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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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REPLY ARGUMENT SUMMARY

The Government admits there is a circuit split over the interplay between the Federal Tort Claims Act's discretionary-function exception and the Act's law-enforcement proviso. Br. in Opp'n ("Opp.") 8, 13. Yet the Government objects that the split "has little practical significance," *id.* at 13–15, the ruling below is correct, *id.* at 10–13, and the petition is a poor vehicle to resolve the conflict, *id.* at 15–16. The Government is wrong in every respect.

Having already percolated for many years, the circuit split is deep and mature. Pet. 4, 19–24. Trying to cast doubt on the Eleventh Circuit's position, the Government points to footnote *dicta* in *Denson* v. *United States*, 574 F.3d 1318, 1336 (11th Cir. 2009). Opp. 14. But the Eleventh Circuit has never repudiated its bellweather ruling that the discretionary-function exception yields to the law-enforcement proviso. *Nguyen* v. *United States*, 556 F.3d 1244 (2009). And no other court has suggested otherwise. Moreover, applying either the Eleventh or the Fifth Circuit's rules is dispositive here and would revive Huntress and Acquest's claims.

On the merits, the Government fails to confront (1) the law-enforcement proviso's reference to "any" claim, and (2) that the law-enforcement proviso is both the later-enacted and more-specific provision. What's more, the Government's interpretation writes the proviso out of existence. Regardless, the serious dispute over the Federal Tort Claims Act's interpretation is a strong reason to grant the petition, not to deny it. Even if the Government is correct, that means that the Fifth and Eleventh Circuits are improperly allowing claims to go forward against the United States that Congress did not allow.

Finally, the Government's vehicle objections are unfounded. Huntress and Acquest have stated valid claims for malicious prosecution and abuse of process under the law-enforcement proviso. And the officials' retaliatory, "strong arm" conduct makes this an ideal case to resolve the circuit conflict. Br. of Nat'l Ass'n of Home Builders 1–6; Br. of the Cato Institute et al. 5–9. Certiorari is warranted.

REPLY ARGUMENT

I. The Court's review is warranted to resolve an acknowledged circuit split.

The Government concedes a circuit split. Opp. 8, 13. As the Government explains, the Fourth, Seventh, Ninth, and D.C. Circuits have all held that the discretionary-function exception always "controls, even if the plaintiff alleges intentional torts that fall within the law enforcement proviso." Opp. 13 (citing *Medina* v. *United States*, 259 F.3d 220, 224 (4th Cir. 2001); *Linder* v. *United States*, 937 F.3d 1087, 1089 (7th Cir. 2019); *Gasho* v. *United States*, 39 F.3d 1420 (9th Cir. 1994); and *Gray* v. *Bell*, 712 F.2d 490 (D.C. Cir. 1983)). The Fifth Circuit, says the Government, generally agrees unless officials were engaged in "egregious, intentional misconduct." Opp. 13–14 (citing *Chaidez Camposi* v. *United States*, 888 F.3d 724, 736 (2018)). And the Eleventh Circuit, the Government concedes, holds "that the law enforcement proviso is not limited by the discretionary-function exception." Opp. 14 (citing *Nguyen* v. *United States*, 556 F.3d 1244 (2009)). That three-way split requires resolution: recurrent litigants are invoking the law-enforcement proviso, but their claims' viability depends entirely on where they bring suit.

The Government insinuates that the Eleventh Circuit later suggested that *Nguyen* applies "only in contexts in which federal law enforcement officers commit clear constitutional violations." Opp. 14 (citing *Denson* v. *United States*, 574 F.3d 1318, 1337 n.55 (11th Cir. 2009)). But that is not so. In the very footnote on which the Government relies, the *Denson* panel recognized that *Nguyen*'s conclusion was that the discretionary-function exception "would not apply even had the agents *not* violated the plaintiff's constitutional rights." *Denson*, 574 F.3d at 1337 n.55 (emphasis added). Indeed. As Huntress and Acquest previously explained, Pet. 21–22, the Eleventh Circuit in *Nguyen* engaged in a reasoned statutory analysis to conclude that the "later and more specific statement in subsection (h) permitting the listed claims [the law-enforcement proviso] trumps the earlier and more general one in subsection (a) [the discretionary-function exemption]." *Nguyen*, 556 F.3d at 1253.

There is no basis to doubt the firmness of the Eleventh Circuit's rule. No federal court has construed *Denson* for the proposition that the Government now advances. To the contrary, other courts consistently recognize that *Nguyen* conclusively held that "the discretionary function exemption . . . does not apply" to claims within the law-enforcement proviso. *Williams* v. *United States*, 2010 WL 1408398, at *10 n.35 (M.D. Fla. 2010). Accord *Garling* v. *EPA*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017); *Bonilla* v. *United States*, 652 Fed. App'x 885, 890 (11th Cir. 2016); *Milligan* v. *United States*, 670 F.3d 686, 695 n.2 (6th Cir. 2012); *Linder* v. *McPherson*, 2015 WL 739633, at *11 (N.D. Ill. 2015); *Moher* v. *United States*, 875 F. Supp. 2d 739, 766 (W.D. Mich. 2012); *Lyttle* v. *United States*, 867 F. Supp. 2d 1256, 1297–98 (M.D. Ga. 2012); Pet. App. 20a n.7.

There also is no doubt that if the Eleventh Circuit rule were applied to this case, Huntress and Acquest's claims could proceed. The law-enforcement proviso specifically waives sovereign immunity and creates federal jurisdiction for the claims Huntress and Acquest have alleged, *i.e.*, arising out of "abuse of process, or malicious prosecution" and related to "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h).

The same is true when viewing this case through the interpretive lens the Fifth Circuit applies to the law-enforcement proviso. The Government says that the Fifth Circuit would have reached the same result as the Second Circuit here because the EPA's officials did not "engage[ ] in the sort of 'egregious, intentional misconduct' that led Congress to enact the [law-enforcement] proviso in the first place." Opp. 13–14. Not so. Recall that the conduct that led Congress to add the law-enforcement proviso was the raid federal agents conducted in Collinsville, Illinois, a raid that officials made without warrants while destroying personal property. S. Rep. No. 93-588 (1974), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2790. Now consider the EPA conduct alleged here:

- Officials ignored the 1997 "negative" jurisdictional determination ("JD") that the Army Corp of Engineers issued with respect to the Wehrle Drive property, a JD that informed Huntress and Acquest's purchase decision, Pet. App. 36a; Homebuilders Br. 1 & n.2;
- Officials ignored the Corps' 2001 JD stating that the Wehrle Drive property's wetlands were not subject to Clean Water Act regulation, Pet. App. 36a; Homebuilders Br. 1–2;

- Officials asserted jurisdiction over the Wehrle Drive property based on a man-made ditch, Pet. App. 37a, Homebuilders Br. 2–3;
- The officials then denied Huntress his day in court, arguing that a court could not review the new JD, *Acquest Wehrle LLC* v. *United States*, 567 F. Supp. 2d 402, 410 (W.D.N.Y. 2008); contra *U.S. Army Corp of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016);
- Officials demanded that Huntress and Acquest pay $2 million for development rights or they would be fined $400,000 and be allowed to develop nothing, Pet. App. 61a;
- When Huntress and Acquest's counsel explained that the EPA lacked jurisdiction under *Rapanos* v. *United States*, 547 U.S. 715 (2006), official Mugdan declared that the Chief Justice could "try to enforce it," Pet. App. 61a;
- In retaliation, officials sued Huntress and his companies twice civilly and also criminally indicted and re-indicted them (after tampering with the grand jury), Pet. 9–15;
- The re-indictment does not even invoke Clean Water Act "wetlands" jurisdiction, but instead merely references "potential wetlands," Homebuilders Br. 7;
- Those same officials suggested that the reason for their strong-arm tactics was because the "government does not care about money or time; Bill Huntress does," Pet. App. 65a; and
- The officials' actions cost Huntress and Acquest their reputation and millions of dollars, Pet. App. 64a, 71a.

All of these facts, which must be accepted true at this stage of the proceedings, caused a myriad of amici—the Cato Institute, the National Federation of Independent Business Small Business Legal Center, the Rutherford Institute, the Mackinac Center for Public Policy, the Center for Constitutional Jurisprudence, and the Competitive Enterprise Institute—to rightly conclude that the EPA officials' actions constituted "the very definition of tyranny" and an attempt to "strong arm" Huntress and Acquest. Cato Br. 4, 9. So even if this Court were to grant the petition and follow the Fifth Circuit's rule rather than the Eleventh's, that decision would result in the reinstatement of Huntress and Acquest's claims.

II. The Government's interpretation of the Federal Tort Claims Act is indefensible.

The Government's opposition brief does not address the petition's proper construction of the statute. To recap, both the discretionary-function exception and the law-enforcement proviso purport to apply to "any" claim under the Federal Tort Claims Act. Pet. 25. But because the law-enforcement proviso is both later enacted and more specific than the discretionary-function exception, the law-enforcement proviso necessarily controls when a case falls within both provisions. Pet. 25–26. That interpretation best comports with Congressional intent. Pet. 26–27. And it prevents judicial eradication of the law-enforcement proviso altogether—or at the very least, the words "any claim" at the proviso's beginning. Pet. 27–28. Again, the Government does not respond to any of these points.

The Government argues instead that "it is customary to use a proviso to refer only to things covered by the preceding clause," so the law-enforcement proviso should be construed as applying only to the tort exception in § 2680(h). Opp. 11. But Congressional "[u]se of a proviso 'to state a general, independent rule,' . . . is hardly a novelty." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 858 (2009) (citation omitted). And "generalizations about the relationship between a proviso and a preceding clause prove to be of little help" when a proviso's text indicates it should be given broader effect. *Alaska* v. *United States*, 545 U.S. 75, 106 (2005).

The law-enforcement proviso is a perfect example of this. When Congress wants to create a narrow limitation on § 2680(h)'s intentional-tort exception, it says so explicitly. *E.g.*, 10 U.S.C. 1089(e) ("the provisions of section 2680(h) . . . shall not apply" to particular claims); 22 U.S.C. 2702(e) ("the provisions of section 2680(h) of title 28, shall not apply to any tort enumerated therein arising out of negligence in the furnishing of medical care or related services"); 38 U.S.C. 7316(f) (similar). Yet in the law-enforcement provision, Congress did not limit the proviso's application textually to the intentional-tort exception. It directed that the Federal Tort Claims Act's sovereign-immunity waiver "shall apply to *any* claim" arising from the enumerated torts. 28 U.S.C. 2680(h) (emphasis added). Hence, the proviso is a "general, independent rule" that obligates courts to give the proviso independent effect. *Beaty*, 556 U.S. at 858 (citation omitted).

Alternatively, the Government posits that when the proviso states that "the provisions of this chapter" apply to the specified torts, the text necessarily incorporates the discretionary-function exception in § 2680(a). Opp. 11. That's wrong. Section 2680, titled "Exceptions," limits the Act's sovereign-immunity waiver by stating that the "provisions of this chapter" do not apply to 13 specified categories of claims, including the discretionary-function exception. 28 U.S.C. 2680. The law-enforcement proviso's use of the same language—"the provisions of this chapter"—makes clear that the law-enforcement waiver does apply to the six torts within the proviso's scope. Otherwise, this Court would have to read the phrase "the provisions of this chapter" differently at the beginning of § 2680 than in § 2680(h).

Finally, the Government says that Huntress and Acquest's interpretation "would allow tort suits against the United States that Congress intended to bar," such as the foreign-country exception in 28 U.S.C. 2680(k). Opp. 12. But "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). Because the law-enforcement proviso "gives no clear indication of an extraterritorial application, it has none," *id.* (citation omitted), meaning the Government's problem is illusory. Unsurprisingly, courts in the Eleventh Circuit have had no trouble preserving immunity for law-enforcement torts committed in foreign countries, despite adopting the statutory interpretation Huntress and Acquest advance here. *E.g.*, *Lyttle*, 867 F. Supp. 2d at 1297–98, 1301 n.18.

III. The Government's vehicle objections are misplaced.

Finally, the Government devotes a single paragraph to the argument that this case is a "poor vehicle" for resolving the acknowledged circuit split. Opp. 15–16. But its three objections are misplaced.

1. It is irrelevant that the Second Circuit used only a single sentence to join the Fourth, Seventh, Ninth, and D.C. Circuits in their interpretation of the interplay between the discretionary-function exception and the law-enforcement proviso. Pet. App. 6a. It remains true that the Second Circuit deepened the three-way split, and further percolation is not going to resolve that conflict.

2. In its one-sentence rejection of Huntress and Acquest's argument that their claims fall within the law-enforcement proviso, the Second Circuit did *not* hold that their claims do not fall within the proviso at all. Contra Opp. 16. Huntress and Acquest plainly pleaded claims that federal investigatory and law-enforcement officers committed acts that amount to an abuse of process and malicious prosecution, claims that fall within the proviso's scope. Pet. App. 75a–76a, 78a–79a. And the district court did not address the merits; it granted the Government's motion to dismiss only for lack of subject-matter jurisdiction, holding that Huntress and Acquest's claims also fell within the scope of the discretionary-function exception, and agreeing with those circuits that have held that the discretionary-function exception trumps the law-enforcement proviso. Pet. App. 11a–20a & n.7. Lacking subject-matter jurisdiction, the district court had no occasion to consider the claims' merits.

The Second Circuit summarized Huntress and Acquest's appeal as challenging that subject-matter jurisdiction holding, *i.e.*, "that the district court erred in concluding that their claims . . . were foreclosed by the discretionary function exception." Pet. App. 3a. The court framed the standard of review in terms of subject-matter jurisdiction. *Id.* And the sum and substance of the court's opinion was an analysis under the discretionary-function exception. Pet. App. 3a–6a.

There is zero evidence that the Second Circuit considered any merits argument whatsoever, nor would it, given its conclusion that it lacked subject-matter jurisdiction. After all, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1968)).

3. There are no "uncertainties" about the allegations before this Court, contra Opp. 14, and the Government's argument on this point is irrelevant in any event.

Both the complaint and the petition make the same point: that the EPA lacks Clean Water Act jurisdiction over the Transit property. There is nothing "complicated" about that position.

More important, the Government's vehicle objection is irrelevant. For purposes of a criminal indictment, if there are two equally plausible interpretations of the law, one which would impose criminal liability and one that would not, "the tie must go to the defendant." *United States* v. *Santos*, 553 U.S.

507, 514 (2008). So it makes no difference whether *Rapanos* and *Sackett* v. *E.P.A.*, 566 U.S. 120, 123–24 (2012), made entirely clear that the EPA lacks jurisdiction over the Transit property's isolated wetlands or merely called that jurisdiction into serious question. Either way, EPA officials should not have indicted. That point is made crystal clear by the EPA's decision to drop all of its "wetlands" allegations from the 2011 indictment and replace them with "potential wetlands" allegations in the 2013 re-indictment. Homebuilders Br. 7. What's more, Huntress and Acquest have stated an abuse-of-process claim even if the Transit wetlands fall within Clean Water Act jurisdiction, based on the EPA officials' outrageous, bad-faith conduct.[1] Cato Br. 7–9.

* * *

At a time when criminal regulatory authority is being used more aggressively than ever, it is critical that citizens have a mechanism to seek redress against the United States when that power is abused. Congress enacted the law-enforcement proviso to do just that. Only this Court can give it effect.

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[1] Huntress and Acquest never limited their claims to the conduct of EPA agent Walter Mugdan. Contra Opp. 11. The complaint references multiple EPA officials. Pet. App. 25a. Huntress and Acquest's only litigation disclaimer was that their complaint was based on actions of the EPA law-enforcement officers, not the Department of Justice. 8/7/18 Pls.' Resp. to Mot. to Dismiss 5 n.1.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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