No. 20-559

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AND PARALYZED VETERANS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The National Veterans Legal Services Program (NVLSP) is an independent, nonprofit organization that has worked since 1981 to ensure that the United States government provides our nation's 25 million veterans and active duty personnel with the federal benefits that they have earned through service to our country. NVLSP advocates before Congress, federal agencies, and courts to protect servicemembers and veterans. When, as here, an Article III court's ruling would deprive large groups of our nation's servicemembers, veterans, or their families of rights granted by Congress, NVLSP authors amicus curiae briefs supporting appellate review and reversal. NVLSP's interest is particularly acute in cases where allegations are as troubling and important as Ms. Doe's.

Paralyzed Veterans of America (PVA) is a national, congressionally chartered veterans service organization headquartered in Washington, D.C. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of veterans of the armed forces who have experienced spinal cord injury or a disorder (SCI/D). PVA seeks to improve the quality of life for veterans and all people with SCI/D through its medical services, benefits, legal, advocacy, sports and recreation, architecture, and other programs. PVA advocates for quality health care, research and

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

education addressing SCI/D, benefits based on its members' military service, and for civil rights, accessibility, and opportunities that maximize independence for its members and all veterans and non-veterans with disabilities. PVA has nearly 16,000 members, all of whom are military veterans living with catastrophic disabilities. To ensure the ability of its members to participate in their communities, PVA strongly supports the opportunities created by and the protections available through the Americans with Disabilities Act, the Federal Tort Claims Act, the Fair Housing Act, and other federal and state disability and civil rights laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

The much-criticized *Feres* doctrine prevents servicemembers from suing the federal government under the Federal Tort Claims Act for injuries sustained "incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). This judicially created exception to federal liability reflects an unjustified reluctance by the judiciary to interfere 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 give rise to legal liabilities, such as those of doctor-patient, landlord-tenant, and educator-student. Whatever validity the *Feres* doctrine might have had in 1950, it cannot be defended today.

The stated rationales for the *Feres* doctrine can no longer withstand scrutiny. The military has changed dramatically since 1950 and is now a smaller, more

diverse, and family-focused all-volunteer institution. Beyond training soldiers, today's military provides education, housing, healthcare, and entertainment to its servicemembers and their families—not only to maintain an effective fighting force but also to attract and recruit new volunteers. As the reach of the military has expanded into more areas of soldiers' lives, so too has the potential for mistakes and misconduct. Because of the *Feres* doctrine, however, soldiers and their families often fail to receive fair and adequate compensation for their injuries, especially as compared to their civilian counterparts.

Congress expressly allowed soldiers and their families to bring tort claims against the United States for non-combat injuries, but the *Feres* Court contravened clear statutory text and legislative intent 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 military service." Sexual assault certainly should not be considered incident to military service, and immunity for sexual assault cases at military academies is particularly unwarranted. NVLSP agrees with Petitioner that this case presents an excellent opportunity for this Court to revisit the *Feres* doctrine.

ARGUMENT

I. *Feres* Should Be Overruled.

The clear text of the Federal Tort Claims Act ("FTCA") 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). "Combatant activities" are not defined. "In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The ordinary meaning of the adjective "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*, OED Online (Oxford Univ. Press Sept. 2020), https://tinyurl.com/y38p7plv.

Despite this plain statutory language, the Supreme Court created an additional, extra-statutory exception to government liability. It held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity *incident to service*." *Feres v. United States*, 340 U.S. 135, 146 (1950) (emphasis added). In other words, rather than limiting liability for "combatant activities … during time of war," 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.

The Court's atextual and incorrect 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 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 expressed similar concerns as recently as last year: "Had Congress itself determined that servicemembers cannot recover for the negligence of the country they serve, the dismissal of their suits 'would (insofar as we are permitted to inquire into such things) be just.' But it did not." *Daniel v. United States*, 139 S. Ct. 1713, 1714 (2019) (Thomas, J., dissenting from denial of certiorari) (citation omitted). Justice Ginsburg did as well. *Id.* at 1713 (noting that Justice Ginsburg "would grant the petition for a writ 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 Tort Claims Act." *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 674 (1977) (Marshall, J., dissenting). "I cannot 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.*, *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995); *Veillette v. United States*, 615 F.2d 505, 506-07 (9th Cir. 1980); *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. For instance, in a case applying the *Feres* doctrine to the injuries of a servicemember's child, 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 opined, "[w]e can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long." *Ritchie v. United States*, 733 F.3d 871, 878 (9th Cir. 2013); *see also Daniel v. United States*, 889 F.3d 978, 982 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1713 (2019) ("If ever there were a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so."); *Hinkie v. United States,* 715 F.2d 96, 97 (3d Cir. 1983) ("We are forced once again to decide a case where we sense the injustice of the result but where nevertheless we have no legal authority, as an

intermediate appellate court, to decide the case differently.") (cleaned up).

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 v. United States*, 656 F.3d 463, 465-66 (7th Cir. 2011); *Richards v. United States*, 176 F.3d 652, 656-58 (3d Cir. 1999).

Indeed, as in Doe's case, the *Feres* doctrine bars relief in circumstances that were never contemplated by Congress when it added the combat exception to the FTCA in 1946. These include rapes and assaults by fellow soldiers, *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014), and personal injuries or deaths caused by medical malpractice, *Ortiz*, 786 F.3d 817. None of these are "combatant activities" or even the type of activities that *Feres* considered "incident to service."

"Members of the armed forces take an oath to 'support and defend the Constitution of the United States against all enemies, foreign and domestic.' … The oath includes an implicit recognition that defense of our country may entail engagement in combat, in armed conflict, where the gravest of injuries are a possibility for all and an inevitability for some." Andrew F. Popper, *Rethinking* Feres*: Granting Access to Justice for Service Members*, 60 B.C. L. Rev. 1491, 1497 (2019). But that oath "does not include the concession that service members would be without recourse should they be injured by egregious and

impermissible misconduct that advances no policy or goal of our armed forces." *Id.*

This Court should overrule *Feres* and prohibit only the claims exempted by Congress, such as 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.*, 138 S. Ct. 2448, 2460, 2486 (2018) (overruling precedent where prior decision "was poorly reasoned," "has led to practical problems and abuse," and "subsequent developments have eroded its underpinnings"); *Hurst v. Florida*, 577 U.S. 92, 102 (2016).

In particular, the *Feres* doctrine should not bar relief for Doe's injuries. As Judge Chin explained in dissent: "Doe's injuries did not arise 'incident to military service.' When she was subjected to a pattern of discrimination, and when she was raped, she was not in military combat or acting as a soldier or performing military service. Rather, she was simply a student, and her injuries were incident only to her status as a student." Pet. App. 43a.

II. The Role Of The Military Has Fundamentally Changed And Eclipsed Any Surviving Rationale Supporting *Feres*.

The *Feres* Court justified its decision in part based on its belief that the relationship between service-members and the government was unique and "'distinctively federal in character.'" *Feres*, 340 U.S. at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947)); *see also United States v. Muniz,* 374 U.S. 150, 162 (1963) (*Feres* doctrine "best explained"

by special relationship between soldiers and their superiors). But the modern military is vastly different from the military that shaped the thinking of the 1950 *Feres* Court, and the expansion of military-provided, non-combat-related services has blurred that distinction.

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, Dec. 2004 at 4. Warfare was different, requiring more troops than are required for 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/ycskvmm8 (last visited Nov. 30, 2020). And neither women nor minorities were integrated into the armed forces until 1948, just two years before *Feres* was decided. Charles C. Moskos & John Sibley Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* 30-31 (1996); Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356.

But in 1973, the United States converted to an all-volunteer force, today comprising only 0.5% of the general population. Council on Foreign Relations, *Demographics of the U.S. Military* (July 13, 2020), https://tinyurl.com/y7t2ggp4. And it is 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" consistent "with the American standard of living." 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, *Modernized Social Compact: Report of the First Quadrennial Quality of Life Review* at ii (2004), https://tinyurl.com/y59ofu6v.

Today's military focuses not just on servicemembers but on the families they bring with them. Today 1.4 million active duty servicemembers come with 1.9 million family members. Segal & Segal, *supra*, at 31. In 2001, President Bush issued a directive creating a "new social compact" between the Department of Defense (DoD) and military families, recognizing that attention to families, not just individuals, was needed to meet the recruitment and retention needs of the armed services. The White House, *National Security Presidential Directive (NSPD-2)* (Feb. 15, 2001), https://tinyurl.com/y2kvk3cw. The President's directive required DoD to reconfigure its support services appropriately, including increased pay, improved housing and healthcare, and strengthened family support networks. *Id*.

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 … during time of war." 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. W. L. Rev. 1, 34, 40-46 (2003). In particular, servicemembers have been denied recovery for injuries sustained as students at the service academies; patients under military medical care; residents of military housing; and participants in military-sponsored recreational activities. But each of those benefits would be unrecognizable to the legislature that drafted the narrow "combatant activities" exception to the FTCA, or even to the Court that decided *Feres* in the first instance.

A. Education

Military training schools have existed in some form almost since the nation's inception: West Point opened in 1802, just fifteen years after the conclusion of the Revolutionary War. "The mission of [the service academies] is to prepare cadets for career service in the armed forces." Brian Scott Yablonski, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, 47 U. Miami L. Rev. 1449, 1468 (1993). That mission hasn't changed over the years, but the method certainly has.

West Point was founded by Congress for the purpose of educating and training young men in military science. *See* Andrew Glass, *House Votes to Create West Point Military Academy*, *Jan. 21, 1802*, Politico (Jan. 21, 2010), https://tinyurl.com/yxqhkp6q. From 1802 through 1960, West Point offered students a prescribed curriculum: All students completed the same set of courses that initially focused on the "arts and sciences of warfare." U.S. Mil. Acad., *A Brief History*

of West Point, https://tinyurl.com/y6azylgg. But as it became apparent that good military leadership required "the ability to think broadly, to operate in the context of other societies and become agile and adaptive thinkers," Jon Marcus, *The Unexpected Schools Championing the Liberal Arts*, The Atlantic (Oct. 15, 2015), https://tinyurl.com/y32eo6jk, the service academies broadened their academic offerings. Now cadets and midshipmen "are required to take humanities and social-sciences courses such as history, composition, psychology, literature, and languages," *id.*, and they have a choice of majors in more than a dozen fields, *see* U.S. Naval Acad., *Academics,* https://tinyurl.com/y8uhothu; U.S.A.F. Acad., *Academics at a Different Altitude,* https://tinyurl.com/y2sqtjsk; U.S. Mil. Acad., *Curriculum*, https://tinyurl.com/y62f84z3.

The service academies are now academically comparable to civilian liberal arts colleges and universities. They are accredited universities that grant bachelor's degrees upon graduation. Courses are taught by a mix of civilian and military faculty, Kirsten M. Keller et al., *The Mix of Military and Civilian Faculty at the United States Air Force Academy: Finding a Sustainable Balance for Enduring Success* at 1 (2013), https://tinyurl.com/yxslgoq5, and cadets and midshipmen may participate in a variety of extracurricular activities during their four years in school, *see e.g.* U.S. Naval Acad., *Midshipman Interests,* https://tinyurl.com/yyosg8cv. And they compete with elite civilian colleges for the best students; West Point, for example, advertises itself as a "nationally ranked, top-tier institution." U.S. Mil. Acad., *USMA Admissions*,

https://tinyurl.com/y43s4kgd. *See also* Bruce Keith, *The Transformation of West Point as a Liberal Arts College*, 96 Liberal Educ. 6 (2010), https://tinyurl.com/y2nkqkl8.

Thus, the service academies provide "a four-year college education similar to that offered at other civilian institutions." Keller, *supra*, at 1. But cadets and midshipmen, unlike their civilian counterparts, cannot pursue tort claims based on injuries that occur on campus. The simple fact of being a student at a service academy renders those injuries "incident to service" under *Feres*. Here, Ms. Doe was not on duty, in training, or otherwise engaged in any activity related to her military service other than being on campus when she was assaulted. Pet. App. 21a. Her "night [was] no different than what any young person might encounter as part of the typical U.S. college experience." Katherine Shin, Note, *How the* Feres *Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault*, 87 Fordham L. Rev. 767, 769 (2018). *See also* Pet. App. 43a, 59a (Chin, J., dissenting).

But the Second Circuit rejected Ms. Doe's claims because she "was a member of the military … subject to military command at all times, … who was at West Point for the purpose of military instruction." Pet. App. 6a-7a (citations omitted). The court determined that her education, therefore, "was inextricably intertwined with her military pursuits." Pet. App. 7a (quotation marks omitted). But a civilian student in Ms. Doe's circumstances may file suit against her university. *See, e.g., Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007). "Due

to their status as servicemembers while attending their respective academies," then, "cadets and midshipmen are denied the due process civilian college students would receive in similar situations." Shin, *supra*, at 772; Pet. App. 43a, 59a (Chin, J., dissenting). *Feres* held that no private injury could be "remotely analogous" to an injury caused by military negligence. 340 U.S. at 141-42. But if Ms. Doe's "military pursuits" are so "intertwined" with her education, Pet. App. 7a, it is "puzzling" to conclude that a sexual assault on a cadet at a service academy is not analogous to one incurred by a civilian student at a public university. Shin, *supra*, at 772. *See also* Pet. App. 43a, 59a (Chin, J., dissenting). That is especially true given that the service academies market themselves as competitive alternatives to elite civilian colleges, Shin, *supra*, at 772, rather than as pure "military training" institutions that would align more closely with Congress's intent to grant immunity for claims arising out of combat activities. *See* 28 U.S.C. 2680(j).

B. Military Healthcare

Another significant post-*Feres* change to military governance is the expansion of military healthcare. Unlike when *Feres* was decided, combat care, or operational care, is only a small portion of military medicine. The DoD now operates a comprehensive healthcare system with a mission of providing quality non-combat-related healthcare 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 15% of the persons eligible for treatment in the Military Health System. Congressional Research Service, *Defense Primer: Military Health System* 1 (Dec. 18, 2019), https://tinyurl.com/y6cfjrfq (hereinafter Defense Primer).

This system does not exist in isolation from civilian healthcare. "[A]s a comprehensive health system, it is influenced by, and must be responsive to, improvements in the civilian health care sector." Dep't of Defense, *Military Health System Review* at 23 (2014), https://tinyurl.com/y5ls3f3d. Military studies compare this system to large civilian healthcare systems, such as Geisinger Health System, Intermountain Healthcare, and Kaiser Permanente. *Id.* at 16. For many servicemembers, the use of the Military Health System is involuntary. Turley, *supra*, at 58; *see also* Defense Primer at 1-2. Yet, because medical care is a benefit of military service, courts have considered malpractice claims stemming from treatment at military treatment facilities to be "incident to military service" and thereby ineligible for FTCA recovery under *Feres*. *See, e.g., Appelhans v. United States*, 877 F.2d 309, 311-12 (4th Cir. 1989); *Daniel*, 889 F.3d at 981.

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 and allowing servicemembers to enroll in private healthcare systems during peacetime. By doing so, it moved entire areas of injury outside of the conventional legal system and—in light of *Feres*—

potentially increased the likelihood of negligent healthcare or conditions for servicemembers. *See* Turley, *supra*, at 57-67 (theorizing that reduced liability has resulted in increased occurrence of medical malpractice).

C. Housing

Housing is another key service offered to military personnel, civilian staff, and their families. The DoD manages more than 300,000 family housing units, and approximately one-third of military families live in on-base housing, with the remainder living in the surrounding communities. U.S. Dep't of Hous. and Urban Dev., *Community Housing Impacts of the Military Housing Privatization Initiative*, at 1 (Oct. 2015), https://tinyurl.com/yys8kxt2. The DoD budgeted more than $60 million for operation and maintenance, leasing, and improvements to existing military housing in 2020. Dep't of Defense, *Family Housing, Defense-Wide*, at FH-5, https://tinyurl.com/yyldo9tn (last visited Nov. 30, 2020).

The choice between on-base and off-base housing is not without consequence, however. 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 higher than what is permitted by safety standards. Lori Lou Freshwater, *What Happened at Camp Lejeune*, Pacific Standard (Aug. 21, 2018), https://tinyurl.com/y882jja9. During that period, an estimated 900,000 servicemembers (plus resident family members and civilian personnel), were exposed to contaminants in the drinking water. Courtney Kube, *Navy to*

Deny All Civil Claims Related to Camp Lejeune Water Contamination, NBC News (Jan. 24, 2019), https://tinyurl.com/yarbpy3k. The Centers for Disease Control has identified nearly 30 diseases that can be positively linked to exposure to the contaminants found at Camp Lejeune, including multiple cancers, various adverse birth outcomes, and neurological effects. Agency for Toxic Substances and Disease Registry, *Health effects linked with trichloroethylene (TCE), tetrachloroethylene (PCE), benzene, and vinyl chloride exposure* (Apr. 11, 2017), https://tinyurl.com/y29wvagk.

"[R]oughly 4,500 plaintiffs" filed claims in federal court seeking damages for injuries caused by water contamination at Camp Lejeune, Kube, *supra*, but those claims were barred by *Feres*. *In re Camp Lejeune N.C. Water Contamination Litig.*, 263 F. Supp. 3d 1318 (N.D. Ga. 2016). The court found that, for servicemembers who were on active duty during the alleged 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 (citing *Feres*, 340 U.S. at 135). But civilians recover damages for these types of harms all the time. *See, e.g.,* Kathleen Gray, *Most of $600 Million Settlement in Flint Water Crisis Will Go to Children*, N.Y. Times (Aug. 20, 2020), https://tinyurl.com/y5o35hsu.

D. Recreation

As part of the "new social compact," the military also began subsidizing entertainment and recreational activities, much like private employers often

support recreational trips, health clubs, and other after-hours activities. *See* Dep't of Defense, *A New Social Compact: A Reciprocal Partnership Between the Department of Defense, Service Members and Families* 70 (2002). But since military regulations cite "morale" as a military concern, virtually any activity on a base or supported by the military is considered "incident to service" under *Feres*. *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."). *Feres* thus reaches beyond subsidized benefits and bars recovery for activities that servicemembers engage in when they are decidedly off duty, including injuries or deaths that result from "fun day" activities, *Chandler v. United States*, 713 F. App'x 251 (5th Cir. 2017); rafting, *Costo v. United States*, 248 F.3d 863 (9th Cir. 2001); Olympic training, *Jones v. United States*, 112 F.3d 299 (7th Cir. 1997); picnicking, *Millang v. United States*, 817 F.2d 533 (9th Cir. 1987); nightclubs, *Bozeman v. United States*, 780 F.2d 198 (2d Cir. 1985); "aero clubs," *Woodside v. United States*, 606 F.2d 134 (6th Cir. 1979); horseback riding, *Hass*, 518 F.2d at 1141; swimming pools, *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966); or simply socializing, *Major v. United States*, 835 F.2d 641 (6th Cir. 1987).

In many cases, the military operates establishments in direct competition with civilian businesses and actively markets them to both civilians and military personnel. For example, in *Pringle v. United States*, 208 F.3d 1220 (10th Cir. 2000), the Army operated a bar called Club Troopers that served military personnel and civilians alike, and was frequented by

a local Kansas gang. When a serviceman exchanged words with gang members, bar employees threw the serviceman out of the bar into the parking lot filled with gang members, where he was beaten so severely that he suffered permanent brain damage. The Tenth Circuit held that the bar staff's decisions were part of a "morale" program that could not be reviewed by the courts without interfering with the military's unique command system, and it dismissed the servicemember's claim as inimical to military discipline and therefore barred by the *Feres* doctrine. *Id.*

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

III. Military Benefits Do Not Justify Retaining The *Feres* Doctrine.

Another main rationale behind the *Feres* doctrine was the availability of military benefits for injuries or deaths that occurred during active duty. This compensation system was considered a viable alternative, and even superior, to the remedies available under the FTCA. *See Feres*, 340 U.S. at 145 (explaining that military recoveries for injuries "compare extremely favorably with those provided by most workman's

compensation statutes"); *see also Johnson*, 481 U.S. at 689 ("[T]he existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries.").

Since 1950, however, the military benefits system often has failed to adequately compensate servicemembers for their injuries, especially in cases of sexual assault and medical malpractice, and has not been an adequate alternative to civil tort liability. Indeed, this case highlights why the military-benefits rationale of *Feres* is outdated and harmful to servicemembers.

First, it is unlikely that Doe or others like her could receive any compensation for their injuries at all. "Survivors of sexual violence in the military will receive little or no benefit from the [Veterans' Benefits Act] unless they suffered a physical injury or have become psychologically disabled as a result." Gregory C. Sisk, *The Peculiar Obstacles to Justice Facing Federal Employees Who Survive Sexual Violence*, 2019 U. Ill. L. Rev. 269, 280-81 (2019); *see Romanowsky v. Shinseki*, 26 Vet. App. 289, 293 (2013) (noting that a veteran "must have a current disability at the time he or she filed his or her claim" to obtain benefits); *see generally* 38 U.S.C. §§ 101-4335 (2018) (Veterans' Benefits Act). Indeed, there are situations where *Feres* bars suit even though no benefits are awarded. *See, e.g.*, *Purcell v. United States*, 656 F.3d 463, 467 (7th Cir. 2011) (applying *Feres* even though estate of active duty serviceman who died by suicide received no benefits); *Sidley v. United States*, 861 F.2d 988, 991 (6th Cir. 1988) ("While the existence of an alternate

compensation system, such as the [Veterans' Benefits Act], makes the sometimes harsh effect of the *Feres* doctrine more palatable, the denial or unavailability of these benefits does not affect the applicability of the *Feres* doctrine.").

Second, even where benefits are available, the military compensation system is not comparable to the civil justice system in terms of the amount of individual judgments or the deterrent effect of litigation. Military benefits are neither adequate nor reliable enough to cover the harms that servicemembers and their families experience.

In wrongful death cases, for example, benefits provided to servicemembers and their families pale in comparison to possible recoveries under the FTCA. *Compare* 38 U.S.C. § 1310 (dependency and indemnity compensation); 10 U.S.C. § 1475 (death gratuity); 38 U.S.C. § 1967 (servicemembers' group life insurance); *and* 10 U.S.C. § 1450 (survivor benefit plan), *with* FTCA recoveries (averaging $1,746,075 based on a Westlaw verdict search from 2010 to 2020). As the Sixth Circuit recently explained: "[T]he *Feres* doctrine's reliance on 'generous' military no-fault compensation has not withstood the test of time. A $100,000 death benefit and $400,000 in a group life insurance payout are mere fractions of most wrongful death awards." *Siddiqui v. United States*, 783 F. App'x 484, 489 (6th Cir. 2019).

Moreover, recovery of benefits under the Veterans' Benefits Act is neither speedy nor efficient. Central to the Court's holding in *Feres* was the assumption that compensation for injuries or deaths

of servicemembers was "simple, certain, and uniform." *Feres*, 340 U.S. at 144. The Court reiterated that assumption in *Johnson*, stating that "the recovery of benefits is 'swift [and] efficient'" under the Veterans' Benefits Act. 481 U.S. at 690 (quoting *Stencel Aero Eng'g*, 431 U.S. at 673).

Although that may have been the case decades ago, it is no longer so. The Department of Veterans Affairs (VA) is currently working under a substantial backlog, and veterans and their families face significant delays at both the initial and appeal levels. As of November 28, 2020, the VA had more than 470,000 claims pending, with more than 200,000 of those pending for more than 125 days. *See* Dep't of Veterans Affairs, *Veterans Benefits Administration Reports*, https://tinyurl.com/y47mlrzl (last updated Nov. 30, 2020). Nor does the VA compensation system resemble the simple process noted in *Feres* 70 years ago. *See Martin v. O'Rourke*, 891 F.3d 1338, 1341-42 (Fed. Cir. 2018) (describing complicated process of seeking VA benefits, including "often-significant periods of delay").

Finally, the military compensation system does not hold tortfeasors accountable or adequately deter future misconduct, as the prevalence of sexual assaults and medical malpractice in the military demonstrates. A recent DoD report, for example, shows that the number of sexual assault and sexual harassment reports increased from 2018 to 2019. *See* Dep't of Defense, *Department of Defense Annual Report on Sexual Assault in the Military*, at 6 (Apr. 2020), https://tinyurl.com/yxsgnjxz. The report notes: "The Department works to prevent sexual assault to

reduce the crime's toll on human lives, improve mission readiness, enhance recruitment and retention, and strengthen international alliances." *Id.* at 8. Nevertheless, "[s]exual harassment and other misconduct remain a persistent challenge." *Id.*[2]

"The two leading rationales for tort liability remain compensation for the injured and deterrence of the tortfeasor." Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 Iowa L. Rev. 731, 781 (2019). Although the economic deterrent effect of tort liability against the federal government may be blunted somewhat, given that compensation is paid by the public treasury rather than by individual tortfeasors, litigating sexual assault claims in a public forum nevertheless has its own deterrent effect. "[A] court ruling that the federal government is liable for sexual violence committed by one of its agents is more likely to draw media and other public attention." *Id.* at 784. "And the prospect of reputational damage to an agency (or its leading officers) for failing to take appropriate measures to prevent sexual violence may undermine the agency's political agenda or provoke negative responses by law or reduced appropriations from Congress." *Id.*; *see* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 849, 880 (2001) (arguing "that constitutional tort damage remedies levied against municipalities do, in fact,

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[2] Of course, victim compensation is just one part of deterrence. Both the military and civilian criminal justice systems also have critical roles to play in deterring sexual assaults.

alter the behavior of government policymakers in desirable ways”).

Just as tort liability would be the only form of recourse for many victims of military sexual trauma, it often provides the only reliable tool to expose and address medical errors. *See* Maxwell J. Mehlman et al., *Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for Future Medical Expenses Under the Affordable Care Act*, 25 Annals Health L. 35, 56 (2016). “Malpractice liability is potentially one of the most effective mechanisms for reducing medical error.” Jennifer Arlen, *Contracting Over Liability: Medical Malpractice and the Cost of Choice*, 158 U. Pa. L. Rev. 957, 959 (2010). “Well-designed malpractice liability can optimally deter error by giving medical providers direct financial incentives to make cost-effective investments in patient safety.” *Id.*

Because of the *Feres* doctrine, however, “[m]isconduct that forever changes the lives of so many of our fellow citizen soldiers was and is undeterred by civil tort sanction.” Popper, *supra*, at 1496. “A vast array of actions ordinarily addressed and resolved in Article III courts for citizens in the private sector go unpunished and undeterred when the victim (or in some instances only the perpetrator) is a service member and the misconduct is, broadly defined, ‘incident to service.’” *Id.* It is past time to overrule *Feres*.

CONCLUSION

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

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