No. 23-1281

In the Supreme Court of the United States

RYAN G. CARTER, 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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
LOWELL V. STURGILL JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

This Court held in *Feres* v. *United States*, 340 U.S. 135, 146 (1950), that the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, does not waive the United States' sovereign immunity from suit for injuries that "arise out of or are in the course of activity incident" to a person's service in the military. The questions presented are:

1. Whether the FTCA permits claims for medical malpractice in a military hospital based on injuries sustained while the service member was not under military orders.

2. Whether the Court should overrule its longstanding interpretation of the FTCA in *Feres*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is available at 2024 WL 982282. The opinion of the district court (Pet. App. 4a-64a) is available at 2022 WL 1642260.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2024. The petition for a writ of certiorari was filed on June 5, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 6, 2018, military doctors at Walter Reed National Military Medical Center performed spine surgery on petitioner Ryan G. Carter, then a Staff Seargeant in the Air National Guard of the United States. Pet. App. 4a-5a, 9a. Carter and his wife, petitioner Kathleen E. Cole, allege that the surgery caused Carter

to suffer debilitating and permanent physical injuries. *Id.* at 2a, 5a.

Carter first became injured in early 2010, when he fell from a pull-up bar during basic training. Pet. App. 8a. When Carter's symptoms began to steadily worsen, he sought treatment at various military medical providers, including Walter Reed. See *ibid.* Walter Reed is a military hospital in Bethesda, Maryland, managed by the Defense Health Agency, a combat support agency within the Department of Defense. *Ibid.* "[R]eceiving treatment at Walter Reed is an exclusive benefit to members of the military and their dependents." *Id.* at 51a (brackets and citation omitted). Thus, with a few exceptions not relevant here, "civilians are generally ineligible for medical care at Walter Reed." *Ibid.*

In early 2018, physicians at Walter Reed diagnosed Carter with "cervical spondylotic myelopathy,"—damage to the spinal cord in the neck—and recommended surgery. Pet. App. 8a & n.7 (citation omitted); C.A. App. 369. On April 6, 2018, military doctors and other medical professionals at Walter Reed performed the surgery. Pet. App. 11a. There were complications, and Carter's medical team ultimately had to perform a second procedure the same day. *Id.* at 12a. Carter was then transferred to Walter Reed's surgical ICU, where he was admitted with an injury to his spinal cord. *Ibid.*

2. At the time of his surgery, Carter was a member of the Maryland Air National Guard and the Air National Guard of the United States, a reserve component of the United States Air Force. Pet. App. 7a. Carter was a dual-status military technician: a full-time federal civilian employee whose employment was conditioned on his membership in the Maryland Air National

Guard and his attendance at inactive-duty training one weekend per month and two weeks per year. *Id.* at 10a.

Carter had recently finished a six-month active-duty tour in March 2018. Pet. App. 9a. On June 27, 2018, at Carter's request, see *id.* at 18a, Carter's commanding officer issued special written orders returning him to active-duty status effective from March 14, 2018, until June 11, 2018. *Id.* at 17a-18a. The written order stated that it was confirming verbal orders that had been issued on March 14, 2018, weeks before the surgery, and that "circumstances prevented written orders" in advance of the surgery. *Id.* at 17a. Carter's commanding officer later explained that he had converted Carter to active-duty status for the period covering his surgery because Carter had requested the conversion, and in order to ensure that Carter was "eligible for pay and benefits, continuing medical treatment, disability and medical retirement benefits, and veterans' benefits after he was discharged from military service." C.A. App. 433.

In January 2020, Carter was granted a medical retirement from the military due to 100% physical disability. Pet. App. 20a. Carter now receives monthly compensation from the Department of Veterans Affairs to cover medical expenses, C.A. App. 360-364, and he is also entitled to other military benefits, including insurance, education, housing, medical, clothing, automobile, and dependents' benefits, *id.* at 357-364.

3. In May 2021, Carter and Cole filed this action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Pet. App. 2a. Petitioners alleged that the healthcare providers at Walter Reed were negligent in their medical care and that their alleged malpractice caused Carter significant injuries. *Id.* at 21a. They further alleged that they

have suffered loss of consortium. *Ibid.* And they alleged that the government failed to adequately secure Carter's informed consent. *Id.* at 22a.

The district court dismissed the complaint for lack of jurisdiction. Pet. App. 4a-64a. The court explained that the FTCA does not waive the United States' sovereign immunity for claims for injuries to a military service member that "arise out of or are in the course of activity incident to service." *Id.* at 27a (quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950)) (emphasis omitted). The court then considered petitioners' contention that *Feres* does not bar their claims because Carter's "surgery occurred while Carter was inactive and off-base." *Id.* at 35a. After extensively canvassing both Fourth Circuit precedent and "out-of-circuit cases," the court rejected that argument, concluding that suits brought by "reservists may be barred by *Feres* even for injuries sustained while not on active status, if the injuries are incident to service." *Id.* at 47a-48a. The court determined that Carter's alleged injuries stemmed from his military service because he "was injured in the context of medical treatment at a military hospital by military doctors" and because "his eligibility for his medical treatment at Walter Reed flowed directly from his military status." *Id.* at 50a.

The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1a-3a. The court observed that Carter had received his surgery at Walter Reed, which was "performed by military doctors," only "because he was a member of the military." *Id.* at 2a. The court also noted that Carter was "neither discharged from the military nor on leave substantially similar to discharged or veteran status" at the time of the surgery. *Ibid.* In light of those facts, the court concluded that

petitioners' claims were "bar[red] * * * under *Feres*." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioners' FTCA claims are barred under this Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950), and by subsequent decisions. Petitioners contend (Pet. i) that the Court should grant certiorari to address whether *Feres* applies to medical-malpractice claims "where the service member was under no military orders, not engaged in any military mission, and whose military status was retroactively altered from inactive to active duty post medical malpractice." But the court of appeals correctly rejected that contention, and petitioners do not identify any court of appeals decision that has reached a contrary conclusion in similar circumstances.

Petitioners also contend (Pet. ii) that this Court should grant review to reconsider *Feres* in its entirety. But the unanimous *Feres* Court's interpretation of the FTCA—including its prohibition of medical-malpractice claims by service members—was adopted shortly after the FTCA was enacted, has been the law for more than 70 years, and has been repeatedly reaffirmed by this Court. This Court has consistently denied petitions for a writ of certiorari raising these same issues. It should deny this petition as well.

1. Petitioners first ask this Court (Pet. i, 20-32) to decide whether the *Feres* bar is inapplicable to their claims for medical malpractice because Carter was on inactive-duty status at the time of the surgery and he was not injured during combat. That issue does not merit this Court's review.

a. In *Feres*, this Court held that the FTCA does not waive the United States' sovereign immunity for

injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. Since then, this Court has repeatedly reaffirmed that interpretation of the FTCA. See *United States* v. *Stanley*, 483 U.S. 669 (1987); *United States* v. *Johnson*, 481 U.S. 681 (1987); *United States* v. *Shearer*, 473 U.S. 52 (1985); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977); *United States* v. *Muniz*, 374 U.S. 150 (1963); *United States* v. *Brown*, 348 U.S. 110 (1954).

Since its inception, *Feres* has applied to claims for medical malpractice. Notably in *Feres* itself, this Court consolidated for review three cases, two of which (*Jefferson* v. *United States*, 77 F. Supp. 706 (D. Md. 1948), aff'd, 178 F.2d 518 (4th Cir. 1949), and *Griggs* v. *United States*, 178 F.2d 1 (10th Cir. 1949)), involved claims of injury to service members caused by alleged medical malpractice. In *Jefferson*, the service member alleged that a towel was negligently left in his stomach by an army surgeon during abdominal surgery. *Feres*, 340 U.S. at 137. And in *Griggs*, the surviving spouse of a service member alleged that "he met death because of negligent and unskillful medical treatment by army surgeons." *Ibid.* Neither claim involved medical treatment provided for injuries to service members sustained during combatant activities. See *ibid.*; *Jefferson*, 77 F. Supp. at 708; *Griggs*, 178 F.2d at 2.

Consistent with that history, every court of appeals to consider the issue has held that the *Feres* bar applies to claims for medical malpractice that arise incident to military service. See *Borden* v. *Veterans Admin.*, 41 F.3d 763 (1st Cir. 1994) (per curiam); *Matthew* v. *United States*, 311 Fed. Appx. 409 (2d Cir. 2009); *Loughney* v. *United States*, 839 F.2d 186 (3d Cir. 1988);

Appelhans v. *United States*, 877 F.2d 309 (4th Cir. 1989); *Schoemer* v. *United States*, 59 F.3d 26 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Sidley* v. *United States Dep't of Navy*, 861 F.2d 988 (6th Cir. 1988); *Selbe* v. *United States*, 130 F.3d 1265 (7th Cir. 1997) (per curiam); *Bowers* v. *United States*, 904 F.2d 450 (8th Cir. 1990); *Daniel* v. *United States*, 889 F.3d 978 (9th Cir. 2018), cert. denied, 139 S. Ct. 1713 (2019); *Quintana* v. *United States*, 997 F.2d 711 (10th Cir. 1993); *Jiminez* v. *United States*, 158 F.3d 1228 (11th Cir. 1998) (per curiam); *Cooper* v. *United States Dep't of Army*, 76 F.3d 1244, 1996 WL 31929, at *1 (D.C. Cir. 1996) (Tbl.) (per curiam).

The courts below in this case likewise correctly held that *Feres* bars petitioners' claims for medical malpractice. Carter underwent surgery at Walter Reed to treat a medical condition that derived at least in part from an injury that he sustained during military training. Pet. App. 7a-8a, 11a. Walter Reed is a military hospital managed by the Defense Health Agency, a combat support agency within the Department of Defense. See *ibid.* And as the courts below recognized, Carter would not have been able to receive the surgery at Walter Reed, which was performed by military doctors, but for his service in the military. *Id.* at 2a, 50a. The surgery and Carter's resulting injuries were thus "incident to service—that is, because of [Carter's] military relationship with the Government," *Johnson*, 481 U.S. at 689—and petitioners' claims accordingly are barred by *Feres*.

The courts below also correctly recognized that Carter's duty status at the time of his surgery did not call for a different result. See Pet. App. 55a-56a. Petitioners argue (Pet. 22) that *Feres* should not apply to their claims because at the time of Carter's surgery, "he

was inactive, subject to no military orders and on no military mission." As a factual matter, Carter's status was "more than inactive" at the time of his surgery, as the district court correctly recognized. Pet. App. 55a. Verbal orders converting Carter to active-duty status had been issued before Carter's surgery, and subsequent written orders confirmed that Carter was to be converted to active-duty status for the period covering his surgery. See *id.* at 16a-17a. And as a legal matter, even if Carter's status were truly inactive at the time of his surgery, his injury would still be incident to service under *Feres* because his "eligibility for his medical treatment stemmed directly from his" military status. *Id.* at 56a. Petitioners point to no court that has held *Feres* categorically inapplicable to claims by inactive-duty service members or others who were not acting under military orders at the time of their injury. On the contrary, courts routinely (and correctly) hold that *Feres* bars claims "for injuries sustained while not on active status, if the injuries are incident to service." *Id.* at 47a (citing *Jackson* v. *United States*, 110 F.3d 1484, 1486-1489 (9th Cir. 1997); *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996); *Schoemer*, 59 F.3d at 29-30; *Quintana*, 997 F.2d at 712; *Duffy* v. *United States*, 966 F.2d 307, 311-312 (7th Cir. 1992)).

Petitioners also point to other facts about Carter's injury (Pet. 22-23) that, in their view, render *Feres* inapplicable. They note, for example, that Carter was not injured while on a military base, and that his surgery was elective. Those arguments downplay the military character of Carter's injury: the location of Carter's surgery, although not a military base, was a "military hospital" and not merely a "government hospital," Pet. App. 51a (citation omitted), and Carter's surgery,

although elective, was to treat an injury first sustained during military training, *id.* at 8a. In any event, neither the location of the surgery nor its elective nature precludes the application of *Feres* to an injury that is incident to military service. Indeed, this Court has applied *Feres* to a case involving an off-base injury. See *Shearer*, 473 U.S. at 53. And every circuit to address the issue has ruled that *Feres* can bar suit even when the medical services in question were elective. See *Scheppan* v. *United States*, 810 F.2d 461 (4th Cir. 1987); *Hayes* v. *United States ex rel. U.S. Dep't of Army*, 44 F.3d 377 (5th Cir.), cert. denied, 516 U.S. 814 (1995); *Alexander* v. *United States*, 500 F.2d 1 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); *Harten* v. *Coons,* 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975); *Rayner* v. *United States*, 760 F.2d 1217 (11th Cir.) (per curiam), cert. denied, 474 U.S. 851 (1985). Petitioners point to no conflicting authority on those issues, and the factbound application of *Feres* to the details of this case in the unpublished decision below does not merit this Court's review.

b. Petitioners contend (Pet. 24-32) that *Feres* should not bar their suit because the three rationales that this Court offered for its interpretation of the FTCA in *Feres* do not apply to the facts here. Whether *Feres* bars a particular claim, however, turns on whether the plaintiff's injury is "incident to service," not on a particularized assessment of the presence or force of the general rationales offered in *Feres* in any particular case. See *Johnson*, 481 U.S. at 686, 691-692 (citation omitted); Pet. App. 57a. In any event, and as the district court correctly determined, this case implicates each of the three rationales for *Feres*.

Petitioners argue (Pet. 25-26) that two of the rationales supporting *Feres*—the "distinctively federal" character of the relationship between the military and service members and the availability of no-fault statutory benefits for service-related injuries, see 340 U.S. at 143-145—do not apply because this Court has since discarded them altogether. The Court considered that argument in *Johnson*, and reaffirmed the continuing validity of both rationales. See 481 U.S. at 689-690.[1]

Both the distinctively-federal-character rationale and the alternative-benefits rationale support the bar to petitioners' claims. As the district court recognized, the distinctively federal character of the relationship between the government and service member "applies here just as much as to any injury incident to service." Pet. App. 59a. And regarding the availability of alternative compensation schemes, even petitioners acknowledge (Pet. 27) that the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.*, "likely covers certain aspects of Mr. Carter's medical care." Indeed, Carter has been receiving veterans' health care benefits since April 2018 to recover from his injuries, and he may receive disability compensation as well. See Pet. App. 60a. Congress also

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[1] In *Shearer*, this Court stated that the distinctively-federal-character and alternative-compensation rationales for *Feres* were "no longer controlling." 473 U.S. at 58 n.4. The FTCA claim in *Shearer*, however, was precluded because the complaint in that case facially challenged the management of the military and "basic choices about the discipline, supervision, and control of [servicemembers]." *Id.* at 58. The Court in *Johnson* subsequently clarified that *Shearer* did not, by holding that this additional rationale supported the *Feres* bar under the circumstances of that case, declare the other *Feres* rationales inapplicable where—as in *Johnson* and many other *Feres* cases—"military negligence is not specifically alleged" on the face of the complaint. *Johnson*, 481 U.S. at 691.

recently amended the Military Claims Act, 10 U.S.C. 2731 *et seq.*, to permit the payment of administrative claims that arise out of service-related medical malpractice. See 10 U.S.C. 2733a; p. 19, *infra*. Petitioners have submitted such claims, see Pet. App. 60a, which may provide an additional path to recovery in the form of economic and non-economic damages—the tort-style remedies authorized by the Department of Defense's implementing regulations. See 32 C.F.R. 45.9, 45.10.

Petitioners acknowledge (Pet. 27-28) the continued viability of the third rationale for *Feres*: the avoidance of judicial intrusion into military discipline and decision making. But they contend that it does not apply in this case because their claims do not "implicate a military decision-maker's willingness to act quickly and forcefully during battlefield conditions, nor will they have any impact on the willingness of military personnel to follow orders." Pet. 30 (brackets, ellipses, and internal quotation marks omitted). That is far too cramped a view of the third *Feres* rationale. Petitioners' suit implicates military decision making because it might require courts "to scrutinize, and pass judgment on, military policy, such as procedures for surgery, testing, diagnosis, referral, and informed consent." Pet. App. 59a. Petitioners' claims could also require military officers to testify at trial or be deposed, a prospect that this Court has recognized would "disrupt the military regime" in ways *Feres* is designed to forestall. *Stanley*, 483 U.S. at 683. And as other courts have noted, permitting medical-malpractice suits like this one could unduly interfere in military decision making by requiring the military to consider reallocating military resources

to avoid tort liability in suits by service members. See *Schoemer*, 59 F.3d at 30; *Bowers*, 904 F.2d at 452.[2]

Petitioners offer (Pet. 31-32) several case-specific reasons why their suit supposedly does not implicate military decision making. They refer, for example, to Carter's duty status at the time of his surgery, the fact that his surgery was "elective" and not required by military commanders, and the fact that he "was not injured on a military base." Pet. 31; see *supra* pp. 8-9. This Court has specifically cautioned against such a granular approach to the third *Feres* rationale. As this Court explained in *United States* v. *Stanley*, "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters." 483 U.S. at 683. Instead, courts must ask at a higher level whether plaintiffs have brought "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, 473 U.S. at 59. Petitioners' claims would do just that. In any event, even if the courts below had misapplied the third *Feres* rationale to the specific details of petitioner's case, that factbound determination would not warrant this Court's review of

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[2] Petitioners invoke (Pet. 30) *Atkinson* v. *United States*, 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988), which concluded that the third *Feres* rationale did not apply to a service member's medical-malpractice claim. But the court in *Atkinson* ultimately affirmed the application of *Feres* because of the other two rationales, which *Johnson* had recently confirmed were viable. *Id.* at 206. In subsequent cases, the Ninth Circuit has continued to apply *Feres* to bar claims for medical malpractice. See, *e.g.*, *Daniel*, 889 F.3d 978.

the unpublished decision below. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); Sup. Ct. R. 10.

c. Petitioners contend (Pet. 17-22) that applying *Feres* to their medical-malpractice claims conflicts with decisions of this Court and other courts of appeals. No such conflict exists.

Petitioners first argue (Pet. 17-19) that the decision below is inconsistent with *Brooks* v. *United States*, 337 U.S. 49 (1949), a case that predated *Feres* and did not involve a claim for medical malpractice. In *Brooks*, the Court held that a suit for injuries sustained by two service members in a car accident while off base and on furlough from military service could proceed under the FTCA. *Id.* at 50. The plaintiffs' claims were permitted to proceed because the accident was not incident to military service and in fact "had nothing to do with the Brooks' [A]rmy careers." *Id.* at 52. By contrast, Carter's claim in this case—negligence by military doctors practicing at a military hospital, during treatment for a medical condition deriving from an injury sustained during military training—resulted directly and distinctly from his military status. See Pet. App. 8a.

Petitioners next argue (Pet. 20-22) that the decision below conflicts with *United States* v. *Brown*, *supra*. In *Brown*, the Court held that an FTCA claim for medical malpractice brought by a plaintiff who was injured "after his discharge" from the military, "while he enjoyed a civilian status," was not barred. 348 U.S. at 112. *Brown* is inapposite because Carter "was neither discharged from the military nor on leave substantially similar to discharged or veteran status" at the time of his surgery at Walter Reed. Pet. App. 2a. On the contrary, Carter had recently completed one active-duty

tour and was later placed on active duty for the period covering his surgery. *Id.* at 9a, 17a.

Petitioners also assert (Pet. 21) a conflict with two federal court of appeals decisions, but both are inapposite. Petitioners point to *Bradley* v. *United States*, 161 F.3d 777 (4th Cir. 1998), which held that *Feres* did not bar a medical-malpractice claim by a service member who was injured while on the Temporary Disability Retirement List (TDRL). Placement on the TDRL entitles a service member to retirement pay and prevents him from being called up to active duty—in other words, it is "comparable to permanent retirement status." *Id.* at 782. Carter was not receiving retirement pay, see C.A. App. 286, and he could have been called up to active duty at any point—indeed, he was eventually reassigned to active-duty status for the period covering his surgery. See Pet. App. 17a. In any event, this Court does not grant review to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioners also invoke *Cortez* v. *United States*, 854 F.2d 723 (5th Cir. 1988), another case involving a service member on the TDRL. That ruling is also consistent with the decisions below because of the material difference between the TDRL and Carter's status at the time of his surgery. Illustrating the point, the Fifth Circuit has held that *Feres* barred a claim brought by a service member who alleged injuries sustained while he was on "inactive duty" but not the TDRL. *Schoemer*, 59 F.3d at 29. In short, petitioners fail to identify any conflict warranting this Court's intervention.

2. Petitioners alternatively ask this Court (Pet. ii, 32) to overrule *Feres* entirely. In *Johnson*, this Court specifically "reaffirm[ed] the holding of *Feres*," 481 U.S.

at 692, including its rule that "service members cannot bring tort suits against the Government for injuries that 'arise out of or are in the course of activity incident to service,'" *id.* at 686 (quoting *Feres*, 340 U.S. at 146). And in the decades since *Johnson*, the Court has repeatedly denied petitions for a writ of certiorari urging that *Feres* be overruled, reexamined, or limited. See, *e.g.*, *Doe* v. *United States*, 141 S. Ct. 1498 (2021) (No. 20-559); *Siddiqui* v. *United States*, 140 S. Ct. 2512 (2020) (No. 19-913); *Jones* v. *United States*, 139 S. Ct. 2615 (2019) (No. 18-981); *Daniel* v. *United States*, 139 S. Ct. 1713 (2019) (No. 18-460); *Buch* v. *United States*, 583 U.S. 1092 (2018) (No. 17-744); *Futrell* v. *United States*, 583 U.S. 973 (2017) (No. 17-391); *Ford* v. *Artiga*, 582 U.S. 932 (2017) (No. 16-1338); *Davidson* v. *United States*, 580 U.S. 988 (2016) (No. 16-375); *Ritchie* v. *United States*, 572 U.S. 1100 (2014) (No. 13-893); *Read* v. *United States*, 571 U.S. 1095 (2013) (No. 13-505); *Lanus* v. *United States*, 570 U.S. 932 (2013) (No. 12-862); *Purcell* v. *United States*, 565 U.S. 1261 (2012) (No. 11-929); *Witt* v. *United States*, 564 U.S. 1037 (2011) (No. 10-885); *Zmysly* v. *United States*, 560 U.S. 925 (2010) (No. 09-1108); *Matthew* v. *Department of Army,* 558 U.S. 821 (2009) (No. 08-1451); *McConnell* v. *United States*, 552 U.S. 1038 (2007) (No. 07-240); *Costo* v. *United States,* 534 U.S. 1078 (2002) (No. 01-526); *Richards* v. *United States*, 528 U.S. 1136 (2000) (No. 99-731); *O'Neill* v. *United States*, 525 U.S. 962 (1998) (No. 98-194); *George* v. *United S*tates, 522 U.S. 1116 (1998) (No. 97-1084); *Schoemer* v. *United States*, 516 U.S. 989 (1995) (No. 95-528); *Hayes* v. *United States*, 516 U.S. 814 (1995) (No. 94-1957); *Forgette* v. *United States*, 513 U.S. 1113 (1995) (No. 94-985); *Sonnenberg* v. *United States*, 498

U.S. 1067 (1991) (No. 90-539). The Court should deny review here as well.

a. Although "not an inexorable command," the benefit of stare decisis is that "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). Any decision to overrule precedent thus requires "'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Ibid.* (citation omitted). Stare decisis has "enhanced force" in statutory-interpretation cases because "Congress can correct any mistake it sees." *Ibid.*; see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) ("Congress remains free to alter what we have done.") (citation omitted). That is especially true where overturning the longstanding precedent of *Feres*—which was reaffirmed 37 years ago in *Johnson*—would expand the waiver of the United States' sovereign immunity to suit for money damages, given the central role of Congress in controlling the public fisc and determining the United States' amenability to suit. Petitioners have not met the exceedingly high bar that would be necessary for the Court to abandon its established precedent in these circumstances.

Petitioners argue (Pet. 12-20) that *Feres* was not correctly decided as an initial matter, and that supposed changes in the underpinnings of *Feres* over the years justify its reconsideration. They focus on the argument (Pet. 12-17) that *Feres* is inconsistent with the FTCA's text, largely echoing Justice Scalia's dissent in *Johnson*, 481 U.S. at 692. The majority in *Johnson*, however, squarely rejected those arguments based on the "three

broad rationales" discussed above (at 9-13, *supra*): the distinctively federal character of the relationship between the military and service members, the availability of certain no-fault statutory benefits for service-related injuries, and the avoidance of judicial intrusion into military discipline and decision making. *Id.* at 688-691. Statutory stare decisis carries enhanced force "regardless whether [the Court's] decision focused only on statutory text or also relied * * * on the policies and purposes animating the law." *Kimble*, 576 U.S. at 456.

Petitioners also contend (Pet. 24-29, 32) that the rationales for *Feres* cannot justify its holding. Once again, that very argument was considered and rejected in *Johnson*, 481 U.S. at 692-693. In any event, the argument lacks merit. Petitioners miss the mark, for example, in arguing (Pet. 26-27) that *Feres* is unjustified because there is no adequate alternative compensation available for service members injured by service-related negligence. When this Court has referred to the "comprehensive system of benefits" available to service members, *Johnson*, 481 U.S. at 690, it has not made a judgment about the particular quantum of compensation that Congress has chosen to make available in a particular situation under the Veterans' Benefits Act, or otherwise. Rather, the Court has recognized that the very existence of such benefit programs—which do not require service members to establish negligence—distinguishes remedies for injuries incident to service from the injuries that Congress sought to compensate through the FTCA: those that went historically uncompensated before the FTCA's enactment. See *id.* at 689-690.

Petitioners likewise err in contending (at 27-28, 32) that the third *Feres* rationale "is inadequate to justify

the widespread injustice and inequity" caused by *Feres*. Again, that is precisely the assertion that this Court has emphatically rejected. As *Johnson* explained, "[e]ven if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." 481 U.S. at 691. Moreover, far from promoting "widespread injustice and inequity," as petitioners contend (Pet. 32), *Feres* ensures equity among service members no matter where they are injured. See 340 U.S. at 143. If *Feres* were overruled or limited as petitioners propose, service members who are injured in combat or overseas would be limited to the no-fault statutory benefits Congress has provided for all service members who are injured in the line of duty, see 28 U.S.C. 2680(j) and (k), while service members who are injured stateside would be afforded a unique remedy. The result would be a fundamental inequality that could undermine morale in the military.

b. Congress's actions since *Feres* further counsel against revisiting the FTCA's incident-to-service bar.

In *Johnson*, this Court observed that, as of that time, Congress had not "changed [the *Feres*] standard in the close to 40 years since it was articulated," even though "Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686 (quoting *Feres*, 340 U.S. at 138). The Court accordingly "decline[d] to modify the doctrine at th[at] late date." *Id.* at 688.

Since *Johnson*, "Congress has spurned multiple opportunities," *Kimble*, 576 U.S. at 456, to enact proposed

legislation that would overrule or limit *Feres*.[3] Congress's actions as recently as the National Defense Authorization Act for Fiscal Year 2020 (2020 Defense Act), Pub. L. No. 116-92, 133 Stat. 1198, confirm that it understands the *Feres* rule to be embedded in the FTCA's "statutory scheme, subject (just like the rest) to congressional change." *Kimble*, 576 U.S. at 456. In the course of considering that legislation, the House of Representatives passed an amendment that would have partially repealed the *Feres* rule by allowing service members to recover under the FTCA for certain service-related claims for medical malpractice. See S. 1790, 116th Cong. § 729 (amendment as passed by the House of Representatives, Sept. 17, 2019). The Senate, however, passed a bill with no similar provision. See H.R. Conf. Rep. No. 333, 116th Cong., 1st Sess. 1280 (2019). The House of Representatives and the Senate ultimately reached a compromise, see *id.* at 1281. Congress declined to amend the FTCA, and instead amended the Military Claims Act to authorize administrative review and payment of certain service members' medical-malpractice claims. See 2020 Defense Act § 731, 133 Stat. 1457-1460 (10 U.S.C. 2733a); *supra*, pp. 10-11. This

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[3] See, *e.g.*, S. 2451, 116th Cong., 1st Sess. (2019); H.R. 2422, 116th Cong., 1st Sess. (2019); H.R. 6585, 115th Cong., 2d Sess. (2018); H.R. 1517, 112th Cong., 1st Sess. (2011); H.R. 1478, 111th Cong., 1st Sess. (2009); S. 1347, 111th Cong., 1st Sess. (2009); H.R. 6093, 110th Cong., 2d Sess. (2008); H.R. 4603, 109th Cong., 1st Sess. 15-16 (2005) (proposed addition of Section 2161(c)(1)(E) to the Public Health Service Act, ch. 373, 58 Stat. 682 (42 U.S.C. 201 *et seq.*)); H.R. 2684, 107th Cong., 1st Sess. (2001); H.R. 3407, 102d Cong., 1st Sess. (1991); H.R. 536, 102d Cong., 1st Sess. (1991); H.R. 536, 101st Cong., 1st Sess. (1989); S. 2490, 100th Cong., 2d Sess. (1988); S. 347, 100th Cong., 1st Sess. (1987); H.R. 1341, 100th Cong., 1st Sess. (1987); H.R. 1054, 100th Cong., 1st Sess. (1987).

Court should not override Congress's judgment—recently reiterated—that the incident-to-service bar should be retained in the FTCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
LOWELL V. STURGILL JR.
Attorneys

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