No. 23-1281

IN THE

Supreme Court of the United States

RYAN G. CARTER, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

For nearly 75 years, Federal Courts have wrestled with the applicability, scope, and rationales of *Feres v. United States*, 340 U.S. 135 (1950). This Petition presents a perfect vehicle and timely invitation to reconsider this unworkable, universally criticized doctrine. The plain text of the Federal Tort Claims Act ("FTCA") waives sovereign immunity and authorizes tort actions against the federal government for the negligence of its employees, while expressly retaining immunity for "claim[s] arising out of the *combatant activities* of the military…*during time of war*." 28 U.S.C. §2680(j) (emphasis added). *Feres* directly conflicts with the plain language meaning of the FTCA, has outgrown its intended purpose and utility, and should be limited or overruled.

Feres neither applies to nor bars Petitioners' congressionally authorized FTCA claims. Mr. Carter's medical negligence claims do not involve any military exigencies, decisions, or considerations; do not intrude upon military affairs; nor will they impact the military's disciplinary structure. Mr. Carter was not involved in the *combatant activities of the military during time of war*, nor were his April 6, 2018, injuries "incident to service"—to the extent an unambiguous, workable definition of "incident to service" exists. There is nothing distinctly military about Mr. Carter's medical negligence claims, the very same claims routinely filed by Mr. Carter's military veteran counterparts under the FTCA.

The medical and surgical delivery systems and patient safety standards employed by one of our nation's largest health care institutions—The Military Health

System—are no different than those of any similarly situated private health care institution. The Hippocratic Oath—"*first, do no harm*"—applies universally to all health care providers – government or private, military or civilian. This duty or standard of care applies to all health care providers, indiscriminately. Why? Because the health care industry recognizes that patient safety is of paramount importance and that medical mistakes are a real, yet preventable crisis plaguing our nation's health care system. According to Johns Hopkins researchers, medical errors are the third leading cause of death in the United States, after heart disease and cancer, accounting for, on average, 251,454 deaths or 9.5 percent of all deaths each year in the United States; a grim statistic from which the Military Health System is certainly not insulated. MA Makary, M Daniel, *Medical error—the third leading cause of death in the US*, BMJ 353:i2139 (May 3, 2016) (acknowledging that reported statistics likely "understate the true incidence" of medical errors nationwide). The FTCA, and tort law as a whole, serves the function of deterring individuals, including military and non-military health care providers alike, from harming others, *i.e.*, patients. The deterrence function of the FTCA, in the medical malpractice context, is critical to patient safety, the wellbeing of our nation's military service members and, in turn, our country's national security. For more than seven decades, the holdings of *Feres* and its progeny have only served to undermine the deterrence function of the FTCA and our tort system of law, to the detriment of our military service members and their families.

Today, an otherwise healthy adult—whether a member of the military, a veteran, or a civilian—should not be injured and paralyzed by the negligent conduct of

trained healthcare professionals, without accountability, remedy, and recourse. Under *Feres*, military service members receive arbitrarily disparate treatment under the law, as compared to both civilians and their ex-military, veteran counterparts—an unworkable and unsustainable byproduct of a judicially engineered legal doctrine.

If a similarly situated veteran had sustained comparable injuries at any government medical facility, including a military hospital like Walter Reed, that individual could bring a civil tort claim against the federal government for medical malpractice under the FTCA, for the very same type of treatment and negligent conduct inflicted upon Mr. Carter. The claim would involve the same proof, the same witnesses, the same standards of care, and the same law. Mr. Carter was an inactive duty serviceman entitled to all the healthcare benefits and rights of recourse of a military veteran or a civilian. Mr. Carter's claims and those of his veteran colleagues are both tangentially related to their military service, yet Mr. Carter's claims are stonewalled by *Feres* while his veteran brothers and sisters are permitted to seek justice, accountability, and recourse under the FTCA. The arbitrary, disparate, and unjust outcomes here, operating with the very same underlying facts, are exactly why *Feres* must be limited or overruled.

The rationales underpinning *Feres* do not apply to Mr. Carter's claims or, quite simply, to any medical malpractice claims asserted by active or inactive duty service members and their families. The *Feres* doctrine has no applicability where an active or inactive duty service member is simply a patient, and the acts or omissions at issue are purely medical, not military,

decisions. Mr. Carter's injuries occurred, not because of any military exigencies or considerations, but because of the failure of Mr. Carter's healthcare providers to follow and implement basic standards of care, standards which are national in scope, and which should be followed by any healthcare provider, military or otherwise, in treating similarly situated patients.

For the reasons outlined in Justice Scalia's *United States v. Johnson*, 481 U.S. 681, 691-703, dissent, *Feres* should be clarified, limited, or overruled. "*Feres* was wrongfully decided and heartily deserves the widespread, almost universal criticism it has received." *Id*. at 700. Failure to act will only serve to renew and validate the federal government's unbridled license for tortious conduct, undermine the deterrence function of the FTCA, implicate and amplify well publicized quality of care and patient safety concerns, and otherwise mandate second-class citizenship to some of our country's most honored and revered citizens—our military service members.

ARGUMENT

A. *Feres* Neither Applies To Nor Bars Petitioners' Congressionally Authorized FTCA Claims.

As of his April 6, 2018, spine surgery, Mr. Carter was a 43-year-old inactive duty Air National Guard Staff Sergeant subject to no military orders—no active duty orders, no medical orders, nor any other orders. On April 6, 2018, Mr. Carter was not engaged in military duties or a military mission; he was inactive; his treatment did not involve any military exigencies, decisions, or considerations; his role was simply that of a civilian

patient seeking medical and surgical care from trained healthcare professionals. It was not until *after* his traumatic spinal cord injury that Mr. Carter's military status was *retroactively* altered from inactive to active duty. Mr. Carter's medical negligence claims are just like those of any similarly situated veteran whose medical care stems from their military service and whose claims are universally permitted under the FTCA. *Feres* simply does not apply.

This Court has laid the foundation for a plain language interpretation of the FTCA with cases like *Brooks v. United States*, a case in which an off-duty military service member was injured by a government employee in a traffic accident and sought recovery for personal injury under the FTCA. 337 U.S. 49 (1949). The *Brooks* Court, employing a plain language interpretation of the FTCA, explicitly declined to find that the FTCA's immunity exemptions applied to an off-duty military service member. The *Brooks* Court concluded that the FTCA provided the District Court with subject matter jurisdiction over certain civil claims and, to the extent that Congress did not waive sovereign immunity for certain claims, such exemptions were codified and written into the plain language of the statute:

> The [FTCA] statute's terms are clear. They provide for District Court jurisdiction over *any claim founded on negligence* brought against the United States. *We are not persuaded that 'any claim' means 'any claim but that of servicemen.'* The statute [has] exceptions. None exclude petitioners' claims. One [exception] is for claims arising in a foreign country. A second

> excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. [] *It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.*

Id. at 51 (emphasis added). The *Brooks* Court concluded that the FTCA was enacted to address the need for adjudication of *all* tort claims, and not just those claims brought by non-service members. *Id.* Moreover, in permitting the *Brooks'* claims under the FTCA, the Court noted that they were "dealing with an accident which had nothing to do with the *Brooks'* army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." *Id.* at 52.

Critically, like the *Brooks* plaintiffs, the negligence in Mr. Carter's case "had nothing to do with [his National Guard] career[, and his], injuries [were] not caused by [his] service except in the sense that all human events depend upon what has already transpired." 337 U.S. at 52. Mr. Carter's spinal cord injury occurred in connection with an elective surgical procedure during which it is alleged that government employees and healthcare providers deviated from the standards of care in negligently placing a spinal disc spacer, permanently traumatizing and injuring Mr. Carter's cervical spinal cord. At the time of the negligence and injury, Mr. Carter was sedated, unconscious, and

immobile, lying on an operating room table, in a hospital surgical suite. Mr. Carter was not involved in the *combatant activities of the military during time of war*, nor were his April 6, 2018, injuries "incident to service."

Because *Feres* was engrafted upon the FTCA by this Court, rather than Congress, only this Court can address the multitude of problems and inequities arising from the decision. The time to revisit *Feres* is now.

B. The Judicially Engineered *Feres* Doctrine and the "Incident To Service" Standard are Ambiguous, Unworkable, and Cannot Be Saved By *Stare Decisis*.

Feres directly conflicts with the plain language meaning of the FTCA and has outgrown its purpose and utility. Even the lone remaining rationale underpinning *Feres*—military discipline—is inadequate to justify the widespread injustice and inequity caused by its arbitrarily disparate and hazardous application. As Justice Scalia wrote in his *Johnson* dissent, "*Feres* was wrongfully decided and heartily deserves the widespread, almost universal criticism it has received." 481 U.S. at 700.

Thus, the only question left to consider is whether *stare decisis* requires the Court to "persist in the [*Feres*] project." *Loper Bright Enterpriser v. Raimondo*, 144 S.Ct. 2244, 2270 (2024). As this Court has reiterated time and time again, *stare decisis* is not an "inexorable command," and the *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, … and reliance on the decision,"—all weigh in favor of letting *Feres* go. *Id*. *Feres* and the "incident to service" standard have proven to be fundamentally

misguided and at odds with the plain language of the FTCA. The *Feres* flaws—apparent from the start—have caused the Federal Courts to struggle with the applicability, scope, and rationale of an ambiguous and unworkable legal doctrine with disparate, unpredictable, and unreliable results.

Experience—perhaps the best available litmus test—has shown that *Feres* is unworkable, demonstrably wrong, and impossible to rein in. The defining feature of its framework is the identification and categorical rejection of claims and injuries determined to be "incident to service." Yet, "incident to service" is nowhere defined in the FTCA because that phrase does not appear in the FTCA. And without any statutory text to serve as a guide, lower courts are understandably confused and no closer to defining the "incident to service" standard than they were seven decades ago. The "incident to service" standard is a nebulous and unreliable term of art concocted by the *Feres* Court, without a consistent, workable definition. The result? For nearly 75 years, the deterrence function of the FTCA has been undermined; the quality of medical care and safety of our military service members and, in turn, our country's national security, remain at increased risk; the courthouse doors have been closed to tortiously injured military service members and their families, without recourse, accountability, and justification; and the Federal Courts remain split and confused on the doctrine's applicability, scope, and underlying rationales. S*ee*, *e.g.*, *United States v. Brown*, 348 U.S. 110 (1954); *Bradley v. United States*, 161 F3d 777 (4th Cir. 1998); *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988). The constantly evolving and expanding implications of *Feres* have been vast, catastrophic, and unpredictable. *See*, *e.g.*, *Lanus v.*

United States, 570 U.S. 932 (2013) (Thomas, J., dissenting from denial of certiorari); *Daniel v. United States*, 587 S.Ct. 1713 (2019) (Thomas, J., dissenting from denial of certiorari); and *Doe v. United States*, 141 S.Ct. 1498 (2021) (Thomas, J., dissenting from denial of certiorari). The time to act is now.

There is no reason to wait helplessly for Congress to correct this Court's mistake, as this Court has jettisoned many precedents that Congress could have legislatively overruled. *See Loper Bright*, 144 S.Ct. at 2272 (citing *Patterson v. McLean Credit Union*, 485 U.S. 617, 618 (1988)). It is this Court's intrinsic obligation to admit and in certain cases correct the Court's own mistakes, especially when those mistakes are serious. *Id*. *Feres* is one of those very mistakes—a judicial invention whereby this Court made a policy judgment that members of the military should not be permitted to sue for injuries incident to their military service. The only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion…is for [this Court] to leave [*Feres*] behind." *Id*. at 2272-73.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the Supreme Court of the United States grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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