No. 06-1282

In the Supreme Court of the United States

EDDIE TYRONE CRANFORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Suits in Admiralty Act's waiver of sovereign immunity bars petitioners' tort action against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 466 F.3d 955. The opinion of the district court (Pet. App. 13-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. A petition for rehearing was denied on December 21, 2006 (Pet. App. 28-29). The petition for a writ of certiorari was filed on March 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Suits in Admiralty Act (SAA), 46 U.S.C. 30901 *et seq.*, waives the federal government's sovereign immunity from maritime tort actions that do not involve

public vessels. See 46 U.S.C. 30903. The Public Vessels Act (PVA), 46 U.S.C. 31101 *et seq.*, similarly waives the federal government's sovereign immunity from admiralty claims involving public vessels. See 46 U.S.C. 31102.[1] Both waivers of sovereign immunity, however, are subject to an exception for acts involving discretionary functions, along the lines of the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a). See, *e.g.*, *Mid-South Holding Co.* v. *United States*, 225 F.3d 1201, 1204 (11th Cir. 2000); *United States Fire Ins. Co.* v. *United States*, 806 F.2d 1529, 1534-1535 (11th Cir. 1986).[2] The discretionary

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[1] On October 6, 2006, the SAA and PVA were recodified with minor modifications not relevant to this case. See Act of Oct. 6, 2006, Pub. L. No. 109-304, § 6, 120 Stat. 1509.

[2] In addition to the court below, ten other courts of appeals also have held that cases brought under the SAA are subject to an implied discretionary function exception. See *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *In re Joint E.&S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991); *McMellon* v. *United States*, 387 F.3d 329, 349 (4th Cir. 2004), cert. denied, 544 U.S. 974 (2005); *Wiggins* v. *United States*, 799 F.2d 962, 966 (5th Cir. 1986); *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996); *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989) (citing *Chotin Transp., Inc.* v. *United States*, 819 F.2d 1342, 1347 (6th Cir.) (en banc), cert. denied, 484 U.S. 953 (1987)); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996). Two other courts of appeals have held that the discretionary function exception applies to the PVA. See *Thames Shipyard & Repair Co.* v. *United States*, 350 F.3d 247, 254 (1st Cir. 2003); *B&F Trawlers, Inc.* v. *United States*, 841 F.2d 626, 630 (5th Cir. 1988).

function exception to the FTCA provides, in relevant part, that the government retains immunity from suits "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).

A two-part inquiry guides courts' application of the discretionary function exception. See *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991). A court must first examine the alleged tortious act to determine whether it was "discretionary in nature"—that is, whether it involved "an element of judgment or choice." *Id.* at 322 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). That element of judgment or choice is not involved where an employee disobeys a "federal statute, regulation, or policy" that "'specifically prescribes a course of action for [the] employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Ibid.* (quoting *Berkovitz*, 486 U.S. at 536); see *id.* at 324 ("If the employee violates [a] mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.").

If it is determined that "the challenged conduct involves an element of judgment," *Berkovitz*, 486 U.S. at 536, the discretionary function exception applies so long as the judgment was "of the kind that the discretionary function exception was designed to shield," *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz*, 486 U.S. at 536). And the exception is designed to shield judgments involving policy; stated differently, it is intended 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." *Id.* at 323 (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)). "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines," allows a government employee "to exercise discretion, it must be presumed" that the employee's actions are "grounded in policy when exercising that discretion." *Id.* at 324.

In this second stage of the analysis, "[t]he 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." *Gaubert*, 499 U.S. at 325 (emphasis added). Further, the discretionary function exception protects discretionary decisions of government employees whether at the "policy or planning level" or the "operational" level. *Ibid.*

2. On August 9, 2003, a motor boat carrying Eddie Cranford, Ronald Melech, and Howard Melech struck a submerged vessel in Mobile Bay, near Fort Morgan beach in Alabama. Pet. App. 2, 16-17. Eddie Cranford and Howard Melech were injured in the allision with the submerged wreck (Fort Morgan wreck), and Ronald Melech died. *Id.* at 2, 17.

The Fort Morgan wreck is charted as a dangerous wreck on National Oceanic and Atmospheric Administration charts. Gov't C.A. Br. 4-5; 04-0561-CB-M Docket entry No. 23, Attchs. 7-9 (S.D. Ala. June 7, 2005). The Fort Morgan wreck was first marked by the Coast Guard in 1992 with a temporary lighted buoy. Pet. App. 3. In 1996, the Coast Guard replaced the temporary buoy with a "telephone-pole-type piling" placed approximately 164 feet north-northwest of the portion of the

wreck closest to the surface. *Id.* at 3, 17. The piling was marked with two unlighted orange and white signs that bore the words "Danger Wreck." *Id.* at 3, 18.

On August 5, 2003, four days before the accident in question, the Coast Guard again modified the marker to improve the identification of the Fort Morgan wreck. It replaced the unlighted signs on the piling with a flashing red light and a six-foot-wide red triangle marked with the letters "WR2." Pet. App. 3, 17-18. One of the reasons for the change in the markings was to provide a "'lateral' aid" that would inform the mariner on which side the hazard lay. Gov't C.A. Br. 6. The red triangle indicated that the mariner should leave the mark to his right (starboard) upon returning from the Gulf of Mexico, following the "red right returning" rule. *Ibid.*; see 33 C.F.R. 62.25(b)(2), 62.21(d). The Coast Guard considered moving the piling, but declined to do so. It feared that moving the piling closer would encourage passing vessels, including the ferry from Dauphin Island, to run too close to the wreck. Gov't C.A. Br. 6; 04-0561-CB-M Docket entry No. 23, Attch. 6, at 3-4 (S.D. Ala. June 7, 2005).

3. Petitioners filed suit against the government under the SAA and the PVA, alleging that the Coast Guard acted negligently in marking the Fort Morgan wreck and in failing to remove the wreck. Pet. App. 3. The district court dismissed the claims on the ground that the conduct challenged by petitioners involves discretionary governmental functions over which the United States has not waived its sovereign immunity. *Id.* at 18-27.

4. The court of appeals affirmed. Pet. App. 1-12. Following the analysis in *Gaubert*, *supra*, the court first concluded that the Coast Guard's decisions concerning

how to mark the wreck "involved elements of judgment or choice" and therefore satisfied the first part of the discretionary function inquiry. *Id.* at 8. The court noted that the Coast Guard's statutory authority, regulations, and internal guidance all conferred broad discretion to mark wrecks as it saw fit. *Ibid.* (citing 14 U.S.C. 86; 33 C.F.R. 64.33(a); U.S. Coast Guard, *Aids to Navigation Manual—Administration* (1981) (*ATON Manual*)).

The court next held that the Coast Guard's decisions concerning whether or how to mark a submerged wreck satisfied the second part of the discretionary function analysis, because they were "susceptible to policy analysis" and "grounded in the policy of the regulatory regime." Pet. App. 9 (quoting *Gaubert*, 499 U.S. at 325). The court stated that "decisions in marking a wreck involve social, political, and economic policy considerations, such as taking into account the knowledge and customs of international mariners, balancing the needs of pleasure and commercial watercraft, and evaluating agency resource constraints, which include but are not limited to financial concerns." *Ibid.* The court rejected petitioners' argument that marking a wreck involved "merely the application of professional standards," *ibid*, noting that the decision was unlike "certain decisions resting on mathematical calculations, for example, [that] involve no choice or judgment in carrying out the calculations." *Ibid.* (quoting *Gaubert*, 499 U.S. at 331.[3]

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[3] The court of appeals further held that the government's failure to remove the wreck likewise was protected by the discretionary function exception. It concluded that a provision of the Rivers and Harbors Appropriation Act of 1899 invoked by plaintiffs, 33 U.S.C. 409, did not require removal by the government of the wreck in question. Pet. App. 11-12. In the absence of a statute requiring the wreck's removal, the court found that the determination whether or not to remove it was

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or other courts of appeals. The court of appeals correctly applied established law articulated by this Court; its fact-bound conclusion does not warrant further review.

1. The court of appeals correctly concluded that petitioners' claim against the Coast Guard for "negligently failing to adequately mark, warn of and/or guard against a known underwater hazard and an obstruction to navigation," 04-0561-CB-M Docket entry No. 1, at 1-2 (S.D. Ala. Aug. 25, 2004), falls within the scope of the discretionary function exception. 28 U.S.C. 2680(a).

a. Petitioners do not appear to challenge the court of appeals' conclusion that no "federal statute, regulation, or policy specifically prescribes a course of action" for the Coast Guard to follow with respect to marking wrecks. *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The Coast Guard's actions in that regard are "discretionary act[s] * * * that involve[] choice or judgment." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991).

Congress expressly granted the Coast Guard (through the Secretary of Homeland Security) broad discretion to determine when and how to mark submerged vessels and other obstructions. The relevant statute provides: "The Secretary *may* mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters above the continental shelf of the United States *in such man-*

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discretionary and implicated public policy concerns. *Id.* at 12. Petitioners do not appear to seek review of that aspect of the court of appeals' decision.

ner and for so long as, in his judgment, the needs of maritime navigation require." 14 U.S.C. 86 (emphasis added). See 14 U.S.C. 81 (stating that Coast Guard "*may* establish, maintain, and operate * * * aids to maritime navigation *required to serve the needs of the armed forces or of the commerce of the United States*") (emphasis added). Similarly, under its own regulations, the Coast Guard "*may* mark for the protection of maritime navigation any structure, sunken vessel or other obstruction that is not suitably marked by the owner." 33 C.F.R. 64.33(a) (emphasis added).[4]

b. Petitioners' challenge to the court of appeals' application of the second part of the discretionary function analysis—whether the determinations at issue are "susceptible to policy analysis," or "grounded in the policy of the regulatory regime," *Gaubert*, 499 U.S. at 325—is without foundation.

"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." *Gaubert*, 499 U.S. at 324. In this case, the governing statutes and reg-

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[4] The *ATON Manual* sets forth more particular guidance for marking wrecks. See No. 04-0561-CB-M Docket entry No. 30, Exh. 18 (S.D. Ala. July 12, 2005). As the court of appeals emphasized, however, the Manual expressly provides that "the Coast Guard retains the discretion to deviate or authorize deviation from" the Manual's requirements. Pet. App. 8 (quoting *ATON Manual* 1-1). In any event, as the district court recognized, *id.* at 23, the Coast Guard complied with the relevant specifications. Thus, even if they could be described as mandatory directives, the provisions of the Manual do not support a claim against the United States. See *Gaubert*, 499 U.S. at 324 ("[I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected.").

ulations expressly set forth the policies that the Coast Guard considers when deciding whether or how to mark a wreck or otherwise establish an aid to maritime navigation. See *Sloan* v. *United States Dep't Hous. & Urban Dev.*, 236 F.3d 756, 761 (D.C. Cir. 2001) (noting that "it is hardly necessary to rely on * * * a presumption" that choice is policy-based when the relevant "regulations place public policy at the forefront of the decision").[5] The Coast Guard may mark wrecks "in such manner and for so long as, in [its] judgment, *the needs of maritime navigation require*." 14 U.S.C. 86 (emphasis added). Aids to maritime navigation generally should be maintained in view of "the needs of the armed forces or of the commerce of the United States." 14 U.S.C. 81(1). And "[t]he aids to navigation system is not intended to identify every * * * obstruction to navigation * * * , but rather provides for reasonable marking of marine features as resources permit." 33 C.F.R. 62.1(c).

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

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[5] Petitioners' argument (Pet. 15) that the court of appeals "has made that presumption irrebuttable" is therefore beside the point because the presumption need not be invoked in this case.

Guard's decisions concerning whether and when to service [a] buoy * * * were policy-based").

Petitioners argue (Pet. 6-7) that the decisionmakers here did not, in fact, consider matters of policy in marking the wreck. That argument bears little weight because "[t]he 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." *Gaubert*, 499 U.S. at 325. To the extent, however, that "[e]vidence of the actual decision may be helpful in understanding whether the 'nature' of the decision implicated policy judgments," *Cope* v. *Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995), that evidence supports the Coast Guard.

The record makes clear that Coast Guard officers weighed policy considerations in determining to modify the wreck marker in 2003, and in deciding what form that modification should take. The beacon marking the Fort Morgan wreck was changed on August 5, 2003, "in order to better mark the wreck following a report of a vessel striking the wreck in 2002." 04-0561-CB-M Docket entry No. 23, Attch. 6, at 3 (S.D. Ala. June 7, 2005). The commanding officer determined that because the Fort Morgan wreck was not near a commercially navigable channel, "it wasn't that much of a hazard to navigation." *Id.* No. 23, Attch. 15, at 26. He recommended in favor of changing the signage on the wreck marker to add a flashing light and provide a lateral aid, in accordance with Coast Guard policies. *Id*. No. 23, Attch. 15, at 70, 78; see 33 C.F.R. 62.25. He did not, however, recommend adding a second marker to the Fort Morgan wreck, because he did not "want to establish a preceden[t] where the Coast Guard was * * *

going to place an inordinate amount of aids to navigation on wrecks * * * whose hazard was questionable." 04-0561-CB-M Docket entry No. 23, Attch. 15, at 71 (June 7, 2005); see *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984) (discretionary function exception applies to decisions that "require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding"). The Coast Guard decided not to move the marker out of a concern that if placed any closer to the wreck, the marker risked drawing the Fort Morgan ferry dangerously close to the wreck. 04-0561-CB-M Docket entry No. 23, Attch. 6, at 3-4 (S.D. Ala. June 7, 2005); *id.* No. 23, Attch. 13, at 24, 41-43. Such judgments, based upon balancing concerns for the safety of the local passenger ferry with the needs of smaller vessels traversing the area, clearly are policy-based.

2. As the above discussion indicates, the question whether the discretionary function exception applies to a particular case is highly fact-specific and depends on the particulars of the statutory and regulatory scheme and the decision at issue. None of this Court's decisions or the decisions of other courts of appeals that petitioners cite creates a conflict with the Eleventh Circuit's fact-specific judgment in this case.

Contrary to petitioners' argument (Pet. 13 n.2, 24-25), there is no general limitation upon the discretionary function exception for matters of safety. Several of the cases that petitioners cite acknowledge this explicitly. *E.g.*, *Whisnant* v. *United States*, 400 F.3d, 1177, 1182 n.3 (9th Cir. 2005) (no liability when, *e.g.*, "government officials must consider competing fire-fighter safety and

public safety considerations in deciding how to fight a forest fire, * * * [or] balance prison safety and inmate privacy considerations in deciding how to search a prisoner's cell in response to a reported threat of violence"); *Shansky* v. *United States*, 164 F.3d 688, 693 (1st Cir. 1999) ("[T]here is no principled basis for superimposing a generalized 'safety exception' upon the discretionary function defense."); *Ayala* v. *United States*, 980 F.2d 1342, 1350 n.4 (10th Cir. 1992) (noting that safety standards "are themselves policy judgments concerning trade-offs between safety, effectiveness, and economy"). That is so because "safety" is often one competing policy consideration that an agency must weigh alongside others or is a more complicated risk-benefit calculation that involves the competing interests of multiple parties.

In those cases in which a court has found the discretionary function exception inapplicable to a safety-related decision, the court also has found that there was effectively no countervailing policy interest that could justify a failure properly or adequately to take the safety measure. See *Whisnant*, 400 F.3d at 1184 (finding that decision not to remove mold from Navy commissary did not involve "allocation of limited resources among competing safety-promoting tasks") (emphasis omitted); *Cope*, 45 F.3d at 451-452 (holding aesthetics not to be countervailing policy consideration when "Park Service has chosen to manage the road in a manner more amenable to commuting through nature than communing with it"); *Myers* v. *United States*, 17 F.3d 890, 897-898 (6th Cir. 1994) (finding no balancing of policy choices implicated by claim that MSHA inspectors "should have found, but failed to find, the existence of certain safety violations") (emphasis omitted); *Andrulonis* v. *United States*, 952 F.2d 652, 655 (2d Cir. 1991)

(finding "neither a regulatory framework nor a defined policy that could serve as the basis for infusing all decisions of CDC employees with policy implications"); *Cestonaro* v. *United States*, 211 F.3d 749, 755-756 (3d Cir. 2000) (concluding that government could articulate no policy rationale for adding some safety measures but not others).[6] In this case, by contrast, the competing policies at issue are indicated on the face of the relevant statutes and regulations. See pp. 10-11, *supra.*

It is certainly relevant whether the government decision reflects the application of "technical safety assessments" or "objective professional standards." Pet. 8; see, *e.g.*, *Berkovitz*, 486 U.S. at 544-545; *Ayala*, 980 F.2d at 1349 (finding mine safety inspector's "technical assistance" concerning "where to connect * * * lights" on automatic mining machine "was governed solely by technical considerations"). Petitioners' assertion (Pet. 8-9) that the presence or absence of such considerations controls the analysis, however, is incorrect. In petitioners' view, decisions about maritime safety warnings would never be discretionary because they would always turn on the mere application of technical judgment. But in other failure-to-warn cases, the courts of appeals have not adopted that categorical approach, and have instead employed a case-by-case approach under which the results vary, even within the same circuit, depending on the particular circumstances of each case. Compare, *e.g.*, *Cope*, 45 F.3d at 451-452 (finding that where 23 traffic warning signs were already posted, failure to warn of slippery road conditions was not policy-based), with

[6] In *Hurd* v. *United States*, 34 Fed. Appx. 77, 81-85 (4th Cir. 2002), the court of appeals declined to address the applicability of the discretionary function exception even though the district court did so. *Hurd* therefore does not create or deepen a circuit split. See Pet. 22.

Loughlin v. *United States*, 393 F.3d 155, 165-166 (D.C. Cir. 2004) (finding that failure to warn about buried munitions and chemicals required balancing, *inter alia*, safety and national security concerns). See generally *Soldano* v. *United States*, 453 F.3d 1140, 1146-1147 (9th Cir. 2006) (describing varied holdings in Ninth Circuit failure-to-warn cases). Like those courts, the court of appeals in this case eschewed a categorical approach and made a fact-specific determination about the nature of the policy decision whether and how to mark a maritime obstruction. In so doing, the court did not create any conflict among the circuits, and its fact-bound conclusion does not warrant further review.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2007

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[7] Petitioners also argue (Pet. 14-15) that the decision in this case conflicts with *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). *Indian Towing* did not, however, address the scope of the discretionary function exception. *Id.* at 64; see *Gaubert*, 499 U.S. at 326. In any event, the alleged negligence at issue in that case—failure to ensure that a lighthouse was operating properly—differs significantly from the policy-laden judgments concerning maritime markers in this case.