No. 12-862

In the Supreme Court of the United States

LINDA LANUS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ERIC K. LANUS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
MARLEIGH D. DOVER
LOWELL V. STURGILL JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether this Court should overrule *Feres* v. *United States*, 340 U.S. 135 (1950), and reject its interpretation of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, which has been in place for more than 60 years.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous: Page

In the Supreme Court of the United States

No. 12-862

LINDA LANUS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ERIC K. LANUS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the *Federal Reporter* but is reprinted in 492 Fed. Appx. 66. The order of the district court (Pet. App. 10-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2012. The petition for a writ of certiorari was filed on January 10, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

United States Coast Guard Fireman's Apprentice Eric K. Lanus returned to his assigned housing at Naval Air Station Key West in the early morning hours of February 8, 2009, a Sunday, after spending the previous

evening in Key West. He turned on the stove in the kitchen and went to his bedroom on the apartment's upper floor. Around 5 a.m., heat from the stove ignited a fire that eventually engulfed the ground floor of the apartment. The fire department extinguished the fire an hour later. Serviceman Lanus was found dead in his bedroom. When he died, Serviceman Lanus had been "on liberty," a status that applies to short time periods, often including weekends, when active-duty service members are not on authorized leave from duties but are outside normal working hours. While on liberty, service members may depart from their units and move about as they please until they must return to duty. Serviceman Lanus was scheduled to report for duty that Monday. Pet. App. 2-3.

Petitioner, Serviceman Lanus's mother, sued the United States on behalf of her son's estate under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq*. She alleged that safety deficiencies in the apartment had allowed the fire to spread unnoticed, and she attributed those alleged safety deficiencies to negligent upkeep of the premises by the United States and its failure to warn him of the apartment's conditions. Pet. App. 3. The United States moved to dismiss for lack of subject matter jurisdiction under the FTCA as interpreted in *Feres* v. *United States*, 340 U.S. 135 (1950), which recognized that the FTCA does not waive the sovereign immunity of the United States for claims for a serviceman's injuries that "arise out of or are in the course of activity incident to service," *id.* at 146. The district court concluded that *Feres* controlled and dismissed the complaint. Pet. App. 10-15.

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-9. The court noted that

Feres itself held that the FTCA did not waive sovereign immunity for a claim by "a serviceman on active duty who died while sleeping * * * after a defect in his assigned on-base housing's heating system ignited a fire and the housing's emergency alarm system failed to operate." *Id.* at 5 (citing *Feres*, 340 U.S. at 137). The court noted the similarities between *Feres* and petitioner's case: "Both men were outside their normal working hours but still on active duty when they died. Both men lived in assigned housing on their respective military bases. Both men died while sleeping due to a fire allegedly caused by the negligence of the United States in maintaining the premises." *Ibid.*

The court of appeals rejected petitioner's two proffered distinctions: First, it saw no difference in the fact that Serviceman Lanus was on liberty when he died, inasmuch as he and the service member in *Feres* were both free to engage in non-duty activity when their accidents occurred, and were doing so. *Id.* at 6-7. Second, the court saw no difference in that fact that the service member in *Feres* died in his barracks, while Serviceman Lanus died in housing that from time to time hosted not only service members but also non-military government employees and civilian contractors and agents; the court noted that *Feres* did not specify (and this Court must therefore have been unconcerned with) whether the barracks in question might have been used from time to time for purposes other than housing active-duty service members. *Id.* at 8-9.

ARGUMENT

The court of appeals' decision is correct because it applies *Feres* v. *United States*, 340 U.S. 135 (1950), to facts indistinguishable from those in *Feres* itself, and it does not conflict with any decision of any other court of

appeals. Petitioner asks only that this Court "abolish[]" *Feres*' interpretation of the FTCA. Pet. i. 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). See also *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977) (applying *Feres* to third-party indemnification actions against the United States). Principles of stare decisis therefore strongly counsel against overruling *Feres*, and its reaffirmation in *Johnson*, at this late date. In any event, *Feres* constitutes a correct interpretation of the FTCA. The Court should deny the petition for a writ of certiorari.

1. *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 certiorari urging that *Feres* be overruled or reexamined. See, *e.g.*, *Witt* v. *United States*, 131 S. Ct. 3058 (2011) (No. 10-885); *Matthew* v. *Department of 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);

Hayes v. *United States*, 516 U.S. 814 (1995) (No. 94-1957); *Schoemer* v. *United States*, 516 U.S. 989 (1995) (No. 95-528); *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.

a. "[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.* (citation 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 rejected in *Johnson*, would particularly disserve the goal of maintaining a stable judicial system. Only confusion and instability would result if the Court overruled a "well-established" precedent like *Feres*. See *Stencel Aero Eng'g*, 431 U.S. at 670; *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008).

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*.[1] 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 are further evidence that *Feres* represents a correct interpretation of the FTCA. See *John R. Sand & Gravel Co.*, 552 U.S. at 139; *Watson* v. *United States*, 552

[1] See H.R. 1517, 112th Cong., 1st. Sess. (2011); H.R. 1478, 111th Cong., 1st Sess. (2009); S. 1374, 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. 300aa-1 *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).

U.S. 74, 82-83 (2007); *Shepard* v. *United States*, 544 U.S. 13, 23 (2005).[2]

Overruling a decision may be warranted if it is proven "unworkable" or "inconsistent with the sense of justice or with the social welfare." *Patterson*, 491 U.S. at 173-174 (citation omitted). But because this Court declined to overrule *Feres* more than 25 years ago in *Johnson*, it would take a particularly compelling showing of such flaws for the Court to overrule it now. In fact, *Feres* suffers from no such flaws. 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

---

[2] Congress also has enacted legislation based on the understanding that *Feres* governs tort claims by military personnel. The Act of December 29, 1981, Pub. L. No. 97-124, 95 Stat. 1666, amended the tort claims provisions of the United States Code "to provide the National 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.

fine-tuning any legal doctrine can require from time to time.[3]

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*. On the contrary, *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

---

[3] In *United States* v. *Brown*, 348 U.S. 110 (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 discharge. In *United States* v. *Shearer*, 473 U.S. 52 (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*, 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. 669 (the "incident to service" test governs whether service members may bring *Bivens* claims); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (same); *Stencel Aero Eng'g*, 431 U.S. 666 (*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); *United States* v. *Muniz*, 374 U.S. 150 (1963) (*Feres* not extended to bar FTCA suits by federal prisoners for injuries in federal prison resulting from negligence of government employees).

members. See *Stencel Aero Eng'g*, *supra*. Similarly, lower 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) (Table); *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 that *Feres* should be open to reexamination because, in her view, the courts of appeals apply inconsistent legal tests in determining whether that doctrine bars suit. That is incorrect. 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.*, *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); *Fleming* v. *USPS, Postmaster Gen.*,

186 F.3d 697, 699-700 (6th Cir. 1999); *Richards* v. *United States*, 176 F.3d 652, 655 (3d Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Whitley* v. *United States*, 170 F.3d 1061, 1070-1075 (11th Cir. 1999); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-683 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996); *Schoemer* v. *United States*, 59 F.3d 26, 28 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Stephenson* v. *Stone*, 21 F.3d 159, 162-163 (7th Cir. 1994); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994); *Brown* v. *United States*, 739 F.2d 362, 367-368 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985).

In applying that approach, lower courts often consider matters such as the service member's duty status at the time he or she was injured (see, *e.g.*, *Stewart*, 90 F.3d at 104; *Schoemer*, 59 F.3d at 29; *Brown*, 739 F.2d at 367); the location of the tort (see, *e.g.*, *Whitley*, 170 F.3d at 1070; *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 service member's conduct was subject to military regulations (see, *e.g.*, *Pringle*, 208 F.3d at 1226; *Stephenson*, 21 F.3d at 163); 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).[4]

---

[4] In considering these matters, the courts of appeals have been careful not to expand the *Feres* doctrine to bluntly encompass, as petitioner contends, "all injuries sustained while in service," Pet. 11 (citation omitted)—a contention belied by cases petitioner herself cites. See *Whitley*, *supra* (permitting suit by foreign service members injured while in status equivalent to furlough in off-base traffic accident); *Elliott* v. *United States*, 13 F.3d 1555 (affirming judgment

Petitioner contends that *Tootle* v. *USDB Commandant*, 390 F.3d 1280 (10th Cir. 2004), and *Maas* v. *United States*, 94 F.3d 291 (7th Cir. 1996), depart from that approach by "analyz[ing] * * * the totality of the circumstances," and emphasizes that those cases reject an approach that would consider whether *Feres*'s rationales are directly implicated in the particular case at hand. Pet. 26. Petitioner accurately describes *Tootle* and *Maas*, but her description shows how those courts take the same approach to *Feres* as other courts, asking, on the facts and circumstances of the case, whether the service member's injury arose out of "activity incident to service." 340 U.S. at 146.

Moreover, an approach that refuses to let the FTCA's waiver of sovereign immunity turn on the extent to which the broad rationales underlying *Feres* are applicable in any particular case is consistent with this Court's own instructions in *Johnson* and *Stanley*. 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; see *id.* at 682-683 ("Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside

---

for plaintiff whose service-member spouse died while on leave in military quarters), reh'g granted and op. vacated, 28 F.3d 1076, aff'd on reh'g by equally divided court, 37 F.3d 617 (11th Cir. 1994).

the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime.").[5]

Petitioner also notes one Second Circuit panel's suggestion more than 20 years ago that courts should apply *Feres* by focusing on whether a service member's injury resulted from activity that would be considered within the scope of his or her employment under the respondeat superior law of the jurisdiction in which the accident occurred. See Pet. 26-27 (citing *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995)). But no other circuit has used that approach, and the Second Circuit itself since *Taber* has returned to the totality of the circumstances approach that all the other circuits employ. See, *e.g.*, *Wake*, 89 F.3d at 58-61.

Petitioner also cites *Elliott* v. *United States*, 13 F.3d 1555, reh'g granted and op. vacated, 28 F.3d 1076, aff'd on reh'g by equally divided court, 37 F.3d 617 (11th Cir. 1994), as an example of a circuit that is "unsettled on how to analyze an FTCA claim." Pet. 28. That suggestion is unfounded. In *Elliott*, the district court and the Eleventh Circuit panel, applying this Court's fact-specific "incident to service" test, both held that the FTCA waived sovereign immunity for the plaintiff's claim. See *Elliott* v. *United States*, 877 F. Supp. 1569,

---

[5] To be sure, the courts of appeals sometimes advert to *Feres*'s rationales as confirmation that a particular injury arose from service-related activity, see, *e.g.*, *Wake*, 89 F.3d at 61-62, or where the complaint on its face challenges the military's supervision and control of service members, see, *e.g. Smith* v. *United States*, 196 F.3d 774, 777-778 (7th Cir. 1999), cert. denied, 529 U.S. 1068 (2000), but 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.

1577 (M.D. Ga. 1992); 13 F.3d at 1560-1563. The en banc court's equally divided vote, 37 F.3d at 618, merely reflects that such a test can result in close cases; it does not suggest that the "incident to service" test is itself unworkable. Moreover, the facts that made *Elliott* a close case are distinguishable from the facts here: The service member in *Elliott* was on leave when his injury occurred, unlike petitioner's decedent, who was merely at liberty. Compare *Elliot*, 13 F.3d at 1561, with Pet. App. 8 n.4 (distinguishing *Elliott* on that basis); see *Feres*, 340 U.S. at 146 (noting that one reason why the service member in *Brooks* v. *United States*, 337 U.S. 49 (1949), was allowed to bring an FTCA suit was that he was on furlough (which is equivalent to leave status) when the accident that caused his injury occurred).

Petitioner also contends (Pet. 29) that the decision below conflicts with *Shults* v. *United States*, 421 F.2d 170 (5th Cir. 1969) (per curiam), which held that the FTCA barred a medical malpractice claim on behalf of a service member who was treated in a naval hospital after he was struck by a car while on "liberty" ("a forty-eight hour pass"). *Id.* at 171. In petitioner's view, *Shults* stands for the proposition in the Fifth Circuit that "a service member on liberty is off-duty" for purposes of applying *Feres*, while the decision below stands for the proposition in the Eleventh Circuit that a service member on liberty is on-duty. Pet. 29. As an initial matter, that essentially terminological issue does not warrant this Court's review absent a showing that it results in divergent outcomes, and petitioner makes no such showing.[6] But more fundamentally, there is no

[6] The opinion in *Shults* uses "liberty" and "leave" interchangeably, but they are not synonyms, as both courts below correctly recognized, see Pet. App. 7, 14. "Leave" is an earned, accrued period of

conflict because *Shults*'s reasoning makes clear that the case turned not on the service member's duty or leave status, but on the fact that "the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status." 421 F.2d at 171.

c. Even if there were disagreement in the circuits over the correct application of *Feres* to particular facts, the striking similarity of the facts of this case to the facts of *Feres* itself would make this case an especially unsuitable vehicle for clarifying *Feres*'s application to any unsettled recurring fact pattern. Because there is, as the court of appeals recognized, "no meaningful distinction between the facts [of this case] and the facts before the *Feres* Court," Pet. App. 9, petitioner could prevail only if this Court were to reject *Johnson*'s reaffirmance of *Feres*, and proceed to overrule *Feres*'s interpretation of the FTCA on its very facts. No justification exists for such an extraordinary departure from principles of stare decisis.

2. In any event, *Feres* was correctly decided, and contrary to petitioner's contentions (Pet. 12-24), the reasons this Court identified in *Johnson*, 481 U.S. at

---

non-duty status, and a member of the Coast Guard who is on "leave" can be recalled to duty only in case of "military necessity." U.S. Coast Guard, U.S. Dep't of Homeland Sec., Commandant Instruction M1000.8, Military Assignments and Authorized Absences §§ 2.A.2.a, 2.A.2.b, 2.A.14.b, at 2-2, 2-24 (Sept. 2011), http://www.uscg.mil/directives/cim/1000-1999/CIM_1000_8.pdf. "Liberty," by contrast, is not earned or accrued and "is defined as any authorized absence granted for short periods to provide respite from the working environment"; it "should normally be granted from the end of normal working hours on one day to the commencement of working hours on the next working day." See *id.* §§ 2.B.1.a, 2.B.2.b, at 2-45.

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 (internal quotation marks and citation omitted; brackets in original). As this Court explained in *Feres*, "[S]tates have 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. 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. As this Court noted in *Johnson*, "[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 (citation and internal quotation marks omitted; 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 that arise 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.*

Petitioner argues that this rationale is no longer valid because the Veterans Benefits Act "is no longer a superior, generous, and more efficient, alternative to the FTCA." Pet. 18. 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. Petitioner does not argue that that parallel no longer holds. More fundamentally, this Court in *Feres* and *Johnson* referred to those benefits not because it was persuaded by 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 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 [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." *Johnson*, 481 U.S. at 690 (citation omitted; 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 (footnote omitted).

Notably, 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 of 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 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.* That

concern is not implicated by FTCA suits based on injuries to civilians.

Petitioner argues (Pet. 23) that military discipline is not threatened by a case like this one, in which the service member was not on a military mission when injured. But *Feres* and *Johnson* recognize broader concerns. The FTCA's limits on the waiver of sovereign immunity are designed to protect not only military discipline, but also "military * * * effectiveness" and military decision making. *Johnson*, 481 U.S. at 690, 691. Here, petitioner's claim attacks the construction of military housing. Yet decisions relating to the quartering of soldiers are integral to the military mission. See, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677, 679 (1973); see generally *Jones* v. *United States*, 60 Ct. Cl. 552, 570 (1925) (explaining that military quarters are "an integral part of the organization itself," and are best seen as "units of the military plant, the indispensable facilities for keeping the Army intact and maintaining it as such"). Indeed, the quartering of soldiers is even of constitutional dimension. See U.S. Const. Amend. III.

d. Petitioner also argues (Pet. 9-12) that *Feres*'s interpretation of the FTCA lacks support in the statute's text. But as this 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), (j) and (k)) that also 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. The record supports the court of appeals' conclusion that "[t]he facts of this case are substantively similar to the facts in *Feres*," Pet. App. 9, and petitioner does not contend otherwise. *Feres* involved a service member who died while sleeping in his on-base military-assigned housing while not on leave. That also describes petitioner's decedent, and both *Feres* and this case involve allegations that military negligence in the management of properties caused the accident in question. *Feres* itself therefore controls.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
MARLEIGH D. DOVER
LOWELL V. STURGILL JR.
Attorneys

MAY 2013