No. 24-683

In the Supreme Court of the United States

ENERGETIC TANK, INC., PETITIONER,

v.

UNITED STATES OF AMERICA, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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The United States identifies no sound reason to deny review of the question whether *Feres* v. *United States*, 340 U.S. 135 (1950), should "be extended to bar claims under statutes other than the Federal Tort Claims Act." Pet. I. So instead, the United States tries to reframe the question as whether *Feres* applies to "tort claims arising in admiralty," just as it does to "claims arising on land." U.S. Br. I. That gambit is telling: Much like the courts of appeals, the United States acts as if the particular statute under which the claim arises is immaterial.

But in fact, the statute makes all the difference. This Court has only ever applied *Feres* to bar claims under a single federal enactment—the Federal Tort Claims Act. That is sensible, because *Feres* was based on reasoning (however misguided) that was expressly rooted in the FTCA's distinctive text and history. Yet the courts of appeals have untethered the *Feres* doctrine from its statute-specific grounding and launched it through the U.S. Code, generating fundamentally unfair outcomes in

service-related cases without even the pretense of congressional sanction.

This case offers an ideal opportunity to contain the damage. The issue is cleanly presented and outcome-determinative, and distinctive features of this case—including that the United States filed an affirmative claim against petitioner based on the collision between the *McCain* and the *Alnic*; was found to be largely at fault; and then used *Feres* as a shield against petitioner's counterclaim for the same incident—highlight the doctrine's shortcomings. This Court should grant review now, to make clear that statutory interpretation is a statute-specific endeavor.

ARGUMENT

I. This Court Has Never Applied *Feres* to a Statute Other Than the FTCA

The United States does not argue that this Court has ever applied *Feres* to bar liability under a statute other than the FTCA. Nor could it. *Feres* rested on a "statutory construction" that was firmly grounded in the Act's distinctive history and text. 340 U.S. at 138; see *id.* at 139-140 (recounting FTCA's history as "the culmination of a long [legislative] effort"); *id.* at 140 (addressing "the detail of the Act"); *id.* at 142 (ascribing "significance" to FTCA's choice-of-law provision). As petitioner noted—and the United States does not dispute—"*Feres* was an interpretation of the FTCA, and this Court has never extended the doctrine to foreclose liability under any other statute." Pet. 21.

Instead, the United States argues (at 10) that the Court has "invoked" *Feres* by citing it favorably in a decision that precluded suit under the Public Vessels Act (PVA). See *Johansen* v. *United States*, 343 U.S. 427 (1952). The United States also notes (at 10) that *Johansen*

itself was later relied upon in a decision precluding suit under the Suits in Admiralty Act (SIAA). See *Patterson* v. *United States*, 359 U.S. 495 (1959) (per curiam). But *Johansen* and *Patterson* involved a distinct issue, and neither presents a barrier to reviewing the question presented here.

In *Johansen*, the question was whether the Federal Employees Compensation Act provided "the exclusive remedy" for civilian seamen injured in the course of their duties aboard public (*i.e.*, governmental) vessels. 343 U.S. at 430. This Court concluded that it did. The statute had been amended in 1949 "to provide clearly that the liability of the United States under the Compensation Act shall be exclusive of all other liability of the United States on account of the same injury." *Id.* at 436; see Pub. L. 81-357, § 201, 63 Stat. 854, 861 (1949) ("The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive"). The only question was therefore whether this amendment had *changed* the law, or instead had merely *clarified* the Compensation Act's pre-amendment effect.

After examining at substantial length the Compensation Act's history, see 343 U.S. at 432-438, the Court expressed its view that "the 1949 amendments, far from changing the law respecting seamen's remedies," instead reflected Congress's preexisting understanding that an injured seaman's "sole remedy is under the Federal Employees Compensation Act." *Id.* at 438; see *ibid.* ("If the remedy of compensation was exclusive prior to the passage of the 1949 amendment, it is exclusive now."). The Court thus concluded that Congress had "established by the Compensation Act a method of redress for [federal] employees," thereby barring all other "systems of

redress," including "recovery under the Public Vessels Act to a civil seaman on a public vessel." *Id.* at 439.

Johansen was accordingly a case about the exclusivity of a federal benefits scheme (the Compensation Act), not the scope of an immunity-waiving statute (the PVA). The decision's analysis turned on the meaning of the Compensation Act itself—in particular, Congress's choice to make it "the exclusive remedy for civilian seamen on public vessels." *Id.* at 441. The Court did not apply the *Feres* doctrine to the PVA, much less did it read the PVA's waiver of sovereign immunity as containing an implicit exception for tort claims brought by servicemembers for service-related injuries (as *Feres* had read into the FTCA). The same is true of *Patterson*, which merely applied to a suit under the SIAA *Johansen*'s holding "'that the Federal Employees Compensation Act is the exclusive remedy for civilian' employees of the United States on government vessels engaged in public service." 359 U.S. at 496 (quoting *Johansen*, 343 U.S. at 441) (ellipsis omitted).

To be sure, the United States is correct (at 10) that *Johansen* cited *Feres* as general support for "the principle of the exclusive character of federal plans for compensation." *Johansen*, 343 U.S. at 440. But the Court relied on that principle to buttress its conclusion that "the Compensation Act is exclusive," *ibid.*, not because the Court sought to limit the PVA in the same manner that *Feres* had limited the FTCA. If anything, *Johansen* and *Patterson* support petitioner's argument here, because they indicate that the PVA and SIAA would *not* have barred the seamen's claims if Congress had not identified the Compensation Act as their "exclusive" remedy—and here, there is no other remedy (exclusive or otherwise) for petitioner's claims.

Indeed, if *Johansen* had "made clear that the *Feres* principle applies to the PVA," as the United States now argues (at 10), presumably the United States would have cited *Johansen* (and *Patterson* regarding the SIAA) at some prior point in this litigation. Yet it never did so—either in the district court or in the Second Circuit. And neither court cited those decisions either, instead relying on circuit precedent (which also did not cite *Johansen* or *Patterson*). See Pet. App. 45a (citing *Cusanelli* v. *Klaver*, 698 F.2d 82, 85 (2d Cir. 1983)); *id.* at 57a (same).

In fact, although the United States notes (at 11) that "every court of appeals to consider the issue" has applied *Feres* to suits under the PVA and SIAA, not a single one of those cases cited *Johansen* or *Patterson* either. See *Charland* v. *United States*, 615 F.2d 508, 509 (9th Cir. 1980); *Blakey* v. *U.S.S. Iowa*, 991 F.2d 148, 151-152 (4th Cir. 1993); *Potts* v. *United States*, 723 F.2d 20, 21-22 (6th Cir. 1983) (per curiam); *Cusanelli*, 698 F.2d at 85; *Beaucoudray* v. *United States*, 490 F.2d 86, 86 (5th Cir. 1974) (per curiam). That silence speaks volumes.

Petitioner's central contention thus remains unrefuted: *Feres* was based on an interpretation of the FTCA, and this Court "has never extended that reading to any other statute." Pet. 3. The Court could accordingly limit *Feres*'s mischief without overruling it. The United States' invocation (at 13) of statutory *stare decisis* rings hollow.

II. This Court Should Limit the Extension of *Feres* to Other Statutes

The United States does not dispute that the courts of appeals have applied *Feres* far and wide throughout the U.S. Code. Indeed, it applauds this fact, arguing (at 12) that "the rationales underlying *Feres* are not FTCA-specific." But *Feres* grounded its reasoning in the "long" history leading up to the FTCA's enactment—including

the demonstrated "inadequacy" of dealing with the claims of governmental employees through "private bills," 340 U.S. at 139-140—as well as other statute-specific "detail[s]," such as Congress's desire to establish the scope of governmental liability under the Act as "analogous [to] private liability" under "'like circumstances,'" *id.* at 140-142 (quoting 28 U.S.C. § 2674). Even treating those considerations as "general principles," U.S. Br. 13 (citation omitted), they cannot reflexively be applied to other statutes—as the courts of appeals have done at least fifty times across eighteen different federal enactments. See Pet. 23-24.

In any event, this Court has since repudiated all three of the original rationales underlying *Feres*. See Pet. 7. Somewhat puzzlingly, the United States fails even to acknowledge those developments, instead doubling down on *Feres*'s now-defunct reliance on "the exclusiveness and uniformity of special compensation systems," U.S. Br. 10; but see *United States* v. *Brown*, 348 U.S. 110, 113 (1954) ("Congress could, of course, make the compensation system the exclusive remedy," but has not done so), and concerns about subjecting governmental liability to "the tort law of jurisdictions around the world," U.S. Br. 11; but see *United States* v. *Muniz*, 374 U.S. 150, 162 (1963) (dismissing government's concerns about "disrupt[ion]" caused by "the nonuniform right to recover").

That leaves the sole argument that this Court later swapped in for *Feres*'s original rationales: concern about "involv[ing] the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." U.S. Br. 10 (quoting *United States* v. *Johnson*, 481 U.S. 681, 690 (1987)). That rationale is similarly unpersuasive. "Congress already determined which military activities are too sensitive to permit the intrusion of tort liability." *Carter* v. *United States*, 145 S. Ct. 519, 522 (2025)

(Thomas, J., dissenting from denial of certiorari) (citing 28 U.S.C. §§ 2680(a), (j), (k)). And anyway, "the *Feres* doctrine is not a rational way of protecting military discipline and decisionmaking," including because "servicemen routinely sue their government and bring military decisionmaking and decision-makers into court seeking injunctive relief." *Id.* at 522-523 (quotation marks omitted).

But to decide that *Feres* should not be extended to other statutes, the Court need not categorically repudiate the only remaining pillar holding *Feres* up (though it could). Instead, it would suffice to reaffirm that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (citation omitted).

This case is a prime example of why that maxim is important. The SIAA and PVA codify ancient principles waiving the immunity of the United States for counterclaims against it "when the United States institute[s] a suit" for damage to its own vessels. *The Siren*, 74 U.S. 152, 154 (1868). Both statutes also predate the FTCA, which specifically exempts from its scope "any claim for which a remedy is provided by [the SIAA and PVA] relating to claims or suits in admiralty against the United States." 28 U.S.C. § 2680(d). And given that exemption, a party raising a claim under the PVA or SIAA is unlikely to have any other avenue for seeking compensation from the United States—just as those statutes offer the only route for petitioner to recover for harm caused by the *McCain*'s negligence. In light of those statute-specific factors, which the courts below did not consider, application of *Feres* would be particularly inappropriate here. See Pet. 28-29.

The United States notes (at 9) that this Court has applied the *Feres* doctrine to claims "for contribution or indemnification in relation to service-connected claims."

But it has done so only to bar claims where suit was initially brought "against the Government" by a servicemember, and then "a third party [sought] indemnity for any damages it may be required to pay the serviceman." *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 672 (1977). The United States was thus an unwilling participant in the suit. Under the SIAA and PVA, by contrast, a counterclaim cannot be filed unless "a civil action in admiralty [was first] brought by the United States." 46 U.S.C. § 30903(a); see *id.* § 31102(b). As a result, even if concerns about subjecting military decision-making to judicial scrutiny could support an atextual exception to the FTCA, they have no application to counterclaims under the SIAA and PVA, where the United States itself has necessarily put its own decision-making into question. The same is true for *Feres*'s now-defunct uniformity rationale: If the United States does not wish to face "the tort law of jurisdictions around the world," U.S. Br. 11, it need not file an affirmative claim.

Petitioner's point is not, as the United States tries to characterize it (at 12), that there is something unique about "admiralty cases." The point is that there is something unique about *every* federal statute. And the consistent failure by the courts of appeals to recognize that truism—instead reflexively applying *Feres* to disparate enactments without any serious textual analysis—calls out for this Court's intervention.

III. This Case Is a Good Vehicle for Considering the Question Presented

The United States does not dispute that the question presented is important and outcome-determinative here, where "the only possible basis for denying petitioner's right to such a counterclaim—and the only ground invoked by the Second Circuit—is an implicit exception to the [PVA and SIAA's] scope under *Feres*." Pet. 28. Nor

does the United States dispute that the ruling below means the United States will bear none of the personal-injury liability for harm to sailors affected by an incident for which it was found to be 80% at fault—though it self-servingly refers to that fact (at 14) as "hardly unfair." Instead, the United States raises three arguments against certiorari, none of which is persuasive.

First, the United States notes (at 14-15) that there is "no disagreement in the courts of appeals on the question presented." While true, that unanimity is a strong reason for denying review here only if this Court agrees with the lower courts' answer to that question. And while the United States is correct (at 8) that this Court has "repeatedly denied petitions for writs of certiorari urging that *Feres* be overruled, reexamined, or limited," none of the petitions it identifies (at 8 n.2) raised the basic question of whether *Feres* can properly be confined to the FTCA without overruling it—which is probably why the United States took the unusual step here of filing an un-requested brief in opposition.

Second, the United States trots out (at 15) the oft-raised, rarely successful argument that the "interlocutory posture of the case" is a reason for denying review now. Yet the United States identifies nothing that could happen on remand that would affect the question presented: All that remains left is to evaluate sailor claims in Phase 2; under the ruling below, petitioner has already been found 20% liable for the collision and will bear 100% of the personal-injury liability for those claims, no matter what their value ends up being. Cf. *Nat'l Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (Kavanaugh, J., respecting denial of certiorari) (citing case's "interlocutory posture" as a reason to deny certiorari because the court of appeals had reversed dismissal of the

suit, and either side might "prevail at summary judgment or at trial").

Third, the United States notes that petitioner "fail[ed] to reserve any claim against the United States for recoupment or setoff," which it says could "complicate this Court's review." U.S. Br. 16 (quotation marks omitted). But the United States does not explain why that might be so, and it is not. If anything, the fact that petitioner has asserted a single basis for recovering against the government—contesting *Feres*'s applicability to its counterclaims under the PVA and SIAA—actually *simplifies* the case, facilitating resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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