No. 24-1078

In The
Supreme Court of the United States

KARI BECK, PERSONAL REPRESENTATIVE OF THE ESTATE OF CAMERON GAYLE BECK, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

Petitioners' case for the death of Cameron Beck caused by a governmental employee's negligent driving is the prototype of claims Congress had in mind in enacting the FTCA. This Court recognized that in upholding the servicemembers' claims in *Brooks*.

The Government responds with faux distinctions of *Brooks* and embracement of the Eighth Circuit's extreme interpretation of the *Feres* doctrine that effectively bars any tort claims of active-duty servicemembers, even when the servicemember was not engaged in any military activity. In contrast, other circuits require looking at what activity caused the injury to determine whether it was incident to service. Review is needed to resolve this conflict and clarify the factors that determine how *Feres* applies.

But if *Feres* really does allow courts to bar tort claims of servicemembers that have nothing to do with their military service except that they are on active duty when injured, then the *Feres* doctrine is in desperate need of overhauling or for this Court to finally end *Feres*'s unjustified discrimination against servicemembers.

I. The Eighth Circuit's Incident to Service Test Conflicts with this Court's Decisions.

The "Feres 'incident to service' test requires a case-by-case assessment of the totality of the circumstances" and "'cannot be reduced to a few bright-line rules.'" BIO.5 (citing *United States v. Shearer*, 473 U.S. 52, 57 (1985)). But the Eighth

Circuit does not follow a "fact-sensitive approach." BIO.5. Instead, it looked only to whether the servicemember was on active duty and on a military base to find the claim is barred. App.5. The Government embraces but-for causation, arguing "[o]nly because of SSgt. Beck's military status was he traveling within Whiteman AFM to his home on the base." BIO.5-6. None of this Court's cases allow for "incident to service" analysis be to be reduced to a question of active-duty status.

The decision below and Government's arguments are inconsistent with *Feres* itself. *Feres* did not bar all tort claims for active-duty servicemembers, but only those claims "where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). The Government concedes that two of the three consolidated cases in *Feres* involved servicemembers injured because of military orders. BIO.6. The Court's opinion described the *Jefferson* case as involving a servicemember who, "while in the Army, was required to undergo an abdominal operation." *Feres*, 340 U.S. at 137. That understanding allowed the Court to distinguish *Brooks*, in which the servicemember was "under compulsion of no orders or duty and on no military mission." *Id.* at 146 (servicemember cannot be denied recovery "solely because they were in the Army"). Like *Brooks*, Beck was not acting under orders or military duty when he was killed.

Shearer and *Johnson* confirm that *Feres* only applies to injuries caused by military duties or orders. In *Shearer*, the Court rejected reliance on the victim's duty status and location of death, stating that was "not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline." *Shearer*, 473 U.S. at 57 (citations omitted). *Shearer*, at its core, involved "a decision of command." *Id.* at 59. In no way does a vehicle accident as here—where the Government *prosecuted* the driver for criminal negligence—implicate any military decisions or military discipline.

In *Johnson*, the claim was barred because the servicemember's "injury arose directly out of [a Coast Guard] rescue mission," which was undisputedly "an activity incident to his military service." *United States v. Johnson*, 481 U.S. 681, 691-92 (1987). The Government ignores *Johnson's* actual holding and instead points to a footnote suggesting it approved applying *Feres* to "service members injured while engaging in voluntary activities during off-duty hours." BIO.7. Not so. It concerned whether *Feres* applied when the tortfeasor was a civilian. *Johnson*, 481 U.S. at 687-88.

When the Government finally turns to *Brooks v. United States*, 337 U.S. 49 (1949), BIO.8, it struggles to explain how the Eighth Circuit's approach to "incident to service" is consistent with that decision.

The Government starts by dismissing *Brooks* as "predat[ing]" and being "distinguished" by *Feres*.

BIO.8. But *Brooks* has never been overruled. *Johnson*, 481 U.S. at 698 (Scalia, J., dissenting); *United States v. Brown*, 348 U.S. 110, 112 (1954) ("The *Feres* decision did not disapprove of the *Brooks* case."). Furthermore, the Government's treatment of *Brooks* as being undermined by *Feres* illustrates confusion that exists. *Compare Major v. United States*, 835 F.2d 641, 645 n.2 (6th Cir. 1989) ("[I]t is obvious that, contrary to the Court['s] assertion in *Brooks*, it has now been 'persuaded' that the phrase 'any claim' contained in the FTCA *does* mean 'any claim but that of servicemen.'") *and Clendening v. United States*, 19 F.4th 421, 430 (4th Cir. 2021) ("[T]he Court in *Feres* cabined *Brooks*.") *with Taber v. Maine*, 67 F.3d 1029, 1039 (2d. Cir. 1995) ("But *Feres* neither overruled *Brooks*, nor limited *Brooks* to its immediate facts.") *and Whitley v. United States*, 170 F.3d 1061, 1068-1075 (11th Cir. 1999) (relying on *Brooks*). This Court has not addressed the dividing line between *Brooks* and *Feres*.

In the end, the only distinction the Government can draw between this case and *Brooks* is that the *Brooks* servicemembers were "on furlough" and off base at the time they were hit by a civilian government employee. BIO.9. But those distinctions are without a difference.

The Government is wrong that "on furlough" as in *Brooks* is different than "off duty" as here. BIO.9. The regulations that actually govern servicemembers make clear that a servicemember can broadly be ordered to return from leave by their commanders for

"military necessity." *See* Department of the Air Force Instruction 36-3003, *Military Leave Program*, at 2.7.3 (August, 7, 2024) ("Unit commanders may recall members from leave for military necessity or in the best interest of the Air Force."); Army Regulation 600-8-10, *Leaves and Passes*, at 12-16 (June 3, 2020) ("Soldiers may be recalled to duty from a leave status due to reasons of military necessity," which is initiated "by contacting the Soldier by telephone … and advising the Soldier to return to the duty station"). And the Uniform Code of Military Justice, which criminalizes disobedience of a lawful order, applies at all times and in all places, regardless of furlough or leave status. 10 U.S.C. §§801, 805, 892; *Larrabee v. Del Toro*, 45 F.4th 81, 94-96 (D.C. Cir. 2022).

The upshot of the Government's argument is illogical: Petitioners could have a claim if Beck had been killed by the negligent government employee while on his way to lunch on leave but the claim is barred by *Feres* because he was killed while on his way to lunch on a workday.[1]

The Court has also rejected the Government's on-base, off-base distinction. In *Brown*, the claim could proceed even though the injury occurred in a

[1] The Government's "furlough" distinction is also inconsistent with Eighth Circuit precedent. *See Chambers v. United States*, 357 F.2d 224, 229 (8th Cir. 1966) ("Even though [the servicemember] might have had a furlough order in his pocket or might have been engaged in [the activity] for recreation, his claim would be subject to the *Feres* rule and no recovery permitted.").

Veterans Administration Hospital. 348 U.S. at 110. In *Shearer*, the claim was barred even though the injury occurred off-base. 473 U.S. at 57. What matters is "whether the suit requires the civilian court to second-guess military decisions." *Id.*

None of the Court's rationales for *Feres* support claims like Petitioners' being barred. To start, the Government acknowledges confusion by pointing to "all three" rationales for *Feres*, BIO.12, even though this Court long ago abandoned the first two of them. *Shearer*, 473 U.S. at 58 n.4; *see* BIO.12 n.1. That also shows the need for clarification of the governing standards. *See Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 822 (10th Cir. 2015) (noting the "confusion and lack of uniform standards" on factors governing *Feres*); *Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013) ("the Supreme Court has offered inconsistent guidance about how *Feres* should be applied"); *Taber*, 67 F.3d at 1032 ("that singular tangle of seemingly inconsistent rulings and rationales known as the *Feres* doctrine"). Even considering all three rationales, none apply.

The Government argues that its liability for Beck's accident should not be governed by state law. BIO.12. Yet it already conceded state law is appropriate here because it convicted the driver under the Assimilated Crimes Act, 18 U.S.C. §13, of criminal negligence in violation of Missouri law. CA8.App.40-42. Likewise, the Government applies state law to servicemembers under the Assimilated Crimes Act.

See 10 U.S.C. §134; Manual for Courts-Martial Part IV-140 § 91.

The Government points to the "various forms of compensation and benefits in light of SSgt. Beck's military status." BIO.13. That compensation applies regardless of whether a servicemember's death was "incident to service." *See Brooks*, 337 U.S. at 53-54; *Brown*, 348 U.S. at 112. It cannot therefore be a basis for determining whether *Feres* applies to any particular case, including here.

Nothing about Petitioners' suit would "require courts to scrutinize how the armed forces ensure safety on their bases." BIO.13. The Government has already agreed that Mitchell's negligence caused Beck's death. CA8.App.41-42. Barring servicemembers from bringing FTCA claims for injuries on base does not avoid judicial scrutiny into base safety because civilians still can—and do—bring such claims. *See, e.g. Bolt v. United States*, 509 F.3d 1028 (9th Cir. 2007); *Toney v. U.S. Dep't of Army*, 207 F. App'x 465 (5th Cir. 2006); *Hammock v. United States*, 78 F. App'x 97 (10th Cir. 2003); *Kelly v. United States*, 809 F. Supp. 2d 429 (E.D.N.C. 2011). And "servicemen routinely sue their government and bring military decision-making and decision-makers into court' seeking injunctive relief." *Carter v. United States*, 145 S. Ct. 519, 523 (2025) (Thomas, J., dissenting); *see also* Pet.23 (citing cases).

II. The Eighth Circuit's Holding Entrenches a Circuit Split and Implicates Deeper Confusion over the Scope of *Feres*.

The Government argues that "the courts of appeals have regularly applied *Feres* to bar claims arising from active-duty service members' vehicular accidents on military bases during off-duty hours" and "to other voluntary activities that had no connection to a specific military mission." BIO.7-8. Some have. *See id.* (citing cases). But others have not. *See* Pet.18-21 (citing cases); *see also* NVLSP Amicus Brief, at 8-17. That split in reasoning and outcomes warrants this Court's review.

The Government argues that "material factual differences" between the decisions of other courts involving servicemembers injured in vehicle accidents and this case "explain the different outcomes." BIO.10. Whether facts are material depends on the applicable legal standard, and there are material differences in the *legal* test these courts applied versus the Eighth Circuit here.

In *Pierce v. United States*, the accident occurred on a road that "traverses the Fort Stewart Military Reservation," "approximately 500 feet from the boundary." 813 F.2d 349, 351, 353 n.6 (11th Cir. 1987). The Eleventh Circuit recognized that "the place of injury is often a matter of fortuity" and declined to consider it as "a controlling factor." *Id.* at 353 n.6. The servicemember was "neither on furlough nor on leave" but simply had been authorized to leave the base during the workday "to conduct some

personal business." *Id.* at 353. A key factor for the Eleventh Circuit was that Pierce's activities at the time of the accident "were not proximately related to military service." *Id.* at 354.

In *Taber* and *Schoenfeld v. Quamme*, the servicemembers were on weekend liberty when they were injured. 67 F.3d at 1032; 492 F.3d 1016, 1017 (9th Cir. 2007). Schoenfeld was injured on base. 492 F.3d at 1017. "Liberty status is subject to immediate cancellation." 492 F.3d at 1017. Beck, too, was "subject to immediate recall." App.5. The Second Circuit and Ninth Circuit determined that *Feres* did not bar the claims because the servicemembers were not engaged in military activities when injured. 67 F.3d at 1051 ("The accident had 'nothing to do' with Tabert's military career."); 492 F.3d at 1025 ("Schoenfeld's activities leading up to his accident are not meaningfully distinguishable from those of a civilian.").

In *Parker v. United States*, the accident occurred on base "while Parker was on his way home" to begin four days of leave. 611 F.2d 1007, 1008 (5th Cir. 1980). The Fifth Circuit examined "what Parker was doing at the time he was injured," explained that "merely passing through the base on his way home" did not make Parker's injury "incident to service," and rejected application of "a strict 'but for' test." 611 F.2d at 1014.

As in these cases, Beck was engaged in "non-military activit[y]" when he was killed. App.5. But unlike the Second, Fifth, Ninth, and Eleventh

Circuits, the Eighth Circuit does not consider Beck's activities as relevant to determining incident to service. Here, the Eighth Circuit applied a but-for test in determining that Beck's death was incident to service. App.5. The result is that tort claims for vehicle accidents during personal activities go forward in these circuits but are barred in the Eighth Circuit due to its focus solely on the servicemember's status.

Review is needed "to resolve different interpretations that the Circuits have given [the incident to service] phrase." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

III. If *Feres* Tolerates the Eighth Circuit's Holding, Then the Court Should Limit or Overrule *Feres*.

At minimum, the Court should grant review to clarify the limits to *Feres* and the legal standard governing "incident to service." That question has divided the courts of appeals since *Johnson*. *See* Pet.27-30. But the problems caused by *Feres* and its lack of any textual basis warrants jettisoning the doctrine altogether. The Government provides no compelling reasons not to do so.

The Government points to the Court's denial of other petitions since *Johnson* that seek review of *Feres* and argue that the Court should deny this petition under stare decisis. BIO.13-14. But the Court's shifting and inconsistent rationales for the *Feres* doctrine have spurred these repeated challenges. *See Taber*, 67 F.3d at 1043 ("*Johnson* … left both the [*Feres*] doctrine and the lower courts

more at loose ends than ever."). These repeated pleas for this Court's review shows that the *Feres* doctrine is not even "settled"—let alone "settled right." *Kimble v. Marvel Ent. LLC*, 576 U.S. 446, 455 (2015); *see Carter*, 145 S. Ct. at 520-21 (Thomas, J., dissenting).

The Government does not explain how overruling *Feres* would "upset expectations" by "requir[ing] the military to consider reallocating military resources to avoid tort liability in suits by service members." BIO.16. Presumably, the military is already seeking to avoid tort liability in suits by civilians, veterans, and servicemembers in a furlough-like status (who can bring claims per the Government). Every exception that Congress wrote in the actual text of the FTCA limits tort liability on the basis of the nature of the claim, such as protecting military decision-making through the discretionary function and combatant activities exceptions. 28 U.S.C. §2680(a), (j). *Feres* limits tort liability on the basis of the claimant. The *Feres* doctrine "creates a massive and unprincipled discrepancy between recovery for injuries suffered by servicemembers and non-servicemembers." *See* CAC/Rutherford Amicus Brief, at 17.

The Government points to Congress's inaction since *Feres*. BIO.16. But this Court long ago warned that it is "at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946). "When a precedent is based on a judge-made rule and is not grounded in anything that Congress has

enacted," the Court "cannot 'properly place on the shoulders of Congress' the entire burden of correcting 'the Court's own error.'" *Kimble*, 576 U.S. at 471 (Alito, J., dissenting). That should be especially true here, given the decades it took for Congress to reach compromises on the FTCA in the first instance. *Brooks*, 337 U.S. at 51; *Feres*, 340 U.S. at 139.

Further, this Court's silence since *Johnson* has resulted in the *Feres* doctrine expanding in the circuits far beyond anything this Court has ever endorsed. *See, e.g.*, *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) ("[T]he Supreme Court has not had occasion to apply *Feres* nearly so broadly as have the circuit courts."). There is no reason to think that Congress has acquiesced in these expansions of *Feres*. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 318 (2005).

IV. This Case Is an Ideal Vehicle to Resolve Exceptionally Important Issues.

This case provides an ideal vehicle to address either or both Questions Presented. The Government identifies no vehicle issues.

Unlike other *Feres* cases, the Government does not argue that this Court has barred a claim like Beck's. Nor does it contest that resolving Question Presented 1 in Petitioner's favor would be outcome determinative, without overruling *Feres*.

No facts are in dispute. It is undisputed that negligence of the governmental employee caused

Beck's death when he was off duty and on his way home for lunch. Although the Government obliquely argues that allowing this suit "might" require courts to examine base safety, it does not explain how that is the case, especially where the Government convicted its employee of negligently causing the accident.

Moreover, the claim here involves negligence in the context of a vehicle accident. The hypothetical safety inquiry could easily have been raised in *Brooks* too, examining the safety training of the government driver. Yet, as the Government acknowledges, this Court allowed the claim in *Brooks*. The only distinction the Government makes between this case and *Brooks* is the duty status and accident location. Neither matter.

This case provides a clean opportunity for the Court to clarify the test for "incident to service" and the line between *Brooks* and *Feres*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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