No. 11-207

In the Supreme Court of the United States

BRIGID BAILEY, INDIVIDUALLY AND AS THE PERSONAL ADMINISTRATOR FOR THE ESTATE OF JOSEPH PAUL BAILEY, DECEASED, AND AS GUARDIAN AD LITEM FOR SAMUEL P. BAILEY, PAUL F. BAILEY, AND MEGHAN BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary-function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioner's tort action against the United States, alleging that the United States Army Corps of Engineers negligently failed to replace signs warning of the presence of a dam on a river within ten days of learning that the signs had been washed away by high water flows.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 623 F.3d 855. The opinion of the district court (Pet. App. A40-A61) is unreported but is available at 2009 WL 1034523.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2010. A petition for rehearing was denied on May 16, 2011 (Pet. App. A36-A37). The petition for a writ of certiorari was filed on August 12, 2011. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, waives the sovereign immunity of the United States from liability for torts caused by government 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." 28 U.S.C. 1346(b)(1). That waiver of immunity is limited by several exceptions, including an exception for 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).

2. Petitioner is the widow of Joseph Bailey, who drowned in a rafting accident at the Daguerre Point Dam, a submerged debris-control dam on the Yuba River near Marysville, California. The Daguerre Point Dam is managed and operated by the United States Army Corps of Engineers (Corps). Pet. App. A3-A4, A41.

In 1987, the Corps published the *Sign Standards Manual* to aid its efforts to provide "appropriate signs and markers at each project to guide, inform, and protect visitors and employees" from hazards associated with the project. Pet. App. A4. The manual outlines procedures for sign maintenance and repair so as to "help insure that broken damaged or missing signs are identified, repaired or replaced in a timely manner." *Id.* at A42. It states that "[i]t is imperative that damaged

signs be reported as soon as the problem is noticed so that the necessary maintenance work can be scheduled and completed in a timely manner." *Ibid.* It also emphasizes, however, that "[p]ersonnel safety is a prime concern in performing sign maintenance." *Id.* at A4 (brackets in original).

As part of its management of the Daguerre Point Dam, the Corps has installed several permanent warning signs, including signs on the dam abutments reading "Danger-Keep Back" and a sign upstream that reads "Warning-Submerged Dam 4 Miles Downstream." Pet. App. A5. In addition, because of increased recreational usage of the river during warmer months, the Corps places seasonal signs every spring warning of the dam. *Ibid.*

In late April 2005, the Corps installed its seasonal warning signs along the river, as well as on a sand bar in the middle of the river. Placing signs on the sand bar required two trucks to drive through part of the river. Corps staff also installed a warning buoy, which required a worker to wade into the river to place an anchor underwater. In order to replace such signs and warning markers, "conditions on the river have to be safe, and the water flow and water levels have to be low enough." Pet. App. A5.

On May 19, 2005, after unexpectedly heavy water flows on the Yuba River, Corps personnel reported that the seasonally-installed signs were either submerged or washed away. On May 25, staff attempted to investigate the situation but were unable to access the areas where the signs had been installed "because of the high, fast water and dangerous river conditions." Four days later, Joseph Bailey took his sons rafting on the Yuba River

upstream of the dam. The rafters went over the dam, and Mr. Bailey drowned. Pet. App. A5-A6.

3. Petitioner sued the United States under the FTCA, alleging that the Corps acted negligently in failing to replace the missing warning signs before Mr. Bailey's accident. The district court granted the government's motion to dismiss, concluding that the action was barred by the discretionary-function exception in Section 2680(a). Pet. App. A40-A61.

4. The court of appeals affirmed. Pet. App. A1-A35.

a. The court of appeals applied the two-part test for the discretionary-function exception set out in this Court's decision in *Berkovitz* v. *United States*, 486 U.S. 531 (1988). Pet. App. A8-A9. Under that test, a government action is covered by the exception if (1) it "involves an element of judgment or choice," and (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991). In this case, the court of appeals concluded, the agency's action satisfied both components of the test. Pet. App. A9-A17.

First, the court of appeals held that the Corps had discretion to determine when to replace the missing signs because no statute, regulation, or agency policy mandated a particular time frame for sign replacement. Pet. App. A10-A11. The court noted that while the Corps' sign manual requires that missing or damaged signs "be replaced or repaired in a *timely* manner," it

"does not create a mandatory and specific directive regarding *when* the Corps must replace any missing or damaged signs," but instead leaves that determination "to the discretion of the Corps." *Id.* at A11.

Second, the court of appeals concluded that the Corps' decision in this case implicated policy concerns, and was of the type protected by the discretionary-function exception, because it "required the Corps to balance competing policy interests." Pet. App. A14. The court noted that the Corps had attempted to replace the warning signs just four days before the accident, "but had judged that the Yuba was so turbulent as to threaten the safety of its workers who had to ford the river to attach new signs and buoys." *Id.* at A3. The court reasoned that, while the Corps was "implementing a safety program when it was deciding when to replace the washed-out signs, in doing so it had to balance competing policy interests: the safety of boaters and the safety of its sign-placing workers and their equipment." *Id.* at A14.

b. Judge B. Fletcher dissented. Pet. App. A18-A35. Judge Fletcher did not take issue with the majority's holding that the Corps had discretion to determine when to replace the signs, but she disagreed with the majority's conclusion that that determination implicated policy concerns. In her view, the Corps' judgment about the timing of sign replacement did not satisfy the second component of the discretionary-function analysis because it involved only safety considerations, not policy considerations. *Id.* at A35.

ARGUMENT

Petitioner argues (Pet. 10-19) that the decision of the Corps about when to replace warning signs on the

Daguerre Dam was not covered by the discretionary-function exception to the FTCA, 28 U.S.C. 2680(a). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the decision about when to replace the dam's warning signs satisfied the two-part test for determining whether a government activity is covered by the discretionary-function exception. First, the court concluded that no statute or regulation required the Corps to replace the missing signs at any particular time, and the Corps therefore had to exercise judgment in deciding when to replace them. Pet. App. A9-A11. Second, the court recognized that deciding when to replace the signs required the Corps to "balance competing policy interests." *Id.* at A14. In particular, the decision required the Corps "to balance the safety of its workers and the risk to its other limited resources, i.e., its equipment, in replacing the signs in dangerous conditions against the competing public safety interest in having the signs replaced sooner." *Ibid.* The Corps' *Sign Standards Manual*, moreover, expressly conferred upon local staff the discretion to reconcile the "critical" importance of timely replacement of missing or damaged signs to help reduce accidents with the "prime concern" for personnel safety. *Id.* at A4; see *id.* at A55. The Corps thus exercised policy judgment "of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988).

2. Petitioner does not contest the court of appeals' conclusion that the decision at issue involved the exercise of discretion. Instead, she argues (Pet. 15-17) that

the decision could not have been grounded in policy considerations because it involved "professional judgment" made while implementing an established policy. That argument is foreclosed by the consistent precedent of this Court establishing that the discretionary-function exception applies not only to the creation of policies but also to the day-to-day conduct of government employees in implementing those policies.

In *United States* v. *Varig Airlines*, 467 U.S. 797 (1984), for example, this Court held that the discretionary-function exception barred actions based on the Federal Aviation Administration's decision to grant certificates to certain aircraft to permit their use in commercial aviation. *Id.* at 821. Significantly, the Court held that the exception applied not only to the agency's "decision to implement the 'spot-check' system of compliance review" but also to "the application of that 'spot-check' system to the particular aircraft involved." *Id.* at 819.

More recently, in *United States* v. *Gaubert*, 499 U.S. 315 (1991), the Court held that the discretionary-function exception barred an action based on alleged negligence in the day-to-day management of a savings and loan association by federal employees. The Court specifically rejected the contention that the challenged actions fell outside the exception "because they involved the mere application of technical skills and business expertise." *Id.* at 331. In so holding, the Court rejected the "nonexistent dichotomy between discretionary functions and operational activities," *id.* at 326—a distinction upon which petitioner's argument in this case appears to be based. The reasoning of *Gaubert* directly applies here and supports the court of appeals' determination that the judgment by Corps personnel, made while im-

plementing the Corps' sign-replacement policy, itself was grounded in policy and protected by the discretionary-function exception.

Petitioner fares no better in suggesting (Pet. 15-17) that the agency's decision is not "susceptible to policy analysis," *Gaubert*, 499 U.S. at 325, because it was based on safety considerations. As an initial matter, the factual premise of that argument is flawed because the decision here involved consideration of more than safety issues. The decision about when to replace the missing signs case implicated a variety of concerns, some, but not all, of which involved considerations of safety. As the district court observed, the sign replacement at issue here was not a simple matter of "nailing a warning to a tree." Pet. App. A55-A56. Installation required workers to drive trucks through the river and wade into it. *Id.* at A5. To determine whether the warning signs should be replaced, "Corps employees were required to make a judgment call as to whether the considerations of public safety outweighed, *inter alia*, risks to their own safety or the expenditure of resources on signs that might once more wash away." *Id.* at A60; see *id.* at A14. The Corps also had to factor in the risk that sign replacement presented to its equipment, *ibid.*, including the trucks required to traverse the river, see *id.* at A5.

In any event, the court of appeals was on firm ground in recognizing that the weighing of competing safety considerations can involve policy judgment, and that it did in this instance. This Court held in *Varig* that FAA inspectors and engineers who conducted compliance checks for aircraft safety were exercising policy judgment. 467 U.S. at 820. Following *Varig*, the courts of appeals have correctly recognized that various decisions about safety involved policy considerations. See, *e.g.*,

Davis v. *United States*, 597 F.3d 646, 651 (5th Cir. 2009) (failed rescue attempt fell within discretionary-function exception because "[s]afety, efficiency, timeliness, and allocations of resources were all necessary to consider, the very policy considerations under the *Gaubert* framework that made the acts discretionary"), cert. denied, 130 S. Ct. 1906 (2010); *Alfrey* v. *United States*, 276 F.3d 557, 565 (9th Cir. 2002) (prison official's judgment as to how extensively to search a cell was policy-based where it required balancing the risk to prison safety with the inmate's interest in avoiding intrusive search); *Miller* v. *United States*, 163 F.3d 591, 595 (9th Cir. 1998) (decision as to how to fight wildfires required consideration of firefighter safety, public safety, cost, and resource damage).

Here, Corps personnel had to weigh two different safety-related agency priorities—protecting the safety of Corps personnel and reducing the risk of accidents to members of the public—against each other in order to determine a course of action. There are significant policy implications associated with a decision of that nature. The converse demonstrates that this is so: an approach that did *not* make worker safety a priority would itself have significant economic and social ramifications and would undermine the agency's ability to carry out its mission. The Corps' decision to give the safety of Corps workers prime consideration until the particularly dangerous conditions they were encountering on the Yuba River subsided likewise has economic and social policy implications.

3. Nor is there any merit to petitioner's suggestion (Pet. 10) that the decision below "effectively eliminates the second prong" of the discretionary-function analysis. According to petitioner (Pet. 18), the decision sweeps

"*any* agency decision involving *any* two competing interests or concerns within the exception." Petitioner bases that suggestion upon the court of appeals' observation that a decision involving "even two competing interests" is "'susceptible' to policy analysis and * * * thus protected by the discretionary function exception." Pet. App. A16. In context, however, it is clear that the court was referring to competing *policy* interests, including, as here, competing safety priorities. Indeed, the court said so explicitly in the next paragraph, concluding that "[t]he Corps had to balance competing policy interests in deciding when to replace the missing signs. Therefore, immunity shields its decision." *Id.* at A17. There is, accordingly, no merit to petitioner's assertion (Pet. 18) that the decision "denies compensation to injured plaintiffs in circumstances that involve no matters of public policy." Instead, the court of appeals simply recognized that the discretionary government conduct at issue in this case implicated matters of public policy.

4. Petitioner suggests (Pet. 10-15) that the decision below conflicts with various decisions of other courts of appeals, but that is incorrect.

Petitioner relies (Pet. 10) on *Cope* v. *Scott*, 45 F.3d 445 (1995), in which the D.C. Circuit held that the failure to place a warning sign on a particular stretch of Beach Drive in Rock Creek Park fell outside of the discretionary-function exception because the decision bore no apparent relationship to the government's asserted policy interest in preserving the natural setting. The court recognized that the decision whether to place a warning sign may, in some contexts, implicate policy considerations protected by the discretionary-function exception. *Id.* at 452. But it rejected application of the exception because it found no evidence that the particu-

lar decision at issue in that case was made in furtherance of the policy goal cited by the government. *Ibid.* Here, by contrast, the Corps relied on its employees to use discretion to determine precisely when to replace missing signs, and it authorized them to balance the "critical" importance of timely sign replacement against the "prime concern" for worker safety. Pet. App. A4. The link between the conduct at issue and furtherance of the cited policy is thus evident.

Most of the other cases petitioner cites likewise involved instances in which a court found no connection between the government conduct at issue and the governmental policy that the conduct was assertedly advancing. See *Duke* v. *Department of Agric.*, 131 F.3d 1407, 1412 (10th Cir. 1997) (absence of any evidence that the National Park Service's failure to warn of the danger of falling boulders implemented any policy or involved weighing any policy considerations); *Cestonaro* v. *United States*, 211 F.3d 749, 757 (3d Cir. 2000) (the "National Park Service fail[ed] to show how providing some lighting, but not more, is grounded in the policy objectives with respect to the management of the National Historic Site"); *Andrulonis* v. *United States*, 952 F.2d 652, 655 (2d Cir. 1991) (failure to warn of dangerous laboratory conditions was not grounded in policy because "it is hardly conceivable that the CDC would ever have a policy to keep silent about obvious, easily-correctable dangers in experiments"), cert. denied, 505 U.S. 1204 (1992). Those cases are inapposite because, as noted, the link between the Corps' sign-replacement policy and the decision to postpone replacement of the warning signs near Daguerre Dam is clear.

Finally, *Myers* v. *United States*, 17 F.3d 890 (6th Cir. 1994), on which petitioner relies (Pet. 12), is also distin-

guishable. In that case, the court concluded that mine inspectors' determinations did not implicate policy concerns because the mine inspectors had no authority to engage in any "balancing of the interests" in determining compliance with mining regulations. *Id.* at 898. The Corps employees here, by contrast, were authorized to, and did, balance competing interests. See Pet. App. A14, A55. There is therefore no conflict warranting this Court's review.[*]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2011

[*] Petitioner also suggests (Pet. 15-16) that the decision below is inconsistent with *Aslakson* v. *United States*, 790 F.2d 688 (8th Cir. 1986), but that case pre-dated *Gaubert* and relied upon the planning/implementation dichotomy that *Gaubert* rejected.