No. 12-

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**

## PETITION FOR A WRIT OF CERTIORARI

JOHN ARTHUR EAVES, JR.
EAVES LAW FIRM
101 North State Street
Jackson, MS 39201
(601) 355-7961

CARTER G. PHILLIPS*
MATTHEW D. KRUEGER
JOHN PAUL SCHNAPPER-CASTERAS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

*Counsel for Petitioners*

* Counsel of Record

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## QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") provides that the United States may be sued and shall be liable for the torts of federal employees acting within the scope of their employment. 28 U.S.C. §§ 1346(b), 2674. The Act lists explicit exceptions to its grant of jurisdiction. *Id.* § 2680.

The question presented is:

Whether, as the First Circuit alone has held, a lawsuit asserting claims arising out of federal employees' conduct that is tortious is nevertheless implicitly exempt from the FTCA because the conduct also violates a federal statute, regulation, or policy that does not itself authorize suits for damages.

## PARTIES TO THE PROCEEDING

Petitioners in this case are Juanita Sánchez, on behalf of her minor child D.R.-S., and 7,124 additional plaintiffs listed in Attachment A to the First Amended Complaint, which is available as Document No. 15-1 on the docket of the United States District Court for the District of Puerto Rico in this case, *Sánchez* v. *United States*, No. 3:09-cv-01260-DRD (D.P.R.).

Respondent in this case is the United States.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners are 7,125 residents of the Island of Vieques, Puerto Rico, who respectfully petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the First Circuit in this case.

## OPINIONS BELOW

The opinion of the United States District Court for the District of Puerto Rico is reported at 707 F. Supp. 2d 216, and is reproduced at Pet. App. 68a-97a. The opinion of the United States Court of Appeals for the First Circuit is reported at 671 F.3d 86, and is reproduced at Pet. App. 1a-67a. The First Circuit's order denying rehearing en banc is not reported but is reproduced at Pet. App. 98a-99a.

## JURISDICTION

The court of appeals entered judgment on February 14, 2012. Pet. App. 1a. That court, by a 3-2 vote, denied a timely petition for rehearing en banc on May 16, 2012. Pet. App. 98a. On July 26, 2012, Justice Breyer granted an extension of time within which to file a petition for a writ of certiorari to and including September 13, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1346(b)(1) of Title 28 of the U.S. Code provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the

> United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by 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.

Section 2674 of Title 28 of the U.S. Code provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Section 2680 of Title 28 of the U.S. Code provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim 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, or 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.

## INTRODUCTION

The United States Navy assumed control over two-thirds of the Island of Vieques, Puerto Rico, in the 1940s for use as a weapons training and testing area. The Navy spent the next six decades bombarding the Island and its surrounding waters with hazardous substances, including Agent Orange, napalm, heavy metals, and depleted uranium. The Navy failed to use due care with these substances, leaving the Island and surrounding waters dangerously contaminated. What is worse, the Navy invited the residents of Vieques to use areas that were particularly hazardous without giving any hint of the risks they confronted. The residents thus were repeatedly exposed to these contaminants as they farmed the Island and fished in its waters. As a result, hundreds of Vieques residents have died and thousands more have suffered severe injuries and illnesses. If the United States were a private citizen, there is no question that its conduct would be tortious and actionable under Puerto Rican law.

Petitioners are Vieques residents who asserted tort claims against the United States under the Federal Tort Claims Act. The Act broadly authorizes suit against the United States for torts committed by federal employees, subject to specific exceptions. 28 U.S.C. §§ 1346(b), 2674, 2680. The only exception that could possibly apply here is the "discretionary function exception," which bars claims arising from policy-laden judgment calls. *Id.* § 2680(a). But the Navy had no leeway to commit these torts: Its activities violated numerous mandatory directives, including a Clean Water Act permit and permits for radioactive materials.

Nonetheless, a divided panel blocked petitioners' suit by "creat[ing]" a new exception to the FTCA

"from whole cloth." Pet. App. 66a (Torruella, J. dissenting). The majority held that unless petitioners "establish[ed] that Congress intended . . . damages to be available" for violations of those mandatory directives, petitioners could not sue under the FTCA. *Id.* at 22a-23a. Even though the FTCA plainly authorizes damages for torts, the First Circuit now requires that, when a federal employee's tortious conduct violates some other federal law, a plaintiff must make an extra showing that Congress intended to authorize damages for violations of that rule. The effect of this is to create a Catch-22 for FTCA plaintiffs. To demonstrate that their claims are not barred by the discretionary function exception, plaintiffs must show a violation of a clear duty imposed as a matter of federal law. But if they do that, they lose under the implicit exception created by the First Circuit, because Congress rarely creates a separate damages action against the United States for breach of a statute—the FTCA already serves that purpose of compensating citizens for the Government's tortious conduct.

This is a profound error that gives rise to an even more profound injustice in this case, warranting this Court's immediate review. Thousands of FTCA suits are filed in the federal courts every year, and plaintiffs frequently allege that the employee's harmful conduct was not discretionary because it violated a binding federal law. The First Circuit's new exception has no basis in the FTCA's text or policy, and it contravenes this Court's established precedents. Nor has this new exception been recognized by any other circuit. All other circuits allow FTCA suits to proceed when the Government's tortious conduct violates a mandatory rule—without inquiring whether the law creating that rule

separately authorizes damages. This Court has often intervened to ensure that lower courts exercise FTCA jurisdiction appropriately. The Court should do so again here, for this "unjust result rests on a teetering legal foundation." Pet. App. 99a (Thompson, J. dissenting from denial of petition for rehearing en banc).

## STATEMENT OF THE CASE

### A. Statutory Background

The FTCA "provides generally that the United States shall be liable, to the same extent as a private party, 'for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.'" *Kosak* v. *United States*, 465 U.S. 848, 851-52 (1984) (quoting 28 U.S.C. § 1346(b)); see 28 U.S.C. § 2674. The FTCA defines "'[e]mployee of the Government'" to include "members of the military or naval forces of the United States." 28 U.S.C. § 2671.

The Act's "broad waiver of sovereign immunity" is subject to textually explicit exceptions. *Kosak*, 465 U.S. at 851-52; 28 U.S.C. § 2680(a). The only statutory exception at issue here is the discretionary function exception. It carves out "[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." *Id.* § 2680(a). This exception reflects "Congress' desire 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.'" *Berkowitz* v. *United States*, 486 U.S. 531, 536-37 (1988) (quoting

*United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984)).

In a pair of decisions—*Berkowitz* and *Gaubert*—this Court established that the discretionary function exception applies only if two conditions are met. First, the federal employee's "challenged conduct" must be "discretionary," and second, the challenged actions must be "based on considerations of public policy." *Berkowitz*, 486 U.S. at 536-38; see *United States* v. *Gaubert*, 499 U.S. 315, 322-23 (1991). If either condition fails, the exception does not apply. *Berkowitz*, 468 U.S. at 536-37. The employee's conduct is not "discretionary" for purposes of the first condition if a "statute, regulation, or policy specifically prescribe[d] a course of action for [the] employee to follow." *Id.* at 536.

### B. Factual Background

The Island of Vieques is located seven miles southeast of the main island of Puerto Rico. Pet. App. 110a. In the early 1940s, the United States Navy assumed control of over two-thirds of Vieques for use in weapons and tactical training. *Id.* at 4a; *Romero-Barcelo* v. *Brown*, 643 F.2d 835, 838-39 (1st Cir. 1981), *rev'd sub nom. Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 307-08 (1982). On the western end of Vieques, the Navy operated an ammunition factory. Pet. App. 4a. On Vieques's eastern end, the Navy established the Atlantic Fleet Weapons Training Facility, which included a "'live impact area'" and "'maneuver area.'" *Id.* at 4a, 111a. With increasing intensity over the next six decades, the Navy conducted exercises with live munitions, including artillery, mortar, small arms fire, naval surface fire, and aircraft strikes. *Id.* at 4a. In 1998 alone, the Navy dropped 23,000 bombs on Vieques. *Id.* at 101a. The Navy also operated an open burning

and detonation facility on the Island's eastern end, where it incinerated and detonated unused ordnance. *Id.* at 4a. Throughout this time, the Navy used highly toxic and carcinogenic materials, including Agent Orange, depleted uranium, napalm, and various ordnances with heavy metal components. *Id.* at 116a-17a.

Sandwiched between these military zones, 9,300 innocent United States citizens continued to reside in the Municipality of Vieques. Pet. App. 111a. Unsurprisingly, the Navy's activities contaminated the Island and exposed its residents to hazardous substances. At least as early as the 1970s, the Government became aware of the severe health risks it was creating. *Abreu* v. *United States*, 468 F.3d 20, 23-24 (1st Cir. 2006). For instance, a 1978 Navy water quality study found toxic components of military explosives in civilians' drinking water sources. Pet. App. 111a. But the Navy never made any effort to warn the residents of the extreme dangers to which they were exposed on a daily basis. To the contrary, the Navy actively facilitated their exposure through various policies, such as allowing residents to graze cows in the Weapons Training Facility and to set fish traps in waters adjacent to it. *Id.* at 9a. After resisting scrutiny for several more decades, in the face of mounting evidence of harms, the Navy gave up its operations on Vieques in 2003. *Id.* at 35a-36a. In its wake, the Navy left the Island contaminated and dangerous, and its residents plagued by serious illness and even deaths. *Id.* at 5a, 101a-02a, 109a, 114a-15a; *Abreu*, 468 F.3d at 23-24. If a situation ever cried out for a judicial remedy, it is this one on behalf of the inhabitants of Vieques.

In 2005, the U.S. Environmental Protection Agency ("EPA") listed the Weapons Training Facility as a

Superfund site. Pet. App. 103a; 70 Fed. Reg. 7182 (Feb. 11, 2005).[1] Ongoing assessments have confirmed that the Island and surrounding waters are littered with "[e]xtensive amounts of unexploded ordnance and remnants of exploded ordnance." EPA Region 2, *Atlantic Fleet Weapons Training Area-Vieques, Puerto Rico* 1 (Nov. 15, 2011).[2] The hazardous substances associated with such ordnance "may include mercury, lead, copper, magnesium, lithium, perchlorate, TNT, napalm, and depleted uranium," as well as "chemicals such as PCBs, solvents, and pesticides." *Id.*

### C. Proceedings Below

1. In 2007, petitioners—7,215 residents of the Vieques—filed suit under the FTCA against the United States to recover damages for the injuries and deaths caused by the Navy's activities.[3] As the basis for recovery, petitioners asserted claims under Puerto Rico law, including negligence. Pet. App. 4a-5a, 115a-30a. These claims alleged that the Navy wrongfully exposed petitioners to toxic substances. *Id.* at 116a-17a. They also alleged that the Navy negligently failed to monitor the environmental impact of its activities and failed to warn petitioners of the severe risks posed to their health and environment. *Id.* at 119a-21a.

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[1] *See* EPA, Region 2 Superfund, *Vieques Island/Atlantic Fleet Weapons Training Area*, http://www.epa.gov/region02/vieques/ (last updated Sept. 11, 2012).

[2] Available at http://www.epa.gov/region02/superfund/npl/0204694c.pdf.

[3] The residents filed suit in the United District Court for the District of Columbia, which transferred the case to the District of Puerto Rico. *Sánchez ex rel. Rivera-Sánchez* v. *United States*, 600 F. Supp. 2d 19, 23-24 (D.D.C. 2009).

2. The district court granted the Government's motion to dismiss for lack of subject matter jurisdiction. Pet. App. 68a-97a. In support of its motion, the Government asserted the discretionary function exception to the FTCA. *Id.* at 73a-74a. To show that the exception does not apply, petitioners alleged that the Navy's conduct violated specific mandatory directives that precluded any exercise of discretion. *Id.* at 5a-7a, 83a-96a, 102a-09a. The residents supported the allegations with affidavits, expert reports, and government documents; they also requested jurisdictional discovery, which the district court denied. *Id.* at 75a-76a & n.8, 92a-93a.

First, petitioners alleged that the Navy violated a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA under the Clean Water Act ("CWA"). Pet. App. 5a-6a, 94a-95a; see 49 Fed. Reg. 43,585 (Oct. 30, 1984). The NPDES permit prohibited the Navy from discharging ordnance that would cause concentrations of harmful compounds in waters around Vieques to exceed stated limits. Pet. App. 94a-95a; see *id.* at 6a, 111a-12a, 118a. According to two 1999 letters from EPA, the Navy violated its NPDES permit at least 102 times from 1994 to 1999. *Id.* at 7a, 118a. The United States could not and did not dispute these violations.

The district court acknowledged that the NPDES permit "appears to create a mandatory monitoring and compliance requirement." Pet. App. 94a; see *id.* at 95a (permit "set forth an inflexible water quality guideline with which the Navy was obliged to comply"). That finding should have foreclosed the discretionary function exception under step one of the *Berkowitz/Gaubert* analysis. Instead, the district court undertook a completely different analysis,

derived from the First Circuit's decision in *Abreu* v. *United States*, 468 F.3d 20 (2006).

In *Abreu*, Vieques residents brought tort claims against the Navy for its negligent handling of hazardous materials. 468 F.3d at 29. To overcome the discretionary function exception, petitioners alleged that the Navy had violated mandatory requirements of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* *Abreu*, 468 F.3d at 29. RCRA does not, however, authorize private suits for damages. *Id.* at 30-31 (citing *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 484-85 (1996)). The First Circuit dismissed the suit, holding that "[i]f an action based on the FTCA were allowed here, the district court would be effectively enforcing RCRA under the guise of a FTCA claim," which would "undermine the intent of Congress." *Id.* at 32.

Following *Abreu*, the district court declared the "pertinent question" to be "whether the CWA falls outside the scope of the discretionary function exception." Pet. App. 95a. The court noted that "[t]he CWA is a comprehensive regulatory statute that" does not authorize "claims for compensatory damages." *Id.* (citing *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17-18 (1981)). Allowing "an FTCA suit based upon violation of the CWA would be to 'enforce the CWA under the guise of a FTCA claim.'" *Id.* at 96a (alteration omitted). The court also read *Abreu* to create a "strong presumption for the application of the discretionary function exception" to claims involving "repercussions of military operations." *Id.* The court therefore held "that the discretionary function exception applies to Plaintiffs' claims which are premised upon violations of the CWA." *Id.*

Second, the residents submitted a letter and report from the Nuclear Regulatory Commission detailing that, in 1999, two aircraft fired over 250 rounds of depleted uranium on Vieques. Pet. App. 7a, 74a-76a. The letter stated that this firing violated a specific Master Material License and its Naval Radioactive Material Permit ("Radioactive Material Permits"). *Id.* at 7a, 74a, 76a-77a. Although the district court recited this evidence, *id.* at 74a, 76a-77a, it did not explain why these permits fail to show that the Navy's conduct was not discretionary.

Finally, the district court found, without allowing any discovery, that other alleged directives were not sufficiently specific to preclude discretion, and the court dismissed the suit. Pet. App. 83a, 86a-93a, 96a.

3. The court of appeals affirmed in a divided opinion that built upon *Abreu* to "create[]" a new exception to the FTCA "by judicial fiat." Pet. App. 64a (Torruella, J. dissenting).

a. The panel majority recited this Court's two-prong test for the discretionary function exception, Pet. App. 11a, but then it cited *Abreu* in asserting that "there is a 'particularly strong argument for limiting the rule of [*Berkowitz/Gaubert*] where the exercise of military authority is involved,'" *id.* at 13a (quoting *Abreu*, 468 F.3d at 27-28).

The panel majority first addressed the Navy's violation of its NPDES permit. Pet. App. 13a-16a. Although petitioners alleged this violation solely to overcome the discretionary function exception, the majority construed "plaintiffs' theory" to be "that they may sue under the FTCA for alleged CWA violations." *Id.* at 15a. The majority held that this "theory . . . is expressly barred by the intent of Congress." *Id.* The majority noted that this Court

has construed the CWA to preclude private claims for damages. *Id.* at 15a-16a (citing *Sea Clammers*, 453 U.S. at 18)). It followed, according to the majority, that "the decision not to permit damages under the CWA" was "a policy significant enough to demand the conclusion that Congress intended the CWA to foreclose the availability of damages" through suits under the FTCA. *Id.* at 17a.

The majority also applied this new exception to reject petitioners' argument that the Navy had violated its Radioactive Material Permits. Pet. App. 19a-20a. It framed the exception broadly, stating that "congressional intent may foreclose a claim for damages against the United States premised on violations of federal law." *Id.* at 22a-23a. Applying this rationale, the majority faulted petitioners for not "establishing that Congress intended that damages be available or unavailable for violations of the two alleged permits." *Id.*[4]

The majority acknowledged that "the plaintiffs pleadings, taken as true, raise serious health concerns," and that "[t]he government has acknowledged the existence of these concerns." Pet. App. 33a. The majority agreed with the dissent that "these issues should be brought to the attention of Congress." *Id.* The panel therefore *sua sponte* instructed the Clerk of the Court "to send a copy of this opinion to the leadership of both the House and Senate." *Id.*

b. Judge Torruella dissented, "protest[ing] this intolerable and undemocratic situation in the

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[4] The panel majority also held that plaintiffs did not adequately allege either that the depleted uranium bullets caused their injuries or that the Radioactive Material Permits constituted a specific mandatory directive. Pet. App. 21a-22a.

strongest of terms." Pet. App. 67a. He "beg[a]n with the incontrovertible proposition that Plaintiffs are suing under the FTCA, not the Clean Water Act." *Id.* at 41a. Petitioners had alleged "causes of action under Puerto Rico law which, if proven, would allow them to recover compensatory damages from the Navy as if it were a 'private individual.'" *Id.* at 43a (quoting 28 U.S.C. § 2674).

Judge Torruella then showed that the discretionary function exception does not bar petitioners' claims. As to the first prong, petitioners alleged that the Navy violated specific mandatory directives, including the terms of its NPDES permit and the Radioactive Material Permits. Pet. App. 53a-59a. As to the second prong, the Navy's conduct was not based on policy considerations, because no "reasonable or permissible policy analysis . . . could justify the Navy's failure to warn Plaintiffs of the known dangers created by the Navy's violation of the laws and regulations applicable to its conduct." *Id.* at 60a. He also criticized the majority for relying on *Abreu* to "creat[e] by judicial fiat" a new FTCA exception that gives the military "free reign to cause egregious harm to the citizenry." *Id.* at 64a.

4. The First Circuit voted 3-2 to deny a petition for rehearing en banc. Pet. App. 98a-99a. Joining Judge Torruella, Judge Thompson dissented from the majority's conclusion that "thousands of citizens" "have no claim and therefore no remedy" against the United States, even though "the Navy exposed them to toxins and caused them a host of grievous injuries." *Id.* at 99a. In her view, en banc review was warranted because this "unjust result rests on a teetering legal foundation." *Id.* at 99a.

## REASONS FOR GRANTING THE PETITION

Review is necessary because the First Circuit has invented an entirely new exception to the Federal Tort Claims Act's broad waiver of sovereign immunity—an exception that has no basis in the Act's text or this Court's precedents. Citizens injured by the Government within the First Circuit's jurisdiction now have less entitlement to compensation than other citizens do, because the First Circuit's new rule exists in no other circuits. The need to ensure decisional uniformity and to remedy a gross injustice warrants this Court review.

First, the decision below contravenes the FTCA and this Court's precedents. The Court gives the FTCA the "'ordinary meaning of [its] words,'" *Kosak*, 465 U.S. at 853, to fulfill its purpose of "'waiv[ing] the Government's immunity from suit,'" except as specified, *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006). The Court has repeatedly refused to infer new exceptions to the FTCA, which has existed for more than 50 years. And, the Court has made clear that the discretionary function exception does not apply when the Government's tortious conduct violated "mandatory statutes or regulations." *Gaubert*, 499 U.S. at 328. Petitioners demonstrated that the Navy's negligence violated numerous mandatory directives, including its NPDES permit and Radioactive Material Permits. This should have ended the matter, and petitioners' suit should have proceeded.

Instead, the majority determined that Congress "intended the CWA to foreclose the availability of damages" under the FTCA. Pet. App. 17a. The majority divined this "intent" even though the FTCA expressly authorizes petitioners' suit, 28 U.S.C. §§ 1346(b)(1), 2674, and even though the CWA

expressly disclaims "restrict[ing] any right . . . under any statute" (such as the FTCA), 33 U.S.C. § 1365(e). The majority then extended this new exception to the Radioactive Material Permits, faulting petitioners for not "establishing that Congress intended that damages be available or unavailable for violations" of these permits, too. Pet. App. 23a. Now, in the First Circuit, when an FTCA plaintiff shows that a federal employee's tortious conduct was not discretionary because it broke a mandatory rule, the plaintiff must also show that Congress intended to authorize damages for violations of the law that gives rise to that non-discretionary rule. This requirement is not rooted in any statute or case law, and renders the FTCA's authorization of damages superfluous.

Second, the First Circuit has set itself apart from all other circuits by adopting this new limitation on the FTCA. Other circuits have allowed FTCA suits to proceed when the Government's tortious conduct violated the CWA or other laws that do not independently authorize damages. If those suits were filed in the First Circuit, the decision below would require their dismissal. Certiorari exists to ensure uniformity among the circuits.

Finally, the question presented is recurring and fundamentally important. Suits under the FTCA are ubiquitous in the federal courts, as the Act provides redress for torts occurring across virtually all federal programs, from the postal service to the military. The discretionary function exception is a common defense, and the First Circuit's rule dramatically limits plaintiffs' ability to overcome the exception by pointing to mandatory directives. Moreover, the decision below disrupts Congress' considered balance between accountability and immunity. This Court should once again intervene to ensure that lower

courts exercise jurisdiction not as they see fit, but as the FTCA requires.

## I. THE DECISION BELOW CONTRAVENES THE FTCA AND THIS COURT'S PRECEDENTS.

Review is required because the decision below departs from the FTCA's text and this Court's precedents. It creates a boundless new exception out of nothing but generalized deference to the military and untenable assumptions about Congress' intent.

### A. The FTCA Allows Tort Claims Unless An Explicit Exception Applies.

1. This Court has repeatedly recognized that the FTCA provides a "broad waiver of sovereign immunity." *Kosak*, 465 U.S. at 851-52; *e.g.*, *Varig Airlines*, 467 U.S. at 814. The Court construes the FTCA according to "'the ordinary meaning of [its] words.'" *Kosak*, 465 U.S. at 853; *e.g.*, *Dolan*, 546 U.S. at 491-92. Thus, the FTCA's exceptions include only "'"those circumstances which are within the words and reason of the exception"—no less and no more.'" 546 U.S. at 492 (quoting *Kosak*, 465 U.S. at 853 n.9); see also *Dalehite* v. *United States,* 346 U.S. 15, 31 (1953). The cannon favoring strict construction of a sovereign immunity waiver does not apply "in the FTCA context" because "'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,'" which provides a remedy to injured citizens "'in sweeping language.'" *Dolan*, 546 U.S. at 491-92 (quoting *Kosak*, 465 U.S. at 853 n.9, and *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)).

Accordingly, unless an express statutory exception applies, tort claims against the United States may proceed under the FTCA. The Court has rejected

multiple overtures by the Government to engraft exceptions onto the FTCA that do not appear in its text. See, *e.g.*, *Berkowitz*, 486 U.S. at 538 (rejecting implied exception for "regulatory programs of federal agencies"); *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318-20 (1957) (rejecting implied exception for "circumstances" in which municipal governments have not "traditionally been responsible for the misconduct of their employees"); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955) (rejecting implied exception for "'uniquely governmental functions'"). When "[t]he language of the statute" subjects the Government to suit, this Court refuses to become "a self-constituted guardian of the Treasury" by "import[ing] immunity back into a statute designed to limit it." *Indian Towing*, 350 U.S. at 68-69.

2. The only statutory exception possibly at issue here is the discretionary function exception, governed by this Court's two-prong test. In elaborating the first prong, the Court has made clear that conduct is not "discretionary" if "a federal statute, regulation, or policy specifically prescribes a course of action for [the] employee to follow." *Berkowitz*, 486 U.S. at 536-38; see *Gaubert*, 499 U.S. at 324 (exception does not apply "[i]f the employee violates [a] mandatory regulation"); 499 U.S. at 328 (exception does not apply if the conduct was "controlled by mandatory statutes or regulations").

The Court illustrated this principle in *Berkowitz*. There, the plaintiffs asserted a state law tort claim under the FTCA, alleging that a federal agency's negligence in regulating polio vaccines caused their child to contract polio. 486 U.S. at 533, 535 n.2 ("the complaint stated a claim under the relevant state law"). To rebut the discretionary function exception, the plaintiffs also alleged that the agency violated a

statute and regulations that required the agency to receive test data from the vaccine manufacturer before issuing a license to the manufacturer. *Id.* at 542. The Court held that the discretionary function exception did not bar a claim "based on a decision of the [agency] to issue a license without having received the required test data," because "to do so would violate a specific statutory and regulatory directive." *Id.* at 542-43. In short, the exception does not apply "[w]hen a suit charges an agency with failing to act in accord with a specific mandatory directive." *Id.* at 544.

### B. The Decision Below Improperly Created A New, Implicit Exception To The FTCA.

1. The decision below contradicts this Court's cases by creating a new exception to the FTCA that is untethered from its text or purpose. Under *Berkowitz* and *Gaubert*, this case is straightforward: Petitioners alleged that the Navy violated its NPDES permit, Radioactive Material Permits, and other mandatory rules, but only for the purpose of rebutting the discretionary function defense. Pet. App. 74a-77a, 94a-95a. They did not rely upon those laws as the source of their right to recovery. The FTCA provides that. See 28 U.S.C. §§ 1346(b), 2674. Because petitioners showed that the Navy's actions violated "specific mandatory directive[s]," the discretionary function exception does not bar their suit. *Berkowitz*, 486 U.S. at 544; see *Gaubert*, 499 U.S. at 323-24. And because no other statutory exception applied, petitioners' claims should have proceeded to discovery.

Instead, the First Circuit fashioned a new exception based on the amorphous "intent of Congress." Pet. App. 22a-23a. According to the decision below, if a plaintiff shows that a federal employee's tortious

conduct violated a mandatory directive, the plaintiff has the extra burden to show Congress "intended that damages be available" for violations of that directive. *Id.* This approach conflicts with this Court's repeated admonition that courts may not "import immunity" into the FTCA. *Indian Towing*, 350 U.S. at 68-69; see also *Berkowitz*, 486 U.S. at 538; *Rayonier*, 352 U.S. at 319-20; *Indian Towing*, 350 U.S. at 64-65. None of the majority's justifications for its new exception has any merit.

*First*, the majority mischaracterized petitioners as suing "for alleged CWA violations." Pet. App. 15a. This mistakes how the FTCA operates. It adopts the "law of the place where the act or omission occurred"—here, Puerto Rico—as the basis for liability. 28 U.S.C. § 1346(b)(1). That is why petitioners based their complaint on Puerto Rico law; they pointed to the CWA and other mandatory directives only to show the Navy's misconduct was not the product of policy considerations. See Pet. App. 41a (Torruella, J. dissenting) ("Plaintiffs are suing under the FTCA, not the Clean Water Act"). This Court has never treated a mandatory directive invoked to defeat the discretionary function exception as the alleged basis for liability.

*Second*, the majority lacked any basis to divine an "intent of Congress" to preclude suit under the FTCA based on an entirely different statute—the Clean Water Act. Pet. App. 15a-16a. The majority stressed that Congress did not affirmatively authorize suits for damages in the CWA's citizen suit provision. *Id.* But that provision expressly states that it does not "restrict any right which any person (or class of persons) may have under any statute . . . to seek any other relief." 33 U.S.C. § 1365(e). Thus, the CWA disclaims affecting other statutes like the FTCA.

The majority nonetheless held that the CWA impliedly revoked the FTCA's authorization of certain suits. Pet. App. 17a ("Congress intended the CWA to foreclose the availability of damages available before the statute was enacted"). This approach "surely do[es] violence to the "'cardinal rule . . . that repeals by implication are not favored.'"" *TVA* v. *Hill*, 437 U.S. 153, 189 (1978) (omission in original). A repeal "'will not be presumed unless the intention of the legislature to repeal'" is "'clear and manifest.'" *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009); see also *Georgia* v. *Pa. R.R.*, 324 U.S. 439, 456-57 (1945). The CWA's express terms show that Congress intended exactly the opposite of what the court below concluded. 33 U.S.C. § 1365(e).

*Third,* the majority wholly misplaced reliance on this Court's decision in *Sea Clammers*. See Pet. App. 15a-16a. In *Sea Clammers*, the Court held that the CWA's citizen suit provision did not itself authorize suits for damages. 453 U.S. at 14; see 33 U.S.C. § 1365(a). And because it did not, the Court held that the CWA did not create any right to damages that could be enforced under 42 U.S.C. § 1983. *Sea Clammers*, 453 U.S. at 19 (discussing how *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) "construed 42 U.S.C. § 1983 as authorizing suits to redress violations . . . of rights *created by federal statutes*") (emphasis added). This holding has no bearing on the FTCA, however, because the FTCA authorizes damages for violations of state tort law, not the CWA. Nothing in *Sea Clammers* remotely supports what the majority did to the FTCA in this case. See Pet. App. 42a n.24 (Torruella, J. dissenting).

*Fourth*, the majority overreached in suggesting it could "'limit[]'" this Court's rules for applying the discretionary function exception "'where the exercise

of military authority is involved.'" Pet. App. 13a. The FTCA expressly authorizes suits by civilians to recover damages caused by "members of the military or naval forces." 28 U.S.C. § 2671. Accordingly, although military members cannot sue under the FTCA for active-duty injuries,[5] courts have long applied the plain terms of the FTCA to allow *civilian* suits arising out of the military's negligence. *E.g.*, *Dalehite*, 346 U.S. at 43-44; *Starrett* v. *United States*, 847 F.2d 539, 541-42 (9th Cir. 1988) (allowing landowners to sue under the FTCA after the Navy contaminated their well water with chemicals from missiles).

2. The majority's analysis of the Radioactive Material Permits demonstrates that its new exception to the FTCA is not at all limited to violations of the CWA, but rather reaches any mandatory directive that plaintiffs allege. Specifically, the majority placed the burden on petitioners to "establish[] that Congress intended that damages be *available or unavailable* for violations of the two alleged [Radioactive Material] permits." Pet. App. 22a-23a (emphasis added).

Thus, the First Circuit no longer allows an FTCA plaintiff to proceed by showing that the tortious conduct violated a mandatory rule (and thus was not discretionary), unless the plaintiff also shows that

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[5] In *Feres* v. *United States*, 340 U.S. 135 (1950), the Court construed the FTCA not to allow tort claims by active-duty service members, partly because Congress has already provided a separate compensation system for such injuries. *Id.* at 144-45; *see also Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 671-73 (1977) (*Feres*'s holding of no FTCA jurisdiction turns on the pre-existence of a "statutory 'no fault' compensation scheme"). For petitioners, the FTCA is the only compensation scheme available.

Congress intended to authorize damages for violations of that rule. Just how plaintiffs must make this additional showing is utterly unclear. It is not enough that the FTCA expressly authorizes suit. It is not enough that the violated rule expressly disclaims restricting rights under the FTCA. See 33 U.S.C. § 1365(e). Apparently, recovery is only available if the violated rule or law contains an express provision for damages against the United States. But if that were the standard, then the FTCA would be superfluous.

It is clear, however, that the First Circuit has erected an entirely new barrier to suit under the FTCA. Commentators have recognized it as such. See 2-12 Jayson & Longstreth, *Handling Federal Tort Claims* § 12.04 (2012) (noting that the First Circuit has created what "amounts to an exception to application of [the *Berkowitz*/*Gaubert*] two-part test."). Indeed, even the Department of Justice acknowledges that, whereas the discretionary function exception should be "straightforward" because "a specific and mandatory self-imposed obligation" will satisfy "the first prong of the analysis," the First Circuit's "recent authority" supports a fundamentally different analysis. David S. Fishback, *The Federal Tort Claims Act is a* Very Limited *Waiver of Sovereign Immunity*, 59 U.S. Att'ys' Bull. 16, 19 (2011) (discussing *Abreu*). Certiorari is warranted because the First Circuit has no authority to change Congress' statute or this Court's interpretation of the law.

## II. THE FIRST CIRCUIT'S NEW FTCA EXCEPTION DOES NOT EXIST IN ANY OTHER CIRCUIT.

This Court's intervention is warranted also because the decision below establishes a new limitation on the

FTCA that exists only in the First Circuit. Unless this Court grants review, an injured plaintiff's right to obtain redress under the FTCA will vary according to where suit is filed.

1. No other circuits have read the CWA as creating an implied exception to the FTCA's grant of jurisdiction. And three circuits have allowed FTCA suits to proceed when the Government's tortious conduct allegedly violated the CWA. First, in *Hurst* v. *United States*, the Eighth Circuit reinstated an FTCA suit by landowners who alleged that the Army Corps of Engineers violated the CWA and implementing regulations by failing to enforce limits in a CWA permit, which resulted in flooding. 882 F.2d 306, 309-10 (8th Cir. 1989). Second, in *Starrett* v. *United States*, the Ninth Circuit sanctioned a suit by landowners who claimed that the Navy had contaminated their water well while disarming weapons on an adjacent base in violation of the CWA, as implemented by an Executive Order. 847 F.2d at 541-42. Finally, in *Platte Pipe Line Co.* v. *United States*, the Tenth Circuit addressed claims that the Government's negligence caused a pipeline to spill oil in violation of the CWA. 846 F.2d 610, 611-12 (10th Cir. 1988). Although the Tenth Circuit held that a suit to recover clean-up costs had to proceed under a specific CWA provision that addressed clean-up costs, see 33 U.S.C. § 1321(i), it also held that "non-cleanup cost claims are cognizable under the FTCA." 846 F.2d at 612.[6] If these three suits had been filed in

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[6] The Tenth Circuit remanded to the district court to address the United States' argument that the discretionary function exception applied on those particular facts. *Platte Pipe Line*, 846 F.2d at 611. The United States "conceded," however, that generally "non-cleanup cost claims were cognizable under the FTCA." *Id.* at 611 n.4.

the First Circuit, the decision below would have required their dismissal, based on the implicit "intent of Congress." There is no way to reconcile the difference in outcomes among these various cases.

2. Moreover, because the First Circuit's new rule is not limited to the CWA, it would have produced a different outcome in many more cases that have held that a mandatory directive defeated the discretionary function exception, even though the directive did not itself authorize damages. For example, in *Jerome Stevens Pharms., Inc.* v. *FDA*, the D.C. Circuit held that the discretionary function exception did not bar suit after the Food and Drug Administration posted the plaintiffs' trade secrets on the agency's website, because the disclosure violated, *inter alia*, the Freedom of Information Act ("FOIA"). 402 F.3d 1249, 1252 (D.C. Cir. 2005). The First Circuit, by contrast, would have dismissed the suit because, just like the CWA, FOIA authorizes only injunctive relief, not damages. See 5 U.S.C. § 552(a)(4)(B); see, *e.g.*, *Cornucopia Inst.* v. *U.S. Dep't of Agric.*, 560 F.3d 673, 675 n.1 (7th Cir. 2009) ("[p]laintiffs are not entitled to monetary damages for violations of FOIA").

Likewise, the Ninth Circuit has allowed an FTCA suit to proceed when federal employees violated a mandatory directive of the Immigration and Naturalization Act ("INA") and its regulations regarding employees' use of firearms. *Vickers* v. *United States*, 228 F.3d 944, 953 (9th Cir. 2000) (discretionary function exception did not apply because employees violated 8 U.S.C. § 1357 and implementing regulations). The Ninth Circuit reached this result even though the INA does not authorize suits for damages arising from violations of those provisions. See *Chairez* v. *U.S. INS*, 790 F.2d 544,

548 (6th Cir. 1986) (holding that there is no "implied remedy for damages under § 1357").

Indeed, *every* other circuit simply applies this Court's two-step analysis of the discretionary function exception. *Every* other circuit holds that the exception does not apply when an employee violates a mandatory directive, regardless of whether that directive also authorizes damages. See, *e.g.*, *Triestman* v. *Fed. Bureau of Prisons*, 470 F.3d 471, 475-76 (2d Cir. 2006) (per curiam) (reinstating a prisoner's suit alleging that guards were negligent in enforcing policies); *Gotha* v. *United States*, 115 F.3d 176, 181 (3d Cir. 1997) ("If the OSHA regulations did apply, then the Navy could not rely on the discretionary function exception absent a statutory exemption."); *Blakey* v. *U.S.S. Iowa*, 991 F.2d 148, 152-53 (4th Cir. 1993) (examining Navy guidelines to determine whether the employees' tortious conduct involved discretion); *Collins* v. *United States*, 783 F.2d 1225, 1230-31 (5th Cir. 1986) (allowing a suit to proceed when a federal mine inspector violated a mandatory regulation); *Rosebush* v. *United States*, 119 F.3d 438, 442 (6th Cir. 1997) ("The relevant inquiry is whether the controlling statutes, regulations and administrative policies mandated that the Forest Service maintain its campsites and fire pits in any *specific* manner."); *Palay* v. *United States*, 349 F.3d 418, 431 (7th Cir. 2003) (allowing a prisoner's suit to proceed because he alleged the Bureau of Prisons' regulations removed officials' discretion); *Hurst*, 882 F.2d at 309-10 (8th Cir.) (allowing a landowner's suit to proceed when Army Corps of Engineers failed to enforce the terms of a CWA permit); *Starrett*, 847 F.2d at 541-42 (9th Cir.) (allowing landowners' suit to proceed when the military violated CWA provisions); *Tinkler* v. *United*

*States*, 982 F.2d 1456, 1464 (10th Cir. 1992) (allowing a suit to proceed after federal employees failed to comply with Federal Aviation Administration rules); *Miles* v. *Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 722 (11th Cir. 2002) (allowing a suit to proceed after an airplane nose gear collapsed because the Government violated inspection requirements mandated by federal regulation); *Jerome Stevens*, 402 F.3d at 1252 (D.C. Cir.) (allowing a suit to proceed when FDA violated FOIA); *cf. Dureiko* v. *United States*, 209 F.3d 1345, 1353 (Fed. Cir. 2000) (following *Berkowitz/Gaubert* to find that the Stafford Act's analogous discretionary function exception, 42 U.S.C. § 5148, did not apply when federal employees violated a binding contract term). In short, the First Circuit's new rule would lead to different outcomes in *every* other circuit.

3. This case demonstrates the unacceptable consequences of varying rules of decision. Petitioners initially filed suit in the U.S. District Court for the District of Columbia. Pet. App. 100a. If suit had proceeded there, the mandatory directives governing the Navy's conduct would have foreclosed the discretionary function exception, and the suit would have proceeded. *Cf. Jerome Stevens*, 402 F.3d at 1252. The case would not have been dismissed because of the free-floating "intent of Congress." But the United States challenged venue, contending that the petitioners claims were subject to the First Circuit's decision in *Abreu*. *Sánchez ex rel. Rivera-Sánchez* v. *United States*, 600 F. Supp. 2d 19, 23-24 (D.D.C. 2009). The district court agreed, and the consequence is that thousands of injured citizens in Puerto Rico

have been denied all judicial relief.[7] *Id.* The majority may have felt bad about allowing this outcome, see Pet. App. 33a, but its hands were not tied. It could have applied the FTCA as every other Circuit has and would, and reinstated this lawsuit.

The Court should grant review to ensure that future FTCA cases are decided on their merits, rather than by their venue. It is intolerable for a plaintiff injured in one circuit to have less right to compensation than plaintiffs injured in all others.

## III. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE.

Thousands of FTCA suits are filed each year, and plaintiffs often establish jurisdiction by showing that the Government's tortious conduct breached a mandatory rule. Unless this Court intervenes, plaintiffs injured within the First Circuit's reach will have a much heavier burden just to get into court. As this case makes painfully clear, the Government's accountability for the harms it inflicts upon its own people is a matter of overwhelming importance.

1. This question presented is certain to recur frequently. The FTCA is the exclusive remedy for most tort claims against the Government. Virtually every citizen interacts with federal employees routinely as they administer an array of federal programs, including postal service, airport security, health and safety services, financial oversight, immigration services, and law enforcement. It is no

[7] The Department of Justice's bulletin to U.S. Attorneys lauded the maneuver: "challenging venue in the District of Columbia ultimately facilitated the dismissal of the case." Adam Bain, *Litigating Venue in Federal Tort Cases*, 58 U.S. Att'ys' Bull. 30, 31 (2010).

surprise that, in just the past two years, nearly 6,500 tort claims were filed against United States.[8]

The discretionary function exception is a frequently invoked defense. See, *e.g.*, *McMellon* v. *United States*, 387 F.3d 329, 335 (4th Cir. 2004) (en banc) ("The most important" of the exceptions to the FTCA's waiver of sovereign immunity "is the discretionary function exception."); 2-12 Jayson & Longstreth, *supra* § 12.05 ("There are a great many reported Tort Claims Act cases involving the discretionary function exclusion . . . ."). In turn, plaintiffs often allege, as this Court's decisions require, that the employee's tortious conduct violated some mandatory directive that removed discretion. Lower courts are constantly reviewing various statutes, regulations, and policies to determine FTCA jurisdiction. See *supra* 24-26. Now, however, plaintiffs in the First Circuit have the additional burden to show that Congress intended to authorize damages for the violations of those mandatory directives.

2. The practical consequences of the First Circuit's rule are serious and far-reaching. Myriad statutes, regulations, and guidelines direct federal employees' conduct, though few expressly authorize damages. The existence of those directives should help plaintiffs establish FTCA jurisdiction by limiting the discretionary function exception. But the decision

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[8] *See* Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, tbl.C-2 (2011), *available at* http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx; Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, tbl.C-2 (2010), *available at* http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx.

below holds these directives *against* plaintiffs as a basis to infer an implicit congressional intent to foreclose damages. This is especially unfair given that plaintiffs typically have no access to jurisdictional discovery. Here, for example, petitioners submitted a Nuclear Regulatory Commission letter and report stating that the Navy had violated specific Radioactive Material Permits, but the district court denied discovery regarding these permits, and then the court of appeals blamed petitioners for not "establishing" Congress' intent regarding the permits. Pet. App. 22a-23a.

Moreover, the First Circuit's approach creates a perverse reward for the Government when its tortious conduct violates additional federal regulations. For example, if an EPA employee climbs into a neighbor's garden without permission, he may be liable for trespass, and the Government could be sued under the FTCA. If the same employee climbs into the neighbor's garden to test for toxic pollutants without presenting the proper credentials, he will have committed both the tort of trespass and a violation of the CWA. See 33 U.S.C. § 1318(a)(B). Under the majority's decision, the Government could be sued for the first trespass but not the second. The Government would thus be better off because its employee committed not just a tort but *also* a regulatory violation. Nothing in the FTCA's text or this Court's decision requires this perverse result.

3. Review is warranted also because this case concerns fundamental questions of sovereignty and accountability within our system of government. Before the FTCA was enacted, citizens injured by the Government had to petition Congress for a private bill that lifted immunity and granted compensation. *Dahelite*, 346 U.S. at 24-25. "[A]fter nearly thirty

years of congressional consideration," Congress finally enacted a permanent waiver of immunity in the FTCA. *Id.* It is the FTCA's text, not any court-made exception, that "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Varig Airlines*, 467 U.S. at 808. The First Circuit had no authority to redraw that boundary. Indeed, by sending its decision to congressional leaders, see Pet. App. 33a, the First Circuit thwarted the FTCA's basic purpose of having courts, rather than Congress, adjudicate tort claims against the Government.

The First Circuit's unprincipled deference to "'the exercise of military authority'" further raises the stakes of this petition. See, *e.g.*, Pet. App. 13a. Congress expressly dictated the extent to which the military is immune from civilian suits under the FTCA, see 28 U.S.C. § 2680(j), and this suit is not barred. Moreover, as Judge Torruella noted, the Navy could have obtained a waiver from various environmental laws to carry out its Vieques exercises, but it did not do so. Pet. App. 57a; see 33 U.S.C. § 1323(a) (national security waiver from Clean Water Act). The First Circuit's grant of immunity—after the fact and by judicial fiat—strikes a devastating blow to the rule of law.

Finally, that the lives of 7,125 residents of Vieques were forever altered by the Navy's decades of negligence should compel this Court to intervene. Unless this Court acts, they will never have their day in court. This injustice "rests on a teetering legal foundation" that conflicts with the FTCA, this Court's precedents, and the settled law in every other circuit. Pet. App. 99a (Thompson, J., dissenting). This Court

should grant review to undo the harm that the First Circuit has done to the FTCA and the citizens of Vieques.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN ARTHUR EAVES, JR.
EAVES LAW FIRM
101 North State Street
Jackson, MS 39201
(601) 355-7961

CARTER G. PHILLIPS*
MATTHEW D. KRUEGER
JOHN PAUL SCHNAPPER-CASTERAS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

*Counsel for Petitioners*

* Counsel of Record

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