No. 14-1510

In the Supreme Court of the United States

WU TIEN LI-SHOU, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

This maritime tort action seeks damages from the United States based upon actions taken by the U.S. Navy vessel USS *Stephen W. Groves* in a military engagement conducted by a NATO anti-piracy task force against Somali pirates that resulted in the death of a hostage.

The questions presented are:

1. Whether the court of appeals correctly held that petitioner's suit, which challenges the reasonableness of tactical and strategic decisions made during a NATO military engagement with Somali pirates, presents a nonjusticiable political question.

2. Whether the court of appeals correctly held, in the alternative, that petitioner's claims under the Public Vessels Act (PVA), 46 U.S.C. 31101 *et seq.*, are not within the PVA's waiver of sovereign immunity because they challenge the exercise of a discretionary function.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 777 F.3d 175. The opinion of the district court (Pet. App. 22a-27a) is reported at 997 F. Supp. 2d 307.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2015. A petition for rehearing en banc was denied on March 23, 2015 (Pet. App. 1a). The petition for a writ of certiorari was filed on June 19, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States has a vital interest in global maritime security and is a leader in international efforts to counteract piracy. As the second President

Bush determined, the "physical and economic security of the United States—a major global trading nation with interests across the maritime spectrum—relies heavily on the secure navigation of the world's oceans for unhindered legitimate commerce by its citizens and its partners." Pet. App. 47a (Memorandum from George W. Bush to the Vice President, *Maritime Security (Piracy) Policy* (June 14, 2007)). In recent years, the United States has recognized that piracy off the Horn of Africa has posed a special threat to the security of international maritime commerce. "Somali-based piracy against chemical and oil tankers, freighters, cruise ships, yachts, and fishing vessels poses a threat to global shipping." *Id.* at 4a (quoting C.A. J.A. 48, U.S. Nat'l Sec. Council, *Countering Piracy off the Horn of Africa: Partnership & Action Plan*, at 5 (Dec. 2008)).

In June 2007, the President issued a Memorandum establishing "United States Government policy and implementation actions to cooperate with other states and international and regional organizations in the repression of piracy." Pet. App. 45a. The Memorandum explained that it is United States policy to "[i]nterrupt and terminate acts of piracy," to "[r]educe the vulnerability of the maritime domain to such acts and exploitation," and to "[c]ontinue to lead and support international efforts to repress piracy." *Id.* at 48a. In particular, the Memorandum emphasized that the United States will "[s]eek international cooperation" in fighting piracy. *Id.* at 50a.

Among other counter-piracy measures, the United States provides military support to the international community's counter-piracy operations, including operations conducted off the Horn of Africa through the

North Atlantic Treaty Organization's (NATO's) Operation Ocean Shield. Operation Ocean Shield is a multinational force of warships and aircraft provided by NATO member states to patrol and protect the waters off the Horn of Africa. See Pet. App. 4a; MARCOM Factsheet, *Operation Ocean Shield* (*Factsheet*), http://www.mc.nato.int/about/Pages/Operation%20Ocean%20Shield.aspx (last visited Aug. 21, 2015). "Command and Control" over Operation Ocean Shield is "exercised by the NATO military chain of command, with the Supreme Allied Commander Europe having delegated operational command to Maritime Command Headquarters" in the United Kingdom. *Factsheet*. "NATO Allies provide ships and maritime patrol aircraft to NATO Standing Maritime Groups, which in turn assign[] a number of ships, on a rotational basis, to Ocean Shield." *Ibid.*

2. This maritime tort action against the United States arises out of an incident that occurred in May 2011, when a U.S. military warship, the USS *Stephen W. Groves* (*USS Groves*), engaged Somali pirates during a NATO counter-piracy operation in the Indian Ocean. Pet. App. 4a. The *USS Groves* was operating as part of Operation Ocean Shield. *Ibid.* NATO assigned the *USS Groves* to a NATO counter-piracy task force, Task Force 508, which was operating off the Somali coast under the command of the NATO Task Force commander, a Royal Netherlands Navy Commodore. *Id.* at 5a.

Following the orders of the NATO Task Force commander, the *USS Groves* tracked Somali pirates aboard a Taiwanese fishing vessel, the Jin Chun Tsai 68 (JCT 68). Pet. App. 4a-5a. The pirates had commandeered the JCT 68 a year earlier and were using

it as a "mother ship" for launching further pirate attacks, while holding the master and crew aboard as hostages. *Id.* at 4a. Following a strategy for a graduated use of force, developed jointly by the NATO Task Force commander and the commander of the *USS Groves*, the *USS Groves* verbally warned the pirates and then fired warning shots. *Id.* at 24a. The pirates fired back, and the *USS Groves* fired at skiffs stacked on the foredeck of the JCT 68. *Ibid.*; see *id.* at 5a. The pirates then surrendered, and members of the *USS Groves* boarded the ship. *Id.* at 5a. "Weapons used by the pirates, including two rocket-propelled grenade launchers, were littered throughout the ship." *Ibid.* The boarding party discovered that fire from the *USS Groves* had killed the vessel's master, Wu Lai-Yu, whom the pirates were holding as a hostage. *Ibid.* The next day, "pursuant to orders from the NATO task force commander," the *USS Groves* sank the JCT 68 with Master Wu's body on board. *Ibid.*

After the incident, the Navy declassified and released portions of the command investigation, an internal Navy investigation into the incident. See Pet. App. 51a-70a. Those portions of the command investigation were disclosed to petitioner and to Taiwanese authorities. Subsequently, the United States, acting under its authority to conduct international relations, made an ex gratia payment to Master Wu's family to reflect the Nation's condolences. See *id.* at 21a n.2.

3. Petitioner is Master Wu's widow. Pet. App. 5a. She filed this maritime tort action under the Death on the High Seas Act, 46 U.S.C. 30301 *et seq.*, and general maritime law, alleging that the United States negligently caused Master Wu's death and violated maritime law by sinking the JCT 68. Pet. App. 37a-

39a (Compl.). Petitioner also relied on the Suits in Admiralty Act (SIAA), 46 U.S.C. 30901 *et seq.*, and the Public Vessels Act (PVA), 46 U.S.C. 31101 *et seq.*, both of which waive the United States' sovereign immunity for certain admiralty claims. Pet. App. 38a, 40a. In particular, the PVA provides that a "civil action in personam in admiralty may be brought, or an impleader filed, against the United States for * * * damages caused by a public vessel of the United States." 46 U.S.C. 31102.

Relying on the Navy command investigation, petitioner alleged that the *USS Groves* had acted negligently by, among other things, firing live ammunition at the JCT 68, using inaccurate weapons, underestimating the difficulty of hitting skiffs, failing to provide adequate notice to the Taiwanese government, and following the NATO Task Force commander's order to sink the JCT 68. Pet. App. 34a-36a.

The district court dismissed the case, holding that petitioner's claims presented a nonjusticiable political question. Pet. App. 22a-27a.

4. The court of appeals affirmed. Pet. App. 3a-21a. The court held that the political question doctrine "prevents the judicial branch from hearing the case" because "allowing [the] action to proceed would thrust courts into the middle of a sensitive multinational counter-piracy operation and force courts to second-guess the conduct of a military engagement" conducted off the Horn of Africa. *Id.* at 6a.

The court of appeals explained that under *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), a case presents a nonjusticiable political question if, among other things, adjudicating the plaintiff's claims would require the courts to decide questions that are constitutionally

committed to a political Branch, or there are no "judicially discoverable and manageable standards for resolving" the claims. Pet. App. 7a (quoting *Baker*, 396 U.S. at 217). The court concluded that petitioner's claims possessed those characteristics because adjudicating the suit would involve second-guessing military and tactical decisions that are constitutionally committed to the President and Congress. Pet. App. 11a-12a (citing U.S. Const. Art. II, § 2, Cl. 1, and Art. I, § 8, Cl. 11). The court explained that determining whether naval personnel acted negligently would require the district court to evaluate the appropriateness of the "warnings [that] were given, the type of ordnance used, the sort of weapons deployed, the range of fire selected, and the pattern, timing and escalation of the firing." *Id.* at 8a (citing petitioner's complaint). Federal judges, the court emphasized, are "not equipped to second-guess" decisions involving military strategy and tactics, and in any event, such tactical questions are "not intended to be answered through the vehicle of a tort suit." *Id.* at 9a.

The court of appeals also observed that adjudicating petitioner's action could involve the courts in larger-scale foreign-relations and strategic questions, including "the command structures of both the U.S. military and Operation Ocean Shield." Pet. App. 9a. Pointing to petitioner's contentions that the *USS Groves* "fail[ed] to follow the proper rules of engagement" and wrongly sunk the JCT 68 on NATO orders, *ibid.*, the court reasoned that "selecting the proper rules of military engagement" and evaluating the NATO command structure and operations were not appropriate judicial inquiries, *id.* at 10a.

The court of appeals rejected petitioner's contention that the PVA's provisions permitting plaintiffs to subpoena crewmembers of public vessels in certain circumstances show that procedures are in place for deciding cases like this. Pet. App. 11a. Although "[s]ubpoenaing members of the military is not necessarily itself an attack on the separation of powers," the court explained, "[a]sking probing questions about the strategy, tactics, and conduct of a military operation * * * is just such an affront." *Ibid.*

The court of appeals also held, in the alternative, that the PVA and SIAA do not waive the sovereign immunity of the United States for the exercise of discretionary functions and that petitioner's claims were barred on that basis. Pet. App. 15a. Petitioner did not dispute that the SIAA does not waive sovereign immunity for actions taken in the exercise of a discretionary function, *ibid.*, and the court concluded that the PVA should be construed the same way. *Id.* at 16a-17a. The court held that petitioner's claims were barred because the "conduct of a military engagement is the very essence of a discretionary function." *Id.* at 17a-18a. The court rejected petitioner's argument that the United States or NATO commanders had acted outside the bounds of their discretion, explaining that petitioner had failed to "identify a law that would permissibly have circumscribed the USS Groves's course of action." *Id.* at 19a.

ARGUMENT

Petitioner contends (Pet. 7-22) that the court of appeals erred in holding that petitioner's suit presents a nonjusticiable political question. The court's decision is correct and does not conflict with any decision of another court of appeals or this Court. Even if the

political question issue otherwise warranted review, moreover, this case would be a poor vehicle, as the court of appeals' judgment is independently supported by the alternative holding that petitioner's claims challenge the exercise of a discretionary function for which the United States has not waived its immunity. Although petitioner argues that the court erred in its application of the discretionary function exception, that fact- and case-specific holding does not warrant review.

1. The court of appeals correctly held that petitioner's action presents a nonjusticiable political question. Pet. App. 6a-15a. That conclusion does not conflict with any decision of this Court or another court of appeals.

a. The political question doctrine is "primarily a function of the separation of powers," *Baker* v. *Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217.

The Constitution confers on the Legislative and Executive Branches broad authority over the military. See U.S. Const. Art. I, § 8, Cls. 11-16; *id.* Art. II, § 2, Cl. 1. Although not "every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, the employment of military assets feature prominently among the areas in which the political question doctrine traditionally has been implicated. In *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), for example, this Court held that the political question doctrine barred a suit seeking injunctive relief based on allegations that the National Guard used excessive force in responding to Vietnam war protesters at Kent State University, because "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Id.* at 5, 10. Indeed, the Court found it "difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches," and "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10.

In determining whether an action presents a political question, a court must undertake a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. The court must ascertain the issues that the plaintiff's complaint seeks to have the court resolve, and then consider whether those issues are ones for which the Constitution vests "ultimate responsibility" in the political Branches, *Gilligan*, 413 U.S. at 10, or whether the issues are otherwise not susceptible to judicial resolution, *Baker*, 369 U.S. at 217. In this case, the lower

courts undertook that inquiry, and correctly determined that they could not adjudicate petitioner's tort action.

As the court of appeals concluded, petitioner's claims would require the courts to decide issues that are textually committed to the political Branches. See *Baker*, 369 U.S. at 217; *Gilligan*, 413 U.S. at 10. Petitioner's complaint alleges that the *USS Groves*, during a military engagement between Somali pirates and a United States naval vessel acting under NATO command, "negligently" caused Wu's death by, among other things, using explosive rather than inert ordnance and firing into central compartments of the ship rather than the skiffs or engines. Pet. App. 37a-38a; *id.* at 35a; Pet. C.A. Br. 3. In order to evaluate whether the United States naval vessel took "reasonable measures" to protect Wu's life, Pet. C.A. Br. 3, the courts would have to apply hindsight to tactical and strategic judgments made by Navy and NATO commanders. Those judgments include "what kind of warnings were given, the type of ordnance used, the sort of weapons deployed, the range of fire selected, and the pattern, timing, and escalation of the firing." Pet. App. 8a. As this Court has recognized, judicial review of such decisions would "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government." *Gilligan*, 413 U.S. at 7.

In addition, adjudicating petitioner's suit would require the courts to second-guess foreign-relations arrangements and decisions by deciding whether the *USS Groves*, in participating in a multinational operation, should have "repudiate[d] the NATO commander's direct order" or otherwise insisted on a different

command structure. Pet. App. 10a-11a. As the Eleventh Circuit recognized in a suit challenging the actions of a United States naval vessel engaged in NATO training exercises, the "relationship between the United States and its allies * * * is a matter of foreign policy" that is committed to the Executive Branch rather than to the courts. *Aktepe* v. *United States*, 105 F.3d 1400, 1403 (1997), cert. denied, 522 U.S. 1045 (1998). Because "courts are unschooled in 'the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict,' the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government." *Id.* at 1403 (citation omitted; brackets in original).

Finally, the court of appeals correctly held that "this controversy lacks discernible rules and standards for judicial resolution," Pet. App. 12a, because it would require the court to determine how a reasonable military force engaged in counter-piracy activities would have conducted the operation. See *Baker*, 369 U.S. at 217. Petitioner is incorrect in contending (Pet. 14-16) that rules governing "maritime rescue" or ordinary "law enforcement activities" would have provided judicially manageable standards by which to measure the *USS Groves'* conduct. See Pet. App. 13a. The primary focus of the NATO counter-piracy operation was stopping the pirates and furthering international maritime security. The operation thus was not a traditional maritime rescue analogous to a Coast Guard rescue of distressed mariners. Nor was the operation analogous to a traditional police action such as Coast Guard drug interdiction: as the court of appeals correctly concluded, the "international forces and threat

involved" and the "military command structure and equipment deployed" are inconsistent with that characterization. *Ibid.* The rules that would govern such actions were therefore inapplicable here.

b. Petitioner argues (Pet. 10-18) that by applying the political question doctrine to this suit, the court of appeals "overr[o]de the intent of Congress in passing the Public Vessels Act." Pet. 10 (capitalization altered). The court of appeals correctly rejected that argument.

i. As an initial matter, petitioner points to no evidence that Congress intended the PVA to subject combat and tactical decisions to judicial review. The PVA waives sovereign immunity for admiralty claims based on "damages caused by a public vessel of the United States." 46 U.S.C. 31102. Petitioner does not point to any evidence in the text or enactment history of the PVA suggesting that Congress specifically intended the PVA to be used to subject to judicial review tactical decisions made during an engagement using military assets. Cf. *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 106 (1948) (*Waterman*) ("Where Congress has authorized review of 'any order' or used other equally inclusive terms, courts have" construed them not to "subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review."); *Koohi* v. *United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) (PVA's waiver of sovereign immunity must be construed not to extend to combatant activities by the Navy or Coast Guard), cert. denied, 508 U.S. 960 (1993).

Contrary to petitioner's argument, the PVA's provisions requiring consent of "the Secretary of the department * * * having control of the vessel" before an officer or crewmember may be subpoenaed, 46 U.S.C. 31110, and permitting stays where the Secretary of the Navy has certified that "prosecution of such suit" would endanger naval operations, Act of July 3, 1944, ch. 399, 58 Stat. 723-724, do not suggest that Congress contemplated that the substance of tactical and foreign-relations decisions would be subject to judicial review. Rather, they indicate only that Congress anticipated that the conduct of military vessels unrelated to use of military force would sometimes give rise to maritime actions under the PVA, and that Congress wanted to ensure that the litigation of such suits would not interfere with any military operations that were ongoing at the time. See Pet. App. 11a.

In any event, the fact that petitioner's claims were brought under the PVA does not preclude application of the political question doctrine. Congress may not override a textual constitutional assignment of an issue to another Branch—and thereby convert an otherwise nonjusticiable political question into a matter to be adjudicated in court—by enacting a statute that purports to confer a right to have the courts resolve the issue. See *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts * * * to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III.") (internal citation omitted); *Waterman*, 333 U.S. at 111 (courts may not review President's determination pursuant to statute providing for judicial review

of decisions regarding foreign air carrier routes because resolution of foreign-policy issues is by nature political); see also *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (citing *Waterman* for the proposition that "'[t]he judicial Power' created by Article III, § 1, of the Constitution is not * * * *whatever* Congress chooses to assign" to the courts) (citations omitted).

The court of appeals therefore correctly held that the PVA does not preclude application of the political question doctrine. Pet. App. 11a. That conclusion is consistent with other appellate-court decisions holding that "[t]he justiciability of a controversy depends not upon the existence of a federal statute, but upon whether judicial resolution of that controversy would be consonant with the separation of powers principles embodied in the Constitution." *Aktepe*, 105 F.3d at 1402 (claim brought under PVA presents political question because it required court to determine how a "reasonable military force would have conducted" drills); see, *e.g., El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (political question doctrine barred Federal Tort Claims Act suit; "a statute providing for judicial review does not override Article III's requirement that federal courts refrain from deciding political questions"), cert. denied, 562 U.S. 1178 (2011); *Spectrum Stores, Inc.* v. *CITGO Petroleum, Inc.*, 632 F.3d 938, 954 (5th Cir.) (Sherman Act and Clayton Act claims presented non-justiciable political questions), cert. denied, 132 S. Ct. 366, and 132 S. Ct. 367 (2011).

At the very least, applying principles of constitutional avoidance, the serious separation-of-powers and political question concerns presented by this suit

strongly reinforce the conclusion that the PVA does not waive the sovereign immunity of the United States to this suit.

ii. Contrary to petitioner's argument, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421 (2012), does not suggest that the existence of a statute generally providing for judicial review prevents a claim from presenting a political question. Rather, *Zivotofsky* held only that, in light of the statute at issue and the nature of the parties' dispute, adjudicating the plaintiff's claim did not require the Court to intrude on any foreign-relations decisions committed to another Branch. *Id.* at 1427.

In *Zivotofsky*, the plaintiff sought to enforce a statute purporting to require the Secretary of State, on request, to list "Israel" as the place of birth on the passport of an American citizen born in Jerusalem, notwithstanding the longstanding policy of the President of not recognizing Israel's sovereignty over Jerusalem. 132 S. Ct. at 1425-1426. In rejecting the government's argument that the case presented a political question because the recognition decision was committed to the Executive, the Court stated that the "existence of a statutory right * * * is certainly relevant to the Judiciary's power to decide Zivotofsky's claim." *Id.* at 1427. That was so because the statute established the issues that the courts would have to consider in order to resolve Zivotofsky's claim. Because the statute conferred only a right to a particular passport designation rather than a right to challenge the Executive Branch's recognition policy itself, the Court concluded that adjudicating petitioner's claim would not require the Court to evaluate the wisdom of the Executive Branch's "determination of what United States policy toward Jerusalem should be." *Ibid.*

("Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right * * * to choose to have Israel recorded on his passport as his place of birth.").

Zivotofsky thus reaffirmed that to determine whether a case presents a political question, the court must consider the substance of the dispute between the parties and the questions that the court is being asked to decide. In this case, petitioner's claims under the PVA present a political question because petitioner alleges that that various aspects of the United States' military and tactical decisions were unreasonable. Those claims seek an "unmoored" judicial determination of what the United States' and NATO's anti-piracy policies should be. See *Zivotofsky*, 132 S. Ct. at 1427.

c. The court of appeals' conclusion that petitioner's challenge to the NATO-led naval engagement with Somali pirates is nonjusticiable does not conflict with any decision of another court of appeals. Contra Pet. 8-10.

In *Koohi* v. *United States*, *supra*, the Ninth Circuit stated that the political question doctrine did not bar a tort action against the United States arising from an incident in which a U.S. warship mistakenly shot down a commercial airliner. See Pet. 9. Because the court held that the suit was barred by sovereign immunity, however, its discussion of the political question doctrine was dicta that does not create a circuit conflict. See 976 F.2d at 1336. In any event, subsequent decisions indicate that the Ninth Circuit would likely conclude that a case involving the circumstances presented here is barred by the political question doctrine.

That court has explained that while *Koohi* involved only a challenge to "on-the-ground execution of military-related operations, not underlying foreign-policy choices such as the very decision to engage in military activity," claims implicating larger-scale national-security and foreign-policy decisions are barred by the political question doctrine. *Saldana* v. *Occidental Petroleum Corp.*, 774 F.3d 544, 553 (9th Cir. 2014) (per curiam); see *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 982-984 (9th Cir. 2007). This case challenges just such large-scale decisions, including the rules of engagement used by, and "parameters" of, the NATO anti-piracy operation, as well as the United States' decision to place the *USS Groves* under the command of the NATO Task Force. Pet. App. 9a-10a (petitioner's claims "threaten[] to involve the courts in the command structures of both the U.S. military and Operation Ocean Shield"). The Ninth Circuit would thus likely conclude, consistent with the decision below, that petitioner's claims present a political question.

Petitioner is also incorrect in arguing (Pet. 8) that the decision below conflicts with other decisions adjudicating claims "involving harms from Navy and Coast Guard operations under the PVA." As the court of appeals explained, those cases did not involve engagements using military force, and adjudicating the claims did not require the courts to second-guess tactical or foreign-relations decisions. See Pet. App. 14a; *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167, 168 (2d Cir. 1968) (Coast Guard vessel partially sunk by negligent action of "a seaman returning from shore leave late at night, in the condition for which seamen are famed"); *Pacific-Atlantic S.S. Co.* v.

United States, 175 F.2d 632 (4th Cir.) (in case involving nighttime collision between civilian and naval vessels, court evaluated reasonableness of ships' navigation and compliance with standard navigation-at-sea rules), cert. denied, 338 U.S. 868 (1949); *Ocean S.S. Co. of Savannah* v. *United States*, 38 F.2d 782, 786 (2d Cir. 1930) (addressing nighttime collision between steamer and submarine on a test run; considering vessels' respective compliance with "ordinary" rules of navigation and lighting rules that, by statute, expressly applied to warships). None of the cases on which petitioner relies required the court to adjudicate the propriety of the Executive Branch's tactical decisions or participation in an international engagement, and thus none involved the separation-of-powers concerns present here.

Finally, the decision below does not conflict with *B & F Trawlers, Inc.* v. *United States*, 841 F.2d 626 (5th Cir. 1988). Contra Pet. 10. There, the Fifth Circuit held that the PVA's waiver of sovereign immunity does not contain an implicit exception for damages caused by public vessels engaged in law enforcement activities—there, Coast Guard vessels engaged in drug interdiction efforts. 841 F.2d at 628-629, 631 (tort action addressed "the government's protected law enforcement function" involving the "apprehension and custody of drug-running vessels"). *B & F Trawlers* thus did not present any challenge to decisions made during an international engagement using military assets.

2. Petitioner next argues (Pet. 19-22) that certiorari is warranted with respect to petitioner's claim for damages arising out of the destruction of the JCT 68. Petitioner relies on nineteenth-century maritime

cases applying the law of prize and capture. See Pet. 19-20 (citing, *e.g.*, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826); *The Paquete Habana*, 175 U.S. 677 (1900)). But as the court of appeals explained, petitioner's challenge to the JCT 68's sinking, like her challenge to the conduct of the engagement with the pirates, presents a political question. The *USS Groves* sank the JCT 68 pursuant to the NATO commander's orders, and petitioner "urges [the court] to repudiate" that order as unreasonable. Pet. App. 10a. In addition, the Task Force determined that the destruction of the vessel was integral to the anti-piracy operation: had it not destroyed the vessel, the Task Force would have had to expend valuable resources towing and salvaging the ship, thereby "substantially interfering with the conduct[] of the operation." *Id.* at 26a. Petitioner's claim for damages based on the JCT 68's destruction would therefore require the courts to oversee the structure of the NATO task force's chain of command and its allocation of tactical resources.

The court of appeals correctly held that the law of prize does not provide any basis on which to adjudicate petitioner's claim. Pet. App. 14a. The "law of prize in essence adjudicates claims to ownership" of a vessel "captured" as a prize in a time of war. *Ibid.*; see 28 U.S.C. 1333 (granting federal courts jurisdiction over claims for "condemnation of property taken as prize"); *Cushing* v. *Laird*, 107 U.S. 69, 77 (1883) (a "prize" is a vessel captured in "time of war"). The law of prize does not apply in this case because, as the lower courts concluded, "neither the USS Groves nor the NATO task force claimed or intended to claim ownership of the JCT 68." Pet. App. 14a-15a; see *The*

Grotius, 13 U.S. (9 Cranch.) 368, 370 (1815). That fact-specific conclusion does not warrant review.

3. Petitioner also challenges (Pet. 23-25) the court of appeals' alternative holding that the United States cannot be liable for damages in this case under the PVA because "it was engaged in the exercise of a discretionary function." Pet. App. 15a. Petitioner does not challenge the court's predicate holding (*id.* at 16a-17a) that the PVA's waiver of sovereign immunity does not apply to actions based on the performance of a discretionary function, in circumstances parallel to those covered by the discretionary function exception contained in the Federal Tort Claims Act (FTCA). See 28 U.S.C. 2680(a). Rather, petitioner argues that the court of appeals should have remanded to permit the district court to determine, after further discovery, the scope of such discretionary functions. See Pet. 24-25. That case- and fact-specific contention does not warrant review.

Looking to FTCA caselaw, the court of appeals correctly explained that the "discretionary function exception applies to 'conduct' that 'involves an element of judgment or choice.'" Pet. App. 17a (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). As the court observed, the "conduct of a military engagement is the very essence of a discretionary function," involving "discretionary decisions * * * that have to be made quickly during moments of pronounced pressure." *Id.* at 17a-18a.

Petitioner contends (Pet. 24-25) that the court of appeals should have remanded to permit the district court to determine whether the Task Force acted "contrary to law or rule," such as a "mandatory directive" limiting the *USS Groves'* discretion. But

petitioner does not identify any legal rule that allegedly supplanted the military commanders' discretion to direct the engagement with the pirates. See Pet. 24 (referring generally to "law and rule"). Before the court of appeals, petitioner argued that certain naval handbooks and non-self-executing treaties provided rules of engagement, but the court rejected that contention, concluding that the identified authorities did not bind the government in conducting the engagement. Pet. App. 19a. Petitioner does not explain why that conclusion is incorrect.

Contrary to petitioner's contention, the court of appeals' refusal to remand the case does not conflict with any decision of another court of appeals. Petitioner relies (Pet. 24-25) on *B & F Trawlers*, 841 F.2d at 632, but there the court remanded for further consideration because the court had identified Coast Guard regulations that may have limited the government's discretion.[*] Petitioner has identified no such authorities here. Further review is unwarranted.

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[*] The other cases on which petitioner relies (Pet. 24) are inapposite. See *Thames Shipyard & Repair Co.* v. *United States*, 350 F.3d 247, 266-267 (1st Cir. 2003) (concluding that PVA claim was barred because of discretionary function, but remanding for further consideration of additional tort claim to which the discretionary function issue was irrelevant), cert. denied, 542 U.S. 905 (2004); *Tobar* v. *United States*, 639 F.3d 1191, 1200 (9th Cir. 2011) (remanding for further consideration of PVA claim without considering discretionary function issue).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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