No. 24-1078

IN THE

Supreme Court of the United States

KARI BECK, PERSONAL REPRESENTATIVE OF THE ESTATE OF CAMERON GAYLE BECK, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with the text and history of the Constitution and important federal statutes like the Federal Tort Claims Act, and therefore has an interest in this case.

The Rutherford Institute is a nonprofit civil liberties organization in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States. The Institute is interested in the instant case because it seeks to remove a legal impediment that has for many years unfairly denied military personnel the justice and compensation for injuries to which they

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[1] This brief is being filed more than 10 days before it is due, so no notice is required. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

should be entitled under the terms of the Federal Tort Claims Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Staff Sergeant Cameron Beck was riding his motorcycle to his home on Whiteman Air Force Base to have lunch with his wife and seven-year-old son when he was tragically struck and killed by a civilian government employee. The driver, distracted by her cellphone, failed to yield when making a left turn and later pleaded guilty to knowingly operating a vehicle in a careless and imprudent manner.

Petitioners—Beck's wife and son—filed suit against the United States under the Federal Tort Claims Act (FTCA), which waives the United States' sovereign immunity in suits "for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The district court dismissed the Becks' lawsuit on the basis of this Court's decision in *Feres v. United States*, which held that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). The court below affirmed.

This Court should grant the petition and reverse because *Feres* does not apply here, and that decision should be overturned in any event. The sweeping bar to recovery for servicemembers adopted in *Feres* is at odds with the text and history of the FTCA.

First, as Justices of this Court have recognized, the *Feres* doctrine directly contravenes the text of the

FTCA. *See, e.g.*, *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) (criticizing the *Feres* Court's analysis and concluding that there is no valid "justifi[cation for] our failure to apply the FTCA as written"); *Carter v. United States*, 145 S. Ct. 519, 523 (2025) (Thomas, J., dissenting from the denial of certiorari) ("The *Feres* doctrine is an undisguised act of judicial legislation, and a poor one at that. Its purported rationales have no basis in the text or logic of the FTCA."). The FTCA's text broadly waives sovereign immunity for common law tort claims and "provide[s] for District Court jurisdiction over *any* claim founded on negligence brought against the United States." *Brooks v. United States*, 337 U.S. 49, 51 (1949) (emphasis added). Nothing in that text remotely suggests that "'any claim' means 'any claim but that of servicemen.'" *Id.* Instead, the statute suggests the opposite, specifically including language respecting claims brought by servicemembers. *See* 28 U.S.C. § 2671 (defining "[f]ederal agency" to include "the military departments," "[e]mployee of the government" to include "members of the military or naval forces of the United States," and "[a]cting within the scope of his office or employment" to mean "acting in [the] line of duty").

Moreover, the FTCA's enumerated exceptions demonstrate that Congress deliberately chose not to exclude claims of servicemembers that arise "incident to service." In particular, the FTCA bars "[a]ny claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, *during time of war*." *Id.* § 2680(j) (emphases added). That provision plainly limits the exception to the FTCA's waiver of sovereign immunity to the narrow circumstances of wartime combatant activities without sweeping so

broadly as to exclude all claims of servicemembers outside of the context of combat and war.

The history of the FTCA reinforces this conclusion. The FTCA was enacted to bring uniformity to a scattershot scheme of private bills brought by individuals seeking to hold the United States liable for common-law torts. S. Rep. No. 79-1400, at 30 (1946); *accord* H.R. Rep. No. 79-1287, at 2 (1946). Indeed, Congress specifically criticized that haphazard system as the product of inconsistent legislative grace. *See* S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 2. The *Feres* doctrine introduces that same inconsistency into the scheme of the FTCA, "barring suits by servicemembers when a 'civilian' would be allowed to challenge 'the same acts, by the same injurer, in the same disciplinary relationship to the government.'" *Carter*, 145 S. Ct. at 522-23 (Thomas, J., dissenting from the denial of certiorari) (quoting *Taber v. Maine*, 67 F.3d 1029, 1042 (2d Cir. 1995)).

Moreover, between 1925 and 1935, eighteen separate bills waiving the United States' sovereign immunity for tort claims were introduced in Congress, and all but two contained exceptions denying recovery to servicemembers across the board. *See Brooks*, 337 U.S. at 51-52. The absence of such language in the final version of the FTCA demonstrates that Congress deliberately chose not to exclude claims of servicemembers, except for "claim[s] arising out of . . . combatant activities . . . during time of war," 28 U.S.C. § 2680(j). Notably, this exception was the result of a last-minute amendment clarifying that servicemembers should be able to bring claims for *non*-combatant activities. 92 Cong. Rec. 10,093 (1946) (statement of Rep. Monroney).

Finally, this Court should also grant the petition because the Court's policy justifications for the *Feres*

doctrine are wholly disconnected from the FTCA's text and defy settled principles of statutory interpretation. Unsurprisingly, this Court has since abandoned its original three rationales for the exception and has subsequently suggested that the *Feres* doctrine somehow maintains orderly discipline in the military. This post hoc rationalization is yet another poorly veiled attempt to justify an exception that Congress never legislated. Justices of this Court may have thought the "incident to service" exception would help the military competently manage its discipline and affairs, but that judgment is irrelevant, given that Congress did not share it.

In any event, as applied by courts today, the *Feres* doctrine hardly serves any of these various policy justifications. As the decision below illustrates, the *Feres* doctrine has strayed so far from its purported justifications that courts now construe it to bar a classic tort claim arising out of the negligent operation of a vehicle by a civilian that caused the death of a servicemember while not engaged in any sort of military service nor implicating any military discipline or personnel decisions *whatsoever*. *Cf. Matthew v. United States*, 311 F. App'x 409 (2d Cir. 2009), *cert. denied sub nom. Matthew v. Dep't of Army*, 558 U.S. 821 (2009); *Siddiqui v. United States*, 783 F. App'x 484 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2512 (2020). Whatever the merits of *Feres*'s atextual rationales in the abstract, they plainly do not apply here.

While "[*s*]*tare decisis* is important to the rule of law, . . . so are correct judicial decisions." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 470 (2015) (Alito, J., dissenting). *Feres* has no basis in the FTCA's text and history, and there is no "reason to wait helplessly for Congress to correct [this] mistake." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411 (2024). Indeed,

"when so many past and current judicial colleagues in this Court and across the country tell [the Court a] doctrine is misguided, . . . the humility at the core of *stare decisis* compels . . . careful[] [reflection] on the wisdom embodied in that experience." *Id.* at 445 (Gorsuch, J., concurring).

This Court should grant the petition and "realign [its] case law with the text of the FTCA" by overturning *Feres*. *Carter*, 145 S. Ct. at 527 (Thomas, J., dissenting).

ARGUMENT

I. *Feres* Is Incompatible with the Text and History of the FTCA.

A. The "Incident to Service" Exception Contravenes the Text of the FTCA.

"Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 578 U.S. 632, 638 (2016). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). This Court has repeatedly cautioned that in the face of plain meaning, "it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). The Court in *Feres* discarded this controlling principle of statutory construction when it decided, in contravention of the FTCA's unambiguous text, to bar claims for injuries that "arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146.

The FTCA waives the United States' sovereign immunity in suits "for money damages . . . for injury or loss of property, or personal injury or death caused by

the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The statute provides that "[t]he United States *shall* be liable . . . in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674 (emphasis added). "Read as it is written, this language 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).

Nothing in the FTCA's text even remotely suggests that servicemembers' claims incurred "incident to service" should be excluded from the statute's broad waiver of sovereign immunity. Indeed, the phrase "incident to service" appears nowhere in the statute, and appears to have been created out of whole cloth by the *Feres* Court. *See* 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2411, 2412, 2671-80 (never using the phrase "incident to service"); *Brooks*, 337 U.S. at 53 (noting that the "literal language" of the FTCA does not mention claims arising out of activities "incident to service").

Other aspects of the statutory scheme reinforce this point—that the FTCA applies to servicemembers' claims just as it applies to those of private individuals. To start, Congress included in the definition of "[e]mployee[s] of the Government" whose acts may give rise to liability "members of the military or naval forces of the United States" and "members of the National Guard while engaged in training or duty." 28 U.S.C. § 2671. Congress also specified that its use of the term "[f]ederal agency" throughout the FTCA was intended to refer to, *inter alia*, "the military departments." *Id.* Finally, Congress expressly stated that "[a]cting within the scope of . . . employment" under the FTCA means, for members of the military, "acting

in [the] line of duty." *Id.* The "incident to service" exception is in substantial tension with these statutory provisions.

Importantly, the FTCA also contains thirteen enumerated exceptions to its waiver of sovereign immunity, none of which bars claims of servicemembers arising "incident to service." *See id.* § 2680(a)-(n). This Court has long held that "[w]here Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)); *see, e.g.*, *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (declining to read an equitable tolling exception into the tax code's time limits because "explicit listing of exceptions . . . indicate[s] to us that Congress did not intend courts to read other unmentioned . . . exceptions into the statute that it wrote"). This is especially so when the exceptions are "lengthy, specific, and close to the present problem." *Brooks*, 337 U.S. at 51.

Such is the case here—in particular, the exception in subsection (j) explicitly applies to servicemembers, but only bars "claim[s] arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*." 28 U.S.C. § 2680(j) (emphases added). The *Feres* Court thus should not have read an exception into the FTCA that bars the claims of servicemembers on a broader basis than the statutory text does. *See* John Astley, Note, United States v. Johnson*:* Feres *Doctrine Gets New Life and Continues to Grow*, 38 Am. U. L. Rev. 185, 195-96 (1988) ("Because the [FTCA] does not contain an exception excluding military suits, the *expressio unius est exclusio alterius* principle of statutory construction implies that Congress did not intend to create such an exception." (footnotes omitted)); *cf. TRW Inc.*, 534 U.S. at 28

(refusing to read an exception into the Fair Credit Reporting Act that would sweep more broadly than those exceptions explicitly enumerated in the statute).[2]

In sum, as the text of the FTCA makes clear, "Congress used neither intricate nor restrictive language in waiving the Government's sovereign immunity" pursuant to that statute. *United States v. Muniz*, 374 U.S. 150, 152 (1963). The FTCA is a broad remedial statute, and consistent with this Court's precedents, its exceptions must be construed narrowly and with fidelity to their text. *See Dalehite v. United States*, 346 U.S. 15, 30-31 (1953) ("[The FTCA] is another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule. . . . In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception."), *abrogated on other grounds by Rayonier Inc. v. United States*, 352 U.S. 315, 319 (1957). Thus, as this Court emphasized in a case decided just seven years after *Feres*, "[t]here is no justification for this Court to read exemptions

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[2] Two additional enumerated exceptions might apply to servicemembers under narrower circumstances than *Feres*. Subsection (k) bars "[a]ny claim arising in a foreign country," which might preclude the claim of a servicemember arising while on deployment or stationed outside of the United States. 28 U.S.C. § 2680(k). Another enumerated exception excludes "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function," which might preclude the tort claim of a servicemember stemming from discretionary decisions made by his or her higher-ranking commanders. *Id.* § 2680(a); *cf.*, *e.g.*, 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, 8 (2003) (arguing that Congress, through these exceptions and the "combatant activities" exception, focused on the core military functions that it sought to protect from the distraction of civil litigation).

into the Act beyond those provided by Congress." *Rayonier*, 352 U.S. at 320.

"[W]hen the meaning of the statute's terms is plain, our job is at an end," *Bostock v. Clayton County*, 590 U.S. 644, 674 (2020), and "the sole function of the courts is to enforce it according to its terms," *Caminetti*, 242 U.S. at 485. The Court in *Feres* looked to the text of the FTCA and found no language precluding claims "incident to service." *See* 340 U.S. at 138-39. The Court should have ended its inquiry there, and this Court should correct that error.

B. The History of the FTCA Demonstrates that It Does Not Bar Claims "Incident to Service."

The history of the FTCA further demonstrates that claims "incident to service" should not be excepted from the FTCA's waiver of sovereign immunity.

1. The FTCA was enacted to "waive the Government's traditional all-encompassing immunity from tort actions and . . . establish novel and unprecedented governmental liability." *Rayonier*, 352 U.S. at 319. Prior to the FTCA's enactment, the federal government was subject to damages suits for breach of contract, admiralty torts, and maritime torts, but not common law torts. S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 1. The only recourse for individuals seeking relief from the government for common law torts was to request a private bill, which would either make a direct appropriation for the payment of the claim or remit the claimant to suit in either the Court of Claims or a United States district court. S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 1-2.

Congress deemed this system both "unduly burdensome to the Congress" and "unjust to the

claimants, in that it [did] not accord to injured parties a recovery as a matter of right but base[d] . . . on considerations of grace." S. Rep. No. 79-1400, at 30; *see Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) ("The [FTCA's] broad and just purpose . . . was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."). Thus, Congress designed the FTCA to remedy these defects by creating a "continually operating machinery for the consideration of [tort] claims" against the federal government. S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 2.

The *Feres* doctrine frustrates that legislative plan by reintroducing the caprice and inconsistency inherent in the private bill system. With *Feres*, the Court created "a massive gap between the legal worth of injuries incurred by service members and non-service members," producing an "extreme form of nonuniformity" within "the universe of litigation against the government." Turley, *supra*, at 13. This very case illustrates the point: Sergeant Beck's family was turned away at the courthouse doors for an otherwise open-and-shut negligence claim simply because he was struck and killed on a military base. No matter that the driver was a civilian or that Sergeant Beck was not engaged in any military duties at the time—just the fact that he was on base and could have been called back from his lunch break was enough to bar recovery for his family. *See* Pet. App. 5. Congress enacted the FTCA specifically to avoid such incongruous scenarios, and "[n]othing in the text of the Act requires this disparate treatment." *Doe v. United States*, 141 S. Ct.

1498, 1499 (2021) (Thomas, J., dissenting from the denial of certiorari).

2. In addition, the history of the FTCA's enactment demonstrates that Congress deliberately chose not to exempt claims of servicemembers "incident to service" from its broad waiver of sovereign immunity. Between 1925 and 1935, members of Congress introduced eighteen separate bills waiving the United States' sovereign immunity for tort claims, and all but two contained exceptions denying recovery to all members of the armed forces. *See Brooks*, 337 U.S. at 51-52; *Feres*, 340 U.S. at 139. Congress was thus well aware of the justifications for excluding servicemembers from the FTCA's coverage and the language that could be used to effectuate such an exemption when it passed the FTCA, but Congress ultimately chose not to include such language in the final text. Accordingly, the absence of an "incident to service" exception was not a mere oversight by Congress but a deliberate choice. *See* 86 Cong. Rec. 12,019 (1940) (statement of Rep. Celler) (stating during House debate regarding an earlier version of the FTCA that immunity was waived except in the case of those exceptions explicitly set forth in the bill).

The House debate on the "combatant activities" exception further demonstrates that Congress deliberately planned for the FTCA to cover military-personnel claims arising from *non*-combatant activities. Originally, the proposed language would have barred "[a]ny claim arising out of the activities of the military or naval forces, or the Coast Guard, during time of war." 92 Cong. Rec. 10,093 (1946). During floor debate, Representative Mike Monroney offered an amendment adding the word "combatant" before "activities," and the House approved it without further debate. *See id.* (statement of Rep. Monroney). That

amendment makes clear that non-combatant military activities—such as riding one's motorcycle home for a family lunch—were not exempted from the FTCA's coverage, even during wartime.

3. Finally, this Court should not infer anything from Congress's failure to pass legislation overruling the *Feres* doctrine in its entirety, even though it has periodically held hearings on the topic. *See Feres Doctrine—A Policy in Need of Reform?: Hearing Before the Subcomm. on Mil. Pers. of the H. Comm. on Armed Servs.*, 116th Cong. (2019). That is because "several equally tenable inferences may be drawn from such inaction." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (failure to enact legislation could reflect anything from "inability to agree upon how to alter the status quo" to "indifference to the status quo"). Here, for instance, even if Congress believed that the *Feres* decision was at odds with the FTCA, perhaps Members of Congress could not agree on whether to incrementally narrow the *Feres* doctrine in particular realms, or overrule it entirely, *cf. Ritchie v. United States,* 733 F.3d 871, 878 (9th Cir. 2013) ("We can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long [as the *Feres* doctrine].").[3]

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[3] Congress passed statutory provisions in 2019 and 2022 to permit servicemembers to file tort claims incurred "incident to . . . service" against the United States for "the medical malpractice of a Department of Defense health care provider," 10 U.S.C. § 2733a(a), and "to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune" between 1953 and 1987, Camp Lejeune Justice Act of 2022, Pub. L. 117-168, § 804, 136 Stat. 1759, 1802-04. However, these provisions were

In any event, "[t]he unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA could hardly have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946." *Johnson*, 481 U.S. at 702-03 (Scalia, J., dissenting). Fundamentally, there is no "incident to service" exception anywhere in the text of the FTCA, so Congress should not bear the burden of passing legislation that would, in effect, merely point out that the exception was never part of the FTCA to begin with. *See Kimble*, 576 U.S. at 471 (Alito, J., dissenting) ("When a precedent is based on a judge-made rule and is not grounded in anything that Congress has enacted, we cannot 'properly place on the shoulders of Congress' the entire burden of correcting 'the Court's own error.'" (quoting *Girouard v. United States*, 328 U.S. 61, 69-70 (1946))).

* * *

The *Feres* doctrine is plainly inconsistent with the FTCA's text and history. Moreover, as the next Section discusses, the *Feres* Court's justifications for creating the doctrine do not withstand scrutiny.

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designed to address discrete problems, not to revisit the FTCA as a whole, and as this Court has explained, "when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, . . . '[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.'" *Alexander v. Sandoval*, 532 U.S. 275, 292-93 (2001) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).

II. The Policy Justifications Offered for the *Feres* Doctrine Reflect an Improper Effort to Substitute Judicial Judgment for Congressional Judgment.

Finding no support in the FTCA's text or history for the "incident to service" exception, the *Feres* Court gave three policy reasons for creating such an exception: (1) a lack of "parallel liability" for private parties, *Feres*, 340 U.S. at 142, (2) the "distinctively federal" relationship between the federal government and its servicemembers, *id.* at 143 (quoting *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305 (1947)), and (3) the availability of veterans' benefits to compensate servicemembers for service-related injuries, *id.* at 146. These rationales are at odds with the text of the FTCA, and this Court has largely abandoned all three of them.

Only the *Feres* Court's first rationale—a lack of parallel private liability—even feigns a foundation in the text of the FTCA. *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (the "'parallel private liability' argument" is the only justification for *Feres* that "purports to be textually based"). As noted previously, under the FTCA, "[t]he 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 Court in *Feres* interpreted that language to mean that "since no 'private individual' can raise an army, and since no State has consented to suits by members of its militia," *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (citing *Feres*, 340 U.S. at 141-42), the FTCA necessarily bars claims for service-related injuries to avoid "visit[ing] the Government with novel and unprecedented liabilities," *Feres*, 340 U.S. at 142.

This logic, however, renders superfluous the "combatant activities" exception, 28 U.S.C. § 2680(j), as

well as a number of other enumerated exceptions. "[P]rivate individuals typically do not, for example, 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 (Scalia, J., dissenting). Acknowledging the untenability of this approach, the Court rejected it just five years later in *Indian Towing Co. v. United States*, concluding that the FTCA permitted suit against the United States for the Coast Guard's negligent operation of a lighthouse. 350 U.S. at 68-70. And just two years after that, the Court reaffirmed abrogation of *Feres*'s first rationale, explaining that "the very purpose of the [FTCA] *was* . . . to establish novel and unprecedented governmental liability." *Rayonier*, 352 U.S. at 319 (emphasis added).

The second rationale of *Feres*—the "distinctively federal character" of the relationship between the federal government and its military—is equally divorced from the text of the FTCA. *See Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001) (noting that the distinctively-federal-relationship "policy justification[]" has been widely "criticized as textually unsupported and illogical" (citations omitted)). The *Feres* Court reasoned that, in light of the nature of this relationship, Congress could not have possibly intended local and geographically diverse tort laws to govern servicemembers' claims arising out of activities "incident to service." *Feres*, 340 U.S. at 142-44; *see* 28 U.S.C. § 1346(b)(1) (stating that the United States' tort liability pursuant to the FTCA is determined by "the law of the place where the act or omission occurred").

However, the FTCA's text evinces no concern about the potential for geographically diverse recoveries based on varying state tort laws. Indeed, the only textual support the Court supplied for this rationale

was the Military Personnel Claims Act, 31 U.S.C. § 223b, a law that the FTCA itself *repealed*. *See* Pub. L. No. 79-601, title IV, § 424, 60 Stat. 812, 846-47 (1946) (repealing 31 U.S.C. § 223b); *Feres*, 340 U.S. at 144 (citing the Military Personnel Claims Act for the principle that no federal law allows local tort laws to control the outcome of lawsuits of servicemembers based on activities "incident to service"). Moreover, barring recovery on *all* claims "incident to service" because of the risk of non-uniformity in recoveries hardly facilitates the larger uniformity that the FTCA was enacted to achieve. Perhaps the *Feres* doctrine achieves "uniform nonrecovery" for servicemembers themselves, *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting), but it also creates a massive and unprincipled discrepancy between recovery for injuries suffered by servicemembers and non-servicemembers.

In any event, this Court promptly retreated from *Feres*'s second rationale, just like it did from the first. In *United States v. Muniz*, the Court held that "federal prisoners (who have no more control over their geographical location than servicemen) [may] recover under the FTCA for injuries caused by the negligence of prison authorities." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting) (citing *Muniz*, 374 U.S. at 162). There is no principled justification for condoning geographically disparate remedies for federal prisoners but not for federal servicemembers.

The *Feres* Court's third rationale—that the availability of compensation for veterans for service-related injuries under 38 U.S.C. §§ 101 *et seq*. suggests that the FTCA was not intended to cover such injuries—is also unsupported by the text of the FTCA. The *Feres* Court explained that, in its view, "[a] soldier is at peculiar disadvantage in litigation," due to "[l]ack of time and money," and "the difficulty if not impossibility of

procuring witnesses." *Feres*, 340 U.S. at 145. Thus, according to the Court, the veterans' compensation scheme in Title 38 is equivalent or superior to the FTCA for servicemembers because it "normally requires no litigation" and provides compensation that is beyond "negligible." *Id.*

This logic and the Court's language in espousing it reflect the sort of policy judgment expected in a congressional committee report, not a Supreme Court decision. Indeed, neither the text of Title 38 nor the FTCA so much as hints that the remedies in either law should be exclusive. *See Brooks*, 337 U.S. at 53 (noting that the FTCA provides for exclusiveness of remedy in three provisions, 28 U.S.C. §§ 1346, 2672, and 2679, none of which relates to servicemembers); *United States v. Brown*, 348 U.S. 110, 113 (1954) (noting the absence of statutory language that supports construing the veterans' compensation system as an exclusive remedy). Thus, Congress apparently did not share the Court's judgment that "double recovery" under the veterans' compensation laws and the FTCA should be avoided. Moreover, servicemembers—both before and after *Feres*—have been permitted to bring FTCA lawsuits despite receiving veterans' compensation for the same injuries, negating the *Feres* Court's "alternative remedy" justification. *See Brooks*, 337 U.S. at 53 (before *Feres*); *Brown*, 348 U.S. at 113 (after *Feres*).

With all three original rationales deemed "no longer controlling," *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985), this Court invented a fourth justification: preserving an orderly process of "military discipline," *id.* at 59. Thus, *Feres* was recast as barring even "the *type* of claim[] that . . . would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* The Court reasoned that "[t]he 'peculiar and special relationship

of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty'" required it to read the FTCA to exempt claims of servicemembers incurred "incident to service." *Id.* at 57 (quoting *Muniz*, 374 U.S. at 162); *see Brown*, 348 U.S. at 112; *Chappell v. Wallace*, 462 U.S. 296, 299 (1983).

This, too, is an unlegislated policy justification. Perhaps Congress determined that negligent decisions made under the exigencies of combat during war should be specially exempt from litigation due to the risk of disruption to the line of command—hence the "combatant activities" exception, 28 U.S.C. § 2680(j). But there is no evidence that this concern extended any further. Indeed, Congress very well might have decided that completely "*barring* recovery by servicemen might adversely affect military discipline." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). There are myriad possible reasons why Congress apparently concluded that permitting claims arising "incident to service" would not undermine military discipline. That the *Feres* Court disagreed with that judgment did not give it license to legislate from the bench.

In any event, the *Feres* doctrine has devolved far beyond the "military discipline" justification. So much so that a claim based on a civilian government employee's uncontested negligent operation of a motor vehicle, resulting in the death of a servicemember on his lunch break, and thus posing not one iota of risk to military discipline or intrusion into sensitive military affairs, was deemed barred by the *Feres* doctrine by the court below.

Clearly, the justifications for the *Feres* doctrine are as divorced from the text of the FTCA as the *Feres*

exception itself. Most have been abandoned by the Court in subsequent years, and the only remaining justification—facilitating orderly military discipline—reflects a substitution of the Court's policy judgment for that of Congress. And, as applied by courts today, the *Feres* doctrine only masquerades as promoting these various justifications. In reality, the doctrine has morphed into something else entirely.

This Court "do[es] not give super-duper protection to decisions that do not actually interpret a statute." *Kimble*, 576 U.S. at 471 (Alito, J., dissenting). Indeed, "[p]roper respect for precedent . . . counsels respect for the written law." *Loper Bright Enters.*, 603 U.S. at 448 (Gorsuch, J., concurring). Because "the Court has gone down a wrong path and the wrong path is creating bad consequences, then what the Court should do is say, 'Well, we made a mistake. . . . We're going to go back and correct the mistake.'" Samuel A. Alito, Jr., et al., *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 Pepp. L. Rev. 33, 55 (2009).

Accordingly, this Court should reject the sole remaining justification for *Feres* and interpret the FTCA in a manner consistent with its text and history.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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