No. 03-1655

In the Supreme Court of the United States

JOE LEWIS, AS PARENT AND GUARDIAN OF BRANDON D. LEWIS, JUDY LEWIS, AS PARENT AND GUARDIAN OF BRANDON D. LEWIS, AND BRANDON D. LEWIS, AN INDIVIDUAL FLORIDA RESIDENT, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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 petitioners' tort action against the United States under the Suits in Admiralty Act is barred because the suit challenges discretionary policy judgments of the United States Coast Guard.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published, but the decision is noted at 88 Fed. Appx. 384 (Table). The opinion of the district court (Pet. App. 5a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2003. Petitions for rehearing were denied on March 12, 2004 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on June 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Suits in Admiralty Act (SAA) waives the federal government's sovereign immunity from maritime tort actions. See 46 U.S.C. app. 742. Nearly every circuit has concluded that the SAA's waiver of sovereign immunity is 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.*, *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-1064 (11th Cir. 1985).[1] The discretionary function exception to the FTCA provides, in relevant

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[1] Nine 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); *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). A panel of the Fourth Circuit has taken a contrary view, see *McMellon* v. *United States*, 338 F.3d 287, 292 (2003) (following prior circuit decisions in declining to imply a discretionary function exception to the SAA), but that court granted rehearing en banc in *McMellon*, No. 02-1494 (4th Cir. Oct. 8, 2003), thereby vacating the panel opinion, see 4th Cir. R. 35(c).

In any event, petitioners have not challenged the applicability of the discretionary function exception to cases brought under the SAA. See, *e.g.*, Pet. 15.

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).

b. 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)). This 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. *Varig*

Airlines, 467 U.S. 797, 814 (1984)). 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." *Id.* 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. Petitioner Brandon Lewis[2] was injured when he developed the "bends" while scuba diving off the coast of Florida on February 13, 2000. Pet. App. 2a, 6a. The United States Coast Guard responded to a radio message from Mr. Lewis's companions reporting his condition and requesting assistance. Dist. Ct. Doc. 33, Exh. 3, at 2. The Coast Guard sent a boat crew to assist, which met the boat carrying Mr. Lewis and his associates, took Mr. Lewis on board, and brought him to the Coast Guard station, where the Coast Guard had arranged to have a hospital helicopter ready to transport him to the closest hospital capable of treating a dive injury. *Ibid.* The Coast Guard boat crew did not administer oxygen to Mr. Lewis during transit because neither oxygen nor personnel trained to administer oxygen were on board the Coast Guard vessel. *Id.* Exh. 6, at 77; Exh. 7, at 25; Exh. 8, at 27.

3. Petitioners filed suit against the government under the SAA, alleging that the Coast Guard acted negligently during the rescue operation. See Pet. 4-5; Pet. App. 2a, 6a. In particular, petitioners asserted that

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[2] Petitioners in this case are Brandon Lewis (Mr. Lewis) and Joe and Judy Lewis (Mr. Lewis's parents and guardians).

the Coast Guard should have administered oxygen to Mr. Lewis. See Pet. 4.

4. The district court granted the government's motion to dismiss, which it converted to a motion for summary judgment, concluding that it lacked jurisdiction over petitioners' claims against the United States because those claims challenged discretionary functions of the Coast Guard. Pet. App. 5a-6a, 16a.

The district court held that the discretionary function exception applied to both the Coast Guard's decision to rescue Mr. Lewis and its determination of how that rescue would be conducted. Pet. App. 15a-16a. Regarding the first aspect of the applicable framework —whether the act in question was discretionary—the district court noted that, while petitioners argued that various provisions of Coast Guard manuals dictated how the Coast Guard was to conduct a rescue, the provisions at issue were precatory, rather than mandatory, and expressly allowed for discretion. *Id.* at 8a-14a.[3]

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[3] For example, the United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual (the Manual) describes factors a rescuer "should consider" in evaluating a rescue response, and the Coast Guard Addendum to the Manual "*advis*[es]" the administration of oxygen for decompression sickness "[w]here the capability exists." Pet. App. 9a (second alteration in original). The district court emphasized a provision in the Manual explaining that "the *guidance provided in this* [manual] *must be tempered with sound judgement, having due regard for the* individual situation. * * * Therefore, few actions or procedures discussed in this Manual are mandatory." *Id.* at 10a (first alteration in original). The court further noted that provisions of the Coast Guard Addendum state that "'Coast Guard personnel are *expected to exercise broad discretion* in performing the functions discussed' therein," *ibid.*, and that the Addendum "creates no duties, standard of care, or obligations to the public and should not be relied

The district court therefore held that there was "no statute, regulation, or policy in the record that supports [petitioners'] position that a specific course of conduct was mandated in the rescue of Brandon Lewis." Pet. App. 13a. Instead, the court found, "the Manuals confer upon the Coast Guard broad discretion to exercise its own judgment regarding a rescue like the one in this case." *Ibid.* Thus, the district court concluded that

> the exercise of judgment by the Coast Guard in this case—be it deciding to rescue Brandon Lewis, deciding how to proceed with the rescue of Brandon Lewis, including the staffing and supplying of a rescue boat and training of its personnel, or deciding what resources to use in executing the rescue [—] is clearly discretionary and of the nature and quality protected by the discretionary function exception.

Id. at 13a-14a.

Turning to the second element of the inquiry —whether the discretionary decisions at issue were based on considerations of public policy—the district court observed that, under *Gaubert*, when the applicable governmental policy "allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." Pet. App. 14a (quoting *Gaubert*, 499 U.S. at 324). Since the applicable manuals grant dis-

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upon as a representation by the Coast Guard as to the manner of proper performance in any particular case," *id.* at 11a. Similarly, the Miami Search and Rescue plan states that it provides "internal *guidance*" and "does not define minimum performance standards, create Coast Guard obligations, nor create rights in third parties." *Ibid.* The district court concluded that "by their plain language, the Manuals cannot be interpreted as policy dictating a course of action." *Ibid.*

cretion to Coast Guard personnel in the conduct of rescue operations, the court concluded that the decisions made by Coast Guard rescuers presumably involve protected policy judgments. *Ibid.* The court noted that its conclusion was confirmed by the fact that policy determinations were involved in the Coast Guard's decisions regarding staffing, training, equipment, and the allocation of resources among the Coast Guard's various congressionally authorized functions. *Id.* at 15a-16a (citing *Varig Airlines*, 467 U.S. at 820).

Having determined that it lacked subject-matter jurisdiction, the district court granted the government's motion to dismiss. Pet. App. 16a-17a.

5. The court of appeals affirmed in a brief, unpublished, per curiam order. Pet. App. 1a-4a. Observing that "the language cited by [petitioners] in the applicable manuals is discretionary and not mandatory," the court concluded that "[t]he discretion to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue" of Mr. Lewis. Pet. App. 3a. Accordingly, the court of appeals upheld the district court's dismissal of this case for lack of subject-matter jurisdiction. *Id.* at 4a.

ARGUMENT

The unpublished judgment of the court of appeals does not warrant review by this Court. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals; nor does it present any issue of general importance warranting further review. Moreover, the Eleventh Circuit correctly applied settled law as articulated by this Court to the facts of this case.

1. a. Contrary to petitioners' assertion, the Eleventh Circuit's decision in this case does not contradict this Court's holding in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). In that case, the plaintiffs alleged that the Coast Guard had negligently failed to maintain a lighthouse or to warn mariners that it was not working. See *id.* at 62. Significantly, the government did not rely on the discretionary function exception in *Indian Towing*. See 350 U.S. at 64; see also *Gaubert*, 499 U.S. at 326 (noting that in *Indian Towing* the government did not contend that the discretionary function exception applied); *Varig Airlines*, 467 U.S. at 812 (same). Instead, the government contended that the FTCA did not waive sovereign immunity from claims concerning negligent performance of "uniquely governmental functions," 350 U.S. at 64, like the maintenance of lighthouses, relying on the FTCA's language imposing liability on the government "in the same manner and to the same extent as *a private individual* under like circumstances," 28 U.S.C. 2674 (emphasis added).

This Court rejected the government's position, holding that the FTCA's waiver of sovereign immunity applies even if the alleged tortious conduct is not of a kind generally performed by private individuals. See *Indian Towing*, 350 U.S. at 67 ("[W]e would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity."). In addition, the Court focused on the "under like circumstances" language in the FTCA and observed that the Good Samaritan doctrine subjects private parties to liability for undertaking tasks similar to the erection of a lighthouse. *Id.* at 64-65 ("[I]t is hornbook tort law that

one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."); see *id.* at 69 (articulating further the government's duty under the general maritime law to use due care in maintaining the lighthouse). The *Indian Towing* Court's statements regarding the Good Samaritan doctrine concern only the scope of the government's tort liability, not the application of the discretionary function exception. Here, of course, the question presented is whether the discretionary function exception preserves the government's sovereign immunity from petitioners' suit—a question that does not implicate *Indian Towing*'s holding.[4]

b. Petitioners also maintain that the Eleventh Circuit's decision conflicts with distress-at-sea cases decided by other courts of appeals that have declined to apply the discretionary function exception where the plaintiff established the government's Good Samaritan liability. See Pet. 16-22. Petitioners misconstrue those cases. None stands for the proposition that the discretionary function exception does not apply if the requirements of the Good Samaritan doctrine are met. Rather, most of those cases do not discuss the discretionary function exception at all. See *Sagan* v. *United States*, 342 F.3d 493, 498-500 (6th Cir. 2003) (reversing the

[4] In a footnote in *Berkovitz*, this Court suggested that the discretionary function exception was inapplicable in *Indian Towing*. 486 U.S. at 538 n.3; see *Gaubert*, 499 U.S. at 326. Even so, the technical conduct at issue in *Indian Towing* (*i.e.*, "making sure the light was operational," *Gaubert*, 499 U.S. at 326) differs significantly from the discretionary policy judgments targeted by petitioners' claims in this litigation (*i.e.*, the Coast Guard's decisions regarding the training of its employees and the equipping and staffing of its vessels).

district court's grant of summary judgment for the government on proximate cause; not mentioning the discretionary function exception); *United States* v. *Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195, 197 (1st Cir.) (discussing the scope of the government's duty of care; not considering the discretionary function exception), cert. denied, 389 U.S. 836 (1967);[5] *United States* v. *DeVane*, 306 F.2d 182, 185-186 (5th Cir. 1962) (explaining the scope of the Good Samaritan doctrine; not discussing the discretionary function exception); *United States* v. *Gavagan*, 280 F.2d 319, 326-329 (5th Cir. 1960) (discussing the Coast Guard's duty during the conduct of rescue operations; not discussing the discretionary function exception), cert. denied, 364 U.S. 933 (1961);[6] see also *Hurd* v. *United States*, 34 Fed. Appx. 77, 81-85 (4th Cir. 2002) (concluding that the district court did not clearly err in finding that the Coast Guard attempted to aid the decedents and that

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[5] In a subsequent case, the First Circuit held that the discretionary function exception barred a claim alleging that the Coast Guard behaved negligently in ordering the evacuation of a distressed vessel during a rescue operation. See *Thames Shipyard & Repair Co.* v. *United States*, 350 F.3d 247, 254-257 (2003). That court distinguished *Sandra & Dennis Fishing Corp.* on the grounds that, there, the government did not rely on the discretionary function exception and the Coast Guard's negligence involved "mere technical, navigational missteps." *Id.* at 256.

[6] Even if the court of appeals' decision in this case were in conflict with *DeVane* or *Gavagan*, which, as decisions of the old Fifth Circuit, are binding on the Eleventh Circuit, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Of course, the Eleventh Circuit correctly perceived no conflict with those decisions, which do not even address the discretionary function exception, as underscored by the denial of en banc review. Pet. App. 18a-19a.

its conduct was reckless and worsened decedents' positions; not addressing the discretionary function exception);[7] cf. *Rodrigue* v. *United States*, 968 F.2d 1430, 1434 (1st Cir. 1992) (addressing whether the Air Force's denial of the plaintiff's administrative claim for relief under the Military Claims Act, 10 U.S.C. 2731 *et seq.*, violated due process; not considering the discretionary function exception).

Most of the cases cited by petitioners simply articulate and apply the proposition that, while voluntary undertakings do not ordinarily create tort duties, a duty of care is created, under the Good Samaritan doctrine, by a voluntary (or discretionary) undertaking, if the undertaking induced detrimental reliance or otherwise increased the risk of harm to the plaintiff. See *Sagan*, 342 F.3d at 498; *Hurd*, 34 Fed. Appx. at 84; *Sandra & Dennis Fishing Corp.*, 372 F.2d at 195; *DeVane*, 306 F.2d at 186; *Gavagan*, 280 F.2d at 328-329; see also *Indian Towing*, 350 U.S. at 64-65, 69. See generally Restatement (Second) of Torts §§ 323, 324A

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[7] The government did not raise the discretionary function exception before either the Fourth Circuit or the district court in *Hurd*. (At that time, the applicability of the exception in cases brought under the Suits in Admiralty Act was unclear in the Fourth Circuit. Compare *Tiffany* v. *United States*, 931 F.2d 271, 276-277 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992), and *Faust* v. *South Carolina State Highway Dep't*, 721 F.2d 934, 938-939 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984), with *Lane* v. *United States*, 529 F.2d, 175, 179 (4th Cir. 1975); see note 1, *supra.*) Nevertheless, the district court in *Hurd* opined that the discretionary function exception did not apply on the facts of that case because the responsible Coast Guard employee terminated a search initiated in response to a distress call without performing certain mandatory actions. See *Hurd* v. *United States*, 134 F. Supp. 2d 745, 768-769 & n.28 (D.S.C. 2001). This district-court dicta obviously does not create a circuit split.

(1965). Here, however, the issue is whether the discretionary function exception preserves the government's sovereign immunity from petitioners' suit, not whether petitioner has a valid cause of action or whether the Coast Guard owed Mr. Lewis a duty of care on the facts of this case. Because the courts below correctly concluded that the discretionary function exception bars this suit, they had no need to reach the question whether the government could be held liable under the Good Samaritan doctrine if it had waived its sovereign immunity.[8]

The other circuit decision on which petitioners rely, *Huber* v. *United States*, 838 F.2d 398 (9th Cir. 1988), provides no support for petitioners' theory that the existence of a duty of care under the Good Samaritan doctrine automatically renders the discretionary function exception inapplicable. There, the Ninth Circuit held that, after the Coast Guard told a sinking vessel that it would provide some navigational assistance, its failure to follow through was not a discretionary judgment susceptible to policy analysis. See *id.* at 401 (stating that "the Coast Guard failed to monitor the radio channel it had instructed the [vessel] to use, failed

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[8] Thus, petitioners' first question presented (Pet. i) does not accurately articulate the issue in this case. It asks "[d]oes the discretionary function exception afford absolute immunity to the Coast Guard during search and rescue operations; or is the Coast Guard obligated to use due care once it makes a decision to institute a search and rescue operation and/or render aid to a mariner in distress?" The question of the scope of the Coast Guard's duty under general maritime law tort principles arises only after the jurisdictional question regarding the applicability of the discretionary function exception to the SAA's waiver of sovereign immunity—the only question reached by the courts below—has been answered.

to investigate when the [vessel] missed the scheduled communication check, and, apparently, forgot about the [vessel] in the chaos of the evening"). *Huber* is inapposite because, in that case, the asserted negligence of the Coast Guard did not arise from carrying out Coast Guard policy. Here, by contrast, the negligence petitioners assert stems directly from Coast Guard policy determinations not to equip all of its vessels with oxygen or staff all vessels with personnel qualified to administer oxygen. Cf. *Alfrey* v. *United States*, 276 F.3d 557, 567 (9th Cir. 2002) (distinguishing *Huber* in part because, there, "the government's choice did not implicate an allocation of resources"). In any event, any differences between this case and *Huber* stem from the very different factual scenarios and do not represent any conflict in legal authority that would merit this Court's review.

Consequently, since the Eleventh Circuit's factbound and unpublished decision in this case created no conflict with a decision of any other court of appeals, it poses no threat to the uniformity of maritime law, despite petitioners' representation to the contrary (Pet. 13, 18).

2. In any event, the court of appeals correctly concluded that this case falls within the scope of the discretionary function exception. Primarily, petitioners maintain that the Coast Guard should have administered oxygen to Mr. Lewis during transit. Pet. 4-5.[9] This was

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[9] At times, petitioners also allege that Coast Guard personnel negligently decided to undertake the rescue of Mr. Lewis. See, *e.g.*, Pet. 5 ("The Coast Guard should have simply declined the search and rescue and allowed the Lewis vessel to transport Mr. Lewis more quickly to shore."). But petitioners have conceded that the United States retains immunity under the discretionary function exception from any claim that Coast Guard personnel abused their discretion or acted negligently in deciding to rescue

not done, however, because neither oxygen nor personnel trained to administer oxygen were on board the Coast Guard boat. Dist. Ct. Doc. 33, Exh. 6, at 77; Exh. 7, at 25; Exh. 8, at 27. Congress granted the Coast Guard discretion to conduct rescues, in addition to its other responsibilities. See 14 U.S.C. 88(a) (providing that Coast Guard "may" rescue persons or property); 14 U.S.C. 88(b)(1) (providing that the Coast Guard "may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized").[10] Accordingly, the Coast Guard's judgments regarding whether to equip its vessels with oxygen and to train its employees to administer oxygen are discretionary policy judgments concerning the allocation of resources; the discretionary function exception was designed to shield these judgments from civil liability and judicial second-guessing. See *Varig Airlines*, 467 U.S. at 814.[11] Further, petitioners cannot, by chal-

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Mr. Lewis. See, *e.g.*, Pet. 8-9 ("In fact, the Eleventh Circuit's opinion fails to recognize that the discretionary function exception only affords the Coast Guard sovereign immunity for the decision of *whether* to undertake a search and rescue.").

[10] The many functions Congress has entrusted to the Coast Guard include, among others, national security, 14 U.S.C. 1, 2; promulgation and enforcement of safety regulations, 14 U.S.C. 2; conduct of search and rescue, 14 U.S.C. 2, 88; law enforcement, 14 U.S.C. 2, 89; oceanographic research, 14 U.S.C. 2; and creation and operation of aids to navigation, 14 U.S.C. 2, 81.

[11] Petitioners assert (Pet. 7), without any citation to the record, that the Coast Guard Commandant issued a directive that all Coast Guard first responders be trained in the administration of oxygen through the Divers Alert Network (DAN) program. This contention is baseless because no mandatory directive was ever issued. As the government established below, in 1996, the former Chief of the Operational Medicine Branch at Coast Guard Head-

lenging the conduct of the personnel involved with the rescue of Mr. Lewis, avoid the government's sovereign immunity from claims attacking this discretionary decision. See *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) ("Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion."); see also *Gaubert*, 499 U.S. at 337-338 (Scalia, J., concurring in part and concurring in the judgment) (stating that the discretionary function exception applies when an employee performs in accordance with the relevant policy, even if she does not herself make policy decisions and she acts negligently).[12] Thus, the courts

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quarters had sought permission to use a DAN video as part of proposed training to Coast Guard first responders in oxygen therapy. Dist. Ct. Doc. 33, Exh. 12, at 2, para. 7. The proposed training was part of a policy initiative which has the "aim of providing a trained medical responder on every Coast Guard [Search and Rescue] Mission." *Ibid.* The policy initiative is still ongoing but "has not been implemented Coast Guard-wide" because of competing budget priorities and insufficient staff. *Id.* at 3. Moreover, the Coast Guard Commandant "was not briefed on the 1996 correspondence with DAN and the use of the DAN video for training Coast Guard personnel." *Id.* at 3-4, para. 9.

[12] To the extent that petitioners challenge other aspects of the Coast Guard personnel's conduct during the rescue of Mr. Lewis, those allegations also are barred by the discretionary function exception. The relevant statements of governmental policy contained in the record conferred substantial discretion on the Coast Guard rescuers to use their judgment in rescuing Mr. Lewis. See

below correctly concluded that the Suits in Admiralty Act did not waive the government's sovereign immunity from claims implicating the Coast Guard's decisions regarding the equipping and staffing of its vessels and the training of its crews.

3. Finally, petitioners' second question presented—regarding the remedies available if the discretionary function exception were inapplicable to this case and the government were found liable—was not reached by either of the lower courts, since both courts found that they lacked subject-matter jurisdiction. Of course, 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); accord *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). In addition, significant factual conflicts exist in this case concerning the applicability of the Good Samaritan doctrine (and, thus, the extent to which the Coast Guard owed a duty of care to Mr. Lewis), whether Coast Guard personnel acted negligently, and whether Coast Guard personnel caused any of Mr.

Pet. App. 8a-13a; pp. 5-6 & note 3, *supra*. Inasmuch as Coast Guard policy expressly contemplated that Coast Guard personnel would use their discretion and judgment in conducting a search and rescue, this Court has instructed that the policy-based nature of this conduct can be presumed. See *Gaubert*, 499 U.S. at 324; see also *Varig Airlines*, 467 U.S. at 820 (holding that the alleged negligence of the employees that administered the government program at issue was not actionable and noting that the employees "necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to a specific grant of authority in the regulations and operating manuals").

Lewis's injuries.[13] The lower courts also did not reach any of these factbound issues, which would need to be resolved before the issue of remedies would arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2004

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[13] Petitioners incorrectly suggest (Pet. 10-11, 16) that the discretionary function exception applies only if the government acts with "due care." The phrase "due care" appears in the FTCA in the portion of Section 2680(a) that shields the government from tort liability for claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid[.]" That clause is not at issue in this case. See *Dalehite*, 346 U.S. at 32-34 (distinguishing between the two clauses in section 2680(a)). The aspect of the discretionary function exception relied on by the government here applies "whether or not the discretion involved be abused." 28 U.S.C. 2680(a); see also *Dalehite*, 346 U.S. at 33 (explaining that this language "connotes both negligence and wrongful acts in the exercise of the discretion because the [FTCA] itself covers only [the] 'negligent or wrongful act or omission of any employee,' 'within the scope of his office' 'where the United States, if a private person, would be liable' ") (quoting 28 U.S.C. 1346(b)).