No. 24-362

In the Supreme Court of the United States

CURTRINA MARTIN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

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

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

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INTERESTS OF AMICUS CURIAE[1]

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

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Tort Claims Act's promise of waiving federal sovereign immunity for common-law torts committed by government employees is being suffocated beneath a blanket of immunity. The reason: lower courts have been misinterpreting the FTCA's discretionary function exception.

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

[2] The current version of this article may be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4749341.

The discretionary function exception, by its terms, precludes liability for the negligent actions of government actors so long as those actions are "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). But relying on a misreading of this Court's decision in *United States v. Gaubert*, lower courts have for years held that in order to fall under the discretionary function exception, government action need only be "susceptible to policy analysis." 499 U.S. 315, 325 (1991). Consequently, and not unlike a case involving the application of rational-basis review, a negligent government actor in a FTCA case is now all but presumed immune from suit unless the plaintiff successfully negates every potential policy implication of the actor's decision—even if entirely "specula[tive]" and "unsupported by evidence." *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

As one example, in *Shansky v. United States*, the First Circuit held that a court analyzing the discretionary function exception should focus on "whether some *plausible* policy justification *could* have undergirded the challenged conduct." 164 F.3d 688, 692 (1st Cir. 1999) (emphasis added). The First Circuit added that only in a "rare case" involving "extreme circumstances" could a plaintiff overcome the hurdle of the discretionary function exception. *Id.* at 695. As another, in *Lam v. United States*, the Ninth Circuit held that the government's failure to "actually weigh[]" policy did not matter because the

discretionary function exception takes effect "so long as the challenged decision was one to which a policy analysis *could* apply." 979 F.3d 665, 682 (9th Cir. 2020) (emphasis added, citation and quotation marks omitted).

Shansky and *Lam* are not outliers; since *Gaubert*, many lower courts have embraced this expansive view of the discretionary function exception—but these lower courts' approach is incompatible with this Court's precedents, including *Gaubert* itself.

Until *Gaubert*, it was well-understood that Congress intended that discretionary function exception apply only to actions "*grounded in* social, economic, and political policy." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (emphasis added); *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988). Lower courts have responded to *Gaubert*, however, by jettisoning that intent. *Gaubert* involved a challenge to a federal takeover of a bank—an area of law already grounded in "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines." 499 U.S. at 324. No matter their "subjective intent," the federal officials' individual, constituent decisions made in furtherance of that policy needed only be "susceptible to policy analysis" to be covered by the discretionary function exception. *Id.* at 324–26. Nowhere did *Gaubert* say that post-hoc, hypothetical, or conjectural justifications were enough to immunize the federal government for the negligent actions of its

employees—but that is how lower courts have been using *Gaubert* for decades.

Lower courts' use of *Gaubert*'s "susceptible to policy analysis" language is also incompatible with the plain text of the statute and the original understanding of the terms of art used in the FTCA's discretionary function exception, which further underscores Congress's intent to preclude tort liability only for actual—not hypothetical—policy judgments.

This case illustrates just how far the lower courts have taken their misreading of *Gaubert*. The Eleventh Circuit here identified no policy—not even a hypothetical one—to which the FBI agents' discretion was susceptible. Instead, the court simply asserted that because federal law enforcement officers have discretion to execute search warrants *generally*, the exception applied here. *See* Pet. App. 18a. That holding is at odds with the FTCA's plain text; is contrary to Congress's intent; and leaves Petitioners with no meaningful remedy for the trauma they suffered as a result of the FBI's negligent pre-dawn invasion of their home.

ARGUMENT

I. CONGRESS INTENDED THE FTCA TO BE A BROAD WAIVER OF SOVEREIGN IMMUNITY

Historically, the United States has been "protected from unconsented suit under the ancient common law doctrine of sovereign immunity." *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983). This blanket immunity

for tort claims presided until the middle of the 20th century.

Congress waived the sovereign immunity of the United States for state tort claims in 1946 when it enacted the FTCA. As this Court confirmed in one of its earliest decisions concerning the statute, the FTCA "was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24 (1953). The FTCA, this Court explained, "was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope." *Id.* at 25; *see also United States v. Muniz*, 374 U.S. 150, 154 (1963) (explaining that the FTCA "was designed . . . to avoid injustice to those having meritorious claims hitherto barred by sovereign immunity"). More recently, this Court reiterated that "central purpose of the statute," which "waives the Government's immunity from suit in sweeping language." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (citation and quotation marks omitted).

The FTCA creates a federal right of action to seek money damages defined by state-law tort remedies. As this Court has explained, "[t]he Tort Claims Act was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Richards v. United States*, 369 U.S. 1, 6 (1962). The FTCA provides that the "United States shall be liable [for] tort claims, in the same manner, and to the same extent as a private

individual under like circumstances." 28 U.S.C. § 2674; *see also id.* § 1346(b)(1) (holding the United States liable "if a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). In other words, the federal government is liable under the FTCA on the same basis and to the same extent as for a tort committed under analogous circumstances by a private person in that particular state. *United States v. Olson*, 546 U.S. 43, 46–47 (2005).

II. CONGRESS INTENDED FOR THE DISCRETIONARY FUNCTION EXCEPTION TO PRECLUDE LIABILITY ONLY FOR ACTS GROUNDED IN SOCIAL, ECONOMIC, AND POLITICAL POLICY

Today, the FTCA is essentially the only vehicle available to compensate litigants for federal official wrongdoing. But even though it has proven to be the most significant waiver of federal sovereign immunity for damages claims against the United States, the FTCA is not limitless. The federal government's amenability to tort liability under the Act is restricted by a series of statutory exceptions. Rejecting the argument that these exceptions should be construed in favor of the government as limitations on the waiver of sovereign immunity, this Court has warned that "unduly generous interpretations of the exceptions run the risk of defeating the [FTCA's] central purpose" of compensating victims of government negligence. *Dolan*, 546 U.S. at 491–92 (citation and quotation marks omitted).

The exception at issue in this case is known as the discretionary function exception, which precludes liability "*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) (emphasis added).[3] Although most FTCA exceptions exclude liability "arising" from specified circumstances or claims (*see* 28 U.S.C. § 2680(b), (e), (h), (j), (k), (l), (m), (n)), the discretionary function exception limits itself to government acts or omissions that are "based upon" a "discretionary function." *Id.* § 2680(a).

To focus on the single word that best describes the proper parameters of the discretionary function exception, it is all about "policy." As this Court previously put it: "Where there is room for policy judgment and decision there is discretion." *Dalehite*, 346 U.S. at 36.

Congress made its intent clear along these lines when enacting the FTCA: when the government's conduct reflects carelessness, but was not grounded in

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[3] This provision also excludes liability based on "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." 28 U.S.C. § 2680(a). This due care exception precludes claims of tort liability against the government based on an allegedly invalid statute or regulation. Thus, "the enactment of a statute or promulgation of a regulation cannot be characterized as a negligent act of governance." GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.6(b)(1), at 166 (2D ED. 2023).

public policy, the discretionary function exception does not apply. Indeed, the key House report on the legislation quoted the government spokesman's explanation of the exception:

> [It is] designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, the Federal Trade Commission, the Securities and Exchange Commission, the Foreign Funds Control Office of the Treasury, or others. It is neither desirable nor intended that *the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act* should be tested through the medium of a damage suit for tort.

H.R. Rep. No. 2245, 77th Cong., 2d Sess., 10 (1942) (quoted in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809–10 (1984) (emphasis added)). That same statement insisted that, "[o]n the other hand, the common law torts of employees of regulatory agencies, as well as of all other Federal agencies, would be included within the scope of the bill." *Id*. at 810.

Echoing this government declaration from the FTCA's legislative history, this Court has described the discretionary function exception as preventing "judicial 'second-guessing' of legislative and administrative decisions *grounded in social, economic, and political policy through the medium of an action in tort*." *Id*. at 814 (emphasis added). In this way, the exception "marks the boundary between Congress'

willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id*. at 808.

Just three years before *Gaubert*, this Court set out an analysis for application of the discretionary function exception in *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531 (1988). *Berkovitz* made clear that the discretionary function exception is implicated only if there was actually room for discretion by the governmental actor. By contrast, if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," there is no discretion, and "the employee has no rightful option but to adhere to the directive." *Id*. at 536. Second, even if there is room for discretion, not every choice falls within the exception. Only those of the type that Congress intended to protect by the exception, that is, social, economic, or political policymaking, are included. *Id*. at 536–37.

III. LOWER COURTS HAVE MISINTERPRETED AND MISAPPLIED *GAUBERT*

This Court's use of a single phrase—"susceptible to policy analysis"—in *United States v. Gaubert*, 499 U.S. 315, 325 (1991), set the discretionary function exception on an entirely new and unintended course. In the more than thirty years since *Gaubert*, lower courts have relied on the phrase "susceptible to policy analysis" to hold that post-hoc, conjectural, or hypothetical justifications of government decisions fall within the scope of the exception, contrary to

Congress's intent. *See, e.g.*, *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 93 (1st Cir. 2012) (requiring only "some plausible policy justification" that "could have undergirded the challenged conduct") (citation and quotation marks omitted); *Jude v. Comm'r of Soc. Sec.*, 908 F.3d 152, 159 (6th Cir. 2018) ("the decision need only have been theoretically susceptible to policy analysis"); *Chadd v. United States*, 794 F.3d 1104, 1113 (9th Cir. 2015) ("[T]he challenged decision need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis.") (emphasis, citation and quotation marks omitted).

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

whether they are susceptible to policy analysis"—which, in *Gaubert*, was satisfied by the fact that each decision was "grounded in the policy of the regulatory regime." *Id.* at 325.

Gaubert's discussion of policy susceptibility thus cannot be divorced from the policy-infused nature of the federal regulation of financial institutions. *See Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (describing bank regulation as "fully grounded in regulatory policy"). This Court understood that the entire operation following the obviously policy-driven decision to seize control of the bank, including its influence on "day-to-day 'operational' decisions," was "undertaken for policy reasons of primary concern to the regulatory agencies." *Gaubert*, 499 U.S. at 332; *see also id.* at 338 (Scalia, J., concurring) (crediting link between regulatory decisions and "policy-based decision" to seize bank). This Court accordingly was "convinced that each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield." *Id.* at 332.

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

This Court in *Gaubert* also understood that being "susceptible to policy analysis" does not mean simply having any reasonably articulable, even if only theoretical, relationship to a matter of social, economic, or political importance. Even in the regulation-rich world of *Gaubert*, which affirmed the regulatory decisions implementing the seizure decision as part and parcel of the policy-saturated whole, this Court recognized that certain collateral actions will lack any meaningful policy justification and, thus, fall outside the exception's protection. *See* 499 U.S. at 324–25. This Court illustrated this limitation using the example of a federal regulator driving a car "on a mission connected with his official duties" and negligently causing an accident. *Id.* at 325 n.7. "Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." *Id.* Despite being connected and arguably even essential to the regulator's execution of those statutory and regulatory responsibilities to which the exception undoubtedly applies, the "nature" of careless driving cannot be categorized as "susceptible to policy analysis." *See id.* at 325.

The Government's own briefing in *Gaubert* is also instructive. The Government failed in its merits briefing in *Gaubert* to even hint at the notion that hypothetical or post-hoc policy rationales should be enough to satisfy the discretionary function exception. The word "susceptible" never appeared in the government's briefing. Brief for the Petitioner, *United States v. Gaubert*, 499 U.S. 315 (1991) (No. 89-1793), 1990 WL 505727; Reply Brief for the United States,

United States v. Gaubert, 499 U.S. 315 (1991) (No. 89-1793), 1990 WL 505729. Indeed, in *all* of the discretionary function exception cases coming before this Court over many decades, the United States has *never* argued in a merits brief that the exception may be invoked whenever a policy choice could be imagined afterward. In its earliest submission to this Court on the subject, the government said the exception applies to "executive conduct which *actually* involves the exercise of judgment, choice, and discretion, and requires the *weighing in the public interest* of competing considerations." Brief for the United States at 191, *Dalehite v. United States*, 346 U.S. 15 (1953) (No. 308), 1953 WL 78664 (emphasis added).

Even though nothing in *Gaubert* "switches the foundational question from whether the decision *was* 'based on considerations of public policy' to whether it hypothetically could have been," *Chadd*, 794 F.3d at 1114 (Berzon, J., concurring), lower courts have nonetheless spent the past three decades citing *Gaubert* when assigning dispositive weight to imaginary policy musings. *See, e.g.*, *supra*, p. 10 (collecting cases). Under the approach adopted by lower courts, if "some plausible policy justification *could have* undergirded the challenged conduct," the exception applies, and immunity bars liability. *Sanchez*, 671 F.3d at 93 (emphasis added). Never mind whether government agents "did or did not engage in a deliberative process," *Baum v. United States*, 986 F.2d 716, 721 (4th Cir. 1993), "make an actual 'conscious decision' regarding policy factors," *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993), or "prove . . . that an affirmative decision was made,"

Gonzalez v. United States, 814 F.3d 1022, 1033 (9th Cir. 2016).

The result has been a discretionary function exception entirely unconcerned with "the nature of the actions taken." *Gaubert*, 499 U.S. at 325. Indeed, at least one court has gone so far as to hold that "competing policy considerations" like "safety, budget, [and] staffing"—with which virtually any government agent from any government body could plausibly be concerned in making any decision—justify the exception's application, even if the agent never "actually weighed them." *Lam v. United States*, 979 F.3d 688, 681–82 (9th Cir. 2020). Another initially rejected the sufficiency of such "an attenuated tie" to policy. *Shanksy v. United States*, 164 F.3d 688, 692–93 (1st Cir. 1999). But it later discarded this limitation by explaining that only "in a rare case" would a policy consideration be "so far-fetched as to defy any plausible nexus between the challenged conduct and the asserted justification." *Id.* at 695. Accordingly, lower courts have, by judicial fiat, successfully converted a narrow exception to the FTCA's waiver of sovereign immunity into a presumption of immunity that all but the rare and ridiculous will fail to rebut.

IV. LOWER COURTS' APPLICATION OF THE EXCEPTION IS ANTITHETICAL TO THE FTCA'S PLAIN TEXT AND ORIGINAL UNDERSTANDING

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

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

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

A. "Based Upon"

Of the thirteen continuing exceptions to governmental liability under the FTCA, eight are defined by whether the claim "arises" out of a category of government activity, specified causes of action, or a foreign geographic area. 28 U.S.C. § 2680(b), (e), (h), (j), (k), (l), (m), (n). The discretionary function exception, by contrast, demands an even tighter fit. The exception is triggered only when the claim is "*based upon* the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused." *Id.* § 2680(a) (emphasis added).

Simply put, a government decision to act or refuse to act cannot be "based upon" something that never happened, plainly excluding a hypothetical policy judgment that was never made. Nor can the exception be satisfied by asserting that an act was "based upon" an attempt to back-date a conjectural policy basis.

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

By requiring that the excepted government act be "based upon" the exercise or failure to exercise a discretionary function, the text of the statute requires a supporting policy judgment. When deliberately choosing to exercise a function that is discretionary or deliberately refraining from that exercise, the government actor makes a choice "grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. Based on such public policy factors, the government agent may choose whether to employ that discretionary power. By contrast, if no policy judgment

supports the government action or inaction, then no discretionary function was brought into play and, accordingly, the fundamental prerequisite to application of the exception is missing.

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

B. "Discretionary Function or Duty"

The phrase "discretionary function" was a legal term of art that Congress borrowed from the law of mandamus and damages suits against government officials. In its first discretionary function opinion, this Court identified "the discretion of the executive or the administrator to act according to one's judgment of the best course" as "a concept of substantial historical ancestry in American law." *Dalehite*, 346 U.S. at 34. This Court then cited to decisions involving discretionary functions in the context of mandamus proceedings and damages claims against federal officials. *Id.* at 34 n.30. As this Court later recognized for another provision of the FTCA, which precludes an award of "punitive damages" against the United States, the choice of a term of art in this statute reflects Congress's adoption of the existing understanding of the concept. *Molzof v. United States*, 502 U.S. 301, 305–12 (1992).

One historical example of this concept, with which Congress must have been familiar, arises in mandamus law. In the then-classic mandamus case of *United States ex rel. Alaska Smokeless Coal Co. v.*

Lane, 250 U.S. 549, 555 (1919), this Court refused mandamus in circumstances where "[m]anifestly judgment in all cases must be exercised-judgment not only of the law but what was done under the law, and its sufficiency to avail of the grant of the law."

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

A second historical analogy is a damages claim against an individual government officer, which points in the same direction. In *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 98 (1845), this Court stated that public officers are not liable for errors where "the act to be done is not merely a ministerial one," and is instead a situation where the officer must "exercise judgment and discretion."

Likewise, in *Johnston v. District of Columbia*, 118 U.S. 19, 21 (1886), this Court described the discretionary function immunity from liability of certain officers as "involving the exercise of deliberate

judgment and large discretion" based on public considerations.

Based on the "light" of these historical data points, the government itself in the briefing to this Court in the very first discretionary function exception case agreed that a "function or duty is 'discretionary'" when "a substantial factor entering into [the official's] exercise of that discretion is an interest special to the United States as a government." Brief for the United States at 35–36, *Dalehite v. United States*, 346 U.S. 15 (1953) (No. 308), 1953 WL 78664. The demand for an actual policy judgment is a practical and not unrealistic expectation under the statute.

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

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

The *Chadd* case, 794 F.3d 1104 (9th Cir. 2015), illustrates this crucial difference. Had the National Park Service made the decision not to remove or destroy the dangerous animal because of a policy

judgment to preserve an iconic wild species for tourists to enjoy, the claim arising from the death of the hiker would arguably have been "based upon" the "failure to exercise" discretion in favor of public safety. Of course, no such policy existed because it would have contradicted the park's written policy manual that regarded the mountain goat as a nuisance species that could be eradicated for public safety. *Id.* at 1110. The true reason for inaction was bureaucratic inertia, not policy judgment.

Congress's adoption of "discretionary function" as a legal term of art disallows expansion of the FTCA exception to ordinary governmental neglect. Drawing from decisional law concerning discretionary governmental acts in mandamus and damages claims against government officials, scholars of the period leading up to the enactment of the FTCA defined "discretionary function" as necessarily involving genuine choices. Edwin W. Patterson, *Ministerial and Discretionary Official Acts*, 20 Mich. L. Rev. 848, 854 (1922). And, in briefing on the issue, the United States government concurred that, based on the bodies of existing law when the FTCA was enacted, the "fundamental criterion" of the discretionary function exception is whether the government actor "has been endowed with the power of choice, and a substantial factor entering into his selection of a particular course of conduct is an interest special to the United States as a government." Brief for the United States at 192, *Dalehite v. United States*, 346 U.S. 15 (1953) (No. 308), 1953 WL 78664. Only under these considered circumstances, the government concluded, "the function or duty is a 'discretionary' one." *Id.*

At bottom, delinquency in attention to a matter is not the "failure to exercise" a "discretionary function." Rather, simple neglect is the *absence* of a "discretionary function."

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Thus, contrary to the approach lower courts have taken for decades, the text of the discretionary function exception requires a causal link to a considered policy judgment. A link is not only demanded by the text of the statute but is commended by multiple statements in FTCA decisions by this Court. This Court has repeatedly articulated the standard in terms that focus on concrete policymaking choices. This Court has tied the policy immunity of the discretionary function exception to that which is "grounded" in policy, *Varig Airlines*, 467 U.S. 814, "based on considerations of public policy," *Berkovitz*, 486 U.S. at 537, or involving the "'exercise of policy judgment.'" *Gaubert*, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3). Only if one takes the once-uttered phrase "susceptible to policy analysis" out of its policy-suffused regulatory context in which it served as a *limit* on the exception could one suggest that this Court has even hinted at hypothetical policy factors as justifying its application. By contrast, the repeated references to policy judgment, grounding in policy, and being based on policy considerations preclude an interpretation that exalts imagination over reality.

V. THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE ILLUSTRATES THE NEED FOR THIS COURT'S REVIEW

This case illustrates just how far lower courts have strayed from the text of the discretionary function exception based on a misunderstanding of four words uttered in *Gaubert*. It is undisputed that in a predawn raid, the FBI broke down Petitioners' door, detonated a flashbang grenade, and pointed guns at Petitioners—even though Petitioners' home was not the house the FBI was authorized to raid. There also seems to be little to no debate that the FBI agents' conduct satisfies Georgia's test for negligence. *See Weller v. Blake*, 726 S.E.2d 698, 702 (Ga. Ct. App. 2012) ("The elements of a negligence cause of action are: (1) a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a causal connection between the conduct and the injury; and (4) damages from the breach of duty.").

Yet, the Eleventh Circuit held that the discretionary function exception covered the FBI agents' conduct. Pet. App. 17a–18a. Invoking *Gaubert*'s oft-misused phrase, the Eleventh Circuit held that "a federal officer's decision as to how to locate and identify the subject of an arrest warrant prior to service of the warrant is susceptible to policy analysis." *Id.* at 18a (citation and quotation marks omitted). The court, however, pointed to *no policy—not even a hypothetical one*—to which the officers' discretion was, or could be, susceptible. Put differently, the lower court here did not even require

the FBI to identify a hypothetical, conjectural, or post-hoc justification for the FBI's negligent conduct, instead simply holding that the discretionary function exception applied because the FBI has discretion generally.

The upshot is that FBI agents—at least within the geographical boundaries of the Eleventh Circuit—are immune from liability for negligently conducting a predawn raid on an innocent family simply because FBI agents have some generalized, undefined amount of discretion to execute warrants. The Eleventh Circuit's holding misunderstands this Court's decision in *Gaubert*, is unmoored from the plain text of the FTCA, and is inconsistent with the original understanding of the terms of art incorporated by Congress into the discretionary function exception. In a word, lower courts' application of the discretionary function since *Gaubert* has proven anything but exceptional.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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