No. 23-1281

In the Supreme Court of the United States

Ryan G. Carter; et al.,
Petitioners,

v.

United States of America,
Respondent.

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

AMICUS BRIEF OF COALITION OF HEROES, BIPARTISAN MEMBERS OF CONGRESS, NATIONAL MILITARY FAMILIES ASSOCIATION, RESERVE ORGANIZATION OF AMERICA, MG WILLIAM K. SUTER (RET.), AND 22 OTHER LEADING ORGANIZATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are members of Congress from both parties, organizations, and individuals dedicated to serving the Armed Forces with a special focus on the national commitment to servicemember wellbeing after service.

The leading *amici* is Coalition of Heroes, Inc., a nonprofit challenging the injustice of military medical malpractice. With projects focused on awareness, education, and policy reform, Coalition of Heroes aims to ensuring for every service member the justice, respect, and support they deserve.

The leading individual *amicus* is William K. Suter, a former Army Judge Advocate who retired as a Major General after twenty-nine years of active service. He thereafter served for twenty-two years as Clerk of the Supreme Court of the United States.

The leading *amici* members of the United States Congress are the following:

- Congressman Kelly Armstrong is the United States representative for the State of North Dakota's at-large congressional district.

[1] Besides *amici* and its counsel, no party or their counsel authored this brief in any way and no other party or their counsel made a monetary contribution intended to fund its preparation or submission. The parties were notified of the intention to file this brief per Rule 37.2.

- Congressman Sanford D. Bishop, Jr. is the United States Representative for the State of Georgia's 2nd congressional district

- Congressman Josh Harder is the United States representative for the State of California's 9th congressional district.

- Congressman Richard Hudson is the United States representative for the State of North Carolina's 9th congressional district

- Congressman Darrell Issa is the United States representative for the State of California's 48th congressional district.

Also submitting this *amicus* brief are the following organizations and individual public servants, all of whom are dedicated to honoring the country's Armed Forces with special attention to the national commitment to servicemembers' well-being:

- *Amicus curiae* Armed Forces Retirees Association, formerly known as the American Military Retirees Association, is a 501(c)19 veteran service organization created by military retirees to protect and defend the earned benefits of all military retirees and their surviving spouses and to protect veterans on Capitol Hill and elsewhere.

- *Amicus curiae* Children's Health Defense – Military Chapter was founded in 2023 and is dedicated to advocating for service members and their families who have been adversely

affected by the Department of Defense (DoD) COVID-19 vaccination mandate. The chapter envisions a military and veteran community free from chronic health conditions caused by environmental exposures, bioengineering, and medical malpractice, and seeks to highlight these critical issues and advocate for a military environment where the health, rights, and well-being of service members are prioritized and protected.

- *Amicus curiae* Center for Law and Military Policy is a nonprofit think tank dedicated to strengthening the legal protections of those who serve our nation in uniform. Led by Dr. Dwight Stirling, a law professor and reserve JAG officer, the CLMP seeks to change policies that harm everyday service members and stand for the proposition that serving in uniform should not make a person a second-class citizen.

- *Amicus curiae* Forging Forward is dedicated to helping active duty and veteran military/first responders and their families/Gold Star Families through Organized Retreats, Remembrance Tags, Outdoor Outreach, The Body Shop, Inspiration, Motivation, and more. By joining like-minded individuals and organizations together, the Foundation seeks to fulfill the vision of creating everyday lives filled with quality, friendship, motivation, flexibility, and individual pride.

- *Amicus curiae* Grunt Style Foundation is a national nonprofit organization committed to providing life changing resources and experiences in which Veterans, Service Members, and their Families thrive.

- *Amicus curiae* The Invisible Enemy is a nonprofit 501(c)(3) charitable organization founded in 2023, dedicated to advocating for military veterans, former Department of Defense (DoD) employees and contractors who were stationed at the Nevada Test and Training Range (NTTR). These individuals worked in areas known to be contaminated with chemical toxins and radiation due to past nuclear testing, leading to severe health issues and premature deaths.

- *Amicus curiae* Jewish War Veterans of the United States of America was organized in 1896 by Jewish veterans of the Civil War and is the oldest active national veterans' service organization in America. The JWV has long taken an interest in advocating that all servicepersons and veterans of all faiths receive the benefits to which they are entitled.

- *Amicus curiae* National Defense Committee is a veterans organization dedicated to military and veterans civil and legal rights.

- *Amicus curiae* National Military Families Association is the leading nonprofit dedicated to serving all military families. Since 1969, NMFA has worked with families to identify and solve

the unique challenges of military life through advocacy and diverse programming. NMFA provides scholarships for military spouses, camps for military kids, and programs for military teens. Its research creates a better understanding of the experience of today's military families. NMFA serves the families of the currently serving, veteran, retired, wounded or fallen members of the Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard, and Commissioned Corps of the USPHS and NOAA.

- *Amicus curiae* Operation Dez Strong was established in December 2021 as an all-volunteer force of veterans, medical professionals, amputees, caregivers, and others that operates to encourage newly limb-different young people to stay strong, even if it means they need a little help to do so.

- *Amicus curiae* Reserve Organization of America is America's only exclusive advocate for the Reserve and National Guard – all ranks, all services. With a sole focus on support of the Reserve and Guard, ROA promotes the interests of Reserve Component members, their families, and veterans of Reserve service; and conducts a legislative campaign that ensures the readiness of our Reserve force.

- *Amicus curiae* Sergeants Major Association of California was chartered in the State of California on 19 October 1968 as a social,

patriotic and networking organization, open to all ranks E-7 thru 9 in the California National Guard.

- *Amicus curiae* Swords to Plowshares is a nonprofit organization founded by Vietnam-era veterans in 1974 that supports approximately 3,000 low-income and at-risk veterans in the San Francisco Bay area. It provides a range of services that address veterans' basic needs and promotes overall health and well-being, including access to health care, counseling, housing support, employment, and benefits assistance.

- *Amicus curiae* Uniformed Services Justice and Advocacy Group's mission is to ensure injured, ill, or wounded service members are separated with benefits, honors, and dignity intact. Its vision entails a system with third-party oversight of the discharge process of injured service members, ensuring both policy and procedure are followed.

- *Amicus curiae* Veterans Assurance Network pledges to serve veterans and their families through advocacy, education, resources, support, and services. It serves veterans by advocating on behalf of veterans and their families, supporting veterans and their families in their journey post-service, educating about veteran issues, concerns, and services, providing resources to help veterans and their loved ones connect to and access benefits and

services, connecting veterans and survivors to benefits and services they are eligible to receive, and networking and promoting organizations providing services to veterans and their families.

- *Amicus curiae* Veterans for Peace is a global organization of Military Veterans and allies whose collective efforts are to build a culture of peace by using our experiences and lifting our voices. It informs the public of the true causes of war and the enormous costs of wars, with an obligation to heal the wounds of wars.

- *Amicus curiae* Veterans Legal Services, Inc. is a non-profit located in Boston, Massachusetts devoted to meeting the civil legal needs of military veterans. Founded in 1991, VLS's mission is to help Massachusetts veterans overcome adversity by providing free civil legal aid that honors their service, promotes well-being, and responds to their distinctive needs.

- *Amicus curiae* Veteran Warriors is a grassroots 501c3 nonprofit serving Veterans, caregivers, families, and survivors of all eras. Its mission is broad; it fills in the gaps wherever needed to ensure all who served our country and their families get the benefits they are entitled to, cutting through red tape and seeking accountability when necessary.

- *Amicus curiae* The Veteran's Advocate is a group of attorneys that came from active-duty

military JAG employment and then continued in their military service in a reserve status as they transitioned into representing service members and Veterans in private practice. The group specializes in medical and disability board advocacy for current military members who are injured in the line of duty; and in handling Veterans' disability claims and appeals before the VA.

- *Amicus curiae* Brigadier General Charlotte L. Miller is Assistant Adjutant General - Army, California National Guard
- *Amicus curiae* Brigadier General Sylvia R. Crockett is Commander, Land Component Command, California Army National Guard.
- *Amicus curiae* Command Sergeant Major Curtis Hayes (Ret.) is a retired United States Army officer.

SUMMARY OF THE ARGUMENT

Everyone knows that the so-called *Feres* doctrine is grievously wrong. A reckoning should be imminent. The question is not about *whether* to reconsider *Feres*. It is just about *which branch* does so and *when*. This petition answers the call correctly. It is high time for the courts that created *Feres* to end it once and for all.

Decades of decisions and scholarship now share the consensus view: *Feres* contradicts the FTCA's text and purpose, wrongly denying military members orthodox legal remedies that Congress clearly opted to supply. The doctrine, now fully unhinged and incoherent, has grown to deny relief to essentially "all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose. *Major v. United States*, 835 F.2d 641, 644–45 (6th Cir. 1987). Given that the FTCA provides for none of this, *Feres* should never have essentially overruled Congress to do its own will via judicial fiat.

The Solicitor General may once again defend *Feres* with familiar *stare decisis* tropes. But that defense will necessarily be half-hearted. It will be forced to use hollow versions of *stare decisis* that were not enough to save *Chevron*, *Teague*, or *Nevada v. Hall*, just to name a few; and *Feres* is certainly not in that league. Now that the Court's precedent of precedent sets a better bar for change, *Feres* should be revisited—if not

to be entirely overruled then at least to be substantially altered.

Fixing *Feres* is not Congress's job. It is this Court's. And even if the job once belonged to Congress, decades of inaction have passed the buck back. Since the original decision and all of its myriad progeny are "judge-made law," *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000), the branch that wrongly invented the rule should fess up and delete it.

None of this position is partisan. It is a staunchly American, pro-military view held by evenhanded stakeholders across every aisle. By taking care of America's military just as the statute dictates—free of *Feres*' atextual limiting constructs—the law both gives the military's servicemembers deserving solicitude and ensures their operational effectiveness. Reconsidering *Feres* is thus a win-win for all, including the courts whose humility in acknowledging error always rightly earns esteem.

ARGUMENT

I. The *Feres* doctrine is grievously wrong.

Over seventy years ago, *Feres v. United States*, 340 U.S. 135 (1950), forced upon the Federal Tort Claims Act an extra-statutory judicial gloss that contradicts what Congress enacted as law. But inasmuch as "we are all textualists,"[2] *Feres* decided anew would again be a unanimous decision—unanimous *going the other way*.

"The statute's terms are clear." *Brooks v. United States*, 337 U.S. 49, 51 (1949). It 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, and expressly waives sovereign immunity for injuries involving "members of the military or naval forces." 28 U.S.C. §§ 1346(b), 2671. Critically too, the statute gives several express military-related exceptions to the general waiver, such as the exception barring claims about "combatant activities…during time of war." 28 U.S.C. § 2680(k).

Is there an exception to the FTCA's waiver of sovereign immunity for servicemember injuries that are merely "incident to service"? Of course not, since none of the enumerated exceptions about that subject say so. But with Justice Scalia still in high school, the

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[2] *See* Judge Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 St. John's L. Rev. 303 (2017)

Court in *Feres* used the era's judicial creativity to do just that and establish sovereign immunity for the "incident to service" category. *Feres*, 340 U.S. at 146.

Under modern doctrine, *Feres* is clearly wrong because it contradicts the FTCA's text, upholding an entire category of sovereign immunity that Congress never did. This ruling's critiques come from every corner of law and politics and all are correct. Its only defense comes from the Solicitor General and is half-hearted for good reason. At least in its current form, the *Feres* doctrine is indefensible.

A. Justice Scalia's critique is correct.

The instant petition is not the first to have sought reconsideration of *Feres*. Several others have done so, and the lessons learned show why a grant is still so sorely needed. Each time the issue arises, criticism loudens to further expose *Feres* as indefensible.

By 1987, Justice Scalia and three others correctly deemed the *Feres* doctrine grievously wrong because it "ignor[ed] what Congress wrote and imagin[ed] what it should have written," *United States v. Johnson*, 481 U.S. 681, 702-03 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). "The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it." *Id.* Everything needed to reconsider *Feres* is in Justice Scalia's *Johnson* dissent. But since the Court did not heed, the *Feres* facade continued.

Also correct in his critique is Justice Thomas, who followed Justice Scalia to rightly recognize that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019) (Mem) (Thomas, J., dissenting from denial of certiorari); *Lanus v. United States*, 570 U.S. 932 (2013) (same); *see also Jones v. United States*, 139 S. Ct. 2615, 2615 (2019) (same). The doctrine's "unfortunate repercussions—denial 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*." *Daniel*, 139 S. Ct. at 1714.

B. The Solicitor General's prior *stare decisis* position is wrong.

If the Solicitor General does not agree to reconsider *Feres*, it will likely be for the same main reason that past petitions were opposed. Knowing that the *Feres* doctrine is indefensible on the merits, the government will probably bank the opposition largely on *stare decisis*. *See, e.g.*, Brief for the United States in Opposition, *Doe v. United States*, No. 20-559 (U.S.), 2021 WL 915959; Brief for the United States in Opposition, *Daniel v. United States*, No. 18-460 (U.S.), 2019 WL 991077. But the SG's past opposition has been half-hearted and would be so here too, at least insofar as it rests on a hollow version of *stare decisis* that the Court's modern precedent of precedent forecloses.

The Solicitor General's most recent *stare decisis* position for *Feres* is threadbare. It rests almost solely on the notion that *Feres* should not be revisited because it has not been revisited. *See* Brief for the United States in Opposition, *Doe v. United States*, No. 20-559 (U.S.), 2021 WL 915959, at *7. But of course that circular notion proves too much and is inconsistent with the modern view of *stare decisis*.

To defend *Feres*, the Solicitor General may again argue that *stare decisis* has extra force whenever "Congress can correct any mistake it sees." Brief for the United States in Opposition, *Daniel v. United States*, No. 18-460 (U.S.), 2019 WL 991077, at *6. But the Solicitor General made that exact same argument in the unsuccessful bid to save *Chevron*, Brief for the United States in Opposition, *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024), 2023 WL 2065102, at * 26, and *Feres* is no *Chevron*.

Indeed, Congress's supposed ability to fix *Feres* gets the problem exactly backwards. The whole point is that Congress *already* spoke to the issue. The solution is not for Congress to supply some sort of re-enactment that re-states what the statute already states plainly enough. The solution is for this Court to hold that the existing statute means what it says and stop "reading extra immunity into statutes where it does not belong." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (Thomas, J., statement respecting denial of certiorari).

The Solicitor General may also defend Feres by reprising the idea that *stare decisis* matters more "when the Court is asked to overturn a longstanding precedent." Brief for the United States in Opposition, *Daniel v. United States*, No. 18-460 (U.S.), 2019 WL 991077, at * 6. But the Solicitor General made that exact same argument in defense of *Chevron* too, Brief for the United States in Opposition, *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024), 2023 WL 2065102, at * 26, and was rightly rejected.

As in *Loper Bright*, the Court's need to tweak *Feres* again and again shows that its *stare decisis* hold is weak. Even more so than *Chevron*, the *Feres* doctrine has now become "so indeterminate and sweeping" that all now realize its "unworkability." *Loper Bright Enterprises*, 144 S. Ct. at 2271–72. That the "doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry" is a clear sign for the need to revisit the original mistake. *Id.*

"*Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to 'ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,' [was] for us to leave *Chevron* behind." *Loper Bright*, 144 S. Ct. at 2272-73. So too with *Feres*, which if anything has earned far less *stare decisis* power than *Chevron.*

II. The time for reconsideration is now.

The time to reconsider *Feres* is now—not later. Kicking the can down the road does not just waste the opportunity of this petition, which does indeed tee the issue up as cleanly as ever. Turning a blind eye to *Feres* aggravates an institutional crisis, as the Armed Forces struggle more than ever to fill the ranks due to widespread institutional "mistrust."[3] That mistrust surely grows whenever headline-grabbing military tragedies occur and *Feres* absurdly denies recovery.

Exemplifying the doctrine's absurd consequences are important stories like that of *Amicus Curiae* Lauren Palladini. While serving in the Army, Lauren underwent what should have been a routine c-section. But due to the military's medical malpractice, a hemorrhaging artery put Lauren's life in grave danger through a horrific 39-day period of extraordinary blood transfusions and other serious procedures. At just 22, Lauren survived. But the hysterectomy resulting from this malpractice erased her dreams of conceiving and carrying future children.

Under the FCTA as Congress designed it, Lauren's claim has nothing to do with "combatant activities" or any other enumerated exception from the waiver of

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[3] *See, e.g.*, Prepared Statement of Hon Ashish S. Vazirani, Acting Under Secretary for Personnel and Readiness, Before the United States House Committee on Armed Services, *Military Personnel Subcommittee Recruiting Shortfalls and Growing Mistrust: Perceptions of the US Military* (December 13, 2023), *available at* https://bit.ly/floreslawcarter1.

immunity. So according to the statute itself, she can access the same remedial scheme that any other young mother in America could—not a guaranteed recovery, of course, but just a chance to make her case like any other wronged citizen would. Yet due solely to the extra layer of sovereign immunity created by *Feres* and its misbegotten progeny, Lauren has no claim for relief *simply because she was in the Army*.[4]

When reconsidering precedent has the potential to change substantial bottom-line outcomes, reliance interests are a valid *stare decisis* consideration. *See, e.g.*, *S. Dakota v. Wayfair*, 585 U.S. 162, 186 (2018). But "*stare decisis* accommodates only 'legitimate reliance interest," *id.* (cleaned up), and the government has no legitimate reliance interest in barring wholly orthodox claims like Lauren's just because her c-section happened to occur while in the military.

Reconsidering *Feres* therefore has more than just the virtue of being more principled in its textualism. By granting the petition, the Court can finally have this important area of FTCA law yield the practically sound results that Congress surely intended.

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[4] For more compelling details about the doctrine's absurd consequences, see *Patient Safety and Quality of Care in the Military Health System"* Testimony of Dez Del Barba Before the House Committee on Armed Services Subcommittee on Military Personnel (March 30, 2022), *available at* https://bit.ly/floreslawcarter2.

CONCLUSION

The petition should be granted. The *Feres* doctrine as it now exists should reconsidered and overruled.

Respectfully submitted,

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