No. 12-1111

In the Supreme Court of the United States

ESTATE OF EZRA GERALD SMITH, BY AND THROUGH THE ADMINISTRATRIX OF HIS ESTATE, RENEE RICHARDSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff can avoid the Federal Tort Claims Act's intentional tort exception, which preserves the government's immunity from suit for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," 28 U.S.C. 2680(h), by alleging that the government was negligent in supervising the employee who committed the relevant intentional tort.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is unreported but is available at 2012 WL 6621350. The opinion of the district court (Pet. App. 17-28) is unreported but is available at 2011 WL 3880935.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2012. The petition for a writ of certiorari was filed on March 11, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the estate and mother of Ezra Gerald Smith, an 18-year-old high school student who was killed by a military police officer. Pet. App. 3.

Smith, who was temporarily housed with his mother on the United States Army base at Fort Bliss, Texas, was shot by Specialist Gerald Polanco on Army property while walking to school. *Ibid.*

2. a. Petitioners brought an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which generally waives the United States' sovereign immunity with respect to suits seeking damages for "personal injury or death caused by the negligent or wrongful act or omission" of a government employee "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). That waiver of sovereign immunity, however, does not extend to claims that "aris[e] out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," 28 U.S.C. 2680(h), or that are "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).

As relevant here, petitioners alleged that military personnel in Polanco's chain of command failed to take adequate precautionary steps to prevent him from committing violence. Pet. App. 3-5.[1] According to petitioners, Polanco had been suffering from post-traumatic

[1] Petitioners also claimed that the Army's mental health personnel had failed to diagnose and properly treat Polanco. Pet. App. 2-4. The district court held that petitioners could not state a claim for medical negligence under Texas law, *id.* at 21-23, and the court of appeals affirmed, *id.* at 8-13. Petitioners do not seek review of that holding.

stress disorder following a combat tour. *Ibid.* Petitioners alleged that Polanco's supervisors were aware that Polanco posed a threat to the community yet made no effort to remove him from his position or to confiscate weapons from his home. *Id.* at 4-5. Petitioners also maintained that although Polanco had been considered absent without leave (AWOL) for a period of time, the Army had taken no action against him. *Id.* at 4. Finally, petitioners asserted that on the morning of the shooting, Polanco had threatened his immediate supervisor but was nevertheless permitted to leave mandatory training. *Id.* at 5.

b. The district court dismissed petitioners' negligent supervision claim for lack of subject-matter jurisdiction. Pet. App. 18. It held that the FTCA's intentional tort exception—which preserves the government's immunity with respect to "[a]ny claim arising out of assault [or] battery," 28 U.S.C. 2680(h); see *Millbrook* v. *United States*, 133 S. Ct. 1441, 1442 (2013)—barred petitioners' claim. Pet. App. 24-25. Applying Sixth Circuit precedent, the court concluded that petitioners' negligence claim could not proceed because it "ultimately stem[med] from the assault and battery committed by Spc. Polanco." *Id.* at 25.

The district court alternatively held that petitioners' claim was barred by the FTCA's discretionary function exception, which preserves the government's immunity from claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a); Pet. App. 26-28. Applying the two-step analysis set forth in *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988), the court deter-

mined that (1) the actions of Polanco's supervisors involved an element of judgment, and (2) that their judgments implicated policy considerations. Pet. App. 26-28. With respect to the first step, the court observed that petitioners had not identified "any specific applicable regulations which removed discretion from Spc. Polanco's chain of command." *Id.* at 26-27. As for the second, it concluded that "[p]olicy concerns" were "inherent in the decisions made by Spc. Polanco's chain of command" and that "[j]udicial second guessing" of those considerations fell squarely "within the ambit of what the discretionary function exception was intended to prevent." *Id.* at 27-28.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 1-16. The court observed that it had previously held that a plaintiff could not avoid the intentional tort exception simply "by framing the complaint in terms of a negligent failure to prevent [an] assault and battery." *Id.* at 15 (citing *Satterfield* v. *United States*, 788 F.2d 395, 399 (6th Cir. 1986)). Accordingly, it agreed with the district court that the exception applied "to negligent supervision claims like those alleged by [petitioners]." *Ibid.*

In light of that holding, the court of appeals determined that it did not need to address "the district court's alternative basis for dismissal—the FTCA's discretionary function exception." Pet. App. 16 n.2. It noted, however, that petitioners' complaint "failed to cite any specific policies or procedures" that the United States had allegedly violated. *Ibid.*

ARGUMENT

The court of appeals correctly held that a plaintiff cannot circumvent the FTCA's intentional tort exception by alleging that the government was negligent in super-

vising the employee who committed the intentional tort. That conclusion does not conflict with any decision of this Court and is in accord with every court of appeals to have considered the issue except the Ninth Circuit. That lopsided division of authority, which has had little practical significance, does not warrant this Court's review at this time. In any event, this case would not be an appropriate vehicle for this Court to consider the issue. Even if the intentional tort exception did not bar petitioners' claim, the FTCA's discretionary function exception would preclude relief. Review of the court of appeals' unpublished decision therefore is not warranted.

1. The FTCA's intentional tort exception expressly bars recovery for "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h). This Court has twice considered the scope of that exception with respect to claims alleging the negligent supervision of a government employee. See *Sheridan* v. *United States*, 487 U.S. 392 (1988); *United States* v. *Shearer*, 473 U.S. 52 (1985). Contrary to petitioners' suggestion (Pet. 12-16), neither of those decisions indicates that a plaintiff may avoid the statutory bar to recovery for injuries "arising out of" an assault or battery by pleading that the United States was negligent in supervising the assailant.

In *Shearer*, this Court held that the doctrine set forth in *Feres* v. *United States*, 340 U.S. 135 (1950), barred recovery under the FTCA. Four of the eight participating Justices would also have held that the intentional tort exception barred a claim for negligent failure to prevent a battery by a serviceman allegedly known to have violent propensities. 473 U.S. at 54-57.[2] As the

[2] Justice Powell did not participate in the decision. See *Shearer*, 473 U.S. at 59.

Shearer plurality explained, the text of "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery," and thereby protects the United States against negligent supervision claims that "stem from a battery committed by a Government employee." *Id.* at 55 (opinion of Burger, C.J.). While petitioners are correct (Pet. 13) that a majority of the Court did not embrace that conclusion, they offer scant reason why that interpretation of the FTCA is incorrect.

Petitioners' reliance on *Sheridan* is similarly misplaced. In *Sheridan*, this Court held that the intentional tort exception does not bar a negligence claim relating to a federal employee's battery if the alleged negligence stems from an independent, antecedent duty—such as a Good Samaritan duty—unrelated to the tortfeasor's status as a government employee. 487 U.S. at 400-402. The Court expressly declined to consider, however, whether "negligent supervision * * * may ever provide the basis for liability" under the intentional tort exception. *Id.* at 403 n.8.[3] There is accordingly no conflict between the decision below and decisions of this Court.

2. a. With the exception of the Ninth Circuit, all the courts of appeals that have considered the issue since *Sheridan* have concluded, consistent with the decision of

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[3] Concurring in the judgment, Justice Kennedy stated that he would have reached the reserved question and would have held that a plaintiff may not maintain a claim based only on the employment relationship between the intentional tortfeasor and the government. *Sheridan*, 487 U.S. at 406-407. As Justice Kennedy explained, if the law were "[o]therwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors." *Id.* at 407.

the Sixth Circuit below, that the intentional tort exception cannot be circumvented simply by pleading that the intentional tort that allegedly injured the plaintiff was caused by the government's negligent supervision. See, *e.g.*, *CNA* v. *United States*, 535 F.3d 132, 148-149 & n.10 (3d Cir. 2008) (barring negligence claim against the United States involving battery of civilian by recruit because the "allegedly negligent supervision" at issue "had everything to do with [an] employment relationship with the Army"); *LM ex rel. KM* v. *United States*, 344 F.3d 695, 700 (7th Cir. 2003) (observing that plaintiff had correctly abandoned negligent supervision claim against Postal Service in case involving sexual abuse by a mail carrier); *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (per curiam) (noting that "[t]o find the government liable for negligent hiring and supervision of an employee who commits a tort would frustrate the purpose of [Section] 2680(h)"); *Leleux* v. *United States*, 178 F.3d 750, 757 (5th Cir. 1999) (barring claim of negligence against the government in alleged battery of recruit by Naval officer because negligence did not arise out of "an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States"); *Perkins* v. *United States*, 55 F.3d 910, 916-917 (4th Cir. 1995) (applying the rule that "[a]n allegation of 'negligent supervision' will not render an otherwise unactionable claim actionable so long as the negligent supervision claim depends on activity of the supervised agent which is itself immune" to "negligent *retention* claims"); *Franklin* v. *United States*, 992 F.2d 1492, 1498-1499 (10th Cir. 1993) (barring claim of negligence in case of medical battery by government employee because claim was contingent on employment relationship); *Kugel* v. *United States*, 947

F.2d 1504, 1507 (D.C. Cir. 1991) (adopting the reasoning of the *Shearer* plurality in dismissing a negligence claim arising out of an alleged defamation by FBI agents); *Guccione* v. *United States*, 847 F.2d 1031, 1037 (2d Cir. 1988), reh'g denied, 878 F.2d 32, 32-33 (1989) (barring claim that the government was negligent in failing to supervise undercover agent because claim was not entirely independent of employment relationship), cert. denied, 493 U.S. 1020 (1990); see also *JBP Acquisitions, LP* v. *United States ex rel. FDIC*, 224 F.3d 1260, 1264 (11th Cir. 2000) (holding that the "misrepresentation exception" in Section 2680(h) "covers actions for negligence when the basis for the negligence action is an underlying claim for misrepresentation").

The Ninth Circuit, by contrast, has held that a plaintiff can avoid the intentional tort exception by pleading that an assault or battery by a federal employee was caused by the government's negligent supervision of that employee. See *Senger* v. *United States*, 103 F.3d 1437, 1441-1442 (1996); *Brock* v. *United States*, 64 F.3d 1421, 1425 (1995); *Bennett* v. *United States*, 803 F.2d 1502, 1503-1505 (1986). While acknowledging that this Court in *Sheridan* "implied that it did not favor government liability under the FTCA in cases involving claims of negligent hiring and supervision," the Ninth Circuit has nonetheless permitted such claims to go forward based on its view "that granting broad immunity would be inconsistent with the purpose of the FTCA." *Senger*, 103 F.3d at 1441-1442.

b. This lopsided conflict, however, does not warrant this Court's review at this time. This Court has previously denied review of the question presented. See *Foster* v. *United States*, 532 U.S. 904 (2001) (No. 00-907); *Guccione* v. *United States*, 493 U.S. 1020 (1990)

(No. 89-553). The Ninth Circuit has not issued a published decision on the issue since the most recent denial, and there has been no intervening change in circumstances that would warrant a different result here.

Moreover, the disagreement between the Ninth Circuit and the other courts of appeals over the scope of the intentional tort exception does not appear to have produced different outcomes in any significant number of cases. The Ninth Circuit has emphasized that "decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield." *Vickers* v. *United States*, 228 F.3d 944, 950 (2000). For that reason, the discretionary function exception itself generally precludes negligent supervision claims arising out of a federal employee's intentional tort within the Ninth Circuit. See, *e.g.*, *Parker* v. *United States*, 500 Fed. Appx. 630, 631-632 (2012) (discretionary function exception bars negligent supervision claim stemming from alleged abuse of process by Small Business Administration agent); *Nurse* v. *United States*, 226 F.3d 996, 999-1002 (9th Cir. 2000) (discretionary function exception bars negligent supervision claim arising out of alleged false imprisonment by Customs agents).

Similarly, courts within the Ninth Circuit have rejected such claims on state law grounds. See, *e.g.*, *McLaughlin* v. *United States*, No. 04-960, 2006 WL 2958998, at *4-*6 (N.D. Cal. Oct. 16, 2006) (United States did not have a duty under California law to protect plaintiff from attack by two Marines); *Day* v. *United States*, No. 04-161, 2006 WL 848100, at *3-*6 (E.D. Wash. Mar. 30, 2006) (alleged battery by Air Force Commissary bagger was not foreseeable under Washington law). As a result, the Ninth Circuit's erroneous

interpretation of the intentional tort exception does not yet appear to have had any significant impact in light of these other doctrines. And because the other courts of appeals have correctly resolved the question presented, that question does not have sufficient practical importance to merit further review at this time.

c. In any event, this case would not be an appropriate vehicle for this Court to resolve the conflict between the Ninth Circuit and every other court of appeals to have considered the question. Regardless of whether the intentional tort exception applies to petitioners' negligence claim, the FTCA's discretionary function exception—which bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused," 28 U.S.C. 2680(a)—preserves the government's immunity in this case.

The discretionary function exception is 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." *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (internal quotation marks omitted) (quoting *United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984)). An action comes within the discretionary function exception if (1) it "involves an element of judgment or choice," and (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second

step focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325.

The district court correctly held that the discretionary function exception bars petitioners' negligence claim. Pet. App. 26-28. With respect to the first step of the inquiry, the decisions by Polanco's supervisors that petitioners allege were negligent—such as not removing him from his position, not taking action against him for being AWOL, and allowing him to leave training after threatening his supervising officer, *id.* at 4-5—inherently involve "an element of judgment or choice." *Berkovitz*, 486 U.S. at 536. As both the district court and the court of appeals observed, petitioners have not identified any Army policy or regulation that removed discretion from Polanco's chain of command in making those judgments. Pet. App. 16 n.2, 26-27.

As for the second step, decisions concerning the discipline of members of the military are precisely the sort of judgments "that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. Decisions "whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct * * * are essentially professional military judgments," *Shearer*, 473 U.S. at 58 (internal quotation marks and citation omitted), and therefore ill-suited for "judicial 'second-guessing' * * * through the medium of an action in tort," *Varig Airlines*, 467 U.S. at 814; see *Minns* v. *United States*, 155 F.3d 445, 451 (4th Cir. 1998) ("[W]hen discretionary decisions are ones of professional military discretion, they are due the courts' highest deference."), cert. denied, 525 U.S. 1106 (1999). Because the FTCA's discretionary function exception

adequately and independently supports the judgment below, resolution of the question presented would not affect the outcome of this case. Accordingly, this case is not a proper vehicle to resolve the division of authority regarding the scope of the intentional tort exception with respect to negligent supervision claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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