No. 06-1282

In The
Supreme Court of the United States

EDDIE TYRONE CRANFORD,
HOWARD MELECH, and DIANE G. MELECH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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The paucity of the response by the United States proves the merit of the Petition. To the argument that circuits other than the Eleventh have developed workable, meaningful tests for applying the second prong of the test set forth in *United States v. Gaubert*, 499 U.S. 315 (1991), the United States can say only that each case involves "a fact-specific determination," Br. p. 14, so there can be no conflict. It is no answer to say summarily that cases do not conflict because their facts are different. The question is what law the courts apply to the facts. As fully set forth in the Petition, the Courts of Appeals for the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and District of Columbia Circuits have articulated standards – such as whether "technical safety assessments,"[1] "objective criteria,"[2] or "professional, scientific, or engineering standards,"[3]

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[1] *Shansky v. United States*, 164 F.3d 688, 693 (1st Cir. 1999) (discussing the "line of cases involving . . . technical safety assessments"); *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991), *cert. den.*, 505 U.S. 1204 (1992) (no policy "required, or even encouraged, Dr. Baer to ignore unsafe . . . conditions and thereby unnecessarily place . . . lives . . . at risk"); *Cestonaro v. United States*, 211 F.3d 749, 759 (3d Cir. 2000) ("We are unable to find a rational nexus between the National Park Services' lighting or warning decisions (or non-decisions) and social, economic and political concerns"); *Myers v. United States*, 17 F.3d 890, 897 (6th Cir. 1994) (mine safety "assessments . . . informed by professional judgment and knowledge").

[2] *Hurd v. United States*, 134 F.Supp.2d 745, 769 (D.S.C. 2001) ("objective criteria"), *aff'd*, 34 Fed.Appx.77 (4th Cir. 2002); *Myers*, 17 F.3d 890 at 897. It is no answer to say that the federal actor has the final word on the result of applying "objective criteria," because the classic jury question is what a "reasonable man" would have done. "[T]he jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment in negligence cases." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, n. 12 (1975).

[3] *Berkovitz v. United States*, 486 U.S. 531, 545 (1998) ("objective scientific standards"); *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) ("matters of scientific and professional judgment – particularly

(Continued on following page)

Petition, *passim*, are involved – for determining whether "actions and decisions [are] based on considerations of public policy." *Gaubert*, 499 U.S. at 323. In contrast, and in conflict, the Eleventh Circuit, like the United States in its Brief, simply concludes, *ipse dixit* and without meaningful analysis, that all decisions and choices by federal actors are grounded in public policy.

The United States wrongly accuses the Plaintiffs of seeking "a general limitation upon the discretionary function exception for matters of safety," Br. pp. 11-12, blatantly ignoring this sentence introducing Plaintiffs' survey of other jurisdictions:

> Other circuits, while carefully refraining from adopting a blanket "safety" exclusion from the discretionary function exception, have developed tests to determine whether safety-related decisions truly involve policy-making or -executing discretion, or only involve the application of "objective criteria," "technical safety assessments," or "scientific, professional, or engineering standards."

Petition p. 16. If a federal employee has to balance "incommensurable values such as safety and aesthetics," *Shansky*, 164 F.3d at 693, that is a policy decision. If a federal employee has to weigh competing demands to make "decisions concerning *whether and when*" to place or maintain a safety device, *Harrell v. United States*, 443 F.3d 1231, 1236 (10th Cir. 2006) (emphasis added), cited at U.S. Br. p. 9, that may well be a policy-based decision, because not all dangers can be marked, and all the ones that need marking cannot be marked simultaneously.

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judgments concerning safety"); *United States v. Ayala*, 980 F.2d 1342, 1349-50 (10th Cir. 1992) ("The choice was governed ... by 'objective principles of electrical engineering'"); *Cope v. Scott*, 45 F.3d 445, 452 (D.C. Cir. 1995) ("The 'engineering judgment' the government relies on is no more a matter of policy than were the 'objective scientific principles' that the *Berkovitz* Court distinguished from exempt exercises of policy judgment.").

However, if a federal employee is simply deciding whether one choice or another among available options best promotes safety, that cannot be a "discretionary function" without writing the FTCA, the SAA, and the PVA[4] out of existence, because such a decision involves little, if anything, more than due care, and the absence of due care is the very thing for which Congress has made the United States liable. To paraphrase the *Cope* court, the Coast Guard "has understandably been unable to articulate how the placement of additional or different signs on [or near the Fort Morgan wreck] implicates the type of economic, social, or political concerns that the discretionary function exception protects from suit." 45 F.3d at 452. Instead, "the focus of the inquiry is . . . on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

The United States cites only two cases as supposedly holding that the *manner* of marking a wrecked vessel for safety is a policy-based decision, and it misstates those cases:

> The Coast Guard's decision to mark a vessel in a particular manner takes account of "the degree of danger an object poses, the vessel traffic type and density, the location of the object in relation to the navigable channel, the history of vessel accidents, and the feasibility and economics, including costs, of erecting and maintaining physical markers in light of the available resources." *Theriot v. United States*, 245 F.3d 388, 399-400 (5th Cir. 1998). It is plainly "grounded in public policy considerations." *Id.* at 400; see *Harrell v. United States*, 443 F.3d 1231, 1236 (10th Cir. 2006) (holding that "the Coast Guard's decision concerning whether and when to service [a] buoy * * * were policy-based").

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[4] Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680; Suits in Admiralty Act ("SAA"), 46 U.S.C. § 30901 *et seq.*; Public Vessels Act ("PVA"), 46 U.S.C. § 31101

Br. pp. 9-10. Like *Harrell*, quoted above, *Theriot* concerns only the "whether and when," *not* the "manner" of warning against dangers: "In determining *when and whether* to mark a public work such as the sill in question, the United States considers, among other things: the degree of danger an object poses, [and the rest of the list quoted by the United States]." 245 F.3d at 399 (emphasis added). The only other case that the United States cites in this portion of its brief is *Sloan v. United States Dept. of Housing and Urban Dev.*, 236 F.3d 756 (D.C. Cir. 2001), Br. p. 9, but *Sloan* involved prosecutorial discretion, not a technical safety assessment: "The decision to initiate a prosecution has long been regarded as a classic discretionary function." 236 F.3d at 760. Thus, the United States has not cited a single case holding that the *manner* of providing for safety is a discretionary function.

The United States asserts that

> The record makes *clear* that Coast Guard officers weighed policy considerations in determining to modify the wreck marker in 2003, and then deciding what form that modification should take. . . . Such judgments, based upon balancing concerns for the safety of the local passenger ferry with the needs of smaller vessels traversing the area, *clearly* are policy-based.

Br. pp. 10-11 (emphasis added). Aside from resting their weight on the word "clear," which signals *ipse dixit* and a lack of empirical or logical support, these assertions suffer from at least three problems: First, the United States' own articulation of the alleged policies at issue demonstrates that the Coast Guard balanced only safety considerations, not "incommensurable values." Second, they favor the summary-judgment movant's evidence over the evidence of the non-movant, accepting the Coast Guard's unsubstantiated assertion, *see* Br. p. 5, that safety for the Dauphin Island Ferry (which makes the same passage several times a day, and whose pilots therefore know the waters) is somehow different from safety for recreational boaters.

Third, after accepting this counterintuitive and contradicted evidence, the United States then leaps to the unsupported conclusion that the choice of wreck marker is "clearly . . . policy-based," rather than a "technical safety assessment" based on "objective criteria." On the contrary, the evidence for the Plaintiffs is that the Coast Guard simply negligently placed the marker too far away from the wreck, thereby preventing mariners from being able to recognize and avoid the hazard; that the Coast Guard negligently placed a confusing red marker, as opposed to a more recognizable "Danger Wreck" marker closer to the wreck; that the Coast Guard's decision to use the red marker negligently enhanced the danger by making a bad situation worse, in that the red marker, unlike a "Danger Wreck" marker, actually draws boaters closer to the wreck because it appears to be a channel marker, which is what even the Alabama Marine Police thought it was; and that the Coast Guard negligently failed to place more than one marker at the wreck site. *See* Petition pp. 2-7 and Exhibits cited, especially Doc. 30, Exhibit 17. The Coast Guard's bare assertion that the ferry would be better served by the red triangle (*see*, *e.g.*, Doc. 30, Ex. 13) is entirely unsupported, and it makes no attempt to support any assertion that commercial vessels other than the Dauphin Island Ferry would be better served by a red triangle than by a "Danger Wreck" marker.

The supposed conflicting policies are, instead, merely Officer Marinelli's rationalizations for his bureaucratic stubbornness and refusal to pay attention to his field officers, for his decision "to cover [his] butt" by unnecessarily and irrationally insisting upon a lateral aid to navigation, "whether or not it meets our approval." Doc. 30, Exhibit 1, p. 3. Marinelli's decision was so bad that both the Coast Guard and the Alabama Marine Police, investigating this incident, referred to the wreck as an "unmarked obstruction." Doc. 30, Exhibit 7, and Exhibit 15, pp. 8-9. The policy decision to mark the Fort Morgan wreck was made long ago; Exhibit 3 to Doc. 30 shows Coast Guard marking of the wreck at least since 1992. The

United States has not yet articulated how the 2003 decision to allegedly improve that marker was "susceptible to policy analysis," *Gaubert*, 499 U.S. at 325. It is hard to see what policy was being served by the "upgraded" marker, especially where the bureaucrat's choice of marker led field officers of the *very same* federal agency to conclude that the supposedly better marked wreck was in fact "unmarked."

Nothing else in the brief of the United States does anything more than the above-refuted excerpts to help its position. Of the 33 cases cited in the United States' brief, 16 are cited only for the proposition that a discretionary function exception applies to the SAA and to the PVA. Br. p. 2 and n. 2. The United States then embarks on a bland recapitulation of this Court's holdings in *Gaubert* and earlier cases, Br. pp. 3-4, and a short, omissively inaccurate statement of the facts, Br. pp. 4-5.[5] The United States then summarizes the opinion below, Br. pp. 5-6. As can be seen on page 6, the conclusion of the Eleventh Circuit that

[5] The United States incorrectly states the facts favorably to itself as summary-judgment movant. With one exception, Plaintiffs will not contrast that statement with the non-movant's evidence and the Plaintiffs' statement, Petition pp. 3-7. That exception is the assertion that "The red triangle indicated that the mariner should leave the mark to his right (starboard) upon returning from the Gulf of Mexico, following the 'red right returning' rule." Br. p. 5. The marker was not near a channel, but the red triangle implied that it was. Even the Coast Guard, with the leisure of studying references, could scarcely decide whether the conventional direction of buoyage (i.e. "returning") off the north shore of Fort Morgan Peninsula was west-to-east or east-to-west. Doc. 30, Ex. 12, pp. 51-52. It was therefore readily foreseeable that a mariner or a recreational boater would conclude that the marker indicated a channel in which "returning" was westward, would thus keep this "channel marker" to starboard while traveling west (or to port while traveling east, as the Plaintiffs were), and would therefore pass it to the south (as the Plaintiffs did), where the wreck lay. *Id.*, pp. 68-69. The absence of a channel to be marked, the implication from a red triangle that a channel was being marked, and the ambiguity in the direction of buoyage are part of what made the red triangle an objectively bad choice, and there is no color of "public policy" involved in that decision. *See* Petition, pp. 3-7, and exhibits cited therein.

the manner of marking the wreck "involve[d] social, political, and economic policy considerations" is entirely conclusory, a mere "because I said so," a classic *ipse dixit*.

The argument of the United States begins on page 7 of its brief. Part 1.a., Br. pp. 7-8, seems to assert that no Coast Guard regulation specifically required a different marker and thus that the facts pass the first prong of the *Gaubert* test, a conclusion which is uncontested. Part 1.b., Br. pp. 8-11, then seems designed to show that the second prong of *Gaubert* is met. The cases the United States cites (*Sloan, Theriot*, and *Harrell*, all *supra*) are inapposite, as explained above, and the evidence it recites, Br. pp. 10-11 simply parrots the Coast Guard's rationalizations for its negligent actions without invoking "social, political, or economic policy" in any way that Plaintiffs can discern.

Part 2 of the United States' Argument, Br. pp. 11-14, then seems designed to refute the argument that other Circuits apply meaningful standards, but it does nothing of the kind. Instead, the United States retreats to the insistence that each discretionary-function issue is "highly fact-specific," Br. p. 11, and "a fact-specific determination," Br. p. 14, as though no pattern can be discerned, expected, or imposed. This is the antithesis of law. It is the advocation of anarchy. The United States, like the Eleventh Circuit, asserts that any choice by a federal actor can be justified by invoking the protean thaumaturge "policy," and no one can hold the actor accountable. If merely saying the word "policy" can miraculously end all debate and provide an arbitrarily changeable shield from liability, then reason has fled, and we have obtained a government of men, not of laws. A court accepting this position is declining to serve as a court, because it is refusing to adjudicate a dispute on reasoned grounds, and it is writing almost out of existence the Congressional acts broadly waiving sovereign immunity.

The United States says: "[I]n those cases in which the court has found the discretionary function exception inapplicable to a safety-related decision, the court also has

found that there was effectively no countervailing policy interest that could justify a failure properly or adequately to take the safety measure." Br. pp. 12-13, citing five of the cases on which Plaintiffs rely.[6] Exactly! *There is no policy other than safety at issue here.* ***There is "no countervailing policy interest that could justify [the] failure properly or adequately to take the safety measure,"*** and the United States makes no attempt to articulate one!

Finally, at pp. 13-14, the United States miscasts the Petition's argument for consideration of " 'technical safety assessments' or 'objective professional standards,' " Br. p. 13 (citations omitted), as an attempt to establish a "categorical approach" under which "decisions about maritime safety warnings would never be discretionary," *ibid.* On the contrary, Plaintiffs argue only that *Gaubert's* "presumption" should not apply to such decisions. *See, e.g.*,

> In *Gaubert*, this Court held that "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." 499 U.S. at 324 (emphasis added). The Eleventh Circuit has made that presumption irrebuttable.

Petition, p. 15. *See also*

> If the government could create such rationalization, it would be impossible for any victim of a federal tort to overcome the "presum[ption] that the agent's acts are grounded in policy." *Gaubert*, 499 U.S. at 324.

Petition, p. 13, n. 2. In short, no "public policy" presumption should apply to a decision facially involving only technical safety assessments or a question of objective professional judgment, but the absence of such a presumption does not preclude the United States from entitling itself to an immunity defense by offering evidence that

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[6] *Whisnant*, *Cope*, *Myers*, *Andrulonis*, and *Cestonaro*, all *supra*.

some countervailing policy interest prevented implementing the choice that was objectively more safe. In its brief, the United States identifies no policy other than safety here, so no presumption of "public policy" should provide an absolute shield of immunity from inquiry into the Coast Guard's egregious lack of due care in assessing safety and, indeed, the holding of the Eleventh Circuit that the decision involved a discretionary function should be reversed.

It is the United States, not the Plaintiffs, that seeks a "categorical approach," under which the mere invocation of the word "policy" by the United States as a defendant precludes further inquiry, despite the broad waiver of sovereign immunity by Congress in the Federal Tort Claims Act, the SAA, and the PVA. Such a categorical approach ignores this Court's holding in *Indian Towing Co. v. United States*, 350 U.S. 61, 66 (1995), wherein this Court rejected the United States' request to immunize it from all acts done in furtherance of a governmental statute or policy, but instead found that when the Coast Guard makes a policy choice to voluntarily assume a duty, it can be held liable for failure to perform that duty within objective principles of due care.[7] This Court should not accept this invitation to repeal legislation, and it should

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[7] Contrary to the United States' contention, Br. at 14, *Indian Towing* is relevant to issue of governmental immunity, as demonstrated by this Court's holding:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import ***immunity*** back into a statute designed to limit it.

350 U.S. at 68-69 (emphasis added).

overturn the Eleventh Circuit's categorical refusal to enforce the Congressional waivers of sovereign immunity.

CONCLUSION

The Petition should be granted, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed, and the cause ultimately should be remanded to the District Court for the Southern District of Alabama for proceedings absent a "discretionary function" defense.

Respectfully submitted,

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