No. 12-335

In the Supreme Court of the United States

JUANITA SANCHEZ, ON BEHALF OF MINOR CHILD D.R.-S., *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

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

BRIEF OF *AMICI CURIAE* THE MUNICIPALITY OF VIEQUES AND THE PUERTO RICAN BAR ASSOCIATION IN SUPPORT OF CERTIORARI

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[*]

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, establishes a broad waiver of the United States' sovereign immunity for suits sounding in tort. Accordingly, as this Court has long held, exceptions—like the discretionary function exception at issue here—must be construed according to their terms. Ignoring this principle, the First Circuit erred by construing the discretionary function exception liberally: Despite clear congressional intent and express dictates from this Court, the First Circuit majority "carv[ed] out an unwarranted exception to the [FTCA's] waiver of sovereign immunity for the exercise of military authority." Pet. App. at 38a (Torruella, J., dissenting). In so doing, the Court of Appeals broadened the "discretionary function" exception to apply even where there is no discretion. This Court should grant certiorari to correct the First Circuit's doctrinal error and thereby resolve the conflict that court created with decisions in this Court and in other circuits.

The First Circuit's unprecedented expansion of the "discretionary function" exception leaves the citizens of Vieques and *Amicus Curiae* Municipality of Vieques ("the Municipality") defenseless against the Navy's environmental destruction based on actions that even the United States has recognized as violat-

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[*] No party or counsel for a party authored or contributed monetarily to the preparation of submission of any portion of this brief. Counsel of record for all parties received notice of the Municipality of Vieques's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

ing the Navy's National Pollutant Discharge Elimination System (NPDES) permits. The Municipality is a small island-municipality of Puerto Rico located on Vieques, or "Little Girl Island," in the northeastern Caribbean. It is approximately eight miles to the east of the Puerto Rican mainland and is home to almost 10,000 U.S. citizens. While Vieques is known for wild horses and beautiful, undeveloped beaches, it was also home to the United States Navy's Atlantic Fleet Weapons Training Facility (AFWTF) for nearly sixty years—during which time the Navy conducted live fire training exercises, using millions of tons of ordnance.

Because of the lack of industry on the island, the poverty rate exceeds fifty percent, and the people subsist primarily on locally grown vegetation, fish and crabs caught in adjacent waters, and small livestock grazed on the island. As explained below, these food sources, as well as the underlying soil, have been found to contain high levels of heavy metals and carcinogens.

The Municipality currently has an administrative claim pending before the Secretary of the Navy for environmental contamination and diminution in value of property in the municipal zone as a result of the AFWTF's presence and activities on Vieques.

The Municipality has an interest in this case because the lives and health of its citizens are grievously harmed by the environmental damage occasioned by the acts and omissions of which the Petitioners complain. The Municipality continues to bear the heavy financial burden of providing substantial health care to those who have fallen ill. The collateral effects on the Municipality's economy are reflected in lost tourism and the decisions of businesses to

either not locate in or leave Vieques because of the environmental contamination and its human health impacts.

The Puerto Rican Bar Association ("PRBA"), founded in 1957 and the oldest ethnic bar in New York State, also has an interest in this case and joins the Municipality in urging this Court to grant the petition. Specifically, the PRBA has been intimately involved with challenging U.S. Navy actions on Vieques that have caused a disproportionate number of island residents to suffer severe health consequences and be exposed to unacceptable environmental hazards. The PRBA thus recognizes the unjustifiable financial and psychological burden the Municipality has endured in attempting to remedy the various damages wrought by the Navy. More generally, the PRBA throughout its history has been committed to serving the needs of the Puerto Rican diaspora community through thoughtful and deliberate legal and social action. It serves a community of people often unable to speak up for, or defend, themselves, thus making ever more immediate the need for lending its voice to causes such as the one the petition, and the Municipality in support, represent.

ARGUMENT

This Court should grant certiorari to reign in the First Circuit's rogue interpretation of the frequently invoked FTCA—a "judicial fiat," as Judge Torruella called it, that contradicts the statute's language, purpose, and history as well as this Court's own decisions construing the statute. Pet. App. at 64a (Torruella, J., dissenting). The result in this particular case is catastrophic: the unjustified protection of the Navy at the expense of the helpless Vieques residents and government who are left without legal recourse. Ap-

plication of the holding in future cases will be even more catastrophic, as it will effectively immunize any government actor's failure to adhere to mandatory environmental regulations so long as he is acting in furtherance of some governmental purpose. The decision, which gives a "whole class of governmental entities . . . free reign to cause egregious harm to the citizenry," should be reviewed and reversed. *Ibid.*

I. If Allowed to Stand, the First Circuit's Decision Would Gravely Impact the Municipality, Which Bears the Brunt of the Economic and Health Costs of the Navy's Conduct, And Would Leave Residents Near Other U.S. Military Bases in Harm's Way.

If allowed to stand, the First Circuit's decision will have particularly grave implications for the Municipality and, for that matter, the citizens of all communities in which the country's military maintains facilities. Indeed, absent accountability for its now-conceded violations of law and the harm it has caused, the Navy—and other branches of the United States military—may well not be welcomed in communities in which it maintains or seeks to maintain its facilities.

1. The NPDES permit at issue here sought to balance the Navy's perceived needs, on the one hand, with the health and safety of Vieques' citizenry, on the other. In other words, the EPA already conducted the necessary policymaking and balancing of interests when it designed the permit. The Navy has no discretion to reconsider that balance, or to revise the permit unilaterally.

If, as alleged (and now shown), the Navy failed to adhere to these (or any other) mandatory requirements, and if such failure proximately caused harm

to the people of Vieques, then—in light of Congress' enactment of the FTCA—the United States would be liable for such misconduct since it was Congress that determined that injured citizens are free to bring suit against the United States for torts causing them harm. As demonstrated in the petition and elaborated below, there may be an exception for "discretionary" acts, but there are *no exceptions* for acts for which there is no discretion but to find a way to comply.

By granting a remedy to injured persons, Congress in the FTCA sought to ensure accountability. By eliminating the accountability that Congress determined was inherent in the FTCA, the First Circuit inadvertently endangers those communities—and their residents—who rely on the EPA's issuance of NPDES permits to safeguard their health notwithstanding the activities of the military nearby. The moment the courts release the United States from these mandatory permit conditions (and other mandatory directives), the people who reside in any community in which the United States military has a presence are put in harm's way. And the inevitable resistance to an ongoing or future military presence furthers no one's policy aims.

2. The Municipality, and likely any local government which hosts similar military conduct, is grievously harmed by the decision below. Not only have the Municipality's citizens been subject to the toxins cutting their lives short, but its citizens—and the Municipality—continue to bear a heavy financial cost for the acts and omissions complained about by the Petitioners in this action. The failure to correct the First Circuit's denial of any remedy to the Petitioners will concomitantly require the Municipality to bear health care costs for which it does not have the funds,

and for which its citizens do not have the means to fund. The collateral costs include the loss of tourism, and the decision of businesses to leave Vieques, or to choose not to move to Vieques, for an indeterminable period.

These are not abstract concerns, but real harms. Over the years, numerous studies have documented the deleterious effects of the Navy's activities on the Municipality's human, animal and plant populations. For example, recent studies confirm the excessive, unsafe radiation, heavy metal contamination and carcinogenic contamination pervading Vieques' air, soil, coral reefs, and water. 1st Cir. App. at 15-16, 57-67 (filed Dec. 1, 2010). Other studies document: plants with 10 times more lead and 3 times more cadmium than samples from mainland Puerto Rico; vegetables and crops highly contaminated with lead, cadmium, copper, and other metals; crabs with 10 to 20 times more cadmium in their tissue than crabs from the east and west U.S. coasts; and goats, which grazed on the AFWTF's grasslands, with 5-7 times more cadmium, 6 times more cobalt, and 5 times more aluminum than goats on mainland Puerto Rico. *Id.* at 15-16, 69-75.

Perhaps the most haunting findings, though, relate to human suffering. Multiple studies have found elevated or toxic levels of mercury, lead, aluminum and cadmium in Petitioners' hair. *Id.* at 95-102, 104-08. And a statistical comparison with mainland Puerto Rico lays bare the Navy's devastating impact. Compared to Puerto Rico, Vieques carries a:

- 55% higher infant mortality rate;
- 30% higher cancer rate;
- 381% higher hypertension rate;

- 95% higher cirrhosis rate; and
- 41% higher diabetes rate.

Id. at 104-08. In sum, "the human population of Vieques has been exposed [to] and metabolized toxic substances that are generated by the military activities of the Navy" which "is a significant contributing factor to many of the diseases of the individuals living on the island." *Id.* at 107-08.

This Court should grant review so that the Municipality and its citizens can have a fair opportunity to seek redress for these harms, and means to avoid or redress the ongoing and future damage that the Navy's actions have created.

II. The First Circuit's Opinion Violates This Court's Directive that the Discretionary Function Exception to the Federal Tort Claims Act Must Be Construed According to Its Terms to Effect the FTCA's Sweeping Waiver of Sovereign Immunity to Tort Suits.

As outlined in greater detail in the petition, the First Circuit's decision also merits this Court's review because it seriously misconstrues the FTCA and this Court's decisions interpreting it. We highlight here the important of the First Circuit's errors.

1. Through the FTCA, the United States granted a broad waiver of sovereign immunity for suits sounding in tort. In "sweeping language," the FTCA "unquestionably waives [sovereign immunity] in favor of an injured person," *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951), generally authorizing suits against the United States for damages:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any em-

> ployee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

The FTCA was by no means "an isolated and spontaneous flash of congressional generosity." *Feres* v. *United States*, 340 U.S. 135, 139 (1950). Rather, it "mark[ed] the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit," its "primary purpose" being "to extend a remedy to those who had been without." *Id.* at 139-40; see also *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955). In an early FTCA case, this Court described the statute's "broad and just purpose" that courts must bear in mind in interpreting it. As the Court put it, "[t]he broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." *Indian Towing Co.*, 350 U.S. at 68-69. The Court went on to note that, "when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction," but "[n]either should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Id.* at 69.

2. The First Circuit's decision, however, "import[s] immunity back into [the FTCA]" contrary to

the dictates of this Court and in a manner Congress never contemplated.

To be sure, the FTCA is subject to certain statutorily defined exceptions, 28 U.S.C. § 2680, including the discretionary function exception at issue here, *id.* § 2680(a). The discretionary function exception bars claims "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.* The purpose of the exception is to insulate "'legislative and administrative decisions grounded in social, economic, and political policy'" from "'judicial 'second-guessing' . . . through the medium of an action in tort.'" *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984) ("*Varig Airlines*")). But because the exception immunizes "only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice,'" "[p]roperly construed, [it] 'protects only governmental actions and decisions based on considerations of public policy.'" *Id.* at 322-23 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536-37 (1988)).

Conversely, and dispositive here, where the "'element of judgment or choice'" "is not satisfied [because] a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' [and] 'the employee has no rightful option but to adhere to the directive,'" the exception does not apply. *Id.* at 322 (quoting *Berkovitz*, 486 U.S. at 537).

In short, the discretionary function exception does not immunize governmental activity that violates mandatory federal law. *Id.* at 322-23. And for good reason: the Government needs no extra flexibility or

protection to *comply* with specific mandates of law, nor is any legislative or policy purpose served by immunizing *violations* of mandatory federal law. As this Court explained in *Gaubert*:

> [i]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.

Id. at 324 (citation omitted).

Consistent with these principles, this Court has consistently implored courts to avoid "unduly generous interpretations of the exceptions [to the FTCA] [which] run the risk of defeating the central purpose of the statute." *Kosak* v. *United States*, 465 U.S. 848, 854 n.9 (1984) (citing *Yellow Cab*, 340 U.S. at 548 n.5); see also *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006). Since "'[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld[,] [courts] are not to add to its rigor by refinement of construction where consent has been announced.'" *Block* v. *Neal*, 460 U.S. 289, 298 (1983) (quoting *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383 (1949)). Accordingly, this Court has proclaimed "that the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak*, 465 U.S. at 854 n.9 (quoting *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953)). Therefore, the discretionary function excep-

tion, like other exceptions to the FTCA, must be strictly construed and not artificially expanded.[1]

3. The First Circuit, however, ignored these considerations. And as Judge Torruella explained, it did so by "go[ing] too far in carving out an unwarranted exception to the [FTCA's] waiver of sovereign immunity for the exercise of military authority." Pet. App. at 38a (Torruella, J., dissenting).

To determine whether the discretionary function exception to the FTCA immunizes Government conduct, courts engage in the two-prong analysis set forth in *Gaubert*, 499 U.S. at 322-23. *First*, the court must "inquire whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations." *Id.* at 328. *Second*, even if discretionary conduct is challenged, the court must determine whether it is "of the kind that the discretionary function exception was designed to shield." *Id.* at 322-23.

The First Circuit purported to perform the *Gaubert* analysis with respect to Petitioners' claims based on the Navy's repeated violations of the NPDES permit. But in reality, the Court of Appeals summarily denied them as foreclosed by its decision in *Abreu* v. *United States*, 468 F.3d 20 (1st Cir. 2006). Pet. App. at 65a (Torruella, J., dissenting) (Rather than relying on dicta from *Abreu*, "it would be more appropriate if the majority adhered to the Supreme Court's admonitions to the effect that FTCA exceptions are

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[1] FTCA jurisprudence is by no means anomalous in its strict construction of exceptions to the general waiver of sovereign immunity. Strict construction of statutory exceptions is a cardinal rule of statutory interpretation. See, e.g., *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989).

not to be construed in an 'unduly generous' fashion.") (quoting *Kosak*, 465 U.S. at 853 n.9). *Abreu,* like this case, involved (1) FTCA claims by citizens of Vieques; (2) the Navy's NPDES permit; and (3) the Resource Conservation and Recovery Act (RCRA), a regulatory scheme with enforcement contours similar to the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.* *Abreu*, 468 F.3d at 28-32. The plaintiffs there asserted claims under RCRA, and the First Circuit said that RCRA violations could not be a basis for FTCA claims because RCRA itself did not provide a cause of action in the circumstances there.

But here, unlike the plaintiffs in *Abreu,* the Petitioners neither dispute the validity of the NPDES permit, nor seek damages for the Navy's violations of the CWA. Rather, they claim that the NPDES permit itself is a specific, mandatory directive and that the Navy violated it at least 102 times, thus taking the Government out of the protected realm of the discretionary function exception under the first prong of the *Gaubert* analysis. As Judge Torruella recognized, "Plaintiffs allege the existence of mandatory rules, specific in nature, which required Navy compliance therewith, but which were not honored by the Navy and were the cause of Plaintiffs' injuries." Pet. App. at 54a (Torruella, J., dissenting).

Indeed, the EPA had no difficulty documenting the violations one-by-one in its formal notification to the Navy, comparing the specific "permit limit" for each toxin or heavy metal with the natural background concentration level calculated and reported by the Navy. 1st Cir. App. at 48-51 (filed Dec. 1, 2010); see *Gaubert*, 499 U.S. at 324 (discussing *Berkovitz*, 486 U.S. at 542-43) (noting that the discretionary function does not apply where there is "no room for choice or judgment" to "follow the specific directions con-

tained in the applicable regulations"). Because of these violations, the Petitioners allege that the Navy is liable to them *not* pursuant to any right of action conferred by the CWA, but rather, under the Puerto Rican Civil Code for negligence—because the Navy plainly knew the land and waters of Vieques were contaminated yet (1) failed to warn and, even worse, (2) facilitated the Petitioners' exposure to contaminants. Pet. at 19; 1st Cir. Appellants' Br. at 49-58 (filed Apr. 20, 2011).

The Court of Appeals majority, however, regarded the question here as whether the CWA itself "authorize[s] civil tort actions against the federal government for damages[,]" and answered that "[i]t is clear that Congress did not intend" such actions. Pet. App. at 15a. Therefore, it found the analysis in *Abreu* with respect to the RCRA applicable equally to the CWA, and thus held Petitioners' claims barred by the discretionary function exception. *Id.* at 15a-17a.[2]

But the majority was plainly wrong. That the CWA, like RCRA, does not itself provide for a private right of action is of no moment. The Petitioners' cause of action does not arise under the CWA. See Pet. App. at 65a (Torruella, J., dissenting) ("The issue in this case is not whether the CWA or NEPA created

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[2] The majority also relied on this Court's decision in *Middlesex Cty. Sewerage Auth.* v. *Nat'l Sea Clammers Assoc.*, 453 U.S. 1 (1981) ("*Sea Clammers*"), to support its conclusion that an FTCA claim based on a violation of the CWA's mandatory permitting requirement is barred. Pet. App. at 15a-17a. This was error. As Judge Torruella noted in dissent, "the FTCA claim in *Sea Clammers* was dismissed at the district court level because plaintiffs had failed to file administrative claims before proceedings to the courts, and thus the FTCA claims were not part of the *Sea Clammers* rationale." *Id.* at 42a n.24 (Torruella, J., dissenting) (citing *Sea Clammers*, 453 U.S. at 8).

a private cause of action for damages."). Rather, Petitioners' claims arise under the civil law of the Commonwealth of Puerto Rico, which provides that "[a] person who by an act or omission causes damage to another through fault or negligence shall be obligated to repair the damage so done." Civil Code of Puerto Rico, art. 1802, P.R. Laws Ann. tit. 31, § 5141.

To be sure, the Navy failed to comply with mandatory federal directives that caused harm to the environment. But the Navy then compounded the harm by failing to warn the Petitioners of the conditions it created and by actually facilitating the Petitioners' exposure to the contaminants—thereby violating Puerto Rican law as well.

The Petitioners are entitled to try their claims of negligence, under Puerto Rican law, against the United States precisely because the FTCA directs that the United States shall be liable for torts to the same extent as any private party. See 28 U.S.C. §§ 1346(b), 2674 (the United States is liable under the FTCA "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" "in the same manner and to the same extent as a private individual under like circumstances"); Pet. App. at 43a (Torruella, J., dissenting) ("Plaintiffs allege eight 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 in like circumstances.'") (quoting § 2674). This is not an improper use of the CWA. See *Adams* v. *United States*, No. CV-03-0049-E-BLW, 2006 WL 3314571, at *2 (D. Idaho Nov. 14, 2006) (rejecting the Bureau of Land Management's argument "that NEPA [(the National Environmental Policy Act of 1969)] provides no private right of action" because it "misperceives

plaintiffs' use of NEPA . . . not to recover any remedy but to argue that the BLM was under a mandatory duty," which "is not an improper use of NEPA," and therefore "refus[ing] to find that the BLM's decision to use Oust is immune from challenge under the discretionary function exception"); CWA, 33 U.S.C. § 1365(e) (disclaiming "restrict[ing] any right . . . under any statute"); see also *Hurst* v. *United States*, 882 F.2d 306, 309-10 (8th Cir. 1989) (reinstating landowners' FTCA suit alleging CWA violations by Army Corps of Engineers); *Starrett* v. *United States*, 847 F.2d 539, 541-42 (9th Cir. 1988) (sanctioning suit by landowners alleging the Navy contaminated their water well while disarming weapons on an adjacent base, in violation of the CWA).

That the Petitioners' claims are in some way *related* to the CWA does not render them claims "under" the CWA. Indeed, as Judge Torruella recognized, "the CWA, NEPA, and other regulations are of relevance only in determining whether the Navy comes within the discretionary function exception." Pet. App. at 56a (Torruella, J., dissenting). In rejecting that position, the First Circuit construed the discretionary function broadly, rather than according to its terms, as required by this Court's precedents. What is more, the First Circuit's interpretation leaves it alone among the Courts of Appeals—as explained more fully in the petition; every other circuit court follows this Court's two-step analysis to determine whether the discretionary function exception applies. And no other circuit court has drawn the First Circuit's line in the sand, barring suits under the FTCA by reasoning that a mandatory directive that does not itself authorize damages cannot defeat the discretionary function exception. See Pet. at 22-27.

Especially when combined with the circuit conflict it creates and the enormous adverse consequences for the Municipality and its people, the First Circuit's fundamental error warrants this Court's review.

III. The First Circuit's Decision Would Permit Government Agents to Violate Mandatory Legal Directives With Impunity.

The broader implications of the First Circuit's decision provide powerful additional reasons for review.

No one denies that military decisions—particularly *combat-related* ones—are often treated with a degree of deference. At the same time, this Court has repeatedly reminded lower courts of the limited reach of the discretionary functions exception to the FTCA, noting, not surprisingly, that the exception may apply only to *discretionary* acts. Where Congress or another arm of the Government mandates a behavior, the military is no more able to violate the law with impunity than any other governmental actor. E.g., *Weinberger* v. *Romero–Barcelo*, 456 U.S. 305, 315 (1982).

The First Circuit nonetheless immunized the Navy from its own permit conditions, despite previous affirmations by the First Circuit and this Court of "rulings and orders . . . regarding the Navy's violations and compliance requirements" involving munitions testing near Vieques. Pet. App. at 55a (Torruella, J., dissenting) (citing *Romero–Barcelo* v. *Brown*, 643 F.2d 835, 861-62 (1st Cir. 1981), *rev'd sub nom. Weinberger*, 456 U.S. 305). Far from shielding "legislative and administrative decisions grounded in social, economic, and political policy" from "judicial 'second-guessing' . . . through the medium of an action in tort," *Varig Airlines*, 467 U.S. at 814, the First Circuit's application of the discretionary function exception allows federal entities to violate all but their *own*

mandatory directives with impunity. Nothing in the legislative history of the FTCA, or the line of cases interpreting the discretionary function exception, supports such an unjust result. Cf. *Block*, 460 U.S. at 298 ("Any other interpretation [of the misrepresentation exception to the FTCA] would encourage the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits.").

If the purpose of the discretionary function exception is to ensure that the Government has flexibility to act within the boundaries of the law, *Varig Airlines*, 467 U.S. at 808, that policy is not served by granting immunity to conduct in violation of mandatory federal directives. To the contrary, such immunity encourages misbehavior and blatant disregard for affirmative legal mandates. It also eliminates accountability in the face of Congress' determination that "suit against the Federal employee [should be had] in situations where the responsibility for his act should in all conscience be borne by the Government." *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before H. Comm. on the Judiciary*, 77th Cong., 2d Session at 25 (1942).

The First Circuit's opinion, by contrast, would immunize not only historical misconduct but all transgressions of mandatory environmental (and other) law by any agency. Although this is not the law, the consequences have already been borne out in the Petitioners' disturbing allegations and evidence of human exposure and health effects.

Indeed, the First Circuit's decision ignores substantial evidence of the Navy's *admitted* violation of specific, mandatory obligations under its own governing law: As the Executive Secretary of the Naval Radia-

tion Safety Committee admitted in an April 1, 1999 letter to the U.S. Nuclear Regulatory Commission, the Navy's firing of 263 depleted uranium ("DU") 25mm rounds during a 1999 training exercise in Vieques "[wa]s a violation of the Navy's Master Material License No. 4S-2364S-01NA, and specifically, the Naval Radioactive Material Permit No. 13-00164-LINP." 1st Cir. App. at 124 (filed Dec. 1, 2010). As the Navy itself reported:

> [T]wo individuals *did not follow standard written procedures* . . . [that] *dictate* that the individuals issuing and receiving ammunition *must check the Notice of Ammunition Reclassification (NAR) database* for each type of ammunition prior to the transfer occurring. The NAR *specifies* that these 25mm rounds are "war reserve" and are to be used *strictly* during combat and are *restricted* from peacetime or training use. Both individuals *failed to refer to the NAR* prior to the DU ammunition being issued.

Id. at 124-25 (emphasis added).

The First Circuit majority ignored this and other adequately supported allegations, and thus "fail[ed] to properly credit Plaintiffs' averments, applying a higher pleading standard than is warranted at the motion to dismiss stage." Pet. App. at 59a (Torruella, J., dissenting).

In so doing, the First Circuit sent a message to all federal agencies operating within that Circuit that they can invoke the discretionary function exception to protect harmful activities that plainly are *not* dis-

cretionary because they violate established federal law. That too is a powerful reason to grant review.

CONCLUSION

"Nowhere does the medieval concept of 'the King can do no wrong' . . . sound more hollow and abusive than when an imperial power applies it to a group of helpless subjects." Pet. App. at 66a (Torruella, J., dissenting). And where, as here, Congress has expressly *waived* that immunity to allow redress for torts conducted in the name of the sovereign, it makes no sense to deny that redress by calling "discretionary" actions that plainly violate federal law. To construe the exception in an "unduly generous"—indeed, irrational—fashion would permit the Government to ignore clear environmental and other legal mandates with impunity. See *Kosak*, 465 U.S. at 853 n.9. But that is what the First Circuit's decision plainly does, and for that reason it plainly merits this Court's review.

The petition should be granted.

Respectfully submitted,

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