No. 21-1410

In the Supreme Court of the United States

CAROL V. CLENDENING, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY J. CLENDENING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
DANIEL TENNY
Attorneys

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

QUESTIONS PRESENTED

1. Whether the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, as interpreted by this Court in *Feres* v. *United States*, 340 U.S. 135 (1950), waives the federal government's immunity for tort claims based on an active-duty service member's exposure to contaminated water on a Marine Corps base.

2. Whether the Federal Tort Claims Act's discretionary function exception, 28 U.S.C. 2680(a), bars petitioner's claims regarding when and how the military should have warned service members about potential exposure to contaminated water.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 21-1410

CAROL V. CLENDENING, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY J. CLENDENING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 19 F.4th 421. The order of the district court (Pet. App. 29-42) is not published in the Federal Supplement but is available at 2020 WL 3404733.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2021. On February 23, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 29, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the United States' sovereign

immunity with respect to certain tort suits, rendering the United States liable in damages "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674; see 28 U.S.C. 1346(b)(1) (the United States may be held liable in tort for the actions or omissions of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

There are various limitations on the FTCA's waiver of sovereign immunity, two of which are relevant here. First, this Court held in *Feres* v. *United States*, 340 U.S. 135 (1950), that the United States "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. Second, the FTCA's discretionary function exception provides that the statute's cause of action and waiver of sovereign immunity "shall not apply to * * * [a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

2. a. Petitioner instituted this action under the FTCA as the personal representative of the estate of her husband, Gary Clendening, who resided at the Camp Lejeune Marine Corps base from May 1970 to December 1971 while serving as a United States Marine Officer in the Judge Advocate Division. Pet. App. 3; see *id.* at 1. Petitioner alleged that Clendening's death was caused by "his exposure to contaminated water and environmental toxins" while stationed at Camp

Lejeune. *Id.* at 2. Petitioner further alleged that the government wrongfully failed to protect Clendening from such exposure, fraudulently concealed and published false notices regarding the contamination, and subsequently failed to warn Clendening of the exposure after his discharge from the Marine Corps. *Id.* at 5.

b. The district court dismissed the complaint for lack of jurisdiction. Pet. App. 29-42. The court observed that petitioner's claims (with the exception of the post-discharge failure-to-warn claim) are based on injuries that allegedly occurred "while Clendening lived and worked at Camp Lejeune as an active duty JAG Officer." *Id.* at 36; see *id.* at 30-33. Those alleged injuries, the court explained, "result[ed] from [Clendening's] daily life at Camp Lejeune, such as drinking and using contaminated water or living in a housing unit geographically near disposed radioactive materials," and are thus "incident to his military service" and barred under *Feres* and its progeny. *Ibid.* The court observed that numerous other courts addressing claims associated with contamination at Camp Lejeune had reached the same conclusion. *Id.* at 36-37 (citing *Foster* v. *Department of the Navy*, No. 19-cv-429, 2020 WL 1542092, at *3 (E.D.N.C. Mar. 31, 2020); *Swanson* v. *United States*, No. 18-cv-2148, 2019 WL 7633157, at *2 (D. Or. Nov. 6, 2019), findings and recommendation adopted, 2020 WL 423384 (D. Or. Jan. 24, 2020); *In re Camp Lejeune N.C. Water Contamination Litig.*, 263 F. Supp. 3d 1318, 1341 (N.D. Ga. 2016), aff'd on other grounds, 774 Fed. Appx. 564 (11th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 2824, and 140 S. Ct. 2825 (2020); *O'Connell* v. *Department of the Navy*, No. 10-cv-10746, 2010 WL 5572928, at *3 (D. Mass. Dec. 21, 2010); *Perez* v. *United States*, No. 09-cv-22201, 2010

WL 11505507, at *3 (S.D. Fla. Mar. 1, 2010); *Gros* v. *United States*, No. 04-cv-4665, 2005 WL 6459834, at *2 (S.D. Tex. Sept. 27, 2005), aff'd, 232 Fed. Appx. 417 (5th Cir. 2007) (per curiam)).

The district court further held that the discretionary function exception barred petitioner's remaining claim that the government had negligently failed to provide adequate warnings to Clendening after his discharge. Pet. App. 42. The court explained that petitioner had not identified any applicable statute or regulation that required the warnings petitioner sought, *id.* at 41, and that several "policy-making decisions control the government's action of whether to warn former inhabitants at Camp Lejeune," *ibid.*

c. The court of appeals affirmed. Pet. App. 1-28. The court explained that petitioner's claims (other than the post-discharge failure-to-warn claim) "fall squarely within *Feres* purview": "[t]he exposure cited as the cause of Clendening's death occurred in the course of his day-to-day, active-duty service while on base at Camp Lejeune." *Id.* at 10. The court further observed that it was "hard to see how [petitioner's] exposure claims are meaningfully different from *Feres* itself," where "an active-duty soldier died when his barracks caught fire." *Ibid.* Here, as there, "death allegedly resulted from unsafe living conditions on base." *Id.* at 11.

As to the failure-to-warn claim, the court of appeals agreed with the district court that petitioner had not identified any "provision that would have required the Government to issue a specific warning to Clendening after his discharge." Pet. App. 20. The court rejected petitioner's reliance on various provisions that related to impurities in the drinking water, noting that even if petitioner were correct that they constrained the

government in some fashion, the relate only to "the drinking water itself; [they say] nothing about the need to provide *warnings*." *Id.* at 21.

The court of appeals observed that "two statutes enacted in the late 2000s which speak to a duty to warn service members of any exposure resulting from their time at Camp Lejeune" were "not referenced in the complaint or [petitioner's] Opening Brief" and in any event "permit[] discretion on the part of the government." Pet. App. 22. The court further explained, consistent with several of its sister circuits, that "the decision to warn is replete with choices and requires ascertaining the need for a warning and its cost, determining the group to be alerted, as well as the content and procedure of such notice, and ultimately, balancing safety with economic concerns." *Id.* at 26 (brackets, citations, and internal quotation marks omitted). The court observed that where, as here, "the Government has provided *some* warning or disclosure, the decision not to provide additional, earlier, or more urgent warnings may more clearly indicate the existence of policy choices than would a failure to provide any warning at all." *Id.* at 26-27.

3. On August 10, 2022, after the petition for certiorari was filed, the President signed into law the Camp Lejeune Justice Act of 2022 (Camp Lejeune Justice Act), Pub. L. No. 177-168, Tit. VIII, § 804, 136 Stat. 1802, which allows certain individuals, including veterans and their legal representatives, to "bring an action in the United States District Court for the Eastern District of North Carolina to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune." § 804(b), 136 Stat. 1802. The statute specifically precludes the government from relying on

certain defenses in such actions, including the FTCA's discretionary function exception. See § 804(f), 136 Stat. 1803.

ARGUMENT

The court of appeals correctly resolved both questions presented, and its decision does not conflict with any decision of this Court or any other court of appeals. Petitioner thus contends that this Court should "abandon[]" *Feres* v. *United States*, 340 U.S. 135 (1950). Pet. 29 (emphasis omitted). But the Court's unanimous decision in *Feres* interpreting the FTCA was adopted shortly after the FTCA was enacted, has been the law for more than 70 years, and has been repeatedly reaffirmed by the Court, including in *United States* v. *Johnson*, 481 U.S. 681 (1987). Petitioner provides no sound basis for reconsidering those precedents, and this Court has consistently denied petitions for writs of certiorari raising the same issue. In addition, because Congress recently enacted legislation specifically addressing claims alleging that former service members were injured by contaminated water at Camp Lejeune, issues arising from suits that do not invoke the recent legislation are not of continuing importance. No further review is warranted.

1. 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). The court of appeals correctly applied this Court's precedents, which should not be reconsidered after having been woven into the statutory fabric for more than 70 years.

a. As the court of appeals explained, this case cannot be meaningfully distinguished from the claims at issue in *Feres* itself. There, this Court concluded that the estate of an active-duty soldier could not pursue claims alleging that the military's negligent quartering in unsafe barracks with a defective heating plant and failure to keep an adequate fire watch caused the soldier's death from a fire in the barracks. *Feres*, 340 U.S. at 137. Petitioner's claim here is premised on harm resulting from contaminated drinking water consumed during Clendening's active-duty service on a Marine Corps base. Thus, "in *Feres*, as in this case, death allegedly resulted from unsafe living conditions on base." Pet. App. 11. Because the service member's claim was precluded in *Feres* itself, it is similarly precluded here.

Petitioner's assertion (Pet. 15, 21, 23-25) that *Feres* should not apply because exposure to contaminants was not related to a particular military mission or function at Camp Lejeune lacks merit. The incident-to-service test "does not inquire whether the discrete injuries to the victim were committed in support of the military mission, but instead whether the asserted injuries stem from the relationship between the plaintiff and the plaintiff's service in the military." *Nacke* v. *United States*, 783 Fed. Appx. 277, 281 (4th Cir. 2019) (per curiam) (citation and internal quotation marks omitted). Just as providing a safe location for members of the military to live was a military function in *Feres* itself, providing drinking water on a Marine Corps base is a necessity of military operation. "Judges are not given

the task of running the Army," *Chappell*, 462 U.S. at 301 (brackets and citation omitted), and service members' claims challenging "management" of the military "strike[] at the core" of *Feres*, *Shearer*, 473 U.S. at 58.

b. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals.

Petitioner's reliance (Pet. 21) on *Brooks* v. *United States*, 337 U.S. 49 (1949), is misplaced. In *Brooks*, which was decided before *Feres*, a service member was allowed to bring an FTCA suit for injuries sustained in an off-base auto accident while he was off-duty. *Id.* at 50-51. The Court in *Feres* distinguished *Brooks* on the ground that the service member's injury there "did not arise out of or in the course of military duty" because he "was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." 340 U.S. at 146. Such claims bear no resemblance to those brought by service members allegedly injured due to military decisionmaking on a military base—as in *Feres* and here.

Petitioner fails to identify any court of appeals that has allowed claims analogous to those here to proceed. To the contrary, as both courts below emphasized, numerous other courts evaluating similar claims specifically arising out of Camp Lejeune have reached the same conclusion as the court below. Pet. App. 11-12, 36-37 (collecting cases). Instead, petitioner cites lower court decisions that, in petitioner's view, "find exceptions to *Feres*." Pet. 19. But none of those decisions conflicts with the decision below; rather, as petitioner acknowledges, each involved circumstances in which the connection to the plaintiff's active-duty military service was far more attenuated than the connection in

this case (and in *Feres* itself). See Pet. 19-21 (describing those decisions as involving injuries "far removed from military command and any military mission").

In *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991), as petitioner explains, "the Ninth Circuit held that the *Feres* doctrine did not bar a military officer's suit against subordinates who broke into her office, stole sensitive personal correspondence, and then distributed it in an effort to damage her reputation, declaring that these actions are 'not incident to service.'" Pet. 20 (quoting *Lutz*, 944 F.2d at 1487) (internal quotation marks omitted). But *Lutz* rested on the premise that "[i]ntentional tortious and unconstitutional acts directed by one servicemember against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*." 944 F.2d at 1487. *Lutz* does not implicate the core holding of *Feres*—that a tort action against the United States is not available to question the *military's* operational and management decisions. And petitioner's claims here—which allege harm from an active-duty service member's consumption of water provided by the government on a Marine Corps base—fall in the heartland of such barred claims.

Similarly, in *Schoenfeld* v. *Quamme*, 492 F.3d 1016 (2007), the Ninth Circuit engaged in a fact-intensive analysis and ultimately concluded that *Feres* did not bar a claim premised on a traffic accident while an off-duty military officer was driving on a road that was open to the public. Again, this case, like *Feres* itself, does not involve personal activities engaged in during leisure time but rather alleges harm that arose directly from military decisions regarding conditions on a

military base directly affecting active-duty service members.

Elliott v. *United States*, 13 F.3d 1555 (11th Cir. 1994), did involve maintenance of housing on a military base. But that decision was vacated by the en banc Eleventh Circuit, Pet. App. 12 n.5 (citing *Elliott* v. *United States*, 28 F.3d 1076 (11th Cir. 1994)), and the judgment of the district court was affirmed without opinion by an equally divided court, *Elliott* v. *United States*, 37 F.3d 617, 618 (11th Cir. 1994). The vacated decision provides no basis for suggesting that this case would come out differently in the Eleventh Circuit and, indeed, a district court in the Eleventh Circuit has dismissed Camp Lejeune claims based on the *Feres* doctrine. *In re Camp Lejeune N.C. Water Contamination Litig.*, 263 F. Supp. 3d 1318, 1341 (N.D. Ga. 2016), aff'd on other grounds, 774 Fed. Appx. 564 (11th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 2824, and 140 S. Ct. 2825 (2020).

c. Petitioner seeks to avoid this Court's interpretation of the FTCA in *Feres*—which has been well established for more than 70 years—by urging the Court to overrule *Feres* in its entirety. Pet. 29-35. The Court should decline that request once again.

i. This Court in *Johnson*—more than 30 years ago—specifically "reaffirm[ed] the holding of *Feres*," 481 U.S. at 692, including its 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). As petitioner acknowledges (Pet. 31-32), 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.*, *Doe* v.

United States, 141 S. Ct. 1498 (2021) (No. 20-559); *Siddiqui* v. *United States*, 140 S. Ct. 2512 (2020) (No. 19-913); *Jones* v. *United States*, 139 S. Ct. 2615 (2019) (No. 18-981); *Daniel* v. *United States*, 139 S. Ct. 1713 (2019) (No. 18-460); *Buch* v. *United States*, 138 S. Ct. 746 (2018) (No. 17-744); *Futrell* v. *United States*, 138 S. Ct. 456 (2017) (No. 17-391); *Ford* v. *Artiga*, 137 S. Ct. 2308 (2017) (No. 16-1338); *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); *Purcell* v. *United States*, 565 U.S. 1261 (2012) (No. 11-929); *Witt* v. *United States*, 564 U.S. 1037 (2011) (No. 10-885); *Zmysly* v. *United States*, 560 U.S. 925 (2010) (No. 09-1108); *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); *Richards* v. *United States*, 528 U.S. 1136 (2000) (No. 99-731); *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).

The Court should deny review here as well. Although "not an inexorable command," stare decisis "promotes the evenhanded, 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,* 576 U.S. 446, 455 (2015) (quoting

Payne v. *Tennessee,* 501 U.S. 808, 827-828 (1991)). Any decision to overrule precedent therefore requires "'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Id.* at 456 (quoting *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Stare decisis 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). And that principle is compelling in a case like this one, where the Court is asked to overturn a longstanding precedent and thereby expand the waiver of the United States' sovereign immunity to suits for money damages, given the central role of Congress in controlling the public fisc and determining the United States' amenability to suit. Petitioner has not met the exceedingly high bar that would be necessary for the Court to abandon its established precedent in these circumstances, 70 years after *Feres* was decided and after the Court's repeated reaffirmation of its interpretation of the FTCA.

Petitioner argues (Pet. 29-35) that *Feres* was not correctly decided as an initial matter, and that supposed changes in the underpinnings of *Feres* over the years justify its reconsideration. But petitioner's arguments have already been considered and rejected by this Court. See pp. 15-16, *infra.* And just as important, this Court in *Johnson* observed, in declining to overrule *Feres*, that, as of that time, Congress had not "changed [the *Feres*] 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." 481 U.S. at 686 (quoting *Feres,* 340 U.S.

at 138). The Court accordingly "decline[d] to modify the doctrine at th[at] late date." *Id.* at 688.

To reconsider *Feres* at this far later date (more than 30 additional years later), based on the same arguments that this Court rejected when it reaffirmed *Feres* in *Johnson*, would be particularly unwarranted. Since *Johnson*, "Congress has spurned multiple opportunities," *Kimble*, 576 U.S. at 456, to enact proposed legislation that would overrule or limit *Feres*.[1] Congress's actions as recently as the National Defense Authorization Act for Fiscal Year 2020 (2020 Defense Act), Pub. L. No. 116-92, 133 Stat. 1198, confirm that it understands the *Feres* rule to be embedded in the FTCA's "statutory scheme, subject (just like the rest) to congressional change." *Kimble*, 576 U.S. at 456. In the course of considering that legislation, the House of Representatives passed an amendment that would have partially repealed the *Feres* rule by allowing service members to recover under the FTCA for certain service-related medical malpractice. See S. 1790, 116th Cong., 1st Sess. § 729 (Sept. 17, 2019) (amendment as passed by House of Representatives). The Senate, however, passed a bill with no similar provision. See H.R. Conf. Rep. No. 333,

---

[1] See, *e.g.*, S. 2451, 116th Cong., 1st Sess. (2019); H.R. 2422, 116th Cong., 1st Sess. (2019); H.R. 6585, 115th Cong., 2d Sess. (2018); H.R. 1517, 112th Cong., 1st Sess. (2011); H.R. 1478, 111th Cong., 2d Sess. (2010); S. 1347, 111th Cong., 1st Sess. (2009); H.R. 6093, 110th Cong., 2d Sess. (2008); H.R. 4603, 109th Cong., 1st Sess. 15-16 (2005) (proposed addition of Section 2161(c)(1)(E) to the Public Health Service Act, 42 U.S.C. 201 *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).

116th Cong., 1st Sess. 1280 (2019). The House of Representatives and Senate ultimately reached a compromise, see *id.* at 1281: Congress declined to amend the FTCA, and instead amended the Military Claims Act, 10 U.S.C. 2731 *et seq.*, to authorize administrative review and payment of certain service members' medical-malpractice claims. See 2020 Defense Act § 731(a)(1), 133 Stat. 1457-1460 (10 U.S.C. 2733a (Supp. I 2019)). This Court should not override Congress's judgment—recently reiterated—that the incident-to-service bar should be retained in the FTCA.

ii. Petitioner contends (Pet. 29-31) that *Feres* is premised on "logical fallacy and lack of legislative written or historical support." But petitioner's arguments are identical to those made by Justice Scalia in his *Johnson* dissent, see 481 U.S. at 693-700, and the majority of the Court was not persuaded. Instead, the majority identified "three broad rationales underlying the *Feres* decision" that remained good law: the distinctively federal character of the relationship between the military and service members, the availability of certain no-fault statutory benefits for service-related injuries, and the avoidance of judicial intrusion into military discipline and decision making. *Id.* at 688; see *id.* at 688-691. Petitioner identifies nothing that would justify a different result here. Statutory stare decisis carries enhanced force "regardless whether [the Court's] decision focused only on statutory text or also relied * * * on the polices and purposes animating the law." *Kimble,* 576 U.S. at 456.

Petitioner further argues (Pet. 16, 18-19, 32-34) that some lower courts have expanded *Feres* beyond its proper scope. In fact, the courts of appeals uniformly understand that an FTCA claim is barred where the

service member's alleged injury arose out of "activity incident to service." *Feres*, 340 U.S. at 146. And the courts of appeals further understand that this inquiry "cannot be reduced to a few bright-line rules" because it 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." *Shearer*, 473 U.S. at 57. Even assuming some court of appeals decisions could be understood as actually expanding *Feres*—rather than merely applying *Feres* to case-specific facts and circumstances—that would not justify overruling the fundamental framework that *Feres* provides. And it would provide no basis for granting a writ of certiorari in this case, which involves a service member's claim of military negligence in managing and supplying a military base on which active-duty soldiers reside, and thus is on all fours with *Feres* itself.

2. Further review of the court of appeals' conclusion that petitioner's failure-to-warn claim is barred by the discretionary function exception is likewise unwarranted.

This Court has set forth a two-part test for determining whether a claim is subject to the discretionary function exception. See *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). Under that test, government action is covered by the exception if (1) it "involves an element of judgment or choice," and (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Ibid.* The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step focuses "on the nature of the actions taken and on whether they

are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991).

The court of appeals faithfully applied this test in holding that petitioner's failure-to-warn claim is covered by the discretionary function exception. First, the court determined that petitioner had "fail[ed] to identify any state, federal, or agency provision that would have required the Government to issue a specific warning to [petitioner] after his discharge," and thus that the government's "'challenged conduct is the product of judgment or choice.'" Pet. App. 20, 25 (citation and internal quotation marks omitted). Second, the court explained that "the Government's decision of how and when to warn implicates policy decisions"—including important public policy, health, safety, practicality, and economic concerns. *Id.* at 27. And here, the court observed, "the Government did provide some warnings," including through published public health assessments, reports, and regulations, further confirming that "its decision to not issue earlier warnings may very well have been due to any of the policy decisions discussed above." *Id.* at 28; see also, *e.g.*, *VA/DOD Response to Certain Military Exposures, Hearing before the Senate Comm. on Veterans' Affairs*, 111th Cong. 1st Sess. 293-294 (2009) (prepared statement of Maj. Gen. Eugene G. Payne, Jr.).

Petitioner now contends that the government was subject to specific mandatory directives to notify individuals who might have been exposed to contaminated drinking water, enacted in defense authorization acts in 2007 and 2008. Pet. 27 (citing John Warner National Defense Authorization Act for Fiscal Year 2007 (Warner Act), Pub. L. No. 109-364, § 318, 120 Stat. 2143-2144; National Defense Authorization Act for

Fiscal Year 2008 (FY 2008 Defense Act), Pub. L. No. 110-181, § 315, 122 Stat. 56-57). The court of appeals correctly rejected that argument. As the court noted, these statutes were "not referenced in the complaint or [petitioner's] Opening Brief." Pet. App. 22. And as the court further explained, *id.* at 22-23, these statutes in any event leave considerable discretion for the government. Far from mandating a specific course of action, they require the government to take "appropriate actions," Warner Act § 318(b)(1), 120 Stat. 2144, and to "make reasonable efforts" to notify individuals potentially exposed to water contamination at Camp Lejeune. FY 2008 Defense Act § 315(a), (b), and (c), 122 Stat. 56-57. The "broad language of the high-level directives at issue here" leaves "numerous decisions involving elements of 'judgment or choice' in the hands of the Government." Pet. App. 22, 24. The court thus correctly concluded that the government's decisions about how and when to provide warnings were covered by the discretionary function exception. See *id.* at 27-28.

Petitioner fails to identify any conflict with any decision of this Court or any other court of appeals. For good reason: No court of appeals has held that any specific and mandatory directive required the government to issue particular warnings relating to Camp Lejeune. And the court of appeals' conclusion that the form and content of warnings more generally is susceptible to policy analysis and thus covered by the discretionary function exception is consistent with the conclusion of other courts to have addressed the subject—particularly where, as here, the government has provided some warning or disclosure. See Pet. App. 25-27 (citing cases). No further review is warranted.

3. As noted, the judgment of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner thus cannot satisfy the usual standards for invoking this Court's discretionary review, particularly because this Court has recently and repeatedly denied petitions for writs of certiorari asking this Court to revisit its decision in *Feres*.

Review is especially unwarranted, however, because Congress recently enacted a new law specifically directed toward persons who claim to have been adversely affected by drinking water at the Camp Lejeune Marine Corps base. See p. 6, *supra* (Camp Lejeune Justice Act). That law addresses both issues raised by the petition for a writ of certiorari in this case. It waives the United States' immunity to suit for money damages on such claims by authorizing veterans who resided at Camp Lejeune from 1953 to 1987, and their legal representatives, to file an action in the Eastern District of North Carolina to seek relief for harm related to exposure to contaminated water. Camp Lejeune Justice Act § 804(b), 136 Stat. 1802. Congress, moreover, has specifically addressed viable defenses under that law, including by precluding reliance on the discretionary function exception as well as otherwise applicable statutes of repose or limitations. § 804(e)-(j), 136 Stat. 1803-1804. Because Congress has spoken directly to the alleged injuries at issue here through the Camp Lejeune Justice Act, this case—which pre-dates the new law and does not invoke it—is a poor candidate for this Court's review. Future cases presenting similar facts will likely be brought under the new law, making the questions presented in this case of limited and rapidly diminishing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
DANIEL TENNY
Attorneys

SEPTEMBER 2022