No. 12-335

IN THE

Supreme Court of the United States

JUANITA SÁNCHEZ, ON BEHALF OF MINOR CHILD D.R.-S., *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR SIERRA CLUB AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Sierra Club is a nonprofit organization dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; and to educating and enlisting humanity to protect and restore the quality of natural and human environments. Founded in 1892 by John Muir, Sierra Club is the nation's oldest grassroots environmental body, with approximately 600,000 members and supporters, including more than 1,400 members who live in Puerto Rico. Sierra Club has participated as a party or as an amicus curiae in many of this Court's most significant environmental cases.

Sierra Club supports petitioners' position that the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, imposes no bar to the tort claims asserted against the United States under the law of Puerto Rico in this litigation. The First Circuit's decision in effect provides the United States with blanket immunity to state-law tort claims based on environmental pollution under the reasoning that the federal government's actions *also* violate federal statutory law, even when private parties would be liable under state tort law for similar conduct. This reasoning is directly contrary to Congress's intent in the FTCA that the United States be liable "in the same manner and to the same extent as

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[1] Counsel of record for both parties received timely notice of the intent to file this brief, and letters consenting to the filing have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

a private individual under like circumstances," 28 U.S.C. § 2674. That congressional directive, in turn, reflects the judgment that state tort law properly operates to deter and remedy tortious activities, by the federal government as well as private parties. Congress did not depart from that judgment in the area of environmental pollution; to the contrary, many major federal environmental statutes expressly save common law remedies.

Moreover, as severe as the situation is on Vieques, the adverse consequences of such a rule would not be limited to that island. Federal environmental pollution is a serious problem across the Nation. Unless individuals like petitioners are able to proceed against the United States under the FTCA, it is likely that they will never be made whole for harm they have suffered as a result of serious environmental damage caused by federal government activity.

SUMMARY OF ARGUMENT

The court of appeals' decision in this case effectively eliminates one of the most important mechanisms in the law available to deter and remedy pollution by the federal government: the tort system. Under the First Circuit's interpretation of the discretionary-function exception to the FTCA, which is the principal waiver of the United States' sovereign immunity from suit for monetary claims, individuals injured by most forms of pollution by the federal government will have no compensatory remedy. The court of appeals reached that conclusion because it thought that such a compensatory remedy would undermine Congress's decision, in various federal environmental statutes, not to create a private right of action for damages. But the court of appeals fundamentally misapprehended the role and func-

tion of the FTCA, which makes the United States liable in the same manner as a private party under state law tort principles. Polluters have long been subject to tort liability under state law, and federal environmental statutes do not displace those liability principles.

The court of appeals' decision, if allowed to stand, could have significantly adverse consequences for victims of pollution by the federal government. The consequences for residents of Vieques, who were subjected to decades of severe pollution and have suffered serious health consequences as a result, will be particularly devastating. But pollution by the federal government is a problem across the Nation, and the issues at stake in this case are by no means limited to Vieques. This Court should grant review to restore the proper interpretation of the FTCA and make clear that, as the statute requires, the United States is liable for the consequences of its pollution just as a private polluter would be.

ARGUMENT

I. THE U.S. NAVY'S ACTIVITIES ON VIEQUES HAVE RESULTED IN A DEVASTATING LEGACY OF POLLUTION AND ILLNESS FOR THE ISLAND'S RESIDENTS

The legal questions presented in this case must be considered in light of the "sorry tale" (Pet. App. 34a) that gave rise to this litigation in the first instance—namely, the six decades in which the United States Navy engaged in the unceasing pollution of Vieques' air, land, and coastal waters. Although the Navy left the island in 2003, the lasting impact of its activities—as demonstrated by the poor and deteriorating health of Vieques' citizens—is precisely why tort relief available under the FTCA is needed today.

The island of Vieques lies seven miles off the southeastern coast of the main island of Puerto Rico and nine miles south of the island of Culebra. Pet. App. 110a (¶ 7160); *Romero-Barcelo* v. *Brown*, 643 F.2d 835, 837 (1st Cir. 1981), *rev'd sub nom. Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). From the 1940s to 2003, the United States Navy occupied more than two-thirds of Vieques' 33,000 acres.[2] On Vieques' western end, the Navy established a Naval Ammunition Facility (NAF) which was used "for deep storage of conventional ammunition." *Romero-Barcelo*, 643 F.2d at 838. On Vieques' eastern end, the Navy established the Atlantic Fleet Weapons Training Facility (AFWTF) where live-fire exercises, explosive-ordnance practice, and naval gunfire practice were regularly conducted. Pet. App. 111a (¶ 7162). The Navy also operated an open burning/open detonation facility at the AFWTF which "was used to detonate or otherwise incinerate" unused ordnance stored at the NAF. *Abreu* v. *United States*, 468 F.3d 20, 23 (1st Cir. 2006). In the limited area not occupied by the military, "full scale civilian communities with organized municipal governments" developed; those communities exist to this day, with approximately 9,300 United States citizens among its members. Pet. App. 34a, 111a (¶ 7162).

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[2] The Navy also occupied most of Culebra, declaring it to be a military reservation. Pet. App. 34a. The Navy was subsequently directed to terminate its operations in Culebra, Exec. Order No. 11,886, 40 Fed. Reg. 49,071 (Oct. 17, 1975), and to transfer its aerial and naval bombardments to Vieques (Pet. App. 35a). Resulting citizen protests against the increased intensity of military activity in Vieques ultimately led the Navy to close its ranges and maneuvering areas on the island in 2003. Pet. App. 35a-36a.

Under some estimates, between 1983 and 1998 Vieques "was bombed, strafed, or targeted with naval gunfire an average of two hundred days a year." C.A. App. 96. The U.S. Agency for Toxic Substances & Disease Registry has stated that "thirty-nine tons of high explosives were likely dropped on the live impact area on a single high-use day" and "90 percent of these bombs probably did not detonate." *Id.* Additionally, "hundreds of thousands of automatic weapon rounds were fired in nearby areas." *Id.* In 1998 alone, United States military forces dropped 23,000 bombs on Vieques. Pet. App. 101a (¶ 4). The explosives, ordnance, and contaminants resulting from these activities have been alleged to include, *inter alia*, napalm, depleted uranium, white phosphorous, arsenic, lead, mercury, cadmium, copper, magnesium, lithium, perchlorate, TNT, and PCBs. *Id.*

Military activities on Vieques exacted a heavy toll on the environment. As early as 1978, following the filing of a lawsuit by Puerto Rico against the United States for its activities at the AFWTF, a Navy Water Quality Study "detected high levels of zinc and lead" in the surface water of eastern Vieques, as well as "the presence of RDX—a toxic component of military explosives—in several drinking water supply sources on civilian land." Pet. App. 111a (¶ 7163). Although the Navy (pursuant to court order) obtained a federal permit to continue discharging ordnance into Vieques' waters during training exercises, Discharge Monitoring Reports (DMRs) generated by the Navy from 1994 through 1999 reflected repeated violations of that per-

mit. C.A. App. 23.[3] Indeed, based upon its review of these DMRs, the Environmental Protection Agency (EPA) documented "102 exceedances of the water quality-based permit limits" for toxic substances, including boron, cadmium, chromium (hexavalent and total), copper, iron, lead, manganese, mercury, oil and grease, phenolics, selenium, silver, sulfide, and zinc. *Id.* 23-24. The EPA went on to note that given the Navy's adherence to minimum reporting requirements only, "[t]he potential for a greater number of actual violations exists than is evidenced in the DMRs." *Id.* 24. A 2003-2004 study of coral reefs located off the eastern end of Vieques found carcinogenic compound levels for fish and water that exceeded the EPA's allowable risk-based concentrations. *Id.* 59-60.[4]

The damage inflicted by the Navy was not limited to Vieques' coastal waters. A 1999 study found "significantly higher than background radiation levels" approximately one mile from where depleted uranium ordnance had been fired on Vieques, suggesting that depleted uranium had in fact been used on several occa-

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[3] Plaintiffs allege that the Navy's permit violations date as far back as 1985. Pet. App. 111a (¶ 7164) (stating that heavy metal and other discharge measurements taken from 1985 to 1999 demonstrate repeated violations of the Clean Water Act and Puerto Rico Water Quality Standards).

[4] According to the study's authors, all of the carcinogenic compounds found were man-made and "are never found in the natural world, except as leachate from human-manufactured explosives." C.A. App. 59. The pollution of Vieques' waters posed particular dangers to its citizens given that "among some islanders, fish intake is substantially higher than that predicted by the U.S. Food and Drug Administration, and the U.S. Environmental Protection Agency." *Id.* 97.

sions. C.A. App. 15. Soil analysis carried out between April 1999 and May 2000 revealed high levels of arsenic, barium, cadmium, chromium, cobalt, copper, lead, nickel, tin, vanadium, zinc, and cyanide—"the same metals found in munitions and targets" used by the Navy at Vieques. *Id.* Subsequent studies confirmed these results, finding, among other things, that plants in Vieques had up to ten times more lead and three times more cadmium than samples taken from the main island of Puerto Rico (as well as excessive levels of nickel, cobalt, magnesium, and copper), and that goats that fed primarily on pasture in the AFWTF had five to seven times more cadmium, six times more cobalt, and five times more aluminum than samples taken from the main island. *Id.* 70-71. The pollution at Vieques proved so extreme that in 2005, the EPA included the AFWTF on its Superfund National Priorities List. 70 Fed. Reg. 7,182 (Feb. 11, 2005).[5]

The public health consequences of the Navy's contamination of Vieques' air, land, and coastal waters have been devastating. Studies of hair samples taken from island residents in 1999 and 2000 revealed toxic levels of both mercury and lead. C.A. App. 105. A study conducted in 2001 showed that the age-adjusted mortality for Vieques' population was 9% higher than

[5] The Superfund Program (established by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.*) was designed to allow the federal government to locate, investigate, and clean up the nation's most hazardous sites—*i.e.*, those that pose the greatest "risk or danger to public health or welfare or the environment." 42 U.S.C. § 9605(a)(8) (setting forth criteria for listing sites on the National Priorities List); http://www.epa.gov/region02/superfund/ (last updated May 17, 2011).

mainland Puerto Rico from 1991 to 1994, and 18% higher from 1994 to 1998, with both increases deemed statistically significant. *Id.* 106. This same study showed higher than expected death rates among Vieques' residents as compared to mainland Puerto Rico from such diseases as cancer (30%), hypertension (381%), cirrhosis (95%), and diabetes (41%). *Id.*[6] Although the infant mortality rate has been decreasing in Puerto Rico for 50 years, this rate has been increasing on Vieques since 1980. *Id.* Further, Vieques has a 33% higher rate of low-birthweight babies and pre-term deliveries. *Id.* The doctor conducting these studies ultimately concluded that U.S. military activities were "a significant contributing factor to many of the diseases" she had encountered on the island, whose population was "the sickest" she had ever seen. *Id.* 107.

II. PROBLEMS CAUSED BY THE FEDERAL GOVERNMENT'S POLLUTING ACTIVITIES EXTEND WELL BEYOND VIEQUES

The health and environmental consequences of the Navy's activities on Vieques may be particularly severe, but unfortunately, the problem of pollution generated by the federal government's activities—and the concomitant need for an effective remedy—exists throughout the Nation. In a given year, the federal government generates hundreds of millions of metric tons of regulated hazardous wastes. *See* Congressional Budget Office, CBO Publication # 517, *Federal Liabili-*

[6] The 7,125 plaintiffs in this litigation have alleged they suffer from similar ailments, including asthma, high blood pressure, cancer, kidney problems and liver diseases. Pet. 51a n.29. Notably, plaintiffs' hair samples all tested positive for toxic concentrations of heavy metals indicated to correlate with these diseases. *Id.*

ties Under Hazardous Waste Laws x (1990) (*Federal Liabilities*). Despite being charged with the safe transport, storage, and disposal of this waste, as well as with the enforcement of numerous environmental laws, the federal government has gained a well-deserved reputation as one of the country's worst polluters and one of the slowest to remedy known contamination. Yet under the First Circuit's unduly broad reading of the discretionary function exception to the FTCA, private citizens who suffer the consequences of these activities will be deprived of one of the few effective avenues of financial redress available to them.

Although the Navy's activities at Vieques stand out for their egregiousness, the problems presented by the federal government's generation, transport, storage, and disposal of hazardous wastes are in no way limited to military installations. The Department of Energy—charged with managing the activities at nuclear weapons research labs, production plants, and test sites—is frequently cited as having "generated the most extensive and costly contamination problems." *Federal Liabilities* 2. At many Department of Energy facilities, "radioactive material and other toxic substances" have leached into the soil and groundwater, posing a threat both to the site itself and to "the drinking water supplies of nearby properties." *Id.* 3-4. It has also been estimated that hazardous wastes contaminate at least 388 facilities and sites on public lands managed by the Departments of Agriculture and the Interior, including national parks and forests. *Id.* 4; *see also* Cary, *A Primer on Federal Facility Compliance With Environmental Laws: Where Do We Go From Here?*, 50 Wash. & Lee L. Rev. 801, 804-805 (1993) (Departments of Agriculture and the Interior "own substantial acres of potentially contaminated land");

Wolverton, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 Harv. Envtl. L. Rev. 565, 567 (1991) (observing that "[n]umerous hazardous waste sites exist on federal lands managed by the Department of the Interior," ranging from "abandoned commercial mines to oil and gas exploration sites"). Other federal, non-military facilities, such as airports, hospitals, medical centers, and federal office buildings, are similarly associated with the regular generation of hazardous wastes. *Federal Liabilities* 4. Like the coastal waters and pastures of Vieques, these are facilities that United States citizens visit, use, and rely on in their daily lives.

Although federal and state laws ostensibly work to minimize the impact that the federal government has on the environment, it is no secret that "[m]uch of the worst pollution in the United States emanates from" federal facilities. Wolverton, 15 Harv. Envtl. L. Rev. at 565; *see also* Cary, 50 Wash. & Lee L. Rev. at 801 (attributing similar remarks to President George H.W. Bush during 1988 election campaign). Indeed, of the 1,367 sites listed as final or proposed priorities for federal response under the Superfund program, no less than 161 (approximately 12% of the total) are associated with the federal government.[7]

Several federal agencies bear responsibility for Superfund sites,[8] but Department of Defense installa-

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[7] http://www.epa.gov/superfund/sites/npl/ (last updated Mar. 2, 2012).

[8] These agencies include, *inter alia*, the Department of Defense, Department of Energy, Department of Agriculture, Department of the Interior, Federal Aviation Administration, and

tions—like the Navy's operations at Vieques—stand out as some of the worst offenders on the National Priorities List. The Tyndall Air Force Base (Tyndall), which was first activated in 1941 as a flexible gunnery school for the Army Air Corps and re-designated as an Air Force Base in 1947, is one such example. Located approximately one mile southeast of Panama City, Florida, Tyndall occupies approximately 29,000 acres of land and is surrounded by several major communities. http://www.epa.gov/region4/superfund/sites/fedfacs/tynafbfl.html (last updated Jan. 3, 2012). Historical activities at the base, including aircraft and vehicle maintenance, storage and distribution of petroleum and jet fuels, small arms training, explosive ordnance testing, sanitary and industrial land filling, and industrial wastewater treatment and exposure, resulted in the contamination of Tyndall's soil and groundwater. *Id.*[9] Yet according to EPA, environmental cleanup at Tyndall, which has been listed as a Superfund site since 1997, generally remains in the early, investigative phases, "with little progress in achieving long-term remediation of contaminated sites" at the installation.[10]

National Aeronautics and Space Administration. http://www.epa.gov/fedfac/ff/nplbracsites.htm (last updated July 31, 2012). The Department of Defense bears responsibility for the largest number of facilities on the National Priorities List.

[9] Among the many contaminants detected at Tyndall were DDT, chlordane, trichloroethylene, tetrachloroethylene, petroleum constituents, jet fuels, munitions, munitions constituents, lead, arsenic, chromium, and barium. *Id.*

[10] U.S. Governmental Accountability Office, GAO-10-348, *Interagency Agreements and Improved Project Management Needed to Achieve Cleanup at Key Defense Installations* 14 (July 2010) (*Cleanup at Key Defense Installations*), *available at* http://www.gao.gov/assets/310/308719.pdf; *see also* http://cfpub.epa.gov/super

Moreover, Tyndall officials failed to inform either EPA or the surrounding community that lead had been discovered at the Tyndall Elementary School in 1992 and never conducted a formal clean-up following that discovery. It was not until 2009, when officials from the Air Force Center for Engineering and the Environment visited the base, became aware of the situation, and pressed Tyndall officials to conduct soil samples to confirm the presence of lead that the situation became known to the EPA and actions could be taken—more than seventeen years after the fact—to protect children from potential exposure.[11]

Operations at the Aberdeen Proving Ground in Northeast Maryland bear similarities to Tyndall. Since World War I, the Army has used this site for the storage and testing of explosives and chemical weapons, including blister agents, tear gas, and nerve agents. de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 Stan. Envtl. L.J. 43, 56 (2008). The site was also used for the study of captured foreign-made chemical weapons. *Id.* As a result of these activities, 319 waste management units at the installation were identified as being contaminated with, *inter alia*, PCBs, petroleum hydrocarbons, TCE, dichloro-diphenyl-trichloroethane (DDT), lead, perchlorate, and UXO. *Id.* Studies also revealed that the soil and water surrounding one of the most contaminated sites at Aberdeen,

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cpad/cursites/csitinfo.cfm?id=0401205 (last updated June 23, 2009) (stating that neither current human exposures to contaminants nor contaminated ground water migration is currently under control at Tyndall).

[11] *Cleanup at Key Defense Installations* 32-33.

known as the "O Field," contained approximately forty hazardous chemicals—the result of the Army using the site as a dumping ground for a variety of explosives, incendiary devices, and chemical agents. *Id.* 56-57. Aberdeen was first proposed for inclusion on the National Priorities List more than twenty five years ago, in 1985; it was formally added in 1990, and remains on the list today.[12] Even though 38,600 people live within three miles of the Aberdeen Proving Ground,[13] the EPA has determined that neither current human exposures to contaminants nor contaminated ground water migration is currently under control.[14]

The situation is equally grave in and around Camp Lejeune in North Carolina. In the early 1980s, volatile organic compounds, including trichloroethylene (a metal degreaser and ingredient in adhesives and paint removers), tetrachlorine (a solvent used in the textile and dry cleaning industries), and benzene (a component of crude oil and gasoline), were detected in water systems serving housing areas on base.[15] Subsequent studies determined that these contaminants—which have previously been linked to a wide variety of adverse health

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[12] http://www.epa.gov/reg3hwmd/npl/MD2210020036.htm (NPL Listing History) (last updated Aug. 9, 2012).

[13] *Id.* (Site Description).

[14] http://cfpub.epa.gov/supercpad/cursites/csitinfo.cfm?id=0300421 (last updated June 23, 2012).

[15] U.S. Government Accountability Office, GAO 12-412, *DOD Can Improve Its Response to Environmental Exposures on Military Installations* 2, 11 (May 2012), *available at* http://www.gao.gov/assets/600/590573.pdf (*Environmental Exposures on Military Installations*).

effects[16]—had leached into the groundwater from leaking underground storage tanks, industrial spills, and waste disposal sites.[17] During the estimated thirty-year contamination period, approximately 650,000 individuals were stationed at the base.[18]

First proposed for inclusion on the National Priorities List in 1989, Camp Lejeune bears the distinction of being the only base for which Congress has required identification and notification of any individuals potentially exposed to its contaminated water. Lin, 4 Veterans L. Rev. at 91.[19] In 2012, Congress took the rare step of authorizing the provision of benefits and health care to veterans who may have been exposed to envi-

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[16] According to the U.S. Agency for Toxic Substances & Disease Registry, health effects associated with drinking the contaminated water at Camp Lejeune include, but are not limited to, aplastic anemia, bladder cancer, brain cancer, breast cancer, cervical cancer, esophageal cancer, non-Hodgkin's lymphoma, leukemia, kidney cancer, and liver cancer. *See* http://www.atsdr.cdc.gov/sites/lejeune/faq_chemicals.html (last updated Jan. 20, 2012).

[17] Lin, *Warning: Don't Drink the Water: An Examination of Appropriate Solutions for Veterans Exposed to Contaminated Water at Marine Corps Base Camp LeJeune*, 4 Veterans L. Rev. 85, 90 (2012); *see also* U.S. Agency for Toxic Substances & Disease Registry, http://www.atsdr.cdc.gov/sites/lejeune/background.html (last updated July 6, 2009).

[18] *Environmental Exposures on Military Installations* 2, 11.

[19] In a 2012 report, the Government Accountability Office noted that the Department of Defense's "response in identifying, studying, addressing, and communicating" the hazards present at Camp Lejeune (among other military installations), had "raised congressional concerns in general about how [the Department of Defense] responds to possible individual exposures to environmental hazards" at sites for which it is responsible. *Environmental Exposures on Military Installations* 2.

ronmental hazards during their military service. 38 U.S.C. § 1710(e)(1)(F); *see also* House Committee on Veterans' Affairs, Joint Statement For Certain Provisions Contained In The Amendment to H.R. 1627, As Amended, http://veterans.house.gov/sites/republicans.veterans.house.gov/files/documents/JES%20HR%201627%20FINAL.pdf (last visited Oct. 18, 2012). Yet even as Congress made this express provision for certain veterans of Camp Lejeune, GAO recognized that other victims, such as contractors and other civilians, might need to look to the FTCA for relief. *Environmental Exposures on Military Installations* 30-31.

The Department of Defense's activities at Tyndall, the Aberdeen Proving Ground, and Camp Lejeune stand out both for the extent of damage wrought and the length of time needed to remedy (or not remedy) the contamination that exists.[20] Yet these are but three examples of many. Under the interpretation of the FTCA that prevails in most circuits, the federal government would bear financial responsibility for its polluting activities where claimants can establish its liability under state law tort principles—just as a pri-

[20] In addition to exacting a hefty toll on the environment and public health, pollution at federal facilities carries an enormous price tag. In its last study on this subject, the Congressional Budget Office observed that in fiscal year 1990, Congress had appropriated approximately $4.2 billion to federal agencies for compliance and cleanup of hazardous wastes, as compared to $3.3 billion in fiscal year 1989. *Federal Liabilities* 38. Those costs have risen substantially: in a 2007 report to Congress, the Department of Defense estimated that investigation and cleanup of contaminated sites for which it was responsible would cost more than $32 billion to complete, while in 2002, the Department of Energy estimated cleanup costs to be $220 billion, which total could reach $300 billion. de Saillan, 27 Stan. Envtl. L.J. at 50-51.

vate polluter would bear financial responsibility under familiar state law tort principles for the health and environmental consequences of its polluting activities. The First Circuit's overly expansive interpretation of the discretionary function exception, however, eliminates this crucially important mechanism for deterring and remedying environmental pollution by the federal government. Given this sort of absolute (and unwarranted) protection from the financial consequences of its actions at tort law, the federal government has little reason either to seek to prevent pollution from occurring in the first instance or to remedy contamination it has caused. As discussed below, this result is not contemplated by either the statute's text or this Court's decisions.

III. THE FIRST CIRCUIT'S INTERPRETATION OF THE FTCA IS SERIOUSLY FLAWED

The court of appeals concluded that petitioners' action was barred by the FTCA because, in its view, allowing the action to proceed would undermine Congress's decision not to authorize actions for damages based on violations of federal environmental statutes such as the Clean Water Act (CWA). *See* Pet. App. 14a-16a. That decision is profoundly wrong: it misapprehends the operation of the FTCA, fundamental principles of tort law, and constitutional principles of federalism, and it undermines the accountability of the United States government for its actions.

The court of appeals' expressed concern—that Congress's decision not to authorize damages suits could be undermined by lawsuits like this one—is misconceived. In our federal system, Congress and the States can decide independently whether, and under what circumstances, actions for damages for negligent

conduct may proceed. Unless there is reason to conclude that Congress has validly preempted state tort law, a state action for damages may proceed even if Congress has not also authorized a private lawsuit based on the same circumstances. State law tort actions to remedy damage and injury caused by pollution are commonplace. Congress well understood the importance of state law in this area, for in the specific context of the Clean Water Act—as with several other important federal environmental statutes—not only did Congress *not* preempt state law damages actions; it expressly saved common law remedies for pollution. *See* 33 U.S.C. § 1365(e); *see also* 42 U.S.C. § 7604(e) (Clean Air Act); 42 U.S.C. §§ 9658(a)(2), 9659(h) (CERCLA); 42 U.S.C. § 6972(f) (RCRA).

A polluter may thus be found liable under state tort law for negligence even if it could not be subject to suit for a violation of a federal environmental statute on the same facts. That is not a problem that the courts are called upon to resolve; it is, rather, the result of our system of dual sovereignty. And when Congress enacted the FTCA, it accommodated the activities of the United States government to our federal system of government by making the United States subject to liability under the laws of the several States, in the same manner as a private party would be liable. *See* 28 U.S.C. § 2674. Congress decided *not* to create a separate system of federal common law to govern the liability of the United States; nor did it grant the United States the special status afforded under some state tort systems for other governmental actors. *See Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957). Rather, Congress's judgment was that the United States should comport its operational activities with the same degree of care as that expected of all other persons un-

der local law, and should be held accountable, just as a private person would be, if it failed to meet that obligation. *See id.*; *Indian Towing Co.* v. *United States*, 350 U.S. 61, 67 (1955).

The court of appeals failed to apprehend that petitioners are not (insofar as pertinent here) seeking damages for a violation of the CWA. Rather, they are seeking damages against the United States under the tort law of Puerto Rico, just as they might seek damages against a private party for engaging in pollution in violation of state tort law. That petitioners may intend to introduce at trial, as *evidence* of the United States' negligence, the fact that the Navy violated federal environmental statutes, regulations, and permits does not convert their lawsuit into a claim based on a federal statute. "The mere fact that the law which evidences negligence is Federal while the negligence action itself is brought under State common law does not mean that the state law claim metamorphoses into a private right of action under Federal regulatory law." *Lowe* v. *General Motors Corp.*, 624 F.2d 1373, 1379 (5th Cir. 1980).

The court of appeals' decision is at odds with these principles. It grants the United States immunity from suit even though a private party could well be liable for causing the same kind of pollution with the same environmental and health consequences. It thus undermines the fundamental purpose of the FTCA, which is to ensure that the United States government may be held accountable, under traditional legal principles, for injury and damage that it causes. That result is particularly tragic for the residents of Vieques, but it is also deeply troubling for the Nation as a whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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