No.

In the

Supreme Court of the United States

MARY SMITH, individually, and as the Personal Administrator for the Estate of Peter Smith, Deceased, and as Guardian Ad Litem for ALICE SMITH, BARRY SMITH, and CHARLES SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Plaintiff's decedent was killed when his raft went over a submerged dam in the Yellow River. Signs warning of the dam had been washed away. The Army Corps of Engineers did not replace the signs until the day after the accident.

QUESTION PRESENTED

Whether a federal agency decision that involves even two competing interests is necessarily susceptible to policy analysis, and thus always within the discretionary function exception to the Federal Tort Claims Act.

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The opinion of the court of appeals (Appendix,[1] page A1) is reported at 999 F.3d 999. The court of appeals' order denying rehearing en banc (A36) and the opinion of the district court (A40) are unreported.

JURISDICTION

The court of appeals' judgment was entered on September 29, 2010. A timely petition for rehearing was denied on May 16, 2011. (A36, A38) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1346(b)(1) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, 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

[1] References to the Appendix are given in parentheses, with page numbers preceded by the letter "A."

> 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.

28 U.S.C. § 2680(a) provides:

> 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.

STATEMENT

On May 29, 2005, during Memorial Day weekend, Peter Smith took his two sons rafting on the Yellow River in northern California. The raft went over a submerged dam and he drowned. (A2) The Army Corps of Engineers had placed signs upstream

warning of the dam, but recent heavy river flows had washed them away. (A2) Peter Smith's widow, petitioner Mary Smith, sued on behalf of herself, her husband's estate, and their children alleging that the government negligently failed to replace the warning signs. (A3)

A. The Deer Point Dam Sign Plan

The Deer Point Dam is a submerged, debris-control dam managed and operated by the Corps. (A3-A4) The dam's structure is under water and not visible from upstream. (A3 n.1) The Corps' management duties include posting signs to warn recreational boaters that the dam presents a hazard. (A4)

In 1987 the Corps promulgated its Sign Standards Manual ("SSM"), which directs how to provide appropriate signs at the Corps' projects. (A4) Regarding sign maintenance and replacement, the SSM requires "that damaged signs be reported as soon as the problem is noticed so that the necessary maintenance work can be scheduled and completed in a timely manner." (A4) It further states that "[i]t is also critical that missing or damaged signs be replaced or repaired in a timely manner," and that "[p]ersonnel safety is a prime concern in performing sign maintenance." (A4)

The SSM directs that a sign plan be developed for each Corps project based on an evaluation of the

conditions existing at that site. (A4) The Corps developed a sign plan for the Deer Point Dam that specifies exactly where warning signs should be placed along the Yellow River, as well as specific details about each sign. (A4-A5) The plan requires the Corps to post several permanent signs, including a sign four miles upstream from the dam that says, "Warning – Submerged Dam 4 Miles Downstream," a number of signs that read "Raft Portage," and signs on the dam abutments that say "Danger – Keep Back." (A5) Because of increased river usage by pleasure boaters in the spring and summer, the plan also requires the Corps to post seasonal signs that clearly instruct boaters to portage when they approach the submerged dam. (A5, A19-A20) These seasonal signs include two signs on a sand/gravel bar in the middle of the river reading "Warning – Submerged Dam 1500 Downstream" and "Danger – Submerged Dam Ahead Take Out Now"; signs on the south bank of the river directing boaters to points on the bank where they should ground their boats and begin to portage; and a mid-river warning buoy with a directional arrow and the words "Take Out." (A20)

Placing the signs on the south bank and the sand/gravel bar and anchoring the buoy to the bottom of the river are the most difficult tasks because Corps employees must drive or wade into the river. (A5, A21)

B. The Corps' decision

In late April 2005, the Corps installed the required seasonal warning signs. (A5) But on or about May 19, 2005, there were unexpectedly heavy water flows, and the Corps learned soon thereafter that all the warning signs, permanent and seasonal, had been washed away except for the signs on the dam itself. (A5-A6) On May 25, 2005, Corps workers assessed the situation, but because of high, fast water and dangerous conditions they could not get to locations on the sand/gravel bar and on the south bank of the river. (A6, A21-A22) The Corps does not assert that dangerous conditions made it difficult for employees to replace the permanent warning signs on the north bank of the river upstream from the dam, including those that say "Raft Portage" and the one that says "Warning – Submerged Dam 4 Miles Downstream." (A22)

On May 30, 2005, the day after Peter Smith's fatal accident, the Corps decided it was safe to replace the missing signs and began to do so that day. (A22)

C. Proceedings below

Peter Smith's survivors sued under the Federal Tort Claims Act ("FTCA"), alleging that the Corps negligently failed to replace the missing warning signs before the busy Memorial Day weekend. (A6)

The Corps moved for summary judgment, or alternatively, to dismiss the case under Federal Rules of Civil Procedure, Rule 12(b)(1) for lack of subject matter jurisdiction. (A6) The district court held that the Corps is immune from suit under the discretionary function exception to the Tort Claims Act, and therefore granted the Corps' motion to dismiss. (A6-A7)

A divided court of appeals affirmed the district court's dismissal for lack of subject matter jurisdiction. (A17) The majority first noted that a two-step test governs the application of the discretionary function exception. The first step is to determine whether a statute, regulation, or policy mandated a specific course of action, thereby precluding application of the exception. If the government action did involve a choice or judgment, the second step is to determine if that judgment was of the kind the discretionary function exception is intended to shield, *i.e.*, decisions based on considerations of public policy. (A8-A9) The majority determined that no regulation or guideline required the Corps to replace the missing signs within a specific period of time, and that when to replace the signs was a matter within the Corps' discretion. (A9-A11) The majority then proceeded to step two: determining whether the decision as to when to replace the missing signs is susceptible to a public policy analysis. Public policy

is understood to include decisions "grounded in social, economic, or political policy." (A11-A12)

In concluding that the decision regarding when to replace the mandated signs is susceptible to a public policy analysis, the majority relied almost exclusively on two cases. In the first, *Miller v. United States*, 163 F.3d 591 (9th Cir. 1998), ranchers sued for damages caused when a forest fire spread from a national forest to their ranches. Lightning had started several fires in the region, and the Forest Service chose to fight others and let the one in question burn. The court concluded that no statute, regulation, or policy mandated a particular course of action, and that the Forest Service's decision was susceptible to a public policy analysis because it required the balancing of several competing interests. The court noted that safety generally is not a consideration based on policy, but added that more than safety was involved. "While safety [of the public and the fire-fighters] was one consideration, the decision regarding how best to approach the . . . fire also required consideration of fire suppression costs, minimizing resource damage and environmental impacts, and protecting private property." *Id.*, at 596.

In the second case, *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005), the plaintiff claimed that he became ill as a result of exposure to toxic

mold the government negligently allowed to colonize a naval commissary's meat department. *Whisnant* held that the government's alleged failure to maintain safe and healthy premises was not a decision susceptible to considerations of social, economic, or political policy, and thus was not within the discretionary function exception. *Id.*, at 1179. In reaching its decision, the court stated the general rule that a decision to adopt safety precautions may be based in policy considerations, but that implementation of those precautions is not. *Id.*, at 1182. It then added in a footnote that an exception to the foregoing general rule applies "where the implementation itself implicates policy concerns, such as where government officials must consider competing fire-fighter safety and public safety considerations in deciding how to fight a forest fire." *Id.*, at 1182 n.3 (citing *Miller*).

Seizing on *Whisnant's* misleading characterization of the *Miller* decision, the majority in the instant case announced that, although "safety considerations generally are not policy considerations," the law "establishes that balancing *competing* safety considerations *is* a protected policy judgment." (A15, emphasis in original) The majority then broadened the newly stated rule to cover *any* competing considerations: "[S]o long as a decision involves even two competing interests, it is 'susceptible' to policy

analysis and is thus protected by the discretionary function exception." (A16)

Judge Fletcher emphatically dissented. (A18) First, she noted that the Corps' decision to delay replacing the signs on the north bank (*i.e.*, those that did *not* require driving or wading into the river) involved no choice between competing safety concerns. Thus, even according to the majority's analysis, that decision was not protected by the discretionary function exception. (A22-A23) The dissent acknowledged that the Corps' initial decision to adopt the sign plan may have taken policy considerations into account. But deciding when to replace the missing signs, in the dissent's view, involved only the exercise of professional judgment regarding safety—a matter rarely considered to be susceptible to social, economic, or political policy analysis. (A23-A27) Nor does the existence of multiple safety considerations change the analysis, since the majority's assertion that the balancing of competing safety considerations is a protected policy judgment is based on a fundamental misreading of *Miller* and *Whisnant*. (A27-A31) Moreover, the dissent found the majority's decision to be inconsistent with the purpose of the FTCA, which is to compensate victims of governmental negligence in circumstances where a private person would be liable. A private landowner in the Corps' position would have had to consider the

exact same factors in deciding when to replace the missing warning signs. (A31-A33) Finally, the dissent rejected the majority's sweeping claim that the discretionary function exception invariably protects *any* decision involving more than one competing interest or concern. (A33-A35) Only if the competing considerations relate to social, economic, or political policy is the discretionary function exception implicated. (A35)

REASONS FOR GRANTING THE PETITION

A. The court of appeals' decision conflicts with decisions in other circuits.

The decision here effectively eliminates the second prong of the two-part test for application of the discretionary function exception. It conflicts with numerous decisions in other circuits that apply the exception only when a decision implicates, not merely professional judgment, but real policy judgment of a social, economic, or political nature.

In *Cope v. Scott*, 45 F.3d 445 (D.C.Cir. 1995) a motorist sued the National Park Service, charging negligent road maintenance and negligent failure to post a sign warning of a dangerous condition. The court held that the design/maintenance decision

involved numerous factors in addition to safety, and was thus protected by the discretionary function exception. It reached a contrary conclusion regarding failure to post a warning sign, which does not generally involve the kind of discretion the discretionary function exception protects. "[O]nly if [such safety decisions] are fraught with public policy considerations do they fall within the exception." *Id.*, at 451 (internal quotes omitted). The court rejected the government's contention that aesthetic and engineering judgments brought the decision within the exception. There were already 23 traffic control, warning, and informational signs on the half-mile stretch of road where the accident occurred, and the engineering judgment was a matter of professional judgment, not policy. *Id.* at 452.

In *Duke v. Dept. of Agriculture*, 131 F.3d 1407 (10th Cir. 1997), a camper was injured when a boulder rolled down a slope and smashed into his tent. The slope was created by a road-cut in the mountain, and the Forest Service permitted people to camp below the slope even though it knew that large rocks had previously fallen there. The court held that the government's failure to warn of the danger did not come within the discretionary function exception. It noted that nearly every governmental action involves some choice,

> which permits the government to argue, as it appears to do here, that decisions — or nondecisions — that involve choice and any hint of policy concerns are discretionary and within the exception. We agree with the D.C. Circuit that this approach would not only eviscerate the second step of the analysis set out in *Berkovitz* and *Gaubert*, but it would allow the exception to swallow the FTCA's sweeping waiver of sovereign immunity. [Citation.] We must ask if the decision or nondecision implicates the exercise of a policy judgment of a social, economic or political nature.
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> *Id.*, at 1411 (internal quotes, brackets, and ellipses omitted).

In *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994), survivors of miners killed in an explosion alleged that mine inspectors from the Mine Safety and Health Administration ("MSHA") were negligent. The court held that the discretionary function exception did not apply:

> [W]e hold that the assessments made by MSHA inspectors are not "policy" decisions protected by the discretionary function exception to the FTCA. Instead, the choices inherent in these assessments are to be made by MSHA inspectors in

> light of their own observations, informed by professional judgment and knowledge of the industry. Considerations of "political, social or economic policy" are not *authorized* to play a part in these assessments.
>
> *Id.*, at 898 (emphasis in original).

In *Cestonaro v. United States*, 211 F.3d 749 (3rd Cir. 2000), the plaintiff widow, whose husband was murdered during a robbery in an unofficial parking lot within the boundaries of a National Historic Site, alleged that the government was negligent in failing to provide adequate lighting or post warning signs. The National Park Service argued that its decision (or nondecision) was susceptible to a policy analysis in light of a management plan calling on the Park Service to preserve the site as it appeared in the nineteenth century. The court noted that the discretionary function exception's core purpose is to prevent judicial second-guessing of legislative and administrative policy decisions through the medium of a tort action. But it concluded that the plaintiff's lawsuit did not put the district court in the position of second-guessing a Park Service administrative decision that was grounded in social, economic, or political policy. *Id.*, at 759. "The exception exempts the United States from liability only where the question is not negligence but social wisdom, not due

care but political practicability, not reasonableness but economic expediency." *Ibid.*

In *Andrulonis v. United States*, 952 F.2d 652 (2nd Cir. 1991), a bacteriologist infected by rabies vaccine furnished by a federal government scientist sued under the FTCA. The government was held liable based on a finding that the government scientist had a duty to warn about obviously dangerous conditions in the laboratory. The court concluded that the scientist was not protected by the discretionary function exception. The exception protects only governmental actions and decisions based on considerations of public policy. *Id.*, at 654. Determining whether the decision or action was susceptible to policy analysis required consideration of the nature of the actions taken. *Id.*, at 655.

> Looking at the "nature of the conduct" in this situation, we do not see how Dr. Baer's negligent omission could possibly have been grounded in CDC's policy scheme. Nothing indicates that CDC policy required, or even encouraged, Dr. Baer to ignore unsafe laboratory conditions and thereby unnecessarily place the lives of laboratory workers at risk in order to further a scientific cause or any other objective of the government.
>
> *Ibid.*

All of the foregoing cases make it plain that a decision comes within the discretionary function exception *only* if it is susceptible to social, economic, or political policy analysis. The court of appeals' decision in the instant case effectively eliminates this requirement in a large class of cases. It notes that safety generally is not a policy consideration (A14-A15), but then concludes that balancing competing safety considerations *is* a protected policy judgment. (A15) No explanation is offered as to *why* this is so, other than reference to the misleading footnote in *Whisnant*, *supra*. It then expands the supposed rule beyond the balancing of competing safety concerns: "[S]o long as a decision involves even two competing interests, it is 'susceptible' to policy analysis and is thus protected by the discretionary function exception." (A16) The decision is squarely at odds with decisions in the other circuits, and effectively neuters the FTCA in the Ninth Circuit.

B. The court of appeals' decision is erroneous under well-settled principles regarding the nature of safety decisions.

"Matters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy." *Whisnant*, *supra*, 400 F.3d at 1181.

In *Aslakson v. United States*, 790 F.2d 688 (8th

Cir. 1986) the operator of a sailboat was killed when the mast struck electrical power lines operated by the Western Area Power Adminstration ("WAPA"). The court of appeals held that WAPA's decision not to elevate certain lines running over the lake was not within the discretionary function exception:

> WAPA's determination that the power lines over Creel Bay were not a safety hazard did not involve an evaluation of the relevant policy factors; rather it was a decision made by WAPA officials charged with the responsibility of implementing an already established policy . . . . Although such a policy necessarily involves some degree of judgment on the part of government officials, it is not the kind of judgment that involves the weighing of public policy considerations. On the contrary, it is the kind of judgment that requires the knowledge and professional expertise of government employees who implement government policies.
>
> *Id.*, at 693.

Before the decision in the instant case, the Ninth Circuit recognized the same principle: "Where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy

considerations, the rationale for the [discretionary function] exception falls away." *Navarette v. United States*, 500 F.3d 914, 919 (9th Cir. 2007), quoting from *ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987).

The Corps' adoption of the Deer Point Dam sign plan may have taken into account policy considerations such as ensuring public access and protecting the environment, but its decision to delay replacing the warning signs did not implicate such concerns. The Corps made the policy decisions when it adopted the sign plan. When the signs were washed away, the Corps had only to exercise its professional judgment as to how and when the signs could safely be replaced. The point of plaintiff's lawsuit was to test whether it exercised that judgment negligently.

C. The issue is important because the FTCA's purpose is to treat people fairly.

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental affairs 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., Inc. v. United States*, 350 U.S. 61, 68-69 (1955).

The discretionary function exception was created because

> Congress wished 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. By fashioning an exception for discretionary governmental functions . . . Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."
>
> *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

The court of appeals' decision in the instant case thwarts the purpose of the FTCA and the discretionary function exception. It sweeps *any* agency decision involving *any* two competing interests or concerns within the exception. It specifically includes competing safety concerns, which until now were not considered matters of policy. It thus denies compensation to injured plaintiffs in circumstances that involve no matters of public policy, and where a private person would be liable. The result is contrary to the treatment of litigants in other circuits and

unfair to litigants in the Ninth Circuit.

CONCLUSION

Review and reversal of the decision below is warranted. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel of Record for Petitioner

August 2011

Appendix

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