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,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Nicholas F. Baker
NICK BAKER LAW LLC
320 North Meridian St.
Suite 801
Indianapolis, IN 46204

Melanie L. Bostwick
Thomas M. Bondy
Anne W. Savin
Amari L. Hammonds
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Feres was wrong in 1950 and is wrong now. The doctrine's incoherence becomes more evident with each case that tries to apply it. Even a limited *Feres* doctrine cannot conceivably include the activity giving rise to Captain Clendening's death—drinking water. That activity was not "incident to service" and *Feres*'s rationales are not served by its overbroad application. If *Feres* nonetheless applies to Petitioner's claims, this Court should abandon it. After years arguing that legislative *inactivity* favors denying certiorari in *Feres* cases, the government now argues that recent legislative *activity* favors denying certiorari. But the new law permits a choice of remedies and does nothing to resolve questions about *Feres*. The Court should grant certiorari to check the doctrine's unwarranted expansion or overrule it altogether.

The Fourth Circuit's application of the discretionary function exception to Petitioner's failure-to-warn claim also merits review. Cases analyzing failure-to-warn claims under this exception are in "disarray." *Shansky v. United States*, 164 F.3d 688, 693 (1st Cir. 1999). And contrary to the government's argument, any discretion the relevant statutes afford regarding the manner or content of a government warning does not include the discretion to forego warnings altogether and fraudulently conceal the dangers of Camp Lejeune's water contamination.

ARGUMENT

I. *Feres* Should Be Limited Or Overruled.

The Court should grant certiorari to clarify that *Feres* does not reach torts at most tenuously connected to a servicemember's active-duty *status*. Only if "incident to service" equals "in the military" can *Feres* reach the facts of this case. The Court should reject the baseless overbreadth of a status-incidence test.

The government fails to identify any coherent distinction separating this case from others involving essential services or intentional torts where *Feres* has not applied. BIO 8-10. By nonetheless arguing for the doctrine's application here, the government's brief merely underscores that the Court should alternatively consider overruling *Feres* outright. The doctrine is atextual, wrong, and cannot be saved by stare decisis.

A. *Feres* does not apply here.

1. Captain Clendening's exposure was not incident to service.

At a minimum, the Court should grant certiorari to cabin the scope of *Feres*. By its terms, *Feres* bars recovery only for injuries that "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). Captain Clendening's activity? Drinking water, and using it to cook, bathe, and wash clothes. Complaint ¶¶ 41, ECF No. 1. The lower courts agreed these were "day-to-

day" activities of "daily life." App. 10, 36. There is nothing incident to service or distinctively military about consuming water. Indeed, Camp Lejeune's civilian residents and employees were harmed by the same toxic water.

Nor was Captain Clendening always "performing duties under orders" during his 19-month exposure. *Feres*, 340 U.S. at 146. He had weekends off and took leave; he undertook personal and professional activities. *Id.* (distinguishing plaintiff "on furlough, … under compulsion of no orders or duty"); *see also Taber v. Maine*, 67 F.3d 1029, 1050-51 (2d Cir. 1995) (declining to apply *Feres* to off-duty servicemember). The government is incorrect that "this case … does not involve personal activities engaged in during leisure time." BIO 9. Regular people drink water and bathe even when not working.

2. This case implicates no *Feres* rationale.

The government argues that *Feres* remains "good law" and nothing "justif[ies] a different result here." BIO 14. But this case differs from *Feres*.

Petitioner's suit will not "impair essential military discipline" or "involve the judiciary in sensitive military affairs." *United States v. Shearer*, 473 U.S. 52, 57, 59 (1985). Captain Clendening's exposure 50 years ago implicates no active servicemember and will not affect military discipline. These claims involve historical judgments about "supplying a military base" with water, BIO 15, not "basic choices

about the discipline, supervision, and control of a serviceman" at *Feres*'s "core," *Shearer*, 473 U.S. at 58.

Moreover, these military judgments have already been subjected to public scrutiny. Civilian claims arising from Camp Lejeune's water are not *Feres*-barred, meaning the same decision-making Petitioner challenges is already under judicial review. *Pride v. Murray*, No. 3:19-cv-363, 2022 WL 987335, at *4 (W.D.N.C. Mar. 31, 2022). And the federal government has repeatedly investigated the Camp Lejeune debacle. *See* U.S. Gov't Accountability Off., GAO-07-276, *Defense Health Care: Activities Related to Past Drinking Water Contamination at Marine Corps Base Camp Lejeune* 45-50 (2007).

Nor are "generous statutory disability and death benefits" available to Petitioner. *United States v. Johnson*, 481 U.S. 681, 689 (1987). Surviving spouses may receive VA compensation. 38 U.S.C. § 1310(a). The current monthly benefit is $1,437.66. U.S. Dep't of Veterans Affairs, *2022 VA DIC Rates for Spouses and Dependents*, https://tinyurl.com/3jwatdvd (last updated Aug. 9, 2022). That is less than the monthly pay for the lowest enlisted pay grade ($1,695.00). Def. Fin. & Acct. Serv., *DOD Monthly Basic Pay Table 2022* (2022), https://tinyurl.com/r7fkwupd. Captain Clendening was a successful attorney and member of the American College of Trial Lawyers. Complaint ¶ 89, ECF No. 1. The surviving-spouse benefit does not adequately—let alone "generously"—compensate Petitioner for her husband's lost love, companionship, and earnings.

Finally, the "fortuity of the situs of the alleged negligence" does not affect government liability. *Johnson*, 481 U.S. at 689 (quoting *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977)). *Feres* expressed concern with "notorious" "divergencies" between states' laws, including "different doctrines" like assumption of risk and contributory negligence and the prevalence of "workman's compensation statutes which provide … the sole basis of [employer] liability" for occupational injuries. 340 U.S. at 142-43. This case presents no such concerns. No state bars recovery for torts arising from poisoned drinking water, and concepts like assumption of risk do not apply. And as discussed, Captain Clendening's poisoning was not an occupational injury.

B. If *Feres* applies, the Court should overrule it.

1. *Feres* is an atextual judicial invention.

The FTCA's "literal language" signals Congress's intent not "to leave injuries incident to service where they were" before the Act. *Brooks v. United States*, 337 U.S. 49, 53 (1949). It grants a remedy for torts committed by "any employee of the Government," with no exception for servicemembers. 28 U.S.C. § 1346(b). *Feres* amended Congress's legislation in imposing an atextual bar on servicemembers' recovery for injuries "'incident to the[ir] service,'" 340 U.S. at 138. That was "demonstrably wrong," *Doe v. United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting from denial of certiorari). The Court began its analysis not with the Act's language but by looking for "guiding

materials" like "committee reports" to determine what Congress had "in mind." *Feres*, 340 U.S. at 138. Finding few, the Court reimagined the Act's plain language. *See Johnson*, 481 U.S. at 702 (Scalia, J., dissenting).

In doing so, the Court synthesized disparate rationales largely lacking any textual basis: the absence of parallel private liability, the need for uniformity in government-servicemember relationships, and the availability of alternative compensation. *Feres*, 340 U.S. at 141-45. The Court over time jettisoned some of these rationales, *see Rayonier Inc. v. United States*, 352 U.S. 315, 319-20 (1957) (parallel liability); *Shearer*, 473 U.S. at 58 n.4 (uniformity, compensation), and later resurrected some, *Johnson*, 481 U.S. at 689-91 (uniformity, compensation). The now-predominant military-discipline rationale was not part of *Feres* but emerged nearly a decade after the FTCA's enactment. *United States v. Brown*, 348 U.S. 110, 112 (1954). The doctrine's shifting rationales highlight *Feres*'s original error: The Court created an exception to FTCA liability that is not in the statute and that impermissibly shrinks Congress's sovereign-immunity waiver. Because *Feres* was wrongly decided and has been sustained only by shaky, changing rationales, and because it continues to improperly foreclose government liability in myriad cases, the Court should overrule it.

2. Stare decisis cannot save *Feres*.

The government nonetheless argues stare decisis saves *Feres*. BIO 11-14. But "'precedents are not sacrosanct'" and should be overruled where necessary

and proper. *Ring v. Arizona*, 536 U.S. 584, 608 (2002). The Court should revisit *Feres* here notwithstanding prior denials of certiorari. Troubling *Feres* cases will arise as long as the doctrine's inconsistency, incoherence, and expansion persist—an inevitability given the doctrine has always been unmoored from statutory text.

Feres has met "widespread, almost universal criticism," underscoring the poverty of its reasoning. *Doe*, 141 S. Ct. at 1499 (Thomas, J., dissenting from denial of certiorari) (quoting *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting)). Jurists and commentators have widely acknowledged the doctrine's analytical frailty. *See, e.g.*, *Johnson*, 481 U.S. at 692-703 (Scalia, J., dissenting); *see generally* Jonathan Turley, Pax Militaris*: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1 (2003).

Even as *Feres* has received well-deserved criticism, it has swelled from a service-incidence test to a status-incidence test, seemingly "'encompass[ing], at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military.'" *Pringle v. United States*, 208 F.3d 1220, 1223-24 (10th Cir. 2000). The doctrine has long been used to "reject[] virtually all claims based on injuries suffered while on active-duty status." *Hunt v. United States*, 636 F.2d 580, 587 n.16 (D.C. Cir. 1980). It no longer limits recovery only for "soldier[s] injured while performing duties under orders." *Feres*, 340 U.S. at 146.

Feres has also proved unworkable. Despite the government's claim that "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,'" BIO 14-15, lower courts are "understandably confused about what counts as an injury 'incident' to military service." *Doe*, 141 S. Ct. at 1499 (Thomas, J., dissenting from denial of certiorari). It has been irreconcilably applied to bar and not bar claims concerning servicemembers who drowned while drunk. *Compare Morey v. United States*, 903 F.2d 880, 881 (1st Cir. 1990), *with Dreier v. United States*, 106 F.3d 844, 845-46 (9th Cir. 1996). It has likewise been invoked to bar and not bar claims relating to servicemember deaths during military-sponsored recreational activities. *Compare McConnell v. United States*, 478 F.3d 1092, 1093-94 (9th Cir. 2007), *with Whitley v. United States*, 170 F.3d 1061, 1068-70 (11th Cir. 1999). The amorphous, atextual *Feres* standard has left lower courts struggling for unattainable consistency. The line-drawing is a job for a legislature making difficult policy determinations, not for unelected judges.

Feres has also disrupted other areas of law. Because *Feres* barred claims against the Navy, the Court expanded manufacturers' traditional duty to warn about their products' dangers to require warnings about downstream components in the maritime context. *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 993-94 (2019); *see also Daniel v. United States*, 139 S. Ct. 1713, 1713-14 (2019) (Thomas, J., dissenting from denial of certiorari). And after this Court invoked *Feres* to block *Bivens* actions by servicemembers, *United States v. Stanley*, 483 U.S.

669, 680-84 (1987), the Seventh Circuit denied *Bivens* relief to civilians tortured by U.S. servicemembers because "civilian courts should not interfere with the military." *Vance v. Rumsfeld*, 701 F.3d 193, 199 (7th Cir. 2012).

Finally, *Feres* implicates no private reliance interests. *Lanus v. United States*, 570 U.S. 932, 932 (2013) (Thomas, J., dissenting from denial of certiorari). Having generated more confusion than clarity, there is little to rely on. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018). Servicemembers do not organize their daily lives around *Feres*. The only meaningful—albeit spurious—reliance interest here is the government's. *Id.* (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). Knowing it will not be held liable for torts against servicemembers, the government need not concern itself with deterring wrongful military conduct. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring).

C. The Camp Lejeune Justice Act does not diminish the need for this Court's review.

The government posits this case is a "poor candidate" for review because Congress "spoke[] directly to the alleged injuries at issue here through the Camp Lejeune Justice Act," Pub. L. No. 117-168, tit. VIII, § 804, 136 Stat. 1759, 1802 (2022). BIO 18. But the government took the opposite position contesting earlier *Feres* certiorari petitions, arguing that the absence of legislative activity tacitly endorsed *Feres*: "Since *Johnson*, Congress has spurned multiple opportunities to enact proposed legislation that would

overrule or limit *Feres*," "confirm[ing] that it understands the *Feres* rule to be embedded in the FTCA's statutory scheme." BIO 11-12, *Doe v. United States*, No. 20-559 (2021) (cleaned up); *see also, e.g.*, BIO 7, *Daniel v. United States*, No. 18-460 (2019). Congress has now embraced multiple opportunities to mitigate *Feres*, including the Camp Lejeune Justice Act's toxic tort remedy, and the 2020 National Defense Authorization Act's medical malpractice remedy, § 731, 133 Stat. 1198, 1457. If legislative *inactivity* weighed against certiorari, recent legislative *activity* favors it. The government cannot have it both ways.

In any event, the Camp Lejeune Justice Act does not foreclose Petitioner's action. It only bars a "tort action against the United States for … harm" caused by Camp Lejeune's toxic water *after* a plaintiff has brought an action under the Act. § 804(e)(1), 136 Stat. at 1803. Congress gave plaintiffs a choice of remedies between the Camp Lejeune Justice Act and the FTCA. The Camp Lejeune Justice Act does not bar alternative claims for recovery. *Id.*

The Camp Lejeune Justice Act is also much narrower in scope than the FTCA and will do nothing to resolve the recurring questions about *Feres*. The Act therefore does not lessen the continuing need for this Court's review. *See* Pet. 24. Whatever "[f]uture cases … will likely be brought under the new law," BIO 18, they will not implicate *Feres* because the government cannot invoke *Feres* under the new Act. § 804(b), 136 Stat. at 1802. The Act does not detract from the ongoing importance of fixing *Feres* at the Court's earliest opportunity.

II. Certiorari Is Also Warranted To Consider Whether The Discretionary Function Exception Applies Where The Government Fails To Give A Mandatory Warning.

This court should also grant certiorari to consider the Fourth Circuit's conclusion that the discretionary function exception applies to Petitioner's failure-to-warn claim.

The government suggests that Petitioner forfeited any claim based on the two notification statutes considered by the court because they were "'not referenced in the complaint or [her] Opening Brief.'" BIO 17 (quoting App. 22). But the Fourth Circuit fully considered the application of both the National Defense Authorization Act for FY 2007 (2007 NDAA), Pub. L. No. 109-364, § 318, 120 Stat. 2083, 2143-44 (2006), and for FY 2008 (2008 NDAA), Pub. L. No. 110-181, § 315, 122 Stat. 3, 56-57. *See* App. 22-27. Because the court expressly addressed these statutes, its reasoning is part of the decision below, and the issue is ripe for the Court's consideration.

The government's defense of the Fourth Circuit's analysis is unpersuasive. First, the government suggests choices over whether or how to provide warnings are covered by the discretionary function exception unless a legal provision required it to issue "'a specific warning'" to affected individuals. BIO 16 (quoting App. 20). But the discretionary function exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Even if no course of action is

prescribed, the exception applies "only to conduct that involves the permissible exercise of policy judgment." *Id.* at 539. Here, the 2007 NDAA required the Marine Corps to "take appropriate actions, including the use of national media such as newspapers, television, and the Internet, to notify former Camp Lejeune residents and employees." § 318(b)(1), 120 Stat. at 2144. The 2008 NDAA required the Navy Secretary to make reasonable efforts to "identify and notify directly individuals who were served by [the Camp Lejeune water] system." § 315(b), 122 Stat. at 56-57. Petitioner's complaint alleges that the United States not only failed to provide a warning about toxic exposure for more than a decade after these laws' enactment (and counting), but "fraudulent[ly] conceal[ed] … the severity, scope, and impact of said exposure." App. 2. Those were not "permissible exercise[s] of policy judgment" falling "within the range of choice accorded by" the statutes. *Berkovitz*, 486 U.S. at 537-38.

The government asserts that "some warnings" were provided, and so questions of "how and when" to go further "implicate[] policy decisions." BIO 16 (quoting App. 27-28). But that contention ignores the law's text, which required the Navy to "notify *directly*" individuals exposed to drinking water contamination. 2008 NDAA, § 315(b), 122 Stat. at 56 (emphasis added). The cited government "warnings," which include a survey of former Camp Lejeune employees' health, a report "discussing the contamination of the water at Camp Lejeune," and regulations "[stating] that … eight associated diseases … were presumed to have been caused by … exposure at Camp Lejeune," App. 27-28, do not qualify as the "direct" warnings the statute requires. These actions left affected

individuals to seek out the pertinent government publications and regulations and ascertain their health implications on their own.

Finally, the government criticizes the petition for "fail[ing] to identify any conflict" between the decision here and "the conclusion of other courts." BIO 17 (citing App. 25-27). But the Fourth Circuit recognized that courts do not consistently apply the discretionary function exception to failure-to-warn claims. App. 26 n.14. Other courts of appeals have noted "disarray" in the failure-to-warn cases. *Shansky*, 164 F.3d at 693; *see, e.g.*, *Kim v. United States*, 940 F.3d 484, 491 (9th Cir. 2019) (exception did not apply to mandatory directive that "The park will provide reasonable public information ... about the known potential for risk of exposure in the park to hazard tree conditions."); *Cope v. Scott*, 45 F.3d 445, 452 (D.C. Cir. 1995) (when Park Service already posted some warning signs, the placement of additional or different signs implicated no policy concerns). The question merits this Court's review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Nicholas F. Baker
NICK BAKER LAW LLC
320 North Meridian St.
Suite 801
Indianapolis, IN 46204

Melanie L. Bostwick
Thomas M. Bondy
Anne W. Savin
Amari L. Hammonds
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

September 19, 2022