No. 00-1246

In the Supreme Court of the United States

DANIEL REED, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), protects the Bureau of Land Management's decision to issue a permit for an outdoor festival, the terms of that permit, and the decision not to suspend the festival.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 231 F.3d 501. The opinion of the district court (Pet. App. 17-34) is reported at 29 F. Supp. 2d 1121.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2000. The petition for a writ of certiorari was filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of the Department of the Interior has broad authority, through the Bureau of Land Management (BLM), to manage the public lands. 43 U.S.C. 1201, 1701, 1731. Congress has stated that "the public lands [should] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values[,] * * * preserve and protect certain public lands in their natural condition [, and] * * * provide for outdoor recreation and human occupancy and use." 43 U.S.C. 1701(a)(8). To carry out that objective, the Secretary has promulgated regulations governing, among other things, recreational use of lands administered by BLM. 43 C.F.R. Subpt. 8372.

Special recreation permits are required for various commercial and other uses of lands and waters administered by BLM. 43 C.F.R. 8372.1-1; see also 43 C.F.R. 8372.0-5(a) (defining "commercial use"). The Secretary has issued specific regulations to govern the issuance of "special recreation permits other than on developed recreation sites." 43 C.F.R. Subpt. 8372 (capitalization omitted). The regulations define "[d]eveloped sites and areas" to mean "sites and areas that contain structures or capital improvements primarily used by the public for recreation purposes." 43 C.F.R. 8360.0-5(c). Developed sites often include such features as "delineated spaces for parking, camping or boat launching; sanitary facilities; potable water; grills or fire rings; tables; or controlled access." *Ibid.* Sites that remain in their natural condition, in contrast, are not considered developed sites. On such undeveloped sites, the "approval of an application and subsequent issuance of a

special recreation permit is *discretionary* with the authorized [BLM] officer." 43 C.F.R. 8372.3 (emphasis added). The regulations vest the relevant agency official with discretion to include in such a recreation permit "such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R. 8372.5(b).

2. Each year from 1992 to 1996, the promoters of the Burning Man Festival, a multi-day performance arts event at which "people gather to erect and burn a large human effigy as dedication to the earth's fertility," Pet. App. 3, obtained a special recreation permit from BLM to hold the festival at the Black Rock Desert playa in Nevada. The playa is federally owned and managed by BLM. *Ibid*. It is an "extremely remote area which consists of little more than vast stretches of sun-hardened silt" (*id*. at 18). As such, the playa is not a "developed site" within the meaning of BLM regulations. 43 C.F.R. 8360.0-5(c).

In applying for a special recreation permit in 1996, the organizers of the event, in accordance with 43 C.F.R. 8372.2, submitted a "site plan" that specified the intended physical plan for the festival. Pet. App. 9. After a comment period and the issuance of an Environmental Assessment in compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, BLM deemed the plan adequate and issued a permit that contained a number of stipulations. Pet. App. 8-9. Among the stipulations were the requirements that Burning Man obtain insurance and issue various safety warnings to festival participants.

Petitioner attended the 1996 Burning Man Festival, where he camped in a tent. Pet. App. 5. Early on the morning of the final day of the event, another festival

attendee drove his car over petitioner's tent. *Ibid.* Petitioner suffered serious injuries and was left permanently disabled. *Ibid.*

3. Petitioner, through his conservator, filed suit in federal district court against, among others, various organizers and affiliates of the Burning Man Festival, a rental car company, various municipalities and municipal officials, and the Department of the Interior, Bureau of Land Management. Pet. App. 1. Petitioner asserted claims against the federal defendants under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680.[1]

The United States moved for summary judgment, asserting that petitioner's claims are barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), and the district court granted the motion. Pet. App. 17-34. The court held that all of petitioner's claims, including those arising out of BLM's issuance of the permit, its decision not to suspend the permit, and its alleged failure to warn campers of dangers, sought to second-guess conduct that "involved an element of judgment or choice * * * of the kind that the discretionary function exception was designed to shield." *Id.* at 21.

3. The court of appeals affirmed. The court followed the two-part test that this Court outlined in *Berkovitz* v. *United States*, 486 U.S. 531, 536-537 (1988), for

[1] Although petitioner's complaint named as a defendant the Department of Interior, Bureau of Land Management, the proper federal defendant in an FTCA suit is the United States. See 28 U.S.C. 2679; Pet. App. 17 n.1.

determining whether the discretionary function exception applied:

> First, a court must determine whether the challenged action involves an element of choice or judgment. If it does, then secondly, the court must decide 'whether that judgment is of the kind that the discretionary function exception was designed to shield,' which 'protects only governmental actions and decisions based on considerations of public policy.'

Pet. App. 7 (quoting *Berkovitz*, 486 U.S. at 536-537) (citation omitted).

With respect to petitioner's claims arising out of the issuance of the permit—including claims for failure to warn (or requiring the event organizers to warn) of certain hazards and negligent approval of the festival's site plan—the court concluded that "the first prong of the discretionary function test clearly is met" because "BLM was granted discretion to determine whether to issue the permit or not and, if issued, to decide the restrictions to be applied." Pet. App. 7. And the second component of the discretionary function test was satisfied because in approving the site plan BLM "balanced competing public policy concerns, including concerns about public access, safety, resource allocation, and the environment." *Id.* at 8.

The court also concluded that the discretionary function exception barred petitioner's claim arising out of BLM's decision not to suspend the permit. Petitioner had conceded that the decision to suspend involved "choice," and the court concluded that the decision "would necessarily include a discretionary balancing of policy considerations." Pet. App. 13-14.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The FTCA is a limited waiver of sovereign immunity for certain tort actions against the United States. See 28 U.S.C. 1346(b) (1994 & Supp. IV 1998); 28 U.S.C. 2674. A principal limitation on that waiver of immunity is the discretionary function exception, which immunizes the United States from tort liability for discretionary policy choices made by its employees. Under that exception, courts may not hold the United States liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

An action is protected by the exception if (1) "it involves an element of judgment or choice," and (2) the judgment "is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step of the inquiry focuses "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); see also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial 'second-guessing'" of decisions "grounded in social, economic, and political

policy"). Petitioner attempts to denigrate this explication of governing law by characterizing it as "dictum." Pet. 11. But this Court's holdings in *Gaubert* and the discretionary function cases that preceded it make clear that determining whether the challenged governmental conduct is "susceptible to policy analysis" is central to the discretionary function inquiry. See 499 U.S. at 325, 331; *Berkovitz*, 486 U.S. at 537; *Varig Airlines*, 467 U.S. at 813. There is no compelling reason for this Court to accept petitionter's invitation (Pet. 10-16) to overrule this precedent, particularly because the discretionary function exception is an issue of statutory interpretation that Congress is always "free to alter." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

2. The court of appeals correctly applied the discretionary function test in holding that petitioner's claims against the United States are barred.

a. Petitioner first argues (Pet. 16-19) that the discretionary function exception did not protect "[m]andatory duties under regulation and the BLM Manual" to suspend the permit. Petitioner bases this claim (Pet. 7-8, 16) on 43 C.F.R. 2920.9-3(b)(1), which provides that upon "determination that there is noncompliance with the terms and conditions of a land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer shall issue an immediate temporary suspension." But petitioner did not establish in the courts below that this regulation governed the Burning Man Festival permit, and thus it would not be appropriate for this Court to review his claim based on that regulation.[2]

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[2] The regulation that petitioner relies on is a general, default provision for "leases, permits, and easements." 43 C.F.R. Subpt.

In any event, as the court of appeals explained, BLM retains discretion even assuming 43 C.F.R. 2920.9-3(b)(1) applies. Pet. App. 13 n.8. That is because a condition precedent to the suspension—a finding that the violation "adversely affects the public health, safety or welfare or the environment" (43 C.F.R. 2920.9-3(b)(1)—necessarily "involves an element of judgment or choice," *Berkovitz*, 486 U.S. at 536. Indeed, petitioner conceded in the court of appeals that the suspension decision under this regulation involves discretion because "the determination as to whether a violation affects public health or safety implies choice." Pet. App. 13.

Thus, the only contested issue is whether that discretion implicates public policy considerations. As the court of appeals explained, the factors that the regu-

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2920 (capitalization omitted). But a prospective permittee who seeks to engage in certain commercial activities on non-developed public land must obtain a "special recreation permit" pursuant to 43 C.F.R. Subpart 8372. Petitioner did not dispute below that the organizers of the Burning Man Festival were required to, and did, obtain this special recreation permit. See, *e.g.*, Appellant Br. 40. And, as noted above, the Black Rock Desert playa is not a developed site. See 43 C.F.R. 8360.0-5(c); see also Pet. 3 (describing the playa as "one of the most desolate * * * places on Earth"). Section 8372.5(a)(1) specifically addresses and therefore governs suspension of "special recreation permits" for non-developed lands. That regulation is permissive: "The authorized officer *may* suspend a special recreation permit if necessary to protect public health, public safety, or the environment." 43 C.F.R. 8372.5(a)(1) (emphasis added); see also Pet. App. 24-25.

The district court held that Section 8372.5(a)(1) was the applicable regulation because the Burning Man Festival permit was a special recreation permit for non-developed land. Pet. App. 24-25. The court of appeals did not decide which regulation applied because it found that the discretionary function exception applied even to the regulation that the petitioner invokes. *Id.* at 13 & n.8.

lation directs BLM to consider—public health, safety, and the environment (43 C.F.R. 2920.9-3(b)(1))—"clearly involve public policy." Pet. App. 25; see also *id.* at 14.

Contrary to petitioner's contention, the decision in this case does not conflict with *Myers* v. *United States*, 17 F.3d 890 (6th Cir. 1994). *Myers* involved government inspections for mine safety under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* In *Myers*, the government failed to "demonstrate that any consideration of 'political, social or economic policy' by MSHA inspectors is, in fact, authorized by the regulatory scheme." 17 F.3d at 897; see also *id.* at 898 ("Considerations of 'political, social or economic policy' are not *authorized* to play a part in these assessments."). The mining regulations in that case were framed in expressly mandatory terms: "*if* a 'violation' is found, * * * *then* inspectors *must* issue a withdrawal order." See, *e.g.*, *id.* at 895 ("*[I]f* two 'unwarrantable failure violations' are found within 90 days, *then* inspectors *must* issue a withdrawal order."). The court thus concluded that the "MSHA inspectors * * * are *not authorized* to reweigh [policy] interests on a case- by-case basis. Rather, they are to determine compliance and, in the event of non-compliance, issue the mandatory citations and orders." *Id.* at 898. In contrast, 43 C.F.R. 2920.9-3(b)(1) vests discretion in BLM officials to weigh public policy concerns. The regulation provides that after determining non-compliance, BLM officials must weigh public health, safety, and environmental concerns in determining whether to suspend a permit. *Ibid.* Because the regulatory scheme in this case expressly authorizes BLM officials to consider public policy issues, the decision in this case does not conflict with *Myers*.

b. Petitioner also argues (Pet. 19-25) that the discretionary function exception does not protect BLM's failure to warn, or to specify in the permit what warnings the permittee should issue, about the dangers of camping at the Burning Man Festival. The courts below correctly found, however, that BLM's decision to delegate safety responsibility to the permit holder falls within the discretionary function exception.

BLM has the regulatory authority to include in a permit "such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R. 8372.5(b). BLM exercised this discretion when it included in the 1996 Burning Man Festival permit a stipulation in which the organizers agreed "to assume responsibility for public safety and health during any phase of the event, including, but not limited to * * * all acts of safety associated with the event." Pet. App. 29. As the court of appeals explained, BLM decided on the terms of the permit— including the decision to delegate safety responsibility to the event organizers—after seeking comments about the permit application, reviewing those comments, and then issuing an Environmental Assessment in compliance with NEPA. *Id.* at 8-9. Throughout this process, BLM weighed a number of factors, including resource allocation, cooperative efforts with local law enforcement, the Burning Man Festival's prior compliance with BLM licensing requirements (*id.* at 9-10), First Amendment concerns about abridging rights of expression and association (*id.* at 10), and the BLM's goal of providing "as many recreational opportunities as possible * * * without undue environmental degradation" (*id.* at 9). The discretionary function

exception protects this type of thorough, policy-based decisionmaking.

Petitioner contends that the court of appeals' treatment of the failure to warn claim in this case conflicts with two decisions of the Tenth Circuit. Pet. 20-25 (citing *Duke* v. *Department of Agric.*, 131 F.3d 1407 (10th Cir. 1997); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989)). Neither of those cases, however, involved a BLM permit in which the agency had deliberately delegated responsibility to the permit holder for the safety concerns created by the grant of the permit. Rather, the plaintiffs in those cases challenged the government's failure to do anything about alleged permanent hazards. And in both of those cases the government did not identify specific policy concerns that influenced the government inaction. In *Boyd*, the court concluded that the Army Corps of Engineers' "failure to warn swimmers of dangerous conditions in [a] popular swimming area did not implicate any social, economic, or political policy judgments with which [the] discretionary function exception [is] properly concerned." 881 F.2d at 895. Likewise, in *Duke*, which involved a claim of failure to warn of falling boulders, the court held that the discretionary function exception did not apply because "[a]t this stage the government has not shown how failure to warn or protect from the danger of a boulder rolling down the man-made slope implicated 'political, social, or economic decisions of the sort that the exception was designed to protect.'" 131 F.3d at 1412 (quoting *Cope* v. *Scott*, 45 F.3d 445, 452 (D.C. Cir. 1995)). The court's "review of the record reveal[ed] no evidence by the government of any social or political justification"; instead, the government had "simply relie[d] on the presumption that there was some policy reason for the failure to do anything at the

site." *Ibid.* Neither *Duke* nor *Boyd* involved an application for a special use that created attendant safety concerns. The government's decision to weigh policy considerations and require the permit applicant to address the specific safety concerns created by the proposed use is quite different from an unexplained failure to address a longstanding potential safety hazard. Therefore, there is no indication that this case, which involved deliberate agency action to delegate responsibility for specific, temporary safety concerns in a remote area based on extended consideration of public policy goals, would have been decided any differently in the Tenth Circuit.[3]

c. Petitioner also contends (Pet. 25-29) that the discretionary function exception does not apply to BLM's decision to approve a site plan that did not mandate separate areas for cars and campers. However, the regulations make clear that a decision to approve a site

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[3] Petitioner also contends that the decision below conflicts with earlier decisions in the Ninth Circuit. Pet. 23-25 (citing *McMurray* v. *United States*, 918 F.2d 834 (9th Cir. 1990); *Faber* v. *United States*, 56 F.3d 1122 (9th Cir. 1995)). But those cases, like the Tenth Circuit cases, did not involve an agency decision to issue a permit and delegate safety responsibility in a remote area to the permit holder. Rather, as the court below explained, those cases involved "allegations of isolated instances of negligence that were not policy-based." Pet. App. 14 (citing *Faber*, 56 F.3d at 1127; *Routh* v. *United States*, 941 F.2d 853, 857 (9th Cir. 1991)). Indeed, *Faber* recognized that the discretionary function exception would apply in failure to warn cases when the "government was required to engage in broad, policy-making activities * * * in the course of making judgments related to safety." 56 F.3d at 1125. As discussed above, BLM did just that in this case. In any event, any inconsistency in intracircuit decisions would be a matter for the court of appeals, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

plan is discretionary: "The approval of an application and subsequent issuance of a special recreation permit is *discretionary* with the authorized officer." 43 C.F.R. 8372.3 (emphasis added). Thus, the court of appeals properly concluded that "[t]here was one discretionary license issued for this event, and what its terms were and how those terms might be enforced were all discretionary." Pet. App. 11. Moreover, for the reasons discussed above, the court held that such decisions required BLM to balance "competing public policy concerns, including concerns about public access, safety, resource allocation, and the environment." *Id.* at 8.

Contrary to petitioner's suggestion, the decision below does not conflict with the Third Circuit's decision in *Gotha* v. *United States*, 115 F.3d 176 (1997). The *Gotha* court concluded that the Navy's failure to build a stairway with handrails along an unlit, steep access path was not protected by the exception because the challenged actions were "not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Id.* at 181-182 (quoting *Gaubert*, 499 U.S. at 325). Here, by contrast, the regulatory regime recognizes that the permit-granting process is discretionary and expressly grants discretion to BLM officers. In exercising this discretion, BLM weighed the views of interested parties about "safety, morality, and the environmental impact of the event" (Pet. App. 8) and conferred with local authorities about safety and other law enforcement measures (*id.* at 10). Plainly, the decisions challenged in this case involved the balancing of important policies, and therefore are protected by the discretionary function exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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