No. 15-859

# In the Supreme Court of the United States

SUSAN M. CHADD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT H. BOARDMAN, DECEASED, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*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 damages claims for injuries allegedly caused by the National Park Service's management decisions with respect to potentially dangerous wildlife.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-57) is reported at 794 F.3d 1104. The decision of the district court (Pet. App. 69-102) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 27, 2015. A petition for rehearing en banc was denied on October 6, 2015 (Pet. App. 103-104). The petition for a writ of certiorari was filed on January 4, 2016. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

### STATEMENT

This case involves the application of the discretionary-function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a). The district court dismissed petitioner's tort claim against the United

States pursuant to that exception, and the court of appeals affirmed. Pet. App. 1-21, 69-102.

1. The National Park Service administers Olympic National Park. The park is populated by more than 400 species of animals. C.A. Supp. E.R. 2. One such species is the mountain goat, which humans introduced to the region before the park's founding in 1938. *Ibid.*

In the 1980s, the Park Service considered relocating the park's goat population, which numbered about 1175 at the time, to protect the park's native vegetation. C.A. E.R. 57-58; C.A. Supp. E.R. 11. The Park Service removed more than a third of the population using helicopters until it determined that the missions endangered both the goats and its staff. *Ibid.* The Park Service considered killing the remaining goats, but it abandoned that plan in the face of political and public opposition. By 2010, the population had dropped to approximately 350 goats dispersed across 147,000 acres of the park. C.A. Supp. E.R. 11.

In 2004, the Park Service learned that some goats were becoming habituated to human contact, losing their fear response toward humans as a result. Pet. App. 5. By 2006, some goats had started displaying behaviors such as "standing their ground, following or chasing humans, pawing the ground, and rearing up." *Ibid.* After confirming those reports, Park Service officials began warning visitors about the goats' behavior in person and on signs posted along trails. *Ibid.* They also began employing "aversive conditioning techniques" to reawaken the goats' fear response—for example, by shooting goats with paintballs or beanbags. *Ibid.* The Park Service nevertheless continued to receive reports of a large male goat

chasing visitors between 2009 and 2010. In response, the Park Service decided to intensify its aversive conditioning efforts and to "explore other management options," such as "relocation [of that goat] from the area." *Id.* at 6.

2. Petitioner in this case is Susan M. Chadd, in her personal capacity and in her capacity as personal representative of the estate of her husband, Robert H. Boardman. In October 2010, Boardman was attacked by a large male goat while hiking in Olympic National Park and died from his injuries. Pet. App. 6. Within hours of the attack, park officials found and killed the goat responsible. *Ibid.* Park officials later determined that only three goat attacks in or near a national park had ever been recorded. *Id.* at 4. None had resulted in a fatality. *Ibid.*

3. Petitioner filed suit under the FTCA, alleging that the Park Service had acted negligently by failing to kill the goat in the years leading up to Boardman's death. Pet. App. 6-7.[1] The district court dismissed petitioner's complaint as barred by the FTCA's discretionary-function exception, codified at 28 U.S.C. 2680(a). *Id.* at 69-102. 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).

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[1] Petitioner also alleged that the Park Service's response to the goat attack was deficient. The district court dismissed that claim in a separate order, and petitioner did not appeal that claim to the court of appeals. See Pet. App. 7 n.2.

In dismissing the case, the district court conducted the two-step analysis required by this Court's decisions in *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531, 536-537 (1988). First, the court determined that no statute, regulation, or policy required the Park Service to kill potentially dangerous animals or this potentially dangerous goat. Pet. App. 94. Rather, the court explained, the Park Service had discretion as to "whether and when to destroy the goat." *Ibid.* The court next determined that the Park Service had "provided evidence that the decisions of what to do about the * * * goat[]" were "grounded in social, economic and political policy." *Id.* at 95. It therefore dismissed the case based on the discretionary-function exception. *Id.* at 101.[2]

4. A divided panel of the court of appeals affirmed. Pet. App. 1-21.

a. Judge O'Scannlain's opinion for the court of appeals began by explaining that, under *Gaubert*, a court considering whether the discretionary-function exception applies must (1) inquire "whether the government's actions are 'discretionary in nature, acts that involv[e] an element of judgment or choice,'" and then (2) consider whether the government's actions are "'of the kind that the discretionary function exception was designed to shield.'" Pet. App. 9 (quoting 499 U.S. at 322-323). The court noted that the latter inquiry focuses "not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether

[2] Petitioner moved for reconsideration in light of new evidence, but the district court denied her motion because the new evidence did not alter its analysis. Pet. App. 59-64.

they are susceptible to policy analysis." *Id.* at 10 (quoting *Gaubert*, 499 U.S. at 325).

At the first step of the analysis, the court of appeals concluded that "no extant statute, regulation, or policy directive * * * required Park officials to destroy the goat prior to Boardman's death." Pet. App. 14. It noted that the Park Service's Management Policies manual—the agency's "basic Service-wide policy document"—states:

> The saving of human life will take precedence over all other management actions * * * within the constraints of the 1916 Organic Act. The primary —and very substantial—constraint imposed by the Organic Act is that discretionary management activities may be undertaken only to the extent that they will not impair park resources and values.

*Id.* at 11-12 (quoting *Management Policies 2006*, U.S. Dep't of the Interior, Nat'l Park Serv. § 8.2.5.1 (*Management Policies Manual*); see C.A. E.R. 309, 313). The court emphasized that the manual itself recognizes that the Park Service's obligation to "'reduce or remove known hazards' is limited by what is 'practicable and consistent with congressionally designated purposes and mandates.'" *Id.* at 12 (quoting *Management Policies Manual* § 8.2.5.1; see C.A. E.R. 313). And it further noted that the manual "explicitly" grants "discretion" to "decisionmakers at the park level" to determine whether to "eliminate potentially dangerous animals." *Ibid.* (quoting *Management Policies Manual* § 8.2.5.1; see C.A. E.R. 313).

The court of appeals also pointed out that no management plan specific to Olympic National Park requires the Park Service to kill aggressive or habituated goats. Pet. App. 13-14. For example, the court

noted, the park's Nuisance and Hazardous Animal Management Plan outlines certain responses that officials may take when confronted with a threatening animal species, but it does not require officials to adopt a particular response or to escalate their response level. *Id.* at 13. And although the park's Mountain Goat Action Plan lists three forms of aversive conditioning as "appropriate incident management techniques," it "does not specify how or when they should be deployed" and "does not even mention animal destruction." *Ibid.*

Finally, the court of appeals emphasized that petitioner herself had acknowledged that no existing statute, regulation, or policy directive required park officials to kill the goat. Pet. App. 14. The court noted that petitioner's own reply brief had stated that petitioner "does not argue that there is a mandatory directive prescribing a specific course of conduct." *Ibid.* (quoting Pet. C.A. Reply Br. 8).

At the second step of the discretionary-function analysis, the court of appeals explained that the Park Service's Management Policies manual requires "many competing considerations" to be taken into account when deciding how to manage a potentially dangerous animal. Pet. App. 20; see C.A. E.R. 313. For example, the manual explains that park officials, in considering measures for "the saving of human life," do so within constraints drawn from the 1916 Organic Act, including protection of "park resources and values" and "congressionally designated purposes and mandates." Pet. App. 12, 20; see C.A. E.R. 313. The court also reaffirmed the district court's finding that park officials had "evaluated multiple policy considerations in deciding how to manage th[is] problem-

atic goat." Pet. App. 19. For instance, park officials were aware of the public's "desire[] to see the goats," as evinced by the "significant opposition" the park encountered when the Park Service attempted to "remove some of the goats" in the past. *Ibid.* Because the Park Service's "decision to use non-lethal methods to manage the goat was susceptible to policy analysis," the court explained, the discretionary-function exception barred petitioner's claims. *Id.* at 21.

In the course of its analysis, the court of appeals rejected petitioner's three principal arguments. First, petitioner had argued that the discretionary-function exception applies only to "high-level policy decision[s]," not to "garden-variety tort[s]." Pet. App. 14. The court explained that this argument is foreclosed by this Court's precedent, which establishes that the exception "'is not confined to the policy or planning level.'" *Id.* at 15 (quoting *Gaubert*, 499 U.S. at 323, 325). The court stated that "[i]t does not matter * * * if the decision at issue was made by low-level government officials[] rather than by high-level policymakers" if that decision is susceptible to policy analysis. *Ibid.*

Second, the court of appeals rejected petitioner's argument that the Park Service officials' only reasonable course of action in light of the reports they had received about the goat's aggressive behavior was to kill the goat. Pet. App. 15. The court explained that the reasonableness of the Park Service's actions "is not the relevant question" when analyzing whether the discretionary-function exception applies. *Ibid.* Rather, "the question is whether the course of action chosen was *susceptible* to a policy analysis, even if the

action constituted an abuse of discretion." *Id.* at 15-16 (internal quotation marks and citations omitted).

Third, the court of appeals rejected petitioner's argument that governmental acts implementing safety regulations are *never* "susceptible to policy analysis" because such acts involve "professional and scientific judgment[s]," not "decisions of social, economic, or political policy." Pet. App. 16-18 (internal quotation marks and citations omitted). The court explained that petitioner's argument rested on a misreading of circuit precedent. The court stated that, far from establishing a categorical rule that the discretionary-function exception never covers implementation of a safety regulation, circuit precedent "ma[kes] clear that the 'implementation of a government policy *is* shielded [by the exception] where the *implementation itself* implicates policy concerns.'" *Id.* at 17-18 (quoting *Whisnant* v. *United States*, 400 F.3d 1177, 1182 n.3 (9th Cir. 2005)). Here, the court emphasized, "park officials evaluated multiple policy considerations in deciding how to manage the problematic goat." *Id.* at 19. The court further emphasized that "there is 'a strong presumption that a discretionary act authorized by [a] regulation involves consideration of the same policies which led to the promulgation of the regulations.'" *Id.* at 21 (quoting *Gaubert*, 499 U.S. at 324).

The court of appeals concluded that whether park officials had expressly evaluated those policies "is irrelevant because the challenged decision need not be *actually* grounded in policy considerations, but must be, by its nature, *susceptible* to a policy analysis." Pet. App. 20 (internal quotation marks and citation omitted). The court explained that the record here

contained "more than" enough evidence demonstrating that decisions implementing wildlife-management guidelines are "subject to competing policy concerns." *Id.* at 21.

b. Judge Berzon joined Judge O'Scannlain's opinion in full, but she also issued a separate concurrence. Pet. App. 21-23. Her concurrence expressed the view that an FTCA claim should not fall within the discretionary-function exception if a plaintiff can prove that the challenged governmental action "was not *actually* based on policy considerations, even if the decision was *susceptible* to a hypothetical policy analysis." *Id.* at 22. Judge Berzon made clear, however, that this interpretation of the exception was not consistent with circuit precedent. *Id.* at 23.

c. Judge Kleinfeld dissented. Pet. App. 23-57. In his view, the discretionary-function exception did not apply because "the particular exercise of discretion at issue did not require a weighing of public policy considerations," and because "[t]here never was a discretionary decision * * * to delay or decline to relocate or remove the goat." *Id.* at 49, 56.[3]

**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 to the facts 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, 28 U.S.C. 2671 *et seq.*, effects a "limited waiver of sovereign immunity" that authorizes

[3] The court of appeals denied petitioner's petition for rehearing and rehearing en banc. Pet. App. 103.

certain suits against the United States based on state tort law. *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). "The [FTCA] 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 Area Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 808 (1984).

One such exception to FTCA liability 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). That 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." *Varig Airlines*, 467 U.S. at 808. The exception "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814.

The court of appeals properly applied the discretionary-function exception and dismissed petitioner's FTCA claim. The court began by correctly explaining that, under *United States* v. *Gaubert*, 499 U.S. 315 (1991), the exception applies when the government actions at issue are (1) "discretionary in nature," insofar as they "involv[e] an element of judgment or choice," and (2) "susceptible to policy analysis," meaning that they implicate considerations of "social, eco-

nomic, and political policy." *Id.* at 322-323, 325 (citation and internal quotation marks omitted); see Pet. App. 9-10.

The court of appeals then properly applied that framework to the facts of this case. With respect to the first step, the court surveyed the statutes, regulations, and policies governing goat management in Olympic National Park and concluded that no mandatory directive required park officials to kill the goat at issue or dictated the timing of any other specific actions. Pet. App. 13-14; see *id.* at 14 (also noting petitioner's acknowledgment that there is no "mandatory directive prescribing a specific course of conduct").

With respect to the second step, the court held that decisions about how to manage aggressive goats implicate "several competing [policy] objectives that Park officials had to consider," such as visitor safety, park resources, and park values. Pet. App. 20. The court reaffirmed the district court's finding that "park officials evaluated multiple policy considerations in deciding how to manage the problematic goat." *Id.* at 19. The court emphasized that, given "the public's interest in preserving Olympic's goats, Park officials implemented several non-lethal management options * * * and explored the possibility of relocating the goat." *Ibid.* The court further noted that the Management Policies manual expressly empowered park officials to exercise discretion when assessing how best to implement the goal of "prioritizing human safety" in a manner consistent with "park resources and values." *Id.* at 20. It concluded that—given the need for park officials to balance competing policy objectives—their decisions regarding how to handle the aggressive goat were susceptible to policy analysis

and thus protected by the discretionary-function exception. *Id.* at 20-21.

2. Petitioner argues that this Court should grant certiorari and hold that the discretionary-function exception "immunizes *only* governmental conduct *actually* based on public policy considerations," regardless of whether that conduct is susceptible to policy analysis. Pet. i (emphasis added); see Pet. App. 15-24, 41. That argument is foreclosed by this Court's decision in *Gaubert* and does not warrant further review.

a. Petitioner argues that when considering whether the discretionary-function exception bars an FTCA suit, a court must determine whether the government employee whose conduct is at issue "actually" based his or her actions on an analysis of policy considerations. Pet. i, 15, 41. This Court rejected that approach in *Gaubert*. There, the court summarized the legal standard as follows:

> When 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. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are *not the kind of conduct* that can be said to be grounded in the policy of the regulatory regime. *The focus of the inquiry is not on the agent's 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. 324-325 (emphasis added).

Petitioner's argument is inconsistent with *Gaubert* because it would require a court to analyze the government official's subjective state of mind when committing the alleged tort. *Gaubert* makes clear that the focus is not on the official's "subjective intent," and that what matters is "the nature of the actions" and "whether [those actions] are susceptible to policy analysis." 499 U.S. at 325; see Pet. App. 20-21 (applying *Gaubert* in that fashion). Consistent with that principle, the courts of appeals have recognized that to determine whether a discretionary act is "susceptible to policy analysis," the relevant question is whether the act implicates competing policy goals, not whether the government acted after specifically deliberating about those goals.[4] Notably, other circuits that have considered FTCA claims arising out of animal attacks on Park Service lands have applied the discretionary-function exception after concluding that animal-management decisions are freighted with poli-

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[4] See, *e.g.*, *Shansky* v. *United States*, 164 F.3d 688, 692 (1st Cir. 1999); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 37 (2d Cir. 1989); *Baer* v. *United States*, 722 F.3d 168, 175 (3d Cir. 2013); *Smith* v. *Washington Metro. Area Transit Auth.*, 290 F.3d 201, 208 (4th Cir.), cert. denied, 537 U.S. 950 (2002); *Spotts* v. *United States*, 613 F.3d 559, 572-573 (5th Cir. 2010); *Rosebush* v. *United States*, 119 F.3d 438, 444 (6th Cir. 1997); *Grammatico* v. *United States*, 109 F.3d 1198, 1203 (7th Cir. 1997); *Metter* v. *United States*, 785 F.3d 1227, 1233 (8th Cir. 2015); *Miller* v. *United States*, 163 F.3d 591, 593-594 (9th Cir. 1998); *Kiehn* v. *United States*, 984 F.2d 1100, 1108 (10th Cir. 1993); *Autery* v. *United States*, 992 F.2d 1523, 1530-1531 (11th Cir. 1993), cert. denied, 511 U.S. 1081 (1994); *Cope* v. *Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995).

cy considerations.[5] That is precisely what the court of appeals did here.

b. Petitioner argues (Pet. 19-22) that the Third, Eighth, and Ninth Circuits have diverged from the other circuits in holding that the discretionary-function exception does not extend to conduct that is "not actually based on public policy considerations." She is mistaken.

The Third Circuit applies the same rule that the court of appeals followed in this case. In *Baer* v. *United States*, 722 F.3d 168 (2013), that court applied the discretionary-function exception and dismissed a suit alleging that the Securities and Exchange Commission (SEC) had improperly declined to investigate the Ponzi scheme orchestrated by Bernard Madoff because of his status as a "Wall Street bigwig." *Id.* at 174-176. Citing *Gaubert*, the court explained that "[t]he focus of the [discretionary-function] inquiry is *not on the agent's 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." *Id.* at 175 (quoting 499 U.S. at 325). The court went on to explain that, under this standard, it was irrelevant whether the actual basis for the SEC's alleged failure to investigate Madoff was "favoritism," "discrimination," or "laziness," because the purpose of the discretionary-function exception is to preserve for the United States "'the right to act without liability for misjudgment and carelessness in the formulation of policy.'" *Id.* at 175-

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[5] See, *e.g.*, *S.R.P. ex rel. Abunabba* v. *United States*, 676 F.3d 329, 342 (3d Cir. 2012) (barracuda attack at Buck Island Reef National Monument); *Tippett* v. *United States*, 108 F.3d 1194, 1199 (10th Cir. 1997) (moose attack in Yellowstone National Park).

176 & n.5 (quoting *Molchatsky* v. *United States*, 713 F.3d 159, 162 (2d Cir. 2013) (per curiam) (citation omitted)).

In addition to *Baer*, petitioner cites (Pet. 19-20) two other Third Circuit decisions quoting the relevant language from *Gaubert* and stating that the discretionary-function exception applies when there is a "rational nexus" between the challenged conduct and policy considerations. See *S.R.P. ex rel. Abunabba* v. *United States*, 676 F.3d 329, 333, 336 (2013); *Cestonaro* v. *United States*, 211 F.3d 749, 753, 759 (2000). But both of those decisions pre-dated *Baer*, and neither adopted petitioner's bright-line rule (Pet. 19) that what matters is whether the government conduct at issue was "actually based on public policy considerations." In context, the Third Circuit's references to a "rational nexus" in those cases are best understood as requiring merely that there be a reasonable relationship between "the *kind* of conduct" at issue and the relevant policy considerations. *Gaubert*, 499 U.S. at 325 (emphasis added) (noting that the inquiry focuses on "the nature of the actions taken" and "whether they are susceptible to policy analysis"). The decisions in those cases accordingly do not conflict with the Ninth Circuit's decision here.

Petitioner also cites (Pet. 20-21) the Eighth Circuit's decision in *Herden* v. *United States*, 726 F.3d 1042, 1049 n.5 (2013), cert. denied, 134 S. Ct. 1874 (2014). But as petitioner herself acknowledges (Pet. 20-21), the *Herden* court expressly stated that "a decision maker *need not actually consider* social, economic, or political policy to trigger the exception," 726 F.3d at 1049 n.5 (emphasis added), and in a subsequent case the Eighth Circuit has held that the gov-

ernment "need *not* have made a conscious decision regarding policy factors," *Metter* v. *United States*, 785 F.3d 1227, 1233 (2015) (emphasis added). *Herden* itself states that the fact that a government decision is actually based on policy considerations is only "one way to demonstrate [that] a decision is susceptible to policy analysis." 726 F.3d at 1049 n.5. That statement is worlds apart from petitioner's argument that such actual consideration of policy is itself required for the discretionary-function exception to apply.

Petitioner claims (Pet. 21) that the Ninth Circuit's decision in *Marlys Bear Medicine* v. *United States*, 241 F.3d 1208, 1216-1217 (2001) (*Bear Medicine*), supports her proposed rule. But as petitioner appears to acknowledge (Pet. 21), subsequent circuit precedent—including in this case—unambiguously establishes that the Ninth Circuit does not limit the exception to those cases in which the challenged conduct was actually the product of policy analysis. See *Dichter-Mad Family Partners, LLP* v. *United States*, 709 F.3d 749, 763 ("Where there is no statute, regulation, or policy on point (either conferring discretion or limiting discretion), the relevant question is *not* whether the decision was the result of an actual policy-based decision-making process.") (emphasis added), cert. denied, 134 S. Ct. 117 (2013). In any event, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), and this Court's review is not warranted to resolve any inconsistency between different Ninth Circuit decisions.

c. Petitioner further argues (Pet. 23) that many circuits have held that *Gaubert* "creates a strong

presumption that the challenged conduct was based on policy considerations," but that "the presumption is rebuttable by persuasive evidence to the contrary." Petitioner's analysis is mistaken. To be sure, *Gaubert* requires courts to presume that discretionary authority implicates policy considerations. 499 U.S. at 325. And *Gaubert* also permits FTCA plaintiffs to rebut that presumption by establishing "that the challenged actions are *not the kind of conduct* that can be said to be grounded in the policy of the regulatory regime." *Ibid.* (emphasis added). But that does not mean that the discretionary-function analysis ultimately turns on the actual reasons motivating the particular government conduct at issue, as petitioner argues. On the contrary, it merely confirms that whether the discretionary-function exception applies turns on the nature of the conduct—specifically, on whether the conduct implicates policy considerations—and not on the alleged tortfeasor's subjective state of mind.

d. Even if petitioner were right that the courts of appeals are divided over her first question presented, this case would be a poor vehicle for this Court to resolve any such conflict. The court of appeals here expressly pointed to the district court's determination that "park officials evaluated multiple policy considerations in deciding how to manage the problematic goat." Pet. App. 19; see *id.* at 94-97, 100. That means that the discretionary-function exception would apply even if petitioner were correct that the exception applies only when the allegedly tortious government conduct actually involved a policy analysis. And although petitioner disagrees (Pet. 41) with the lower courts' view of the record evidence underlying the

park officials' decisionmaking, that factbound dispute is not independently worthy of further review.

3. Petitioner also asks (Pet. i-ii, 24-41) this Court to hold that the discretionary-function exception does not apply when the challenged conduct involves government employees who fail to implement safety measures. That argument is inconsistent with *Gaubert* and does not implicate any split of authority among the courts of appeals.

a. As explained above, *Gaubert* holds that the discretionary-function exception applies when the challenged government conduct is both "discretionary in nature" and "susceptible to policy analysis." 499 U.S. at 322-323, 325. That rule does not differentiate between situations in which the government (1) regulates "private individuals under complex regulatory schemes," and (2) regulates, "as a manager of its own employees," with respect to "safety measures." Pet. 37. Petitioner's argument in favor of such a distinction—and embracing a categorical rule that the discretionary-function exception never applies in the latter circumstance—is therefore not consistent with *Gaubert*.

Petitioner defends her proposed rule by arguing (Pet. 37-38) that this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955), establishes that the discretionary-function exception should never apply when the government "fail[s] to follow measures designed to protect the public" because such decisions do not have anything to do with public policy. In that case, the government was held liable for negligently allowing the light to go out in a lighthouse. *Ibid.* But as this Court subsequently explained, the government's liability in *Indian Towing* turned on the

fact that ensuring that the lighthouse was operational "did not involve any permissible exercise of policy judgment." *Berkovitz* v. *United States*, 486 U.S. 531, 538 n.3 (1988); see *Gaubert*, 499 U.S. at 326. It did not turn on any general rule that the discretionary-function exception never protects the failure of government employees to properly implement safety measures. Moreover, the government in *Indian Towing* expressly disclaimed any reliance on the discretionary-function exception; this Court's decision thus does not bear on the proper interpretation of that exception. See 350 U.S. at 64; *Gaubert*, 499 U.S. at 326.

In any event, this Court's decision in *Varig Airlines* confirms that there is no categorical rule rendering the discretionary-function exception inapplicable to actions taken by government employees in connection with a government-mandated safety scheme. 467 U.S. at 815-816. There, the Court recognized that the exception protected employees "implementing" a "spot-check" plan for inspecting airplanes, even when the employee conduct was "negligent." *Gaubert*, 499 U.S. at 323; see *Varig Airlines*, 467 U.S. at 815-816, 819-820. The Court's decision is not consistent with petitioner's proposed rule, which would appear to render the discretionary-function exception inapplicable in such circumstances.[6]

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[6] Petitioner also emphasizes (Pet. 38) that (1) the FTCA generally makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674; and (2) a private employer can be held liable under Washington law for "fail[ing] to follow through on [his or her] safety measure." As this Court has made clear, however, the discretionary-function exception marks one circumstance in which

b. Petitioner argues that the court of appeals' decision in this case conflicts with decisions from at least six circuits establishing that the discretionary-function exception "generally does not immunize the government's failure to follow its own safety measures." Pet. 25; see Pet. 25-36. But the court of appeals in this case did not hold that such a failure always triggers the exception. Rather, the court applied *Gaubert* and held that the exception applied because governing statutes, regulations, and policies do not prescribe a specific measure to protect public safety in the particular circumstances and any such action would implicate discretionary judgments and tradeoffs among various "competing objectives" and "competing considerations." Pet. App. 20; see pp. 10-12, *supra*.

The Ninth Circuit's conclusion is consistent with petitioner's cited decisions from other circuits, which generally establish that the discretionary-function exception does not apply when the challenged government conduct does not implicate policy considerations.[7] Indeed, petitioner herself concedes (Pet. 29)

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the FTCA "specifically set[s] forth" that "the liability of the United States is *not* co-extensive with that of a private person under state law." *Richards* v. *United States*, 369 U.S. 1, 13-14 (1962) (emphasis added). Petitioner's analogy to the liability of a private employer thus begs the question of whether the exception applies in the first place.

[7] See, *e.g.*, *Bear Medicine*, 241 F.3d at 1215 (holding that the record did not support the government's assertion that supervision of a logging site implicated policy judgments about tribal autonomy and resource allocation); *Coulthurst* v. *United States*, 214 F.3d 106, 110-111 (2d Cir. 2000) (holding that the record did not support the government's assertion that negligence arising from a safety inspector's decision to take a smoke break implicated policy judg-

that the circuits she identifies all recognize that the discretionary-function exception *does* apply when the government's "fail[ure] to follow its own safety measures * * * involves permissible policy-based decisionmaking." The different outcomes in those decisions reflect different underlying facts; they do not establish a circuit conflict warranting review by this Court.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ments of any sort); *Gotha* v. *United States*, 115 F.3d 176, 181-182 (3d Cir. 1997) (holding that the record did not support the government's assertion that installation of an outdoor staircase on a government facility implicated policy judgments about national defense).