No. 21-1570

In the Supreme Court of the United States

RANDALL L. SPADE, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that it could not review the Secretary of Labor's determination that petitioner's claims are covered by the exclusive remedies in the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported but is available at 2022 WL 444259. The opinion of the district court (Pet. App. 9a-21a) is reported at 531 F. Supp. 3d 901.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2022. On May 5, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including June 14, 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 Employees' Compensation Act (FECA or Act), 5 U.S.C. 8101 *et seq.*, provides that "[t]he United States shall pay compensation * * * for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty," unless certain exceptions apply. 5 U.S.C. 8102(a). The Act guarantees covered federal employees "immediate, fixed" workers' compensation benefits, "regardless of fault and without need for litigation." *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983). "[B]ut in return they lose the right to sue the Government," *ibid.*, because the Act forecloses other remedies when it applies, 5 U.S.C. 8116(c) ("The liability of the United States or an instrumentality thereof [under the Act] with respect to the injury or death of an employee is exclusive and instead of all other liability * * * under a Federal tort liability statute.").

The Secretary of Labor (Secretary) is authorized to "administer[] and decide all questions arising under" FECA, 5 U.S.C. 8145, and to "prescribe rules and regulations necessary for [the Act's] administration and enforcement," 5 U.S.C. 8149. The Secretary has delegated the authority to administer and enforce the Act to the Director of the Office of Workers' Compensation Programs. 20 C.F.R. 10.1. When the Office issues an initial decision adverse to a claimant, there are three available avenues for administrative review: The claimant can request a hearing before an Office hearing representative, request reconsideration by the Office, or appeal to the Employees' Compensation Appeals Board. 20 C.F.R. 10.600-10.626; see 5 U.S.C. 8124, 8128. As required by statute, the Secretary has created the Board "to

hear and * * * make final decisions on appeals taken from determinations and awards" made by the Office. 5 U.S.C. 8149; see 20 C.F.R. 10.625, 10.626.

Congress provided that those mechanisms for administrative review are exclusive and bar judicial review of the Secretary's decisions under FECA:

> The action of the Secretary or his designee in allowing or denying a payment under this [Act] is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. 8128(b).

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the sovereign immunity of the United States from liability for torts caused by government employees acting within the scope of their employment, "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." 28 U.S.C. 1346(b)(1). Because FECA's remedies for workplace injuries are "exclusive and instead of all other liability of the United States * * * under a Federal tort liability statute," 5 U.S.C. 8116(c), this Court has recognized that "the courts have no jurisdiction over FTCA claims where the Secretary of Labor determines that FECA applies," *Southwest Marine, Inc.* v. *Gizoni,* 502 U.S. 81, 90 (1991).

2. a. Petitioner is a corrections officer at the U.S. Penitentiary in Lewisburg, Pennsylvania, and an employee of the Bureau of Prisons. Pet. App. 2a. In 2011, petitioner learned that inmates at the penitentiary possessed some of his personal information, including his

address and social security number. *Id.* at 2a-3a. Following an investigation, the Bureau of Prisons determined that materials including petitioner's unredacted personal information had mistakenly been provided to an inmate in response to a Freedom of Information Act request. *Id.* at 3a.

b. In December 2015, petitioner filed suit in the United States District Court for the Middle District of Pennsylvania, seeking damages related to the 2011 incident under the FTCA. Pet. App. 3a; see *id.* at 22a-29a. Petitioner alleged that, by releasing his personal informational to an inmate, the government negligently inflicted emotional distress, which had required (and would continue to require) medical treatment. *Id.* at 3a, 27a-28a. In 2018, the court dismissed the complaint for failure to state a claim because petitioner had identified no "Pennsylvania authority creating liability for the negligent handling or disclosure of personal information" that would give rise to an FTCA claim. *Id.* at 3a (citation omitted).

Petitioner appealed. While the appeal was pending, the government determined that petitioner's claims might be covered by FECA. Pet. App. 10a. The court of appeals vacated the district court's order and remanded the case, instructing the district court to "obtain a determination from the Department of Labor * * * as to whether FECA barred" petitioner's claims, and, if it did not, to decide whether a recent Pennsylvania Supreme Court decision indicated that there was a state-law duty that could give rise to petitioner's FTCA claim. *Id.* at 4a (citing *Dittman* v. *UPMC*, 196 A.3d 1036 (Pa. 2018)).

The district court stayed the proceedings in federal court to permit petitioner to file a FECA claim with the Department of Labor. D. Ct. Doc. 27, at 3 (June 21, 2019).

c. In July 2019, petitioner filed a FECA claim based on the 2011 incident, alleging that he sustained an injury or medical condition as a result of his employment as a corrections officer. D. Ct. Doc. 32-1, at 2 (June 17, 2020). Petitioner did not submit any medical evidence in support of his claim. *Ibid.* The Office of Workers' Compensation Programs advised him of that deficiency and provided petitioner with "the opportunity to submit additional evidence." *Id.* at 15. Petitioner again did not "submit any medical evidence containing a medical diagnosis in connection" with the disclosure of his personal information. *Id.* at 16.

In 2020, the Office of Workers' Compensation Programs issued its Notice of Decision. D. Ct. Doc. 32-1, at 15-17. The Office found that petitioner had "established that [he is] a Federal civilian employee who filed a timely claim, and the evidence supports that the injury and/or events occurred as described." *Id.* at 16. But the Office denied the claim because it did "not receive[] any medical evidence in [his] case" and therefore there was "not sufficient" evidence "to establish that a medical condition was diagnosed in connection with the claimed event and/or work factors." *Ibid.*

d. The government moved to dismiss petitioner's FTCA complaint because FECA was petitioner's exclusive remedy and the district court lacked subject matter jurisdiction to review the Secretary's FECA determination. Pet. App. 11a. The court granted that motion. *Id.* at 9a-21a. The court noted that the Office had found that petitioner's "injury was covered by FECA" and then "denied [his] claim for lack of evidence." *Id.* at 16a.

And, because the Secretary's determination that "particular injuries are covered by FECA" is "'absolutely immune from judicial review,'" and because the remedy in FECA is "exclusive," the court found that it "ha[d] no jurisdiction to hear [petitioner's] FTCA claim." *Id.* at 13a, 20a (citation omitted).

3. The court of appeals affirmed. Pet. App. 1a-8a. The court noted that "FECA provides federal employees with a comprehensive" and "exclusive" "remedy for injuries sustained 'in the performance of duty.'" *Id.* at 5a (quoting 5 U.S.C. 8102(a)). The court also noted that "[w]hether a claim is covered by FECA is a determination made by the Secretary," and "[t]he Secretary's coverage determination, as well as the amount of any award, 'is final, and review of any kind by a court is absolutely barred.'" *Ibid.* (citations omitted). The Act therefore "operates as a jurisdictional bar," the court explained: "if 'a claim is covered under FECA, then the federal courts have no subject matter jurisdiction to entertain the action, since the United States has not otherwise waived its sovereign immunity to suit.'" *Id.* at 6a (citation omitted).

The court of appeals determined that, "although the Secretary declined to award [petitioner] compensation, the Secretary nevertheless found that FECA applied to [his] claims" by "reach[ing] the issue of the sufficiency of [his] medical evidence." Pet. App. 7a. The court noted that, "[a]t a minimum," there was "a substantial question of FECA coverage, which would also divest" the federal courts of jurisdiction. *Id.* at 8a. The court therefore concluded that it had no jurisdiction to review the Secretary's determination that FECA provides the exclusive remedy for petitioner's injuries. See *id.* at 2a, 7a-8a.

ARGUMENT

Petitioner renews his contention (Pet. 20-30) that the court of appeals erred in holding that Section 8128(b) bars federal-court review of the Secretary's determination that petitioner's claims are covered by FECA. The court correctly rejected that argument, and its unpublished, nonprecedential decision does not conflict with any decision of this Court or implicate a circuit conflict that warrants this Court's intervention. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly concluded that Section 8128(b) bars federal-court review of the Secretary's determination that petitioner's claims relating to the 2011 incident are covered by FECA.

FECA provides covered federal workers with a comprehensive workers' compensation scheme. *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983). In establishing that scheme, "Congress adopted the principal compromise * * * commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government." *Ibid.* Thus, liability under FECA "is exclusive and instead of all other liability," including liability "under a Federal tort liability statute." 5 U.S.C. 8116(c). The authority to determine whether a federal employee's injury is covered by FECA is vested in the Secretary of Labor, who "decide[s] all questions arising under" the Act, 5 U.S.C. 8145, and whose actions are "final and conclusive * * * with respect to all questions of law and fact" and are "not subject to review * * * by a court," 5 U.S.C. 8128(b)(1) and (2). This Court has ac-

cordingly recognized that Section 8128(b) is "an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage" and that, "[c]onsequently, the courts have no jurisdiction over FTCA claims where *the Secretary* determines that FECA applies." *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 90 (1991) (emphasis added; citation omitted).

The court of appeals correctly applied those statutory provisions in dismissing petitioner's FTCA claim. The court appropriately recognized that, when the Secretary determined that any claims related to the 2011 incident are covered by FECA, he rendered a "final and conclusive" decision that is "not subject to review * * * by a court," 5 U.S.C. 8128(b)(1) and (2). Pet. App. 5a-6a. And because liability under FECA "is exclusive and instead of all other liability," 5 U.S.C. 8116(c), the court correctly determined that petitioner's FTCA claim was barred by FECA. Pet. App. 2a, 6a.

b. Petitioner primarily contends that, because Section 8128(b) provides that "[t]he action of the Secretary * * * *in allowing or denying a payment* under" FECA is final and unreviewable, 5 U.S.C. 8128(b) (emphasis added), FECA's bar on judicial review applies only to the portion of "an order awarding or denying compensation, not to threshold legal questions about FECA's statutory scope," Pet. 23; see Pet. 22-26. But that contention cannot be squared with the plain language of FECA, which provides that the "Secretary of Labor shall * * * decide *all* questions arising under" the Act, 5 U.S.C. 8145 (emphasis added), and that his determinations are "final and conclusive for *all* purposes and with respect to *all* questions of law and fact" and are

unreviewable in federal court, 5 U.S.C. 8128(b)(1) (emphases added); see 5 U.S.C. 8128(b)(2). If Congress had wanted to adopt petitioner's reading of Section 8128(b), it would have used different language. For example, Congress could have provided that "the action of the Secretary in allowing or denying a payment is final and conclusive and not subject to judicial review, except with respect to the Secretary's determination of coverage under the Act," or that such actions are only "final and conclusive and not subject to judicial review with respect to questions of fact."

Applying the text of Section 8128(b) to the Secretary's action here illustrates the point. The Secretary determined that FECA covers any claims by petitioner arising out of the 2011 incident, but then denied petitioner's claim for lack of evidence. The Secretary's decision on petitioner's FECA claim was therefore an "action * * * allowing or denying a payment" under the Act, which must be treated as "final and conclusive for all purposes and with respect to all questions of law and fact" and is "not subject to review" by a federal court. 5 U.S.C. 8128(b). Nothing in the text of Section 8128(b)—or elsewhere in the Act—permits a federal court to second-guess a portion of the Secretary's action (the determination of coverage) while barring review of a different portion of the action (the denial for lack of evidence).

Petitioner's proposed approach also would unravel the Act's "principal compromise," in which employees give up their right to sue in exchange for immediate and fixed benefits. *Lockheed Aircraft Corp.*, 460 U.S. at 194. When evaluating any claim under FECA, the Secretary's threshold legal inquiry is generally whether the

injury falls within the scope of that statute. Under petitioner's proposal, whenever the Secretary determines that a claim is covered by FECA, an employee would have a right to challenge that coverage determination in federal court. That principle would hold true regardless of whether the Secretary goes on to award FECA compensation in any particular case: both employees who receive no FECA compensation (like petitioner) and the tens of thousands of employees who are awarded FECA compensation would be entitled to judicial review of the coverage determination. See Pet. 31 (recognizing that, in 2021, more than 96,400 FECA claims were filed and ongoing compensation was paid to 183,000 individuals). Such litigation not only would be contrary to FECA's clear text, but also would undermine FECA's core purpose of quickly providing benefits to federal employees while disallowing protracted ancillary litigation.

c. Petitioner's remaining arguments likewise lack merit. As an initial matter, petitioner's reliance on the presumption of judicial review (Pet. 21-22) is misplaced. Although this Court has recognized a general "presumption favoring judicial review of administrative action," it has explained that the presumption "may be overcome by specific language" or where "congressional intent to preclude judicial review is 'fairly discernible' in the detail of the legislative scheme." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984); see, *e.g.*, *Thryv, Inc.* v. *Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1374 (2020) (finding that the relevant statutory text "overc[ame] the presumption favoring judicial review"). The text of Section 8128(b) readily qualifies and overcomes the presumption favoring judicial review. See pp. 7-9, *supra*. Indeed, on two occasions, this Court has cited Section 8128(b) as an example of

the "unambiguous and comprehensive" language that Congress uses when it "intends to bar judicial review altogether." *Lindahl* v. *Office of Personnel Mgmt.*, 470 U.S. 768, 779-780 (1985); see *id.* at 780 n.13; see also *Southwest Marine*, 502 U.S. at 90 (similar).

Petitioner's reliance (Pet. 26-27) on *Traynor* v. *Turnage*, 485 U.S. 535 (1988), is unavailing. In *Traynor*, the Court interpreted a statute barring judicial review of Veterans' Administration decisions "on any question of law or fact under any law administered by" that agency. 38 U.S.C. 211(a) (1982). The Court concluded that the statute did not prohibit judicial review of a claim that a Veterans' Administration regulation violated the Rehabilitation Act because the agency did not administer that Act. *Traynor*, 485 U.S. at 543-544. Here, in contrast, petitioner asserts that the Secretary of Labor misconstrued FECA, a statute that the Secretary "administer[s] and decide[s] all questions arising under." 5 U.S.C. 8145. And, as discussed, the text of Section 8128(b)—which is materially different from the statutory text at issue in *Traynor*—clearly precludes judicial review of the Secretary's determination that FECA applies to a particular claim or injury.

The historical context within which Section 8128(b) was enacted also does not support petitioner's reading (Pet. 28) of that provision. That Congress may have been focused on the amount of FECA compensation to which certain employees were entitled when it adopted that provision does not undermine the straightforward reading of Section 8128(b)'s unambiguous and comprehensive text. And petitioner fails to cite anything in the

history of FECA to suggest that Congress did not intend the plain-text reading that the court of appeals adopted here.[1]

2. The decision below is consistent with the decisions of other courts of appeals, which have found that, if the Secretary has determined that an injury or claim is covered by FECA—or, if the Secretary has not yet made a determination but there is a substantial question of FECA coverage—a court is barred from considering an FTCA or other claim arising out of the same incident. See, *e.g.*, *Gill* v. *United States*, 471 F.3d 204, 205-209 (1st Cir. 2006), cert. denied, 552 U.S. 810 (2007); *Mathirampuzha* v. *Potter*, 548 F.3d 70, 81-83 (2d Cir. 2008); *Wallace* v. *United States*, 669 F.2d 947, 951-952 (4th Cir. 1982); *White* v. *United States*, 143 F.3d 232, 233-234 (5th Cir. 1998); *McDaniel* v. *United States*, 970 F.2d 194, 196-198 (6th Cir. 1992) (per curiam); *Fuqua* v. *United States Postal Serv.*, 956 F.3d 961, 964-965 (7th Cir. 2020); *Tippetts* v. *United States*, 308 F.3d 1091, 1094-1095 (10th Cir. 2002); *Noble* v. *United States*, 216 F.3d 1229, 1234-1235 (11th Cir. 2000); *Spinelli* v. *Goss*, 446 F.3d 159, 160-161 (D.C. Cir. 2006). And this Court has declined to review claims similar to the one petitioner raises. See *Gill* v. *United States*, 552 U.S. 810 (2007) (No. 06-1332); *Moe* v. *United States*, 540 U.S. 877 (2003) (No. 03-108); *Figueroa* v. *United States*, 511 U.S. 1030 (1994) (No. 93-972). It should follow the same course here.

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[1] Petitioner briefly discusses (Pet. 29-30) this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court of appeals did not rely on *Chevron* or otherwise apply any form of deference, see Pet. App. 1a-8a, and the government did not invoke *Chevron* or request deference in its briefing in that court, see generally Gov't C.A. Br., No. 21-1865.

Petitioner asserts (Pet. 10-20) that this Court's review is warranted because the Ninth Circuit's decision in *Sheehan* v. *United States*, 896 F.2d 1168 (1990), conflicts with the decisions of other courts of appeals. But the Ninth Circuit has cabined *Sheehan*, limiting the impact of any disagreement between that decision and the decisions of other courts of appeals. In *Sheehan*, the court concluded that the plaintiff's FTCA action for emotional distress caused by workplace sexual harassment—which was "divorced from any claim of physical harm"—was not barred by the Secretary's determination that FECA "extend[s] to such claims" because that determination was erroneous. *Id.* at 1173-1174. But in its later decision in *Figueroa* v. *United States*, 7 F.3d 1405 (1993), cert. denied, 511 U.S. 1030 (1994), the Ninth Circuit read *Sheehan* narrowly:

> *Sheehan* stands only for the proposition that when a plaintiff has failed to allege a colorable claim under FECA as a matter of law, the district court should render a judgment. We do not read *Sheehan* as altering the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary.

Id. at 1408.[2]

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[2] Indeed, in allowing the plaintiff's suit to go forward in *Sheehan*, the court of appeals did not reach an open question of FECA coverage. Rather, it was bound by a previous decision, *Guidry* v. *Durkin*, 834 F.2d 1465 (9th Cir. 1987), in which the court had held, without considering whether it had the authority to do so under 5 U.S.C. 8145, that FECA did not cover emotional injuries entirely separate from physical harm. See *Sheehan*, 896 F.2d at 1174 (citing *Guidry*, 834 F.2d at 1471-1472). Although, as explained above, the court in *Guidry* should not have reached that issue, it appears that the court

Applying that principle, the court in *Figueroa* found that there was a colorable question whether the plaintiffs' FTCA claim for emotional distress was covered by FECA, relying in part on the fact that "the Department of Labor has determined that emotional distress may be considered a disability" covered by the Act when it arises from a worker's emotional reaction to a requirement imposed by the employment. *Ibid.* The court therefore held that "the district court properly dismissed plaintiffs' FTCA claims in order to allow the Secretary to resolve the question of whether or not the claims are covered by FECA." *Ibid.* Ninth Circuit decisions since *Figueroa* have consistently confirmed its limited reading of *Sheehan*.[3]

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was not aware of the jurisdictional bar and was simply considering whether FECA could serve as an alternative basis for jurisdiction where it was not clear whether a state case was correctly removed to federal court. See *Guidry*, 834 F.2d at 1468-1469, 1471-1472. At any rate, the court's holding in *Guidry* that FECA does not extend to claims of emotional distress unrelated to physical harm foreclosed any determination by the *Sheehan* court that there was a "substantial question" whether plaintiff's comparable claims fell within the scope of the Act. As the court explained in *Figueroa*, *Sheehan* does not "alter[] the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary." 7 F.3d at 1408.

[3] See, *e.g.*, *Moe* v. *United States,* 326 F.3d 1065, 1068, 1070 (9th Cir.) (explaining, in a case in which the Secretary had not yet determined whether FECA covered a plaintiff's claims, that a "plaintiff need only allege a colorable claim under FECA for our courts to lose jurisdiction over an FTCA action," and that the plaintiff's FTCA claims for "emotional injuries" were precluded by FECA), cert. denied, 540 U.S. 877 (2003); *Barrett* v. *United States*, 213 F.3d 641, 2000 WL 285378, at *2 (9th Cir. 2000) (Tbl.) ("'An injured federal

The Ninth Circuit's approach in those particular circumstances generally accords with the approach taken by other courts of appeals, which have recognized that, when the Secretary has not yet made a coverage determination, they have "limited" "jurisdiction" "to consider[] whether a 'substantial question' of coverage exists under the FECA." *Fuqua*, 956 F.3d at 964 (citation omitted); see, *e.g.*, *Mathirampuzha*, 548 F.3d at 82 n.13 ("[I]n an action that begins as a[n] FTCA claim in federal court * * * [c]ourts need not refer FTCA claims to the Secretary of Labor unless there is a 'substantial question' of FECA coverage."). The Ninth Circuit applies essentially the same standard in such cases. See *Barrett* v. *United States*, 213 F.3d 641, 2000 WL 285378, at *2 (2000) (Tbl.) (explaining that if "a 'substantial question' exists" or "if a claim is 'colorably under FECA,'" the district court should dismiss the FTCA claim and "'allow the Secretary to resolve the question of whether or not the claims are covered by FECA'") (citations omitted). In light of that agreement, the fact

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employee may not bring an action under the FTCA if there is a substantial question as to whether his injuries are covered under FECA.' * * * [I]f such a 'substantial question' exists, if a claim is 'colorably under FECA,' or if it 'arguably falls under FECA,' the district court should dismiss the FTCA claims 'in order to allow the Secretary to resolve the question of whether or not the claims are covered by FECA.'") (citations omitted); see also *Reilley* v. *United States*, 31 Fed. Appx. 353, 353 (9th Cir. 2002) (The plaintiff "concedes that her claims against the United States are at least arguably within the scope of FECA. Her failure to obtain a ruling from the Secretary that her claims are not within the scope of FECA prior to filing suit under the FTCA constitutes grounds for dismissal."); cf. *Gill*, 471 F.3d at 207 (noting that the Ninth Circuit in *Figueroa* "confined *Sheehan* to cases where the plaintiff's claim 'was not colorable under FECA as a matter of law'") (citation omitted).

that the Ninth Circuit in *Sheehan* found that one particular coverage determination by the Secretary was incorrect does not suggest a broad disagreement among the courts of appeals that merits this Court's review. Indeed, petitioner identifies no precedential decision other than *Sheehan* in which the Ninth Circuit disagreed with a coverage determination made by the Secretary.

3. In any event, this case would be a poor vehicle for resolving the question presented because the Secretary correctly determined that FECA covers emotional-distress injuries like those that petitioner suffered. Petitioner does not argue in this Court that, if the court of appeals were to independently consider whether his emotional-distress damages are covered by FECA, that court would likely reverse the Secretary's determination. The Secretary has consistently determined that emotional-distress injuries are covered by FECA, regardless of whether the employee also suffers a physical injury. See *Gill*, 471 F.3d at 208-209. That accords with FECA's text, which authorizes compensation for "personal injury," 5 U.S.C. 8102(a)—which includes both emotional and physical injuries. See *Black's Law Dictionary* 627 (2d ed. 1910) (defining "[p]ersonal injury" to "includ[e] any injury which is an invasion of personal rights * * * such * * * as * * * mental suffering") (emphasis omitted); see also Br. in Opp. at 9-10, *Gill*, *supra* (No. 06-1332).[4] Petitioner therefore would not be entitled to bring an FTCA claim even if the question presented were resolved in his favor.

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[4] The government has served petitioner with a copy of the brief in opposition in *Gill*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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