No. 21-

IN THE

Supreme Court of the United States

A. MICHAEL DAVALLOU,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated: October 20, 2021

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTION PRESENTED

Whether the Government's failure to warn of a specific, known, immediate hazard, for which the acting agency is responsible, is not the kind of broader social, economic, or political policy decision that the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. §§1346, 2680(a), is intended to protect, consistent with holdings of the Ninth Circuit; or, as held by the First Circuit, the failure to warn of a specific, known, immediate hazard is susceptible to policy analysis and shielded by the discretionary function exception, unless such conduct amounts to a complete rejection of safety considerations involving extreme circumstances.

PARTIES TO THE PROCEEDING

Petitioner A. Michael Davallou was the plaintiff in the district court and the appellant in the court of appeals. Petitioner is an individual and has no information to disclose under **Rule 29.6**.

Respondent United States of America was the defendant in the district court and the appellee in the court of appeals. The Ancient & Honorable Artillery Company of Massachusetts and Emery A. Maddocks, Jr., were also defendants in the district court, but are no longer parties in the case.

RELATED PROCEEDINGS

A. Michael Davallou v. United States, Ancient and Honorable Artillery Company of Massachusetts, and Emery Maddocks, Jr., Defendants, No.18-10822-LTS, U.S. District Court for the District of Massachusetts.

- Report and Recommendation on Government's Motion to Dismiss, entered May 23, 2019.
- Order of Sorokin, J., entered June 25, 2019.

A. Michael Davallou v. United States, No. 20-1523, U.S. Court of Appeals for the First Circuit.

- Judgment entered May 25, 2021.

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Petitioner A. Michael Davallou respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 998 F.3d 502, is contained in **Appendix A**, *infra,* 1a-10a. An order of the district court adopting the magistrate judge's findings and recommendation on motion to dismiss is unreported; it is contained in **Appendix B,** *infra*, 11a. The report and recommendations of the U.S. Magistrate for the U.S. District Court for the District of Massachusetts is unreported but available at 2019 WL 3546665; it is found in **Appendix C**, *infra*, 12a-25a.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on May 25, 2021. On July 19, 2021, this Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 of the United States Code, Section 1346(b)(1) provides, in relevant part:

> **United States as defendant**
>
> * * * * *
>
> 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 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.

Title 28 of the United States Code, Section 2680(a) provides, in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a)
>
> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

INTRODUCTION AND STATEMENT OF THE CASE

A. Introduction

"It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." President Abraham Lincoln, Cong. Globe, 37th Cong., 2d Sess., App. 2 (1862).

Congress would eventually heed President Lincoln's words in 1946, enacting the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§1346(b), 2401(b), 2671-2680, and ending the United States' sovereign immunity for claims of negligence or wrongful acts committed by Government employees, subject to various exceptions. *United States v. Gaubert*, 449 U.S. 315, 339 n.4 (1991). The FTCA offered compensation to a person who suffered personal injury or death caused by the "negligent or wrongful act or omission" of any government employees acting within the scope of their 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)(1). Tort victims were no longer impeded by the tenet of sovereign immunity that "the King can do no wrong"; with passage of the FTCA, Congress accomplished the "broad goal [] to provide access to redress when risk-generating conduct by government actors fell below socially acceptable norms and caused injury." *Hughes v. U.S.*, 116 F.Supp.2d 1145, 1149 (N.D. Cal. 2000).

Yet this waiver of sovereign immunity required balance. Mindful of the need to protect the government's decision making ability within the FTCA's creation of the right to sue the United States

in tort, Congress "mark[ed] the boundary" between the two with the discretionary function exception. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984).

Designed "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," *id.* at 814, the discretionary function exception exempts "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. §2680(a). If the exception applies, immunity is reinstated.

The Supreme Court has set forth a two-step test to determine whether a claim falls within the discretionary function exception. *Gaubert, supra,* 499 U.S. at 322–323.

The first step is to determine whether the discretionary function exception applies: the requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Gaubert, supra*, 499 U.S. at 322, citing *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

If the challenged action was discretionary, the second step of the test considers: "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, *supra*, 499 U.S. at 322–23. The discretionary function exception "protects only governmental actions and decisions based on considerations of public policy."

Berkovitz, *supra*, 486 U.S. at 537 (citation omitted). The focus of the inquiry is not on the agent's subjective intent in exercising discretion, but on the nature of the action taken and whether the challenged action was "susceptible to policy analysis." *Gaubert*, *supra*, 499 U.S. at 324-325.

The stark division in determining Section 2680(a)'s application to the question of whether the challenged action is "susceptible to policy analysis," and the uncertainty engendered by the inapposite interpretations, is clearly seen in two divergent lines of circuit court opinions rendered by the First Circuit and the Ninth Circuit. Petitioner is a party in the decision in the First Circuit, which is the subject of this Petition.

This case is ripe for review because it is a matter of first impression for this Court and involves a clear intra-circuit conflict in the application of an oft-litigated federal statute.

B. The Underlying Claim and Proceedings Below.

Petitioner A. Michael Davallou filed a federal tort action against Respondent, the United States, alleging that he suffered permanent hearing damage when the Massachusetts Army National Guard (MANG), negligently fired howitzers (a type of cannon) in close proximity to him while he was wandering through the Boston Common as the Ancient and Honorable Artillery Company (AHAC), a historic military organization with no present-day military functions, was conducting their annual "June Day" ceremony. *Davallou v. United States*, 998 F.3d 502, 503-504 (1st Cir. 2021). On June 25, 2019, the district court adopted the Report and Recommendations of the U.S. Magistrate, which

included the finding that "choosing whether and how to provide warnings and/or safe zones for bystanders during the ceremonial firing of artillery" were "choices that are readily susceptible to policy analysis," and thus shielded by Section 2680(a). Appendix C, 19a-20a. The district court dismissed Petitioner's action as to the United States for lack of subject matter jurisdiction. Appendix B, 11a.

Petitioner appealed. The First Circuit affirmed the district court's application of the discretionary function exception[1] and dismissal of the suit, finding that Petitioner did not meet his burden of alleging facts that MANG's exercise of discretion in this instance was not susceptible to policy analysis. *Davallou, supra*, 998 F.3d at 503-505. "Deciding how to handle safety considerations at the annual June Day ceremony implicated a number of competing values, including the efficient allocation of resources, the historical and ceremonial functions of the event, the public's ability to view the event, and the value of the event as a military training or recruitment exercise." *Davallou, supra*, 998 F.3d at 505.

The court found it "plausible that MANG could have weighed the various policy considerations and favored the lower cost and greater efficiency of relying on AHAC generally when it came to safely managing

[1] The First Circuit declined to address the district court's alternative conclusion that the FTCA did not apply, because a private individual would not be liable for the challenged conduct under like circumstances. *See Davallou*, *supra*, 998 F.3d at 507 n.1. Accordingly, this issue is not before the Court. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001), quoting *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999) (We ordinarily "do not decide in the first instance issues not decided below.").

spectators." *Davallou, supra*, 998 F.3d at 505. The court offered a hypothetical circumstance:

> … in which such policy considerations could not plausibly have informed MANG's conduct. Imagine, for example, that unprotected individuals were standing an arm's length away from the howitzers as MANG prepared to fire. With MANG thus on notice that AHAC's safety precautions were failing and that spectators were in imminent danger, the government's proffered policy justifications for firing the howitzers may be so far-fetched as to defy any plausible nexus between the challenged conduct and the asserted justification.

Davallou, supra, 998 F.3d at 506 (internal quotations, citations omitted).

The court continued: "… Davallou's complaint alleges no facts "supporting an inference that [the defendant] would have [had] reason to know ex ante that the [challenged conduct] was sufficiently likely to cause serious injury as to deem it the product of a rejection of a policy goal rather than a balancing of such goals." *Davallou, supra*, 998 F.3d at 506 (parentheses in original).[2]

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[2] In reviewing the lower court's dismissal of Davallou's complaint, the First Circuit remarked: "We do not know from the complaint where in the park the ceremony was held, how close AHAC allowed the public (including Davallou) to get to the howitzers at the time of the artillery salute, or whether anyone was even aware of Davallou's presence when the howitzers were fired." The Court also cited an apparent lack of awareness that anyone else had previously suffered injury as a result of prior June Day ceremonies, *Davallou, supra*, 998 F.3d at 506, and independently determined that "the risk [of not warning

The court discounted evidence offered by Petitioner to show the Government's knowledge of the risks associated with noise from weapon firing in the form of a public health training manual published by the U.S. Army Public Health Command, Army Hearing Program, Technical Guide 250, *Readiness Through Hearing Loss Prevention* in July 2014.

This public health training manual – which was found online[3] with the designation "Approved for public release; distribution unlimited" – contained the following specific warnings:

- noise "during any weapon firing" can impair your hearing;
- hearing loss caused by loud noise becomes permanent and is not medically treatable;
- "there is no proven cure for inner ear hearing loss caused by the noise";
- 140 dB is the start of hearing hazard for impulse noise;
- high intensity noise requires hearing protection;

Davallou] is minimal," *Davallou, supra*, 998 F.3d at 507, despite Mr. Davallou's allegations that he suffered permanent hearing damage. *Davallou, supra*, 998 F.3d at 503-504; *see also* Complaint, ¶¶5, 18-19, 22, 26, 32, 39-41. The need for such facts at the motion to dismiss stage appears to exceed what is necessary for preliminary analysis of the discretionary function exception; the First Circuit acknowledged its obligations to review all well-pleaded facts as true, and to draw all reasonable inferences in Mr. Davallou's favor. *Davallou, supra*, 998 F.3d at 504 (citation omitted).

[3] The pamphlet is available at https://phc.amedd.army.mil/PHC Resource Library/TG250.pdf. Last visited August 11, 2021.

- firing a 155-millimeter howitzer creates a risk of hearing loss;
- howitzer fire reaches 180dB.

The *Davallou* court found:

> … the training manual does not purport to establish concrete safety criteria that account for any risk to public safety or any of the other competing interests that MANG might have considered in this instance. Rather, the manual simply explains how noise can cause hearing loss, how service members using military equipment can protect themselves from noise, and how hearing loss can adversely affect readiness for combat. This sort of general educational information does not remove MANG's conduct in this case from the realm of policy decisions. *Cf. Shuman v. United States*, 765 F.2 283, 293-94 (1st Cir. 1985) (finding that the Navy's promulgation of advisory safety guidelines for shipyards did not eliminate the Navy's discretion to prioritize production over safety.)

Davallou, supra, 998 F.3d at 507.

The court concluded that "on the facts alleged, additional precautions were not so obviously needed that the decisions to proceed according to tradition and to leave the management of spectators to AHAC fell outside the realm of possible policy decisions." *Davallou, supra*, 998 F.3d at 507.

The court further found that because Davallou's complaint had not alleged facts offering "where in the park the ceremony was held, how close AHAC allowed the public (including Davallou) to get to the howitzers at the time of the artillery salute, or whether anyone was even aware of Davallou's presence when the howitzers were fired," nor facts showing there was "reason to believe that anyone else had previously suffered injury as a result of AHAC's supervision of the annual June Day ceremony," there could be no finding that MANG exhibited such a complete disregard for public safety that its decisions could not have been driven by policy analysis." *Davallou, supra*, 998 F.3d at 506.

The court dismissed Davallou's reliance on a line of cases from the Ninth Circuit holding that "a decision not to warn of a specific, known hazard for which the acting agency is responsible is not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect." *Davallou, supra*, 998 F.3d at 506, citing "*Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994) (emphasis added); *accord, e.g., Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011) (finding that the discretionary function exception did not apply to the Forest Service's failure to warn property owners of its decision to light a backfire nearby)." The court found that those cases did not deal with the policy considerations in Davallou's case, *i.e.*, "the advantages of relying on AHAC," in a ceremony "organized, directed, arranged, supervised, and controlled" by AHAC. *Davallou, supra*, 998 F.3d at 507.

The court declined to read the Ninth Circuit cases:

> as broadly as Davallou does, [as those cases] would place outside the discretionary function exception all instances in which the government knowingly creates a risk of injury without issuing a warning, even if the risk is minimal and a particular type of warning would undermine competing policy interests. Such a sweeping approach is contrary to our precedents. We have previously rejected the notion that 'when safety becomes an issue, all else must yield.'

Davallou, supra, 998 F.3d at 507, citing *Shansky v. United States*, 164 F.3d 688, 693 (1st Cir. 1999) (explaining that "there is no principled basis for superimposing a generalized 'safety exception' upon the discretionary function defense.")

The court opined that only in circumstances where the Government's decision would "amount to a complete rejection" of safety considerations – such as "a decision to have Marine Corps recruits jump off a twenty foot cliff onto concrete during training," *Davallou, supra*, 998 F.3d at 506, citing *Hajdusek v. United States*, 895 F.3d 146, 152 (1st Cir. 2018), would the discretionary function exception fail to protect the Government from liability. The court concluded that "[s]uch cases, though, invariably involve extreme circumstances[,]", *Davallou, supra*, 998 F.3d at 506, citing *Shansky, supra*, 164 F.3d at 695.

REASONS FOR GRANTING THE PETITION

A. The Courts of Appeals are Divided on the Question Presented and Will Remain So Without this Court's Review.

As detailed above, there is a split among the First and Ninth Circuit Courts of Appeal on the question presented in this petition, and parties seeking justice under the FTCA will experience vastly disparate results, depending on the location of where the Government's injury-causing negligence occurs.

B. The Present Case is Ideally Suited to Resolving the Question Presented.

"The discretionary function exception to the FTCA … is a difficult area of the law because it challenges typical notions of liability. Under the discretionary function analysis, exposure to liability is based, not upon negligence, but upon questions of "public policy." *McMellon v. United States*, 395 F.Supp.2d 422, 427 (S.D.W.V. 2005) (discussing the exception in the context of both the FTCA and the Suits in Admiralty Act ("SIAA")).

Notwithstanding the difficulty of this area of the law, as well as an acknowledged "weaving lines of precedent regarding what decisions are susceptible to social, economic, or political policy analysis, particularly in cases in which the allegation of agency wrongdoing involves a failure to warn," *see Ruffino v. United States*, 374 F.Supp.3d 961, 975 (E.D. Cal. 2019), quoting *Young v. United States*, 769 F.3d 1047, 1055 (9th Cir. 2014), quoting *Whisnant v. United*

States, 400 F.3d 1177, 1181 (9th Cir. 2005),[4] this Court has not made any rulings on Section 2680(a)'s discretionary function exception since its 1991 *Gaubert* opinion.

The time is thus ripe for review of an issue which is narrow and clearly-defined: whether the Government's decision not to warn of a specific, known, and immediate hazard for which the acting agency is responsible, is, or is not, the kind of broader social, economic, or political policy decision which the discretionary function exception is intended to protect.

The First Circuit has held that the Government's failure to warn of specific, known, and immediate danger, for which the Government is responsible, is susceptible to policy analysis, except in cases where there has been a "complete rejection" of safety considerations, "invariably involv[ing] extreme circumstances; thus, "a decision to have Marine Corp recruits being ordered to jump off a twenty foot high cliff onto concrete during training would not be protected…" *Davallou, supra*, 998 F.3d at 506, citing *Shansky*, 164 F.3d at 695; *Hajdusek*, 895 F.3d at 152.

In contrast, the Ninth Circuit has held that a "decision not to warn of a specific, known hazard for which the Government's acting agency is responsible is not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect." *Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994); *accord, e.g., Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011).

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[4] As the *Whisnant* court observed: "… determining the appropriate place on the spectrum for any given government action can be a challenge." *Id.* at 1181.

The instant case presents a timely opportunity for the Court to provide district courts with a uniform standard of relief for responding to tort victims whose injuries are caused by a specific, known, and immediate hazard for which the Government (or its acting agency) is responsible.

C. The First Circuit Incorrectly Decided the Question Presented Due to its Misapplication of 28 U.S.C. §2680(a).

1. *The purpose of the FTCA: to compensate victims injured by ordinary negligence.*

The First Circuit's decision reflects an understanding of the FTCA which appears to be fundamentally at odds with the purpose of the Act. The court relies on a line of cases premised on the fact that a decision not to warn of safety issue is within the Government's exercise of discretion, except in cases which "invariably involve extreme circumstances." *Davallou*, *supra*, 998 F.3d at 506. The court cites a hypothetical about "Marine Corps recruits being ordered to jump off a twenty-foot cliff onto concrete" as exceeding an exercise of discretion and instead amounting to a "complete rejection" of safety considerations. *Id.*

The court implies that Davallou's claim seeks to "superimpose[ing] a generalized 'safety exception' upon the discretionary function exception, and cites its previous rejection of the premise that "when safety becomes an issue, all else must yield." *Davallou*, *supra*, 998 F.3d at 507 (citation omitted).

Opposing a generalized safety exception, the First Circuit catapults to the other end of the spectrum: when safety is an issue, First Circuit

precedent mandates that "susceptibility to policy analysis" trumps all. The Government is free of the obligation to act with care, even when the Government itself has created a specific, known, immediate danger, except in cases "invariably involving extreme circumstances[]," and, quite frankly, ludicrous examples.[5]

Yet the FTCA was not drafted to protect tort victims injured in "extreme circumstances." This Court has explained: "[u]ppermost in the collective mind of Congress [when it passed the FTCA] were the ordinary common-law torts. *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 338 (3d Cir. 2012), quoting *Dalehite v. United States*, 346 U.S. 15, 28 (1953), *partially overruled on other grounds by Rayonier, Inc. v. United States*, 352 U.S. 315 (1957). "[C]ongressional thought was centered on granting relief for run-of-the-[mill] accidents," which occurred due to the Government's failure to take *basic steps to alleviate specific safety concerns*. *S.R.P. ex rel. Abunabba, supra*, 676 F.3d at 338, citing *Dalehite, supra*, 346 U.S. at 28 n.19 (emphasis added).

The First Circuit's refusal to consider the Government's failure to warn of a specific, known, immediate risk, for which the Government itself is responsible, as being separate and distinct from its derided "generalized safety exception," discussed *infra*, Section C(3),and thus outside the scope of the discretionary function exception, is troubling, and

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[5] Respectfully, *Hajdusek's* example of Marine recruits being ordered to "jump off a twenty-foot high cliff onto concrete," *Hajdusek v. United States, supra*, 895 F.3d at 152, cited by the *Davallou* court, seems to border on criminal behavior, not ordinary negligence.

wrong. One court has summed up the misapplication of the discretionary function exception in this way:

> If applied unrealistically, this element could immunize virtually all official government conduct – and thus effectively eviscerate the FTCA. Congress couldn't have intended that result (courts cannot assume that Congress is in the business of making obviously false promises).
>
> * * *
>
> Congress must have expected the courts to exercise some semantic restraint and common sense in this arena - to fashion approaches to drawing the necessary line that would not have the effect of insulating from suit virtually every negligence act by a federal employee that was not in violation of a specifically targeted directive."

Hughes, supra, 116 F.Supp.2d at 1152.

Respectfully, the First Circuit's obeisance to *Shansky's* "extreme circumstances" dicta has led that court to a wholly unrealistic application of the discretionary function exception, excusing the Government's failure to warn Mr. Davallou of a specific, known, immediate hazard for which the Government was responsible, effectively eviscerating the FTCA and judicial common sense.

2. *The accessibility of the FTCA: treating the United States "more like a commoner than like the Crown."*

Although this Court has not spoken on the scope of the discretionary function exception in more than twenty five years, a recent decision involving a different aspect of the FTCA offers support for the premise that the FTCA's remedies should be more, not less, accessible to injured parties.

In *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), the Court held that the FTCA's two year statute of limitations, set forth in 28 U.S.C. §2401(b), was in fact not jurisdictional, but subject to equitable tolling.

The Court observed:

> And the Government's claim [that at the time of the FTCA's enactment, all time limitations on actions against the United States carried jurisdictional consequence][6] is peculiarly inapt as applied to 2401(b) because *all that is special about the FTCA cuts in favor of allowing equitable tolling.* As compared to other waivers of immunity (prominently including the Tucker Act), the FTCA treats the United States more like a commoner than like the Crown.

Id. at 419.

The First Circuit's firmly held stance – that all safety considerations are grounded in policy decisions, unless they involve "extreme

[6] *See Kwai Fun Wong, supra*, 575 U.S. at 417-418.

circumstances," *see Davallou*, 998 F.3d at 506, citing *Shansky v. United States*, 164 F.3d 688, 695 (1st Cir. 1999)[7] and *Hajdusek v. United States*, 895 F.3d 146, 153 (1st Cir. 2018), leaves tort victims injured by the Government's negligence with sympathy, but little else.[8] This result – that the FTCA's remedies are available only in extreme circumstances when safety considerations are involved – cannot be reconciled with this Court's recent decision in *Kwai Fun Wong*. Indeed, if "*all that is special about the FTCA cuts in favor of allowing equitable tolling",* then similarly, *"all that is special about the FTCA cuts in favor of" allowing Mr. Davallou's case to be tried*, where the excessive, hearing-damaging noise caused by the

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[7] "It is true that, in a *rare case*, the government's invocation of a policy justification may be so far-fetched as to defy any plausible nexus between the challenged conduct and the asserted justification." *Id.* (emphasis added). *Shansky* was decided by the First Circuit in January, 1999, less than four years after this Court's decision in *United States v. Gaubert*, 499 U.S. 315, 322-323 (1991). *Shansky* rightly held: "In particular, there is no principled basis for superimposing a generalized safety exception upon the discretionary function defense. A case-by-case approach is required." *Shansky, supra*, 164 F.3d at 693. Yet *Shansky* cited no support from the text of the FTCA, or this Court's prior holdings, for its determinations that the Government's alleged tortious conduct would fall outside the exception only in "a rare case" and in "cases invariably involv[ing] extreme circumstances." *Shansky*, *supra*, 164 F.3d at 695-696. *Shansky* continues to be controlling precedent in the First Circuit.

[8] *See Davallou*, *supra*, 998 F.3d at 507: "This is a challenging case, and a sad one.", and *Hajdusek v. United States*, 895 F.3d 146, 153 (1st Cir. 2018) ("Hajdusek's case is a sympathetic one. He attempted to serve his country, was injured in that attempt, and now, due to the quirk of his not-quite Marine status, the services normally available to injured servicemen and women are unavailable to him").

firing of a howitzer – was a specific, known, immediate hazard, created by a government agency.

The Government's failure to warn Mr. Davallou of this specific, known, immediate hazard is not the kind of broader social, economic, or political policy decision that the discretionary function exception is intended to protect. The Ninth Circuit's common sense approach in this area of law, consistent with *Kwai Fun Wong, supra*, appropriately "treats the United States more like a commoner than like the Crown." In contrast, the First Circuit's approach does not: it characterizes the Government's prior knowledge of the dangers of hearing loss caused by loud noise, and specifically howitzer fire, as "general educational information," which does not remove the Government's conduct – failure to warn Mr. Davallou of an immediate danger which the Government itself *specifically and knowingly created* – from the realm of policy decisions. *Davallou, supra*, 998 F.3d at 507.

The result is application of the discretionary function exception in a manner which offers relief to First Circuit tort victims only where there has been "a complete rejection of safety considerations," in cases "invariably involv[ing] extreme circumstances." The First Circuit has thus altered the test's fundamental character, and created a wall of "extreme circumstances" which tort victims must scale in order to get FTCA relief – in contravention of the statute's purpose, and without justification from this Court. *See, e.g., Hughes v. United States*, 116 F.Supp.2d 1145, 1152 (N.D.Cal. 2000) ("Lower courts should be careful not to apply the test in a manner that so alters its fundamental character – especially when the Supreme Court, the source of the test, has had ample opportunity to make such a change explicitly but has chosen not to do so").

3. *The Government's failure to warn Mr. Davallou of a specific, known, immediate danger for which it was responsible was not a policy-based decision within the scope of the discretionary function exception.*

Contrary to the First Circuit's suggestion, Petitioner does not seek to "superimpos[e] a generalized 'safety exception' upon the discretionary function defense." *Davallou*, at 11, citing *Shansky, supra*, 164 F.3d at 694. Moreover, the First Circuit's valid concern – that a "generalized safety exception" not be permitted to override the discretionary function defense – is easily reconciled with the Ninth Circuit's approach to the issue before this Court.[9]

The Ninth Circuit has long recognized that, where the hazard at issue was both known to and created by the agency, "[a] decision not to warn of a specific, known hazard for which the acting agency is responsible is not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect." *Young v. United States*, 769 F.3d 1047, 1057 (9th Cir. 2014), quoting *Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994). *See also Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011) (Fletcher, C.J. specially concurring) (writing separately … "to emphasize that the discretionary function exception does not apply to

[9] The Ninth Circuit, consistent with the First Circuit, has emphatically rejected imposing a generalized safety exception upon the discretionary function exception. *See United States v. Morales*, 895 F.3d 708, 716 (9th Cir. 2018) ("We reject the suggestion that the government cannot invoke the discretionary function exception whenever a decision involves considerations of public safety.")

the government's failure to warn of an agency-created hazard.")

Young involved a young mother who was severely injured when she fell into a twelve foot deep hole that had formed underneath the snow in an area near the Mount Rainier National Park's main visitor center. *Id.* at 1050. The lower court had dismissed her complaint against the Government for its negligent failure to warn visitors at Mount Rainier National Park of a hazard that the National Park Service (NPS) both knew of and created, finding that the action was barred by the discretionary function exception. *Id.* On appeal, the Ninth Circuit reversed the district court's judgment.

The *Young* court held:

> Plaintiffs *alleged that the government was negligent in failing to warn of a particular danger that it knew of and created-allegations that, in our view, are meaningfully different because they encompass conduct that may not be shielded by the Park Service's broad discretion*. The distinction is therefore important, and the district court erred in mischaracterizing Plaintiff's allegations ["more broadly"]. *Id.* at 1054.

Relying on the facts as alleged in plaintiff's complaint, the *Young* court found:

> … this case is about the NPS's decision not to place a warning sign at the location of the buried transformer, even though the NPS knew that the transformer emitted heat, knew that it was buried under twelve feet of snow,

> and knew that it was located right across the road from the Park's most popular visitor area. The NPS's decision in that respect is not susceptible to considerations of any social, economic, or political policy that the government has identified." *Id.* at 1058.

The *Young* court's analysis could similarly apply to Mr. Davallou:

> This case is about the Government (MANG's) decision not to warn people in the Boston Common that a howitzer was going to be fired, even though MANG knew that noise during any weapon firing can impair your hearing, knew that firing a 155 millimeter howitzer creates a risk of hearing loss, knew that hearing loss caused by loud noise becomes permanent and is not medically treatable, and knew that it was firing the howitzer in a popular public park on a June day. MANG's decision in that respect is not susceptible to considerations of any social, economic, or political policy that the government has identified.

Twenty years prior to *Young*, the Ninth Circuit considered whether the Navy's failure to post speed limit signs after it placed buoys in navigable waterways was not protected by the discretionary function exception. In *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), the court stated:

> The key point here is that the Navy had placed a partially submerged obstruction to navigation in its waters,

through which private boaters regularly passed. The Navy's failure to post a speed limit sign thereafter was more than a failure to enforce a general system of regulation; it can reasonably be regarded as a failure to warn. In light of the hazard in the water, the Navy's failure to post the speed limit adequately is not protected by the discretionary function exception because the omission was not one grounded in social, economic or political policy.

The *Sutton* court continued:

…there was no evidence here that the Navy's failure adequately to post speed limit signs was the result of a conscious policy decision, (citations omitted), **but that is not the essential point**. The government need not show that a conscious decision weighing competing policy concerns in fact was made. *In re Consolidated United States Atmospheric Testing Litigation,* 820 F.2d 982, 998 (9th Cir.1987). **The essential point is that the decision not to post appropriate speed limit signs after creating a hazard to navigation is not the kind of policy decision protected by the discretionary function exception.** *See Kennewick*[10]*,* 880 F.2d at 1028 ("the relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy

[10] *Kennewick Irrigation District v. United States*, 880 F.2d 1018 (9th Cir. 1989) (as amended).

> analysis") (citing *United States Fidelity & Guaranty Co. v. United States,* 837 F.2d 116, 120–21 (3d Cir.1988)).

Sutton, supra, 26 F.3d at 920 n.6 (emphasis added).

Other courts have acknowledged that an overly broad construction of the discretionary function exception could easily swallow the FTCA's general waiver of sovereign immunity and frustrate the purpose of the statute. The Third Circuit has chosen a common sense approach, such that where the Government is aware of a specific risk, and responding to that risk would only require basic remedial steps, then the discretionary function exception does not apply. *See S.R.P. ex rel. Abunabba v. United States, supra*, 676 F.3d at 338, citing *Cestonaro v. United States*, 211 F.3d 749, 755 (3d Cir. 2000).

See also McMellon v. United States, 395 F.Supp.2d 422, 433 (S.D.W.V. 2005),[11] citing the Ninth Circuit's reasoning in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994) to be persuasive and relevant to the analysis of the case before it. The *McMellon* court concluded that the government owed a duty to boaters to provide adequate and effective warning of the presence of the locks and dam, which was built and maintained by the government itself. The court focused on the government's *creation* of the danger in determining that the government had a duty to warn of same.

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[11] *McMellon*, like *Sutton v. Earles*, involved the Suits in Admiralty Act ("SIAA"), 46 App. U.S.C. §§741-752. The Ninth Circuit has held that the discretionary function exception set forth in the Federal Tort Claims Act should be read into the SIAA. *Sutton, supra*, 26 F.3d at 906, citing *Earles v. United States (Earles I),* 935 F.2d 1028, 1032 (9th Cir. 1991).

4. *The First Circuit's interpretation of the discretionary function exception to the FTCA suggests that the Government may directly and immediately endanger the public, without consequence, consistent with public policy.*

The First Circuit has held that the Government's failure to warn Mr. Davallou of a specific, known, and immediate danger, which the Government itself created on June 1, 2015, by firing a howitzer in the middle of the Boston Common, one of this country's most celebrated city parks, thereby exposing Mr. Davallou, through no fault of his own, to noise loud enough to cause permanent hearing damage, did not fall outside "the realm of possible policy decisions."

This decision is, quite simply, wrong. Congress enacted the FTCA to provide relief for the Government's negligence in committing garden variety torts. The First Circuit's decision – excusing the Government's failure to warn Mr. Davallou of a specific, known, and immediate danger, which the Government itself created, condones the Government's ability to *directly and immediately endanger the public*, *without consequence, consistent with public policy.*

Such interpretation fails in the context of the FTCA, and reflects the concerns articulated by Justice Jackson following passage of the Act:

> [T]he Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort

> Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases it defends.

Shuman v. United States, 765 F.2d 283, 294-295 (1st Cir. 1985), citing *Dahelite v. United States*, 346 U.S. 15, 50 (1953), (Jackson, J., dissenting).

The First Circuit's refusal to hold the Government accountable for its failure to warn unwitting bystanders walking through a popular public park that a howitzer would be fired, a howitzer with a known propensity to exceed noise safe limits, with the ability to immediately cause serious hearing damage – undermines all that is good about the FTCA, and legitimizes the Government's ability "to clothe official carelessness with a public interest." The result – passed off, albeit with sympathy, as consistent with "public policy" – leaves those enjoying the park – the young mother pushing her baby's stroller, the elderly man enjoying the sun on his face, and the Petitioner, Mr. Davallou, simply taking a walk on a June day – in a dangerous place, where what is deemed "public policy" utterly fails to protect the public good.

CONCLUSION

In order to resolve the split of authority among the First and Ninth Circuit Courts of Appeals and remove uncertainty on an issue repeatedly presented to district courts, Petitioner respectfully submits that this petition for a writ of certiorari be granted.

Respectfully submitted,

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