No. 19-224

In the Supreme Court of the United States

BRYAN JAMES STROTHER, PETITIONER

v.

DAVID S. BALDWIN, ADJUTANT GENERAL, CALIFORNIA ARMY NATIONAL GUARD, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Following attempts to recoup enlistment bonuses improperly paid to soldiers in the California Army National Guard, the Department of Defense established an administrative process for affected soldiers to seek a waiver of their obligation to repay the bonuses, as well as repayment of any amounts previously withheld from their compensation. Petitioner received a favorable administrative decision waiving the debts associated with his improper reenlistment bonus and refunding all the money previously withheld from his military pay to satisfy those debts. Petitioner also brought this action for damages, asserting claims under 42 U.S.C. 1983 and for breach of contract and fraud. The question presented is as follows:

Whether the district court correctly dismissed petitioner's claims for failure to state a claim and for lack of subject-matter jurisdiction.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

Strother v. *Baldwin*, No. 16-cv-255 (Dec. 5, 2017)

United States Court of Appeals (9th Cir.):

Strother v. *Baldwin*, No. 18-15244 (May 28, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 774 Fed. Appx. 1016. The order of the district court (Pet. App. 5a-37a) is not published in the Federal Supplement but is available at 2017 WL 6017137.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2019. The petition for a writ of certiorari was filed on August 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After petitioner reenlisted in the California Army National Guard in 2007, he received a $15,000 reenlistment bonus and approximately $5,000 in student loan repayment incentives. See Pet. App. 2a, 7a-8a; C.A.

E.R. 329-330. In 2008, an internal audit revealed that thousands of soldiers in the California Army National Guard were being paid bonuses and student loan repayment incentives for which they were not eligible. C.A. E.R. 102. The resulting investigation led to criminal charges against a former National Guard Incentive and Benefits Manager and a comprehensive audit of all bonuses and student loan repayments made to soldiers in the California Army National Guard between 2004 and 2010. *Ibid.* In 2012, the Department of the Army notified petitioner that it had identified a discrepancy in his bonus and student loan repayment incentive payments and that the Department would seek to recoup the improper payments. *Id.* at 507. Petitioner challenged the recoupment order and sought a waiver of the repayment obligations, which the Department of Defense's Defense Finance and Accounting Service (DFAS) denied in 2015. *Id.* at 517. The Department of the Army then began withholding a portion of petitioner's military pay to recoup his debt. *Id.* at 458.

Petitioner appealed the denial of his request for a waiver to the Defense Office of Hearings and Appeals, an adjudicative body within the Department of Defense. C.A. E.R. 520; see 32 C.F.R. Pt. 284, App. F (appeal procedures). In August 2016, the Defense Office of Hearings and Appeals issued a decision in petitioner's favor, waiving his obligation to repay any amount associated with his reenlistment bonus or student loan repayment incentives. C.A. E.R. 329-333. DFAS refunded $4,885.51 to petitioner by direct deposit, which represented the full amount previously withheld in connection with his debt. *Id.* at 458; see Pet. App. 8a.

In October 2016, the Secretary of Defense ordered the suspension and reconsideration of all efforts to recoup debts like the one at issue here. C.A. E.R. 102. Congress later directed the Secretary to "conduct a review of all bonus pays, special pays, student loan repayments, and similar special payments that were paid to members of the National Guard of the State of California during the period beginning on January 1, 2004, and ending on December 31, 2015," and to "determine whether waiver of recoupment is warranted" for any improper payments. National Defense Authorization Act for Fiscal Year 2017 (NDAA), Pub. L. No. 114-328, Div. A, Tit. VI, Subtit. F, § 671(c)(1)(A) and (2)(A)(iv), 130 Stat. 2174-2175. Congress specified that a waiver "is warranted" unless the agency "makes an affirmative determination, by a preponderance of the evidence, that the member knew or reasonably should have known that the member was ineligible for the bonus pay, special pay, student loan repayment, or other special payment otherwise subject to recoupment." NDAA § 671(c)(2)(B), 130 Stat. 2175. Congress also directed the Secretary to develop procedures to address any financial hardships that servicemembers may have experienced from recoupment efforts. NDAA § 671(c)(4)(C), 130 Stat. 2176.

2. In February 2016, before he received the administrative decision waiving his debt in full, petitioner filed this putative class action in the United States District Court for the Eastern District of California, asserting claims under 42 U.S.C. 1983 and for breach of contract and fraud. Compl. ¶¶ 32-103. Petitioner named DFAS as a defendant, as well as Mike McCord, the then-Comptroller of the Department of Defense, and David

S. Baldwin, the Adjutant General of the California National Guard, both of whom were sued in their official and individual capacities. Pet. App. 5a n.1.

In December 2017, the district court dismissed the complaint. Pet. App. 5a-37a. Although the court acknowledged the "significant developments" that had occurred since petitioner filed the complaint, *id.* at 7a—including the waivers and refunds that had been made available to petitioner and the majority of putative class members—the court concluded the case was not moot because petitioner had sought damages with respect to each of his claims. See *id.* at 15a-17a. On the merits, however, the court concluded that "each of the causes of action fails to state a claim for which relief can be granted." *Id.* at 25a.

First, the district court explained that petitioner's Section 1983 claim—asserting an alleged "failure to train" military recruiters, Compl. ¶ 62—"plainly fails" to state a violation of any federal right. Pet. App. 28a; see *id.* at 28a-32a. The court left open the possibility that petitioner might be able to amend the complaint to assert a Section 1983 claim alleging a violation of the Due Process Clause of the Fourteenth Amendment, but it explained that Section 1983 provides a cause of action only against state government actors and "precludes liability in federal government actors." *Id.* at 31a (citation omitted); cf. *id.* at 19a-21a (stating that the complaint left unclear whether General Baldwin was alleged to have been acting in a federal or state capacity). In their motion to dismiss, respondents had also argued that, to the extent that petitioner's Section 1983 claim sought to challenge the training provided by the military to its members, the claim would be barred by *Feres* v. *United States*, 340 U.S. 135 (1950), and circuit prece-

dent. D. Ct. Doc. 13-1, at 6-7 (Sept. 13, 2016). The district court "deem[ed] [petitioner] to have conceded this argument" in his opposition to respondents' motion to dismiss. Pet. App. 31a.

Second, the district court dismissed petitioner's breach of contract claim on the ground that it was "foreclosed by binding precedent" establishing that entitlement to military pay is governed by statute and not by principles of contract law. Pet. App. 32a; see *id.* at 29a ("Simply put, 'common-law rules governing private contracts have no place in the area of military pay.'") (quoting *Bell* v. *United States*, 366 U.S. 393, 401 (1961)).

Third, the district court dismissed petitioner's claims sounding in fraud for failure to satisfy the heightened pleading standard in Federal Rule of Civil Procedure 9(b) or the general pleading standard in Rule 8(a). Pet. App. 32a-35a. The court explained that the complaint failed to identify any actions taken by the individual respondents to support the fraud claims asserted against them in their personal capacities. See, *e.g.*, *id.* at 34a ("There are no factual allegations *anywhere in the complaint* that describe Defendant McCord doing anything of any sort—literally none."); *id.* at 35a ("If a reader can walk away having read a complaint without having the slightest clue whether a cause of action is brought against him at all, he surely is not on the 'fair notice' required by Rule 8(a)(2).") (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007)). The court also held that it lacked subject-matter jurisdiction over petitioner's fraud claims against Baldwin and McCord in their official federal capacities because petitioner had failed to identify any applicable waiver of federal sovereign immunity. *Id.* at 24a-25a. The "only relevant waiver arguably applicable here," *id.* at 24a, was the

Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* As the court recognized, the FTCA requires exhaustion of administrative remedies as a prerequisite to filing suit, and petitioner failed to allege any facts demonstrating exhaustion of those remedies. Pet. App. 24a-25a.

3. The court of appeals affirmed in a brief, unpublished decision. Pet. App. 1a-5a. The court held that petitioner had failed to state a claim under 42 U.S.C. 1983 because he had "failed to identify a constitutional right to which his § 1983 claim could attach." Pet. App. 3a. The court determined that petitioner's effort to characterize his Section 1983 claim as alleging a due-process violation relating to servicemembers' asserted "contractual right to the bonuses described in their reenlistment agreements" failed, both because the complaint "does not clearly allege such a due process violation" and because, in any event, "soldiers do not have a contractual right to their reenlistment bonuses." *Ibid.* The court also held that petitioner had failed to state a plausible claim for breach of contract. *Id.* at 3a-4a. Relying on this Court's decisions in *Bell* v. *United States*, *supra*, and *United States* v. *Larionoff*, 431 U.S. 864 (1977), the court of appeals recognized that "a soldier's entitlement to pay is dependent upon statutory right," not contract law—a principle that, as the court explained, extends to both regular pay and reenlistment bonuses. Pet. App. 4a (quoting *Larionoff*, 431 U.S. at 869). The court found that principle determinative here because petitioner "does not claim that his bonus was authorized by statute." *Ibid.*

Finally, the court of appeals affirmed the dismissal of petitioner's three claims sounding in fraud, explaining that to the extent he sought to bring claims against

respondents in their official capacities, he had failed to identify an applicable waiver of sovereign immunity. Pet. App. 4a. The court also explained that, to the extent petitioner sought to bring claims against the individual respondents in their personal capacities, he had failed to identify any specific actions taken by either Baldwin or McCord and thus had failed to meet the pleading requirements in Rule 9(b). *Id.* at 5a.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner raises a host of fact-specific challenges to the dismissal of his claims, but none merits further review. And petitioner's contention (Pet. 21-25) that this case provides a suitable vehicle to re-examine *Feres* v. *United States*, 340 U.S. 135 (1950), is without merit. The decision below does not rest on the *Feres* doctrine; indeed, the court of appeals did not even mention that decision. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner alleged five causes of action based on the government's since-abandoned efforts to recoup a reenlistment bonus and student loan repayment incentives improperly paid to him: (I) failure to train, asserted under 42 U.S.C. 1983; (II) breach of contract; (III) intentional misrepresentation; (IV) deceit or intentional fraud; and (V) fraud by concealment. Pet. App. 2a. The court of appeals correctly affirmed the dismissal of each of those claims for failure to state a claim upon which relief can be granted and, with respect to claims III-V, for lack of subject-matter jurisdiction.

a. Section 1983 provides a federal cause of action against any person who, under color of state law, subjects a citizen of the United States "to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. As petitioner appears to recognizes (Pet. 31), Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). The complaint nowhere identifies any statutory or constitutional right allegedly violated by respondents.

Petitioner argued on appeal that respondents had violated due process by engaging in a pattern of failing to train California National Guard employees, which resulted in depriving him of a contractual right to receive his reenlistment bonus. See Pet. C.A. Br. 35-40. Setting aside for the moment that petitioner in fact received his bonus in full (see p. 2, *supra*), the court of appeals correctly concluded that this Court's precedent forecloses such a claim. Pet. App. 3a-4a. In particular, it is well settled that a "soldier's entitlement to pay is dependent upon *statutory* right," not contractual right. *Bell* v. *United States*, 366 U.S. 393, 401 (1961) (emphasis added). Although "[e]nlistment is a contract; * * * it is one of those contracts which changes the status" of the contracting party. *Id.* at 402 (quoting *In re Grimley*, 137 U.S. 147, 151 (1890)). "By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged." *Ibid.* (quoting *Grimley*, 137 U.S. at 151). By the same token, if the government violates its contractual obligations, the soldier remains a soldier and his

entitlement to pay remains a matter of statute, not contractual obligation.

Contrary to petitioner's suggestion (Pet. 18-19), this Court has already rejected the distinction that petitioner seeks to advance between basic pay and enlistment bonuses. In *United States* v. *Larionoff*, 431 U.S. 864 (1977), several servicemembers brought a class action alleging "that their agreements to extend their enlistments * * * entitled each of them to payment of a re-enlistment bonus," *id.* at 865. The Court explained that "the rights of the affected service members must be determined by reference to the statutes and regulations governing the [re-enlistment bonus], rather than to ordinary contract principles." *Id.* at 869. The Court thus did *not* "distinguish[] a bonus from regular pay" (Pet. 18), but rather indicated that any entitlement to bonus pay depended on the statutes and regulations governing military pay—not on contract law. Here, petitioner does not assert any statutory entitlement to the bonus at issue. Pet. App. 4a; cf. Pet. 17.

The court of appeals was therefore correct to conclude that, under *Bell* and *Larionoff*, petitioner could not state a Section 1983 claim based on any alleged contractual entitlement to a reenlistment bonus. Pet. App. 3a. That same logic also correctly led the court to affirm the dismissal of petitioner's breach-of-contract claim. See *id.* at 3a-4a.

b. The court of appeals dismissed petitioner's claims sounding in fraud (Counts III-V) for equally sound reasons. To the extent that petitioner seeks to advance those claims against DFAS and defendants Baldwin and McCord in their official capacities, petitioner has never identified any applicable waiver of sovereign immunity under which his fraud claims could proceed. See *United*

States v. *Mitchell*, 445 U.S. 535, 538 (1980) ("It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (brackets and citation omitted).

As the court of appeals recognized, the FTCA provides the only possible vehicle for petitioner to assert fraud claims because the defendants here are all federal, not state, actors. DFAS is a federal agency and defendant McCord was sued in his official-capacity as then-Comptroller for the Department of Defense.* Although defendant Baldwin, as a member of the California Army National Guard, does serve in a state role, all of the allegations here related to his federal authority to administer reenlistment bonus and student loan repayment programs, which are authorized by Congress and which involve the distribution of federal funds. See *Perpich* v. *Department of Def.*, 496 U.S. 334, 348 (1990) (explaining that National Guard members serve in civilian, military, and state capacities, and that a court should consider the contents of the complaint in determining the capacity in which the defendant was sued).

The FTCA thus provides the only apparent vehicle for asserting tort claims against the defendants in their official capacities. But petitioner failed to satisfy the FTCA's administrative exhaustion requirement, 28 U.S.C. 2675(a), before bringing suit. As a result, the court of appeals properly affirmed the dismissal of his fraud claims on that basis. See Pet. App. 4a-5a ("The FTCA bars claimants

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* McCord vacated the office of Comptroller in 2017. The official-capacity claims would run against his successor under Rule 35.3 of the Rules of this Court.

from bringing suit in federal court until they have exhausted their administrative remedies.") (quoting *McNeil* v. *United States*, 508 U.S. 106, 113 (1993)).

Finally, with regard to the fraud claims brought against respondents in their *personal* capacities, the court of appeals correctly held that the complaint failed to satisfy Rule 9(b)'s requirement that fraud claims be pleaded with "particularity." Fed. R. Civ. P. 9(b). Petitioner argues (Pet. 25-31) that his complaint identifies the who, when, where, and how of the alleged fraud. But the court of appeals determined that petitioner "conceded at oral argument that he did not plead his claims with particularity with regard to Defendants Baldwin and McCord," Pet. App. 5a, and petitioner does not explain why that concession should now be set aside. The district court also thoroughly examined the complaint and concluded that "in 103 paragraphs" it "manages to say nothing meaningful about either Defendant." *Id.* at 35a (emphasis omitted).

2. Petitioner argues (Pet. 21-25) that review is warranted in this case to reconsider *Feres*. In *Feres*, this Court held that servicemembers cannot bring tort suits against the government under the FTCA for injuries that "arise out of or are in the course of activity incident to [military] service." 340 U.S. at 146; see *United States* v. *Johnson*, 481 U.S. 681, 687-688 (1987) ("[T]he *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries."). The *Feres* doctrine, however, is irrelevant to the proper disposition of this case. The court of appeals nowhere cited *Feres* in affirming the dismissal of petitioner's claims. Petitioner's fraud claims against respondents in their official capacities are barred by the FTCA for the inde-

pendent reason that petitioner failed to exhaust available administrative remedies before filing suit, as both lower courts held. See pp. 10-11, *supra*.

3. Petitioner identifies no decision of this Court or any other court of appeals that conflicts with the decision below. As explained above, the decision below is consistent with *Bell* and *Larionoff* and does not present any question under *Feres*. Moreover, the Department of Defense has undertaken administrative review of the recoupment sought against petitioner and similarly situated soldiers in the putative class and has provided mechanisms for affected servicemembers to obtain relief, including all who met the standard articulated by Congress for a waiver of their debt. See p. 3, *supra*. Petitioner has already received a waiver of his outstanding debt and a full refund of all monies previously withheld. Although the court of appeals disagreed, the government continues to maintain that the redress petitioner already received has rendered this case largely moot. Gov't C.A. Br. 12-14; see Pet. App. 3a. At a minimum, whether petitioner has stated a claim is of little practical importance to him or any other servicemember. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2019