No. 20-426

In The

Supreme Court of the United States

WILLIAM L. HUNTRESS AND ACQUEST DEVELOPMENT, LLC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE CATO INSTITUTE, NFIB SMALL BUSINESS LEGAL CENTER, RUTHERFORD INSTITUTE, MACKINAC CENTER FOR PUBLIC POLICY, COMPETITIVE ENTERPRISE INSTITUTE, AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In 2006, the Court rejected the EPA's Clean Water Act jurisdiction over a wetland that does not abut navigable-in-fact waters. *Sackett* v. *E.P.A.*, 566 U.S. 120, 123–24 (2012) (explaining *Rapanos* v. *United States*, 547 U.S. 715 (2006)). Yet the EPA filed a civil action in 2009 and a felony criminal indictment in 2011 against Petitioners for alleged violations related to purported wetlands located miles from navigable waters. After a court dismissed the indictment for the government's grand-jury interference, the government re-indicted in 2013—after *Sackett*. That indictment was dismissed in 2016.

Petitioners filed this Federal Tort Claims Act suit for abuse of process and malicious prosecution. The FTCA creates subject-matter jurisdiction and waives sovereign immunity for U.S. officers' negligent or wrongful conduct, subject to a few exceptions, including exercise of "a discretionary function." 28 U.S.C. 2680(a). But the FTCA also includes a law-enforcement proviso, clarifying that the Act's provisions "*shall* apply to *any* claim" for "abuse of process[] or malicious prosecution." 28 USC 2680(h) (emphasis added). The court below picked § 2680(a) over § 2680(h) and dismissed. That ruling raises an important question:

Does the Federal Tort Claims Act's "discretionary function" exception nullifies that statute's law-enforcement proviso and thereby deprives regulated parties of a crucial safeguard against the worst excesses of the administrative state?

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INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The **National Federation of Independent Business Small Business Legal Center** (NFIB SBLC) is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts. NFIB is the nation's leading small business association, representing members in Washington and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files *amicus* briefs in cases that affect small businesses.

The **Rutherford Institute** is a nationwide, nonprofit civil liberties organization dedicated to the defense of civil liberties and human rights. Founded in 1982, the Institute's overarching mission is to make the government play by the rules of the Constitution.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

As part of that mission, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public on a wide spectrum of issues affecting their freedoms. Nonpartisan, apolitical and committed to the principles enshrined in the Constitution and Bill of Rights, the Rutherford Institute works to reshape the government from the bottom up into one that respects freedom, resists corruption, and abides by the rule of law. In its many efforts to pursue justice and prevent the government from overreaching or abusing its vast powers, the Institute subscribes to Thomas Jefferson's belief that one should not trust government officials but rather "bind them down from mischief with the chains of the Constitution."

The **Mackinac Center for Public Policy** is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

The **Center for Constitutional Jurisprudence** is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to ownership and use of private property. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *US Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016) *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Rapanos v. United States*, (2005).

The **Competitive Enterprise Institute** (CEI), founded in 1984, is a non-profit public policy organization dedicated to advancing the principles of free enterprise, limited government, and individual liberty. CEI publishes original research and commentary on government regulatory policy and participates in litigation on a range of constitutional and administrative law issues. CEI's amicus brief on the crushing ambiguities of wetlands regulation in *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), was cited in Justice Alito's concurrence in that case.

This case interests *amici* because the Federal Tort Claims Act, properly construed, is a crucial bulwark for liberty. Agencies like the EPA can use their financial and criminal resources to browbeat business and property owners, while courts like the Second Circuit foreclose a judicial remedy for this abuse based on erroneous interpretations of the FTCA.

INTRODUCTION AND SUMMARY OF ARGUMENT

In discussing the "danger posed by the growing power" of the administrative state, Chief Justice Roberts cautioned that it would be "a bit much" to describe modern bureaucratic governance as "the very definition of tyranny." *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (dissenting). The instant case warrants no such restraint. Here, the petitioner alleges that the U.S. Environmental Protection Agency (EPA) brought felony criminal charges in order to in-

crease the government's leverage in a regulatory dispute. If these claims are proven true, then William Huntress endured "the very definition of tyranny."

For almost two decades, this controversy has consumed Mr. Huntress's life, including more than four years of living as an accused felon. All along, he has maintained that the government has no jurisdiction over his property and that he's being bullied by an overbearing bureaucracy. EPA officials became "agitated" upon learning that he would reject the agency's one-sided settlement offer and instead contest federal jurisdiction over the putative "wetlands" on his property. Pet. App. at 13. After petitioners broached this Court's jurisprudence regarding the scope of the Clean Water Act, the EPA agent declared, "Let the Chief Justice try to enforce it!" *Id*. The same official referred the petitioner's dispute to the agency's Criminal Investigative Division for indictment. *Id*.

If Mr. Huntress's allegations are true, then he has been tortiously harmed. And because he presents "a plausible claim for relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), he is entitled to a waiver of sovereign immunity under the plain meaning of the "law enforcement proviso" of the Federal Tort Claims Act (FTCA), *see* 28 U.S.C. § 2680(h). But the courts below closed their doors to the petitioner. As interpreted by the Second Circuit, the FTCA's "discretionary function" exception shields the EPA's misconduct from judicial oversight, no matter how plausible the allegations. *See Huntress v. United States*, 810 Fed. Appx. 74 (2d Cir. 2020). In so holding, the court below deepened a circuit split regarding the interplay between the "law enforcement proviso" and the "discretionary

function" exception of the FTCA. See Pet. App. at 21-25 (discussing the "mature" circuit split).

Beyond the petitioner's plight, there is much more at stake. A modern legislating trend has been to authorize criminal sanctions for violations of rules promulgated by domestic regulatory agencies. This controversy involves such a "hybrid" criminal-civil regulatory statute. With the criminalization of the Federal Code of Regulations, agencies have gained access to a powerful tool with which to "escalate" regulatory disputes, as is plausibly alleged here.

Courts like the Second Circuit, which refuse to hear believable claims of abuse of process by regulatory agencies, lack an important check on tyrannical government. If Mr. Huntress had incurred the government's abuse in the Eleventh Circuit, he would have been afforded his day in court. Citizens in that circuit are protected from being bullied by the government. All regulated parties deserve this protection. The Court should use this case to affirm that the FTCA waives sovereign immunity for the worst excesses of the administrative state.

ARGUMENT: COURTS MUST ENSURE ACCOUNTABILITY WHEN THE GOVERNMENT BULLIES REGULATED PARTIES WITH THE THREAT OF CRIMINAL SANCTIONS

"The Framers could hardly have envisioned the vast and varied federal bureaucracy and the authority administrative agencies now hold have over our economic, social, and political activities." *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting)

(cleaned up). Indeed, no one seems quite sure how many agencies exist. Government estimates vary from 71 to 454. *See* Clyde Wayne Crews, Jr., "How Many Federal Agencies Exist?" *Forbes*, July 5, 2017, https://bit.ly/2HyrFrP). Not only is the number of agencies uncertain, but the number of regulations is growing. In 1975, the Federal Register contained 71,224 pages. In 2019, it had 185,984. Clyde Wayne Crews, Jr., "How Many Rules and Regulations Do Federal Agencies Issue?" *Forbes*, Aug. 15, 2017, https://bit.ly/31QbPja).

To an unfortunate extent, the modern administrative state has expanded into criminal law enforcement. Many federal regulatory statutes—including those governing antitrust, securities, and the environment—authorize agencies to pursue both civil and criminal penalties. *See, e.g.*, 15 U.S.C. § 77x (securities violations); 15 U.S.C. §§ 1-2 (antitrust violations). One scholar estimated that more than 300,000 federal regulations are punishable by criminal penalties—and that was *nearly 30 years ago*. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort Crime Distinction in American Law*, 71 B.U. L Rev. 193, 216 (1991).

The Clean Water Act is among these "hybrid" civil-criminal regimes, and its legislative history provides a telling contrast with the petitioner's experience. When Congress amended the Clean Water Act in 1987 to add felony criminal liability, lawmakers were spurred by a series of high-profile disasters caused by water pollution, including the explosion of almost 13 miles of sewer lines in Louisville, Kentucky. *See* Raymond W. Mushal, *Up from the Sewers: A Perspective*

on the Evolution of the Federal Environmental Crimes Program, 2009 Utah L. Rev. 1103 (2009).

These catastrophes are a far cry from William Huntress's supposed crime, which didn't implicate any environmental harm. Instead, he was charged—twice—with hampering the enforcement of environmental regulations. His recidivist "crime" was a willingness to fight for what he believes: that the government has no jurisdiction over his private property.

More generally, this Court is well aware of the government's undue aggressiveness in policing the reach of the Clean Water Act. In *Sackett*, for example, the Court unanimously rejected the agency's "strong-arming of regulated parties" in these sorts of disputes. *Sackett v. EPA*, 566 U.S. 120, 130–131 (2012). In *Hawkes*, moreover, this Court affirmed the Eight Circuit, whose opinion had objected to the agency's "transparently obvious litigation strategy" of forcing on the regulated party the "prohibitive costs, risk, and delay" of dealing with the government. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1001 (8th Cir. 2015), *aff'd*, 136 S. Ct. 1807 (2016).

Turning to the instant case, the facts here raise multiple red flags regarding the government's conduct. It's not often, as happened here, that a trial court dismisses an indictment for government interference with a grand jury. *See United States v. Acquest Dev., LLC*, 932 F. Supp. 2d 453 (W.D.N.Y. 2013). In a related proceeding, a magistrate judge noted how he was "intrigued" by the agency's failure to make a crucial regulatory finding "until . . . after [petitioner] acquired the Site," such that "notions of due process

point toward affording the timing of this designation some potential weight." *United States v. Acquest Transit LLC*, No. 09-cv-00055S(F), 2018 WL 3861612, at *34 (W.D.N.Y. Aug. 14, 2018). Early in the dispute, petitioner alleges that his representative was warned by an EPA official that, "[t]he government does not care about money or time; Bill Huntress does." *See*, *e.g.*, Pet. App. at 14. But Mr. Huntress refused to back down in the face of the government's threat to bring its asymmetrical resources to bear. So the government upped the ante, by indicting him.

In some jurisdictions, however, these bright red flags are immaterial. Even if the courts below had accepted all the petitioner's allegations as true, it wouldn't matter, because the Second Circuit—among others—interprets the FTCA to preclude the possibility that a regulatory agency could be sued for intentional torts like malicious prosecution or abuse of process. In such jurisdictions, the administrative state escapes accountability. The doors of these courts are closed to regulated parties like the petitioner, who have sound reasons to believe that they've been harmed by the government's "strong arm" tactics.

Nor would the petitioner have any hope of political accountability. Even if he somehow gained the president's ear, federal employees are notoriously difficult to discipline through management channels. *See* 5 U.S.C. §§ 4303, 7513 (setting forth extensive procedures for adverse actions against civil servants).

It follows that regulated parties in the Second Circuit—and sister circuits who share this interpretation of the FTCA—have no means of defending themselves

from being tortiously harmed by a bureaucratic bully. Of course, "such unaccountable power is inconsistent with individual liberty," the principle on which "[o]ur constitutional structure is premised." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd*, 130 S. Ct. 3138 (2010).

To be sure, almost all regulators are dedicated civil servants. But there are exceptions. *See*, *e.g.*, *Vidrine v. United States*, 846 F. Supp. 2d 550 (W.D. Fla. 2011) (finding government liable under the FTCA for an EPA agent's malicious prosecution). Here, the allegations are imminently plausible and involve a regulatory program known for the "strong arming" of property-owners. *Sackett*, 566 U.S. at 131. To ward off such abuse, this Court should use this case to affirm that the FTCA remains an important check on the administrative state.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

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