No. 21-___

IN THE

Supreme Court of the United States

CARRIE S. WILLIS, INDIVIDUALLY AND AS TRUSTEE OF THE TRUST OF JAMES C. AND NORMA D. WILLIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Grant Rahmeyer
STRONG-GARNER-BAUER P.C.
415 E. Chestnut Expwy.
Springfield, MO 65802

Walter Dellinger
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20009
(202) 383-5204
kendallturner@omm.com

Yaira Dubin
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036

QUESTIONS PRESENTED

The Federal Tort Claims Act is the primary, and often the only, avenue for relief for those harmed by the torts of government agents. The FTCA waives the United States' sovereign immunity for state-law tort claims arising from such acts, 28 U.S.C. § 1346(b)(1), unless those claims are premised on a government agent's performance of discretionary (rather than mandatory) functions, *id.* § 2680(a). This petition presents the following two questions about the scope of that exception:

1. Whether the discretionary-function exception shields the Government from suit whenever a government agent fails to fulfill a mandatory duty that applies only in certain circumstances, on the theory that the agent must have determined those circumstances did not exist.

2. Whether the discretionary-function exception shields a government agent's undisputed failure to exercise discretion.

RELATED PROCEEDINGS

Willis v. United States, No. 6:16-cv-03251 (W.D. Mo. Mar. 23, 2020)

Willis v. United States, No. 20-2047 (8th Cir. Apr. 2, 2021)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Regulations

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carrie S. Willis, individually and as trustee of the Trust of James C. and Norma D. Willis, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-9a) is published at 993 F.3d 545. The district court's opinion (Pet. App. 10a-30a) is published at 448 F. Supp. 3d 1048.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2021. Pet. App. 1a. On March 19, 2020, this Court entered a standing order that extends the time to file a petition for a writ of certiorari in this case to August 30, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or 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.

Exceptions to jurisdiction under the Act are provided in 28 U.S.C. § 2680, which states in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> (a) 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.

The relevant provisions of the Internal Revenue Manual are set forth in the appendix.

INTRODUCTION

The Federal Tort Claims Act ("FTCA") is the primary, and often the only, avenue for relief for those harmed by the torts of government employees or agencies. The FTCA waives the United States' sovereign immunity for state-law tort claims arising from such acts, 28 U.S.C. § 1346(b)(1), unless those claims arise from an agency's or employee's "discretionary function," *id.* § 2680(a).

This Court has established a two-step test to determine whether an agency or employee is performing a discretionary function and thus may not be sued. First, the Court asks whether a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *United*

States v. Gaubert, 499 U.S. 315, 322 (1991) (internal quotation marks omitted). If a specific directive exists, then an employee has no choice and the discretionary-function exception is inapplicable. Second, even if a choice is involved, the Court asks whether that choice is "of the kind that the discretionary function exception was designed to shield." *Id.* at 322-23 (internal quotation marks omitted). Decisions "grounded in social, economic, and political policy" are protected, *id.* at 323 (internal quotation marks omitted), but discretionary acts that "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish" are not, *id.* at 325 n.7. For example, a government employee's negligence in driving a government car is unprotected because it "can hardly be said to be grounded in regulatory policy," even though driving "requires the constant exercise of discretion." *Id.*

Although these principles are easy enough to explain in theory, "numerous courts" have noted that "reconciling conflicting case law in this area can be difficult." *O'Toole v. United States*, 295 F.3d 1029, 1035 (9th Cir. 2002). And that "is an understatement—as the dozens of cases involving the assertion of the exception as a government defense graphically illustrate." 5 Stuart M. Speiser et al., American Law of Torts § 17:7 (Westlaw 2021 update). In the thirty years since this Court last addressed the scope of the discretionary-function exception, courts of appeals have increasingly diverged from one another and from the original purpose of the exception, applying it in situations where it was never intended to (and should not) shield the Government from suit.

In this case, the IRS seized 364,000 dollar coins from petitioner. The coins were collectibles, worth more than their face value. Although IRS policy forbids agents from depositing seized, collectible currency, the IRS agent here did exactly that: He deposited petitioner's coins in a bank account, destroying their worth as collectibles. The IRS agent never disputed that he was subject to a mandatory duty, and he admitted that he conducted no analysis to determine whether the coins were collectibles. Yet when petitioner sued the Government for conversion, the Eighth Circuit held that the discretionary-function exception insulated the Government from suit.

As to the first prong of the discretionary-function analysis, the Eighth Circuit conceded that the IRS agent here was subject to a mandatory duty. It saw that duty as the duty to *decide* whether petitioner's coins were collectible assets in the first place, rather than to *refrain* from depositing collectible assets. Pet. App. 5a. And it held that, because the IRS agent deposited petitioner's coins, he must have "decided that the coins were ordinary currency" and thus fulfilled his mandatory obligation. *Id.* at 7a. In other words, the Eighth Circuit holds that an IRS agent's act of depositing or not depositing currency proves that he has made a discretionary determination that the currency is or is not a collectible asset, and thus the discretionary-function exception shields the Government from suit. Under the Eighth Circuit's theory, that remains true no matter how obviously collectible an asset is—even if (as here) a standard pricing guide establishes its status as a collectible, *see*

id. at 29a, or even if the asset is framed with a collector's certificate.

Every other court of appeals would have ruled differently, and for good reason: If a government agent is subject to a mandatory duty in certain circumstances, a court cannot infer from the agent's failure to fulfill that duty the conclusion that the agent must have decided the relevant circumstances were not present. If, for example, an agent has to perform a certain act at 6:00 p.m., but he forgets to look at the clock and does not perform the act at 6:00 p.m., it cannot be right that the Government is insulated from suit on the theory that the agent must have (incorrectly) assessed the time and determined it was not 6:00 p.m. But that is exactly the result the Eighth Circuit's opinion here compels. Allowing its opinion to stand would shield the Government from liability in virtually all circumstances in which the FTCA applies, as virtually all mandatory duties apply only in certain circumstances.

Even if the IRS agent here *did* have discretion in assessing how to treat petitioner's coins, the Eighth Circuit still erred—and parted from the views of three of its sister circuits—at the second step of the discretionary-function analysis. The Second, Fourth, and Seventh Circuits hold that the exception does not apply where, as here, the government agent's actions derived from carelessness or inattention rather than policy considerations. The Eighth Circuit's contrary view that the discretionary-function exception shields a government agent's undisputed abdication of duty—a view that the Ninth and Eleventh Circuits share—is flatly inconsistent with the text and purpose of the exception and this Court's precedent.

This Court should step in to restore a proper understanding of the discretionary-function exception and ensure that it does not swallow the FTCA's rule.

STATEMENT OF THE CASE

A. Factual Background

1. The Internal Revenue Service's Internal Revenue Manual ("IRM") "is the primary, official compilation of instructions to staff that relate to the administration and operation of the IRS." IRM 1.11.2.2(1). It instructs IRS agents on, among other things, the steps they should take in criminal investigations in which they seize property. When currency is seized, the IRM mandates that it be processed within five days "except where it is to be used as evidence or held as a 'collectible asset.'" IRM 9.7.4.6.1(2); 9.7.6.14.1(1).

2. Between 2007 and 2011, petitioner Carrie Willis and her then-husband, Bobby Willis, bought 364,000 limited-edition dollar coins depicting presidents from George Washington through James Garfield. They bought the coins directly from banks to keep as collectible assets "for investment purposes." Tr. 47.[1]

Mr. and Ms. Willis divorced in early 2012. As part of the divorce, Mr. Willis gave up any interest in the coins, though Ms. Willis continued to store them at Mr. Willis's house. Ms. Willis planned on selling

[1] All references to "Tr." are references to the trial transcript. References to docket numbers are references to entries in the district court docket.

them at auction in the future and kept them with her other collectibles. Tr. 48. Her coins were "the largest known collection of presidential dollars in the world," Tr. 291; *see also* Tr. 468, and they were worth more than their face value, *see* Pet. App. 29a.

3. In 2012, New Mexico police began investigating allegations of financial crimes related to Mr. Willis's business. Pet. App. 15a. The police came to believe that evidence of these crimes might be located at Mr. Willis's home, and they secured a search warrant for that property. The search warrant was limited in scope; it allowed the police to search for financial and business documents related to the allegations against Mr. Willis. It did not authorize agents to search for, or seize, any currency. *Id.* at 17a-18a.

On September 26, 2012, local and state law enforcement officers raided Mr. Willis's home pursuant to the warrant. Pet. App. 17a. The Willises were not present because they were seeking medical treatment for Mr. Willis. Tr. 50.

During the search, the officers found several large safes containing valuables, including the 364 boxes of limited-edition presidential dollar coins. Pet. App. 17a-18a. The coins were wrapped in rolls and packaged in boxes. *Id.* at 12a, 18a. Each box contained 1,000 coins, and each box identified the bank that distributed the coins, the coins' release date, and the name of the President featured on the coins in the box. *Id.* at 19a.

Although these coins were outside the scope of the warrant, one of the Missouri Highway Patrol Troopers participating in the raid called IRS Special Agent Scott Wells to inform him of the discovery. Pet.

App. 17a-18a. Agent Wells did not have a warrant to seize the coins. Nor did he apply for a warrant, create an affidavit explaining the need to seize the coins without a warrant, or document any reason for seizing the coins. *Id.* at 18a. He also did not photograph or otherwise document the coins themselves. *Id.* at 18a-19a. Instead, Agent Wells contacted his IRS supervisor and federal prosecutors, who told him he could execute a warrantless seizure of the coins. *Id.* at 18a. These actions directly contravened multiple provisions of the IRM. *See id.* at 26a-27a.[2]

4. After the seizure was already complete, the IRS contacted Special Agent Robert Jackson, an Asset Forfeiture Coordinator ("AFC"). Pet. App. 19a. As an AFC, Agent Jackson was responsible for ensuring that the IRS agents working on Mr. Willis's case complied with the IRM's requirements. IRM 9.7.1.2.7. But at trial, Agent Jackson admitted that he did not know whether Agent Wells followed the IRM's seizure policies. *See* Tr. 218.

Agent Jackson likewise did not follow the IRM's seizure policies. He never considered whether the presidential coins were collectible assets. Pet. App. 28a. By his own admission, he conducted no analysis

---

[2] Although some government witnesses testified that exigent circumstances might have permitted the seizure, *see* Tr. 139, 161, no federal agent documented any such circumstances, Tr. 94-95, 121-22, 162, 193, 204, in direct contravention of IRS policies for warrantless seizures, *see* IRM 9.7.2.7.5. On appeal, the Government's opening brief never mentioned the exigent-circumstances exception, and the Eighth Circuit did not address it.

to determine whether they had numismatic value as collectibles above their face value. *Id*. at 2a-3a, 20a. He did not have them appraised, he did not document their condition, and he did not inventory the boxes or their markings. Tr. 214-21. He also created no chain of custody documentation for the coins. *See* Tr. 213-14. Instead, on the same day he took possession of the coins, Agent Jackson delivered them to a third-party contractor to have them processed and their packaging destroyed. Pet. App. 19a-20a. The coins' face value of $364,000 was then deposited into an IRS account. *Id.* at 20a.

5. Weeks after depositing the coins, the IRS notified Mr. Willis of the seizure. Pet. App. 20a. During the month that followed, Ms. Willis's counsel repeatedly wrote the IRS to seek return of the illegally seized property, including the 364,000 coins. *Id*. at 21a.

About three and a half years later, the IRS finally informed Ms. Willis that the coins had been "converted to cash and deposited into the government's account." Pet. App. 20a. The IRS acknowledged in an internal memo that the coins were unconnected to any charges against Mr. Willis. Trial Ex. 138. Thereafter, the IRS transferred $364,000 to Ms. Willis's attorney's trust account. Pet. App. 20a.

In August 2015, Ms. Willis filed an administrative tort claim with the Department of the Treasury. Pet. App. 21a. She claimed that the coins were worth $3.3 million as collectible assets and that the United States had improperly converted them into their face value of $364,000. Ms. Willis obtained

no relief in that administrative process. *See* Dkt. No. 67-1.

B. Procedural Background

1. In 2016, Ms. Willis sued the United States in district court in Missouri.[3] She claimed that the destruction of the numismatic value of the presidential coins constituted common law conversion and that the United States was susceptible to suit under the FTCA. The United States argued that it was immune from suit under the FTCA's discretionary-function exception.[4]

After a two-day bench trial, the district court ruled that the discretionary-function exception did not insulate the United States from suit. It found that Agent Jackson "failed to perform his" mandatory duties "at all" when he deposited Ms. Willis's collectible coins at their face value. Pet. App. 29a. Agent Jackson "made no 'choice'" in treating the coins that way "because he never even considered an alternative to the $1 Presidential coins being currency." *Id.* at 28a. In other words, the Government's claim for immunity failed at the first step of the discretionary-function analysis. The Government's claim for immunity also failed at the

---

[3] Although Ms. Willis initially sued individual federal agents involved in the seizure of her coins, those defendants were subsequently dismissed. Dkt. Nos. 148, 169.

[4] The Government also argued in district court that it was immune from suit under the detained-goods exception to the FTCA. The district court rejected this argument, Pet. App. 25a-27a, and the Government abandoned it on appeal.

second step of the analysis: Although "IRS policy is silent as to the difference between currency and collectible assets," "Agent Jackson did not exercise any discretion" in deeming the coins to be ordinary currency. *Id.* at 28a. He "performed no analysis" at all "regarding whether the $1 Presidential coins had numismatic value." *Id*. Consequently, his actions were not the sort that the discretionary-function exception protects. *Id.* at 29a.

Because the district court ruled that the discretionary-function exception did not insulate the United States from suit, it proceeded to the merits of Ms. Willis's conversion claim. And because both sides' experts agreed the coins' value as collectibles exceeded their face value, the district court found the Government liable. It entered judgment for Ms. Willis in the amount of $94,880—an amount based on the testimony of the Government's damages expert. Pet. App. 29a.

2. The Eighth Circuit reversed and ordered the case dismissed. According to the court of appeals, both prongs of the discretionary-function analysis shield the Government from suit.

As to the first prong, the Eighth Circuit conceded that Agent Jackson had a "mandatory obligation . . . to decide whether the seized currency was ordinary currency or a collectible asset." Pet. App. 7a. It also acknowledged that Agent Jackson "admits that he did not make an effort to determine whether the coins had any numismatic value." *Id.* at 3a. And it did not dispute that whether something is a collectible asset is a factual question that may be made—as it was in the district court, *see id*. at 29a—by consulting a simple pricing guide. But the Eighth

Circuit concluded that Agent Jackson had "quite clearly" made the required determination that the coins were not collectible—simply by virtue of the fact that he had not treated them as such. *Id.* at 7a.

As to the second prong, the Eighth Circuit acknowledged that Agent Jackson "exercised no judgment" in treating the coins as ordinary currency. Pet. App. 8a. But, in the Eighth Circuit's view, because an IRS agent's decision to deposit seized currency *could* be "susceptible to policy analysis," the discretionary-function exception shielded Agent Jackson's action here. *Id.*

REASONS FOR GRANTING OF WRIT

A. The courts of appeals are divided on both questions presented.

1. Only the Eighth Circuit applies the discretionary-function exception where an agent fails to fulfill a mandatory duty on the theory that the agent must have determined the duty did not apply.

No court of appeals other than the Eighth Circuit applies the discretionary-function exception where an agent fails to fulfill a mandatory duty that applies only in certain circumstances, on the theory that the agent must have decided that those circumstances were not present. Rather, those courts all hold that, where a government fails to fulfill a mandatory duty that applies in the relevant factual setting, the FTCA renders the Government susceptible to suit.

For example, in *Anestis v. United States*, 749 F.3d 520 (6th Cir. 2014), the Sixth Circuit ruled that

the Government was susceptible to suit where a former Marine committed suicide after he was turned away from two Veterans Administration ("VA") clinics. VA staff were required to send a patient who was "in an emergency state" to a clinician or emergency facility where he could be treated. *Id.* at 529. The Sixth Circuit held that VA staff failed to fulfill this obligation. In doing so, it rejected the idea that, simply because the VA turned the decedent away, VA staff must have decided the decedent was not "in an emergency state." *Id.*

The Ninth Circuit similarly held that the Government was susceptible to suit in *In re Glacier Bay*, 71 F.3d 1447 (9th Cir. 1995). There, the plaintiffs alleged that negligence of the National Oceanic and Atmospheric Administration ("NOAA") in preparing nautical charts was partly responsible for a ship running aground, which caused a major oil spill. *Id.* at 1449. To prepare its nautical charts, the NOAA was required to lay "sounding lines" at the bottom of the body of water. Under the NOAA's regulations, the required spacing of these sounding lines varied depending on the depth of the body of water. In *Glacier Bay*, the NOAA had laid the sounding lines too far apart for the water being mapped. The Ninth Circuit held that the NOAA could be sued, rejecting the idea that, simply because the NOAA laid the sounding lines a certain distance apart, it must have decided the water was a certain depth there and thus fulfilled its mandatory duties. *See id.* at 1452-53.

The decisions of other courts of appeals are in accord. *See, e.g.*, *Sanders v. United States*, 937 F.3d 316, 329-31 (4th Cir. 2019) (Government susceptible

to suit for FBI agent's failure to contact certain local law enforcement official, even though that duty applied only if FBI's initial outreach to local law enforcement was deemed unsuccessful); *Parrott v. United States*, 536 F.3d 629, 637-38 (7th Cir. 2008) (Government susceptible to suit for Bureau of Prisons' failure to separate prisoners, even though that duty applied only if Bureau first determined separation order was in place); *Downs v. U.S. Army Corps of Eng'rs*, 333 F. App'x 403, 413 (11th Cir. 2009) (Government susceptible to suit where it failed to fulfill duty to fill a beach area with "non-rocky, sandy material," even though Government had to make antecedent determination about whether material it used met that standard); *Andrews v. United States*, 121 F.3d 1430, 1441 (11th Cir. 1997) (Government susceptible to suit where Navy had mandatory duty to segregate flammable liquid waste, even though that required antecedent determination whether waste was liquid and flammable).

Here, however, the Eighth Circuit believed it could infer that Agent Jackson had fulfilled his mandatory duty to decide whether Ms. Willis's coins were collectibles and treat them accordingly from the simple fact that he deposited the coins at face value. Pet. App. 7a. Under the Eighth Circuit's theory, no matter what action Agent Jackson took, the Government was insulated from suit: If he did not deposit the currency, then he must have determined the currency was a collectible and thus satisfied his mandatory duty. Or, as happened here, if Agent Jackson deposited Ms. Willis's coins, then he must have "quite clearly decided that the coins were ordinary currency," and thus fulfilled his mandatory

duty. *Id*. This holding flatly contradicts the decisions of other courts of appeals.

2. The courts of appeals disagree on whether the discretionary-function exception shields a federal agent's failure to exercise discretion.

Even if Agent Jackson had discretion to determine how to treat Ms. Willis's coins, three federal courts of appeals would have deemed the discretionary-function exception inapplicable under the second prong of the analysis because Agent Jackson admitted he never even considered whether Ms. Willis's coins were collectibles. In contrast, three other courts of appeals hold that the discretionary-function exception applies even in those circumstances.

1. In the Second, Fourth, and Seventh Circuits, government inattention or carelessness is not protected by the discretionary-function exception.

In *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000), the Second Circuit held that the discretionary-function exception would not shield prison officials if their inspections of prison weight machines were "distracted or inattentive." *Id.* at 109. Such carelessness is not "grounded in considerations of governmental policy," *id.*, and thus is not protected by the discretionary-function exception. On the contrary, the Second Circuit explained, the exception protects decisions "motivated by considerations of economy, efficiency, and safety." *Id*; *see also Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 476 (2d Cir. 2006).

The Fourth Circuit adopted the Second Circuit's reasoning in *Rich v. United States*, 811 F.3d 140 (4th Cir. 2015). Citing *Coulthurst*, the court held that a prisoner could sue prison guards for negligence in patting down prisoners if those pat-downs were "marked by individual carelessness or laziness." *Id.* at 147. That sort of conduct "would not be shielded by the discretionary function exception because no policy considerations would be implicated," "even if, *under typical circumstances* . . . the manner in which prison officials perform pat[-]downs" could be the product of a policy-driven decision. *Id.* (emphasis added). The Fourth Circuit reaffirmed its view just last year. *See Tyree v. United States*, 814 F. App'x 762, 768-70 (4th Cir. 2020).

The Seventh Circuit likewise holds that the discretionary-function exception does not shield decisions that have "nothing whatever to do with discretionary judgments" and are the result of mere "carelessness." *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003). For example, if a government agent "was simply asleep" or left his post "in order to enjoy a cigarette or a snack" at the time of the alleged tort, his action "would not be covered by the discretionary function exception, as it involves no element of choice or judgment grounded in public policy considerations." *Id.* at 432 (citing *Coulthurst*); *see also Keller v. United States*, 771 F.3d 1021, 1025 (7th Cir. 2014).[5]

---

[5] The Third Circuit has not yet taken a position on this question. But it has expressed interest in the approach of the Second, Fourth, and Seventh Circuits, directing a district court

2. The Eighth, Ninth, and Eleventh Circuits, in contrast, have squarely rejected their sister circuits' approach. Each holds that the discretionary-function exception shields a decision rendered out of carelessness rather than policy considerations.

In the Eighth Circuit's view, as long as a government agent could have reached the same conclusion after weighing policy concerns, the discretionary-function exception protects the Government from suit even if the government agent admits he did not weigh policy concerns. Here, for example, Agent Jackson admittedly "exercised no judgment" in depositing Ms. Willis's coins at their face value. Pet. App. 8a. He "never considered whether the coins had numismatic value," and "there was never a balancing of any policy considerations." *Id*. Yet the Eighth Circuit held that the discretionary-function exception shielded the Government from suit.

The Ninth Circuit has likewise immunized derelictions of duty. In *Gonzalez v. United States*, 814 F.3d 1022 (9th Cir. 2016), a family sued for damages arising out of a home invasion. They alleged that the FBI knew the attack was imminent but failed to disclose that information to local law enforcement, in contravention of a mandatory FBI Guideline requiring FBI field agents to "promptly transmit" certain information to local authorities. *Id.* at 1029. The Ninth Circuit held that, because the guidelines

---

to "consider whether" to adopt that approach in the first instance. *Middleton v. United States FBP*, 658 F. App'x 167, 171-72 (3d Cir. 2016).

did "not prescribe" *how* to disclose the information, the discretionary-function exception shielded the Government from suit when it failed to disclose the information *at all*. *Id.* In doing so, the Ninth Circuit rejected the argument that "[a] lazy or careless failure to disclose . . . would not be shielded under the discretionary function exception." *Id.* at 1033. Instead, the Ninth Circuit held that the discretionary-function exception applies "so long as the challenged decision is one to which a policy analysis *could* apply." *Id.* at 1034 (emphasis added).

The Tenth Circuit has similarly held that it is "irrelevant whether the alleged" tort is "a matter of deliberate choice, or a mere oversight." *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993) (internal quotation marks omitted). In that court's view, "[t]he failure to consider some *or all* critical aspects of a discretionary judgment does not make that judgment less discretionary and does not make the judgment subject to liability." *Id.* (emphasis added).

B. The questions presented are of substantial importance.

1. The FTCA is the exclusive remedy for most tort claims in the many fields in which federal employees operate. It enables injured plaintiffs to bring claims against the Government for federal agents' torts in a wide variety of contexts, including waterway maintenance, public health regulation, upkeep of military property, inspections of prison conditions, maintenance of federal lands, and medical malpractice at government hospitals. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955)

(failure to maintain lights in a Coast Guard lighthouse); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957) (failure to contain fire that spread from federal land to private property); *Berkovitz v. United States*, 486 U.S. 531 (1988) (failure to follow regulatory policy in licensing and releasing unsafe vaccine lot); *Gotha v. United States*, 115 F.3d 176 (3d Cir. 1997) (failure to maintain safe footpaths on Navy base); *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000) (failure to inspect prison exercise yard's equipment); *Kim v. United States*, 940 F.3d 484 (9th Cir. 2019) (failure to abate hazardous tree in national park); *Anestis v. United States*, 749 F.3d 520 (6th Cir. 2014) (failure to provide emergency care to suicidal veteran based on clerical error).

The FTCA's broad scope reflects the legislative judgment that victims generally deserve compensation if government employees act tortiously. "[U]nduly generous interpretations of the [FTCA] exceptions run the risk of defeating the central purpose of the statute" by leaving many victims of government torts without relief. *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984).

Allowing the Eighth Circuit's decision to stand would yield exactly that result: If the Government is immune from suit even where an agent fails to fulfill a mandatory duty that applies only in certain circumstances, on the theory that the agent must have decided that those circumstances were not present, then the Government will virtually never be subject to suit. Similarly, if a government agent's admitted abdication of duty somehow qualifies as a policy-driven determination, then individuals injured

by federal agents' torts will rarely, if ever, be able to sue for redress.

2. Only this Court can prevent that result. And the time is ripe to do so: This Court last weighed in on the scope of the discretionary-function analysis thirty years ago, in *United States v. Gaubert*, 499 U.S. 315 (1991). Since then, it has become increasingly "unclear exactly what falls within the scope of this provision, despite an immense amount of precedent that has developed on the subject." 14 Charles Alan Wright et al., Federal Practice and Procedure § 3658.1 (3d ed. 2007).

3. This Court should intervene to ensure that the federal government's susceptibility to suit—and therefore citizens' ability to seek redress for tortious conduct by its agents—is uniform across the country. If a tree falls in the forest and causes injury due to federal employees' negligence, the fact that it fell in Arkansas rather than Kentucky should not determine whether the injured party may sue the Government. *Compare Layton v. United States*, 984 F.2d 1496, 1505 (8th Cir. 1993) (Forest Service's failure to warn contractor about hazardous trees was policy decision protected by the discretionary-function exception), *with Caplan v. United States*, 877 F.2d 1314, 1317 (6th Cir. 1989) (Forest Service's failure to warn contractor about hazardous trees was *not* policy decision protected by the discretionary-function exception). So, too, should IRS agents' improper destruction of property render the Government liable to suit regardless of whether it occurred in Missouri or Illinois. Allowing the Eighth Circuit's decision here to stand would permit exactly this sort of arbitrary,

geographical variation in the federal government's susceptibility to suit for tort claims.

4. Disagreement among the courts of appeals on the questions presented implicates individuals' ability to obtain redress under not only the FTCA, but also any statute containing language like the FTCA's discretionary-function exception. Those statutes include the Stafford Act, which bars suit for disaster-relief claims arising from the discretionary actions of federal employees, *Freeman v. United States*, 556 F.3d 326, 336 (5th Cir. 2009); the Foreign Sovereign Immunities Act, which renders foreign governments amenable to suit in American courts for torts occurring in the United States, *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921-22 (D.C. Cir.)*, order modified by*, 823 F.2d 606 (D.C. Cir. 1987); the Suits in Admiralty Act, which waives the federal government's sovereign immunity for suits in admiralty, *see Hurd v. United States*, 134 F. Supp. 2d 745, 766-68 (D.S.C. 2001) (collecting authorities); and the immunity provisions in the intergovernmental compact creating the Washington Metro Area Transit Authority, *see Smith v. Wash. Metro Area Transit Auth.*, 290 F.3d 201, 206-08 (4th Cir. 2002).[6] This Court's intervention is needed to

[6] Many States have also enacted state-law equivalents of the FTCA and embrace federal interpretations of the discretionary-function exception. *See, e.g.*, *State v. Abbot*, 498 P.2d 712, 717 (Alaska 1972); *Sec. Inv. Co. v. State*, 437 N.W.2d 439, 445 (Neb. 1989); *Brantley v. Dep't of Human Res.*, 523 S.E.2d 571, 574 (Ga. 1999); *Ingerson v. Pallito*, 214 A.3d 824, 829-30 (Vt. 2019); *Martinez v. Maruszczak*, 168 P.3d 720, 722, 728 (Nev. 2007); *Goodman v. City of Le Claire*, 587 N.W.2d. 232,

harmonize interpretations of discretionary-function exceptions across these areas of law.

C. This case is an excellent vehicle for clarifying the scope of the discretionary-function exception.

This case affords a particularly good opportunity to resolve the questions presented because the relevant government policy is clear, the issue was preserved throughout the district court and Eighth Circuit proceedings, and the questions presented are outcome-determinative.

1. The IRS regulation at issue is clear and clearly mandatory. There is a formal, written regulation stating that IRS agents "must" expeditiously deposit "domestic and foreign currency seized for forfeiture, except where it is . . . held as a 'collectible asset.'" IRM 9.7.4.6.1; *see* IRM 9.7.6.14.1. Neither the Government nor the Eighth Circuit disputed that this duty bound the IRS here. Gov't Br. 31 n.21; Pet. App. 5a-6a.

2. The questions presented were fully briefed and argued below and directly resolved by the Eighth Circuit.

a. In the court of appeals, Ms. Willis noted that "the IRS delineated specific policies prohibiting Agent Jackson from depositing . . . 'collectible assets' . . . into general circulation." Appellee Br. 7. "Agent

---

237-39 (Iowa 1998); *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 718 n.3 (Minn. 1988); *Olson v. City of Garrison*, 539 N.W.2d 663, 665-67 (N.D. 1995).

Jackson had no discretion to wholly violate this policy" by depositing Ms. Willis's coins at their face value. *Id.* at 19. The Government, however, maintained that all "the IRS employee charged with processing assets seized by the IRS was required" to do was "to make a decision—either treating the seized coins as 'domestic currency' or as 'collectible assets.'" Gov't Br. 20. No matter which decision the employee made, his decision was—in the Government's view—shielded by the discretionary-function exception. *Id.* The Eighth Circuit agreed. It believed that, because Agent Jackson had deposited Ms. Willis's coins, he had necessarily determined that the coins were not collectible and thereby fulfilled his mandatory duties. Pet. App. 7a-8a.

b. The arguments on the second question presented have also been well preserved and directly decided. Ms. Willis argued in the Eighth Circuit that the discretionary-function exception does not apply when a decision is "absent-minded" rather than based on policy considerations. Willis Br. 5. The Government, in contrast, argued that the discretionary-function exception applies "even if the decision is characterized as 'negligent and sloppy.'" Gov't Br. 39. The Eighth Circuit's holding on this question is equally clear: It expressly held—parting ways with many of its sister circuits—that "[e]ven if the decision was carelessly made or was uninformed, the agent's negligence in making it is irrelevant." Pet. App. 7a.

3. Finally, the questions presented are outcome-determinative, especially when taken together.

If Agent Jackson violated a mandatory duty when he deposited Ms. Willis's coins, then Ms. Willis

prevails at the first step of the discretionary-function analysis. But even if Agent Jackson had discretion in how to treat Ms. Willis's coins, Ms. Willis would prevail at the second step of the discretionary-function analysis because Agent Jackson admitted that he acted out of carelessness or inattention rather than policy concerns. *See* App. 2a, 7a, 28a-29a. The Government had a full trial—during which the trial court heard from eight witnesses and considered 150 exhibits—to develop any contrary evidence, and it was unable to do so.

Moreover, no further proceedings would be required before Ms. Willis could prevail. Because the district court already conducted a trial on the merits, reversal of the court of appeals' decision would entitle her to relief.

D. The Eighth Circuit's decision is wrong.

1. The Eighth Circuit erred at the first step of the discretionary-function analysis.

The Eighth Circuit's application of the discretionary-function exception fails at the first step of the analysis. The exception does not apply where a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *United States v. Gaubert*, 499 U.S. 315, 322 (1991). Rather, for the exception to apply, the challenged government conduct must be the product of choice. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). This limitation is "mandated by the language of the exception" itself; "conduct cannot be discretionary unless it involves an element of judgment or choice." *Id.*

That remains true even if a mandatory duty applies only in certain circumstances. That was exactly the situation in *Berkovitz*. There, a statute and various regulations "require[d], as a precondition to licensing, that the [Government] receive certain test data from the manufacturer relating to the product's compliance with regulatory standards." 486 U.S. at 542. The petitioner alleged that the Government issued a license for a polio vaccine without having received the "required test data." *Id.* at 542-43. The Court held that the discretionary-function exception "impose[d] no bar" to a suit based on the Government's failure to fulfill the mandatory duty not to issue the license in those circumstances. *Id.* But if the Eighth Circuit were correct, *Berkovitz* would have come out the other way: Under the Eighth Circuit's view of the law, the fact that the Government issued the license necessarily means the Government had determined it had received the "required test data" and thus fulfilled its mandatory duties. *Id.* at 543.

The Eighth Circuit's view of the discretionary-function exception is inconsistent with not only this Court's precedent but also common sense. An example proves the point: Federal policy instructs that "employees are required to refrain from the use of illegal drugs." Exec. Order No. 12564, Drug-Free Federal Workplace, 51 Fed. Reg. 32,889 (Sept. 17, 1986). This policy requires that employees first determine whether a given substance is an "illegal drug[]," just as the IRS policy requires that agents first determine whether a given coin is a "collectible asset." But it would be absurd to conclude that the simple presence of the substance in an employee's

body conclusively showed that he had made the required "antecedent determination," Pet. App. 6a, that the substance was not an illegal drug. The Eighth Circuit's reasoning, however, would compel that bizarre result.

2. The Eighth Circuit erred at the second step of the discretionary-function analysis.

The text and purpose of the FTCA, this Court's precedent, and common sense likewise show that the discretionary-function exception should not protect a government agent's failure to exercise discretion.

1. The discretionary-function exception insulates the Government from suit where the suit is "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). Under the plain text of the statute, the discretionary-function exception applies only where a government agent exercises "the discretion *involved*" in performing his "function or duty." *Id.* (emphasis added). If a certain action is *not* within the "discretion involved" in the relevant regulation, or if no discretion is exercised at all, then the exception does not apply.

That means the exception has no application where, as here, the government agent admittedly failed to exercise any discretion or weigh any policy concerns. Discretion is the "liberty of suiting one's action to circumstances." *Discretion*, The Pocket Oxford Dictionary of Current English (7th ed. 1943). It is not action without any judgment. *See Discretion*,

Webster's Collegiate Dictionary (5th ed. 1936) (defining "discretion" as the "[p]ower of free decision; individual judgment; undirected choice"). Acting without judgment is not an exercise of discretion but an abdication of it. And the plain text of the discretionary-function exception renders the exception inapplicable to a government agent's failure to exercise discretion *at all*.

2. This view of the law—that the discretionary-function exception insulates government conduct from suit only if the conduct involves an actual exercise of discretion—effectuates Congress's purpose in enacting the FTCA and the discretionary-function exception.

The FTCA was the product of years of debate about whether the United States should waive sovereign immunity. That debate culminated on July 28, 1945, when an airplane piloted by an Army serviceman flew too low and struck the Empire State Building. Multiple people in the building and on the streets below were killed or seriously injured, and the property damage was extensive. *See Hearings on H.R. 5373 and H.R. 6463 Before the House Judiciary Committee*, 77th Cong., 2d Sess. 49, 52 (1942). The victims had no way to recover damages from the Government because sovereign immunity barred relief. *Id.*

Twelve months later, Congress enacted the FTCA. Pub. L. No. 79-601, 60 Stat. 812, 842 (1946) (codified as amended at 28 U.S.C. §§ 1346, 2671-80 (1982)). It was "the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying

out their work." *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

At the same time, Congress adopted the discretionary-function exception 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." *Berkovitz*, 486 U.S. at 536-37 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). No such second-guessing occurs where, as here, a government agent's action is *not* grounded in policy concerns. In that context, the FTCA's broader legislative purpose—making the Government susceptible to suit for the "misfeasance" of its agents and agencies—controls.

3. Consistent with the FTCA's purpose, this Court has long held that the discretionary-function exception does not apply to all government actions that "involve[] an element of judgment," but instead "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 537. The exception does not, for example, protect government drivers who drive poorly and "collide[] with another car"; although driving "requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." *Gaubert*, 499 U.S. at 325 n.7. In other words, where the government agent is not exercising "the discretion involved" in "the regulatory regime" within which he is operating, the discretionary-function exception does not apply. *Id.* Any other interpretation of the exception would eviscerate the FTCA: Because *all* actions involve some "element of judgment," more

than a modicum of judgment must be required for the discretionary-function exception to apply.

In fact, this Court has already rejected this view of the law in the administrative law context. There, the discretionary decisions of administrative agencies are generally reviewed under the forgiving abuse-of-discretion standard. *See, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996). This standard is forgiving for a reason: It, like the discretionary-function exception, is designed to avoid Monday-morning quarterbacking of policy decisions. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). But where agencies "submit[] no reasons at all" why they made a particular discretionary decision, this Court has held that they necessarily abused their discretion. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). It does not matter whether there are policy reasons the agency *might* have considered in reaching the same ultimate conclusion. *Id.* What matters is that the agency, in making its choice, did not actually engage in any policy judgment. *Id.* Because the Government has wholly abdicated its responsibility to engage in "reasoned decision-making," the forgiving abuse-of-discretion standard does not apply. *Id.* at 52.

The same approach is appropriate here. Subjecting the Government to suit for its agents' failure to exercise discretion does not present the risks the discretionary-function exception was designed to avoid. Where agents are exercising "the discretion involved" in their duties, they are still immune from suit. But where they entirely abandon

their duties, they should be subject to suit for the torts they commit while doing so.

4. An example proves the point. Many jurisdictions require parole boards to hold periodic hearings in which board members have discretion to determine whether a given inmate should be released. But whether a parole board is exercising "the discretion involved" cannot be determined by looking simply to the fact that it made a choice whether to parole someone or not. The choice to grant parole could be the result of policy considerations—or it could be the result of, say, flipping a coin. The discretionary-function exception was intended to shield policy determinations, not an employee's dereliction of duty. But the Eighth Circuit's decision here protects both: In that court's view, all the parole board must do is make a choice. That cannot be the law.

Once that conclusion is clear, the error of the Eighth Circuit's decision is also clear. Agent Jackson admitted he did "not conduct any analysis to determine whether" petitioner's "coins had numismatic value." Pet. App. 20a. It is irrelevant that Agent Jackson *could have* balanced competing policies in deciding whether to deposit Ms. Willis's coins at their face value. *Id.* at 8a. The "focus of the inquiry" is on the "nature of the actions taken"—not on the agent's ultimate choice. *Gaubert*, 499 U.S. at 325. Agent Jackson's action was to conduct no analysis. Conducting no analysis is simply not "susceptible to policy analysis." *Id.* The Eighth Circuit's contrary conclusion should not be allowed to stand.

CONCLUSION

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

Respectfully submitted,

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Grant Rahmeyer
STRONG-GARNER-BAUER P.C.
415 E. Chestnut Expwy.
Springfield, MO 65802

Walter Dellinger
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20009
(202) 383-5204
kendallturner@omm.com

Yaira Dubin
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036

August 27, 2021