.g.*, *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005). The

design of a course of governmental action may be shielded by the discretionary-function exception, but the *implementation* of that course of action is not. *Id.*

Justice Scalia's concurrence in *Gaubert* establishes the correct analysis that the First Circuit should have followed, and this Court's prior precedent should be modified to make that clear. This Court should hold that, as Justice Scalia correctly stated, "it is proper to take the level of the decisionmaker into account." *Gaubert*, 499 U.S. at 336 (Scalia, J., concurring).

If the First Circuit would have taken this correct approach, it would have fittingly held that Franciosi had no discretion in cutting Evans' trees, and her mistake in doing so was not grounded in any policy considerations and was not susceptible to any policy analysis. The discretionary-function exception covers acts that are *discretionary*, so the challenged action must be "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. But Franciosi was just a technician working at the operational level, and she had no authority to create policy for APHIS or USDA. Franciosi had no discretion to enter Evans' property or to cut down his trees without first receiving his permission because the applicable policy in place in Worcester, Massachusetts, was to remove uninfested trees only with the lawful property owner's permission, and Evans had provided no such permission. App. 6, 22, 51–52. Her actions were irrefutably at odds with the policy developed by the cooperative program. Her actions were not the exercise of policy-making judgment but rather human error.

As to the second part of test for the discretionary-function exception, a court must determine whether the discretion involved is of the type that the exception was designed to shield, namely, legislative and administrative decisions based on social, economic, or political policy or susceptible to policy analysis. *Berkovitz*, 486 U.S. at 536; *Gaubert*, 499 U.S. at 325. Applying Justice Scalia's approach, the fact that Franciosi was a low-level employee provides "strong evidence" that her mistake in cutting Evans' trees was not a decision that was "informed by policy considerations." *Gaubert*, 499 U.S. at 336 (Scalia, J., concurring). This approach fits with the reality of the situation, and with many other similar situations, because low-level government employees, especially those working at the operational level, have limited or no ability to shape policy. The reality of the situation was that Franciosi did not have the ability to shape policy in equal respect to the Secretary of Agriculture (or in any respect in this case), but the test applied by the First Circuit ignores this reality and assumes that she did have such authority. The result was predictably unsound.

Because Justice Scalia's concurrence in *Gaubert* establishes the correct analysis that the First Circuit should have followed in applying the discretionary-function exception to the FTCA, this Court should grant the petition and reverse the court below.

II. This Court should resolve the Circuit split regarding which party has the burden of proof under the discretionary-function exception.

This Court's prior precedent should also be clarified to resolve a Circuit split regarding which party has the burden of proof under the discretionary-function exception. The First Circuit's decision below should be overturned and remanded to clarify that, as the party raising the issue and with greater access to the sources of proof, the government bears the burden of proving that the discretionary-function exception applies.

The First Circuit assigned Evans the burden of proving that the discretionary-function exception does not apply. App. 15 (*quoting Shansky v. United States*, 164 F.3d 688, 692 (1st Cir. 1999)). While proving a negative in this respect seems impractical, this approach aligns with First Circuit caselaw, which "places the burden on the plaintiff to show that discretionary conduct was not policy-driven and, hence, falls outside the exception." *Carroll v. United States*, 661 F.3d 87, 100, n.15 (1st Cir. 2011). But the Circuits are split on which party should bear the applicable burdens. *See St. Tammany Parish, ex rel. Davis v. FEMA*, 556 F.3d 307, 315 n.3 (5th Cir. 2009) (collecting cases).

The Third, Seventh, and Ninth Circuits hold that the government has the burden of proving the applicability of the discretionary-function exception. *Merando v. United States*, 517 F.3d 160, 164 (3rd Cir. 2008); *Middleton v. United States*, 658 F. App'x 167, 169 (3d Cir. 2016); *Keller v. United States*, 771 F.3d 1021, 1026 (7th Cir. 2014); *Bunch v. United States*, 880

F.3d 938, 942 (7th Cir. 2018); *Bailey v. United States*, 623 F.3d 855, 859 (9th Cir. 2010), cert denied, 565 U.S. 1079 (2011); *Gonzalez v. United States*, 814 F.3d 1022, 1027 (9th Cir. 2016). The First, Fourth, Fifth, Tenth, and Eleventh Circuits place the burden on the plaintiff. *Carroll v. United States*, 661 F.3d 87, 100 n.15 (1st Cir. 2011); *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009); *Seaside Farm, Inc v. United States*, 842 F.3d 853, 857 (4th Cir. 2016); *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016); *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175 (10th Cir. 2008); *Clark v. United States*, 695 F. App'x 378, 383 (10th Cir. 2017); *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016); *Lewis v. United States*, 618 F. App'x 483, 486 (11th Cir. 2015); *Slappey v. United States Army Corps. of Eng'rs*, 571 F. App'x 855, 856 (11th Cir. 2014). The Eighth Circuit appears to be unclear on the issue, but it leans towards placing the burden on the plaintiff. *See Herden v. United States*, 688 F.3d 467, 472 (8th Cir. 2012) (holding that the plaintiff bears the burden of rebutting the presumption of applicability at the second step of the analysis); *Hart v. United States*, 630 F.3d 1085, 1089 (8th Cir. 2011) (declining to decide the issue, but noting authority from within the Circuit indicating the plaintiff has the burden).

The decision below conflicts with the precedent of the Third, Seventh, and Ninth Circuits. In the present case, the First Circuit placed the burden on Evans to prove that any discretion was not "'grounded in social, economic, and political policy,'" and "was not susceptible to policy analysis." App. 14–15 (*quoting Varig Airlines*, 467 U.S. at 814, and *Shansky*, 164 F.3d

at 692). By doing so, the First Circuit, along with the Fourth, Fifth, Tenth, and Eleventh Circuits, improperly shift the burden in a way that makes it virtually guaranteed that the second step of the analysis will always swing in the government's favor. Combined with the fact that courts do not apply the appropriate analysis from Justice Scalia's concurrence in *Gaubert*, which can provide "strong evidence" on this question, Congress' intent is being thwarted. *See Gaubert*, 499 U.S. at 336 (Scalia, J., concurring).

As the party raising the discretionary-function exception, which applies in the manner of an affirmative defense, the government should bear the applicable burden of proof. *See Keller*, 771 F.3d at 1023 ("The discretionary function exception is an affirmative defense to liability under the FTCA that the government must plead and prove."). As the Seventh Circuit observed, "[a]ssigning the burden to the plaintiff would not simply shift the outcome in favor of the United States in a close case. It would also foist on the plaintiff the need to include allegations in her complaint designed to prove a raft of negatives—*i.e.*, that each exception does not apply—and then to prove each of these negatives as part of her case-in-chief." *Bunch*, 880 F.3d at 942. Simply put, "the Government will generally be in the best position to prove facts relevant to the applicability of the discretionary function exception." *S.R.P. v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012).

The petition should be granted, the decision below should be reversed, and this Court should clarify that the government bears the burden of proof in applying the discretionary-function exception.

III. *Gaubert* should be clarified to reaffirm that government policy as applicable to the discretionary-function exception may be established on a case-by-case basis and formed in partnership with a state government based on local conditions under that state's statute, regulation, or policy.

For ease of analysis, this third question presented can be divided into two interrelated questions: (A) whether *Gaubert* should be clarified to reaffirm that government policy as applicable to the discretionary-function exception may be established on a case-by-case basis, and (B) whether government policy as applicable to the discretionary-function exception may be formed in partnership with state governments based on state statute, regulation, or policy. Each is addressed separately.

A. Government policy may be established on a case-by-case basis.

Gaubert correctly recognized that, in determining whether a policy exists relative to the discretionary-function exception, some government agencies establish policy on a case-by-case basis. 499 U.S. at 324. This is what occurred in the present case. App. 20. The evidence establishes that Respondent's policy applied to the program in Worcester, Massachusetts, was to remove only infested trees, and uninfested trees could only be removed with the property owner's permission. App. 5, 20, 51–52. Quixotically, the First Circuit refuted the established policy for the program at issue in this case in favor of a theoretical possibility that was not actually applied. App. 11–13. The effect of this decision is to improperly

modify this Court's existing precedent. The petition should be granted to reaffirm the correct analysis that the First Circuit disregarded.

Gaubert's application of the discretionary-function exception states that if a government employee violates a mandatory regulation, "there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." 499 U.S. at 324. In such a situation, "[t]he requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Id.* at 322 (*quoting Berkovitz*, 486 U.S. at 536). The key to applying the discretionary-function exception in this case therefore lies within the statutes, regulations, and policies applicable to the facts.

Gaubert directs as follows:

> Not all agencies issue comprehensive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations. In any event, it will most often be true that the general aims and policies of the controlling statute will be evident from its text.

Id. at 324; *see also Varig Airlines*, 467 U.S. at 820 (analyzing policy established in "operating manuals"). The First Circuit's decision alters this precedent by

disregarding the fact that Respondent's policy in the present situation was to remove only infested trees, and uninfested trees could only be removed with the property owner's permission. The First Circuit instead based its decision upholding summary judgment on a theoretical possibility that did not apply. App. 11. By ignoring the facts establishing the actual applicable policy in favor of a theoretical possibility, the First Circuit rejected *Gaubert*'s direction that the policy may be established on a case-by-case.

Numerous documents and sources of evidence, all of which should have been considered under *Gaubert* (and which presented an issue of fact on summary judgment) establish Respondent's policy in the present situation. First, the applicable regulations required Respondent to provide Evans with written notice that his property was within a quarantined area. 7 C.F.R. § 301.51-3(b). Respondent failed to provide such notice until after it removed Evans' trees. App. 6, 22.

On January 9, 2009, USDA issued a quarantine order that encompassed Evans' property. App. 43–46. This quarantine order referred to 7 C.F.R. § 301.51-3(b) as specifically requiring that "written notification be given to the owner or person in possession of a newly quarantined area." App. 45. As that regulation states, APHIS is required to give "written notice" of a quarantine designation to property owners in an affected area. 7 C.F.R. § 301.51-3(b). Evans did not receive any such written notice prior to his trees being taken. App. 6, 22. Because Respondent thereby violated this regulatory requirement in taking his trees without first securing Evans' permission, the discretionary-function exception did not apply.

It was only after his trees were cut and removed that Evans received the Legal Notification Form on February 21, 2009. App. 6, 22. The Legal Notification Form further evidences Respondent's policy to remove only infested trees. App. 47–52. The Legal Notification Form included an Acknowledgement and Permission form, which specifically states that uninfested trees are not required to be removed, and that such uninfested trees will only be removed if property owners "request and authorize" such removal. App. 20, 52. Because Evans never granted permission to remove his trees, Respondent vitiated its own policy in doing so, and the discretionary-function exception did not apply.

Testimony further establishes that Respondent's policy was to only remove uninfested trees with the property owner's permission. The individuals employed by USDA and APHIS described this policy, including Christine Markham, the national director of the Asian Longhorned Beetle program, Donna Fernandes, the operations supervisor, and Clint McFarland, the project manager for the work done in Worcester, Massachusetts. These individuals acted in accordance with this policy of removing only infested trees. And they testified that the policy was to only remove uninfested trees with the property owner's permission.[1] Their testimony also demonstrates that

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[1] Black's Law Dictionary defines "permission" as "[t]he act of permitting," or, "[a] license or liberty to do something; authorization." Black's law Dictionary 1255 (9th ed. 2009). Without permission, i.e., a license, the removal of Evans' trees violated state law. *See* Mass. Gen. Laws ch. 242, § 7 (stating that a person who without license willfully cuts down tees shall be liable in tort for treble damages).

the policy in place in Worcester, Massachusetts, was different from policies in other areas of the country. While Respondent *could* have had a different policy in place for this program in Worcester, Massachusetts—a different program was a theoretical possibility—they did not. Instead, Respondent developed the applicable policy in coordination with MDCR based on local conditions, such as terrain, prevalent types of trees, level of infestation, local political considerations, and a myriad of other concerns. This policy was clear and well-defined, Respondent's employees all acted under it accordingly, and the only reason why Respondent cut Evans' trees without his permission was because APHIS employee Crystal Franciosi made a negligent mistake, which Christine Markham acknowledged afterwards.

A great deal of additional evidence—more than can even be mentioned here—further establishes Respondent's policy in this case. Because that policy was violated when Franciosi removed Evans' uninfested trees without first having secured his permission, the discretionary-function exception does not apply.

In addition, the appellate court in a parallel Massachusetts case involving Evans was decided on a similar case-by-case analysis. While the Massachusetts appellate court stated that Evans' trees were cut "incident to a nuisance eradication program," the court went on to recognize the reality that "in certain contexts, agency pronouncements can be binding on the agency even where they have not formally been promulgated as regulations." *Evans v. Mayer Tree Serv., Inc.*, 89 Mass. App. Ct. 137, 149, 46

N.E.3d 102, 111 (2016) (*citing Macioci v. Comm'r of Rev.*, 386 Mass. 752, 763, 438 N.E.2d 786 (1982) (holding that because public confidence in government is involved, commissioner of revenue had a duty to conform to guidelines issued to the public), and *Amato v. Dist. Attorney for the Cape & Islands Dist.*, 80 Mass. App. Ct. 230, 238 n.15, 952 N.E.2d 400 (2011) (distinguishing between guidelines that "concern[] only the internal management of State agencies" and those designed to "affect the rights of or procedures available to the public")). "Where an agency has published guidelines on how it is going to proceed and has implicitly invited affected members of the public to rely on them, such guidelines can be deemed to constrain the agency's actions." *Id.*

But instead of conducting the analysis required by *Gaubert* to consider whether the applicable policy was established on a case-by-case basis, the courts below instead imagined and relied on a theoretical situation where USDA and APHIS might seek to remove uninfested trees without permission (resolving factual disputes against Evans in the process). *See* App. 11–14, 22. But this was not the policy applied to Evans' situation in Worcester, Massachusetts, and as a result, the courts' analysis improperly modifies this Court's precedent in *Gaubert*.

Under the actual policy in place in this case, Respondent had no discretion to remove Evans' trees without his prior consent. App. 5, 20, 51–52. Instead of considering that the applicable policy was developed "on a case-by-case basis," *Gaubert*, 499 U.S. at 324; *see also* App. 20 ("Because the community was not in favor of removing uninfested host trees, decisions on whether

to remove uninfested host trees were made on a case-by-case basis."), the First Circuit stated that securing a property owner's permission prior to cutting down his trees was only a "courtesy," not a federal policy, App. 13. This conclusion rejects *Gaubert*'s direction that a policy may be established by an agency on a case-by-case basis, as occurred in the present situation. 499 U.S. at 324; App. 20. The First Circuit also reasoned that "[f]rom a scientific standpoint, the best option often was to remove all host trees, regardless of whether they were already infested and regardless of whether property owner permission had been obtained. APHIS's decision to employ that option was squarely within the compass of its discretion." App. 12. While this may be entertained from a scientific standpoint, and a policy theoretically could have been established based on that standpoint, no such policy was so formed in this case. APHIS made no decision to employ any such option, and the court's supposition ignores the actual policy established by Respondent and applied in Worcester, Massachusetts. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

Because *Gaubert* mandates that governmental policy may be established on a case-by-case basis, and because the First Circuit ignored that direction, this Court should grant the petition and reverse the First Circuit's decision below.

B. Government policy may be formed in partnership with a state government based on local conditions under that state's statute, regulation, or policy.

The petition should also be granted to clarify that federal government policy can be formed in partnership with a state's government agencies. Respondent and MDCR worked closely together as partners in applying the quarantine in Worcester, Massachusetts, and in removing Evans' trees. App. 4, 18–19. But the First Circuit rejected this reality and drew a strict dividing line between federal and state policies. App. 10. The petition should be granted to provide an opportunity for this Court to clarify that where federal and state agencies act in coordination, state statute, regulations, and policies should be considered to be adopted as federal policy.

On December 22, 2008, USDA through its agency, APHIS, entered into the Cooperative Agreement with MDCR, codifying a joint action to eradicate the Asian Longhorned Beetle from the quarantine zone in Worcester, Massachusetts. App. 4, 18–19. Pursuant to the Cooperative Agreement, APHIS agreed to provide personnel to accomplish operational activities. App. 19. MDCR agreed to secure and manage a tree removal contract. App. 19. And the appellate court in the Massachusetts case involving Evans found that there was at least a genuine dispute of material fact as to whether MDCR "limited its broad authority to cut trees without a property owner's permission." *Mayer Tree Serv.*, 89 Mass. App. Ct. at 149.

The Plant Protection Act expressly authorizes cooperation between USDA and "States or political subdivisions of States." 7 U.S.C. § 7751(a). Respondent was acting under this statutory authority when it joined with MDCR in the Cooperative Agreement. App. 4, 18–19. Where a federal agency must rely on state authority as the legal justifications for its actions, it should equally be bound by those limitations and restrictions that the state places on itself.

Respondent also relied on the Legal Notification Form sent by MDCR to satisfy the applicable federal regulatory requirements. App. 47–52. The regulation in question required Respondent to give written notice of the quarantine designation to property owners in the affected area, including Evans. 7 C.F.R. § 301.51-3(b); App 48. Respondent could have satisfied this requirement in cooperation with MDCR through the Legal Notification Form issued by MDCR. App. 47–52. As discussed above, the Legal Notification Form provided to property owners under this cooperation stated that uninfested trees would only be removed with the property owner's permission. App. 20. This was the policy in place relative to Evans' property. And the Legal Notification Form again demonstrates the close cooperation between Respondent and MDCR. App. 47–48. It was this very form that was not sent to Evans until after his trees were cut. App. 6, 22.

But the courts below ignored the reality of this cooperation. In analyzing the discretionary-function exception, the District Court and the First Circuit both emphasized that a federal employees' discretion must be limited by a federal, not state, statute regulation, or

policy. App. 11, 29, 32. If *Gaubert* remains valid precedent in any respect, then the courts below should have considered that federal government policy may be established on a case-by-case basis. *See* 499 U.S. at 324. And they should have considered that Respondent adopted certain of MDCR's policies as their own by entering into the Cooperative Agreement and sending the Legal Notification Form jointly with MDCR. App. 4, 18–19, 47–48. The First Circuit erred in failing to give credit to the fact that Respondent and MDCR cooperated closely to implement the quarantine designation, and they jointly formed the applicable policy implementing that quarantine based on local conditions, such as terrain, prevalent types of trees, level of infestation, local political considerations, and a myriad of other concerns. *See* App. 20.

The First Circuit decision below should be reversed, and the petition should be granted to clarify that government policy as applicable to the discretionary-function exception may be formed in partnership with a state government based on local conditions under that state's statute, regulation, or policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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