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

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION PRESENTED

The Eleventh Circuit's construction of the "discretionary function" exception to federal admiralty and tort liability has become so broad that any conduct involving choice by a government agent is immune from suit, and the discretionary function exception thus swallows the rule that Congress has waived sovereign immunity. Thus, the question presented is:

Does *United States v. Gaubert*, 499 U.S. 315 (1991), lend itself correctly to the construction placed on it by the Eleventh Circuit in this and other cases, in conflict with the construction placed on *Gaubert* by other Courts of Appeals, which hold that decisions based on such factors as "technical safety assessments," "objective criteria," or "professional, scientific, or engineering standards," are not within the scope of the discretionary function exception, because they are not "based on considerations of public policy"? *Id.* at 323 (quoting *Berkovitz v. United States*, 486 U.S. 531, 537 (1991)).

PARTIES

The Plaintiffs are Diane G. Melech, as Personal Representative and Administratrix of the Estate of Ronald C. Melech, deceased; Howard Melech; and Eddie Tyrone Cranford. The Defendant is the United States of America, based on actions taken by the United States Coast Guard. No corporate disclosure statement is pertinent.

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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS

The opinion under review is *Cranford v. United States*, No. 06-10685, October 5, 2006, 466 F.3d 955 (11th Cir. 2006). The underlying December 13, 2005, opinion and order of the District Court for the Southern District of Alabama is styled *Rebecca Nelson v. United States of America*, Civil Action No. 04-560-CB-M (a complaint based on a separate allision with the same submerged wreck, not at issue here); *Eddie Tyrone Cranford v. United States of America*, Civil Action No. 04-561-CB-M; *Howard Melech v. United States of America*, Civil Action No. 04-562-CB-M; *Diane G. Melech, et al. v. United States of America*, Civil Action No. 04-563-CB-M. The District Court did not designate its opinion for publication.

THE BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals for the Eleventh Circuit entered its judgment on October 5, 2006. App. 1. The Court of Appeals denied petitions for rehearing and for rehearing *en banc* on December 21, 2006. App. 28-29. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the Court of Appeals pursuant to a petition for writ of certiorari.

STATUTES INVOLVED IN THE CASE

This action proceeds principally under the Suits in Admiralty Act ("SAA"):

> In cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States.

46 U.S.C. app. § 742. This action also proceeds under the Public Vessels Act ("PVA"):

> A libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States.

46 U.S.C. app. § 781. The Eleventh Circuit followed its previous holdings that both of these Congressional waivers of sovereign immunity in admiralty cases against the United States "are subject to the discretionary function exception of the Federal Tort Claims Act (FTCA)." App. 5. The discretionary function exception of the Federal Tort Claims Act provides:

> The provisions of this chapter . . . shall not apply to –
>
> (a) Any claim based upon an act or omission of an employee of the Government . . . 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).

STATEMENT OF THE CASE

The evidence in this case highlights the Eleventh Circuit's misinterpretation of *Gaubert* and its conflict with the holdings of other circuits. This is because the evidence establishes, beyond any doubt, that the government's decisions in this case that led to the death of Ronnie Melech and the injuries to his brother, Howard Melech, and friend, Tyrone Cranford, had absolutely nothing to do with social, political, or economic policy. Instead, the evidence demonstrates a complete failure of professional assessment, a failure to follow objective criteria, and a reckless disregard for the safety of our fellow citizens in the face of obvious safety considerations, which in other Circuits do not fall within the scope of the discretionary function exception. Those facts are as follows:

As the District Court found, the wreck that the Plaintiffs struck was likely a government-owned vessel that the government intentionally sank near the mouth of Mobile Bay over 50 years ago. App. 18. The government was aware of the severity of the hazard and of numerous accidents caused by the wreck. Doc. 30, Exs. 1, 3-9, 17. More than eight years before the Plaintiffs' allision with the submerged wreck, one Coast Guard employee, who had made several requests to his superiors for assistance to have the wreck better marked or removed, wrote the following in one of his requests:

> [N]o one can offer a real solution or compromise. Since I've done all I know to do about this case, I really don't want to talk with the lawyers when they come here with their inquiries. ***When someone gets killed hitting this thing***, then we'll have some questions to answer.

Doc. 30, Ex. 1, p. 2 (emphasis added).

Despite the government's knowledge of the severity of the hazard, the Coast Guard failed to adequately mark the wreck. Initially, the Coast Guard set a single temporary lighted buoy to mark the wreck, which the Coast Guard found unreliable because it often drifted away from the wreck, during which time several boaters hit the wreck. Doc. 30, Ex. 3, pp. 11-12, 13; Ex. 1, p. 1. Later, the Coast Guard placed a permanent white and orange marker with the words "Danger Wreck" in the vicinity of the wreck. Doc. 30, Ex. 3, p. 16. However, that marker was at least 200 feet due north of the wreck. Doc. 30, Ex. 1, p. 15; Doc. 30, Ex. 3, p. 2. In fact, the Coast Guard's own employees believed the marker was too far from the wreck, not properly marking the wreck, and that the "hazard [was] marked poorly." Doc. 30, Ex. 1, pp. 4, 15; Doc. 30, Ex. 3, p. 2.

In 2003, after yet another accident at the wreck, the Coast Guard decided to change the "Danger Wreck" marker. Coast Guard employees familiar with the site and the waters of Mobile Bay (some of whom were stationed in Mobile) recommended that the Coast Guard use markers that clearly stated that a danger was in the area (such as an "isolated danger marker" or the "Danger Wreck" markers), that the marker be moved closer to the wreck, and that the marker be lighted. Doc. 30, Ex. 1, p. 13. However, the decision-maker in New Orleans, who had never been to the area, decided not to move the marker closer to the wreck. He also decided to replace the "Danger Wreck" marker with a red triangular marker, which looks exactly like a channel marker, and which draws recreational boaters toward the wreck. Doc. 30, Ex. 1, p. 13; Ex. 17, pp. 8-9.

In making these decisions, these Coast Guard employees did not consider social, economic, or political policy. The local Coast Guard employees were merely concerned

with providing the best warning possible under the circumstances. As evidenced by their correspondence with their superior, these employees requested that the Coast Guard use an "isolated danger" marker or a "Danger Wreck" marker which would clearly give the public adequate notice and which would provide safe passage around the wreck. Unfortunately, their superior, Anthony Marinelli, rejected these common sense ideas and decided to use a single confusing red channel marker to mark the wreck. The reasoning for his rejection, was, in his words, the following: "I've learned *to cover my butt*. The next time Joe-Boater hits this wreck, I want to be able to tell the judge that the aid [marking the wreck] conforms to COMDT standards, *whether or not it meets our approval.*" Doc. 30, Ex. 1, p. 3 (emphasis added).

The "COMDT standards" to which Mr. Marinelli referred are contained in an obscure and unpublished (to the public) *internal* Coast Guard manual known as the Aids to Navigation ("ATON") Manual. As the Eleventh Circuit held, this ATON Manual did not require the marker that Mr. Marinelli decided to use. App. 8. In fact, the ATON Manual's own language demonstrates that in deciding how to mark a wreck, Coast Guard employees are not to apply any fixed or rigid standard. Doc. 30, Ex. 18, p. 2, § 1.A.3. Instead, the ATON Manual requires basic safety decisions about whether wreck markings are "near the wreck," whether they are placed to minimize "possible confusion," and whether they ensure that a boater can pass the wreck safely. Doc. 30, Ex. 18, p. 7, § 6.A.2.f. To carry out these decisions, the ATON Manual requires that Coast Guard employees exercise "more than the minimum threshold of due care." *Id.*, p. 2, § 1.A.3.

These statements in the ATON Manual are consistent with the statement of Plaintiffs' expert, Captain Alvin Cattalini, a former Coast Guard Captain and Chief of Navigation Safety in Washington, D.C. Captain Cattalini opined that the government's marking was inconsistent with its own internal guidelines, which required that the Coast Guard make decisions based, not on social, political, or economic policy, but upon common sense safety principles, such as whether the marker was confusing to recreational boaters, whether it was close enough to the wreck, and whether it was sufficient to ensure safe passage by recreational boaters. Doc. 30, Ex. 17, pp. 8-9.[1]

Despite the fact that the ATON Manual required the consideration of such factors, which require merely technical, objective, and professional assessments about the adequacy of a warning, the Coast Guard failed to consider these factors. It ignored the fact that the marker was confusing, in that even the Coast Guard's own employees could not determine which side to safely pass the wreck. Doc. 30, Ex. 9, p. 45; Ex. 12, pp. 51-52, 68-69, 96-97. It ignored the fact that the marker was not close enough to the wreck. It also ignored the fact that the chosen marker actually drew boaters to the wreck, thereby making a bad situation worse. Doc. 30, Ex. 17, pp. 8-9. Instead, the Coast Guard proceeded to replace the "Danger Wreck" marker with a single red channel marker, of which its own employees did not approve.

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[1] Captain Cattalini also stated that the Coast Guard's conduct was "unconscionable" and that the decision to use a confusing channel marker to mark the wreck made a "bad situation worse." Doc. 30, Ex. 17, p. 9. The Eleventh Circuit ignored this evidence.

The marker was so poorly done that Coast Guard employees who recorded the Meleches' accident determined that the wreck was "unmarked." *See* Ex. 7 to Doc. 30, which is a document produced from the Coast Guard's Boating Accident Report Database stating that "vessel #1 was in route to the boat ramp when the vessel struck a currently ***unmarked*** sunken barge." (Emphasis added). Similarly, the Alabama Marine Police, which investigated the accident, determined that the cause of the accident was "***unmarked*** obstruction." Doc. 30, Ex. 15, pp. 8-9 (emphasis added).

It is no wonder, then, that just four days after (and on the first Saturday after) the Coast Guard removed the "Danger Wreck" sign and replaced it with the confusing channel marker, two boats and one JetSki hit the wreck. As demonstrated herein, the government introduced ***no*** evidence that these allisions resulted from a decision based on social, political, or economic policy. Instead, the overwhelming evidence is that the agency's employees simply failed to act with due care consistent with objective safety standards and consistent with professional and technical judgments. Further, when the agency settled upon the inadequate and misplaced red triangle, it was selected to "cover [their] butt[s] [from] the judge" who, the Coast Guard expected, would hear the ***next*** personal injury or death case. Doc. 30, Ex. 1, p. 3. Thus, it is clear that the method of marking the wreck was not based on social, economic, or political policy, but, at best, on objective principles of safety, and at worst, on the desire of the Coast Guard employees to "cover [their] butt[s] [from] the judge."

Diane Melech, as the widow of Ronnie Melech; Howard Melech; and Tyrone Cranford filed complaints in the Southern District of Alabama on August 25, 2004. Doc. 1.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1333 and 1346. On June 7, 2005, the United States moved, on the basis of the discretionary function exception to the waiver of sovereign immunity, to dismiss for lack of jurisdiction or, alternatively, for summary judgment. Doc. 23. Plaintiffs filed a response, Doc. 30, and the United States filed a reply, Doc. 32.

On December 13, 2005, the District Court entered an order granting the motions to dismiss. App. 13-27. After the Plaintiffs appealed, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of dismissal. App. 1-12. Plaintiffs filed a petition for rehearing *en banc*, but the Court denied that petition on December 21, 2006. App. 28-29.

REASONS FOR ALLOWANCE OF THE WRIT

The Eleventh Circuit's opinion in this case, if allowed to stand, would eliminate the remedy provided by Congress to victims of federal torts in any case in which the federal employee has a choice. This is because the Eleventh Circuit has, in stark contrast to other Courts of Appeals, interpreted the discretionary function exception to immunize all conduct that does not amount to negligence per se.

The Eleventh Circuit's opinion in this case conflicts with a body of law on the subject developed by other circuit courts of appeal. In analyzing whether a choice made by a federal agent was an immune "discretionary function" or not, the other courts of appeals have considered whether the decision in question "involve[d] technical safety assessments," "objective professional judgments," the application of "objective scientific standards," "observation[s] informed

by professional judgment and knowledge," "objective criteria," "matters of scientific and professional judgment – particularly judgments concerning safety," or "engineering judgment." The analytical tools employed by the other circuit courts of appeals provide a reasoned basis upon which the congressional waiver of sovereign immunity in the FTCA, the SAA, and the PVA is given due scope. By contrast, the Eleventh Circuit, in this and all other similar cases, has dismissively rejected any and all attempts to assert that a decision by a federal agent can be anything other than grounded in public policy and therefore immune.

1. The Two-Prong Test of *United States v. Gaubert*

In *United States v. Gaubert*, 499 U.S. 315 (1991), this Court refined the test for the discretionary function exception to the FTCA:

> The exception covers only acts that are discretionary in nature, acts that "involv[e] an element of judgment or choice". . . . The requirement of judgment or choice is not satisfied if a "federal statute, regulation or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive."

499 U.S. at 322 (citations omitted). This has become the "first prong" of the *Gaubert* test, under which an employee is not performing a discretionary function if he has no room to exercise "judgment or choice" in the matter.

It is the second prong of the *Gaubert* test that has confounded the Eleventh Circuit:

> Furthermore, even "assuming the challenged conduct involves an element of judgment," it

> remains to be decided "whether that judgment is of the kind that the discretionary function exception was designed to shield." . . . Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions *grounded in* social, economic and political *policy* through the medium of an action in tort," . . . , when properly construed, the exception "protects only governmental *actions and decisions based on considerations of public policy*."

Id. at 322-23 (emphasis added; citations omitted).

This Court's amplification on the second prong of the test includes some broad language that the Eleventh Circuit has consistently misconstrued as immunizing all government conduct that does not constitute negligence per se. That language includes the following: "On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.* at 324. Further,

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be *presumed* that the agent's acts are *grounded in policy* when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which 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. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on

> the nature of the actions taken and on whether they are *susceptible to policy analysis*.

Id. at 324-25 (emphasis added). As demonstrated below, the Eleventh Circuit, in conflict with other circuits, has construed this explanation of the second prong of the *Gaubert* test in a manner that immunizes all government conduct involving choice.

2. The Eleventh Circuit's Evisceration of the Second Prong of the *Gaubert* Test

Since *Gaubert*, the Eleventh Circuit has held that every single government decision involving an element of choice is immune from suit. As a well respected Judge of the Southern District of Alabama, The Honorable William H. Steele, has noted: "the Eleventh Circuit has found the discretionary function exception to be applicable in almost every case it has considered since *Gaubert*," listing the following instances:

> *OSI, Inc. v. United States*, 285 F.3d [947, 953 (11th Cir. 2002)] (Air Force's landfill disposal of waste); *Monzon v. United States*, 253 F.3d 567, 572 (11th Cir. 2001) (National Weather Service's failure to warn of rip currents); *Mid-South Holding Co. v. United States*, 225 F.3d [1201, 1202 (11th Cir. 2000)] (Coast Guard's and Customs Service's boarding and search of vessel); *Cohen v. United States*, 151 F.3d [1338, 1343-44 (11th Cir. 1998)] (Bureau of Prisons' classification and placement of prisoners); *Mesa v. United States*, 123 F.3d [1435, 1438 (11th Cir. 1997)] (Drug Enforcement Agency's decision how to locate and identify the subject of an arrest warrant); *Andrews v. United States*, 121 F.3d 1430, 1440 (11th Cir. 1997) (Navy's decision to delegate waste control to a

> private concern); *Ochran v. United States*, 117 F.3d [495, 501-02 (11th Cir. 1997)] (Assistant United States Attorney's failure to protect a victim threatened by a suspected offender); *Hughes v. United States*, 110 F.3d [765, 768 (11th Cir. 1997)] (Postal Service's security measures); *Powers v. United States*, 996 F.2d [1121, 1126 (11th Cir. 1993)] (Federal Emergency Management Agency's publicizing of the availability of flood insurance); *Autery v. United States*, 992 F.2d [1523, 1531 (11th Cir. 1993)] (National Park Service's selection and execution of procedures for inspecting for hazardous trees).

Marbulk Shipping, Inc. v. Martin-Marietta Materials, Inc., 271 F.Supp.2d 1374, 1378, n. 7 (S.D. Ala. 2003). Footnote 7 of *Marbulk* continues:

> In the only known Eleventh Circuit cased [sic] rejecting the discretionary function exception since *Gaubert*, the exception foundered on the first criterion because the government actor had no discretion to begin with. See *Miles v. Naval Aviation Museum Foundation*, 289 F.3d [715, 722 (11th Cir. 2002)]; *Ochran v. United States*, 117 F.3d at 504.

Id. Plaintiffs have carried forward Judge Steele's research as reflected in *Marbulk* by searching the Westlaw database CTA11 for the word "Gaubert." The search disclosed only three additional opinions: *Cranford v. United States*, the October 5, 2006, opinion now under review; *Martinez v. United States*, 192 Fed. Appx. 839, 841 (11th Cir. 2006) (dismissal of a pro se action against the EEOC, affirmed because "The discretionary function exception clearly applies here because the alleged misconduct involved the elements of judgment and choice."); and *Enlow v. United*

States, 161 Fed. Appx. 837 (11th Cir. 2006) (affirming dismissal of an inmate's case alleging negligence in transferring him, an informant, out of a special housing unit without first reviewing his file; affirmed on the grounds that both the first and second prongs of the *Gaubert* test were met).

Further, the District Court here confirmed the Eleventh Circuit's view of *Gaubert* by stating the following: "While the plaintiffs are correct that this formulation of the discretionary function exception to the waiver of sovereign immunity threatens to swallow the waiver, this result is nonetheless called for by the controlling precedents." App. 25. In fact, the Eleventh Circuit itself has said that the discretionary function clearly applies when "the alleged misconduct involved the elements of judgment and choice." *Martinez*, 192 Fed. Appx. at 841. However, as this Court and other circuits have made clear, it is not the "elements of judgment and choice" that render the conduct immune. Instead, a court must look to "the nature of the actions taken" to determine if it falls within the discretionary function exception.[2] *Gaubert*, 499 U.S. at 325.

By refusing to look at the nature of the conduct at issue, but instead focusing on the elements of judgment and

[2] *Gaubert* also holds that the issue is not whether the federal employee actually considered public policy but whether the decision "was susceptible to policy analysis." 499 U.S. at 325. This holding is not a basis for declining to issue the writ. It is clear from the facts of this case that the decision *only* involved issues of public safety. Further, as the Ninth Circuit has held, the government cannot create "ex post facto rationalizations . . . in an attempt to invoke the discretionary shield." *Bear Medicine v. United States*, 241 F.3d 1208, 1211 (9th Cir. 2001). 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.

choice, the Eleventh Circuit has separated itself from other circuits which hold that conduct involving technical safety judgments, objective criteria, or professional engineering standards is not immune. In this case, the court rejected Plaintiffs' argument based on the cases from other circuits discussed below with the following dismissive comment, not even acknowledging the contrary line of authority:

> The contention that the Coast Guard applied professional standards "is just another way of saying that the considerations . . . are so precisely formulated that decisions at the operational level *never* involve the exercise of discretion within the meaning of [the discretionary function exception], a notion that [the Supreme Court] ha[s] . . . rejected."

App. 9, quoting *Gaubert*, 499 U.S. at 331 (alterations in *Cranford*; emphasis added). Plaintiffs do not argue that "operational level" decisions "never involve the exercise of discretion." Instead, Plaintiffs argue that judgments or choices that depend upon a factual analysis of a situation and upon such criteria as "technical safety judgments," "objective criteria," or "professional, engineering, or scientific standards," are not discretionary decisions within the meaning of the discretionary function exception.

The gravity of the situation can be seen from the fact that this case is virtually on all fours with *Indian Towing Company v. United States*, 350 U.S. 61 (1955), but the Eleventh Circuit dismissed *Indian Towing* with the comment that it is "severely undercut if not altogether disavowed," App. 7, quoting an earlier Eleventh Circuit opinion. However, contrary to *overruling Indian Towing* in *Gaubert*, this Court clarified it and left it intact. 499 U.S. at 326. The Court has also recently *reaffirmed Indian*

Towing in *United States v. Olson*, 546 U.S. 43, 126 S.Ct. 510 (2005).[3]

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. The evidence in this case demonstrates knowledge of unsafe conditions, knowledge that the proposed modification of a safety warning would not make conditions safer, and a callous formalism that disregarded the danger of the proposed solution. Nevertheless, the Eleventh Circuit did not even consider the possibility that Plaintiffs had rebutted the presumption, but merely dismissed Plaintiffs' arguments as "just another way of saying that ... decisions at the operational level never involve the exercise of discretion within the meaning of [the discretionary function exception]." App. 9, quoting *Gaubert*, 499 U.S. at 331 (alteration by the Eleventh Circuit). The Eleventh Circuit's broad reading of the "grounded in social, economic, or political policy" language of *Gaubert* writes the second prong of the test out of existence, and allows only negligence per se, the direct violation of a specific requirement, as actionable under the FTCA, the SAA, or the PVA.

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[3] The Eleventh Circuit held that *Gaubert* had the effect of overruling *U. S. Fire Ins. Co. v. United States*, 806 F.2d 1529 (11th Cir. 1986); and *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985). App. 6-7. On the contrary, those cases are still good law to the same extent that *Indian Towing*, on which they rely, is still good law.

3. Other Circuits Have Properly Followed *Gaubert*

The Eleventh Circuit has yet to find any circumstances that satisfy the second prong of the *Gaubert* test. By contrast, other circuits have developed reasonable applications of the "grounded in public policy" language in *Gaubert*.

The Plaintiffs presented a discussion of the following cases from other jurisdictions to the Eleventh Circuit, but the court dismissed the analysis in Plaintiffs' brief and in those cases as merely attempting to revive the "planning/operational" distinction discredited in *Gaubert*. App. 9. On the contrary, the following opinions carefully analyze the nature of the decision being made to determine whether policy considerations were at issue. It is the Eleventh Circuit that has improperly revitalized the "operational" concept, holding that any decision made by any federal agent in carrying out any federal activity necessarily constitutes a policy-making decision that is an immunized discretionary activity. 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." *See Shansky v. United States*, 164 F.3d 688, 693-94 (1st Cir. 1999); *Andrulonis v. United States*, 952 F.2d 652, 654-55 (2d Cir. 1991); *Cestonaro v. United States*, 211 F.3d 749, 757-59 (3d Cir. 2000); *Hurd v. United States*, 134 F.Supp.2d 745, 768-69 (D.S.C. 2001), *aff'd*, 34 Fed. Appx. 77 (4th Cir. 2002); *Myers v. United States*, 17 F.3d 890, 897-98 (6th Cir. 1994); *Whisnant v.*

United States, 400 F.3d 1177, 1181-82 (9th Cir. 2005); and *Cope v. Scott*, 45 F.3d 445, 448-52 (D.C. Cir. 1995).[4]

Perhaps the earliest example comes from the Second Circuit in *Andrulonis v. United States*, 952 F.2d 652 (2nd Cir. 1991). There, after its original decision was vacated and the cause remanded pursuant to *Gaubert*, the Second Circuit reaffirmed its holding that the alleged failure of a federal official to warn of hazards associated with the use of a rabies vaccine did not constitute a discretionary function. In discussing *Gaubert*, the Second Circuit noted that "*Gaubert*'s import lies in its clarification of *Indian Towing* and its rejection of any simplistic reliance on the dichotomy between planning-level actions and operational-level actions. Policy considerations, however, remain the touchstone for determining whether the discretionary function exception applies." *Id.* at 654. The Court concluded:

> Nothing indicates that CDC policy required, or even encouraged, Dr. Baer to ignore unsafe laboratory conditions and thereby unnecessarily place the lives of laboratory workers at risk in order to further a scientific cause or any other objective of the government. The general policy of wanting to eradicate rabies and granting officials some discretion to achieve those ends is far too broad and indefinite to insulate Dr. Baer's negligent conduct in the circumstances of this case. Thus, Dr. Baer's action "cannot be said to be based on the purposes the regulatory regime seeks to accomplish."

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[4] Plaintiffs have found no cases considering this type of analysis – either applying it or refusing to do so – from the Fifth, Seventh, or Eighth Circuit Courts of Appeals.

Id. at 655. Similarly, no Coast Guard policy requires, or even encourages, its officers to ignore unsafe maritime conditions and thereby unnecessarily place the lives of mariners at risk simply to further a bureaucrat's desire to "cover [his] butt." Doc. 30, Ex. 1, p. 2.

The First Circuit, in *Shansky v. United States*, 164 F.3d 688 (1st Cir. 1999), approved the District of Columbia Circuit's highly workable construction as to whether safety-promoting activities of the government fall within the second prong of the *Gaubert* test, i.e., whether the decision in question "involve[d] technical safety assessments." 164 F.3d at 694, citing *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995). Although the *Shansky* court held that the Park Service's balancing of "incommensurable values such as safety and aesthetics" would not be "rework[ed] by the judicial branch," 164 F.3d at 693, it emphasized that the policy-making decisions involved weighing aesthetics at a historic site that did not have safety rails versus the decision whether to add such modern safety measures, *not* a weighing of how safety was to be effectuated. The discussion in *Shansky* includes the following pertinent paragraph and footnote:

> This holding falls neatly into a line of cases involving plaintiffs who challenge official judgments that implicate *technical safety assessments* conducted pursuant to prior policy choices. *See, e.g., Ayala v. United States*, 980 F.2d 1342, 1348-49 (10th Cir. 1992); *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991). Such decisions come within a category of *objective professional judgments* that, without more, are not readily amenable to policy analysis. *See Berkovitz*, 486 U.S. at 545, 108 S.Ct. 1954 (indicating that discretion involving application of "*objective scientific*

standards" is not policy-based discretion); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1030 (9th Cir. 1989) (similar). Thus, to determine whether an action taken in such circumstances is grounded in policy-based discretion, the operative *distinction is* the one *between a judgment that embodies a professional assessment* undertaken *pursuant to* a policy of *settled priorities and a fully discretionary judgment that balances incommensurable values in order to establish those priorities.*[FN5]

[FN5] This distinction clearly underpins the analysis in cases such as *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990), and *ARA Leisure Serv. v. United States*, 831 F.2d 193 (9th Cir. 1987). The distinction is perhaps illustrated most effectively by contrasting *ARA Leisure*'s separate holdings. The court concluded that the Park Service's initial decision to design and construct a park road without guardrails was protected by the discretionary function exception (principally on the ground that Park Service policies required roads to be "esthetically pleasing"), yet held that failure to maintain a certain stretch of the road in a safe condition was not grounded in policy (and, therefore, not protected). *See id.* at 195. In a particularly revealing passage, the court explained that "*where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing policy considerations, the rationale for the exception falls away and the United States will be responsible for the negligence of its employees.*" *Id.* (quoting *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986)). The District of Columbia Circuit drew essentially the same distinction in upholding Cope's "failure

> to warn" claim, but foreclosing his "failure to make the road surface skid-resistant" claim. *See Cope*, 45 F.3d at 450-51.

Shansky, 164 F.3d at 693 (emphasis added).

The Third Circuit has held that, although the government retained discretion with respect to lighting and warning decisions, the decisions were *not grounded in policy objectives* and so were not immune under the second prong of *Gaubert*. *Cestonaro v. United States*, 211 F.3d 749 (3d Cir. 2000). "The National Park Service fails to show how providing some lighting, but not more, is grounded in the policy objectives with respect to the management of the National Historic Site." *Id.* at 757. The *Cestonaro* court distinguished *Shansky*, *supra*, noting that *Shansky* recognized that "there must be a 'plausible nexus between the challenged conduct and the asserted justification.'" 211 F.3d at 757, n. 6 (quoting 164 F.3d at 695). The Third Circuit was "unable to find a rational nexus between the National Park Service's lighting or warning decisions (or non-decisions) and social, economic and political concerns." *Id.* at 759. The court held that "The National Park Service remains free to make decisions grounded in policy considerations without risking tort liability; but it cannot make decisions unrelated to policy and then seek shelter under the discretionary function exception." *Id.* Like other circuits outside the Eleventh Circuit, the Third Circuit treats *Indian Towing* as being still good law:

> In one of its early treatments of the FTCA, the Supreme Court articulated the Act's purpose in terms that underscore why the National Park Service cannot rely on the discretionary function exception here. The Court stated:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental affairs 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.

Cestonaro, 211 F.3d at 759 (quoting *Indian Towing*, 350 U.S. at 68-69).

Another Third Circuit opinion applying the second prong of the *Gaubert* test is *Gotha v. United States*, 115 F.3d 176 (3rd Cir. 1997). The question there was whether the Navy was entitled to immunity for a decision not to provide a stairway, railing, and lighting to make a steep pathway on a Navy facility safe. The court held that "the action or inaction goes more to the issue of negligence rather than whether the issue of policy discretion is implicated." *Id.* at 180. Rejecting an argument by the Navy that "there are military, social and economic considerations involved," the court held that "the Navy's proffered reasons are of such general application as to provide no assistance in determining whether the discretionary function exception fits the situation here." *Id.* at 181.

> This case is not about a national security concern, but rather a mundane, administrative, garden-variety housekeeping problem that is about as far removed from the policies applicable to the Navy's mission as it is possible to get. In the words of the Supreme Court, the "challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."

Id. at 181-82 (citation omitted).

It was only in 2004 that the Fourth Circuit held that a discretionary function exception must be read into the Suits in Admiralty Act and the Private Vessels Act. *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004), *cert. den.*, 544 U.S. 974 (2005). However, in *Hurd v. United States*, 134 F.Supp.2d 745 (D.S.C. 2001), *aff'd*, 34 Fed. Appx. 77 (4th Cir. 2002), the District Court for the District of South Carolina "assum[ed] that the Fourth Circuit would imply a discretionary function exception to Defendants' waiver of sovereign immunity under the SIAA," and held that such a discretionary function exception "would not apply to the facts of this case because this court has found that the Coast Guard exercised its discretion by making the policy decision to render aid in the search and rescue operation, and concomitantly was *obligated to exercise reasonable care in the operation*." 134 F.Supp. at 768 (emphasis added). The court held that once the Coast Guard officer "made the decision to render aid, [his] decisions were not grounded in social, economic, or political policy. Rather, he merely implemented, under *objective criteria*, the clear mandates of the Coast Guard." *Id.* at 769 (emphasis added). Thus, *Hurd*, having been affirmed by the Fourth Circuit, stands as authority for the proposition that the Fourth Circuit would not apply a discretionary function exception to safety-related activity, once undertaken by the government, if the decisions on how to conduct that safety-related activity are based on "objective criteria."

In *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994), the Sixth Circuit held that "the choices inherent in these [mine safety] assessments are to be made by MSHA inspectors in light of their own observations, informed by *professional judgment and knowledge* of the industry, [and] that the discretion afforded MSHA inspectors by the

Act and the relevant regulations is not grounded in public policy and is not protected by the discretionary function exception." *Id.* at 898 (emphasis added). The court noted the language in *Berkovitz*, *supra*, that "If the determination is to be made by the mere 'application of objective scientific standards,' however, plaintiff's claim would not be barred." 17 F.3d at 897, quoting *Berkovitz*, 486 U.S. at 545. The Sixth Circuit continued:

> As the Court in *Berkovitz* held, the applicability of the discretionary function exception in such situations turns on whether the MSHA inspector is authorized to make such assessments as a matter of public policy or whether those determinations are supposed to be the product of more *objective criteria*. We hold that neither the Act nor the MSHA regulations authorize mine safety inspectors to conduct their inspections on the basis of "social, economic or political policy."

17 F.3d at 897 (emphasis added). *But see Lawson v. United States*, 124 F.3d 198 (6th Cir. 1997) (table) (reported at 1997 WL 530540), in which the Sixth Circuit held that "the Coast Guard's decision to place navigation lights on the Lorain breakwater is a discretionary one exempted from the Suits in Admiralty Act by the discretionary function exception." *Id.* at **6. However, the Sixth Circuit also noted that

> Unlike *Eklof* [*Marine Corp. v. United States*, 762 F.2d 200 (2d Cir. 1985)] or *Somerset* [*Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951)], this is not a situation where the misplacement of a buoy by the Coast Guard became "a trap for the ignorant or unwary rather than a warning of danger." *Somerset*, 193 F.2d at 635 (quoted by *Eklof*, 762 F.2d at 203). The placement of two

> lights on the Lorain breakwater, one on either end, did not lure boaters into the breakwater.

WL at **5. The facts of *Lawson* are in stark contrast to the facts in the present case, where the only evidence in the record is that the red channel marker drew boaters to the wreck, thereby "making a bad situation worse." Doc. 30, Ex. 17, pp. 8-9; Ex. 14, p. 2.

By contrast to the Eleventh Circuit's placing the burden on the plaintiff to "establish that the discretionary function exception does not apply," App. 5, the Ninth Circuit has held that "it is the government's burden to demonstrate the applicability of the discretionary function exception." *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005); *Bear Medicine v. United States ex rel. Sec'y of the Dep't of the Interior*, 241 F.3d 1208, 1213 (9th Cir. 2001). The *Whisnant* court, in applying "the second *Gaubert/Berkovitz* prong," noted that it had "recently remarked upon the difficulty of charting a clear path through the weaving lines of precedent regarding what decisions are susceptible to social, economic, or political policy analysis." 400 F.3d at 1181 (citing *O'Toole v. United States*, 295 F.3d 1029, 1035 (9th Cir. 2002)). The *Whisnant* court noted that the Ninth Circuit had established a body of precedent that "*matters of scientific and professional judgment – particularly judgments concerning safety* – are rarely considered to be susceptible to social, economic, or political policy." *Id.* at 1181 (emphasis added). Contrary to the Eleventh Circuit, the Ninth Circuit treats *Indian Towing* as remaining good law, noting that,

> although the analysis in *Indian Towing* is not addressed to the discretionary function exception, . . . subsequent Supreme Court precedent has treated *Indian Towing* as relevant authority in

> this area, *see Berkovitz*, 486 U.S. at 538, n. 3 ("the decision in *Indian Towing* . . . illuminates the appropriate scope of the discretionary function exception.").

Id. at 1182, n. 2. The court noted: "As we have summarized: 'The decision to adopt safety precautions may be based in policy considerations, but the *implementation of those precautions is not. . . . [S]afety measures, once undertaken, cannot be shortchanged in the name of policy.*'" *Id.* at 1182 (quoting *Bear Medicine*, 241 F.3d at 1215, 1216-17 (emphasis added)). In reversing a dismissal of a claim alleging negligent failure to remove toxic mold, the *Whisnant* court held: "Cleaning up mold involves professional and scientific judgment, not decisions of social, economic or political policy." *Id.* at 1183. Similarly, determining how to place or modify a warning sign involves professional and scientific judgment, not decisions of social, economic, or political policy.

Finally, the *Whisnant* court rejected the argument that budgetary concerns are a sufficient ground for a finding of a discretionary function:

> Were we to view inadequate funding alone as sufficient to garner the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly. Instead, in order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly.

Id. at 1184.

In *Ayala v. United States*, 980 F.2d 1342, 1349 (10th Cir. 1992), the Tenth Circuit held that "technical judgments

made by [a federal agent are not] protected by the discretionary function exception." The court contrasted the discretionary decision to act with the technical judgment exercised:

> Where the particular decision challenged is not a policy-based decision, there is no reason to provide the government with immunity. In this case, the particular decision being challenged is not Marshall's decision to offer technical advice, but his recommendation of where to connect the lights to the continuous mining machine.

Id. Similarly, here, the decision being challenged is not the decision *whether* to mark the Fort Morgan wreck, but the decision of *how* to mark it and *where* to place the marker.

The District of Columbia Circuit has adopted a reasonable construction of the second prong of *Gaubert* in *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995). The Court first noted the overbreadth of the government's argument:

> Determining whether a decision is "essentially political, social, or economic," . . . is admittedly difficult, since nearly every governmental action is, at least to some extent, subject to "policy analysis." . . . "Budgetary constraints," for example, "underlie virtually all government activity." . . . At oral argument, counsel for the government asserted that these underlying fiscal constraints should therefore exempt "virtually all government activity." With the exception of discretion exercised by bad drivers, the government appears to argue that decisions that involve choice and the faintest hint of policy concerns are discretionary and subject to the exception. This approach, however, would not only eviscerate the second step of the analysis set out in *Berkovitz* and *Gaubert*, but it would allow the exception to swallow the FTCA's

> sweeping waiver of sovereign immunity. . . . It was thus not surprising that, when pressed at oral argument, government counsel was unable to provide, under its theory, even one example of a discretionary decision that would not be exempt for failure to implicate policy concerns.
>
> The government reads the exception far too broadly. The question is not whether there is any discretion at all, but whether the discretion is "*grounded* in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 325 (emphasis added). The mere association of a decision with regulatory concerns is not enough; exempt decisions are those "fraught with . . . public policy considerations." . . . The mere presence of choice – even if that choice involves whether money should be spent – does not trigger the exception.

Id. at 448-49. After also rejecting efforts by the plaintiff Cope to "restrict [the] application" of the exception, *id.* at 449, the *Cope* court noted that "we have consistently held that the discretionary function exception applies 'only where "the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency."'" *Id.* at 450 (citations omitted). The court allowed a discretionary function defense to an allegation that the road was maintained in too slippery a condition, but rejected a discretionary function defense regarding the signage on the road:

> In contrast to our decision regarding the road surface, however, we find that the discretion regarding where and what type of signs to post is not the kind of discretion protected by the discretionary function exception. While it may be true, as the government claims, that the placement of signs involves judgments because engineering and aesthetic

> concerns determine where they are placed, such judgments are not necessarily protected from suit; only if they are "fraught with public policy considerations" do they fall within the exception, and we do not think that is the case here. 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. *See* 486 U.S. at 545.

Id. at 451-52 (emphasis added). The Court's conclusion is highly applicable to the analysis in this case:

> The Park Service has already posted signs in an effort to alert drivers to safety hazards on the road. In light of these factors, the Park Service has understandably been unable to articulate how the placement of additional or different signs on Beach Drive implicates the type of economic, social, or political concerns that the discretionary function exception protects from suit under the FTCA.

Id. at 452. Similarly, the Coast Guard has already posted an aid to navigation in an effort to alert boaters to the known safety hazard posed by the Fort Morgan wreck. It has been unable to articulate how the placement of a different sign would implicate the type of economic, social, or political concerns that the discretionary function exception protects from suits under the SAA and the PVA. The Eleventh Circuit's holding to the contrary conflicts with the holdings of the District of Columbia Circuit in *Cope v. Scott* and the other circuits, as discussed above.

The fact that the Eleventh Circuit's interpretation is inconsistent with *Gaubert* and with the Congressional intent behind the FTCA, the SAA, and the PVA is also shown by *Dolan v. United States Postal Service*, 546 U.S. 481, 126 S.Ct.

1252 (2006), where the Court held that the FTCA exception found in 28 U.S.C. § 2680(b) for claims arising out of "the loss, miscarriage, or negligent transmission of letters or postal matter" did not apply to a claim alleging negligently leaving mail on the plaintiff's porch in such a way that she tripped and fell over it. Pertinent here, the Court noted that a narrow construction of the exception is more consistent with the Congressional intent than a broad construction:

> Finally, it should be noted that this case does not implicate the general rule that "a waiver of the Government's sovereign immunity will be strictly construed in terms of its scope, in favor of the sovereign," *Lane v. Peña*, 518 U.S. 187, 192 (1996). As *Kosak* [*v. United States*, 465 U.S. 848 (1984)] explains, this principle is "unhelpful" in the FTCA context, where "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," 465 U.S., at 853, n. 9, which "waives the Government's immunity from suit in sweeping language."

Dolan, 546 U.S. at ___, 126 S.Ct. at 1260 (some citations omitted). The Eleventh Circuit's "unduly generous interpretations of the exceptio[n]" defeats the purpose of the statutes. That purpose is to provide an action against the United States "[i]n cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. app. § 742. Given that a private individual would be liable under the Wreck Act, 33 U.S.C. § 409, for making poor choices about the adequacy of a marker of his sunken vessel, the government is not conducting an immunized discretionary function simply because government agents rather than private individuals are choosing how to mark the wreck.

CONCLUSION

Congress did not do a futile thing when it enacted the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act. In the states and waters under the jurisdiction of the Eleventh Circuit, however, those Acts have little or no field of operation unless and until this Court steps in and corrects the Eleventh Circuit's expansive construction of the *Gaubert* "public policy" aspect of the discretionary function test. Other circuits have developed workable applications of this test, including analysis of whether a particular decision involved only "technical safety assessments," "professional, scientific, or engineering standards," or "objective criteria." This Court should approve those workable tests and disapprove the expansive construction by the Eleventh Circuit whereby any decision or choice by any federal employee constitutes an immunized discretionary function activity.

Respectfully submitted,

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March 20, 2007.