No. 04-949

In the Supreme Court of the United States

CARRIE A. MCMELLON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Suits in Admiralty Act, 46 U.S.C. App. 741-752, waives the sovereign immunity of the United States for tort claims based on the exercise of discretionary functions by federal employees.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-110) is reported at 387 F.3d 329. The previous panel decision is reported at 338 F.3d 287. The order of the district court (Pet. App. 111-117) is reported at 194 F. Supp. 2d 478.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2004. The petition for a writ of certiorari was filed on January 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1999, the four petitioners went for a ride on two jet skis on the Ohio River. Pet. App. 3, 111. Heading downstream, they approached what they believed was a bridge and realized too late that they were

going over the gates of the Robert C. Byrd Locks and Dam, a dam owned and operated by the United States. *Id.* at 3, 112. Petitioners were unfamiliar with the section of the river on which they were riding, and had not consulted any navigation charts, maps, publications, or other navigational aids before embarking on their journey. *Id.* at 111-112.

Petitioners dropped approximately 25 feet into the water below and sustained injuries. Pet. App. 3. At the time of the accident, several warning signs upstream from the dam marked the restricted area near the dam where boating was prohibited, although petitioners offered evidence that some of these signs were difficult to see from the river. *Id.* at 3, 112. Until 1995, there also had been buoys in place that marked the entrance to the restricted area near the dam. *Id.* at 112. Those buoys were removed when extensive repairs were made to the dam and locks, because the U.S. Army Corps of Engineers determined that the buoys posed a safety threat to vessels used on the project. *Ibid.*

2. Petitioners filed suit in district court under the Suits in Admiralty Act (SIAA), 46 U.S.C. App. 741 *et seq.* Petitioners asserted that their accident resulted from the government's negligent failure to warn persons navigating on the relevant stretch of the Ohio River of the dangers presented by the dam, and in failing to maintain warning signs clear of vegetation. See Pet. App. 3; C.A. App. 22-25. The United States filed a motion to dismiss or, in the alternative, for summary judgment, on the grounds that: (1) the United States is immune from suit because petitioners' allegations pertain to the exercise of discretionary functions by federal government employees, and (2) the United States owed

no actionable duty of care to petitioners. See Pet. App. 112, 113, 115.

Citing *Lane* v. *United States*, 529 F.2d 175, 179 (4th Cir. 1975), the district court held that the SIAA does not generally except from its scope governmental conduct based on a discretionary function. See Pet. App. 113-115. Nevertheless, the district court held that the government's alleged actions did not breach its common-law duty of care and accordingly dismissed petitioners' claims. *Id.* at 116.

3. In a divided ruling, a panel of the United States Court of Appeals for the Fourth Circuit reversed the district court's judgment. *McMellon* v. *United States*, 338 F.3d 287 (2003), vacated, 387 F.3d 329 (2004) (en banc). The panel majority held that, under binding circuit precedent, the United States could be liable under the SIAA for the exercise of discretionary functions by its employees, 338 F.3d at 292-293, and that petitioners had stated a claim that the United States had breached an actionable duty of care. *Id.* at 295-306. Judge Niemeyer dissented on both issues. *Id.* at 306-315. The government successfully sought rehearing en banc on the question whether, under the SIAA, the United States waived its sovereign immunity for admiralty tort claims based on the exercise of discretionary functions by federal government employees.

4. The en banc court overruled the panel on the discretionary function issue and remanded to the district court for further proceedings. Pet. App. 2-40. The majority held, in accordance with the unanimous holdings of ten other courts of appeals, "that the government's waiver of sovereign immunity reflected in the Suits in Admiralty Act is subject to an implied exception similar to the discretionary function exception contained within

the Federal Tort Claims Act." *Id.* at 2-3. The majority concluded that "separation-of-powers principles require us to read a discretionary function exception into the SIAA, and it was those same separation-of-powers concerns that drove Congress to create the discretionary function exception to the FTCA." *Id.* at 39. Because "the discretionary function exception as it has been developed and applied under the FTCA is the best embodiment of those separation-of-powers concerns," the court concluded that "it is therefore appropriate for FTCA cases to guide the application of the exception under the SIAA." *Ibid.* Judge Wilkinson concurred in the majority opinion, explaining his view that "any different result would not be supportable," *id.* at 41, because "without the ability to exercise some element of judgment in the execution of law, neither federal, state, nor local government could function." *Id.* at 42. Judge Niemeyer filed a separate opinion, dissenting in part but concurring with respect to the portion of the majority's opinion challenged by the petition for certiorari. *Id.* at 47-56.

Judge Motz, joined by Judge Michael, filed an opinion concurring in part, but dissenting from the majority's holding at issue here. Pet. App. 56-66. Judges Widener, Luttig, and Gregory each filed separate dissenting opinions. *Id.* at 66-110.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or that of any other court of appeals. Indeed, the decision of the en banc court below now brings the Fourth Circuit into agreement with the unanimous view of the ten other circuits that have already decided the question, all

of which have held that the Suits in Admiralty Act does not waive the United States' sovereign immunity from tort suits challenging the exercise of discretionary governmental functions. See *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991); *Wiggins* v. *United States*, 799 F.2d 962, 966 (5th Cir. 1986); *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996); *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989) (citing *Chotin Transp., Inc.* v. *United States*, 819 F.2d 1342, 1347 (6th Cir.) (en banc), cert. denied, 484 U.S. 953 (1987)); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996); *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-1064 (11th Cir. 1985). The petition for a writ of certiorari should be denied.

1. The holding of the en banc court is correct. As explained below, the conclusion that the SIAA does not waive the United States' sovereign immunity for tort claims based upon the exercise of discretionary functions by federal employees is supported by (1) the SIAA and its statutory development; (2) constitutional and common-law principles settled at the time the SIAA was enacted, which establish the government's immunity from suit for the exercise of discretionary functions; and (3) this Court's discussion of the discretionary function exception of the Federal Tort Claims Act.

a. The SIAA provides that, "[i]n cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U.S.C. App. 742. "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743.

The SIAA, as originally enacted in 1920, permitted in personam suits against the United States only in cases involving government merchant vessels and cargo "where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained." Act of Mar. 9, 1920, ch. 95, § 2, 41 Stat. 525. The Public Vessels Act (PVA), 46 U.S.C. App. 781 *et seq.*, enacted in 1925, similarly authorized in personam admiralty actions for damages caused by the "public" vessels of the United States, as distinguished from the "merchant" vessels of the United States addressed in the SIAA. See 46 U.S.C. App. 781. The United States did not waive its sovereign immunity for ordinary tort claims in admiralty outside the purview of those statutes until 1946, and when it did so, it provided for such claims through the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*

There are few decisions construing the SIAA as enacted in 1920 that address the question whether the statute rendered the United States liable for the exercise of discretionary functions by its employees. As a general matter this is not surprising, inasmuch as the

SIAA was enacted originally to address problems that would be raised by the seizure of government-owned merchant and cargo vessels in connection with in rem actions after collisions caused by negligent navigation of those ships, rather than a broader category of tort claims that would be more likely to involve the exercise of governmental policy discretion. Thus, a House Committee report on a draft of the original statute explained that "[t]he object of this bill is not to add to the liability of the Government, but to prevent the seizure and detention of our ships." H.R. Rep. No. 497, 66th Cong., 2d Sess. 3 (1919); see S. Rep. No. 223, 66th Cong., 2d Sess. 3 (1919) (explaining that SIAA precludes in rem suits and seizures of government-owned merchant vessels, but provides for in personam suits, because "[v]essels get into collisions and into situations where salvage services are necessary").

Five years later, Congress enacted the Public Vessels Act, a statute permitting in personam suits against the United States in connection with government-owned vessels used for public purposes, and thus perhaps somewhat more likely to involve the exercise of discretionary functions. The legislative history demonstrates, however, that Congress did not believe that it was waiving sovereign immunity for the performance of such discretionary functions. The House Report in support of the PVA stated that the "chief purpose" of the legislation was "to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act." H.R. Rep. No. 913, 68th Cong.,

1st Sess. 1 (1924), adopted by S. Rep. No. 941, 68th Cong., 1st Sess. 1 (1925).

Although the House Report discussed the need for liberalization of the sovereign immunity doctrine in this context, it also quoted with approval language from *Walton* v. *United States*, 24 Ct. Cl. 372, 377, 379, 380 (1889), quoting the legislative history of a private bill, which opined that "the Government of the United States is *not* liable for loss or damage occasioned to private citizens by reason of any imperfection in the performance of the ordinary functions of government, or by reason of the acts, omissions, or negligence of its officers or agents in the discharge of such functions." H.R. Rep. No. 913, *supra*, at 3 (emphasis added). The only exceptions recognized to this rule were instances where the government acts like a private person rather than as a sovereign, *i.e.*, where it "manages or controls property, from which it receives a benefit or profit," and where "the Government is using or managing property through its agents under circumstances where these agents mingle on terms of equality with the general mass of citizens." *Ibid*.

Congress amended the SIAA in 1960 to extend its reach to claims (such as the one presented here) that did not involve government-owned vessels or cargo but that would be within the admiralty jurisdiction of the courts "if a private person or property were involved." See Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912. The 1960 amendments were intended in part to remove confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims in contract actions. See S. Rep. No. 1894, 86th Cong., 2d Sess. (1960); see also *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 175-176 (1976)

("It was the difficulty in determining the appropriate forum for a maritime claim against the United States that moved Congress to amend the Suits in Admiralty Act in 1960."); *id.* at 172 (stating that the 1960 SIAA amendments were "an outgrowth of severe jurisdictional problems facing the plaintiff with a maritime claim against the United States"). In addition, however, as a result of the 1960 amendments, certain tort claims that previously would have been cognizable, if at all, only under the FTCA, could now be heard, if at all, only under the SIAA. See *id.* at 176 & n.14.

The FTCA explicitly excludes from its scope conduct based on the exercise of a discretionary function.[1] Thus, prior to 1960, the courts regularly applied the discretionary function exception in maritime cases brought under the FTCA. See, *e.g.*, *Somerset Seafood Co.* v. *United States*, 193 F.2d 631, 635 (4th Cir. 1951) (holding that claim based on the government's failure to remove or mark a wrecked ship was not based on a "discretionary" act within the meaning of the FTCA's discretionary function exception); *Coates* v. *United States*, 181 F.2d 816, 817 (8th Cir. 1950) (holding that claim based upon the government's redirection of the Missouri River

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[1] The "discretionary function" exception excludes from the purview of the FTCA:

> 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.

28 U.S.C. 2680(a).

was barred by the discretionary function exception); *Westchester Fire Ins. Co.* v. *Farrell's Dock & Terminal Co.*, 152 F. Supp. 97, 98 (D. Mass. 1957) (holding that claim that government allowed flammable oil to remain on the surface of a channel was barred by the discretionary function exception). In transferring such tort claims from the purview of the FTCA to the purview of the SIAA, Congress gave no indication that it intended drastically to expand the scope of the United States' substantive liability for those claims by exposing the government to new liabilities without regard to whether the actions at issue involved the exercise of discretionary functions.

b. Indeed, Congress would have had no reason to believe that the SIAA's waiver of sovereign immunity subjected the United States to tort liability for the exercise of discretionary functions by the government. As explained below, under well-established common-law and constitutional principles, including separation of powers and sovereign immunity, courts had long refused to entertain suits that would result in the second-guessing of the performance of discretionary functions by federal employees. As this Court observed in *Dalehite* v. *United States*, 346 U.S. 15 (1953), "the discretion of the executive or the administrator to act according to one's judgment of the best course" is "a concept of substantial ancestry in American law." *Id.* at 34 & n.30 (citing cases); see, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170-171 (1803) ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."); *Kendall* v. *Stokes*, 44

U.S. (3 How.) 87, 98 (1845) ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs."); see also *Coates*, 181 F.2d at 818 (citing cases from the 19th and early 20th centuries "in which the courts have had occasion to consider the meaning of 'discretionary functions' and to disclaim judicial power to interfere with, to enjoin or mandamus, or inquire into the wisdom or unwisdom or 'negligence' in their performance within the scope of authority lawfully granted").

Moreover, as the en banc court in this case emphasized (Pet. App. 22-28), immunity for discretionary governmental functions is grounded in fundamental separation-of-powers principles, which must be observed "even in the absence of an explicit statutory command." *Canadian Transp. Co.*, 663 F.2d at 1086. Otherwise, as the courts of appeals construing the SIAA have explained, "all administrative and legislative decisions concerning the public interest in maritime matters" would be subjected "to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d at 35 (quoting *Bearce*, 614 F.2d at 559, and *Gercey*, 540 F.2d at 539). "Such an outcome is intolerable under our constitutional system of separation of powers." *Ibid.* Accord *Wiggins*, 799 F.2d at 966 ("Without the implication of a discretionary functions exception in the [SIAA], every decision of a government official cognizable under that Act would be subject to a second-guessing by a

court on the claim that the decision was negligent."); *Canadian Transp. Co.*, 663 F.2d at 1085 ("We believe that respect for the doctrine of separation of powers requires that in cases arising under the Suits in Admiralty Act, courts should refrain from passing judgment on the appropriateness of actions of the executive branch which meet the requirements of the discretionary function exception of the FTCA."); Pet. App. 24-28.

To interpret the SIAA to waive the United States' well-established immunity for the performance of discretionary governmental functions would also violate this Court's instruction that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." See, *e.g.*, *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). As this Court has made clear, "[s]uch a waiver must also be 'unequivocally expressed' in the statutory text." *Ibid.* (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)).

These principles apply with particular force where, as here, a limiting construction is supported by congressional intent and historical context. For example, in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), this Court held that a provision of Title VII making the United States' liability "the same as a private person" did not waive the government's sovereign immunity from interest payments, despite the statute's silence on the issue. *Id.* at 319-320.[2] The Court noted that "[o]ther statutes placing the United States in the same position as a private party also have been read narrowly to preserve certain immunities that the United States

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[2] The result in *Library of Congress* v. *Shaw*, *supra*, was later superseded by statute. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 251 (1994).

has enjoyed historically." *Ibid.*[3] Similarly, in *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court held that the broad waiver of sovereign immunity in the FTCA did not apply to claims by military personnel for service-related injuries. This Court concluded that it could not "impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 146.

Indeed, this Court reached a similar result in another case construing the scope of the 1960 amendments to the SIAA. In *United Continental Tuna*, the Court held that, in light of the limited purpose of the 1960 SIAA amendments, the general language of those amendments should not be construed to expand the government's waiver of sovereign immunity with respect to tort claims related to public vessels, which would effectively repeal sub silentio the exceptions to the waiver of sovereign immunity set forth in the Public Vessels Act. As the Court noted, "[t]here is no indication that Con-

[3] To the same effect is *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 682 (1983), in which this Court recognized a limitation on a statutory provision permitting the award of attorneys fees. The Court held that even though the statute permitted the award of fees where "appropriate," it did not permit any fee award to a party that did not succeed on the merits of its claims. Although the statutory language did not expressly limit the availability of a fee award to prevailing parties, the Court concluded that when it was "read in the light of the historic principles of fee-shifting in this and other countries," the statute mandated that result. *Id.* at 682. The Court explained that "[b]efore we will conclude Congress abandoned [an] established principle * * * a clear showing that this result was intended is required." *Id.* at 685. This was especially so in light of the fact that the fee-shifting provision applied against the United States, because "[w]aivers of immunity must be construed strictly in favor of the sovereign, * * * and not enlarge[d] . . . beyond what the language requires." *Ibid.* (internal quotation marks and citations omitted).

gress had any such broad purpose. The legislative history contains no explicit suggestion that Congress intended to render nugatory the provisions of the Public Vessels Act." 425 U.S. at 178 (footnote omitted).

Accordingly, the courts of appeals have emphasized that a waiver of the government's established immunity from suits challenging the performance of discretionary functions "requires clear statutory expression." *Wiggins*, 799 F.2d at 965; see *Sea-Land Serv.,* 919 F.2d at 891 ("We understand [*United States* v. *Varig Airlines*, 467 U.S. 797 (1984)] to teach that, as a matter of judicial construction, we should not read a general waiver of sovereign immunity to include a waiver of immunity with respect to damage occasioned by policy decisions. * * * Congress must speak with unmistakable intent in order to waive tort immunity for the government's discretionary functions."); *Gercey*, 540 F.2d at 539 (declining, "in the absence of an express Congressional directive to the contrary," to construe the waiver of sovereign immunity set forth in the SIAA as providing federal courts with the power to review governmental policy decisions).

In the SIAA, Congress spoke with no such unmistakable intent. Indeed, it gave no indication—either when it originally enacted the SIAA in 1920, or when it expanded it in 1960 to include claims previously falling under the purview of the FTCA—that it meant to waive the United States' sovereign immunity from suits arising from the performance of discretionary governmental functions. Under these circumstances, the courts of appeals' uniform conclusion that the SIAA does not make the government liable in tort for the performance of discretionary functions is correct.

c. Contrary to petitioners' assertion (Pet. 14-17), the fact that the FTCA expressly exempts the government from tort liability for the exercise of discretionary functions, while the SIAA does not, does not expose the government to such liability under the SIAA. As this Court has explained, the discretionary function exception was included in the FTCA merely as a "clarifying amendment." *Dalehite*, 346 U.S. at 26. Congress "believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction." *Varig Airlines*, 467 U.S. at 810 (citing *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29, 37 (1942) (statement of Assistant Attorney General Francis M. Shea); *id.* at 37 (Memorandum with Appendixes, Federal Torts Claims Act—explanatory of Comm. Print of H.R. 5373)). See also, *e.g.*, *Sea-Land Serv.*, 919 F.2d at 891 (discretionary function exception "merely makes explicit what would otherwise be implicit") (citing *Varig Airlines*, 467 U.S. at 810). Indeed, as the Eighth Circuit observed shortly after the FTCA was enacted, Congress adopted the discretionary function exception "in recognition of the separation of powers among the three branches of the government and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment." *Coates*, 181 F.2d at 818.

Thus, when Congress amended the SIAA in 1960 and transferred a subset of maritime claims from the purview of the FTCA to the purview of the SIAA, it did so against the backdrop of the understanding when the

FTCA was enacted and this Court's decision in *Dalehite* emphasizing that the discretionary function exception was enacted as a "clarifying amendment" to accord with traditional rules of judicial construction. There is no basis in this context to read the general language of the SIAA, as amended in 1960, to expand sub silentio the government's liability in a novel and unprecedented fashion by eliminating the government's longstanding immunity from suits involving the performance of discretionary governmental functions. Under these circumstances, the courts of appeals properly have declined, "in the absence of an express Congressional directive to the contrary, to construe this waiver of sovereign immunity as providing the federal courts with" the unprecedented power to review federal discretionary functions in tort litigation. *Gercey*, 540 F.2d at 539.

d. Petitioners argue (Pet. 5-14) that the separation-of-powers rationale is insufficient, standing alone, to support the conclusion that the SIAA did not waive the United States' sovereign immunity for the exercise of discretionary functions. But for the reasons explained above, the legislative history and the backdrop against which Congress legislated also strongly support the view that the SIAA did not, by mere silence, waive the United States' sovereign immunity for discretionary functions. Thus, the question whether separation-of-powers concerns alone would support immunity for discretionary functions, even if Congress were expressly to waive immunity for discretionary functions, is not presented by the SIAA. See Pet. App. 28 n.5 ("Because the SIAA is silent on the question of a discretionary function exception, we need not and do not consider whether such a withdrawal of immunity would be constitutional."). In any event, as the other courts of appeals

have recognized, and as this Court's decision in *Varig* suggested, the discretionary function exception does embody separation-of-powers principles, and it is wholly appropriate for the courts of appeals to consider those implications in deciding whether the waiver of sovereign immunity in the SIAA should be construed to extend to discretionary functions notwithstanding the congressional silence on the issue.

Petitioners suggest (Pet. 12-13) that separation-of-powers concerns in a given SIAA case should be addressed not by considering whether the claims are based on the exercise of discretionary governmental functions, but instead by evaluating whether the claims involve a nonjusticiable political question. That proposal lacks merit for a variety of reasons. It ignores the background and legislative history of the 1960 amendments, which provide a sound *statutory* basis for evaluating whether claims are subject to the SIAA's waiver of immunity. Rather than resolve these issues as a matter of statutory interpretation, petitioners would convert every SIAA case involving an asserted discretionary function into a *constitutional* case involving the political question doctrine. And in urging that approach, petitioners ignore *Congress's* judgment and understanding—manifested when it enacted the FTCA, as well as when it enacted the Public Vessels Act (see p. 8, *supra*)—concerning the scope of a waiver of the United States' sovereign immunity from suits for ordinary torts.

Moreover, petitioners' proposal ignores the fact that the statutory discretionary-function limitation on the waiver of sovereign immunity is itself based on separation-of-powers concerns. Congress sought to prevent "judicial 'second-guessing' of legislative and administra-

tive decisions grounded in social, economic, and political policy through the medium of an action in tort." *Wiggins*, 799 F.2d at 965 (quoting *Varig Airlines*, 467 U.S. at 814). As Judge Wilkinson pointed out in his concurring opinion below, "[t]he discretionary function exception expresses Congress' view of that degree of 'separation' required by the executive branch to carry out its duties. It further underscores the need for judicial forbearance in the face of policy-laden decisions made by the coordinate branches of our government. These are classic separation-of-powers concerns." Pet. App. 43. There is no reason to "jettison congressional language tailored to this very context—governmental tort liability—in favor of the all-purposive political question doctrine." *Id.* at 45.

2. As noted above (pp. 4-5, *supra* (citing cases)), the ten other courts of appeals to reach the question presented are in unanimous agreement with the en banc decision below. There is thus no circuit conflict for this Court to resolve. To the contrary, there is now a broad and firm consensus on the proper construction of the SIAA. Moreover, the law has long been established, in the vast majority of the courts of appeals, that the SIAA does not waive the United States' immunity from tort claims based on the performance of discretionary governmental functions. The First Circuit reached this conclusion in 1976, see *Gercey*, 540 F.2d at 539, and the Seventh Circuit and the D.C. Circuit followed suit in 1980, see *Bearce*, 614 F.2d at 559-560; *Canadian Transp. Co.*, 663 F.2d at 1085-1086. Congress has thus had more than 25 years to amend the SIAA if it disagreed with the consensus of the courts of appeals (other than, until the decision below, the Fourth Circuit). As the en banc majority pointed out, "[i]f import

can ever be attached to congressional inaction, we think it would be in this case." Pet. App. 37 n.7. Indeed, Congress amended the SIAA in 1996 without addressing governmental liability for discretionary functions. See Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, Tit. XI, § 1105, 110 Stat. 3967 (deleting provisions relating to service on the United States or a corporation by a libelant).

3. This Court repeatedly has denied other petitions for certiorari seeking review of decisions holding that the SIAA does not waive the government's immunity from tort claims based on the performance of discretionary functions by federal employees, even though the Fourth Circuit had reached the opposite conclusion in its now-overruled decision in *Lane* v. *United States*, 529 F.2d 175, 179 (4th Cir. 1975). See *Lawson* v. *United States*, 124 F.3d 198 (6th Cir. 1997) (Table), cert. denied, 522 U.S. 1109 (1998); *Baldassaro*, 64 F.3d at 208; *Sea-Land Serv.*, 919 F.2d at 891; *Bearce*, 614 F.2d at 559-560; *Gercey*, 540 F.2d at 539; cf. *Lewis* v. *United States*, 88 Fed. Appx. 384 (11th Cir. 2003) (Table), cert. denied, 125 S. Ct. 477 (2004) (denying review of determination that the discretionary function exception barred a particular claim under the SIAA). The Court should similarly deny review here, especially given that the en banc decision below has now made unanimous the already strong and broad consensus in the courts of appeals on the issue.

4. This case comes to the Court in an interlocutory posture. The court of appeals expressly left open the question whether the claims in this case are based on the performance of discretionary functions by government employees. Pet. App. 40. Petitioners will thus have an opportunity to persuade the district court on

remand that, despite the holding of the court of appeals, the actions at issue here are subject to suit under the SIAA. If they succeed, petitioners will have no need for review by this Court of the question presented here. Thus, even if the issue otherwise might warrant certiorari at some point, there is no reason in this case for the Court to eschew its usual practice of awaiting final judgment before exercising its certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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