No. 09 -___

IN THE

Supreme Court of the United States

AYSHA NUDRAT UNUS AND HANAA UNUS,

Petitioners,

v.

ROGER AARONS ET AL.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Amendment categorically permit officers to detain occupants of a residence for several hours during the execution of a search warrant – without regard to the facts that the search is merely for financial records and that the individuals represent no threat but instead are dramatically outnumbered by the officers – as the Fourth Circuit held in conflict with the Ninth and Tenth Circuits?

2. When a claim against the United States under the Federal Tort Claims Act (FTCA) is dismissed, does the FTCA's judgment bar, 28 U.S.C. § 2676, require dismissal of independent claims against individual federal officials in the same complaint, as the Fourth Circuit held in conflict with the Ninth Circuit?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fourth Circuit.

Petitioners here and appellants below are Aysha Nudrat Unus and Hanaa Unus.

Respondents here and appellees below are Roger Aarons, Special Agent, DHS-ICE; Camille Barnett, Special Agent, DHS-ICE; Byron Braggs, Senior Special Agent, ICE; Jennifer Crandall, Special Agent, DHS-ICE; Francisco Gerardo, Special Agent, ICE; Antonio Gomez, Special Agent, IRS; Stasia A. McMahon, Special Agent, IRS; Elmer R. Mooring, Sr., Postal Inspector; Michael R. O'Hanlon, Special Agent, IRS; Kenneth W. Oland, Special Agent, IRS; United States of America; Michael J. Zens, Special Agent, United States Secret Service.

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Petitioners Aysha Nadrat Unus and Hanaa Unus respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 565 F.3d 103 (4th Cir. 2009). Petitioners' Appendix ("App.") A. The district court's relevant orders are unpublished. App. B.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2009. On July 27, 2009, Chief Justice

Roberts extended the time within which to file a petition for a writ of certiorari to and including September 3, 2009. App. 09A101. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment of the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const., amend IV.

The Federal Tort Claims Act provides, in relevant part: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

STATEMENT

Federal officers executed a search warrant upon petitioners' family residence, searching for financial records allegedly possessed by another family member. The officers detained petitioners, placed them in handcuffs, and held them for four hours. The Fourth Circuit held that petitioners' civil rights suit must be dismissed. Regarding petitioners' claim under the Fourth Amendment, the court of appeals held that officers are categorically permitted to detain residents in handcuffs during the course of

any search. According to the court of appeals, it made no difference to the "reasonableness" of the detention that the search was merely for financial records (rather than contraband) and that petitioners presented no danger. The Fourth Circuit further held that petitioners' distinct claim against individual officers must be dismissed under the judgment bar of the Federal Tort Claims Act (FTCA) because the court had sustained the dismissal of petitioners' distinct claim under the FTCA.

1. In early 2002, federal agents secured a warrant to search the residence of Dr. Iqbal Unus. The warrant application "swore that there was probable cause to believe that evidence of federal law violations would be found in the Unus residence in the form of [certain organizations'] financial records." App. 8a-9a. Those organizations were suspected of being a component of a supposed network of groups ultimately providing financial support for groups involved with international terrorism. App. 6a. All the members of the Unus family are United States citizens; none has a criminal record. App. 2a.

Eleven federal agents and three local police officers executed the warrant on March 20, 2002. Home at that time were Dr. Unus' wife and eighteen-year-old daughter, petitioners Aysha and Hanaa Unus. At 10:30 a.m., the agents began "pounding" on the front door of the Unus residence. App. 9a. After seeing a gun through the side window of the door, Aysha screamed for Hanaa, who was upstairs sleeping, and the two of them called 911 from the living room. App. 9a-10a. At this point, less than one

minute after the initial door-pounding, App. 27a, the officers broke through the front door with a battering ram and stormed in with guns drawn, App. 10a. One officer pointed his gun at Aysha and ordered her to drop the phone. App. 10a.

The agents handcuffed both Aysha and Hanaa behind their backs in the living room and kept both women handcuffed for approximately four hours while they searched the residence. App. 10a.

At that time, Aysha and Hanaa informed the agents that they were obligated to perform their ritual cleansing and afternoon prayers, in accordance with their Muslim faith. App. 10a. The agents permitted the women to pray, without handcuffs, but refused to let the women pray outside the presence of the male agents, and refused to let the women wear headscarves or cover their hands as required by their faith. App. 10a-11a. After petitioners prayed, the agents did not reapply the handcuffs, but they were confined to the living room for the remainder of the search, which concluded approximately one hour later. App. 11a.

At the conclusion of the search, the agents seized two computers and several boxes of documents. App. 11a. Neither the particular search of petitioners' residence nor the associated investigation resulted in any charges, and the government eventually returned most of the seized records. App. 11a n.8.

2. Petitioners and Dr. Unus subsequently filed this suit in the U.S. District Court for the Eastern

District of Virginia. As is relevant here, petitioners alleged a violation of their First and Fourth Amendment rights and sought damages from the individual officers under *Bivens v. Six Unknown Named Fed. Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Separately, petitioners brought claims against the United States pursuant to the FTCA, 28 U.S.C. § 2679(d)(1), for assault-and-battery, false imprisonment, and trespass.

The district court dismissed petitioners' Fourth Amendment claim against the federal agents, ruling that the agents were entitled to qualified immunity, App. 19a., and dismissed petitioners' First Amendment claim as moot, App. 21a. The district court entered summary judgment in favor of the United States on petitioners' FTCA claims. App. 20a-21a.

4. The Fourth Circuit affirmed the district court's judgment in relevant part.

With respect to petitioners' Fourth Amendment claim, the Fourth Circuit upheld the initial detention of petitioners, the officers' decision to place them in handcuffs, and the continued application of the handcuffs for four hours. According to the court of appeals, officers have a categorical right to initially detain occupants during the execution of any search warrant: "The federal agent defendants were executing a facially valid search warrant for the Unus residence, and the plaintiffs were—unfortunately for them—occupants of the residence at the time of the search." App. 30a-31a.

The Fourth Circuit concluded that the officers furthermore acted reasonably in placing petitioners in handcuffs. The court of appeals found it dispositive that "the agents did not know whether they would be confronted by resistance" and had "encountered hectic conditions," because "there was 'excitement' in the plaintiffs' voices, and the plaintiffs were 'clearly concerned and worried and agitated.'" App. 32a.

Finally, the Fourth Circuit held that the officers acted reasonably when they kept "the plaintiffs detained in handcuffs for nearly four hours." App. 32a. The court of appeals relied on the following testimony of the officer with control over petitioners' detention:

> [Agent] McMahon further explained that, after "things had calmed down a bit," she moved the handcuffs from the back to the front of the plaintiffs to make them more comfortable. At that point, however, McMahon explained that she "simply wasn't comfortable . . . going from cuffed to totally not cuffed." The agents reassessed the situation as the search progressed, however, entirely removing the handcuffs after the women performed their afternoon prayers. "It was a progression of just a general sense of we're progressing with the warrant," McMahon explained. "[I]t was just a different moment," McMahon recalled, "and I made a different decision [to remove the handcuffs]."

App. 32a-33a. (citations omitted, second and third alterations in original). Based on that testimony, the Fourth Circuit found it "clear that the federal agent defendants reasonably assessed the circumstances presented, balancing the law enforcement interest of safety—of both the agents and the plaintiffs—with the 'marginal intrusion' imposed on the plaintiffs." App. 33a.

The court of appeals further held that the United States was entitled to summary judgment on petitioners' remaining assault-and-battery and false imprisonment claims under the FTCA on the ground that the officers were entitled to forcibly enter the home and to draw weapons "in order to gain control of a fluid situation and ensure the safety of all involved." App. 28a.

On that basis, the court of appeals held that petitioners' *Bivens* claims asserting that the individual officers violated their First Amendment rights of religious freedom must be dismissed as well. According to the court of appeals, the FTCA's judgment bar, 28 U.S.C. § 2676, precluded petitioners from pursuing their *Bivens* claims against the federal agent defendants. *See* App. 36a. That statute provides: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. In the view of the Fourth Circuit, the bar is not limited to the preclusive effect of *prior* judgments dismissing FTCA claims, but

applies even when the FTCA claim is dismissed in the course of the *same* suit as the claim under *Bivens*. App. 35a-36a. The court of appeals accordingly held that petitioners could not pursue their claims that the individual officers had violated their First Amendment rights of religious freedom in refusing to allow them to conduct prayers free from interference – claims that petitioners notably could *not* have brought against the government itself because they have no common law analog and cannot be brought under the FTCA. *See* App. 36a.

REASONS FOR GRANTING THE WRIT

Both of the questions presented merit this Court's review. The Fourth Circuit's holding that officers acted reasonably under the Fourth Amendment in detaining petitioners, handcuffing them, and holding them in handcuffs for four hours despite any circumstances warranting those detentions conflicts with this Court's precedents and with uninterrupted lines of decisions from two other circuits. The Fourth Circuit's further holding that the dismissal of petitioners' common law FTCA claims against the United States required dismissal of petitioners' distinct constitutional tort claims against the individual officers for violating petitioners' right to freedom of religion is the subject of an acknowledged circuit split. Both questions recur frequently, and only this Court can bring needed uniformity to these important issues of federal law. Certiorari accordingly should be granted.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE FOURTH CIRCUIT'S HOLDING THAT OFFICERS EXECUTING A SEARCH WARRANT FOR FINANCIAL RECORDS MAY DETAIN IN HANDCUFFS FOR SEVERAL HOURS OCCUPANTS WHO PRESENT NO THREAT.

This Court has articulated clear limits on the power of police officers executing a search warrant to detain individuals, hold them in handcuffs, and continue the detention for several hours during a search. The Ninth and Tenth Circuits have faithfully applied this Court's precedents. The Fourth Circuit, by contrast, has abrogated those limits and created an unquestionable circuit conflict by holding that the detention in this case was reasonable under the Fourth Amendment. Because federal, state, and local officers execute hundreds of search warrants *every day*, it is difficult to imagine a question on which this Court's clear guidance is more important.

A. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

1. In *Michigan v. Summers*, 452 U.S. 692, 693 (1981), officers preparing to "execute a warrant to search a house for narcotics" encountered and detained one of the occupants for the duration of the search. This Court upheld the detention on the ground that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at

705. The Court reserved the question "whether the same result would be justified if the search warrant merely authorized a search for evidence." *Id.* at 705 n.20.

In *Muehler v. Mena*, 544 U.S. 93, 95 (2005), officers investigating "a gang-related, driveby shooting" executed a search warrant on the residence of a gang member to search for contraband, including "deadly weapons." The search carried a "high degree of risk," calling for the use of "a Special Weapons and Tactics (SWAT) team." *Id.* at 95-96. When the officers encountered four occupants (including the respondent), two officers detained them in handcuffs in a separate converted garage for two to three hours. *Id* at 96.

This Court first held that the initial detention of the respondent was justified on the basis of *Summers*, *supra*. When "executing a search warrant for contraband," the Court explained, "[a]n officer's authority to detain incident to a search is categorical." 544 U.S. at 98. "*Summers* makes clear that when a neutral magistrate has determined police have probable cause to believe contraband exists, '[t]he connection of an occupant to [a] home' alone 'justifies a detention of that occupant.'" *Id.* at 99 n.2 (quoting *Summers*, 452 U.S. at 703-04).

The Court then turned to the distinct question of whether the officers violated the Fourth Amendment by detaining the respondent with handcuffs, which had not occurred in *Summers*, and which "was undoubtedly a separate intrusion in addition to detention in the converted garage." 544 U.S. at 99.

The Court upheld the use of the handcuffs because "this was no ordinary search": the warrant "authorize[d] a search for weapons and a wanted gang member reside[d] on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants." *Id.* at 100.

Finally, the Court addressed the justification for continuing the use of handcuffs for two to three hours. The Court found that extended period justified because "this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons." *Id.* at 100.

Justice Kennedy – who provided a fifth vote for the Court's opinion – deemed it "important" to write separately "to help ensure that police handcuffing during searches becomes neither routine nor unduly prolonged." *Id.* at 102. In his view, the reasonableness requirement of the Fourth Amendment calls for handcuffs to "be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers' safety or risk interference or substantial delay in the execution of the search." *Id.* at 103.

Justice Kennedy used the facts of the detention in *Muehler* to illustrate the reasonableness inquiry: "The time spent in the search here, some two to three hours, certainly approaches, and may well exceed, the time beyond which a detainee's Fourth Amendment interests require revisiting the necessity of handcuffing in order to ensure the restraint, even

if permissible as an initial matter, has not become excessive." 544 U.S. at 103. But Justice Kennedy found dispositive that "during much of this search 2 armed officers were available to watch over the 4 unarmed detainees," such that "[w]here the detainees outnumber those supervising them, and this situation could not be remedied without diverting officers from an extensive, complex, and time-consuming search, the continued use of handcuffs after the initial sweep may be justified." *Id.*

2. The ruling below cannot be reconciled with this Court's decisions in *Summers* and *Muehler*. The officers' conduct violated the Fourth Amendment at every turn, from the initial detention of petitioners, to the application of handcuffs, to the continued detention in handcuffs for four hours.

The search in this case involved neither contraband nor any danger to the officers. The search warrant sought only financial records. The fourteen officers had no reason whatsoever to anticipate that the scene would be remotely dangerous or to believe that petitioners had committed a crime. They instead encountered two women who presented no threat. Indeed, when the agents broke down their door, petitioners were anxiously calling *the police*, obviously believing that they were the victims of an armed home invasion.

The Fourth Circuit nonetheless upheld the initial detention as a matter of law – without regard to the circumstances – on the ground that respondents "were executing a facially valid search warrant for the Unus residence, and the plaintiffs were—

unfortunately for them—occupants of the residence at the time of the search." App. 30a-31a. This Court, by contrast, has carefully cabined the authority to detain occupants to the distinct circumstance in which officers are executing "a warrant to search for contraband," as opposed to instances (such as this case) in which "the search warrant merely authorized a search for evidence." *Summers*, 452 U.S. at 705 & n.20. The "categorical" authority to detain the occupants of a residence that the Fourth Circuit adopted here is in fact limited to "a search warrant for contraband." *Muehler*, 544 U.S. at 98.

The court of appeals specifically rejected petitioners' submission that this Court in *Summers* and *Muehler*, had authorized detention and continued handcuffing of residents only in the context of searches for contraband, whereas here officers "were searching for financial documents only—and not for either weapons or persons." App. 31a. "We see this as a distinction without a difference, however, as the rationale underlying *Summers* and *Muehler* applies equally to situations where agents are seeking evidence of federal crimes." App. 29a n.22.

The conflict between the ruling below and this Court's precedents extends to the Fourth Circuit's further holding that it was reasonable under the Fourth Amendment for the officers to place petitioners in handcuffs. Petitioners did not resist being detained by the officers in any respect and, as noted, presented no threat of any sort. The Fourth Circuit nonetheless held that the officers' conduct was reasonable because "the agents did not know

whether they would be confronted by resistance" and "there was 'excitement' in the plaintiffs' voices, and the plaintiffs were 'clearly concerned and worried and agitated.'" App. 32a. None of those circumstances materially differentiate this search from almost any other or limit the sweep of the court of appeals' ruling. Resistance is *conceivable* whenever any search warrant is executed, and it is all but inevitable that residents who see unknown men with guns drawn and who batter down their front door will be "worried and agitated." As the court of appeals acknowledged, the entry of the officers would have "been a harrowing experience" for anyone in petitioners' circumstances. App. 28a.

In stark contrast to the Fourth Circuit's holding that such circumstances always authorize the detention of residents in handcuffs, this Court has held that such a restraint is reasonable only in "inherently dangerous situations" in order to "minimize[] the risk of harm to both officers and occupants." *Muehler*, 544 U.S. at 100. This search for financial records and the detention of two innocent women who obviously presented no threat could not be further apart from the search in *Muehler* for "deadly weapons" in the home of a known gang member. *Id.* at 95.

Finally, the conflict between the ruling below and this Court's decisions is most stark with respect to the Fourth Circuit's holding that the agents acted reasonably in continuing to detain petitioners in handcuffs for *four hours*, despite the agents' overwhelming numerical superiority and the absence of any objective indication at all that the use of

handcuffs remained necessary. The court of appeals found that detention reasonable merely because the agent in charge of the scene, *subjectively*, simply "wasn't comfortable" with removing the handcuffs, App. 33a, and only later "made a different decision," *id.* The agents' assessment changed not because of a determination that petitioners had once been a threat but no longer were, but instead "just a general sense of we're progressing with the warrant." App. 32a-33a.

The Fourth Circuit's ruling is utterly irreconcilable with this Court's decision in *Muehler*. In that case, this Court found it critical that the officers were faced with "no ordinary search," but instead critically were looking for deadly weapons in the home of a gang member and the detained individuals outnumbered the officers under their supervision. 544 U.S. at 100. Justice Kennedy took care to write separately to reiterate that it was essential to the Court's ruling sustaining the shorter detention in *Muehler* that "the detainees outnumber[ed] those supervising them." *Id.* at 103.

Here, by contrast, the Fourth Circuit upheld the continued detention of petitioners in handcuffs despite the absence of *any* objective justification. The court of appeals merely accepted the individual officer's subjective assessment – relating only to her "comfort[]" rather than the standards of the Constitution – as the measure of reasonableness. Notwithstanding that the district court record showed that the officers "were not subjectively concerned about the Unus residence being connected to terrorism-related activity, and that they did not

anticipate that the residence might house weapons or dangerous persons," App. 23a, the court of appeals went so far as to hold that "there is no genuine issue of material fact," such that respondents were entitled to summary judgment. App. 33a.

B. THE RULING BELOW SQUARELY CONFLICTS WITH THE PRECEDENT OF THE NINTH AND TENTH CIRCUITS.

Certiorari is also warranted to resolve the clear conflict between the precedent of the Fourth Circuit and contrary decisions of the Ninth and Tenth Circuits. The decision below extends prior Fourth Circuit precedent reading this Court's decisions in *Summers* and *Muehler* to broadly authorize officers to detain residents in handcuffs during searches for contraband. In *Mazuz v. Maryland*, 442 F.3d 217, 230 (4th Cir. 2006), that Court held in a case involving a search for contraband that detention is authorized whenever "a warrant authorizes a law enforcement officer to enter a premises to conduct a search," including with "the use of handcuffs."

The Fourth Circuit's ruling that the detention, initial handcuffing, and prolonged handcuffing of petitioners was reasonable under the Fourth Amendment conflicts with a line of Ninth Circuit decisions. In *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), agents detained a resident for several hours in the course of executing a warrant for financial records. The Ninth Circuit explained that such a detention "must be 'carefully tailored' to the law enforcement interests that, according to the

Summers line of cases, justify detention while a search warrant is being executed." *Id.* at 1061-62. The court concluded that "[b]ecause handcuffing 'substantially aggravates the intrusiveness of a detention, it follows" that "[m]ore is required" to "justify a detention by handcuffing." *Id.* at 1063. Because the case came before the court on the understanding that the agents "had no reason to believe that the occupants were dangerous" or were "a serious impediment to the search or a threat," the court held that the agents were "not justified in detaining [the plaintiff] in handcuffs" during the search. *Id.*

Subsequently, in *Tekle v. United States*, 511 F.3d 839 (9th Cir. 2006), the court held that officers violated the Fourth Amendment by detaining an occupant in handcuffs for roughly twenty minutes while executing an arrest warrant. The court reaffirmed its ruling in *Meredith*, *supra*, as well as its prior holding that in executing a warrant "[p]olice do not . . . have unfettered authority to detain a building's occupants in any way they see fit." *Id.* at 848 (quoting *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006)). The Ninth Circuit reasoned that this Court's decision in *Muehler* authorizing the use of handcuffs turned on the "inherently dangerous" situation of a search for weapons. *Id.* at 849. While also noting that the plaintiff was a minor, the court held the detention unlawful because "law enforcement personnel vastly outnumbered [the plaintiff], more than twenty to one. It was apparent at the time that he was not the subject of the arrest warrant. Nor was there a

suspicion that there were deadly weapons and a gang member thought to be 'armed and dangerous' on the premises." *Id.* at 849-50. *See also Baldwin v. Placer County*, 418 F.3d 966, 970 (9th Cir. 2005) ("The governmental interests in using handcuffs are at their maximum when 'a warrant authorizes a search for weapons and a wanted gang member resides on the premise.' Conversely, governmental interests are at a minimum when the searches assert no belief that weapons will be found and no belief other than that the occupants of a house are a practicing dentist and his wife." (quoting *Muehler*, 544 U.S. at 100)).

The Ninth Circuit's established rule that officers may only handcuff occupants when executing a warrant that presents distinctly dangerous circumstances is illustrated by district court rulings in that circuit. In *Hepner v. Balaam*, No. 3:03-CV-0681-RAM, 2007 U.S. Dist. LEXIS 50495, at *9 (D. Nev. July 10, 2007), the court recognized that under the Ninth Circuit's ruling in *Erath*, as well as this Court's decision in *Muehler*, "where law enforcement have no reason to believe that the occupants were dangerous, use of handcuff[s] is not permitted." The court accordingly held that officers were not entitled to summary judgment on the occupants' Fourth Amendment claims, particularly given that "many law enforcement personnel were present during each search." *Id. See also Davage v. City of Eugene*, Civ. No. 04-6321-HO, 2007 U.S. Dist. LEXIS 50337, at *63-*64 (D. Or. July 6, 2007).

The Fourth Circuit's sweeping view of the reasonableness of such conduct equally with an uninterrupted line of precedent from the Tenth

Circuit. In *United States v. Ritchie*, 35 F.3d 1477 (10th Cir. 1994), officers detained the defendant for roughly ten minutes (not in handcuffs) while they searched his property for the proceeds of an armed robbery he was suspected of conducting just the day before. The Tenth Circuit held that, under *Summers*, "the 'police may always detain persons found at the premises named in a search warrant, *provided* (i) the warrant authorizes a 'search for contraband' and (ii) the persons detained are 'occupants.'" 35 F.3d at 1482 (quoting W. LaFave, Search & Seizure 4.9(e), at 309 (2d ed. 1987) (emphasis added and omitted)).

The Tenth Circuit subsequently reaffirmed the limits on police authority to detain residents in the wake of this Court's decision in *Muehler*. In *Denver Justice and Peace Committee v. City of Golden*, 405 F.3d 923, 929 (10th Cir. 2005), the Tenth Circuit explained that *Muehler* reaffirmed the principle that "police officers have a 'categorical' authority to ***detain*** persons found on premises subject to a lawful search warrant for 'contraband' materials" (emphasis in original). Thus, *Muehler* "reiterated the restriction of police officers' authority to detain occupants to the case 'when a neutral magistrate has determined police have probable cause to believe contraband exists.'" *Id.* at 931 (quoting *Muehler*, 544 U.S. at 99 n.2). The Tenth Circuit rejected the argument that *Muehler* broadly authorized officers to detain and frisk occupants during the course of any valid search. Although *Muehler* had deemed it reasonable to handcuff the occupants of the residence on the facts of that case, the Tenth Circuit recognized that this Court "stressed that these extreme measures were

justified by the circumstances in *Muehler*" and "articulated *narrow* grounds that permit police officers to detain individuals who are present during the execution of a search warrant, without running afoul of the Fourth Amendment." *Id.* at 931-32 (emphasis added).

Subsequently, the Tenth Circuit sustained the detention of individuals in handcuffs, but strictly limited its ruling to searches for contraband that present dangerous circumstances. "[T]he use of handcuffs to effectuate such a detention is proper when the search involves an inherent risk to officer safety." *United States v. Glover*, 211 Fed. Appx. 811, 813 (10th Cir. 2007) (citing *Muehler*, *supra*). "In this case, officers were authorized to search for both drugs and guns in a residence where drug-dealing had occurred and which was occupied by a twice-convicted drug dealer. They were confronted with multiple occupants. As in *Muehler*, the use of handcuffs in this situation was objectively reasonable because their use minimized the safety risk to officers and others." *Id.* Similarly, in *United States v. Castro-Portillo*, 211 Fed. Appx. 715, 722-23 (10th Cir. 2007), the Court held that handcuffing was authorized pursuant to a search under a "warrant for contraband and weapons," because "where a search warrant authorizes a search for weapons, an 'inherently dangerous situation arises.'" And *Wright v. City of St. Francis*, 95 Fed. Appx. 915, 925 (10th Cir. 2004), held that "police officers may apply handcuffs to those who are present during a search if they have 'good reason to fear violence or destruction

of evidence,'" though even in that circumstance the officers must specially justify a "prolonged" detention.

In contrast to the Fourth Circuit's ruling holding that respondents acted reasonably, the Ninth and Tenth Circuits would have held that petitioners stated a claim under the Fourth Amendment. In conflict with the Tenth Circuit, the court of appeals in this case held that it made no difference that the officers were executing a warrant seeking financial records, as opposed to contraband. In further conflict with both the Ninth and Tenth Circuits, the Fourth Circuit held that the initial and prolonged handcuffing of petitioners was justified despite the absence of any objectively reasonable reason to believe that the officers (who dramatically outnumbered petitioners) faced a dangerous situation. This Court's intervention is warranted to resolve the conflict.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT OVER WHETHER THE DISMISSAL OF AN FTCA CLAIM REQUIRES DISMISSAL OF SEPARATE CLAIMS AGAINST INDIVIDUAL FEDERAL OFFICERS IN THE SAME ACTION.

Petitioners' complaint asserts common law claims against the United States for assault and battery and false imprisonment under the Federal Tort Claims Act, as well as separate claims against individual federal agents under *Bivens v. Six Unknown Named Federal Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Fourth Circuit held that the

district court properly dismissed the FTCA claims. It then held that dismissal of the separate and distinct *Bivens* claim alleging that the individual officers violated petitioners' right to religious freedom was required by the FTCA's judgment bar. App. 36a. That statute provides: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

The Fourth Circuit's holding that the FTCA's judgment bar applies to the dismissal of individual claims in the *same* suit – and is not limited to the dismissal of FTCA claims in a separate action – is consistent with the precedent of three other circuits. *See Harris v. United States*, 422 F.3d 322, 336 (6th Cir. 2005); *Manning v. United States*, 546 F.3d 430, 438 (7th Cir. 2008); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir. 2005).

But those decisions conflict with the precedent of the Ninth Circuit. In *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992), as in this case, the plaintiff's complaint asserts claims under the FTCA and *Bivens*. The Ninth Circuit rejected the argument that dismissal of the FTCA claim triggered the judgment bar as to the individual *Bivens* claims in the same case. The court of appeals explained that the text of the judgment bar "fails to resolve the question of whether the bar applies to other claims raised in the same action," *id.* at 838, and concluded that the better reading of the statute as a whole was

that congress enacted Section 2676 to (i) "prevent multiple lawsuits on the same facts" and (ii) "preclude dual recovery against the government and its employees." *Id.* Therefore, because the plaintiff brought her *Bivens* claim and FTCA claim in the same lawsuit and there was "no threat of dual recovery . . . because Kreines did not prevail on her FTCA claim," *id.*, the court held that judgment on the FTCA claim did not preclude Kreines from recovering under *Bivens*. *See also Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (declining to extend *Kreines* to cases where a *Bivens* claim is brought *subsequent* to judgment on an FTCA claim, but reiterating that "an FTCA judgment in favor of the government [does] not bar the Bivens claim when the judgments are 'contemporaneous' and part of the same action."). District courts in the Ninth Circuit accordingly consistently allow plaintiffs to pursue a *Bivens* claim where the court has entered judgment on a contemporaneous FTCA claim. *See, e.g.*, *Kyei v. Beebe*, No. CV 01-1266-PA, 2005 WL 3050442, at *1-*2 (D. Or. Nov. 13, 2005) (holding that, under *Kreines*, plaintiff's *Bivens* claim was not barred by the dismissal of his contemporaneous FTCA claim); *Palma v. Dent*, No. C 06-6151 PJH, 2007 WL 2023517, at *5 (N.D. Cal. July 12, 2007) (same).

The Fourth Circuit was mistaken in citing *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987), as supporting its position. *See* App. 35a. In *Arevalo*, the Ninth Circuit held that the judgment bar applied when the plaintiff *prevailed* in his FTCA claim against the United States. Subsequently, in *Kreines*, in which the plaintiff's FTCA claim was dismissed,

the Ninth Circuit specifically distinguished *Arevalo* on that basis. "In *Arevalo*, we barred a contemporaneous *Bivens* judgment against a federal employee because the plaintiff prevailed on his FTCA claim against the government. We thereby read § 2676 to preclude dual recovery against the government and its employees." 959 F.2d at 838. The Ninth Circuit held that the rationale of *Arevalo* did not apply when, as in this case, "[t]here is no threat of dual recovery." *Id.*

The conflict is mature and widely acknowledged. The Sixth and Seventh Circuits expressly rejected the Ninth Circuit's holding in *Kreines* and found that the judgment bar applies to contemporaneous *Bivens* claims regardless of who prevails on the FTCA claim. *See Harris v. United States*, 422 F.3d at 335-36; *Manning v. United States*, 546 F.3d at 437. Similarly, the Tenth Circuit has implicitly rejected *Kreines* by holding that the judgment bar applies regardless of who prevails on the FTCA claim. *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d at 858.

This case perfectly illustrates the obvious error in the Fourth Circuit's construction of the FTCA's judgment bar. Petitioners' common law claims against the United States are entirely distinct from their First Amendment claims against the individual federal officers. The claims involve different facts and seek different relief. Petitioners *could not* have brought their religious discrimination claims against the United States under the FTCA. Yet, despite the absence of any concern that petitioners were

instituting successive litigation, the court of appeals held that the dismissal of petitioners' FTCA claims illogically barred them from pursuing a wholly different, meritorious claim that the federal officers violated petitioners' rights of religious freedom. Congress could not have intended that result.

In the Ninth Circuit, petitioners would have been entitled to pursue their separate claim under *Bivens* that the individual federal officers violated petitioners' rights by refusing to permit them to conduct their prayers free from interference. This Court should grant certiorari to resolve that conflict.

III. THE PROFOUND IMPORTANCE OF THE QUESTIONS PRESENTED CANNOT BE DISPUTED.

This Court should intervene to resolve the square conflicts between the ruling below and the precedents of this Court and other circuits. The first question presented is implicated during the execution of most of the hundreds (if not thousands) of search warrants that federal, state, and local officers execute every single day around the nation. It is essential that law enforcement authorities have clear guidance regarding whether they are permitted to detain individuals they encounter in executing warrants, under what conditions, and for what period of time. The present significant uncertainty regarding the reasonableness of such detention can only be resolved through a ruling by this Court elaborating on its prior decisions in *Summers* and *Muehler*.

This case is an ideal vehicle in which to decide the question presented. *Muehler*, in particular, involved the inherently dangerous situation of two officers outnumbered by detainees during the course of a search for deadly weapons in the home of a known gang member. The Fourth Circuit paid no heed to the careful limits of the Court's decision, and the separate concurrence of Justice Kennedy, but instead broadly authorized the hours-long handcuffed detention of innocent individuals who presented no threat. This case thus presents an excellent counterpoint to the dangerous circumstances faced by the agents in *Muehler*. The two cases in combination will provide law enforcement agencies with significant guidance on permissible police practices in these frequently recurring circumstances.

The importance of the second question presented is equally obvious. It is commonplace for civil rights plaintiffs to set forth in their complaints a claim against the United States under the FTCA, as well as separate claims against individual federal officers. Frequently, the FTCA claim is dismissed under one of the many defenses available to the government under the statute. The question whether the FTCA's judgment bar cuts off valid claims against the individual defendants necessarily arises in such a case. Given the Ninth Circuit's longstanding holding that the judgment bar does not apply in those recurring circumstances – dating to that Court's 1992 decision in *Kreines* – only this Court can bring needed uniformity to federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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