No. 23-1281

IN THE

Supreme Court of the United States

RYAN G. CARTER AND KATHLEEN E. COLE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SAVE OUR SERVICEMEMBERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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 20 million veterans and servicemembers with the federal benefits 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 servicemembers are denied relief for such grievous injuries as Mr. Carter's.

Save Our Servicemembers (SOS) is an independent, nonprofit organization that was founded in 2020 by Gold Star and military families with a loved one who either died or was seriously injured at the start of their military career. SOS advocates for victims of military medical malpractice and negligence and seeks to provide a voice for future generations of servicemembers to ensure they are aware of their rights while on active duty.

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[1] The parties were notified of the intention to file this brief per Rule 37.2. 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.

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, 146 (1950). This judicially created exception to liability reflects an unjustified reluctance by the judiciary to interfere in any military matters, as well as an outdated view that the military's relationship with servicemembers is fundamentally different from other societal relationships that can create legal liabilities, such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 2 million U.S. servicemembers, which represents about 0.5 percent of the U.S. population. Judicial policy concerns regarding "depleting of the public treasury," as noted in *Feres*, 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."

Here, the court of appeals arguably extended *Feres* even further, as Petitioner Ryan Carter was not in any military duty status at the time of his surgery. He was a member of the Maryland Air National Guard. Having left federal service on March 13, 2018, Mr. Carter was not in any authorized duty status on April 6, 2018. *See* Air National Guard Instruction (ANGI) 36-2001, *Management of Training and Operational Support Within the Air National Guard*, para. 1.3 (Apr. 30, 2019). As a Guardsman not in federal service, he was not subject to the Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 802(a)(3)(A)(ii). Moreover, his military technician (dual status) position was a "Federal civilian employee" position, 10 U.S.C. § 10216(a)(1), that required Mr. Carter to "be in an off duty or official leave status" to undertake his military duties, ANGI 36-2001, para. 2.7. At the time of his surgery, he was more civilian than servicemember. Yet the court of appeals deemed his injury "incident to service" under *Feres* and denied him access to FTCA relief.

Amici agree with Petitioners that this case presents an excellent opportunity for this Court to revisit the *Feres* doctrine. Medical malpractice during elective surgeries while not in any duty status certainly should not be considered "incident to service," and immunity for botched surgeries that render servicemembers quadriplegic is particularly unwarranted.

This Court should therefore take this opportunity to overrule *Feres* and its progeny. (Part I.) The *Feres* Court's original rationales cannot survive given the dramatic changes in American military forces since the end of World War II. (Part II.) Not only has the military changed dramatically, but military benefits have failed to keep pace with civil remedies. (Part III.) And the military's robust discipline system does not require the *Feres* doctrine's protection. (Part IV.) *Feres* no longer serves the judicial policy preferences that birthed it.

ARGUMENT

I. *Feres* Should Be Overruled.

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). "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 Mar. 2024), https://doi.org/10.1093/OED/8716146566.

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: "It would be one thing if Congress itself were responsible for this incoherence. But Congress set out a comprehensive scheme waiving sovereign immunity that we have disregarded in the military context for nearly 75 years. Because we caused this chaos, it is our job to fix it." *Clendening v. United States*, 143 S. Ct. 11, 14 (2022) (Thomas, J., dissenting from denial of certiorari); *accord Doe v. United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting from denial of certiorari); *Daniel v. United States*, 139 S. Ct. 1713, 1713-14 (2019) (Thomas, J., dissenting from denial of certiorari); *Lanus v. United States*, 133 S. Ct. 2731, 2731-32 (2013) (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 (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) ("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.") (citation omitted).

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. Carter'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 medical malpractice, *Ortiz*, 786 F.3d 817, and sexual assaults by fellow soldiers, *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014). None of these are "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. "[I]n *Feres*, this Court invented an atextual, policy-based carveout that prevents servicemen from taking advantage of the FTCA's sweeping waiver of sovereign immunity." *Clendening*, 143 S. Ct. at 12 (Thomas, J., dissenting from denial of certiorari). 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. Carter's injuries. Elective surgery at a U.S. military hospital should not leave a servicemember permanently disabled, and a judge-made doctrine should not immunize such extreme medical malpractice. This case exemplifies "the unfairness and irrationality [*Feres*] has bred." *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting).

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

The *Feres* Court justified its decision in part based on its belief that the relationship between servicemembers and the federal government was unique. *Feres*, 340 U.S. at 143; *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 the *Feres* Court considered, and the expansion of non-combat-related military services has blurred the distinction the Court described.

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 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*. 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 U.S. military became an all-volunteer force, today comprising just 0.5 percent of the population. *Demographics of the U.S. Military*, Council on Foreign Relations (July 13, 2020), https://tinyurl.com/y27hn3bt. 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 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, *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 also on their families. Today, 2.1 million servicemembers come with 2.6 million family members. Dep't of Defense, *2020 Demographics: Profile of the Military Community*, at 97 (2020), https://tinyurl.com/4jx2bm2z. 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 recruitment and retention needs. 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, 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." 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; studying at service academies; living in military housing; and participating in military-sponsored recreational activities. 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

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*, at 1 (Mar. 4, 2024), https://tinyurl.com/3r89ybpz (hereinafter Defense Primer).

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." 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. *Id.* at 1, 16. Many servicemembers are entirely reliant on this system. Turley, *supra*, at 58-59; *see also* Defense Primer at 1-2. 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., 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. 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

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 nineteen years after the Revolutionary War ended. "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 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/56c2hfyv. 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 v. Hagenbeck*, 870 F.3d 36, 44-49 (2d Cir. 2017).

Housing is another key service offered to military personnel. Junior enlisted servicemembers without a spouse or child typically live in military-managed barracks. In September 2023, the Government Accountability Office reported that some barracks pose serious health and safety risks. U.S. GAO, *Military Housing: Strengthened Oversight Needed to Make and Sustain Improvements to Living Conditions*, Testimony Before the Quality of Life Panel, House Committee on Armed Services (Sept. 27. 2023), https://tinyurl.com/35cyhcbs. The DoD also oversees more than 200,000 family housing units, and approximately one-third of military families live on base. U.S. GAO, *Military Housing: DOD Can Further Strengthen Oversight of Its Privatized Housing Program*, at 1 (Apr. 6, 2023), https://tinyurl.com/5dbtpw5x.

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.

About 4,500 plaintiffs filed claims in federal court seeking damages for injuries caused by Camp

Lejeune's toxic water, *id.*, but *Feres* barred those 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.[2]

Feres also bars recovery for activities that servicemembers engage in when they are decidedly off-duty. As part of the "new social contract," the military began subsidizing entertainment and recreational activities. *See* Dep't of Defense*, A New Social Compact: A Reciprocal Partnership Between the Department of Defense, Service Members and Families*, at 70 (2002). And 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." *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.").

C. The Military's Structural Change

Not only has the military shrunk numerically and expanded benefits since the 1950s, but its structure

[2] Congress recently enacted an exception to *Feres* for Camp Lejeune toxic exposure claims, but it 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.

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 subject to *Feres*. 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).

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

Another main rationale behind the *Feres* doctrine was the availability of military benefits for service-related injuries or deaths. This compensation system was considered a viable alternative—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 workmen'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 medical malpractice, and has not been an adequate alternative to civil tort liability. Indeed, this case highlights how *Feres*'s outdated military-benefits rationale harms servicemembers.

First, the military compensation system is not comparable to civil litigation in terms of recovery amounts or deterrent effects. In wrongful death cases, for example, benefits provided to servicemembers and their families pale in comparison to possible recover-

ies 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); 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). "[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 servicemembers' injuries or deaths was "simple, certain, and uniform." *Feres*, 340 U.S. at 144. In *Johnson*, the Court reiterated that assumption, 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 June 22, 2024, nearly one million claims were pending before the agency. *See* Dep't of Veterans Affairs, *Veterans Benefits Administration Reports*, https://tinyurl.com/vs2xm82b; Board of Veterans' Appeals Quarterly Reports, https://tinyurl.com/555n7ewb. Nor does VA's compensation system resemble the

simple process noted in *Feres*. *See Martin v. O'Rourke*, 891 F.3d 1338, 1341-42 (Fed. Cir. 2018) (describing complicated VA benefits process, including "often-significant periods of delay").

Regarding medical malpractice cases, Congress recently enacted a limited exception to the *Feres* doctrine. The National Defense Authorization Act for Fiscal Year 2020 allows servicemembers to bring administrative claims "for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider." 10 U.S.C. § 2733a(a) (2019). Although a positive development, 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 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).

Finally, the military compensation system does not hold tortfeasors accountable or adequately deter future misconduct. "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 medical malpractice claims in a public forum also has a deterrent effect. *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).

Tort liability 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). And it is an effective tool: "Well-designed malpractice liability can optimally deter error by giving medical providers direct financial incentives to make cost-effective investments in patient safety." Jennifer Arlen, *Contracting Over Liability: Medical Malpractice and the Cost of Choice*, 158 U. Pa. L. Rev. 957, 959 (2010).

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." Andrew F. Popper, *Rethinking* Feres*: Granting Access to Justice for Service Members*, 60 B.C. L. Rev. 1491, 1496 (2019). "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.*

IV. Military Discipline Does Not Require *Feres*'s Atextual Protection.

Although not an original justification for *Feres*, over the last forty years, military discipline has be-

come the predominant rationale. But this belated reasoning—premised on purported judicial incompetence to review military-related questions—ignores the robust arsenal of disciplinary tools at a commander's disposal. Military commanders need no more than their existing judicial and cultural resources to preserve military discipline. *Feres* provides no meaningful additional protections.

A. Military discipline was a post hoc *Feres* rationale.

When this Court decided *Feres*, it did not rely on any purported risk to military discipline. 340 U.S. at 142-44. It first cited that potential threat four years later in *United States v. Brown*, 348 U.S. 110, 112 (1954) (declining to apply *Feres* because the veteran claimant was not "on active duty or subject to military discipline").

Over time, this after-the-fact discipline justification has displaced the original *Feres* reasoning. In the mid-1980s, this Court recharacterized as the "core" *Feres* concerns whether a suit implicated military decision-making and "essential military discipline." *United States v. Shearer*, 473 U.S. 52, 57-58 & n.4 (1985) (describing original *Feres* factors as "no longer controlling"); *see Johnson*, 481 U.S. at 698 (Scalia, J., dissenting) ("[W]e have repeatedly cited the later-conceived-of 'military discipline' rationale as the 'best' explanation for" the *Feres* doctrine.). As the district court here recognized, "in analyzing the applicability of the *Feres* doctrine, courts have focused in large part on the rationale as to military structure and discipline." Pet. App. 32a.

This concern turns on the belief that lawsuits by servicemembers will erode "obedience to orders" and "more generally duty and loyalty to one's service and to one's country." *Johnson*, 481 U.S. at 691; *see Kendrick v. United States*, 877 F.2d 1201, 1205 (4th Cir. 1989). This concern was driven by fear of "erroneous judicial conclusions" that would "becloud military decisionmaking" or, even if correct, would nonetheless "disrupt the military regime." *United States v. Stanley*, 483 U.S. 669, 682-83 (1987); *see* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962) ("Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.").

B. Military discipline is not so fragile as this rationale suggests.

This concern with preserving servicemembers' obedience is misplaced. Contrary to the implication that military discipline is either too fragile or too opaque to warrant judicial intervention, Congress has long provided the military with robust disciplinary tools. *Parker v. Levy*, 417 U.S. 733, 744 (1974) (recognizing the purpose of military justice "to maintain the discipline essential to perform its mission effectively").

Congress enacted the UCMJ and its predecessor Articles of War to ensure punishment of disobedient or disruptive behavior that undermines a unit's cohesion, effectiveness, and sense of duty. David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129, 145-60 (1980). Indeed, the mili-

tary "can try service members for a vast swath of offenses." *Ortiz v. United States*, 585 U.S. 427, 438 (2018). Military-specific offenses include a servicemember's disobedience to an order or regulation, 10 U.S.C. § 892, or willful disobedience to an officer, *id.* § 890. Beyond acts of disobedience, the UCMJ authorizes punishment for disrespectful behavior. *Id.* § 889 (disrespectful behavior to a superior officer); *id.* § 891 (insubordinate behavior to a warrant officer, noncommissioned officer, or petty officer). Particularly relevant to cases in which a servicemember may allege physical injury, the UCMJ also authorizes commanders to punish malingerers—those who feign illness or disability intending to avoid military duties. *Id.* § 883.

For other disruptive behavior, military commanders may punish "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." *Id.* § 934. Moreover, conduct that violates "military tradition, necessity, and experience" may be punished if the requisite adverse impacts are proved. *United States v. Martinez*, 42 M.J. 327, 330 (C.A.A.F. 1995) (affirming conviction of airman who loaned his car to a drunk driver who was killed driving it). This legal code ensures that the military's "law is that of obedience." *In re Grimley*, 137 U.S. 147, 153 (1890).

Military commanders incorporate these punitive articles into a variety of proceedings, from relatively swift "non-judicial punishments" through general courts-martial. *See* 10 U.S.C. § 815 (authorizing limited pay forfeitures and temporary arrest in quarters); *id.* § 817 (authorizing imprisonment and capital

punishment); 1 David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1–6(B), p. 39 (9th ed. 2015). Commanders can also avail themselves of non-punitive sanctions—like letters of reprimand—for minor misconduct or offenses resulting in civilian prosecutions. A formal written reprimand can result in a servicemember being passed over for promotion and separated from service.

Commanders therefore have an arsenal of effective measures with which to preserve discipline and punish any breaches. The much more remote effects of the *Feres* doctrine do not meaningfully enhance this military discipline.

C. Duty and obedience are bedrock military values.

Apart from the punitive measures Congress has provided through the UCMJ, the military instills duty and obedience into every recruit. Recruiting from an ethnically, culturally, and religiously diverse American population, the military creates a cohesive band of brothers and sisters by supplanting members' external identifiers with military values. Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. Rev. 1, 112-30 (2002) (describing the "[h]abituation of [c]ultural [n]orms" within the military). Recruits adopt a uniform that minimizes differences, enhances morale, and creates the appearance of homogeneity. *See, e.g.,* Army Regulation (AR) 670-1, para. 1-1 (Jan. 26, 2021) ("Proper wear of the Army uniform … is indicative of esprit de corps and morale within a unit."). This indoctrination creates "a specialized society separate from civilian society," one that conditions its

members to meet the "'overriding demands of discipline and duty.'" *Parker*, 417 U.S. at 743-44 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

As a result of this assimilation, recruits embrace core values of loyalty, duty, honor, and integrity, all harnessed to the collective pursuit of national defense. *See, e.g.*, AR 600-20, *Army Command Policy*, ch. 4 (July 24, 2020); AR 600-100, *Army Profession and Leadership Policy*, paras. 1-5–1-7 (Apr. 5, 2017); Exec. Order No. 12633, *Amending the Code of Conduct for Members of the Armed Forces of the United States* (Mar. 28, 1988). Along with the military's robust justice system, this unique military culture reinforces the discipline expected from every servicemember.

In the event a servicemember's disgruntlement over civil litigation leads to unprofessional conduct, the military can take care of its own. Servicemembers routinely continue their duties after personal or professional loss or disappointment. Furthermore, where, as here, a grievous injury renders a servicemember's return to duty impossible, there can be no reasonable prospect that the servicemember will break faith with and put at risk his or her fellow servicemembers. The *Feres* doctrine does not meaningfully improve military discipline but works a substantial injustice to injured servicemembers. As Justice Scalia observed, "I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not

mean what it plainly said in the statute before us." *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting).

CONCLUSION

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

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