No. 21-1570

In the Supreme Court of the United States

RANDALL L. SPADE, PETITIONER,

v.

UNITED STATES DEPARTMENT OF JUSTICE

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

REPLY BRIEF FOR PETITIONER

CHRISTIAN A. LOVECCHIO
CALLAHAN LOVECCHIO LAW OFFICE
520 West Fourth St.
Williamsport, PA 17701

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

JEREMY C. MARWELL
Counsel of Record
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Statutes—Continued: **Page(s)**

Other Authorities:

REPLY BRIEF FOR PETITIONER

The government's brief in opposition is most striking for what it does *not* say. It does not contest that the question presented implicates an acknowledged and persistent circuit split. Nor does the government disagree that this case raises a question about the proper administration of a vitally important federal statute, which provides billions of dollars in benefits each year and covers millions of federal workers nationwide. Instead, the opposition attempts to distract from the clear certworthiness of these issues by artificially downplaying the circuit split and straining to manufacture supposed vehicle problems, which evaporate under even passing scrutiny.

The government effectively concedes the existence of a "circuit conflict" (Opp. 7), but suggests this Court need not intervene because the Ninth Circuit has "cabined" its distinct rule (Opp. 13). The Solicitor General's reading of the case law will doubtless surprise the Second and Third Circuits, among others, which have recognized a division of authority and distanced themselves from what *they* understand to be the Ninth Circuit's contrary view. See, *e.g.*, Pet. App. 6a (acknowledging circuit split); *Mathirampuzha* v. *Potter*, 548 F.3d 70, 82 (2d Cir. 2008) (same). For its part, the Ninth Circuit has steadfastly applied its precedents to exercise subject-matter jurisdiction in cases where other circuits would not.

Unable to deny the importance of the issue to millions of federal employees nationwide, or to FECA's administration more broadly, the government weakly suggests this case is a poor vehicle. Opp. 16. The

government's sole vehicle argument, however, is that the Third Circuit may, on remand, agree with the Secretary of Labor on a *merits* issue about FECA's scope, that neither the district court nor the Third Circuit have reached, given their (erroneous) conclusion that they lacked jurisdiction. *Ibid.* This argument is a makeweight; the existence of a legally and logically subsequent issue to be addressed by a lower court on remand is no obstacle to this Court's review of a threshold jurisdictional question.

In the end, the government is left defending the unsettling proposition that Congress implicitly vested the Secretary with unilateral and unreviewable authority to decide the scope of FECA, even when the Secretary's determinations effectively, and potentially erroneously, strip federal courts of jurisdiction to hear cases under *other* federal statutes, such as the FTCA. Opp. 7-12. But nothing in FECA or this Court's cases compels such a striking and counterintuitive conclusion. The government's textual arguments misread FECA, and cannot overcome the presumption favoring judicial review of executive action.

This case presents a defined legal question on which lower courts are intractably divided, which is important to millions of federal workers nationwide and central to the administration of two major federal statutes (FECA and the FTCA).

I. Lower Courts Are Squarely Divided Over the Question Presented.

The government does not deny that there is a circuit split on the question presented. See Opp. 7, 13. Rightly so. Courts of appeals routinely recognize that

the Ninth Circuit's decision in *Sheehan* v. *United States*, 896 F.2d 1168, as amended, 917 F.2d 424 (1990), is inconsistent with other circuits' approaches.[1] Indeed, the Third Circuit rejected *Sheehan* as a "minority position." Pet. App. 6a. There can be no question that the Third Circuit has chosen sides in the split; its "unpublished" (Opp. 7) decision here applied binding circuit precedent. Pet. App. 5a (applying *Heilman* v. *United States*, 731 F.2d 1104, 1109 (3d Cir. 1984)). Nor does the government question the petition's characterization of the majority-view circuits' shared approach to the jurisdictional issue.

Instead, the government labors to minimize the split, by arguing that the Ninth Circuit has "cabined" *Sheehan* and "limited" the resulting inter-circuit "disagreement." Opp. 13-16. Incorrect. Far from merely following circuit precedent on FECA's scope (as the government wrongly suggests, *id.* at 13 n.2), *Sheehan* announced a general rule: Questions of FECA's "coverage"—*i.e.*, questions about whether a plaintiff is entitled to FECA compensation under the facts of a particular event—are for the Secretary. 896 F.2d at 1174. But questions of FECA's *scope*—notably, decisions about what *types* of injuries fall within the statutory scheme—are for the courts. *Ibid.*

---

[1] See, *e.g.*, *Swafford* v. *United States*, 998 F.2d 837, 840-841 (10th Cir. 1993) (rejecting *Sheehan*'s reasoning); *Gill* v. *United States*, 471 F.3d 204, 207 (1st Cir. 2006) (same); *Mathirampuzha* v. *Potter*, 548 F.3d 70, 82 (2d Cir. 2008) (citations omitted) ("Only the Ninth Circuit has taken the position * * * that a federal court decides * * * whether the type of injury alleged falls within the scope of FECA coverage * * * .").

Figueroa v. *United States*, 7 F.3d 1405 (9th Cir. 1993), did not "cabi[n]" (Opp. 13) *Sheehan* in any material respect. Notwithstanding the language that the government cites out of context, *Figueroa* explicitly reiterated *Sheehan*'s scope-coverage distinction, *id.* at 1407-1408, and explained that "*Sheehan* held that when there is a question about the scope of FECA coverage, this question should be resolved by the district court." *Id.* at 1408.[2] Indeed, the *Figueroa* court exercised jurisdiction to answer what *Sheehan* considered a question of FECA's scope, holding that "FECA * * * contemplates coverage for a condition of emotional distress that *results from*" physical exposure to toxics. *Ibid.*

Subsequent cases confirm that *Sheehan*'s rule remains fully applicable in the Ninth Circuit. The government's invocation of *Moe* v. *United States* (Opp. 14 n.3) is particularly curious, for *Moe*—decided a decade *after* *Figueroa*—unequivocally reaffirmed *Sheehan*'s scope-coverage framework and emphasized that "[s]cope * * * is a question that must be answered by the federal courts." 326 F.3d 1065, 1068 (9th Cir. 2003). *Moe* then *applied* that framework to resolve an "open question" (Opp. 13 n.2) about FECA's scope—whether claims of psychological injury resulting in physical injury (the reverse of the *Figueroa* scenario) fall within FECA's scope. 326 F.3d at 1068-1070.

Relying on *Sheehan* and its progeny, courts in the Ninth Circuit continue to exercise jurisdiction to

---

[2] *Figueroa* may have distinguished *Sheehan* in some respects but did not purport to overrule *Sheehan*'s holding; nor could the court have done so under the prior panel precedent rule. See, *e.g.*, *Hart* v. *Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

address FECA's scope, in contexts not limited to emotional injury. For example, the court in *Ice* v. *United States* cited *Sheehan*, *Figueroa*, and *Moe* as authority for it to determine "that [a postal inspector's] suicide is the 'type' of injury contemplated by FECA." No. 07-cv-8431, 2008 WL 11342630, at *2 (C.D. Cal. Aug. 6, 2008) (citations omitted); see also *Gwin* v. *United States*, No. 2:09-cv-08511, 2010 WL 11596674 (C.D. Cal. Mar. 25, 2010) (reiterating scope-coverage distinction).

The government seizes upon the fact that the Ninth Circuit has employed the phrase "substantial question" in its analysis of the FECA jurisdictional question. Opp. 15. Unlike other circuits, however, the Ninth Circuit applies the "substantial question" standard only to *coverage* questions (which are for the Secretary), not to *scope* questions (which courts have jurisdiction to address).[3] *Sheehan*, 896 F.2d at 1174. The government quotes *Moe*'s statement that a "plaintiff need only allege a colorable claim under FECA for our courts to lose jurisdiction over an FTCA action." 326 F.3d at 1068. But only a few sentences earlier, *Moe* distinguished the courts' role—addressing scope questions—from the Secretary's role—deciding coverage questions. *Ibid.* That is the critical distinction in this case, as petitioner argues that the Third Circuit had jurisdiction to address whether his injury is within FECA's scope.

---

[3] *Barrett* v. *United States* involved a coverage question: whether the injury was "employment-related." 213 F.3d 641, 2000 WL 285378, at *2 (9th Cir. 2000) (Tbl.).

The government's complaint that "petitioner identifies no precedential decision other than *Sheehan* in which the Ninth Circuit disagreed" with the Secretary's views about the scope of FECA asks and answers the wrong question. Opp. 16. The relevant issue here is *who decides* questions about FECA's scope (and more specifically whether district courts have jurisdiction to address those issues), not whether courts ultimately agree with how the Secretary would resolve those questions. And even if that *were* the relevant inquiry, the Ninth Circuit disagrees with the Secretary on the pertinent scope question here—whether petitioner's purely emotional injury is within FECA's statutory scheme. See *Sheehan*, 896 F.2d 1168.

II. The Decision Below Is Wrong.

1. In reading FECA as unambiguously giving the Secretary of Labor unreviewable discretion to determine FECA's scope, the government overreads the statutory text and gives short shrift to key textual and contextual indicators. Most critically, the opposition downplays the key threshold limitation, that by its terms 5 U.S.C. § 8128(b) applies only to an "action of the Secretary * * * allowing or denying a payment." See Opp. 7 (omitting limiting language in paraphrasing statute); Pet. 23-24 (explaining relevance of this phrase). Similarly, the government all but ignores key parts of the statute's context. For instance, the title of § 8128, "Review of Award," further narrows the scope of that section's jurisdiction-stripping language.[4] The

[4] Title 5 of the U.S. Code, including the headings thereto, was enacted into positive law. Pub. L. 89-554, § 1, 80 Stat. 378 (1980); see also *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct.

term "award" naturally speaks to a final determination of a proceeding or case on the merits, and not an initial determination about the scope of the statutory scheme. See *Webster's New International Dictionary of the English Language* (2d. ed., 1960) (defining "award" to mean "judgment, sentence, or final decision").

Put differently, even if § 8128(b) rebuts the presumption favoring judicial review as to the Secretary's "action" granting or denying an award of benefits, see Opp. 10-11, this Court's cases caution against inferring a broader intent to foreclose courts from addressing foundational questions regarding the statute's scope. *E.g.*, *Bowen* v. *Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 675-676 (1986) (statute limiting the forum and scope of review for "any determination * * * of * * * the amount of [Medicare] benefits" did not constrain judicial review of related threshold issues, such as the method for computing awards). In urging a maximalist reading of § 8128, the government ignores that "[i]nterpretation of [provisions barring judicial review] should be guided * * * by the recognition that unreviewability gives the executive a standing invitation to disregard * * * statutory requirements and to exceed the powers conferred." *Ralpho* v. *Bell*, 569 F.2d 607, 617 (D.C. Cir. 1977) (citation and internal quotation marks omitted).

Perhaps recognizing the weaknesses of its arguments under § 8128, the government leans heavily on § 8145's statement that the Secretary "shall administer, and decide all question arising under [FECA]."

883, 893 (2018) (headings "supply cues as to what Congress intended" (citation and internal quotation marks omitted)).

But by its plain terms, this section does not address judicial review at all (never mind purport to limit the same). Instead, it merely specifies which executive branch official Congress intended to administer FECA. There is no inconsistency between Congress specifying that the Secretary will have routine administrative responsibility for FECA, on the one hand, and retaining a role for federal courts in interpreting the scope of a key federal statute, on the other.

The government's reliance on fleeting dicta from *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 90 (1991), is also misplaced. This Court did not have the benefit of in-depth briefing on the FECA question in *Southwest Marine*, where the parties and this Court addressed the issue only in passing. *Ibid.* Because FECA was not of central relevance to the case, this Court's opinion did not address the distinction between questions of statutory scope and coverage, or § 8128's reference to review of the Secretary's action in allowing or denying a payment. This Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006).

The government's effort to distinguish *Traynor* v. *Turnage*, 485 U.S. 535 (1988), fails to account for the relationship between the Secretary's authority to interpret FECA (which he administers), and the legal effect that the Secretary's determinations have on the scope of federal-court jurisdiction in FTCA cases. *Traynor* provides on-point authority for the proposition that this Court should reject overbroad interpretations of jurisdiction-stripping provisions

that would give an agency unreviewable discretion to decide issues affecting other statutes' breadth.

2. The government's policy- and purpose-based arguments fare no better. Reading § 8128(b) according to its plain terms would not open a floodgate of litigation or "unravel" (Opp. 9) the Act's balance between an employee's right to sue and the goal of providing prompt benefits through a readily administrable scheme. While district courts would have jurisdiction to make threshold determinations about FECA's scope in the context of FTCA actions, courts will promptly develop a body of precedent resolving key questions of scope, which will bind future litigants and reduce the need for prospective litigation. See *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) ("[J]udicially created doctrine[s] designed to implement a federal statute * * * effectively become part of the statutory scheme * * * ." (citation and internal quotation marks omitted)). Thirty years of experience in the Ninth Circuit proves the point. Notwithstanding the significant number of FECA claims filed each year, the government does not suggest that district courts in the Ninth Circuit have been overwhelmed by a flood of FECA litigation post-*Sheehan*, or that the Secretary's administration of that Act has been impeded in the Ninth Circuit.

3. Strikingly, the government does not even attempt to defend the position of some majority-view courts, which ground their renunciation of jurisdiction in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Cf. Opp. 12 n.1. The government effectively concedes that the majority position is based in part on a misapplication of

Chevron. The Third Circuit's heavy reliance here on those other circuits' decisions, and the government's attempt to minimize *Chevron*'s importance in this context, only underscore the need for this Court's intervention. See *Mathirampuzha*, 548 F.3d at 82 (relying on *Chevron*); Pet. App. 6a-7a (panel citing *Mathirampuzha* and explaining that its "position [is] held by many of [its] sister Courts of Appeals").

III. This Case Is a Clean Vehicle to Address the Question Presented

The government's sole purported "vehicle" problem—that the Third Circuit might agree with the Secretary on remand about whether petitioner's claim falls within FECA's scope, Opp. 16—is a makeweight. Perplexingly, the government appears to criticize petitioner for focusing his question presented on jurisdiction, and not *also* arguing that the court of appeals "would likely reverse the Secretary's determination" that FECA covers emotional distress injuries. *Ibid*. This argument fails for several reasons.

First, petitioner appropriately limited the question presented to the ground of decision below: whether federal courts have jurisdiction to address FECA's scope in the context of an FTCA action. Pet. I. Because the Third Circuit held that it lacked jurisdiction, it (like the district court) did not reach the subsequent question of whether petitioner's claimed injury falls within FECA's scope. Pet. App. 6a-8a; see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998). The government does not explain why petitioner should have sought this Court's review of a question not reached by the Third Circuit. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court

of review, not of first view"). This case is thus readily distinguishable from *Gill*, in which the petition raised both the jurisdictional and FECA-scope questions. See Pet. at i, *Gill* v. *United States*, No. 06-1332, cert. denied, 552 U.S. 810 (2007). Indeed, the absence here of the second question presented in *Gill* (about FECA's scope) makes this case a cleaner vehicle.[5] If this Court corrects the majority-view circuits' jurisdictional error, it will enable percolation on the scope of FECA—percolation which cannot happen today except in the Ninth Circuit, because the majority-view circuits disclaim jurisdiction to address that issue. Conversely, to the extent the denial of certiorari in *Gill* rested on this Court's desire to allow further development of the issues in the lower courts, or an expectation that the Ninth Circuit might change its position, the split's persistence over the intervening 15 years underscores the need for this Court's intervention.

Second, this Court routinely grants certiorari to clarify jurisdictional or other threshold questions, even when subsequent issues would remain for remand. *E.g.*, *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) (holding state and federal courts have concurrent jurisdiction over certain crimes in Indian country). More generally, the existence of legally and

---

[5] The only other petitions presenting the jurisdictional question involved even more complications than *Gill*. See Br. in Opp. at i, *Figueroa* v. *United States*, No. 93-972 (raising four questions); Pet. at i, *Moe* v. *United States*, No. 03-108 (raising nine questions).

logically subsequent questions to be addressed on remand has never been understood to bar certiorari.[6]

Nor does the government seriously dispute the importance of the question presented. Because FECA provides the "exclusive" remedy for federal employee workplace injuries, 5 U.S.C. § 8116(c), the existing circuit split leaves some 80% of full-time federal employees nationwide deprived of any judicial forum to make arguments about FECA's scope. See Office of Personnel Mgmt., Policy, Data, Oversight, *Federal Civilian Employment*, https://bit.ly/3U6VSyD (reporting 2017 federal employment by state, and showing percentage of federal employees in states within the Ninth Circuit's jurisdiction). The Court should take this opportunity to decide an important question that implicates a longstanding circuit conflict.

---

[6] Indeed, in petitioning for review, the government regularly argues that the existence of alternate grounds for affirmance is no barrier to certiorari. *E.g.*, Gov't Cert. Reply Br., *Comm'r* v. *Estate of Jelke*, No. 07-1582, 2008 WL 4066478, at *9 (Sept. 3, 2008) ("[W]hen an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground to defend the judgment is not a barrier to review - particularly where, as here, that ground * * * was not addressed by the court of appeals.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTIAN A. LOVECCHIO
CALLAHAN LOVECCHIO LAW OFFICE
520 West Fourth St.
Williamsport, PA 17701

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

JEREMY C. MARWELL
Counsel of Record
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

OCTOBER 2022