No. 18-460

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER DANIEL, individually and as Personal Representative of the Estate of Rebekah Daniel,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY

1. The Government Misstates the Questions Presented by Petitioner; Petitioner does not Ask the Court to Overrule *Feres* in its Entirety.

Petitioner does not ask this Court "to reconsider *Feres* in its entirety." Rsp. 4. Both questions presented are specifically directed to medical malpractice claims now barred by *Feres v. United States*, 340 U.S. 135 (1950). Pet. i. The legal and factual arguments supporting the petition are targeted to medical malpractice cases and the operation of the military health care system.

The government's attack on an argument not made is reflected in its list of cases denying petitions for a writ of certiorari.[1] (Rsp. 5-6). These cases, including those arising out of medical malpractice, ***do*** challenge *Feres* in its entirety. They are not tailored to the unique considerations present in medical malpractice cases with the fundamental changes in the basis for the *Feres* doctrine in the military health care system since 1950.[2] Nor did *United States v. Johnson*, 481 U.S. 681 (1987), on which the Government places heavy reliance, address these arguments.

The Government further obscures the difference between medical malpractice and other cases by emphasizing that the medical malpractice cases of

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[1] "Denials of certiorari never have precedential value." *Barefoot v. Estelle*, 463 U.S. 880, 908 n. 5 (1983).

[2] But this petition does share in common with earlier petitions an attack on the reasoning of the original opinion. And as in earlier responses, the Government does not offer a defense of the reasoning in the 1950 opinion.

Jefferson and *Griggs* were consolidated with *Feres* in 1950. Rsp. 4-5. But that point cuts in favor of petitioners and review by this Court. Pet. 23-25. Because *Jefferson* and *Griggs* are considered binding for medical malpractice cases under vertical stare decisis, lower courts do not have to consider medical malpractice cases in light of subsequent developments in the underlying rationales for *Feres*, and in light of fundamental changes in military health care. As the Ninth Circuit panel pointed out below, only this Court can do that. *Daniel v. United States*, 889 F.3d 978, 982 (9th Cir. 2018). More to the point, because of the unique considerations involved with medical malpractice cases, this Court may overrule the holdings in *Griggs* and *Jefferson* on medical malpractice, without disturbing the *Feres* doctrine as it has developed in this Court.

2. Stare Decisis does not Support the *Feres* Doctrine in Medical Malpractice Cases.

The Government distinguishes the stare decisis discussion in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) on the ground that "the *Feres* rule is purely statutory." Rsp. 11. This response ignores what is fundamentally common to *Wayfair* and this case. In both situations, Congress could have at any time legislatively "correct[ed] any mistake it sees." (Rsp. 6, quoting *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409 (2015). Congress remains free now to alter the judicial rule adopted in W*ayfair*, under its plenary Commerce Clause power, just as Congress will remain free to alter any decision of this Court modifying or overruling *Feres* in medical malpractice cases. Notably, the Government's response does not contest Petitioner's

argument regarding the demise of legislative acquiescence as a tool for interpreting statutes. Pet. 25-28.

Stare decisis considerations here are far removed from those in *Kimble v. Marvel Entertainment*. *Kimble* involved a case at "the intersection of two areas of law: property (patents) and contracts (licensing agreements)" where considerations of "stare decisis are 'at their acme.'" *Id.*, 135 S. Ct. at 2410. In addition, the parties had the tools to contractually structure their business arrangements in order to avoid potential adverse effects of the *Brulotte* precedent.[3] *Id.* at 2408.

But stare decisis is at its nadir when dealing with tort law, especially unintentional torts at issue under the FTCA.[4] *See e.g., State v. Peeler*, 321 Conn. 375, 453 (2016); *Ex parte Vanderwall*, 201 So. 3d 525, 536 n. 6 (Ala. 2015); *Johnson Controls, Inc. v. Employers Ins. of Wausau,* 264 Wis. 2d 60, 130–31 (2003); *Trujillo v. City of Albuquerque*, 125 N.M. 721, 731 (1998); *Falzone v. Busch*, 45 N.J. 559, 569 (1965). Unlike the situation with property or contract rights, military health care providers do not "rely on such precedents" as *Feres* to provide substandard health care. *Kimble,* 135 S. Ct. at 2410. And service members cannot structure their military medical care to avoid the *Feres* rule.

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[3] *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

[4] The FTCA bars claims for intentional torts. 28 U.S.C. §2680(h); *Millbrook v. United States,* 569 U.S. 50, 52 (2013); *United States v. Shearer*, 473 U.S. 52, 57 (1985). The *Feres* doctrine only bars unintentional torts.

The Government's contention that "*Johnson* specifically 'reaffirm[ed] the holding of *Feres*,'" (Rsp. 5) ignores the fact that *Johnson* addressed a single issue, not present here, i.e., whether *Feres* barred service member claims arising out of the negligence of civilian employees of the federal government, an issue on which the circuits were split. *Id.* at 684-85. Justice Scalia's dissent "did not persuade the Court to abandon the *Feres* doctrine" (Rsp. 8), because no one asked the Court to abandon *Feres*.

> We have not been asked by respondent here to overrule *Feres*, and so need not resolve whether considerations of stare decisis should induce us, despite the plain error of the case, to leave bad enough alone.

481 U.S. at 692 (Scalia, J., dissenting).[5]

The Government contests petitioner's argument that the Court abandoned the parallel private liability rationale in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *Rayonier v. United States*, 352 U.S. 315 (1957), by resort to *Johnson*, stating:

> Justice Scalia made the same argument in his *Johnson* dissent, see 481 U.S. at 694-695, and the majority in *Johnson*

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[5] "Mr. Eaton: Let me make one thing perfectly clear. I am not here asking this Court to overrule *Feres*." Transcript Supreme Court of the United States, 85-2039, p. 25 found at https://www.supremecourt.gov/pdfs/transcripts/1986/85-2039_02-24-1987.pdf.

> was not persuaded. Instead, the majority identified 'three broad rationales underlying the *Feres* decision,' which remained good law. *Id.* at 688.

Rsp. 7.

To the contrary, the majority in *Johnson* did not rely upon the parallel private liability rationale underlying *Feres*, *Jefferson* and *Griggs*. The opinion does not mention this discredited rationale. Nor did the majority call into question the dissent's statement that the Court in *Indian Towing* and *Rayonier* "rejected *Feres*' 'parallel private liability' rationale." *Id.* at 694-95. The majority's "three broad rationales" cited by the Government did not include the parallel private liability rationale. *Id.*, at 688-691.

The Government also states that the two rationales other than military discipline - the availability of statutory benefits and the distinctively federal character of the relationship with the government - "are ***supposedly*** no longer controlling." Rsp. 8 (emphasis added). But this Court in *United States v. Shearer*, 473 U.S. 52, 57 & n. 4 (1985), said categorically that these two rationales were "no longer controlling," without the adverb "supposedly" added by the Government. And *Johnson* did not state or hold otherwise. All three rationales were present in *Johnson*. The Court did not indicate that the presence of either benefits or the distinctively federal character was independently sufficient to support *Feres*. It was unquestioned in *Johnson* that the decedent was an

active duty service member on a military mission when he died. Pet. 19.[6]

Military discipline is still the controlling rationale under the *Feres* doctrine. The Government does not dispute that this Court has never addressed medical malpractice in light of the demise of the parallel private rationale and the rise of military discipline as the controlling rationale supporting *Feres*.

The Government argues that budgetary considerations and "the allocation of scarce military resources," satisfies the military discipline rationale, relying on language in *Bowers v. United States*, 904 F.2d 450 (8th Cir. 1990). Rsp. 9. This argument stretches the military discipline rationale beyond anything the Court has recognized.

Bowers expressed a concern that allowing claims by service members would result in the allocation of greater resources to military care. *Id.* at 452. *Bowers'* reasoning misconceives the nature of military health care as it actually operates in non-combat, non-operational settings. The military health care system does not, as it were, maintain two sets of books, one for service members and one for everyone else. There is not one set of medical procedures to be followed for civilians giving birth, and another set of procedures for service members

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[6] The Government's argument (Rsp. 8 n. 2) that *Johnson* clarified *Shearer* on this point because *Johnson* did not actually "plead the military discipline/decision making rationale" is, like the reference to "supposedly," an addition made by the Government, but not found in *Johnson*. The footnote does not contain a specific citation to *Johnson*, because it made no such point.

giving birth. The mission itself is to provide the same health care interchangeably to service members and civilians alike. The cost should be the same. And the government should not be providing negligent health care to either group.

Budgetary considerations are issues for Congress, as the Government's response recognizes. Rsp. 9. A myriad of political, legal and military considerations go into Congressional budget decisions on the military. These are matters for Congress, not the Court. At the end of the day, if Congress disagrees with the Court's ruling, it has the power to change the law.

For the foregoing reasons and for the reasons stated in the petition for a writ of certiorari, petitioner respectfully requests that the petition for a writ of certiorari should be granted.

DATED this 20th day of March, 2019.

Respectfully submitted,

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