No. 20-____

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After years of deliberation, in 1946 Congress waived the United States' sovereign immunity from tort liability through the Federal Tort Claims Act ("FTCA"), including for injuries involving "members of the military or naval forces." 28 U.S.C. §§ 1346(b), 2671. Congress limited that waiver with enumerated exceptions, for instance preserving sovereign immunity against claims arising from "combatant activities . . . during time of war." *Id.* § 2680(k). Despite the plain text of the statute, just four years later this Court held that the FTCA broadly precludes claims for injuries "incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). For seventy years, *Feres* has deprived servicemembers of the statutory remedy Congress provided. Members of this Court have criticized this radical departure from statutory text, *see United States v. Johnson*, 481 U.S. 681, 702-03 (1987) (Scalia, J., dissenting) (*Feres* "ignor[ed] what Congress wrote and imagin[ed] what it should have written"), and voted to grant certiorari in cases seeking to correct this error. *See, e.g.*, *Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019) (Mem.) ("Justice Ginsburg would grant the petition for a writ of certiorari"); *id*. (Thomas, J., dissenting from denial of certiorari).

While a cadet at the United States Military Academy, Petitioner Jane Doe was subject to pervasive sexual harassment and raped by a fellow cadet. Later, she brought tort claims under the FTCA. The Second Circuit, applying *Feres*, held that her claims were "incident to service" and therefore barred. The questions presented are:

1. Was *Feres* wrongly decided and should it be overruled?

2. Alternatively, should *Feres* be limited so as not to bar tort claims brought by servicemembers injured by violations of military regulations, during recreational activities, or while attending a service academy?

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INTRODUCTION

Petitioner Jane Doe grew up in a military family, and as a senior in high school she was thrilled to receive her offer of admission to the United States Military Academy at West Point ("West Point"). Ms. Doe entered West Point in 2008 and excelled as a cadet. However, West Point subjected her to pervasive sexual harassment. In her second year, Ms. Doe was raped on campus by a fellow cadet during a recreational walk late one evening. When she reported the assault, West Point failed to adhere to mandatory Department of Defense ("DOD") regulations governing sexual violence response. In 2010, Ms. Doe withdrew from the school. She later brought suit, including claims under the FTCA. The district court and court of appeals dismissed her FTCA claims on the pleadings, as *Feres* and its progeny have obliged courts to dismiss the claims of many other servicemembers.

In *Feres v. United States*, this Court dramatically curtailed Congress's waiver of sovereign immunity under the FTCA, holding that servicemembers cannot bring claims for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. This interpretation is incompatible with the plain text of the FTCA. "As written," the FTCA's broad waiver of sovereign immunity "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *Lanus v. United States*, 570 U.S. 932, 932 (2013) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks omitted). And "when the meaning of the statute's terms is plain, [the Court's] job is at an end." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020). "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain

terms based on some extratextual consideration." *Id*. Nonetheless, since 1950, the *Feres* doctrine has nullified the FTCA's plain-text promise to servicemembers injured by tortious government conduct.

The national importance of *Feres* and its progeny cannot be overstated. In recent decades, civilians injured by government actions have gained greater access to recovery under the FTCA. Meanwhile, *Feres* and its progeny have denied servicemembers—and sometimes even their children—access to the very system of justice they have pledged to defend. *See, e.g.*, *Brown v. United States*, 739 F.2d 362, 368-69 (8th Cir. 1984) (rejecting as *Feres*-barred claims against the United States and superior officers for failing to prevent mock lynching of a Black servicemember, despite finding no relevant relationship between his injuries and military service); *Mondelli v. United States*, 711 F.2d 567, 568 (3d Cir. 1983) (rejecting as *Feres*-barred claims of a civilian child born with a genetically transferred form of cancer caused by her servicemember father's exposure to radiation). *Feres* has wrongfully deprived injured servicemembers of the remedies Congress established for them in the FTCA.

Unmoored from the text of the FTCA and lacking a coherent rationale, the *Feres* doctrine has also generated confusion among the lower courts. Circuit courts have come to conflicting conclusions about the scope of *Feres*'s "incident to service" bar, likely because some judges seek to avoid the injustice at the heart of the doctrine.

Over time, the *Feres* exception has swallowed the FTCA's rule. As members of this Court have concluded, "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *United States v. Johnson*, 481 U.S. 681,

700 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). *Feres* has unjustly closed the courthouse doors to too many injured service-members and for too long has left tortious government conduct unchecked. The time to revisit *Feres* is now.

OPINIONS BELOW

The court of appeals opinion is reported at 815 Fed. App'x. 592 (2d Cir. 2020). That opinion relied on and incorporated the *Feres* analysis from a prior published decision on the government's earlier interlocutory appeal. 870 F.3d 36 (2d Cir. 2017); *see also id.* at 50 (Chin, J., dissenting). The district court's opinion is reported at 98 F. Supp. 3d 672 (S.D.N.Y. 2015).

JURISDICTION

The court of appeals entered its judgment on May 29, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a judicially created exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346 *et seq*. The pertinent provisions of the FTCA are included at Pet.App.132a.

STATEMENT

Since childhood, Jane Doe dreamed of following in the footsteps of her relatives by serving in the U.S. Armed Forces. Pet.App.104a. Ms. Doe was a conscientious and motivated student in high school, and after securing the necessary congressional nomination, she was thrilled to receive an offer of admission from West Point in 2008. *Id*. at 105a. Ms. Doe thrived at West Point, ranking high in her class and garnering praise from her professors. *Id*. at 106a-07a. One professor

described Ms. Doe as "one of the most professional and internally motivated" students at West Point, *id.* at 107a, a young woman who was likely to "excel as an Army officer" and whom he "would gladly recruit . . . to serve on [his] team, regardless of the mission." *Id*.

However, Ms. Doe achieved this success in spite of, not because of, the culture she found at West Point. During Ms. Doe's time at West Point, school administrators failed to take necessary steps to protect female cadets from a pervasive and well-known culture of sexual violence. West Point and its leaders fostered a sexually aggressive and misogynistic environment,[1] failed to punish rapists and other sexual assailants,[2]

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[1] For instance, during team-building exercises, male cadets would march and sing sexually violent cadences, e.g., "I wish that all the ladies / were statues of Venus/ and I was a sculptor / I'd break'em with my penis," and "I wish that all the ladies / were holes in the road / and I was a dump truck / I'd fill'em with my load" Pet.App.108a. This was done in full view of West Point officials, who did nothing to stop them. *Id.* West Point professors and staff openly joked with male cadets about sexual exploits, encouraged male cadets to seize any opportunity for sex, and claimed heavy drinking was an understandable response to the lack of sexual opportunities on campus. *Id.* at 109a.

[2] In 2010, during Ms. Doe's time of attendance, nearly 10% of female cadets indicated they had been subject to sexual assault at West Point that year. Defense Manpower Data Center, *2010 Service Academy Gender Relations Survey*, U.S. Dep't of Def. iv-v (2010), *available at* https://sapr.mil/public/docs/research/FINAL_SAGR_2010_Overview_Report.pdf [https://perma.cc/W5P4-BYW3]. More than half said they had been sexually harassed. *Id* at v. In academic year 2009-2010, West Point received eleven official reports of sexual assault. These reports were a small fraction of the assaults at West Point that year. Pet.App.110a. Of these eleven reports, five were "unrestricted" (informing the perpetrator's superiors and initiating an investigation) and six were "restricted" (meaning no action was to be taken). Only one perpetrator was dismissed from West Point. *Id.* at 110a-111a.

and failed to implement mandatory DOD directives and instructions to protect victims.[3]

Ms. Doe suffered the full consequences of West Point's blatant disregard of DOD policies on May 8, 2010, when she was raped by a fellow cadet. *Id*. at 115a-116a. Ms. Doe was attacked in an academic building, after-hours, during the course of a recreational nighttime walk. *Id*. She sought immediate medical care from West Point, which once again failed to comply with mandatory military directives or to provide appropriate medical and emotional support.[4] Three months later, she resigned and left the school. *Id*. at 118a. Ms. Doe's departure was a bitter loss to a young woman who had dreamed of serving her country. It was also a tragic loss to the nation of a promising future soldier.

After exhausting her administrative remedies, Ms. Doe filed an action in the Southern District of New York in 2013, pleading four causes of action: FTCA claims, a *Bivens* Fifth Amendment Due Process claim,

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[3] In 2011, West Point was not in compliance with DOD sexual harassment and assault policies and was employing a "deficient" prevention training program that failed to meet minimum standards. Pet.App.113a. DOD found that the quality of West Point's sexual harassment and assault prevention programs had declined since 2008. *Id.*

[4] West Point did not provide Ms. Doe with timely access to comprehensive medical and psychological treatment. In the two weeks following the rape, she received no counseling or support, aside from a single email. Pet.App.118a. Nor did she receive a forensic examination despite visiting a health clinic twice in the days after the rape. *Id.* at 116a-17a. These omissions directly contravened mandatory DOD regulations. Pet.App.62a; *see also* U.S. Dep't of Def., Directive 6495.01: Sexual Assault Prevention and Response Program, at 2, 13 (Nov. 7, 2008).

a *Bivens* Fifth Amendment equal protection claim, and a Little Tucker Act claim. *Id*. at 77a-78a. The district court (Hellerstein, J.) granted the defendants' motion to dismiss all claims with the exception of the *Bivens* equal protection claim. *Id*. at 101a.

The government filed an interlocutory appeal to the Second Circuit. Ms. Doe made a motion to transfer to the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(2), which a motions panel denied. *Id*. at 67a-68a. A divided Second Circuit merits panel then reversed the district court on Ms. Doe's equal protection claim, holding that "no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service." *Id*. at 32a (internal quotation marks omitted). In dissent, Judge Chin noted that Jane Doe "was not in military combat or acting as a soldier or performing military service," but instead was merely a student, and "her injuries were incident only to her status as a student." *Id*. at 43a (Chin, J., dissenting). Ms. Doe subsequently appealed the dismissal of her statutory claims to the Federal Circuit, which transferred the case to the Second Circuit. *Id*. at 15a. Relying on and incorporating the *Feres* analysis from its prior equal protection decision, the Second Circuit affirmed, holding that "Doe's FTCA claims are incident to service, and are therefore barred under *Feres*." *Id*. at 5a-6a.

Jane Doe petitions for a writ of certiorari only as to the dismissal of her FTCA claims. At the time of the harassment, rape, and subsequent negligent handling of her rape by the West Point administration, Ms. Doe had incurred no active service obligation; she was "taking classes, participating in extracurricular activities, and learning to grow up and to be a self-sufficient and healthy individual." *Id*. at 59a (Chin, J., dissenting). "There was nothing characteristically military

about what she was doing." *Id*. (internal quotation marks omitted). Ms. Doe simply seeks to have her claims—and those of other injured servicemembers not subject to a *textual* limitation to the FTCA's waiver of sovereign immunity—heard on the merits.

REASONS FOR GRANTING THE PETITION

I. The *Feres* Doctrine's Departure from the Plain Text of the FTCA is a Recurring Issue of Great National Importance.

In *Feres v. United States*, this Court vitiated the ability of servicemembers to bring claims under the FTCA, barring tort claims against the government for injuries "incident to service." 340 U.S. at 146. This judicially created exception contravenes the plain text of the FTCA and dramatically restricts Congress's express waiver of sovereign immunity. The *Feres* doctrine wrongly deprives servicemembers of the remedies Congress created for them under the FTCA.

If the *Feres* doctrine ever was a defensible interpretation of Congress's intent, it has since outgrown every rationale. Rather than create "a workable, consistent and equitable whole," *Feres*, 340 U.S. at 139, for seventy years the "incident to service" bar has undermined Congress's statutory scheme, erroneously denied redress to servicemembers, and insulated tortious government conduct from liability. It has also led to "distortions" in other areas of law. *Daniel*, 139 S. Ct. at 1713-14 (Thomas, J., dissenting from denial of certiorari). This Court should grant certiorari to restore a faithful and just interpretation of the FTCA.

A. Contrary to the Plain Text of the FTCA, *Feres* Closes the Courthouse Doors to Jane Doe and Countless Other Servicemembers.

When Congress gave the district courts jurisdiction to hear "any claim" of negligence against the United States, it did not mean "any claim but that of servicemen." *Brooks v. United States*, 337 U.S. 49, 51 (1949). The *Feres* doctrine is an indefensible interpretation of the plain text of the statute and a gross injustice to servicemembers denied remedy for injuries not precluded by the FTCA's enumerated exceptions.

1. The *Feres* Doctrine Contravenes the Plain Text of the FTCA.

The FTCA's "terms are clear." *Brooks*, 337 U.S. at 51. The statute provides that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. The Act uses "neither intricate nor restrictive language in waiving . . . immunity." *United States v. Muniz*, 374 U.S. 150, 152 (1963). Critically, the FTCA expressly waives sovereign immunity for torts involving "members of the military or naval forces" and "the military departments." 28 U.S.C. § 2671. This broad waiver of sovereign immunity is qualified by several enumerated exceptions, at least three of which indicate Congress specifically considered and provided for the needs of the military. *Id.* § 2680(j) (excepting "[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(k) (excepting "[a]ny claim arising in a foreign country"); *id*. § 2680(a) (excepting "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function."). But these limited

statutory exclusions do not encompass all claims incident to military service.

In the first years after its adoption, this Court recognized that servicemembers were eligible for recovery under the FTCA. In 1949, this Court allowed servicemembers to bring claims for the actions of a civilian Army employee who struck their car with an Army truck. *Brooks*, 337 U.S. at 51. The *Brooks* Court was persuaded by the plain language of the statute, its structure, and its legislative history. *Id.* Observing the FTCA's numerous exceptions are "lengthy, specific, and close to the present problem," the Court noted "such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim' [to describe the scope of government liability for servicemember claims]." *Id.* The *Brooks* Court thus read the FTCA to permit servicemember claims not barred by a statutory exclusion. And rightly so. As this Court has repeatedly emphasized: "In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 727 (1989).

Moreover, Congress considered—and rejected—a servicemember bar. *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari) ("Congress contemplated such an exception . . . but codified language that is far more limited.") (citations omitted). Indeed, "[t]here were eighteen tort claims bills introduced in Congress between 1925 and 1935," and "[a]ll but two contained exceptions denying recovery to members of the armed forces." *Brooks*, 337 U.S. at 51. Yet, the final text of the FTCA contained no such exception. *Id*. at 51-52. Accordingly, as this Court

observed, "[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when [the FTCA] was passed." *Id.* at 51.

Yet, just one year after *Brooks*, and despite the plain language and legislative history of the FTCA, the *Feres* Court negated the FTCA's waiver of sovereign immunity for servicemembers, creating an additional broad exception barring claims for injuries incurred "incident to service[,]" 340 U.S. at 146—a phrase that appears nowhere in the statute. In so doing, the *Feres* Court neglected the definition of servicemember employment in Section 2671 and rendered superfluous the combatant activities exception, 28 U.S.C. § 2680(k).

"There is no support for [the incident to service bar] in the text of the statute . . . ." *Lanus*, 570 U.S. at 933 (Thomas, J. dissenting from denial of certiorari). As Judge Calabresi has likewise explained, the *Feres* Court's interpretation of the FTCA "flew directly in the face of a relatively recent statute's language," and "its willingness to ignore language, history, and the process of incremental law making . . . was . . . remarkable." *Taber v. Maine*, 67 F.3d 1029, 1038-39 (2d Cir. 1995). In fact, just seven years after *Feres*, this Court acknowledged—in a case not brought by a servicemember—that "[t]here is no justification . . . to read exemptions into the [FTCA] beyond those provided by Congress." *Rayonier v. United States*, 352 U.S. 315, 320 (1957). "If the Act is to be altered that is a function for the same body that adopted it." *Id.* Nonetheless, for seventy years the judicially created *Feres* doctrine has wrongfully closed the courthouse doors to injured servicemembers.

2. Courts Have Applied *Feres* to Preclude Suit in a Variety of Circumstances Not Intended by Congress.

The *Feres* doctrine "now 'encompasses, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military.'" *Pringle v. United States*, 208 F.3d 1220, 1223-24 (10th Cir. 2000) (quoting *Persons v. United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991)). This "has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government . . . ." *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari); *see also Richards v. United States*, 180 F.3d 564, 564-65 (3d Cir. 1999) (Rendell, J., dissenting from denial of rehearing en banc) ("*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.") (citations omitted).

Ms. Doe's case is but one of many examples that illustrate how *Feres* unjustly deprives injured servicemembers from any opportunity to be heard in court. Jane Doe, then a cadet studying at West Point, was raped by a fellow student during a social walk after hours. Had Ms. Doe chosen to attend a "private college receiving federal funding or another public educational institution," rather than choosing to serve her country, "she could seek recourse for her injuries." Pet.App.43a (Chin, J., dissenting). Moreover, if Ms. Doe was a *civilian* raped on the West Point campus by a cadet, she would be allowed to bring suit. *See Loritts v. United States*, 489 F. Supp. 1030, 1031 (D. Mass. 1980) (holding civilian may bring FTCA claims against

West Point for negligence when she was raped by cadet while visiting campus). As these cases demonstrate, *Feres*'s overbroad application has irrationally denied servicemembers a remedy for injuries for which "private individual[s] under like circumstances" would be liable. 28 U.S.C. § 2674.

It may seem anomalous that Ms. Doe's injury could be found "incident to service." But her case is not an outlier. The rape of an underage servicemember, plied with alcohol and assaulted at a party, was held "incident" to her military employment. *Gonzalez v. United States Air Force*, 88 F. App'x 371, 375 (10th Cir. 2004); *id.* at 379 (Lucero, J., concurring) ("Surely, no one should suggest that when young Americans sign up for military service, they can expect that potential sexual assaults upon them will be routinely considered 'incident' to that service. . . It is my hope that the expansive reach of *Feres* will be revisited."). The murder of a female naval officer, shot to death while watching a movie at home with a friend, was determined to be "incident to service" because the assailant, her ex-fiancé, was also a naval officer. *O'Neill v. United States*, 140 F.3d 564, 564-65 (3d Cir. 1998); *id.* at 565 (Becker, C.J., dissenting) ("[I]t is difficult . . . to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend.").When a drill sergeant ordered a recruit into a latrine and raped her—causing such extreme mental anguish to the recruit that she killed herself rather than face his continued abuse—the drill sergeant's conduct was also deemed "incident to service" because he threatened her with military discipline if she refused to submit to his advances. *Stubbs v. United States*, 744 F.2d 58, 59 (8th Cir. 1984).

Malicious religious discrimination and race discrimination within the military have no connection to military goals, yet here too, the *Feres* doctrine has immunized the United States from liability. For instance, a drill sergeant targeted a Muslim Marine Corps recruit on the basis of his faith, allegedly subjecting him to physical abuse so extraordinary that the recruit committed suicide. *Siddiqui v. United States*, 783 Fed. App'x. 484, 486 (6th Cir. 2019). The *Feres* doctrine barred his grieving parents' suit that claimed *inter alia* a pattern of religious discrimination against Muslims at their son's base. *Id.* at 488. In a similarly appalling circumstance, a group of servicemembers attempted to hang a Black servicemember in a mock lynching. *Brown*, 739 F.2d at 364. The court acknowledged the servicemember's assault took place at a "drinking party on a long holiday weekend" that was "not sponsored by the military base" nor was, in any way, "related to the military mission." *Id.* at 368. Yet, the court still held that his claim against the United States was barred by the *Feres* doctrine. *Id.* at 369. The servicemember later attempted suicide. *Id.* at 363.

The *Feres* doctrine's sweeping preclusive effect has barred FTCA claims of servicemembers for injuries wholly unrelated to any military duties. *See, e.g.*, *Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001) (holding the deaths of two off-duty servicemembers, who drowned during a civilian-led, off-base, recreational rafting trip were incident to service); *Bon v. United States*, 802 F.2d 1092, 1093 (9th Cir. 1986) (holding servicemember's injuries caused when a government-owned motorboat collided with her canoe were barred, although the accident occurred during the servicemember's off-duty recreational time); *Bozeman v. United States*, 780 F.2d 198, 201 (2d Cir. 1985) (rejecting as *Feres*-barred a widow's FTCA claims for

the death of her servicemember husband who was killed in a drunk-driving accident after the Army continued to serve the visibly inebriated driver at one of its clubs); *Hass v. United States*, 518 F.2d 1138, 1139 (4th Cir. 1975) (barring claims by servicemember injured while recreationally riding a horse rented from civilian employees of a government-owned stable).

The *Feres* doctrine has also wrongly precluded third-party claims that have their "genesis" in the servicemember's injury. For example, medical negligence caused a servicemember's child to be born with permanent brain injury and physical disfigurement. *See Ortiz v. United States*, 786 F.3d 817, 818 (10th Cir. 2015). Yet, the *Feres* doctrine left the family without any legal remedy, unable to recover costs to help with physicians, hospitalizations, medications, and other treatments necessary to support their child's life. *Id.* at 831; *see also Mondelli*, 711 F.2d at 568 (rejecting as *Feres*-barred claims of a civilian child born with a genetically transferred form of cancer, because her condition was a consequence of her servicemember father's exposure to radiation during nuclear device testing).

The legal claims of servicemembers victimized by conduct far removed from the scope of their military employment and duties have long crumpled against the steel wall of the *Feres* doctrine. Until this Court revisits *Feres*, servicemembers will continue to be injured without the possibility of legal redress provided by Congress and the plain text of the FTCA.

B. Members of This and Other Courts Have Urged This Court to Revisit *Feres*.

Perhaps no other contemporary doctrine has provoked more lament, nor calls for reconsideration from

the bench, than *Feres*—including from members of this Court. *See, e.g.*, *Johnson*, 481 U.S. at 700-01 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (citation omitted). In recent years, members of this Court have voted to grant certiorari in cases seeking to revisit *Feres*. *See, e.g.*, *Daniel*, 139 S. Ct. at 1713 (Mem.) ("Justice Ginsburg would grant the petition for a writ of certiorari"); *id*. (Thomas, J., dissenting from denial of certiorari); *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari); *Jones v. United States*, 139 S. Ct. 2615, 2615 (2019) (Thomas, J., dissenting from denial of certiorari).

Lower courts, too, have frequently called for this Court to revisit *Feres*. *See, e.g.*, *Day v. Mass. Air. Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) (Boudin, J.) ("Possibly *Feres* . . . deserves reexamination by the Supreme Court."); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985) (Meskill, J.) ("The *Feres* doctrine is a blunt instrument; courts and commentators have often been critical of it."); *Taber*, 67 F.3d at 1044 n.11 (Calabresi, J.) ("The fact that the doctrine can be made workable does not suggest that the Supreme Court ought not abandon the doctrine completely for reasons akin to those given by Justice Scalia in his *Johnson* dissent."); *Richards*, 180 F.3d at 564-65 (Rendell, J., dissenting from denial of rehearing en banc) ("*Feres* represents more than a 'bad estimation[]' of what Congress intended to do (but did not do), in the [FTCA] . . . I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres*.") (citations omitted); *Matreale v. State Dep't of Military & VA*, 487 F.3d 150, 159 (3d Cir. 2007)

(Smith, J. concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands . . . *Feres* and its progeny ought to be reexamined."); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (Thornberry, J.) ("[W]e are compelled, however reluctantly, to reverse the judgment of the district court and dismiss the claim as barred by *Feres*. We are not blind to the tragedy . . . and we regret the effects of our conclusion."); *Uhl v. Swanstrom*, 79 F.3d 751, 755 (8th Cir. 1996) (McMillian, J.) ("[W]e find ourselves equally reluctant, yet legally bound, to hold that plaintiff's claims in the present case are nonjusticiable under the *Feres* doctrine."); *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (McKeown, J.) ("[W]e apply the *Feres* doctrine here without relish . . . in determining this suit to be barred, we join 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.") (citations omitted); *Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1991) (Nelson, J.) ("It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*."); *Ortiz*, 786 F.3d at 818 (Tymkovich, J.) ("[T]he facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule."); *see also Bork v. Carroll*, 449 Fed. Appx. 719, 721 (10th Cir. 2015) (Gorsuch, J.) ("*Feres* proceeded to hold—despite the FTCA's language suggesting a waiver of immunity—that FTCA suits for injuries 'aris[ing] out of or . . . in the course of activity incident to service'" are barred).

It is time for this Court to revisit *Feres*.

C. The *Feres* Doctrine Lacks a Single Coherent Rationale.

Over time, this Court has identified four purported justifications for *Feres*'s rewriting of the FTCA. Those rationales are: (1) a lack of "parallel [private] liability," *Feres*, 340 U.S. at 141-142; (2) the "distinctively federal in character" relationship between the Government and members of the armed forces, *id*. at 143; (3) the existence of an alternative compensation scheme, *id.* at 145; and (4) the importance of preserving military discipline. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977); *United States v. Brown*, 348 U.S. 110, 112 (1954). If ever these rationales were persuasive, the doctrine has far outlived them. This Court itself has abandoned the first three rationales—those originally articulated in *Feres*. *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955) (holding that the United States could be liable for negligently operating a lighthouse despite the lack of parallel private liability); *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985) (noting that the second, distinctively federal relationship, rationale and the third, alternative compensation, rationale no longer control). And for good reason.

This Court rejected *Feres*'s "parallel private liability" rationale a mere five years after *Feres*. *Indian Towing*, 350 U.S. at 66-69; *see also Rayonier*, 352 U.S. at 319. Dispensing with the "parallel private liability" rationale was appropriate, as several of the FTCA's exceptions would be rendered superfluous if uniquely governmental conduct did not fall within the FTCA's reach. For example, "private individuals typically do not . . . transmit postal matter, 28 U.S.C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system,

§ 2680(i)." *Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting).

Next, in 1963, this Court set aside *Feres*'s "distinctively federal relationship" rationale in *United States v. Muniz*, 374 U.S. 150, 162 (1963), and later confirmed the rationale is no longer controlling. *Shearer*, 473 U.S. at 58 n.4. The *Feres* Court had reasoned that the relationship between the government and members of the armed forces necessitated uniform recovery for servicemembers. 340 U.S. at 143 ("It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.").[5] But in *Muniz*, the Court "abandoned this peculiar rule of solicitude" by "allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting). Moreover, "[t]he unfairness to servicemen

[5] In *Feres*, the "distinctively federal relationship" rationale rested on the notion that fairness to servicemembers required uniform recovery. In *Stencel Aero Engineering Corp. v. United States*, this Court suggested the rationale is directed toward uniformity for the Government. 431 U.S. at 672. But, "[t]o the extent that the rationale rests upon the military's need for uniformity, it is equally unpersuasive." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting). Several FTCA exemptions "show that Congress considered the uniformity problem, *see, e.g.*, 28 U.S.C. §§ 2680(b), 2680(i), 2680(k), yet it chose to retain sovereign immunity for only some claims affecting the military. § 2680(j)." *Id.* Furthermore, as civilian claims against the military are not barred by the *Feres* doctrine, and servicemembers may recover for injuries not incident to service, the military desire for uniformity has been decidedly rejected by this Court. *Id.*

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." *Id*. at 695-96; *see also Lanus*, 570 U.S. at 933 (Thomas, J., dissenting from denial of certiorari) (emphasizing that, contrary to the FTCA's text, *Feres* deprives servicemembers of *any* remedy for tortious government conduct.).

Feres's "alternative compensation" rationale was rejected by this Court before *Feres* was even decided. *Brooks*, 337 U.S. at 53 ("[N]othing in the [FTCA] or the veterans' laws . . . provides for exclusiveness of remedy."). And it was again rejected by this Court just four years after *Feres*. *Brown*, 348 U.S. at 113 (noting "Congress had given no indication that it made the right to compensation the veteran's exclusive remedy," and "the receipt of disability payments . . . did not preclude recovery under the [FTCA] but only reduced the amount of any judgment" thereunder). Moreover, *Feres* has been applied to bar recovery for injuries, like sexual assault, where no alternative compensation—from the Department of Veterans Affairs or elsewhere—exists. Gregory C. Sisk, *The Peculiar Obstacles to Justice Facing Federal Employees Who Survive Sexual Violence*, 2019 U. Ill. L. Rev. 269, 280-81 (2019) (explaining survivors of military sexual trauma receive "no benefit from the [Veterans Benefits Administration] unless they suffered a physical injury or have become psychologically disabled as a result"); *see also Webb v. Wilkie*, 32 Vet. App. 309, 313 (2020) (explaining entitlement to compensation under the veterans benefits scheme requires evidence of current disability). "In sum, 'the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable.'" *Johnson*,

481 U.S. at 698 (Scalia, J., dissenting) (quoting *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980)).

It was only "[s]everal years after *Feres* [that the Court] thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (citing *Brown*, 348 U.S. at 112). Over time, lower courts increasingly relied on this *post hoc* rationale. *See, e.g.*, *Taber*, 67 F.3d at 1043 ("Because the lower courts have found the rationales other than discipline extremely difficult to apply in a coherent manner . . . it is not surprising that *Johnson*—a decision that we are bound to follow—left both the doctrine and the lower courts more at loose ends than ever." (citation omitted)); *Elliott v. United States*, 13 F.3d 1555, 1559 (11th Cir. 1994) (stating that *Feres*'s other rationales "provide no help in determining when an injury occurs 'incident to service'"), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir. 1994) (*en banc*), *affirming district court judgment by equally divided court*, 37 F.3d 617 (11th Cir. 1994); *see also Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) (noting application of the military discipline rationale to bar claims for civilian family of service-member "follows no legislative direction but instead enlarges a problematic court precedent").

But preserving military discipline cannot coherently justify the *Feres* doctrine's broad "incident to service" bar. In fact, precisely because military discipline serves as a *post hoc* rationale for *Feres*, courts have applied the doctrine to cases that have no military discipline implications whatsoever. *Hall v. United States*, 451 F.2d 353, 354 (1st Cir. 1971) ("Even though

there may have been no disciplinary element in this case . . . *Feres* required no nexus between discipline and injury."). Moreover, in Jane Doe's case, *Feres* was applied to shield not military order but rather violations of mandatory DOD directives and instructions. Broadly immunizing the government from suit for servicemembers' injuries—whether incident to service or not—undermines military discipline rather than preserves it.[6]

What is more, "[p]erhaps . . . Congress thought that *barring* recovery by servicemen might adversely affect military discipline." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). As the government itself recently told this Court, "[s]exual assault 'is one of the most destructive factors in building a mission-focused military.'"[7] Not only is intra-military sexual assault "difficult to uncover, but [also] devastating to the morale, discipline,

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[6] Empirical evidence also suggests military order and efficiency are undermined by prioritizing deference to hierarchy over accountability to one's comrades. Barry Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War*, 29 St. Louis U. L.J. 383, 408-09 (1985) ("Studies conducted during the Korean and Vietnam Wars confirmed the 'seeming irrelevance' of traditional concepts of discipline . . . [finding] that the basic drive to return home safely and the intimacy of the group were the primary motivations under fire. . . . Although blind obedience may have been necessary 'when armies had to be forced into open fire in mass infantry lines,' it is harmful in modern armies requiring individual responsibility.").

[7] Brief for Petitioner at 5, *United States v. Briggs*, *argued*, No. 19-108 (Oct. 13, 2020) (quoting Memorandum from James N. Mattis, Secretary of Defense, to All Members of the Department of Defense: S*exual Assault Prevention and Awareness* (Apr. 18, 2018), *available at* https://dod.defense.gov/portals/1/features/2018/0418_sapr/saap-osd004331-18-res.pdf [https://perma.cc/TGC4-VXWA]).

and effectiveness of our Armed Forces."[8] "And the destruction of 'morale, good order and discipline' is only exacerbated by a failure to bring assailants to justice."[9] Yet the *Feres* doctrine has been consistently applied to bar recovery for intra-military sexual assault. *See, e.g.*, *Smith v. United States*, 196 F.3d 774, 777 (7th Cir. 1999) (dismissing servicemember's FTCA claims that while off-duty, her drill sergeant repeatedly forced her into his private vehicle and took her off-post to rape her, because the assaults "were made possible by his status as her military superior" and thus "incident to service" under *Feres*).

Undermining the FTCA's deterrent effect is of particular concern in the military context. Taking sexual assault as an example, "[t]he Pentagon has identified military sexual trauma as a major deployment and readiness issue." Brief for Petitioner at 5, *United States v. Briggs*, *argued*, No. 19-108 (Oct. 13, 2020) (citing *UCMJ Sex Crimes Report* at 117 n.457). Which is why "the 'deterrence of sexual offenses in the military is especially critical.'" *Id.* (quoting *UCMJ Sex Crimes Report* at 117 n.456). Simply put, "[a]n effective fighting force cannot tolerate sexual assault within its ranks."[10] And yet, in 2010, the year Ms. Doe

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[8] *Id.* at 23.

[9] *Id*. at 7 (quoting U.S. Dep't of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice* 2 ("*UCMJ Sex Crimes Report*") (Jan. 16, 2015), *available at* https://jpp.whs.mil/public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf [https://perma.cc/264Y-D7TA]).

[10] *Id.* (quoting Sexual Assault Prevention and Response Office, U.S. Dep't of Defense, *Department of Defense Fiscal Year 2009 Annual Report on Sexual Assault in the Military* 5 (2010), *available at* https://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf [https://perma.cc/C43R-HV98]).

resigned from West Point, DOD's own data revealed that staggering numbers of West Point students were subject to sexual assault and harassment on campus.[11] More recently, in 2018, DOD found that, despite its efforts, female servicemembers were experiencing increased rates of sexual assault and male servicemembers' rates of sexual assault had not improved at all.[12]

The *Feres* doctrine still further disrupts military discipline by limiting recoveries for servicemembers and their families: "After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). And to the extent that the potential effects of tort liability on military discipline is an appropriate consideration, Congress itself took account of this concern by preserving sovereign immunity against claims arising out of combatant activities during times of war, 28 U.S.C. § 2680(j), in foreign countries, *id*. § 2680(k), and as a result of discretionary actions. *Id*. § 2680(a). These statutory provisions have been sufficient to shield the military from liability when Congress intended. *See, e.g.*, *Mercado Del Valle v. United States*, 856 F.2d 406, 409 (1st Cir. 1988) (Breyer, J.) (holding discretionary

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[11] Defense Manpower Data Center, *supra* note 2, at 12, 64.

[12] Sexual Assault Prevention and Response Office, U.S. Dep't of Defense, *Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military* 3 (2020), *available at* https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [https://perma.cc/76UL-QK7W].

function exception bars FTCA claims arising from death of student in hazing incident related to Air Force ROTC program and declining to reach separate contention that *Feres* precluded suit).

The *Feres* rationales are now so disconnected from justifying the "incident to service" bar that some courts simply refuse to interpret the bar in light of those purported rationales. *Daniel v. United States*, 889 F.3d 978, 981 (9th Cir. 2018) ("Because of extensive criticism of the doctrine and its underlying justifications, we have 'shied away from attempts to apply these policy rationales.'") (quoting *Costo*, 248 F.3d at 867); *see also Daniel*, 139 S. Ct. at 1713-14 (Thomas, J., dissenting from denial of certiorari).

Moreover, absent a coherent rationale, the *Feres* doctrine has created pressure to offset the government's windfall by warping other areas of law in order to provide servicemembers some relief. *Id*. at 1714 ("[D]enial of relief to military personnel and distortions of other areas of law to compensate will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."). These distortions mitigate the injustice of *Feres* in marginal cases but are unsustainable and insufficient substitutes for the statutory scheme Congress created in tort.[13] The Court

[13] In fact, there is evidence that reduced liability under *Feres* has encouraged collateral expansion of the government into essentially civilian activities, disconnected from any distinctively military mission. *See* Jonathan Turley, Pax Militaris: *The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 4 (2003) (arguing reduced liability under *Feres* has encouraged collateral expansion of the military to displace private sector competitors, e.g., in recreation for servicemembers).

must step in to restore a reasoned approach to remedying servicemembers' injuries.

II. The *Feres* Doctrine Generates Inconsistent Results Across the Circuit Courts.

In an apparent effort to avoid the manifest injustice of the doctrine, some courts have sought ways to evade the harsh preclusive effect of *Feres*. These efforts have largely failed given the sweeping scope of *Feres*, but to the extent they have succeeded, they have resulted in a series of circuit splits.

The circuits are divided over whether injuries incurred during recreational activities—such as the rape of Ms. Doe on an after-hours walk—are barred by *Feres*. *Compare Costo*, 248 F.3d at 864 (holding off-duty servicemember's injuries from recreational rafting trip were incident to service), *and Bon v. United States*, 802 F.2d 1092, 1093 (9th Cir. 1986) (same, concerning recreational canoe rented from naval facility), *and Hass*, 518 F.2d at 1139 (same, regarding recreational horseback riding on military base), *with Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 645-46 (5th Cir. 2008) (holding FTCA claim by servicemember injured on boat rented from civilian company licensed to operate at Army's facility was not incident to service, because connection to plaintiff's military status was "largely coincidental").

The Second Circuit held that Ms. Doe's injuries were *Feres*-barred because as a West Point cadet she was subject to military discipline "at all times" and review of her claims would implicate military decision-making. Pet.App.6a-7a. But in *Regan*, the Fifth Circuit explained that, according to that circuit's precedent, whether a servicemember "is at that time subject to military discipline . . . would be the wrong focus," and rather

"what is relevant . . . is where that status is on a continuum between performing the tasks of an assigned mission to being on extended leave from duty." 524 F.3d at 637. Like the injury in *Regan*, Ms. Doe's rape did not occur while she was performing a military mission, nor did it serve any military purpose. And insofar as civilians may bring claims against West Point under the FTCA arising from sexual assault on campus, *see Loritts*, 489 F. Supp. at 1031, Ms. Doe's status was similarly "coincidental to [her] injuries and not necessary to them." *Regan*, 524 F.3d at 643. But as the Ninth Circuit reasoned in *Costo*, "whatever the original scope of the *Feres* doctrine, it is clear that it has been interpreted throughout the lower courts—and, specifically, by [the Ninth Circuit]—to include[,]" injuries incurred during recreational activities at military-controlled facilities. 248 F.3d at 869.

Circuit courts have also come to conflicting conclusions as to whether tortious violations of DOD regulations—such as Ms. Doe's injuries—fall within the scope of the *Feres* bar. In *Johnson v. United States*, the Ninth Circuit explained that injuries incurred because of the government's "fail[ure] to follow established military rules and procedures" simply "do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review." 704 F.2d 1431, 1440 (9th Cir. 1983); *see also* Pet.App.62a (Chin, J., dissenting) ("The concern identified in *Feres* and its progeny that courts not interfere with military discipline and structure carries little weight when the military is violating its own rules and regulations."). But in holding that Ms. Doe's claims were barred by the *Feres* doctrine, the Second Circuit came to the opposite conclusion. Pet.App.5a-6a; *see also Major v. United States*, 835 F.2d 641, 645 (6th Cir. 1987) (rejecting as *Feres*-barred claims arising

from the death a servicemember, and injury of another, struck by a drunk driver who consumed alcohol at an on-base party in violation of military regulations).

There is further division across the circuits as to whether FTCA claims by off-duty servicemembers involving conduct unrelated to military orders or training are barred. The Ninth Circuit has held that personal activities are not related to military function and discipline and allows these FTCA suits to proceed.[14] *Johnson*, 704 F.2d at 1440. This conduct is "subject to military discipline only in the very remotest sense . . . [and] purely personal." *Id*. The Fifth Circuit has reached a similar result. *See Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980) (holding that *Feres* did not bar suit by family of servicemember killed when hit by a military vehicle while driving on an Army-maintained road within Fort Hood because "a suit by one leaving the base to attend to his personal affairs, while under no military supervision, will not interfere with military discipline").

Other circuits, however, disagree and bar liability in cases involving off-duty servicemembers. The Tenth Circuit has rejected as *Feres*-barred claims by an off-duty servicemember against the United States for negligent operation of an officer's club that led to his beating by gang members in the parking lot. *Pringle*, 208 F.3d at 1222. Despite the nearly identical factual circumstances to *Johnson*, the *Pringle* court interpreted *Feres*' "incident to service" language to apply to "*all* injuries suffered by military personnel that are

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[14] The Ninth Circuit has applied this interpretation with some frequency. *See*, *e.g*., *Mills v. Tucker*, 499 F.2d 866, 867 (9th Cir. 1974) (*per curiam*); *Dreier v. United States*, 106 F.3d 844, 853 (9th Cir. 1996), *as amended* (Feb. 4, 1997); *Schoenfeld v. Quamme*, 492 F.3d 1016, 1017 (9th Cir. 2007).

even remotely related to the individual's status as a member of the military." 208 F.3d at 1223-24. Other circuits following this approach have barred recovery for horrific off-duty injuries unrelated to any plausible military objective or training. *See, e.g.*, *Brown*, 739 F.2d at 368-69 (barring claims arising from mock lynching of a Black servicemember, despite finding no relevant relationship between his injuries and military service); *Richards v. United States*, 176 F.3d 652, 656 (3d Cir. 1999), *reh'g denied* (barring recovery when servicemember was killed while driving home from work when his private vehicle was broadsided by military truck on a public highway that runs through Fort Knox Army Base); *O'Neill*, 140 F.3d at 564-565 (denying petition for rehearing en banc after concluding murder of servicemember watching a movie in her home, committed by a servicemember ex-fiancé, was incident to service).

The courts of appeals also disagree whether *Feres* applies to "dual status" technicians in the military, and if so, how. *Compare Jentoft v. United States*, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006) (holding that "the plain language of [10 U.S.C.] § 10216(a) makes clear that" dual-status technicians are civilians) *with Zuress v. Donley*, 606 F.3d 1249, 1253 (9th Cir. 2010) (holding [10 U.S.C.] § 10216(a) has no bearing on the *Feres* analysis), *and Bowers v. Wynne*, 615 F.3d 455, 467 (6th Cir. 2010) (same), *and Williams v. Wynne*, 533 F.3d 360, 366-67 (5th Cir. 2008) (same).

Finally, the courts of appeals have diverged over whether *Feres* bars claims brought on behalf of servicemembers' civilian children, when the genesis of the injury involves negligent treatment of the servicemember parent. *Compare Brown v. United States*, 462 F.3d 609, 614 (6th Cir. 2006) (allowing father to bring suit under FTCA on behalf of his infant daughter who

was injured as a result of negligent prenatal care provided to her servicemember mother) *with Ortiz*, 786 F.3d at 818 (rejecting father's claims on behalf of his infant daughter who was injured as a result of negligent care provided to her servicemember mother preceding and during delivery). In some circuits, a servicemember mother cannot bring a claim due to *Feres* if she is injured by negligent prenatal care, but she "may recover consequential damages for non-physical injury [she] sustain[ed] as a result of injury" to her unborn civilian child. *Romero v. United States*, 954 F.2d 223, 227 (4th Cir. 1992) (holding FTCA claims not barred regarding civilian child injured in childbirth because hospital's negligent actions did not harm mother at all and thus had no genesis in mother's injury). *Cf. Mossow v. United States*, 987 F.2d 1365, 1369-70 (8th Cir. 1993) (holding FTCA claims not barred because hospital's negligent administration of medicine was intended to benefit only third-party child and not the mother).

Just as the *Feres* doctrine's evident error and injustice has led courts to distort other areas of the law, *see Daniel*, 139 S. Ct. at 1713-14 (Thomas, J., dissenting from denial of certiorari), so too has it prompted some courts to try to pry open the courthouse door for at least some injured servicemembers. These irreconcilable results across the circuits are the inevitable consequence. Though these circuit splits may be modest, the national stakes of their collective incoherence could not be higher. Servicemembers injured by tortious government conduct should be "entitled to rely on the law as written." *Bostock*, 140 S. Ct. at 1749. They likewise deserve consistency across the circuits. And only a reconsideration of *Feres* can make it so.

III. This Case Presents an Appropriate Vehicle to Reconsider *Feres*.

While this Court need not overturn *Feres* to resolve this case in favor of the Petitioner,[15] Ms. Doe's case provides this Court an excellent opportunity to revisit the *Feres* doctrine.

This case squarely presents the *Feres* question. The Second Circuit held Ms. Doe's FTCA claims were "incident to service, and are therefore barred under *Feres*." Pet.App.6a. The allegations of Ms. Doe's complaint illuminate the tension between the FTCA's textual promise of a remedy and *Feres*'s bar to servicemembers' relief. Ms. Doe's injuries were not incurred abroad or in connection with combat activities. *See* 28 U.S.C. §§ 2680(j)-(k). She was injured on a college campus thousands of miles from any active battlefield. She was not attacked by an enemy combatant but a fellow cadet. She was raped not while performing military duties but after-hours on a recreational walk. That her injuries are deemed "incident to service" and

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[15] This Court could hold that, while *Feres* bars claims that "unduly interfere with military discipline," *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting), *Feres* is not controlling where military employees violate the military's own mandatory rules. In such cases, servicemembers would not fall within the scope of the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), and the Court would be in the position of reinforcing, rather than interfering with, military discipline. *See* Pet.App.62a (Chin, J,. dissenting) ("The concern identified in *Feres* and its progeny that courts not interfere with military discipline and structure carries little weight when the military is violating its own rules and regulations."). Additionally, or in the alternative, this Court could hold that *Feres* is not controlling where injuries arise during recreational activities or while attending a service academy. "[T]he special factors counseling hesitation . . . are simply not implicated" in such circumstances. *Id.* at 60a (Chin, J., dissenting) (internal quotation marks omitted).

therefore that her claims must be dismissed demonstrates just how far the *Feres* doctrine has departed from the plain text of the FTCA.

This Court does not lightly reconsider its past decisions, even ones as unjust and rightly condemned as *Feres*. Nevertheless, "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . . and experience has pointed up the precedent's shortcomings." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2417 (2015) (Alito, J., dissenting) (citations and internal quotation marks omitted). *See also Johnson v. United States*, 576 U.S. 591 (2015) (Scalia, J., joined by Roberts, C.J. and Ginsburg, Breyer, Kagan, JJ.) ("Decisions . . . proved to be anything but evenhanded, predictable, or consistent . . . undermine, rather than promote, the goals that *stare decisis* is meant to serve."). While the Court has abandoned its three original justifications, *see, e.g.*, *Indian Towing Co.*, 350 U.S. at 66-69, and the fourth has been inconsistently applied and widely criticized in recent decades, *see, e.g., Johnson*, 481 U.S. at 700 (Scalia, J., dissenting), the doctrine has persisted in denying justice to countless servicemembers. Ms. Doe's case presents an opportunity for this Court to restore the balance.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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