No. 06-819

In the Supreme Court of the United States

MARSHALL KENNETH FLOWERS AND ANNA FLOWERS,
PETITIONERS

v.

UNITED STATES ARMY, 25TH INFANTRY DIVISION,
ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

This suit alleged that the Army's investigation of then-Sergeant Major Marshall Flowers for larceny was the product of a conspiracy among his superior officers to press false charges against him. As relevant here, the complaint alleged that subpoenas for bank records that the Army issued in connection with the larceny investigation were a product of the alleged conspiracy and thus constituted a willful violation of the Right to Financial Privacy Act of 1978.

The question presented is whether the court of appeals correctly dismissed petitioners' claims in reliance on *Feres* v. *United States*, 340 U.S. 135 (1950), because those claims are for injuries arising out of military service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is not published in the *Federal Reporter* but is reprinted in 179 Fed. Appx. 986. The opinions of the district court (Pet. App. 81a-97a, 59a-80a) are reported at 289 F. Supp. 2d 1213 and 295 F. Supp. 2d 1130.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2006. A petition for rehearing was denied on September 14, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action arises out of disciplinary proceedings brought by the United States Army against petitioner Marshall Flowers, then a Sergeant Major in the Army. After the Army determined that Flowers had committed larceny, it barred him from re-enlisting in the Army when his term of service expired. In connection with the larceny investigation, the Army issued subpoenas for petitioners' bank records. Pet. App. 63a-64a. As relevant here, the complaint alleged that the subpoenas were issued as part of an Army conspiracy to press false charges against Marshall Flowers, and thus constituted a willful violation of the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq*. The district court held that the claim was barred under *Feres* v. *United States*, 340 U.S. 135 (1950), because it would require the court to investigate the motives of Marshall Flowers' superior officers for conducting the disciplinary proceedings. The court of appeals affirmed. Pet. App. 2a-7a.

1. The factual background is described at length by the district court. See Pet. App. 61a-69a. In December 1997, the Army arrested then-Sergeant Major Marshall Flowers for shoplifting at a military exchange at Schofield Barracks, Hawaii. See *id*. at 63a; C.A. App. Tab 61; Tab 77 at 34; Tab 79 at 4. Footage from video surveillance cameras showed Marshall Flowers taking a television and a hard drive without payment on separate occasions in December 1997. See C.A. App. Tab 60; Tab 61; Tab 77 at 34; Tab 79 at 4. Marshall Flowers was already under investigation at the time because he had on multiple occasions returned duplicate items to Army and Navy exchanges, often without receipts, in exchange

for cash. See Pet. App. 63a; C.A. App. Tab 77 at 37, 51; Tab 78; Tab 80 at 2.

From December 1997 until March 1998, a military Criminal Investigation Division (CID) investigated the conduct of Marshall Flowers and his wife, Anna Flowers. See Pet. App. 63a. During a search of petitioners' residence, the CID found numerous duplicate and unopened electronic, computer, and other high-value items. *Ibid.*; see C.A. App. Tab 77 at 48-49; Tab 80 at 3-7. The CID investigation report determined that there was probable cause to believe that petitioners conspired to steal more than $27,000 worth of merchandise from Army and Navy exchanges. See C.A. App. Tab 80 at 1.

In April 1998, the Army charged Marshall Flowers with 42 counts of larceny under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.* Pet. App. 63a-64a; C.A. App. Tab 81. Ultimately, the Army and Marshall Flowers reached an agreement under which he would retire from the Army and accept non-judicial punishment pursuant to Article 15 of the UCMJ, 10 U.S.C. 815, in lieu of a general court-martial. See Pet. App. 66a; C.A. App. Tab 93, Enclosure 9. A hearing was held pursuant to Article 15, and Marshall Flowers was found to have committed larceny in violation of Article 121 of the UCMJ, 10 U.S.C. 921. See Pet. App. 67a. Marshall Flowers received a formal written reprimand and was required to forfeit approximately $3500. See *ibid.* His appeal was denied. See *id.* at 69a.

Marshall Flowers' term of enlistment was set to expire on May 13, 1999. See Pet. App. 68a; C.A. App. Tab 94. In April 1999, his supervisor recommended a formal bar to re-enlistment in light of the findings in the Article 15 proceeding that Marshall Flowers had com-

mitted larceny. The bar was approved by General James T. Hill. See Pet. App. 68a-69a.

In the course of the larceny investigation, the Army issued subpoenas for petitioners' bank records. Pet. App. 64a; see C.A. App. Tab 87 (subpoena to First Hawaiian Bank); Fort Jackson Federal Credit Union (F.J.) Supp. E.R. 1, Juliano Decl. Exh. B (subpoena to Fort Jackson Federal Credit Union). The court of appeals later determined that the Army lacked subpoena power at that stage of the disciplinary proceedings. See 295 F.3d 966 (9th Cir. 2002). The bank records were not used in the disciplinary proceedings and played no role in the decision to impose the bar to re-enlistment. Pet. App. 65a-66a; see C.A. App. Tab 77 at 72-74, 92-100; Tab 76 at 79, 86.

2. Petitioners filed the present actions under the RFPA. See Pet. App. 61a-62a. Their Second Amended Consolidated Complaint, which was filed through counsel and is the operative complaint for purposes of this appeal, named as defendants the United States Department of the Army; the Secretary of the Army in his official capacity; Major John Ohlweiler; and the two financial institutions that had received Army subpoenas (respondents First Hawaiian Bank and Fort Jackson Federal Credit Union). *Id.* at 6a; see C.A. App. Tab 96; Tab 41; Tab 69. The premise of the complaint was that Marshall Flowers' superior officers conspired to press false larceny charges against him, and that the disciplinary proceedings were themselves "fraudulent." C.A. App. Tab 96, paras. 8-11. The complaint sought punitive damages for allegedly willful and malicious violations of the RFPA. The complaint also alleged violations of petitioners' constitutional right to privacy, as well as various

tort claims arising out of the same disciplinary proceedings.[1]

The district court dismissed the claims against the federal defendants. Pet. App. 81a-97a. The court held that all of the claims were barred under the *Feres* doctrine, which immunizes the United States and members of the military from suits that may "intrude in military affairs, second-guess military decisions, or impair military discipline." *Id.* at 88a (quoting *Zaputil* v. *Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003). The court surveyed a number of contexts in which the principle of *Feres* has been applied to bar suits, including under the Tort Claims Act (FTCA) in *Feres* itself and under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Pet. App. 85a, 86a. The court explained that in this case it likewise could not assess petitioners' contention that the Army willfully violated the RFPA without examining the nature of the Army's disciplinary investigation, the need for the Article 32 proceeding, and the motives and state-of-mind of the investigating authorities in issuing the subpoenas—precisely the type of inquiry foreclosed under *Feres*. See Pet. App. 88a-89a. The court further observed that petitioners' pending discovery requests—seeking to depose a four-star general and other senior military officials regarding the reasons for the Article 32 proceeding—underscored the intrusion into military affairs and military discipline. See *id.* at 89a-90a.[2]

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[1] The United States was substituted for Major Ohlweiler as defendant on petitioners' tort claims, pursuant to 28 U.S.C. 2679(d)(1). See C.A. App. Tab 66.

[2] In a subsequent opinion, the district court entered summary judgment for defendant Fort Jackson Federal Credit Union, and partial summary judgment for defendant First Hawaiian Bank. See Pet. App.

3. A unanimous panel of the Ninth Circuit affirmed in an unpublished, per curiam opinion. Pet. App. 2a-7a. The court held that the claims against the federal defendants were properly dismissed under *Feres* because their adjudication "would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States." *Id.* at 4a. The court explained that the claims thus "implicate the concerns that lie at the heart of the *Feres* doctrine." *Ibid.*[3]

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with a decision of another court of appeals. The petition for a writ of certiorari should be denied.

1. In *Feres* v. *United States*, *supra*, this Court held that "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.'" *United States* v. *Johnson*, 481 U.S. 681, 686 (1987) (quoting *Feres*, 340 U.S. at 146). As this Court has explained, such suits "would involve the judiciary in sensitive military affairs at the expense of military discipline

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59a-80a. The court awarded petitioners $200 in statutory damages against First Hawaiian Bank in light of the determination of the court of appeals that an RFPA violation had occurred, see *id.* at 78a-79a, as well as costs and fees, see *id.* at 9a-14a.

[3] The court of appeals affirmed the district court's ruling on the bank defendants' motion for summary judgment, finding that petitioners' arguments were unsupported by the record. Pet. App. 5a-6a. The court rejected various procedural objections raised by petitioners, including an objection to the government's failure to serve petitioners with letters informing the clerk's office of the dates on which government counsel would be unavailable to present oral argument. *Id.* at 7a.

and effectiveness." *Id.* at 690 (internal quotation marks and citation omitted).

In *Feres* itself, the Court held that members of the military were barred from bringing suit under the FTCA. In *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and *United States* v. *Stanley*, 483 U.S. 669 (1987), the Court held that *Feres* bars *Bivens, supra,* actions against individual officials as well. In *Johnson*, the Court held that *Feres* bars an FTCA claim for service-related injuries even though the suit challenged the conduct of civilian rather than military officials. This Court observed that such suits "have the potential to disrupt military discipline in the broadest sense of the word." 481 U.S. at 691.

The RFPA was enacted in 1978, against the backdrop of the Court's decision in *Feres*. The RFPA therefore is properly construed to incorporate the same limitation on damages actions sounding in tort that arise out of military service, especially where, as in this case, the suit challenges the institution and conduct of disciplinary proceedings. Cf. *Hartman* v. *Moore*, 547 U.S. 250 (2006) (discussing special difficulties with retaliatory prosecution claims even in civilian context).

Indeed, as the court of appeals held, petitioners' claim for willful violation of the RFPA implicates the concerns for military discipline "that lie at the heart of the *Feres* doctrine." Pet. App. 4a. The premise of the complaint was that the disciplinary proceedings and the subpoenas issued pursuant to those proceedings were the product of a conspiracy by high-ranking Army officials to press false larceny charges against then Sergeant Major Flowers. See, *e.g.*, C.A. App. Tab 96, para. 8 ("The agents' fraudulent conduct and obstruction of justice, led them to conspire to create a crime and

charge Plaintiff with a violation of the Uniform Code of Military Justice."); see also Pet. 3-4 ("Through altering of evidence and improper influenced [*sic*], * * * Captain John Ohlweiler * * * had Capt. Joseph Hall * * * prefer charges against SGM Flowers that alleged violation of Article 121 (Larceny)."). Petitioners thus insisted that they be allowed to depose a four-star general and other high-ranking Army officials in Marshall Flowers' chain of command in the hope of developing evidence of an improper motive for their actions. See Pet. App. 89a-90a; see also Pet. 26 (arguing that "the district court unreasonably restricted access to discovery that prohibited the depositions of federal defendant and witnesses, particularly, Capt. John Ohlweiler and former 25th Infantry Division Commander, General James Hill"). As the court of appeals explained, the district court could not adjudicate that claim without conducting precisely the type of inquiry into military disciplinary proceedings that the *Feres* doctrine is intended to prevent. Pet. App. 4a.

2. The decision of the court of appeals is unpublished, and thus does not constitute binding precedent within the Ninth Circuit. See 9th Cir. R. 36-1. Moreover, contrary to petitioners' contention (Pet. 20-25), the decision below does not conflict with a decision of any other court of appeals. The decision was based on the specific facts of this case, that is, the allegation that Army officials had willfully violated the RFPA as part of a military conspiracy to press false disciplinary charges against Marshall Flowers. The court of appeals decisions that petitioners cite, *Duncan* v. *Belcher*, 813 F.2d 1335 (4th Cir. 1987), and *Cummings* v. *Department of the Navy*, 279 F.3d 1051 (D.C. Cir. 2002), did not present similar factual scenarios and are otherwise distinguish-

able. Most notably, neither case involved a challenge to subpoenas issued during a military disciplinary proceeding based on the subjective intent of the military officers involved. In addition, *Cummings* involved the Privacy Act, not the RFPA, and the court's decision rejecting the application of *Feres* in that case turned on specific statutory language in the Privacy Act, not present in the RFPA, that contemplated the particular application of the Act to the military in the manner at issue in that case. *Duncan* did involve a claim under the RFPA, but the court did not address application of *Feres* (although the Army had urged unsuccessfully that the RFPA should not be applied in a manner that would interfere with military discipline or law enforcement generally, see 813 F.3d at 1339). Rather, the issue on appeal, and the focus of the court's opinion, was whether an individual was a "customer" of a financial institution where the individual had obtained a credit card under his personal name but used the card primarily to charge business expenses. The district court had determined that because the individual service member had used the card primarily to charge business travel expenses, the business (in that case an apparent civilian company that covertly provided security and counterintelligence support to United States Army special operations around the world), and not the individual, was the "customer" for purposes of the RFPA. The court of appeals reversed, holding that the individual card holder was a "customer" entitled to protection under the RFPA, regardless of the use of the card for business expenses. That unremarkable holding does not conflict with the court of appeals' application of *Feres* to the markedly different facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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