No. 12-335

In the Supreme Court of the United States

JUANITA SANCHEZ, ON BEHALF OF MINOR CHILD D.R.-S, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' damages claims for injuries allegedly caused by naval training exercises and munitions disposal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 671 F.3d 86. The decision of the district court (Pet. App. 68a-97a) is reported at 707 F. Supp. 2d 216.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2012. A petition for rehearing en banc was denied on May 16, 2012 (Pet. App. 98a-99a). On July 26, 2012, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 13, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Navy has for decades operated facilities on Vieques Island, which is part of the Commonwealth of Puerto Rico. Pet. App. 1a, 4a; see *Romero-Barcelo* v. *Brown*, 643 F.2d 835, 837 (1st Cir. 1981), rev'd on other grounds, *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The Navy owns slightly more than three-quarters of the island's 33,000 acres, most of which was acquired in the 1940s, pursuant to specific statutory authorization. *Romero-Barcelo*, 643 F.2d 837-838; see, *e.g.*, An Act To Authorize the Secretary of the Navy To Proceed with the Construction of Certain Public Works, and for Other Purposes, Pub. L. No. 77-22, 55 Stat. 50. During World War II, the Navy used its property to conduct fleet maneuvers and training; beginning in the 1960s, the Navy used it for live-ammunition training exercises; later, the Navy began also to use it for detonation of unused ordnance. See *Abreu* v. *United States*, 468 F.3d 20, 23 (1st Cir. 2006).

In 1977, concerned with the environmental impact of military operations on Vieques, the government of Puerto Rico initiated litigation that ultimately required the Navy to comply with certain federal environmental statutes, including the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.* and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq*. See *Abreu*, 468 F.3d at 23-24; see also *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). In compliance with the Clean Water Act, the Navy subsequently obtained from the Environmental Protection Agency (EPA) a National Pollution Discharge Elimination System (NPDES) permit, which requires that the Navy maintain the water concentrations of particular compounds below certain levels. Pet. App. 6a.

In 1980, in compliance with the National Environmental Policy Act, the Navy completed an Environmental Impact Statement regarding the continued use of the Vieques training range, which concluded that continuing military activities on Vieques would not significantly affect the environment beyond the impact that had already occurred during the previous 20 years of operations. C.A. App. 192. After several years of litigation, the Navy and the Commonwealth of Puerto Rico also entered into a Memorandum of Understanding that addressed historic site preservation initiatives, land use, environmental matters, and ordnance delivery on Vieques. *Id.* at 173, 192. In May 2000, the Navy discontinued live fire training on Vieques, and, on April 30, 2003, the Navy terminated all military exercises on Vieques. See *Abreu*, 468 F.3d at 24.

2. Petitioners are several thousand Vieques residents who filed suit against the United States in September 2007, seeking damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), for injuries allegedly caused by the Navy's activities on the island. Pet. App. 4a-5a & n.4, 68a. The FTCA generally permits a plaintiff to bring an action against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Petitioners' FTCA claims asserted various tort causes of action under Puerto Rican law premised on the theory that the

Navy's activities in Vieques had damaged the environment and harmed their health. Pet. App. 4a-5a.

The district court dismissed petitioners' complaint, concluding that the claims were barred by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). Pet. App. 68a-97a. That exception provides that the FTCA "shall not apply to" a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The district court noted a "strong presumption," recognized in multiple courts of appeals, that the exception should apply "to the repercussions of military operations" on a nearby civilian population. Pet. App. 96a-97a; see *id.* at 97a (citing *Abreu* v. *United States*, *supra*; *Loughlin* v. *United States*, 393 F.3d 155 (D.C. Cir. 2004), and *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)).

3. a. The court of appeals affirmed. Pet. App. 1a-67a. Citing this Court's decisions in *United States* v. *Gaubert*, 499 U.S. 315 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531 (1988), the court of appeals explained that "the discretionary function exception applies if the conduct underlying an FTCA claim both (1) involves an element of judgment or choice and (2) was susceptible to policy-related analysis." Pet. App. 11a (internal quotation marks and citation omitted). The court recognized that "[c]onduct does not involve an element of judgment or choice 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.'" *Ibid.*

(quoting *Gaubert*, 499 U.S. at 322). But it concluded that petitioners had not identified a mandatory directive that would foreclose the application of the discretionary function exception in the context of the military operations at issue here. *Id.* at 13a-33a.

The court first rejected petitioners' contention that violations by the Navy of its NPDES permit could serve as a predicate for avoiding the discretionary function exception. Pet. App. 13a-18a. The court reasoned that because "the decision not to permit damages * * * is a significant policy of" the Clean Water Act, it would be inappropriate to predicate an award of damages under the FTCA on alleged violations of the Clean Water Act. *Id.* at 17a. The court noted that in *Abreu* v. *United States*, *supra*, it had concluded that alleged violations of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901, *et seq.*, could not provide the basis for an FTCA claim because RCRA itself did not allow for damages suits. Pet. App. 14a-15a; see *Abreu*, 468 F.3d at 29-32. And the court noted that this Court's decision in *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (*Sea Clammers*), had declined to allow a damages claim under 42 U.S.C. 1983 for alleged violations of the Clean Water Act, on the ground that such a claim would subvert the Clean Water Act's own comprehensive liability scheme, which does not provide for such damages claims. Pet. App. 15a-16a; see *Sea Clammers*, 453 U.S. at 20-21.

The court of appeals also rejected a separate theory of FTCA liability premised on a specific incident in 1999 involving the firing of depleted-uranium bullets. Pet. App. 7a-8a; 19a-23a. The court concluded that petitioners had failed to establish a genuine dispute of material

fact about whether this incident had caused any of their injuries. *Id.* at 20a. The court moreover concluded that even if petitioners "had raised a material fact that the Navy's firing of depleted uranium bullets caused the injuries they allege (as they have not), they have failed to adequately allege that the challenged conduct was non-discretionary." *Ibid.* The court reasoned that a letter from the Nuclear Regulatory Commission asserting that the Navy had violated a radioactive material permit was insufficient to show that the Navy's conduct had been prohibited by a mandatory directive: because the letter did not identify the particular requirements to which the Navy was subject, and because petitioners had not offered any evidence of what those specific requirements might have been, petitioners had not shown "that the purported permits, even if they limit the firing of depleted uranium bullets, are mandatory in the relevant sense." *Id.* at 21a-22a. The court additionally noted that the absence of the asserted permit in the record made it impossible to tell whether the permits were predicated on a statutory scheme that might itself preclude damages relief for a permit violation. *Id.* at 22a-23a. And the court found petitioners' argument that they should have gotten more discovery on this issue to be both waived and meritless. *Id.* at 23a.

The court of appeals similarly concluded that a third theory of liability, premised on the assertion that the Navy had violated "unnamed internal requirements," failed to concretely identify any mandatory directives that constrained the Navy's discretion. Pet. App. 24a. Finally, the court rejected a fourth theory of liability based on the Navy's alleged failure to warn about environmental hazards. *Id.* at 24a-32a. The court noted that the "source of this alleged non-discretionary duty to

warn suffers from vagueness and indeterminacy and so, as explained earlier, fails to meet the *Gaubert* requirements." *Id.* at 24a-25a. The court also identified "other flaws" in the theory, including its own and other circuits' precedent refusing to hold that safety concerns vitiate governmental discretion, particularly in the military context. *Id.* at 25a, 27a-31a (citing, *inter alia*, *Loughlin* v. *United States*, *supra*, and *In re Consol. U.S. Atmospheric Testing Litig.*, *supra*).

b. Judge Torruella dissented. Pet. App. 33a-67a. In his view, petitioners had sufficiently identified mandatory directives that would put this case outside the discretionary function exception. *Id.* at 53a-66a.

ARGUMENT

The court of appeals correctly concluded that the discretionary function exception bars petitioners' tort claims against the United States. The application of that exception in the particular circumstances of this case does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The FTCA effects a "limited waiver of sovereign immunity" that authorizes certain suits against the United States under state (or territorial) tort law. *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). "The Act did not waive the sovereign immunity of the United States in all respects, however; Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). The first such listed exception is the discretionary function exception, which forecloses suits "based upon the exercise or performance or the failure to exercise or perform a discretion-

ary 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).

As this Court has explained, the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals," and its purpose 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." *Varig Airlines*, 467 U.S. at 808, 814. This Court's decision in *United States* v. *Gaubert*, 499 U.S. 315 (1991), makes clear that the discretionary function exception bars an FTCA plaintiff from seeking damages based on governmental actions that (1) "involve an element of judgment or choice" and (2) are "based on considerations of public policy." *Id.* at 322-323 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536-537 (1988)) (brackets omitted).

b. Petitioners do not dispute that the operation of a military facility and the conduct of military exercises fall squarely within the class of judgments that Congress intended to shield from suit when it enacted the discretionary function exception. This Court has often recognized the important interests that must be balanced by military officials and has admonished that courts should "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter* v. *NRDC*, 555 U.S. 7, 24 (2008) (quoting *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986)); see, *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (observing that "it is difficult to conceive of an area of governmental activity in which the

courts have less competence" than military activities); see also Pet. App. 32a.

Petitioners nevertheless contend that the particular military activities at issue in this case can provide the basis for an FTCA claim. Petitioners note (*e.g.*, Pet. 17) that this Court has recognized the inapplicability of the discretionary function exception in circumstances where a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," such that the employee lacks discretion to do anything "but to adhere to the directive." *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536); see *id.* at 324 (exception does not apply if employee violates a regulation that "mandates particular conduct"). And they assert that the NPDES permit that the Navy allegedly violated in this case is an example of such a "statute, regulation, or policy."[1]

That argument overreads this Court's precedents. The permit requirements relied upon by petitioner do not "specifically prescribe[] a course of action" or "mandate[] particular conduct" that the Navy was required to undertake. *Gaubert*, 499 U.S. at 322, 324. Rather, they set forth an end result—limited concentration of certain substances in the water—that the agency's activities, taken together, needed to achieve. See Pet. App. 6a, 94a

[1] To the extent petitioners are reasserting any of their other theories of liability in this Court, the court of appeals correctly rejected those theories on the ground that petitioners had identified no specific statute, regulations, or policies that would preclude application of the discretionary function exception. Pet. App. 19a-31a. With respect to petitioners' depleted-uranium-bullet theory in particular, the court of appeals also determined that petitioners had not adequately shown causation. *Id.* at 20a. Petitioners present no meaningful argument for why the court of appeals' rejection of those theories would warrant further review.

(describing the water-quality requirements on which petitioners' claim relies). If the Navy did not achieve that end result, it was potentially subject to remedies under the Clean Water Act. But the existence of the permit did not itself require the Navy to take (or refrain from) any particular action, as would be necessary to preclude application of the discretionary function exception under this Court's precedents. Compare *Varig Airlines*, 467 U.S. at 814-820 (concluding that Federal Aviation Administration retained discretion about how to implement safety goals specified in statutes and regulations), with *Berkovitz*, 486 U.S. at 540-545 (holding that National Institutes of Health violated mandatory directive stating that a vaccine may not be licensed without complying with specific procedures).

The permit accordingly did not divest the Navy of its broad discretion in the conduct of military operations. Nothing in the permit terms would, for example, prohibit the Navy from undertaking a particular training exercise it deemed critical to military readiness. And nothing in the permit invites "judicial second-guessing" of naval operations "through the medium of an action in tort," *Gaubert*, 499 U.S. at 323 (citation omitted), simply because the Navy's inherently imprecise predictive judgment about the overall environmental impact of its activities turned out to be incorrect. The discretionary function exception thus remains applicable to the military conduct about which petitioners complain.

Petitioners' reliance on the NPDES permit is misplaced for the additional reason that it prefers one agency's interpretation of the permit (the EPA's) over another's (the Navy's). Petitioners note that, "[a]ccording to two 1999 letters from EPA, the Navy violated its NPDES permit at least 102 times from 1994 to 1999,"

and they assert that "[t]he United States could not and did not dispute these violations." Pet. 9. But while it is true that the government does not dispute that the EPA sent the letters, the only reason the government has not yet addressed the asserted violations themselves is that this case was dismissed at the pleading stage. Petitioners are wrong to suggest that the Navy and the EPA shared a common understanding about the permit's requirements. For example, while the EPA has asserted that certain salt flats are "waters of the United States" for purposes of the permit, and identified violations based on that interpretation, the Navy has understood the permit differently. C.A. App. 111, 147-148, 306-307. These different understandings help demonstrate in this context, for purposes of the discretionary function exception, that the permit was insufficiently specific to serve as a basis for federal liability in tort. An FTCA suit is not the proper forum for resolving, in the context of violations that allegedly occurred more than a decade ago, differences between two federal agencies regarding the interpretation of a permit that one issued to the other.

Finally, petitioners' reliance on the NPDES permit is unavailing because petitioners' complaint fails to allege a direct casual link between any particular permit violations and their injuries. A plaintiff seeking to overcome the discretionary function exception cannot simply point to any violation of a legal requirement; such a plaintiff must, at a minimum, establish a causal relationship between the alleged violations of mandatory directives and his injury. See *Montijo-Reyes* v. *United States*, 436 F.3d 19, 25-26 (1st Cir. 2006); see also *Fisher Bros. Sales Inc.* v. *United States*, 46 F.3d 279, 286-287 (3d Cir.) (en banc) (rejecting plaintiffs' attempt to avoid

discretionary function exception by re-characterizing the harm-causing conduct), cert. denied, 516 U.S. 806 (1995). As the district court noted, however, petitioners in this case only "mention[ed]" the Clean Water Act "in passing" in their complaint, and they focused on the permit only when forced to respond to the government's motion to dismiss. Pet. App. 93a-94a. The complaint itself does not make the requisite connection between alleged permit violations and harm to petitioners, but instead simply asserts that Clean Water Act violations occurred. See *id.* at 111a-112a (citing reports of discharges by the Navy from 1985 to 1999 that "violated the Clean Water Act and Puerto Rico Water Quality Standards"); *id.* at 118a (alleging that the "EPA determined that the Navy had committed at least 102 violations of the Clean Water Act"). Although the alleged Clean Water Act violations might be "consistent with" causation, they do not inherently demonstrate an "entitlement to relief," in a tort action for damages. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). Petitioners' bare-bones allegations accordingly are insufficient to survive dismissal.

c. Petitioners fail to demonstrate that any other court of appeals would have allowed them to avoid the discretionary function exception on the facts of this case. Petitioners contend (Pet. 23) that "three circuits have allowed FTCA suits to proceed when the Government's tortious conduct allegedly violated the" Clean Water Act. But each of the cases they cite pre-dates this Court's decision in *Gaubert,* and in none of them did the deciding court rely on an NPDES permit itself as the basis for finding the discretionary function exception to be inapplicable.

In *Hurst* v. *United States*, 882 F.2d 306 (1989), the Eighth Circuit found the discretionary function exception inapplicable based on the existence of a specific Army Corps of Engineers regulation requiring an employee to "immediately issue an order prohibiting further work" when he discovered unauthorized activity in progress. *Id.* at 309-310 (quoting 33 C.F.R. 326.2(a) (1984)) (emphasis omitted); see *id.* at 310 ("The discretionary function exception does not apply to the Hursts' claim based on this alleged negligent failure to comply with *mandatory Corps regulations*.") (emphasis added). Likewise, in *Starrett* v. *United States*, 847 F.2d 539 (1988), the Ninth Circuit found the discretionary function exception inapplicable based on an Executive Order that provided "a specific and mandatory direction to the Navy to provide secondary treatment for wastes and to prevent their being discharged if they constitute a health hazard." *Id.* at 541. And finally, in *Platte Pipe Line Co.* v. *United States*, 846 F.2d 610 (1988), the Tenth Circuit did not discuss the discretionary function exception at all, but instead simply concluded that a suit could be brought against the United States under the FTCA for "non-cleanup cost[s]" resulting from an oil spill (as opposed to "cleanup costs," which were cognizable only in the Court of Federal Claims). *Id.* at 611-612.

Other circuit decisions cited by petitioners (Pet. 24-26) similarly fail to demonstrate that the deciding courts would have reached a different result on the facts here. In two of the cases, the court of appeals held that the discretionary function exception was, in fact, applicable to certain government conduct. See *Rosebush* v. *United States*, 119 F.3d 438, 442 (6th Cir. 1997); *Blakey* v. *U.S.S. Iowa*, 991 F.2d 148, 152-153 (4th Cir. 1993). And the others all involved directives that mandated a specif-

ic course of conduct, rather than a permit that simply set forth an end result. See *Triestman* v. *Federal Bureau of Prisons*, 470 F.3d 471, 472, 475-476 (2d Cir. 2006) (per curiam) (requirement that prison inmates not be left unattended in locked areas without a device for signaling guards in the event of an emergency); *Jerome Stevens Pharms., Inc.* v. *FDA*, 402 F.3d 1249, 1252 (D.C. Cir. 2005) (requirement not to disclose trade secrets); *Palay* v. *United States*, 349 F.3d 418, 430-431 (7th Cir. 2003) (requirements for transferring prisoners); *Miles* v. *Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 722 (11th Cir. 2002) (requirement that inspections be performed in certain manner); *Vickers* v. *United States*, 228 F.3d 944, 951-953 (9th Cir. 2000) (requirement to investigate and report misuse of firearms); *Tinkler* v. *United States*, 982 F.2d 1456, 1461, 1464 (10th Cir. 1992) (requirement to respond to pilot's request for weather information); *Collins* v. *United States*, 783 F.2d 1225, 1230-1231 (5th Cir. 1986) (requirement that mine receive certain classification if a particular concentration of flammable gas were detected); see also *Gotha* v. *United States*, 115 F.3d 176, 181 (3d Cir. 1987) (noting that if regulation requiring a stairway were applicable, then discretionary function exception would not apply).

Moreover, decisions of other courts of appeals are consistent with the result reached by the First Circuit in this case. Both the Tenth and Eleventh Circuits have recognized that "[a]n objective, alone, does not equate to a specific, mandatory directive" that would preclude application of the discretionary function exception. *Aragon* v. *United States*, 146 F.3d 819, 826 (10th Cir. 1998); see *OSI, Inc.* v. *United States*, 285 F.3d 947 (11th Cir.

2002) (similar).[2] And, as the First Circuit described (Pet. App. 27a-29a), multiple circuits have held that the discretionary function exception shields the government from liability for injuries sustained as a result of hazards and contaminants resulting from military activities. See *Loughlin* v. *United States*, 393 F.3d 155, 158-159, 162-166 (D.C. Cir. 2004) (applying discretionary function exception to claims by landowners arising out of the military's burial of hazardous chemicals and munitions); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 992-999 (9th Cir. 1987) (applying discretionary function exception to claims of injury arising out of military nuclear testing program), cert. denied, 485 U.S. 905 (1988).

2. Petitioners contend that this Court should grant certiorari to decide whether a mandatory directive must itself be part of a scheme that provides a damages remedy against the United States before the directive can serve as a basis for overcoming the FTCA's discretionary function exception. Pet. i. Petitioners are correct that the discretionary function exception imposes no such categorical requirement, and insofar as the court of appeals believed otherwise, it was mistaken. The court of appeals' analysis, however, was focused on the Clean Water Act and its particular regulatory scheme, including the specific measures for its enforcement. Pet. App. 13a-18a. The court did not purport to announce a categorical rule regarding all mandatory directives.

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[2] The decision in *OSI, Inc.* notes that the Ninth Circuit previously had summarily affirmed a district-court decision that reached a contrary conclusion, but further observes that the reasoning of that decision pre-dated this Court's decisions in both *Berkovitz* and *Gaubert*. See 285 F.3d at 951-952 & n.4.

With respect to the Clean Water Act in particular, we agree that the mere absence of a damages remedy in that Act is not in itself a bar to overcoming the discretionary function exception to the FTCA's waiver of sovereign immunity. But the absence of a damages remedy, and the broader regulatory framework and enforcement mechanisms a federal statute provides, may be relevant in determining whether the particular provisions of the statute or implementing regulations or other administrative measures (such as a permit) on which an FTCA plaintiff relies impose the sort of specific and mandatory obligations that could, through the operation of the discretionary function exception, subject the United States to liability in tort for a violation. Here, the permits on which petitioners rely do not do so.

For the reasons discussed above (see pp. 8-12, *supra*), any error by the court of appeals in its analysis does not undermine the correctness of its judgment affirming the dismissal of petitioners' claims on discretionary-function-exception grounds. And because this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), review by this Court is not warranted. See *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (stating that this Court sits "to correct wrong judgments, not to revise opinions"); see also *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (noting that Article III standing requirements prohibit courts from "decid[ing] questions that cannot affect the rights of litigants in the case before them").

The prospective significance of the court of appeals' reasoning in this case is far from clear and is likely to be limited. The government is aware of only two cases in which the First Circuit has relied on this particular rationale concerning the availability of a damages reme-

dy: this case and another Vieques case, *Abreu* v. *United States*, 468 F.3d 20 (2006). The First Circuit moreover has its own precedent, materially identical to the circuit decisions cited by petitioners (Pet. 24-26), that implicitly accepts the proposition that a mandatory directive can preclude application of the discretionary function exception, even if the directive itself does not provide a basis for a non-FTCA damages claim against the United States. See *Irving* v. *United States*, 909 F.2d 598, 605 (1st Cir. 1990) (remanding for determination of how much discretion federal employees had in light of a policy promulgated by the Occupational Health and Safety Administration). Any reconciliation of conflicting precedent is properly the job of the court of appeals in the first instance. See *Wisniewski* v. *United States*, 353 U.S. 901-902 (1957) (per curiam).

In the six years since *Abreu* was decided, no other federal court of appeals has cited it for the proposition that the absence of a damages remedy in a federal statute that allegedly supplies a specific directive for purposes of the discretionary function exception in itself defeats liability under the FTCA. Nor has the government advocated that approach in other cases.[3]

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[3] The government did not advocate that approach in *Abreu*, in which the First Circuit relied on the absence of a damages remedy under RCRA in rejecting the argument that asserted violations of RCRA rendered the discretionary function exception inapplicable. See p. 5, *supra*. The government did rely on *Abreu*'s rationale in the First Circuit in this case (see Gov't C.A. Br. 13-16, 21-24), but noted that the court "need not address" that particular rationale, "because even under application of the straightforward two-prong discretionary function exception test, [petitioners] did not meet their burden" (*id.* at 24). For the reasons stated in the text, the United States does not take the position here that the absence of a damages remedy under

Particularly because petitioners have identified no other circuit that has either squarely addressed or specifically discussed the question presented, review of the question would be premature at this point. See, *e.g.*, *Vasquez* v. *United States*, 454 U.S. 975, 976 (1981) (Stevens, J., respecting the denial of certiorari) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts."). At the very least, plenary review should await a case in which the issue is outcome-determinative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the Clean Water Act in itself forecloses petitioners' suit under the discretionary function exception.