FOR PUBLICATION

In the United States Court of Appeals

For the Eleventh Circuit

No. 23-10062

CURTRINA MARTIN,
Individually and as Parent and Next friend of,
G.W.,
a Minor,
HILLIARD TOI CLIATT,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
LAWRENCE GUERRA,
SIX UNKNOWN FBI AGENTS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:19-cv-04106-JPB

Before JORDAN, JILL PRYOR, and KIDD, Circuit Judges.

PER CURIAM:

"The United States, as sovereign, is immune from suit save as it consents to be sued[.]" *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Through the Federal Tort Claims Act, Congress waived that immunity for certain torts committed by federal government officials and employees. *See* 28 U.S.C. §§ 1346(b), 2671 *et seq*. But, in so doing, Congress recognized that there are certain governmental functions that should not be "disrupted by FTCA lawsuits" and carved out 13 separate exceptions (one of which has a proviso). *See Molzof v. United States*, 502 U.S. 301, 312 (1992).

This case, which arises out of a wrong-house raid, presents us with two of those exceptions—the discretionary-function exception and the intentional-tort exception. *See* 28 U.S.C. §§ 2680(a), (h). We also address the grant of qualified immunity to the Federal Bureau of Investigation agent who was in charge of the raid.

Following review of the record, and with the benefit of oral argument, we affirm the district court's grant of summary judgment to the United States on the plaintiffs' FTCA claims. We reverse the grant of qualified immunity to the FBI agent.

I

This case is before us on remand from the United States Supreme Court. In *Martin v. United States*, 605 U.S. 395 (2025) (*Martin II*), the Court expressly abrogated three of our prior cases, vacated our prior opinion in full, and remanded for further consideration

in light of the change to our FTCA precedent. We begin with the facts and then pivot to the case's procedural history.

A

In 2015, the FBI commenced Operation Red Tape to address violent gang activity in Georgia. On October 12, 2017, the Operation culminated in a 30-defendant indictment. Arrest warrants, including one for gang member Joseph Riley, and search warrants, including one for Mr. Riley's residence in southwest Atlanta, soon followed. The address of that residence was 3741 Landau Lane.

Hilliard Cliatt, his then-fiancée Curtrina Martin, and her seven-year-old son G.W. were not among the defendants indicted. Yet, through no fault of their own, the Cliatt-Martins were caught in the crosshairs of Operation Red Tape.

At approximately 5:00 am on October 18, 2017, an FBI SWAT team broke down the door of the Cliatt-Martin residence—located at 3756 Denville Trace—and immediately detonated a flash bang grenade. Mr. Cliatt and Ms. Martin cowered in a closet as the SWAT team—wearing full tactical gear, green ballistic helmets, protective headphones and lenses, and ballistic vests—stormed into their bedroom. Each member of the SWAT team carried a rifle and a holstered handgun. Soon after entering the bedroom, the SWAT team located Mr. Cliatt in the closet, dragged him onto the bedroom floor, and handcuffed him. G.W. was in his room across the hall, awake and terrified by the sounds of the raid.

Amidst the chaos, the SWAT team leader, Agent Lawrence Guerra, noticed that Mr. Cliatt did not have the same face and neck tattoos that he had seen in the photographs of their target, Mr. Riley. Agent Guerra asked Mr. Cliatt for his name and address, which he provided, and which did not match the name and address in the search and arrest warrants. Around the same time, a SWAT team member located a piece of mail with an address different from the warrants. After realizing their mistake, the SWAT team immediately left the home, located Mr. Riley, and arrested him as he attempted to flee. Agent Guerra later returned to the Cliatt-Martin home, provided FBI contact information, and documented the damage to the front door caused by the forcible entry.



Br. for Appellant at 5. *See also* D.E. 101-4 at 1.

As shown above, the Cliatt-Martin home is three houses away from Mr. Riley's residence—on a different street and with an intervening cross street between them. Agent Guerra's excuse for

going to the wrong home was that his personal Garmin-brand GPS unit directed him to the wrong home. The Cliatt-Martins vehemently dispute whether Agent Guerra conducted an adequate site survey or day-of drive-by in advance of the raid. Agent Guerra threw his personal Garmin GPS away shortly after the incident, and has not provided an explanation for doing so.

B

Since the wrong-house raid on October 18, 2017, this case has had a lengthy procedural history. In September of 2019, Mr. Cliatt, Ms. Martin, and G.W. filed this action. They brought six claims: (1) false arrest and false imprisonment against the United States under the FTCA (Count I); (2) assault and battery against the United States under the FTCA (Count II); (3) trespass and interference with private property against the United States under the FTCA (Count III); (4) negligent infliction of emotional distress and intentional infliction of emotional distress against the United States under the FTCA (Count IV); (5) negligence against the United States under the FTCA (Count V); and (6) illegal entry, detention, and false arrest in violation of the Fourth Amendment against Agent Guerra and other agents under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (Count VI).[1]

[1] Mr. Cliatt and Ms. Martin (with her son) filed two separate complaints, initiating two actions before they were consolidated. The difference between the two complaints is that Mr. Cliatt's complaint added the interference with private property to Count III (in addition to trespass) and the intentional infliction

On August 27, 2021, the government and Agent Guerra moved for summary judgment. The government argued that the district court lacked subject-matter jurisdiction over Counts III–V under the FTCA's discretionary-function exception. It then asserted that the plaintiffs' remaining claims against the government (Counts I and II) failed under Georgia law. Agent Guerra maintained that he was entitled to qualified immunity on Count VI because he did not violate clearly established law.[2]

On September 23, 2022, the district court granted the government's motion as to Counts III–V, ruling that the discretionary-function exception restored the government's sovereign immunity. The court also concluded that Counts I and II fell within the discretionary-function exception but that—based on then-existing Eleventh Circuit precedent—the law enforcement proviso overcame that exception. Then, rejecting its arguments under Georgia law, the court decided that the government was not entitled to summary judgment as a matter of law. Additionally, the court granted Agent Guerra's motion for summary judgment as to Count VI, concluding that qualified immunity shielded him from the plaintiffs' Fourth Amendment claims.

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of emotional distress to Count IV (in addition to negligent infliction of emotional distress).

[2] Agent Guerra previously moved to dismiss on this ground. The district court construed that motion as one for summary judgment (based on his attached affidavit) and denied it without prejudice.

On November 21, 2022, the government moved for reconsideration based on our intervening decision in *Kordash v. United States*, 51 F.4th 1289 (11th Cir. 2022), which solidified a Supremacy Clause defense to FTCA claims. The district court, applying *Kordash*, granted the government summary judgment on Counts I and II.

The plaintiffs appealed. The government again argued that Georgia law barred the plaintiffs' FTCA claims for false imprisonment and assault and battery and, even if not, the Supremacy Clause defense applied. It then asserted that the discretionary-function exception barred the plaintiffs' remaining FTCA claims. Applying *Kordash,* 51 F.4th at 1293, as well as a number of discretionary function cases, we affirmed. *See Martin v. United States*, No. 23-10062, 2024 WL 1716235, at *6–*8 (11th Cir. Apr. 22, 2024) (*Martin I*).

The plaintiffs filed a petition for writ of certiorari, and the Supreme Court granted the petition to answer the following two questions: (1) "[w]hether the Constitution's Supremacy Clause bars claims under the Federal Tort Claims Act when the negligent or wrongful acts of federal employees have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law[;]" and (2) "[w]hether the discretionary-function exception is categorically inapplicable to claims arising under the law enforcement proviso to the intentional torts exception." *Martin v. United States*, 145 S. Ct. 1158 (2025).

The Supreme Court first concluded that the law enforcement proviso, *see* 28 U.S.C. § 2680(h), only overcomes the FTCA's intentional-tort exception, abrogating *Nguyen v. United States*, 556 F.3d 1244, 1260 (11th Cir. 2009). *See Martin II*, 605 U.S. at 403–08. The Court then ruled that there is not a Supremacy Clause defense to liability under the FTCA, abrogating *Denson v. United States*, 574 F.3d 1318, 1347 (11th Cir. 2009), and *Kordash*, 51 F.4th at 1293. *See Martin II*, 605 U.S. at 409–13. The Court continued:

> Where does all that leave the case before us? We can say this much: The plaintiffs' intentional-tort claims survive their encounter with subsection (h) thanks to the law enforcement proviso, as the Eleventh Circuit recognized. But it remains for that court on remand to consider whether subsection (a)'s discretionary-function exception bars either the plaintiffs' negligent- or intentional-tort claims. As we have explained, the Eleventh Circuit must undertake that assessment without reference to its mistaken view that the law enforcement proviso applies to subsection (a).

Id. at 413–14. "Should some or all of the plaintiffs' claims survive the discretionary-function exception, the Eleventh Circuit must then ask whether, under Georgia state law, a 'private individual under like circumstances' would be liable for the acts and omissions the plaintiffs allege, subject to the defenses discussed in § 2674[.]" *Id.* at 414. So, here we are.

II

Whether the United States' sovereign immunity is waived under one of the FTCA's exceptions is a legal question we review *de novo*. *See Alvarez v. United States*, 862 F.3d 1297, 1301 (11th Cir. 2017). We also review "the district court's grant of a motion for summary judgment *de novo*, applying the same legal standards used by the district court." *Means v. United States*, 176 F.3d 1376, 1378 (11th Cir. 1999) (citation omitted). "Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (quotation omitted). We "must consider the evidence in the light most favorable to the nonmoving party." *Id.* (quotation omitted).

On remand from the Supreme Court, the plaintiffs ask us to "construe the [discretionary-function] exception from first principles." Supp. Br. for Appellants at 20. Specifically, they contend that we should examine the overlap (if any) between law enforcement officers' intentional torts and federal employees' discretionary functions on a blank slate and conclude that the discretionary-function exception cannot be applied to intentional-tort claims arising from a wrong-house raid. They say that we have license to do so as a three-judge panel because the Supreme Court instructed us to engage in a "careful reexamination of this case in the first instance." *Martin II*, 605 U.S. at 415.

The government responds that all of the plaintiffs' FTCA claims are barred by the discretionary-function exception (now that the Supreme Court has held that the law enforcement proviso does

not overcome it). It also contends that the FTCA claims fail because there would be no liability under Georgia law.

A

The FTCA's intentional-tort exception applies to "[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[.]" 28 U.S.C. § 2680(h). But, through the law enforcement proviso, sovereign immunity is not restored for the "acts or omissions of investigative or law enforcement officers of the United States Government" for claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." *Id.* On remand, the government does not meaningfully contest that Count I for false arrest and false imprisonment and Count II for assault and battery against it fall under both the intentional-tort exception and the law enforcement proviso.[3]

Below, the government never argued that Counts I and II were barred by the discretionary-function exception. This was, of course, against a different backdrop of now-abrogated Eleventh Circuit precedent. *See Martin II*, 605 U.S. at 403–13 (abrogating *Nguyen*, 556 F.3d at 1260, *Denson*, 574 F.3d at 1347, and *Kordash*, 51 F.4th at 1293). And we generally allow litigants to raise new issues "where there is an intervening decision of the Supreme Court on

[3] As to Count I, the government argues that the plaintiffs "appear to concede that this claim may proceed only on a false imprisonment theory." Supp. Br. for Appellees at 8 n.4. We find no such concession by the plaintiffs.

an issue that overrules either a decision of that Court or a published decision of this Court that was on the books when the appellant's opening brief was filed[.]" *United States v. Durham*, 795 F.3d 1329, 1331 (11th Cir. 2015) (en banc). We therefore take up all the FTCA claims under the discretionary-function exception—keeping in mind that the Supreme Court held in *Martin II* that the law enforcement proviso does not expressly overcome this exception.

B

The discretionary-function exception applies to

> [a]ny 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.

28 U.S.C. § 2680(a).[4]

In *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991), the Supreme Court set out a two-part test to determine whether the discretionary-function exception applies. First, we must look to the nature of the challenged conduct and decide whether the conduct "violated a mandatory regulation or policy that allowed no judgment or choice." *Autery v. United States*, 992 F.2d 1523, 1526 (11th Cir. 1993). The discretionary-function exception will not apply "if a federal statute, regulation, or policy specifically prescribes a

[4] Another provision, 28 U.S.C. § 2680(a), provides a due-care exception to the sovereign immunity waiver, which is not at issue here. *See Chhetri v. United States*, 823 F.3d 577, 582 (11th Cir. 2016).

course of action for an employee to follow." *Gaubert*, 499 U.S. at 322 (quotation omitted). *See also Autery*, 992 F.2d at 1529 ("Only if a 'federal statute, regulation, or policy specifically prescribes a course of action,' embodying a '"fixed or readily ascertainable standard,"' will a government employee's conduct not fall within the discretionary[-]function exception.") (emphasis and internal citation omitted). Second, if we conclude that no "statute, regulation, or policy specifically prescribes a course of action," we must then consider whether the challenged conduct "is of the kind that the discretionary[-]function exception was designed to shield." *Gaubert*, 499 U.S. at 322–23. The purpose of the exception is 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." *Id.* at 323 (internal quotation marks and citation omitted).

The plaintiffs mount several attacks on the application of the discretionary-function exception to the conduct here. We begin with their categorical arguments and then take up their case-specific arguments.

1

The plaintiffs maintain that the discretionary-function exception does not shield constitutional violations because federal officials lack discretion to violate the Constitution. They acknowledge that our decision in *Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021), rejected this same argument and that the Supreme Court did not address the issue in this case. In fact, the Supreme

Court stated that whether *Shivers*, 1 F.4th at 931 (and *Martin I*'s reliance on it, 2024 WL 1716235, at *6), espoused a mistaken view of the discretionary-function exception was a question "well beyond" the two that it granted certiorari to address. *See Martin II*, 605 U.S. at 415.

Nevertheless, the plaintiffs contend that the Supreme Court's instruction to carefully reexamine this case in the first instance gives us an opportunity to reconsider *Shivers*. *See id*. *See also id*. at 418 (Sotomayor, J., concurring) (noting that *Shivers*' "approach," suggesting that the discretionary-function exception applies unless a source of federal law specifically prescribes the course of conduct "which even the Government does not defend before this Court, would run headlong into this Court's precedents").

We reluctantly disagree. As a later panel, we are bound by a prior published decision like *Shivers* unless the "Supreme Court case actually abrogate[s] or directly conflict[s] with, as opposed to merely weaken[ing], the holding of the prior panel." *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009). We cannot, therefore, revisit *Shivers*' holding that the discretionary-function exception immunizes unconstitutional conduct. *See* 1 F.4th at 929–35.

2

The plaintiffs contend that the discretionary-function exception categorically does not immunize careless conduct. Although we have not expressly weighed in on the circuit split on this issue, the government says that *Shivers* essentially rejected this argument too. *See Xi v. Haugen*, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J.,

concurring) (noting that "there is a split over whether the exception applies when the challenged act was careless rather than a considered exercise of discretion"). *Compare Willis v. Boyd*, 993 F.3d 545, 549 (8th Cir. 2021) (carelessness covered by exception), *Lam v. United States*, 979 F.3d 665, 682 (9th Cir. 2020) (same), *and Ball v. United States*, 967 F.3d 1072, 1077 (10th Cir. 2020) (same), *with Coulthurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000) (carelessness outside exception), *Rich v. United States*, 811 F.3d 140, 147 (4th Cir. 2015) (same), *and Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) (same).

Shivers stated that "there is nothing in the statutory language that limits application of this exception based on the degree of the abuse of discretion or the egregiousness of the employee's performance." 1 F.4th at 930 (internal quotation marks omitted). "Congress could have adopted language that carved out certain behavior from this exception—for example, grossly negligent behavior, intentional behavior, or behavior that rises to the level of a constitutional violation." *Id.* "But Congress did not do so, and it is Congress that uniquely decides what should fall within the waiver of sovereign immunity." *Id. See also Autery*, 992 F.2d at 1528 ("[N]egligence is simply irrelevant to the discretionary function inquiry.") (quoting *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989)).

Although we did not couch this holding in the same "carelessness" terms, we do not think *Shivers* allows for a categorical carelessness exception to the discretionary-function exception.

Shivers held that the level of wrongfulness of the federal employees' conduct plays no role in our analysis. *See* 1 F.4th at 930.

3

We now reach *Gaubert*'s two-step test. Importantly, "the same governmental act may have both discretionary and nondiscretionary aspects, and in these circumstances [we] must disaggregate conduct to determine which claims are cognizable and within the court's jurisdiction and which are not." 14 Wright & Miller, Fed. Prac. & Proc. Juris. § 3658.1 (4th ed. 2015 & Apr. 2026 Supp.) (citing *Gaubert*, 499 U.S. at 325–26). *Accord Swafford v. United States*, 839 F.3d 1365, 1370 (11th Cir. 2016) ("In evaluating whether the discretionary-function exception applies, we first must determine exactly what conduct is at issue.") (internal quotations marks and citation omitted).

We begin with the proverbial elephant in the room: *Mesa v. United States*, 123 F.3d 1435 (11th Cir. 1997). In *Mesa*, DEA agents obtained an arrest warrant for a Pedro Pablo Mesa but arrested the wrong Pedro Pablo Mesa. *See id.* at 1437. The Mesas alleged that the DEA agents were negligent and reckless in their investigation of the whereabouts of the Pedro Pablo Mesa named in the arrest warrant. *See id.* We held that "the investigation of the whereabouts and identity of the subject of an arrest warrant prior to service of

the arrest warrant is conduct that falls within the discretionary[-] function exception." *Id.* at 1438.[5]

Under the first part of the *Gaubert* test, we concluded that "the decisions regarding how to locate and identify the subject of an arrest warrant and regarding whether the person apprehended is in fact the person named in the warrant are discretionary in nature and involve an element of judgment or choice." *Id.* On the second part of the test, we reasoned that "the decision regarding how to locate and identify the subject of an arrest warrant is fundamentally rooted in policy considerations, and that judicial second-guessing of this decision thus is not appropriate." *Id.* We considered that the agents might weigh secrecy, urgency, public safety, and the need to preserve evidence. *See id.*

Additionally, once inside the wrong residence, "the agents may consider the possible repercussions of erroneously deciding that the person they apprehended is not in fact the person named in the warrant and letting that person go free." *Id.* at 1438–39. We ruled, therefore, that "the discretionary[-]function exception applies to the process of determining whether the person apprehended is actually the person named in the arrest warrant." *Id.* at 1439. *See also Mid-South Holding Co. v. United States*, 225 F.3d 1201, 1206 (11th Cir. 2000) (holding that "the on-site decisions of the

[5] The other claims, which were not at issue in the appeal, included negligence in the procurement of a warrant, assault, battery, false imprisonment, intentional infliction of emotional distress, invasion of privacy, and a *Bivens* claim. *See Mesa*, 123 F.3d at 1437 n.2.

agents of the Customs Service concerning the manner in which to search [a] vessel also fall within the scope of the discretionary[-]function exception" under the Suits in Admiralty Act).

The plaintiffs nonetheless insist that the actions underlying a wrong-house raid are not based on a discretionary function. They offer a "ground-up construction" of the exception, showing that the discretionary-function exception applies only when an employee exercises discretion to fulfill the ends of an administrative agency based on the discretionary-function exception's text, the discretionary-function exception Supreme Court precedent, and the legislative history of the law enforcement proviso. *See* Supp. Reply Br. of Appellants at 1.

It is true that the discretionary-function exception's text references administrative agencies. *See* 28 U.S.C. § 2680(a). But we cannot ignore that it includes claims based on "a discretionary function or duty on the part of a federal agency *or* an employee of the Government[.]" *Id.* (emphasis added).

We recognize that the cases in which the Supreme Court analyzed the discretionary-function exception—leading up to *Gaubert*—involved regulatory policy. These cases include *Dalehite v. United States*, 346 U.S. 15, 38–41 (1953) (Tennessee Valley Authority's fertilizer production program covered by exception); *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (Coast Guard's upkeep of lighthouse was not discretionary even if the decision to build the lighthouse is discretionary); *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (the destruction of Navajo horses by federal

agents was not discretionary where they failed to comply with a federal regulation); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984) (the Federal Aviation Administration's decision to certify airplanes without first inspecting them "falls squarely" within the exception); *Berkovitz v. United States*, 486 U.S. 531, 547 (1988) (the formulation of policy by the Food and Drug Administration to regulate polio vaccine lots was covered by the exception but the decision to release to the public the particular lot of vaccine in violation of those standards was not covered); *and Gaubert*, 499 U.S. at 332 (decisions through which federal savings and loan associations supervised thrift institutions were covered by the exception). *But cf. Berkovitz*, 486 U.S. at 538 (rejecting the argument that "the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies" in part because "the language of the exception . . . protects 'discretionary' functions, rather than 'regulatory' functions").[6]

The same, however, cannot be said of our own cases. Indeed, we have applied the discretionary-function exception to low-level decisions involving some modicum of discretion. *See, e.g.*, *Mesa*, 123 F.3d at 1438 (steps taken by DEA agents to identify the

[6] One caveat related to *Indian Towing*, 350 U.S. at 64–65: Although the government conceded that the discretionary-function exception would not cover the negligent upkeep of the lighthouse and instead argued that the language of *Dalehite*, 346 U.S. at 28, precluded liability, courts and scholars alike generally agree that *Indian Towing* "directly bear[s] upon construction of the exception." Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 UCLA L. Rev. 871, 879 (1991).

subject of an arrest warrant were covered by the exception); *Hughes v. United States*, 110 F.3d 765, 768 (11th Cir. 1997) (decisions related to security at a U.S. Post Office involve discretionary functions); *O'Ferrell v. United States*, 253 F.3d 1257, 1266–67 (11th Cir. 2001) (decisions by law enforcement officials throughout an investigation, including alleged misrepresentations implicating the plaintiffs in the subject bombings, threatening them, illegally searching their property, and holding their property, are not cognizable under the FTCA).

The plaintiffs also point to the legislative history of the law enforcement proviso. As Justice Sotomayor explained in her concurrence in *Martin II*, in April of 1973, 15 state and federal officers wrongfully ransacked the home of Herbert and Evelyn Giglotto in Collinsville, Illinois, and held them at gunpoint before realizing their mistake. *See Martin II*, 605 U.S. at 419 (Sotomayor, J., concurring) (citation omitted). "The officers [then] moved on to the home of Donald Askew, where they terrorized yet another innocent couple before confessing they had acted on a 'bad tip.'" *Id.* (citation omitted).

After learning of such egregious raids, the Senate Committee on Government Operations proposed an amendment to the FTCA—adding the law enforcement proviso to § 2680(h). *See id.* at 419–20. In the Committee's view, this amendment would make it so that "innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action

against the individual Federal agents and the Federal Government." S. Rep. No. 93–588, at 3 (1973).

If this sounds familiar, it is exactly the plaintiffs' argument. Why would the Senate Committee propose this amendment if the United States' immunity for wrong-house raids would (or could) continue through the discretionary-function exception? Yet we are mindful that "legislative history cannot be used to contradict unambiguous statutory text or to read an ambiguity into a statute which is otherwise clear on its face." *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008). To hold that this legislative history creates ambiguity in the discretionary-function exception would be in some tension with *Shivers*, where we cautioned against atextual exceptions to the discretionary-function exception and said that "the language Congress chose in § 2680(a) is unqualified" and Congress did not categorically "carve[ ] out certain behavior" from the exception. *See* 1 F.4th at 930.

Moreover, in this very case, the Supreme Court held that the law enforcement proviso only overrides the intentional-tort exception, and not the discretionary-function exception. *See Martin II*, 605 U.S. at 407. The Court noted that "[the plaintiffs] point[ed] to a committee report discussing how Congress enacted the proviso in response to two wrong-house raids much like their own." *Id.* at 408. But it rejected the argument:

> And, the plaintiffs argue, unless the proviso is given broad effect across § 2680, it will not fulfill Congress'[ ] purpose of ensuring that wrong-house-raid cases may proceed. But this argument stumbles,

> too. . . . Members of Congress may well have had more than one purpose in mind when adding the proviso to the FTCA. Perhaps some thought amending subsection (h) [the intentional-tort exception] alone and leaving others untouched would strike a suitable balance between immunity and liability. Perhaps others concluded there was no need to apply the proviso more broadly because no other exception would shield the government from liability for wrong-house raids. Whatever the reason, no amount of guesswork about the purposes behind legislation can displace what the law's terms clearly direct.

Id. (internal citations omitted).

We therefore cannot say that the discretionary-function exception does not apply to law enforcement proviso claims arising out of wrong-house raids. Though it may be true that Supreme Court caselaw signals a connection between a "discretionary function" and the regulatory policy of an administrative agency, our cases—rightly or wrongly—have largely extended the discretionary-function exception to the execution of warrants by law enforcement officers. *See Mesa*, 123 F.3d at 1436–37.

The plaintiffs further argue that *Mesa* was abrogated by *Utah v. Strieff*, 579 U.S. 232, 240 (2016). "Abrogation by the Supreme Court requires that the later decision from that Court 'demolish and eviscerate each' of our prior decision's 'fundamental props.'" *Chemaly v. Lampert*, 174 F.4th 843, 851 (11th Cir. 2026) (quoting *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1223 (11th Cir. 2022)). Unfortunately for the plaintiffs, *Strieff* was a Fourth

Amendment suppression case, not an FTCA case. *Strieff* addressed "whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between [an] unlawful stop and the discovery of drug-related evidence[.]" 579 U.S. at 239. In deciding that it did, the Court stated that the execution of an arrest warrant is "a ministerial act that was independently compelled by the pre-existing warrant." *Id.* at 240. We are not aware of any authority supporting the proposition that a ministerial act within the meaning of the Fourth Amendment's exclusionary rule doctrine and the meaning of the discretionary-function exception under the FTCA are the same. In short, we cannot say that *Strieff* abrogated *Mesa*.

Nevertheless, we acknowledge that *Mesa* is not identical to the case before us. *Mesa*, when it reached our court, only involved a single tortious act: the negligent *investigation* of the whereabouts and identity of the subject of an arrest warrant. *See* 123 F.3d at 1439 n.5 (stating that "we focus solely in this case on whether the appellants may pursue their claims that the agents negligently investigated the whereabouts and identity of the subject of the arrest warrant" and the failure to end the detention). Indeed, we made clear that the plaintiffs' allegations did "not sweep so broadly as to encompass all actions which might be taken in deciding when and how to execute the arrest warrant." *Id.* at 1437 n.3.

In *Mesa*, we did "not decide the question of whether all actions taken in deciding when and how to execute an arrest warrant are subject to the discretionary[-]function exception." *Id.* "Instead,

we address[ed] the narrower question of whether the process of locating and identifying the subject of an arrest warrant is within the discretionary[-]function exception." *Id.* With this cautionary language in mind, we apply the two-part *Gaubert* test to this case.

In this case, the plaintiffs have asserted two factual theories.

The first theorizes that Agent Guerra failed to conduct a site survey or drive-by of the target house. We believe *Mesa* forecloses any argument that Agent Guerra's planning and preparation for the raid were outside of the scope of the discretionary-function exception.

"Government conduct does not involve an element of judgment or choice if there is a statute, regulation, or policy that requires the employee to follow a specific course of action." *Mesa*, 123 F.3d at 1438 n.4 (citing *Gaubert*, 499 U.S. at 322). The plaintiffs do not claim that there is a statute, regulation, or policy requiring SWAT team leaders to conduct a pre-raid site survey. Instead, they assert that the government's policy is to search the right house and that Agent Guerra had "no rightful option but to adhere to [the warrant's] directive." *Gaubert*, 499 U.S. at 322 (internal quotation marks and citation omitted). We think this argument—when applied to the preparation for the execution of a warrant—contravenes *Mesa*. We said there that the discretionary-function exception squarely applies to the "process" of determining whether the target of a warrant is actually apprehended; it follows that the process for the target residence to be searched is also discretionary. *See Mesa*, 123 F.3d at 1439. Whether to conduct a site survey and drive-

by were clearly part of the planning, during which Agent Guerra was vested with discretion.

The preparation to execute the warrant also implicated certain policy considerations. For example, *Mesa* recognized that agents may consider the "desire to keep the investigation secret[.]" *Id.* at 1438. Too many unmarked law enforcement vehicles in advance of a coordinated raid could have tipped Mr. Riley off. Other decisions that Agent Guerra made during the planning, including deciding the location of the staging area, the plan to enter the house, and the timing of the raid, are grounded in a concern for "danger to public safety" and the safety of the agents themselves. *Id.* at 1439. "All of these considerations are rooted in policy considerations." *Id. Cf. O'Ferrell*, 253 F.3d at 1267 (stating that law enforcement techniques (there, interrogative techniques) are "a paradigmatic example of a discretionary function"). We conclude, therefore, that any liability arising out of deficiencies in the planning process for the execution of a warrant is shielded by the discretionary-function exception according to our binding precedent in *Mesa*.

The second theory combats the claim by Agent Guerra that his Garmin GPS led him to the wrong house on the morning of the raid and instead posits that the wrong-house raid was attributable to human error. We apply the two-part *Gaubert* test to this second theory, endeavoring to faithfully apply *Mesa* and the plentitude of other Eleventh Circuit discretionary-function exception cases. If Agent Guerra input the wrong address into the Garmin or simply misread his Garmin GPS' screen, it is a much closer call whether

this conduct involves "an element of judgment or choice." *Gaubert*, 499 U.S. at 322 (internal quotation marks and citation omitted).

On one hand, we have extended *Mesa*'s reasoning to "the on-site decisions of the agents" during a search. *See Mid-South Holding Co.*, 225 F.3d at 1206. On the other hand, "[t]here are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary[-] function exception[.]" *Gaubert*, 499 U.S. at 325 n.7. For example, if an official "drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply." *Id.* "Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." *Id.*

If the exercise of judgment had ended at Agent Guerra's decision to use a GPS and his choice to stop at the first intersection in the neighborhood, instead of the second, our inquiry might end here. But we do not think our precedent allows for such simplicity.

There was no federal statute, regulation, or policy mandating a specific course of conduct for Agent Guerra to follow once he arrived at the home. He had discretion to decide whether to order one of the SWAT team members to check the street signs or the mailbox. He had discretion to decide whether to take time to pull geolocation data from his phone. And his conduct after his team arrived at the wrong house involved an element of judgment and choice.

Such discretion is rooted, at least to some degree, in policy considerations. As the SWAT addendum laid out, "SWAT teams will need to achieve a near simultaneous start to ensure surprise is achieved." D.E. 83-6 at 26. The team here needed to comply with a precise timeline. Covert execution of a warrant and protection of the public involve policy considerations recognized in the discretionary-function exception context. *See Mesa*, 123 F.3d at 1438–39. *See also Sabow v. United States*, 93 F.3d 1445, 1453 (9th Cir. 1996) ("The investigation into [a Marine Corps Colonel's] death involved the types of social and political judgments that Congress meant to shield from FTCA challenges. Investigations by federal law enforcement officials . . . clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation."); *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986) ("Congress did not intend to provide for judicial review of the quality of investigative efforts."), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013).

We therefore conclude that, under our precedent, the plaintiffs' FTCA claims are "based upon the exercise or performance or the failure to exercise or perform a discretionary function" by a federal government employee. *See* 28 U.S.C. § 2680(a). In the end, "the power to waive the federal government's immunity is Congress'[ ] prerogative, not ours[.]" *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 48 (2024). We, as a three-judge panel, cannot contort or disregard our precedents in *Shivers* and in *Mesa* to

provide Mr. Cliatt, Ms. Martin, or her son with recourse under the FTCA.

III

In *Martin II*, the Supreme Court vacated our prior decision in full. *See* 605 U.S. at 415. A vacatur means the prior decision has no legal effect, *see United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (en banc), so we are free to revisit the qualified immunity issue.

The government asks us to reinstate the holding of the prior panel affirming the district court's grant of qualified immunity to Agent Guerra. The plaintiffs do not address the now-vacated ruling on qualified immunity in their supplemental briefing.[7]

Qualified immunity shields a government official sued in his or her individual capacity "'unless the law preexisting the [ ] official's supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant's place would be on notice that what the [ ] official was doing would be clearly unlawful given the circumstances.'" *Underwood v. City of Bessemer*, 11 F.4th 1317, 1328 (11th Cir. 2021) (quoting *Morton v. Kirkwood*, 707 F.3d 1276, 1280 (11th Cir. 2013)

[7] We directed the parties to address the FTCA issues in light of *Martin II*. Although we also allowed the parties to address any other issues they deemed appropriate, we are not aware of any authority—and the government has not cited any—for the proposition that an appellant must reassert each and every argument made in his or her opening brief to avoid abandoning an issue on which the Supreme Court did not grant certiorari.

(citation and quotation marks omitted). "A police officer cannot obtain qualified immunity unless he establishes that he was acting within his discretionary authority." *Id.* It is well-settled that effectuating an arrest warrant is a legitimate, authorized function of a law enforcement officer's job responsibilities. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). The burden shifts to the plaintiffs, who must show that the official violated a clearly established constitutional right. *See Underwood*, 11 F.4th at 1328.

There are three ways to show that a constitutional right is clearly established: (1) binding precedent with materially similar facts; (2) a broad statement of principle enshrined in the Constitution, statute, or case law; or (3) conduct that so egregiously violates the Constitution that no prior case law is required. *See Gilmore v. Ga. Dep't of Corr.*, 144 F.4th 1246, 1258 (11th Cir. 2025) (en banc). Critically, in addressing qualified immunity at summary judgment, we view the facts in the light most favorable to the plaintiffs. *See Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014).

We have addressed the contours of qualified immunity in the context of the "entry by law enforcement agents into the wrong residence to execute a presumably valid search warrant for a nearby house." *Hartsfield v. Lemacks*, 50 F.3d 950, 951 (11th Cir. 1995), *as amended* (June 14, 1995). *See also Duncan v. Barnes*, 592 F.2d 1336, 1338 (5th Cir. 1979) (reversing the district court's entry of judgment as a matter of law for the officers who executed a warrant at the wrong residence based on the warrant's incorrect

description of the location). In *Hartsfield*, we said that it is "clearly established law that, absent probable cause and exigent circumstances, a warrantless search of a residence violates the Fourth Amendment, unless the officers engage in reasonable efforts to avoid error." 50 F.3d at 955.[8]

In this case, as described above, the plaintiffs submit that there is evidence in the record supporting two sets of facts. "On one set of facts, [Agent] Guerra had firsthand familiarity with the target home from a prior visit, FBI intelligence (including GPS tracking of the target's cell phone), maps showing the location of the home, numerous photographs, and other pieces of intelligence confirming the address of the target house." D.E. 101 at 2. "On a second version of facts, [Agent] Guerra did not conduct a site survey or attempt a day-of drive-by of the target residence at all,

[8] We have applied *Hartsfield* in a number of unpublished decisions. *See, e.g.*, *White v. McLain*, 648 F. App'x 838, 842–43 (11th Cir. 2016) (granting qualified immunity to the official responsible for confirming that the correct house was raided where he made more efforts than the official in *Hartsfield* before raiding the house next door); *Treat v. Lowe*, 668 F. App'x 870, 871 (11th Cir. 2016) (denying qualified immunity to an officer who executed a search warrant two doors down from the correct house because he did not engage in "well-intentioned attempts" to locate the correct house) (internal quotation marks and citation omitted); *Norris v. Hicks*, 855 F. App'x 515, 516 (11th Cir. 2021) (granting qualified immunity to the officers who initially approached the correct home "but thought it was not the target of the warrant because it was an abandoned, dilapidated, uninhabitable 'storage out-building' and officers understood the target to be an occupied, 'normal' home" so they raided the home next door (approximately 40 yards away)).

instead going into a subdivision blind with predictable results." *Id.* at 3.

The plaintiffs say that Agent Guerra's self-serving testimony supports the first theory, and his "documented falsehoods" and the absence of record evidence support the second. *Id.* Given that we must view the evidence in the light most favorable to the plaintiffs in assessing qualified immunity, *see Tolan*, 572 U.S. at 655–56, we discuss these two scenarios.

On one side of the ledger, the plaintiffs rebut Agent Guerra's claimed drive-by in the hour before the warrant's execution. Agent Guerra says that he went to the correct home with Agent Michael Lemoine on the morning of October 18. But there is cell phone GPS data for Agent Lemoine, and it does not show that he went to the target home or the plaintiffs' home before the raid. Significantly, Agent Lemoine testified that it was his practice to take his cell phone with him on site surveys. There is cell phone data for Agent Guerra following the raid, but the data from the days leading up to and the morning before the raid could not be located.

The plaintiffs also dispute Agent Guerra's asserted facts concerning the alleged October 16 site survey. Agent Guerra initially swore in a declaration that he conducted the site survey of the target residence with Agent Gregory Donovan. Because Agent Donovan's GPS data showed that he did not visit the target residence at any time in the days leading up to and including October 16, Agent Guerra corrected his testimony to provide that he does not recall who conducted the site visit with him. Again, we view the

evidence—and the reasonable inferences—in the light most favorable to the plaintiffs.

It is also undisputed that Agent Guerra failed to upload the alleged site survey photographs to the FBI's evidence management system electronically. And there is no metadata for Agent Guerra's photographs. The metadata for some of the other photographs show that another agent took them during surveillance of Mr. Riley on October 3 when Agent Guerra was not present. It is undisputed that one of these photographs—rather than Agent Guerra's alleged photos—was used in the SWAT addendum. Agent Guerra's cell phone data is also missing for the day of the alleged site survey.

We resolve the conflicts in the evidence, and the reasonable inferences which can be drawn, in favor of the plaintiffs. For summary judgment purposes, then, Agent Guerra did not conduct a drive-by beforehand. Nor did he carry out a site survey. *See Tolan*, 572 U.S. at 657 (reversing the grant of qualified immunity because the circuit court "fail[ed] to credit evidence that contradicted some of its key factual conclusions, . . . improperly weigh[ed] the evidence[,] and resolved disputed issues in favor of the moving party") (internal quotation marks omitted).

The district court largely disposed of the plaintiffs' arguments on this point because (1) they did not request any specific relief related to Agent Guerra's alleged spoliation of evidence (the disposal of the GPS) and (2) without it, the plaintiffs' argument rested on speculation. We disagree that the plaintiffs did not

request sufficiently specific relief and therefore missed the boat on the factual inferences to be drawn from Agent Guerra's disposal of the GPS. They requested a special interrogatory on the factual question of Agent Guerra's bad faith in anticipation of a post-trial sanctions motion. But, more importantly, the district court's belief that it could not draw inferences in the plaintiffs' favor at this stage missed the mark.

"It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (citations omitted). At trial, the jury can view the facts and draw inferences in any party's favor; that is why an instruction on spoliation is necessary. *See* 2 John Henry Wigmore, Evidence in Trials at Common Law § 291 (James H. Chadbourn rev. 1979) (explaining that, for an adverse inference based on the destruction of evidence, "the sole question is whether the jury may legitimately draw a certain inference from a certain fact"). At summary judgment, however, the district court already views the evidence in the light most favorable to the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The plaintiffs' failure to specifically move for any spoliation-related relief before Agent Guerra filed his motion for summary judgment is not fatal to their *Bivens* claim. Nor did it give the district court license to disregard the circumstantial evidence of a

constitutional violation. Although the court correctly noted that the non-movant "must do more than raise 'metaphysical doubt' regarding the facts," *Martin v. United States*, 631 F. Supp. 3d 1281, 1293–94 (N.D. Ga. 2022) (citing *Garczynski v. Bradshaw*, 573 F.3d 1158, 1165 (11th Cir. 2009)), this is not a case that rests on baseless speculation. There are obviously inferences to be drawn from the undisputed fact that Agent Guerra led his SWAT team to the wrong house, returned to that house to provide his business card and the name of the FBI's Chief Division Counsel, photographed the battered-in front door, and then threw his personal GPS away—to this day, without explanation.

Moreover, there are disputed facts unrelated to the GPS and cell phone records. The plaintiffs fault Agent Guerra for baselessly attributing Mr. Cliatt's car in the driveway to Mr. Riley and say that Agent Guerra's unfamiliarity with the vehicles associated with the target residence shows that he did not conduct a site survey. During the morning drive-by, Agent Guerra asserted that he observed a black Chevrolet Camaro in the driveway, which he later would use as a reference point when locating the home. But the preparation materials clearly state that the subject vehicle associated with Mr. Riley is a white Nissan Maxima. Finally, even if not dispositive, the mere fact that Agent Guerra led the SWAT team to the wrong home is circumstantial evidence that he had never been to the property before.

There is, of course, some evidence on Agent Guerra's side. Agent Guerra reviewed the Operation Order and SWAT

addendum. He attended an operational briefing, which included a presentation showing the photograph of the correct home and Mr. Riley. He selected a staging area at a church and communicated to the SWAT team to meet there the morning of the raid. He created a plan, including designating the "stack" formation (the order in which SWAT team members position themselves outside the front door) and deciding which SWAT team member would breach the door, who would carry a shield, and who would go upstairs or downstairs upon entry. Although this is a preparation effort, it is not clear to us that the creation of the plan had anything to do with ascertaining the correct address for the raid. With respect to the now-vacated opinion in *Martin I*, the prior panel did not resolve many of the evidentiary conflicts in the plaintiffs' favor and credited disputed evidence in Agent Guerra's favor to conclude that he complied with FBI standard practice. *See Martin I*, 2024 WL 1716235, at *6.

In addition to the evidentiary conflicts, there are also many undisputed facts that warrant denial of qualified immunity at this stage. Geographically, the two homes were three houses away from one another, on the opposite side of Landau Lane, and separated by a cross street. The target home is at a four-way intersection while the plaintiffs' home is at a three-way intersection. Neither home has the house number displayed on the house itself; both have it on the mailbox. The street sign at the intersection where the target home is located clearly marks the intersection of Landau Lane and Cranford Drive—not Denville Trace, where the plaintiffs' home is located.

There are also physical differences between the two residences. The target home is white or cream while the plaintiffs' home is closer to brown or beige. The plaintiffs' home has stonework around the façade of the door, but the target home does not. The target home has a stairwell leading to the front door with large shrubbery in front of it; the plaintiffs' home has no shrubbery in front of the stairwell. The target home's windows are single wide with stucco faux shutters, while the plaintiffs' home has mostly double or triple wide windows without faux shutters. Lastly, the target home has dormers on the roof; the plaintiffs' home does not.

We again view this evidence in the light most favorable to the plaintiffs and cannot minimize the differences between the two houses and the distance between them. Although the raid was carried out during the early morning hours, Agent Guerra testified that some details of the house (for example, the color) were perceptible—whether from moonlight or artificial light. In sum, we resolve all disputes and draw all inferences from the evidence regarding the dissimilarities in the houses and their configuration in the neighborhood, the missing cell phone records, Agent Guerra's disposal of the GPS, and Agent Guerra's ignorance of the subject vehicle in the plaintiffs' favor. Against this backdrop, we ask whether the search of the plaintiffs' home and their seizure was unreasonable within the meaning of the Fourth Amendment.

In *Hartsfield*, the officer went to "the proper residence the day before the search and had procured the search warrant based upon his own observations[.]" 50 F.3d at 955. "Although [he] had

the warrant in his possession, he did not check to make sure that he was leading the other officers to the correct address, let alone perform any precautionary measures" such as checking the house number or verifying any notable exterior features of the house. *Id.*[9]

As in this case, "the houses were located on different parts of the street, separated by at least one other residence, and [ ] their appearances were distinguishable." *Id.* In *Hartsfield*, the raid was in daylight; here, it was at dawn. *See id.* That is a largely immaterial difference when accounting for the evolution in technology from 1991, when the raid in *Hartsfield* occurred, to 2017, when this raid occurred. *See id.* at 951. This evolution makes Agent Guerra's conduct more egregious because he had access to his GPS, his cell phone's Google Maps, and text alerts providing a link to a Google Map with Mr. Riley's geolocation every fifteen minutes the morning of the raid.

Agent Guerra's conduct was "simply not 'consistent with a reasonable effort to ascertain and identify the place intended to be searched.'" *Hartsfield*, 50 F.3d at 955 (quoting *Maryland v. Garrison*, 480 U.S. 79, 88 (1987)). Viewing the evidence in the light most favorable to the plaintiffs, a reasonable jury could fairly conclude that Agent Guerra failed to engage in reasonable efforts to avoid error, and, therefore, violated the plaintiffs' constitutional rights. Such plain incompetence has clearly violated the Fourth Amendment

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[9] The prior panel opinion also did not meaningfully engage with the striking similarities between this case and our decision in *Hartsfield*, 50 F.3d at 955. *See Martin I*, 2024 WL 1716235, at *5.

since at least 1995 when we decided this materially similar precedent. *See id*. *See also Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'") (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).[10]

We therefore reverse the grant of qualified immunity to Agent Guerra.

IV

We affirm the district court's dismissal of the FTCA claims in Counts I–V based on the United States' sovereign immunity. We

[10] As one of the amici explains, the recognition of liability for improper entry predates the founding. *See* Amicus Br. for Nat'l Police Accountability Project at 4. The common-law foundation of knocking-and-announcing can be traced back to the seventeenth century. *See Wilson v. Arkansas*, 514 U.S. 927, 931–36 (1995) (citing *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)). In *Semayne's Case*, the King's Bench recognized that the sheriff "ought to signify the cause of his coming" before entering a home to recover the debts of another (the deceased joint tenant). *See* 77 Eng. Rep. at 195. And "[t]he propositions resolved in *Semayne's Case* were by no means an innovation." G. Robert Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. Pa. L. Rev. 499, 501 (1964) (explaining the limits of forcible entry into the home under Biblical law and early Anglo-Saxon law). Accordingly, at the Fourth Amendment's framing, the common law imposed a serious obligation on the officer to ensure the "cause of his coming" to avoid "the destruction or breaking of any house . . . by which great damage and inconvenience might ensue." *Semayne's Case*, 77 Eng. Rep. at 195–96.

reverse the district court's grant of qualified immunity to Agent Guerra on Count VI.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

JORDAN, Circuit Judge, joined by JILL PRYOR, and KIDD, Circuit Judges Concurring:

"All agree that the Federal Tort Claims Act permits some suits for wrong-house raids." *Martin v. United States*, 605 U.S. 395, 399 (2025). But, in this Circuit, the discretionary-function exception is a mess, as interpreted bars all (or certainly most) FTCA suits based on wrong-house raids. And we are not alone in the doctrinal bog. *See id.* at 401 (noting that "several of our lower court colleagues report that they have struggled to discern what [the discretionary-function exception] requires of them") (citing *Xi v. Haugen*, 68 F.4th 824, 842 (3d Cir. 2023) (Bibas, J., concurring)) (alterations adopted). *See also* 5 American Law of Torts § 17:7 (2026) ("To say that [the discretionary-function exception] has been difficult to apply is an understatement"); 14 Wright & Miller, Fed. Prac. & Proc. Juris. § 3658.1 (4th ed. 2015 & Apr. 2026 update) (explaining that the discretionary-function exception "is among the most criticized features of the FTCA" in part "for having generated a 'quagmire' of interpretive confusion") (quoting *Baird v. United States*, 653 F.2d 437, 440 (10th Cir. 1981)).

I join the court's opinion in full and write separately to set out my view of the discretionary-function exception under first principles. I explain what I think is the correct understanding of the exception, applying *United States v. Gaubert*, 499 U.S. 315 (1991), and navigating our numerous decisions on the exception. I bear in mind that "we should not take it upon ourselves to extend the [FTCA's

sovereign immunity] waiver beyond that which Congress intended." *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979) (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 68–69 (1955)). "Neither, however, should we assume the authority to narrow the waiver that Congress intended." *Id.* at 118 (citing *Indian Towing Co.*, 350 U.S. at 68–69).

* * * * *

The discretionary-function exception provides that the United States' sovereign immunity is not waived for "[a]ny claim . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). But the "FTCA does not define the term discretionary, and the exact boundaries of the exception remain unclear, despite an immense amount of precedent that has developed on the subject." 14 Wright & Miller, Fed. Prac. & Proc. Juris. § 3658.1 (4th ed. 2015 & Apr. 2026 update).

The Supreme Court has interpreted the exception to "cover[ ] only acts that are discretionary in nature, acts that involve an element of judgment or choice[.]"*Gaubert*, 499 U.S. at 322 (internal quotation marks and citation omitted). "The requirement of judgment or choice is not satisfied *if* a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere

to the directive.'" *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)) (emphasis added). In this Circuit, we have taken this language from *Gaubert* and made the presence of a prescriptive statute, regulation, or policy an absolute requirement for a plaintiff's claims to overcome the exception. *See Shivers v. United States*, 1 F.4th 924, 931 (11th Cir. 2021) (emphasis in original) (stating that "the discretionary function exception applies *unless* a source of federal law 'specifically prescribes' a course of conduct") (citing *Gaubert*, 499 U.S. at 322). *See also Autery v. United States*, 992 F.2d 1523, 1529 (11th Cir. 1993) ("*Only if* a 'federal statute, regulation, or policy specifically prescribes a course of action,' embodying a '"fixed or readily ascertainable standard,"' will a government employee's conduct not fall within the discretionary[-]function exception.") (emphasis added); *Zelaya v. United States*, 781 F.3d 1315, 1330 (11th Cir. 2015) (stating that "*unless* a federal statute, regulation, or policy specifically prescribes a course of action embodying a fixed or readily ascertainable standard, it will be presumed that the particular act involved an element of judgment or choice") (internal quotation marks omitted and emphasis added).

But the term "if" is not synonymous with "unless" or "only if." *See, e.g., Twp. of Tinicum v. U.S. Dep't of Transp.*, 582 F.3d 482, 489 (3d Cir. 2009) ("The word 'if' describes a sufficient condition. . . . The phrase 'only if' describes a necessary condition, not a sufficient condition.") (first citing *Alden Mgmt. Servs. v. Chao*, 532 F.3d 578, 581 (7th Cir. 2008), and then citing *California v. Hodari D.*, 499 U.S. 621, 627–28 (1991)); *Campuzano v. Bondi*, 163 F.4th 186, 190 n.7 (5th Cir. 2025) (same). *Compare Fed. Trade Comm'n v. Corpay,*

Inc., 164 F.4th 807, 840 (11th Cir. 2026) (explaining that the word "unless" describes a "mandatory" condition); Burton's Legal Thesaurus 583 (4th ed. 2007) (defining "unless" as "except, excepting, however, precluding, save, without"). If the Supreme Court in *Gaubert* wanted to make the presence of a prescriptive statute, regulation, or policy the only way to fail the first part of the test, I believe it would have said so. *See Rafferty v. Denny's, Inc.*, 13 F.4th 1166, 1182 (11th Cir. 2021) (explaining that the Supreme Court "say[s] what it means").

As Justice Sotomayor explained in this very case, "there is reason to question the Eleventh Circuit's suggestion in the decision below that the discretionary-function exception might apply *unless* a source of federal law specifically prescribes a federal employee's course of conduct." *Martin*, 605 U.S. at 418 (Sotomayor, J., concurring) (quoting *Martin v. United States*, No. 23-10062, 2024 WL 1716235, at *6 (11th Cir. Apr. 22, 2024) (quoting *Shivers*, 1 F.4th at 931)) (internal quotation marks omitted and alteration adopted). "That approach, which even the Government [did] not defend before [the Supreme] Court, would run headlong into [the] Court's precedents." *Id.*

Our Circuit's approach is not grounded in the text of the exception. *See* § 2680(a) (restoring immunity for claims "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"). It is also untethered from the circumstances

presented in *Gaubert*, which involved the federal supervision and regulation of a financial institution during the savings and loan crisis of the 1980s. *See* 499 at 317 n.1, 319–20. *See United States v. Stanley*, 483 U.S. 669, 680 (1987) (explaining that "no holding can be broader than the facts before the court").[1]

As I see it, *Gaubert* provided a mandatory statute, regulation, or policy as *one* avenue to show that a government employee had no room to exercise judgment or choice. *See Gaubert*, 499 U.S. at 322 (stating that "[t]he requirement of judgment or choice is not satisfied *if* a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow") (internal quotation marks omitted and emphasis added). *See also* John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 Am. Bus. L.J. 223, 242 (1993) (explaining that the Supreme Court in *Gaubert* addressed whether the exception extends "to lower level regulators' decisions in their implementation of policies established by statute, regulation, or agency policy statement" and decided that the exception "protects actions of an authorized agency

[1] As the court's opinion here explains, the Supreme Court has addressed the scope of the discretionary-function exception in cases involving complex regulatory regimes or statutory schemes. *See Dalehite v. United States*, 345 U.S. 15, 38–41 (1953) (Tennessee Valley Authority's fertilizer program); *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (Department of the Interior's treatment of Navajo horses); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984) (Federal Aviation Administration's airplane safety certification); *Berkovitz v. United States*, 486 U.S. 531, 547 (1988) (Food and Drug Administration's regulatory policy regarding polio vaccines).

employee that are consistent with a regulation's mandatory directives").

Our approach has collapsed the *Gaubert* standard into an all-encompassing test that has no cognizable or meaningful line between policy judgments and non-deliberate decisions. As I have said before, this has caused our interpretation of the exception to be "unnecessarily broad" and inconsistent with our earliest discretionary-function exception cases. *See Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1171 (11th Cir. 2020) (Jordan, J., dissenting).

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Government employees are not automatons. *See Gaubert*, 499 U.S. at 325 n.7 ("There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish."). *See also* Bagby & Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability*, 30 Am. Bus. L.J. at 229 ("Most human activity exhibits varying levels of discretion interspersed with more routine or instinctive actions."). Thus, as we explained in an early FTCA case, "[m]ost conscious acts of any person whether he works for the government or not, involve choice." *Smith v. United States*, 375 F.2d 243, 246 (5th Cir. 1967). "Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions." *Id.*

Here is how we put it six decades ago: "If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist interpretation of *Dalehite*['s statement that "[w]here there is room for policy judgment and decision there is discretion[,]" 346 U.S. at 36,] and that interpretation is rejected by *Indian Towing* and especially by *Rayonier*." *Smith*, 375 F.2d at 246. *See also J.H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97, 99 (5th Cir. 1975) ("an absolutist interpretation of the discretionary function is improper"). Based on this reading of *Dalehite*, we repeatedly reiterated in early FTCA cases that "[i]t is not a sufficient defense for the government merely to point out that some decisionmaking power was exercised by the official whose act was questioned." *Smith*, 375 F.2d at 246. *See, e.g.*, *J.H. Rutter Rex Mfg. Co.*, 515 F.2d at 99 ("It is not sufficient for the government to demonstrate that some choice was involved in the decision-making process. That showing could be made in almost every case."); *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060, 1064 (11th Cir. 1985) ("For the government to show merely that some choice was involved in the decision-making process is insufficient to activate the discretionary function exception.").

Our earlier cases correctly reflect that the first prong of *Gaubert* must have some teeth even if the planning vs. operational distinction does not control. *See* 499 U.S. at 325–26. In other words, the clarification in *Gaubert* that the planning vs. operational dichotomy is not dispositive does not change that we are still bound by

our prior decisions. And those decisions shield actions based on conscious policy or plan development while permitting liability for acts taken to execute or implement a plan that are not policy judgments. *See, e.g.*, *Payton v. United States*, 679 F.2d 475, 482–83 (5th Cir. Unit B 1982) (en banc) (concluding "that the decision of the parole board to release a prisoner on parole and the determination of the terms of parole are discretionary functions," but "the decision of the prison medical board to examine allegedly insane prisoners is non-discretionary"); *Pigott v. United States*, 451 F.2d 574, 575 (5th Cir. 1971) (holding that "the kind of discretion exercised by the government in this case, involving decisions merely as to the day and hour of the [operation] and the amount of thrust . . . , is insufficient to insulate the defendant").

As we explained while sitting en banc, "the fact that the negligence may have occurred in connection with a discretionary function does not make the negligent act a discretionary function." *Payton*, 679 F.2d at 480 (quoting *Aretz v. United States*, 604 F.2d 417, 431 n.18 (5th Cir. 1979)). "Nor does the discretionary character of the government's initial undertakings govern whether a duty can arise out of those undertakings." *Id.* (alterations adopted). "Discretionary decision-making, then, is accompanied by nondiscretionary acts of execution, whether termed operational, ministerial, or clerical." *Id. Accord Xi*, 68 F.4th at 843 (Bibas, J., concurring) (positing that the "ordinary legal meaning of the phrase 'discretionary function' when the FTCA was enacted" in 1946 described "a public officer's immunity when sued for torts in his personal capacity" and categorized "certain kinds of government activities as either

'ministerial' or 'discretionary'") (quoting William L. Prosser, Handbook of the Law of Torts § 108, at 1075–79 (1941 ed.)).

In this case, for example, the site survey, the drive-by, the Operation Order, and the SWAT Addendum should be separated from the failures to check the street sign and the house number, or otherwise verify the address on the GPS. *See Smith*, 375 F.2d at 246 ("It must be remembered that the question at hand here is the nature and quality of the discretion involved in the acts complained of."). Once the tortious conduct is defined, I think it is worth considering whether the prescriptive source of law should be defined at a higher level. Why can't the first prong be as simple as deciding that the warrant and its legal force do not grant the SWAT team any discretion as to *where* to execute it? Or, alternatively, why can't we say it is obviously the government's policy to raid the correct house? As the court's opinion recognizes, *Mesa* answered this question regarding the "who" of the warrant. *See* 123 F.3d at 1439. To give any meaning to the *Mesa* panel's statement that its decision was narrow, *see id.* at 1437 n.3, we must address the sweeping breadth of our more recent interpretation of the *Gaubert* test.

The second prong of *Gaubert* fares no better in preventing an unconscious action from coming within the exception. We do not "inquire whether the employee *actually* weighed social, economic, and political policy considerations before acting." *Ochran v. United States*, 117 F.3d 495, 500 (11th Cir. 1997) (emphasis added). In a case like this one, where we are unfortunately bound by *Mesa*, we justify ex post facto Agent Guerra's conduct because the

decision not to check the street signs or the house number *could be* grounded in policy concerns, and not because Agent Guerra actually made a reasoned decision not to verify the address for safety or other reasons.

Importantly, the Supreme Court in *Gaubert* did not claim to overrule its earlier cases, such as *Dalehite*, on which our early FTCA cases were based. *See* 499 U.S. at 322–27. And we assume the Court does not overrule precedent "sub silentio." *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 18 (2000). For me, *Gaubert* clarified that the step in the decisionmaking process or the status of the decisionmaker do not control. *See* 499 U.S. at 325 ("A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. . . . Discretionary conduct is not confined to the policy or planning level."). *See also Cranford v. United States*, 466 F.3d 955, 959 (11th Cir. 2006) (declining to follow our cases that turned "*expressly* on the principle that 'operational' conduct falls outside the discretionary function exception") (emphasis added). *Gaubert* made clear that there are not shortcuts in the test. A policy judgment requires deliberate decisionmaking in an area where the actor had discretion to do so. *See Gaubert*, 499 U.S. at 322–23. *See also Berkovitz*, 486 U.S. at 537. On a blank slate, the SWAT's team negligent mistake—stopping too early in the neighborhood and failing to verify the address in any way—was just that: a heedless mistake, not a policy judgment concerning the safety, secrecy, or efficiency of the operation.

Therefore, in my view, there is line-drawing within the *Gaubert* framework that would benefit from this Court's en banc review. How can it be that the conduct here—which is essentially the equivalent of a government driver making a wrong turn onto a one-way street—is defeated by the discretionary-function exception because there is no "mandatory regulation or policy" dictating that a member of the SWAT team is required to check the street sign or the house number on the mailbox? *See Autery*, 992 F.2d at 1526. Must a government agency memorialize such a rudimentary requirement to raid the correct house? There must be a point between conscious decisionmaking and mistakenly raiding the wrong house based on a GPS-related mistake that would require us to reexamine the language of *Shivers* (and cases like it) and perhaps revisit *Mesa*.

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As Justice Sotomayor explained in her concurrence in this case, there remains an open question of whether the context of the passage of the law enforcement proviso amendment to the FTCA means that the discretionary-function exception should not be construed to cover wrong-house raids. *See Martin*, 605 U.S. at 420 (Sotomayor, J., concurring). That makes this case an exceptionally important vehicle to reexamine our discretionary-function exception jurisprudence.

"When Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Ross v. Blake*, 578 U.S. 632, 633 (2016) (internal quotation marks and

citation omitted and alteration adopted). As the court's opinion explains, Congress amended the FTCA in 1973 in direct response to the Collinsville wrong-house raids. *See* S. Rep. No. 93-588 (1973). Against the backdrop of the ambiguity of the discretionary function exception, I would, at least, consider the familiar facts of the Collinsville raids and the raid here. *See Martin*, 605 U.S. at 419 (Sotomayor, J., concurring).

I hope that, at some point, we will convene en banc to reexamine our discretionary-function exception jurisprudence. This case seems like a good vehicle in which to do so.