No. 13-893

In the Supreme Court of the United States

JONATHAN RITCHIE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GREGORY RITCHIE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court recognized that the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, does not waive the sovereign immunity of the United States for claims seeking to recover for injuries to military service members that "arise out of or are in the course of activity incident to service." The questions presented are as follows:

1. Whether this Court should overrule *Feres* and reject its interpretation of the FTCA, which has been in place for more than 60 years.

2. Whether *Feres* bars a suit alleging that military orders given to a pregnant service member by her superiors caused the premature birth and subsequent death of her child.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 733 F.3d 871. The order of the district court (Pet. App. 24a-44a) is not published in the *Federal Supplement* but is available at 2011 WL 1584353.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2013. The petition for a writ of certiorari was filed on January 22, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's wife, January Ritchie, became pregnant while serving as a Specialist on active duty in the

United States Army. Pet. App. 4a. Petitioner alleges that, pursuant to Army regulations, a military doctor created a "pregnancy profile" restricting Specialist Ritchie's duties. *Ibid.* The profile specified that she could march up to two miles, mow grass, and lift up to 20 pounds, but that she should not carry or fire weapons, engage in physical training testing, or run or walk long distances. *Id.* at 4a, 26a.

During her pregnancy, Specialist Ritchie was transferred to Fort Shafter in Hawaii. Pet. App. 4a. Petitioner alleges that Specialist Ritchie's superiors at Fort Shafter disregarded her pregnancy profile by ordering her to pick up trash, participate in physical training, and engage in other strenuous activities. *Ibid.* Petitioner further alleges that Specialist Ritchie's superiors ignored her protests that she was unable to perform these tasks because of her pregnancy. *Ibid.*

On August 7, 2006, Specialist Ritchie underwent an emergency cerclage procedure in which her cervix was stitched shut in an effort to prevent a premature birth. Pet. App. 4a. Petitioner alleges that Specialist Ritchie's doctors then informed Army personnel that she would be unable to perform her normal duties for the duration of her pregnancy. *Id.* at 4a-5a. Petitioner further alleges that Specialist Ritchie's superiors disregarded those instructions and that, as a result, her son Gregory was born prematurely on August 26 and died approximately 30 minutes later. *Id.* at 5a.

2. Following the denial of his administrative claims, petitioner filed this action on behalf of himself and Gregory Ritchie's estate, asserting claims for loss of consortium and wrongful death under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et*

seq. The district court dismissed the complaint for lack of subject matter jurisdiction, holding that petitioner's claims were barred under *Feres* v. *United States*, 340 U.S. 135 (1950). Pet. App. 24a-44a. *Feres* held that the FTCA does not waive the sovereign immunity of the United States for claims seeking to recover "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. Subsequent cases establish that *Feres* "bars not only suits by service members against military superiors," but also derivative actions by relatives and other similar civilian plaintiffs who seek to recover for injuries that arise out of a service member's military service. Pet. App. 33a (citing, *e.g.*, *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977) (*Stencel Aero*)). The district court concluded that because petitioner seeks to recover for injuries allegedly caused by orders given to Specialist Ritchie by her military superiors while she was on active duty, "this suit falls squarely within the *Feres* doctrine." *Id.* at 42a.

3. The court of appeals affirmed. Pet. App. 1a-23a. The court observed that "the core theory" of petitioner's case is that "Gregory's injury derived from [Specialist Ritchie's] military service" and concluded that "a claim challenging military orders given to a servicewoman on active duty * * * cannot escape *Feres*." *Id.* at 10a.

The court of appeals rejected petitioner's reliance on a handful of decisions by other courts holding that, notwithstanding *Feres*, FTCA actions may be brought on behalf of infants injured as a result of negligent prenatal care by military doctors. Pet. App. 13a-16a. The court noted that it was not bound by those out-of-

circuit precedents. *Id.* at 15a. But it also observed that the prenatal-care cases are distinguishable because they involved "medical judgments made by medical personnel at medical facilities." *Ibid.* Here, in contrast, petitioner challenges "military orders given by military supervisors on a military base." *Ibid.* For that reason, the court determined, this case "implicates *Feres*'s concern about judicial interference in military personnel matters" to a far greater degree than the prenatal-care cases. *Ibid.* The court also suggested that petitioner could not prevail under the rule established in the prenatal-care cases in any event because those decisions permit recovery only where "the purportedly negligent acts caused injury *only* to the civilian fetus." *Id.* at 13a. Here, in contrast, the negligent actions alleged by petitioner caused injuries *both* to Specialist Ritchie herself and to Gregory. *Id.* at 16a.

Judge Nelson, joined by Judge Nguyen, concurred. Pet. App. 17a-23a. Judge Nelson agreed that petitioner's claim was barred by *Feres*, but argued that *Feres* should be overruled or limited, at least in the context of suits alleging that the military violated its own regulations and procedures. *Ibid.* Judge Farris concurred in the result only. *Id.* at 17a.

ARGUMENT

The court of appeals correctly applied the interpretation of the FTCA adopted in *Feres* v. *United States*, 340 U.S. 135 (1950), and this Court's subsequent decisions. Petitioner principally contends (Pet. 20-34) that this Court should grant review to "overturn" *Feres*. But *Feres* has stood for six decades. This Court specifically reaffirmed *Feres* in *United States* v. *Johnson*, 481 U.S. 681 (1987). And in *United States* v. *Stanley*,

483 U.S. 669 (1987), the Court extended *Feres*'s "incident to service" test to govern claims by service members under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Principles of stare decisis therefore strongly counsel against overturning *Feres*, and its reaffirmation in *Johnson*, at this late date. But beyond those principles, which are compelling here, *Feres* is based on a correct interpretation of the FTCA.

In the alternative, petitioner contends (Pet. 34-36) that this Court should grant review to resolve a purported disagreement among the courts of appeals about the application of *Feres* to suits based on prenatal injuries to a service member's child. But as the court of appeals explained, the cases allowing such claims to proceed all involved allegedly negligent prenatal care by military doctors. Petitioner does not identify any decision allowing a suit to go forward where, as here, the claimed injuries were allegedly caused by orders given to a pregnant service member by her military superiors. This case thus would not be an appropriate vehicle for resolving any difference of opinion about the application of *Feres* to cases involving negligent prenatal care.

1. The interpretation of the FTCA in this Court's unanimous decision in *Feres*[1] was adopted shortly after the FTCA was enacted, has been the law for more than 60 years, and has been repeatedly reaffirmed by this Court. Petitioner fails to identify any sound reason to reconsider such a foundational statutory precedent.

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[1] Eight Justices joined Justice Jackson's opinion for the Court, and Justice Douglas concurred in the result. See 340 U.S. at 136, 146.

a. *Feres* holds that under the FTCA, "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.'" *Johnson*, 481 U.S. at 686 (quoting *Feres*, 340 U.S. at 146). *Johnson*, decided nearly four decades after *Feres*, specifically "reaffirm[ed] the holding of *Feres*." *Id.* at 692. And in the decades since *Johnson*, the Court has repeatedly denied petitions for writs of certiorari urging that *Feres* be overruled or reexamined. See, *e.g.*, *Lanus* v. *United States*, 133 S. Ct. 2731 (2013) (No. 12-862); *Witt* v. *United States*, 131 S. Ct. 3058 (2011) (No. 10-885); *Matthew* v. *Department of the 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); *O'Neill* v. *United States*, 525 U.S. 962 (1998) (No. 98-194); *George* v. *United States*, 522 U.S. 1116 (1998) (No. 97-1084); *Bisel* v. *United States*, 522 U.S. 1049 (1998) (No. 97-793); *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). There is no reason for a different result here.

"[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (citation omitted). Stare decisis "ensures that 'the law will not merely change erratically' and 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.'" *Ibid.* (citation omitted). Thus, any decision to overrule precedent "demands special justification." *Ibid.* (cita-

tion omitted). Stare decisis has "special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court has] done." *Id.* at 172-173. Accordingly, "the burden borne by the party advocating the abandonment of an established precedent is [even] greater where the Court is asked to overrule a point of statutory construction." *Id.* at 172. Petitioner cannot carry that heavy burden.

Petitioner's arguments about whether *Feres* was correctly decided "were examined and discussed with great care" in *Johnson*. *Patterson*, 491 U.S. at 171. In *Johnson*, this Court noted that Congress had not acted to modify *Feres* "in the close to 40 years since it was articulated, even though, as the court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686 (citation omitted). As *Johnson* explained, the Court "ha[d] never deviated" from *Feres*'s holding that service members may not sue the United States "for injuries that 'arise out of or are in the course of activity incident to service.'" *Ibid.* (quoting *Feres*, 340 U.S. at 146). The Court thus "decline[d] to modify the doctrine at [that] late date," *id.* at 688—more than 25 years ago. For the Court to reconsider *Feres* now, based on the same arguments it rejected when it reaffirmed *Feres* in *Johnson*, would particularly disserve the goal of maintaining a stable judicial system. Only confusion and instability would result if the Court were to overrule a "well-established" precedent like *Feres*. See *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 670 (1977); *John R. Sand &*

Gravel Co. v. *United States*, 552 U.S. 130, 139 (2008) (*John R. Sand*).

Moreover, in the more than 25 years since this Court reaffirmed *Feres* in *Johnson*, Congress has declined to enact numerous bills that would have overruled or limited *Feres*.[2] Congress's long acquiescence in *Feres* was one of the principal reasons why the Court reaffirmed *Feres* in *Johnson*. See 481 U.S. at 686. Congress's repeated refusals to modify *Feres* since *Johnson* are even more compelling reasons for not disturbing *Feres*, and further underscore that *Feres* represents a correct interpretation of the FTCA. See *John R. Sand*, 552 U.S. at 139; *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007); *Shepard* v. *United States*, 544 U.S. 13, 23 (2005).[3]

Congress has also enacted legislation based on the understanding that *Feres* governs tort claims by service members. The Act of Dec. 29, 1981, Pub. L. No. 97-124, 95 Stat. 1666, amended the tort claims provisions of the United States Code "to provide the Na-

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[2] See 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. (2005) (proposed addition of Section 2161(c)(1)(E) to the Public Health Service Act, 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, 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).

[3] Petitioner asserts (Pet. 25) that it is inappropriate to draw any inference from Congress's failure to modify *Feres*. But this Court has repeatedly concluded that considerations of stare decisis have additional force where, as here, "Congress has long acquiesced in the interpretation [this Court] ha[s] given" to the statute in question. *John R. Sand*, 552 U.S. at 139.

tional Guard the same coverage under the Tort Claims Act as now exists for the Armed Forces." H.R. Rep. No. 384, 97th Cong., 1st Sess. Pt. 1, at 2 (1981). The House Report accompanying the legislation stated that "[i]t is well settled that claims for injuries to servicemen that 'arise out of or are in the course of activity incident to service' may not be brought under the" FTCA pursuant to *Feres*, and that "[i]t is the intent of the Committee that the rule of the *Feres* case apply to the acts or omissions of National Guard personnel." *Id.* at 5.

Overruling a decision may be warranted if it is proven "unworkable." *Patterson*, 491 U.S. at 173. But because this Court declined to overrule *Feres* more than 25 years ago in *Johnson*, it would take a particularly compelling showing for the Court to overrule *Feres* (and *Johnson*) now. In fact, *Feres* suffers from no such flaw. It provides a straightforward rule of decision that courts have been able to apply with relative ease. See *Stanley*, 483 U.S. at 683 (noting that *Feres*'s incident-to-service test "provides a line that is relatively clear" and avoids undue intrusion into the military mission). For that reason, this Court in *Stanley* adopted the *Feres* test as the applicable rule of law for determining *Bivens* liability in suits by service members against other service members. See *id.* at 683-684. Only a handful of *Feres* cases have made their way to this Court in the 60-plus years since *Feres* was decided, and those cases represent nothing more than the fine-tuning any legal doctrine can require from time to time.[4]

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[4] In *United States* v. *Brown*, 348 U.S. 110, 112 (1954), this Court held that *Feres* does not bar FTCA claims by discharged service members if the claims arise out of activity that occurred after

A decision also may be overruled when it is incompatible with the law as it has developed in other areas. See *Patterson*, 491 U.S. at 173-174. But that is not the situation with *Feres*. Contrary to petitioner's claim (Pet. 22-25) that *Feres* could be overruled without disruption, *Feres* has been woven into the fabric of the law in a number of different contexts. For example, as noted above, this Court has adopted *Feres*'s "incident to service" test as the governing rule for *Bivens* claims brought by one service member against another. See *Stanley*, 483 U.S. at 684. The Court has also adopted the *Feres* test to govern when an indemnification action may be brought against the United States for damages paid by third parties to service members. See *Stencel Aero*, 431 U.S. at 670. Similarly, lower

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discharge. In *United States* v. *Shearer*, 473 U.S. 52, 57-59 (1985), the Court held that *Feres* bars FTCA claims based on injuries inflicted by other service members where such suits would require the courts to second-guess core military judgments regarding the supervision and control of military personnel. In *Johnson*, 481 U.S. at 682, 691-692, the Court held that *Feres* bars FTCA claims on behalf of service members even for injuries caused by civilian government employees, where the injuries arose out of service-related activity. The Court's remaining *Feres* cases have concerned whether the "incident to service" test should be extended to other contexts beyond FTCA suits on behalf of service members. See *Stanley*, 483 U.S. at 683-684 (the "incident to service" test governs whether service members may bring *Bivens* claims); *Chappell* v. *Wallace*, 462 U.S. 296, 304-305 (1983) (same); *Stencel Aero*, 431 U.S. at 673-674 (*Feres* bars indemnification action against United States for damages paid by third party to service member who was injured in the course of military service); see also *United States* v. *Muniz*, 374 U.S. 150, 159 (1963) (*Feres* not extended to bar FTCA suits by federal prisoners for injuries in federal prison resulting from negligence of government employees).

courts have held that the *Feres* test governs whether the United States may be sued in tort for the death or injury of a foreign service member (see, *e.g.*, *Daberkow* v. *United States*, 581 F.2d 785 (9th Cir. 1978)), or in actions by commissioned officers of the Public Health Service (see, *e.g.*, *Backman* v. *United States*, 153 F.3d 726 (10th Cir. 1998) (Tbl.); *Scheppan* v. *United States*, 810 F.2d 461 (4th Cir. 1987)). This Court should therefore be particularly hesitant to overrule *Feres*, because doing so would unsettle the law in a number of areas. See *California* v. *FERC*, 495 U.S. 490, 499 (1990) (declining to overrule a precedent because the Court had "employed" it "with approval in a range of decisions" in the same and "other contexts").

b. Petitioner contends (Pet. 14-19, 21-22) that the rule established in *Feres* should be revisited because it has "def[ied] practical workability." That is an implausible assertion with respect to a statutory interpretation that has governed for more than 60 years—virtually the entire history of the FTCA. Petitioner attempts to demonstrate that *Feres* is unworkable by claiming that courts of appeals have adopted differing tests to determine when an injury is "incident to service"; that circuits applying *Feres* to a few specific circumstances have reached inconsistent results; and that some lower court decisions are inconsistent with this Court's cases involving materially identical facts. All of those arguments lack merit.

i. Petitioner first asserts (Pet. 14-16) that courts of appeals apply inconsistent standards to determine whether a suit is barred by *Feres*. No such conflict exists. All of the circuits recognize that, as *Feres* itself held, the fundamental inquiry is whether the

service member's injury arose out of "activity incident to service." 340 U.S. at 146. The circuits also uniformly understand, as this Court made clear in *United States* v. *Shearer*, 473 U.S. 52 (1985), that the inquiry "cannot be reduced to a few bright-line rules," but instead requires analysis of the facts and circumstances of "each case," "examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." *Id.* at 57.

All of the courts of appeals follow the approach described in *Shearer*. See, *e.g.*, *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-683 (1st Cir. 1999); *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996); *Richards* v. *United States*, 176 F.3d 652, 655 (3d Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Schoemer* v. *United States*, 59 F.3d 26, 28 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Fleming* v. *USPS*, 186 F.3d 697, 699-700 (6th Cir. 1999); *Stephenson* v. *Stone*, 21 F.3d 159, 162-163 (7th Cir. 1994); *Brown* v. *United States*, 739 F.2d 362, 367-368 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985); *Costo* v. *United States*, 248 F.3d 863, 867 (9th Cir. 2001), cert. denied, 534 U.S. 1078 (2002); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Whitley* v. *United States*, 170 F.3d 1061, 1070-1075 (11th Cir. 1999); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994).

In applying that approach, courts often consider matters such as the service member's duty status at the time of the injury (see, *e.g.*, *Stewart*, 90 F.3d at 104-105; *Schoemer*, 59 F.3d at 29; *Brown*, 739 F.2d at 367); the location of the conduct (see, *e.g.*, *Whitley*, 170 F.3d at 1072; *Day*, 167 F.3d at 682); the activity in

which the service member was involved (see, *e.g.*, *Fleming*, 186 F.3d at 700; *Richards*, 176 F.3d at 656; *Wake*, 89 F.3d at 61); whether the conduct at issue was subject to military regulations (see, *e.g.*, *Pringle*, 208 F.3d at 1226; *Stephenson*, 21 F.3d at 163-164); and whether the service member's activity arose out of military life or was a benefit of military service (see, *e.g.*, *Costo*, 248 F.3d at 868; *Verma*, 19 F.3d at 648).

Petitioner claims (Pet. 14-16) that the First, Fifth, Ninth, and Eleventh Circuits have adopted three conflicting multifactor tests for *Feres* cases. It is true that those courts have sometimes used slightly different formulations to describe the factors to be considered. But those differing formulations do not reflect any substantive disagreement: Petitioner does not claim that they lead to inconsistent results, and all of the formulations capture the same relevant considerations. See *Day*, 167 F.3d at 682-683 (1st Cir.) (noting that courts have considered "[1] whether [the injury] occurred on a military facility, [2] whether it arose out of military activities or at least military life, [3] whether the alleged perpetrators were superiors or at least acting in cooperation with the military, and * * * [4] whether the injured party was himself in some fashion on military service"); *Schoemer*, 59 F.3d at 28 (5th Cir.) (courts must "examine the totality of the circumstances," and in particular "(1) the serviceman's duty status; (2) the site of his injury; and (3) the activity he was performing"); *Schoenfeld* v. *Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007) (listing "four nonexclusive factors": (1) "the place where the negligent act occurred"; (2) "the plaintiff's duty status"; (3) "the benefits accruing to the plaintiff because of his status"; and (4) "the nature of the plaintiff's activities at

the time of the negligent act") *Speigner* v. *Alexander*, 248 F.3d 1292, 1298 (11th Cir.) (articulating the same three factors as *Schoemer*), cert. denied, 534 U.S. 1056 (2001).[5]

Petitioner next asserts (Pet. 15-16) that the Fourth and Sixth Circuits ask whether the rationales supporting *Feres* are present in a particular case, whereas the Seventh and Tenth Circuits do not. In *Johnson* and *Stanley*, this Court made clear that courts may not abandon the fact-specific "incident to service" test in favor of a rationales-based approach to applying *Feres*. In *Johnson*, this Court reaffirmed *Feres*'s "incident to service" test as the key inquiry, which the court of appeals there had ignored in favor of asking whether allowing the suit would have impaired military discipline. See 481 U.S. at 684-688. And in *Stanley* the Court explained that abandoning the "incident to service" test for a rationales-based approach would itself "require judicial inquiry into, and hence intrusion upon, military matters." 483 U.S. at 682.

Contrary to petitioner's characterization, the Fourth and Sixth Circuits have not adopted the rationales-based approach rejected in *Johnson* and *Stanley*. Instead, the decisions on which petitioner relies merely invoked *Feres*'s rationales as further

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[5] Petitioner is also wrong to claim (Pet. 16) that the Ninth Circuit departs from other circuits by requiring courts to "compare the fact pattern of the case at hand with other cases that have applied the *Feres* doctrine." In fact, *Shearer* directed courts to examine each case "in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." 473 U.S. at 57. Unsurprisingly, therefore, other circuits likewise rely on past *Feres* cases involving "similar facts." *Richards*, 176 F.3d at 655-656; see also, *e.g.*, *Pringle*, 208 F.3d at 1224 ("[W]e begin by examining prior cases that are factually analogous to the present case.").

support for their conclusions. See *Brown* v. *United States*, 462 F.3d 609, 613 (6th Cir. 2006) (*Brown*); *Romero* v. *United States*, 954 F.2d 223, 226 (4th Cir. 1992). Other courts of appeals—including the Seventh and Tenth Circuits—also sometimes advert to *Feres*'s rationales as confirmation that a particular injury arose from service-related activity. See, *e.g.*, *Pringle*, 208 F.3d at 1227 (10th Cir.); *Smith* v. *United States*, 196 F.3d 774, 777-778 (7th Cir. 1999), cert. denied, 529 U.S. 1068 (2000). Such observations are consistent with *Johnson* and *Shearer*, in which this Court offered similar observations about the particular facts of those cases. See *Johnson*, 481 U.S. at 691-692; *Shearer*, 473 U.S. at 58-59.

ii. Petitioner next contends (Pet. 18-19) that the courts of appeals are divided over the application of *Feres* to soldiers on terminal leave and to injuries suffered during recreational activities. But even if the decisions on which petitioner relies reflected true disagreements rather than merely the differing facts and circumstances of individual cases, those narrow conflicts would scarcely establish that the basic *Feres* doctrine is unworkable. And because neither of the alleged conflicts is even arguably implicated here, this case would not be an appropriate vehicle for resolving any disagreements that do exist.[6]

iii. Finally, petitioner contends (Pet. 22) that the courts of appeals have reached inconsistent results in

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[6] Petitioner also contends (Pet. 17-18) that the circuits are divided over the application of *Feres* to a third narrow circumstance: cases involving prenatal injuries. That alleged conflict is the basis for petitioner's second question presented. As explained below, however, any disagreement among the courts of appeals on this issue is not implicated in this case. See pp. 22-28, *infra*.

cases involving facts identical to those addressed by this Court in *Feres* and in *Brooks* v. *United States*, 337 U.S. 49 (1949). But the two cases he cites do not support that claim. In *Elliott* v. *United States*, 13 F.3d 1555, reh'g granted and opinion vacated, 28 F.3d 1076, aff'd by equally divided court on reh'g en banc, 37 F.3d 617 (11th Cir. 1994), a panel of the Eleventh Circuit initially held that *Feres* did not bar an FTCA claim based on carbon monoxide poisoning suffered by a service member in military housing. See *id.* at 1556-1557. Petitioner claims that those facts are materially indistinguishable from one of the consolidated cases in *Feres*, which arose out of a fire in a military barracks. See 340 U.S. at 136-137. But the Eleventh Circuit panel distinguished *Feres* because the service member in *Elliot* was on leave at the time of the injury. 13 F.3d at 1561; see *Feres*, 340 U.S. at 146. In any event, the panel opinion in *Elliot* lacks precedential value because it was vacated by the en banc court.

Petitioner is likewise wrong to contend (Pet. 22) that *Veillette* v. *United States*, 615 F.2d 505 (9th Cir. 1980), barred an FTCA claim identical to the one this Court allowed to proceed in *Brooks*. Both cases involved vehicular collisions, but the similarity ends there. The plaintiff in *Brooks* alleged negligence by the motorist who caused the accident. 337 U.S. at 50. The plaintiff in *Veillette*, by contrast, alleged negligence on the part of the military medical personnel who treated his injuries. 615 F.2d at 507. Two of the three cases that were consolidated for review by this Court in *Feres* involved alleged medical malpractice by military doctors, see 340 U.S. at 137, and as a result the Ninth Circuit correctly held that the claims in *Veillette* were *Feres*-barred.

c. Petitioner also contends (Pet. 30-32) that *Feres* should be overruled because it has been criticized by federal judges, including some Members of this Court. But *Johnson* "reaffirm[ed] the holding of *Feres*" notwithstanding similar criticism. 481 U.S. at 692; see *id.* at 700-701 (Scalia, J., dissenting). And more recently, this Court has repeatedly denied petitions seeking to revisit *Feres* based on similar arguments. See, *e.g.*, *Lanus*, 133 S. Ct. at 2731-2732 (Thomas, J. dissenting from the denial of certiorari). There is no reason for a different result here.[7]

2. In any event, *Feres* was correctly decided. Contrary to petitioner's contentions (Pet. 25-30), the reasons this Court identified in *Johnson*, 481 U.S. at 688-691, for why *Feres* correctly interpreted the FTCA remain sound.

a. Because "[t]he relationship between the Government and members of its armed forces is distinctively federal in character," it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." *Johnson*, 481 U.S. at 689 (citations and internal quotation marks omitted; brackets in original). As this Court explained in *Feres*, "[S]tates have

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[7] There is also no merit to petitioner's claim (Pet. 32-34) that this case is an especially suitable vehicle for reconsidering *Feres*. Petitioner notes that this case involves alleged violations of military regulations, but fails to explain why that fact would make this a suitable occasion for reconsidering *Feres* when the Court has declined to do so in other recent cases, including cases that presented circumstances analogous to those at issue in *Feres* itself—negligent medical care and negligent maintenance of military housing. See *Feres*, 340 U.S. at 136-137; see also, *e.g.*, *Lanus*, *supra* (No. 12-862) (military housing); *Witt*, *supra* (No. 10-885) (medical care); *Matthew*, *supra* (No. 08-1451) (same).

differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence." 340 U.S. at 143. As a result, "[i]t would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Ibid.* Moreover, allowing disparate recovery based on the fortuity of where each service member's injury occurred could undermine the trust and goodwill among service members that is essential to military success. To allow service members who are injured in the United States to bring FTCA actions, while service members injured in combat overseas are barred from such recovery, see 28 U.S.C. 2680(j), would severely test that trust and goodwill, and potentially create serious morale problems in the military.

b. This Court noted in *Johnson* that "[t]hose injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift [and] efficient, normally requir[ing] no litigation." 481 U.S. at 690 (citations and internal quotation marks omitted; second pair of brackets in original). It is "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." *Ibid.* As the Court explained in *Feres*, if Congress had intended the FTCA to provide a statutory tort remedy for injuries to service members arising from service-related activity, "it is difficult to see why [Congress] should have

omitted any provision to adjust these two types of remedy to each other." 340 U.S. at 144. "The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Ibid.*[8]

Amici Emory Law Volunteer Clinic for Veterans, et al., argue (Br. 8-26) that the foundation for *Feres* has been eroded because the government's disability compensation system no longer provides military veterans with adequate compensation. But hypothetical recovery under the FTCA is not the relevant point of comparison. Rather, as just explained, *Feres* and *Johnson* noted the parallel between service members' statutory benefits for service-related injury and benefits under state worker's compensation programs. Amici do not argue that that parallel no longer holds. More fundamentally, this Court in *Feres* and *Johnson* referred to those benefits not because of a judgment concerning the particular quantum of compensation Congress had chosen to make available to service members under the Veterans Benefits Act (or otherwise), but rather because the very existence of those benefits distinguished service members as a group from persons Congress sought to compensate through the FTCA. In particular, Congress designed the FTCA to provide a remedy to persons who had been without one; if Congress had intended the FTCA to authorize tort

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[8] Petitioner argues (Pet. 28) that this rationale does not justify *Feres* because *Feres* did not preclude the FTCA suits in *Brooks* and *United States* v. *Brown*, 348 U.S. 110 (1954). But neither of those cases involved service-related injuries, and this argument was considered but rejected in *Johnson*. See 481 U.S. at 697-698 (Scalia, J., dissenting).

suits by service members for service-related injury, Congress would have adjusted that remedy to take into account the statutory benefits to which service members are entitled, much as States have adjusted their tort law in conjunction with their enactment of worker's compensation laws. See *Johnson*, 481 U.S. at 689-690; *Feres*, 340 U.S. at 144.

c. "[S]uits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Johnson*, 481 U.S. at 690 (citation omitted; second pair of brackets in original). "Even 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." *Id.* at 691.

Petitioner contends (Pet. 23-24) that overruling *Feres* would not undermine military discipline because the government could still rely on the enumerated exceptions to the FTCA. But even the *Johnson* dissenters did not dispute "the possibility that some suits brought by servicemen will adversely affect military discipline," 481 U.S. at 699, although they considered that point insufficient to support *Feres*'s interpretation of the FTCA in light of the fact that courts may nonetheless review military decisions in FTCA suits by civilians, see *id.* at 700. As the Court noted in *Johnson*, however, "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country." *Id.* at

691. As a result, "[s]uits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." *Ibid.*

Petitioner also contends (Pet. 25-27) that the judiciary already decides claims involving the military in various other contexts. But petitioner overstates the extent of the judiciary's involvement in military affairs. For example, the three cases he cites (Pet. 26) to demonstrate that courts often "assess the tortious conduct committed by service members upon other service members" merely held that the claims in those cases could go forward because they were not sufficiently related to military matters. See *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477, 1479 (9th Cir. 1991); *Durant* v. *Neneman*, 884 F.2d 1350, 1354 (10th Cir. 1989), cert. denied, 493 U.S. 1024 (1990); *Brown* v. *United States*, 739 F.2d at 369. More importantly, this Court considered a very similar argument in *Johnson*, see 481 U.S. at 700 (Scalia, J., dissenting), but still declined to accept the substantial additional judicial intrusion into military matters that would follow from overruling *Feres*.

d. Petitioner asserts (Pet. 11, 19) that *Feres*'s interpretation of the FTCA lacks support in the statute's text. But as the Court explained in *Feres*, the FTCA states that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." 340 U.S. at 141 (citing 28 U.S.C. 2674). There is "no liability of a 'private individual' even remotely analogous" to a claim by or on behalf of a service member who is injured as a result of service-related activity. *Ibid.*

Relatedly, petitioner contends (Pet. 9-11) that the FTCA should not be read to exclude from its waiver of sovereign immunity service-related claims on behalf of service members because the statute contains other provisions (28 U.S.C. 2680(a), (h), (j) and (k)) that exempt some claims by service members. That mode of reasoning is not persuasive. Numerous FTCA exceptions overlap with one another, including the very exceptions on which petitioner relies. Section 2680(j)'s exception for claims arising out of combatant activities during time of war overlaps with Section 2680(k)'s exception for claims arising in a foreign country, and both of those exceptions in turn overlap with the "discretionary function" exception of Section 2680(a). Overlaps among the different exceptions, or overlaps between the exceptions and the foundational limits of the FTCA's waiver of sovereign immunity, are no reason to read any of those limits out of the statute.

3. As an alternative to his request that this Court overrule *Feres*, petitioner argues (Pet. 34-36) that it should grant certiorari to resolve a purported circuit split about the application of *Feres* to cases involving prenatal injuries to service members' children. But the decision below was correct and does not conflict with any decision by another court of appeals.

a. The court of appeals correctly concluded that petitioner's claims are barred by *Feres*. In *Stencel Aero*, this Court held that *Feres* bars third parties from bringing FTCA claims that have their genesis in a service member's service-related activity. See 431 U.S. at 673. As the Court explained, "where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is

identical whether the suit is brought by the soldier directly or by a third party." *Ibid.*

In light of *Stencel Aero*, every court of appeals to consider the issue has held that *Feres* applies to claims by family members or similarly situated third parties that have their genesis in a service member's service-related activity. See, *e.g.*, *DeFont* v. *United States*, 453 F.2d 1239, 1240 (1st Cir.), cert. denied, 407 U.S. 910 (1972); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 201, 203 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Hinkie* v. *United States*, 715 F.2d 96, 98 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Minns* v. *United States*, 155 F.3d 445, 449 (4th Cir. 1998), cert. denied, 525 U.S. 1106 (1999); *Gaspard* v. *United States*, 713 F.2d 1097, 1101-1102 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); *Brown*, 462 F.3d at 612 (6th Cir.); *Mossow* v. *United States*, 987 F.2d 1365, 1369-1370 (8th Cir. 1993); *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); *Smith* v. *United States*, 877 F.2d 40, 41 & n.5 (11th Cir. 1989), cert. denied, 493 U.S. 1069 (1990); *Lombard* v. *United States*, 690 F.2d 215, 219 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

Petitioner does not challenge the general rule adopted in these cases. Instead, he argues (Pet. 36) that "Gregory's death did not derive indirectly from the military's conduct towards [Specialist] Ritchie: it was a direct result of the military's actions toward *him*." As the court of appeals explained, however, that is incorrect: Petitioner's claims rest on the allegation that "military personnel at Fort Shafter caused Gregory's death by ordering [Specialist] Ritchie to engage in military duties against her doctor's recom-

mendations. That Gregory's injury derived from [Specialist Ritchie's] military service is, in other words, the core theory of his case." Pet. App. 10a. Accordingly, as petitioner himself concedes (Pet. 34), his claims lie at the "heart of the [*Feres*] doctrine" because they challenge the propriety of military orders. See, *e.g.*, *Johnson*, 481 U.S. at 683, 691-692 (*Feres* barred claim for death of service member who died after being dispatched to participate in a military rescue mission); *Stanley*, 483 U.S. at 671, 686 (*Feres* barred claim of service member who was given LSD while on active duty as a part of a military study of the long-term effects of the drug).

b. Petitioner contends (Pet. 17-18, 34-36) that the decision below conflicts with decisions of the Fourth, Sixth, Eighth, and Eleventh Circuits finding *Feres* inapplicable to suits based on prenatal injuries to service members' children. But the cases on which petitioner relies all involved negligent prenatal care by military doctors. See *Brown*, 462 F.3d at 610-611 (recommendation to discontinue prenatal vitamins); *Mossow*, 987 F.2d at 1367 ("medical negligence during delivery"); *Romero*, 954 F.2d at 224 ("doctors' failure to implement a medical treatment plan"); *Del Rio* v. *United States,* 833 F.2d 282, 284 (11th Cir. 1987) ("negligent administration of prenatal care by active duty military medical personnel").[9]

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[9] *Mossow* is even further removed from this case because it did not directly address an FTCA claim based on prenatal injuries. The court held that a service member's child could bring a legal malpractice action against a military lawyer who had advised the child (through his parental representatives) that he could not bring an FTCA suit for medical malpractice by military doctors during his birth. 987 F.2d at 1368-1370 & n.5. The only injury directly at

Those courts allowed claims based on negligent prenatal care to proceed because they concluded that the military physicians owed an independent duty to the unborn children, who, as civilians, were not subject to the *Feres* doctrine. See *Romero*, 954 F.2d at 225 (reasoning that "claims brought by civilians and civilian dependents of service members who have directly sustained injuries from military personnel are not *Feres*-barred"). The courts also noted that the rationales underlying *Feres* "are simply inapplicable to suits for negligent prenatal care affecting only the health of the fetus" because such suits "clearly cannot be said to invite judicial interferences in 'sensitive military affairs.'" *Brown*, 462 F.3d at 614-615; see also *Mossow*, 987 F.2d at 1370 (the suit "would not involve examining orders given to a serviceman").

Petitioner contends (Pet. 17-18) that *Brown*, *Mossow*, *Romero*, and *Del Rio* conflict with *Scales* v. *United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983). *Scales* held that *Feres* barred a suit by a child alleging that military doctors acted negligently in administering a rubella vaccine to his mother without first determining whether she was pregnant. *Id.* at 971. The Fifth Circuit found that claim *Feres*-barred because "[t]he treatment accorded [the child's service member] mother is inherently inseparable from the treatment accorded [the child] as a fetus in his mother's body." *Id.* at 974. Read broadly, that reasoning is arguably inconsistent with the

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issue was thus the post-birth harm inflicted on the child by the lawyer's allegedly negligent advice. But the court appeared to assume that the child's underlying medical malpractice action would not have been *Feres*-barred, and it endorsed the Fourth Circuit's decision in *Romero*, a prenatal-care case. See *id.* at 1369.

analysis in *Brown*, *Mossow*, *Romero*, and *Del Rio*. But the result in *Scales* can be reconciled with those cases because the allegedly negligent treatment in *Scales* was not prenatal care directed exclusively or even primarily at the health of the unborn child. See *id.* at 971-972. Moreover, the decision in *Scales* is more than 30 years old, and the Fifth Circuit could choose to revisit its analysis in a future case in light of developments in other circuits. See *Brown*, 462 F.3d at 614 (suggesting that notwithstanding *Scales*, the Fifth Circuit would allow a claim "for negligent [prenatal] medical care administered *solely* to the detriment of a civilian child").[10]

In any event, even if there is some disagreement about the proper application of *Feres* to suits alleging negligent prenatal care, this case would not be an appropriate vehicle for resolving it. As the court of appeals explained, petitioner's claim "is markedly different from the medical malpractice claims in *Romero*, *Brown*, and the like." Pet. App. 15a. Those cases involved "medical judgments made by medical personnel at medical facilities"; this case involves "military orders given by military supervisors on a military base." *Ibid.* Petitioner seeks to challenge orders

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[10] Petitioner also contends (Pet. 18) that the prenatal-care cases on which he relies are inconsistent with the Ninth Circuit's decision in *Monaco*, 661 F.2d at 133-134. But *Monaco* is inapposite because it did not involve a claim of negligent prenatal care. Instead, the claim at issue in that case was that the military had negligently exposed a service member to radiation while he was on active duty, and that as a result, the service member's infant child, born years later, developed birth defects in utero. *Id.* at 130. *Monaco* held that *Feres* barred that claim because the infant's injury had its genesis in orders directed toward the infant's active-duty father. See *id.* at 133-134.

given to a service member on active duty by her military superiors, not medical treatment directed to the health of an unborn civilian child. And for that reason, this case "implicates *Feres*'s concern about judicial interference in military personnel matters far more squarely" than any of the cases on which petitioner relies. *Ibid.* Petitioner does not identify any case allowing a claim to proceed based on analogous facts.

In addition, as the court of appeals observed, petitioner would not have a valid FTCA claim based on the prenatal-care cases even if he were challenging medical decisions rather than military orders. "Under the test applied by our sister circuits," the court noted, "a civilian fetus's claim may only escape *Feres* if its servicewoman mother suffered no injury from the purportedly negligent acts." Pet. App. 16a; see *Brown*, 462 F.3d at 615 ("[H]ad the proper prenatal care been provided, it would have been solely for the benefit of the fetus and would not have affected the mother's health in any way."); *Mossow*, 987 F.2d at 1370 & n.9 (the child's parents "suffered no injury" from the challenged conduct); *Romero*, 954 F.2d at 225 ("If the treatment had been administered, its sole purpose would have been directed at preventing injury to [the child]. * * * Because the purpose of the treatment was to insure the health of a civilian, not a service member, *Feres* does not apply.").[11] As the

[11] Petitioner notes (Pet. 36) that in *Del Rio*, the service member mother alleged that she also suffered injury from the negligent prenatal care. See 833 F.2d at 284, 287-288. But the Eleventh Circuit did not explicitly consider the significance of that fact, and it does not appear to have revisited the issue since the subsequent decisions in *Brown*, *Romero*, and *Mossow* emphasizing the im-

court of appeals explained, "[a] plain reading of the allegations in [petitioner's] complaint forecloses such a finding here," given the allegations that the physical tasks Specialist Ritchie was required to perform caused her "considerable pain." Pet. App. 16a. This case is thus "unlike *Brown* and *Romero* because harm to Gregory occurred, at least in part, due to (service-related) injury to [Specialist Ritchie]." *Id.* at 38a. And this additional distinction further confirms that this case would not be an appropriate vehicle for resolving any disagreement about the application of *Feres* to suits alleging negligent prenatal care by military doctors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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portance of the absence of any injury to the service member in allowing similar actions to proceed notwithstanding *Feres*.