No. 18-981

In the Supreme Court of the United States

THERESA JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, does not waive the federal Government's sovereign immunity for injuries that "arise out of or are in the course of activity incident" to a person's active-duty status in the military. *Feres* v. *United States*, 340 U.S. 135, 146 (1950). The question presented is whether to overrule *Feres* and reject its interpretation of the FTCA, which has been in place for more than 60 years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 733 Fed. Appx. 903. The opinion of the district court (Pet. App. 5a-21a) is not published in the Federal Supplement but is available at 2016 WL 3033859.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2018. A petition for rehearing en banc was denied on October 16, 2018 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on January 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 22, 2013, Lieutenant Commander Landon Jones and Chief Warrant Officer 3 Jonathan Gibson tragically died while on active duty and under

orders relating to military operations in the Red Sea. Pet. App. 2a-3a, 8a. The decedents, both fighter pilots, were inside a helicopter when it was hit by waves and forced over the side of the Navy destroyer on which it was docked. *Id.* at 8a.

Petitioners are the families of the two pilots, and they filed this action on behalf of themselves and the pilots' estates. Pet. App. 5a. The complaint alleged that the Navy and its officers acted negligently in operating the destroyer during the storm. C.A. E.R. 182-184. It also claimed that the Navy negligently failed to inform its personnel of design defects with the destroyer. *Id.* at 187-190.

The district court granted a motion to dismiss. Pet. App. 19a-21a.[1] The court explained that the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, does not waive the United States' sovereign immunity for "suits against the military and military personnel for injuries arising out of or in the course of activity 'incident to service.'" Pet. App. 20a (quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950)). And the court determined that petitioners' claims were barred under *Feres*, because the "decedents were on active duty and were performing duties incident to their military service at the time of their deaths." *Ibid.*

2. The court of appeals affirmed. Pet. App. 1a-4a. The court noted that "[t]he sole question on appeal is whether the rule announced in *Feres* * * * applies to this case." *Id.* at 2a. The court held that "[i]t does," because the pilots "were on duty and under orders" at the time of their deaths. *Ibid.*

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[1] The district court dismissed without prejudice the other counts of the complaint, which have been settled and are no longer part of the case. Gov't C.A. Br. 3-4.

ARGUMENT

The court of appeals correctly applied the FTCA, as interpreted by this Court in *Feres* v. *United States*, 340 U.S. 135 (1950), and subsequent cases. Petitioners contend (Pet. i), however, that this Court should grant review to reconsider *Feres* in its entirety. But the unanimous *Feres* Court's interpretation of the FTCA was adopted shortly after the FTCA was enacted, has been the law for more than 60 years, and has been repeatedly reaffirmed by this Court, including in *United States* v. *Johnson*, 481 U.S. 681 (1987). Petitioners provide no sound basis for reconsidering those precedents, and this Court has often denied petitions raising these same issues. This Court should deny this petition as well.

In *Feres*, this Court held that the FTCA does not waive the United States' sovereign immunity for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. Since then, this Court has repeatedly reaffirmed that interpretation of the FTCA. See *United States* v. *Stanley*, 483 U.S. 669 (1987); *Johnson*, *supra*; *United States* v. *Shearer*, 473 U.S. 52 (1985); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977); *United States* v. *Muniz*, 374 U.S. 150 (1963); *United States* v. *Brown*, 348 U.S. 110 (1954).

This case is indistinguishable from *Feres* and its progeny. In *Feres*, this Court consolidated for review three cases, one of which involved a claim that the United States acted negligently in "quartering" an active-duty service member "in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch." 340 U.S. at 136-137. In *Stencel*, the Court held that *Feres* barred an action against the United States

for malfunction of an aircraft emergency ejection system. 431 U.S. at 668, 674. And in *Johnson*, the Court specifically "reaffirm[ed] the holding of *Feres*," 481 U.S. at 692, and held that the widow of a service member could not recover for her husband's on-duty death in a helicopter crash. *Id.* at 682-683.

In the decades since *Johnson*, the Court has repeatedly denied petitions for a writ of certiorari urging that *Feres* be overruled, reexamined, or limited. See, *e.g.*, *Buch* v. *United States*, 138 S. Ct. 746 (2018) (No. 17-744); *Futrell* v. *United States*, 138 S. Ct. 456 (2017) (No. 17-391); *Davidson* v. *United States*, 137 S. Ct. 480 (2016) (No. 16-375); *Ritchie* v. *United States*, 572 U.S. 1100 (2014) (No. 13-893); *Read* v. *United States*, 571 U.S. 1095 (2013) (No. 13-505); *Lanus* v. *United States*, 570 U.S. 932 (2013) (No. 12-862); *Witt* v. *United States*, 564 U.S. 1037 (2011) (No. 10-885); *Matthew* v. *Department of the 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); *Schoemer* v. *United States*, 516 U.S. 989 (1995) (No. 95-528); *Hayes* v. *United States*, 516 U.S. 814 (1995) (No. 94-1957); *Forgette* v. *United States*, 513 U.S. 1113 (1995) (No. 94-985); *Sonnenberg* v. *United States*, 498 U.S. 1067 (1991) (No. 90-539).[2] The Court should deny review here as well.

Although "not an inexorable command," the benefit of stare decisis is that "it promotes the evenhanded,

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[2] A petition for a writ of certiorari is also currently pending in another case raising similar questions. See *Daniel* v. *United States*, No. 18-460 (filed Oct. 11, 2018).

predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991)). Any decision to overrule precedent calls for "'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Ibid.* (quoting *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Stare decisis also has "enhanced force" in statutory interpretation cases because "Congress can correct any mistake it sees." *Ibid.*; see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) ("Congress remains free to alter what we have done.") (citation omitted). That is especially so when the Court is asked to overturn a longstanding precedent where the result would be to expand the waiver of the United States' sovereign immunity to suit for money damages, given the central role of Congress in controlling the public fisc and the United States' amenability to suit. Petitioner has not made the showing necessary to abandon established precedent in these circumstances.

Petitioners argue that supposed changes in the underpinnings of the *Feres* doctrine over the years justify reconsidering the doctrine, but the arguments they raise have already been considered and rejected by this Court. In *Johnson*, this Court expressly "reaffirm[ed] the holding of *Feres*," 481 U.S. at 692, and the rule 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.'" *id.* at 686 (quoting *Feres*, 340 U.S. at 146). The Court noted that it had "never deviated from th[at] characterization of the *Feres* bar," and that Congress had not "changed this

standard in the close to 40 years since it was articulated," even though "Congress 'possesses a ready remedy' to alter a misinterpretation of its intent.'" *Ibid.* (quoting *Feres* 340 U.S. at 138). The Court thus "decline[d] to modify the doctrine at th[at] late date," *id.* at 688, which is now more than 30 years ago.

Petitioners contend (Pet. 8) that the decision in *Feres* relied in part on a rationale that parallel liability of a private person in like circumstances was not available, and that *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957), and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), undermined that portion of the Court's rationale. But Justice Scalia made the same argument in his *Johnson* dissent, see 481 U.S. at 694-695, and the majority in *Johnson* was not persuaded. Instead, the majority identified "three broad rationales underlying the *Feres* decision," which remained good law. *Id.* at 688.[3] Petitioners identify nothing new about their argument that would justify a different result here. See *Kimble*, 135 S. Ct. at 2409 (noting that stare decisis carries enhanced force when a decision interprets a statute, "regardless whether our decision focused only on statutory text or also relied * * * on the polices and purposes animating the law").

Also not new is petitioners' contention (Pet. 8-9) that two other rationales supporting *Feres*—the availability of no-fault statutory benefits for service-related injuries and the distinctively federal character of the relationship between the military and service members, see *Feres*, 340 U.S. at 143-145—are supposedly no longer

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[3] *Indian Towing* also expressly distinguished *Feres* on the ground that "[w]ithout exception, the relationship of military personnel to the Government has been governed exclusively by federal law." 350 U.S. at 69 (quoting *Feres* 340 U.S. at 146).

controlling. See Pet. 16. The Court considered that point in *Johnson* as well, and reaffirmed the continuing validity of both rationales. See 481 U.S. at 689-690.[4] Petitioners argue (Pet. 7-9) that those other rationales do not account for *Brooks* v. *United States*, 337 U.S. 49 (1949), where a service member was allowed to bring an FTCA suit for injuries sustained in an off-base auto accident while he was off-duty. The circumstances of *Brooks* are far removed from those in this case. In any event, that argument was presented in Justice Scalia's *Johnson* dissent, see 481 U.S. at 696-697, but did not persuade the Court to abandon the *Feres* doctrine there. No sound basis exists for revisiting the majority's decision in *Johnson*.

Petitioners contend that the third rationale for *Feres*—avoiding intrusion into military discipline and decision making—does not apply to this case, because this case "does not implicate command decisions." Pet. 14. But the court of appeals correctly rejected that contention on the facts of this case, determining that "[a] trial in this case would necessarily 'involve second-guessing military orders, and would . . . require members of the Armed Services to testify in court as to each

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[4] In *Shearer*, the Court had stated that those two rationales were "no longer controlling." 473 U.S. at 58 n.4. In *Shearer*, however, the complaint on its face challenged the management of the military and "basic choices about the discipline, supervision, and control of a service[member]." *Id.* at 58. In a case like that, the third *Feres* rationale—the need to avoid intrusion on military discipline and decision making—clearly supports the bar to suit, as *Shearer* correctly held. See *id.* at 58-59. *Johnson* subsequently clarified that *Shearer* did not declare the other *Feres* rationales inapplicable where—as in *Johnson* and many other *Feres* cases—the complaint on its face does not itself effectively plead the applicability of *Feres*'s military discipline and decision-making rationale.

other's decisions and actions' about the Navy's continued use" of the Arleigh Burke Class Destroyers that petitioners allege are defectively designed. Pet. App. 4a (quoting *Stencel*, 431 U.S. at 673). Petitioners provide no rebuttal to that conclusion, which is both case-specific and correct. This Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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