No. 23-196

In the Supreme Court of the United States

JADE MOUND, ET AL., PETITIONERS

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 RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' action against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is available at 2023 WL 3911505. The opinion of the district court (Pet. App. 9-45) is not published in the Federal Supplement but is available at 2022 WL 1059471.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2023. The petition for a writ of certiorari was filed on August 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671, *et seq.*, waives federal sovereign immunity and creates a cause of action against the United States for certain claims against "any employee of the

Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable [under] the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). This waiver, however, "shall not apply to" several excepted categories of claims. 28 U.S.C. 2680.

As relevant here, the "discretionary function" exception retains the United States' sovereign immunity from "[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). This Court has established a two-part inquiry to identify such discretionary functions: first, the conduct at issue must be "discretionary in nature" and involve "'an element of judgment or choice;'" second, the challenged action or inaction must have been "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 322-323, 325 (1991) (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)).

2. This case concerns FTCA claims challenging the Standing Rock Sioux Tribe's decisions regarding road safety pursuant to a self-determination contract with the Bureau of Indian Affairs (BIA).

a. The BIA is tasked with maintaining nearly 29,000 miles of Indian reservation roads identified as "BIA System Roads" on the National Tribal Transportation Facility Inventory. Pet. App. 2, 21; see 23 U.S.C. 202(b)(1)(B). BIA principally does so through two programs: the road maintenance program and the tribal transportation program. The road maintenance program is authorized by 25 U.S.C. 318a, which authorizes the appropriation of

funds for "the survey, improvement, construction, and maintenance of" certain "Indian reservation roads." The tribal transportation program is authorized by 23 U.S.C. 202 (2018 & Supp. III 2021), which provides funds jointly to the Secretaries of the Interior and Transportation for a variety of transportation-related costs like planning and construction, but which restricts the amounts that BIA may use for maintenance alone. 23 U.S.C. 202(a) (2018 & Supp. III 2021); 25 C.F.R. Pt. 170.

Because of the vast extent of roads within Indian reservations around the country and the limited funds available to BIA under those programs, the amounts apportioned to roads within a particular reservation are not always sufficient to address all road improvement, construction, and maintenance issues that may arise. See C.A. App. 97; see also 23 U.S.C. 202(b)(3)(B) (requiring tribal transportation program funds to be allocated for the benefit of tribes using a statutory formula to apportion "[t]ribal shares"). And for Indian reservations in northern or mountainous regions, winter maintenance activities involving snow and ice removal significantly deplete the funds available for road projects. Pet. App. 21.

b. The Indian Self-Determination and Education Assistance Act (Indian Self-Determination Act), 25 U.S.C. 5301, *et seq.*, seeks to give Indian tribes "an effective voice in the planning and implementation of programs run for [their] benefit" by permitting tribes to assume control of certain programs operated by the Secretary of the Interior, 25 U.S.C. 5301(a)(1); 25 U.S.C. 5302(a) and (b); see 25 U.S.C. 5304(i), 5321 (2018 & Supp. II 2020), including BIA's road maintenance and tribal transportation programs within the tribes' reservations.

Pet. App. 17; see 23 U.S.C. 202(b)(6)(A) (providing that tribal transportation program funding can be provided to a tribe under the Indian Self-Determination Act); 25 C.F.R. 170.930. The Act does so by allowing eligible tribes to enter into "self-determination" contracts with BIA, pursuant to which tribes agree to assume the program with a statutorily determined amount of BIA funding. See, *e.g.*, 25 U.S.C. 5325 (2018 & Supp. II 2020); *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250, 252 (2016).

Like the BIA, a tribe operating a program under the Indian Self-Determination Act receives "the full protection and coverage of the Federal Tort Claims Act," such that any civil action against a contracting tribe based on performance of a self-determination contract "shall be deemed to be an action against the United States." Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. III, § 314, 104 Stat. 1959-1960, amended by Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. III, § 308, 107 Stat. 1416 (25 U.S.C. 5321); see 25 C.F.R. 900.180-900.188 (BIA regulations addressing tribal contractor FTCA coverage); *Hinsley* v. *Standing Rock Child Protective Servs.*, 516 F.3d 668, 672 (8th Cir. 2008) (describing such coverage).

3. During the times relevant here, the Standing Rock Sioux Tribe contracted to assume the BIA's road maintenance and tribal transportation programs for nearly 200 miles of roads within the Tribe's Reservation, which straddles the border between North and South Dakota. See Pet. App. 2, 20. The Tribe's contracts specified that the Tribe's decisions regarding road safety and maintenance were within the Tribe's discretion. *Id.* at 2. For example, among other provisions,

the Tribe's road maintenance program contract specified that the Tribe would "'preserve, upkeep, and restore' roads 'within available funding'" and that the "'frequency and type of maintenance' would 'be at the discretion of the [Tribe], taking into consideration traffic requirements, weather conditions and the availability of funds.'" *Ibid.* (brackets in original).

Exercising that discretion, the Tribe adopted a planning document identifying the infrastructure projects that the Tribe proposed to undertake over the next five years under the tribal transportation program contract, prioritizing those projects based on the needs and interests of the Tribe. Pet. App. 24. That document was publicly available and approved by the Federal Highway Administration. See *ibid.*; see also 25 C.F.R. 170.421. The limited funding required the Tribe to spread projects out over time and prioritize those that it deemed most urgent.

As relevant here, the Tribe identified the Kenel Road Culvert in 2014 as one among the 50 projects that it sought to prioritize under its contracts. Pet. App. 2, 37; see C.A. App. 102, 651-655. The culvert allowed water to run under Kenel Road, also known as BIA Route 3, on the North Dakota side of the reservation. Pet. App. 2, 10; C.A. App. 102. The Tribe hired engineers and, in 2018, contracted with BIA to fund a survey, an environmental assessment, and engineering design for potentially replacing the culvert or otherwise repairing it. C.A. App. 102-103, 662-676. After that assessment, the Tribe decided that it was best to replace the culvert. Pet. App. 3. Because that construction project went beyond the maintenance provided for in its existing contracts, the Tribe sought an additional self-determination contract for the construction of a new culvert. *Ibid.*

Before the BIA and the Tribe had finalized the new contract, however, heavy rains led to flooding that caused a section of BIA Route 3 and the Kenel Road Culvert to wash out, leaving a gap in the road. Pet. App. 3. Four individuals drove their vehicles into the gap as they traveled in the dark in the early morning hours following the storm. *Ibid.* Trudy Peterson and James Vander Wal died in the crash, while Evan Thompson and Steven Willard allege injuries resulting from the accident. See *id.* at 10.

4. Petitioners are representatives of the estates and heirs of the decedents and persons injured in the accidents. Pet. App. 3. They brought suit against the United States under the FTCA alleging that the Tribe breached a duty to inspect and maintain the Kenel Road Culvert as well as to place signage warning of "washout potential." *Ibid.* The government thereafter moved to dismiss the suit under the "discretionary function" exception to the FTCA's waiver of sovereign immunity.

5. The district court granted the government's motion and dismissed the case. Pet. App. 9-45. Applying this Court's two-step test for the discretionary function exception, the district court first considered whether the Tribe's conduct was discretionary and concluded that the relevant contracts and regulations gave the Tribe "considerable discretion to take into consideration budgetary and policy concerns in deciding what road maintenance activities to undertake." *Id.* at 35; see *id.* at 25, 34-35.

Turning to the second step, the district court held that the Tribe's decisions were "susceptible to policy analysis." Pet. App. 36 (quoting *Gaubert*, 499 U.S. at 325); *id.* at 36-37. The court noted that, under the test articulated by this Court, "when 'established governmental

policy * * * allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.'" *Id.* at 37 (quoting *Gaubert*, 499 U.S. at 324-325). The district court observed that a decision regarding how and when to replace a major element of a substantial public facility is bound up in considerations of economic and political policy. *Id.* at 38. And the court concluded that such discretion extends to "decision[s]" regarding "whether to warn or not" and "the manner and method used to warn" during replacement, which are "susceptible to a policy analysis that weighs the benefits of warning * * * with its costs." *Id.* at 41-42 (quoting *Demery* v. *United States Dep't of Interior*, 357 F.3d 830, 834 (8th Cir. 2004)). Although the court expressed that it was "troubled by th[e] outcome" and "very sympathetic to the personal tragedies that occurred," it recognized that the law within the circuit "is clear," *id.* at 44, and urged Congress to enact a "legislative change," *id.* at 45.

6. The court of appeals affirmed. Pet. App. 1-6. The court noted that petitioners did "not appear to contest that the first step of the test—that the conduct at issue 'involved an element of judgment or choice'—is satisfied." *Id.* at 4 (quoting *Gaubert*, 499 U.S. at 322) (brackets omitted). In any event, the court "agree[d] with the district court" that "[t]he Tribe had discretion over how to maintain roads located within the Standing Rock Reservation, including whether to warn motorists of unsafe road conditions." *Id.* at 4 n.3.

As to the second step, the court of appeals concluded that "the Tribe's decision about whether to erect warning signs" "was 'susceptible to policy analysis' " because it "required a balance of safety versus cost." Pet. App.

5 (quoting *Gaubert*, 499 U.S. at 325). The court rejected petitioners' argument that such a holding would "nullify the United States' waiver of sovereign immunity" because "the cost of a warning sign would have been de minimis," and every contract that is "'subject to available funding'" would be able to "invoke the discretionary function exception." *Id.* at 5-6. The court explained that the "applicable regulations" "expressly require[]" consideration of "the availability of funds in deciding whether to perform maintenance on its roads" and therefore indicate that policy analysis is required. *Id.* at 6 (quoting *Walters* v. *United States*, 474 F.3d 1137, 1140 (8th Cir. 2007)). Accordingly, the court held that plaintiffs "failed to rebut the presumption that the [Tribe's] decision not to post warning signs was grounded in policy." *Ibid.* (quoting *Metter* v. *United States*, 785 F.3d 1227, 1232 (8th Cir. 2015)) (brackets in original).

ARGUMENT

Petitioners contend (Pet. 9-16) that the court of appeals erred in holding that the FTCA's discretionary function exception applies to the Tribe's failure to warn of the potential of a washout on the road it maintained. The court of appeals' decision is correct and does not conflict with a decision of this Court or another court of appeals. The application of the discretionary function exception is necessarily fact-dependent, and courts across the country have held that similar failure-to-warn claims fall within the exception. Further review is not warranted.

1. Both the district court and the court of appeals correctly applied the two-prong test for identifying discretionary functions established by this Court's decisions in *United States* v. *Gaubert*, 499 U.S. 315 (1991),

and *Berkovitz* v. *United States*, 486 U.S. 531 (1988). See Pet. App. 4-5, 15-16. As required by that test, both courts found that decisions regarding the maintenance, repair, or failure to warn of potential dangers at the Kenel Road Culvert (1) were not dictated by statute or regulation, but instead involved elements of judgment and choice, and (2) were susceptible to public policy considerations. *Id.* at 4-6, 25-44. Petitioners agree (Pet. 8) that the correct legal test was applied, but disagree with the outcome (Pet. 15-16). That claim presents no question of broad or enduring importance; it seeks only the correction of alleged error, which does not customarily warrant this Court's review. See Sup. Ct. R. 10.

In any event, there is no error in the lower courts' application of the test. At the first step, petitioners did not argue to the court of appeals—and expressly do not argue before this Court (Pet. 8)—that any authority *required* the Tribe to address safety issues in any particular way at the Kenel Road Culvert, or indeed at any other location along 200 miles of reservation roads. See Pet. App. 4. Instead, as the district court explained, the relevant regulations and contracts made "clear" that the Tribe retained "considerable discretion to take into consideration budgetary and policy concerns in deciding what road maintenance activities to undertake." *Id.* at 35.

Because those "established governmental polic[ies]" provided the Tribe with discretion, there is a "strong presumption" that the Tribe's exercise of discretion was "grounded in policy." *Gaubert*, 499 U.S. at 324-325. Indeed, the purpose of the Tribe's self-determination contract under the Indian Self-Determination Act was to give the Tribe "effective and meaningful participation * * * in the planning, conduct, and administration" of

BIA's road programs "so as to render such services more responsive to the needs and desires of those communities." 25 U.S.C. 5302(a) and (b); see, *e.g.*, C.A. App. 110 ("This Contract is * * * intended to provide for the meaningful participation by the Tribe in the planning, design and administration of the road maintenance functions on the Reservation."); 25 U.S.C. 5301(a)(1) (finding that "[f]ederal domination of Indian service programs" had "denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities"); 25 C.F.R. 900.3.

As the court of appeals recognized, petitioners "failed to rebut the presumption that the [Tribe's] decision not to post warning signs was grounded in policy." Pet. App. 6 (quoting *Metter*, 785 F.3d at 1232). A "decision about whether to erect warning signs" "require[s] a balance of safety versus cost." *Id.* at 5. As the Eighth Circuit has noted in other cases, that balance entails, first of all, "the need for professionals on the ground to adapt to the conditions they face in determining how to expend limited resources in the efforts to identify dangers," as well as any assessment of risks. *Buckler* v. *United States*, 919 F.3d 1038, 1052 (2019) (collecting cases). See, *e.g.*, *Ball* v. *United States*, 967 F.3d 1072, 1080-1081 (10th Cir. 2020) (applying the discretionary function exception to decisions regarding safety warnings because they require balancing of policy considerations); *Gonzalez* v. *United States*, 851 F.3d 538, 550-551 & n.64 (5th Cir. 2017) (reaching the same conclusion in light of need to balance "public safety and the protection of resources"); *Childers* v. *United States*, 40 F.3d 973, 976 (9th Cir.) (applying the exception because the balancing of public safety against other considerations

"within the constraints of the resources available" was a discretionary function), cert. denied, 514 U.S. 1095 (1995); *Rosebush* v. *United States*, 119 F.3d 438, 443 (6th Cir. 1997) (similar).

Such balancing further entails an assessment of "the benefits of a warning," Pet. App. 5 (quoting *Demery* v. *United States Dep't of Interior*, 357 F.3d 830, 834 (8th Cir. 2004)),—including, for example, whether and how much any given warning would avoid any accident and the value of such a warning in light of relevant upcoming infrastructure projects. Since the Tribe had decided to replace the culvert, its decisions regarding the benefits of a warning pending the forthcoming replacement were "made in the context of the operation of a much larger project" that required policy judgment. *Metter*, 785 F.3d at 1230; see *Baum* v. *United States*, 986 F.2d 716, 724 (4th Cir. 1993) ("The decision of how and when to replace a major element of a substantial public facility is, like the decisions involving design and construction * * * inherently bound up in considerations of economic and political policy."); *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989) (holding that "policy decisions were made about what type of warnings were effective and cost-justified, considering that [the lock at issue] was to be closed").

The decision also necessarily entailed consideration of "costs," Pet. App. 5, in terms of "staffing and funding," *United States* v. *S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984), including an assessment of the likelihood that a washout would actually occur, as well as the opportunity costs of not focusing attention on other aspects of the culvert replacement, or other safety issues and projects. At the time in question, the Tribe had to balance

50 prioritized projects and other matters, including maintenance operations during the winter season and improvements for unpaved roads and bridges on school bus routes. See C.A. App. 109-110, 150, 154, 163, 170, 177 (contract provisions and modifications reflecting the kind of work generally performed).

Petitioners' contrary arguments characterize the Tribe's decision as one not to undertake a "*de minimis*" cost. Pet. 9. But that characterization does not accurately reflect the nature of the Tribe's decision or the court of appeals' opinion, and it mistakenly treats signage as an isolated issue. The Tribe was confronted with the need to address a variety of maintenance concerns and potential hazards, and its conduct here must be viewed in that context. See *Elder* v. *United States*, 312 F.3d 1172, 1183-1184 (10th Cir. 2002) ("[O]ne cannot isolate a particular possible warning sign * * * and say whether its absence constitutes negligence" because officials weigh the "adequacy of one safety measure" based on "the totality of the safety package in terms of its impact on other public policies besides safety."). Moreover, as the court of appeals noted, quoting circuit precedent, in rejecting petitioners' "de minimis" characterization, decisions about monetary costs at the very least require policy judgment when, as here, "'applicable regulations expressly required the [Tribe] to consider the availability of funds in deciding whether to perform maintenance on its roads.'" Pet. App. 5-6 (quoting *Walters* v. *United States*, 474 F.3d 1137, 1140 (8th Cir. 2007)). The court's precedent thus does not reflect the holding that petitioners argue against.

Petitioners attempt (Pet. 7, 9) to bolster their claim of error by contending that the lower courts' decisions are inconsistent with *Indian Towing Co.* v. *United*

States, 350 U.S. 61 (1955). But as this Court has explained, "the Government conceded that the discretionary function exception was not implicated in *Indian Towing*," so that decision focused primarily on a different argument "that the [FTCA] contained an implied exception from liability for 'uniquely governmental functions.'" *Varig Airlines*, 467 U.S. at 812 (citation and emphasis omitted). At most, *Indian Towing* applied the general rule that the discretionary function exception does not apply where, as in that case, the government concedes that the challenged action "did not involve any permissible exercise of policy judgment." *Gaubert*, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3).

Nor are petitioners correct in suggesting (Pet. 4) that the district court believed that the Eighth Circuit's precedent required judicial correction. The court expressed its policy disagreement with the applicability of the exception and called on *Congress* to "address this law," noting that "a legislative change is needed." Pet. App. 45.

2. Petitioners contend (Pet. 10-14) that the court of appeals' determination that the Tribe's failure to post warning signs was based on public policy considerations conflicts with the decisions of other courts of appeals in failure-to-warn cases. But none of the cases petitioners cite established a broad rule limiting the discretionary function exception in failure-to-warn cases. Rather, each decision reflects the highly fact- and context-specific nature of discretionary function determinations. As a result, other failure-to-warn cases from those same circuits have found the discretionary function exception applicable and, in particular, have ruled that public policy

considerations can underlie a decision not to erect warning signs.

As to the Ninth Circuit, petitioners rely on cases stating that the exception should not apply based on "inadequate funding alone." Pet. 10-11 (quoting *O'Toole* v. *United States*, 295 F.3d 1029, 1037 (9th Cir. 2002), Pet. 11 (citing *Whisnant* v. *United States*, 400 F.3d 1177, 1184 (9th Cir. 2005)). But as the Ninth Circuit subsequently explained, notwithstanding those statements, its precedent establishes that resource allocation decisions in identifying and warning of dangers "are 'precisely the kind the discretionary function exception was intended to immunize from suit.'" *Terbush* v. *United States*, 516 F.3d 1125, 1134-1136 (2008) (quoting *Childers*, 40 F.3d at 975-976, and collecting cases).

The Ninth Circuit has "acknowledge[d] that" its "case law may not be in complete harmony on this issue," but it viewed any perceived inconsistency as "the inevitable result of such a policy-specific and fact-driven inquiry." *Terbush*, 516 F.3d at 1136. The court also noted that the exception applies when, as here, a maintenance decision "turned out to involve a balancing of policy considerations, more complex decisions or outright replacement." *Id.* at 1134. And, like the court here, the Ninth Circuit has held that "[w]here a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function." *National Union Fire Ins.* v. *United States*, 115 F.3d 1415, 1421-1422 (1997) (discussing cases), cert. denied, 522 U.S. 1116 (1998); see *Bailey* v. *United States*, 623 F.3d 855, 862, 863 (9th Cir. 2010) (stating that Ninth Circuit precedent "establishes that balancing competing safety considerations is a protected policy judgment" and "so

long as a decision involves even two competing interests, it is 'susceptible' to policy analysis") (emphases omitted), cert. denied, 565 U.S. 1070 (2011).

Petitioners' reliance on the D.C. Circuit's decision in *Cope* v. *Scott*, 45 F.3d 445 (1995), is likewise mistaken. In considering a traffic accident in Rock Creek National Park, the D.C. Circuit held that the discretionary function exception applied to claims regarding road maintenance, explaining that such decisions "would require balancing factors such as Beach Drive's overall purpose, the allocation of funds among significant project demands, the safety of drivers and other park visitors, and the inconvenience of repairs as compared to the risk of safety hazards." *Id.* at 451. With respect to warning sign placement, however, the court rejected the exception's application, which the government invoked based on engineering and aesthetic concerns. *Ibid.* The court found those asserted interests unconvincing on the particular facts before it—citing the presence of "no less than 'twenty-three traffic control, warning, and information signs' [that] already exist[ed] on the half-mile stretch of road" near the accident. *Id.* at 452 (citation omitted).

That decision is not at odds with the court of appeals' decision here. See *Loughlin* v. *United States*, 393 F.3d 155, 166 (D.C. Cir. 2004) (distinguishing *Cope* and explaining that the presence of other signs "was probative of the nature of the decision to place an additional warning sign, because it demonstrated that the Government was not concerned with preserving a pristine view on the particular stretch of road"); *Shansky* v. *United States*, 164 F.3d 688, 694 (1st Cir. 1999) (concluding that *Cope* did not apply where "no directive bound the [decision-maker] to a pre-determined safety policy that

contained established priorities"); *Rich* v. *United States*, 119 F.3d 447, 452 n.2 (6th Cir. 1997) (explaining that *Cope* did not apply to "the decision to post warning markers at all"), cert. denied, 523 U.S. 1047 (1998). Indeed, in a later case involving a failure to warn, the D.C. Circuit recognized that the relevant safety needs "must be balanced against the need for alternative projects that could consume scarce resources." *Macharia* v. *United States*, 334 F.3d 61, 67 (D.C. Cir. 2003) (citation omitted), cert. denied, 540 U.S. 1149 (2004).

Contrary to petitioners' suggestion (Pet. 11-12), Tenth Circuit precedent also does not conflict with the court of appeals' decision in this case. The Tenth Circuit has rejected the argument that no "policy issues" are relevant in failure-to-warn cases because "putting up one sign takes little time, effort, or money." *Ball*, 967 F.3d at 1082. Instead, the court has held that the discretionary function exception protects officials' discretion to "weigh the cost of safety measures against the additional safety that will be achieved" and has noted that "[e]ven inexpensive signs may not be worth their cost." *Elder*, 312 F.3d at 1181. Indeed, the court has expressly disagreed with petitioners' broad reading of *Duke* v. *Department of Agriculture*, 131 F.3d 1407, 1412 (10th Cir. 1997)—a case in which the government had conceded that "no economic factors influenced the decision." As the Tenth Circuit explained, in that context, *Duke* and other cases "simply held that there were no such policy judgments behind the failures in those cases." *Ball*, 967 F.3d at 1081. And the court rejected as a misreading of its precedent the argument "that prioritization of resources cannot by itself be a sufficient policy reason for failure to act." See *id.* at 1080 n.3.

3. This case would not provide a suitable vehicle to address any broader questions regarding the discretionary function exception. The exception's application is fact-specific and not susceptible to "formulaic categories." *Terbush*, 516 F.3d at 1129-1130. It "requires a particularized analysis of the specific agency action challenged." *GATX/Airlog Co.* v. *United States*, 286 F.3d 1168, 1174 (9th Cir. 2002). And as the D.C. Circuit has recognized, this Court has long "rejected" attempts to impose various "'analytical frameworks,'" recognizing that they are "an inappropriate means of addressing the discretionary function exception." *Cope*, 45 F.3d at 449 (citation omitted).

Petitioners' arguments amount to a fact-specific disagreement with the court of appeals' decision and a claim that the Tribe abused its discretion in failing to place warning signs before replacing the Kenel Road Culvert. Because the court of appeals' decision is correct and comports with the rulings of this Court and other courts of appeals, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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