No. 20-559

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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REPLY BRIEF FOR PETITIONER

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March 19, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

This Petition presents a suitable vehicle for revisiting the antiquated and unjust doctrine launched in *Feres v. United States*, 340 U.S. 135 (1950). That the Government opposes certiorari primarily for alleged vehicle problems and *stare decisis* considerations confirms the doctrine's grave shortcomings. The plain text of the Federal Torts Claims Act (FTCA) provides recourse for all persons—including servicemembers—injured by government negligence. Pet. 7-10. Yet, the judicially created *Feres* doctrine has slammed shut the courthouse doors to wounded servicemembers, barring claims for injuries "incident to service." *Id*. 11-14. And *Feres* does so even though, in the decades since it was decided, its analytical underpinnings have collapsed. *Id*. 17-25. *Feres* has warped other doctrines, *id.* 29, and provoked criticism across the judiciary. *Id*. 14-16. Many appellate judges and members of this Court have urged the Court to revisit *Feres*. *Id*. This case provides that opportunity. Ms. Doe was raped during a recreational walk one evening on an academic campus overlooking the Hudson River—miles away from any battlefield. She was not injured abroad nor in connection with combatant activities. *See* 28 U.S.C. §§ 2680(j)-(k). The only bar to Ms. Doe having her claims heard is this Court's allegiance to *Feres*.

Feres was wrong when it was decided, and it is time for this Court to fix its error. This is not, as the Government would have it, a misinterpretation of statutory text that should await a congressional fix. The *Feres* Court "ignor[ed] what Congress wrote and imagin[ed] what it should have written," *United States v. Johnson*, 481 U.S. 681, 702-03 (1987) (Scalia, J., dissenting), and this Court should not "place on the shoulders of Congress the burden of the Court's own

error." *Girouard v. United States*, 328 U.S. 61, 69-70 (1946). *Accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008) ("[I]t is hard to see how the judiciary can wash its hands of a problem it created."). Nor should this Court assume tacit agreement from Congress's inaction since *Feres*. *See Alexander v. Sandoval*, 532 U.S. 275 (2001); *Johnson*, 481 U.S. at 702-03 (Scalia, J., dissenting) (faulting reliance on guesswork about "unlegislated desires of later Congresses"). Ms. Doe respectfully requests her Petition be granted.

ARGUMENT

I. This Case Is an Appropriate Vehicle to Review *Feres.*

The Second Circuit dismissed Ms. Doe's FTCA claims explicitly and exclusively on the basis of *Feres*, making this a proper Petition to reexamine the much-criticized doctrine. The Government nevertheless offers three reasons "this case would be an unsuitable vehicle" to address the Questions Presented. Opp. 6-7. None is persuasive.

First, the Government objects that the FTCA's discretionary function exception may provide an independent basis to affirm the court of appeals decision. Opp. 7. However, when there is an issue independent of the question presented that has not been addressed below, the Court simply grants review of the question presented and, if necessary, remands the case for consideration of the independent issue after answering the question presented. This happens frequently. *See, e.g., Fed. Republic of Ger. v. Philipp*, 141 S. Ct. 703 (2021); *Brownback v. King*, 141 S. Ct. 740 (2021); *Trump v. Mazars*, 140 S. Ct. 2019 (2020); *Trump v. Vance*, 140 S. Ct. 2412 (2020). The Second Circuit did

not reach the Government's discretionary function exception arguments, Pet.App.7a, nor did the district court reach additional arguments advanced by the Government to dismiss the FTCA claims. *Compare* Pet.App.99a-100a *with* Mem. in Supp. of Defs.' Mot. to Dismiss at 19, *Doe v. Hagenbeck*, No. 13-2802 (S.D.N.Y.), ECF No. 16. Because the Second Circuit ruled exclusively on *Feres* grounds, these alternative arguments are irrelevant to whether this case presents an appropriate vehicle to reexamine *Feres*.

Second, the Government objects that this case is a poor vehicle to consider Ms. Doe's second Question Presented, requesting limitations to the *Feres* doctrine, because "petitioner does not develop her argument in support of that request." Opp. 19. The Government misses the mark. The Petition, as a whole, asks the Court to overrule *Feres*, and Ms. Doe's alternative argument offers this Court a narrower option for limiting *Feres*'s overreach in some of the most problematic cases. The argument for limiting *Feres* is the same as for overruling it: *Feres* was wrongly decided and is no longer supported by the policy rationales that purportedly justified it. Moreover, Ms. Doe *did* argue for a narrowing construction on the Government's interlocutory appeal, when she urged that *Feres* should not be applied to torts against cadets at military service academies. It was on this very ground that Judge Chin dissented. Pet.App.66a. Given the sweeping nature of *Feres*, however, courts below generally lack the power to develop limiting constructions of *Feres*. Such limitations are exclusively the purview of this Court.[1]

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[1] Arguments to limit the scope of *Feres* are not novel. *Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) ("While lower courts

Third, the Government argues that a decision in this case might not resolve the many minor circuit splits *Feres* has generated. *See* Opp. 18. Not so. Revisiting *Feres* and clarifying that the meaning of the plain text of the FTCA does not include an "incident to service" exception is likely to resolve many, if not all, of the issues that have divided courts below, as those splits have involved whether particular activities or injuries qualify as "incident to service."[2] Moreover, this case presents an "exceptionally clean vehicle" to revisit *Feres* on the whole. Br. of Protect Our Defenders, et al. as *Amici Curiae* 24. The Second Circuit was clear that its hands were bound exclusively by *Feres*. Pet.App.7a. The Government itself acknowledges "[t]his case is squarely controlled by *Feres* and its progeny." Opp. 7.

This Petition is an appropriate vehicle for this Court to reconsider the *Feres* doctrine.

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are bound by the Supreme Court's decision in *Feres*, they are hardly obliged to extend the limitation."). Courts below remain bound to enforce a "problematic court precedent," *id*., but this Court is not similarly circumscribed. *See Daniel v. United States*, 889 F.3d 978, 982 (9th Cir. 2018) (expressing desire to limit *Feres*, but explaining "only the Supreme Court has the tools to do so"), *cert. denied*, 139 S. Ct. 1713 (2019).

[2] The Government contends there is "no genuine conflict" among the courts of appeals concerning injuries arising out of recreational activities. Opp. 20-21. Yet the courts of appeals themselves have acknowledged the conflict. *See*, *e.g.*, *Regan v. Starcraft Marine LLC*, 524 F.3d 627, 645 (5th Cir. 2008) (explaining it would not bar a recreational claim because while "some courts have gone further than the Supreme Court has indicated is necessary . . . [t]his Circuit has not journeyed as far") (citing *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001)).

II. *Stare Decisis* Does Not Justify Preserving *Feres.*

The Government urges the Court not to revisit the "well-established" *Feres* doctrine. Opp. 9. However, the injustice *Feres* inflicts on servicemembers can no longer be justified. *Feres*'s harsh and confusing results have provoked widespread condemnation and calls for reconsideration from the bench. Pet. 14-16. Indeed, *all* the courts of appeals have criticized the doctrine as they wrestle with its application. Br. of Federal Courts and Constitutional Law Professors as *Amici Curiae* 5. And in recent years, members of this Court have voted to grant certiorari in cases seeking to revisit *Feres*. *See, e.g.*, *Daniel*, 139 S. Ct. at 1713 (Mem.) ("Justice Ginsburg would grant the petition for a writ of certiorari"); *id*. (Thomas, J., dissenting from denial of certiorari).

To be sure, overturning precedent is an "exceptional action" demanding "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). While the quality of a decision's reasoning is a relevant *stare decisis* factor, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478-79 (2018); *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003), revisiting precedent requires more than "an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258, 266 (2014). *Feres* demands exceptional action.

Every s*tare decisis* factor traditionally recognized by this Court weighs in favor of *Feres*'s reconsideration. *Stare decisis* is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). It may yield when: "the analytical underpinnings [of a holding are] substantially weakened," *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997); "where the later law has rendered the decision irreconcilable with competing legal

doctrines or policies," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant . . . justification," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 832, 855 (1992) (plurality opinion); when a decision is unworkable, *id.* at 854; and when those affected by the decision have not detrimentally relied on it. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). In light of these factors, *Feres* is ripe for reconsideration.

A. *Feres*'s Analytical Underpinnings Have Collapsed.

The *Feres* doctrine fails to "contribute[] to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827. Appellate courts are continually vexed that *Feres*'s "incident to service" bar is at odds with the doctrine's purported justifications. *See, e.g., Matreale v. N.J. Dep't of Mil. & Veterans Affs.*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundations upon which it stands."); *Ruggiero v. United States*, 162 F. App'x 140, 142 (3d Cir. 2006) ("[W]e have serious concerns about the analytical underpinnings of the *Feres* doctrine."); *Est. of McAllister v. United States*, 942 F.2d 1473, 1476, 1480 (9th Cir. 1991) ("[*Feres*'s] results have not flowed easily from the doctrine's purported rationales . . . . [W]e follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine."); *Hercules Inc. v. United States*, 24 F.3d 188, 207 (Fed. Cir. 1994) (Plager, J., dissenting) (noting the Court has struggled to find a "reasoned basis" for *Feres*).

Not one of the rationales this Court has offered for *Feres* has stood the test of time. Pet. 17-24; Br.

of Constitutional Accountability Center and The Rutherford Institute as *Amici Curiae* 15-20. The Government concedes this Court has discarded *Feres*'s parallel private liability rationale. Opp. 13 (arguing other rationales "remain[] good law"). And the Government is mistaken that "the particular quantum of compensation" available is irrelevant to *Feres*'s alternative compensation rationale. Opp. 14. The *Feres* Court explicitly noted that veterans' benefits "compare extremely favorably with those provided by most workmen's compensation statutes" in articulating its reasoning. *Feres*, 340 U.S. at 145. That the rape of a servicemember is now "incident to service" under *Feres*, even when no alternative compensation is available for such injuries, Pet. 19, confirms the bankruptcy of *Feres*'s rationales. *See* Br. of National Veterans Legal Services Program and Paralyzed Veterans of America as *Amici Curiae* 19-24.

Finally, contrary to the Government's argument, military discipline—*Feres*'s *post hoc* rationale—would be better served by allowing servicemembers to seek remedy when injured by tortious violations of the military's own regulations, rather than barring them altogether.[3] Pet. 20-23; Pet.App.62a (Chin, J., dissenting). The Government asserts this argument turns the

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[3] The Government asserts that allowing a civilian court to adjudicate Ms. Doe's claims would generate "disruptive effects" by second-guessing military decisions. Opp. 16-17. Yet civilian courts already adjudicate such claims when brought by civilians. *See, e.g.*, *Loritts v. United States*, 489 F. Supp. 1030, 1031 (D. Mass. 1980) (holding civilian raped by cadet while visiting campus could bring FTCA claims against West Point for negligence); *see also Lombard*, 690 F.2d at 233 (Ginsburg, J., concurring in part and dissenting in part) (noting this argument would "preclude any civilian FTCA claim for damages" against the military, which the FTCA clearly allows).

logic of *Feres* and its progeny on its head. Opp. 16. The idea that military discipline can be better served by allowing members of the military to violate their own regulations, injure a fellow servicemember while doing so, and escape any liability for their actions, demonstrates the absurdity of *Feres*'s logic.

B. *Feres* is Irreconcilable with Competing Doctrines and Contemporary Facts.

Feres frustrates civil rights and enforcement of military regulations in ways the *Feres* Court could hardly have anticipated. *See, e.g., Matreale*, 487 F.3d at 159 (applying *Feres* to bar suit by servicemember alleging retaliation for cooperating with sexual harassment investigation); *Stubbs v. United States*, 744 F.2d 58, 61 (8th Cir. 1984) (applying *Feres* to bar claims for sexual assault where assailant threatened military discipline if junior soldier did not submit to his advances); *Wright v. Park*, 5 F.3d 586, 587 (1st Cir. 1993) (applying *Feres* to bar whistleblower's claims involving retaliation for reporting safety violations). The *Feres* Court could not have foreseen that the doctrine would be used to shield the government from liability for the rape or harassment of servicemembers because women were integrated into the military only two years before *Feres* was decided, Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356, and admitted to the service academies decades later. Department of Defense Appropriation Authorization Act, Pub. L. No. 94-106, 89 Stat. 537 (1975). Had Ms. Doe chosen to attend a federally-funded civilian institution, she would have recourse for her injuries under Title IX.[4] Pet.App.43a (Chin, J.,

[4] The Government is wrong that Congress's failure to limit *Feres* by amendment to the National Defense Authorization Act

dissenting). *See also* Br. of Graduates of U.S. Service Academies as *Amici Curiae* 16-18; Br. of National Veterans Legal Services Program and Paralyzed Veterans of America as *Amici Curiae* 11-14.

Feres is also inconsistent with modern understandings of "the right of access to the courts [as] an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); s*ee also Janus*, 138 S. Ct. at 2478 ("This Court has not hesitated to overrule decisions offensive to the First Amendment.") (internal quotation marks omitted).

C. *Feres* is Unworkable.

Feres is not only wrong and antiquated—it is unworkable. The Government denies the existence of confusion in the courts below by asserting they "uniformly understand" *Feres* bars claims for injuries "incident to service." Opp. 17. That assertion evades the problem. "Incident to service" is nowhere defined in the FTCA because that phrase does not appear in the FTCA. Despite seven decades of effort, courts have failed to craft a consistent definition for *Feres*'s "incident to service" bar. And this Court's attempt to salvage *Feres* in *Johnson* "left . . . the lower courts

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for Fiscal Year 2020 confirms *Feres* is "embedded" in the FTCA. Opp. 11-12. "Congressional inaction cannot amend a duly enacted statute." *Patterson*, 491 U.S. at 175 n.1; *see also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."). While inaction may carry some weight where Congress engages in "year-by-year supervision, like tax," *id.*, there is no such ongoing supervision of the FTCA.

more at loose ends than ever." *Taber v. Maine*, 67 F.3d 1029, 1043 (2d Cir. 1995); *see also Ritchie v. United States*, 733 F.3d 871, 878 (9th Cir. 2013) (explaining *Feres* has generated "pained affirmances" and "doctrinal contortions"); *McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007) (acknowledging cases applying *Feres* "defy reconciliation"). Moreover, since *Johnson*, the *Feres* doctrine has created "distortions of other areas of law." *Daniel*, 139 S. Ct. at 1714 (Thomas, J., dissenting from denial of certiorari). And "[c]ontinued adherence to a line of decisions that necessitates such dissembling cannot possibly promote what we have perceived to be one of the central values of the policy of *stare decisis*: the preservation of the actual and perceived integrity of the judicial process." *Holder v. Hall*, 512 U.S. 874, 936-37 (1994) (Thomas, J., concurring) (internal quotation marks omitted).

D. No Reliance Interests Are Threatened.

No private reliance interests would be harmed by reconsideration of *Feres*. While *stare decisis* carries "enhanced force" in the statutory context, Opp. 10, that is true largely because of the reliance interests statutory interpretation engenders. William N. Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1366, 1367 (1988). This is not the case with *Feres*, because its ill-defined "incident to service" bar has generated not clarity but confusion. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (reliance does not weigh in favor of retaining a precedent that "no longer [offers] a clear or easily applicable standard"). "We are dealing with the law of torts, where there can be little if any justifiable reliance." *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 283 (N.J. 1958). To the extent the Government might rely on *Feres* to escape

liability for its negligence, that is not a reliance interest worth protecting. *Wayfair*, 138 S. Ct. at 2098 (explaining *stare decisis* does not protect illegitimate reliance interests like avoiding taxes).

CONCLUSION

This Court has repeatedly declined to revisit *Feres*. Opp. 9. That is a reason to grant certiorari, not to deny it. Wounded servicemembers have suffered the "real-world effects" of *Feres* long enough. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). Unless this Court reconsiders its own error, the injustice wrought by *Feres* will persist. *Feres* has been "tested by experience [and] has been found to be inconsistent with the sense of justice [and] with the social welfare." *Patterson,* 491 U.S. at 174. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

The time to revisit *Feres* is now.

Respectfully submitted,

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March 19, 2021