No. 20-559

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF FEDERAL COURTS AND CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATUTES

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae, listed in the Appendix, are 15 law professors from the nation's leading law schools. *Amici* teach, research, and write about federal jurisdiction, constitutional law, or the intersection of those fields. *Amici* have a professional interest in this Court's reconsideration of *Feres* and its extension to bar Federal Tort Claims Act suits based on sexual assault of students in military academies.

QUESTIONS PRESENTED

Amici adopt the questions presented by the Petitioner. In addition, *amici* add the following question presented:

If *Feres* is not overturned, should it be limited to bar claims only when the servicemember was injured while performing duties under orders?

SUMMARY OF THE ARGUMENT

Jane Doe, a college student, was raped on campus by a classmate while out on a walk one evening. Ms. Doe's college did little to help her afterwards—indeed, far less than its own policies required. Worse, the college tolerated, and in some cases encouraged, the atmosphere of sexual harassment that led to Ms. Doe's rape. In most circumstances, Ms. Doe would be able to sue her college for the injuries she suffered as a result of its conduct. But Ms. Doe did not attend just

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[1] Counsel of record for all parties received timely notice of the intention to file this brief and consented to the filing. No counsel for a party authored this brief in whole or part, and no person other than *amici* and their counsel made any monetary contribution intended to fund this brief.

any college; she attended West Point. Solely because of this, the Second Circuit concluded that Ms. Doe could not bring her claims.

This harsh conclusion rested on this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court held that although the Federal Tort Claims Act ("FTCA") largely waived the federal government's sovereign immunity for negligence, it did not waive immunity for claims of injury sustained by servicemembers acting "incident to the service." *Id.* at 138. This incident-to-service exception finds no support in the text of the FTCA, and over the years, has been interpreted increasingly broadly to include any injury that an active servicemember suffers at the hands of the government—no matter how far removed from his or her actual military duties.

This case exemplifies the overbreadth and unfairness of *Feres*. At the time of her rape, Ms. Doe was not a soldier engaged in combat or on base; she was, in fact, not yet even obliged to enter into military service. Nor was Ms. Doe doing anything characteristically "military." The only thing connecting Ms. Doe's rape to military service was her enrollment at West Point. Yet under *Feres*, that alone was enough to make her rape incident to military service.

Ms. Doe's case is not an outlier. The *Feres* doctrine denies servicemembers recovery for injuries sustained in many circumstances far removed from their military duties, including drinking at a bar, picnicking with family, water-skiing on leave, and even giving birth. The result is second-class citizenship for servicemembers: While civilians can sue the government under the FTCA to recover when

its negligent acts injure them, *Feres* denies servicemembers any relief under the statute.

In light of this, it should come as no surprise that the *Feres* doctrine is nearly universally criticized and only reluctantly followed. This, of course, would not matter if the *Feres* doctrine had been dictated by Congress. In that circumstance, the Court would be bound to apply it, regardless of the harsh consequences that result. *See United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting). But Congress did not enact the *Feres* exception to the FTCA; this Court created the exception based on policy rationales that it later rejected. Without a textual basis or a viable policy rationale to guide the doctrine's application, the result has been confusion and conflicting rulings among courts across the country. For these reasons, respected jurists from various jurisprudential backgrounds agree: *Feres* should be overturned.

To be sure, this is not the first petition asking this Court to overturn *Feres*. But that is a reason to grant the petition—not to reject it. Litigants have repeatedly asked this Court to reconsider *Feres* because the lower courts have repeatedly struggled with the arbitrary and unfair outcomes that result from its application. And litigants will continue to ask this Court to bring sense and reason to such an "exceedingly willful" reading of the FTCA until it does so. *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995). The Government will no doubt argue that because petitions seeking to overrule *Feres* have been "often and recently denied," this Court should deny this petition, too. But the mere fact that the Court has previously refused to reconsider *Feres* is not in and of

itself a reason to deny certiorari. To argue otherwise urges this Court to abdicate its role to critically consider whether a problematic doctrine should be retained. As Justice Frankfurter so aptly put it, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

For seventy years, the judge-made *Feres* doctrine has denied relief to those who make the greatest sacrifices for our country. It is time for this Court to correct its error by overturning *Feres* or, at the very least, by narrowing the meaning of "incident to service."

ARGUMENT

I. THE COURT SHOULD OVERTURN *FERES*.

For the past seventy years, "the *Feres* doctrine has been criticized by countless courts and commentators across the jurisprudential spectrum." *Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013) (internal quotation marks omitted). Justice Thomas agrees, as did Justices Ginsburg, Scalia, and Stevens: *Feres* should be overturned. *See Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019) (Thomas, J., dissenting from denial of cert.); *Id.* (Ginsburg, J.) (voting to grant certiorari in a petition seeking to overrule *Feres*); *Johnson*, 481 U.S. at 692 (Scalia, J., dissenting, joined by Brennan, Marshall, Stevens, J.J.); *see also Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) (describing *Feres* as "a problematic court precedent").

Every Court of Appeals has openly criticized *Feres* when applying it. *See, e.g.*, *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) ("Possibly *Feres* itself deserves reexamination by the Supreme Court."); *Taber*, 67 F.3d at 1038 ("[*Feres*'] reading of the FTCA was exceedingly willful, and flew directly in the face of a relatively recent statute's language and legislative history."); *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999) ("It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *Appelhans v. United States*, 877 F.2d 309, 313 (4th Cir. 1989) (criticizing *Feres* but concluding that the "undeniably harsh results [of *Feres* do] not relieve this court of its obligation to apply precedent"); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) ("Though the rationale underlying *Feres* has been criticized by courts and commentators it remains the law to which we must adhere." (internal citations omitted)); *France v. United States*, 225 F.3d 658 (6th Cir. 2000) (per curiam) ("[M]any courts and commentators have strongly criticized the *Feres* decision."); *Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997) (reluctantly applying *Feres* despite the "tenuous link" between the *Feres* rationales and the servicemember's injuries); *Laswell v. Brown*, 683 F.2d 261, 265 (8th Cir. 1982) ("*Feres* doctrine has long been criticized by courts and commentators"); *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) ("reluctantly" applying *Feres* to bar the plaintiff's lawsuit and "join[ing] the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes"); *Ortiz*

v. United States ex rel. Evans Army Cmty. Hosp., 786 F.3d 817, 818 (10th Cir. 2015) ("[T]he facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule."); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1341–42 (11th Cir. 2007) ("The *Feres* doctrine has been controversial … [but] remains the law"); *Lombard*, 690 F.2d at 227 (expressing "considerable sympathy" for plaintiff, but explaining that it "must adhere to *Feres*"); *Hercules Inc. v. United States*, 24 F.3d 188, 207 (Fed. Cir. 1994) (Plager, J., dissenting) (noting the Court has struggled to find a "reasoned basis" for *Feres*).

This near-universal criticism is well-deserved. *See Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). *Feres* lacks any basis in the text of the FTCA, the rationales that originally justified the decision have been abandoned, and lower courts struggle to apply it in a consistent and logical way, without either a textual or a policy rudder. *Stare decisis* should not save a decision like *Feres* that is both wrong and unworkable. The time has come for this Court to overrule—or at the very least to narrow—its decision resulting from the "too-common practice of reading extra immunity into statutes where it does not belong." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, No. 19-1284, 2020 WL 6037214, at *2 (U.S. Oct. 13, 2020) (Thomas, J., statement respecting denial of certiorari).

A. There Is No Textual Support For The *Feres* Doctrine.

When the Court in *Feres* decided that the FTCA did not cover servicemember's tort claims that arose incident to service, it made no effort to root this

exception in the text of the FTCA. Nor could it. The *Feres* doctrine has no support in the text, structure, or history of the FTCA. To the contrary, all of the foregoing suggest that the FTCA does not exclude servicemembers' claims for injuries sustained "incident to service."

The FTCA broadly waives the federal government's sovereign immunity from tort liability for the acts of federal employees. Specifically, it provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Nothing in the language of this provision suggests that servicemembers cannot bring claims against the United States. "Read as it is written" the FTCA "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting). Indeed, when, in *Brooks v. United States*, 337 U.S. 49 (1949), the Court held that an off-duty serviceman could sue the government for injuries sustained in a collision with an Army truck, this Court acknowledged that the FTCA's plain language does not exclude servicemembers' claims. As the Court explained in that case, the FTCA gave federal courts jurisdiction over "*any* claim founded on negligence brought against the United States," and "any claim" does not mean "any claim but that of servicemen." *Id.* at 51 (emphasis added).

None of the FTCA's thirteen enumerated exceptions bars servicemembers from bringing claims that arise incident to their service either. Instead, the

text of the FTCA contains a far narrower exception for "claim[s] arising out of the combatant activities of the military ... during time of war." 28 U.S.C. § 2680(j). The fact that Congress enumerated "lengthy" and "specific" exceptions to the FTCA, including an exception specifically targeted at military conduct, shows that Congress contemplated liability to servicemen and decided *not* to exclude most of their claims from the FTCA. *Brooks*, 337 U.S. at 51. As the Court stated in *Brooks*, "[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." *Id.* It clearly "specifically considered, and provided what it thought needful for, the special requirements of the military." *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting). Those "needful" exceptions did not include one for any injury that a servicemember suffered incident to service.

Indeed, before enacting the FTCA, Congress specifically considered precluding all lawsuits by servicemembers, but ultimately decided against that approach. *Feres*, 340 U.S. at 139. "[E]ighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted ... made no exception." *Id.* (citing *Brooks*, 337 U.S. at 51). Instead, Congress chose to include a much more limited exception for combat injuries. 28 U.S.C. § 2680.

All of this evidence shows that the FTCA does not exclude servicemember's claims that arise incident to service. Rather, the incident-to-service exception resulted from this Court engaging in judicial policy-making that contradicted the statute's text, structure,

and history. *See Johnson*, 481 U.S. at 694 (Scalia, J., dissenting).

B. The Rationales Underpinning *Feres* Have Eroded.

Having no basis in the FTCA's text, *Feres* and its progeny proffer four policy rationales to justify the incident-to-service exception. But those rationales all have been abandoned or discredited and no longer can justify the arbitrary and unfair outcomes *Feres* produces.

1. *Parallel Liability*. The only rationale for *Feres* that even refers to the FTCA's text relies on the FTCA's waiver of the government's sovereign immunity "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *Feres*, 340 U.S. at 141–42. Since private individuals cannot raise armies, the argument goes, the FTCA did not waive the government's immunity with respect to soldiers who are injured on active duty. *Feres*, 340 U.S. at 141–42. But this rationale would render many of the Act's exceptions superfluous "since private individuals typically do not, for example, transmit postal matter, collect taxes or customs duties, impose quarantines, or regulate the monetary system." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (citing 28 U.S.C. § 2680(b), (c), (f), (i)). And many claims barred by *Feres* involve conduct that is *not* uniquely governmental—like serving alcohol, recreational river rafting, or protecting college students from sexual assault. *Bozeman v. United States*, 780 F.2d 198 (2d Cir. 1985) (serving alcohol); *Costo*, 248 F.3d at 867–68 (recreational river rafting); Pet.App.4a–7a (sexual assault). This rationale was thus quickly abandoned.

Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957) (recognizing that "the very purpose of the [FTCA] was to … establish novel and unprecedented governmental liability").

2. *Uniform Treatment Under Federal Law.* *Feres* also reasoned that the incident-to-service exception was necessary to avoid unfairly subjecting servicemembers to the vagaries of the tort law of the state where the military happened to assign them. *Feres*, 340 U.S. at 142–43. As Justice Scalia noted, "[t]he unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification given that ... nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery." *Johnson*, 481 U.S. at 695–96 (Scalia, J., dissenting). Perhaps because *Feres*' original justification is so absurd, subsequent decisions have shifted the focus to the *military's* need for uniform standards. *See, e.g.*, *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977). But this rationale is likewise unpersuasive: The FTCA allows civilians and servicemembers who are not acting incident to service to recover against the military, even though this too requires application of nonuniform state tort law. *Brooks*, 337 U.S. 49 (liability to servicemembers not acting incident to service); *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (liability to civilians). Thus, it is unsurprising that this Court has deemed this rationale "no longer controlling." *United States v. Shearer*, 473 U.S. 52, 58, n.4 (1985).

3. *Military Benefits*. The *Feres* Court further reasoned that the incident-to-service exception made sense because Congress had already provided a

"system[] of simple, certain, and uniform compensation" for servicemembers killed or injured in the line of duty through the Veterans' Benefit Act ("VBA"), 38 U.S.C. § 101 *et seq*., making it unlikely that Congress meant to permit additional recovery under the FTCA. *Feres*, 340 U.S. at 144. Specifically, the Court reasoned that "[i]f Congress had contemplated that [the FTCA] would be held to apply [here] it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." *Id*. Accordingly, the Court reasoned that the VBA provided the "sole remedy for service-connected injuries." *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980) (per curiam).

But this rationale does not justify *Feres* either. The availability or unavailability of VBA benefits does not influence the application of the *Feres* doctrine at all. To the contrary, applying *Feres*, courts have both permitted servicemen to raise FTCA claims where they could collect VBA benefits and refused to permit servicemen to raise FTCA claims where they could not collect VBA benefits. In *Brooks*, for instance, the fact that the serviceman had "already received VBA benefits troubled [this Court] little," because nothing in the FTCA or the VBA stated that their remedies were exclusive, and the Court "refused to 'call either remedy … exclusive … when Congress ha[d] not done so.'" *Johnson*, 481 U.S. at 697 (Scalia, J., dissenting) (quoting *Brooks*, 337 U.S. at 53). The Court repeated this reasoning in a case decided after *Feres*, noting that "the receipt of disability payments under the [VBA] ... did not preclude recovery under the [FTCA] but only reduced the amount of any judgment under the latter Act." *United States v. Brown*, 348 U.S. 110,

113 (1954). On the flip side, courts have applied *Feres* to bar recovery even when VBA benefits were not available. As one court explained, "[w]hile the existence of an alternate compensation system, such as the VBA, makes the sometimes harsh effect of the *Feres* doctrine more palatable, the denial or unavailability of these benefits does not affect the applicability of the *Feres* doctrine." *Sidley v. U.S. Dep't of Navy*, 861 F.2d 988, 991 (6th Cir. 1988). Because this rationale has no relation to the *Feres* doctrine's application, this Court has determined that it too is "no longer controlling." *Shearer*, 473 U.S. at 58 n.4.

4. *Military Discipline.* Given the weakness of the three original *Feres* rationales, the Court subsequently added a fourth. *See id.* at 57; *Johnson*, 481 U.S. at 698–99 (Scalia, J., dissenting). The Court reasoned that claims raised by soldiers to redress injuries are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, 473 U.S. at 59.

Like the other *Feres* rationales, this post-hoc rationalization falls apart on closer review. To start, this Court has not shied away from reviewing claims merely because they involve sensitive military judgments. This Court, for instance, accepts review of military court martial decisions that implicate the military's discipline of its own ranks. *See Ortiz v. United States*, 138 S. Ct. 2165, 2173–80 (2018). And it scrutinizes the military's decisions regarding the detention of both civilian and foreign enemy combatants, despite the government's assertion that permitting judicial review would result in "discovery

into military operations [that] would … intrude on the sensitive secrets of national defense." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 531–32, 535 (2004) (plurality opinion) (concluding that "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here"); *see also Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (permitting judicial review of the detention of foreign enemy combatants even though it might "burden" the military). It is hard to see how judicial review of negligence claims relating to things like recreational boating accidents, serving too much alcohol, and handling sexual assault claims of college students could possibly pose more of a risk of involving the judiciary in sensitive military affairs than the types of cases this Court already allows. *See supra* at 8.

In addition, "the argument that judicial scrutiny of military orders [under the FTCA] would adversely affect discipline proves too much, for it would preclude any civilian FTCA claim for damages resulting from military exercises." *Lombard*, 690 F.2d at 233 (Ginsburg, J., dissenting). Yet the *Feres* doctrine allows civilian claims to proceed. Indeed, in some cases, injury to both a servicemember and a civilian arises from the same act of negligence, and will require inquiry into exactly the same military decisions, but *Feres* bars only the servicemember's claim. *See, e.g.*, *Shaw v. United States*, 854 F.2d 360, 363–65 (10th Cir. 1988) (barring claims of serviceman under *Feres* to avoid sensitive inquiry into military affairs even though his wife's claims arising from the same car accident would not be barred). This makes

no sense. If courts can assess military conduct under the FTCA in the context of civilian suits without impermissibly intruding on military affairs, then they can do the same for servicemembers.

Nor would elimination of the *Feres* doctrine overwhelm the courts with claims requiring judicial scrutiny of sensitive military decisions. Congress crafted express textual exceptions to address "those suits most threatening to military discipline"—that is, claims arising from conduct in foreign countries, combat activities, intentional torts, "discretionary" functions, or the execution of statutory or regulatory duties. *See Johnson*, 481 U.S. at 699–700 (Scalia, J. dissenting) (citing 28 U.S.C. § 2680(a), (h), (j), (k)). For those claims that the FTCA's textual exceptions do not cover, but *Feres* does—like the handling of a college student's sexual assault claim at issue here—it is doubtful that tort liability would have any adverse impact on military decision-making or discipline. *See id.* at 699 (questioning whether "the effect upon military discipline is so certain"). To the contrary, *denying* servicemembers relief might negatively impact military discipline and morale. *See id.* at 700. In short, judicial speculation about "the effect upon military discipline is [not] so certain … that [this Court is] justified in holding … that Congress did not mean what it plainly said in the [FTCA]." *Id.* at 699; *see also United States v. Muniz*, 374 U.S. 150, 163 (1963) (refusing to exempt federal prisoners' claims from the FTCA based on speculation about the effect on prison discipline).

For these reasons, this post-hoc rationalization cannot sustain *Feres* either.

C. *Stare Decisis* Should Not Save *Feres*.

Without text or policy to support it, *Feres* can be defended only on *stare decisis* grounds. Unsurprisingly, in recent petitions seeking to overrule *Feres*, the Government has heavily relied on *stare decisis* to defend the decision. *See, e.g.*, Resp't Br. at 4–5, *Daniel*, 139 S. Ct. 1713 (No. 18-460). But *stare decisis* is "not an inexorable command," as this Court has repeatedly recognized. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). When a precedent of this Court is not only wrong, but also poorly reasoned or unworkable, *stare decisis* should not save it. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Feres* fits that description to a tee.

1. The *Feres* doctrine is unworkable.

Nearly universally, courts and commentators agree that *Feres* was wrongly decided, for the reasons already explained. But *Feres* is more than wrong; it lacks any grounding in text and sound reasoning, and thus has proven unworkable in practice. Courts struggle to apply *Feres* in a logical and consistent manner to the many different tort claims that servicemembers bring against the United States. Despite seventy years' worth of attempts, courts have been unable to craft a consistent definition for *Feres*' incident-to-service requirement. And this Court's own efforts to solidify *Feres* in *Johnson* left "the lower courts [only] more at loose ends than ever." *Taber*, 67 F.3d at 1043. "[T]he *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today." *Id.* at 1032. It is a "confusing area of law," *id.* at 1038, that has led to "inconsistent results that have no relation to the

original purpose of *Feres*," *Costo*, 248 F.3d at 875 (Ferguson, J., dissenting).

A review of some of the decisions applying *Feres* in the lower courts demonstrates just how "confusing" and "inconsistent" the doctrine has become. Applying *Feres*, courts have held that the United States retains immunity if a drunken, off-duty serviceman drowns when falling off a pier, but not if he drowns when falling into an on-base drainage channel. *Compare, e.g.*, *Morey v. United States*, 903 F.2d 880, 881 (1st Cir. 1990) (*Feres* barred claims of drunken serviceman who drowned after falling off a pier), *with, e.g.*, *Dreier v. United States*, 106 F.3d 844, 845–46 (9th Cir. 1996) (*Feres* did not bar claims of drunken serviceman who drowned after falling into on-base drainage channel). Likewise, courts have held that the United States retains immunity when its negligent upkeep of a home results in a servicemember dying in a fire, but not when the death results from carbon monoxide poisoning. *Compare, e.g.*, *Lanus v. United States*, 492 F. App'x 66, 68–69 (11th Cir. 2012) (*Feres* barred claims of a serviceman killed in a fire in his home), *with, e.g.*, *Hall v. United States*, 130 F. Supp. 2d 825, 826–29 (S.D. Miss. 2000) (*Feres* did not bar claims of a serviceman killed by carbon monoxide poisoning in his home). And courts have held that the United States retains immunity when a servicemember is injured during a recreational water-skiing trip, but not during a recreational rugby event. *Compare, e.g.*, *McConnell v. United States*, 478 F.3d 1092, 1093–94 (9th Cir. 2007) (*Feres* barred claims of serviceman killed while waterskiing), *with, e.g.*, *Whitley v. United States*, 170 F.3d 1061, 1068–70 (11th Cir. 1999) (*Feres*

did not bar claims of serviceman killed while attending rugby event).

Indeed, whether a particular claim falls within the *Feres* doctrine often turns on random details that have no apparent relationship with *Feres*' stated purposes. Take a hypothetical car accident as an example. Suppose a serviceman driving around base suddenly loses control and causes a number of accidents. He hits an off-duty servicewoman and her child having a picnic at an on-base park. Then he crashes into two privately-owned vehicles: one driven on a base-owned road by a serviceman who obtained a pass to leave the base and the other driven on a state-owned highway by a serviceman who obtained permission (but no formal pass) to leave to the base to help his pregnant wife. Applying the *Feres* doctrine, courts would likely bar the claims of the servicewoman at the picnic and the serviceman driving on the state-owned highway to meet his wife, but not the servicewoman's child or the serviceman driving on the base road with a pass. *See, e.g.*, *Millang v. United States*, 817 F.2d 533, 534–35 (9th Cir. 1987) (*Feres* barred claims of off-duty serviceman injured by a military truck while attending a family picnic on base); *Richards*, 176 F.3d at 653–54 (*Feres* barred claims of serviceman killed while driving home on a state-owned highway to meet his pregnant wife because he had only permission to leave and not a formal pass); *Downes v. United States*, 249 F. Supp. 626, 627–28 (E.D.N.C. 1965) (*Feres* did not bar claims of serviceman injured while driving on base to meet movers at his home because he obtained a pass). It is hard to see how this incoherent set of holdings concerning liability furthers the rationales of uniform

application of law, avoiding double recovery of veteran's benefits, or respecting military discipline. And it is harder still to justify these arbitrary outcomes when they have no basis in the choices Congress made but are instead based on "unauthorized rationalization [of this Court] gone wrong." *Johnson*, 481 U.S. at 702 (Scalia, J., dissenting).

These examples show just some of the confusion that *Feres* has sown in the circuit courts. Disagreements between and among the circuit courts abound on *Feres* questions. *See* Pet. 25–28.

2. Neither reliance interests nor congressional inaction justify retaining *Feres*.

The government may argue that *Feres* should be retained—even if it is wrong and even if it is unworkable—because *Feres* is a longstanding precedent that has engendered reliance and because Congress could overturn it, if it saw fit. But neither argument warrants refusing to reconsider this problematic decision.

Although in some circumstances, reliance interests weigh against overturning a precedent that has been on the books for so long—even if it is wrong—this is not one of them. Overruling *Feres* will not open the floodgates to claims against the military. Congress provided a number of express exemptions in the FTCA that preclude liability in cases where judicial scrutiny poses any real risk of interfering with military operations. *See supra* at 11–12. Where *Feres* reaches broader than these textual exemptions, it has not engendered reliance, but rather confusion and

uncertainty as circuits apply different tests to reach different results on essentially the same claims. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (reliance does not weigh in favor of retaining a precedent where it "no longer [offers] a clear or easily applicable standard"). Moreover, to the extent the government asserts that it relies on this Court's mistaken decision in *Feres* to escape liability for its negligence in providing servicemembers with domestic housing, medical care, education, or recreational activities, it is claiming a reliance interest that is simply not worth protecting. *Id.* (noting that *stare decisis* does not protect illegitimate reliance interests like avoiding taxes).

That Congress could amend the FTCA to eliminate the *Feres* doctrine should not dissuade this Court from overruling *Feres*. Congress' inaction does not indicate that it agrees with *Feres*. This Court can discern little from the "unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA." *Johnson*, 481 U.S. at 702–03 (Scalia, J., dissenting). Nor is *Feres* the type of case where judges simply misread statutory text. *Feres* was a bald act of judicial policymaking made without reference to statutory text. Indeed, lower courts describe the *Feres* doctrine as "a *judicially created exception* to the federal government's waiver of sovereign immunity." *McMahon*, 502 F.3d at 1341 (emphasis added). This Court cannot "properly place on the shoulders of Congress the burden of the Court's own error." *Girouard v. United States*, 328 U.S. 61, 69–70 (1946).

Moreover, *Feres* is no longer a single mistaken decision—it is a jurisprudential cancer. The confusion and unpredictability that *Feres* initially created in

FTCA cases has metastasized over the years to other statutes and distorted other areas of law. *See, e.g.*, *Daniel*, 139 S. Ct. at 1714 (noting that the *Feres* doctrine creates "distortions of other areas of law") (Thomas, J., dissenting from denial of cert.); *Aikens v. Ingram*, 811 F.3d 643, 648–49 (4th Cir. 2016) (noting the *Feres* doctrine now applies beyond the FTCA to *Bivens* actions and claims brought under 42 U.S.C. § 1983). Given this, the onus should not be on Congress to try to untangle the confusion this Court created. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008) ("[I]t is hard to see how the judiciary can wash its hands of a problem it created.").

In short, applying *stare decisis* to a doctrine like *Feres* will not further the principles of "stability and repose," but will instead allow *Feres*' error to continue to "metastasize[] …, thereby distorting the law." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 470 (2008) (Thomas, J., dissenting). *Stare decisis*, therefore, should not stop this Court from reconsidering and overruling this problematic decision.

II. AT THE LEAST, THIS CASE PRESENTS THE OPPORTUNITY TO LIMIT *FERES*.

If the Court is not inclined to overturn *Feres*, it should still grant certiorari to limit *Feres*. This case demonstrates the unfairness and absurdity of an overly broad application of the *Feres* doctrine. Being raped by a college classmate should not be regarded as an activity that is incident to service, even if the rape occurs at a military academy.

The *Feres* doctrine as originally conceived would not have barred a claim relating to a cadet's off-duty

rape. When this Court originally decided *Feres*, it viewed the doctrine as an analogy to newly emerging workers' compensation statutes. *Feres*, 340 U.S. at 143 (discussing emerging worker's compensation laws). *Feres*, thus, can be "understood as an attempt to preclude suits by servicemembers against the government because, as military *employees*, they received government disability and death benefits—benefits that the Court observed were similar to (and if anything more generous than) most civilian workers' compensation awards." *Taber*, 67 F.3d at 1038. If it is retained, *Feres* should be limited to this original purpose, barring only injuries sustained, "where compensation [would be] given under a military analogue to workers' compensation," *id.* at 1045—that is, where the servicemember was injured "while performing duties under orders," *see Feres*, 340 U.S. at 146.

As it stands now, *Feres* applies in circumstances that are remote from this worker's compensation analogy. Under current jurisprudence, *Feres* denies servicemembers relief for any injury inflicted by any government entity, based on the mere happenstance of the servicemember's active duty status. This includes claims that have no discernable relationship with the military's unique mission or the servicemembers' actions taken in the line of duty—claims about bars serving too much alcohol, hospitals providing negligent medical care during childbirth, recreational outfits improperly maintaining their equipment, or colleges mishandling sexual assaults. *Bozeman*, 780 F.2d at 198–99 (serving alcohol); *Daniel v. United States*, 889 F.3d 978, 980 (9th Cir. 2018) (care during childbirth); *McConnell*, 478 F.3d at 1093–

94 (waterskiing); Pet.App.4a–7a (sexual assault). *Feres* even precludes servicemember claims against government entities *other than* the military. *Johnson*, 481 U.S. at 686–88 & nn.7–8 (*Feres* barred servicemember's claim against the Federal Aviation Administration); *see also Fleming v. U.S. Postal Serv.*, 186 F.3d 697, 699–701 (6th Cir. 1999) (*Feres* did not bar claim against the postal service only because the servicemember was not acting incident to service). And *Feres* further precludes family members' claims that derive from the servicemembers' injuries. *See, e.g.*, *Ortiz*, 786 F.3d at 818 (*Feres* barred child's claim because her injury derived from negligent medical care of the servicemember mother during birth). *Feres* requires these "counter-intuitive and inequitable result[s] simply because of [the servicemember's] military status." *Richards*, 176 F.3d at 657.

Applying *Feres* to bar Ms. Doe's claim demonstrates how far *Feres* has departed from its initial underpinnings. Ms. Doe was taking a walk with a classmate on her college campus after hours, and that classmate raped her. Her college created the atmosphere of sexual harassment that led to the rape and that prevented her from obtaining help afterwards. She is not eligible for "any benefits akin to workers' compensation benefits for [her] injuries." Pet.App.61a–62a (Chin, J., dissenting). She was doing "nothing characteristically military" when she was injured. *Id.* at 59a. And if she were attending a "private college receiving federal funding or another public educational institution ... she could seek recourse for her injuries." *Id.* at 43a. But because Ms. Doe dreamed of devoting her life to military service—

and chose to go to a military academy for college in pursuit of that dream—*Feres* denies her recovery. *See Johnson*, 481 U.S. at 703 (Scalia, J., dissenting). In sum, the *Feres* doctrine has become far more than a workers' compensation analogue and now functions as a declaration that, "members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans." *Costo*, 248 F.3d at 870 (Ferguson, J., dissenting).

Neither the text of the FTCA nor the *Feres* Court's original rationales justify the *Feres* doctrine, and the doctrine should not exist. To the extent it must be retained, it certainly should not operate to make servicemembers second-class citizens, subject to government negligence without recompense. Thus, at minimum, this Court should grant certiorari to limit *Feres* to those injuries that are truly "incident to service"—that is, those injuries suffered while performing duties under orders.

CONCLUSION

After seventy years of growing confusion, the time has come to overturn—or at least rein in—*Feres*. For these reasons, and those advanced by the Petitioner, the Court should grant the petition for a writ of certiorari.

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