No.

In the Supreme Court of the United States

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, waives the federal government's sovereign immunity for certain tort actions but sets forth 13 enumerated exceptions, including exceptions for all claims arising out of the exercise of a discretionary function, all claims "arising in a foreign country," and all claims "arising out of the combatant activities of the military * * * during time of war." *Id.* § 2680(a), (j), (k). In *Feres* v. *United States*, 340 U.S. 135, 138 (1950), this Court recognized a non-enumerated exception for all claims based on injuries to members of the United States armed forces that "arise out of or are in the course of activity incident to service."

The questions presented in this case are:

1. Whether the Third Circuit, in conflict with decisions of the Second, Fifth, Sixth, Ninth, and Eleventh Circuits, correctly ruled that the *Feres* doctrine bars suit by a soldier's widow and children for injuries that arose out of an ordinary automobile accident occurring on a public road running through an Army post, where the decedent's supposed "activity incident to service" at the time of the fatal accident was driving home in his personal vehicle after completing his military job.

2. Whether, in view of the widespread condemnation of *Feres*, including by several current Members of this Court (see *United States* v. *Johnson*, 481 U.S. 681, 692-703 (1987) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *Lombard* v. *United States*, 690 F.2d 215, 228-30, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring and dissenting in part), cert. denied, 462 U.S. 1118 (1983)), and given what four judges of the Third Circuit in this case called "the compelling argument for the abandonment of *Feres*," this Court should, as the Third Circuit judges urged, "grant certiorari to revisit" *Feres* and overrule it.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The Federal Tort Claims Act And The Judicial Creation Of The *Feres* Doctrine 2

B. The Proceedings Below 4

REASONS FOR GRANTING THE PETITION 9

I. THE THIRD CIRCUIT'S TEST FOR DETERMINING WHAT CONSTITUTES "ACTIVITY INCIDENT TO SERVICE" AND ITS HOLDING THAT *FERES* BARS PETITIONER'S CLAIMS CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS 11

A. The Circuits Have Adopted Vastly Different Approaches To Applying The *Feres* Doctrine . . 11

B. In Other Circuits, *Feres* Would Not Have Barred Petitioner's Claims. 14

C. The Circuits Have Reached Conflicting Results In Cases Factually Similar To This One 17

D. The Decision Below Was Wrong 18

TABLE OF CONTENTS — Continued

Page

II. IN LIGHT OF THE WIDESPREAD CRITICISM OF THE *FERES* DOCTRINE AND WHAT FOUR THIRD CIRCUIT JUDGES CALLED "COMPELLING ARGUMENT[S]" FOR ITS "ABANDONMENT," THIS COURT SHOULD CONSIDER OVERRULING IT 20

A. *Feres* Has Been The Subject Of Withering Judicial Criticism. 20

B. The *Feres* Doctrine Has Proved To Be Unworkable In Practice 24

C. *Feres* Was Wrongly Decided 24

D. *Stare Decisis* Provides No Good Reasons To Deny Review 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases:

Bowers v. *United States*, 904 F.2d 450
(8th Cir. 1990) 21

Bozeman v. *United States*, 780 F.2d 198
(2d Cir. 1985) 21

Bradshaw v. *United States*, 443 F.2d 759
(D.C. Cir. 1971) 13

Briggs v. *United States*, 617 F. Supp. 1399
(D.R.I. 1985), aff'd mem.,
787 F.2d 578 (1st Cir. 1986) 20

Brooks v. *United States*,
337 U.S. 49 (1949) . . . . . *passim*

Brown v. *United States*, 151 F.3d 800
(8th Cir. 1998) 14

C.R.S. v. *United States*, 761 F. Supp. 665
(D. Minn. 1991) 22

Cutshall v. *United States*, 75 F.3d 426
(8th Cir. 1996) 10, 21

Day v. *Massachusetts Air Nat'l Guard*,
167 F.3d 678 (1st Cir. 1999) 12, 20

TABLE OF AUTHORITIES — Continued

Page(s)

Dreier v. *United States*, 106 F.3d 844
(9th Cir. 1996) 14, 16

Elliott v. *United States*, 13 F.3d 1555
(11th Cir.), vacated, 28 F.3d 1076
(11th Cir.), judgment aff'd by
equally divided court, 37 F.3d 617
(11th Cir. 1994) 17, 22

Estate of McAllister v. *United States*,
942 F.2d 1473 (9th Cir. 1991),
cert. denied, 502 U.S. 1092 (1992) 14, 22

Feres v. *United States*,
340 U.S. 135 (1950) . . . . . *passim*

Fleming v. *U.S. Postal Service*,
186 F.3d 697 (6th Cir. 1999) 12, 13, 17

Flowers v. *United States*, 764 F.2d 759
(11th Cir. 1985) 6, 7

Graham v. *United States*, 753 F. Supp. 994
(D. Me. 1991) 20

Green v. *Hall*, 8 F.3d 695 (9th Cir. 1993),
cert. denied, 513 U.S. 809 (1994) 16

Hall v. *United States*, 528 F. Supp. 963
(D.N.J. 1981), aff'd mem.,
668 F.2d 821 (3d Cir. 1982) 21

TABLE OF AUTHORITIES — Continued

Page(s)

Hinkie v. *United States*, 715 F.2d 96
(3d Cir. 1983), cert. denied,
465 U.S. 1023 (1984) 21

Hohn v. *United States*, 524 U.S. 236 (1998) 28, 29

Hunt v. *United States*, 636 F.2d 580
(D.C. Cir. 1980) 22

In re "Agent Orange" Prod. Liability Litig.,
580 F. Supp. 1242 (E.D.N.Y.), appeal
dismissed, 745 F.2d 161 (2d Cir. 1984) 21

Jones v. *LaRiviera Club, Inc.*,
655 F. Supp. 1032 (D.P.R. 1987) 20

Kohn v. *United States*, 680 F.2d 922
(2d Cir. 1982) 21

LaBash v. *U.S. Department of the Army*,
668 F.2d 1153 (10th Cir.), cert. denied,
456 U.S. 1008 (1982) 22

Lauer v. *United States*, 968 F.2d 1428 (1st Cir.),
cert. denied, 506 U.S. 1033 (1992) 18

Lombard v. *United States*, 690 F.2d 215
(D.C. Cir. 1982), cert. denied,
462 U.S. 1118 (1983) 23

TABLE OF AUTHORITIES — Continued

Page(s)

Lutz v. *Secretary of the Air Force*,
944 F.2d 1477 (9th Cir. 1991) 16-17, 22

Miller v. *United States*, 42 F.3d 297
(5th Cir. 1995) 12

Mills v. *Tucker*, 499 F.2d 866 (9th Cir. 1974) 16

Minns v. *United States*, 155 F.3d 445 (4th Cir.
1998), cert. denied, 119 S. Ct. 874 (1999) 10

Monaco v. *United States*, 661 F.2d 129
(9th Cir. 1981), cert. denied,
456 U.S. 989 (1982) 22

Mondelli v. *United States*, 711 F.2d 567
(3d Cir. 1983), cert. denied,
465 U.S. 1021 (1984) 21

Monell v. *New York City Dep't of Social Servs.*,
436 U.S. 658 (1978) 28-29

O'Callahan v. *Parker*, 395 U.S. 258 (1969) 24

Ocello v. *United States*, 685 F. Supp. 100
(D.N.J. 1988) 21

Parker v. *United States*, 611 F.2d 1007
(5th Cir. 1980) 18, 21

TABLE OF AUTHORITIES — Continued

Page(s)

Patterson v. *McLean Credit Union*,
485 U.S. 617 (1988) 28, 29

Patterson v. *McLean Credit Union*,
491 U.S. 164 (1989) 29

Persons v. *United States*, 925 F.2d 292
(9th Cir. 1991) 22

Pierce v. *United States*, 813 F.2d 349
(11th Cir. 1987) 17-18

Punnett v. *United States*, 602 F. Supp. 530
(E.D. Pa. 1984) 21

Sanchez v. *United States*, 813 F.2d 593
(2d Cir. 1987) 21

Saudi Arabia v. *Nelson*,
507 U.S. 349 (1993) 18, 28

Scales v. *United States*, 685 F.2d 970
(5th Cir. 1982), cert. denied,
460 U.S. 1082 (1983) 21

Schoemer v. *United States*, 59 F.3d 26
(5th Cir.), cert. denied,
516 U.S. 989 (1995) 13

Selbe v. *United States*, 130 F.3d 1265
(7th Cir. 1997) 12

TABLE OF AUTHORITIES — Continued

Page(s)

Shaw v. *United States*, 854 F.2d 360
(10th Cir. 1988) 12, 18

Skees v. *United States*, 107 F.3d 421
(6th Cir. 1997) 14

Solorio v. *United States*,
483 U.S. 435 (1987) 27

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 29

Stephenson v. *Stone*, 21 F.3d 159
(7th Cir. 1994) 12

Stewart v. *United States*, 90 F.3d 102
(4th Cir. 1996) 12, 18

Taber v. *Maine*, 67 F.3d 1029
(2d Cir. 1995) . . . . . *passim*

Troglia v. *United States*, 602 F.2d 1334
(9th Cir. 1979) 6, 7, 16

United States v. *Johnson*,
481 U.S. 681 (1987) . . . . . *passim*

United States v. *Shearer*,
473 U.S. 52 (1985) 8, 13-14

United States v. *Stanley*,
483 U.S. 669 (1987) 18, 28

TABLE OF AUTHORITIES — Continued

Page(s)

Veillette v. *United States*, 615 F.2d 505
(9th Cir. 1980) 23-24

Veloz-Gertrudis v. *United States*,
768 F. Supp. 38 (E.D.N.Y.),
aff'd mem., 953 F.2d 636
(2d Cir. 1991), cert. denied,
504 U.S. 911 (1992); 21

Verma v. *United States*, 19 F.3d 646
(D.C. Cir. 1994) 12

Wake v. *United States*, 89 F.3d 53
(2d Cir. 1996) 14

Whitley v. *United States*, 170 F.3d 1061
(11th Cir. 1999) 12

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1346(b), 2671-2680 2-3

28 U.S.C. § 2671 . . . . . 2, 25

28 U.S.C. § 2680 . . . . . 2-3, 25

Pub. L. No. 79-601, title IV, § 424,
60 Stat. 842 (1946) 26

TABLE OF AUTHORITIES — Continued

Page(s)

Miscellaneous:

8 Am. Jur. 2d, *Automobiles and Highway Traffic* § 771 (1997) 15

Annotation, Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile, 27 A.L.R. 5th 174 (1995) 15

Bennett, *The* Feres *Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U. L.J. 383 (1984) 23

Comment, *The* Feres *Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?*, 44 U. PITT. L. REV. 929 (1983) 23

Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979) 23

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TABLE OF AUTHORITIES — Continued

Page(s)

Note, *Servicemembers' Rights Under the* Feres *Doctrine: Rethinking "Incident To Service" Analysis*, 33 VILL. L. REV. 175 (1988) 23

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Tomes, Feres *to* Chappell *to* Stanley*: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93 (1990) 23

Seidelson, *From* Feres *v.* United States *to* Boyle *v.* United Technologies Corp.*: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219 (1994) 23

Wells, *Providing Relief to the Victims of Military Medicine*, 32 DUQ. L. REV. 109 (1994) 23

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 176 F.3d 652. The opinion of Judge Rendell, joined by Chief Judge Becker and Judges Nygaard and McKee, dissenting from the denial of rehearing *en banc* (App., *infra*, 11a-12a) is reported at 180 F.3d 564. The opinion of the district court (App., *infra*, 13a-23a) is reported at 1 F. Supp. 2d 498.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1999, and rehearing was denied on June 30, 1999 (App., *infra*, 10a, 11a). On September 17, 1999, Justice Souter extended the time in which to file the petition for a writ of certiorari to and including October 28, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act are set forth at App., *infra*, 24a-27a.

STATEMENT

Private Charles A. Richards, Jr. was killed by an Army truck while driving home from work at Fort Knox to care for his pregnant wife. His widow brought a wrongful death action, alleging both that the truck had been negligently maintained, and that the driver of the truck had been negligent in driving it. Recognizing a division in the circuits on whether claims of this sort could proceed under *Feres* v. *United States*, 340 U.S. 135 (1950), a panel of the Third Circuit held that *Feres* barred the suit. At the same time, however, the Third Circuit "express[ed] misgivings about" its decision and acknowledged that the result was "counter-intuitive and inequitable" as well as illustrative of "the disconnect that has come to exist between the philosophy behind *Feres* and its application." App., *infra*, 8a, 10a. Four judges of the Third Circuit dissented from the

denial of rehearing *en banc*. Calling *Feres* a "travesty," they "urge[d] the Supreme Court to grant certiorari" and overrule it. *Id.* at 12a.

A. The Federal Tort Claims Act And The Judicial Creation Of The *Feres* Doctrine.

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, which waives federal sovereign immunity for certain tort actions and vests the federal district courts with exclusive jurisdiction over such actions. Specifically, the FTCA permits the imposition of liability

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b). An "employee of the Government" is defined as including "members of the military or naval forces of the United States." *Id.* § 2671. The FTCA also specifies that the phrase "acting within the scope of his office or employment" in Section 1346(b) "means acting in [the] line of duty" in "the case of a member of the military or naval forces of the United States." 28 U.S.C. § 2671.

The broad waiver of immunity contained in the FTCA, however, is subject to no fewer than 13 enumerated exceptions. See 28 U.S.C. § 2680. For example, Congress expressly exempted "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). It also broadly exempted "[a]ny claim arising in a foreign country." *Id.* § 2680(k). Except for certain intentional tort claims brought against federal investigative or law enforcement

officers, Congress exempted intentional torts, including all claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* § 2680(h). And Congress exempted all claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of * * * an employee of the Government." *Id.* § 2680(a).

2. Shortly after the FTCA was enacted, this Court decided *Brooks* v. *United States*, 337 U.S. 49 (1949). In *Brooks*, two soldiers and their father were driving on a public highway when they were hit by an Army truck. The government moved to dismiss for lack of jurisdiction, arguing that because the brothers were in the Army, claims arising from their injuries and death were excepted from the FTCA. The Court rejected the argument. "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.'" *Id.* at 51 (emphasis in original). The accident, explained the Court, "had nothing to do with the [brothers'] Army careers * * * except in the sense that all human events depend on what has already transpired." *Id.* at 52.

A year after *Brooks*, the Court decided *Feres* v. *United States*, 340 U.S. 135 (1950). Two of the three consolidated cases involved claims of medical malpractice; the third was a wrongful death claim arising out of a soldier's death in a barracks fire. Deciding that none of the claims should have been permitted to go forward, the *Feres* Court held that in addition to the exceptions specified by Congress in the FTCA, Congress intended to exempt all tort claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. In *United States* v. *Johnson*, 481 U.S. 681 (1987), four dissenting Justices criticized *Feres* as "wrongly decided and heartily deserv[ing of] the widespread, almost universal

criticism it has received." *Id.* at 701 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ.) (internal quotation marks omitted).

B. The Proceedings Below.

1. On June 26, 1995, Private Charles A. Richards, Jr. was killed by a five-ton Army truck. He was 21 years old. The accident took place on Kentucky Highway 1638, a public road crossing Fort Knox, in Muldraugh, Kentucky, near an intersection with another public road. According to the official accident report of the Kentucky State Police, the Army truck ran a red light and broadsided Mr. Richards's car, shoving it into a ditch, and finally coming to rest on top of the car, crushing Mr. Richards to death. C.A. Joint App. 187. At the time he was killed, Mr. Richards was off duty for the day and was driving home in his personal car to care for his wife, Shammara, who was three months pregnant with their second child.

2. On March 26, 1997, Mrs. Richards initiated this wrongful death suit in the United States District Court of the Virgin Islands. Invoking the FTCA as the basis for jurisdiction and naming the United States as defendant, Mrs. Richards advanced claims for herself as well as on behalf of her husband's estate and her two minor children, Shanee and Charles. App., *infra*, 28a-32a. As bases for liability, Mrs. Richards alleged that the Army had been negligent in failing to properly maintain the truck involved in the accident, in allowing the truck to be operated in an unsafe condition (including being equipped with defective front brakes, damaged tail and rear turn lamps, contaminated brake fluid, and an inoperable horn), and in allowing the driver of the truck to drive it even though he was not licensed to operate a vehicle of that class. *Id*. at 30a-31a. Mrs. Richards also alleged that the government was liable under a theory of *respondeat superior* for the driver's negligence in running a red light and losing control. *Id*. at 31a.

The government answered, admitting that the truck's driver "was acting within the course and scope of his federal employment at the time of the accident." App., *infra*, at 35a. The government denied, among other things, that Mr. Richards was on personal business at the time of the accident. *Ibid*. The government also asserted various defenses, including that the court lacked subject matter jurisdiction and that Mrs. Richards's claims were "barred by the *Feres* Doctrine." *Ibid*. Relying on *Feres*, the government then moved to dismiss the complaint for lack of subject matter jurisdiction.

3. Accepting the allegations in the complaint as true (including the allegation that Mr. Richards was off duty and headed home when he was killed), the U.S. District Court of the Virgin Islands granted the government's motion to dismiss. App., *infra*, 13a-23a. The court described its approach as follows. First, in deciding whether the injuries in this case "arise out of or are in the course of activity incident to [military] service," the court had to consider "the totality of the circumstances," including "(1) the service member's duty status; (2) the situs of the injury; (3) and the activity the service member was performing." *Id.* at 16a. "When the totality of the circumstances show that the *Feres* doctrine bars suit," the court reasoned, it "may dismiss the suit without considering the underlying *Feres* doctrine rationales." *Id.* at 16a-17a. "On the other extreme," however, "even when the three-factor totality of the circumstances test strongly indicates that the *Feres* doctrine does not bar suit, the Court must look to the *Feres* doctrine rationales before permitting suit." *Id*. at 17a. The court described those rationales: avoiding judicial involvement in military affairs; preserving the "federal nature" of the relationship between service members and the government; and preventing excess tort recovery by those eligible for benefits such as the "death gratuity" and certain other benefits provided to Mrs. Richards. *Id.* at 16a.

The court first considered Mrs. Richards's argument that all three of the "factors generally considered in the totality of the circumstances conclusively show that [Mr.] Richards' death did not occur incident to service," because "[Mr.] Richards was in off-duty status, on a public road, and performing an act not related to his military duties — going home." App., *infra*, 17a. The district court observed that the Ninth Circuit, in a "factually similar case," "held that suit by an off-duty service member injured while possibly returning to the base after enjoying a short period of liberty, on a public road passing across an easement on military property, may not be barred by the *Feres* doctrine." *Id.* at 17a (citing *Troglia* v. *United States*, 602 F.2d 1334 (9th Cir. 1979)). In contrast, the court wrote, the Eleventh Circuit had held that *Feres* barred suit when an off-duty service member who was driving home from the grocery store was injured on a public road running through an easement on military property. *Id.* at 17a-18a (citing *Flowers* v. *United States*, 764 F.2d 759 (11th Cir. 1985)). Although the district court suggested that consideration of "the three-factor test points more strongly toward finding a *Feres* bar than toward permitting suit," it ultimately ruled that application of that test was "inconclusive." *Id.* at 19a. It did so because "the two circuits that have considered factually similar cases are split and because the Third Circuit has not had occasion to review a factually similar case." *Ibid.*; see also *id.* at 23a (again noting existence of "split" in the circuits).

Turning finally to *Feres*'s rationales, the district court concluded that they "support a finding that the Plaintiffs' suit is barred by the *Feres* doctrine." App., *infra*, at 19a-22a. On that basis, it dismissed the lawsuit.

4. The Third Circuit affirmed. App., *infra*, 1a-10a. At the outset, it noted that "[t]he Supreme Court has not articulated a specific method for determining whether an injury is 'incident' to

military service," but has instead "instructed courts to examine each case in light of the statute as it has been construed in *Feres* and subsequent cases." *Id.* at 4a (internal quotation marks omitted). Echoing the district court's initial analysis, the Third Circuit explained that, "[t]o assist in that inquiry," the lower courts "consider a number of factors including: (1) the service member's duty status; (2) the site of the accident; and (3) the nature of the service member's activity at the time of the injury." *Ibid.*

Like the district court, the Third Circuit took note of the fact that "the two United States Courts of Appeals that have considered" the applicability of *Feres* to "similar facts differ on whether *Feres* bars suit." App., *infra*, at 5a (citing the Eleventh Circuit's decision in *Flowers* and the Ninth Circuit's decision in *Troglia*). Nevertheless, it concluded that this case was more analogous to *Flowers*, where *Feres* had been applied to bar suit. The panel emphasized that the accident that took Mr. Richards's life had occurred on a public highway, but one that ran through a military installation. *Id.* at 6a-7a. In addition, wrote the panel, "Private Richards's activity at the time of the accident supports the application of *Feres*." *Id.* at 7a. The panel thought it significant that, at the time of the accident, Mr. Richards was "driving home from his duty station" across military property and not "simply driving on a public road as a member of the public." *Ibid.* The panel hinted that these facts might have been, but were not necessarily, dispositive: "Had Private Richards been struck by a military vehicle while traveling home from a place unrelated to his military service, or on a public road outside the Army base, we may have reached a different conclusion." *Ibid.* On the basis of this analysis, the panel concluded that *Feres* barred suit under the "totality of the circumstances." *Id.* at 8a.

Unlike the district court, which in a two-step process had examined the result in light of *Feres*'s rationales, the Third Circuit held that only one step was proper. Once a court determines that

activity was incident to service, on the basis of "the totality of the circumstances in light of the evaluation of the factors," inquiry into *Feres*'s purposes is unnecessary. At the same time, however, the Third Circuit went on to examine *Feres*'s purposes in order to explain why the result in this case — which it called "counter-intuitive and inequitable" — "illustrates the disconnect that has come to exist between the philosophy behind *Feres* and its application." App., *infra*, 8a, 10a.

Quoting *United States* v. *Shearer*, 473 U.S. 52, 57 (1985), the panel observed that *Feres*

> seems best explained by 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 Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

App., *infra*, 8a. An action in which "a soldier attempted to sue the commander of his platoon for injuries received during battle" would obviously threaten the "special relationship between soldier and superior," and would be barred under *Feres*. *Id.* at 9a. To the panel, however, this case was vastly different. Mr. Richards had been killed on a public highway, maintained and patrolled by the Commonwealth of Kentucky, and used by anyone who chose to drive on it. "[U]nlike the hypothetical * * * involving a soldier engaged in combat, the accident that took Private Richards's life was not necessarily related to his military duty." *Ibid.* Rather,

> it was purely a matter of chance that Private Richards's automobile, rather than a civilian's vehicle, was struck by the military fuel truck, and that Private Richards, rather than a civilian, was killed.

Ibid. The widow of a civilian would obviously be free to sue the Army without fear of *Feres*; that lawsuit, in turn, would be "no less or more intrusive" than Mrs. Richards's. The court wrote:

> [W]hile it is true that but for Private Richards' active status in the military, he would not have been "in the same place at the same time with the same purpose" at the time of the accident, it is not at all clear that Mrs. Richards's suit implicates the "special relationship" between her deceased husband and his superiors in the manner contemplated [by the Supreme Court].

Id. at 9a-10a. "Thus," the panel concluded, "we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status." *Id*. at 10a.

5. Four judges of the Third Circuit dissented from the denial of rehearing *en banc*. App., *infra*, 11a-12a (Rendell, J., joined by Becker, C.J., and Nygaard and McKee, JJ., dissenting). "This case," they wrote, "presents yet another compelling argument for the abandonment of the *Feres* doctrine." *Id*. at 11a. The four judges criticized *Feres* because it "represents * * * a 'bad estimation[]' of what Congress intended to do (but did not do), in the Federal Tort Claims Act." *Id*. at 11a-12a (quoting Justice Scalia's dissent in *United States* v. *Johnson*, 481 U.S. 681, 695 (1987)). No less disturbing, they wrote, *Feres* is "being employed by many courts on a regular basis to deny a military employee's recovery and to prevent the government's accountability for injuries sustained in connection with essentially civilian activities wholly unrelated to military service." *Id.* at 12a. Calling the *Feres* doctrine a "travesty," the judges "urge[d] the Supreme Court to grant certiorari," to "revisit" *Feres*, and to overrule it. *Ibid*.

REASONS FOR GRANTING THE PETITION

This case presents a question over which the courts of appeals are hopelessly divided: how to determine whether injuries are suffered as a result of "activity incident to service" within the meaning of *Feres* v. *United States*, 340 U.S. 135, 138 (1950).

The question is of critical importance to members of the American military and their families and dependents, for the answer determines whether or not in a particular case they will be afforded the remedies available to all other Americans under the Federal Tort Claims Act.

As the Third Circuit stressed, Mrs. Richards's lawsuit is nothing like one in which "a soldier attempt[s] to sue the commander of his platoon for injuries received during battle" (App., *infra*, 9a), the paradigmatic example of "activity incident to service." Nor does this case involve a service member's challenge to any peculiarly military judgments, which would also unquestionably be barred under *Feres*. Cf., *e.g.*, *Minns* v. *United States*, 155 F.3d 445 (4th Cir. 1998) (barring claims by children born of Gulf War veterans for severe birth defects caused by pesticides administered in anticipation of defending against biological and chemical warfare), cert. denied, 119 S. Ct. 874 (1999). Nor is Mrs. Richards's action one for military medical malpractice, to which all the circuits apply a rule that (unjust though it might be) at least has the virtue of uniformity: the plaintiff always loses. Cf., *e.g.*, *Cutshall* v. *United States*, 75 F.3d 426 (8th Cir. 1996) (barring claims by a Marine corporal who was misdiagnosed as having an infection and repeatedly assured she did not have cancer when in fact she did).

Mrs. Richards, instead, sued because her husband was killed on his way home by a negligent truck driver driving a negligently maintained truck, the type of routine though tragic accident that happens every day, all over the country, to people who have no connection to the American military. In deciding whether suits such as this should be permitted to go forward, the courts of appeals use varying approaches, and, as the Third Circuit panel noted here (App., *infra*, 5a), cases such as this have yielded sharply conflicting results. The result has been what Judge Guido Calabresi has called, with matchless understatement, "that singular tangle of seemingly inconsistent rulings and rationales known as the *Feres* doctrine." *Taber* v. *Maine*, 67 F.3d 1029, 1031 (2d Cir. 1995).

The Court should grant the petition in order to resolve this conflict over *Feres*'s scope.

Conflict among the circuits aside, this case also presents the question raised by the four dissenting judges of the Third Circuit in urging the Court to grant certiorari: whether it is time for the Court to "revisit what [it has] wrought." App., *infra*, 12a. The *Feres* doctrine — an indeterminate and unpredictable creature of federal common law — is not just unfair and unworkable, it is illegitimate. The Court should grant the petition and finally consign *Feres* to the jurisprudential graveyard, where it belongs.

I. THE THIRD CIRCUIT'S TEST FOR DETERMINING WHAT CONSTITUTES "ACTIVITY INCIDENT TO SERVICE" AND ITS HOLDING THAT *FERES* BARS PETITIONER'S CLAIMS CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The different circuits' approaches to *Feres* in cases such as this one are in conflict, and the different approaches have yielded irreconcilable results. Unlike the uniform, "plaintiff always loses" rule applied in actions for military medical practice, what constitutes injury arising out of other "activity incident to service" varies from jurisdiction to jurisdiction — resulting in precisely the chaotic welter of "laws which fluctuate in existence and value" that *Feres* itself decried. 340 U.S. at 143. For members of the U.S. armed forces and their families and dependents, the decisions of the courts of appeals interpreting *Feres* have created a macabre and perverse legal regime: their right to recovery under the FTCA depends on the jurisdiction in which they are lucky enough to live, or to die.

A. The Circuits Have Adopted Vastly Different Approaches To Applying The *Feres* Doctrine.

Whether *Feres* bars a tort action based on injury to a member of the armed forces hinges on whether the service member was, when injured, engaged in "activity incident to service." In determin-

ing what constitutes "activity incident to service" within the meaning of *Feres*, the courts of appeals are using at least five different approaches.

1. The Third Circuit, along with the Seventh, Eleventh, and D.C. Circuits, considers various "factors" "in light of the totality of the circumstances," among them "(1) the service member's duty status; (2) the site of the accident; and (3) the nature of the service member's activity at the time of the injury." App., *infra*, 4a; accord *Stephenson* v. *Stone*, 21 F.3d 159, 164 (7th Cir. 1994); *Whitley* v. *United States*, 170 F.3d 1061, 1070-75 (11th Cir. 1999); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) (per curiam). Once these courts determine that the plaintiff in a case suffered injuries from an "activity incident to service," judicial inquiry ends: *Feres* bars the suit regardless of "whether or not the circumstances of a case implicate the rationales for the *Feres* doctrine." *Verma*, 19 F.3d at 647; accord *Selbe* v. *United States*, 130 F.3d 1265, 1268 (7th Cir. 1997); *Whitley*, 170 F.3d at 1075. As the Third Circuit held here, even if allowing the suit would in no way undermine, or even implicate, the rationales underlying *Feres*, application of this multi-factor test is conclusive — even when this analysis produces results that are "counter-intuitive" and "inequitable." App., *infra*, 8a-10a.

2. The First, Fourth, Fifth, Sixth, and Tenth Circuits also decide whether activity is incident to service by assessing "the totality of the circumstances" as evidenced by "certain factors" and "prongs," but they consider these factors in light of the *Feres* rationales. *Miller* v. *United States*, 42 F.3d 297, 301-02 (5th Cir. 1995); accord *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-83 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-05 (4th Cir. 1996); *Fleming* v. *U.S. Postal Service*, 186 F.3d 697, 699 (6th Cir. 1999); *Shaw* v. *United States*, 854 F.2d 360, 362 (10th Cir. 1988). All of these courts understand *Feres* as grounded in the three rationales

articulated in *United States* v. *Johnson*, 481 U.S. 681, 689-91 (1987): the federal nature of the relationship between service members and the government; the availability of certain disability and death benefits; and the risk that tort suits might entangle the judiciary in military affairs. Although the First, Fourth, and Tenth Circuits give all three rationales equal weight, the Fifth and Sixth do not. The Fifth Circuit concerns itself with the relationship between the service member and the armed services and thus "often treat[s] the serviceman's duty status as the most important factor," *Schoemer* v. *United States*, 59 F.3d 26, 28 (5th Cir.), cert. denied, 516 U.S. 989 (1995); the Sixth Circuit, in contrast, considers mainly whether allowing an FTCA action would "impermissibly insinuate the civilian judiciary into military decisions," *Fleming*, 186 F.3d at 700 (internal quotation marks omitted).

3. The Second Circuit takes an entirely different approach, based on its reasoning that *Brooks* and *Feres* are best understood as part of a military analogue to workers' compensation. See *Taber* v. *Maine*, 67 F.3d 1029, 1037-45 (2d Cir. 1995) (Calabresi, J.); see also *Bradshaw* v. *United States*, 443 F.2d 759, 762 (D.C. Cir. 1971) ("[T]he *Brooks*/*Feres* distinction falls into the work related non-work related dichotomy characteristic of workmen's compensation schemes generally."). Thus, in determining whether activity is "incident to service," the Second Circuit applies the familiar rule of workers' compensation law: injury results from activity incident to service only if the victim was acting within the scope of his military employment at the time he was injured; activity is not incident to service when the victim was acting outside the scope of employment. Given the military setting, this rule is subject to an exception "in the extreme case": recovery may be barred only if a lawsuit might implicate considerations relating to the discipline of the tortfeasor, as in *United States* v. *Shearer*, 473 U.S. 52 (1985) (claim that the Army had negligently failed to maintain disciplinary control over a soldier who abducted and

murdered another soldier). See *Taber*, 67 F.3d at 1052; cf. *Wake* v. *United States*, 89 F.3d 53, 58, 61 (2d Cir. 1996) (holding that scope-of-employment considerations did "not come into play"; recovery barred in part because of such disciplinary considerations). The Sixth Circuit has expressly rejected the approach taken by the Second Circuit in *Taber*. *Skees* v. *United States*, 107 F.3d 421, 425 n.3 (6th Cir. 1997).

4. The Eighth Circuit eschews multi-pronged inquiries into factors and looks instead to the three rationales underlying *Feres* that were set out in *Johnson*. See, *e.g.*, *Brown* v. *United States*, 151 F.3d 800, 804-05 (8th Cir. 1998). If allowing recovery would frustrate *Feres*'s purposes, an action is barred.

5. The Ninth Circuit has "reluctantly recognized * * * that [a] reconciliation of prior pronouncements on the [*Feres*] doctrine is not possible." *Dreier* v. *United States*, 106 F.3d 844, 848 (9th Cir. 1996) (citation and internal quotation marks omitted); see also *Estate of McAllister* v. *United States*, 942 F.2d 1473, 1476 (9th Cir. 1991) ("Precisely how a court should apply the *Feres* doctrine to the facts of a given case * * * remains unclear."), cert. denied, 502 U.S. 1092 (1992). Thus, while that court has sometimes "looked to four factors" when "the existence of a *Feres* bar is not clear" — duty status, site of injury, nature of the activity, and the availability of military benefits in a particular case — the Ninth Circuit in effect applies no test at all. *Dreier*, 106 F.3d at 848. Instead, the Ninth Circuit resorts to "a comparison of fact patterns" as "the most appropriate way to resolve *Feres* doctrine cases." *Ibid.* (internal quotation marks omitted).

B. In Other Circuits, *Feres* Would Not Have Barred Petitioner's Claims.

Under the approach to *Feres* used in other circuits, this case would have come out the other way.

1. In the Second Circuit, Mrs. Richards's suit would have gone forward. Like Mrs. Richards, the plaintiff in *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995), sued the government for injuries arising out of a vehicular accident, alleging (as does Mrs. Richards) that the government was liable under a theory of *respondeat superior*. See *id.* at 1052. The court held that *Feres* did not bar the claim: the plaintiff had not been acting in the scope of his employment when he was hit, and "negligence alleged in the operation of a vehicle" does not implicate the types of issues involving tortfeasor military discipline that might require a bar in the "extreme case." *Ibid.*

The same is true here. Driving home from work in one's own car after being released from duty is not within the scope of a person's employment. See generally 8 AM. JUR. 2D, *Automobiles and Highway Traffic* § 771 (1997); *Annotation*, Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile, 27 A.L.R. 5th 174, § 3 (1995). As in *Taber*, moreover, the fact that the driver of the Army truck that killed Mr. Richards may have been negligent does not touch on matters of military discipline. Indeed, Shammara Richards is alleging that the government is liable because its truck driver negligently ran a red light — a distinctly non-military act, and one that has no bearing on the chain of command or other military relationships. Under Second Circuit law, therefore, Mr. Richards plainly was not injured in the course of any "activity incident to service," and thus *Feres* would not have barred Mrs. Richards's suit.

2. Mrs. Richards would also have been allowed to prosecute her case in those circuits that consider whether or not a lawsuit would undermine *Feres*'s purposes. As the Third Circuit itself acknowledged, Mrs. Richards's action did not implicate "the special relationship between her deceased husband and his superiors," and thus would not frustrate the rationales underlying the

Feres doctrine. App., *infra*, 9a. Had the Third Circuit applied the test of the courts that evaluate various factors in light of *Feres*'s underlying reasons, Mrs. Richards likely would have won, given that in those jurisdictions the factors are not by themselves dispositive. And had the Third Circuit applied the Eighth Circuit's approach, which looks only to the *Feres* rationales, there can be no doubt of the result. Again, the Third Circuit itself stated that the purposes underlying *Feres* did not support the use of the doctrine in this case. Because Mrs. Richards's suit would not undermine the purposes of *Feres*, *Feres* would not pose a bar.

3. Under the Ninth Circuit's "most similar case" analysis, Mrs. Richards's suit would have gone forward as well. Both the Third Circuit and the district court readily acknowledged that this case closely resembles *Troglia* v. *United States*, 602 F.2d 1334 (9th Cir. 1979). App., *infra*, 5a (noting that *Troglia* involved "sim-ilar facts"); *id.* at 17a (calling *Troglia* "factually similar"). *Troglia* involved a claim by a service member hit by a car on a federally owned highway just outside an air base. The Ninth Circuit held that if it was determined on remand that the service member was trav-eling on personal business, *Feres* would not bar his suit.

Nor is *Troglia* an isolated case in the Ninth Circuit. That court has rejected *Feres* bars in many other cases involving very similar facts. See, *e.g.*, *Dreier* v. *United States*, 106 F.3d 844 (9th Cir. 1996) (action arising out of the death of an off-duty sailor who drowned in a drainage channel located on base); *Green* v. *Hall*, 8 F.3d 695 (9th Cir. 1993) (claim by an off-duty soldier who was hit by a car after leaving post to go out for breakfast), cert. denied, 513 U.S. 809 (1994); *Mills* v. *Tucker*, 499 F.2d 866 (9th Cir. 1974) (action arising out of the death of a sailor returning from leave to his on-base home and killed in a car accident inside the installation); see also *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991) (claim by an officer who was harassed at work on base by her military subordinates). There can be little

question, then, that in the Ninth Circuit, Mrs. Richards would have been allowed to proceed with her claims, since the "most similar cases" in that jurisdiction would have required this result.

C. The Circuits Have Reached Conflicting Results In Cases Factually Similar To This One.

Given the overall indeterminacy of the multi-factor analyses employed in whole or part outside the Second, Eighth, and Ninth Circuits, it is hardly surprising that virtually identical cases have yielded irreconcilable results in those jurisdictions.

In one case, in fact, the *en banc* Eleventh Circuit divided evenly over the application of its multi-factor test to facts almost exactly like those in *Feres* itself. In *Feres*, this Court held that a soldier's widow could not recover for her husband's death in a barracks fire on an Army post. In *Elliott* v. *United States*, 13 F.3d 1555 (11th Cir. 1994), in contrast, a panel affirmed a multi-million dollar judgment against the government for severe injuries to a service member and his wife who suffered carbon monoxide poisoning at their on-post apartment, holding that *Feres* posed no bar. Although the panel decision was vacated, 28 F.3d 1076 (11th Cir. 1994), the full Eleventh Circuit affirmed the judgment against the government by an equally divided court, 37 F.3d 617 (11th Cir. 1994). (Curiously, the Solicitor General's office apparently chose not to petition for a writ of certiorari in *Elliott*, electing to let a $9 million judgment stand rather than ask this Court to reverse summarily in a case factually indistinguishable from *Feres*.)

Moreover, in many cases involving facts that are virtually indistinguishable from those present here, courts have held, in contrast to the Third Circuit, that *Feres* does *not* bar recovery. See, *e.g.*, *Fleming* v. *U.S. Postal Service*, 186 F.3d 697 (6th Cir. 1999) (claim by an off-duty soldier who was hit by a truck on his way to work); *Pierce* v. *United States*, 813 F.2d 349 (11th

Cir. 1987) (per curiam) (claim by an off-duty soldier who was hit by a car while running errands); *Parker* v. *United States*, 611 F.2d 1007 (5th Cir. 1980) (claim by the widow of a soldier killed in an accident on post while driving home to take leave). In other cases with virtually indistinguishable facts, however, courts have held that *Feres* does bar recovery. See, *e.g.*, *Stewart* v. *United States*, 90 F.3d 102 (4th Cir. 1998) (claim by an off-duty soldier who was hit by a car while driving home to shower and change after physical training session); *Lauer* v. *United States*, 968 F.2d 1428 (1st Cir.) (claim by an off-duty sailor who was hit by a car while walking on a highway off post), cert. denied, 506 U.S. 1033 (1992); *Shaw* v. *United States*, 854 F.2d 360 (10th Cir. 1988) (claim by an off-duty soldier who was hit by a truck on post while driving to work). That Mrs. Richards would or would not have been barred under these cases is no argument against review — it is, rather, a compelling reason why guidance from this Court is needed. *Feres* itself was predicated on the desirability of uniformity in the law that governs members of the armed forces. See 340 U.S. at 142-43. In the course of trying to apply *Feres*'s rule, however, courts have created a body of law that is, at its core, indeterminate and incoherent.

D. The Decision Below Was Wrong.

As the preceding discussion suggests, the Third Circuit's decision was flawed at every turn. Given that *Feres* is in effect a "judicially crafted rule," *United States* v. *Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring and dissenting), and a "creature of federal common law," *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring and dissenting), it is a bizarre legal regime that would have courts determine if activity is "incident to service" within the meaning of the *Feres* doctrine without *any* reference to the principles on which that doctrine rests. Moreover, even the multi-factor, totality-of-the-circumstances

approaches that do look to *Feres*'s purposes are so indeterminate as to be meaningless, yielding a body of case law that in essence amounts to no more than results in search of rationales.

The Third Circuit's decision was also incorrect on its own terms. The court applied its test mechanically, checking each "factor" off its list regardless of whether the factors were truly relevant. Whether someone is "off duty" as opposed to "on leave" often makes no difference, for example; in either status a service member is subject to recall by his commanders, and in both statuses he is perfectly free to go about his personal business. Whether an accident occurs within the literal confines of a military installation is also irrelevant in many cases, as it was here: Mr. Richards was driving on a public highway, and it was merely happenstance that he was driving on that road within Fort Knox, as opposed to driving on the same road but outside Fort Knox, when he was killed. The nature of the activity at issue (that Mr. Richards was driving home from work, as opposed to driving home from doing errands) was also of marginal relevance here. Driving one's own car to one's home at the end of the work day is no more "military" than any other routine, daily activity engaged in by anyone, military or not.

At bottom, the Third Circuit's holding that Charles Richards — off duty and finished with work, on a public highway, driving his own car home — was nonetheless acting "incident to service" comes down to this: he was *acting incident* to service because he was *in* the service. That, however, is not the law. Mr. Richards's death "had nothing to do with * * * [his] Army career[] * * * except in the sense that all human events depend on what has already transpired." *Brooks* v. *United States*, 337 U.S. 49, 52 (1949). In holding that *Feres* barred the lawsuit that Mrs. Richards brought after her husband's death, the Third Circuit was wrong.

II. IN LIGHT OF THE WIDESPREAD CRITICISM OF THE *FERES* DOCTRINE AND WHAT FOUR THIRD CIRCUIT JUDGES CALLED "COMPELLING ARGUMENT[S]" FOR ITS "ABANDONMENT," THIS COURT SHOULD CONSIDER OVERRULING IT

A. *Feres* Has Been The Subject Of Withering Judicial Criticism.

Dissenting from the denial of rehearing *en banc* in this case, four judges of the Third Circuit took the remarkable step of excoriating the *Feres* doctrine as a "travesty" and "urg[ing]" this Court "to grant certiorari" and "revisit what we have wrought." App., *infra*, 12a. Yet in expressing doubts about the validity or fairness of the *Feres* doctrine, Chief Judge Becker and Judges Nygaard, McKee, and Rendell have merely joined a chorus of other federal judges, including members of this Court.

The judges who have criticized *Feres* over the years have sat on the appellate and trial benches in nearly every jurisdiction:

- From the First Circuit: Circuit Judges Boudin, Lynch, Lipez, and Selya, and District Judges Carter and Acosta. See *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 681-85 (1st Cir. 1999); *id.* at 683 (writing that "[p]ossibly *Feres* itself deserves reexamination by the Supreme Court"); *Briggs* v. *United States*, 617 F. Supp. 1399, 1402 (D.R.I. 1985), aff'd mem., 787 F.2d 578 (1st Cir. 1986); *Graham* v. *United States*, 753 F. Supp. 994, 995 & n.1 (D. Me. 1991); *Jones* v. *LaRiviera Club, Inc.*, 655 F. Supp. 1032, 1033 n.6 (D.P.R. 1987).

- From the Second Circuit: Circuit Judges Leval, Calabresi, Pierce, Mahoney, Feinberg, Van Graafeiland, Meskill, Kaufman, and Mansfield, and District Judges Raggi and Weinstein. See *Taber* v. *Maine*, 67 F.3d 1029, 1038-1049

(2d Cir. 1995); *id.* at 1038 (calling *Feres* "extremely confused and confusing"); *Sanchez* v. *United States*, 813 F.2d 593, 595 (2d Cir. 1987); *Bozeman* v. *United States*, 780 F.2d 198, 200 (2d Cir. 1985); *Kohn* v. *United States*, 680 F.2d 922, 925 (2d Cir. 1982); *Veloz-Gertrudis* v. *United States*, 768 F. Supp. 38, 41 (E.D.N.Y.), aff'd mem., 953 F.2d 636 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992); *In re "Agent Orange" Prod. Liability Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), appeal dismissed, 745 F.2d 161 (2d Cir. 1984).

- From the Third Circuit: In addition to Chief Judge Becker and Circuit Judges Nygaard, McKee, and Rendell in this case, Circuit Judges Hunter, Higginbotham, Adams, Stapleton, and Sarokin, and District Judges Ditter and Gerry. See *Hinkie* v. *United States*, 715 F.2d 96, 97 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Mondelli* v. *United States*, 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *Ocello* v. *United States*, 685 F. Supp. 100, 103 (D.N.J. 1988); *Punnett* v. *United States*, 602 F. Supp. 530, 531 (E.D. Pa. 1984); *Hall* v. *United States*, 528 F. Supp. 963, 967 (D.N.J. 1981), aff'd mem., 668 F.2d 821 (3d Cir. 1982).

- From the Fifth Circuit: Circuit Judges Thornberry, Johnson, Garwood, Goldberg, Fay, and Anderson. See *Scales* v. *United States*, 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Parker* v. *United States*, 611 F.2d 1007, 1011 (5th Cir. 1980).

- From the Eighth Circuit: Circuit Judges Magill, Bright, Murphy, Richard Arnold, Bowman, and Heany, and District Judge Doty. See *Cutshall* v. *United States*, 75 F.3d 426, 429 (8th Cir. 1995) ("We note * * * that the *Feres* doctrine has been roundly criticized as unjust and unwarranted."); *Bowers* v. *United States*, 904 F.2d 450, 452 (8th Cir. 1990)

(applying *Feres* bar because "we are obligated" but "with a pronounced lack of enthusiasm"); *C.R.S.* v. *United States*, 761 F. Supp. 665, 669 & n.1 (D. Minn. 1991).

- From the Ninth Circuit: Circuit Judges Betty Fletcher, Norris, Trott, Goodwin, Thompson, O'Scannlain, Dorothy Nelson, Reinhardt, and Canby, and District Judges Singleton and Battin. See *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991) ("[T]his circuit has accepted *Feres*, albeit grudgingly, as an ineradicable feature of our legal landscape, [but] even *Feres* concatenations must come to an end.") (internal quotation marks omitted); *Estate of McAllister* v. *United States*, 942 F.2d 1473, 1476-77 & n.2 (9th Cir. 1991) (calling *Feres* "this troubled doctrine"), cert. denied, 502 U.S. 1092 (1992); *Persons* v. *United States*, 925 F.2d 292, 295, 299 (9th Cir. 1991) (referring to "the countless reasons for feeling discomfort with *Feres*"); *Monaco* v. *United States*, 661 F.2d 129, 132 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982).

- From the Tenth Circuit: Circuit Judges Doyle, Breitenstein, and McKay. See *LaBash* v. *U.S. Department of the Army*, 668 F.2d 1153, 1156 (10th Cir.), cert. denied, 456 U.S. 1008 (1982).

- From the Eleventh Circuit: Circuit Judges Hatchett, Godbold, and Fay. See *Elliott* v. *United States*, 13 F.3d 1555, 1559-61 (11th Cir.), vacated, 28 F.3d 1076 (11th Cir.), judgment aff'd by equally divided court, 37 F.3d 617 (11th Cir. 1994).

- From the District of Columbia Circuit: Circuit Judges Tamm and Wald, and District Judge Joyce Green. See *Hunt* v. *United States*, 636 F.2d 580, 589 (D.C. Cir. 1980).

Numerous commentators have also criticized *Feres*, arguing on the basis of detailed analyses of the text, structure, and legislative history of the FTCA that the decision was incorrect.[1]

And *Feres*'s critics have included at least three current Members of this Court. Justices Scalia and Stevens (joined by Justices Brennan and Marshall) argued in their dissent in *United States* v. *Johnson*, 481 U.S. 681, 692-703 (1987), that *Feres* was wrong when decided. Justice Ginsburg criticized *Feres* in her concurring and dissenting opinion in *Lombard* v. *United States*, 690 F.2d 215, 228-30, 233 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983), noting that "the *Feres* Court's interpretation of the FTCA continues to be questioned" and calling *Feres* "a problematic court precedent." *Id.* at 229 n.7, 233; see also *Veillette* v. *United States*, 615 F.2d 505, 506 (9th Cir. 1980) (per Fletcher, J., joined by Kennedy, J.) (stating that the court was applying a *Feres* bar "[r]eluctantly"). The judicial and

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[1] See, *e.g.*, Seidelson, *From* Feres *v.* United States *to* Boyle *v.* United Technologies Corp.*: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219 (1994); Wells, *Providing Relief to the Victims of Military Medicine*, 32 DUQ. L. REV. 109 (1994); Tomes, Feres *to* Chappell *to* Stanley*: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93 (1990); Bennett, *The* Feres *Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U. L.J. 383 (1984); Seidelson, *The* Feres *Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983); Rhodes, *The* Feres *Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976); Note, *Servicemembers' Rights Under the* Feres *Doctrine: Rethinking "Incident To Service" Analysis*, 33 VILL. L .REV. 175 (1988); Note, *Military Medical Malpractice and the* Feres *Doctrine*, 20 GA. L. REV. 497 (1986); Note, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine*, 95 YALE L.J. 992 (1986); Comment, *The* Feres *Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?*, 44 U. PITT. L. REV. 929 (1983); Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979).

academic criticism of *Feres* is "widespread, almost universal" (*Johnson*, 481 U.S. at 700 (internal quotation marks omitted)), and uniform: aside from being unjust and unworkable, *Feres* is illegitimate. It should be overruled.

B. The *Feres* Doctrine Has Proved To Be Unworkable In Practice.

Experience has shown that the rule that *Feres* established, that service members have no recourse under the FTCA when they suffer injuries resulting from "activity incident to service," has proved to be completely unworkable. That much is clear from the conflicting decisions that have attempted — unsuccessfully — to make sense of the test and to apply it. And that alone would be reason enough to overrule the *Feres* doctrine, as this Court has not hesitated to overrule judge-made tests that were similarly unmanageable.

In *Solorio* v. *United States*, 483 U.S. 435 (1987), for instance, the Court rejected a rule that was virtually *Feres*'s twin. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), had held that court-martial jurisdiction under the Uniform Code of Military Justice depended on the "service connection" of the offense that was charged. In part because the "service connection" test "proved confusing and difficult" to apply, *Solorio*, 483 U.S. at 448, the Court in *Solorio* overruled *O'Callahan* and abolished that test, thus reversing a 20-year-old precedent. In his dissent in *O'Callahan*, Justice Harlan had predicted that the "service connection" test would spawn "infinite permutations of possibly relevant factors," as well as "create confusion and proliferate litigation." 395 U.S. at 284 (Harlan, J., dissenting). The same is true of *Feres*.

C. *Feres* Was Wrongly Decided.

Ordinarily, a case that has been the subject of such universal criticism and has proved to be so difficult to interpret and apply

would be a prime candidate for the Court's attention, regardless of whether it was correct in the first instance. But the *Feres* doctrine should be revisited for an even more fundamental reason: *Feres* was wrongly decided.

The suggestion that *Feres* correctly construed the FTCA is indefensible. In devising an exception to the FTCA for all claims based on "injuries to servicemen [that] arise out of or are in the course of activity incident to service" (340 U.S. at 146), and in doing so notwithstanding Congress's inclusion of 13 specific statutory exceptions in the FTCA, the *Feres* Court did more than merely ignore the fundamental principle of *expressio unius est exclusio alterius*. It failed to give proper weight to reams of evidence in the text, structure, and legislative history showing that Congress never intended to create such an exception to FTCA liability.

Among that evidence was: Congress's express inclusion, in the definition of those "employee[s] of the Government" whose acts may give rise to liability, of "members of the military or naval forces of the United States" (28 U.S.C. § 2671); its further specification that "acting within the scope of employment" under the FTCA means, for members of the military, "acting in [the] line of duty" (*ibid*.); and Congress's inclusion of several other exceptions that clearly contemplated tort claims by military personnel, including the discretionary function exception, the exception for claims arising in a foreign country, and, perhaps most importantly, the exception for all "claim[s] arising out of the combatant activities of the military or naval forces * * * during time of war" (*id.* § 2680(a), (j), (k)). As these provisions show, Congress plainly anticipated that the FTCA would not waive immunity for certain — but not all — claims arising out of military activities.

But in creating an exception to the FTCA for *all* claims arising out of activity incident to service, the *Feres* Court turned the process of statutory construction on its head: deriving its rule from a

statute — the Military Personnel Claims Act — that had been *repealed by the FTCA*. See *Feres*, 340 U.S. at 144 (relying on that Act's exclusion of "claims of military personnel 'incident to their service'"); compare Pub. L. No. 79-601, title IV, § 424, 60 Stat. 842 (1946) (repealing 31 U.S.C. § 223b). See generally Note, United States *v.* Johnson: Feres *Doctrine Gets New Life and Continues To Grow*, 38 AM. U. L. REV. 185, 202 n.121 (1988) ("The [*Feres*] Court noted that the Military Personnel Claims Act, a federal law, allowed servicemen to recovery for injuries incurred not incident to service; however, the FTCA repealed this law.").

Nor is this all. There is ample evidence in the legislative history of the FTCA to show that Congress never intended to create an exception along the lines recognized in *Feres*. As one commentator has explained, the bill that became the FTCA originally included an exception for all military suits, but that exception was dropped during the legislative process, perhaps "because of adverse criticism expressed in an earlier hearing on earlier bills." Note, 38 AM. U. L. REV. at 195 & n.66. Moreover, Congress's last-minute clarification of the exception for combat activities undercuts the rule of *Feres*:

> Originally, the Act excluded claims arising out of military activities. During debate on the bill, the House adopted an amendment adding the word "combatant" to the exception. By emphasizing that only claims arising out of combat activities were excluded from FTCA coverage, Congress presumably intended military personnel claims arising from non-combat activities to be protected.

Id. at 196 (footnotes omitted).

Feres thus has no real basis in the text, structure, or history of the FTCA. In fact, the Court no longer pretends that it does. See *Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting). Instead of being grounded in the FTCA itself, the *Feres* doctrine purports to represent "three disembodied estimations of what Congress *must*

(despite what it enacted) have intended" in the FTCA. *Id.* at 695 (dissent) (emphasis in original). And "[t]hey are bad estimations at that." *Ibid.*

Thus, the Court has identified one reason underlying *Feres* as the need for a uniform law governing a service member's recovery in tort. See *Johnson*, 481 U.S. at 689. But in fact *Feres*'s "incident to service" test has had the opposite effect, allowing or barring recovery in different jurisdictions in cases with virtually indistinguishable facts. While service members are afforded government benefits when injured — another reason supposedly justifying *Feres*, see *Johnson*, 481 U.S. at 689-90 — those benefits today (unlike, perhaps, in 1950) are not nearly the equivalent in value to tort judgments, and the discrepancy keeps getting worse. See *Taber* v. *Maine*, 67 F.3d 1029, 1045 (2d Cir. 1995). Moreover, the availability of military benefits has never by itself barred tort recovery, since certain members of the military — those who, as in *Brooks*, are held not to have been hurt in "activity incident to service" — can receive benefits as well as damages in tort, with the benefits setting off the tort damages to prevent any double recovery. And while *Feres* purportedly protects the integrity of military discipline and decision making, see *Johnson*, 481 U.S. at 690-91, that integrity is equally threatened by lawsuits brought for injuries to civilians, which the *Feres* doctrine has never precluded. In sum, "neither the three original *Feres* reasons nor the *post hoc* rationalization of 'military discipline' justifies [the Court's] failure to apply the FTCA as written." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). "*Feres* was wrongly decided" (*ibid.*), and it should be overruled.

D. *Stare Decisis* Provides No Good Reasons To Deny Review.

The government will no doubt urge the Court to deny review on grounds of *stare decisis*. For at least four reasons, however, considerations of *stare decisis* are not controlling.

First. The doctrine of *stare decisis* does not bear at all on the first question presented in this petition, which asks only that *Feres* be clarified.

Second. "It is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled." *Patterson* v. *McLean Credit Union*, 485 U.S. 617, 617 (1988) (per curiam). We ask for no more than that here. And in the end, an argument about *stare decisis* is really an argument about the merits. Especially in a case such as this, which presents a separate and distinct question that is independently worthy of the Court's review, it would make no sense to foreclose any reconsideration of one of the Court's prior decisions by denying the second question presented. *Stare decisis*, after all, "is a principle of policy rather than an inexorable command." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998) (internal quotation marks omitted).

Third. *Stare decisis* does not provide a persuasive reason to deny review of the second question, because the doctrine does not militate strongly against overruling *Feres*. Although *stare decisis* does have considerable force in the area of statutory construction, only one of the rationales originally offered in support of *Feres* (that there was no "parallel private liability" for suits by service members against the government) even "purport[ed] to be textually based" (*Johnson*, 481 U.S. at 694 (Scalia, J., dissenting)) — and that rationale is no longer deemed valid. See *Johnson*, 481 U.S. at 688-90. In reality, the *Feres* doctrine is a "judicially crafted rule," *United States* v. *Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring and dissenting), a "creature of federal common law," *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring and dissenting), as opposed to an interpretation of the FTCA. *Stare decisis* is therefore of less concern.

Fourth. Even if *Feres* were grounded in a construction of the FTCA, this Court has "never applied *stare decisis* mechanically to prohibit overruling * * * earlier decisions determining the meaning of statutes." *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 695 (1978). Rather, the Court has overruled cases involving statutory construction where appropriate. See generally *Patterson*, 485 U.S. at 618 (citing a "host of cases" in which the Court "explicitly overruled statutory precedents"); see also, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997) (overruling a 29-year old decision that was based on the construction of a statute). Two points are particularly important here. The Court has overruled prior cases involving the construction of statutes when "a precedent may be a positive detriment to coherence and consistency in the law * * * because of inherent confusion created by an unworkable decision." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). And last Term, the Court overruled a 53-year old decision interpreting a statute, holding that "it should not be followed" in part because the earlier case's "conclusion was erroneous." *Hohn*, 524 U.S. at 251. Those describe *Feres* precisely.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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