No. 21-1013

IN THE

Supreme Court of the United States

REPUBLIC OF TURKEY,

Petitioner,

v.

LUSIK USOYAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the unanimous, fact-specific decision that the Turkish security detail's actions in assaulting peaceful protestors on public streets in Washington, DC, were not plausibly based on considerations of security-related policy and, therefore, do not fall within the Foreign Sovereign Immunity Act's discretionary function exception.

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INTRODUCTION

These consolidated cases arise from violent attacks by members of Turkish security forces, first, on a small group of people and, later, on one woman, as they were protesting on public sidewalks in Washington, DC, during a visit by Turkey's President. As a result of the attacks, the victims suffered injuries including concussions, seizures, and lost teeth. When they brought tort suits seeking damages for their injuries, Turkey moved to dismiss, arguing that it was immune from liability under the Foreign Sovereign Immunities Act (FSIA).

The FSIA withholds immunity for a foreign state from lawsuits seeking damages for bodily injury or death occurring in the United States and caused by tortious action of an official or employee acting within the scope of employment, unless the challenged action falls within the FSIA's "discretionary function exception." To determine whether the exception applies, courts use a two-part test that looks, first, to whether a law or policy specifically prescribed a course of action for a foreign government's official or employee to follow and, second, to whether the official or employee's exercise of discretion was based on considerations of public policy. *See Berkovitz v. United States*, 486 U.S. 531 (1988).

Below, the district court, applying *Berkovitz* and considering a large body of evidence, including videos of the events, found that Turkish security personnel—with no plausible basis for perceiving a threat to Turkey's President—violently attacked civilian protesters, including by striking and kicking protesters who had fallen to the ground. In what the court described as "a very narrow, fact-specific decision,"

Pet. App. 66, it concluded that Turkey's actions were not covered by the discretionary function exception.

On appeal, the D.C. Circuit, consistent with the views stated by the United States in a brief filed at the court's invitation, agreed. The court held that the discretionary function exception does not apply because "the nature of the challenged conduct was not plausibly related to protecting President Erdogan, which is the only authority Turkey had to use force against United States citizens and residents." *Id*. at 27.

Criticizing the courts below for considering the facts, Turkey seeks review in this Court. None of the questions it presents warrant review.

The petition's first two questions challenge the court of appeals' application of the second step of the two-part test set forth in *Berkovitz* to the facts of this case. Its first question asks whether the discretionary function exception applies to claims based on a foreign "security detail's use of force during an official state visit to the United States, when they were acting within the scope of their employment." Pet. i. As the court of appeals explained, the answer under *Berkovitz* and *United States v. Gaubert*, 499 U.S. 315 (1991), is that immunity in such circumstances depends on whether the action was grounded in considerations of security-related policy. Although the petition seems to suggest that the answer is always yes, it is careful not to expressly articulate that suggestion, which would eliminate the second *Berkovitz* step.

The petition's second question asks whether the use of force comes within the exception when it was not "plausibly" related to the proffered policy objective

of protecting the president. Pet. i. As the court of appeals, adopting the view of the United States, explained, where the use of force was not even "plausibly" related to protecting the foreign official, *Berkovitz*'s second step is not satisfied and the exception, therefore, does not apply.

Turkey's suggestion that the exception applies where the action is not even "plausibly" related to the proffered policy would make a nullity of the second step of the *Berkovitz* test. By asking whether the challenged discretionary action is based on policy considerations, this step ensures that the action "is of the kind that the discretionary function exception was designed to shield." 486 U.S. at 536. Here, the D.C. Circuit correctly held that the decision to attack civilians on U.S. soil without a plausible security justification was not the kind of decision that the discretionary function exclusion was designed to protect. And although Turkey asserts that the D.C. Circuit's decision conflicts with decisions of other courts of appeals, it identifies no cases that support that claim.

The petition also asks the Court to consider which party bears the burden of proving whether the discretionary function exception applies. The court below did not address this issue, however, and the opinion cannot reasonably be read to suggest that an unstated decision about allocation of burden determined the outcome. Moreover, the petition's citation to a single unpublished Seventh Circuit decision does not show a divide among the courts of appeals; the Seventh Circuit's precedent on burden allocation in FSIA cases is consistent with the views of the other circuits. Thus, the burden question, too, does not warrant review.

In short, the court below properly applied established precedent and rejected Turkey's argument that, under the FSIA, even "mowing [protesters] down by machine gun could be" covered by the discretionary function exception. D.C. Cir. Tr. 10. The petition should be denied.

STATEMENT

Foreign Sovereign Immunities Act

The FSIA, 28 U.S.C. §§ 1602–1611, presumptively provides foreign states immunity from the jurisdiction of courts in the United States. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). The FSIA, however, sets forth several exceptions to the presumption of immunity; and where an exception applies, United States courts may exercise jurisdiction over a foreign state. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

One exception to FSIA immunity is the "tortious acts exception." This exception applies in any case

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment[.]

28 U.S.C. § 1605(a)(5). That exception has its own exception: It does not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." *Id.* § 1605(a)(5)(A). This exception to the FSIA's provision allowing suit

for tortious acts is known as the "discretionary function exception."

Courts considering the FSIA's discretionary function exception look to this Court's case law concerning a provision of the Federal Tort Claims Act (FTCA) that, similar to section 1605(a)(5)(A), disallows tort suits against federal government employees based on the performance of discretionary functions or tasks. *See* 28 U.S.C. § 2680(a);[1] *see, e.g.*, *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921–22 (D.C. Cir. 1987). Under that case law, two conditions must be present for the FTCA's discretionary function exception to apply. First, there can be no "federal statute, regulation, or policy [that] specifically prescribes a course of action for an employee to follow." *Berkovitz*, 486 U.S. at 536; *see Gaubert*, 499 U.S. at 322. Second, because some discretionary acts "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish," *Gaubert*, 499 U.S. at 325 n.7, the employee's exercise of discretion must be "the kind that the discretionary function exception was designed to shield"—that is, "based on considerations of public policy." *Berkovitz*, 486 U.S. at 536–37; *see Gaubert*, 499 U.S. at 322–23. Only where both conditions apply is the exception satisfied and the immunity preserved.

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[1] Section 2680(a) provides that the FTCA does not apply to "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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."

Factual background

The petition for certiorari concerns two separate cases, consolidated for purposes of appeal, arising from attacks by Turkish security forces on protestors near the Turkish Ambassador's residence in Washington, DC.

At around noon on May 16, 2017, while Turkey's President Recep Tayyip Erdogan met with President Trump at the White House, a group of people gathered in Lafayette Park to protest the treatment by President Erdogan's regime of the Kurdish community and other issues. A few hours later, carrying signs, chanting, and using a bullhorn, Pet. App. 37, the protestors gathered on the Sheridan Circle sidewalk across the street from the Ambassador's residence, in an area designated by U.S. law enforcement for protesting. *Id*. at 64. Meanwhile, a far larger group of pro-Erdogan civilians and Turkish security forces had gathered on the opposite side of the street; they stood between the protesters and the Ambassador's residence. They yelled threats and racial slurs at the protestors, JA81, 83, 91,[2] and the protestors shouted back from across the street, Pet. App. 37–38. At one point, a physical altercation between the protestors and the pro-Erdogan group broke out in the street, and U.S. law enforcement separated the two sides in less than one minute. Although Respondents disagree with the petition's description of the altercation, including who instigated it, that disagreement is not pertinent to the

[2] "JA" refers to the Joint Appendix filed in the court of appeals.

sovereign immunity question, as the district court noted. *Id*. at 39.

After the brief altercation, both sides returned to their respective sidewalks, across the street from one another. *Id*. As the district court confirmed after looking at videos of the protest, aside from a brief step off the curb by two people, the protesters then remained on the Sheridan Circle sidewalk across from the Ambassador's residence, as directed by law enforcement. *Id*. at 39–40. Yelling between the two groups continued. United States and District of Columbia law-enforcement officers lined up between the two groups, separating them. *Id*. at 39.

Shortly after 4:00 pm, President Erdogan arrived by car. About three minutes later, while President Erdogan was sitting in the car at the entrance to the residence, the Turkish security forces and pro-Erdogan civilians "rushed forward and broke through the U.S. law enforcement line [that] had been separating the two groups" and attacked the protesters. *Id*. at 40. As the district court observed from the video evidence, "at the time the pro-Erdogan group attacked the protesters, all of the protesters were standing on the Sheridan Circle sidewalk." *Id*. "The video evidence shows that none of the protesters rushed forward to meet the attackers." *Id*. at 40–41. Rather, Turkish security forces "crossed a police line to attack the protesters." *Id*. at 65.

The Turkish forces punched and kicked protesters who had fallen to the ground and chased those who fled, "violently physically attack[ing] many of them." *Id*. at 41. They continued striking protesters who lost consciousness, as well as one protester who suffered seizures. And they, along with the Erdogan support-

ers, ripped up the protesters' signs. After several minutes, U.S. law enforcement was able to stop the attack. *Id.* The protesters were left bloodied and disoriented, with concussions, lost teeth, and other serious injuries. JA48, 88, 97, 98.

During the attack, President Erdogan got out of the car and walked slowly into the residence, stopping twice to watch. JA357. Further reflecting the lack of a security justification for the attack, "[i]t is uncontroverted that the Turkish security forces did not detain, question, search, or otherwise investigate any of the protesters before, during, or immediately after the attack." Pet. App. 41.[3]

All but one of Respondents here were injured in the attack that afternoon. The remaining Respondent, Lacy MacAuley, did not attend that protest. Later that day, however, walking to the Turkish Embassy with an anti-Erdogan sign, she came to a police perimeter guarded by at least four United States law enforcement officers. She stopped there, where she stood with her sign and began protesting. Ms. MacAuley—5'3" tall, 105 pounds, and the lone protester—was behind the police perimeter when President Erdogan's motorcade drove by on its way to the Embassy. "At approximately 6:17 p.m., it is uncontroverted that a group of Turkish security forces emerged from a van that was part of President

[3] *See also* JA349 (expert declaration of former U.S. secret service agent stating, "I cannot overstate the extent to which the TSD's [Turkish security detail's] decision to pursue protesters located in Sheridan Circle, across the street from the [Ambassador's residence] and away from the arrival point, contradicts standard security procedures for perimeter control and the premise that the TSD perceived a security threat from the protesters.").

Erdogan's motorcade and at least four of them surrounded Plaintiff MacAuley." *Id.* at 42. They forcibly covered her mouth, aggressively grabbed her wrist, and grabbed her sign, crumpled it, and threw it to the ground. U.S. law enforcement officers intervened to end the attack. *Id.*

Both executive and legislative branch officials condemned the actions of the Turkish security detail and called for the perpetrators to be held responsible. The State Department communicated to Turkey "in the strongest possible terms" that "[v]iolence is never an appropriate response to free speech." *State Department condemns violence by Erdogan security guards at D.C. protest*, Politico, May 17, 2017. The United States charged fifteen Turkish security officials with the "bias-related (hate-crimes)" of assault with a deadly weapon, assault with a dangerous weapon of a senior citizen, aggravated assault, and assault with significant bodily injury. JA382; *see* Pet. App. 19. The House of Representatives unanimously passed a resolution condemning the actions of the Turkish security detail, stating that the "demonstrators did not instigate violence" and "[a]t no point was President Erdogan in danger." H. Res. 354, 115th Cong. (June 6, 2017).

Procedural background

A. District court proceedings

In two separate lawsuits, Respondents sued Turkey in the U.S. District Court for the District of Columbia. One of the two lawsuits also named several individuals as defendants. Both lawsuits allege assault, battery, intentional infliction of emotional distress, and violation of D.C. Code 22-3704, which creates a civil cause of action for injuries that demonstrate the accused's prejudice based on the

victim's race or national origin, as well as other claims. Respondents include a seven-year-old girl who was with her father, a mother who was pushing her four-year-old in a stroller, local small-business owners, and others.

Turkey moved to dismiss both lawsuits on the grounds of foreign sovereign immunity, the political question doctrine, and international comity. In a memorandum opinion addressing both cases, and after reviewing "the ample video evidence submitted by the parties," Pet. App. 36, the district court denied the motions "without prejudice," *id.* at 34. Of particular relevance here, the district court held that it had jurisdiction under the tortious acts exception to the FSIA and that the discretionary function exception to the tortious acts exception did not apply "at this time on this record." *Id.* at 35. Specifically, "using the two-part discretionary function test developed in *Berkovitz*," the court concluded "that Defendant Turkey cannot rely on the discretionary function rule to maintain its immunity because Defendant Turkey's exercise of discretion relating to the violent physical attack on the protesters was not grounded in social, economic, or political policy and was not of a nature and quality that Congress intended to shield from liability." *Id.* at 48. The court also denied Turkey's motions to dismiss on political question and international comity grounds. *Id.* at 68, 74.

B. Court of appeals proceedings and the United States' brief

Turkey appealed to the D.C. Circuit, which, on the parties' joint motion, consolidated the two cases.

1. After oral argument, the court requested that the United States file a brief as amicus curiae to

express its view "on this case, and in particular on the source and scope of any discretion afforded to foreign security personnel with respect to taking physical actions against domestic civilians on public property (i.e., not on diplomatic grounds)." D.C. Cir. No. 20-7017, Order (Jan. 25, 2021). The United States subsequently filed a brief agreeing with Respondents that the district court's decision should be affirmed. *See* Amicus Brief of United States, D.C. Cir. No. 20-7017 (filed Mar. 9, 2021) (hereafter, U.S. Brief). The United States' brief explained:

> [I]f foreign security personnel attack civilians on U.S. territory when the use of force does not reasonably appear necessary to protect against bodily harm, they are acting outside any reasonable conception of the protective function and thus outside their legally protected discretion, and the discretionary function rule does not apply.

Id. at 1.

Noting the "fact-intensive" nature of the inquiry, the United States concluded that the conduct at issue in the case "cannot reasonably be regarded as an exercise of the agents' protective function" and, therefore, that the district court had properly held that Turkey is not entitled to sovereign immunity under the facts of this case. *Id*. at 2.

2. The D.C. Circuit, in a unanimous opinion by Judge Henderson, held that the district court had properly asserted jurisdiction over the two lawsuits and affirmed the denial of the motions to dismiss on all three grounds asserted by Turkey: foreign sovereign immunity, political question, and comity. Pet. App. 2.

As to whether the discretionary function exception of the FSIA shields Turkey from suit, the court of appeals began with the two conditions set forth in *Berkovitz*. First, the court addressed whether the challenged conduct "involves an element of judgment or choice." *Id*. at 9 (quoting *Berkovitz*, 486 U.S. at 536). "In essence," the court wrote, "*Berkovitz*'s first condition asks whether the challenged conduct is rightfully the product of independent judgment." *Id*. Thus, the court identified two issues to resolve: To begin with, because Turkish security forces do not have authority to perform law enforcement functions in the United States, "if we are to find that the Turkish security detail was exercising its discretion in taking its challenged actions, we must identify the source of that discretion." *Id*. at 10. Then, assuming that Turkey had discretion to act, the court considered whether violations of D.C. law, as alleged by the plaintiffs, "take Turkey's conduct outside the ambit of the discretionary function exception." *Id*.

To assist it in answering the initial question, the court looked to the views set forth in the brief of United States on the "source and scope of any discretion afforded to foreign security personnel with respect to taking physical actions against domestic civilians on public property." *Id*. at 12. The United States' brief took the view that, for the purpose of protecting state officials, such authority derives from international practice and the inherent authority of nations. Agreeing with the United States on this point, the court concluded that a foreign state has a right "to protect diplomats and other high officials representing the sending state abroad." *Id*. at 18.

Turning to whether Turkey's violations of D.C. criminal law took it outside the ambit of the exception,

the court agreed with Turkey that Turkey's immunity was not removed on the ground that the criminal assaults violated local law. "[G]enerally applicable laws prohibiting criminal assault did not give the Turkish security detail a sufficiently 'specific directive' to strip Turkey of its immunity," the court stated. *Id.* at 20 (quoting *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995)).

Next, the court considered the second *Berkovitz* condition: whether the challenged "actions and decisions [were] based on considerations of public policy." *Id.* at 23 (quoting *Berkovitz*, 486 U.S. at 537). The court noted that, under this Court's precedent, "[o]nly discretionary actions 'grounded in social, economic, and political policy' fall within the exception." *Id.* at 24 (quoting *Gaubert*, 499 U.S. at 323). As the court explained, "*Berkovitz*'s second condition is met 'only where the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency.'" *Id.* (citation omitted).

Applying its own long-established case law and that of this Court, the court held that *Berkovitz*'s second condition was not satisfied. The court explained that, although the security detail's protective mission was discretionary "as a general matter," not "every action" a Turkish officer may take is an immunized exercise of that discretion. *Id.* "Discrete injury-causing actions can, in certain cases, be sufficiently separable from protected discretionary decisions to make the discretionary function exception inapplicable." *Id.* (internal quotation marks omitted). Turkey argued that "all decisions about how to protect President Erdogan are susceptible to policy analysis, given that those decisions required its employees to

'weigh varying security risk levels against the cost of specific countermeasures.'" *Id.* at 25 (quoting *Macharia v. United States*, 334 F.3d 61, 66 (D.C. Cir. 2003)). The court concluded, however, that "[a]lthough certain Turkish security officers may be responsible for 'weigh[ing] varying security risk levels,' those are not the decisions giving rise to the plaintiffs' suit." *Id.* at 25–26.[4]

Quoting the First Circuit, the D.C. Circuit observed that "[v]iewed from 50,000 feet, virtually any action can be characterized as discretionary. But the discretionary function exception requires that an inquiring court focus on the specific conduct at issue." *Id.* at 26–27 (quoting *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009)). Here, viewing the facts "up close," the court had no trouble determining that "the decisions by the Turkish security detail giving rise to the plaintiffs' suit were not the kind of security-related decisions that are fraught with economic, political, or social judgments." *Id.* at 27 (quoting *Cope*, 45 F.3d at 450; internal quotation marks omitted). The court thus concluded: "The nature of the challenged conduct was not plausibly related to protecting President Erdogan, which is the only authority Turkey had to use force against United States citizens and residents." *Id.* It further explained:

> In the same way that speeding down a residential street may occasionally be justifiable but is not an execution of policy, the Turkish security detail's actions may have been justified in some circumstances but cannot be

[4] Contrary to Turkey's characterization of the opinion below, Pet. 3, the court nowhere suggested that an action is not covered by the exception if the trial court finds the action "repugnant."

> said in this case to have been plausibly grounded in considerations of security-related policy and thus do not fall within the discretionary function exception.

Id.

Turkey's petition for rehearing en banc was denied, with no judge calling for a vote. *Id.* at 80.

REASONS FOR DENYING THE WRIT

The petition's first two questions ask this Court to address whether the FSIA's discretionary function exception always applies to claims based on a foreign security detail's use of force in the United States when they are acting within the scope of their employment, and whether the exception applies where a "discretionary use of physical force" was not "plausibly" based on considerations of public policy. Pet. i. As the United States and the D.C. Circuit agree, this Court's precedent directly answers both questions: The discretionary function exception does not always apply to claims based on a foreign security detail's use of force in the United States; it applies where the use of force involved an element of judgment or choice and the exercise of that judgment or choice was based on policy considerations.

The petition chides the D.C. Circuit for undertaking a "fact-specific analysis" of whether particular actions were "plausibly related to protecting" President Erdogan. *Id.* at 11–12. No decision of this Court, however, or any federal court of appeals, holds (or even suggests) that the discretionary function exception should apply where the claim that the challenged action was in furtherance of public policy was *implausible*. Indeed, Turkey's request that the Court

adopt such a rule—far from relying on this Court's precedent—would eviscerate *Berkovitz*'s second step.

Almost as an afterthought, the petition adds a third question, asking who bears the burden of proof as to the discretionary function exception. Notably, Turkey does not argue that the answer to that question would make any difference to the outcome here. And as the D.C. Circuit's opinion reflects, it would not. In addition, the claimed circuit split is illusory.

For these reasons, the petition should be denied.

I. The decision below is consistent with the decisions of this Court and other courts of appeals.

As the petition agrees, the lower courts are unanimous in applying the FTCA discretionary-function test set forth in *Berkovitz* and applied in *Gaubert* when considering the FSIA's discretionary function exception. Turkey's complaint is not with that test, but with the D.C. Circuit's application of it. A disagreement about the application of settled law to the facts of a particular case, however, "rarely" warrants this Court's review. S. Ct. R. 10.

Seeking to convert its disagreement with the D.C. Circuit's fact-based decision into a cert-worthy issue, the petition asserts that the opinion below fails to follow this Court's precedent and conflicts with the decisions of other Circuits applying that precedent. Even putting aside that this assertion is incorrect, the petition's concession that the D.C. Circuit otherwise has consistently "followed the consensus view," Pet. 21, highlights that the disagreement here is only over the application of settled law to the facts of this case. Thus, unsurprisingly, the petition fails to identify any

way in which the decision below is inconsistent with this Court's precedent or decisions of other courts of appeals.

A. The court below applied the test set forth in this Court's cases.

Describing the *Berkovitz* test for evaluating whether the discretionary function exception applies, the petition correctly identifies two parts: the official's or employee's conduct must be discretionary in that it involves an element of judgment or choice, and the conduct must be fundamentally governmental and based on considerations of policy. Pet. 17 (citing *Berkovitz*, 486 U.S. at 536–37). Then, declaring that the decision below conflicts with the decisions of other circuits (but citing no cases), and quoting a line from *Gaubert* out of context, the petition declares that, where the first part of the test is met, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." Pet. 17–18 (quoting *Gaubert*, 499 U.S. at 324).

To the extent that Turkey suggests that *Gaubert* states an *irrebuttable* presumption that discretionary actions of government actors are necessarily "grounded in policy" and thus *always* satisfy the second *Berkovitz* step, its suggestion would effectively eliminate that step. Furthermore, *Gaubert*'s presumption is unquestionably rebuttable, as Turkey elsewhere concedes. *See* Pet. 22. Thus, after the sentence quoted in the petition, *Gaubert* continues: "For a complaint to survive a motion to dismiss, it must allege facts [that] would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." 499 U.S. at 324–25. The "focus" of that

inquiry is "on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id*. at 325. And *Gaubert* is clear that "[t]here are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception." *Id*. at 325 n.7.

Thus, to the extent that the petition's first question suggests that the discretionary function exception immunizes from suit *any* violent action of foreign security forces in the United States that falls within their scope of employment, *Gaubert* and *Berkovitz* reject that extraordinary suggestion. Those decisions do not achieve the goal of "prevent[ing] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy," *id*. at 323, by deeming *all* discretionary actions to be in furtherance of policy. They achieve that goal by applying the exception "*only*" to "actions and decisions based on considerations of public policy." *Id*. (emphasis added).

The court of appeals properly followed this Court's cases—the same cases on which Turkey relies—and described the applicable test the same way that the petition does. *Compare* Pet. 17, *with* Pet. App. 8. Nonetheless, the petition claims that the decision below "rejects" the second part of the *Berkovitz* test, under which the question is whether the type of decision at issue is "susceptible to" policy analysis. Pet. 18 (quoting *Gaubert*, 499 U.S. at 325). In fact, the court expressly considered Turkey's argument that "all decisions about how to protect President Erdogan are susceptible to policy analysis." Pet. App. 25. The court did not disagree with Turkey's formulation of the inquiry; it disagreed that the attacks even

"plausibly" involved decisions about how to protect President Erdogan.

Turkey is therefore wrong to argue that, under *Gaubert*, "[w]hether the specific actions alleged in any particular case were actually motivated by policy considerations is not relevant." Pet. 18. As Turkey elsewhere understands, *id.* at 17, and as it did not contest below, the second step under *Gaubert* and *Berkovitz* expressly requires courts to consider whether the challenged actions were based on considerations of policy. "This inquiry is highly fact-intensive." U.S. Brief 2.

Finally, although in this Court Turkey suggests that the Court should grant review to devise a different standard for the discretionary function exception in the FSIA context, referring to *Gaubert* and *Berkovitz* as simply "good guides," Pet. 19, Turkey has waived any argument that a different test might apply. Below, Turkey expressly asked the court of appeals to "adhere to the *Berkovitz* Test [and] find that both of its prongs are satisfied." Appellant Brief 17. It nowhere argued that existing precedent developed under the FTCA was inapplicable or insufficient to resolve the question of immunity under the FSIA.

B. Turkey's specific assertions of error are inconsistent with *Berkovitz* step two.

Rejecting Turkey's claim to immunity, the court below held that Turkey's argument that the actions of the security detail were "grounded in considerations of security-related policy" was not "plausibl[e]." Pet. App. 27. Here, Turkey argues that requiring that a defendant's argument under *Berkovitz* second step be "plausible" is an "abuse of discretion." Pet. 21. A

contrary rule, however, would effectively eliminate step two. And while Turkey asserts that the opinion below, by declining to credit an implausible argument, conflicts with the opinions of other circuits and the D.C. Circuit's own precedent, it cites no case illustrating such a conflict.

Specifically, the petition argues that the opinion below fails to follow *Gaubert* and *United States v. Varig Airlines*, 467 U.S. 797 (1984), in four ways. Each of its four points combines a fact-bound disagreement about the application of step two with implicit challenges to that step.

1. Turkey argues that the court's holding that Respondents overcame a presumption that the challenged actions were grounded in considerations of policy "conflicts" with *Gaubert*. Pet. 22. This disagreement about the application of settled law to the facts of the case is not a legal issue, much less a legal issue warranting review. *See* S. Ct. R. 10. Moreover, the argument overlooks the extensive record and arguments on which the court relied—including the brief of the United States. Turkey also suggests that it should have prevailed on step two because the court held, at step one, that the Turkish forces' actions were discretionary. Pet. 22. That suggestion collapses *Berkovitz*'s two-step test into a single step—unsupported by any case law.[5]

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[5] The petition states that Respondents' complaints noted Turkey's "policies that disfavor ethnic and political dissidents." Pet. 22. Turkey, however, does not claim that its attacks on Respondents were based on any such policies—and for good reason. Not even the petition claims that policies disfavoring ethnic minorities would satisfy "the basic inquiry concerning the application of the discretionary function exception"—that is,

(*Footnote continued*)

2. Turkey argues that the opinion below runs afoul of *Gaubert* because the court considered the security detail's "subjective intent." As support for that assertion, Turkey states that the D.C. Circuit "labeled [the Turkish agents'] acts 'malicious conduct [that] cannot be recast in the language of cost-benefit analysis.'" Pet. 23 (quoting Pet. App. 24). The sentence that Turkey quotes, however, was not describing Turkey's actions at all. Rather, the sentence appears in the middle of a paragraph setting forth general considerations under *Berkovitz* step two.

Further arguing that the court impermissibly "relied on its subjective interpretation," Turkey points without context to language in the opinion stating that, "viewed up close," the actions at issue "were not the kind of security-related decisions that are fraught with economic, political, or social judgments." Pet. 23 (quoting Pet. App. 27; internal quotation marks omitted). According to Turkey, the phrase "viewed up close" shows that the court looked to the "facts and circumstances" presented, rather than looking at the case from a "theoretical" vantage point. *Id*. But again, Turkey's insistence on approaching *Berkovitz*'s second step from the highest level of generality would make step two a mere pro forma inquiry that would, in every case, be satisfied. This Court's precedent does not, however, ask lower courts reflexively to accept a defendant's assertion, no matter how implausible, that the challenged action was based on considerations of policy. And again, the D.C. Circuit's

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whether the challenged acts are "of the nature and quality that Congress intended to shield from tort liability." *Varig*, 467 U.S. at 813.

approach was precisely that required by this Court's precedents and followed by other courts of appeals.

In the portion of the opinion on which Turkey focuses, the court described the Turkish security detail's conduct as "grounded in public policy only in the limited way that a police officer effectuates public policy when he gives chase to a fleeing vehicle," noting that "[i]t is 'universally acknowledged that the discretionary function exception never protects against liability for the negligence of a vehicle driver,'" Pet. App. 26 (quoting *Gaubert*, 499 U.S. at 336 (Scalia, J., concurring)), "even though a negligent government driver may have been acting in the service of some greater policy," *id*. As the negligent driver example illustrates, the court continued, "[v]iewed from 50,000 feet, virtually any action can be characterized as discretionary. But the discretionary function exception requires that an inquiring court focus on the specific conduct at issue." *Id*. at 26–27 (quoting *Limone*, 579 F.3d at 101). Focusing on that "specific conduct," and in contrast to the "view[] from 50,000 feet," the court stated that "viewed up close … *[t]he nature of the challenged conduct* was not plausibly related to protecting President Erdogan, which is the only authority Turkey had to use force against United States citizens and residents." *Id*. at 27 (emphasis added). Turkey agrees that "the nature of the challenged decision" is the proper point of focus. *See, e.g.*, Pet. 23, 24, 26. The D.C. Circuit's opinion expressly focuses on exactly that point.

3. Turkey asserts that the decision below runs afoul of *Varig* by "second-guess[ing] a foreign sovereign's discretionary decision." Pet. 23. But Turkey overlooks the rest of *Varig*'s sentence: "Congress wished to prevent judicial 'second-guessing'

of legislative and administrative decisions *grounded in social, economic, and political policy*[.]" *Varig*, 467 U.S. at 813 (emphasis added). Accordingly, this Court's cases instruct that determining whether a decision was discretionary is only the first step in the analysis. Here, Turkey prevailed on that step. *See* Pet. App. 24 (stating that "the Turkish security detail's protective mission was discretionary as a general matter"). Its quarrel is with the second step: whether the discretionary decision was "based on considerations of public policy." *Id*. at 23 (quoting *Berkovitz*, 486 U.S. at 537); *see Varig*, 467 U.S. at 813 (stating "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts … are of the nature and quality that Congress intended to shield from tort liability").

At bottom, Turkey's complaint is that the court did not accept without question the assertion that the security detail attacked Respondents for the purpose of protecting its President—although the assertion was implausible. By that measure, any foreign security detail could take any sort of extreme or violent action anywhere in the United States and then avoid accountability by making an implausible assertion that the violence was an exercise of discretion. Turkey's claim that the attack on respondent MacAuley was for the purpose of protecting President Erdogan illustrates the point: She was a lone protestor, standing on a public street, at a police barricade. "*After President Erdogan's motorcade had already passed*, multiple Turkish security forces ran towards [her] and surrounded her" and "physically attacked" her. Pet. App. 66 (emphasis added). Indeed, at oral argument, Turkey's counsel stated that, under Turkey's view of the FSIA, Turkey

would be immune even had the security detail murdered her or other protestors. *See* D.C. Cir. Tr. 9; *see id.* at 10 ("I think that's right, Judge Wilkins. I think that mowing [the protesters] down by machine gun could be part of presidential security[.]"). Nothing in the FSIA or the case law of any federal court gives Turkey a right to avoid accountability—for attacking or even murdering a protestor standing on a public street after its President has passed—by invoking "presidential security," where "[t]he nature of the challenged conduct was not plausibly related to protecting" its president. Pet. App. 27.[6]

4. Turkey complains that the court of appeals erred by failing to apply the discretionary function exception to actions taken at the "operational" level. Pet. 24. In this regard, the petition both misunderstands the legal standard and the decision below. The court of appeals did not hold that operational decisions fail to satisfy the exception. It held that the challenged decisions in this case were not plausibly based on policy considerations. In offering examples of security-related decisions that would reflect policy considera-

[6] In its brief below, the United States agreed with Turkey on several points, including that it had "the authority to protect their diplomats and senior officials in the United States … includ[ing] the discretion to use force against civilians on U.S. territory when foreign security personnel reasonably believe that the use of force is necessary to protect diplomats and senior officials from threats of bodily harm." U.S. Brief 1. The United States explained, however, that "if foreign security personnel attack civilians on U.S. territory when the use of force does not reasonably appear necessary to protect against bodily harm, they are acting outside any reasonable conception of the protective function and thus outside their legally protected discretion, and the discretionary function rule does not apply." *Id.* The court of appeals' decision is wholly in line with the United States' view.

tions, the court did not suggest that the attacks on protestors did not fall within the exception because they were "operational," but because they were not "plausibly related" to policy considerations concerning protection of President Erdogan. Pet. App. 27.

C. The decision below is consistent with the decisions on which the petition relies.

The court of appeals in this case applied the same test applied by courts in other cases considering the FSIA's discretionary function exception. Nonetheless, citing one appellate court decision and one district court decision, Turkey contends that the opinion below represents a "radical" departure from the Court's precedent. Pet. 25. Neither decision aids Turkey here.

First, in *Broidy Capital Managment, LLC v. State of Qatar*, 982 F.3d 582 (9th Cir. 2020), as in this case, the court considered the specific tort alleged (the tort of intrusion upon seclusion as well as several related statutory claims, based on alleged unauthorized access into the plaintiffs' servers and subsequent distribution of stolen materials) and the policy put forward by the foreign defendant. Stating that "there can be little doubt that Qatar's alleged actions involved considerations of public policy," the court concluded that Qatar's alleged conduct involved "the type of discretionary judgments that the exclusion was designed to protect." *Id*. at 593 (citation omitted). Second, the unpublished district court opinion in *Ghazarian v. Republic of Turkey*, Civ. No. 19-cv-04664-PSG, 2021 WL 5934471 (C.D. Cal. Nov. 16, 2021), applied the same test and held, on the facts of the case, that the policy as articulated by the plaintiffs

was "precisely the kind of decision the discretionary function exclusion was designed to protect." *Id*. at *5.

Thus, in each of the two cases on which Turkey relies, the court cited and applied *Berkovitz*. Then, based on the facts of the particular case, the courts found that the challenged actions involved considerations of public policy and held that the discretionary function exception applied. Neither case suggests that the exception would apply where the defendant's claim that the challenged action was based on policy considerations was implausible.

That the exception applies in some cases but not others is neither evidence of a conflict nor surprising. It is the expected outcome of applying the law to the different facts of different cases.

II. The burden issue does not warrant review.

The decision below does not mention burden of proof. In the district court, the court stated that Respondents bore the burden of overcoming the presumption of sovereign immunity by producing evidence that an FSIA exception applies, after which Turkey bore the "ultimate burden of persuasion" to show that the alleged exception to sovereign immunity does not apply. Pet. App. 43 (quoting *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013)). And the parties addressed burden in their appellate briefing. That the word appears only once in the oral argument transcript, *see* D.C. Cir. Tr. 45, and not at all in the court's opinion, reflects that neither the parties nor the court believed the point to be dispositive. Because the court of appeals' opinion does not address burden at all, this case would be a poor vehicle for the Court's consideration of that issue.

Moreover, burden allocation had no impact on the outcome below. Respondents prevailed at step two, based on the evidence presented, including "an abundance of video evidence," Pet. App. 36 (district court opinion), and the court's consideration of the amicus brief of the United States. The D.C. Circuit's conclusion that it was not even "plausible" that Turkey satisfied the exception proves that burden of persuasion had no impact.[7]

In any event, there is no split. Every Circuit to address the point applies the test articulated by the district court below, under which, after the defendant makes a prima facie case that it is a foreign sovereign, the plaintiff has the burden of coming forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted. If the plaintiff satisfies that burden of production, the foreign state bears the "ultimate burden of persuasion." Pet. App. 43; *see, e.g.*, *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013); *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 52 (2d Cir. 2021); *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 & n.13 (3d Cir. 1993); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 397 (4th Cir. 2004); *Frank v. Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 367 (5th Cir. 2016); *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009); *Enahoro v. Abubakar*, 408 F.3d

[7] *See also* Pet. App. 27 ("Our analysis might have been affected if Turkey had consulted with the United States regarding the specific decisions giving rise to the plaintiffs' suit, but there is no such allegation here and, as noted earlier, the United States has indicted fifteen Turkish security officials as a result of their actions. Turkey's claim to sovereign immunity thereby fails." (citation omitted)).

877, 882 (7th Cir. 2005); *Broidy*, 982 F.3d at 591 (9th Cir.); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 991–92 (10th Cir. 2007); *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009). The Eighth Circuit has stated the test similarly, although without specifying that the foreign state bears the ultimate burden of persuasion. That court's three decisions on FSIA immunity do not indicate either way the court's views on that point—reflecting that, in each of the cases, as here, "which party bore the burden [was] irrelevant" because "the material jurisdictional facts [were] undisputed" and an exception "plainly" did or did not apply. *Hart v. United States*, 630 F.3d 1085, 1089 (8th Cir. 2011) (FTCA case).[8]

In support of its argument that the lower courts are divided, the petition cites only one case: *Nwoke v. Consulate of Nigeria*, 729 F. App'x 478 (7th Cir. 2018). The petition relies on a sentence stating that "Nwoke has not met her burden to show that immunity does not apply here." *Id.* at 479, *quoted in* Pet. 28. But the petition fails to note that, as support for that sentence, the opinion cites *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983)—a published

[8] *See Community Fin. Group v. Republic of Kenya*, 663 F.3d 977, 982 (8th Cir. 2011) (holding that the FSIA tort exception did not apply because the alleged tort did not occur in the U.S., as required under the FSIA's plain language); *BP Chemicals Ltd. v. Jiangsu SOPO Corp.*, 420 F.3d 810, 818 (8th Cir. 2005) (upholding district court decision that the FSIA commercial activity exception applied—and thus that the defendant was not immune from suit—based on the evidence); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1383–84 (1993) (holding that the FSIA commercial activity exception did not apply—and thus that the defendant was immune from suit in the U.S.—based on evidence that the defendant had neither engaged in commercial activity in the U.S. nor caused the plaintiff harm in the U.S.).

opinion that describes the same burden-shifting framework applied by the other courts of appeals. *See id*. at 253, 256. Thus, the unpublished opinion in *Nwoke* neither suggests a conflict among the lower courts nor calls into question the Seventh Circuit's published precedent. *See Enahoro*, 408 F.3d at 882 ("The party claiming FSIA immunity bears the initial burden of proof of establishing a prima facie case that it satisfies the FSIA's definition of a foreign state. Then the burden of going forward shifts to the plaintiff to produce evidence that the entity is not entitled to immunity. The ultimate burden of proving immunity rests with the foreign state." (citing cases)).

The FSIA's legislative history states the same burden-shifting approach applied by the courts of appeals:

> [S]ince sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. … Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 94-1487, at 17 (1976).

III. The decision below risks no grave consequences for U.S. foreign relations.

Expressing concern for "United States interests," the petition argues that the decision below "presents immediate threats to foreign relations and the United States' national security." Pet. 29, 31. The brief filed

by the United States in the D.C. Circuit, however, shows that the United States does not share this concern.

Although the United States agreed with Turkey that a foreign government has authority to protect its diplomats and officials in United States territory, it disagreed that Turkey was entitled to sovereign immunity here. Rather, the United States explained that when "foreign security personnel attack civilians on U.S. territory when the use of force does not reasonably appear necessary to protect against bodily harm, they are acting outside any reasonable conception of the protective function and thus outside their legally protected discretion, and the discretionary function rule does not apply." U.S. Brief 1.

The United States explained: "No source of law affords foreign security personnel discretion to use force against civilians on U.S. territory except in the exercise of their protective function." *Id.* at 6. It continued: "U.S. security personnel charged with protecting U.S. diplomatic and consular personnel and senior officials in foreign territory (including agents of both the State Department and the Secret Service) are required as a matter of policy to respect that constraint." *Id.* at 7. Although the United States disagreed with the district court "to the extent it suggested that the discretionary function rule categorically cannot immunize conduct involving the use of 'violent physical' force or 'sudden, violent, physical acts,'" *id.* at 9, it stated that "[t]he discretionary function rule cannot apply, however, when agents have no lawful discretion to exercise. That is the case when foreign security personnel use force against civilians on U.S. territory in a manner that cannot be

understood to fall within any reasonable conception of their protective function." *Id*.

Applying those principles to the facts of this case, the United States concluded: "The district court's description of the facts establishes that Turkish security personnel used force in a manner outside any reasonable conception of their protective function and therefore not protected by the FSIA's discretionary function rule." *Id*. at 10. First, the United States found "no basis in the district court's account of the facts to regard the 'attack' by Turkish agents as protective in nature." *Id*. Second, it stated that "the actions the Turkish agents took after the initial attack leave little doubt that they were using force for a purpose outside their proper protective function." *Id*. at 11 (reviewing the facts). The United States also noted that the conclusion that Turkish security personnel are not covered by the discretionary function for the attacks at issue in this case is "very narrow [and] fact-specific." *Id*. (quoting Pet. App. 66). That observation, too, shows that Turkey's concern about United States foreign relations is unwarranted and does not support this Court's review.

Finally, it appears that, "[e]xcept for the United States, no country that has enacted a tort exception to immunity provides a discretionary function exception to that exception." Sienho Yee, *The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do As the Romans Wish?*, 93 Colum. L. Rev. 744, 778 (1993); *see, e.g.*, European Convention on State Immunity, art. 11, May 16, 1972, E.T.S. 74; State Immunity Act of 1978, ch. 33, § 5 (UK); State Immunity Act, R.S.C. 1985, ch. S-18, § 6 (Canada); Foreign States Immunities Act of 1985, § 13 (Austl.);

see also United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 12, *opened for signature* Dec. 2, 2004, A/RES/59/38. Thus, nations acting in other territories generally have no expectation of the kind of broad immunity that Turkey claims. For this reason as well, protection of the United States' interests does not require acceptance of Turkey's submission that its security forces are free to engage in any acts of violence they choose on American soil as long as their actions are within the scope of their employment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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