Through the Federal Accountability Looking Glass

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The Supreme Court confronted a simple question in *Martin v. United States*: "If federal officers raid the wrong house, causing property damage and assaulting innocent occupants, may the homeowners sue the government for damages?"[1] The answer, the Court explained, "is not as obvious as it might be."[2] Or, perhaps, not as obvious as it *should* be. As a result, the innocent Martin family's search for a remedy in the aftermath of a mistaken FBI raid on their home has led them on a surreal adventure through the federal-accountability looking glass. And what the Supreme Court found there reveals a bizarre landscape of immunities through which the Martins continue their journey in search of a remedy.

Introduction

> *"Oh, what fun it'll be, when they see me through the glass in here, and can't get at me!"*
>
> —Lewis Carroll[3]

For half a century, the path to legal remedies for rights violations has been overgrown by a thicket of immunities and exceptions. Courts have steadily increased protections for government officials,

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[1] Martin v. United States, 145 S. Ct. 1689, 1694 (2025).

[2] *Id.*

[3] Lewis Carroll, Through the Looking-Glass and What Alice Found There ch. I (1871).

while decreasing the availability of causes of actions through which to hold officials accountable.[4] Consider qualified immunity, a doctrine conceived by the Supreme Court in 1967.[5] Once a modest defense to constitutional claims, requiring government officials to show good faith and reasonableness,[6] the doctrine grew into one that demands victims prove their rights were "clearly established" by pointing to binding judicial precedent involving materially identical facts.[7] Similarly, "*Bivens* claims"[8]—implied causes of action against federal officers for constitutional violations—were once so robust as to prompt the Supreme Court's creation of the clearly established test[9] but have since been marked "disfavored"[10] and all but prohibited.[11] Federal officials now operate in a "Constitution-free zone,"[12] an immunity wonderland where the rules bend to federal discretion.

The Supreme Court often cites the constitutional separation of powers to justify its animosity toward these implied causes of action. "[C]reating a cause of action," it argues, "is a legislative endeavor."[13] Yet, even when Congress *has* endeavored to create a cause of action, as it did through the Federal Tort Claims Act (FTCA),[14] the road to a remedy is difficult to find in American courthouses.

Congress passed the FTCA in 1946 to ensure remedies for certain state tort claims against the United States for the wrongs committed by its employees. The FTCA was the years-long culmination of congressional efforts to address a growing problem: remediless

[4] *See infra* Part II.

[5] *See* Pierson v. Ray, 386 U.S. 547, 554–57 (1967).

[6] *See id*.

[7] Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982).

[8] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); *see also* Butz v. Economou, 438 U.S. 478, 485–504 (1978).

[9] *See Harlow*, 457 U.S. at 813–19.

[10] Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

[11] Egbert v. Boule, 596 U.S. 482, 486 (2022) ("[P]rescribing a cause of action is a job for Congress[.]").

[12] Byrd v. Lamb, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., concurring).

[13] *Egbert*, 596 U.S. at 491. *But see* The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824) (holding that the judiciary can create a cause of action, if "justice demands," so an "injured party [may] receive a suitable redress").

[14] 28 U.S.C. §§ 1346(b)(1), 2671–80.

wrongs that resulted from the actions of government officials as they performed their work. As with qualified immunity and *Bivens*, however, the FTCA remedy—once widely available—began to shrink. Over the past several decades, the courts have denied the FTCA's promise in many ways, draining what was once a reservoir of remedies.[15] Sometimes they have done so at the request of the Department of Justice—as with the expansion of the FTCA's "discretionary function" exception,[16] which the government argues should operate like qualified immunity.[17] Other times, the courts have done it themselves—as with the Eleventh Circuit's creation of a Supremacy Clause bar that prohibits all FTCA claims that "have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law."[18]

Alice's bizarre journey through the looking glass seems mundane compared to the misadventure of suing the federal government. Even an innocent family, mistakenly raided by the FBI, can be left without recourse as courts stack exceptions, bars, and immunities atop one another.[19]

But in this Term's *Martin v. United States*, the Supreme Court reached through the looking glass. It unanimously rejected the Eleventh Circuit's Supremacy Clause bar to FTCA claims.[20] It also directed the lower court to revisit critical questions surrounding the

[15] *See, e.g.*, Brownback v. King, 592 U.S. 209, 218 (2021) (holding that jurisdictional dismissal of an FTCA claims can trigger a judgment bar that defeats other, unrelated claims); *id.* at 222 (Sotomayor, J., concurring) (noting that this may "produce[] seemingly unfair results by precluding meritorious claims when a plaintiff's FTCA claims fail for unrelated reasons").

[16] 28 U.S.C. § 2680(a).

[17] *See* Brief for Respondents at 36, Martin v. United States, 145 S. Ct. 1689 (2025) (No. 24-362), 2025 WL 1011691 (quoting *Harlow*, 457 U.S. at 818) ("The scope of the exception thus mirrors the doctrine of qualified immunity, under which 'government officials performing discretionary functions [] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights.'").

[18] Denson v. United States, 574 F.3d 1318, 1348 (11th Cir. 2009); *see also* Kordash v. United States, 51 F.4th 1289, 1293–94 (11th Cir. 2022).

[19] Martin v. United States, No. 23-10062, 2024 WL 1716235 (11th Cir. Apr. 22, 2024) (*Martin Appeal*).

[20] *See Martin*, 145 S. Ct. at 1700.

discretionary-function exception in cases of "wrong-house raids and similar misconduct."[21] Noting several circuit splits along the way, the Court hinted at a broader interest in clearing the path to federal remedies via the FTCA.[22]

In Part I of this tale, we review the facts of the *Martin* raid. Next, in Part II, we situate the expansion of the discretionary-function exception within the ever-growing landscape of government defenses, focusing on the contradicting interpretations created by the circuit courts. In Part III, we explain the lower court decisions in *Martin*. Finally, in Part IV, we discuss the Supreme Court's unanimous decision in *Martin v. United States*, its implications, and the potential paths back to the remedies Congress provided through the FTCA.

With qualified immunity still a formidable queen, *Bivens* a disfavored pawn, and the accumulation of federal power adding more pieces to the government's side of the board each year, "the stakes of clarifying the scope of the discretionary-functions exception grow ever greater."[23] Victims of federal abuse "must increasingly rely on the FTCA" to find their way back through the looking glass and "vindicate their constitutional rights."[24]

I. The Raid of the Martin House

> *"How would you like to live in Looking-glass House?"*[25]

In suburban Atlanta sits a house at 3756 Denville Trace. Built on a quarter-acre lot in 2000, the four-bedroom, three-bathroom home has an attached two-car garage, tasteful landscaping, and a manicured lawn. In 2017, it was home to a family: Hilliard Toi Cliatt; his partner, Curtrina Martin; and her seven-year-old son, Gabe.

A. The Raid

Before dawn on October 18, FBI Special Agent Lawrence Guerra led a six-agent SWAT team to 3756 Denville Trace. Guerra, failing to

[21] *Id.* at 1703.

[22] *See id.*

[23] Xi v. Haugen, 68 F.4th 824, 844 (3d Cir. 2023) (Bibas, J., concurring).

[24] *Id.*

[25] Carroll, *supra* note 3, at ch. I.

confirm the address visible on the mailbox, mistakenly believed he had arrived at 3741 Landau Lane—the home of a gang member for which Guerra had a search warrant. Ignoring conspicuous features that should have averted their mistake, the heavily armed SWAT team battered down the Martins' door, detonated a flashbang grenade in their home, and stormed inside.

The explosion startled the Martins awake, filling them with the dread that dangerous criminals were invading their home. Trina's first instinct was to run to her son's room, but Toi, acting to protect his partner, grabbed Trina and pulled her into a closet. Meanwhile, seven-year-old Gabe cowered under his covers, where he heard his mother's desperate cries: "I need to go get my son, . . . I need to go get my son."

Masked government agents shoved open the door to the closet where Toi and Trina had barricaded themselves. Agents dragged Toi out and handcuffed him, and Trina, half naked, collapsed before a room full of hostile strangers. As she pleaded to see her son, agents pointed guns at her and Toi.

B. The Realization

Agents peppered Toi with questions. But when he told them his address—3756 Denville Trace—the chaos abruptly stopped. Realizing his colossal error, Agent Guerra unshackled Toi and said, "I'll be right back."

He and his team went down the block to 3741 Landau Lane and executed another raid at the *correct* address. Guerra then galumphed back to 3756 Denville Trace, apologized, documented the damage, and left a calling card with his supervisor's information. The Martins were left in stunned disbelief.

The cause of this terrible and life-threatening mistake? Agent Guerra later claimed his GPS, purportedly set for 3741 Landau Lane, had instead directed him to 3756 Denville Trace. But Guerra could not prove this; he threw the GPS away before the Martins could examine it in discovery.[26]

[26] This telling of the facts is modeled on Brief for Petitioners at 11–13, Martin v. United States, 145 S. Ct. 1689 (2025) (No. 24-362), 2025 WL 788935.

C. The Repercussions

"Left with personal injuries and property damage—but few explanations and no compensation,"[27] the Martins sued. They brought individual *Bivens* claims against Agent Guerra and the unnamed SWAT-team members for their violation of the Fourth Amendment and FTCA claims against the United States for the Georgia-law torts committed during the raid.

In another moment the Martins were through the looking glass—into a world where reason dissolved and blame vanished. In this checkerboard-landscape, the federal government plays the immunity game against its victims.

Here we pause the Martins' story to survey this topsy-turvy fiefdom.

II. The Immunity Game

> *"It's a great huge game of chess that's being played."*[28]

Over the years, the federal government has systematically fortified its immunities and defenses, while simultaneously eroding avenues for people to hold it accountable. A formidable wall now stands between rights and remedies, built primarily with three tools: the expansion of qualified immunity, the constriction of *Bivens*, and the inversion of the FTCA through its discretionary-function exception.[29]

A. Qualified Immunity

> *"Curiouser and curiouser! . . . I'm opening out like the largest telescope that ever was!"*[30]

Qualified immunity emerged from the Supreme Court in 1967's *Pierson v. Ray*.[31] Initially envisioned as a "defense of good faith and

[27] *Martin*, 145 S. Ct. at 1695.

[28] Carroll, *supra* note 3, at ch. II.

[29] 28 U.S.C. § 2680(a).

[30] Lewis Carroll, Alice's Adventures in Wonderland ch. II (1865).

[31] 386 U.S. 547, 554–58 (1967).

probable cause,"[32] this "qualified immunity" from liability required an officer to prove both reasonableness and good faith.[33] Though first applied to state police under 42 U.S.C. § 1983,[34] the Court soon extended good-faith immunity to all government workers—local, state, and federal.[35] Foreshadowing a dark future for accountability, the Court wrote that "any lesser standard would deny much of the promise of § 1983."[36]

Then, in 1982, the Supreme Court adopted a lesser standard, dramatically reshaping qualified immunity in *Harlow v. Fitzgerald*. Driven by its own policy concerns in the *Bivens* case against Nixon administration officials,[37] the Court abandoned the subjective "good faith" inquiry for the objective "clearly established test." The Supreme Court announced, "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[38] This clearly established test "completely reformulated qualified immunity along principles not at all embodied in the common law[.]"[39]

The clearly established test quickly grew into a disorienting hedge maze, requiring a victim of government abuse to prove that the legal principles in her case have such a "clear foundation in then-existing precedent" that they are "beyond debate," and "every reasonable official would interpret [them] to establish the particular rule the plaintiff seeks to apply" to the "particular circumstances" of the

[32] *Id.* at 557.

[33] *See* Wood v. Strickland, 420 U.S. 308, 321–22 (1975).

[34] *See Pierson*, 386 U.S. at 550, 555–58; *see also* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. *But see generally* Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 Harv. J.L. & Pub. Pol'y (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5124275.

[35] *See* Procunier v. Navarette, 434 U.S. 555, 568–69, 556 nn.1–2 (1978); Butz v. Economou, 438 U.S. 478, 507 (1978).

[36] *Wood*, 420 U.S. at 322.

[37] *Harlow*, 457 U.S. at 816.

[38] *See id.* at 818.

[39] Anderson v. Creighton, 483 U.S. 635, 645 (1987).

victim's situation with "a high degree of specificity."[40] Were that not enough, the Supreme Court continued to adorn qualified immunity with additional, government-friendly features like the right to an immediate interlocutory appeal and the ability to win without having to defend the constitutionality of the government actions.[41]

We could say much more,[42] but we must not be late!

B. The Bivens *Cause of Action*

"What a curious feeling! . . . I must be shutting up like a telescope."[43]

As qualified immunity grew, the Supreme Court cut *Bivens* back to the roots, making it nigh impossible to sue individual federal

[40] District of Columbia v. Wesby, 583 U.S. 48, 63 (2018) (citations omitted) (cleaned up). In practice, qualified immunity imposes a two-part hurdle: A plaintiff must show (1) the violation of a constitutional right (the merits) and (2) that the right was clearly established at the time of its violation (the clearly established test). Pearson v. Callahan, 555 U.S. 223, 232 (2009). Despite its opening promise that qualified immunity would not "license [] lawless conduct," *Harlow*, 457 U.S. at 819, or shield "the plainly incompetent," Malley v. Briggs, 475 U.S. 335, 341 (1986), the doctrine routinely does both and allows courts and government officials to sidestep accountability through nonsensical distinctions of earlier precedent. *See, e.g.*, Benning v. Comm'r, 71 F.4th 1324, 1332–34 (11th Cir. 2023) (shielding prison officials who confiscated and censored emails because earlier precedent involved physical, not electronic, mail); Frasier v. Evans, 992 F.3d 1003, 1015 (10th Cir. 2021) (shielding police who forced a man to delete a video he recorded of them using force on a suspect, even though they had been trained that doing so violated the First Amendment because "judicial decisions are the only valid interpretive source of the content of clearly established law"); Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018) (shielding officers who allowed their dog to bite a surrendered suspect because the suspect in an earlier case had positioned his body differently).

[41] For example, the Court has formally extended qualified immunity from the federal officers to their state and local colleagues, Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984); granted government defendants a right to immediate interlocutory appeals whenever immunity is denied, Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985); and allowed courts to avoid deciding the constitutional merits by determining that a right is not clearly established, *Pearson*, 555 U.S. at 236.

[42] And we have. *See generally* Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. Crim. L. & Criminology 105 (2022) (providing a fuller discussion of qualified immunity's dark history and discussing our optimism for a brighter future in light of indications from the Supreme Court). As have others. *See generally, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018) (providing comprehensive overview of qualified immunity).

[43] Carroll, *supra* note 30, at ch. I.

officials for violating the Constitution.[44] The Court formally authorized the *Bivens* cause of action in 1971, after Webster Bivens sued federal narcotics agents who invaded his home without a warrant, handcuffed him in front of his family, and arrested him on baseless charges.[45] (Sound familiar?) To ensure state-federal constitutional parity, the Court ruled that the Constitution itself implied a right to sue for its violation, affirming that courts must "be alert to adjust their remedies so as to grant the necessary relief."[46]

Over the following decade, the Court directly approved *Bivens* claims in two more cases—*Davis v. Passman*[47] and *Carlson v. Green*[48]—and implicitly blessed many more.[49] By 1982, *Bivens* claims were so widespread and robust that *Harlow* constructed the clearly established test to temper the Court's policy concerns with holding federal officials to their constitutional obligations.[50] *Bivens*, however, remained generally available.[51]

But in 1983, the tide began to turn. The Supreme Court first ruled that an "elaborate, comprehensive scheme" by Congress addressing some harm—however remotely—displaced *Bivens* claims in the same arena.[52] By 1988, even congressional *inaction* could displace *Bivens*, since "special factors counselling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indications that congressional inaction

[44] *See generally* Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz v. Economou, 126 Dick. L. Rev. 719 (2022) (detailing the history of claims against federal officers and the Court's inconsistent approach to qualified immunity and *Bivens*). *See also generally, e.g.*, Steven I. Vladeck, *The Inconsistent Originalism of Judge Made Remedies Against Federal Officers*, 96 Notre Dame L. Rev. 1869, 1887–89 (2021).

[45] *See Bivens*, 403 U.S. at 389–90.

[46] *Id.* at 392 (citations omitted).

[47] Davis v. Passman, 442 U.S. 228 (1979).

[48] Carlson v. Green, 446 U.S. 14 (1980).

[49] *See* Jaicomo & Bidwell, *Unqualified Immunity*, *supra* note 44, at 763–64 app. A (collecting 31 Supreme Court cases recognizing, implying, or allowing to go forward constitutional claims against federal officers).

[50] *See Harlow*, 457 U.S. at 820 n.36.

[51] *See* Jaicomo & Bidwell, *Unqualified Immunity*, *supra* note 44, at 735–43.

[52] Bush v. Lucas, 462 U.S. 367, 380–90 (1983); *see also* Chappel v. Wallace, 462 U.S. 296, 298–304 (1983) (citing Congress's authority in the field of military discipline structure as a "special factor" counseling hesitation against extending *Bivens*).

has not been inadvertent."[53] And the Court's stated concern shifted from institutional competency to the separation of powers.[54] Even when Congress passed the Westfall Act in 1988,[55] explicitly allowing claims against "employee[s] of the Government . . . brought for a violation of the Constitution of the United States,"[56] the judicial erosion of claims against federal officers continued apace.[57]

Then, in the 2000s, the Supreme Court began walking *Bivens* to the gallows. In *Correctional Services Corp. v. Malesko*,[58] the Court reimagined *Bivens* as generally *unavailable* and announced that, unless the Court had previously extended the cause of action into a specific context, none existed.[59]

In *Ziglar v. Abbasi*, the Court went further, unveiling a restrictive two-step test to assess *Bivens* availability: A plaintiff must (1) demonstrate that his case does not present a "new context" (often based on picayune distinctions),[60] and, if it does, (2) show there are no "special

[53] Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (internal quotation marks omitted).

[54] *Contra, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824) ("[T]his Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.").

[55] Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (citing as its impetus Westfall v. Erwin, 484 U.S. 292 (1988)).

[56] 28 U.S.C. § 2679(b)(2)(A).

[57] The Supreme Court recently acknowledged that the Westfall Act "left *Bivens* where it found it" in 1988. Hernandez v. Mesa, 589 U.S. 93, 111 n.9 (2020). But the effect of this acknowledgement (*i.e.*, where Congress found *Bivens*) is still a mystery that has not been answered by the courts. *But see* Buchanan v. Barr, 71 F.4th 1003, 1015–18 (D.C. Cir. 2023) (Walker, J., concurring) ("I'm not certain whether the Westfall Act is best read to allow state tort suits for constitutional injuries. But that reading finds support in the text of the statute, accords with Founding-era principles of officer accountability, and closes a remedial gap—ensuring relief for those injured by federal officers' unconstitutional conduct.").

[58] Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).

[59] *Id.* at 70, 74.

[60] Ziglar v. Abbasi, 582 U.S. 120, 136 (2017). The new-context analysis is eerily like the clearly established test. *See supra* note 40. It asks whether a case is "different in a meaningful way from previous *Bivens* cases decided by this Court" considering a nonexhaustive list of factors. *Ziglar*, 582 U.S. at 1859. Courts have taken this to mean that a case must "exactly mirror the facts and legal issues" of an earlier decision. Ahmed v. Weyker, 984 F.3d 564, 568 (8th Cir. 2020) (citing Farah v. Weyker, 926 F.3d 492, 498 (8th Cir. 2019)). Thus, when Veterans Administration police beat and choked an elderly veteran for failing to put his belongings in an x-ray machine quickly enough,

factors counseling hesitation" against the judiciary extending a cause of action into this new context.

Finally, in *Egbert v. Boule*, the Court stopped just short of overruling *Bivens* outright,[61] leaving the bench and bar to answer a riddle: "When might a court ever be 'better equipped' than the people's elected representatives to weigh the 'costs and benefits' of creating a cause of action?"[62] If this question is not merely rhetorical, no one seems to know the answer. But it's growing increasingly difficult to imagine a *Bivens* remedy available to anyone other than Webster Bivens himself.

C. The Federal Tort Claims Act and Its Exceptions

> *"[The Queen's] so extremely . . . likely to win, that it's hardly worthwhile finishing the game."*[63]

This brings us to the Federal Tort Claims Act[64]—the heart of *Martin v. United States* and a crucial piece in the complex immunity game played by the federal government against everyday people. Before qualified immunity, *Bivens*, and even Section 1983, there was the bar of sovereign immunity, founded on the ancient notion that "the King can do no wrong."[65] The FTCA, passed in 1946, partly in response to a U.S. Army airplane's deadly collision with

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the Fifth Circuit concluded that the case presented a new context from *Bivens* because it took place in a hospital, not a private home; the officers were not investigating a narcotics crime; and the officers did not handcuff or strip-search the veteran. Oliva v. Nivar, 973 F.3d 438, 442–43 (5th Cir. 2020). The Fifth Circuit even treated the officers' *greater* violence (chokehold) as reason to deny relief because the narcotics officers in *Bivens* "did not place Webster Bivens in a chokehold." *Id.* at 443.

[61] *Egbert*, 596 U.S. at 482. "While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Id.* at 492. More pointedly, *Egbert* explained, "A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* at 496 (citation omitted).

[62] *Id.* at 503 (Gorsuch, J., concurring).

[63] Carroll, *supra* note 30, at ch. VIII.

[64] This discussion of the FTCA draws heavily from Brief for Petitioners at 6–11, 19–21, Martin v. United States, 145 S. Ct. 1689 (2025) (No. 24-362), 2025 WL 788935.

[65] We do not pause to consider why a nation that threw off its sovereign would turn around and adopt this legal principle, though others have. *See, e.g.*, David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 2–21 (1972).

the Empire State Building,[66] was Congress's effort "to mitigate [the] unjust consequences of sovereign immunity" and address the "multiplying number of remediless wrongs . . . which would have been actionable if inflicted by an individual or a corporation but [were] remediless solely because their perpetrator was an officer or employee of the government."[67]

Congress designed the FTCA to waive sovereign immunity and permit remedies for a large swath of government harms. To accomplish these purposes, the FTCA permitted a federal cause of action for damages, "allow[ing] a plaintiff to bring certain state-law tort suits against the Federal Government."[68] The act provides a broad grant of jurisdiction and waiver of sovereign immunity for claims that satisfy six criteria:

> Subject to [28 U.S.C. § 2671–80], the district courts . . . shall have exclusive jurisdiction of civil actions on claims [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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.[69]

Even so, a claim could still be defeated by sovereign immunity if it falls within the "Exceptions" in Section 2680, for which "[t]he provisions of [chapter 171] and section 1346(b) of this title shall not apply[.]"[70] These exceptions exclude 13 categories of claims from the FTCA's waiver of sovereign immunity.[71] Among these are the so-called "discretionary-function" and "intentional-tort" exceptions.[72]

[66] *See* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 536 (2008); *see also* 28 U.S.C. 1346(b)(1) (making the FTCA retroactively effective for claims "accruing on and after January 1, 1945").

[67] Feres v. United States, 340 U.S. 135, 139–40 (1950).

[68] *Brownback*, 592 U.S. at 210–11.

[69] 28 U.S.C. § 1346(b)(1).

[70] *Id.* § 2680.

[71] *Id.*

[72] *Id.* § 2680(a), (h). Neither shorthand description is apt. *See* United States v. Gaubert, 499 U.S. 315, 324–25 & 325 n.7 (1991) (2680(a) includes some nondiscretionary acts and excludes some discretionary ones); Levin v. United States, 568 U.S. 503, 507 n.1 (2013) (2680(h) includes some negligent acts and excludes some intentional ones).

1. Section 2680(a): The discretionary-function exception

The discretionary-function exception reinstates sovereign immunity for any 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."[73] This exception was Congress's safeguard against courts second-guessing legislative or administrative policy decisions. Even so, the exception was merely a "clarifying amendment" to that end.[74]

Crucially, the discretionary-function exception precludes claims for acts based on federal regulations[75] or legally conferred discretion "based on considerations of public policy."[76] For acts in the latter category, just any discretion will not do. Because the exception concerns policy judgments, there are "obviously discretionary acts" that do not trigger the discretionary-function exception because they are not "based on the purposes that [a] regulatory regime seeks to accomplish."[77] The exception, in other words, is a term of art with boundaries that do not extend to every act involving discretion.[78]

[73] 28 U.S.C. § 2680(a).

[74] Dalehite v. United States, 346 U.S. 15, 26 (1953). As the Department of Justice liaison on the FTCA, Assistant Attorney General Francis Shea, explained to Congress, "[i]t is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action," but just in case they might, the exception "makes this specific." *Hearings on H.R.5573 and 6463 Before H. Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942).

[75] *Gaubert*, 499 U.S. at 324.

[76] *Id.* at 322–23 (cleaned up).

[77] *Id.* at 325 n.7.

[78] "Discretionary function" means the use of power conferred by law in certain circumstances to fulfill a definite, policy-based end. *See* Black's Law Dictionary 587, 827 (3d ed. 1933) ("When applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances," and "function" means, "[o]ffice; duty; fulfillment of a definite end or set of ends by correct adjustment of means."). This understanding is reinforced by the historical context of the FTCA's enactment and related statutes—such as the Reorganization Act of 1945 and Administrative Procedure Act of 1946, which used "function" to describe policy-driven agency actions. *See* Reorganization Act of 1945, Pub. L. No. 79-263, 59 Stat. 613 (1945); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946); *see also* Off. of Att'y Gen., *Final Report of the Attorney General's Committee on Administrative Procedure* 119 (1941) (attorney general explaining that the purpose is to limit judicial interference with the types of policy determinations vested in the agencies' discretion).

Because the exception concerns policy judgments, many discretionary acts do not trigger the exception because they are not based on policy. Take, for instance, driving: Although driving requires constant discretion, a negligent car crash does not trigger the exception because decisions about when to break, change lanes, or turn on a car's headlights are not "grounded in regulatory policy."[79] By contrast, the exception would shield a government official's use of delegated authority to order the removal of a stop sign or increase of a speed limit, even if those decisions resulted in a car crash.

The discretionary-function exception's core purpose is to shield decisions rooted in social, economic, or political policy,[80] not bar ordinary common-law torts committed by government employees.[81] So, in the event of a catastrophic explosion caused by large fertilizer shipments to Europe after the Second World War, the exception shielded the cabinet-level decision to ship enormous amounts of potentially explosive fertilizer under dangerous conditions,[82] but it would not have shielded a government dockworker dropping a lit cigarette into a cargo hold.[83]

[79] *Gaubert*, 499 U.S. at 325 n.7. *Gaubert* sorts the discretionary-function exception into four buckets: (1) "[I]f a regulation mandates particular conduct, and the employee obeys the direction," 2680(a) reinstates sovereign immunity, and the claim is barred. (2) If "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion," 2680(a) presumptively reinstates sovereign immunity, and the claim is barred if the agent exercises discretion to further the established policy. (3) "If [an] employee violates [a] mandatory regulation," 2680(a) does not reinstate sovereign immunity, and the claim can proceed. (4) If no statute, regulation, or agency guideline confers discretion on an employee to take an action, 2680(a) does not reinstate sovereign immunity, and the claim can proceed. *Id.* at 324.

[80] United States v. Varig Airlines, 467 U.S. 797, 814 (1984) ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."); *Dalehite*, 346 U.S. at 27 (citation omitted) (explaining that the exception shields against tort suits that can be resolved only by forcing the judiciary to assess "the validity of legislation or discretionary administration action," such as "decisions of a regulatory nature," "the expenditure of Federal funds," or "the execution of a Federal project").

[81] *Dalehite*, 346 U.S. at 28 & n.19 ("Ordinary common-law torts" were "[u]ppermost in the collective mind of Congress" when it passed the FTCA.); *Varig Airlines*, 467 U.S. at 810 (The common law torts of employees of regulatory agencies, as well as of other Federal agencies," are "within the scope of" the FTCA.).

[82] *See id.* at 38–42.

[83] *See id.* at 23 ("Since no individual acts of negligence could be shown, the suits for damages that resulted necessarily predicated government liability on the participation of the United States in the manufacture and the transportation of FGAN.").

2. Section 2680(h): The intentional-tort exception and law-enforcement proviso

Congress did bar some ordinary common-law torts from the FTCA when it enacted the statute in 1946. To prevent claims "where some agent of the Government gets in a fight with some fellow . . . [a]nd socks him,"[84] Congress also enacted an intentional-tort exception, reinstating sovereign immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[85]

But as experience between 1946 and 1973 showed, the intentional-tort exception created a glaring injustice: "[A] Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults the same citizen in the course of an illegal 'no-knock' raid."[86]

Thus, in 1974, spurred by a pair of federal drug raids on innocent families in Collinsville, Illinois[87] (again, sound familiar?), Congress added a vital "law-enforcement proviso," or carve-out, to the intentional-tort exception.[88] This exception-to-the-exception-to-a-waiver-of-immunity ensures that the FTCA provides claims for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" when committed by a federal law enforcement officer.

The law-enforcement proviso's purpose, the Supreme Court explained in *Carlson v. Green*, was to ensure that "innocent individuals who are subjected to raids [of the type conducted in Collinsville and *Bivens*] will have a cause of action against . . . the Federal Government."[89] And although public outrage toward the

[84] United States v. Shearer, 473 U.S. 52, 55 (1985) (citation omitted).

[85] 28 U.S.C. § 2680(h).

[86] S. Rep. No. 93-588, at 3 (1973).

[87] The raids made national news. *See, e.g.*, Andrew H. Malcolm, *Drug Raids Terrorize 2 Families—by Mistake*, N.Y. Times (Apr. 29, 1973); *Hearings on Reorganization Plan No. 2 of 1973 Before the Subcomm. on Reorganization, Rsch., and Int'l Orgs. of the S. Comm. on Gov't Operations*, 93d Cong., 1st Sess., pt. 3, at 461–83 (1973) (testimony from victims of Collinsville raids); *see also generally* John C. Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment*, 54 N.C. L. Rev. 497, 499–517 (1976).

[88] 28 U.S.C. § 2680(h).

[89] *Carlson*, 446 U.S. at 20 (quoting S. Rep. No. 93-588, at 3).

Collinsville raids moved Congress to act, Congress did not cabin the proviso to the specific facts—or torts—at issue in those raids.[90] Instead, the language Congress enacted provides a remedy for a swath of tortious conduct by federal law enforcement officers that the FTCA could not otherwise address due to its intentional-tort exception.[91] Congress (in consultation with the Department of Justice) crafted the proviso as a statutory "counterpart to . . . *Bivens*" that extends beyond "constitutional tort situations[.]"[92]

3. The circuit splits

After its enactment of the law-enforcement proviso, Congress expected the FTCA to provide remedies for victims of federal police abuses like the families in Collinsville.[93] But the lower courts have since invented such a wide range of conflicting interpretations—weaving together what the law-enforcement proviso allows with what the discretionary-function exception prohibits—that what was once a springboard to remedies is now a trap door to their denial.

Soon after Congress enacted the proviso, courts read it in relative harmony with the discretionary-function exception. Consider the analysis in *Caban v. United States*.[94] There, the Second Circuit allowed a wrongful detention claim to proceed, reasoning that the agents' actions did not involve "weighing important policy choices."[95] Other circuits agreed. As the Fifth Circuit explained in a similar ruling, "if actions under the proviso must also clear the hurdle of the discretionary function exception . . . even *Bivens* and Collinsville would not pass muster and the law enforcement proviso would fail to create the effective legal remedy intended by Congress."[96] And the Ninth Circuit emphasized that, while law enforcement necessarily involves making discretionary decisions, they are not "the sort of generalized

[90] *See* S. Rep. No. 93-588, at 3–4.

[91] *Id.* at 1 (explaining that the purpose of the bill containing the proviso was "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers").

[92] S. Rep. 93-588, at 3–4; *see also Carlson*, 446 U.S. at 20 ("Congress views FTCA and *Bivens* as parallel, complementary causes of action[.]").

[93] *See* S. Rep. 93-588, at 3–4.

[94] Caban v. United States, 671 F.2d 1230 (2d Cir. 1982).

[95] *Id.* at 1233.

[96] Sutton v. United States, 819 F.2d 1289, 1296 (5th Cir. 1987).

social, economic and political policy choices that Congress intended to exempt from tort liability."[97]

This harmony began to change after the Supreme Court's 1991 decision in *Gaubert v. United States*,[98] which tried to clarify—but apparently muddled—the test for applying the exception.[99] The lower courts seized on several phrases in the decision, largely (or entirely[100]) stripped them of context, and began treating almost any discretionary act as presumptively policy-driven, regardless of how mundane, misguided, or—even—unconstitutional the underlying decision was.[101] To limit this broad reading of the discretionary-function exception in light of the law-enforcement proviso, lower courts then invented various carve-outs to the discretionary-function exception, leading to several "longstanding, recurring circuit splits involving the discretionary-function exception."[102] The result has been a doctrinal Wonderland, wherein similar facts produce different outcomes depending on the circuit in which they are adjudicated.

> *"It's my own invention."*[103]

First, "there is a split over whether claims that fall within the . . . law-enforcement proviso must also fall outside the discretionary-function

[97] Garcia v. United States, 826 F.2d 806, 809 (9th Cir. 1987) (citing *Caban*, 671 F.2d at 1230).

[98] *Gaubert*, 499 U.S. at 315.

[99] *Id*. at 335 (Scalia, J., concurring in part).

[100] C.M. v. United States, 672 F. Supp. 3d 288, 334 (W.D. Tex. 2023) (criticizing Shivers v. United States, 1 F.4th 924, 932–33 (11th Cir. 2021)).

[101] *See, e.g.*, Campos v. United States, 888 F.3d 724, 735 (5th Cir. 2018) (asserting that the exception applies "unless the official had clear guidance on what to do when presented with what is argued to be the relevant evidence."); Esquivel v. United States, 21 F.4th 565, 574 (9th Cir. 2021) (writing that when a federal officer exercises discretion, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion."); *Shivers*, 1 F.4th at 931 (citations omitted) (declaring that the exception applies "*unless* a source of federal law 'specifically prescribes' a course of conduct."); *id.* at 932 ("[T]here is no 'constitutional-claims exclusion' to the statutory discretionary function exception. . . .").

[102] *Xi*, 68 F.4th at 842–43 (Bibas, J., concurring). This discussion of the splits is adapted from Petition for a Writ of Certiorari at 23–34, Martin v. United States, 145 S. Ct. 1689 (2025) (No. 24-362), 2024 WL 43774198.

[103] Carroll, *supra* note 3, at ch. VIII.

exception."[104] Six circuits hold that an FTCA claim must clear the discretionary-function exception, even if it also falls within the law-enforcement proviso.[105] But the Eleventh Circuit determined that the proviso operates as an exception, not only to the intentional-tort exception, but to the discretionary-function exception too.[106] In the Eleventh Circuit's view, the discretionary-function exception is categorically inapplicable to claims brought under the law-enforcement proviso. Simply put, if a plaintiff brings a proviso claim, the discretionary-function analysis is moot.

Second, "there is a split over whether the exception applies when the challenged conduct was careless rather than a considered exercise of discretion."[107] Three circuits hold that—because careless action does not require the weighing of policy considerations—the exception does not apply to incompetent or lazy acts.[108] But another three circuits allow careless acts to trigger the exception.[109] In these circuits, a federal employee's carelessness is irrelevant because "the government is not required to prove either that an affirmative decision was made, or that any decision actually involved the weighing of policy considerations, in order to claim immunity."[110] In the circuits that exclude carelessness, the failure of prison guards to discover a nine-inch-long knife during a pat down would not trigger the exception,[111] but in the other circuits . . . it may.

Third, the courts are split over "whether unconstitutional conduct necessarily falls outside the exception."[112] Seven circuits hold that the discretionary-function exception does not apply when a

[104] *Xi*, 68 F.4th at 843 (Bibas, J., concurring).

[105] Caban v. United States, 671 F.2d 1230, 1234 (2d Cir. 1982); Medina v. United States, 259 F.3d 220, 226 (4th Cir. 2001); Joiner v. United States, 955 F.3d 399, 406 (5th Cir. 2020); Linder v. United States, 937 F.3d 1087, 1089 (7th Cir. 2019); Gasho v. United States, 39 F.3d 1420, 1433 (9th Cir. 1994); Gray v. Bell, 712 F.2d 490, 507–08 (D.C. Cir. 1983).

[106] Nguyen v. United States, 556 F.3d 1244, 1260 (11th Cir. 2009).

[107] *Xi*, 68 F.4th at 843 (Bibas, J., concurring).

[108] Coulthurst v. United States, 214 F.3d 106, 111 (2d Cir. 2000); Rich v. United States, 811 F.3d 140, 147 (4th Cir. 2015); Palay v. United States, 349 F.3d 418, 432 (7th Cir. 2003).

[109] Willis v. Boyd, 993 F.3d 545, 549 (8th Cir. 2021); Gonzalez v. United States, 814 F.3d 1022, 1033 (9th Cir. 2016); Kiehn v. United States, 984 F.2d 1100, 1105 (10th Cir. 1993).

[110] *Gonzalez*, 814 F.3d at 1033.

[111] *See Rich*, 811 F.3d at 147.

[112] *Xi*, 68 F.4th at 843 (Bibas, J., concurring).

federal officer's conduct is unconstitutional.[113] These courts reason that "[f]ederal officials do not possess discretion to violate constitutional rights[,]" so when they do, the discretionary-function exception does not affect a victim's ability to recover under the FTCA.[114] But in two circuits, including the Eleventh Circuit through its decision in *Shivers v. United States*, "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act[.]"[115] This interpretation also explains why, as discussed in Part III, the Eleventh Circuit's decision in *Martin* did not need to reach the merits of the Martins' constitutional claims—deciding only that the rights were not clearly established.[116] The constitutionality of Agent Guerra's raid on the wrong house was irrelevant to the FTCA's discretionary-function analysis, and, of course, *Pearson v. Callahan* made it optional for the qualified-immunity analysis too.

With the pieces thus set for the huge game of chess, we return to the story of the Martin family to see how they braved the gyre of immunities.

III. The Lower Court Denial of the Martins' Remedies

> *"Would you kindly tell me the meaning of the poem called 'Jabberwocky'?"*[117]

The Martins invoked *Bivens* against the individual agents and the FTCA against the United States. Given the similarities to the *Bivens* and Collinsville raids, the Martins' case should have quickly proceeded to trial. Yet, through the accountability looking glass, justice is rarely so straightforward.

[113] Limone v. United States, 579 F.3d 79, 102 (1st Cir. 2009); Myers & Myers Inc. v. USPS, 527 F.2d 1252, 1261 (2d Cir. 1975); United States Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988) (*USF&G*); *Medina*, 259 F.3d at 225; Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003); Nurse v. United States, 226 F.3d 996, 1002 (9th Cir. 2000); Loumiet v. United States, 828 F.3d 935, 943 (D.C. Cir. 2016).

[114] *USF&G*, 837 F.2d at 120.

[115] *Linder*, 937 F.3d at 1090; *see also Shivers*, 1 F.4th at 930 ("Congress left no room for the extra-textual 'constitutional-claims exclusion'[.]" (citation omitted)).

[116] *Martin Appeal*, 2024 WL 1716235, at *5.

[117] Carroll, *supra* note 3, at ch. VI.

The federal government moved for summary judgment. The Fourth Amendment *Bivens* claims, it argued, "should be dismissed on qualified immunity grounds because Guerra was acting within the scope of his discretionary authority, and [the Martins] have failed to show that the alleged constitutional right was clearly established at the time of the incident."[118] And the government argued that the discretionary-function exception barred the Martins' negligence claims and, shockingly, that the Constitution's Supremacy Clause barred their intentional-tort claims for good measure.[119]

A. The Martins' Adventures in Districtcourtland

The district court agreed with the federal government and poured the Martins out of court.[120] Despite Supreme Court and Eleventh Circuit precedent establishing that officers violate the Fourth Amendment when they raid the wrong house, unless "objective facts available to the officers at the time suggest[] no distinction between" a search warrant's target and the place mistakenly searched,[121] the district court held these prior cases lacked "indistinguishable facts" to "clearly establish" the Martins' rights.[122] Because Agent Guerra had done "considerably more than nothing"[123] to prepare for the raid and the two homes "shared several conspicuous features" (though also "were dissimilar in some respects and separated by three or four homes"), qualified immunity barred the Martins' *Bivens* claims.[124]

[118] Martin v. United States, 631 F. Supp. 3d 1281, 1291 (N.D. Ga. 2022) (*Martin MSJ*).

[119] These arguments were made in successive motions and addressed in successive orders, but we discuss them together for simplicity. *See Martin MSJ*, 631 F. Supp. 3d 1281; Martin v. United States, No. 1:19-cv-4106, 2022 WL 18263039 (N.D. Ga. Dec. 30, 2022) (*Martin Reconsideration*).

[120] *Martin Reconsideration*, 2022 WL 18263039, at *5.

[121] Maryland v. Garrison, 480 U.S. 79, 88 (1987); *see also* Hartsfield v. Lemacks, 50 F.3d 950, 955 (11th Cir. 1995) (finding that an officer's actions "were simply not consistent with a reasonable effort to ascertain and identify the place intended to be searched" (citing *Garrison*, 480 U.S. at 88–89)).

[122] *Martin MSJ*, 631 F. Supp. 3d at 1292 (citing Smith v. LePage, 834 F.3d 1285, 1297 (11th Cir. 2016)).

[123] *Id.* at 1294 (internal quotation marks omitted) (citing *Hartsfield*, 50 F.3d at 955).

[124] *Id.* at 1294–95.

Turning to the FTCA, the district court noted that "the Eleventh Circuit has concluded that the investigation of the whereabouts and identity of the subject of an arrest warrant . . . is conduct that falls within the discretionary function exception."[125] And because "there was no statute, regulation or even internal operating procedure prescribing Guerra's course of action," his "decisions regarding *how* to execute the warrant" were "the epitome of discretion."[126] Accordingly, the Martins' FTCA claims fell within the discretionary-function exception.[127]

The district court acknowledged that the Martins had established valid intentional-tort claims under Georgia law—false imprisonment, assault, and battery—and recognized they were permitted by the law-enforcement proviso[128] (which Eleventh Circuit precedent held to override the discretionary-function exception).[129] But it still dismissed the claims under the Eleventh Circuit's mimsy Supremacy Clause bar, precluding all FTCA claims for actions that have "some nexus" with federal policy and can "reasonably be characterized" as compliant with "the full range of federal law."[130]

B. The Martins' Adventures in Circuitcourtland

The Eleventh Circuit affirmed the district court's decision, denying the Martins any remedy. In a brisk opinion, the panel upheld Agent Guerra's qualified immunity, reasoning that "[t]he FBI affords its agents discretion in preparing for warrant executions" because the FBI "has no official policy or practice with respect to how agents are to locate or navigate to the target address of a search warrant."[131] Accordingly, "the law at the time did not clearly establish that Guerra's preparatory steps before

[125] *Id.* at 1296 (citing Mesa v. United States, 123 F.3d 1425, 1438 (11th Cir. 1997) (cleaned up)).

[126] *Id.* at 1296.

[127] *Id.* at 1297.

[128] *Id.*

[129] *Nguyen*, 556 F.3d at 1260 ("[W]here . . . the § 2680(h) proviso applies to waive sovereign immunity, the exception to waiver contained in § 2680(a) is of no effect.").

[130] *Kordash*, 51 F.4th at 1293–94; *Martin Reconsideration*, 2022 WL 18263039, at *2–3.

[131] *Martin Appeal*, 2024 WL 1716235, at *6.

the warrant execution would violate the Fourth Amendment."[132] And because *Pearson v. Callahan* allows the courts to skip the constitutional merits[133]—that is, whether Agent Guerra executed an unreasonable search by smashing down the door of the wrong house without checking the address—"the sole issue for [] resolution [wa]s whether his actions violated clearly established law."[134] The panel concluded they did not.

The United States also retained its immunity against the Martins' FTCA claims, thanks to the discretionary-function exception and Supremacy Clause bar. While the Eleventh Circuit offered a plaintiff-friendly interpretation of the law-enforcement proviso through its decision in *Nguyen v. United States* (holding that the proviso trumps the discretionary-function exception),[135] the Eleventh Circuit more than offset that ruling with defendant-adoring interpretations elsewhere.

Consider, first, the *Shivers* rule: In *Shivers v. United States*, the Eleventh Circuit transformed the FTCA's discretionary-function provision from a limited exception into a slithy default by holding that it "applies *unless* a source of federal law 'specifically prescribes' a course of conduct," citing *Gaubert* and *Berkowitz v. United States*.[136] This, even though "neither cited Supreme Court case uses 'unless' in that context,"[137] and both decisions made a broader point—that, while specifically prescribed conduct is indeed not discretionary, it's not the only category of nondiscretionary conduct.[138]

Consider, next, the *Denson* Supremacy Clause bar: In *Denson v. United States*, the Eleventh Circuit concocted a constitutional barrier to the FTCA itself.[139] Even though the act is a "Law[] of the

[132] *Id.*

[133] *Pearson*, 555 U.S. at 236; *see also supra* note 40.

[134] *Martin Appeal*, 2024 WL 1716235, at *5.

[135] *Nguyen*, 556 F.3d at 1260.

[136] 1 F.4th 924, 931 (11th Cir. 2021) (citing *Gaubert*, 499 U.S. at 322; Berkowitz v. United States, 486 U.S. 531, 536 (1988)).

[137] *C.M.*, 672 F. Supp. 3d at 334.

[138] *Gaubert*, 499 U.S. at 322.

[139] *Denson*, 574 F.3d at 1344–49.

United States" and so "the supreme Law of the Land,"[140] *Denson* concluded that the Supremacy Clause actually bars all FTCA claims that "have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law."[141] Drawing a "broader application" from the Supreme Court's decision in *In re Neagle*,[142] the Eleventh Circuit began from the premise that "an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law."[143] Because the FTCA provides relief "in accordance with the law of the place where the act . . . occurred,"[144]—typically, state tort law—*Denson* concluded that "liability simply cannot attach to the acts taken by federal officers in the course of their duties and committed in compliance with federal law[.]"[145] The court then clarified in *Kordash v. United States* that these standards are satisfied whenever a federal employee acts within the scope of his "discretionary authority."[146] In other words, the Supremacy Clause bar was just the discretionary-function exception in disguise, renamed to undo *Nguyen*'s holding that the exception could not bar FTCA claims permitted by the law-enforcement proviso.

The *Martin* panel noted how these immunity doctrines conveniently burble into a single justification that immunizes the government and its employees.[147] Since Agent Guerra was acting within his "discretionary authority," all the Martins' claims—constitutional, intentional-tort, and negligence-tort—were doomed by immunity of one sort or another.[148]

[140] U.S. Const. art. VI.

[141] *Denson*, 574 F.3d at 1348.

[142] 135 U.S. 1 (1890).

[143] *Denson*, 574 F.3d at 1346–47.

[144] 28 U.S.C. § 1346(b)(1).

[145] *Denson*, 574 F.3d at 1349.

[146] *Kordash*, 51 F.4th at 1294.

[147] *Martin Appeal*, 2024 WL 1716235, at *6 (explaining that "[s]imilar to the discretionary-function exception, the Supremacy Clause ensures that states do not impede or burden the execution of federal law") (citing *Denson*, 574 F.3d at 1336–37)).

[148] *Id.* at *8.

Citing the circuit splits over the discretionary-function exception, the Martins petitioned for certiorari, and the Supreme Court agreed to hear their case.[149]

IV. The Supreme Court Revival of the Martins' Remedies

"Shaking" and "Waking"[150]

The Supreme Court unanimously revived all the Martins' FTCA claims.[151] It addressed two pivotal issues: "(1) whether the law enforcement proviso overrides not just the intentional-tort exception but also the discretionary-function exception, and (2) whether the Supremacy Clause affords the United States a defense in FTCA suits."[152] With a vorpal blade, the Court "[c]lear[ed] away the two faulty assumptions on which the [Eleventh Circuit] has relied in the past"[153] and answered a resounding "no" to both—abrogating *Nguyen*'s interpretation of the law-enforcement proviso[154] and *Denson* and *Kordash*'s creation and extension of the Supremacy Clause

[149] Underscoring the rights-eating challenges posed by immunity doctrines more generally, the same day we filed our petition in *Martin*, we also filed one in *Jimerson v. Lewis*. Petition for a Writ of Certiorari, Jimerson v. Lewis, 145 S. Ct. 1220 (2025) (mem.) (No. 24-473), 2024 WL 4625629; *see also* Jimerson v. Lewis, 94 F.4th 423 (5th Cir. 2024). Both cases involved wrong-house raids in which police failed to confirm an address, and both resulted in the victims being denied a remedy. The crucial difference was the officers' employment. In *Jimerson*, unlike *Martin*, the officers executing the raid were local, not federal police. So rather than file a lawsuit under the FTCA (and *Bivens*), the family had to sue police officers under Section 1983. As a result, when the Fifth Circuit held—as the Eleventh Circuit had in *Martin*—that the Fourth Amendment violation suffered by the Jimersons was not clearly established because the officer who ordered the raid had done more than "nothing," *Jimerson*, 94 F.4th at 430 (citing *Hartsfield*, 50 F.3d at 955), it was sufficient to establish "reasonable effort[s] to ascertain and identify the place intended to be searched." *Id.* at 429 (citing *Garrison*, 480 U.S. at 88). While the Supreme Court was apparently unprepared to take up a wrong-house raid case in the qualified immunity context, it was interested in the FTCA. So, while it granted certiorari in *Martin*, it denied it in *Jimerson*. *Jimerson*, 145 S. Ct. at 1220 ("Justice Sotomayor and Justice Jackson would grant the petition for writ of certiorari.").

[150] Carroll, *supra* note 3, at chs. X, XI.

[151] *Martin*, 145 S. Ct. at 1703.

[152] *Id.* at 1697.

[153] *Id.* at 1703.

[154] *Id.* at 1697–1700.

bar.[155] The Court also called into question the continued vitality of *Shivers*—and the entirety of the Eleventh Circuit's discretionary-function jurisprudence—while acknowledging the foregoing circuit splits.[156] Altogether, *Martin* is a victory for victims of wrong-house raids by federal police that shakes awake the judiciary, returning the FTCA to the real world.

A. The Quiet End of the Supremacy Clause Bar and Law-Enforcement Proviso Supremacy

> *"The Cat's head began fading away the moment he was gone, and, by the time he had come back with the Duchess, it had entirely disappeared."*[157]

The Supreme Court swiftly dispatched the Supremacy Clause bar. While the FTCA allows the government to "assert any defense based upon judicial or legislative immunity . . . as well as any other defenses to which the United States is entitled,"[158] *Martin* declared the Eleventh Circuit's Supremacy Clause defense indefensible. The FTCA, as federal law, is itself supreme. And since the FTCA "incorporates state law, in most cases there is no conflict for the Supremacy Clause to resolve."[159] As a result, Georgia law—"the law of the place" where the raid occurred—is incorporated as federal law for purposes of the FTCA and, because it "would permit a homeowner to sue a private person for damages if that person intentionally or negligently raided his house and assaulted him," it permits such FTCA claims too.[160] The Supremacy Clause is no longer a hurdle to the Martins or anyone else living in the long shadow of *Bivens* and Collinsville.

The Supreme Court similarly junked the idea that the law-enforcement proviso overrides the discretionary-function exception. Rather than categorically permit the six listed torts of the law-enforcement proviso, regardless of any of Section 2680's exceptions, the Court determined that the proviso countermands only the

[155] *Id.* at 1700–02.

[156] *Id.* at 1702–03.

[157] CARROLL, *supra* note 30, at ch. VIII.

[158] *Martin*, 145 S. Ct. at 1702 (citing 28 U.S.C. § 2674).

[159] *Id.* at 1700.

[160] *Id.* (citations omitted)

intentional-tort exception.[161] Relying heavily on the proviso's placement "in the same subsection (and the same sentence) as the intentional-tort exception," Section 2680(h), the Court concluded that the proviso does not apply to the discretionary-function exception.[162] On the way, it diminished our "resort to legislative history" via discussion of the Collinsville raids because, of course: "Legislative history is not the law."[163]

B. The Quiet Beginning of a New Era for the FTCA

"A boat beneath a sunny sky, Lingering onward dreamily . . ."[164]

So "[w]here does all that leave the case" of the wrong-house raid on the Martin family?[165] With a glimpse of a way back through the looking glass.

Though it confined its holdings to the two questions above, the Supreme Court provided instructions for the Eleventh Circuit on remand, directing it to "careful[ly] reexamin[e] this case in the first instance," free from "faulty assumptions."[166] By reversing the Eleventh Circuit's broad application of the discretionary-function exception to both the Martins' negligent- and intentional-tort claims,[167] the Supreme Court also sent an unmistakable message: The exception does not automatically apply just because an officer has some room for judgment.

The Supreme Court also flagged its interest in resolving the broader confusion over the discretionary-function exception, acknowledging the existence of multiple circuit splits and noting that "important questions surround whether and under what circumstances that exception may ever foreclose a suit like this one."[168]

[161] *Id.* at 1697–1700.

[162] *Id.* at 1703.

[163] *Id.* at 1699–1700.

[164] Carroll, *supra* note 3, at ch. XII.

[165] *Martin*, 145 S. Ct. at 1702.

[166] *Id.* at 1703.

[167] *Compare Martin*, 145 S. Ct. at 1703, *with Martin Appeal*, 2024 WL 1716235, at *7 (citing *Shivers*, 1 F.4th at 929, and *Mesa*, 123 F.3d at 1438).

[168] *Martin*, 145 S. Ct. at 1703 (citing, *e.g.*, *Shivers*, 1 F.4th at 931 (presumption that exception applies); *Rich*, 811 F.3d at 147 (application of exception to careless or lazy acts);

"Before addressing" these questions, however, the Court directed the Eleventh Circuit to conduct a "proper inquiry" on remand.[169]

Justice Sonia Sotomayor, joined by Justice Ketanji Brown Jackson, concurred. Going further than the majority, Justice Sotomayor explained "there is reason to think the discretionary-function exception may not apply to these claims."[170] And, she clarified, "[e]ven where a federal employee retains an element of choice, . . . the exception does not apply reflexively. After all, it is rare for statutes or regulations to prescribe an official's required course of conduct down to the very last detail, so some degree of choice will almost invariably remain."[171] Noting the uncertainty among the lower courts and the Supreme Court's three-decade silence on the matter,[172] Justice Sotomayor was plain: "[I]t is long past time for this Court to weigh in on the exception's scope."[173]

Justice Sotomayor also questioned "the Eleventh Circuit's suggestion in the decision below [and *Shivers v. United States*] that the discretionary-function exception might apply 'unless a source of federal law specifically prescribes' a federal employee's course of conduct.'"[174] And she implored the lower court on remand not to "ignore the existence of the law enforcement proviso, or the factual context that inspired its passage, when construing the discretionary function exception."[175] Of course, "any interpretation should allow for liability in the very cases Congress amended the FTCA to remedy."[176] Given the clear parallels between Collinsville and the Martin raid, the discretionary-function exception must either deny a remedy to both or neither. It is difficult to imagine Congress intended the former conclusion when it enacted the law-enforcement proviso in response to the Collinsville raids.

Xi, 68 F.4th at 839 (application of exception to unconstitutional acts); *id.* at 843 (Bibas, J., concurring) (application of exception to ministerial acts)).

[169] *Martin*, 145 S. Ct. at 1703.

[170] *Id.* at 1704 (Sotomayor, J., concurring).

[171] *Id.*

[172] *See Gaubert*, 499 U.S. at 315.

[173] *Martin*, 145 S. Ct. at 1704–05 (Sotomayor, J., concurring).

[174] *Id.* at 1705 (cleaned up, citing, *e.g.*, *Shivers*, 1 F.4th at 931).

[175] *Id.* at 1706.

[176] *Id.*

On remand, then, the Eleventh Circuit's options are limited. Having had its application of the discretionary-function exception to the Martins' negligence claims reversed,[177] it cannot simply rely on past precedent to dismiss the Martins' case again. This leaves the Eleventh Circuit with a choice: realign the discretionary-function exception with its original meaning or join other circuits in holding that careless or unconstitutional acts cannot trigger the exception. Either course should lead to a better world.

Epilogue: The Concepts of a Conclusion

> *"Which dreamed it?"* [178]

Returning to where we began: "If federal officers raid the wrong house, causing property damage and assaulting innocent occupants, may the homeowners sue the government for damages?"[179] The answer, unfortunately, remains less than obvious. But at least the answer is not, as it was before *Martin*, a definitive "no." We will see where the adventure leads the Martins next, as we return to the Eleventh Circuit. But they have already come a long way.

Beyond *Bivens*, around qualified immunity, and on the shoulders of reluctant adventurers like Trina, Gabe, and Toi, the FTCA may yet lead the people of America back to a world where federal officials looking into a mirror must face the consequences of their actions, rather than imagining a looking-glass world of immunities free from self-reflection.

> *"Your majesty shouldn't purr so loud," Alice said, rubbing her eyes, and addressing the kitten, respectfully, yet with some severity. "You woke me out of oh! such a nice dream! And you've been along with me, Kitty—all through the Looking-Glass world. Did you know it, dear?*[180]

[177] *Martin Appeal*, 2024 WL 1716235, at *7.

[178] Carroll, *supra* note 4, at ch. XII.

[179] *Martin*, 145 S. Ct. at 1694.

[180] Carroll, *supra* note 3, at ch. XII.