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

REPLY BRIEF OF PETITIONERS

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

February 12, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATION

REPLY BRIEF

Under the Federal Tort Claims Act's (FTCA) plain terms, and this Court's precedents, the district court had jurisdiction to hear petitioners' claims that the Navy's contamination of Vieques, in violation of its Clean Water Act (CWA) permit and other binding directives, caused horrific injuries and illnesses to the residents of that Island. The First Circuit denied jurisdiction by inventing a new exception to the FTCA "from whole cloth." Pet. App. 66a (Torruella, J. dissenting). The Government does not attempt to defend the First Circuit's indefensible holding. In a striking change of position, the Government now "agree[s] that the mere absence of a damages remedy in [the CWA] is not in itself a bar" to jurisdiction. Opp. 16. Certiorari is warranted to compel the First Circuit to heed governing law, to ensure that civilians injured by the Government in the First Circuit do not face higher barriers to remediation than all other civilians face, and to give the residents of Vieques their day in court.

I. THE DECISION BELOW CONFLICTS WITH THE FTCA, THIS COURT'S PRECEDENTS, AND THE DECISIONS OF EVERY OTHER CIRCUIT ON A QUESTION OF EXCEPTIONAL IMPORTANCE.

1. This Court has made clear that the discretionary function exception does not apply if "a federal statute, regulation, or policy specifically prescribes a course of action for [the] employee to follow." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988); see *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991). Petitioners demonstrated that several mandatory directives, including a National Pollutant Discharge Elimination System (NPDES) permit and Radioactive Material

Permits, prohibited the Navy from contaminating the Island and its waters in specified ways.[1] Because these mandatory directives removed the Navy's discretion, petitioners' suit should have proceeded to full discovery on the merits.

Instead of applying the *Berkovitz/Gaubert* inquiry, the First Circuit dismissed petitioners' suit under a new FTCA exception of its own invention. See Pet. App. 13a-18a. The majority did not even address each of the particular mandatory directives that petitioners allege the Navy violated, including the NPDES permit's specific limits on discharges of pollutants. Rather, extending its decision in *Abreu* v. *United States*, 468 F.3d 20 (1st Cir. 2006), the majority denied jurisdiction by inferring that "Congress intended the CWA to foreclose the availability of damages" through the FTCA, because the CWA does not itself authorize suits for damages. Pet. App. 17a. The First Circuit's judgment necessarily depends upon its holding that Congress' "decision not to permit damages under the CWA is a sufficient [enough] policy of that statute" to foreclose suit under the FTCA, *id.*, regardless of whether a federal actor violated a mandatory directive of the CWA.

This holding is utterly indefensible. It has no basis in the FTCA's text and contravenes this Court's precedents, which construe the Act to provide jurisdiction when a federal actor violates a mandatory directive, and to withdraw jurisdiction only for ""those circumstances which are within the words

---

[1] Contrary to the Government's claim (Opp. 9 n.1), petitioners have preserved for review whether the Radioactive Material Permits and other statutes, regulations, and policies constitute mandatory directives that defeat the discretionary function exception. *See* Pet. 18, 21-22, 29. Regardless, petitioners only need one basis for jurisdiction to proceed.

and reason of the exception"—no less and no more.'" *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 492 (2006).

Indeed, the Government now "agree[s]" with petitioners that the "absence of a damages remedy in [the CWA] is not in itself a bar to overcoming the discretionary function exception." Opp. 16. This is a complete reversal of the Government's position below that "*Abreu* required dismissal, since the CWA, like [the Resource Conservation and Recovery Act (RCRA)], ... does not provide for a private cause of action for damages." Gov't C.A. Br. 16; see also *id.* at 23; Opp. 17 n.3. As the Government now concedes, that position is wrong. This Court should grant the petition to ensure that the First Circuit applies the FTCA according to its text and this Court's precedents.

2. Review is warranted especially because the First Circuit's concededly erroneous standard exists in no other circuit. The Government does not dispute that the First Circuit stands alone. See Opp. 17 ("no other federal court of appeals" follows *Abreu* or *Sánchez*).

a. Three other circuits have permitted FTCA suits to proceed when the Government violated a mandatory directive that derived from the CWA. Pet. 23-24. The Government tries to reconcile those outcomes with the decision below on the ground that those circuits did not "rely on an NPDES permit" as the basis to reject the discretionary function exception. Opp. 12.[2] But those decisions did not turn on such a formalistic distinction.

---

[2] It does not matter that these decisions pre-date *Gaubert*, *contra* Opp. 12, because *Gaubert* did not alter the pre-existing rule that a mandatory directive defeats the discretionary function exception, *see Berkovitz*, 486 U.S. at 536.

Rather, in *Starrett* v. *United States*, 847 F.2d 539 (9th Cir. 1988), the Ninth Circuit held the discretionary function exception did not bar suit because the Navy violated a mandatory directive that prohibited discharges of "'substances in concentrations which are hazardous to health.'" *Id.* at 542. That is a far less specific standard than the precise, numeric pollution limits in the NPDES permit. *Infra* Part II.3. Likewise, the NPDES permit is not distinguishable from the directive in *Hurst* v. *United States*, 882 F.2d 306 (8th Cir. 1989), which required the Army Corps of Engineers to take enforcement action upon learning of unauthorized activities. *Id.* at 310. If anything, the NPDES permit is more specific and restrictive, given that agencies enjoy broad discretion over enforcement actions. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-32 (1985).

Conversely, if *Starrett* or *Hurst* had been filed in the First Circuit, the decision below would have compelled their dismissal because each alleged a violation of a directive based on the CWA. See *Hurst*, 882 F.2d at 309-10; *Starrett*, 847 F.2d at 541-42. The decision below would have compelled a different outcome also in *Platte Pipe Line Co.* v. *United States*, 846 F.2d 610, 611-12 (10th Cir. 1988), which allowed an FTCA suit to recover oil spill clean-up costs caused by the Government's violation of the CWA. These outcomes cannot be reconciled.

b. The Government's attempt to harmonize the First Circuit's decision with circuits' decisions outside the CWA context is just as flawed. The Government declares that the directives in those cases "mandated a specific course of conduct," rather than an "end result." Opp. 13-14. As detailed below, *infra* Part II.3, this distinction is unfounded and unworkable. By strictly limiting the Navy's ability to discharge

pollutants, the NPDES permit cabined the Navy's discretion just as much as directives limiting an agency's ability to disclose trade secrets or requiring a federal employee to initiate investigations. See, *e.g.*, *Jerome Stevens Pharms., Inc.* v. *FDA*, 402 F.3d 1249, 1252 (D.C. Cir. 2005); *Vickers* v. *United States*, 228 F.3d 944, 951-53 (9th Cir. 2000).

All other circuits allow specific mandatory directives to overcome the discretionary function exception. They would not have treated the mandatory directives here any differently. The only explanation for the divergent outcomes is the First Circuit's indefensible holding that the statute underlying the mandatory directive must itself authorize damages. The Court should grant the petition and ensure that the Government is equally accountable to all its citizens, whereever they reside.

II. THE GOVERNMENT'S ARGUMENTS AGAINST CERTIORARI LACK MERIT.

The Government's arguments that certiorari should not be granted, despite the conceded error below, are meritless.

1. The decision below will undoubtedly have "prospective significance," Opp. 16-17. It built upon the First Circuit's decision in *Abreu*, which adopted its erroneous standard for a different statute (RCRA). Further, the majority here applied its holding not only to the CWA but also to the Radioactive Material Permits, faulting petitioners for not "establish[ing] that Congress intended that damages be *available or unavailable* for violations of the two alleged permits." Pet. App. 22a-23a (emphasis added). The First Circuit's erroneous test thus is the settled law of the

circuit, having been applied in two published opinions, to three different regulatory regimes.[3]

Thousands of FTCA suits are filed every year, and the discretionary function exception is frequently invoked in defense. See Pet. 27-28. Plaintiffs in every other circuit can overcome the discretionary function exception by pointing to a mandatory directive, but plaintiffs in the First Circuit cannot—unless they also show that Congress intended damages to be available for violations of those directives.

2. The Government's decision not to defend the First Circuit's holding, Opp. 17, is no reason to deny certiorari. The holding below is still law of the First Circuit, regardless of the Government's position here. It binds future First Circuit panels and district courts, which have cited *Abreu* and *Sánchez* for the very proposition the Government now disavows. See *United States* v. *Baxter*, No. 1:10-cv-435-JAW, 2011 U.S. Dist. LEXIS 55277, at *22 (D. Me. May 23, 2011) (citing *Abreu* as "[d]isallowing FTCA claim where it 'would effectively be enforcing' another statutory remedial scheme"); cf. *Cruz* v. *P.R. Power Auth.*, 878 F. Supp. 2d 316, 323 n.3 (D.P.R. 2012) (citing *Sánchez* and dismissing a 42 U.S.C. § 1983 claim in light of other """specific statutory remedies""").

Moreover, nothing stops the Government from urging courts in the First Circuit (or elsewhere) to follow *Abreu* and *Sánchez*'s clearly erroneous

---

[3] There is no merit to the Government's suggestion (Opp. 17) that the First Circuit may correct the decision below in light of its decades-old decision in *Irving* v. *United States*, 909 F.2d 598 (1st Cir. 1990). The majority discussed *Irving* without perceiving any conflict with *Abreu*, Pet. App. 21a-22a, which it believed controlled this case, *id.* at 17a-18a.

standard.[4] The Government states only that it no longer supports their holdings "here." Opp. 17 n.3. And, with the caveat that the "absence of a damages remedy ... may be relevant" to FTCA jurisdiction, *id.* at 16, the Government apparently reserves the right to make similar arguments in future cases. On the other hand, if the Government does adhere to its new position, and refrains from asking courts to follow *Abreu/Sánchez*, this conflict is not likely to mature any further. In either case, review by this Court would not be "premature," *id.* at 18.

In any event, even if *Abreu* and *Sánchez* are the only cases in which the First Circuit's arbitrary bar on jurisdiction is ever applied, the result would be that thousands of Vieques residents—and only them—will have been subject to a special barrier to suit. See Br. for the Sierra Club as *Amicus Curiae* 3. It is hard to imagine a more unjust result than singling out Vieques residents for additional injury, after they suffered six decades of mistreatment by the Navy. Hundreds of Vieques residents have died and thousands have suffered severe injuries as a result of the Navy's negligence. Those who survived have experienced staggering rates of poverty and unemployment. See Brief of *Amici Curiae* the Municipality of Vieques et al. 2. This Court should grant the petition, because the FTCA is petitioners' "only effective remaining forum in which to seek redress for their alleged wrongs." Pet. App. 67a (Torruella, J. dissenting).

---

[4] For example, the Government urged the district court to extend *Abreu* to another statute, the Comprehensive Environmental Response, Compensation, and Liability Act. *See* Motion to Dismiss at 40, *United States* v. *Sánchez,* No. 3:09-cv-01260-DRD (D.P.R. May 18, 2009) (Doc. 30-2).

This Court has not hesitated to grant certiorari to enforce FTCA jurisdiction over the Government's opposition. See *Millbrook* v. *United States*, No. 11-10362 (cert. granted Sept. 25, 2012). At a minimum, the Court should summarily grant, vacate, and remand to the First Circuit for further consideration in light of the new position asserted by the Solicitor General. *E.g.*, *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 166-67 (1996) (per curiam) ("We have GVR'd in light of ... confessions of error or other positions newly taken by the Solicitor General."). What it should not do is simply leave this injustice in place.

3. The Government ultimately opposes the petition on the alternative ground—not even addressed by the First Circuit—that the NPDES permit does not constitute a specific mandatory directive. Opp. 7-12. This argument is deeply flawed.

a. First, the NPDES permit and the underlying statute unambiguously "prescribe[d] a course of action" that defeats the discretionary function exception. *Berkovitz*, 468 U.S. at 536-37. As the district court recognized, the NPDES permit "set forth an inflexible water quality guideline" that limited the particular substances the Navy could discharge into the waters surrounding Vieques. Pet. App. 94a-95a; see 49 Fed. Reg. 43,585 (Oct. 30, 1984). The permit is explicitly mandatory, contains penalties for non-compliance, and requires regular sampling, monitoring, and recordkeeping. 49 Fed. Reg. 43,585. The underlying statute is equally clear and mandatory: "the discharge of any pollutant by any person shall be unlawful," "[e]xcept as in compliance" with an NPDES permit. 33 U.S.C. § 1311(a).

The Government argues that the NPDES permit merely "set[s] forth an end result" and does not "itself

require the Navy to take (or refrain from) any particular action." Opp. 9-10. That description is false. By setting specific limits on pollutants from stray ordnance, the permit directly restricted the Navy's ability to discharge ordnance with particular constituents (*e.g.*, arsenic, lead, mercury) into the water.

Moreover, the Government's distinction between "courses of actions" and "end results" has no foundation in this Court's decisions.[5] The Government's reliance, Opp. 10, on *United States* v. *Varig Airlines*, 467 U.S. 797, 820 (1984), is unavailing because it involved a flexible airline-inspections scheme wherein the agency develops tests "'deem[ed] reasonably necessary in the interest of safety,'" and inspectors' "'[c]onformity determination[s] may be varied depending upon circumstances.'" *Id.* at 805, 817. Here, the NPDES permit did not leave the Navy with discretion to adopt whatever measures it "deemed reasonably necessary in the interest" of pollution control; rather, the permit prohibited specific levels of concentrations and mandated monitoring and reporting to ensure compliance.

Nor is the Government's "end result" distinction remotely workable. For example, if a federal law prohibited postal workers from driving in excess of 60 MPH and a worker injured someone while driving 70 MPH, the discretionary function exception would not apply under *Gaubert* and *Berkovitz*. But under the Government's logic, the exception would apply

---

[5] *Aragon* v. *United States*, 146 F.3d 819 (10th Cir. 1998), undermines the Government's claim. That case held that the "objective" of the "protection of water resources" was too abstract, *id.* at 826, and contrasted it with "specific, mandatory water quality standards," *id.* at 825—the very type of standards imposed by the NPDES permits.

because the speed limit merely set forth an "end result" and did not mandate a "course of conduct" for achieving it—such as using the brake or cruise control. This makes no sense and cannot be the law. Federal employees no more have the "discretion" to disobey the CWA and NPDES permits than they do to disobey traffic laws.

b. Second, the Government's claim that the EPA's findings were just "one agency's interpretation of the permit ... over another's (the Navy's)" is a red herring. Opp. 10. Whatever the Navy may think, the complaint's allegations that the EPA found numerous, specific violations of the NPDES permit undoubtedly carried petitioners' pleading burden. See *Berkovitz*, 486 U.S. at 540 (accepting "factual allegations in petitioners' complaint as true").

In any event, the CWA clearly vests the EPA, not the Navy, with authority to issue permits, set binding permit terms, and determine permit violations. See 33 U.S.C. §§ 1319, 1342(a). Moreover, the Government does not and cannot dispute the Navy's own monitoring showed "102 exceedances of the water quality-based permit limits" for at least 14 chemicals and compounds. C.A. App. 23-24. These violations are a simple matter of comparing the detected concentrations to the permit limits. They are not subject to "different understandings" by the Navy. Opp. 11.

c. Third, the Government is mistaken in denying that petitioners sufficiently alleged a "causal link between any particular permit violations and [petitioners'] injuries." *Id.* Neither the district court nor the First Circuit questioned this aspect of causation. See Pet. App. 13a-18a, 93a-96a. Nor could they, for the complaint explicitly alleges that "the Navy had committed at least 102 violations of the

[CWA]," and that this "negligently, recklessly, and/or intentionally exposed the residents of Vieques to toxic and/or hazardous materials," which caused their injuries. *Id.* at 118a, 131a. In opposing the motion to dismiss, petitioners also submitted expert declarations that further support causation. C.A. App. 107-108; Pet. App. 46a-52a. This was more than enough to demonstrate FTCA jurisdiction.

d. Finally, the Government's sweeping claim that the "discretionary function exception shields the government from liability for injuries sustained as a result of hazards and contaminants resulting from military activities," Opp. 15, is demonstrably incorrect. The FTCA expressly applies to torts committed by "members of the military or naval forces." 28 U.S.C. § 2671. The cases cited by the Government dismissed FTCA actions not because they involved military activities, but because, unlike here, the plaintiffs failed to point to a mandatory directive. *Loughlin* v. *United States*, 393 F.3d 155, 163 (D.C. Cir. 2004); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 984, 995 (9th Cir. 1987). Numerous courts have sanctioned FTCA suits arising out of military activities. *E.g.*, *Starrett*, 847 F.2d at 541-42 (Navy's operations contaminated wells in violation of prohibition on discharges); *McMichael* v. *United States*, 856 F.2d 1026, 1033 (8th Cir. 1988) (government inspectors failed to follow munitions plant safety checklist).

The FTCA reflects Congress' considered balance between accountability and immunity for all federal actors, including the military. This Court's review is urgently needed to restore that balance in the First Circuit and ensure that the residents of Vieques have an equal ability to hold the Government accountable for its negligently inflicted harms.

CONCLUSION

For these reasons, and those stated in the petition, 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

February 12, 2013