CASE NO. 23-10062

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CURTRINA MARTIN,
G.W., & HILLIARD TOI CLIATT,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
LAWRENCE GUERRA, & SIX UNKNOWN FBI AGENTS,
Defendants-Appellees.

Appeal from a Judgment of the U.S. District Court for the
Northern District of Georgia, D.C. Docket No. 1:19-cv-04106-JPB

BRIEF OF THE CATO INSTITUTE, THE LAW ENFORCEMENT ACTION PARTNERSHIP, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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November 27, 2026

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule No. 26.1(a)(6), *amici* certify that the following persons have an interest in the outcome:

1. Cato Institute, *amicus curiae*
2. Matthew P. Cavedon, counsel for *amicus curiae*
3. Laura A. Bondank, counsel for *amicus curiae*
4. Law Enforcement Action Partnership, *amicus curiae*
5. Rutherford Institute, *amicus curiae*

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Respectfully submitted,

Dated: November 27, 2026 /s/ Matthew P. Cavedon

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 200 criminal justice professionals advising on police community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and

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[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amici* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

beliefs, calling for more practical and ethical policies from a public safety perspective.

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

INTRODUCTION

In the early morning hours of October 18, 2017, an FBI SWAT team broke down the front door of the Atlanta home Curtrina Martin shared with her partner, Hilliard Cliatt, and her seven-year-old son. Curtrina and Hilliard hid in their bedroom closet as agents in helmets and ballistic vests stormed into their room with rifles. Across the hall, Curtrina's son lay awake and terrified. After dragging Hilliard out of the closet and handcuffing him on the bedroom floor, Special Agent Lawrence Guerra noticed that Hilliard didn't match the description of the man they had come

to arrest. *Martin v. United States*, No. 23-10062, slip op. at 3–4 (11th Cir. Oct. 7, 2026). That man lived three houses away, on a different street. *Id.* at 4. Agent Guerra had a GPS, a phone with Google Maps, and text alerts pinging the target's location every fifteen minutes. *Id.* at 36. Still, no one checked the address before breaking in. *Id.* at 25, 31.

A mistaken house raid is not a protected policy judgment. The Federal Tort Claims Act ("FTCA") waives the United States's sovereign immunity for the negligent actions of its employees, subject to thirteen exceptions. In 1974, after federal agents raided two wrong homes in Collinsville, Illinois, Congress amended the FTCA to allow suits for certain torts committed by federal law enforcement officers. Congress left intact the discretionary-function exception, which protects the government from claims based on a federal employee's policy judgments. The Supreme Court observed that some legislators may have thought no further amendment was needed because "no other exception would shield the government from liability for wrong-house raids." *Martin v. United States*, 605 U.S. 395, 408 (2025).

Curtrina, Hilliard, and Curtrina's son sued under the FTCA, but the panel held that the discretionary-function exception barred their claims. It "reluctantly" concluded it could not revisit circuit precedent on whether the exception shields unconstitutional conduct. *Martin*, slip op. at 13. However, all three judges joined a

concurrence calling this case "a good vehicle" for reconsideration. *Id.* at 12 (Jordan, J., concurring). This Court should grant rehearing en banc and hold that discretion over conducting a raid does not shield failure to confirm the address before entering.

ARGUMENT

I. CONGRESS AMENDED THE FTCA TO ALLOW SUITS FOR WRONG-HOUSE RAIDS.

In 1973, federal officers raided two homes in Collinsville, Illinois. First, they broke down Herbert and Evelyn Giglotto's door. Agents forced Herbert facedown onto his bed, tied his hands, pressed a pistol to his head, and told him: "You move, you're dead." Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 500 (1976). Evelyn stood by in her nightclothes, until one officer announced, "we have the wrong people." *Id.* Thirty minutes later, the same officers appeared at Donald Askew's door as he ate dinner with his family. He feared for his family's safety and his wife fainted. *Id.* at 501. Agents searched the house with pistols drawn before admitting they had acted on a "bad tip." *Id.*

The Giglottos and the Askews had no effective remedy for the physical damage to their homes or their "pain, suffering and humiliation," due to the FTCA's intentional-tort exception. S. Rep. No. 93-588, at 2 (1973); *Martin*, 605 U.S. at 419–20 (Sotomayor, J., concurring). Congress quickly amended the Act to waive immunity for assault, battery, false imprisonment, and false arrest so that "innocent

individuals who are subjected to raids of the type conducted in Collinsville" could sue. S. Rep. No. 93-588, at 3; *see also* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)).

This remedy is often the only way for victims like the Martin family to hold the United States accountable. Since 1988, the Westfall Act has made the FTCA the exclusive remedy for common-law torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 2679(b)(1). Federal agents who raid the wrong house cannot be sued under state law, and the Supreme Court has all but closed the door on new *Bivens* claims. *See Egbert v. Boule*, 596 U.S. 482, 491 (2022). Even where one survives, it runs only against an individual officer, subject to qualified immunity. In 1974, Congress opened a path for victims of wrongful raids. Yet this Court's precedent forecloses it.

II. THIS COURT'S PRECEDENTS BAR NEARLY ALL CLAIMS ARISING FROM WRONG-HOUSE RAIDS.

This Court applies the discretionary-function exception so broadly that ordinary mistakes justify immunity. Under *United States v. Gaubert*, the exception is supposed to apply only when two requirements are met. 499 U.S. 315, 322–25 (1991). First, the challenged act must involve "an element of judgment or choice." *Id.* at 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Second, the judgment must be "based on considerations of public policy." *Id.* at 323 (quoting

Berkovitz, 486 U.S. at 537). This Court's precedents have hollowed out both requirements by treating almost any act as a matter of judgment or choice, and almost any choice as a policy judgment.

This misinterprets Supreme Court precedent. *Gaubert* says an act involves no choice "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" *Id.* at 322 (quoting *Berkovitz*, 486 U.S. at 536). A specific directive is one way to show an official had no choice—but it's not the only way. *See Martin*, slip op. at 3–4 (Jordan, J., concurring). Yet under this Court's decision in *Shivers v. United States*, "the discretionary function exception applies unless a source of federal law 'specifically prescribes' a course of conduct." 1 F.4th 924, 931 (11th Cir. 2021) (emphasis omitted) (quoting *Berkovitz*, 486 U.S. at 536). In other words, an act like a wrong-house raid involves judgment or choice *unless* an agency wrote down a rule forbidding the mistake. But no agency is going to write a rule telling agents to read a street sign or check the address on a mailbox before detonating a flash-bang grenade. *See Martin*, 605 U.S. at 418 (Sotomayor, J., concurring) (explaining that *Shivers* runs "headlong into" Supreme Court precedent).

Gaubert's second requirement asks whether "the nature of the actions taken" is susceptible to policy analysis. 499 U.S. at 325. In *Mesa v. United States*, DEA agents with a warrant for one man arrested another with the same name. 123 F.3d

1435, 1437 (11th Cir. 1997). The plaintiffs sued under the FTCA, arguing that the agents acted negligently, but this Court held that their claims were barred by the discretionary-function exception. *Id.* at 1437, 1439. It reasoned that deciding how to locate and identify the subject of a warrant is grounded in policy because agents may need to weigh secrecy, urgency, public safety, and the preservation of evidence. *Id.* at 1438–39. The *Mesa* Court looked at the agents' job in general, not the specific mistake the plaintiffs challenged. That approach empties *Gaubert*'s second requirement. Almost every task an officer performs can implicate global-level policy issues, yet not every careless error is a policy judgment within the meaning of *Gaubert*.

The panel treated Agent Guerra's failure to verify the address as a protected policy judgment because *Shivers* and *Mesa* left it no other option. *Martin*, slip op. at 23–26. Under *Shivers*, it found that Agent Guerra had discretion because no statute, regulation, or policy told him to check the street sign or the mailbox. *Id.* at 25. It then reasoned that, under *Mesa*, Agent Guerra's choices were grounded in policy "at least to some degree" because the raid depended on surprise and a precise timeline. *Id.* at 26. The panel even rejected an argument that the warrant left Agent Guerra no choice about where to go, specifically because of *Mesa*. *Id.* at 23 (saying that because *Mesa* held "that the discretionary-function exception squarely applies to the 'process' of determining whether the target of a warrant is actually apprehended,"

"it follows that the process for the target residence to be searched is also discretionary").

The panel's reasoning would apply with equal force to the very Collinsville families who were in Congress's mind when it amended the FTCA. *Mesa* immunizes agents' investigation of a suspect's whereabouts, 123 F.3d at 1438, and the Askew raid grew out of a "bad tip" about where a suspect lived. *Mesa* also immunizes the process of deciding whether the person detained is the one the agents came for, *id.* at 1439, which is what the officers were doing when they held Herbert Giglotto at gunpoint. The Collinsville officers had no warrant, but that would not matter either, because *Shivers* holds that the discretionary-function exception covers even unconstitutional conduct. 1 F.4th at 929–35. (Nearly every other circuit rejects this rule. *See Xi v. Haugen*, 68 F.4th 824, 838 n.10 (3d Cir. 2023) (collecting cases).) And while the panel held that a jury could find that Agent Guerra violated the Fourth Amendment, it still held that the discretionary-function exception barred claims against him. *Martin*, slip op. at 36–37. It is difficult to imagine *any* wrong-house raid claim that could satisfy this Court's misinterpretation of the discretionary-function exception, as all three panel judges recognized. *Martin*, slip op. at 1 (Jordan, J., concurring).

That near-categorical bar comes from this Court's precedents alone. The Supreme Court has repeatedly rejected court-made rules that narrow constitutional

and statutory protections. *See Barnes v. Felix*, 605 U.S. 73, 81–83 (2025) (rejecting a rule that narrowed the Fourth Amendment); *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 309–11 (2025) (rejecting a heightened evidentiary burden unsupported by statute). And Justice Sotomayor cautioned that "any interpretation should allow for liability in the very cases Congress amended the FTCA to remedy." *Martin*, 605 U.S. at 420 (Sotomayor, J., concurring).

The panel was bound to apply *Shivers* and *Mesa*, yet all three judges urged the full Court to reconsider these cases. *Martin*, slip op. at 11–12 (Jordan, J., concurring). This Court should grant the petition for rehearing en banc.

III. RAIDING THE WRONG HOUSE IS NOT A PROTECTED POLICY JUDGMENT.

Neither entering the wrong address nor misreading a GPS becomes a protected policy judgment merely because the error occurs during an official assignment. When a single operation has "both discretionary and nondiscretionary aspects," courts must "disaggregate conduct" and evaluate each part separately. *Martin*, slip op. at 15 (quoting 14 WRIGHT & MILLER, FED. PRAC. & PROC. JURIS. § 3658.1 (4th ed. 2015 & Apr. 2026 Supp.) (citing *Gaubert*, 499 U.S. at 325–26)). A federal employee driving on official business makes choices constantly, yet the Supreme Court has explained that a negligent collision falls outside the discretionary-function exception because the driver's decisions "can hardly be said to be grounded in

regulatory policy." *Gaubert*, 499 U.S. at 325 n.7. The same is true here. Whatever policy judgments went into planning the raid, the question is whether the mistake that sent the SWAT team to the wrong house was one of them.

Whether Agent Guerra typed the wrong address into his GPS or misread its screen, his mistake was not a choice. *Martin*, slip op. at 24. The panel acknowledged that whether such an error involves "an element of judgment or choice" was a "much closer call," and suggested that if the analysis stopped at Agent Guerra's use of the GPS, the exception might not apply. *Id.* at 24–25. But it concluded that this Court's precedent did not allow for "such simplicity." *Id.* at 25. Instead, the panel looked at what Agent Guerra could have done after arriving: check the street signs, inspect the mailbox, or consult his geolocation data. *Id.* He certainly could have. But the fact that he could have caught his mistake does not mean he *chose* to make it.

Even if skipping obvious precautionary measures could be deemed a choice on some philosophical level, it is not a policy judgment. A driver who rear-ends another vehicle could have driven more slowly or watched the road more closely. Yet the collision falls outside the discretionary-function exception because those choices are not grounded in policy. *See Gaubert*, 499 U.S. at 325 n.7. The panel tied Agent Guerra's choices to the raid's need for surprise and a precise timeline. *Martin*, slip op. at 26. But a glance at the house number on the mailbox wouldn't have compromised those objectives. Agent Guerra's error was a routine mistake, no

different in kind from the driver example in *Gaubert*. 499 U.S. at 325 n.7; *see also Martin*, 605 U.S. at 419 (Sotomayor, J., concurring) (questioning whether Agent Guerra's "choice to use his personal GPS" involved "the kind of policy judgments that the discretionary-function exception was designed to protect"); *Martin*, slip op. at 11 (Jordan, J., concurring) (equating Agent Guerra's conduct with "a government driver making a wrong turn onto a one-way street").

The panel established only that Agent Guerra could have caught his error before breaking into the wrong home—not that this error involved a policy choice. When a single operation includes both policy judgments and ordinary mistakes, the discretionary-function exception covers the former alone. A mistake about which house to enter is not a policy judgment, and the exception does not bar claims arising from it.

CONCLUSION

The Court should grant the petition for rehearing en banc.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,551 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

/s/ Matthew P. Cavedon

Dated: November 27, 2026 *Counsel for Amici Curiae*

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on November 27, 2026, he electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the Eleventh Circuit using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Matthew P. Cavedon

Dated: November 27, 2026 *Counsel for Amici Curiae*