No. 13-704

In the Supreme Court of the United States

GREG HERDEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' claim that a United States Department of Agriculture employee acted negligently in specifying a cattle-pasture seeding mixture as part of a federal conservation program.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-25a) is reported at 726 F.3d 1042. The panel opinion of the court of appeals (Pet. App. 26a-46a) is reported at 688 F.3d 467. The memorandum opinion and order of the district court (Pet. App. 47a-55a) is unreported but is available at 2011 WL 4538072.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2013. On October 29, 2013, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 9, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671-2680, waives the sovereign immunity of the United States from liability for torts caused by 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). That waiver of immunity is limited by several exceptions, including an exception for any 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).

2. a. This case involves the Environmental Quality Incentives Program (EQIP), 16 U.S.C. 3839aa *et seq.*, which is administered by the Natural Resources Conservation Service (NRCS) of the United States Department of Agriculture (USDA). EQIP was established to "promote agricultural production * * * and environmental quality as compatible goals, and to optimize environmental benefits." 16 U.S.C. 3839aa. Through EQIP, NRCS provides financial and technical assistance to farmers who voluntarily enroll in the program. 7 C.F.R. 1466.1 (2004). In exchange for such assistance, participating farmers implement conservation measures on their private land that "address soil, water, air, and related natural resources concerns * * * in an environmentally beneficial and cost-effective manner." *Ibid.*

Because environmental conditions vary widely across the United States, the specific conservation

practices approved through EQIP are determined locally. See 68 Fed. Reg. 32,341 (May 30, 2003). Local NRCS employees "are assigned the responsibility to administer EQIP in specific areas," 7 C.F.R. 1466.6(b) (2004), and they are given "maximum flexibility * * * to implement the program," 68 Fed. Reg. at 32,343.

b. Petitioners are cattle farmers in Minnesota who enrolled in the EQIP program. Pet. App. 2a. In exchange for participating in the program, the government agreed to reimburse petitioners for 90% of their costs to implement the conservation measures. *Id.* at 3a. As part of the pasture planting plan designed for petitioners' land, an NRCS employee (Howard Moechnig) selected a seed mixture that would, in his view, "establish good ground cover," "enhance soil quality," "enhance ground and surface water quality," "prevent erosion," "create wildlife habitat," "provide good forage," and "continue to provide good vegetation for many years, so cost-sharing it through EQIP [would be] a good investment for NRCS." *Id.* at 4a. Petitioners planted the seed mixture, allowed their cattle to graze the pasture, harvested the hay, and later fed their cattle the stored hay. *Id.* at 6a.

c. In February 2010, petitioners filed suit against the United States under the FTCA. Pet. App. 6a. Petitioners alleged that Moechnig acted negligently in selecting the seed mixture as part of the EQIP pasture planting plan. *Ibid.* More specifically, they alleged that the chosen mixture proved toxic and that their cattle suffered illness and death after eating the hay. *Ibid.*

The United States contested petitioners' allegations and asserted that the hay was improperly stored

and that the cattle herd was injured as a result of mold, not the seed mixture. Pet. App. 6a. The United States moved to dismiss for lack of jurisdiction, relying on, *inter alia*, the FTCA's discretionary function exception, 28 U.S.C. 2680(a). Pet. App. 6a-7a.

3. The district court granted the motion to dismiss. Pet. App. 47a-55a. Applying "a two-step process," the court concluded that it is "quite clear that the discretionary function exception of the FTCA prohibits this action." *Id.* at 52a, 54a. At the first step, the court determined that "decisions about seeding mixtures" are left "to the discretion of employees like Moechnig." *Id.* at 53a. At the "second step," the court noted that Moechnig had "weighed various policy considerations when formulating [petitioners'] seeding mixture"; that the "policy considerations are the type that the discretionary exception protects"; and that petitioners had not "rebutted the presumption that Moechnig's decision was based in policy considerations." *Id.* at 53a-54a.

4. A panel of the court of appeals reversed in a divided decision. Pet. App. 26a-46a. The court agreed with the district court that the seed mixture determination was discretionary. *Id.* at 34a-35a. The majority, however, concluded that it "was not the type of discretion Congress intended to shield from suit." *Id.* at 27a, 35a-41a. Judge Bye dissented. *Id.* at 41a-46a.

5. The United States petitioned for rehearing en banc. Pet. App. 2a. The court of appeals granted the petition and affirmed the decision of the district court. *Id.* at 1a-25a.

a. The en banc court of appeals applied the "well-established" two-part test to determine whether the discretionary function exception applies to bar peti-

tioners' FTCA claim. Pet. App. 8a-9a (citing *United States* v. *Gaubert*, 499 U.S. 315, 325, 328 (1991)). The court first concluded, in accord with the district court and panel decisions, that "Moechnig's selection of a seed mixture" for the relevant pasture was a "discretionary decision." *Id.* at 9a-11a.

The court of appeals then concluded that "this case involves the type of discretionary decision Congress meant to shield from judicial second-guessing." Pet. App. 11a-19a. The court explained that "[t]he fact that Moechnig's decision involved technical or professional judgment at the operational level is not enough to remove his decision from the protection of the discretionary function exception." *Id.* at 13a. Rather, the court continued, "the inquiry is whether the seed mixture decision was susceptible to a policy analysis because it was 'based on considerations of social, economic, and political policy.'" *Ibid.* (citation omitted). The court noted that "Moechnig's selection of a seed mixture implemented the policies of the EQIP program"; that he gave six reasons "for his seed mixture decision," which "were all based on considerations of environmental policies the EQIP program was meant to advance"; and that he "was charged with balancing a number of competing interests." *Id.* at 13a-16a. Those factors, the court concluded, "clearly demonstrate[]" that "the decision he ultimately made was susceptible to policy analysis and thus the type of decision Congress meant to shield from judicial second-guessing." *Id.* at 17a.

b. Judge Melloy, joined by two other judges, dissented. Pet. App. 19a-25a. He did not dispute the discretionary nature of the decision at issue; he "simply disagree[d]" as to whether "such discretion can be

characterized as addressing real and competing policy considerations in a meaningful sense." *Id.* at 20a.

ARGUMENT

The court of appeals' decision is correct. The decision does not conflict with any decision of this Court or any other court of appeals, and petitioners essentially concede as much. Instead, petitioners ask this Court to overrule decisions that have controlled the discretionary function analysis for more than two decades. Petitioners offer no sound reason to depart from settled precedent. Further review is not warranted.

1. a. The FTCA's 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) (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 of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325.

This Court has consistently held that the discretionary function exception applies not only to the creation of policies, but also to the day-to-day conduct of government employees in implementing those policies.

In *Varig Airlines*, for example, the Court held that the discretionary function exception barred actions based on the Federal Aviation Administration's decision to grant certificates to certain aircraft to permit their use in commercial aviation. 467 U.S. at 821. Significantly, the Court held that the exception applied not only to the agency's "decision to implement the 'spot-check' system of compliance review," but also to "the application of that 'spot-check' system to the particular aircraft involved." *Id.* at 819. And, in *Gaubert*, the Court held that the discretionary function exception barred an action based on alleged negligence in the day-to-day management of a savings and loan association by federal employees. 499 U.S. at 327-334. The Court squarely rejected the contention that the challenged actions fell outside the exception "because they involved the mere application of technical skills and business expertise." *Id.* at 331. In so holding, the Court discredited the "nonexistent dichotomy between discretionary functions and operational activities." *Id.* at 326.

b. The en banc court of appeals applied this Court's well-settled precedent and correctly held that the NRCS employee's selection of a particular seed mixture pursuant to a pasture planting plan under EQIP was covered by the discretionary function exception.

At the first step of the analysis, the decision was discretionary—as every judge to consider that question in this case has concluded. Pet. App. 9a-11a, 34a-35a, 52a-53a. No "federal statute, regulation, or policy" mandated a specific course of action, *Berkovitz*, 486 U.S. at 536; the chosen seed mixture was a product of "judgment or choice," Pet. App. 8a-11a.

At the second step, the decision was readily "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325; see Pet. App. 11a-19a, 53a-54a. The NRCS official who designed the pasture planting plan, including selecting the particular seeding mixture, was charged with implementing the explicit and sometimes competing policy goals of the federal program. EQIP is designed to "promote agricultural production * * * and environmental quality as compatible goals," 16 U.S.C. 3839aa, to "address soil, water, air, and related natural resources concerns, and to encourage enhancements * * * in an environmentally beneficial and cost-effective manner," 7 C.F.R. 1466.1 (2004). Local NRCS officials (like Moechnig) are afforded "maximum flexibility" to "implement the program." 68 Fed. Reg. at 32,343. And Moechnig, in fact, considered a variety of policy considerations in selecting the seed mixture for petitioners' land. See Pet. App. 4a (explaining that Moechnig chose the particular seed mixture because it would "establish good ground cover," "enhance soil quality," "enhance ground and surface water quality," "prevent erosion," "create wildlife habitat," "provide good forage," and "continue to provide good vegetation for many years, so cost-sharing it through EQIP [would be] a good investment for NRCS"). The court of appeals thus correctly concluded that this case involves precisely "the type of discretionary decision Congress meant to shield from judicial second-guessing." *Id.* at 19a.

2. The court of appeals' decision is thus a straightforward application of the well-established standards set forth by this Court. And it does not conflict with any decision of the Court or any other court of appeals. Petitioners essentially concede as much.

Petitioners instead argue (Pet. 7-24) that this Court should overrule *Berkovitz* and *Gaubert* and discard the framework they adopted. Petitioners, however, advance no compelling reason for the Court to disregard principles of stare decisis, which "have special force in the area of statutory interpretation, for * * * [the legislature] remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). This Court will not overrule precedent construing a federal statute unless intervening law has undercut the "conceptual underpinnings" of the decision; "later law has rendered the decision irreconcilable with competing legal doctrines or policies"; or there is "compelling evidence" bearing on the legislature's original intent. *Neal* v. *United States*, 516 U.S. 284, 295 (1996) (citation omitted). None of those considerations is satisfied here.

Contrary to petitioners' contention (Pet. 14, 19), the discretionary function exception has neither "swallowed the rule" nor proven "unworkable." In *Berkovitz* itself, the Court held that the discretionary function exception did not bar the claims there involving the licensing of a polio vaccine and the subsequent release of a specific lot of the vaccine. 486 U.S. at 539-548. Courts of appeals have found the discretionary function exception inapplicable in other circumstances as well. For example, as petitioners appear to acknowledge, the discretionary function exception generally does not apply to medical malpractice claims. See Pet. 15-16 (citing cases). Nor does it generally "protect[] against liability for the negligence of a vehicle driver." Pet. 17 (quoting *Gaubert*, 499 U.S. at 336) (Scalia, J., concurring in part and concurring in

the judgment)); see also *Coulthurst* v. *United States*, 214 F.3d 106, 110-111 (2d Cir. 2000) (listing other examples of "discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish") (quoting *Gaubert*, 499 U.S. at 325 n.7). And while petitioners now suggest (Pet. 17-18) ways in which such claims could fall within the discretionary function exception, they do not identify a single case that has reached such a result. A concern that courts could hypothetically apply this Court's precedents in a way that would expand the discretionary function exception beyond its intended reach provides no reason to revisit rules that have been well-settled and faithfully applied for more than two decades.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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