No. 20-559

IN THE

Supreme Court of the United States

JANE DOE, *Petitioner*,

v.

UNITED STATES, *Respondent*.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees, including meaningful access to the courts. CAC also works to ensure that courts remain faithful to the text and history of important federal statutes like the Federal Tort Claims Act. Accordingly, CAC has a strong interest in ensuring that the Federal Tort Claims Act is understood, in accordance with its text and Congress's plan in passing it, to permit servicemembers to file suit against the United States for injuries that arise out of activities that are deemed incident to their service.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose rights are violated and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States. The Institute is interested in the instant case because it seeks to remove a legal impediment that has for many years unfairly denied military personnel the justice and compensation for injuries to which they are entitled under the terms of the Federal Tort Claims Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Jane Doe enrolled in the Military Academy at West Point in 2008, where she excelled as a cadet, but was subjected to pervasive sexual harassment and a culture of misogyny and sexual violence. Pet. 3-4. Late one evening during her second year at West Point, Doe was raped by a fellow cadet during a recreational walk on campus. *Id.* at 5. After West Point authorities failed to appropriately respond to Doe's report of the rape in accordance with Department of Defense policies, Doe withdrew from the Academy and filed suit against the United States, invoking, as relevant here, the Federal Tort Claims Act (FTCA). The FTCA waives the United States' sovereign immunity in suits "for money damages . . . 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)(1).

The district court dismissed Doe's lawsuit on the basis of this Court's decision in *Feres v. United States*, which held that "the Government is not liable under the [FTCA] for injuries to service[members] where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). The court below affirmed. This Court should grant the petition

and reverse because *Feres* was wrongly decided and should be overturned. The sweeping bar to recovery for servicemembers that this Court adopted in *Feres* is at odds with the text and history of the FTCA, as well as Congress's plan in passing it.

First, as Justices of this Court have previously recognized, the *Feres* doctrine directly contravenes the text of the FTCA. *See, e.g.*, *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) (criticizing the *Feres* Court's analysis and concluding that there is no valid "justifi[cation for] our failure to apply the FTCA as written"); *Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019) (Thomas, J., dissenting from the denial of certiorari) (stating that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received" (quoting *Lanus v. United States*, 570 U.S. 932, 933 (2013) (Thomas, J., dissenting from denial of certiorari))). The FTCA's text grants a broad waiver of sovereign immunity for common law tort claims, reflecting Congress's desire to "provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States." *Brooks v. United States*, 337 U.S. 49, 51 (1949) (emphasis added). Nothing in the text of the statute remotely suggests that "'any claim' means 'any claim but that of service[members].'" *Id.* To the contrary, the statute specifically includes language respecting claims brought by servicemembers. *See* 28 U.S.C. § 2671 (defining "[f]ederal agency" to include "the military departments," "[e]mployee of the government" to include "members of the military or naval forces of the United States," and "[a]cting within the scope of his office or employment" to mean "acting in [the] line of duty").

Moreover, the exceptions enumerated in the text of the FTCA demonstrate that Congress deliberately chose not to exclude claims of servicemembers that arise "incident to service." In particular, the FTCA bars "[a]ny claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j) (emphasis added). That provision demonstrates Congress's intent to limit the exception to the FTCA's waiver of sovereign immunity to the narrow circumstances of combatant activities. The *Feres* doctrine renders that exception superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

The history of the FTCA reinforces this conclusion. The FTCA was enacted for the express purpose of bringing uniformity to a scattershot scheme of private bills brought by individuals seeking to hold the United States liable for torts at common law. S. Rep. No. 79-1400, at 30 (1946); *accord* H.R. Rep. No. 79-1287, at 2 (1946). Indeed, Congress specifically criticized that haphazard system as the product of inconsistent legislative grace. *See* S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 2. The *Feres* doctrine introduces that same inconsistency into the scheme of the FTCA, barring servicemembers from recovering for torts that are *identical* to those suffered by non-servicemembers, but that happened to occur, say, on a military academy's campus.

Moreover, between 1925 and 1935, eighteen separate bills waiving the United States' sovereign immunity for tort claims were introduced in Congress, and all but two contained exceptions denying recovery to servicemembers across the board. *See Brooks*, 337 U.S. at 51-52. The absence of such language in the final version of the FTCA demonstrates that Congress deliberately chose not to exclude claims of servicemembers, except for "claim[s] arising out of . . . combatant

activities . . . during time of war," 28 U.S.C. § 2680(j). Notably, this exception was the result of a last-minute amendment which aimed to clarify that servicemembers should be able to bring claims for *non*-combatant activities. 92 Cong. Rec. 10,093 (1946) (statement of Rep. Monroney).

Finally, this Court should also grant the petition because the Court's three policy justifications in *Feres* for the "incident to service" exception are wholly disconnected from the text of the statute and defy settled principles of statutory interpretation. Indeed, this Court has since abandoned all three of its original rationales for the "incident to service" bar and has subsequently suggested that the *Feres* doctrine somehow maintains orderly discipline in the military. This post hoc rationalization, like the ones that came before it, is a poorly veiled attempt to justify an exception that Congress never legislated. The *Feres* Court (or subsequent Courts) may have thought the "incident to service" exception would ameliorate the ability of the military to competently manage its discipline and affairs, but that judgment is irrelevant, given that Congress apparently did not share it.

Because *Feres* has no basis in the FTCA's text and history, this Court should grant the petition and overturn that decision.

ARGUMENT

I. *FERES* IS INCOMPATIBLE WITH THE TEXT AND HISTORY OF THE FTCA.

A. The "Incident to Service" Exception Contravenes the Text of the FTCA.

"Statutory interpretation, as we always say, begins with the text," *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), and "[w]hen the words of a statute are

unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). The Court in *Feres* discarded this controlling principle of statutory construction when it decided, in contravention of the FTCA's unambiguous text, that individuals cannot bring claims for injuries that "arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146.

The FTCA waives the United States' sovereign immunity in suits "for money damages . . . 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)(1). The statute provides that "[t]he United States *shall* be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674 (emphasis added). "Read as it is written, this language renders the United States liable to *all* persons, including service[members], injured by the negligence of Government employees." *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting).

Nothing in the text of the FTCA even remotely suggests that servicemembers' claims incurred "incident to service" should be excluded from the statute's broad waiver of sovereign immunity. Indeed, the phrase "incident to service" appears nowhere in the statute, and appears to have been created out of whole cloth by the *Feres* Court. *See* 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2411, 2412, 2671-80 (never using the phrase "incident to service"); *Brooks*, 337 U.S. at 53 (noting that the "literal language" of the FTCA does

not mention claims arising out of activities "incident to service").

Other aspects of the statutory scheme reinforce the conclusion that the FTCA should apply to the claims of servicemembers, just as it applies to those of private individuals. As an initial matter, Congress included in the definition of "[e]mployee[s] of the Government" whose acts may give rise to liability "members of the military or naval forces of the United States" and "members of the National Guard while engaged in training or duty." 28 U.S.C. § 2671. Congress also specified that its use of the term "[f]ederal agency" throughout the FTCA was intended to refer to, *inter alia*, "the military departments." *Id.* Finally, Congress expressly stated that "[a]cting within the scope of . . . employment" under the FTCA means, for members of the military, "acting in [the] line of duty." *Id.* The "incident to service" exception is in substantial tension with these statutory provisions.

Importantly, the FTCA also contains thirteen enumerated exceptions to its waiver of sovereign immunity, none of which bar claims of servicemembers arising "incident to service." *See* 28 U.S.C. § 2680(a)-(n). This Court has long held that "[w]here Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)); *see, e.g.*, *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (declining to read an equitable tolling exception into the tax code's time limits because "explicit listing of exceptions . . . indicate[s] to us that Congress did not intend courts to read other unmentioned . . . exceptions into the statute that it wrote"). This is especially so when the exceptions are "lengthy, specific, and close to the present problem." *Brooks*, 337 U.S. at 51. Such

is the case here—in particular, the exception in subsection (j) explicitly applies to servicemembers, but only bars "claim[s] 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) (emphases added). It was thus improper for the Court to read an exception into the statute that bars the claims of servicemembers on a broader basis than this exception in the statutory text. *See* John Astley, Note, United States v. Johnson*:* Feres *Doctrine Gets New Life and Continues to Grow*, 38 Am. U. L. Rev. 185, 195-96 (1988) ("Because the [FTCA] does not contain an exception excluding military suits, the *expressio unius est exclusio alterius* principle of statutory construction implies that Congress did not intend to create such an exception." (footnotes omitted)); *cf. TRW Inc.*, 534 U.S. at 28 (refusing to read an exception into the Fair Credit Reporting Act that would sweep more broadly than those explicitly enumerated in the statute).[2]

This Court has also repeatedly explained that "[a] statute should be construed so that effect is given to

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[2] Two additional enumerated exceptions might apply to servicemembers under narrower circumstances than the *Feres* exception. Subsection (k) bars "[a]ny claim arising in a foreign country," which might preclude the claim of a servicemember arising while on deployment or stationed outside of the United States. 28 U.S.C. § 2680(k). Another enumerated exception excludes "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function," which might preclude the tort claim of a servicemember stemming from discretionary decisions made by his or her higher ranking commanders. *Id.* § 2680(a); *cf.*, *e.g.*, 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, 8 (2003) (arguing that Congress, through these exceptions and the "combatant activities" exception, focused on the core military functions that it sought to protect from the distraction of civil litigation).

all its provisions, so that no part will be inoperative or superfluous." *Hibbs*, 542 U.S. at 101; *see Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (canon against surplusage is at its "strongest" where, as here, "an interpretation would render superfluous another part of the same statutory scheme"). Yet here, *Feres*'s exception for claims "incident to service" renders the "combatant activities" exception superfluous: if all claims "incident to service" were barred by the FTCA, then claims "arising out of the combatant activities of the military or naval forces" would necessarily be barred as well. This Court should reject the *Feres* doctrine in order to properly "give[] effect to every clause and word" of the FTCA, *Marx*, 568 U.S. at 385 (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011)), including the "combatant activities" exception in § 2680(j).

In sum, as the text of the FTCA makes clear, "Congress used neither intricate nor restrictive language in waiving the Government's sovereign immunity" pursuant to that statute. *United States v. Muniz*, 374 U.S. 150, 152 (1963). The FTCA is a broad remedial statute and, consistent with this Court's precedents, its exceptions must be construed narrowly and with fidelity to their text. *See Dalehite v. United States*, 346 U.S. 15, 30-31 (1953) ("[The FTCA] is another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule. . . . In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception."), *abrogated on other grounds by Rayonier Inc. v. United States*, 352 U.S. 315, 319 (1957). Thus, as this Court emphasized in a case decided just seven years after *Feres*, "[t]here is no justification for this Court to read exemptions into the

Act beyond those provided by Congress." *Rayonier*, 352 U.S. at 320.

"[W]hen the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020). The Court in *Feres* looked to the text of the FTCA and found no language precluding claims "incident to service." *See* 340 U.S. at 138-39. The Court should have ended its inquiry there, and this Court should correct that error.

B. The History of the FTCA Demonstrates That It Does Not Bar Claims "Incident to Service."

The history of the FTCA further demonstrates that claims "incident to service" should not be excepted from the FTCA's waiver of sovereign immunity.

1. The FTCA was enacted for the express purpose of "waiv[ing] the Government's traditional all-encompassing immunity from tort actions and . . . establish[ing] novel and unprecedented governmental liability." *Rayonier*, 352 U.S. at 319. Prior to the enactment of the FTCA, the federal government was subject to damages suits for breach of contract, admiralty torts, and maritime torts, but not common law torts. S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 1. If individuals sought relief from the government for common law torts, their only recourse was to seek a private bill, which would either make a direct appropriation for the payment of the claim or remit the claimant to suit in either the Court of Claims or a United States district court. S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 1-2.

Congress found that this system was both "unduly burdensome to the Congress" and "unjust to the claimants, in that it [did] not accord to injured parties a recovery as a matter of right but base[d] any award that

may be made on considerations of grace." S. Rep. No. 79-1400, at 30; *see Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."). Thus, Congress's plan in passing the FTCA was to remedy these defects by creating a "continually operating machinery for the consideration of [tort] claims" against the federal government. S. Rep. No. 79-1400, at 30; *accord* H.R. Rep. No. 79-1287, at 2.[3]

The *Feres* doctrine frustrates Congress's legislative plan for a consistent system of adjudicating tort claims by reintroducing the caprice and inconsistency inherent in the federal tort scheme that predated the FTCA. With *Feres*, the Court created "a massive gap between the legal worth of injuries incurred by service members and non-service members," producing an "extreme form of nonuniformity" within "the universe of litigation against the government." Turley, *supra*, at 13. This very case illustrates the point: Doe was prevented from seeking relief not because her claim lacked merit, but simply because her rape, and the authorities' mishandling of it, happened to occur at West Point instead of a non-military college. *See* Pet. App. 43a (Chin, J., dissenting) ("If West Point were a private college receiving federal funding or another public

[3] To be sure, the Court in *Feres* noted that "Congress was suffering from no plague of private bills on the behalf of military and naval personnel" at the time of the enactment of the FTCA, 340 U.S. at 140, but that fact hardly supports reading the FTCA to bar claims on behalf of military and naval personnel arising "incident to service" when no such bar appears in the statutory text.

educational institution and allegations such as these were proven, there clearly would be a violation of Doe's rights and she could seek recourse for her injuries."). Congress enacted the FTCA for the explicit purpose of avoiding such incongruous scenarios.

2. In addition, the history of the FTCA's enactment demonstrates that Congress deliberately chose not to except claims of servicemembers "incident to service." Between 1925 and 1935, members of Congress introduced eighteen separate bills waiving the United States' sovereign immunity for tort claims, and all but two contained exceptions denying recovery to all members of the armed forces. *See Brooks*, 337 U.S. at 51-52; *Feres*, 340 U.S. at 139. Congress was thus well aware of the language and justifications for excluding servicemembers from the FTCA's coverage when it passed the statute, but it chose not to include such language in the final text of the statute. Put a different way, the history of the FTCA demonstrates that the absence of an "incident to service" exception was not a mere oversight by Congress but a deliberate choice, given Congress's familiarity with such exceptions. *See* 86 Cong. Rec. 12,019 (1940) (statement of Rep. Celler) (stating during House debate regarding an earlier version of the FTCA that immunity was waived except in the case of those exceptions explicitly set forth in the bill).

Moreover, the House debate on the "combatant activities" exception further demonstrates that Congress deliberately intended military-personnel claims arising from *non*-combatant activities to be covered by the statute. Originally, the proposed statutory language excluded from the FTCA's waiver of sovereign immunity "[a]ny claim arising out of the activities of the military or naval forces, or the Coast Guard, during time of war." 92 Cong. Rec. 10,093 (1946). During floor

debate on the bill, Representative Mike Monroney offered an amendment adding the word "combatant" before "activities," and it was accepted by the House without further debate. *See id.* (statement of Rep. Monroney). That amendment makes clear that noncombatant military activities—such as going for a recreational walk on West Point's campus—were not exempted from the FTCA's coverage, even if they occurred during times when the United States was at war.

3. Finally, this Court should not infer anything from Congress's failure to pass legislation overruling the *Feres* doctrine in its entirety, even though it has periodically held hearings on the topic. *See* Kevin M. Lewis, Cong. Research Serv., R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview* 39 (2019) (noting that the House Armed Services Committee's Subcommittee on Military Personnel held a hearing regarding *Feres* as recently as April 2019). That is because "several equally tenable inferences may be drawn from such inaction." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (failure to enact legislation could reflect anything from "inability to agree upon how to alter the status quo" to "indifference to the status quo"). Here, for instance, even if Congress believed that the Court's decision in *Feres* was at odds with a proper interpretation of the FTCA, perhaps Congressmembers could not agree on whether to act incrementally by narrowing the *Feres* doctrine in particular realms most frequently criticized by scholars and advocates, *cf.* Ann-Marie Woods, Note, *A "More Searching Judicial Inquiry": The Justiciability of Intramilitary Sexual Assault Claims*, 55 B.C. L. Rev. 1329, 1331-32 (2014) (arguing that *Feres* should not

bar claims of military sexual assault victims), or to overrule the doctrine in its entirety, *cf. Ritchie v. United States,* 733 F.3d 871, 878 (9th Cir. 2013) ("We can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long [as the *Feres* doctrine].").[4]

In any event, "[t]he unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA could hardly have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946." *Johnson*, 481 U.S. at 702-03 (Scalia, J., dissenting). Fundamentally, there is no "incident to service" exception anywhere in the text of the FTCA, so Congress should not bear the burden of passing legislation that would, in effect, merely point out that the "incident to service" exception was never part of the FTCA in the first place.

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The *Feres* doctrine is plainly inconsistent with the FTCA's text and history. Moreover, as the next Section discusses, the justifications the Court gave in

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[4] In the National Defense Authorization Act for Fiscal Year 2020, Congress did permit servicemembers to file tort claims incurred "incident to . . . service" against the United States for "the medical malpractice of a Department of Defense healthcare provider." 10 U.S.C. § 2733a(a). However, this provision was designed to address one specific problem, not to revisit the FTCA as a whole, and as this Court has explained, "when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, . . . '[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.'" *Alexander v. Sandoval*, 532 U.S. 275, 292-93 (2001) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).

Feres for creating the doctrine out of whole cloth do not withstand scrunity.

II. THE SUPREME COURT'S JUSTIFICATIONS FOR THE *FERES* DOCTRINE ARE UNSUPPORTED BY THE STATUTORY TEXT AND REFLECT AN IMPROPER EFFORT TO SUBSTITUTE THE COURT'S JUDGMENT FOR THAT OF CONGRESS.

Finding no support in the text or history of the FTCA justifying the "incident to service" exception, the *Feres* Court gave three policy reasons for creating such an exception: (1) a lack of "parallel liability" for private parties, *Feres*, 340 U.S. at 142, (2) the "distinctively federal" relationship between the federal government and its servicemembers, *id.* at 143 (quoting *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305 (1947)), and (3) the duplicative and preferable availability of veterans' benefits to compensate servicemembers for injuries suffered incident to service, *id.* at 146. These rationales are unsupported by the text of the FTCA, and the Court has largely abandoned all three of them.

Only the first rationale given by the Court in *Feres*—a lack of parallel private liability—even feigns a foundation in the text of the FTCA. *See Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (stating that only the "'parallel private liability' argument . . . purports to be textually based"). As noted previously, pursuant to the FTCA, "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The Court in *Feres* interpreted that language to mean that "since no 'private individual' can raise an army, and since no State has consented to suits by members of its militia," the FTCA necessarily protects the federal government from liability for

servicemembers' claims arising out of or in the course of activities "incident to service." *See Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (citing *Feres*, 340 U.S. at 141-42).

This logic, however—much like the holding of *Feres* itself, *see supra* Section I.A—renders superfluous the "combatant activities" exception, 28 U.S.C. § 2680(j). It also renders superfluous a number of other enumerated exceptions to the waiver of sovereign immunity in the FTCA, given that "private individuals typically do not, for example, transmit postal matter, 28 U.S.C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system, § 2680(i)." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting). Acknowledging the untenability of this approach, the Court rejected the "parallel private liability" rationale of *Feres* just five years later in *Indian Towing Co. v. United States*, concluding that the FTCA permitted suit against the United States for the negligent operation of a lighthouse by the Coast Guard. *See Indian Towing*, 350 U.S. at 68-70; *see also Rayonier*, 352 U.S. at 319-20 (reaffirming *Indian Towing*'s abrogation of *Feres*'s first rationale and holding that the United States could be held liable for the negligence of its public firefighters).

The second rationale of *Feres*—the "distinctively federal character" of the relationship between the federal government and its military—is equally divorced from the text of the FTCA. *See Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001) (noting that the distinctively-federal-relationship "policy justification" has been widely "criticized as textually unsupported and illogical" (citations omitted)). The *Feres* Court reasoned that, in light of the nature of this relationship, Congress could not have possibly intended local and geographically diverse tort laws to govern

servicemembers' claims arising out of activities "incident to service." *Feres*, 340 U.S. at 142-44; *see* 28 U.S.C. § 1346(b)(1) (stating that the United States' tort liability pursuant to the FTCA is determined by "the law of the place where the act or omission occurred").

However, nothing in the text of the FTCA suggests reason to be concerned about the potential for varied recoveries based on the diverse tort laws of the states. Indeed, the only textual support the Court supplied for this rationale was the Military Personnel Claims Act, 31 U.S.C. § 223b, a law that the FTCA itself *repealed*. *See* Pub. L. No. 79-601, title IV, § 424, 60 Stat. 846-47 (1946) (repealing 31 U.S.C. § 223b); *Feres*, 340 U.S. at 144 (citing the Military Personel Claims Act for the principle that no federal law allows local tort laws to control the outcome of lawsuits of servicemembers based on activities "incident to service"). Moreover, barring recovery on all claims "incident to service" because of the risk of non-uniformity in recoveries hardly facilitates the larger uniformity that the FTCA was enacted to achieve. Perhaps the *Feres* doctrine achieves "uniform nonrecovery" for servicemembers themselves, *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting), but it also creates a massive and unprincipled discrepancy between recovery for injuries suffered by servicemembers and non-servicemembers.

In any event, this Court promptly retreated from *Feres*'s second rationale, just like the first. In *United States v. Muniz*, the Court held that "federal prisoners (who have no more control over their geographical location than service[members]) [may] recover under the FTCA for injuries caused by the negligence of prison authorities." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting) (citing *Muniz*, 374 U.S. at 162). There is no principled justification for condoning geographically

disparate remedies for federal prisoners but not for federal servicemembers.

The *Feres* Court's third rationale—that the availability of compensation for veterans under 38 U.S.C. §§ 101 *et seq*. for injuries incurred "incident to service" suggests that the FTCA was not intended to cover such injuries—is also unsupported by the text of the FTCA. The *Feres* Court explained that, in its view, "[a] soldier is at peculiar disadvantage in litigation," due to "[l]ack of time and money," and "the difficulty if not impossibility of procuring witnesses." *Feres*, 340 U.S. at 145. Thus, according to the Court, the veterans' compensation scheme set forth in Title 38 is equivalent or superior to the FTCA for servicemembers because it "normally requires no litigation" and provides compensation for servicemembers that is neither "negligible [n]or niggardly." *Id.*

This logic, and the language the Court uses in espousing it, reflects the sort of policy judgment one would expect to read in a congressional committee report, not a Supreme Court opinion. Indeed, neither the text of Title 38 nor the FTCA so much as suggests that either law's remedies are to be exclusive. *See Brooks*, 337 U.S. at 53 (noting that the FTCA provides for exclusiveness of remedy in three provisions, 28 U.S.C. §§ 1346, 2672, and 2679, none of which relate to servicemembers); *United States v. Brown*, 348 U.S. 110, 113 (1954) (noting the absence of statutory language suggesting that the veterans' compensation system should be construed as an exclusive remedy). Thus, the Court's judgment that "double recovery" under the veterans' compensation laws and the FTCA should be avoided apparently was not shared by Congress. Nor did the Court ultimately bind itself to this rationale, as both before and after *Feres*, servicemembers have been permitted to bring FTCA lawsuits even where

they have also been compensated for the same injuries pursuant to the veterans' compensation laws, negating the *Feres* Court's "alternative remedy" justification. *See Brooks*, 337 U.S. at 53 (before *Feres*); *Brown*, 348 U.S. at 113 (after *Feres*).

With all three of the original rationales for the *Feres* doctrine promptly abandoned or severely curtailed, this Court came up with a fourth justification for the doctrine: preserving an orderly process of "military discipline." The Court reasoned that "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty" required it to read the FTCA to exempt claims of servicemembers incurred "incident to service." *Brown*, 348 U.S. at 112; *see United States v. Shearer*, 473 U.S. 52, 57 (1985) (quoting *Brown*); *Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (same); *Muniz*, 374 U.S. at 162 (same).

This post hoc policy justification, like those that came before it, finds no support in the text of the FTCA. Again, the "combatant activities" exception, 28 U.S.C. § 2680(j), is illuminating—it reflects Congress's considered judgment that the United States should be shielded from tort liability only for those injuries arising out of combatant activities during times of war. Perhaps Congress determined that negligent decisions made under the exigencies of combat should be specially exempt from litigation due to the risk of disruption to the line of command. Or perhaps "Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly." *Johnson*, 481 U.S. at 700 (Scalia, J.,

dissenting). Or perhaps Congress in fact decided "that *barring* recovery by service[members] might adversely affect military discipline." *Id.* There are myriad possible reasons why Congress did not deem its decision to permit claims arising "incident to service" a threat to military discipline. That the *Feres* Court disapproved of, or disagreed with, that judgment, did not give it license to legislate from the bench.

In sum, the justifications for the *Feres* doctrine are as divorced from the text of the FTCA as the *Feres* exception itself. Most have been abandoned by the Court in subsequent years, and the only remaining justification—facilitating orderly military discipline—reflects a substitution of the Court's policy judgment for that of Congress. This Court should reject the sole remaining justification for *Feres* and give the FTCA the meaning required by its text and history.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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