No. 21-311

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In September 2012, the Internal Revenue Service seized $364,000 in coins in which petitioner had an 80% interest. At the direction of an IRS Asset Forfeiture Coordinator, the coins were treated as currency under the Internal Revenue Manual and were deposited in an IRS account. The IRS returned the seized property by wiring $364,000 to petitioner's counsel.

The question presented is whether the court of appeals correctly held that the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioner's suit regarding the IRS's handling of the coins.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 993 F.3d 545. The opinion of the district court (Pet. App. 10a-30a) is reported at 448 F. Supp. 3d 1048.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2021. The petition for a writ of certiorari was filed on August 27, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2012, federal and state authorities were investigating claims of financial fraud involving a business previously owned by petitioner and Bobby Willis, from

whom petitioner was divorced in early 2012. Pet. App. 15a. A Missouri judge issued a search warrant for several properties associated with Bobby Willis, including a residence in Branson, Missouri. *Id.* at 17a. While executing the warrant on September 26, 2012, a Missouri state law enforcement official contacted IRS Special Agent Scott Wells to notify him that the search had uncovered 364,000 $1 coins that fell outside the scope of the warrant. *Id.* at 17a-18a.

In consultation with Agent Wells' supervisor at the IRS and the U.S. Attorney's Office, Agent Wells seized the coins, which were in 364 boxes of 1000 coins each. Pet. App. 18a. The coins had been minted between 2007 and 2011 with the images of various former presidents. *Id.* at 11a. After the coins proved unpopular, the U.S. Treasury stopped minting new $1 presidential coins in 2011, but the coins remain legal tender. *Id.* at 13a-14a.

IRS Special Agent Robert Jackson, the Asset Forfeiture Coordinator for the Missouri IRS Office, took possession of the seized coins. Pet. App. 19a. On September 27, 2012, Agent Jackson transported the coins to a facility where they were removed from their boxes and processed through a coin counter, resulting in $364,000 being deposited in an IRS account. *Id.* at 19a-20a. Other property seized at the same time as the coins, including "collectible coins, gems, and paper money, were stored in an asset forfeiture safe." *Id.* at 20a. The IRS sent a formal notice regarding the seized property on November 12, 2012. *Ibid.* Through counsel, petitioner requested return of the assets on December 5, 2012, and again in April 2015. *Ibid.*

In April 2015, the IRS informed petitioner's counsel that the coins had been "converted to cash and deposited into the government's account." Pet. App. 20a

(citation omitted). The government wired the $364,000 from its account to petitioner's counsel's trust account. *Ibid.*

2. Petitioner filed an administrative tort claim with the Department of Treasury in August 2015 seeking $33,000,000 in damages. Pet. App. 21a; D. Ct. Doc. 1-2 (June 24, 2016). After the claim was denied, petitioner brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671 *et seq.*, in the District Court for the Western District of Missouri. D. Ct. Doc. 1 (June 24, 2016); D. Ct. Doc. 1-3; D. Ct. Doc. 67 (Feb. 6, 2017). As relevant here, petitioner asserted a claim for conversion based on the IRS's treatment of the 364,000 coins as currency rather than collectibles. Pet. App. 22a-25a.[1]

Following a bench trial, the district court found the United States liable for conversion of the coins. The court found that: petitioner "owned 80% of the $1 Presidential coins"; the United States "seized and possessed the $1 Presidential coins"; and petitioner "demanded the $1 Presidential coins be returned, and [the United States] failed to return them." Pet. App. 24a-25a.

The district court rejected the government's contentions that suit was barred by the FTCA's discretionary function exception, which bars claims "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

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[1] At trial, petitioner abandoned her negligence claim and proceeded solely on a conversion theory. Pet. App. 22a-23a & n.1 (noting that "[i]rrespective of this abandonment, the Court finds [petitioner] failed to establish at trial the elements of a negligence claim under Missouri law").

U.S.C. 2680(a). The exception applies when the conduct at issue involves an element of discretion or choice and is "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see *id.* at 322-325. The court concluded the exception was inapplicable because "Agent Jackson did not exercise any discretion in his actions," "performed no analysis regarding whether the $1 Presidential coins had numismatic value," and did not "consider[] an alternative to the $1 Presidential coins being currency." Pet. App. 28a.

The district court also rejected the government's contention that plaintiff's claim was untimely under the FTCA's statute of limitations, 28 U.S.C. 2401(b). Pet. App. 23a, 29a. Although under Missouri law of conversion, a claim is based on the refusal to return the disputed property, the court concluded that petitioner's claim did not accrue until she became aware that the coins had been converted into cash. *Id.* at 29a. Based on the expert testimony presented at trial, the court concluded that the $364,000 in coins had a collectible value of $482,600, in which petitioner had an 80% interest, and the court therefore found that the government owed petitioner $94,880.00 in damages. *Id.* at 29a-30a.

3. The court of appeals reversed. Pet. App. 1a-9a. The court held that petitioner's suit was barred by the discretionary function exception, deciding the case on that basis without addressing the government's alternative argument that petitioner's claim was also barred by the FTCA's statute of limitations. *Id.* at 9a; Gov't C.A. Br. 41-52.

The court of appeals explained that "despite its apparent breadth," the discretionary function exception "does not insulate from suit every discretionary decision that a government agent makes; the decision must

be 'of the kind that the discretionary function exception was designed to shield.'" Pet. App. 4a (quoting *Gaubert*, 499 U.S. at 322-323). The court explained that under the two-step inquiry established by this Court, a court first asks "whether the challenged conduct or omission is 'truly discretionary' in that 'it involves an element of judgment or choice instead of being controlled by mandatory statutes or regulations.'" *Ibid.* (quoting *Buckler* v. *United States*, 919 F.3d 1038, 1045 (8th Cir. 2019)). "If it is," the court then "consider[s] whether the employee's judgment or choice could be 'based on considerations of social, economic, and political policy,'" and "[i]f it could, the exception applies, and sovereign immunity bars the suit." *Id.* at 4a-5a (quoting *Buckler*, 919 F.3d at 1045).

With respect to the first question, the court of appeals held that Agent Jackson's decision to process the coins as currency was discretionary. Pet. App. 5a. Petitioner's expert agreed that nothing in the Internal Revenue Manual (IRS Manual), and nothing in any mandatory rule, dictated how an agent is to decide whether seized currency is a collectible item. *Ibid.* "That determination," the court concluded, "is left to the agent's discretion." *Ibid.* The court rejected petitioner's contention that the IRS Manual requires an agent "to investigate whether the coins had a special value to collectors," explaining that the Manual did "not direct an agent to undertake [such] an investigation." *Ibid.* Rather, Agent Jackson complied with the IRS Manual "when he determined that the coins were ordinary currency and had them expeditiously processed" within five days of seizure, as required by the IRS Manual. *Ibid.* The court noted that the IRS Manual "never elaborates on the information an agent must obtain

before making a realistic estimate" of the value of seized property, and "[i]t never spells out when additional investigatory duties are triggered, or what an additional investigation might look like." *Id.* at 6a.

In this case, the court of appeals concluded, Agent Jackson "satisfied his mandatory obligation—he did not fail to decide whether the seized currency was ordinary currency or a collectible asset." Pet. App. 7a. He "quite clearly decided that the coins were ordinary currency and so had them quickly processed," and the IRS Manual did not "require[] the agent to do more than he did when he categorized the coins." *Ibid.* And "[e]ven if the decision was carelessly made or was uninformed, the agent's negligence in making it is irrelevant." *Ibid.*

With regard to the second step of the inquiry, the court of appeals explained that the relevant question is whether a decision is "susceptible to policy analysis," not whether the agent actually engaged in a balancing of policy. Pet. App. 8a (citation omitted). IRS policy emphasized the importance "of expeditiously depositing seized currency," and requires an agent to count, process, and deposit seized currency within five days. *Ibid.* (citing IRS Manual §§ 9.7.4.6.1(2), 9.7.6.14.1(1) (2013)). That policy addresses "'[t]he security, budgetary, and accounting problems associated with the seizure and retention of large amounts of cash," which "creates great concern," problems that "raise[] both financial management and internal control issues.'" *Ibid.* (quoting IRS Manual § 9.7.4.6.1(1)). Thus, the court explained, "agents who seize currency must balance the competing interests of expeditious deposit on the one hand and preserving property on the other." *Id.* at 9a. The court concluded that Agent Jackson's choice here was

therefore susceptible to policy analysis in the relevant sense. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or other courts of appeals. The Eighth Circuit applied the two-part inquiry this Court set out in *United States* v. *Gaubert*, 499 U.S. 315 (1991), for analyzing the applicability of the discretionary function exception. Petitioner's arguments are based largely on a misunderstanding of the court of appeals' straightforward application of that standard, presenting a fact-bound disagreement with the court's reading of an IRS Manual, a matter that does not merit this Court's review. Moreover, exercise of this Court's jurisdiction would be unwarranted because petitioner's suit is independently barred by the FTCA's statute of limitations.

1. The court of appeals' straightforward application of this Court's well-established approach to the FTCA's discretionary function exception was correct.

a. The FTCA's discretionary function exception forecloses claims "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 out a two-part analysis to determine whether that exception applies. First, a court inquires whether the challenged act or omission was "discretionary in nature," involving "'an element of judgment or choice.'" *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). Next, a court decides whether the challenged conduct was "susceptible to policy analysis." *Id.* at 325. If so, it

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

b. At the first step of the *Gaubert* analysis, the court of appeals correctly held that Agent Jackson's decision regarding how to handle the seized coins was discretionary in nature. Petitioner's expert conceded at trial "that neither [the IRS M]anual nor any other mandatory rule instructed an agent how to determine whether seized currency is a 'collectible asset.'" Pet. App. 5a. Rather, "[t]hat determination is left to the agent's discretion." *Ibid.*

The court of appeals considered the various provisions on which petitioner sought to rely and found that they did not curb the exercise of discretion. The court rejected petitioner's argument that the agent violated the IRS Manual by "failing to investigate whether the coins had a special value to collectors," observing that the IRS Manual does not require such an investigation. Pet. App. 5a. Contrary to petitioner's argument, the IRS Manual does not address—let alone mandate—what "information an agent must obtain before making a realistic estimate" of the value of seized property. *Id.* at 6a. It does not "spell[] out when additional investigatory duties are triggered, or what an additional investigation might look like." *Ibid.* The court concluded that the IRS Manual instead "apparently gives an agent discretion to determine whether seized currencies' face value is a realistic estimate of its worth or whether an investigation into its value as a collectible asset is needed and what it might entail." *Ibid.*

Nor do the IRS Manual provisions petitioner cited relating to storage of seized property and property appraisals set forth mandatory rules about investigations. "[T]hose provisions do not guide agents in determining

whether seized currency is collectible in the first place." Pet. App. 6a. "At most, they tell agents how to handle coins like these should they conclude that the coins are collectibles." *Ibid.* Here, the IRS agent satisfied the only "mandatory obligation" the IRS Manual imposed in this context, since "he did not fail to decide whether the seized currency was ordinary currency or a collectible asset." *Id.* at 7a. Agent Jackson "quite clearly decided that the coins were ordinary currency and so had them quickly processed." *Ibid.* (explaining that the IRS Manual did not "require[] the agent to do more than he did when he categorized the coins"). Because nothing in the IRS Manual, or in any other source of mandatory rules, constrained the agent's discretion regarding how to categorize the coins, the duties that would have come into play had he made a different decision and deemed them collectibles have no bearing on the analysis here.

At *Gaubert*'s second step, the court correctly held that the decision regarding how to treat the seized coins was grounded in policy considerations. Pet. App. 8a-9a. Those considerations include "the policy of expeditiously depositing seized currency," a policy that reflects the "security, budgetary, and accounting problems associated with the seizure and retention of large amounts of cash," which can "create[] great concern . . . and raise[] both financial management and internal control issues." *Id.* at 8a. (quoting IRS Manual § 9.7.4.6.1(1)). Thus, the court of appeals explained, "agents who seize currency must balance the competing interests of expeditious deposit on the one hand and preserving property on the other—a calculation that plainly involves questions of social, economic, and political policies." *Id.* at 9a. The choice Agent Jackson had to make regarding handling of the seized coins thus

"was susceptible to policy analysis in the relevant sense." *Ibid.* (citation and internal quotation marks omitted).

c. Petitioner's quarrels with the court of appeals' application of the *Gaubert* analysis are meritless.

First, petitioner characterizes (Pet. 12) the court of appeals' decision as holding that suit is barred by "the discretionary-function exception where an agent fails to fulfill a mandatory duty that applies only in certain circumstances, on the theory that the agent must have decided that those circumstances were not present." Petitioner's argument on that point is not altogether clear, but it appears to turn on a disagreement with the court not about the discretionary function analysis, but rather about the particulars of the mandatory duty the IRS Manual imposes on IRS agents handling seized currency. The court rejected petitioner's argument that the IRS Manual required agents to take any particular steps before making a currency-related determination, deciding instead that the only relevant "mandatory obligation" was to "not fail to decide whether the seized currency was ordinary currency or a collectible asset," a duty Agent Jackson discharged when having the coins "quickly processed" as "ordinary currency." Pet. App. 7a.

Petitioner suggests that the IRS Manual imposes a more robust decision-making duty on IRS agents, involving overt consideration of the coins as potential collectibles through such steps as "consulting a simple pricing guide" or making an "'effort to determine whether the coins had any numismatic value.'" Pet. 11 (citation omitted). With a duty so defined, petitioner asserts (Pet. 14) that the court of appeals wrongly "infer[red] that Agent Jackson had fulfilled his mandatory duty to

decide whether [petitioner's] coins were collectibles." But the court explained why petitioner was wrong that "the manual required the agent to do more than he did when he categorized the coins." Pet. App. 7a. "Even if the decision was carelessly made or was uninformed," that does not change the fact that the agent decided to process the coins as currency—and while petitioner may have wanted different factors to be considered before arriving at that decision, any "negligence in making it is irrelevant" to the discretionary function analysis. *Ibid.*

Petitioner's contention (Pet. 24-26) that the court of appeals' decision conflicts with this Court's decision in *Berkovitz* is without basis. In *Berkovitz*, this Court held that the discretionary function exception did not apply when the government issued a license for the polio vaccine without first having obtained certain test data, as required by regulation. 486 U.S. at 542-543. Petitioner argues that if the court of appeals here were correct, the decision in *Berkovitz* would have been different, because "the fact that the Government issued the license necessarily means the Government had determined it had received the 'required test data' and thus fulfilled its mandatory duties." Pet. 25 (quoting *Berkovitz*, 486 U.S. at 543). But the point in *Berkovitz* was that obtaining required test data—not simply making a licensing decision—was commanded by a specific, mandatory directive. See *Berkovitz*, 486 U.S. at 542-543 (explaining that a statute and regulations "require, as a precondition to licensing, that the [government] receive certain test data from the manufacturer"); *Gaubert*, 499 U.S. at 324 (explaining that in *Berkovitz*, "the agency employees had failed to follow the specific directions contained in the applicable regulations, *i.e.,* in those instances,

there was no room for choice or judgment"). No similar requirement governed the process of categorizing the coins here.

Petitioner also contends (Pet. 26) that the court of appeals erred at the second step of the *Gaubert* analysis because "here, the government agent admittedly failed to exercise any discretion or weigh any policy concerns." See Pet. 30 ("Agent Jackson admitted he did 'not conduct any analysis to determine whether' petitioner's 'coins had numismatic value.'") (quoting Pet. App. 20a). But as the Eighth Circuit recognized, the relevant point here is "that the agent's choice was susceptible to policy analysis," Pet. App. 9a (citation and internal quotation marks omitted), regardless of whether he actually engaged in such analysis. "[I]t does not matter whether the agent actually engaged in conscious policy-balancing," so long as "the decision in question is by its nature as an objective matter susceptible to policy analysis." *Id.* at 8a (citation and internal quotation marks omitted); see *Gaubert*, 499 U.S. at 325 ("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.").

Indeed, this Court has explained that "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Gaubert*, 499 U.S. at 324. The IRS Manual here left IRS agents free to arrive at a determination regarding currency status, without any specific directives. Petitioner's attempt to create

restrictions the IRS did not impose no more establishes that the court of appeals erred at the second step of *Gaubert* than it does at the first.

2. Petitioner's assertions (Pet. 12-18) of a circuit conflict are wide of the mark.

a. First, petitioner contends (Pet. 12-15) that the court of appeals' decision conflicts with the decisions of five other circuits that "all hold that, where a government fails to fulfill a mandatory duty that applies in the relevant factual setting," the discretionary function exception does not apply. Pet. 12. As with petitioner's assertion of error, petitioner's contention that the decision below departs from that principle turns on a mischaracterization of the court of appeals' description of the "mandatory duty" in this case. As discussed, the duty imposed here by the IRS Manual to categorize seized coins as either currency or collectibles did not involve any specific decision-making steps or criteria.

In contrast, the cases discussed by petitioner involved specific, mandatory directives with which the government failed to comply. In *Anestis* v. *United States*, 749 F.3d 520 (2014), the Sixth Circuit addressed a "mandatory, not discretionary" rule that veterans' hospitals treat veterans who needed emergency care, even if they were not eligible for VA benefits. *Id.* at 529; see *id.* at 523-524. In addressing the discretionary function exception, the court concluded that the challenged conduct—"turning [a veteran] away from the VA clinics," *id.* at 522—was governed by mandatory "specific directives that *would* be followed if an emergency situation arose, not flexible guidelines that were dependent upon the VA staff's judgment during an emergency situation," *id.* at 529. And while the VA policies "did allow limited discretion in determining whether a patient was

in an emergency state," the court explained that such a determination involved "only a consideration of the patient's health," which, like "'medical decisions by government doctors,'" are "not 'of the kind that the discretionary function exception was designed to shield.'" *Ibid.* (citations omitted).

Similarly, the Ninth Circuit's decision in *In re Glacier Bay*, 71 F.3d 1447 (1995), involved government hydrographers' alleged "fail[ure] to follow mandatory instructions regarding" how to conduct surveys in the preparation of nautical charts. *Id.* at 1450; see *id.* at 1450-1454 (discussing mandatory directions regarding the space between "soundings of the bottom" and the circumstances triggering investigation of "bottom anomalies"). The court concluded that the discretionary function exception might insulate decisions made by the government officials who approved the charts, but that "such discretion would not shield allegedly negligent non-discretionary acts by the hydrographers." *Id.* at 1451. Insofar as the alleged failures involved "a scientific hydrographic judgment" involving "'the application of objective scientific standards,'" the court determined that the discretionary function exception did not apply because those scientific judgments did not involve "economic, political and social policy" considerations. *Id.* at 1453 (citation omitted).

Likewise, the remaining cases petitioner cites also involved nondiscretionary steps the government was required to take in the course of making a decision or conducting an activity. See *Sanders* v. *United States*, 937 F.3d 316, 329-332 (4th Cir. 2019) (concluding that the discretionary function exception did not apply insofar as plaintiffs alleged a failure to comply with "mandatory directives that the [government] was required to follow

in performing the background check" connected with a firearms purchase); *Parrott* v. *United States*, 536 F.3d 629, 638 (7th Cir. 2008) (addressing prison regulations "requir[ing] its employees to 'prevent any physical contact between'" inmates subject to a separation order, with "no discretion left to operate on that narrow question" where "a valid separation order is in effect") (citation omitted); *Andrews* v. *United States*, 121 F.3d 1430, 1441 (11th Cir. 1997) (noting that the government conceded it "had a mandatory duty to segregate waste" and "violated that duty by placing flammable materials in * * * dumpsters").[2]

The decision below does not conflict with any of those cases. The only mandatory duty created by the IRS Manual—to make an entirely discretionary decision how to categorize and process the seized coins—was fulfilled. See Pet. App. 7a. Petitioner's attempt to liken that unfettered choice to specific directives regarding, *e.g.*, medical or scientific determinations is unavailing. And petitioner's misapprehension of the discretionary function exception is clear from her dissatisfaction that regardless of the choice Agent Jackson made regarding the coins' status, "the Government was insulated from suit." Pet. 14. That is how the discretionary function exception works: absent violation of some specific, mandatory directive constraining its discretion, the government is not liable under the FTCA for the consequences

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[2] Petitioner's reliance (Pet. 14) on an unpublished Eleventh Circuit case is equally unavailing. In *Downs* v. *United States Army Corps of Eng'rs*, 333 Fed. Appx. 403 (11th Cir. 2009), the court concluded only that contract terms may "establish mandatory duties" and remanded for a construction of a contract term to "determine if the Corps' duty, * * * was sufficiently specific to subject the government to suit." *Id.* at 414.

of its choices on discretionary matters, even if a plaintiff disagrees with that choice or thinks it ought to have been made in a different way.

b. Nor is there any division among the circuits regarding whether a negligent exercise of discretion falls within the scope of the discretionary function exception. See Pet. 15-18. The statute by its terms covers "[a]ny 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) (emphases added). Petitioner's argument is irreconcilable with the statute's plain text and the decisions of this Court and the courts of appeals, which have consistently refused to conflate the questions of negligence and the application of the exception. See, *e.g.*, *Gaubert*, 499 U.S. at 325 ("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."); *Rosebush* v. *United States*, 119 F.3d 438, 444 (6th Cir. 1997) ("[E]ven the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made.") (citation omitted); *Kiehn* v. *United States*, 984 F.2d 1100, 1108 (10th Cir. 1993) ("Factual issues concerning negligence are irrelevant to the threshold issue whether the officials' actions are shielded from liability by the discretionary function exception.") (citation omitted).

Petitioner mistakenly seeks to identify a general rule to the contrary in decisions of the Second, Fourth, and

Seventh Circuits, which he cites for the proposition that "government inattention or carelessness is not protected by the discretionary function exception." Pet. 15. But the cited cases all involved alleged conduct by prison guards of the type that courts have likened to decisions made in the course of driving a vehicle, the paradigmatic example of "discretionary" decisions not implicating policy considerations and thus not triggering the exception. See *Coulthurst* v. *United States*, 214 F.3d 106, 109-111 (2d Cir. 2000) (citing *Gaubert*'s discussion of vehicular discretion and concluding that guards' actions such as "fail[ing] to notice [a] frayed cable" would not be shielded by the discretionary function exception); *Rich* v. *United States*, 811 F.3d 140, 147-148 (4th Cir. 2015) (citing *Coulthurst* and remanding to permit "discovery on the issue whether and how the prison officials performed the patdowns and searches, and whether more specific directives existed regarding the manner of performing the patdowns and searches"); *Palay* v. *United States*, 349 F.3d 418, 430-432 (7th Cir. 2003) (citing *Coulthurst* and remanding for further proceedings to determine if the discretionary function exception applied to prison-guard conduct as it related to inmate violence).[3]

3. In any event, this case would be an inappropriate vehicle for reviewing the question presented for the additional reason that the FTCA's statute of limitations would supply an independent basis for the court of appeals' judgment. Because the court of appeals held that

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[3] The Third Circuit decision petitioner cites (Pet. 16 n.5) in a footnote refers to all three of the cases petitioner cites as invoking the so-called "negligent guard" theory. See *Middleton* v. *United States Federal Bureau of Prisons*, 658 Fed. Appx. 167, 171 (3d Cir. 2016) (per curiam).

suit was barred by the discretionary function exception, it did not address the question—fully briefed by the government below—whether petitioner's suit is also time-barred. See Gov't C.A. Br. 41-52; Gov't C.A. Reply Br. 9-14. In the event of a remand, the court of appeals would need to address that issue in the first instance, contrary to petitioner's assertion (Pet. 24) that "reversal of the court of appeals' decision would entitle her to relief" without "further proceedings."

A claim under the FTCA is barred unless a plaintiff files an administrative claim "within two years after such claim accrues." 28 U.S.C. 2401(b). The "general rule under the [FTCA] has been that a tort claim accrues at the time of the plaintiff's injury." *United States* v. *Kubrick*, 444 U.S. 111, 120 (1979). The tort claim in this case is based solely on conversion, which under Missouri law, "is the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner's rights." *Emerick* v. *Mutual Benefit Life Ins. Co.*, 756 S.W.2d 513, 523 (Mo. 1988) (en banc). As the district court recognized, Pet. App. 24a-25a, the claim in this case was based on "a refusal to give up possession on demand," *Emerick*, 756 S.W.2d at 525. Accordingly, in holding that petitioner had established a claim for conversion, the district court explained that: petitioner "owned 80% of the $1 Presidential coins"; the United States "seized and possessed the $1 Presidential coins"; petitioner "demanded the $1 Presidential coins be returned"; and the United States "failed to return them." Pet. App. 24a-25a.

The IRS seized the coins in September 2012; it formally issued notice of the seizure in November 2012; and when petitioner demanded return of the coins in December 2012, it did not accede to the demand. See

Pet. App. 20a. Because petitioner's theory of conversion is predicated on the government's failure to return the coins on demand, any injury occurred—and thus her claim accrued—no later than December 2012. Her administrative claim, which was filed more than two and a half years later, on August 17, 2015, *id.* at 21a, was therefore untimely. That petitioner learned subsequently of the conversion of the coins into cash does not alter that timeline, and as the government explained on appeal, the district court erred as a matter of law in concluding otherwise. *Id.* at 29a; Gov't C.A. Br. 41-52. Conversion of the coins into cash goes to damages, not to the underlying tort of conversion under state law. Thus, resolution of the questions presented regarding the discretionary function exception would not alter the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2021