No. 12-1008

In the Supreme Court of the United States

DEBRA R. KOHL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioner's damages claim for injuries sustained during a federally funded field experiment involving the collection of bomb fragments from exploded vehicles.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 699 F.3d 935. The decision of the district court (Pet. App. 28-48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2012. The petition for a writ of certiorari was filed on February 13, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a certified bomb technician with the Metropolitan Nashville Police Department who participated in a field experiment, funded by the United States Department of Defense, to improve the government's technical capacity in investigating attacks carried out using improvised explosive devices (IEDs). Pet. App. 2-

3. The experiment involved manufacturing and detonating explosive devices inside vehicles and then collecting debris from those vehicles for later laboratory analysis. *Id.* at 3. The project involved not only Department of Defense personnel, but also employees of other federal and state agencies, including explosives enforcement officers from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). *Ibid.*

During the evidence-recovery phase of the experiment, some members of the investigation team attempted to inspect the driver's side area of an exploded minivan. Pet. App. 4. The driver's side door had buckled during the explosion, however, and would not open. *Ibid.* In order to gain access, the investigators decided to try to open the door using a winch. *Ibid.* Petitioner moved away from the minivan during an initial, unsuccessful, attempt to winch the door, but then decided to approach and investigate the passenger side of the minivan while a second winching attempt was under discussion. *Id.* at 4, 30-31. Petitioner alleges that further use of the winch caused the vehicle to bump her in the head. *Id.* at 4. Although petitioner reported at the time that she was fine and continued working, she subsequently sought medical treatment and was diagnosed with post-concussive syndrome. *Id.* at 4-5, 31.

2. Petitioner filed suit against the United States, seeking damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1). Pet. App. 5. The FTCA generally permits a plaintiff to bring an action 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." 28 U.S.C. 1346(b)(1). Petitioner alleged that federal employees had operated the winch unsafely and failed to warn her of its dangers. Pet. App. 5.

The district court dismissed petitioner's complaint, concluding that her claims were barred by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). Pet. App. 28-48. That exception provides that the FTCA "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 district court determined that petitioner's claims were premised on allegations of negligence concerning discretionary government decisionmaking about "the recovery of forensic evidence and the necessary actions taken to facilitate that recovery." Pet. App. 43. The court concluded that the discretionary decisions in managing the project, including choices about "when and how to winch and what precautions, if any, to take," were grounded in policy considerations and therefore immunized by the discretionary function exception. *Id.* at 45.

3. a. The court of appeals affirmed. Pet. App. 1-19. Relying on this Court's decision in *United States* v. *Gaubert*, 499 U.S. 315 (1991), the court of appeals observed that the determination whether a claim falls within the discretionary function exception involves a two-step analysis. At the first step, the court inquires whether "there was room for judgment or choice in the decision made." Pet. App. 8. At the second step, the

court evaluates whether the decisionmaking is "susceptible to policy analysis" and thus "of the kind that the discretionary function exception was designed to shield from liability." *Ibid.* (quoting *Gaubert*, 499 U.S. at 322-323, 325).

Applying the first step of that analysis here, the court of appeals concluded that "the challenged government conduct involved discretion," noting the agreement of the parties that "'no mandatory regulation or policy govern[ed] the federal employees' conduct in this case.'" Pet. App. 12 (quoting Pet. C.A. Br. 17). The court found "little sense" in petitioner's argument "that *because* there was no formal or written policy addressing the conduct at issue, the discretionary-function exception cannot apply." *Id.* at 12 n.2. The court explained that the "governing precedents do not imply that government conduct can be discretionary only if it is taken pursuant to a written directive of some sort" and that it is, in fact, "more likely that government agents are exercising discretion if they are conducting an experiment that is not governed by a written manual or regulation, because such decisions will involve 'an element of judgment or choice.'" *Ibid.* (quoting *Berkovitz* v. *United States,* 486 U.S. 531, 536 (1988)).

On the second step of the *Gaubert* analysis, the court of appeals determined that "ATF's actions in collecting the forensic evidence from the field test, including decisions about what equipment to use," Pet. App. 12, were the sorts of discretionary decisions protected from suit by the discretionary function exception. See *id.* at 12-19. The court rejected petitioners' contention that the relevant inquiry should be "whether the ATF employee operated the winch in a safe manner." *Id.* at 11. The court explained that application of the discretionary

function exception turns on "the governing administrative policy, rather than the negligence of a particular employee," and reasoned that petitioner's "narrow characterization" of the relevant conduct would improperly "collapse[] the discretionary function inquiry into a question of whether the government was negligent." *Id.* at 10-12 (internal quotation marks, brackets, and citations omitted).

The court of appeals emphasized that "framing the conduct more broadly, as we have done, does not imply that every action taken in connection with a government program will be brought under the umbrella of the broader policy-related judgments involved in the program." Pet. App. 13. The court recognized that "[a]lthough difficult to draw, there is a line between conduct 'of the kind that the discretionary function exception was designed to shield,' * * * and the sorts of run-of-the-mill torts, which, while tangentially related to some government program, are not sufficiently 'grounded in regulatory policy' so as to be shielded from liability." *Ibid.* (quoting *Berkovitz*, 486 U.S. at 536, and *Gaubert*, 499 U.S. at 325 n.7). "Where an act 'cannot be said to be based on the purposes that the regulatory regime seeks to accomplish,'" the court continued, "the discretionary-function exception will not apply." *Id.* at 14 (quoting *Gaubert*, 499 U.S. at 325 n.7).

The court of appeals determined that, in the particular circumstances here, the "decision to use a winch was part of the decisionmaking involved in deciding how best to conduct the post-blast investigation." Pet. App. 14. The court observed that the execution of the field experiment required "judgments about how to respond to hazards, what level of safety precautions to take, and how best to execute the experiment in a way that bal-

anced the safety needs of the personnel and the need to gather evidence from the vehicles." *Id.* at 15. "Decisions about how to execute the experiment," the court reasoned, "include judgments as to what kinds of equipment to use to extract the evidence for forensic laboratory analysis." *Ibid.*; see *ibid.* ("These equipment-related decisions were 'intimately related' to the execution of the field experiment.").

b. Judge Merritt dissented. Pet. App. 20a-26a. In his view, "once the government decided to carry out the hazardous IED experiment," it was "'obligated to use due care.'" *Id.* at 21a (quoting *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955)).

ARGUMENT

The court of appeals correctly concluded that the discretionary function exception bars petitioner's tort claims against the United States. The application of that exception in the particular circumstances of this case does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The FTCA effects a "limited waiver of sovereign immunity" that authorizes certain suits against the United States under state tort law. *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). "The Act did not waive the sovereign immunity of the United States in all respects, however; Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). The first such listed exception is the discretionary function exception, which forecloses suits "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). As this Court has explained, the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals," and its purpose 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." *Varig Airlines*, 467 U.S. at 808, 814.

The court of appeals correctly identified the settled rules governing the discretionary function exception, as set forth in *United States* v. *Gaubert*, 499 U.S. 315 (1991), and properly applied them to the facts of this case. At the first step of its analysis, the court determined that decisionmaking about the field experiment was not governed by any "mandatory policy or regulation" and therefore involved the exercise of discretion. Pet. App. 12. At the second step, the court observed that decisions about how to conduct the evidence-recovery mission—including what equipment to use in order to gain access to obstructed bomb fragment evidence—"were 'intimately related' to the execution of the field experiment." *Id.* at 15. The court reasoned that "[t]he planning and execution of the research experiment [was] susceptible to policy analysis," in that it involved "judgments about how to respond to hazards, what level of safety precautions to take, and how best to execute the experiment in a way that balanced the safety needs of the personnel and the need to gather evidence from the vehicles." *Ibid.*

2. Petitioner presents no sound reason for this Court to review the court of appeals' fact-bound application of well-settled discretionary-function-exception principles to the particular circumstances of this case. Petitioner first contends (Pet. 8-10) that the decision below "deepens" a conflict among the circuits as to "which party bears the ultimate burden of proof" in applying the discretionary function exception. As a threshold matter, that issue is not encompassed within the questions presented by the petition, see Pet. i, and it therefore cannot provide a basis for granting certiorari on those questions. In any event, the court of appeals' decision did not rest on any holding about the burden of proof. The opinion makes no reference to the issue, which was mentioned only in passing in petitioner's reply brief (primarily in a one-sentence footnote). See Pet. C.A. Reply Br. 15 n.53; see *Kuhn* v. *Washtenaw Cnty.*, 709 F.3d 612, 624 (6th Cir. 2013) ("This court has consistently held that arguments not raised in a party's opening brief, as well as arguments adverted to in only a perfunctory manner, are waived."). But even assuming the burden-of-proof issue was properly preserved, nothing suggests that the court of appeals considered it outcome-determinative.

Petitioner next contends (Pet. 11-14) that a government employee must be presumed incapable of exercising discretion unless the government can produce a written document specifically and expressly setting forth the policy that the employee is supposed to further. Petitioner identifies no court of appeals that has adopted such an approach, and her suggestion that this Court's decisions require such an approach rests on a misreading of *Gaubert*. The Court held in *Gaubert* that "[w]hen established governmental policy, as expressed

or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." 499 U.S. at 324. The requirement to apply a presumption favoring application of the discretionary function exception in those circumstances does not imply that the exception is categorically inapplicable in the absence of a specific written policy document. To the contrary, *Gaubert* recognized that agencies can "establish policy on a case-by-case basis * * * through administration of agency programs." *Ibid.*

Nothing in the text of the discretionary function exception, or this Court's decisions interpreting that text, places upon a federal agency the effectively impossible burden to anticipate and formally document every conceivable circumstance in which an agency employee might exercise discretion in furthering the agency's mission. Rather, such discretion can be determined by reference to the agency's overall statutory mission and the nature of the activities the agency is carrying out. In this case, petitioner does not suggest that the Department of Defense or ATF lacks statutory authority to conduct research into best practices for investigating IED attacks; she does not dispute that implementing such a research agenda necessarily involves discretionary decisions about what avenues to explore and what equipment to use; and she does not identify any legal constraints on government employees' authority to make those types of judgments.[1]

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[1] In any event, petitioner's failure to raise her specific-documentation argument in the district court precludes her from ascribing significance to the government's alleged failure to proffer

Petitioner finally contends (Pet. 14-17) that the court of appeals erred in "applying the discretionary function exception to simple machine operator error." But the court of appeals determined that the conduct underlying petitioner's tort claim could not properly be characterized as simple machine operator error, but was instead "the recovery of forensic evidence and the necessary actions taken to facilitate that recovery, including actions taken to dislodge the door of the minivan so that evidence could be recovered." Pet. App. 12 (internal quotation marks omitted). Petitioner identifies no decision of this Court or any other court of appeals that compels the "narrow characterization" (*id.* at 10) urged by petitioner. Petitioner's attempt to equate the circumstances here to the act of an employee driving an automobile, see Pet. 14-15, 20, is misplaced. A driver's decisions to change lanes or yield the right of way would normally be too far attenuated from agency policy objectives to be protected by the discretionary function exception. See *Gaubert*, 499 U.S. at 325 n.7. Here, in contrast, "decisions about how to extract evidence from the site of the explosions, and what types of equipment to use to do so," Pet. App. 3, were "a necessary part of the decisions involved in how to execute the experiment," *id.* at 16 n.3, and were related "to the purposes that the post-blast investigation sought to accomplish," *id.* at 16.

Petitioner observes that the "decision to use the winch was made *ad hoc* in the field." Pet. 16. But the scope of the discretionary function exception "is not confined to the policy or planning level," and can encom-

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documents confirming the self-evident proposition that administration of the IED-research program involved the exercise of discretion.

pass "acts on the operational level" as well. *Gaubert*, 499 U.S. at 325-326. Petitioner separately asserts that the government had "no compelling reason to take any step that could pose harm to someone else." Pet. 16. But even if that were true, it would simply be an argument that the decision to use the winch was wrong, not that the decision lacked the sort of discretionary character that would bring it within the scope of the discretionary function exception. The government had discretion about how best to access the driver's side interior of the minivan, and the discretionary function exception accordingly precludes petitioner from contending that "the decision to use the winch," Pet. 15, was "negligently performed" or was "an abuse of discretion," *Dalehite* v. *United States*, 346 U.S. 15, 34 (1953). This Court has made clear that "[a]ctions taken in furtherance" of a discretionary program can be protected under the discretionary function exception, "even if those particular actions were negligent." *Gaubert*, 499 U.S. at 323 (citing *Varig Airlines*, 467 U.S. at 820). And it has rejected claims that invite courts to second-guess whether an agency should have placed more emphasis on safety in deciding how to undertake a particular activity. See *Varig Airlines*, 467 U.S. at 820 (concluding that agency's balancing of "safety" concerns with "the reality of finite agency resources" was protected by the discretionary function exception).[2]

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[2] Petitioner correctly declines to rely on the view of the dissenting judge that the panel's decision was inconsistent with *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). The dissenting judge invoked *Indian Towing* for the proposition that "once the government makes a protected policy [decision], every implementing step * * * must proceed with 'due care' in carrying out its decision." Pet. App. 20-21. As the panel majority explained, "the discretionary-function

3. Even assuming the court of appeals erred in applying the settled discretionary-function-exception framework to the specific facts of this case, any such error would not warrant this Court's review. See Sup. Ct. R. 10. Contrary to petitioner's suggestion (Pet. 17-20) that the decision below sounds the "death knell" of the FTCA, the court of appeals' fact-bound analysis breaks no new ground. The court of appeals stressed that the analysis here did "not imply that every action taken in connection with a government program will be brought under the umbrella of the broader policy-related judgments involved in the program." Pet. App. 13. The court recognized the existence of "a line" between exercises of policy judgment protected by the discretionary function exception and "the sorts of run-of-the-mill torts" resulting from conduct not susceptible to policy analysis. *Ibid.* And it found this "a close case," *id.* at 14, implying that it could and would reach a different result on different facts. Particularly in the absence of any demonstration that another court of appeals would have decided this particular case differently, no further review is warranted.

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exception was not at issue in *Indian Towing*," *id.* at 17 n.4, and the case therefore does not constitute relevant authority. See also *Gaubert*, 499 U.S. at 326 (noting that the government did not rely on the discretionary function exception in *Indian Towing*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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