No. 24-685

IN THE

Supreme Court of the United States

SUSAN MCBRINE AND DAVID L. PETRIE,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The lead question presented is central to resolving hundreds of thousands of pending claims under the Camp Lejeune Justice Act (CLJA). And the government does not dispute that the district court's decision is the first ever to hold that a statute expressly *preserving* the right to trial by jury is insufficiently clear to authorize jury trials. As the government's opposition lays bare, that view rests almost entirely on the word "affirmatively" in this Court's decision setting forth a general presumption against the implication of statutory jury-trial rights in *Lehman v. Nakshian,* 453 U.S. 156, 168 (1981). In the government's view, because the CLJA's jury-trial provision is "phrased in the negative," no other consideration matters—including Congress's refusal to incorporate the jury-trial bar of the closely related Federal Tort Claims Act (FTCA) into the CLJA, the government's failure to ascribe any realistic function to an entire sentence of the statute, the Department of Justice's own interpretation of the relevant language while it was under consideration by Congress, and this Court's precedents recognizing jury-trial rights in statutes containing far less clarity.

The lead question presented also has immediate and overwhelming significance. Whether CLJA claimants have the right to tell the story of their Camp Lejeune tragedy to a jury goes to the core of Congress's remedial scheme. The government offers a variety of purported reasons for why this Court should delay answering that question for years—after a potentially colossal waste of resources by plaintiffs, courts, and the government itself—but none has merit. The question of whether the CLJA authorizes jury trials is

cleanly presented, exceptionally important, and fit for resolution now.

This case also presents the opportunity to resolve a longstanding circuit conflict over the availability of mandamus relief to remedy the improper denial of a jury-trial right. That question cannot be resolved on appeal from a final judgment.

The Court should grant the petition.

I. THE GOVERNMENT'S OPPOSITION CONFIRMS THE NEED FOR IMMEDIATE REVIEW OF THE JURY-TRIAL QUESTION

A. Review Is Necessary To Clarify *Lehman*

The government's opposition brief confirms that it is critical for this Court to clarify its holding in *Lehman*. The government agrees in principle that whether Congress intended to authorize jury trials against the United States is analyzed under the same standard as sovereign-immunity waivers. Opp. 18-19. But in practice, the government—like the district court—applies a far narrower standard equivalent to an improper "magic words" test of the kind this Court has repeatedly rejected. *See* Pet. 13-15.

Plucking one line (really one word) from *Lehman*, the government claims that the Court pronounced that only an "affirmative[]" jury-trial grant will suffice and argues that Subsection (d) fails that standard because it is "phrased in the negative." Opp. 7-11. But it is a "mistake to read judicial opinions like statutes." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 426 (2024) (Gorsuch, J., concurring); *see Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 373 (2021) (Alito, J., concurring in the judgment).

The government's decision to do so distorts *Lehman*'s standard, which was articulated in multiple ways: "unequivocally expressed," "clearly and unequivocally," and "affirmatively and unambiguously." 453 U.S. at 160, 162, 168 (internal quotations omitted). That suggests that the word "affirmatively" does not have talismanic significance and that the Court was simply describing the ordinary sovereign-immunity-waiver standard—exactly what it said it was doing. *Id.* at 160-61.

Moreover, the government's understanding would mean that *Lehman* silently overruled the Court's earlier precedents in *Galloway v. United States*, 319 U.S. 372, 388-89 & n.18 (1943) and *Pence v. United States*, 316 U.S. 332, 334 n.1 (1942), which discerned a jury-trial waiver in a statute that said nothing about jury trials. Contrary to the government's claim that the discussion in *Galloway* was dicta (Opp. 17), *Galloway* expressly *held*, in light of the statute's amendment history, that "Congress[,] in the legislation cited, has made [the Seventh Amendment] applicable," reaffirming the identical holding in *Pence*, which the government fails to address. 319 U.S. at 389 n.18. And *Lehman* cited *Galloway* approvingly as an example of where Congress had granted statutory jury trials. Pet. 15-16. The government's view would also contradict *Lehman*'s own analysis, which carefully considered statutory structure and context before concluding that the provision there—which did not mention jury trials—was insufficiently clear. Pet. 14-17.

This all underscores why this Court's review is needed to clarify *Lehman* and harmonize it with the broader body of precedents on sovereign-immunity

waivers and jury trials. This Court recently granted certiorari to correct the misreading of "a single, but oft-quoted, sentence" in one of this Court's opinions. *Groff v. DeJoy*, 600 U.S. 447, 464 (2023). The Court should likewise grant certiorari here to clarify a "single, but oft-quoted," word in *Lehman*.

Finally, notwithstanding the government's assertion, Opp. 19-20, the options of limiting *Lehman*'s reach or reconsidering whether the Seventh Amendment applies to suits against the United States fall within the question presented: "[w]hether plaintiffs who bring actions against the United States under the Camp Lejeune Justice Act of 2022 have the right to trial by jury." Pet i.

B. The Government Offers No Persuasive Defense Of The District Court's Construction Of The CLJA

The government's efforts to explain why Congress would have expressly preserved the right to a jury trial where none exists fall flat.

1. The government's basic textual argument is that because the preservation of jury-trial rights in Subsection (d) is "phrased in the negative," it merely preserves rights that "might otherwise attach because of some legal basis independent of the CLJA." Opp. 7-8. That reading ignores that no other source of law could possibly confer the right to a jury trial that the statute expressly preserved. No other federal or state statute applies to CLJA claims; the only related statute, the FTCA, expressly bars jury trials; and under current precedent, the Seventh Amendment does not apply to suits against the United States. The government would thus have this Court construe the

sentence to preserve something that does not exist—an implausible result that defies principles of statutory interpretation and common sense.

The government's reliance on *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), is misplaced. Opp. 8-9. Although the statute in *Cooper Industries* used similar language ("nothing … shall diminish the right"), that language naturally referred to existing contribution rights under state law—and the contrary reading would have rendered superfluous another part of the statute. *Id.* at 166-67. Here, the same textual imperative to give effect to every provision of a statute points decisively in the opposite direction, because the government's interpretation leaves an entire sentence of the CLJA with no realistic function.

The government also claims that Subsection (d) "sharply contrasts" with other statutes authorizing jury trials against the United States. Opp. 9. That is wrong: Subsection (d) is far clearer than the statute that this Court held to authorize jury trials in *Galloway* and *Pence*. *See* p. 4, *supra*; Pet. 15-16. That the government must jettison *two* of this Court's precedents to make its argument work is reason alone to grant review. And at any rate, whether Congress could have been clearer is not the relevant inquiry; Congress need not speak in the "*most* straightforward way" to waive immunity. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 394 (2023).

The government's other textual arguments are likewise unavailing. The government acknowledges that using the definite article typically connotes

something that is actually provided for in a statute—here, "the right" to a jury trial. Opp. 11. Yet the government contends that, absent an independent provision granting such a right, the definite article carries no legal effect. That argument overlooks the more natural explanation: Congress understood that Subsection (d) itself provided for that right, using language mirroring the syntax of the Bill of Rights in presuming the existence of the right conferred. Pet. 17-18. The government's efforts to distinguish the particular language of constitutional rights (Opp. 14) fail to grapple with that common linguistic feature.

2. The government's position renders Subsection (d) meaningless or at least practically insignificant—a result that this Court is loath to countenance. *See Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698-99 (2022).

Like the district court, the government scrambles to manufacture a purpose for Subsection (d) under its reading of the statute, speculating that the CLJA's "restrictions on venue and jurisdiction" might otherwise "be misunderstood to restrict" the right to a jury trial in "a fraud counterclaim asserted by the government against a CLJA plaintiff" or "third-party complaints by the United States against other entities or persons." Opp. 11-12. But as petitioners explained, CLJA plaintiffs and third parties have a preexisting *constitutional* right to a jury trial in suits that the government might bring against them under other laws, and the first sentence of Subsection (d) could not plausibly impair that constitutional right. Moreover, the statutes of limitations and repose on third-party claims expired decades ago. Pet. 20. The

government's explanations for the function of the statutory language are thus entirely contrived.

3. The government emphasizes that the FTCA has long barred jury trials (Opp. 10 & n.2), but it draws the wrong conclusion from that fact. Although the CLJA incorporates certain FTCA provisions, Congress chose *not* to incorporate the FTCA's jury-trial bar. *See* Pet. 22-23. That omission provides strong contextual evidence that Subsection (d) grants CLJA plaintiffs the right to a jury trial.

The government's only response is to state the truism that the burden is not on Congress to preclude jury trials. Opp. 10 n.2. But the task here is to discern the meaning of the statute Congress enacted through the tools of construction. When Congress creates a cause of action designed to fill a gap in the FTCA and expressly incorporates certain provisions of the FTCA, its choice not to carry over the FTCA's jury-trial bar—*and* to expressly preserve the right to a jury trial—leaves no doubt that Congress intended to authorize jury trials.

4. The government itself once knew better. During the CLJA's drafting process, the Department of Justice complained to Congress that the bill language would authorize jury trials, yet Congress chose to enact it without change. The government's suggestion (Opp. 15) that Congress disagreed with the Department's legal analysis is pure speculation.

At points the government also seems to suggest that the CLJA should be construed not to authorize jury trials because they would impose an undue burden on the Eastern District of North Carolina. Opp. 5, 7, 13, 16. That concern is irrelevant to the

meaning of the text and would perversely reward the government for injuring a greater number of its citizens. Moreover, Congress has streamlined CLJA litigation in other ways—like by declining to require proof of fault and by relaxing causation standards.

5. At bottom, the government criticizes petitioners for relying on the only realistic account of how Congress expected the CLJA to operate given the text of Subsection (d). Opp. 10. But the point of statutory construction is not to woodenly hold Congress to an artificial set of judge-made presumptions. It is to enforce the law that Congress wrote. And here, Congress's intent is clear from the CLJA's text: It expected CLJA plaintiffs to have the right to a jury trial. The notion that courts should frustrate that intent because of a single word in *Lehman* defies common sense and the separation of powers.

C. The Court Should Address The Jury-Trial Question Now

The government does not dispute that whether hundreds of thousands of victims of Camp Lejeune's water contamination have the right to trial by jury is a question of singular importance. But the government nevertheless asks the Court to postpone resolving that question for years. The government has offered no compelling reason for doing so.

First, the government suggests that waiting years to resolve this issue would somehow promote "judicial economy." Opp. 21-22. That defies logic. Retrying scores of cases to juries would be a substantial tax on the judicial system that this Court could avoid by answering the question now—while also ensuring that as many CLJA plaintiffs as possible have the

opportunity to see justice in their lifetimes. The government cites various procedures that the district court has adopted to promote efficient case management (Opp. 21-22), but none of those procedures would ameliorate the needless burden of trying "countless" cases twice. App. 7a. And while it is possible that some bench trials could occur before this Court issues an opinion, the government does not answer petitioners' point that granting certiorari would provide a strong ground to impanel advisory juries for those trials.*

Second, the government contends that granting certiorari now would be premature because the denial of mandamus relief is interlocutory and the district court denied interlocutory certification under 28 U.S.C. § 1292(b). Opp. 21-22. But this Court has reviewed the denial of jury trials in exactly this posture. *See infra*, pp. 10-11; Charles Alan Wright et al., *Federal Practice and Procedure* § 3935.1, at 698 (3d ed. 2012) (cited Opp. 21) (stating that "a court of appeals should correct an error in striking a demand for jury trial by issuing mandamus").

Finally, given that the petition raises a purely legal question that has been thoroughly analyzed by all the active judges of the district court—and that the court of appeals declined to address despite a clear opportunity to do so—further proceedings in the lower

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* The government suggests that the fact that petitioners do not currently have trials scheduled disfavors certiorari. Opp. 3-4. But that ensures that this Court can resolve the jury-trial question without risking interference with any scheduled trial. Petitioners are also prepared to proceed on any expedited schedule that this Court deems appropriate.

courts are unlikely to aid this Court's review. Indeed, in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), this Court granted certiorari and reversed a court of appeals' unreasoned denial of mandamus relief to protect the right to a jury trial. *Id.* at 470. Moreover, the only other conceivable basis for the court of appeals' decision—that mandamus relief is not categorically available to vindicate a statutory jury-trial right—warrants certiorari in its own right. *See* Pet. 30-32; *see also* pp. 10-12, *infra*.

II. THE GOVERNMENT FAILS TO EXPLAIN AWAY THE CONFLICT OVER THE MANDAMUS QUESTION

A. This Court has held "the right to grant mandamus to require [a] jury trial where it has been improperly denied is settled." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959). The government attempts several unfounded distinctions to avoid that crystal-clear holding.

First, the government misconstrues *Beacon Theatres* as hinging on the concern that, in cases involving equitable claims, an improperly denied jury-trial right could not be vindicated after final judgment. Opp. 25. But the rule that the Court announced in *Beacon Theatres* did not rest on that rationale, nor did the precedents that the Court cited, including *Ex parte Simons,* 247 U.S. 231 (1918). More fundamentally, the government's reading of *Beacon Theatres* does not make sense. When a case presenting both legal and equitable claims is improperly tried to the bench, appellate courts can simply vacate the final judgment, direct the proper sequencing, and remand for a jury trial. *See*

Lytle v. Household Mfg., Inc., 494 U.S. 545, 552-53 (1990) (collecting cases).

Second, the government would cabin *Beacon Theatres* to mandamus petitions invoking the Seventh Amendment. Opp. 25-26. But the government again fails to explain how that limitation squares with the categorical rule that *Beacon Theatres* announced. And the government ignores that the dissent in *Beacon Theatres* expressly agreed with the Court that the denial of a "constitutional *or statutory* right to a jury trial" warrants mandamus relief, with no objection from the Court that the dissent was mischaracterizing its holding. 359 U.S. at 511 (Stewart, J., dissenting) (emphasis added). The government also asserts that statutory jury-trial rights can be vindicated after final judgment. Opp. 25-26. But that is equally true of the Seventh Amendment right. Indeed, because the erroneous denial of a jury-trial right can seemingly always be remedied on appeal after final judgment, the government's reasoning would mean that mandamus relief would *never* be appropriate—the opposite of what *Beacon Theatres* held.

Third, the government attempts to distinguish this Court's pre-*Beacon Theatres* precedents based on their procedural postures (Opp. 26 n.4), disregarding that the *reason* those decisions approved the availability of mandamus relief was that the lower courts had allegedly deprived the petitioners of their jury-trial rights. *In re Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924); *In re Peterson*, 253 U.S. 300, 305-06 (1920).

B. The government errs in claiming that no circuit conflict exists with respect to the second question

presented. While it is true that most circuit decisions do not explicitly address statutory jury-trial rights (Opp. 26), the rule applied in those cases does not distinguish between constitutional and statutory rights. And the Eighth Circuit's decision in *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982), entertained a mandamus petition for a claimed deprivation of a statutory jury-trial right on the ground that "[t]he remedy of mandamus in determining the right to a jury trial is firmly settled," without invoking the traditional mandamus standard. *Id.* at 319. That *Vorpahl* also involved a constitutional argument does not explain why the Eighth Circuit concluded that it could adjudicate the statutory argument despite the fact that it could have been resolved after final judgment.

Moreover, the government does not deny that the Seventh Circuit has held that courts must apply the traditional mandamus standard even to the denial of a constitutional jury-trial right, departing from the consensus of other circuits. *See First Nat'l Bank of Waukesha v. Warren*, 796 F.2d 999, 1001-06 (7th Cir 1986). Granting review would allow this Court to resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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