No. 18-460

In the Supreme Court of the United States

WALTER DANIEL, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF REBEKAH DANIEL, PETITIONER

v.

UNITED STATES OF AMERICA

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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QUESTIONS 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 questions presented are:

1. Whether the FTCA waives the federal government's immunity for injuries that arise out of or are in the course of activity incident to a person's active-duty status, and involve medical malpractice.

2. 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. A1-A8) is reported at 889 F.3d 978. The opinion of the district court (Pet. App. A10-A25) is not published in the Federal Supplement but is available at 2016 WL 258619.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2018. A petition for rehearing en banc was denied on July 16, 2018. The petition for a writ of certiorari was filed on October 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 9, 2014, Lt. Rebekah Daniel was admitted to Naval Hospital Bremerton (NHB), a military hospital located at Naval Station Bremerton, Washington,

to give birth to a daughter. Pet. App. A3. At the time, Lt. Daniel was a commissioned officer on active duty in the United States Navy. *Ibid.* After her daughter was born, Lt. Daniel tragically suffered "postpartum hemorrhaging and died approximately four hours after delivery." *Ibid.*

Because Lt. Daniel was on active duty at the time of her death, her heirs received (and continue to receive) numerous statutory benefits as a result of her death, including a lump sum death payment, a Survivor Benefit Plan Annuity, full payments from the Servicemember's Group Life Insurance, Veterans Affairs educational benefits, and Dependency and Indemnity Compensation. See C.A. S.E.R. 6 ¶ 15; 38 U.S.C. 1310; 32 C.F.R. 716.1; 38 C.F.R. 3.5, 3.10.

2. Petitioner is Lt. Daniel's husband. He filed this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, against the United States on behalf of himself and Lt. Daniel's estate. Pet. App. A12. The complaint alleges that Lt. Daniel died because the health care team failed to follow the established standard of care for postpartum hemorrhage. See *ibid.*

The district court dismissed the complaint for lack of jurisdiction. Pet. App. A10-A25. The court explained that the FTCA does not waive the sovereign immunity of the United States for claims for injuries to a military service member that "arise out of or are in the course of activity incident to service." *Id.* at A16 (quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950)); see also *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977) (holding that the FTCA does not permit derivative actions by relatives and other similar civilian plaintiffs who seek to recover for injuries that arise out of a service member's military service). The court of

appeals determined that, in applying *Feres* and its progeny, the Ninth Circuit had held that the FTCA barred "[s]imilar medical malpractice claims arising out of injury to active duty service members from care received at a military hospital." Pet. App. A18; see *Persons* v. *United States*, 925 F.2d 292 (9th Cir. 1991); *Atkinson* v. *United States*, 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988); *Veillette* v. *United States*, 615 F.2d 505 (9th Cir. 1980).

The court of appeals affirmed. Pet. App. A1-A8. The court noted that its cases had "consistently applied the *Feres* doctrine to bar medical malpractice claims predicated on treatment provided at military hospitals to active duty service members." *Id.* at A5 & n.2. The court found its 1987 decision in *Atkinson* in particular to be controlling, as *Atkinson* "involved medical treatment of an active duty servicewoman at a domestic military hospital for a condition of pregnancy unrelated to military service," and had held that claims arising from such treatment could not be brought under the FTCA. *Id.* at A7.

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. Petitioner contends (Pet. i) that the Court should grant certiorari to overturn *Feres* as to medical malpractice claims where the medical treatment "did not involve any military exigencies, decisions, or considerations, and where the service member was not engaged in military duty or a military mission at the time of the injury or death." But in *Feres* itself, the Court held that the FTCA did not waive the United States' sovereign immunity against medical malpractice claims under similar cir-

cumstances. See 340 U.S. at 137. Petitioner also contends (Pet. i) that this Court should grant review to reconsider *Feres* in its entirety. But the unanimous *Feres* Court's interpretation of the FTCA—including its prohibition of medical malpractice claims by or on behalf of service members—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). Petitioner provides no sound basis for reconsidering those precedents or their application to medical malpractice claims, and this Court has often denied petitions raising these same issues. This Court should deny this petition as well.

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).

Notably, in *Feres*, this Court consolidated for review three cases, two of which (*Jefferson* v. *United States*, 77 F. Supp. 706 (D. Md. 1948), aff'd, 178 F.2d 518 (4th Cir. 1949), and *Griggs* v. *United States*, 178 F.2d 1 (10th Cir. 1949)), involved claims of injury to active-duty service members caused by alleged medical malpractice: In *Jefferson*, the service member alleged that a towel was negligently left in his stomach by an army surgeon during abdominal surgery. *Feres*, 340 U.S. at 137. And

in *Griggs*, the surviving spouse of a service member "alleged that while on active duty he met death because of negligent and unskillful medical treatment by army surgeons." *Ibid.* Neither claim involved medical treatment provided overseas or for injuries to service members that arose out of combatant activities. See *ibid.*; *Jefferson*, 77 F. Supp. at 708; *Griggs*, 178 F.2d at 2. This case is accordingly indistinguishable from *Feres* itself. And in 1989, the Court in *Johnson* 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).

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.*, *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); *Lanus* v. *United States*, 570 U.S. 932 (2013) (No. 12-862); *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); *Sonnenberg* v. *United States*, 498 U.S. 1067 (1991) (No. 90-539). And of particular relevance here, the Court has repeatedly denied petitions requesting that *Feres* be declared inapplicable to medical malpractice suits or overruled to reach that result. See *Buch* v. *United States*, 138 S. Ct. 746 (2018) (No. 17-744); *Read* v. *United States*, 571 U.S. 1095 (2013) (No. 13-505); *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); *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). The Court should deny review here as well.

Although "not an inexorable command," the benefit of stare decisis is that "it 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*, 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 a 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."). 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.

Petitioner argues that supposed changes in the underpinnings of the *Feres* doctrine over the years justify reconsidering the doctrine, both as applied to medical-

malpractice claims and more broadly. But the arguments petitioner raises 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 30 years ago.

In particular, petitioner contends (Pet. 3) that the decision in *Feres* relied in part on a rationale that parallel private liability was not available, and that *Rayonier* v. *United States*, 352 U.S. 315 (1957), and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), had 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.[1] Petitioner identifies nothing new about his argument that would justify a different result here. See *Kimble*, 135 S. Ct. at 2409 (noting that stare decisis carries enhanced force when a

[1] *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).

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 petitioner's contention (Pet. 16) 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 government and service members, see *Feres*, 340 U.S. at 143-145—are supposedly no longer controlling. The Court considered that point in *Johnson* as well, and reaffirmed the continuing validity of both rationales. See 481 U.S. at 689-690.[2] Petitioner argues (Pet. 9-11) that these 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. Again, 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*.

Petitioner contends that the third rationale for *Feres*—avoiding intrusion into military discipline and

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[2] 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* clarifies that *Shearer* did not declare the other *Feres* rationales inapplicable where—as in *Johnson* and most other *Feres* cases—the complaint on its face does not itself effectively plead the applicability of *Feres*'s military discipline/decision making rationale.

decision making—does not apply to medical malpractice cases, and that this Court has never expressly so held. See Pet. 19. But as noted, *Feres* itself involved two medical malpractice claims. See 340 U.S. at 137. And in any event, petitioner's argument is misplaced, because application of the doctrine is supposed by all three *Feres* factors. For example, allowing medical malpractice actions by service members would intrude on military decisions regarding the allocation of scarce resources regarding a core military function—providing medical treatment to soldiers. See *Schoemer* v. *United States*, 59 F.3d 26, 30 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Bowers* v. *United States*, 904 F.2d 450, 452 (8th Cir. 1990). Indeed, that kind of substantial expansion of the United States' liability under the FTCA could even eventually require Congress, for budgetary reasons, to reconsider or limit the provision of medical services to retirees and dependents, which also serves core military purposes. See pp. 10-11, *infra* (discussing subsequent benefit statutes).

In addition, the FTCA prohibits claims that arise out of combatant activity as well as any claim arising in a foreign country. See 28 U.S.C. 2680(j) and (k). To allow medical malpractice actions by service members who are injured stateside and not as a result of combat, but not for service members injured overseas or in combat, could create morale problems in the military, which relies on the uniform system of statutory remedies Congress has provided to foster trust and goodwill among all who serve, and especially those who are deployed overseas and into combat situations. See Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 Am. U. L. Rev. 393, 453 (2010); see also *Johnson*, 481 U.S. at 691 ("[T]o accomplish its mission the military

must foster instinctive obedience, unity, commitment, and esprit de corps.") (brackets and citation omitted).

Feres's first and second rationales also apply to medical malpractice suits by active-duty service members. Because military service can involve frequent deployments across the United States, its territories, and locations around the world, "it 'makes no sense to permit the fortuity of the situs of the alleged negligence to effect the liability of the Government to [the] service-[member].'" *Johnson*, 481 U.S. at 689 (quoting *Stencel Aero*, 431 U.S. at 672). Moreover, service members are entitled to generous, no-fault statutory benefits for injuries sustained as a result of medical services provided by the military, and one would have expected Congress to adjust those benefits to the tort recovery available in an FTCA suit if it had intended the FTCA to allow such suits. See *id.* at 689-690 & n.10. Congress did not do so.

Petitioner also contends that *Feres*'s applicability to medical malpractice actions should be reexamined because, in the years since *Feres* was decided, Congress has expanded the military health care system to provide more extensive and certain coverage for retirees and dependents. See Pet. 28-34. But if anything, the changes to the military health care system to which petitioner refers provide further reason not to disturb *Feres* at this late date. At the time Congress enacted the Military Dependents Act, Pub. L. No. 84-569, 70 Stat. 250, and the Military Medical Benefits Amendments of 1966, Pub. L. No. 89-614, 80 Stat. 862, *Feres* had already established that service members cannot bring FTCA suits arising out of medical malpractice. See *Feres*, 340 U.S. at 137. That aspect of *Feres* limited the government's exposure to tort damages arising out of its

health care system, and thus freed up funds to contribute to the expansion of that system to retirees and dependents. Abandoning *Feres* along the lines petitioner requests would upset the assumptions upon which Congress authorized that expansion.

Petitioner's reliance on *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018), is also misplaced. In *Wayfair*, this Court ruled that principles of stare decisis did not preclude abandoning a prior decision which held that, under the Commerce Clause, an out-of-state seller's physical presence in the taxing state is necessary for that state to require the seller to collect and remit its sales tax. See *id.* at 2096-2100. In so ruling, the Court concluded that "the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by" the relevant precedent, *Quill* v. *North Dakota*, 504 U.S. 298 (1992), "must give way to the 'far-reaching systemic and structural changes in the economy,'" which had rendered *Quill*'s physical-presence rule obsolete and damaging to "federalism and free markets." *Wayfair*, 138 S. Ct. at 2096-2097 (citation omitted). But the *Feres* rule is purely statutory; there have not been "'far-reaching systemic and structural changes'" in the basic relationship between the United States military and active-duty service members; and the *Feres* rule does not damage federalism or free markets. *Ibid.* Indeed, Congress's expansion of the military health care system for retirees and dependents provides further support for the continued vitality of *Feres* in claims involving medical-malpractice injuries to an active duty service member. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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