

*Federal Tort Claims Act — Discretionary Function Exception and Law Enforcement Proviso — Martin v. United States*

On a spring night in 1973, armed invaders busted down the doors of two Collinsville, Illinois, families' homes.<sup>1</sup> The men shackled and pointed guns at the residents, some of whom begged for their lives.<sup>2</sup> The interlopers were federal narcotics agents; the families had committed no crime.<sup>3</sup> And, though the agents admitted their mistake,<sup>4</sup> the victims could not successfully sue the government.<sup>5</sup> That's because the Federal Tort Claims Act<sup>6</sup> (FTCA), which waives the federal government's sovereign immunity for its employees' tortious conduct,<sup>7</sup> contains an exception precluding suits for eleven enumerated intentional torts.<sup>8</sup> After a public outcry,<sup>9</sup> Congress amended the intentional tort exception, codified at 28 U.S.C. § 2680(h), by adding a law enforcement proviso, which ensures that plaintiffs can recover for six intentional torts committed by "investigative or law enforcement officers of the United States Government."<sup>10</sup>

Last Term, in *Martin v. United States*,<sup>11</sup> the Supreme Court overruled the Eleventh Circuit's outlier interpretations of the FTCA. First, it held that the proviso superseded only the intentional tort exception.<sup>12</sup> The Eleventh Circuit had held that the proviso overcame every exception listed in § 2680, including the discretionary function exception,<sup>13</sup> which shields the government from claims arising from an official's exercise of discretionary authority.<sup>14</sup> Second, it held that the Supremacy Clause does not afford the government a defense in FTCA cases.<sup>15</sup> *Martin* is a vanishingly narrow decision. While it rightly rejected the

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<sup>1</sup> See *ILLINOIS: In the Name of the Law*, TIME (May 14, 1973, at 00:00 ET), <https://time.com/archive/6841062/illinois-in-the-name-of-the-law> [<https://perma.cc/S8X8-7AKJ>]; Andrew H. Malcolm, *Drug Raids Terrorize 2 Families — By Mistake*, N.Y. TIMES, Apr. 29, 1973, at 1.

<sup>2</sup> See *ILLINOIS: In the Name of the Law*, *supra* note 1; Malcolm, *supra* note 1, at 1.

<sup>3</sup> See Malcolm, *supra* note 1, at 1.

<sup>4</sup> See *ILLINOIS: In the Name of the Law*, *supra* note 1.

<sup>5</sup> See John Wrench, *Right Remedy, Wrong House*, INST. FOR JUST. (Apr. 2, 2025), <https://ij.org/cje-post/right-remedy-wrong-house> [<https://perma.cc/HV3E-KGPM>].

<sup>6</sup> 28 U.S.C. §§ 1346(b), 2671–2680.

<sup>7</sup> See *id.* § 1346(b)(1).

<sup>8</sup> *Id.*; § 2680(h). Those torts are "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, [and] interference with contract rights." *Id.*

<sup>9</sup> Wrench, *supra* note 5.

<sup>10</sup> *Id.*; 28 U.S.C. § 2680(h) (waiving sovereign immunity for "claim[s] arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution"); see S. REP. NO. 93-588, at 1–3 (1973) ("This whole matter was brought to the attention of the Committee in the context of the Collinsville raids . . ." *Id.* at 3.).

<sup>11</sup> 145 S. Ct. 1689 (2025).

<sup>12</sup> See *id.* at 1699.

<sup>13</sup> See *id.* at 1696 (citing *Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009)).

<sup>14</sup> 28 U.S.C. § 2680(a).

<sup>15</sup> *Martin*, 145 S. Ct. at 1700.

Eleventh Circuit's outlier FTCA interpretations, chaos is likely to continue in the lower courts, which "struggl[e]" to interpret the FTCA despite decades of case law.<sup>16</sup> The Eleventh Circuit continues to interpret the discretionary function exception in two erroneously capacious and government-friendly ways. Though *Martin* provides a glimmer of hope, the Court should act quickly to clarify this doctrine for civil rights plaintiffs, many of whom may have no remedy at all.

*Martin*'s facts bear a striking resemblance to those of the Collinsville raids. At around five in the morning of October 18, 2017, an FBI SWAT team raided the Atlanta home of Curtrina Martin, her partner Hilliard Toi Cliatt, and her seven-year-old son G.W.<sup>17</sup> Martin and Cliatt, fearing a burglary, took refuge in a closet.<sup>18</sup> SWAT team members quickly found them and, guns trained on Martin, threw Cliatt to the ground and handcuffed him.<sup>19</sup> Only after an officer found mail with the house's address did the team realize they were in the wrong house.<sup>20</sup>

The agents, led by FBI Special Agent Lawrence Guerra, had search and arrest warrants for 3741 Landau Lane.<sup>21</sup> A few days prior, Guerra had conducted a site survey of that address.<sup>22</sup> But, when he conducted a drive-by hours before the raid, his personal GPS device directed him to 3756 Denville Trace — Martin's home.<sup>23</sup> Guerra used the same device to navigate to the raid, and he and the other officers apparently did not notice the street sign, which read "Denville Trace," or the house number affixed to the mailbox.<sup>24</sup>

Martin, Cliatt, and G.W. filed suit in the U.S. District Court for the Northern District of Georgia.<sup>25</sup> They sued Guerra for damages, alleging violations of their Fourth Amendment rights.<sup>26</sup> They also sued the United States under the FTCA, alleging both intentional and negligent torts.<sup>27</sup>

Judge Boulee granted the defendants' motions for summary judgment in part and denied them in part.<sup>28</sup> He first held that qualified immunity shielded Guerra from the plaintiffs' Fourth Amendment claim because the law did not clearly establish that Guerra's preparatory steps

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<sup>16</sup> *Xi v. Haugen*, 68 F.4th 824, 842 (3d Cir. 2023) (Bibas, J., concurring).

<sup>17</sup> See *Martin v. United States*, 631 F. Supp. 3d 1281, 1288 (N.D. Ga. 2022); *Martin*, 145 S. Ct. at 1694; *Martin v. United States*, No. 23-10062, 2024 WL 1716235, at \*2 (11th Cir. Apr. 22, 2024) (per curiam).

<sup>18</sup> *Martin*, 145 S. Ct. at 1694.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *Martin*, 2024 WL 1716235, at \*2.

<sup>23</sup> See *id.*

<sup>24</sup> *Martin*, 145 S. Ct. at 1694–95.

<sup>25</sup> See *Martin v. United States*, 631 F. Supp. 3d 1281, 1286 (N.D. Ga. 2022).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 1297.

<sup>28</sup> *Id.* at 1300.

were insufficient or unreasonable.<sup>29</sup> Moving to the FTCA claims, Judge Boulee ruled that the discretionary function exception barred the plaintiffs' claims for torts not enumerated in the law enforcement proviso.<sup>30</sup> However, he ruled that the plaintiffs' false imprisonment and assault and battery claims were intentional torts that could proceed under the law enforcement proviso, which overrode the discretionary function exception.<sup>31</sup>

The United States moved for reconsideration of the denial of summary judgment as to the plaintiffs' intentional tort claims.<sup>32</sup> The government argued that *Kordash v. United States*,<sup>33</sup> decided one month after the district court issued its order, required dismissal of those claims under the Supremacy Clause.<sup>34</sup> Judge Boulee granted the motion, holding that “[b]ecause Guerra was acting within the scope of his discretionary duty, and his actions did not violate the Fourth Amendment,” the Supremacy Clause barred the plaintiffs' intentional tort claims.<sup>35</sup>

The Eleventh Circuit affirmed both district court orders in an unpublished, per curiam opinion.<sup>36</sup> The court adopted the lower court's reasoning as to qualified immunity.<sup>37</sup> Turning to the FTCA, the court first held that the discretionary function exception barred the plaintiffs' claims not covered by the law enforcement proviso.<sup>38</sup> The court explained that Guerra “enjoyed discretion in how he prepared for the warrant execution”<sup>39</sup> and that that preparation was “susceptible to policy analysis.”<sup>40</sup> Finally, it ruled that the Supremacy Clause barred the plaintiffs' remaining intentional tort claims because Guerra “acted within the scope of his discretionary authority” in preparing for the raid and the law did not clearly establish that his preparation violated the Fourth Amendment.<sup>41</sup>

The Supreme Court vacated and remanded.<sup>42</sup> Writing for a unanimous Court, Justice Gorsuch began by contrasting the Eleventh Circuit's approach to FTCA cases involving law enforcement with those of

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<sup>29</sup> *Id.* at 1294–95.

<sup>30</sup> *See id.* at 1297.

<sup>31</sup> *See id.* at 1297–300.

<sup>32</sup> *Martin v. United States*, Nos. 19-cv-04106, 19-cv-04180, 2022 WL 18263039, at \*1 (N.D. Ga. Dec. 30, 2022).

<sup>33</sup> 51 F.4th 1289 (11th Cir. 2022).

<sup>34</sup> *Martin*, 2022 WL 18263039, at \*1–2.

<sup>35</sup> *Id.* at \*3.

<sup>36</sup> *Martin v. United States*, No. 23-10062, 2024 WL 1716235, at \*1 (11th Cir. Apr. 22, 2024) (per curiam).

<sup>37</sup> *See id.* at \*5–6; *Martin v. United States*, 631 F. Supp. 3d 1281, 1291–95 (N.D. Ga. 2022).

<sup>38</sup> *Martin*, 2024 WL 1716235, at \*7.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (quoting *Mesa v. United States*, 123 F.3d 1435, 1438 (11th Cir. 1997)).

<sup>41</sup> *Id.*

<sup>42</sup> *Martin*, 145 S. Ct. at 1703.

its sister circuits.<sup>43</sup> Most courts begin with the intentional tort exception, dismissing claims sounding in those enumerated torts unless they fall under the law enforcement proviso.<sup>44</sup> They then move to the discretionary function exception, disallowing claims “challenging decisions that ‘involv[e] an element of judgment or choice’ of a ‘kind that the . . . exception was designed to shield.’”<sup>45</sup> They finally turn to the merits, siding with the plaintiff when a private individual in the federal official’s shoes would be liable under applicable state tort law.<sup>46</sup>

The Eleventh Circuit, Justice Gorsuch noted, sticks out from its peers.<sup>47</sup> It applies the law enforcement proviso to all the exceptions enumerated in § 2680, including the discretionary function exception.<sup>48</sup> So, while negligent torts are subject to the discretionary function exception, intentional torts that clear the law enforcement proviso’s hurdle sail straight to the merits.<sup>49</sup> Describing this approach as “expansive and plaintiff-friendly,” Justice Gorsuch wrote that the Eleventh Circuit “compensate[s]” with a “restrictive and defendant-friendly view at the FTCA’s liability stage.”<sup>50</sup> That view dictates that the Supremacy Clause thwarts liability when a federal officer’s “actions bear ‘some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law.’”<sup>51</sup>

Justice Gorsuch first overruled the Eleventh Circuit’s approach to the law enforcement proviso.<sup>52</sup> He began with the text of § 2680, noting that the law enforcement proviso appears only in subsection (h)’s intentional tort exception, rather than at the end of the list of all exceptions.<sup>53</sup> “[A]n ordinary reader,” he wrote, would thus “naturally presume that the proviso modifies only subsection (h).”<sup>54</sup> Justice Gorsuch opined that nothing in the text or structure of § 2680 suggests abandoning the “general rule” that “statutory provisos generally modify only the provisions in which they sit.”<sup>55</sup> The Court thus ruled that the law enforcement proviso applies only to the intentional tort exception, not to § 2680’s twelve other exceptions.<sup>56</sup>

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<sup>43</sup> See *id.* at 1695–96 (quoting *Millbrook v. United States*, 569 U.S. 50, 55 (2013); *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991); *Xi v. Haugen*, 68 F.4th 824, 842–43 (3d Cir. 2023) (Bibas, J., concurring); 28 U.S.C. § 2674; *id.* § 1346(b)(1); *Denson v. United States*, 574 F.3d 1318, 1348 (11th Cir. 2009)).

<sup>44</sup> See *id.* at 1695 (quoting *Millbrook*, 569 U.S. at 55).

<sup>45</sup> *Id.* (alterations in original) (quoting *Gaubert*, 499 U.S. at 322–23).

<sup>46</sup> See *id.* at 1696 (quoting 28 U.S.C. §§ 2674, 1346(b)(1)).

<sup>47</sup> See *id.*

<sup>48</sup> *Id.* (citing *Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009)).

<sup>49</sup> See *id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (quoting *Denson v. United States*, 574 F.3d 1318, 1348 (11th Cir. 2009)).

<sup>52</sup> See *id.* at 1699.

<sup>53</sup> See *id.* at 1697.

<sup>54</sup> *Id.* at 1698.

<sup>55</sup> *Id.*

<sup>56</sup> See *id.* at 1698–99.

Justice Gorsuch then scrapped the Eleventh Circuit’s Supremacy Clause defense.<sup>57</sup> Ordinarily, “when a regulated party cannot comply with both federal and state directives, the Supremacy Clause tells us the state law must yield.”<sup>58</sup> But there is typically no such issue in FTCA suits because the statute requires government liability if a “private individual under like circumstances . . . would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>59</sup> Federal law, noted Justice Gorsuch, can only rarely displace state law in an FTCA suit, such as when federal maritime law provides the relevant “law of the place.”<sup>60</sup> The Eleventh Circuit had relied on *In re Neagle*,<sup>61</sup> a pre-FTCA case holding that the Supremacy Clause can protect a federal officer from state criminal charges “for an act which he was authorized to do by the law of the United States.”<sup>62</sup> But Justice Gorsuch declined to extend *In re Neagle*’s reasoning to FTCA suits, explaining that the case “does not speak to a situation where, as here, Congress has . . . expressly bound the federal government to accept liability under state tort law on the same terms as a ‘private individual.’”<sup>63</sup>

Justice Gorsuch concluded by assessing the state of the case on remand.<sup>64</sup> While the “plaintiffs’ intentional-tort claims survive[d] their encounter with subsection (h) thanks to the law enforcement proviso,” both their negligent and intentional tort claims would have to be evaluated under the discretionary function exception by the district court in the first instance.<sup>65</sup> Justice Gorsuch declined the plaintiffs’ invitation to overrule the Eleventh Circuit’s interpretation of the discretionary function exception, which presumes the exception applies “*unless* a source of federal law ‘specifically prescribes’ a course of conduct.”<sup>66</sup> Though he recognized that lower courts had varying interpretations of the discretionary function exception, Justice Gorsuch determined that “those questions lie well beyond the two [the Court] granted certiorari to address.”<sup>67</sup>

Justice Sotomayor concurred,<sup>68</sup> writing separately to contend that the discretionary function exception should not apply to the plaintiffs’

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<sup>57</sup> *Id.* at 1700. The government did not defend the Eleventh Circuit’s ruling on this issue, so the Court appointed Christopher Mills as amicus to do so. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (quoting 28 U.S.C. § 2674; *id.* § 1346(b)(1)).

<sup>60</sup> 28 U.S.C. § 1346(b)(1); see *Martin*, 145 S. Ct. at 1700–01 (quoting *Hess v. United States*, 361 U.S. 341, 318 & n.7 (1960)).

<sup>61</sup> 135 U.S. 1 (1890); see *Denson v. United States*, 574 F.3d 1318, 1346–47 (11th Cir. 2009).

<sup>62</sup> *Martin*, 145 S. Ct. at 1701–02 (quoting *Neagle*, 135 U.S. at 75).

<sup>63</sup> *Id.* at 1702 (quoting 28 U.S.C. § 2674).

<sup>64</sup> *Id.* at 1702–03.

<sup>65</sup> *Id.* at 1703.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Justice Sotomayor was joined by Justice Jackson.

claims.<sup>69</sup> She emphasized that “the exception protects only those governmental actions and decisions that are themselves ‘based on considerations of public policy.’”<sup>70</sup> Thus, some discretionary acts within the scope of a government employee’s duties may nonetheless fall outside the discretionary function exception.<sup>71</sup> Justice Sotomayor then expressed skepticism that the Eleventh Circuit’s gloss on the exception could be squared with the Court’s precedents, which provide the United States a defense “only where an official’s actions both involve an element of judgment and rely on public policy considerations.”<sup>72</sup>

Justice Sotomayor submitted that though “executing a warrant always involves some measure of discretion,” Guerra’s actions did not “involve[] the kind of policy judgments that the discretionary-function exception was designed to protect.”<sup>73</sup> She wrote that the FTCA’s history prescribes this conclusion, as the law enforcement proviso was passed in the wake of the Collinsville raids.<sup>74</sup> Given this history, Justice Sotomayor warned courts “not [to] ignore the existence of the law enforcement proviso, or the factual context that inspired its passage, when construing the discretionary-function exception.”<sup>75</sup>

*Martin* ends where it began. Justice Gorsuch opened his opinion by asking: “If federal officers raid the wrong house, . . . may the homeowners sue the government for damages?”<sup>76</sup> And, at the close of the opinion, the question remained unanswered. *Martin* was a self-consciously narrow decision, acknowledging but refusing to resolve numerous raging circuit splits likely to impact the case on remand.<sup>77</sup> That was a mistake, and the Eleventh Circuit is guilty of applying two particularly indefensible interpretations of the discretionary function exception left unaddressed by the *Martin* Court. Still, despite its limited scope, *Martin* gives civil rights plaintiffs reason to be hopeful.

The second question presented in the plaintiffs’ petition for certiorari was: “Whether the FTCA’s discretionary-function exception bars claims for torts arising from wrong-house raids and similar negligent or wrongful acts by federal employees.”<sup>78</sup> But the Court granted certiorari on a narrower question: “Whether the discretionary-function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional torts exception.”<sup>79</sup> This makes Justice Gorsuch’s opening words all the stranger, especially as he later chided the plaintiffs

<sup>69</sup> *Martin*, 145 S. Ct. at 1704 (Sotomayor, J., concurring).

<sup>70</sup> *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 537 (1988)).

<sup>71</sup> *See id.* (quoting *United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991)).

<sup>72</sup> *Id.* at 1705 (citing *Gaubert*, 499 U.S. at 322–23; *Berkovitz*, 486 U.S. at 536–37).

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at 1705–06.

<sup>75</sup> *Id.* at 1706.

<sup>76</sup> *Id.* at 1694 (majority opinion).

<sup>77</sup> *See id.* at 1703.

<sup>78</sup> Petition for a Writ of Certiorari at i, *Martin*, 145 S. Ct. 1689 (No. 24-362).

<sup>79</sup> *Martin v. United States*, 145 S. Ct. 1158, 1158 (2025) (mem.).

for “ask[ing] us to decide more still” before describing the narrow decision as “work enough for the day.”<sup>80</sup> And, though Justice Sotomayor signaled she would have resolved the broader question,<sup>81</sup> neither opinion fully reflected the extent to which lower court “jurisprudence in this area has gone off the rails.”<sup>82</sup> Unless the Eleventh Circuit reconsiders its capacious view of the discretionary function exception, the *Martin* plaintiffs are likely to face significant obstacles to relief, especially on two issues where the circuits have split.

First, the Eleventh Circuit does not require a government employee to prove she actually exercised discretion for the discretionary function exception to preclude government liability.<sup>83</sup> Eight other circuits agree with the Eleventh Circuit,<sup>84</sup> generally holding that a protected discretionary act “need only have been *theoretically* susceptible to policy analysis.”<sup>85</sup> Only in the Third Circuit must a federal officer’s act “be grounded in the policy of the regulatory regime.”<sup>86</sup>

The majority rule is at war with the text of the exception.<sup>87</sup> The text protects “an act or omission . . . *based upon* the exercise or performance . . . [of] a discretionary function.”<sup>88</sup> An act or omission “cannot be ‘based upon’ something that never happened.”<sup>89</sup> But that is the argument some lower courts accepted and the Supreme Court stubbornly declined to overrule in *Martin*. The government didn’t even attempt to argue below that Guerra exercised discretion in raiding the wrong house. Rather, it simply argued that no federal statute “prescribed” Guerra’s action<sup>90</sup> and that locating “the subject of an arrest warrant . . . is susceptible to policy analysis” — all it was required to do under Eleventh Circuit precedent.<sup>91</sup> By declining to take a stance on the majority rule, the Court again declined to resolve a long-simmering circuit split, of

<sup>80</sup> *Martin*, 145 S. Ct. at 1703.

<sup>81</sup> *Id.* at 1705 (Sotomayor, J., concurring) (“[I]t is long past time for this Court to weigh in on the exception’s scope.”).

<sup>82</sup> *Chadd v. United States*, 794 F.3d 1104, 1114 (9th Cir. 2015) (Berzon, J., concurring).

<sup>83</sup> *See Shivers v. United States*, 1 F.4th 924, 931 (11th Cir. 2021) (“[T]he discretionary function exception applies *unless* a source of federal law ‘specifically prescribes’ a course of conduct.” (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991))). Indeed, the Eleventh Circuit’s interpretation is even more extreme than its sister circuits’. *See infra* note 85 and accompanying text.

<sup>84</sup> Petition for a Writ of Certiorari, *supra* note 78, at 28. Those circuits are the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth. *See id.*

<sup>85</sup> *Jude v. Comm’r of Soc. Sec.*, 908 F.3d 152, 159 (6th Cir. 2018) (emphasis added).

<sup>86</sup> *Cestonaro v. United States*, 211 F.3d 749, 753 (3d Cir. 2000) (quoting *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997)).

<sup>87</sup> *See Gregory C. Sisk, Immunity for Imaginary Policy in Tort Claims Against the Federal Government*, 100 NOTRE DAME L. REV. 729, 753–56 (2025).

<sup>88</sup> 28 U.S.C. § 2680(a) (emphasis added).

<sup>89</sup> *Sisk, supra* note 87, at 754.

<sup>90</sup> Memorandum of Law in Support of Defendants’ Motion for Summary Judgment at 27, *Martin v. United States*, 631 F. Supp. 3d 1281 (N.D. Ga. 2022) (Nos. 19-cv-04106, 19-cv-04180).

<sup>91</sup> *Id.* at 28 (quoting *Mesa v. United States*, 123 F.3d 1435, 1438 (11th Cir. 1997)).

which it was keenly aware, leaving in place an uphill battle for plaintiffs in most of the country.

Second, the Eleventh Circuit is one of only two circuits to squarely hold that a government employee's unconstitutional action may be protected under the discretionary function exception.<sup>92</sup> Other circuits have referred to the proposition that "a federal official cannot have discretion to behave unconstitutionally" as "tautolog[ical]"<sup>93</sup> and "elementary."<sup>94</sup> But the minority circuits argue that the text of the exception is "categorical," noting that "Congress could have . . . carved out . . . behavior that rises to the level of a constitutional violation" but didn't.<sup>95</sup>

This supposedly textualist reading runs into problems. For one, longstanding precedent dictates that when a government official's conduct violates a "federal statute, regulation, or policy," the discretionary function exception does not shield the government from liability.<sup>96</sup> There is no clear textual reason the exception should be read to immunize constitutional violations while forbidding statutory violations.<sup>97</sup> The Court has held in other contexts that government officials do not have the discretion to violate the Constitution.<sup>98</sup> This applies equally in the FTCA context, as commentators have noted that, in creating the exception, Congress imported the term "discretion" from its common law background.<sup>99</sup> And, at common law, the Constitution delineated clear limits on an officer's discretion.<sup>100</sup>

The Eleventh Circuit emphasized that the exception applies "whether or not the discretion involved be abused,"<sup>101</sup> rejecting a supposedly atextual "constitutional-claims exclusion."<sup>102</sup> Its argument is

<sup>92</sup> See Petition for a Writ of Certiorari, *supra* note 78, at 31–32; *Shivers v. United States*, 1 F.4th 924, 930 (11th Cir. 2021); *Linder v. United States*, 937 F.3d 1087, 1090 (7th Cir. 2019).

<sup>93</sup> *Myers & Myers, Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975).

<sup>94</sup> *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009); see also Note, *Recovering the Lost Meaning of the Federal Tort Claims Act's "Discretionary Function Exception,"* 138 HARV. L. REV. 654, 655–56 (2024) (discussing the circuit consensus that federal officers do not have the discretion to violate the U.S. Constitution).

<sup>95</sup> *Shivers*, 1 F.4th at 930.

<sup>96</sup> *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

<sup>97</sup> See Brief of Public Accountability et al. as *Amici Curiae* in Support of Petitioners at 15, *Martin*, 145 S. Ct. 1689 (No. 24-362).

<sup>98</sup> See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 649 (1980) ("[A] municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."); *Ex parte Young*, 209 U.S. 123, 159 (1908) ("An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."); *Phila. Co. v. Stimson*, 223 U.S. 605, 619–20 (1912) (holding that federal officers, like state officers, can be held liable for "seeking to enforce unconstitutional enactments").

<sup>99</sup> See Note, *supra* note 94, at 657–58.

<sup>100</sup> See *id.* at 661–62; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506–07 (1987); James E. Pfander & Rex N. Alley, *Federal Tort Liability After Egbert v. Boule: The Case for Restoring the Officer Suit at Common Law*, 138 HARV. L. REV. 985, 1017–18 (2025).

<sup>101</sup> *Shivers v. United States*, 1 F.4th 924, 930 (11th Cir. 2021) (emphasis omitted) (quoting 28 U.S.C. § 2680(a)).

<sup>102</sup> *Id.*

unavailing. Unconstitutional “discretion” is neither abused nor an atextual exception to the exception — it’s not discretion at all within the meaning of the statute.<sup>103</sup> The Court didn’t have to keep this circuit split intact.

In refusing to grant certiorari or decide the broader question, the Court preserved at least two pernicious and longstanding circuit splits. The Eleventh Circuit is on the wrong side of both. *Martin* — a case where the officer involved did not allege that he actually exercised discretion, that fairly presented a constitutional issue, and in which there was no material factual dispute — was the proper vehicle to address those splits.<sup>104</sup> The Court’s unwillingness to do so will likely continue to cause “significant confusion”<sup>105</sup> among the lower courts and harm civil rights plaintiffs.

Justice Gorsuch thought it premature to resolve the splits absent “careful reexamination” by the Eleventh Circuit.<sup>106</sup> It is unclear what this reexamination would accomplish in the grand scheme. It’s possible that the Eleventh Circuit could rule for the *Martin* plaintiffs, but it would likely require an en banc hearing to squarely overturn its own precedent.<sup>107</sup> And, no matter how the Eleventh Circuit comes out, these two splits would remain. As Justice Sotomayor noted in her concurrence: “It has been 34 years since th[e] Court last weighed in on the discretionary-function exception.”<sup>108</sup> In that time, some lower court judges have been less than subtle in asking the Court to resolve the splits.<sup>109</sup> Percolation for percolation’s sake will only continue to confuse lower courts and harm litigants.

Still, there is at least one reason civil rights plaintiffs can be hopeful that *Martin* signals a shift toward a less government-protective discretionary function exception. *Martin* made it clear that, in interpreting the FTCA, text is king. In holding that the law enforcement proviso was inapplicable to the discretionary function exception, the Court held the plaintiffs’ resorts to structure and legislative history could not “overcome the textual evidence we have just laid out.”<sup>110</sup> And, in striking down the Supremacy Clause defense, an appeal to *In re Neagle* was no

<sup>103</sup> Note, *supra* note 94, at 670–71.

<sup>104</sup> See Petition for a Writ of Certiorari, *supra* note 78, at 16.

<sup>105</sup> *Xi v. Haugen*, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J., concurring).

<sup>106</sup> *Martin*, 145 S. Ct. at 1703.

<sup>107</sup> See *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

<sup>108</sup> *Martin*, 145 S. Ct. at 1704–05 (Sotomayor, J., concurring).

<sup>109</sup> See, e.g., *Xi*, 68 F.4th at 842 (Bibas, J., concurring) (“[I]t might be time for the Supreme Court to revisit the test for when the FTCA’s discretionary-function exception applies.”); *Chadd v. United States*, 794 F.3d 1104, 1114–15 (9th Cir. 2015) (Kleinfeld, J., dissenting) (“A Supreme Court concurrence commented that the courts have had ‘difficulty in applying’ the rule for deciding which government actions fall within the discretionary function exception. Indeed.” (footnote omitted) (quoting *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

<sup>110</sup> *Martin*, 145 S. Ct. at 1699.

match for the statutory text; the Court explained that the government would be liable if “a ‘private individual under like circumstances’ would be liable for the acts and omissions the plaintiffs allege, subject to the defenses discussed in § 2674 — not a Supremacy Clause defense nowhere mentioned there.”<sup>111</sup>

*Martin* is in keeping with other recent Supreme Court cases interpreting the FTCA that prefer textual analyses over vague separation-of-powers or policy-related concerns.<sup>112</sup> This trend toward text and away from protecting government policy interests should signal to lower courts, like the Eleventh Circuit, that judging an act based on whether it is generally “susceptible to policy analysis,”<sup>113</sup> rather than “based upon the exercise . . . [of] a discretionary function”<sup>114</sup> is out of step with the Court’s FTCA interpretive methodology.

Yes, there is reason in *Martin* for civil rights plaintiffs to be hopeful. And Ms. Martin and her family should celebrate the fact that their case lives to see another day. But it is now in its ninth year. The family did not even bother to seek certiorari on its constitutional damages claim, which would likely be dead on arrival in the Supreme Court.<sup>115</sup> For the plaintiffs, it is the FTCA or nothing.<sup>116</sup> And the reality is that, by its own terms, the Supreme Court left several festering circuit splits right where it found them.<sup>117</sup> It should have resolved them, for the dignity of the family, for the sanity of the lower courts, and to vindicate the correct reading of the FTCA.

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<sup>111</sup> *Id.* at 1703.

<sup>112</sup> *See, e.g.*, *United States v. Wong*, 575 U.S. 402, 419 (2015) (holding that the FTCA’s time bar was nonjurisdictional in part because, by its plain text, “the FTCA treats the United States more like a commoner than like the Crown”); *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) (holding that a suit arising under the same facts as a prior suit dismissed under the discretionary function exception is not barred because by “the plain text” of the FTCA, its judgment bar “does not apply” to suits dismissed under the exceptions); *Brownback v. King*, 141 S. Ct. 740, 748 (2021) (interpreting the judgment bar using the meaning of “on the merits” as it was used in 1946).

<sup>113</sup> *Mesa v. United States*, 123 F.3d 1435, 1438 (11th Cir. 1997).

<sup>114</sup> 28 U.S.C. § 2680(a).

<sup>115</sup> *See, e.g.*, *Goldey v. Fields*, 145 S. Ct. 2613, 2615 (2025) (“This Court has repeatedly emphasized that ‘recognizing a cause of action under *Bivens* is ‘a disfavored judicial activity.’” (quoting *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022))).

<sup>116</sup> *Cf.* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) (“For people in *Bivens*’ shoes, it is damages or nothing.”); *Hernandez v. Mesa*, 140 S. Ct. 735, 760 (2020) (Ginsburg, J., dissenting) (“[I]t is *Bivens* or nothing.”).

<sup>117</sup> *See Martin*, 145 S. Ct. at 1703.