No. 08-1451

In the Supreme Court of the United States

GERARD D. MATTHEW, ET AL., PETITIONERS

v.

DEPARTMENT OF THE ARMY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether claims under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for injuries allegedly suffered as a result of exposure to depleted uranium and medical malpractice during active military service are barred by this Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950).

2. Whether *Feres* should be overruled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-9a) is unreported. The opinion of the district court (Pet. App. 10a-36a) is reported at 452 F. Supp. 2d 433.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. The petition for a writ of certiorari was filed on May 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are former members of the Army Reserves and certain of their family members. Pet. App. 3a. Petitioners sued the Army under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq*. The former servicemembers alleged that, while they performed ac-

tive military duty in Iraq, the Army negligently caused them to be exposed to depleted uranium (DU), a hazardous substance. C.A. App. 20-23. They also alleged that they were subject to medical malpractice both before and after their discharge from military service. *Id.* at 23-25. Their family members alleged loss of companionship as well as injuries resulting from prenatal exposure to DU. *Id.* at 25-27.

The Army moved to dismiss for lack of subject-matter jurisdiction. Pet. App. 12a. It relied on *Feres* v. *United States*, 340 U.S. 135 (1950), which held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. The Army also argued that the complaint was barred by the FTCA's exceptions for injuries sustained in combat or while engaged in military service in a foreign country. See 28 U.S.C. 2680(j) and (k).

2. The district court granted the motion to dismiss in part and denied it in part. Pet. App. 10a-36a. The court held that *Feres* barred the servicemembers' claims of negligent exposure to DU in Iraq, their claims of predischarge medical malpractice, and their allegations that the Army failed to warn them about the hazards of DU exposure, because those claims all arose out of service-related activity. *Id.* at 16a-19a. But it held that *Feres* did not bar claims alleging post-discharge medical malpractice, *id.* at 23a-24a, and it concluded that those claims were not barred by the FTCA's foreign-country exception or by the exception for claims that arise out of combatant activities, *id.* at 30a-32a.

The district court allowed the family members to pursue their claims for the loss of consortium to the extent those claims were predicated on non-*Feres*-barred

claims. Pet. App. 29a. It held that *Feres* barred the family members' other claims, however, because those claims were based on service-related activity on the part of the servicemember petitioners. *Id.* at 24a-29a.

In order to secure a final judgment for purposes of appeal, petitioners agreed to dismiss with prejudice the claims that the court had held were not barred by *Feres*. Pet. App. 6a n.1. The district court then entered a final judgment, and petitioners appealed.

3. In an unpublished summary order, the court of appeals affirmed. Pet. App. 1a-9a. The court held that claims based on exposure to DU in Iraq were "plainly barred under *Feres*" because they directly challenged the Army's "decision to deploy plaintiffs to areas allegedly contaminated by DU, as well as [its] subsidiary decisions regarding (1) what disclosures to make (or not make) to the soldier-plaintiffs regarding the dangers of DU exposure and (2) what steps to take (or not take) to protect them from such dangers." *Id.* at 5a. The court also concluded that the pre-discharge medical malpractice claims were barred by *Feres*, noting that "*Feres* itself concerned, in part, medical malpractice claims by active-duty service members regarding care received at military facilities." *Id.* at 6a. Finally, the court of appeals agreed with the district court that *Feres* barred the family members' claims that arose out of service-related injuries to the soldier-plaintiffs. Adjudicating those claims, the court of appeals explained, "would require a court to examine the same questions and decisions implicated by the soldier-plaintiffs' own FTCA claims." *Id.* at 7a-8a.

ARGUMENT

The court of appeals correctly applied *Feres* v. *United States*, 340 U.S. 135 (1950), when it affirmed the district court's dismissal of petitioners' FTCA claims based on injuries allegedly resulting from active military service. The court's unpublished decision does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. In *Feres*, this Court held that the FTCA does not authorize suits by service members based on injuries that are "incident to service." 340 U.S. at 146. In subsequent cases, this Court "has never deviated from this characterization of the *Feres* bar," *United States* v. *Johnson*, 481 U.S. 681, 686 (1987) (citations omitted), and it has emphasized that the "incident to service" test requires a case-by-case approach that focuses on the totality of the circumstances, see *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). This Court also has held that *Feres* bars third-party indemnity claims against the United States based on service-related injuries to soldiers, because "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." *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977) (*Stencel Aero*). The court of appeals correctly applied those principles in this case when it affirmed the district court's dismissal of petitioners' FTCA claims based on injuries allegedly sustained during military service.

2. Petitioners argue (Pet. 20-22) that *Feres* does not apply to medical-malpractice claims by active-duty servicemembers. They note that in *United States* v. *Brown*, 348 U.S. 110 (1954), this Court held that *Feres*

does not bar former servicemembers from bringing FTCA claims alleging medical malpractice that occurs *after* their discharge. *Id.* at 112. Petitioners suggest (Pet. 20) that *Brown* should be extended to medical malpractice that occurs *during* service because, they say, "[t]here is no meaningful distinction between petitioners' status before or after discharge: they were medical patients at all relevant times."

As both courts below correctly observed, *Feres* itself involved medical-malpractice claims by active-duty soldiers. Pet. App. 6a, 19a; *Feres*, 340 U.S. at 137. *Brown* was careful to distinguish *Feres* on the ground that the injury in *Brown*, unlike the claims in *Feres*, occurred *after* the plaintiff's discharge. 348 U.S. at 112. Thus, *Feres* bars petitioners' active-duty medical-malpractice claims, and nothing in *Brown* suggests a contrary result.

Petitioners also are wrong to maintain that there is no difference between alleged malpractice that occurs while a servicemember is on active duty and alleged malpractice that occurs after discharge. As this Court explained in *Johnson*, active-duty servicemembers have a "distinctively federal" relationship with the government, making it appropriate to apply a uniform federal remedy that provides "simple, certain, and uniform compensation for injuries or death of those in the armed services." 481 U.S. at 689. That rationale is fully applicable to an active-duty servicemember who is injured while receiving medical treatment that is furnished because of his military service. Moreover, active-duty servicemembers —unlike former servicemembers—are subject to military discipline and control under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, while they are receiving medical treatment. Those critical facts all confirm that the rationale underlying *Feres* applies to

active-duty medical-malpractice claims. See *Del Rio* v. *United States*, 833 F.2d 282, 286 (11th Cir. 1987).

Contrary to petitioners' suggestion, *Feres* is not limited to situations in which an active-duty service member is involved in military combat or training. In *Feres* itself, for example, this Court held that the FTCA did not permit the assertion of claims on behalf of a soldier who was killed in a barracks fire while asleep. See 340 U.S. at 137-138. Such an action is barred because it could require courts to become involved in second-guessing military judgments, such as how to manage military properties consistent with limited resources. To allow medical malpractice actions by active-duty servicemembers could result in the same kind of second-guessing. See, *e.g.*, *Schoemer* v. *United States*, 59 F.3d 26, 29-30 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Del Rio,* 833 F.2d at 286. For those reasons, Congress has consistently refused to amend the FTCA to allow for such actions.

3. Petitioners also argue (Pet. 23-26) that the district court wrongly dismissed the FTCA claim of petitioner Victoria Matthew, who allegedly was deprived of proper prenatal care because of the military's alleged concealment of the toxicity of the DU to which her father was exposed during his service. That argument lacks merit. In *Stencel Aero*, this Court held that "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." 431 U.S. at 673. Based on that reasoning, the Court held that a third-party indemnity action against the United States arising out of a service-related injury to an active-duty servicemember is "unavailable for essentially the same reasons

that the direct action by [the servicemember] is barred by *Feres*." *Ibid.*

Every court of appeals to consider the question has held that *Feres* bars actions by third parties for injuries that have their genesis in injuries incurred by servicemembers incident to their military service. Those cases include claims of prenatal torts arising out of a servicemember's active-duty exposure to toxic contaminants. See, *e.g.*, *Minns* v. *United States*, 155 F.3d 445 (4th Cir. 1998), cert. denied, 525 U.S. 1106 (1999); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 201 (2d Cir. 1987); *Hinkie* v. *United States*, 715 F.2d 96 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Gaspard* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); *Mondelli* v. *United States*, 711 F.2d 567 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Laswell* v. *Brown*, 683 F.2d 261 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Monaco* v. *United States*, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982). As those courts have recognized, third-party claims are barred by *Feres* because they "would raise the same issues, and require the same scrutiny of military decisions, as an action by" the servicemember himself or herself. *Mondelli*, 711 F.2d at 569. Indeed, "[t]o hold otherwise * * * might open the door for governmental liability to countless generations of claimants having ever diminishing genetic relationship(s) to the person actually injured." *Lombard*, 690 F.2d at 223 (quotation marks omitted).

As both courts below correctly held, Victoria Matthew's claim had its genesis in the injuries her father allegedly sustained while on active duty with the Army in Iraq. Pet. App. 7a-8a, 26a-27a. It was then that her

father was allegedly exposed to DU, which she contends caused her injuries. C.A. App. 25. She does not allege, nor could she, that the Army concealed the toxicity of DU from her prior to her birth; more generally, she fails to identify any allegation of government misconduct that concerns her—as distinct from her father—while her father was on active duty.

Petitioners rely (Pet. 23) on lower court decisions holding that a servicemember's child may bring an FTCA action for negligent acts that are directed solely toward the child. See *Brown* v. *United States*, 462 F.3d 609 (6th Cir. 2006) (child may recover for negligent prenatal care of servicemember mother where mother suffered no injury herself and medical care was directed solely toward the child); *Romero* v. *United States*, 954 F.2d 223, 225 (4th Cir. 1992) (same). Those cases are inapposite, because the allegedly negligent acts in this case were not directed toward Victoria Matthew. Rather, petitioner's claim that Victoria Matthew was injured because of the Army's alleged failure to warn about the dangers of DU exposure flows inexorably from, and is inextricably tied to, the Army's distinctively federal relationship with her father. See *Minns*, 155 F.3d at 450 (noting that "[q]uestioning the military's decision not to warn either the soldiers or their families about the possible risks of inoculation or exposure to pesticides would again create the court-intrusion problem that the *Feres* doctrine aims to avoid"); see also *Persons* v. *United States*, 925 F.2d 292, 296-297 (9th Cir. 1991); *Heilman* v. *United States*, 731 F.2d 1104, 1107-1109 (3d Cir. 1984).

4. Finally, petitioners note (Pet. 14-20) that *Feres* has been criticized by some court of appeals judges and Supreme Court Justices, and they suggest that it should

be reconsidered. This Court expressly reaffirmed *Feres* in *Johnson*, however, noting that it has never deviated from *Feres* in the decades since that case was decided and that Congress, which has been on notice of this Court's decisions in the area, has not amended the FTCA to overturn *Feres*. 481 U.S. at 686. As this Court has recognized, "[c]onsiderations of *stare decisis* have 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 [this Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Twenty-one years after *Johnson*—and with more than 60 years of precedent now supporting *Feres*—this Court should be even more reluctant to re-examine that settled statutory ruling.

Johnson reiterated that the *Feres* doctrine is supported by three important rationales. First, because "the 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." 481 U.S. at 689 (citations and internal quotation marks omitted). Second, "[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." *Id.* at 690 (citations and internal quotation marks omitted). Third, "suits brought by service members against the Government for [service-related] injuries * * * 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.'" *Ibid.* (citations omitted). Those rationales remain valid today.

In the years since this Court decided *Johnson*, the Court has repeatedly denied petitions for certiorari urging that *Feres* be reexamined. See, *e.g.*, *Costo* v. *United States*, 534 U.S. 1078 (2002); *O'Neill* v. *United States*, 525 U.S. 962 (1998); *George* v. *United States*, 522 U.S. 1116 (1998); *Bisel* v. *United States*, 522 U.S. 1049 (1998); *Hayes* v. *United States*, 516 U.S. 814 (1995); *Schoemer* v. *United States*, 516 U.S. 989 (1995); *Forgette* v. *United States*, 513 U.S. 1113 (1995); *Sonnenberg* v. *United States*, 498 U.S. 1067 (1991); see also *McConnell* v. *United States*, 128 S. Ct. 649 (2007). Petitioners suggest no reason why the Court should take a different course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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