No. 08-894

In the Supreme Court of the United States

DONAL MCLEAN SNYDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a provision of a 1957 Naval manual eliminated government discretion for purposes of the Federal Tort Claim Act's discretionary function exception.

2. Whether there was a sufficient finding that petitioners' claims were susceptible to public policy considerations and therefore properly dismissed under the Federal Tort Claim Act's discretionary function exception.

3. Whether decisions regarding disposal of industrial waste at a military base are susceptible to public policy considerations under the Federal Tort Claim Act's discretionary function exception.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter*, but is reprinted in 296 Fed. Appx. 399. The opinion of the district court (Pet. App. 3a-15a) is reported at 504 F. Supp. 2d 136.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2008 (Pet. App. 16a). The petition for a writ of certiorari was filed on January 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to the enactment in 1946 of the Federal Torts Claims Act (FTCA), 28 U.S.C. 1346(b), there was

no non-maritime judicial remedy for anyone whose injury or death was caused by action or inaction of the United States. See *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953). The FTCA waives the United States' sovereign immunity and renders the United States liable for damages for 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). Congress, however, expressly excluded from that waiver

> [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). If a tort claim comes within that discretionary function exception, the claimant's remedy, if any, lies where it did before 1946—with Congress.

This Court has established a two-part test to determine the applicability of the discretionary function exception. First, the allegedly negligent act or omission must be a matter of discretion. *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991). A government employee's conduct is not discretionary 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 *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)).

Second, if the government employee had discretion, the discretionary function exception then applies if the conduct involved the kind of judgment that the discretionary function exception was designed to shield. *Gaubert*, 499 U.S. at 322-323; *Berkovitz*, 486 U.S. at 536-537. Because Congress intended the discretionary function exception to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy," *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 814 (1984), the exception applies if the nature of the conduct is "susceptible to policy analysis," *Gaubert*, 499 U.S. at 325. Under this inquiry, the focus must be on the "nature of the conduct" and not the "status" of the allegedly negligent government employee or the employee's "subjective intent in exercising the discretion." *Id.* at 322, 325 (citation omitted).

2. Petitioner Donal McLean Snyder, Jr., served in the United States Marine Corps. He and his wife, petitioner Pam Snyder, were stationed at Camp Lejeune, North Carolina, from March through December of 1970. The couple had a son, petitioner Donal McLean Snyder, III (Donal III), in January 1971. The child was diagnosed with a congenital heart defect known as bicuspid aortic valve. In July 1971, petitioners returned to Camp Lejeune and remained there until October 1972. Pet. App. 4a.

In 2004, petitioners filed an action against the United States under the FTCA, alleging that the Camp Lejeune water system had been contaminated with the chemicals trichloroethylene (TCE) and tetrachloroethylene (PCE) because military personnel had used degreasing agents

to clean tanks and weapons on the base. Petitioners claimed that the chemicals were disposed of in barrels and directly onto the ground, and, consequently, the chemicals seeped into the soil and eventually migrated to the underground water supply. Petitioners alleged that Pam Snyder, in consuming Camp Lejeune water, was exposed to those chemicals while she was pregnant with Donal III, and that that exposure caused his heart defect. Petitioners' complaint asserted several tort claims alleging that the United States was negligent in disposing of chemicals and failing to protect Camp Lejeune's water supply. Pet. App. 4a-5a.

3. The district court dismissed petitioners' complaint for lack of subject matter jurisdiction. Pet. App. 3a-15a. Applying the FTCA's two-part discretionary function test, the district court concluded that the exception barred petitioners' action. First, the court concluded that disposal of the chemicals involved government discretion. The court found that there were no specific government provisions regulating TCE and PCE prior to and including the time that petitioners resided at or near Camp Lejeune. *Id.* at 9a-11a.[1] The only provision that petitioners had identified was from a 1957 Naval manual stating that "refuse * * * should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water." *Id.* at 9a (quoting *Bureau of Medicine and Surgery, U.S. Dep't of the Navy, NAVMED P-5010-*

[1] The district court noted that TCE and PCE were not regulated as pollutants under the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq.*, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, or the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*, until well after the time period relevant to this lawsuit. Pet. App. 10a.

8, Manual of Naval Preventive Medicine, Art. 8-15, at 8-5 (June 1957) (*1957 Manual*)). The court noted that the *1957 Manual* did not mention TCE or PCE and failed to "offer any specific guidance regarding how to dispose of refuse, leaving to military personnel the determination of whether a particular disposal location would fall within the meaning of the phrase, 'where it [refuse] may pollute surface or underground waters,'" as used in the provision. *Id.* at 10a (quoting *1957 Manual*, Art. 8-15, at 8-5).

Second, the court found that the alleged negligent conduct was based upon policy considerations, citing factually analogous cases from the Tenth Circuit. Pet. App. 11a-14a (citing *Ross* v. *United States*, 129 Fed. Appx. 449 (10th Cir. 2005), and *Aragon* v. *United States*, 146 F.3d 819 (10th Cir. 1998)). The court noted that in *Ross* and *Aragon* landowners who lived adjacent to military installations claimed that military operations generated TCE contamination, which polluted residential well waters. In each case, the Tenth Circuit affirmed dismissal based upon the FTCA's discretionary function exception. Pet. App. 11a-13a. In particular, the district court quoted the Tenth Circuit's statement in *Aragon* that

> [there is] little doubt * * * the Air Force's actions involved policy choices of the most basic kind . . . . Indeed, the record makes clear the military recognized it needed flexibility to weigh its groundwater protection policies against broader public and military policies; thus it allowed the Air Force to place security and military concerns above any other concerns.

Id. at 13a (quoting *Aragon*, 146 F.3d at 826). The court concluded that these "authorities * * * make it clear that these types of decisions by the military regarding operations at Camp Lejeune were the kinds of government policy choices the discretionary function exception was designed to shield." *Id.* at 14a.

4. In an unpublished decision, the court of appeals affirmed. Pet. App. 1a-2a. Finding that the district judge had "entered a thorough and thoughtful opinion," the court affirmed "[e]ssentially for the reasons stated by the district court." *Id.* at 1a.

ARGUMENT

The unpublished decision of the court of appeals does not warrant further review. The district court correctly applied the two-part test established by this Court for determining the applicability of the Federal Torts Claims Act's discretionary function exception, and the court of appeals correctly affirmed that decision. The court of appeals' non-precedential decision neither conflicts with any decision of this Court or of any other court of appeals, nor presents any issue of general importance warranting further review.

1. Although petitioners assert (Pet. 5-6) that this case implicates circuit conflicts on two issues, the court of appeals' decision was not predicated on either of those issues. The asserted conflicts, accordingly, provide no basis for reviewing the court of appeals' decision.

a. Petitioners contend (Pet. 5) that this Court's review is warranted because there is an intercircuit conflict regarding whether the FTCA's discretionary function exception is a jurisdictional prerequisite. But the court of appeals' decision was not based on the jurisdictional nature of the discretionary function exception. In

the absence of any indication that that issue had a bearing on the present case, it provides no basis for further review.

While the district court dismissed the case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), see Pet. App. 15a, the district court's ultimate resolution of the case was not predicated upon the jurisdictional nature of the discretionary function exception. There is no indication in the district court's decision that it placed the burden of proof on petitioners or resolved any factual issues. See *id.* at 9a-14a. Cf. *Aragon* v. *United States*, 146 F.3d 819, 832 (10th Cir. 1998) (placing burden of proof on plaintiff in addressing FTCA's discretionary function exception). To the contrary, the court accepted the petitioners' allegations and assertions of fact at face value. See Pet. App. 4a-5a. The court of appeals, in an unpublished opinion, merely noted that the dismissal was for lack of subject matter jurisdiction and affirmed "[e]ssentially for the reasons stated" by the district court. *Id.* at 2a. Petitioners have not shown or argued that the decisions below would have been any different had the district court dismissed the case for failure to state a claim, Fed. R. Civ. P. 12(b)(6), or for failure to raise a material issue of triable fact, Fed. R. Civ. P. 56.

Even if the outcome of this case had turned on the court's treatment of the FTCA's discretionary function exception as jurisdictional, no square circuit conflict exists regarding that issue. Citing *Clark* v. *United States*, 326 F.3d 911 (2003), petitioners state that the "Seventh Circuit has suggested that the treatment of the discretionary function exception as a jurisdictional prerequisite is not correct." Pet. 5 & n.1. *Clark*, however, did not involve the FTCA's discretionary function

exception, but rather the exception for any "claim arising in respect of the assessment or collection of any tax." 28 U.S.C. 2680(c). See *Clark*, 326 F.3d at 913. Moreover, the court found that treatment of the exception as "jurisdictional," rather than as an element of the plaintiff's statutory right to relief, "does not matter" because the district court had correctly concluded that the plaintiffs' claim could not proceed under the FTCA. *Ibid.*[2]

b. Petitioners also assert (Pet. 6) that there is a circuit conflict regarding whether federal agency manuals can create mandatory obligations that eliminate government discretion under the FTCA's discretionary function exception. The purported circuit conflict, however, is not implicated in this case because the issue was not dispositive or even addressed in the courts below. And this Court's ordinary practice is "not [to] decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); see *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001).

Under the first part of the discretionary function test, a government employee retains discretion as long as no "federal statute, regulation, or policy specifically

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[2] More recently, in *Parrott* v. *United States*, 536 F.3d 629 (2008), the Seventh Circuit stated in dicta that the FTCA's statutory exceptions, including the discretionary function exception, "limit the breadth of the Government's waiver of sovereign immunity," but not "by withdrawing subject-matter jurisdiction from the federal courts." *Id.* at 634. Accordingly, the court stated that the United States has the "burden to assert these exceptions." *Id.* at 635; see also *Collins* v. *United States*, No. 08-1334, 2009 WL 1162529, at *4 (7th Cir. May 1, 2009) (citing *Parrott*, stating in dicta that the discretionary function exception is not jurisdictional, recognizing that the government raised the discretionary function exception, and holding that the exception applied).

prescribes a course of action for [the] employee to follow." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). Therefore, to remove discretion, a provision must not only be prescriptive or mandatory, but it must also be specific. Here, the district court's decision did not turn on whether provisions in a federal agency manual could be mandatory, but rather on the court's finding that the particular provision at issue here was *not sufficiently specific* to remove discretion. The district court noted that the provision in the *1957 Manual* upon which petitioners relied did not mention TCE or PCE and only addressed "refuse" disposal in general. Pet. App. 10a. The court found that there was no "*specific guidance* regarding how to dispose of refuse, leaving to military personnel the determination of whether a particular disposal location would fall within the meaning of the phrase 'where it [refuse] may pollute surface or underground waters.'" *Ibid*. (emphasis added). That fact-bound determination does not merit this Court's review.

In any event, petitioners have failed to demonstrate that there is a conflict in the circuit courts regarding whether provisions in federal agency manuals are inherently mandatory. Petitioners rely upon a pre-*Berkovitz* case, *Clark* v. *United States*, 660 F. Supp. 1164, 1172-1173 (W.D. Wash. 1987), aff'd, 856 F.2d 1433 (9th Cir. 1988), in which a district court found that certain military manuals contained mandatory requirements and held that the discretionary function exception did not apply. The Ninth Circuit affirmed that decision in a one sentence order "for the reasons stated in the district court's opinion." 856 F.2d at 1434. In *Aragon*, the Tenth Circuit stated that "[a]n agency manual, in contrast to a regulation, is not *necessarily* entitled to the force and effect of law." 146 F.3d at 824 (emphasis add-

ed). The court noted that a particular manual's qualification that it was "intended for guidance" because of the "varied nature of industrial problems" weighed "heavily against ruling the Manual prescribed mandatory directives." *Id.* at 824-825 (citation omitted). Those case-specific decisions do not create a conflict regarding any general issue of whether provisions in an agency manual should be regarded as mandatory for purposes of the discretionary function exception.

2. The courts below correctly applied the discretionary function exception. Petitioners' claims of error are unfounded and do not, in any event, provide a basis for this Court's review.

a. Petitioners contend (Pet. 9-11) that the court of appeals erred in affirming the district court's finding that a provision from the *1957 Manual*, stating that "refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water," was not sufficiently specific to remove discretion. Pet. 9 (quoting *1957 Manual*, Art. 8-15, at 8-5). Petitioners, however, do not show how the provision specifically prescribed a course of action by removing an employee's choice regarding how to act. See *Berkovitz*, 486 U.S. at 536. As the district court explained, the provision did not mention TCE or PCE and failed to "offer any specific guidance regarding how to dispose of refuse," and it left to military personnel the determination of whether disposal in a particular location might pollute drinking water. Pet. App. 10a.

In essence, petitioners contend (Pet. 11) that the discretionary function exception is inapplicable because the regulation is a binding directive against water pollution, and water pollution nevertheless occurred. As courts

have consistently held, however, goal-based water pollution provisions do not prescribe a specific course of conduct under the first part of the discretionary function test. See *OSI Inc.* v. *United States*, 285 F.3d 947, 952 (11th Cir. 2002) (finding that objectives and principles do not create mandatory directives that overcome the discretionary function exception); *Aragon*, 146 F.3d at 826 (stating that a pollution prevention provision suggests "principles rather than practices," and "[a]n objective, alone, does not equate to a specific, mandatory directive").[3]

b. Petitioners also contend (Pet. 15-21) that the district court failed to make a finding on the second part of the discretionary function test, and industrial waste disposal is not the type of conduct that the exception was designed to shield. Petitioners are mistaken.

The district court plainly found that the alleged negligent conduct was grounded in policy considerations. In addressing the second part of the discretionary function test, the court cited the factually analogous *Ross* and *Aragon* cases, which involved claims that military operations, including waste disposal, caused TCE contamination of drinking water. Pet. App. 11a-14a. The district court quoted *Aragon*'s statement that disposal of solvents at an Air Force Base "involved policy choices of

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[3] Petitioners' reliance (Pet. 9-10) upon *Starrett* v. *United States*, 847 F.2d 539, 541-542 (9th Cir. 1988), is misplaced. In *Starrett*, the court held that the requirement of "secondary treatment" of certain wastes was sufficiently specific to overcome the discretionary function exception. But the "secondary treatment" prescription at issue in *Starrett* mandated particular conduct, whereas the *1957 Manual* provision at issue here seeks a particular result and does not prescribe specific conduct. Moreover, the Ninth Circuit decided *Starrett* prior to this Court's discussion in *Berkovitz*.

the most basic kind," because "the military recognized it needed flexibility to weigh its groundwater protection policies against broader public and military policies" and to place "security and military concerns above any other concerns." *Id.* at 13a (quoting *Aragon*, 146 F.3d at 826). The court then concluded that these "authorities * * * make it clear that these types of decisions by the military regarding operations at Camp Lejeune were the kinds of government policy choices the discretionary function exception was designed to shield." *Id.* at 14a. Thus, the district court expressly held that the second part of the test was satisfied.

Petitioners incorrectly contend (Pet. 18-19) that the military's decisions regarding the disposal of waste solvents at Camp Lejeune "do not rise to the level of public policy, but rather are issues dealt with by landfills and waste removal companies on a daily basis." The fact that the conduct at issue may also be performed by private persons on a daily basis is not dispositive of the inquiry. See *Gaubert*, 499 U.S. at 320, 325 (holding that the discretionary function exception barred challenges to the day-to-day government supervision of a federally-insured savings and loan). The military's waste disposal decisions are necessarily intertwined with, and subject to, the policies underlying the military's broader mission, as embodied in Department of Navy regulations. See generally 10 U.S.C. 5063; 32 C.F.R. 700.202. As courts have consistently recognized, waste disposal and environmental protection decisions at military bases implicate public policy considerations. See *Ross* v. *United States*, 129 Fed. Appx. 449, 451-452 (10th Cir. 2005); *Aragon*, 146 F.3d at 826-827. See also *OSI*, 285 F.3d at 953 (the second part of the discretionary function analysis was satisfied where "[t]he nature of the military's

function requires that it be free to weigh environmental policies against security and military concerns"); *Western Greenhouses* v. *United States*, 878 F. Supp. 917, 929 (N.D. Tex. 1995) (decisions regarding whether to take measures for environmental protection at a military base were protected by the discretionary function exception; such conduct implicated public policy because decision-makers must "balance two of the nation's top priorities: national defense and environmental protection").[4]

Petitioners erroneously rely (Pet. 12-13) upon this Court's holding in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955), that the government could be liable under the FTCA for failing to maintain a lighthouse after the government had made the discretionary decision to operate the lighthouse. As petitioners acknowledge (Pet. 12) and as this Court recognized in *Gaubert*, 499 U.S. at 326, the United States did not raise the FTCA's discretionary function exception in *Indian Towing*. Instead, the United States argued that the FTCA provided immunity for "uniquely governmental functions." *Indian Towing*, 350 U.S. at 64. This Court explained in *Gaubert* that "[t]he United States was held liable [in *Indian Towing*], not because the negligence occurred at the operational level but because making sure the light was operational 'did not involve any permissible exercise of policy judgment.'" 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3). Because the conduct at issue in the present case was grounded in

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[4] Citing *Loughlin* v. *United States*, 393 F.3d 155 (D.C. Cir. 2004), petitioners argue (Pet. 18-19) that only munitions disposal decisions implicate military policies, and the discretionary function exception should not shield the military's disposal of other substances. But *Loughlin*'s reasoning did not turn on the fact that munitions were at issue in that case. See 393 F.3d at 163-164.

public policy considerations, the decisions below are fully consistent with *Indian Towing*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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