No. 24-

In the Supreme Court of the United States

ENERGETIC TANK, INC., PETITIONER,

v.

UNITED STATES OF AMERICA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act waives the immunity of the United States for money-damages claims based on the negligence or wrongdoing of its employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1); see *id.* § 2674. In *Feres* v. *United States*, 340 U.S. 135 (1950), this Court interpreted the Act as implicitly excluding tort claims brought by servicemembers for injuries sustained in the course of their service.

Feres has long been the subject of criticism, see, *e.g.*, *United States* v. *Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting), but this Court has declined to overrule it. At the same time, this Court has never extended *Feres* to any other statute.

The courts of appeals have nevertheless reflexively extended *Feres* to eighteen different statutes. The result has been an unwritten, free-floating bar to governmental liability that spans the U.S. Code—at the expense of both Congress's prerogatives and servicemembers' interests.

In this case, following a collision between a U.S. Navy destroyer and a commercial vessel, the United States filed a claim for damages against the commercial vessel. The vessel's owner counterclaimed, pursuant to an express waiver of sovereign immunity in two admiralty statutes, seeking contribution from the United States for tort claims brought by the destroyer's injured sailors. The Second Circuit held that the commercial vessel's counterclaim was barred under *Feres*.

The question presented is:

Should *Feres* be extended to bar claims under statutes other than the Federal Tort Claims Act?

CORPORATE DISCLOSURE

Petitioner Energetic Tank, Inc. states that it does not have a corporate parent, and there is no publicly held corporation that owns 10% or more of its stock.

PARTIES TO THE PROCEEDING

Petitioner Energetic Tank, Inc. was Plaintiff–Counter-Defendant–Appellant–Cross-Appellee below.

Respondent the United States was Claimant–Counter-Claimant–Counter-Defendant–Appellee–Cross-Appellant below.

Unknown Defendant was Defendant–Counter-Defendant–Appellee below.

Navin Ramdhun was Defendant–Counter-Claimant–Appellee–Cross-Appellant below.

Mark Joseph Ligon and Malachi Shannon were Claimants–Counter-Claimants–Counter-Defendants–Appellees–Cross-Appellants below.

Andy Aceret, Michael Wuest, Joshua Patat, Ashanti Molton, Donnovan Lamarcus Jones, Ayaka Joseph, Xiomaro Cuevas Soto, Devin Mask, Patrick Joseph, Haruka Ramdhun, Cheysserr Luangco, Carmelo Castro, Philip Torio, Phillip Fields, James Andy Woods, John B. Ray, Rodrigo Owen Tionquiao, Jerrell Dean, Clember Miranda, Michael Collins, Dedrick Walker, Milton O. Lovelace, Davion Reese, Juan Romero, Akimwalle Winter, Vares Belony, Tracey Lovelace, Delando Beckford, Victor Granados, and Byron Jamal Johnson were Counter-Claimants–Claimants–Appellees–Cross-Appellants below.

Gilleon Gillis, John Hoagland, Karen Doyon, Richard Lopez, Taylor Troy, Karen Bushell, Rachel Eckels, Theresa Palmer, Darryl Smith, Amy Winters, Jacqueline Ingram, Gao Yong, Donnel Robinson, Mr. Doyle A. Ebarb,

Joshua Bruce Hook, Jason Luangco, Francesco Sanfilippo, Alexis Sanfilippo, Nestor Cuevas Soto, and Joseph K. Robbins were Counter-Claimants–Claimants–Appellees.

Kerrington Harvey, Jason Baldwin, and Brandon York were Claimants–Appellees–Cross-Appellants below.

Matthew Montgomery, Jennifer Simon, and Karen Tolley, as personal representative of the Estate of Brandon Tolley, were Claimants–Appellees below.

Brandon Tolley was Claimant below.

RELATED PROCEEDINGS

In the Matter of the Complaint of Energetic Tank, Inc., No. 18-cv-1359 (S.D.N.Y. Feb. 15, 2018)

In the Matter of Energetic Tank, Inc., 110 F.4th 131 (2d Cir. 2024)

Energetic Tank, Inc. v. *United States et al.*, No. 24A351 (U.S. Oct. 10, 2024)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–47a) is reported at 110 F.4th 131. The opinion of the district court regarding petitioner's contribution claim (App. 48a–60a) is unreported but available at 2022 WL 7059134. The opinion of the district court regarding liability (App. 61a–140a) is reported at 607 F. Supp. 3d 328.

JURISDICTION

The court of appeals issued its opinion on July 26, 2024. Justice Sotomayor extended the time for filing a petition for a writ of certiorari until December 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Suits in Admiralty Act (SIAA), Pub. L. No. 109-304, § 6(c), 120 Stat. 1518 (2006) (codified at 46 U.S.C. § 30903), provides in relevant part:

§ 30903. Waiver of immunity

> (a) IN GENERAL.—In a case in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained, a civil action in admiralty in personam may be brought against the United States or a federally-owned corporation. In a civil action in admiralty brought by the United States or a federally-owned corporation, an admiralty claim in personam may be filed or a setoff claimed against the United States or corporation.

The Public Vessels Act (PVA), Pub. L. No. 109-304, § 6(c), 120 Stat. 1521 (2006) (codified at 46 U.S.C. § 31102), provides in relevant part:

§ 31102. Waiver of immunity

> (a) IN GENERAL.—A civil action in personam in admiralty may be brought, or an impleader filed, against the United States for—
>
> > (1) damages caused by a public vessel of the United States; or
> >
> > (2) compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.
>
> (b) COUNTERCLAIM OR SETOFF.—If the United States brings a civil action in admiralty for damages caused by a privately owned vessel, the owner of the vessel, or the successor in interest, may file a counterclaim in personam, or claim a setoff, against the United States for damages arising out of the same subject matter.

STATEMENT

The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States for certain tort claims brought against it. See 28 U.S.C. §§ 1346(b), 2674. In *Feres* v. *United States*, 340 U.S. 135 (1950), this Court interpreted the Act as containing an unwritten exception for claims brought by servicemembers for injuries sustained in connection with their service.

Since it was decided, *Feres* has been one of this Court's most-maligned decisions. Critics have pointed out the doctrine's many flaws—most prominently, ignoring the FTCA's clear text in favor of the Court's own policy preferences. The Court has also subsequently abandoned every single justification it gave in *Feres* for creating the exception in the first place, replacing them with a new post-hoc rationalization. And, of course, critics have noted the manifest injustice of barring recovery for horrific injuries suffered by those who have dedicated their lives to defending this country.

For better or worse, this Court has so far declined to revisit *Feres*'s interpretation of the FTCA. Yet it has never extended that reading to any other statute. Such an extension would be imprudent, given the decision's serious shortcomings. But even taking *Feres* as a given, applying the decision to different laws would also violate the bedrock principle that "a determination under one statute [should not] be mechanically carried over in the interpretation of another." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 173 (1962).

The courts of appeals, however, have not been similarly restrained. At nearly every opportunity, they have extended *Feres*'s unwritten bar on liability to other statutes that waive the immunity of the United States. They have done so while giving little or no consideration to why an interpretation of the FTCA should be ported over to

another statute (and then another and another) with a distinct text, history, and purpose.

This case typifies the problem. After a U.S. Navy destroyer collided with a commercial vessel owned by petitioner, the United States filed a claim against petitioner for damages. Petitioner counterclaimed and sought, among other things, contribution for tort claims asserted by sailors injured aboard the destroyer. Petitioner brought its counterclaim pursuant to two admiralty statutes—the Public Vessels Act and the Suits in Admiralty Act—that expressly waive the immunity of the United States for exactly these sorts of counterclaims.

In a detailed opinion, the district court determined that the U.S. Navy was overwhelmingly (80%) responsible for the tragic accident, by "creating a scenario where collision between the vessels was either inevitable, or all-but inevitable." App. 111a. But the Second Circuit held that petitioner's counterclaim was barred, ruling—with scarcely any analysis—that *Feres*'s interpretation of the FTCA applies as well to counterclaims under the admiralty statutes. The upshot is that petitioner will be responsible for 100% of the personal injury damages in a collision for which it was only 20% responsible.

This petition does not require the Court to overrule *Feres*. But even if that decision was a valid interpretation of the FTCA—or, at least, should be left in place under principles of statutory *stare decisis*—the courts of appeals have no business extending *Feres* to every other statute they encounter. Only this Court can address the lower courts' persistent disregard of basic principles of statutory interpretation. Certiorari should be granted.

A. Legal Background

1. Enacted in 1946, the Federal Tort Claims Act confers jurisdiction on the district courts over claims against the United States for money damages based on the negligence or wrongdoing of its employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1); see *id.* § 2674. In *Feres*, this Court interpreted the FTCA's broad waiver of sovereign immunity as containing an implicit exception for tort claims brought by servicemembers for service-related injuries. Even though this Court has left *Feres* in place as a basis for interpreting the FTCA, it has shifted, revised, and ultimately abandoned the justifications that *Feres* articulated in support of its holding.

a. At issue in *Feres* were consolidated suits brought against the United States under the FTCA by three different claimants—the widow of a soldier burned alive in his barracks; a veteran who had been sewed up by army surgeons with a three-foot-long towel still in his stomach; and the widow of a soldier who had died on an army operating table. 340 U.S. at 137. Each case accordingly centered on a common question of statutory construction: "whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong." *Id.* at 138.

In answering that question, the Court acknowledged that the FTCA "confer[s] district court jurisdiction generally over claims for money damages against the United States founded on negligence." *Ibid.* (citing 28 U.S.C. § 1346(b)). The text also specifically "contemplate[s] that the Government will sometimes respond for negligence of military personnel," since it "defines 'employee of the Government' to include 'members of the military,'" and also provides that a servicemember who "'act[s] in [the] line of duty'" thereby "'act[s] within the scope of his office

or employment.'" *Ibid.* (quoting 28 U.S.C. § 2671). The Court further noted that the statute expressly excludes "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," *ibid.* (quoting 28 U.S.C. § 2680(j))—with no exclusion for any other service-specific claims. And the Court observed that, from 1925 and 1935, Congress had introduced eighteen tort claims bills, sixteen of which had specifically barred recovery by service members, but the FTCA was one of only two bills without such a bar. *Id.* at 139.

The Court nevertheless identified three reasons that it would be more "rational" to read the FTCA as implicitly excepting injuries to active servicemembers. *Id.* at 143. First, the Court stated that barring relief for service-related injuries would align the FTCA with "the entire statutory system of remedies against the Government," because servicemembers can often recover for service-related injuries through other statutory schemes. *Id.* at 139; see *id.* at 144. Second, the statute makes the United States liable only "in the same manner and to the same extent as a private individual under like circumstances," *id.* at 141 (quoting 28 U.S.C. § 2674), and the Court found "no liability of a 'private individual' even remotely analogous to that which [the plaintiffs] [we]re asserting," *ibid.* Third, the FTCA directs courts to apply "the law of the place where the act or omission occurred," *id.* at 142 (quoting 28 U.S.C. § 1346(b)), and in the Court's view, it would "make[] no sense" to allow "the geography of an injury" to "select the law to be applied," since a servicemember does not choose where he serves, *id.* at 143.

The Court thus concluded that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.

b. Over the subsequent decades, the Court would come to second-guess or repudiate all three of *Feres*'s primary rationales, declaring them "no longer controlling." *United States* v. *Shearer*, 473 U.S. 52, 58 n.4 (1985).

First, the Court concluded that the existence of alternative remedies is not itself a bar to FTCA claims, even for servicemembers. See, *e.g.*, *United States* v. *Brown*, 348 U.S. 110, 113 (1954). After all, "Congress could, of course, make the [servicemember] compensation system the exclusive remedy," but it has not done so. *Ibid.*

Second, the Court "rejected" the notion that the FTCA's private-analog test ("'in the same manner and to the same extent'") precludes the Act from reaching conduct undertaken by servicemembers in a "uniquely governmental" context. *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318–19 (1957) (quoting 28 U.S.C. § 2674). The Court explained that "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Id.* at 319.

Third, the Court disclaimed *Feres*'s concern that servicemembers' "opportunities to recover may be affected by differences in state law over which they have no control." *United States* v. *Muniz*, 374 U.S. 150, 161 (1963). Absent a "more definite indication of the risks of harm from [such geographic] diversity," the Court explained, that consideration was insufficient to "narrow the remedies provided by Congress." *Id.* at 162, 165–66.

In place of these three original rationales for *Feres*, the Court identified a fourth to retroactively support its decision: "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for

negligent orders given or negligent acts committed in the course of military duty." *Brown*, 348 U.S. at 112.

c. In the years since *Feres*, members of this Court have sharply criticized the decision. See, *e.g.*, *Lanus* v. *United States*, 570 U.S. 932, 932 (2013) (Thomas, J., dissenting from denial of certiorari) ("There is no support for [*Feres*'s] conclusion in the text of the statute."); *United States* v. *Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." (cleaned up)); *Shearer*, 473 U.S. at 60 (Marshall, J., concurring in the judgment) (declaring himself "not a firm supporter of *Feres*"). But this Court has not overruled it. At the same time, the Court has never extended *Feres*'s reading of the FTCA to any other statute.

2. The Suits in Admiralty Act (SIAA) and the Public Vessels Act (PVA) waive the immunity of the United States for counterclaims in maritime suits in which the United States itself has sought compensation. These provisions codify the longstanding principle that "when the United States came into court to enforce a claim[,] it would be assumed to submit to just claims of third persons in respect of the same subject matter." *The Western Maid*, 257 U.S. 419, 434 (1922).

As relevant here, the SIAA provides that "[i]n a civil action in admiralty brought by the United States . . . an admiralty claim in personam may be filed or a setoff claimed against the United States." 46 U.S.C. § 30903(a). And under the PVA, "[i]f the United States brings a civil action in admiralty for damages caused by a privately owned vessel, the owner of the vessel, or the successor in interest, may file a counterclaim in personam, or claim a setoff, against the United States for damages arising out of the same subject matter." *Id.* § 31102(b).

B. Factual and Procedural Background

1. The U.S.S. *John S. McCain* is a U.S. Navy Arleigh Burke-class guided-missile destroyer. App. 63a. In the early hours of August 21, 2017, the *McCain* and another vessel, M/V *Alnic MC*, were both heading west across the Singapore Strait—one of the world's busiest shipping lanes—bound for Singapore. App. 84a.

a. The *McCain*'s steering and thrust is controlled through an Integrated Bridge and Navigation System (IBNS). App. 64a–66a, 71a–72a. With multiple consoles, the IBNS can be controlled from several locations, including the helm and lee-helm stations on the vessel's bridge and the aft steering station at its stern. *Ibid.* Typically, the helmsman controls both steering and thrust; but another crew member, the lee helmsman, can be added to assist either function. *Ibid.*

An IBNS console "looks nothing like a traditional steering console." App. 64a. Instead, its state-of-the-art touchscreens manage "extensive functions, drop down menus, and hosts of configurations." *Ibid.* From each touchscreen, an operator can take control of the ship's steering or thrust, or transfer control to another station. App. 65a. Once in control, the operator can direct the pitch and thrust of the individual propellers and the angle of the rudders. *Ibid.*

The IBNS also has additional controls: buttons to "gang" the propellers (linking them together) or "ungang" them (facilitating quick turns); an "All Stop" button to stop the engines and propeller thrust immediately; and, at both the bridge and aft steering stations, an "Emergency Override to Manual" button—known as the "Big Red Button"—to immediately take control of steering from another station. App. 65a–66a.

New and technologically complicated, the IBNS was also prone to critical failure. At the time of the collision, the *McCain* had unaddressed casualty reports concerning major system crashes. App. 72a. A Navy technician was due in Singapore to help repair the IBNS as soon as the warship arrived. App. 73a.

In the meantime, the *McCain*'s commanding officer, Commander Alfredo Sanchez, had a preferred "work around" for IBNS glitches: switching to "backup manual" mode. This allowed the helmsman to steer the rudders using only the ship's physical steering wheel, without assistance from the IBNS. *Ibid.* Due to lack of training, backup manual mode "affected steering control in ways that neither [Commander Sanchez] nor his crew understood." *Ibid.*

b. The pre-dawn sky on the date of the incident was moonless and dark. App. 84a. Many ships were navigating the strait that morning, and the *Alnic*—a massive, fuel-laden tanker—was the slowest of several commercial vessels bunched close together. App. 84a–85a. The *McCain* sought to overtake the group. As the overtaking vessel, the *McCain* had a duty to steer clear of other vessels; the vessels being overtaken had a duty to maintain their course and speed. App. 114a, 122a.

Notwithstanding the crowded shipping lane and pitch-black conditions, and against his officers' recommendation, Commander Sanchez ordered the *McCain* to enter the strait short-staffed. App. 69a–71a. The *McCain* was traveling fast—over twice as fast as the *Alnic*. App. 84a–85a. It was also operating in backup manual mode, with the helmsman steering the destroyer manually. App. 73a.

At approximately 05:20:30 local time (3'28" to collision), Commander Sanchez ordered the crew to transfer the ship's thrust control from the helm to the lee helm.

App. 86a. This decision to split steering and thrust control was not planned or briefed in advance. D. Ct. Doc. 371, at 62. It was also the first time the lee helmsman had ever stood watch in that position. App. 113a.

In attempting to carry out Commander Sanchez's order, the *McCain*'s crew made two critical errors. First, they un-ganged propellers, giving the lee helmsman control only of the *portside* propeller. App. 87a. Second, the crew inadvertently transferred *steering* from the helm to the lee helm, but without warning to (or acceptance by) the helmsman—something that was possible only because the ship was operating in backup manual mode. D. Ct. Doc. 371, at 63–64. No crewmember noticed either error.

Following the botched transfer, the helmsman announced a "loss of steering" to the bridge, unaware that steering had been transferred to the lee helm. App. 87a–88a. Yet the lee helmsman did not check whether his station had steering control because, in his own words, "no one knew the lee helm could steer." App. 87a.

For the next several minutes, the *McCain*'s crew did not know which station had control of steering. The ship's PA system announced: "Loss of steering in the pilot house, loss of steering in the pilot house. Man aft steering." App. 88a. But operators at different stations repeatedly pressed the Big Red Button—thereby taking steering control away from other stations—under the mistaken belief that the button would *send* control to aft steering. *Ibid.* As a result, "control of steering ping-ponged around the ship, with none of the crew understanding where it was at any given time, or how to get it back." *Ibid.*

At approximately 05:22:06 (1'52" to collision), Commander Sanchez ordered the *McCain*'s speed reduced from 20 knots to roughly 10 knots. App. 92a. The lee helmsman reduced the thrust on the IBNS touchscreen; but because he didn't realize the propellers were un-

ganged, he reduced thrust to only the *portside* propeller. *Ibid.* This error caused the *McCain* to begin turning to port, toward the *Alnic*. *Ibid.*

It was not yet apparent to surrounding ships that the *McCain* was off course. App. 103a. The *Alnic*'s crew were tracking the *McCain*'s course on radar, but they had no way to know of the chaos unfolding aboard the warship. App. 87a, 91a. Unlike other nearby vessels, and contrary to Navy safety guidelines, Commander Sanchez had opted not to engage the *McCain*'s Automatic Identification System, which would have transmitted critical navigational data—including the warship's position, course, speed, and navigational status—to surrounding vessels. App. 117a. Absent this data, the *Alnic* had no direct information regarding the *McCain*'s navigational status, which "would have helped *Alnic* confirm that *McCain* had lost control of steering and better predict the destroyer's trajectory." *Ibid.*

At 05:22:45 (1'13" to collision), Commander Sanchez ordered the *McCain* to slow again, this time to 5 knots. App. 94a. But because the thrust was *still* un-ganged, the lee helmsman reduced thrust only to the portside propeller, producing an even greater thrust mismatch and causing the *McCain* to veer further towards the *Alnic*. *Ibid.*

The *McCain*'s aft crew finally secured control of the warship's steering at 05:23:27 (0'31" to collision). App. 96a. But they didn't realize the rudders still had a "hard left" order on the IBNS touchscreen, so the *McCain* veered *even harder* towards the *Alnic* before the rudders reset. *Ibid.* At 05:23:44 (0'14" to collision), the *McCain* finally began turning to starboard, away from the *Alnic*. App. 96a–97a.

At the same moment, the *Alnic*'s crew decreased its speed, from full ahead to half ahead. But there was not enough time, or ocean, to slow the massive tanker to avoid

a collision. App. 97a. Weighing 39,000 metric tons, the *Alnic* "took around 7 minutes—and 1.35 nautical miles—to go from full speed ahead to full stop." App. 74a. The *McCain*, by contrast, was the maritime equivalent of a sportscar that could stop quickly; but at no point did its crew hit the "All Stop" button. App. 116a.

The ships collided at 05:23:58. App. 98a. The *Alnic*'s V-shaped bow crashed into the *McCain*'s port side, piercing the warship's hull and embedding into several crew compartments. *Ibid.* The resulting damage to both ships was extensive. Tragically, ten Navy sailors were killed, and others were injured. App. 99a.

c. Following a thorough investigation, the Navy released a public report, which concluded that many failures aboard the *McCain* were systemic. Per the report:

> Many of the decisions made that led to this incident were the result of poor judgment and decision making of the Commanding Officer. That said, no single person bears full responsibility for this incident. The crew was unprepared for the situation in which they found themselves through a lack of preparation, ineffective command and control and deficiencies in training and preparations for navigation.

App. 117a–118a.

The Navy ultimately disciplined twenty members of the *McCain*'s crew. Commander Sanchez was court-martialed, pleaded guilty to dereliction of duty, and agreed to retire. App. 107a. Other senior-ranking officers were disciplined for failing to ensure proper training of the crew. *Ibid.* And both the helmsman and lee helmsman were found to have been derelict in their duties. *Ibid.*

2. Petitioner Energetic Tank, Inc., the *Alnic*'s owner, filed a limitation action in federal district court,

designed to cap petitioner's liability for the incident. C.A. App. 219–25; see 46 U.S.C. § 30523(a)–(b) (permitting a vessel's owner to limit its liability for any "injury by collision," including personal injury, to "the value of [that] vessel and pending freight"). Forty-two claims were filed against petitioner. All but one of the claimants were Navy sailors or their representatives. D. Ct. Doc. 85-1, at 1–3.

The remaining claimant, the United States, filed a claim for damage caused to the *McCain*. C.A. App. 305–19. To establish its case, the United States submitted transcripts from five crew members who were subjected to depositions and made extensive document productions—including of its own classified and sensitive documents from the Navy's investigation and discipline of those responsible. See App. 64a–73a. The United States also called Commander Sanchez, as well as the ship's chief petty officer, chief warrant officer, and chief engineer, as live witnesses in its case-in-chief at trial. *Ibid.*

Petitioner counterclaimed against the United States under the SIAA and PVA. Petitioner sought compensation for damage caused to the *Alnic*; and petitioner also sought contribution, setoff, and indemnity for claims based on harm to the sailors. C.A. App. 320–31.

The district court conducted a bench trial to apportion liability and damages for the collision between petitioner and the United States (Phase 1), while holding the sailor's claims for trial at a later date (Phase 2). The court determined that the *McCain* was 80% at fault for the collision and the *Alnic* was 20% at fault (for, among other things, failing to stop its engines a minute or two earlier). App. 61a–140a. The court dismissed petitioner's counterclaims against the United States for contribution for or indemnification against any Phase 2 damages, holding that such claims were barred by sovereign immunity. App. 48a–60a. The court accordingly entered judgment in

favor of the United States, ordering petitioner to pay $44,857,901. D. Ct. Doc. 418, at 1; D. Ct. Doc. 417, at 2.

3. The Second Circuit affirmed. App. 1a–47a. First, the court confirmed its jurisdiction to review the district court's judgment, both as a partial final judgment pertaining to damages, see Fed. R. Civ. P. 54(b), and as an interlocutory admiralty order under 28 U.S.C. § 1292(a)(3). App. 23a–27a. Then, finding "no clear error in the district court's factual findings and no error in its legal conclusions," the court of appeals upheld the district court's 80/20 allocation of fault between the *McCain* and the *Alnic*. App. 43a.

Next, the court of appeals turned to petitioner's counterclaim against the United States for contribution and indemnification for damages based on harm to the sailor-claimants. App. 43a–47a. Under the doctrine established in *Feres*, the court held the United States was immune from petitioner's counterclaim. App. 45a–47a. The court acknowledged that *Feres* and its progeny had interpreted the FTCA, whereas petitioner's counterclaims arise under the SIAA and PVA. App. 45a. The court also observed that petitioner's counterclaim "concern[s] not direct damages but contribution or indemnification following the United States's own invocation of federal jurisdiction," and "the Government has already produced evidence of its own fault in the Phase 1 trial." *Ibid.* The court further conceded "some potential unfairness" in barring petitioner's counterclaim, because petitioner "may have to pay the full value of the Sailor-Claimants' damages claims, even though ALNIC was only 20% at fault for the collision." *Ibid.*

The court nevertheless rejected any "statutory differences" between the FTCA as interpreted in *Feres* and the SIAA and PVA. A contribution counterclaim under those latter statutes by the owner of a private vessel, the court

held, is "essentially the same" as a direct action brought by a servicemember under the FTCA. App. 46a (citation omitted). The court also found it irrelevant that "the Government participated in"—indeed, it had initiated—"the Phase 1 trial." App. 47a. True, it admitted, *Feres*'s sole remaining rationale is "the judiciary's reluctance to 'second-guess military orders' or to 'require members of the Armed Services to testify in court as to each other's decisions and actions,'" *ibid.* (quoting *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977)), and due to the United States' own litigation decisions, "these scenarios have already materialized here," *ibid.* But the court declined to "inquire into the extent to which particular proceedings . . . would call into question military discipline and decisionmaking." *Ibid.* (citation and quotation marks omitted).

The court thus summarized that "*Feres* reflects our reading of Congress's enactments," and then concluded: "It is not for us to say that the United States's assertion of immunity here goes too far." *Ibid.*

REASONS FOR GRANTING THE PETITION

In *Feres*, this Court created an implicit exception to the text of the FTCA for claims brought by servicemembers for service-related injuries. Although the Court has never applied the doctrine to any other statute, the courts of appeals have reflexively extended it to a range of laws across a wide variety of subjects. The result is a doctrine that burrows through nearly every statute it crosses, at the expense of Congress's legislative prerogatives and the right of servicemembers to obtain redress for injury.

This case represents the apotheosis of the *Feres* doctrine's illogic. The United State initiated claims against petitioner for damage sustained by the *McCain* during its collision with the *Alnic*. To prove its case, the United

States relied on testimony from the *McCain*'s servicemember personnel and classified documents detailing the Navy's investigation of the incident. Despite being found overwhelmingly at fault, the United States obtained a judgment of tens of millions of dollars against petitioner. Yet the court of appeals held that petitioner, whose counterclaim based on the same incident arises under statutes that expressly waive sovereign immunity, cannot recover for damage caused by the Government's own negligence.

Only this Court can halt the *Feres* doctrine's rampage through the U.S. Code. The Court need not overrule the decision, but it should at least make clear that the doctrine is confined to the FTCA context in which it arose—and in which this Court has always applied it.

I. *Feres* Does Not Extend Beyond the FTCA

Feres v. *United States*, 340 U.S. 135 (1950), reflects this Court's interpretation of the scope of the United States' liability under the FTCA. The Court has never extended that statute-specific holding—which is suspect even on its own terms—to any other law. To do so would violate bedrock principles of statutory interpretation.

A. *Feres* began by framing the question presented as "whether the Tort Claims Act extends its remedy to [a servicemember] sustaining 'incident to the service' what under other circumstances would be an actionable wrong." *Id.* at 138. The Court then lamented the lack of "guiding materials for our task of statutory construction," by which the Court meant that "[n]o committee reports or floor debates disclose what effect the statute was designed to have." *Ibid.* In the Court's view, as a result of the FTCA's scant legislative history, "no conclusion can be above challenge." *Ibid.*

The Court next turned to traditional tools of statutory construction. Among the "considerations persuasive of

liability," the Court acknowledged several relevant statutory provisions. *Ibid.* Most fundamentally, "[t]he Act does confer district court jurisdiction generally over claims for money damages against the United States founded on negligence." *Ibid.* (citing 28 U.S.C. § 1346(b)). It also "contemplate[s] that the Government will sometimes respond for negligence of military personnel," because it "defines 'employee of the government' to include 'members of the military or naval forces,'" and because it treats such a servicemember as "'acting within the scope of his office'" whenever he is "'acting in line of duty.'" *Ibid.* (quoting 28 U.S.C. § 2671). The statute also *excludes* "any claim arising out of the combatant activities of the military or naval forces . . . during time of war." *Ibid.* (quoting 28 U.S.C. § 2680(j)) (emphasis omitted).

Despite those textual clues, however, the Court ultimately relied on its sense that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Id.* at 139. The Court thus articulated *Feres*'s three original rationales: the availability of alternative avenues for relief; the apparent dissimilarity of service-related injuries to circumstances giving rise to private liability; and concerns about geographic variation in compensation for soldiers stationed in different areas. See *id.* at 139–45. The Court also attempted to ascertain the intent behind the FTCA, including Congress's putative "awareness [of what] the Act might be interpreted to permit." *Id.* at 144. In the end, the Court concluded that "Congress, in drafting this Act, [had not] created a new cause of action dependent on local law for service-connected injuries or death due to negligence." *Id.* at 146.

Following *Feres*, this Court has consistently emphasized that the holding in that case was tied to the specific

statute being interpreted: the FTCA. In *Brown*, the Court reiterated the factors that had "led the Court *to read that Act* as excluding claims of" servicemembers. 348 U.S. at 112 (emphasis added). In *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), the Court likewise discussed "the Act as . . . construed by the Court" in *Feres*. *Id.* at 670. In *United States* v. *Shearer*, 473 U.S. 52 (1985), the Court warned that "each [*Feres*] case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Id.* at 57. And in *United States* v. *Johnson*, 481 U.S. 681 (1987), the Court reaffirmed *Feres* against an "argument for changing the interpretation of a congressional statute." *Id.* at 688 n.9; see *id.* at 686 ("[A]s the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." (citation omitted)).

B. To be sure, *Feres* was an *incorrect* interpretation of the FTCA. As critics have explained, the decision ignored the plain text of the Act in favor of a general sense of congressional purpose. Over time, the Court has abandoned all three of the justifications articulated in *Feres* itself, in favor of a new one grounded in concerns about "the effects of the maintenance of such suits on discipline." *Brown*, 348 U.S. at 112. But even that post-hoc rationale is suspect, because the FTCA indisputably permits *other* suits that invade the realm of military decision-making and discipline just as much as the ones barred by *Feres*. See *Clendening* v. *United States*, 143 S. Ct. 11, 13 (2022) (Thomas, J., dissenting from denial of certiorari) (providing examples, including the ability of servicemembers to "seek injunctions against their superior officers' personnel decisions").

As critics have noted, moreover, *Feres* is unadministrable. Due to its lack of textual foundation, "[t]he lower courts' attempts to apply *Feres*'s [test] are marked by

incoherence," and "[t]he force of *Feres* . . . distorts even longstanding [legal] principles." *Id.* at 12–13. The result is "an extremely confused and confusing area of law." *Taber* v. *Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995) (Calabresi, J.); see *Costo* v. *United States*, 248 F.3d 863, 867 (9th Cir. 2001) ("[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable.").

And, of course, critics have also pointed out the absurd and often tragic consequences of "depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees." *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari). Circumstances in which service members have been denied the right to bring claims include: the rape of a cadet at West Point, see *Doe* v. *Hagenbeck*, 870 F.3d 36, 38 (2d Cir. 2017); the experimental testing of hallucinogenic drugs on nonconsenting servicemembers, see *Stanley* v. *CIA*, 639 F.2d 1146, 1149 (5th Cir. 1981); orders to servicemembers to stand pat in an open field while nuclear bombs were exploded short distances away, see *Jaffee* v. *United States*, 663 F.2d 1226, 1229 (3d Cir. 1981); and a mock lynching of a Black private at a Memorial Day party, plunging him into such "a deep mental depression" that he "shot himself in the head, inflicting permanent and severe physical and mental damage," *Brown* v. *United States*, 739 F.2d 362, 363–64 (8th Cir. 1984). The "unfairness and irrationality" of reading the FTCA as implicitly disadvantaging members of the Armed Forces, merely because they were injured while serving our Nation, is obvious. *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting).

Thus, as Justice Scalia aptly summarized, "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Id.* at 700 (citation and quotation marks omitted). A broad swath of

jurists and scholars agree. See, *e.g.*, *Ortiz* v. *U.S. ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 818 (10th Cir. 2015) (Tymkovich, J.) ("In the many decades since its inception, criticism of the so-called *Feres* doctrine has become endemic."); *Ritchie* v. *United States*, 733 F.3d 871, 878 (9th Cir. 2013) ("We can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long."); *Persons* v. *United States*, 925 F.2d 292, 299 (9th Cir. 1991) ("It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres* . . . ."); 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, 4 (2003) ("[T]he *Feres* doctrine was fundamentally flawed from its inception on both a constitutional and statutory basis . . . [and constitutes] a quintessential exercise of judicial activism.").

C. Of course, the Court has long since abandoned *Feres*'s approach to reading statutes, in which legislative history and impressions of congressional purpose are preferenced over a statute's plain text. But whether correct or not, *Feres* was an interpretation of the FTCA, and this Court has never extended the doctrine to foreclose liability under any other statute. To do so would violate fundamental canons of interpretation.

Even taking *Feres* at face value, its interpretation of the FTCA was necessarily a statute-specific endeavor. Statutes "have different language, different histories, and were enacted in different contexts." *Dep't of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 398 (2015). For that reason, this Court has stressed that "[w]hen conducting statutory interpretation, [courts] must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross* v. *FBL*

Fin. Servs., Inc., 557 U.S. 167, 174 (2009) (citation and quotation marks omitted).

In fact, this Court has not even seriously invoked *Feres*'s reasoning in any other case—save for a single context that is essentially the mirror opposite of statutory interpretation. In *Chappell* v. *Wallace*, 462 U.S. 296 (1983), the Court considered whether to allow "enlisted military personnel [to] maintain suits to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the course of military service." *Id.* at 297. Since "Congress had not expressly authorized such suits," the plaintiffs could recover, if at all, only under *Bivens*. *Id.* at 298. The Court accordingly considered, as "'special factors' that bear on the propriety of [the plaintiffs'] *Bivens* action," the same considerations that "also formed the basis of this Court's decision in *Feres*." *Ibid.*

The Court again declined to extend *Bivens* to a suit by a servicemember in *United States* v. *Stanley*, 483 U.S. 669 (1987), where the plaintiff alleged that he had been injured by participating in an Army medical study. *Id.* at 671. Although he did not sue his superior officers, as the plaintiff did in *Chappell*, the result was the same: Based on "essentially a policy judgment," the Court concluded that concerns about military discipline were "special factors" counseling against a *Bivens* remedy. *Id.* at 681.

The *Bivens* context inverts the separation-of-powers principles that make the *Feres* doctrine so problematic. When interpreting the FTCA, a court is "confronted with an explicit congressional authorization for judicial involvement that [i]s, on its face, unqualified." *Ibid.* A decision to impose *Bivens* liability, by contrast, constitutes a "congressionally uninvited intrusion into military affairs by the judiciary." *Id.* at 683. The special-factor analysis is thus the opposite of statutory interpretation: "[C]reating

a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a range of policy considerations at least as broad as the range a legislature would consider." *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022) (cleaned up). It is thus notable—though unsurprising—that the decision in *Stanley* was authored by Justice Scalia only a month after his scathing dissent in *Johnson*.

II. This Court Should Halt the Reflexive Extension of *Feres* to Other Statutes

Every court of appeals besides the Federal Circuit has extended *Feres* to foreclose liability under statutes other than the FTCA. These decisions often lack serious (or even any) statute-specific consideration of whether doing so is appropriate. Such recurring and flagrant disregard of duly enacted text is reason enough for this Court's intervention. But these decisions also often have serious consequences for servicemembers nationwide. Absent course-correction from this Court, *Feres* will continue its steady spread throughout the U.S. Code.

A. In more than fifty decisions, the courts of appeals have extended *Feres* to at least eighteen different federal statutes. Besides the FTCA and the two statutes at issue in this case, *Feres* has also been held to preclude servicemember suits brought under: Section 1981,[1] Section 1983,[2] Section 1985, [3] Section 1986,[4] Section 1988,[5] Title VII,[6] the

[1] *E.g.*, *Brown* v. *United States*, 739 F.2d 362, 367 (8th Cir. 1984).

[2] *E.g.*, *Martelon* v. *Temple*, 747 F.2d 1348, 1351 (10th Cir. 1984).

[3] *E.g.*, *Lombard* v. *United States*, 690 F.2d 215, 227 (D.C. Cir. 1982).

[4] *E.g.*, *Tootle* v. *Dunavan*, 107 F. App'x 825, 826–27 (10th Cir. 2004).

[5] *Lovell* v. *Heng*, 890 F.2d 63, 63, 65 (8th Cir. 1989).

[6] *E.g.*, *Willis* v. *Roche*, 256 F. App'x 534, 535 (3d Cir. 2007).

Rehabilitation Act,[7] the Americans with Disabilities Act,[8] the Age Discrimination in Employment Act,[9] the Death on the High Seas Act,[10] the Jones Act,[11] the Panama Canal Act,[12] the Civil Service Reform Act,[13] the Right to Financial Privacy Act,[14] and the Federal Wiretap Act.[15] Thus, as one court aptly summarized, *Feres* now applies to "practically any suit that implicates . . . military judgments and decisions." *Bowen* v. *Oistead*, 125 F.3d 800, 803 (9th Cir. 1997) (cleaned up).

B. Calling these extensions of *Feres* "reflexive" would be an understatement. None of these decisions engaged in serious analysis—using traditional tools of statutory construction—to determine whether Congress actually intended, under the particular statute at issue, to limit liability for service-related suits. In most of them, the courts did not even consider whether it was proper to extend the construction of one federal statute to another, quite different statute. Instead, *Feres* has metastasized almost of its own force.

Consider the two statutes at issue in this case, the Suits in Admiralty Act and the Public Vessels Act. *Feres* was first extended to those statutes in *Beaucoudray* v.

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[7] *E.g.*, *Coffman* v. *State of Mich.*, 120 F.3d 57, 59 (6th Cir. 1997).

[8] *E.g.*, *Gordon* v. *Illinois Army Nat. Guard*, 215 F.3d 1329 (7th Cir. 2000) (per curiam).

[9] *E.g.*, *Spain* v. *Ball*, 928 F.2d 61, 63 (2d Cir. 1991) (per curiam).

[10] *Blakey* v. *U.S.S. Iowa*, 991 F.2d 148 (4th Cir. 1993).

[11] *Ibid.*

[12] *Kelly* v. *Panama Canal Comm'n*, 26 F.3d 597, 600 (5th Cir. 1994).

[13] *Wright* v. *Park*, 5 F.3d 586, 591 (1st Cir. 1993).

[14] *Flowers* v. *U.S. Army, 25th Infantry Div.*, 179 F. App'x 986, 987 (9th Cir. 2006) (per curiam).

[15] *Gadbois* v. *United States*, 58 F. App'x 310, 310–11 (9th Cir. 2003) (per curiam).

United States, 490 F.2d 86 (5th Cir. 1974) (per curiam). In response to the plaintiffs' argument that their suit was cognizable under the SIAA and PVA, even if not under the FTCA, the Fifth Circuit simply stated without explanation that their argument lacked "merit." *Id.* at 86.

Six years later, the Ninth Circuit did scarcely better when it cited *Beaucoudray* and stated—again without explanation—that "[t]he rationale supporting the ruling in *Feres* . . . applies with equal force in the context of governmental liability in admiralty." *Charland* v. *United States*, 615 F.2d 508, 509 (9th Cir. 1980). The Second Circuit next followed suit in *Cusanelli* v. *Klaver*, 698 F.2d 82 (2d Cir. 1983), where it cited the Fifth and Ninth Circuit's decisions; repeated *Feres*'s statute-specific holding; and then concluded, "by analogy," that the plaintiff "would be barred under *Feres* from suing the government." *Id.* at 85.

Several more circuits have since repeated the pattern, each citing the decisions of previous circuits without elaborating further. See, *e.g.*, *Potts* v. *United States*, 723 F.2d 20, 22 (6th Cir. 1983) (per curiam); *Lewis* v. *U.S. Navy*, 976 F.2d 726 (4th Cir. 1992) (per curiam). The result: an ever-lengthening string-cite, with no court actually analyzing the basic question of whether an interpretation of the FTCA ought to apply to two admiralty statutes.

The courts of appeals have applied the same turtles-all-the-way-down treatment to other federal statutes. Indeed, courts regularly extend *Feres* to new statutes based solely on the fact that *Feres* has previously been extended to *other* non-FTCA statutes. See, *e.g.*, *Brown* v. *Roche*, 206 F. App'x 430, 432 (6th Cir. 2006). Some courts have also ruled that *Feres* presumptively applies to entire *categories* of statutes, regardless of any possible differences among them. See, *e.g.*, *Brown*, 739 F.2d at 367 (extending

Feres to "actions brought under a federal civil rights statute").

Even on the rare occasions when a court of appeals has attempted to justify extending *Feres* with more than a conclusory sentence, its reasoning is invariably makeweight. Some courts, for instance, have claimed that *Feres* "remained a limited doctrine until 1983, when the Supreme Court [in *Chappell*] expanded the holding to include all suits for damages." *Speigner* v. *Alexander*, 248 F.3d 1292, 1295 (11th Cir. 2001). *Chappell*, of course, did no such thing. As noted above, see pp. 22–23, *supra*, it held only that some of the considerations supporting *Feres* constitute the kinds of "special factors" that, in the absence of congressional direction, make it "inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." 462 U.S. at 304. Still other courts have professed to be "unable to find . . . a reasoned distinction for the purposes of the *Feres* doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute." *Brown*, 739 F.2d at 367. Justice Scalia would beg to differ.

C. On even rarer occasions—petitioner has been able to identify only three—courts have *declined* to extend *Feres* to other statutes. Two such decisions involved the Swine Flu Act. See *Brown* v. *United States*, 715 F.2d 463, 464 (9th Cir. 1983); *Hunt* v. *United States*, 636 F.2d 580, 582 (D.C. Cir. 1980). In the third, *Cummings* v. *Department of the Navy*, 279 F.3d 1051 (D.C. Cir. 2002), the D.C. Circuit reversed a decision applying *Feres* to bar a servicemember's lawsuit under the Privacy Act. See *id.* at 1052. Though the Government noted that "*Feres* has been extended beyond the FTCA context," *id.* at 1057, the D.C. Circuit was unconvinced: "Because the duty remains ours to determine the meaning of a particular statute," the court explained, "the bare fact that the *Feres* doctrine has

been extended beyond the FTCA to other statutory contexts is not particularly probative." *Ibid.* (cleaned up). But such independent reasoning has unfortunately been in short supply.

Even then, Judge Williams dissented, "noting that other circuits have carried *Feres* well beyond its FTCA origins." *Id.* at 1060. He acknowledged that *Feres* was "under a cloud." *Id.* at 1061. But in his view, "[t]he most plausible solutions seem to be (1) consistent application of its principle; (2) a rule rather arbitrarily cutting it off with the exact applications already found by the Supreme [C]ourt and no more; and (3) complete abandonment." *Ibid.* Judge Williams felt compelled to pursue the first option, since the latter two "are available only to the Supreme Court." *Ibid.*

III. This Case Presents a Good Vehicle for Determining Whether *Feres* Should Extend Beyond the FTCA

Judge Williams was right about one thing: To prevent *Feres* from continuing to spread willy-nilly beyond its FTCA grounding, this Court must intervene. And for several reasons, this case is ideally suited for stemming the doctrine's advance. Indeed, several aspects of this case make it the *reductio ad absurdum* of the *Feres* doctrine—providing the perfect opportunity to take a stand against its unthinking extension by the courts of appeals.

First, the statutes under which petitioner's counterclaim arises, the SIAA and PVA, contain clear and unequivocal waivers of sovereign immunity. The SIAA provides that, "[i]n a civil action in admiralty brought by the United States . . . an admiralty claim in personam may be filed or a setoff claimed against the United States." 46 U.S.C. § 30903(a). Under the PVA, "[i]f the United States brings a civil action in admiralty for damages caused by a privately owned vessel, the owner of the vessel, or the

successor in interest, may file a counterclaim in personam, or claim a setoff, against the United States for damages arising out of the same subject matter." *Id.* § 31102(b).

There is no dispute that, absent *Feres*, both provisions would confer jurisdiction here. The United States, by bringing claims against petitioner based on the collision, triggered the immunity-waivers in those statutes. And petitioner's request for contribution, setoff, and indemnity for claims based on harm to the *McCain*'s sailors plainly "aris[es] out of the same subject matter" as the Government's claims. *Ibid.* Accordingly, the only possible basis for denying petitioner's right to such a counterclaim—and the only ground invoked by the Second Circuit—is an implicit exception to the statutes' scope under *Feres*.

Second, the statutes at issue here are particularly ill-suited to being treated as *Feres* follow-ons. For one thing, the SIAA and PVA both predate the FTCA, see Act of Mar. 9, 1920, ch. 95, 41 Stat. 525 (SIAA); Act of Mar. 3, 1925, ch. 428, 43 Stat. 1112 (PVA), removing any argument that when Congress enacted them, it tacitly incorporated this Court's interpretation of the FTCA in *Feres*. The FTCA also exempts from its scope "any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States," 28 U.S.C. § 2680(d)—*i.e.*, any claim under the SIAA and PVA. It would thus be especially anomalous to apply a case interpreting the FTCA (*Feres*) to statutes that are expressly exempted from its coverage.

More generally, the SIAA and PVA codify the long-standing principle that "[w]henever the United States sues for damage inflicted on its vessel or cargo, it impliedly waives its exemption from admiralty jurisdiction as to cross libels or counterclaims arising from the same transaction." 2 Am. Jur. 2d Admiralty § 44. This principle

reflects "the consent of the sovereign power to see full justice done in such circumstances." *The Western Maid*, 257 U.S. at 434 (discussing *The Siren*, 74 U.S. 152, 154 (1868)). Thus Justice Holmes explained—in a case where the United States had filed a claim based on a collision between its ship and a private vessel—that "[w]hen the United States comes into court to assert a claim[,] it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *United States* v. *The Thekla*, 266 U.S. 328, 339–40 (1924).

In light of Congress's decision to codify those implied-waiver principles in the SIAA and PVA, there is now even greater cause to view the government as "tak[ing] the position of a private suitor" where (as here) it *voluntarily* "comes into court to assert a claim." *Ibid.* Indeed, Congress enacted those statutes to prevent the "injustice" of allowing "the United States, while immune from [suit] . . . , [to] sue the vessels of private owners, ha[ve] its day in court without the risk of costs being awarded against it, and, when the Government vessel [wa]s found to have been at fault, refuse[] to pay the damages sustained by the private owner." S. Rep. No. 941, at 2 (1925). The *Feres* doctrine, by contrast, is "concerned with" the opposite scenario—namely, "the disruption of the peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hale his superiors into court" *involuntarily*. *Chappel*, 462 U.S. at 304 (cleaned up).[16]

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[16] In *Stencel*, the Court applied *Feres* to bar a cross-claim for indemnification brought by a private party "for damages paid by it to a member of the Armed Forces injured in the course of military service." 431 U.S. at 667. But in that case, the suit was initiated by the servicemember *against* both the private party and the United States.

Here, the United States was a voluntary participant, having filed an affirmative claim against petitioner that put at issue its own negligence. Yet the Second Circuit—following the same mechanistic approach used by other courts of appeals—applied *Feres* to bar petitioner's counterclaim under the SIAA and PVA anyway. Given the distinctive language, history, and function of those provisions, this case is an ideal vehicle for testing whether the *Feres* doctrine respects *any* statutory limits.

Third, the procedural posture here throws into particularly stark relief the *Feres* doctrine's flaws. After decades of erosion, the doctrine's only remaining justification—and the one relied upon by the court of appeals—is an "interest[] in preventing civilian courts from second-guessing military decisions and in preserving essential military discipline." App. 44a (cleaned up). But here, the United States *itself* subjected the decision-making of the *McCain*'s officers and crew to judicial scrutiny when it filed its affirmative claim against the *Alnic*. That fundamental litigation choice required the United States: to release classified and sensitive documents from the Navy's own investigation and discipline of those responsible; to subject twenty-nine servicemembers to depositions, including the *McCain*'s Commanding Officer and two senior U.S. Navy Captains; and to call the *McCain*'s Commanding Officer, chief petty officer, chief warrant officer, and chief engineer as witnesses at trial. See App. 63a–73a. For the United States now to seek immunity from a counterclaim based on the very same incident, by invoking concerns about military discipline, thus rings especially hollow.

Id. at 672–74. The United States was thus an *unwilling* participant, having been haled into court as a defendant.

Indeed, the district court has *already* found the United States 80% liable for the collision. All that remains in resolving petitioner's counterclaim is to apply that apportionment ruling to any amounts that petitioner must pay to the sailor-claimants. Petitioner's contribution counterclaim therefore could not possibly have any further effect on military discipline or readiness.[17]

Finally, the lopsided liability ruling here further highlights *Feres*'s unfairness. Even though the United States was adjudged to be 80% at fault for the incident, it will bear none of the personal-injury liability for harm to the sailors affected by the incident: "to the extent that joint-and-several liability is available here, [petitioner] may have to pay the full value of the Sailor-Claimants' damages claims, even though ALNIC was only 20% at fault for the collision." App. 45a. Of course, the unfairness here is but one manifestation of the "unfortunate consequence[s]" under *Feres* of barring judicial relief against the Government "when [servicemembers] are injured by the negligence of the Government or its employees." *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari).

If Congress itself—elected by and accountable to the American people—had prescribed such unfairness, that would be one thing. Even if the outcome were required by a decision of this Court, statutory *stare decisis* would

[17] The Second Circuit stated that it need "not inquire into the extent to which particular proceedings, such as the Phase 2 trial, would call into question military discipline and decisionmaking." App. 47a (cleaned up). But counterclaims under the SIAA and PVA *always* require "a civil action in admiralty brought by the United States." 46 U.S.C. § 30903(a); see *id.* § 31102(b) ("If the United States brings a civil action in admiralty . . . ."). As a result, in any case where a counterclaim is asserted under those statutes, the United States will already have chosen to put its own decision-making into question.

provide at least a prima facie reason for leaving the error in place. But here, the doctrine's extension beyond the FTCA has been based on little more than reflexive string-citing by the courts of appeals. There is accordingly no sound reason for the Court to allow such "unfairness and irrationality" to proliferate. *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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