ORAL ARGUMENT IS NOT REQUESTED

No. 16-4059

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ESTATE OF JAMES D. REDD, ET AL.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs have not requested oral argument. The government agrees that oral argument is not necessary in this appeal, because the issues are straightforward and fully presented in the briefs. However, the government stands ready to present oral argument if the Court concludes that argument would be helpful.

STATEMENT OF PRIOR OR RELATED APPEALS

Redd v. Love, No. 16-4010 (10th Cir.), a *Bivens* action against Bureau of Land Management Agent Daniel Love in his individual capacity, arises out of the same events as this appeal. This Court denied plaintiffs' motion to consolidate *Redd v. Love* with this appeal on June 13, 2016. *Redd v. Love* is fully briefed and scheduled for oral argument on September 20, 2016.

INTRODUCTION

This Federal Tort Claims Act (FTCA) case arises out of a multi-year joint investigation by the Federal Bureau of Investigation (FBI) and the Bureau of Land Management (BLM) of a large network of illegal traffickers of Native American artifacts in the Four Corners Region. After a federal grand jury indicted Dr. James Redd and his wife, Jeanne Redd, on charges including theft of tribal property, federal personnel arrested the Redds and searched their large home, ultimately identifying more than 800 artifacts. Plaintiffs assert that the United States is liable in tort because government employees allocated too many, and inappropriately attired, personnel to conduct the arrests and search. Plaintiffs also allege that government employees misrepresented the value of a pendant identified in a charge on which James Redd and Jeanne Redd were jointly indicted, and to which Jeanne Redd pleaded guilty.

The district court correctly dismissed plaintiffs' claims under the discretionary function exception to the FTCA, which bars suit when the conduct at issue involves an element of judgment or choice and when the challenged actions are susceptible to policy analysis. It is not controverted here that the conduct of a law enforcement investigation and the decision to seek an indictment are imbued with the type of policy concerns that are protected by the discretionary function exception. It is also established that decisions about how best to effectuate warrants are fundamentally rooted in policy considerations. In urging that the discretionary function is nevertheless inapplicable to their claims, plaintiffs assert that the government's

conduct did not involve a permissible exercise of discretion in two respects. Their overarching theory is that the manner in which the warrants were executed contravenes constitutional standards and thus falls outside the scope of the discretionary function exception. They also contend that the government had no discretion to seek a felony indictment, rather than misdemeanor charges, against James Redd and Jeanne Redd with respect to the pendant because agents were allegedly aware that the pendant was worth less than $1000.

The district court properly rejected each of these assertions. The execution of the warrants did not violate any constitutional standard, much less a clearly established constitutional norm that prescribed a specific course of conduct. Plaintiffs have not cited any source of federal law clearly establishing that the Fourth Amendment curtails the number or attire of personnel that may participate in arrests and searches. Indeed, courts have upheld decisions to assign a large number of personnel to execute warrants in a range of circumstances. With respect to plaintiffs' allegations about the pendant, plaintiffs offer only conclusory assertions about the government's alleged misconduct, and those assertions are directly at odds with plaintiff Jeanne Redd's plea of guilty to a charge involving the same pendant and the same value. In any event, it would be anomalous to allow plaintiffs to challenge the validity of Jeanne Redd's criminal conviction through a civil tort suit.

STATEMENT OF JURISDICTION

Plaintiffs assert tort claims against the United States under the Federal Tort

Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1346(b). The district court dismissed some of plaintiffs' claims on June 26, 2012. The court dismissed plaintiffs' remaining claims on March 15, 2016, and entered final judgment on March 25, 2016. Plaintiffs filed a timely notice of appeal on April 22, 2016, and an amended notice of appeal on May 3, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the discretionary function exception is inapplicable to plaintiffs' claims, because the number and attire of personnel involved in executing warrants at the Redds' home allegedly violated clearly established constitutional restrictions, or because government employees allegedly overvalued a pendant identified in a charge on which James Redd and Jeanne Redd were jointly indicted, and to which Jeanne Redd pleaded guilty.

STATEMENT OF THE CASE

A. The Federal Tort Claims Act.

The FTCA waives the sovereign immunity of the United States and creates a statutory cause of action for certain tort claims against the United States. 28 U.S.C. §§ 1346(b)(1), 2671-2680. The United States may be liable for torts caused by employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.* § 1346(b)(1).

That waiver of immunity is limited by several exceptions, including an exception preserving the United States' immunity from suit as to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary-function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

B. Factual Background.

1. In October 2006, the Bureau of Land Management ("BLM") and the Federal Bureau of Investigation ("FBI") began an investigation known as "Operation Cerberus." JA226 ¶ 7. The investigation revealed "a large network of illegal traffickers of Native American artifacts in Southern Utah and the Four Corners Region." JA203 ¶ 2. The agencies focused their efforts on subjects in "three categories: excavators, dealers, and super collectors," because each one of these groups serves a "unique" and "equally * * * damaging" role in establishing criminal networks and illegal markets for looted artifacts. JA452. Over the course of the lengthy investigation, "undercover sources * * * purchased 258 illegal artifacts from 48 subjects, totaling $335,685.00 in illegally purchased evidence." JA451.

As a result of the investigation, a federal grand jury indicted twenty-four individuals. JA237 ¶ 13. James Redd and his wife, Jeanne Redd, were indicted on felony charges. *See* Superseding Indictment, *United States v. Redd*, No. 2:09-cr-00044-CW (D. Utah May 27, 2009), ECF No. 4 (Indictment). Count 4 of the indictment charged James Redd and Jeanne Redd jointly of "receiv[ing], conceal[ing], and

retain[ing]" an "effigy bird pendant" "belonging to an Indian tribal organization, with a value of more than $1,000 * * * knowing such property to have been embezzled, stolen, or converted," in violation of 18 U.S.C. § 1163. *Id.* at 2. The remaining six counts of the indictment charged Jeanne Redd with crimes involving different artifacts ranging in value from more than $500 to over $1000, in violation of 16 U.S.C. § 470ee, 18 U.S.C. § 641, and 18 U.S.C. § 1163. *Id.* at 1-3.

A magistrate judge issued nineteen arrest warrants and twelve search warrants for people and places in Southern Utah, including the Redds and the Redds' home. JA203 ¶ 3. The agencies decided that it would be "necessary to execute search warrants fairly simultaneously because of the nature of this illegal network," reasoning that "[i]n the past when search warrants have been served in this community, valuable evidence was lost because subjects received advance warning of impending search warrants." JA453.

The total number of personnel initially assigned to carry out warrants at any location ranged from eight to twenty-one. JA228 ¶ 19. The agencies assigned personnel to arrest warrant locations based on factors such as the location's physical characteristics, whether adults, children, dogs, guns, or barricades might be present, and the criminal backgrounds of the warrant subjects. *See, e.g.*, JA426-432; JA459 (setting out this information about the Redds). At search warrant locations, the agencies assigned personnel "to catalog all the suspect items by photographing and recording each item in an evidence log." JA453; *see also* JA227-228 ¶¶ 13-15

(declaration of Gregory Bretzing, Assistant Special Agent in Charge of FBI's Salt Lake City Division at the time of the arrests). Expecting to find large volumes of artifacts, the agencies planned that personnel would "be reassigned to help * * * where needed" as personnel completed their tasks at their initial assignment locations, *see* JA449, to "ensure" that evidence could be "properly seized" and catalog artifacts not immediately seized. JA452-453. The agencies directed law enforcement officers to wear bullet-proof vests and carried side-arms, as both agencies' policies require. *See* JA214-215 ¶¶ 66-69.

2. Federal personnel executed all of the Operation Cerberus warrants virtually simultaneously on June 10, 2009. *See* JA203-204 ¶¶ 3-5. A team of twelve law enforcement officers and an unarmed cultural specialist arrived at the Redds' home at 6:40 a.m. JA207 ¶ 20. Four law enforcement officers wearing bullet-proof vests and carrying side-arms knocked on the front door and announced their presence. JA208 ¶ 23; *see* JA214-215 ¶¶ 66-69. Jeanne Redd answered the door and was arrested without incident. JA208 ¶ 24. James Redd returned home at about 6:55 a.m. and was arrested in the driveway without incident. JA208-209 ¶¶ 29-31. After being advised of his rights and consenting in writing to answer questions without a lawyer present, JA526, James Redd spoke with personnel in the garage of the home until about 9:30 a.m. JA209 ¶¶ 32-35.

Meanwhile, "[b]y about 8:00am, it had become apparent" that "additional federal personnel" were needed to conduct the search of the large home. JA230 ¶ 33;

JA523. Agents discovered artifacts and other potential evidence of criminal activity "in stacks behind furniture, inside of drawers, inside house plants, and stowed in virtually every corner of the large home, as well as scattered throughout the exterior areas within aspects of the landscaping." JA230 ¶ 32. Documenting this evidence "was a time consuming and painstaking process." JA240 ¶ 35 (declaration of Emily Palus, BLM Deputy Division Chief, Cultural, Paleontological Resources and Tribal Consultation). "All of the artifacts at the Redd home required special handling in order to complete the inventory and photography." JA240 ¶ 33. The artifacts ranged in age from "100 to over 1,000 years old." *Ibid.* Many of the artifacts "were fragile and valuable." JA231 ¶ 35. Some artifacts had "especially great delicacy and cultural significance," including a "cradleboard * * * taken from a child's burial site," an Apache Gan mask, and human remains. JA240 ¶ 36. Artifacts "likely from burial contexts" required handling with particularly "great care and respect." *See* JA240 ¶ 35.

Agents transported James Redd from the home by 10:34 a.m. JA209 ¶ 36. Sixteen federal personnel were present at that time. JA210 ¶ 39; JA558. Between 6:40 a.m. and 10:34 a.m., a total of twenty-two federal personnel visited the home; six remained fewer than fifteen minutes. JA209 ¶¶ 37-38; JA553. Personnel were present at the Redds' home until 5:34 p.m. JA574. Fifty-three personnel, including seven unarmed cultural specialists, visited the home at various times over the course of the day. JA231 ¶¶ 36-37. "[M]ore than 800 artifacts were ultimately seized and inventoried" from the home. JA212 ¶ 57; *see also* JA250-276 (812-item bill of

particulars for forfeiture of property).

On June 11, 2009, James Redd committed suicide. The following month, Jeanne Redd pleaded guilty to all seven counts in the indictment, including the charge of theft of a pendant on which she and James Redd were indicted jointly. Statement by Defendant in Advance of Plea of Guilty, *United States v. Redd*, No. 2:09-cr-00044-CW (D. Utah July 5, 2009), ECF No. 31 (Jeanne Redd Statement). Jeanne Redd's signed plea agreement avers that she "possessed and displayed" the pendant to a confidential source and knew "that the pendant was taken without legal authority from the Navajo Indian Reservation, from a location known as Black Mesa, near Kayenta, Arizona." *Id.* at 4. Jeanne Redd's statement also attests, "I acknowledge that the pendant is valued in excess of $1000." *Ibid.*

Based on evidence recovered from the Redds' home, the government also charged Jericca Redd, the Redds' adult daughter. In September 2009, Jericca Redd pleaded guilty to one charge of theft of tribal property and two counts of unlawful excavation and transportation of archaeological artifacts, in violation of 18 U.S.C. § 1163 and 16 U.S.C. § 470ee. JA285-291.

C. Prior Proceedings.

Plaintiffs in this action under the FTCA are Jeanne Redd, individually and as the personal representative of James Redd's estate, and several of James Redd's children, individually and as heirs of their father. The complaint asserts that the United States is liable to the estate for damages based on claims of negligence,

malicious prosecution, abuse of process, false arrest, false imprisonment, and intentional infliction of emotional distress. The complaint also asserts that the United States is liable to members of James Redd's family for wrongful death. Plaintiffs separately brought a *Bivens* action against BLM Agent Daniel Love. The district court dismissed these claims, ruling that Agent Love was entitled to qualified immunity. *Estate of Redd v. Love*, No. 2:11-cv-00478, 2015 WL 8665348, at *14 (D. Utah Dec. 11, 2015). The appeal in that case, *Redd v. Love*, No. 16-4010, is scheduled for oral argument on September 20, 2016.

The United States moved to dismiss the complaint, urging that plaintiffs' challenge is barred by the FTCA's discretionary function exception. Plaintiffs contended that their suit does not implicate protected discretionary activities for two principal reasons. Arguing that the discretionary function exception does not protect unconstitutional conduct, they alleged that the government used excessive force against James Redd by sending personnel in "paramilitary" attire to the Redds' home and assigning "approximately 80 agents" to the home "at any one point in time" and "approximately 140 different agents" over the entire day. *See* JA20 ¶ 40; JA21 ¶ 54. Plaintiffs also argued that government employees lacked discretion to make alleged misrepresentations regarding the value of the pendant identified in the joint charge against James Redd and Jeanne Redd, claiming that government employees "deliberate[ly] and reckless[ly] misrepresent[ed]" the value of the pendant with the "purpose of having Count 4" of the indictment "allege a felony." JA28 ¶¶ 103-104.

On June 26, 2012, the district court granted in part and denied in part the government's motion to dismiss the complaint. JA115-137. The court first ruled that the discretionary function exception barred plaintiffs' claims based on the value of the pendant. The court observed that Jeanne Redd's written plea agreement "acknowledge[d]" that the pendant involved in Count 4, on which James Redd was jointly indicted, "is valued in excess of $1000." Jeanne Redd Statement at 4. Concluding that it could not "ignore the reliability of such a statement," the court dismissed the claims relying on assertions about the pendant's value. JA128.

The court declined to dismiss plaintiffs' claims concerning the number and attire of the personnel assigned to execute the arrest and search warrants. JA130-131. The court stated that, "[a]ccepting as true Plaintiffs' allegation that 100 plus heavily armed officers were sent to arrest Dr. Redd and search his home," it was "not clear" whether that allocation was "justified" and thus, that the decision was not discretionary. JA130. The district court based this conclusion on its understanding of *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179 (10th Cir. 2001), in which this Court concluded that "SWAT" officers acted unconstitutionally in "continuing to hold * * * children directly at gunpoint after the officers had gained complete control of the situation." *Id.* at 1193. The district court believed that *Overdorff* supported a finding that the allocation and attire of personnel here "was potentially unreasonable," JA1043, because "[t]hough *Overdorff]* does not state how many SWAT team members were present, it is unlikely that the number approached anything close to the 100 plus

officers alleged to have been present" at the Redds' home. JA130.

On March 15, 2016, after extensive discovery and pretrial proceedings, the district court granted the government's motion for summary judgment. JA1043-1058. Although plaintiffs' summary judgment opposition claimed that at least fifty agents had been present at the Redd home, JA1054, the court concluded that, "viewing the evidence in a light most favorable to Plaintiffs, the competent record evidence suggests" that a total of twenty-two federal agents in standard protective attire had visited the home by the time James Redd left the property. JA1057.

The district court stressed, moreover, that "even if there were as many as 50 agents present * * *, this amount does not constitute an unconstitutional showing of force in this case." JA1057. Thus, the government's conduct was not circumscribed by the type of mandatory directive that removes discretion. *See* JA1049-1057. The court also explained that decisions about the execution of arrest and search warrants are grounded in the type of policy concerns protected by the discretionary function exception. *See* JA1050-1051. "In conducting Operation Cerberus, and specifically in the execution of the Redd warrants," government employees undertook activities that implicated "federal policy and social interests, such as the allocation of federal resources, the safety of federal personnel, and the efficiency and expeditious retrieval of hundreds of fragile Native American artifacts." JA1051. The court thus ruled that the discretionary function exception barred the claims based on assertions about the personnel assigned to the Redds' home. JA1058.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal of plaintiffs' claims under the discretionary function exception. *See, e.g.*, *Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004).

SUMMARY OF ARGUMENT

The district court correctly rejected all of plaintiffs' claims under the discretionary function exception, which bars claims when the conduct at issue involves an element of judgment or choice and when the challenged actions are susceptible to policy analysis. The government's investigation, indictments, and execution of the warrants implicate the type of considerations that the discretionary function exception is intended to protect. And the conduct of government employees in carrying out these activities involved permissible exercises of discretion.

Plaintiffs' main submission is that the manner in which the warrants were executed contravenes constitutional standards and therefore falls outside the scope of the discretionary function exception. But plaintiffs have not cited any source of federal law clearly establishing that the Fourth Amendment curtails the number or attire of personnel who may participate in arrests and searches—much less, as plaintiffs urge, that the Fourth Amendment caps at sixteen the permissible number of personnel who could be assigned here. Plaintiffs' attempt to avoid application of the discretionary function exception based on assertions about the value of the pendant identified in the indictment likewise fails. Plaintiffs' assertions are both conclusory

and at odds with plaintiff Jeanne Redd's plea of guilty to the charge involving the same pendant at the same value. In any event, this claim amounts to an impermissible collateral attack on the validity of Jeanne Redd's conviction.

ARGUMENT

PLAINTIFFS' CLAIMS ARE BARRED BY THE DISCRETIONARY FUNCTION EXCEPTION.

A. The Government's Investigation, Indictments, and Execution of the Warrants Implicate the Type of Considerations Protected from Suit by the Discretionary Function Exception.

1. The FTCA's discretionary function exception provides that the statute "shall not apply to" a 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). 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.'" *Elder v. United States*, 312 F.3d 1172, 1176 (10th Cir. 2002) (quoting *United States v. Gaubert*, 499 U.S. 315, 323 (1991)) (additional citations and quotation marks omitted).

Courts engage in a two-part inquiry to determine whether the federal government's conduct qualifies as a discretionary function or duty. *Berkovitz v. United States*, 486 U.S. 531, 536-538 (1988); *Elder*, 312 F.3d at 1176. First, a court determines whether the conduct involves "'an element of judgment or choice.'" *Kiehn v. United*

States, 984 F.2d 1100, 1102 (10th Cir. 1993) (quoting *Berkovitz*, 486 U.S. at 536). If a statute, regulation, or policy "specifically prescribes a course of action for an employee to follow, * * * the exception does not apply." *Ibid.* (quotation marks omitted). If a court concludes that the government's decision involved an element of judgment, it must determine whether the decision was "based on considerations of public policy." *Id.* at 1103 (quoting *Berkovitz*, 486 U.S. at 537). "The focus of the inquiry is not on * * * subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. *See also Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) (explaining that a court "may entertain a claim" under the FTCA "only when the plaintiff can demonstrate that the 'challenged actions are not *the kind of conduct* that can be said to be grounded in the policy of the regulatory regime'") (quoting *Gaubert*, 499 U.S. at 325); *Harrell v. United States*, 443 F.3d 1231, 1235 (10th Cir. 2006) (explaining that a court may not "consider the subjective intent of the particular actor or whether he or she was animated by a concern for public policy").

2. Plaintiffs urge that the government's actions caused James Redd's suicide. Notwithstanding the tragedy of Dr. Redd's decision to take his life, the district court correctly held that the FTCA does not permit plaintiffs' claims to go forward.

It is not controverted that the conduct of a law enforcement investigation and the decision to seek an indictment reflect the type of policy concerns protected by the

discretionary function exception. "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." *Sabow v. United States*, 93 F.3d 1445, 1453 (9th Cir. 1996); *see, e.g.*, *Hobdy v. United States*, No. 91-3204, 1992 WL 149871, at *2 (10th Cir. June 26, 1992) ("Deciding how to investigate, who to investigate, and how to present evidence" is "exactly the type of conduct the discretionary function exception was intended to protect from judicial branch interference."); *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986). "[E]ach individual decision whether or not to initiate prosecution is part of a national enforcement policy and involves the weighing of competing resources and priorities." *Gray v. Bell*, 712 F.2d 490, 514 (D.C. Cir. 1983); *see, e.g.*, *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967). "[T]he decision regarding how to best effectuate" warrants likewise "is fundamentally rooted in policy considerations." *Williams v. United States*, 314 F. App'x 253, 258 (11th Cir. 2009); *see, e.g.*, *Milligan v. United States*, 670 F.3d 686, 694-695 (6th Cir. 2012); *Hart v. United States*, 630 F.3d 1085, 1090-1091 (8th Cir. 2011); *Shuler v. United States*, 531 F.3d 930, 934 (D.C. Cir. 2008); *Mesa v. United States*, 123 F.3d 1435, 1438 (11th Cir. 1997).

Although it is not necessary to determine whether such policy considerations animated the decisions here, both the investigations and the execution of the warrants were unusually complex and required a commensurate exercise of judgment. The agencies jointly conducted a multi-year, multi-state investigation into "a large network

of illegal traffickers of Native American artifacts," JA203 ¶ 2, during which undercover sources purchased hundreds of illegal artifacts from almost fifty subjects, totaling more than a third of a million dollars in illegally purchased evidence. JA451. That investigation culminated in federal grand jury indictments of two dozen individuals, JA237 ¶ 13, including James Redd and his wife, as well as nineteen arrest warrants and twelve search warrants for people and places in Southern Utah, including the Redds and the Redd home. JA203-204 ¶¶ 3-4.

The agencies planned the execution of the warrants meticulously. *See, e.g.*, JA426-434, 453-457, 459 (detailing the operation and warrant service); JA436-443 (specifying locations and personnel assignments); JA445-446 (describing warrants service timeline); JA448-449 (May 26, 2009 planning update); JA452 (explaining, "[t]he plan for each search warrant is a highly coordinated operation that reflects the complicated nature of this case"). *See also supra* pp. 5-6. The agencies assigned personnel to arrest warrant locations based on factors specific to each location and warrant subject, *see, e.g.*, JA426-432; JA459, and to search warrant locations based on the large anticipated volume of evidence and the special care that properly identifying, recording, and retrieving artifacts requires. *See, e.g.*, JA227-228 ¶¶ 13-15; JA449, 452-453 (explaining that personnel would "be reassigned to help * * * where needed" as personnel completed their tasks at their initial assignment locations to "ensure" that evidence could be "properly seized" and catalog artifacts not immediately seized). The agencies also directed law enforcement officers to wear standard protective attire.

See JA214-215 ¶¶ 66-69 (explaining law enforcement officers wore bullet-proof vests and carried side-arms).

Decisions about how to allocate and attire personnel executing arrest and search warrants as part of a multi-state, multi-agency operation implicate policy considerations. These considerations include the proper use of federal resources, the appropriate distribution of "shared responsibilities between agencies" in a "highly coordinated," "jointly conducted operation," JA452, the safety of personnel, and the need to accurately identify, record, and secure potential evidence of criminal activity—as well as, in this case, the need for "expeditious retrieval of hundreds of fragile Native American artifacts," JA1051, in a manner that would permit these artifacts to be restored to the appropriate "scientific and Native American communities." JA452-453 (explaining the "goal[s] of the operation"); *see also* 16 U.S.C. § 470aa(b) (explaining that the Archaeological Resources Protection Act, which Jeanne and Jericca Redd pleaded guilty to violating, is intended "to secure, for the present and future benefit of the American people, the protection of archaeological resources"). The district court correctly ruled that such decisions are "rooted in the kind of policy considerations the discretionary function exception was designed to shield." JA1052.

In urging that the discretionary function is nevertheless inapplicable to their claims, plaintiffs assert that the conduct at issue did not involve a permissible exercise of discretion in two respects. They argue that the manner in which the warrants were executed violates constitutional standards and thus falls outside the scope of the

discretionary function exception. They also contend that the government lacked discretion to seek a felony indictment rather than misdemeanor charges with respect to the effigy bird pendant because government employees allegedly were aware that the pendant was worth less than $1000. The district court properly rejected each of these assertions, which we address below in turn.

B. The Execution of the Warrants Did Not Violate Any Constitutional Standard, Much Less a Clearly Established Constitutional Norm that Prescribed a Specific Course of Conduct.

1. At least eight circuits have held or noted in dictum that the discretionary function exception "does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription." *Loumiet v. United States*, No. 15-5208, slip op. at 10-13 (D.C. Cir. July 12, 2016) (collecting cases and noting that one circuit holds a contrary view). When a "federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow," the government has already exercised the relevant judgment and left no further discretion for an individual government official to exercise. *Berkovitz*, 486 U.S. at 536 (emphasis added). But the requirement of specificity applies to constitutional, statutory, and regulatory obligations alike. A constitutional guarantee provides a *specific* mandatory duty for discretionary function purposes only where the case law explains to a reasonable government official how those guarantees apply in particular contexts. If a constitutional provision meets this standard and specifically prescribes a course of conduct, it leaves no room for the exercise of permissible discretion.

The Supreme Court has long recognized that conduct may be discretionary even if it is later determined to have violated the Constitution. The common law doctrine of official immunity applies to the exercise of "discretionary functions" even when conduct violated the Constitution, as long as the constitutional right was not defined with sufficient specificity that the official should have known that his or her act was prohibited. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (explaining that "government officials performing *discretionary functions* generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known.") (emphases added); *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-1776 (2015) ("We have repeatedly told courts * * * not to define clearly established law at a high level of generality.").

The FTCA provided plaintiffs with a claim against the United States in place of claims against federal employees personally.[1] In enacting the statute, Congress did not set aside recognized principles of official immunity. *See* Comment, *The Federal Tort*

[1] When the FTCA was originally enacted, a plaintiff could elect whether to pursue an FTCA suit against the United States for the common law torts of one of its employees, or a state tort suit against the federal employee in his or her individual capacity. Congress later enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (commonly known as the "Westfall Act"), which mandates the substitution of the United States for any individual federal employee as the sole defendant with respect to common law tort suits arising out of acts within that employee's scope of employment. See 28 U.S.C. § 2679(d).

Claims Act, 56 Yale L. J. 534, 545 (1947). Instead, Congress included an explicit discretionary function exception "to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action." *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984) (explaining that "[i]t was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added"). When the Court in *Berkovitz* held that a federal mandate must "specifically prescribe" conduct in order to overcome the discretionary function exception, it reasoned by analogy from official immunity precedent, underscoring that the two standards operate in tandem. *See* 486 U.S. at 536 (citing *Westfall v. Erwin*, 484 U.S. 292, 296-297 (1988)).

As a result, the limit on discretionary functions described in *Berkovitz* and later cases is not triggered by every allegation of unlawful conduct, but only by a showing that discretion was cabined by a specific, mandatory directive, accompanied by plausible assertions that the specific directive was violated. *See, e.g.*, *Elder*, 312 F.3d at 1177 ("The issue before us is whether the guidelines are sufficiently specific to remove decisionmaking under them from the discretionary function exception."). And the exception's purpose, "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort," *Gaubert*, 499 U.S. at 323 (quotation marks omitted), is implicated equally whether the mandatory

duty alleged to remove an officer's conduct from the ambit of the exception is based on a statute, regulation, or constitutional provision.

A contrary approach would undermine not only the purpose of the discretionary function exception, but also the limits of qualified immunity that apply in actions against federal officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs may recover under *Bivens* only where a constitutional violation was clearly established when the conduct took place. To allow a plaintiff to recover in an FTCA suit against the United States by alleging a constitutional violation that is not clearly established would permit the United States to be liable for conduct even when its employees are not. But the Supreme Court has explained that the Court "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." *FDIC v. Meyer*, 510 U.S. 471, 485 (1994). And "when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, * * * the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 19-20 (1980). Subjecting the United States to broader liability than that of its individual employees would subvert Congress's design.

2. a. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Reasonableness "is not capable of precise definition or

mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The reasonableness inquiry "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Whether government employees acted reasonably is judged from the perspective "of a reasonable officer on the scene," not "with the 20/20 vision of hindsight." *Id.* at 396-397.

"[T]he fact that it is clear that any unreasonable use of force is unconstitutional does not mean that it is always clear *which* uses of force are reasonable." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). "Fourth Amendment jurisprudence has long recognized that the right to make an arrest * * * necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. Beyond the Fourth Amendment's protection against unreasonableness, "'it is generally left to the discretion'" of officers "'to determine the details of how best to proceed with the performance'" of warrants. *United States v. Medlin*, 842 F.2d 1194, 1196 (10th Cir. 1988) (quoting *Dalia v. United States*, 441 U.S. 238, 257 (1979)); *see also United States v. Husband*, 226 F.3d 626, 634 (7th Cir. 2000) ("[W]ithin the limits of reasonableness, the decision on how to execute a warrant is generally left to the discretion of the police.").

We are not aware of any case clearly establishing that the Fourth Amendment would deem unreasonable a decision to allocate even as many as "50 or more"

personnel to carry out arrest and search warrants under the circumstances of this case. Pls.' Br. 47-52. Indeed, courts have upheld decisions to assign a large number of personnel to conduct arrests or searches in a range of circumstances. In *Whitewater v. Goss*, 192 F. App'x 794, 797-798 (10th Cir. 2006), this Court rejected a claim that a sheriff had acted unreasonably by assigning an armed thirteen-member SWAT team in "full camouflage" to execute a search warrant at a home. In *Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 933 (8th Cir. 2016), the Eighth Circuit rejected a claim that the government had used excessive force by sending thirty-five law enforcement agents wearing ballistic vests and armed with "handguns and secondary weapons" to search a large facility for evidence of a nonviolent crime. In *United States v. Rizzi*, 221 F. App'x 283, 285-286 (4th Cir. 2007), the Fourth Circuit rejected a claim that the government had acted unreasonably by assigning "approximately twenty-four officers," including "ten to twelve SWAT team members" to execute a search warrant at a residential home at 4:30 a.m., when the home's occupant was asleep. The Fourth Circuit has also deemed reasonable the choice to dispatch "approximately forty law enforcement officers, many dressed in full combat gear" to conduct a four-hour search for evidence of nonviolent crimes. *United States v. Sanders*, 104 F. App'x 916, 917, 922 (4th Cir. 2004); *see also McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002) ("[N]othing in the fourth amendment specifies how many officers may respond to a call.").

Nor is there any colorable argument that it would have been constitutionally unreasonable to assign even as many as "50 or more" (Pls.' Br. 47-52) armed

personnel in protective attire to carry out the warrants here. These decisions relied on official policies and were reasonable in light of the circumstances. *See Graham*, 490 U.S. at 396 (explaining that "proper application" of the test for reasonableness under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case"); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251-1252 (10th Cir. 2003) (explaining that reliance on "official policy that explicitly sanctioned the conduct in question" bears on whether the conduct is objectively reasonable); *Roberts*, 814 F.3d at 933 (upholding the reasonableness of officers' possession of firearms while executing a search warrant on the basis that the relevant agencies' policies required officers to be armed); *accord Wilson v. Layne*, 526 U.S. 603, 617 (1999) (explaining that "it was not unreasonable for law enforcement officers to look and rely on their formal * * * policies" in the absence of clearly contrary law).

As FBI's *Domestic Investigations and Operations Guide* explains, any individual's response to "being placed under arrest" is inescapably uncertain. Among other possibilities, a person may "submit peacefully" or "attempt to flee" or "attempt to injure or kill [the] arresting person," thus the "[a]rresting party should consist of enough" personnel "to cope properly with those or other situations which might arise." JA501. Here, personnel were tasked with arresting two adults charged in connection with a large and "highly lucrative" criminal network, whose members were indicted on multiple felonies. JA452. The search required personnel to painstakingly identify, record, and preserve hundreds of "ancient items" of possible evidence,

JA240 ¶ 33, which were "stowed in virtually every corner of the large home, as well as scattered throughout the exterior areas within aspects of the landscaping." JA230 ¶ 32. "All" of these artifacts required "special handling." JA240 ¶ 33. Some were considered "sacred" to the communities from which the artifacts had been stolen. *See* JA240 ¶ 38. Both BLM and FBI policies require officers to carry firearms and wear body armor when executing warrants. JA449; JA 472; JA477; JA490; JA496. Under the totality of these circumstances, a decision to allocate even "50 or more" (Pls.' Br. 47-52) armed personnel in protective attire would have been reasonable. JA1057.

Plaintiffs have not cited any source of federal law clearly establishing that the Fourth Amendment constrains the number or attire of personnel who may participate in arrests and searches. Instead, plaintiffs assert (Br. 47-49, 55-61) that the Fourth Amendment caps at sixteen the permissible number of personnel who could be assigned to execute warrants under the circumstances here. The sole case on which plaintiffs rely, *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179 (10th Cir. 2001), does not support their claim. In *Overdorff*, this Court concluded that law enforcement officers had used excessive force "where, among other things, a SWAT team member in the course of a raid chased down a four-year-old girl with a high-powered firearm and a laser sight trained on her back despite the fact that she posed no threat whatsoever." *Cortez v. McCauley*, 478 F.3d 1108, 1145 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) (describing *Overdorff*). This Court expressly declined to hold that "the display of force inherent in the deployment

of the SWAT team—the force invoked by the *decision* to deploy—was excessive under Fourth Amendment standards." *Overdorff*, 268 F.3d at 1191. Nothing about *Overdorff* suggests that, at the time of the arrests and search here, the Fourth Amendment curtailed the number of personnel who could be assigned to execute warrants—much less, as plaintiffs argue (Br. 47-49), that no more than sixteen officers could constitutionally participate here.

Plaintiffs' argument also misunderstands the Fourth Amendment inquiry. Plaintiffs' assertions (Br. 47-49) about the unconstitutionality of assigning more than sixteen officers to execute the arrest and search warrants are based on a "calculation" drawn from an amalgam of sources about the number of personnel that allegedly were "needed" or "adequate." But the Fourth Amendment requires reasonableness, not the minimum means necessary to effectuate law enforcement objectives. *See, e.g.*, *United States v. Sokolow*, 490 U.S. 1, 11 (1989). In any event, plaintiffs' "calculation" appears to be based on plaintiffs' own theorizing about how many personnel were "needed" to physically remove potential evidence from the search scene. Federal personnel identified, photographed, and cataloged hundreds of artifacts in the Redds' home on the day of the arrests; government employees removed some evidence immediately, and removed additional artifacts on the day after Jeanne Redd's guilty plea. JA24 ¶ 77. Plaintiffs concede (Br. 61) the reasonableness of assigning personnel to participate in "evidence gathering" but contend (Br. 48-49, 61) that this consideration cannot support the constitutionality of the number of officers assigned

to the Redds' home, because allegedly "only one adult was needed to carry" the evidence physically removed from the home on the morning of the Redds' arrests. Plaintiffs offer no support for this remarkable proposition, and none exists.

b. Plaintiffs argue at length that the number of federal personnel engaged in the search of the Redd residence was greater than the total—twenty-two—that the district court found supported by the summary judgment record. The discussion is largely beside the point. As the district court explained, "even if there were as many as 50 agents present * * *, this amount does not constitute an unconstitutional showing of force in this case." JA1057. In any event, plaintiffs identify no error in the district court's evaluation of the record.

The government established through a variety of sources that twenty-two personnel in standard agency-mandated protective attire had been present at the Redds' home by the time James Redd left the property. As a declaration by the Assistant Special Agent in Charge of FBI's Salt Lake City Division at the time of the arrests explained, federal personnel "who arrived at and departed from the Redd residence over the course of the day on June 10, 2009 signed in and out on a log, in accordance with standard operating procedure." JA229 ¶ 22 (declaration of Gregory Bretzing). The log established that thirteen personnel were assigned to arrive at the Redds' home at 6:40 a.m. JA548-551. The log also showed that an additional nine personnel arrived at the home between 6:40 a.m. and 10:34 a.m., JA553-556, and that sixteen personnel were present at 10:34 a.m., when James Redd left the property.

JA558-561. A total of fifty-three personnel visited the home over the course of the day. JA568-572.

Other evidence corroborated the log. A contemporaneous written statement by the leader of FBI's evidence recovery team describing the arrests corroborates the log entries by personnel who arrived at 6:40 a.m. JA523 (statement by Diane Eden Kisabeth). The declaration by the Assistant Special Agent in Charge during the time of the arrests, who was present at the Redds' home, attests that the log accurately reflected the number of personnel at the scene. JA231 ¶¶ 36-38. The log tally of the number of personnel present at 6:40 a.m. is also consistent with the number of personnel anticipated by the plan for the operation as a whole. JA436; JA439-440. The district court correctly concluded that all this evidence "paints a different picture" than plaintiffs' complaint, JA1044, which asserted that "approximately 80 agents" were present at the home "at any one point in time" and "approximately 140 different agents" visited the home over the course of the day. JA21 ¶ 54.

Plaintiffs' main submission (Br. 46-51, 55) is that the district court failed sufficiently to "indulge[]" Paragraph 6 of the declaration by Jericca Redd, the Redds' adult daughter, which contains her account of events on the morning of her parents' arrests. This paragraph states: "There appeared to be as many as 50 agents from the time I first noticed the agents. I first noticed the agents when the[y] came in the front door and arrested" Jeanne Redd. JA649 ¶ 6(c)(i). "The agents numbered 50 or more from the time I first noticed them until I left the home. I left the home around

noon." JA649 ¶ 6(c)(iii). As the district court explained, these statements do not suffice to create a genuine triable issue on the number of personnel present on the morning of the arrests. JA1055-1056 (reasoning that these "vague statements * * * do[] not controvert the competent record evidence before the Court").

As an initial matter, plaintiffs' claims depend on the number of personnel that James Redd observed at the home, not how many Jericca Redd saw. *Cf.* Pls.' Br. 23 (acknowledging that "the relevant time period" is "6:40 a.m. to 10:34 a.m.," when James Redd left the property). Jericca Redd's declaration does not contain any statements from which it could be inferred that James Redd—who undisputedly spent the bulk of the morning speaking with personnel in the confines of the home's garage—encountered fifty or more personnel before he left the home.

In any event, Federal Rule of Civil Procedure 56 "requires the nonmoving party to go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quotation marks omitted). "[I]t is not enough that the evidence" favoring a party opposing summary judgment "be 'merely colorable' or anything short of 'significantly probative.'" *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). Jericca Redd's declaration, like plaintiffs' complaint, simply asserts that an approximate number of personnel were present at the property. *Compare* JA21 ¶ 54 (asserting that "there were approximately 80 agents in the home at any one point in time, with approximately 140 different

agents despoiling their home during the course of the day"), *with* JA648 ¶ 6(c)(i) (asserting that "[t]here appeared to be as many as 50 agents"). The declaration offers no explanation of how Jericca Redd arrived at her total, nor does the declaration explain how she distinguished among "agents coming and going" from the various areas throughout the large home and the property's grounds. JA645 ¶ 4(a); *see also ibid.* ("There were more agents than I could count."). Such "conclusory allegations without specific supporting facts * * * lack[] probative value" and are not sufficient to defeat a summary judgment motion. *Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Plaintiffs assert that the personnel log is unreliable because an agent with whom James Redd was speaking in the garage signed the log at 9:52 a.m., after completing the conversation, rather than at 6:40 a.m., upon her arrival at the property. JA548. The government's summary judgment exhibit reflected this correction, ensuring that this agent was counted among the personnel who were first to arrive at the Redds' home. JA548 n.1. As the district court explained, plaintiffs offered no specific factual assertions that could support the conclusion that any other agent failed to sign the log in a timely fashion, much less that the government had failed to correct any such oversight. *See* JA1056-1057. In any event, a delay in signing the log by one agent out of the twenty-two that visited the Redds' home prior to James Redd's departure does not support the inference that as many as seventy-eight additional agents were present at the home but unaccounted on the morning of the arrests. Br.

47 (arguing that "no less than 50" and "as many as 100" personnel were present at the Redds' home). Such "wide speculation and leaps in logic" cannot create a genuine issue of material fact. JA1056.

Plaintiffs also mistakenly contend (Br. 51-52) that an FBI press release corroborates Jericca Redd's statements and undercuts the government's evidence. The press release describes as a whole the investigation—which spanned an area far larger than Blanding, Utah—and states: "The law enforcement operation was conducted on June 10, 2009 by approximately 150 agents and employees from the FBI and the BLM." JA816. A press statement issued one week after the arrests about the "approximate[]" number of personnel involved in executing all of the Southern Utah warrants does not undercut the specific contemporaneous evidence about the number of personnel actually present at the Redds' home on the morning of the arrests. Indeed, while plaintiffs assert that comparing this statement with the operations plan in the record shows that "27 agents, were unaccounted for" and "*available* for assignment" to the Redds' home, Br. 51-52 (emphasis added), plaintiffs stop short of specifically asserting that any "unaccounted for" personnel were actually present on the morning of the arrests and search, or that James Redd encountered them. In any case, as the district court explained, such an assertion would be wholly "based on conjecture and speculation." JA1056.

Plaintiffs also posit (Br. 52-54) that congressional testimony by the then-Attorney General of the United States about the operation "created an inference * * *

that there were as many as 100 agents * * * or at least as many as Jericca Redd stated that there were (50 or more)" at the Redds' home on the morning of the arrests. Plaintiffs assert that the then-Attorney General's failure to correct a statement by Senator Orrin Hatch that "media reports state that over 100 Federal agents were used in this operation," JA695, constitutes "an adoptive admission" supporting plaintiffs' version of events. But of course, Senator Hatch did not ask the then-Attorney General to confirm or deny how many personnel visited the Redd home; as plaintiffs explain elsewhere (Br. 26), Senator Hatch asked "what, if any, factors were used to measure the appropriate level of force and personnel" during the operation generally. JA695. Nothing about this question or the responses suggests anything about the number of personnel at the Redds' home, or how these personnel were equipped. In any event, even assuming the adoptive admissions doctrine applies, plaintiffs offer no reason why it would be "improper or unnatural" (Br. 53) for the then-Attorney General in this setting to forgo the opportunity "to correct the Senator and to tell them [sic] his facts or allegations were inaccurate, and that there were only 12-22 agents" present on the morning of the Redds' arrests. Br. 54.

Plaintiffs further argue (Br. 58) that the district court failed adequately to consider whether "SWAT team members" were among the personnel present at the Redds' home. As the declaration by the Assistant Special Agent in Charge of FBI's Salt Lake City Division at the time of the arrests explained, SWAT officers were involved in arrests at only one location in Southern Utah, which was not the Redds'

home. JA228 ¶ 20; *see also* JA204 ¶ 6. Plaintiffs appear to allude to the fact that four personnel with special weapons and tactics training "happened to * * * be at the residence assisting in the evidence search" after completing their assignments at another location. JA211 ¶¶ 47-48. After James Redd left the property, these personnel retrieved rifles and assumed protective positions around the property, JA211 ¶¶ 47-49, because a caller believed to be James Redd's adult son, Javalan Redd, telephoned the Redds' home and left two threatening voicemails on the Redds' answering machine. JA210-211 ¶¶ 44-46. As the district court explained, the personnel present at the home on the morning of the arrests were armed and dressed in accordance with FBI and BLM policy. *See* JA1057. There were no SWAT operations at the Redds' home. *See ibid.*

c. In any event, it is not clear how the number or attire of the personnel at the Redds' home bears on plaintiffs' claims. Plaintiffs do not argue that James Redd's death is attributable to the number or attire of the personnel allocated to the Redds' home. Plaintiffs' complaint instead specifically states (JA33 ¶ 133) that "Dr. Redd's untimely death would not have occurred but for the malicious acts of federal agents who," according to plaintiffs, "aggressively manhandled Dr. Redd, unnecessarily held him in custody, and—most critically—verbally threatened and assaulted him. The federal agents repeatedly stated his sole means of livelihood to provide for his family was lost." But the district court dismissed all of the claims based on "the actual conduct of the agents" on the morning of the Redds' arrests, JA129, concluding that

these claims are barred under the discretionary function exception. JA129-133. And plaintiffs have not pursued those claims on appeal.

C. The District Court Correctly Rejected Plaintiffs' Attempt to Avoid Application of the Discretionary Function Exception Based on Conclusory Allegations about the Overvaluation of a Pendant Identified in the Indictment.

Plaintiffs urge that the discretionary function exception is inapplicable because government employees "confabulated the value" of the pendant identified in the joint charge against James Redd and Jeanne Redd "with the aid and assistance" of a confidential source. JA28 ¶ 104. The district court correctly rejected this contention.

1. As a threshold matter, it is not apparent how plaintiffs' assertions about the pendant bear on their claims. Plaintiffs have not argued that James Redd would not have been arrested and prosecuted if the government had valued the pendant at less than $1000; the statute that he was charged with violating prohibits stealing property from a tribe whether the value of the stolen property exceeds $1000 or not. 18 U.S.C. § 1163. Plaintiffs assert that government employees had a "*preference* to bring felony charges against targets of the undercover operation," JA18 ¶ 27 (emphasis added), but do not claim that the prosecutors responsible for reaching charging decisions and bringing charges would have declined to pursue misdemeanors. *Compare* JA452 (explaining that the government's investigation focused on "categories" of participants in the illegal marketplace for looted artifacts—"excavators, dealers, and super collectors"—and that the primary goal of the investigation was to return stolen

property of "undoubtedly important" "cultural significance" to the "rightful owners"). Plaintiffs likewise do not claim that the number or attire of the personnel allocated to the Redds' home would have been different if the government had valued the pendant at less than $1000.

2. In any case, the district court correctly dismissed these claims. Plaintiffs offer only conclusory assertions about the government's alleged misconduct, and those assertions are directly at odds with plaintiff Jeanne Redd's plea of guilty to a charge involving the same pendant and the same value.

James Redd and Jeanne Redd were jointly indicted of "receiv[ing], conceal[ing], and retain[ing]" an "effigy bird pendant" "belonging to an Indian tribal organization, with a value of more than $1,000 * * * knowing such property to have been embezzled, stolen, or converted." *See* Indictment at 2, Count 4. Jeanne Redd's signed written guilty plea agreement "acknowledge[s] and "certif[ies]" that she understands the facts that the agreement sets out, that she has been assisted by counsel in completing the agreement, and that she "understand[s] the charges," her rights, and "what the government is required to prove in order to convict me." Jeanne Redd Statement at 1. The plea agreement "stipulate[s] and agree[s]" that the facts the agreement contains "accurately describe" Jeanne Redd's conduct and "provide a basis for the Court to accept" her guilty plea "and for calculating the sentence" in her case. *Id.* at 3. The plea agreement avers that Jeanne Redd "possessed and displayed" the pendant knowing that it "was taken without legal authority from" tribal land and

attests, "I acknowledge that the pendant is valued in excess of $1000." *Id.* at 4.

Plaintiff Jeanne Redd's admission in her plea agreement that the pendant's value exceeds $1000 undermines the assertions made here that government employees "confabulated the value" of the pendant "with the aid and assistance" of a confidential source "for the deliberate, reckless, and untruthful purpose of having Count 4" of the indictment "allege a felony." JA28 ¶ 104. Plaintiffs concede that the district court appropriately considered Jeanne Redd's written plea agreement, and urge that this Court "can do the same." Br. 42 n.9. "[F]actual allegations that contradict * * * a properly considered document are not well-pleaded facts that the court must accept as true" when evaluating whether to dismiss a complaint. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997). As the district court explained, Jeanne Redd's statement "makes it implausible" than a confidential source, "at least in this instance, employed a fraudulent method of valuation in declaring" the value of the pendant. JA128. Far from constituting error, "it would have defied common sense for the district court to ignore" Jeanne Redd's statement. *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 962 (10th Cir. 2001) (affirming a district court's decision to consider documents discussed by the defendant when deciding whether to grant the defendant's motion to dismiss).

Even setting Jeanne Redd's statement aside, the complaint itself does not adequately assert that government employees misrepresented the value of the pendant identified in the indictment against James Redd and Jeanne Redd, to which Jeanne

Redd pleaded guilty. A complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). To satisfy the pleading standard, plaintiffs must provide more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ibid.*; *see also id.* at 678-679 (explaining that plaintiffs "armed with nothing more than conclusions" are not entitled to discovery). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *id.* at 678; this requires that the facts alleged support more than "the mere possibility of misconduct." *Id.* at 679. If a complaint does not satisfy these criteria, the complaint must be dismissed. *Ibid.*

Plaintiffs conspicuously fail to meet this standard. The complaint alleges that government employees "trained, directed, and encouraged" a confidential source to use a "virtually bottomless supply of cash" "to raise the value he paid for the undercover purchases" so that the informant could "entrap" purchasers and produce "more serious criminal charges." JA18 ¶¶ 21-23. Plaintiffs deny that James Redd or Jeanne Redd purchased or sold any pendant for cash, however; the complaint instead states that the couple obtained a pendant by other means. *See* JA20-21 ¶¶ 46-47, 50. Plaintiffs contend that this confidential source was "biased and incentivized to overvalue items" because both the government and the source himself assertedly had a "preference to bring felony charges against targets of the undercover operation."

JA18 ¶ 27. Based on this supposed "preference," plaintiffs assert that government employees "confabulated the value" of the pendant "with the aid and assistance" of the source. JA28 ¶ 104. But plaintiffs' only support for these conclusory allegations are even more speculative, baseless assertions—that the personnel who participated in the operation were motivated by boredom, retaliation, religious prejudice, and malice toward James Redd. JA29 ¶ 111.

This pleading does not provide sufficient facts to permit a court to draw any "reasonable inference" that government employees misrepresented the value of the pendant identified in the charge on which James Redd and Jeanne Redd were jointly indicted. *Iqbal*, 556 U.S. at 678. Indeed, plaintiffs do not specifically assert that the government employees responsible for the supposed misrepresentations made any misstatement to the prosecution, who ultimately presented evidence to the grand jury. *See, e.g.*, *Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996) (explaining that "the chain of causation is broken by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutor"). Because plaintiffs' complaint has not "nudged their claims across the line from conceivable to plausible," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), plaintiffs' claims involving the pendant must be dismissed.

3. Plaintiffs allege that the district court erred in two respects. Plaintiffs principally argue (Br. 34-45) that the district court gave Jeanne Redd's admission about the value of the pendant "preclusive effect to the issue of the value," Br. 36,

and discuss at length the doctrine of issue preclusion. This argument misunderstands the district court's reasoning. The court did not engage in issue preclusion analysis; instead, the court appropriately declined to "ignore the reliability" of Jeanne Redd's admission when evaluating whether the complaint plausibly alleged that government employees had mispresented the value of the pendant. Plaintiffs concede that the court could properly consider Jeanne Redd's written statement, Br. 42 n.9, and that the court was not obligated to treat factual assertions that are inconsistent with it as true. *See, e.g.*, *Dean Witter Reynolds, Inc.*, 261 F.3d at 962; *GFF Corp.*, 130 F.3d at 1385.

Similarly unavailing is plaintiffs' assertion that Jeanne Redd "did not admit that the pendant was worth $1000," Br. 42, therefore "it is not implausible that" a confidential source "employed a deliberately inaccurate method of valuation for the bird effigy pendant." Br. 44. Plaintiffs argue that the district court erred by relying on Jeanne Redd's written guilty plea without taking account of Jeanne Redd's oral statements during her plea colloquy. Br. 43 (arguing that the plea colloquy establishes that Jeanne Redd "admitted that the Government, now and then, valued" the pendant "at $1000.00, or more," but not that Jeanne Redd herself shared the government's view). Plaintiffs did not ask the district court to consider Jeanne Redd's oral statements, even though the government's motion to dismiss explained that Jeanne Redd's written guilty plea averred that the pendant was worth more than $1000. The court did not err by failing to weigh statements that plaintiffs did not ask the court to consider, and it is too late to inject the plea colloquy now.

In any case, plaintiffs' argument boils down to an assertion that Jeanne Redd obtained all the benefits conferred by her plea agreement from the criminal district court while artfully recanting her signed admission that the facts in her plea agreement are true. This cannot be reconciled with the criminal court's careful inquiry into the facts supporting Jeanne Redd's guilty plea. The court explained that it could not accept her plea of guilty "unless I make a determination that you, in fact, committed the offenses with which you're charged." *See* Partial Transcript at 3, *United States v. Redd*, No. 2:09-cr-00044-CW (D. Utah July 6, 2009). Jeanne Redd explicitly acknowledged that it was "a correct statement" that the government valued the pendant in excess of $1000 and that she "accept[ed] that value for purposes" of entering her guilty plea. *Id.* at 5-6. The court asked whether there were "other corrections or additions that should be put on the record to make these facts complete before we proceed." *Id.* at 8. Jeanne Redd replied, "No, your Honor." *Ibid.* Having "convince[d] the judge that she actually committed the crime to which she pleaded guilty," JA128, Jeanne Redd cannot now avoid her plea.

4. It would, in any event, be anomalous to allow plaintiffs to challenge the validity of Jeanne Redd's conviction, following her guilty plea, on criminal charges involving the same pendant at the same value. As the Supreme Court has explained, "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). In *Heck v. Humphrey*, the Court considered whether this principle barred a state prisoner

from bringing a suit for damages under 42 U.S.C. § 1983 for claims that the government had conducted its investigation illegally, knowingly destroyed exculpatory evidence, and violated the prisoner's rights at trial. *Id.* at 479. Explaining that it "has long expressed * * * concerns for finality and consistency and has generally declined to expand opportunities for collateral attack," *id.* at 485-486, the Court held that the plaintiff "must prove" that his conviction had been reversed, expunged, declared invalid, or called into question by a successful habeas petition "in order to recover damages for * * * harm caused by actions whose unlawfulness would render a conviction or sentence invalid." *Id.* at 486-487. If "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction" and the conviction has not "already been invalidated," the Court explained, "the complaint must be dismissed." *Id.* at 487.

Applying *Heck v. Humphrey*, this Court concluded in *Parris v. United States*, 45 F.3d 383 (10th Cir. 1995), that the FTCA likewise "is not an appropriate vehicle for challenging the validity of outstanding criminal judgments." *Id.* at 385 (quotation marks and alterations omitted). In *Parris*, an inmate claimed that the government had presented false evidence at trial and that the inmate's federal public defender's assistance had been ineffective. *Id.* at 384. This Court explained that "the same common law principles that informed" *Heck v. Humphrey* "should inform the decision of whether an action under the FTCA is cognizable when it calls into question the validity of a prior conviction," *Parris*, 45 F.3d at 385, and concluded that the inmate's

claims "squarely call[ed] into question the validity of" his convictions. *Id.* at 384 (quotation marks omitted). Because the inmate had not shown that his convictions had been declared invalid, the Court concluded that the district court had appropriately ruled for the United States. *Id.* at 385.

The rule in *Heck v. Humphrey* and the principles that the rule effectuates apply to tort claims that imply the invalidity of criminal judgments even when the civil plaintiff is not the convicted criminal. *See Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012). In *Beets*, the Ninth Circuit analyzed the application of *Heck v. Humphrey* to wrongful death claims brought by the parents of an individual who allegedly participated in a crime for which her co-conspirator was convicted, and who died during a confrontation with law enforcement officers attempting to arrest the pair. 669 F.3d at 1040-1041. The court ruled that the wrongful death claims implied the invalidity of the co-conspirator's conviction. *Id.* at 1042-1046. The court also rejected assertions that any "consideration beyond the preclusion doctrine itself" salvaged the claims in that case. *Id.* at 1046-1047. The court explained that, although the plaintiffs had not participated in the criminal trial of their deceased child's co-conspirator, the plaintiffs' interest in arguing that officers had acted unlawfully was "in no way inconsistent with the surviving criminal's interest in the issue." *Id.* at 1048. The court thus concluded that there was no reason to "allow for conflicting resolutions arising out of a single" factual setting "and undermine consistency and finality." *Ibid.*

It makes no difference that the plaintiffs named in the complaint here include

additional parties, as well as Jeanne Redd herself.[2] As this Court has explained, "*Heck* should apply to such situations when the concerns underlying *Heck* exist." *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999). Plaintiffs concede that the claims involving the value of the pendant effectively challenge the validity of Jeanne Redd's conviction, following her guilty plea, on a charge involving the same pendant at the same value—as well as the convictions of others on charges involving artifacts that plaintiffs allege the same confidential source intentionally overvalued. Pls.' Mem. in Opp. to Mot. to Dismiss at 17, *Redd v. United States*, No. 2:11-cv-1162, 2012 WL 7677367 (D. Utah Apr. 26, 2012) (acknowledging that "[a] judgment in favor of the Plaintiffs may imply the invalidity of various convictions of other third parties, including Jeanne and Jerrica [sic] Redd, and others"). Permitting plaintiffs' claims to proceed here would allow convicted criminals to undermine the judgments in their cases through the simple expedient of adding to their complaints more individuals with claims based on the same underlying events, or appearing as plaintiffs on behalf of another entity. Nothing in *Heck* sanctions that result.

Plaintiffs do not dispute that Jeanne Redd's criminal conviction "decided" the question whether government employees misrepresented the value of the pendant and that this issue "is identical with the one presented in the action in question." Br. 36. Plaintiffs likewise acknowledge that this issue "has been finally adjudicated on the

[2] Plaintiffs have voluntarily dismissed Jericca Redd as an appellant in this appeal. *See* Order (June 14, 2016) (granting plaintiffs' motion).

merits" by Jeanne Redd's criminal conviction. *Ibid.* Instead, plaintiffs contend (Br. 36-41) that the plaintiffs other than Jeanne Redd herself were not adequately represented at Jeanne Redd's criminal proceeding.

This argument reduces to an objection to the rationale of *Heck v. Humphrey* itself. Third parties cannot intervene in criminal proceedings, and criminal defendants do not participate in criminal proceedings as representatives of others' rights. But civil claims equally "allow for conflicting resolutions arising out of a single" factual setting "and undermine consistency and finality" whether or not the convicted criminal is the sole civil plaintiff. *See Beets*, 669 F.3d at 1048. There is no reason to carve out an exception for plaintiffs here.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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I certify that this brief is proportionately spaced, using Garamond 14-point type. Based on the count of Microsoft Word, this brief contains 11,539 words, including the footnotes, but excluding the tables, statement of related appeals, certificates, and addenda.

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I hereby certify that on July 18, 2016, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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