No. 24-1078

IN THE

Supreme Court of the United States

KARI BECK,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Veterans Legal Services Program (NVLSP) is a nonprofit organization that works to ensure that the Nation's 18 million veterans and active-duty servicemembers have access to their hard-won veterans benefits. NVLSP advocates on their behalf before Congress, federal agencies, and courts and has, for over two decades, published the *Veterans Benefits Manual*, the leading practice guide on the subject. It has represented thousands of veterans before the Department of Veterans Affairs, the Board of Veterans' Appeals, and the Court of Appeals for Veterans Claims.

NVLSP also has filed numerous amicus briefs in this Court (and others) in cases implicating issues of critical importance to veterans and veterans benefits. *See, e.g.*, *Rudisill v. McDonough*, 601 U.S. 294 (2024); *Arellano v. McDonough*, 598 U.S. 1 (2023); *Kisor v. Wilkie*, 588 U.S. 558 (2019); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016); *Henderson v. Shinseki*, 562 U.S. 428 (2011). NVLSP's interest is particularly acute when, as here, courts deny servicemembers and their survivors congressionally authorized tort remedies for grievous injury or death, like

[1] Pursuant to Supreme Court Rule 37.2, because this brief is filed at least ten days prior to the deadline, the brief itself suffices as notice to the parties. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Staff Sergeant Cameron Beck's death in a traffic accident at Whiteman Air Force Base, Missouri. NVLSP encourages this court to overrule *Feres*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The much-criticized *Feres* doctrine prevents servicemembers from suing the federal government under the Federal Tort Claims Act (FTCA) for injuries sustained "incident to service." *Feres v. United States*, 340 U.S. 135, 144 (1950). This judicially created exception to liability reflects an unjustified reluctance by the judiciary to intervene in any military matters, as well as an outdated view that the military's relationship with servicemembers is fundamentally different from other societal relationships that can create legal liabilities, such as doctor-patient, landlord-tenant, and educator-student. Whatever validity the *Feres* doctrine had in 1950, it is indefensible today.

The stated rationales for the *Feres* doctrine no longer withstand scrutiny. *Feres* was decided shortly after World War II, when the U.S. military's membership had grown to more than 12 million servicemembers. Limiting judicial involvement in military affairs at that time might have seemed like prudent policy (assuming judicial policy preferences can ever displace express statutory language).

But today's military is a much smaller, all-volunteer force. There are currently about two million U.S. servicemembers, which represents about 0.6 percent

of the U.S. population. Judicial policy concerns regarding "depleting of the public treasury," as noted in *Feres*, 340 U.S. at 139, are far less relevant today and, in any event, far outweighed by the injustice the doctrine has wrought. Because of the *Feres* doctrine, servicemembers and their families often do not receive fair and adequate compensation for their injuries, especially as compared to their civilian counterparts.

Congress expressly allowed servicemembers and their families to bring tort claims against the United States for non-combat injuries, but the *Feres* Court contravened explicit statutory text to preclude such claims. As a result, the *Feres* doctrine has unjustly deprived servicemembers and their families of legal remedies based on an outdated and flawed understanding of what conduct is "incident to service." 340 U.S. at 144.

This Court should overrule *Feres* and its progeny because it is unmoored from the FTCA's text. (Part I.) With no textual anchor, *Feres* has intractably split the lower courts left struggling to apply it. (Part II.) And the *Feres* Court's original rationales have not survived the dramatic changes in American military forces since the end of World War II. *Feres* no longer serves the judicial policy preferences that birthed it. (Part III.) The time has come to overrule *Feres* and "realign our case law with the text of the FTCA." *Carter v. United States*, 145 S. Ct. 519, 527 (2025) (Thomas, J., dissenting from denial of certiorari).

ARGUMENT

I. This Court Should Overrule The Atextual *Feres* Doctrine.

The FTCA's text plainly allows servicemembers and their families to bring tort claims against the United States "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). The Act defines "employee of the government" to include "members of the military or naval forces of the United States." 28 U.S.C. § 2671.

Congress included a list of exceptions to liability under the FTCA, including any claim "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) (emphasis added). Because "combatant activities" are not defined, "we construe [the] statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The ordinary meaning of "combatant" in 1946 was: "Fighting, ready to fight." *Combatant*, Shorter Oxford English Dictionary (3d ed. 1944). It means the same thing today: "Fighting, contending in fight, ready to fight." *Combatant*, Oxford English Dictionary (Dec. 2024), https://doi.org/10.1093/OED/8716146566. And "war" has consistently been defined as an "armed contest between nations." *War*, Bouvier's Law Dictionary and Concise Encyclopedia (8th ed. 1914). The exception thus covers activities related to fighting during times of armed conflict.

Despite this plain statutory language, the *Feres* Court added an extra-statutory exception to government liability. It 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*." *Feres*, 340 U.S. at 146 (emphasis added). In other words, rather than limiting liability for "combatant activities," the *Feres* Court limited liability for all activities "incident to service." *Compare* 28 U.S.C. § 2680(j), *with Feres*, 340 U.S. at 146.

This atextual interpretation of the FTCA has been resoundingly criticized by individual justices and lower courts alike. As Justice Scalia explained, the *Feres* Court had "no justification ... to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for [Congress,] the same body that adopted it." *United States v. Johnson*, 481 U.S. 681, 702 (1987) (Scalia, J., dissenting) (quoting *Rayonier Inc. v. United States*, 352 U.S. 315, 320 (1957)). "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Id.* at 700 (citation omitted).

Justice Thomas recently expressed similar concerns: "This Court should overrule *Feres*. The *Feres* doctrine has no basis in the text of the FTCA, and its policy-based justifications make little sense. It has been almost universally condemned by judges and scholars. And, it is difficult for lower courts to apply, leading to several splits in the Courts of Appeals." *Carter*, 145 S. Ct. at 521 (Thomas, J., dissenting from denial of certiorari). "*Feres* is indefensible as a matter

of law, and senseless as a matter of policy." *Id.*; *accord Clendening v. United States*, 143 S. Ct. 11, 12 (2022) (Thomas, J., dissenting from denial of certiorari); *Doe v. United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting from denial of certiorari); *Daniel v. United States*, 587 U.S. 1020, 1021 (2019) (Thomas, J., dissenting from denial of certiorari).

Decades earlier, Justice Marshall criticized "the theory that in any case involving a member of the military on active duty, *Feres* … displaces the plain language of the [FTCA]." *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 674 (1977) (Marshall, J., dissenting). He could not "agree that that narrow, judicially created exception to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the Government by active-duty servicemen based on injuries incurred while on duty." *Id.*

The courts of appeals likewise have recognized the lack of textual support for the *Feres* doctrine and its resulting ambiguities. *See, e.g.*, *Clendening v. United States*, 19 F.4th 421, 427-28 (4th Cir. 2021); *Ritchie v. United States*, 733 F.3d 871, 878 (9th Cir. 2013); *Purcell v. United States*, 656 F.3d 463, 465-66 (7th Cir. 2011); *Taber v. Maine*, 67 F.3d 1029, 1038-39 (2d Cir. 1995); *Parker v. United States*, 611 F.2d 1007, 1009 (5th Cir. 1980). They also have expressed frustration at the doctrine's harsh and unjust results. In a case applying the *Feres* doctrine to a servicemember's child, for example, the Tenth Circuit explained: "In the many decades since its inception, criticism of the so-called *Feres* doctrine has become endemic. That criticism is at its zenith in a case like this one—where

a civilian third-party child is injured during childbirth, and suffers permanent disabilities." *Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 818 (10th Cir. 2015) (Tymkovich, J.). Another court stated, "[w]e can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long." *Ritchie*, 733 F.3d at 878; *see also Daniel v. United States*, 889 F.3d 978, 982 (9th Cir. 2018); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983).

Courts have similarly expressed concern about "the doctrine's ever-expanding reach" and "the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes." *Costo v. United States*, 248 F.3d 863, 864, 869 (9th Cir. 2001); *see also Purcell*, 656 F.3d at 465-66; *Richards v. United States*, 176 F.3d 652, 656-58 (3d Cir. 1999).

Indeed, as in Mr. Beck's case, the *Feres* doctrine bars relief in circumstances never contemplated by Congress when it added the combat exception to the FTCA. These include personal injuries or deaths caused by recreational activities, *Costo*, 248 F.3d at 864, and sexual assaults by fellow soldiers, *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014). None of these are wartime "combatant activities" or even the type of activities that *Feres* considered "incident to service."

There simply is no textual defense of *Feres* and its progeny. "In *Feres* …, this Court created an additional, atextual exception for claims based on 'injuries incident to military service.'" *Carter*, 145 S. Ct. at 519 (Thomas, J., dissenting from denial of certiorari).

"The Court has never articulated a coherent justification for this exception, and the lower courts for decades have struggled to apply it. The result is that courts arbitrarily deprive injured servicemembers and their families of a remedy that Congress provided them." *Id.* This Court should overrule *Feres* and prohibit only those claims "arising out of the combatant activities … during time of war." 28 U.S.C. § 2680(j). *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 886, 929 (2018) (overruling precedent where prior decision "was poorly reasoned," "has led to practical problems and abuse," and "subsequent developments have eroded its underpinnings").

In particular, the *Feres* doctrine should not bar relief for Mr. Beck's death. He was killed while off-duty and engaged in non-military activities. A civilian government employee's car crashed into Mr. Beck's motorcycle while he was driving home for lunch. A judge-made doctrine should not immunize this run-of-the-mill negligence action. "[T]he doctrine unjustifiably deprives the injured servicemember of a tort remedy simply 'because [he] devoted his life to serving in his country's Armed Forces.'" *Carter*, 145 S. Ct. at 523 (Thomas, J., dissenting from denial of certiorari) (quoting *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting)).

II. *Feres* Has Intractably Split The Courts of Appeal.

Not only is *Feres* not grounded in the FTCA's text, but cases applying it "ha[ve] gone off in so many different directions that it is difficult to know precisely what the doctrine means today." *Carter*, 145 S. Ct. at

524 (Thomas, J., dissenting from denial of certiorari) (citation omitted). This dysfunction has led federal courts of appeal to conflicting outcomes in similar cases. For example, sexual assault may be incident to service, *Doe v. Hagenbeck*, 870 F.3d 36 (2d Cir. 2017), or it may not, *Spletstoser v. Hyten*, 44 F.4th 938 (9th Cir. 2022). Likewise, recreational activity may be incident to service, *Costo*, 248 F.3d 863, or it may not, *Regan v. Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008). These "divergen[t]" and "absurd[]" results strengthen the case for overruling *Feres*. *Carter*, 145 S. Ct. at 526 (Thomas, J., dissenting from denial of certiorari).

A. Military sexual assault and *Feres*.

The conflict between the Second and Ninth Circuits on whether sexual assault is incident to service results from their attempts to rationalize irreconcilable case law. The Second Circuit asks generally whether a claim calls into question "basic choices about the discipline, supervision, and control" of servicemembers, while the Ninth Circuit replaces *Feres*'s shifting policy rationales with a four-factor test. These approaches have resulted in "irreconcilable" results. *Costo*, 248 F.3d at 867.

1. The Second Circuit held that sexual assault *is* incident to service.

In *Doe v. Hagenbeck*, a former West Point cadet alleged she was raped by another student. 870 F.3d at 39. On May 9, 2010, Doe prepared for bed, taking a prescribed sedative. *Id.* She then agreed to walk

around campus with a male cadet, from whom she accepted "a few sips of alcohol." *Id.* The combination of sedative and alcohol caused her to lose consciousness. *Id.* The male cadet raped her while she was unconscious. *Id.* She reported the rape to a psychiatrist the next day and sought medical care. *Id.* at 39-40. She eventually resigned from West Point as a result of the rape and completed her degree at a civilian college. *Id.* at 40.

Doe later sued the officers who served as Superintendent and Commandant of Cadets while she attended West Point. *Id.* at 38. She brought *Bivens* claims for due process and equal protection violations, a Little Tucker Act claim, and an FTCA claim. *Id.* at 40-41. Defendants moved to dismiss. *Id.* at 41. The district court dismissed all but Doe's equal protection claim. *Id.* Although the district court recognized "'the need to insulate the military's disciplinary structure from judicial inquiry,'" it "concluded that Doe's claim, at least at the motion to dismiss stage, did not implicate such concerns." *Id.* (citation omitted). Defendants appealed. *Id.*

The Second Circuit acknowledged that Doe's allegations, if true, "are no credit to West Point, an institution founded … 'to train officer-leaders of character.'" *Id.* at 42 (citation omitted). But that observation "should [not] end the judicial inquiry." *Id.* Because courts are as "protective of military concerns" under *Bivens* as they are under *Feres*, the majority reasoned by analogy to *Feres*'s incident-to-service test. *Id.* at 44 (citation omitted).

The court explained a cadet like Doe was a servicemember obligated to follow orders from superior officers and subject to the Uniform Code of Military Justice. "[C]ourts citing *Feres* have reliably applied the doctrine of intramilitary immunity to bar suits brought by … cadets." *Id.* at 45. It concluded Doe's claim was incident to service because it "d[id] not merely invite, but require[d] a most wide-ranging inquiry into [defendants'] commands." *Id.* at 46. Adjudicating her claims "would require a civilian court to engage in searching fact-finding about [defendants'] 'basic choices about the discipline, supervision, and control' of the cadets that they were responsible for training." *Id.* (citation omitted).

The court rejected Doe's argument that *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995), dictated that "her injuries did not arise incident to military service." *Doe*, 870 F.3d at 47. It retreated from *Taber*'s workers' compensation analysis, limiting that framework to "the circumstances of that case." *Id.* Because the court could not extricate West Point's academic mission from its military mission, it concluded that Doe was a servicemember on a military installation—not merely a college student on a college campus—at the time she was assaulted. *Id.* at 49. Her claim therefore "'strikes at the core' of the concerns implicated by the [*Feres*] incident-to-service rule: that civilian courts are ill-equipped 'to second-guess military decisions' regarding 'basic choices about the discipline, supervision, and control'" of servicemembers without "impair[ing] 'military discipline and effectiveness' in unintended and unforeseen ways." *Id.* (citations omitted). Doe's claim therefore "triggers the incident-to-service rule and cannot proceed." *Id.*

2. The Ninth Circuit held that sexual assault *is not* incident to service.

Contrary to the Second Circuit's approach, the Ninth Circuit applied its distinct four-factor test—designed to remedy the difficulty in applying *Feres*—to conclude that even its broadest reading "does not encompass the facts of this alleged sexual assault." *Spletstoser*, 44 F.4th at 958; *Costo*, 248 F.3d at 867 (relying on four-factor test because courts "have shied away from attempts to apply [*Feres*'s] policy rationales").

General John Hyten commanded the U.S. Strategic Command in Nebraska. 44 F.4th at 942. Colonel Kathryn Spletstoser directed his Commander's Action Group. *Id.* In 2017, both were invited to attend the Reagan National Defense Forum in California. *Id.* According to the complaint, on December 2, 2017, General Hyten unexpectedly knocked on Colonel Spletstoser's hotel room door as she prepared for bed. *Id.* He entered her hotel room under the pretense of discussing work, but instead restrained and sexually assaulted her. *Id.* In 2019, Colonel Spletstoser sued General Hyten, alleging, among other claims, sexual battery and assault. *Spletstoser v. United States*, No. 19-cv-10076, 2020 WL 6586308, at *4 (C.D. Cal. Oct. 22, 2020). By then, General Hyten was Vice Chairman of the Joint Chiefs of Staff, and the United States substituted in as defendant. *Id.* at *1, *4.

Defendant moved to dismiss, but the district court denied the motion. *Id.* at *15. The district court reasoned that Colonel Spletstoser sought "to recover for

a single instance of alleged sexual assault that occurred while she was off-duty and off-base," and the fact that her alleged attacker was a military officer did not, by itself, bring her claims within *Feres*. *Id.* at *14.

The Ninth Circuit affirmed. Unlike the Second Circuit, which asked only whether a plaintiff's claims required a court to question the military's discipline, *Doe*, 870 F.3d at 46, the Ninth Circuit applied its four-factor test. *Spletstoser*, 44 F.4th at 953-59. This weighs: (1) the place where the tortious act occurred; (2) the plaintiff's duty status when the act occurred; (3) the benefits accruing to the plaintiff because of her military service; and (4) the nature of plaintiff's activities at the time the act occurred. *Id.* at 948. The panel concluded that all four factors weighed against applying *Feres*, some "heavily." *Id.* at 956-57. It emphasized that Colonel Spletstoser was in an off-base hotel room preparing for bed "as any civilian would have been." *Id.* at 954-55 (citation omitted). Although General Hyten entered Colonel Spletstoser's room under the pretense of discussing work, it was "unimaginable that [she] would have been 'under orders' to submit to Hyten's sexual advances, or that she was performing any sort of military mission in conjunction with the alleged assault." *Id.* at 957 (citation omitted). In allowing Colonel Spletstoser's claims to proceed, the Ninth Circuit observed that "it would be a highly unusual circumstance when a sexual assault consisting of the facts alleged [here] would further any conceivable military purpose, and thus be considered incident to military service." *Id.* at 958.

B. The Circuit Courts have split regarding military-sponsored recreation and *Feres*.

Military sexual assault is not the only context in which the courts of appeals have split in applying *Feres*. Injuries arising from military-sponsored recreation have also given rise to conflicting decisions.

1. The Ninth Circuit held that recreational activity *is* incident to service.

Relying on the four-factor test that supplants *Feres*'s policy rationales, the Ninth Circuit concluded that the deaths of two sailors during an off-duty, Navy-organized rafting trip were incident to service. *Costo*, 248 F.3d at 867, 869.

The *Costo* court concluded that the active-duty sailors were off-duty and off-base when they died. *Id.* at 867-68. They were on a rafting trip sponsored by the Naval Air Station Whidbey Island's morale, welfare, and recreation (MWR) program, itself overseen by the naval air station's commander. *Id.* at 864-65, 867. The MWR program provides recreational opportunities to servicemembers as a benefit of military service. *Id.* at 867. Although the sailors died during this off-base trip, the court concluded that the critical "supervisory" negligence that led to their deaths took place on base. *Id.* at 868. The majority relied heavily on the MWR program's role in planning and leading the rafting trip, noting that "in our court, at least," military-sponsored activities like MWR trips "fall within the *Feres* doctrine, *regardless of whether they are related to military duties*." *Id.* (emphasis added).

Even as it cited analogous out-of-circuit opinions, the Ninth Circuit acknowledged *Feres*'s unbridled expansion, explaining that "the Supreme Court has not had occasion to apply *Feres* nearly so broadly as have the circuit courts." *Id.* at 869. Nonetheless, "whatever the original scope of the *Feres* doctrine," the Ninth Circuit had interpreted it "to include military-sponsored recreational programs," and the majority was thus "compelled to hold that the [sailors'] estates' suit is barred." *Id.*

2. The Fifth Circuit held that recreational activity *is not* incident to service.

The Fifth Circuit came to the opposite result in applying the doctrine to hold that a soldier's boating accident was not incident to service, drawing on its own "nuanced consideration" of military recreational activities in declining to follow the Ninth Circuit's lead. *Regan*, 524 F.3d at 637-45.

Staff Sergeant Daniel Regan met a friend at the Army's Toledo Bend MWR facility. *Id.* at 629. Similar to *Costo*, the MWR facility was the responsibility of the commander of nearby Fort Polk, Louisiana, whose soldiers, dependents, and civilian employees were its primary beneficiaries. *Id.* at 630. Sergeant Regan and his friend rented a Starcraft Marine pontoon boat from the facility to spend an off-duty day with friends "relaxing, swimming, and drinking." *Id.* at 629. The group cruised away from the MWR facility's small cove out into the public area of Toledo Bend Reservoir. *Id.* While there, Regan stood up, stumbled forward off

the boat, and was struck in the leg by the boat's propeller. *Id.* Doctors eventually amputated his leg due to the severity of his injuries. *Id.* at 629-30.

Sergeant Regan sued Starcraft Marine and several other parties in Louisiana state court. *Id.* at 630. Starcraft filed a third-party complaint against the United States, alleging its negligence caused Regan's injury. *Id.* The United States removed the case to federal court and moved to dismiss under the *Feres* doctrine. *Id.* The district court agreed, dismissing the third-party complaint and remanding the remaining state law claims. *Id.* Starcraft appealed. *Id.*

The Fifth Circuit rejected the government's arguments about military discipline and judicial review and instead applied its own three-factor test. *Id.* at 636-37. Noting that duty status at the time of injury is analytically "key," the court recognized that, because he was off-post and "entitled to off-duty time away," Sergeant Regan was "sufficiently far from core concerns of *Feres*" that this first factor "weigh[ed] in favor of allowing suit." *Id.* at 637, 640. Because the Fifth Circuit deemed the location of *injury* relevant—in conflict with the Ninth Circuit's focus on the location of the *tortious act*—Sergeant Regan's injury at the Reservoir also "weigh[ed] in favor of suit." *Id.* Finally, examining the "activity being performed at the time of the injury," it concluded Sergeant Regan "was engaged in purely recreational activity" not related to any mission or "tactical or field training." *Id.* The Fifth Circuit concluded that the MWR-rental connection was too tenuous to bar Sergeant Regan's claim as incident to service. *Id.* at 641-45.

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Without an anchor in the FTCA's text, the lower courts have struggled to apply *Feres* coherently and consistently. As a result, servicemembers are at the mercy of the conflicting interpretations of the courts of appeals. This Court should overrule *Feres* and restore the FTCA's plain language to ensure consistency in servicemembers' tort remedies. At the very least, this Court should limit *Feres*'s incident-to-service test to claims arising while servicemembers perform military duties under orders. That limitation would effectively overrule the overbroad incident-to-*military-status* test that has swallowed the *Feres* doctrine.

III. Military Changes Have Eclipsed Any Surviving Rationale Supporting *Feres*.

There is no textual reason to preserve *Feres*, and it has proven unworkable in practice. That is enough to warrant abandoning the doctrine. But there is still another reason to overrule *Feres*—the post-World War II military that informed the *Feres* Court's analysis is unrecognizable in today's modern military. The expansion of non-combat-related military services and the reliance on civilian contractors has blurred the distinction on which the *Feres* Court relied.

During World War II, "about 12 percent of the population" served in the military, including, remarkably, "56 percent of the men eligible for military service." David R. Segal & Mady Wechsler Segal, *America's Military Population*, 59 Population Bulletin, no. 4, at 4 (Dec. 2004), https://ti-

nyurl.com/2pxaphbd. Warfare was different, requiring more troops than contemporary warfare, and the military relied on conscription to meet its needs. *Id.* at 3. In fact, more than 60% of World War II servicemembers were draftees. National WWII Museum, *Research Starters: US Military by the Numbers*, https://tinyurl.com/3p4ax3uv. And the military largely restricted women and minorities to segregated units until 1948, just two years before *Feres*. Exec. Order No. 9,981, 13 Fed. Reg. 4313 (Jul. 28, 1948); Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356.

But in 1973, the U.S. military became an all-volunteer force, and it has become different in kind. "The all-volunteer military is more educated, more married, more female, and less white than the draft-era military." Segal & Segal, *supra*, at 3. This "new generation of military recruits has aspirations and expectations for quality of life services and access to health care, education, and living conditions that are very different from the conscript force of the past." Donald H. Rumsfeld, *The Annual Defense Report: 2004 Report to the President and to the Congress* 19 (Cosimo ed., 2005). Meeting those expectations is necessary to assure our "continued readiness to fight and win the Nation's wars." Dep't of Defense (DoD), *Report of the First Quadrennial Quality of Life Review*, Appendix A3, at ii (2004), https://tinyurl.com/4kp6nhu7.

Today's military focuses not just on servicemembers, but also on their families. Today, two million servicemembers come with 2.4 million family members. DoD, *2023 Demographics: Profile of the Military*

Community, at 107 (2023), https://tinyurl.com/4rumuyn6. In 2001, President Bush issued a directive requiring the Secretary of Defense to take steps to "improv[e] the quality of life for our military personnel." The White House, *National Security Presidential Directive/NSPD-2* 2 (Feb. 15, 2001), https://tinyurl.com/y2kvk3cw. The President's directive recognized that attention to families, not just individuals, was needed to meet recruitment and retention needs; it required the Department of Defense to reconfigure its support services, including increased pay, improved housing and healthcare, and strengthened family support networks. *Id.* at 2-3.

This expansion of benefits and services has led to a collateral expansion of activities considered "incident to service" under *Feres*, despite being wholly unrelated to "combatant activities." 28 U.S.C. § 2680(j). *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, 34, 40-46 (Feb. 2003). As a result, servicemembers have been denied recovery for injuries sustained while receiving routine care at military hospitals, *Carter v. United States*, No. 22-1703, 2024 WL 982282 (4th Cir. Mar. 7, 2024), *cert. denied*, 145 S. Ct. 519 (2025); studying at service academies, *Doe*, 870 F.3d 36; living in military housing, *Clendening*, 19 F.4th 421; and participating in military-sponsored recreational activities, *Costo*, 248 F.3d 863. These judge-made exceptions would be unrecognizable to the *Feres* Court, let alone the legislature that drafted the FTCA's narrow "combatant activities" exception.

A. Military healthcare is no longer limited to combat.

Among the most significant post-*Feres* changes to military governance is the expansion of military healthcare. Unlike when *Feres* was decided, combat care is a fraction of military medicine today. The DoD now operates a comprehensive healthcare system with a mission of providing quality non-combat-related health care to active-duty servicemembers and their dependents, as well as retirees and their dependents, at military healthcare facilities. Beginning with the 1956 Dependents' Medical Care Act, the non-combat component of the Military Health System has grown enormously; active-duty servicemembers now represent only 14% of eligible patients. Congressional Research Service, *Defense Primer: Military Health System* 1 (updated Oct. 18, 2024), https://tinyurl.com/3r89ybpz.

This system does not exist in isolation from civilian health care. "[A]s a comprehensive health system, it is influenced by, and must be responsive to, improvements in the civilian health care sector." DoD, *Military Health System Review – Final Report* 23 (Aug. 29, 2014), https://tinyurl.com/y5ls3f3d. Military studies compare this system to large civilian healthcare systems. *Id.* at 16. Many servicemembers are entirely reliant on this system. Turley, *supra*, at 58-59. Yet, because medical care is a benefit of military service, courts have considered malpractice occurring during treatment at military facilities to be

"incident to service" and ineligible for FTCA recovery under *Feres*. *See, e.g.*, *Carter*, 2024 WL 982282, at *1.[2]

Military medical care is no different from healthcare coverage by private employers. The military decided to introduce a comprehensive medical system rather than maintaining a smaller combat medical staff. By doing so, it moved entire areas of injury outside the conventional legal system and—in light of *Feres*—potentially increased the likelihood of negligent healthcare for servicemembers. *See* Turley, *supra*, at 57-67 (theorizing that reduced liability has increased medical malpractice).

B. Military education, housing, and recreation have evolved.

Other significant post-*Feres* changes to military governance include the evolution of military education, particularly at the service academies, military housing, and recreational activities.

Military academies have existed almost since the nation's inception: West Point opened in 1802, just 19

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[2] Although Congress enacted a limited exception to the *Feres* doctrine for medical malpractice cases, 10 U.S.C. § 2733a(a), this legislation falls far short of the relief that would result from allowing claims permitted under the text of the FTCA but barred by *Feres*. For example, if the Secretary of Defense denies a servicemember's administrative claim, there is no additional avenue of relief (such as judicial review), and the legislation limits most claims to under $100,000. *Id.* at § 2733a(d). Moreover, the DoD has denied the vast majority of claims. *See* Patricia Kime, *Military Services Approving Roughly 3% of Malpractice Claims from Service Members*, Military.com (June 7, 2024), https://tinyurl.com/by58bejj.

years after the Revolutionary War ended. The military academies "core" mission is "to educate, train, and inspire men and women to become officers in the Military Services to serve the United States." DOD Instr. No. 1322.22, *Military Service Academies* 10 (as rev'd Nov. 1, 2023). That mission has not changed, but the methods have. The service academies are now academically comparable to civilian colleges and universities, competing with those institutions for the best students. *See* Bruce Keith, *The Transformation of West Point as a Liberal Arts College*, 96 Liberal Educ. 6 (2010), https://tinyurl.com/2m9h3wzr. But cadets and midshipmen, unlike their civilian counterparts, cannot pursue tort claims based on injuries that occur on campus because those injuries are considered "incident to service" under *Feres*. *See Doe*, 870 F.3d at 44-49.

Housing is another key service offered to military personnel. Junior enlisted servicemembers without a spouse or child typically live in military-managed barracks. The DoD also oversees more than 200,000 family housing units, and approximately one-third of military personnel live on base. Congressional Research Service, *Military Housing* 1, 11 (Sept. 29, 2023), https://tinyurl.com/48jw92zd.

Choosing between on-base and off-base housing can be consequential. From the 1950s until at least 1985, for example, the drinking water at Camp Lejeune, North Carolina, was contaminated with toxic chemicals at levels 240 to 3400 times beyond what is permitted by federal safety standards. Lori Lou Freshwater, *What Happened at Camp Lejeune*,

Pacific Standard (Aug. 21, 2018), https://tinyurl.com/y882jja9. An estimated 900,000 servicemembers, family members, and civilian personnel were exposed. Courtney Kube, *Navy to Deny All Civil Claims Related to Camp Lejeune Water Contamination*, NBC News (Jan. 24, 2019), https://tinyurl.com/yarbpy3k.

Servicemembers sought damages for injuries caused by Camp Lejeune's toxic water, *id.*, but *Feres* barred their claims. *In re Camp Lejeune N.C. Water Contamination Litig.*, 263 F. Supp. 3d 1318, 1341 (N.D. Ga. 2016). The court found that, for servicemembers on active duty during the period of contamination, "*Feres* applies virtually as a matter of law. … [S]leeping while stationed on active duty at a military base is an activity 'incident to service.'" *Id.* at 1341-42.[3]

Feres also bars recovery for activities that servicemembers engage in when they are decidedly off-duty. *See supra* § II.B. As part of a "new social compact," the military began providing more entertainment and recreational activities. *See, e.g.*, DoD, *Report of the First Quadrennial Quality of Life Review*, *supra*, 57, 94-96. And since military regulations cite "morale" as a military concern, virtually any activity on a base or

[3] In 2022, Congress enacted legislation allowing servicemembers to bring FTCA claims for harms caused by exposure to contaminated water at Camp Lejeune. This legislation came decades after servicemembers were exposed, should not have been needed given the FTCA's plain text, and does not address other, similar problems that may be discovered. *See* Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, § 804, 136 Stat. 1759, 1802-03.

supported by the military can be considered "incident to service." *Hass v. United States*, 518 F.2d 1138, 1141 (4th Cir. 1975) ("Recreational activity provided by the military can reinforce both morale and health and thus serve the overall military purpose.").

As it did with healthcare, the United States military has vastly expanded its educational, housing, and recreational opportunities to attract and retain servicemembers in the all-volunteer era. And again, vast swaths of military life have been removed from the tort liability system by a judge-made doctrine with no statutory basis.

C. The military's structural change renders *Feres* inequitable.

Not only has the military shrunk numerically and expanded benefits since the 1950s, but its structure has also changed in ways that render *Feres* even more inequitable.

America's wars in Afghanistan and Iraq stretched the post-Cold War military's financial and human resources. To limit the number of "boots on the ground" and save money, the Pentagon outsourced security services to private defense contractors who in turn employed civilians. *America's Paid Boots on the Ground*, The Week (Jan. 8, 2015), https://tinyurl.com/5n7k5s3h. In Iraq, there were as many private American contract personnel as U.S. servicemembers, and in Afghanistan, 207,000 contractors supported 175,000 servicemembers. *Id.*

These private contractors—who performed many of the same duties as servicemembers in prior conflicts—are not prohibited by *Feres* from bringing tort claims. Although some of their claims may be limited by the FTCA's exceptions for combatant activities and claims arising in foreign countries, 28 U.S.C. § 2680(j), (k), they are not broadly foreclosed from tort relief merely by their status as civilian contractors—even when their claims implicate command decisions or military discipline. As the pool of military-adjacent personnel who can recover tort damages against the government expands, the inequity visited on similarly situated servicemembers seems even less justifiable.

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Given the dramatic changes in the military since 1950, *Feres* should be overruled. "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience." Benjamin N. Cardozo, *The Growth of the Law* 136-37 (1924).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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