No. 15-1361

In the Supreme Court of the United States

STEVEN CRAIG PATTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH 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 claim for economic damages, pain and suffering, and punitive damages, arising from the Drug Enforcement Administration's failure to notify him before an authorized driver of his truck drove the truck as part of an undercover controlled drug delivery.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on February 5, 2016. The petition for a writ of certiorari was filed on May 5, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States generally enjoys sovereign immunity against monetary liability. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, however, waives the government's sovereign immunity 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 preserving the United States' immunity from suit as to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

2. This case arises from a Drug Enforcement Administration (DEA) undercover controlled-delivery operation that went awry. Pet. App. 4-5, 29 n.3. Petitioner operates a small trucking company in Texas. Unbeknownst to him, one of his drivers was a confidential informant for the DEA. On November 18, 2011, the driver contacted DEA Task Force Officer Villasana (a City of Houston police officer deputized as a DEA agent) and notified him that someone in the Zeta drug cartel had asked him to transport 1800 pounds of marijuana from Rio Grande City, Texas, to an individual near Houston, Texas. *Id.* at 4. The driver told Villasana that "he would tell the owner of the tractor-trailer that he was leasing[] that he had planned to spend Thanksgiving in Houston" and "knew of an inexpensive repair shop in Houston where he could take the truck for routine maintenance and needed repairs." *Ibid.* (citation omitted). On November 20, 2011, the driver called Villasana and told him that he had been instructed to pick up and transfer the marijuana the next day. *Id.* at 4-5.

The DEA Task Force decided to conduct a "controlled drug delivery," a standard undercover opera-

tion. Pet. App. 5. The DEA Task Force "met and devised a * * * plan" whereby the truck would remain under surveillance, the delivery of the marijuana would occur at a prearranged location in Houston, and DEA officers would arrest the suspects and seize the illegal drugs once they were delivered. *Ibid.* (citation omitted).

On November 21, 2011, petitioner's driver picked up the load of marijuana and began hauling it to Houston. From there, however, "[t]he plan quickly deteriorated." Pet. App. 5. "Several heavily armed cartel members in three sport-utility vehicles intercepted the truck in northwest Houston." *Ibid.* "The ensuing firefight wounded an undercover Harris County Sheriff's deputy and killed [petitioner's] driver." *Ibid.* Petitioner's truck was "wrecked and riddled with bullet holes." *Ibid.* (citation omitted). The DEA returned the damaged truck to petitioner. *Ibid.*

3. On July 23, 2012, petitioner filed an administrative claim under the FTCA. Pet. App. 6. Petitioner sought $1,483,532.10 from the government, consisting of $133,532.10 for damage to the truck and other economic losses, and $1,350,000 in "pain, suffering, and humiliation." *Ibid.* (citation omitted). The Department of Justice denied the claim. *Ibid.*

Petitioner then brought this action in the United States District Court for the Southern District of Texas. Pet. App. 6. In his original complaint, petitioner asserted claims under the FTCA, and against individual federal, state, and county officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. 1983, for negligence, intentional torts, and violations of his constitutional rights. Subsequently,

petitioner voluntarily dismissed his claims against all the defendants except the United States, including his constitutional *Bivens* claims against individual officials. In his amended complaint, petitioner asserted only tort claims against the United States under the FTCA. These remaining FTCA claims purported to include "constitutional torts," negligence, conversion, and abuse of process. Pet. App. 6 (citation omitted). Petitioner again sought $1,483,532.10 in actual damages, largely consisting of emotional damages, and now also sought $5,000,000 in punitive damages. *Ibid.*

On April 27, 2015, the district court granted summary judgment in favor of the United States. Pet. App. 3-33. As relevant here, the court held that the FTCA's discretionary-function exception covered the official conduct challenged here, and accordingly that petitioner's claim is barred by the government's sovereign immunity. *Id.* at 15-30.

Applying the test articulated in *United States* v. *Gaubert*, 499 U.S. 315 (1991), the district court explained 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 the challenged conduct involves "an element of judgment or choice." *Id.* at 322 (citation omitted). At the second, 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." *Id.* at 322-323, 325 (citation omitted). See Pet. App. 16.

Analyzing the first step of *Gaubert*, the district court held that no "statute, regulation, or policy * * * prohibited the [DEA's] course of action." Pet. App. 17. The court found it undisputed that Villasana

was "aware of no formal procedure or policy from the DEA regarding determining the identity of the owner of the truck." *Id.* at 18-19 (citations and internal quotation marks omitted). The court also noted that the DEA Task Force had "met and discussed 'the need to keep the operation covert and not involving unknown persons [such as the truck's owner] and their associations that could jeopardize the success of the mission.'" *Id.* at 20 (citation omitted; brackets in original). The court found that conclusion consistent with many cases upholding law enforcement discretion in undercover operations. *Id.* at 19-21; see *Suter* v. *United States*, 441 F.3d 306, 311 (4th Cir.), cert. denied, 549 U.S. 887 (2006); *Frigard* v. *United States*, 862 F.2d 201, 203 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1098 (1989).

Turning to the second step of the *Gaubert* analysis, the district court held that the DEA's decisions in "[o]rchestrating a covert controlled drug delivery" are susceptible to policy analysis. Pet. App. 24-25. The court held that deciding to carry out the mission "without giving the vehicle owner advance notice and obtaining his consent" implicated sensitive questions of law-enforcement policy, *id.* at 25, citing a variety of cases involving decisions within and in furtherance of undercover law-enforcement operations, *id.* at 25-28.

4. The court of appeals affirmed in an unpublished per curiam order "for the reasons given in the opinion of the district court." Pet. App. 1.

ARGUMENT

The court of appeals correctly affirmed the district court's decision concluding that the United States' sovereign immunity bars petitioner's tort claims, as they fall within the discretionary-function exception to

the FTCA. Petitioner does not dispute that the district court articulated the correct legal rule, set forth in *United States* v. *Gaubert*, 499 U.S. 315 (1991). And the court's application of *Gaubert* to reject petitioner's contention that the government was obligated to inform him when his driver agreed to participate in an undercover sting operation is correct, fact-specific, and does not conflict with any decision of this Court or any other court of appeals. The court of appeals unpublished and non-precedential order of affirmance does not warrant this Court's review.

1. a. The discretionary-function exception to the FTCA's waiver of sovereign immunity forecloses an action "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). This Court in *Gaubert* set forth a two-step analysis for a court to follow in determining whether the discretionary-function exception applies. First, a court inquires whether the challenged act or omission involved "an element of judgment or choice." *Gaubert*, 499 U.S. at 322 (citation omitted). This requirement is not satisfied "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,'" because under those circumstances "the employee has no rightful option but to adhere to the directive." *Ibid.* (citation omitted). Second, a court decides whether the challenged judgment was "susceptible to policy analysis," *id.* at 325, in the sense of being "based on considerations of public policy," *id.* at 323 (citation omitted). If so, the challenged conduct

cannot give rise to liability, even if "the discretion involved [was] abused." 28 U.S.C. 2680(a).

b. Petitioner does not dispute that the district court (affirmed by the court of appeals) correctly articulated the *Gaubert* test. Petitioner challenges only the application of that test to the facts of this case. Petitioner's arguments are both factbound and lack merit.

At the first step, the district court correctly noted that whether and how to conduct an undercover operation is "necessarily discretionary in nature." Pet. App. 18 (quoting *Suter* v. *United States*, 441 F.3d 306, 311 (4th Cir.), cert. denied, 549 U.S. 887 (2006)). No formal DEA policy mandated the details of conducting an undercover operation, including whether or not to seek permission from the owner of a vehicle utilized in such an operation. *Id.* at 17-21. As petitioner conceded below, Villasana was "aware of 'no formal procedure or policy from the DEA regarding determining the identity of the owner of the truck'" that would have circumscribed his discretion. *Id.* at 19 (citations omitted). Villasana also testified that "contact[ing] the lienholder to get permission or the holder or the title owner" was "never a necessary step" and "was not something that we normally do." *Ibid.* (citation omitted; brackets in original).

At the second step, the district court correctly recognized that the formulation and execution of covert DEA operations are susceptible to policy analysis. Decisions about how to structure and implement a covert operation—including when and where to stage the operation, what property to use in the operation, who to notify of the operation, and how to address the consequences of the operation on third parties—

implicate sensitive questions of federal law-enforcement policy. The court noted, for example, Villasana's testimony that he did not give petitioner advance notice "because of [the] operation's covert nature, the risks of injury and potential for damage if something went wrong, and the uncertainty about whether other individuals (including [petitioner]) could be trusted." Pet. App. 18. The court then correctly held that deciding to use the truck and to maintain the undercover nature of the controlled delivery fit within and furthered the DEA's policy mission of enforcing the Controlled Substances Act, 21 U.S.C. 801 *et seq*. Pet. App. 24-25. The court thus correctly held that the discretionary-function exception applied to the undercover operation, and the court of appeals properly affirmed that determination by summary disposition. *Id.* at 1.

c. Petitioner's contrary arguments lack merit and are highly record-specific. Petitioner contends (Pet. 3) that the government violated a purported mandatory policy requiring the DEA to provide advance notice to property owners if their property may become involved in covert operations. But Villasana's affidavit stated that he was not aware of any such mandatory-notification policy, and the district court concluded that no such mandatory policy existed. Pet. App. 18-19. The court also rejected petitioner's argument (Pet. 6) that Villasana's affidavit contradicts his earlier deposition testimony that, "[i]f we're going to use somebody else's vehicle, we have to have permission." Pet. App. 19 (quoting D. Ct. Doc. 55, Ex. A, at 92 (May 14, 2014)). Here, Villasana had permission from an authorized driver of the truck, who was a confidential informant. And as the court explained, Villasana

further testified that there was no policy mandating that they "find out who the rightful owner is," and that he was not "aware of" any policy telling him to "clarify or seek permission from lawful, rightful owners before using their property for DEA authorized operations." *Ibid.* (quoting D. Ct. Doc. 55, Ex. A, 92). It was also an "undisputed material fact" that Villasana "was aware of no 'formal procedure or policy from the DEA regarding determining the identity of the owner of the truck.'" *Ibid.* (citations omitted). In any event, the court's conclusion that Villasana had not violated any mandatory directive—a conclusion the court of appeals affirmed in an unpublished order—is the type of fact-bound determination that does not warrant this Court's review.

Petitioner also asserts (Pet. 6-8) that DEA's conduct did not implicate a balancing of policy considerations, citing cases indicating that the discretionary-function exception generally does not encompass the negligent driving of an automobile. That assertion reflects a misunderstanding of governing legal principles. A driver's decision to change lanes or not yield the right of way does not ordinarily involve the implementation of policy-based judgment. See *Gaubert*, 499 U.S. at 325 n.7. Here, by contrast, DEA's failure to afford petitioner advance notice of the operation exemplifies sensitive government decisionmaking concerning how to structure and implement undercover operations that, as shown above, clearly implicate "considerations of public policy." *Id.* at 323 (citation omitted).

Petitioner is also wide of the mark to the extent he urges review (Pet. 6, 9) on the basis that violations of the Constitution are excluded from the discretionary-

function exception. The district court found that petitioner waived the argument through insufficient briefing. Pet. App. 21. Petitioner did not challenge that finding on appeal and does not seek the Court's review of that question. The district court further held that, in any event, petitioner "fail[ed] to explain how * * * constitutional provisions specifically prescribed a different course of conduct or specifically proscribed" Villasana's actions. *Id.* at 23.

3. Contrary to petitioner's assertions (Pet. 8-9), this case does not implicate any circuit conflict. Petitioner acknowledges that the unpublished decisions below are consistent with decisions of the Fourth, Eighth, and Ninth Circuits, see *Suter*, 441 F.3d at 311; *Frigard* v. *United States*, 862 F.2d 201 (9th Cir. 1988), cert. denied, 490 U.S. 1098 (1989); *Georgia Cas. & Surety Co.* v. *United States*, 823 F.2d 260 (8th Cir. 1987), but asserts that it conflicts with the First Circuit's decision in *Limone* v. *United States*, 579 F.3d 79 (2009). No such conflict exists. At the outset, the court of appeals' decision here is unpublished and nonprecedential. Pet. App. 1. Moreover, as *Limone* itself recognized, "the discretionary function exception requires that an inquiring court focus on the *specific conduct at issue*," 579 F.3d at 101 (emphasis added). And the conduct at issue in *Limone* is strikingly different from the conduct here: *Limone* did not involve any question of notifying an owner of a vehicle before an authorized driver uses the vehicle in an undercover operation; it involved claims that government agents falsely testified at trial in order to frame individuals for murder, and that the government failed to turn over exculpatory evidence for over three decades to

protect a former informant and a concluded covert operation. *Id.* at 85-86.

Furthermore, the First Circuit held in *Limone* that the discretionary-function exception did not apply because it had previously held that the FBI's conduct was "a clear violation of due process." 579 F.3d at 102. By contrast, the district court here found that petitioner waived the contention that the discretionary function was inapplicable in light of claimed violations of the Constitution, and concluded that petitioner had failed to show that constitutional provisions specifically prescribed or proscribed a specific course of action. Pet. App. 21, 23-24. *Limone* is thus inapposite, and no circuit conflict is presented here.

3. Petitioner also overstates the importance of the court of appeals' unpublished order summary affirming the district court's judgment. Petitioner asserts (Pet. 3) that, if the court of appeals' decision is correct, "then law enforcement officials can seize the personal property of any citizen in America and the Government can escape liability simply by claiming that it has 'discretion' to fight crime." Not so. The Fourth Amendment protects against unreasonable seizures, the Due Process Clause protects against deprivations of property without due process of law, and the Just Compensation Clause mandates that just compensation be provided when there is a taking. See U.S. Const. Amends. IV and V.[1] The court of appeals

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[1] Petitioner asserted below that his claims are cognizable as "takings" in the Court of Federal Claims (CFC). See Pet. C.A. Reply Br. 1. But as petitioner himself recognized, the CFC generally has "exclusive jurisdiction," pursuant to the Tucker Act, 28 U.S.C. 1491, for claims that property has been taken without just compensation. Pet. C.A. Reply Br. 1.

decision here does not undermine any of those protections. It merely holds that the FTCA does not waive the government's sovereign immunity for tort claims arising out of the government's not providing petitioner with advance notice of the particular undercover operation here, where, among other things, an authorized driver of petitioner's truck consented to its use in the operation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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