No. _____

In The
Supreme Court of the United States

JADE MOUND, AND ON BEHALF OF THE HEIRS AT LAW PERSONAL REPRESENTATIVE TRUDY PETERSON ESTATE OF TRUDY PETERSON; RON VANDER WAL, AND ON BEHALF OF THE HEIRS AT LAW PERSONAL REPRESENTATIVE JAMES VANDER WAL ESTATE OF JAMES VANDER WAL; EVAN THOMPSON; STEVEN WILLARD; AND SONJA WILLARD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC P. BARSTAD
ROBINS KAPLAN LLP
800 La Salle Ave #2800
Minneapolis, MN 55402
(612) 349-8500

TIMOTHY Q. PURDON
Counsel of Record
ROBINS KAPLAN LLP
1207 W. Divide Ave #200
Bismarck, ND 58501
(701) 255-3000
TPurdon@RobinsKaplan.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioners brought claims against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq*. based on the United States' failure to warn of a known, latent danger posed by a failing culvert underlying a road maintained by the U.S. Bureau of Indian Affairs. After the culvert collapsed in the middle of the night, and with no warning to heed, multiple people were killed or injured when they drove their cars into the resulting chasm. Citing mere budgetary considerations, the Eighth Circuit Court of Appeals held the Act's discretionary function exception shields the federal government from liability. That ruling deepens an entrenched conflict among the circuit courts, which are divided on this important federal question:

When the government is alleged to have tortiously neglected to warn the public of a known, latent danger, whether the *de minimis* cost of posting such a warning is sufficient to render that omission an exercise of political, social, economic judgment exempt from suit under the Federal Tort Claims Act.

PARTIES TO THE PROCEEDINGS BELOW

Jade Mound, Ron Vander Wal, Evan Thompson, Steven Willard, and Sonja Willard (Petitioners) were the plaintiffs in the district court proceeding and the appellants in the court of appeals proceeding.

The United States of America (Respondent) was the defendant in the district court proceeding and the appellee in the court of appeals proceeding.

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the District of North Dakota and the U.S. Court of Appeals for the Eighth Circuit:

- *Mound v. United States*, No. 1:21-CV-081, 2022 WL 1059471 (D.N.D. Mar. 15, 2022)
- *Mound v. United States*, No. 22-1721, 2023 WL 3911505 (8th Cir. June 9, 2023)

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The Eighth Circuit's decision (Pet. App. 1-8) is unreported but is available at 2023 WL 3911505 (8th Cir. June 9, 2023). The District Court's opinion (Pet. App. 9-42) is unreported but is available at 2022 WL 1059471 (D.N.D. Mar. 15, 2022).

STATEMENT OF JURISDICTION

The Eighth Circuit entered judgment on June 9, 2023. Pet. App. 1-8. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves Sections 1346 and 2680 of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2680. Pet. App. 46-51.

INTRODUCTION

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq*. (FTCA) broadly waives sovereign immunity from suits for negligent or wrongful acts of Government employees. The liability of the United States under the FTCA is subject to certain statutory exceptions. One exception is the "discretionary function" exception, which provides that the Government is not liable for "[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).

The discretionary function exception does not shield all government conduct that involves an element of discretion or judgment. "[W]hen properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.'" *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quoting *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 539 (1988)). That is, the exception extends only to "political, social, and economic judgments" of governmental agencies. *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 539 (1988).

Because everything the government does is subject to the availability of funds, other circuit courts have declined "to permit the government to use the mere presence of budgetary concerns to shield allegedly negligent conduct from suit under the FTCA." *Whisnant v. United States*, 400 F.3d 1177, 1184 (9th Cir. 2005). Holding otherwise would exempt "virtually all government activity" from liability under the FTCA. *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995).

In the Eighth Circuit, the mere presence of budgetary concerns are sufficient to shield allegedly negligent conduct from suit, and virtually all government activity is therefore exempt from liability under the FTCA. That is the upshot of the decision below, which

is the latest and most extreme instance of the Eighth Circuit's improperly construing the discretionary function exception to encompass *de minimis* budget concerns.

This Petition presents a clear split over the justiciability of failure-to-warn FTCA claims. The split involves, most saliently, three Circuits: the Eighth versus the Ninth and D.C. It offers a powerful vehicle for resolving the important question of federal law presented, and establishing consistency across circuits as to the rights and remedies the people of this Republic possess with respect to their sovereign.

This question is critically important. There is no good reason why the federal government should face liability for a tort inflicted upon the people of California or Washington, D.C., but enjoy an exemption from liability if it inflicts the same tort on the people of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. Under the FTCA, the federal government owes, and should be incentivized to show, the same duty of care to all Americans, regardless of which state or federal appellate circuit they call home.

Petitioners ask this Court to grant this Petition, resolve the circuit split, and reverse the dismissal of their case so they may pursue the merits of their claims. Petitioners also ask this Court to heed the entreaties of the District Court below, which observed

that Eighth Circuit law on this issue "is in dire need of correction." Pet. App. at 44.

STATEMENT OF THE CASE

I. Factual Background

The Bureau of Indian Affairs (BIA) knew about the dangerous condition of the culvert on the Standing Rock Sioux Reservation as early as June 2014 when it designated the structure as "failing" and in need of replacement. The corrugated metal structure had corroded over time, prompting tribal members to warn the BIA about the hazard it posed to motorists traveling the road, which is known as BIA Route 3 and Kenel Road. The BIA knew of the tragic consequences that could result if it fails to address such a hazard because it settled a similar FTCA action in 2012 when a culvert washed out on the Lower Brule Reservation in South Dakota.

Yet, the BIA did not replace the structure on the Standing Rock Sioux Reservation or erect signs warning motorists to approach with caution in a rainstorm. The BIA let the culvert continue to degrade for five years until July 9, 2019. Heavy rains early that morning caused the culvert and surrounding soil to buckle

and wash out, creating a chasm seventy feet deep in the middle of the highway:

Between 4:40 and 5:30 a.m., four vehicles traveling the road drove off the pavement and plummeted into the chasm. The drivers had no warning about the washout ahead or the potential for a washout to occur at the site in a rainstorm. The newly carved chasm was not visible to them in the darkness and rain. Trudy Peterson and James Vander Wal each died, alone, at the bottom of the washout. Steven Willard and Evan Thompson suffered permanent injuries when their vehicles plunged into the chasm.

II. Procedural History and Basis for Jurisdiction

Petitioners brought claims against the United States pursuant to the FTCA for monetary damages as compensation for the deaths and injuries caused by the negligent and wrongful acts and omissions of the BIA. They argue the BIA was negligent in failing to warn them about the unsafe condition of the road and should have posted signs cautioning motorists of the culvert's "failing" condition and concomitant washout potential.

Petitioners first filed administrative tort claims with the U.S. Department of the Interior on September 9, 2020. They received no decision on those claims, however, and after six months they brought the claims in the U.S. District Court for the District of North Dakota pursuant to 28 U.S.C. § 2401(b). Venue in this District Court is proper under 28 U.S.C. §§ 1346(b)(1), 1402(b).

The District Court dismissed Petitioners' claims for lack of subject matter jurisdiction, holding that the BIA and the Tribe, which contracted with the BIA for road maintenance, have "discretion to determine when, where, and how to perform road maintenance and, as such, that conduct is shielded by the discretionary function exception." Pet. App. at 43. The court nevertheless said it was "troubled" by this conclusion and called the application of the discretionary function exception in this case "extremely unfair." *Id*. at 44. "This exception to federal tort liability is a concept that needs to be eroded and is in dire need of a correction." *Id.*

The Eighth Circuit did not address these entreaties from the District Court. Instead, the Eighth Circuit affirmed the District Court's dismissal, concluding the government's decision was "susceptible to a policy analysis that weighs the benefits of the warning (e.g., increased safety) with its costs (e.g., the cost of erecting the warnings)." *Id.* at 5.

Petitioners now ask this Court to review the Eighth Circuit's ruling on their appeal by granting this petition.

III. The Discretionary Function Exception

One of this Court's earliest rulings on the discretionary function exception came in 1955—nine years after Congress passed the FTCA. The case involved a situation similar to Petitioners' in which the government failed to warn of a known danger. In *Indian Towing Co. v. United States*, 350 U.S. 61, 62 (1955), a barge's cargo sustained damage when the tugboat towing it went aground after a light failed in a lighthouse operated by the Coast Guard. This Court declined to apply the discretionary function exception and shield the government from liability, saying the Coast Guard was "obligated" to discover that the light had gone out and "to repair the light or give warning that it was not functioning." *Id.* at 69.

In the years since *Indian Towing*, this Court established a two-part inquiry to determine whether the discretionary function exception bars FTCA claims. The government is not liable for a claim brought under

the FTCA if (1) the challenged actions were discretionary and (2) those actions involved the kind of policy judgment the exception was designed to protect. *United States v. Gaubert*, 499 U.S. 315, 328, 332 (1991). The exception "covers acts involving an element of judgment or choice if they are based on considerations of public policy." *Id.* at 316. It protects "Government agents' actions involving the necessary element of choice and grounded in the social, economic, or political goals of a statute and regulations." *Id.* A plaintiff can survive a motion to dismiss by showing that the challenged actions are not "susceptible to policy analysis." *Id.* at 324–25.

Petitioners' appeal to the Eighth Circuit focused on the second part of the inquiry: whether the BIA's actions involved the kind of policy judgment the exception was designed to protect. The BIA has described its failure to warn of the danger posed by the corroded culvert as a "maintenance decision" rooted in generic "subject to the availability of funding" clauses in its contract with the Tribe. Petitioners argued the budgetary impact of erecting signs on both sides of the culvert to warn oncoming motorists would be "de minimis" and would not implicate public policy in a substantive way. To hold otherwise would mean that "subject to the availability of funding" clauses contained in many government rules and contracts would effectively nullify the FTCA.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's interpretation of the discretionary function exception has significantly departed from *Indian Towing* in which this Court emphasized the government's "obligation" to warn of known dangers when it declined to let the exception bar an FTCA claim. Since then, the Eighth Circuit has repeatedly held that the government is shielded from liability for failing to warn about a known danger when funding availability forms the basis for the government's judgment. The circuit's interpretation of the exception under such circumstances, including in its ruling on Petitioners' appeal, is at odds with the rulings of other circuits.

Petitioners' claims may not have been dismissed had they been filed in the Ninth or D.C. Circuits—each of which has declined to let the discretionary function exception "swallow" the FTCA by elevating *de minimis* funding considerations into issues of social, economic, or political policy judgment. Circuits throughout the country have acknowledged inconsistencies in their rulings and have repeatedly bemoaned the difficulty of determining whether the exception applies in failure-to-warn cases. This Court should grant this petition to provide clarity to the circuits and resolve the prevailing discord.

I. The circuits are divided over whether governmental conduct falls within the discretionary function exception when based on funding availability

Review by this Court is warranted because the Eighth Circuit's ruling on Petitioners' appeal adds to a body of cases in conflict with the precedents of the Ninth and D.C. Circuits. As a result of the inconsistencies between these circuits, the government cannot be held liable for its failure to warn of a corroded culvert on the Standing Rock Sioux Reservation, whereas it could be liable for the same failure had it occurred in California or Washington, D.C.

The Ninth and D.C. Circuits have ruled that the government's failure to warn of a known danger does not fall within the discretionary function exception when such conduct implicates considerations about funding availability. In *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995), the D.C. Circuit rejected the government's assertion that fiscal constraints should exempt "virtually all government activity" from liability under the FTCA in a case about the government's failure to adequately warn motorists of a dangerous curve in a park road. The D.C. Circuit said the government "reads the exception far too broadly," and that the "mere presence of choice—even if that choice involves whether money should be spent—does not trigger the exception." *Id.* The Ninth Circuit echoed that language in *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002), when it said "every failure to warn . . . can be couched in terms of policy choices based on allocation

of limited resources" and were it "to view inadequate funding alone as sufficient to garner the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly." The Ninth Circuit further emphasized that considerations about funding availability do not trigger the discretionary function exception in *Whisnant v. United States*, 400 F.3d 1177, 1184 (9th Cir. 2005), when it declined "to permit the government to use the mere presence of budgetary concerns to shield allegedly negligent conduct from suit under the FTCA." Holding otherwise "would permit the discretionary function exception to all but swallow the Federal Tort Claims Act." *Id.*

The cases above show that within the D.C. and Ninth Circuits, funding availability alone is an insufficient basis for holding that the government's judgment is susceptible to policy analysis and shielded by the discretionary function exception. The Tenth Circuit reached a similar conclusion in a case about the small cost of warning signs such as those Petitioners argue the BIA should have erected along the road above the corroded culvert. In that case, the Tenth Circuit declined to apply the discretionary function exception when the government failed to warn campers of falling rocks and a boulder smashed a tent and injured a child. *Duke v. Dep't of Agric.*, 131 F.3d 1407, 1408, 1410, 1412 (10th Cir. 1997). The court found no evidence of a social, political, or economic justification for the government's failure to warn of the "specific hazard" it knew existed near the campground, given that a warning

sign "would cost little." *Id.* at 1412. The Tenth Circuit distinguished such a warning sign from a protective fence, which "might be costly" and may therefore fall within the exception on economic policy grounds. *Id.*

The state of the law in the Eighth Circuit is starkly divergent. In *Walters*, the Eighth Circuit held that the discretionary function exception barred the suit of plaintiffs injured when their vehicles crashed amid washboard conditions that developed along a gravel road on the Cheyenne River Indian Reservation in South Dakota. 474 F.3d 1137, 1138 (8th Cir. 2007). The BIA was responsible for road maintenance, and the Eighth Circuit ruled that the exception shielded liability for the deteriorating condition of the road because "the applicable regulations expressly required the BIA to consider the availability of funds in deciding whether to perform maintenance on its roads." *Id.* at 1140. In *Demery*, the discretionary function exception barred a suit after a snowmobiler died when she fell through open water on an icy lake aerated by the BIA. 357 F.3d 830, 831–832 (8th Cir. 2004). The plaintiff argued the BIA failed to adequately warn lake users about the risks posed by the aeration process. *Id.* at 832. The Eighth Circuit concluded that the BIA's decision about whether to warn "is susceptible to a policy analysis that weighs the benefits of warning (e.g., increased safety) with its costs (e.g., the cost of erecting warnings)," because increased safety and cost are each "issues of social, political, and economic policy." *Id.* at 834.

The Eighth Circuit's holding in *Demery* conflicts with *Duke* in the Tenth Circuit. While the Eighth Circuit characterized considerations about the cost of erecting a warning sign at the aerated lake as an "issue of social, political, and economic policy," the Tenth Circuit found no evidence of a social, political, or economic justification for the government's failure to erect a warning sign near a campground where falling rocks presented a hazard, given that a warning sign "would cost little." The Tenth Circuit suggested a more expensive measure such as a protective fence might constitute an economic justification susceptible to policy analysis, but it distinguished a warning sign as something that does not rise to that level due to its small cost. Moreover, the Eighth Circuit's holding in *Walters* that the discretionary function exception barred a suit when regulations required the BIA to consider funding availability conflicts with *Cope*, *O'Toole*, and *Whisnant*, each of which held that considerations about funding availability do not fall within the exception.

II. The Eighth Circuit's ruling deepens an entrenched conflict over the application of the discretionary function exception to the government's failure to warn of known dangers

Circuit courts have repeatedly acknowledged difficulty in determining whether to apply the discretionary function exception in failure-to-warn cases, as well as inconsistencies in their rulings as a result. This Court should provide clarity to the circuits to

encourage consistent outcomes for the victims of government negligence.

While the circuits remain divided over their interpretations of the discretionary function exception, many agree that "reconciling conflicting case law in this area can be difficult," as the Ninth Circuit stated in *O'Toole*, 295 F.3d at 1035. The First Circuit characterized the development of the law surrounding the exception to be in "disarray," causing it to "despair of reconciling all the cases" as it considered a dispute over the government's failure to warn visitors to a national historic site of the risk posed by a staircase without a handrail. *Shansky v. United States*, 164 F.3d 688, 690-693 (1st Cir. 1999). The Ninth Circuit said in an appeal about the National Park Service's failure to post warnings at the site of a rockfall, "[W]e acknowledge that our case law may not be in complete harmony on this issue. . . ." *Terbush v. United States*, 516 F.3d 1125, 1136 (9th Cir. 2008). And the D.C. Circuit in *Cope* lamented that determining when the discretionary function exception applies "is admittedly difficult, since nearly every government action is, at least to some extent, subject to 'policy analysis.'" 45 F.3d at 448. This issue requires clarification, given the circuits' well-documented challenges in applying the law surrounding the exception.

III. The Eighth Circuit's ruling has left Petitioners without a remedy after suffering permanent injuries and the deaths of family members

This Court can provide Petitioners the opportunity to seek justice for the BIA's negligence by accepting their petition to resolve the inconsistencies within the circuit courts and reversing the dismissal of their claims. Without the ability to pursue the merits of their case, Petitioners have no recourse against the government for the tragedy that occurred when it failed to warn the public about the danger posed by the corroded culvert.

The District Court made clear it had no other choice in dismissing Petitioners' case because it was bound by Eighth Circuit precedent. The court's opinion referenced the lack of justice that would result from the ruling, saying, "The application of the discretionary function exception in this case is extremely unfair." *Mound*, 2022 WL 1059471, at *14. The court added, "Common sense, fairness, and justice are absent in the application of the exception in this case" and said the exception is "a concept that needs to be eroded and is in dire need of a correction." *Id.* Only this Court is capable of providing the needed correction.

This Court should clarify that superficial references to "the availability of funds" are insufficient to satisfy the discretionary function exception's policy threshold in cases where the federal government fails to warn of a known danger, the cost of which would be

de minimis. Government conduct cannot be susceptible to any meaningful policy analysis when the purported policy concern is funding considerations yet the act or omission at issue is essentially costless. Providing this clarification would help realign the circuits with this Court's *Indian Towing* precedent, which held that the government was "obligated" to "give warning" once it discovered that a light had failed inside a lighthouse it operated. Since *Indian Towing*, the circuits have repeatedly acknowledged the lack of consistency in their rulings about the discretionary function exception in failure-to-warn cases. Granting this Petition would enable this Court to clarify that, under some circumstances, the district courts may hear FTCA claims premised on governmental failures to warn. Such guidance would help resolve the inconsistent approach to these cases across circuits, ensuring that the same tort, committed by the same sovereign, is subject to the same scope of liability regardless of the specific subjurisdiction in which it is committed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ERIC P. BARSTAD
ROBINS KAPLAN LLP
800 La Salle Ave #2800
Minneapolis, MN 55402
(612) 349-8500

TIMOTHY Q. PURDON
Counsel of Record
ROBINS KAPLAN LLP
1207 W. Divide Ave #200
Bismarck, ND 58501
(701) 255-3000
TPurdon@RobinsKaplan.com

Counsel for Petitioners

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