

No. 20-559

In The
Supreme Court of the United States

JANE DOE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

**BRIEF OF *AMICI CURIAE* PROTECT OUR
DEFENDERS, AMERICAN ASSOCIATION OF
UNIVERSITY WOMEN, BATTERED WOMEN'S
JUSTICE PROJECT, CALIFORNIA WOMEN'S LAW
CENTER, THE CENTER FOR LAW AND MILITARY
POLICY, END RAPE ON CAMPUS, EQUAL RIGHTS
ADVOCATES, GEORGIA MILITARY WOMEN,
HER JUSTICE, HUMAN RIGHTS WATCH,
LEGAL MOMENTUM, THE MILITARY WOMEN'S
COALITION, MINORITY VETERANS OF AMERICA,
MODERN MILITARY ASSOCIATION OF AMERICA,
NATIONAL ALLIANCE TO END SEXUAL
VIOLENCE, NATIONAL CRIME VICTIM LAW
INSTITUTE, NOT IN MY MARINE CORPS,
RED FEATHER RANCH, SERVICE WOMEN'S
ACTION NETWORK, AND THE WOMEN'S LAW
PROJECT IN SUPPORT OF PETITIONER**

MAYA M. ECKSTEIN

Counsel of Record

MATTHEW R. MCGUIRE

KELLY R. OELTJENBRUNS

HUNTON ANDREWS KURTH LLP

Riverfront Plaza, East Tower

951 East Byrd Street

Richmond, VA 23219

(804) 788-8788

meckstein@huntonAK.com

QUESTIONS PRESENTED

1. Was *Feres* wrongly decided and should it be overruled?

2. Alternatively, should *Feres* be limited so as not to bar tort claims brought by service-members injured by violations of military regulations, during recreational activities, or while attending a service academy?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I. The <i>Feres</i> Doctrine Enables Continued Sexual Violence Perpetrated Against Ser- vice-members	11
A. Sexual violence is pervasive in the military	11
B. The military justice system does not provide an effective remedy to service- member victims of sexual assault	15
C. <i>Feres</i> creates a fictional dichotomy be- tween civilians, who may seek judicial relief for sexual violence, and service- members, who may not	18
II. This Court Should Revisit <i>Feres</i> Now	24
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brooks v. United States</i> , 337 U.S. 49 (1949)	18
<i>Cioca v. Rumsfeld</i> , 720 F.3d 505 (4th Cir. 2013).....	22
<i>Daniel v. United States</i> , 139 S. Ct. 1713 (2019)	25
<i>Day v. Mass. Air Nat’l Guard</i> , 167 F.3d 678 (1st Cir. 1999)	23
<i>Dexheimer v. United States</i> , 608 F.2d 765 (9th Cir. 1979).....	23
<i>Girouard v. United States</i> , 328 U.S. 61 (1946)	26
<i>Halliburton Co. v. Erica P. John Fund, Inc.</i> , 573 U.S. 258 (2014)	24
<i>Kimble v. Marvel Ent., LLC</i> , 576 U.S. 446 (2015)	24
<i>Klay v. Panetta</i> , 758 F.3d 369 (D.C. Cir. 2014)	22
<i>Knick v. Township of Scott</i> , 139 S. Ct. 2162 (2019)	24
<i>Lanus v. United States</i> , 570 U.S. 932 (2013)	25
<i>Mackey v. United States</i> , 226 F.3d 773 (6th Cir. 2000).....	23
<i>Marquet v. Gates</i> , No. 12-cv-3117 (S.D.N.Y. Sept. 11, 2013).....	23

TABLE OF AUTHORITIES—Continued

	Page
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 164 (1989)	26
<i>Ricks v. Nickels</i> , 295 F.3d 1124 (10th Cir. 2002).....	22
<i>Smith v. United States</i> , 196 F.3d 774 (7th Cir. 1999).....	23
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997)	25
<i>Stubbs v. United States</i> , 744 F.2d 58 (8th Cir. 1984).....	23
<i>United States v. Johnson</i> , 481 U.S. 681 (1987)	18, 19, 20, 25, 26
STATUTES	
8 U.S.C. § 2674	18
8 U.S.C. § 2680(j).....	18
OTHER AUTHORITIES	
2016-2018 Active Duty Military Personnel by Service by Rank/Grade, DEFENSE MANPOWER DATA CENTER, https://www.dmdc.osd.mil/appj/ dwp/dwp_reports.jsp	17
2019 Industry Study Report, PROTECT OUR DE- FENDERS, https://tinyurl.com/yy7g2r6t	17
Andrew F. Popper, <i>Rethinking Feres: Granting Access to Justice for Service-members</i> , 60 B.C. L. REV. 1491 (2019)	20

TABLE OF AUTHORITIES—Continued

	Page
Ashley C. Schuyler, et al., <i>Experiences of Sexual Harassment, Stalking, and Sexual Assault During Military Service Among LGBT and Non-LGBT Service-members</i> , 33 J. TRAUMATIC STRESS 3 (June 2020).....	12
Chelsea M. Austin, <i>Who’s Got Your Six: Ramifications of the Court’s Refusal to Define Incident to Service in the Feres Doctrine on Military Sexual Assault Survivors</i> , 2018 MICH. ST. L. REV. 987 (2018).....	20
CONG. RSCH. SERV., R46107, FY2020 National Defense Authorization Act: Selected Military Personnel Issues (2020)	19
Deirdre G. Brou, <i>Alternatives to the Judicially Promulgated Feres Doctrine</i> , 192 MIL. L. REV. 1 (2007).....	21
Department of Defense Academic Program Year 2018-2019 Annual Report on Sexual Harassment and Violence at the Military Service Academies, https://tinyurl.com/y3llydfe	13
Department of Defense Fiscal Year 2018 Annual Report on Sexual Assault in the Military, https://tinyurl.com/y88k7fbr	12, 13
Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military, https://tinyurl.com/y4dvearl	12, 13, 15, 16, 17
Dwight Stirling, <i>The Feres Doctrine and Accountability</i> , 1 J.L. POL’Y & MIL. AFF. 1 (2019) ...	16, 19, 20

TABLE OF AUTHORITIES—Continued

	Page
Earl Warren, <i>The Bill of Rights and the Military</i> , 37 N.Y.U. L. REV. 181 (1962)	21
Gregory C. Sisk, <i>Holding the Federal Govern- ment Accountable for Sexual Assault</i> , 104 IOWA L. REV. 731 (2019)	21
Inspector General, U.S. Department of Defense, Evaluation of the Separation of Service-mem- bers Who Made a Report of Sexual Assault (May 9, 2016), https://tinyurl.com/y4ppe6xe	13
Janelle Nanos, <i>Base Boston: Rape and Sexual Assault in the Coast Guard</i> , BOSTON MAG. (June 25, 2013), https://tinyurl.com/y2hhtlke	15
Jonathan Turley, <i>Pax Militaris: The Feres Doc- trine and the Retention of Sovereign Immunity in the Military System of Governance</i> , 71 GEO. WASH. L. REV. 1 (2003)	21
Katherine Shin, Note, <i>How the Feres Doctrine Prevents Cadets and Midshipmen of Military- Service Academies from Achieving Justice for Sexual Assault</i> , 87 FORDHAM L. REV. 767 (2018)	22
Meagan Flynn, <i>He went AWOL after being sex- ually assaulted. After 30 years, the Navy fi- nally believed him</i> , THE WASHINGTON POST (June 5, 2018), https://tinyurl.com/yavp2rum	14
Michael Winerip, <i>Revisiting the Military’s Tail- hook Scandal</i> , N.Y. TIMES (May 13, 2013), https://tinyurl.com/yy73lr5o	11

TABLE OF AUTHORITIES—Continued

	Page
Military Justice Overview, PROTECT OUR DEFENDERS, https://tinyurl.com/y64g5bug	16
Richard E. Custin, Jordan Ondatje & Deborah Kelly, <i>Is It Time to Revisit the Feres Doctrine: The Disparate Treatment of Active Duty Military Personnel under the Federal Tort Claims Act</i> , 22 J. L. BUS. & ETHICS 1 (2016)	19
<i>Sexual Assault in the Military: Hearings Before the Senate Armed Services Subcomm.</i> , 116th Cong. 262 (2019).....	15
<i>Survivor Spotlight: Aviation Commander Darchelle Mitchell</i> , Protect Our Defenders News Blog (May 28, 2020), https://tinyurl.com/yxwu5m7o	14

INTEREST OF AMICI CURIAE¹

Amici curiae are committed to protecting service-members from sexual assault and other violence and to ensuring that legal recourse is available when such violence occurs.

Protect Our Defenders is dedicated to ending rape and sexual assault in the military. It honors, supports, and gives voice to survivors of military sexual assault and sexual harassment—including service-members, veterans, and civilians assaulted by members of the military. Protect Our Defenders works for reform to ensure survivors and service-members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice. Protect Our Defenders routinely advocates against *Feres v. United States* and the consequences the doctrine has on service-members.

American Association of University Women (“AAUW”) was founded in 1881 by like-minded women who had challenged society’s conventions by earning college degrees. Since then it has worked to increase women’s access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *Amici*’s intent to file this brief under Rule 37(2)(a). All counsel consented to the filing of the brief.

AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with its member-adopted Public Policy Program, AAUW supports freedom from violence and fear of violence in homes, schools, workplaces, and communities, which extends to freedom from sexual harassment and violence for women serving in the military and attending military academies.

Battered Women's Justice Project ("BWJP") serves as a national resource center on the civil and criminal legal responses to intimate partner violence and promotes systemic change to create an effective and just response to victims and perpetrators of intimate partner and sexual violence, as well as the children exposed to this violence. BWJP provides resources and training to advocates, battered women, legal system personnel, policy makers, and others engaged in the justice system's response to intimate partner and sexual violence.

The mission of California Women's Law Center ("CWLC") is to create a more just and equitable society by breaking down barriers and advancing the potential of women and girls through transformative litigation, policy advocacy, and education. For over thirty years, CWLC has prioritized eliminating gender discrimination and violence against women in California. CWLC has fought for justice on behalf of female veterans who experience Military Sexual Trauma with impact litigation, policy advocacy, trainings, and resource development.

The Center for Law and Military Policy is a nonprofit think tank dedicated to strengthening the legal protections of those who serve our nation in uniform. Its foremost scholarly objective is elimination of the *Feres* doctrine, a policy that has done—and continues to do—substantial harm to service-members and one the Center considers a blight on the American judicial system.

End Rape On Campus (“EROC”) works to end campus sexual assault by providing direct support for survivors and their communities, prevention through education, and policy on the campus, local, state, and federal levels. EROC works to combat and eradicate the toxicity that rape culture permeates through our nation’s higher educational institutions, including in the military, where this culture has persisted for decades.

Equal Rights Advocates (“ERA”) is a national nonprofit legal advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA works to advance gender equity and economic security for women and families through a combination of litigation, policy reform, direct service, and community outreach and education. Since its founding in 1974, ERA has litigated numerous high-impact cases on issues of gender discrimination and civil rights. Through litigation and other advocacy efforts, ERA has helped expand workplace protections and conferred significant benefits on large groups of women and girls. ERA also assists hundreds of individuals each year facing unfair substandard, and unequal conditions on the job and at school through our free national Advice and

Counseling program, including women experiencing sexual harassment and assault in the military. ERA has participated as *amicus curiae* in numerous cases involving the interpretation and application of legal rules and laws affecting workers' rights and access to justice. ERA has also represented plaintiffs in numerous employment-related civil rights cases, including the first case in the Ninth Circuit to establish that sexual harassment is a form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). ERA contends that sexual assault and violence goes largely unaddressed in the military and simply cannot continue to be held "incident to military service."

Georgia Military Women ("GMW") is an informal club of roughly 4,000 diverse individuals based in Georgia to serve women veterans and support them as leaders, advocates, and individuals. The group hosts numerous meetup and networking opportunities, advocates for state legislation, and exchanges information about veteran resources and benefits. GMW is recognized nationally as a model program for bringing military women together.

Her Justice recruits and mentors volunteer lawyers to provide free legal help to address individual and systemic legal barriers for women in poverty in New York City. Since 1993, Her Justice has been dedicated to making a real and lasting difference in the lives of low-income, under-served, and abused women by offering them legal services designed to foster equal access to justice and an empowered approach to life.

Informed by its work, Her Justice promotes policies that make society more responsive to the legal issues confronting the women it serves. Approximately 80% of Her Justice's clients are survivors of gender-based violence, and assisting survivors of gender-based violence has always been a substantial part of Her Justice's practice.

Human Rights Watch is a nonprofit, independent organization and the largest international human rights organization based in the United States. For more than 40 years, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of all people. Human Rights Watch investigates allegations of human rights violations in more than 90 countries around the world by interviewing witnesses, gathering information from a variety of sources, and issuing detailed reports. Human Rights Watch documented the experiences of United States service-members who are sexual assault survivors in two reports: *Booted: Lack of Recourse for Wrongly Discharged US Military Rape Survivors* (2016) and *Embattled: Retaliation Against Sexual Assault Survivors in the US Military* (2015).

Legal Momentum: The Women's Legal Defense & Education Fund is the nation's oldest legal advocacy organization for women. For 50 years, Legal Momentum has worked to advance the rights of all women and girls by using the power of the law and creating innovative public policy. Legal Momentum was the leading advocate for the landmark Violence Against Women Act and its subsequent reauthorizations, which seek to

redress the historical inadequacy of the justice system's response to domestic and sexual violence. For 40 years, Legal Momentum's National Judicial Education Program ("NJEP") has provided judges across the country with education about all aspects of sexual violence. NJEP's two-day curriculum, *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, has been presented in more than 25 states. Legal Momentum's Legal Director, Lynn Hecht Schafran, is widely published on sexual assault issues, e.g., *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 *FORDHAM U. L. J.* 3 (1993) and *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case* (2016), <https://www.legalmomentum.org/node/205>. Ms. Schafran is a former Presidential appointee to the Defense Department Advisory Committee on Women in the Services and a former member of the American Bar Association Standing Committee on Armed Forces Law.

The Military Women's Coalition ("MWC") is a national group of formal and informal organizations that work collaboratively to serve and support U.S. active duty, Guard, Reserve, Veteran, and retired servicewomen by uniting and elevating their voices to influence policy and improve their well-being. The MWC's member organizations, friends of the coalition, and the scores of women they serve, stand to benefit from the overturning of *Feres*.

Minority Veterans of America ("MVA") is a non-partisan, nonprofit organization that was designed to

create belonging and advance equity for underserved and underrepresented veterans, including women, people of color, LGBTQ, and religious minorities. With several thousand members and supporters located throughout the country, the organization aims to transform the narrative of the American veteran by building an interconnected community, fostering greater understanding of our memberships' identities, and serving minority veterans through the development of targeted programming and advocacy. MVA frequently advocates on behalf of military sexual trauma survivors in federal and state legislatures, government agencies, and within community organizations.

Modern Military Association of America (“MMAA”) is a nonprofit, non-partisan legal services, policy, and advocacy organization serving lesbian, gay, bisexual, transgender, and queer military personnel, veterans, military spouses, family members, allies, and individuals living with HIV. With over 75,000 members, MMAA has a unique understanding of the challenges faced by the populations it serves. Since 1993, MMAA and its predecessors have provided legal and advocacy assistance to over 15,000 people, including relating to issues of military sexual assault, and has challenged laws and regulations that target, stigmatize, discriminate against, or otherwise negatively affect LGBTQ service-members and their families—thereby reducing morale and diminishing military readiness by inhibiting the military’s efforts at recruiting and retention. MMAA and its predecessors routinely appear as *amici* in cases that directly affect the communities it serves.

The National Alliance to End Sexual Violence is the voice in Washington for the 56 state and territorial sexual assault coalitions and over 1500 local sexual assault programs who work in their communities to support survivors and end sexual violence. Its programs see the devastating impacts of sexual violence every day, and are deeply committed to ensuring survivors, including those in the military and military academies, are able to seek and receive justice.

The National Crime Victim Law Institute (“NCVLI”) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI’s mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through training and education; providing legal technical assistance on cases nationwide; researching and analyzing developments in crime victim law; promoting the National Alliance of Victims’ Rights Attorneys & Advocates; and participating as *amicus curiae* in select cases that present victims’ rights issues of broad importance.

Not In My Marine Corps advocates for survivors of sexual assault and harassment among military service-members, exposing the pervasive behaviors and attitudes ingrained by complacent and dismissive military leadership. It provides resources for service-members to report harassment or assault, take action to help themselves, and stand up for others.

Red Feather Ranch is a transformational earth-based place where women veterans and their children transcend trauma through their relationships with land, livelihood, and community. Many of the women veteran trauma survivors that Red Feather Ranch serves experienced a secondary trauma due to the negligent and or intentional acts of the military and the military justice system.

Since its founding, Service Women's Action Network ("SWAN") has worked to support victims of military sexual assault, hold perpetrators accountable in the military justice system, and ensure victims with posttraumatic stress resulting from a sexual assault are recognized by the United States Department of Veteran Affairs. SWAN continues to work on these issues today and provide direct assistance to women facing challenges related to mental health, sexual assault, VA claims, and more. SWAN has and will continue to denounce *Feres* due to the barrier to justice it creates for service-members attempting to collect damages from the United States government for personal injuries experienced in the performance of their duties.

The Women's Law Project ("WLP") is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania that seeks to eliminate discrimination based on gender through impact litigation, policy advocacy, public education, and individual counseling. Elimination of violence against women and safeguarding the legal rights of women and children who experience sexual abuse is a high priority. WLP's

work encompasses institutional response to sexual violence in the home, at work, in school, in the military, and in the criminal justice system. WLP represents and counsels students subjected to sexual misconduct in educational programs, engages in policy advocacy to improve the response of educational institutions to sexual violence, and participates as *amicus curiae* to challenge bias against victims of domestic and sexual violence in educational programs. WLP believes it is essential that schools respond appropriately to sexual harassment and that courts hold them accountable under the applicable law.



SUMMARY OF THE ARGUMENT

This petition presents an all-too-familiar circumstance: a federal court (here, the U.S. Court of Appeals for the Second Circuit) found itself bound by an incorrect and unjust legal doctrine, which required the court to slam the courthouse doors, yet again, to a service-member who was raped—this time on a college campus.

Sexual violence in the military is rampant, and this Court's decision in *Feres* perpetuates it. Unlike their civilian counterparts, service-member survivors of sexual violence have virtually no judicial recourse. That would be an indefensible policy decision if Congress had chosen to enact a law dictating such a result. But it is made all the worse when this unconscionable injustice is a pure judicial creation, resulting from an

interpretation of the Federal Tort Claims Act (“FTCA”) that is untethered to statutory text, reason, and experience.

The petition should be granted, so this Court can fix a 70-year wrong.



ARGUMENT

I. The *Feres* Doctrine Enables Continued Sexual Violence Perpetrated Against Service-members.

The history of sexual violence in the military is deeply disturbing, but it is not inevitable. The judicially-created *Feres* doctrine, unfortunately, has allowed its perpetuation, gifting a “free pass” to military sexual assailants while leaving our nation’s defenders without an effective avenue of redress.

A. Sexual violence is pervasive in the military.

Military sexual assault and harassment are epidemic. This is no secret.² The statistics are staggering:

² The nation’s eyes were opened to the severe problem by the infamous 1991 Tailhook Convention, an annual Navy reunion at which more than 90 men and women were sexually assaulted by peers and superiors. See Michael Winerip, *Revisiting the Military’s Tailhook Scandal*, N.Y. TIMES (May 13, 2013), <https://tinyurl.com/yy73lr5o>.

- One-fourth of active duty women reported that they were sexually harassed in 2018. Department of Defense Fiscal Year 2018 Annual Report on Sexual Assault in the Military (“2018 DOD Annual Report”), at 12, <https://tinyurl.com/y88k7fbr>.
- 20,500 service-members were sexually assaulted or raped in 2018. Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military (“2019 DOD Annual Report”), at 6, <https://tinyurl.com/y4dvearl>.
- At least 62% of military sexual assaults are committed by a service-member perpetrator on a service-member victim. 2019 DOD Annual Report, Appendix B at 11.
- Sexual-minority service-members suffer harassment and assault at even higher numbers. See Ashley C. Schuyler, et al., *Experiences of Sexual Harassment, Stalking, and Sexual Assault During Military Service Among LGBT and Non-LGBT Service-members*, 33 J. TRAUMATIC STRESS 3, 6 (June 2020). This is particularly true for male service-members identifying as gay or bisexual. *Id.* at 7.

These startling numbers do not tell the whole story. Compounding the problem, sexual assault in the military is underreported. 2019 DOD Annual Report at 14. Two of every three military victims of sexual assault did not report their assault in 2018. 2018 DOD Annual Report at 4. The tragic underreporting makes perfect sense: there is a well-known fear of retaliation

for reporting military sexual harassment and assault. Indeed, reports of actual retaliation abound and add to an already stark story:

- Approximately 21% of female service-members who reported a sexual assault were subjected to conduct that met the legal criteria for the kind of retaliatory behavior prohibited by military law. 2018 DOD Annual Report at 20.
- A third of victims separate from the military after reporting abuse. Inspector General, U.S. Department of Defense, Evaluation of the Separation of Service-members Who Made a Report of Sexual Assault, at 4 (May 9, 2016), <https://tinyurl.com/y4ppe6xe>.
- Of 82 retaliation offenses investigated in FY 2019, most involved reprisal—actions that negatively affect professional opportunities—and ostracism. 2019 DOD Annual Report, Appendix B at 38.

Military Service Academies are no exception to these statistics, as Petitioner’s case reveals. Department of Defense statistics show 149 reports of sexual assault involving a cadet or midshipman as a victim in a single school year, 2018-19. Department of Defense Academic Program Year 2018-2019 Annual Report on Sexual Harassment and Violence at the Military Service Academies, at 14, <https://tinyurl.com/y3llydfe>.

These numbers do not represent faceless victims. They are real people—real people who agreed to serve this country, often at great risk to their lives, by voluntarily joining the military.

For example, Darchelle Mitchell was an Aviation Commander in the Navy, where she has received numerous awards and accolades, including the Meritorious Unit Commendation Medal, the Navy and Marine Corps Commendation Medal, the Navy Achievement Medal (twice), and the Presidential Volunteer Service Award.³ Yet, Darchelle was raped by a military colleague who forced his way into her bedroom. When Darchelle's son came to the door and asked what was happening, her colleague barricaded the door and raped her.

Heath Phillips had long wanted to follow his father and stepfather into the military and enlisted in the Navy just five days after his seventeenth birthday. Shortly after joining, he woke to two colleagues standing over him, one attempting to pull his pants down, and the other ejaculating on his face. Heath reported the assault, but his commanders did not believe him. After that, the assaults escalated, and Heath was raped several times. Heath tried to commit suicide and went AWOL to get away from the abuse. He eventually accepted an other-than-honorable discharge so that he would not be convicted of going AWOL and forced to return to the same ship where he was assaulted.⁴

³ Darchelle retired in 2018 with 14 years of honorable service. *Survivor Spotlight: Aviation Commander Darchelle Mitchell*, Protect Our Defenders News Blog (May 28, 2020), <https://tinyurl.com/yxwu5m7o>.

⁴ In May 2018, the Navy agreed to grant Heath an honorable discharge. Meagan Flynn, *He went AWOL after being sexually*

Coast Guard service-member Panayiota Bertzikis was raped by a colleague while hiking with him. When she reported the rape, she was promptly told to “get out” of the commanding officer’s office. Eventually, the Coast Guard administratively discharged her against her will.⁵

B. The military justice system does not provide an effective remedy to service-member victims of sexual assault.

As explained above, sexual violence in the military is grossly underreported. This is often because survivors simply do not believe that the military will do anything about it. *See, e.g., Sexual Assault in the Military: Hearings Before the Senate Armed Services Subcomm., 116th Cong. 262 (2019)* (testimony of Senator Martha McSally) (explaining that she did not report being raped by a superior officer while serving in the United States Air Force because she “didn’t trust the system at the time”).

That is a fair assumption—of the 5,699 “unrestricted reports” of sexual assault filed in 2019,⁶ only

assaulted. After 30 years, the Navy finally believed him, THE WASHINGTON POST (June 5, 2018), <https://tinyurl.com/yavp2rum>.

⁵ Panayiota has since started the Military Rape Crisis Center, an organization for military rape survivors. Janelle Nanos, *Base Boston: Rape and Sexual Assault in the Coast Guard*, BOSTON MAG. (June 25, 2013), <https://tinyurl.com/y2hhtlke>.

⁶ “Restricted reports” are kept confidential, are not referred for investigation, and do not involve review by command authorities. 2019 DOD Annual Report, Appendix B at 5. “Unrestricted

795 cases (or 13.9%) were referred to court martial by military commanders in 2019. 2019 DOD Annual Report, Appendix B at 22-23. Of those, 91 charges were dismissed, 86 assailants were granted discharge or resignation in lieu of court martial, and 363 proceeded to trial. *Id.* Of those that proceeded to trial, only 264 involved convictions of any particular offense—or just 4.6% of the 5,699 unrestricted reports. *Id.*

The military justice system, as currently operating, simply is not sufficiently responsive to service-members' reports of sexual assault. The system emerged from historically-deferential British military principles, vesting commanders with immense authority. Military Justice Overview, PROTECT OUR DEFENDERS at 1, <https://tinyurl.com/y64g5bug>. Since World War II, a patchwork system developed that remains inefficient and ineffective at least in part because military commanders—and not independent prosecutors—retain power over the entire justice process, and because the process is far more complex than its civilian counterpart. *Id.* at 2. The lack of external check on the system also works against justice despite internal accountability mechanisms. See Dwight Stirling, *The Feres Doctrine and Accountability*, 1 J.L. POL'Y & MIL. AFF. 1, 18-21 (2019). As evidenced by the numbers, few receive the justice they deserve, and many instead are subject to retaliation. Indeed, service women who report sexual assault are 11 times as likely to be retaliated against as to see their attacker convicted of a sex

reports" are referred for investigation and command is notified of the allegations. *Id.*

offense. 2019 DOD Annual Report, Appendix C at 20; *accord id.*, Appendix B at 14, 23.

Take Darchelle, Heath, and Panayiota. Despite DNA evidence of Darchelle's rape, the perpetrator was found not guilty and suffered no consequence. Darchelle's reenlistment, though, was denied. Heath had to take an "other than honorable" discharge so that he would not be returned to the ship where he had been subjected to repeated sexual abuse. And Panayiota was forcibly discharged after speaking up, while her rapist faced no consequences.

Military personnel and statistics all tell the same story: sexual violence is rampant among our armed forces, and the military justice system has failed in the vast majority of cases.⁷

⁷ Sexual violence in the military affects men, women, and other gender identity individuals. And while *Amici* certainly hope the pervasiveness abates for everyone, increasing gender diversity makes addressing the problem of sexual assault all the more urgent. Between 2016 and 2018, the percentage of active duty personnel who are women increased from 15.88% to 16.55%. 2019 Industry Study Report, PROTECT OUR DEFENDERS, at 4, <https://tinyurl.com/yy7g2r6t> (compiling statistics from 2016-2018 Active Duty Military Personnel by Service by Rank/Grade, DEFENSE MANPOWER DATA CENTER, https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp). The Department of Defense's goal of increasing gender diversity is laudable, but the problems with *Feres* are unlikely to abate. Congress plainly expected the FTCA to safeguard all of our service-members. And as women increasingly make up more of the Armed Forces, it is vital that they have access to justice in the face of victimization.

C. *Feres* creates a fictional dichotomy between civilians, who may seek judicial relief for sexual violence, and service-members, who may not.

Feres exacerbates the epidemic of military sexual assault. It creates an artificial split between service-members and civilians, barring relief for the former simply because they “devoted [their] li[ves] to serving in [their] country’s Armed Forces.” *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting). This result is untenable, not because there are not legitimate differences between service-members and civilians, but because *Feres* does not draw a credible line between the two.

Congress crafted the FTCA to act as a limited waiver of federal sovereign immunity. When a claim falls under the FTCA, the United States is liable to the same extent as a private tortfeasor. 28 U.S.C. § 2674. Congress carved out a narrow exception in the military context for “[a]ny 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) (emphases added). This Court has unequivocally permitted service-members to bring claims under the FTCA, as “[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed.” *Brooks v. United States*, 337 U.S. 49, 51 (1949). The FTCA’s limited exceptions for combatant activities “make this plain.” *Id.* The text of the FTCA, then, draws only a very limited distinction between service-members and civilians.

Feres is utterly inconsistent with Congress’s decision that service-members should be treated the same as private citizens in most circumstances.⁸ Because of *Feres*, service-member suits are “singled out and barred under the FTCA.” See Richard E. Custin, Jordan Ondatje & Deborah Kelly, *Is It Time to Revisit the Feres Doctrine: The Disparate Treatment of Active Duty Military Personnel under the Federal Tort Claims Act*, 22 J. L. BUS. & ETHICS 1, 7 (2016); see also *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (“[Johnson’s] widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.”). And *Feres* follows active service-members, barring their claims even when their assailants are not members of the military. See *Johnson*, 481 U.S. at 688-91. This Court thus has concluded that service-members are disfavored members of society when it comes to vindicating their legal rights vis-à-vis the federal government.

⁸ In the face of this clear inconsistency, Congress recently took some steps to re-open avenues of relief to service-members: the FY20 National Defense Authorization Act establishes an administrative claims process to compensate injured service-members whose claims for medical malpractice had been barred by *Feres*. See CONG. RSCH. SERV., R46107, FY2020 National Defense Authorization Act: Selected Military Personnel Issues 262 (2020). But sexual assault victims remain without remedy, and the complexity of the military system, along with the desire to appear patriotic, leads “Legislators . . . to see the military as an entity to be funded and equipped as opposed to scrutinized or questioned.” Stirling, *supra*, at 14. It is no wonder, then, that Congress has not fixed a problem it did not create.

Service-members face this unfair treatment for no cognizable purpose. Consider the supposed strongest rationale for the *Feres* doctrine: that FTCA suits by service-members would undermine “military discipline and effectiveness” by involving the civilian judiciary in military affairs. *Johnson*, 481 U.S. at 690. Scholarship and experience, however, show that this is not the case. Instead, predators are emboldened as *Feres* seriously reduces their risk of facing consequences. As one study finds, under *Feres*, “military managers’ power is unchecked,” and the “result is a dynamic of being ‘above the law,’ of operating outside of the reach of standard legal norms and standards.” See Stirling, *supra*, at 2. The result? “Process is ignored and the rule of law is defiled.” *Id.* at 24; see also Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service-members*, 60 B.C. L. REV. 1491, 1523-24 (2019) (explaining that the military discipline rationale is unreasonable and laying out seven simple arguments why, absent *Feres*, increased accountability under the FTCA would have a “powerful corrective effect”; explaining also that the frequency of wrongs like sexual assault and rape “has increased to epidemic levels because of the absence of the accountability and deterrence that would otherwise flow from civil tort actions”); and Chelsea M. Austin, *Who’s Got Your Six: Ramifications of the Court’s Refusal to Define Incident to Service in the Feres Doctrine on Military Sexual Assault Survivors*, 2018 MICH. ST. L. REV. 987, 1017 (2018) (“[S]hutting the courthouse doors to military personnel who have suffered at the hands of military rapists and

sexual assaulters diminishes military discipline and cohesion.”).

Further, this artificial divide does not make sense when military members today engage in many civilian tasks that are not “characteristically military.” Pet. App. 57a. The military has expanded in the past decades into “collateral areas of governance such as medicine, entertainment, and transportation,” in which the military often “openly competes with private businesses for both military and civilian customers.” 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, 4 (2003); see also Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 4-5, 43-44 (2007) (arguing that the military performs many functions that private individuals perform, well beyond military decision-making).

This has two consequences: first, more people are affected by the military and service-member actions and, second, the distinctly-military rationales underlying *Feres* make little sense in these traditionally-civilian spaces. See Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 781 (2019) (explaining that as the federal government expands and adds public employees, “occasions expand for misconduct by federal agents to impact on individual members of the populace”); see also Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) (“When the authority of the military has such a sweeping capacity for affecting

the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.”).

Indeed, some of the most egregious examples of *Feres*'s application come in a distinctly non-military context, as here. By mere nature of her decision to attend a military academy and serve her country, Petitioner lacks a judicial remedy for the rape she suffered. But if she had been raped at a non-military academy, her claim would certainly be heard on the merits. See Katherine Shin, Note, *How the Feres Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault*, 87 *FORDHAM L. REV.* 767, 793 (2018) (explaining that Petitioner may have had a successful Title IX claim had she attended a federally funded civilian institution); accord Pet. App. 60a-61a.

Petitioner's case is emblematic of the overall problem with *Feres* and how federal courts apply the doctrine to repeatedly bar relief for survivors of sexual violence. Examples abound. See, e.g., *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014) (dismissing *Bivens* actions by twelve service-members who were “raped, sexually assaulted, stalked, . . . and severely harassed” while on active duty); *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013) (*Feres* precluded suits for sexual assault incurred while on active duty in the military); *Ricks v. Nickels*, 295 F.3d 1124 (10th Cir. 2002) (*Feres* precluded claims for sexual assault that occurred in military prison even though victim was fully discharged from

the military at the time of the assaults); *Mackey v. United States*, 226 F.3d 773 (6th Cir. 2000) (*Feres* precluded claims for sexual harassment brought by Air Force Captain against superiors who regularly ogled and inappropriately touched her); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678 (1st Cir. 1999) (*Feres* precluded federal claims filed by National Guard member following hazing incident in which he was sexually assaulted by other Guardsmen); *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999) (*Feres* precluded claims relating to repeated rapes of female service-member even though all of the assaults occurred while she was off-duty and off-base); *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984) (*Feres* precluded claims by army private sexually harassed by drill instructor; she subsequently killed herself); *Dexheimer v. United States*, 608 F.2d 765 (9th Cir. 1979) (*Feres* precluded FTCA claims brought by army private who alleged he was sexually assaulted while confined to disciplinary barracks); *Marquet v. Gates*, No. 12-cv-3117 (S.D.N.Y. Sept. 11, 2013), ECF No. 15 (citing *Feres* to dismiss *Bivens* suit by fourth-year cadet alleging that West Point was indifferent to her rape by an upper classman).

In short, with no statutory justification whatsoever, *Feres* acts as an insurmountable obstacle to service-members who have faced sexual violence committed by military colleagues. Congress did not intend that result, and for good reason: it makes no sense as a matter of law or policy.

II. This Court Should Revisit *Feres* Now.

As noted above and discussed in detail by Petitioner, Pet. 8-10, *Feres* is an indefensible interpretation of the FTCA, and this case is an exceptionally clean vehicle for addressing the questions presented.⁹ The time thus has come for this Court to jettison *Feres* notwithstanding the importance of *stare decisis*.

We recognize that this Court does not lightly overrule prior precedent, even when it is obviously wrong. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177 (2019) (“The doctrine of *stare decisis* reflects a judgment ‘that in most matters it is more important that the applicable rule of law be settled than it be settled right.’”) (citation omitted). And when the Court has construed a statute (as it did in *Feres*), *stare decisis* often weighs heavily in favor of upholding prior precedent. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (citation omitted). But it is “not an inexorable command,” *id.* (citation omitted), and “special justifications” exist for overruling *Feres*. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). This is truly a rare

⁹ To be sure, the case has a lengthy procedural history, but that is largely because the parties disputed whether appeals belonged in the Second Circuit or the Federal Circuit. *See* Pet. App. 14a-15a. The Second Circuit ultimately decided all appeals in the case, and the court’s decision addressing the FTCA claim was unpublished because the court concluded that Petitioner’s claim was “foreclosed by [the court’s] decision in *Doe I.*” Pet. App. 5a. Thus, neither the procedural posture, nor the fact that the Second Circuit’s FTCA decision is unpublished, impacts the cert-worthiness of this case.

case for various reasons, several of which we highlight below.

First, *Feres* is an outlier that has received “widespread, almost universal criticism.” *Johnson*, 481 U.S. at 700 (citation omitted) (Scalia, J., joined by Brennan, Marshall, & Stevens, JJ., dissenting); *accord* Pet. 15-16 (citing criticism by lower courts). At this point, at least five members of this Court have expressly stated that *Feres* is wrong, *see Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019) (Thomas, J., dissenting), and Justice Ginsburg would have granted certiorari in a case that asked for the decision to be reconsidered, *id.* To reiterate, the reason for that near-universal criticism is because (1) “[t]here is no support for” *Feres* in the text of the FTCA, and (2) the “consequence of” *Feres*’s atextual interpretation is that service-members are “depriv[ed] . . . of any remedy when they are injured by the negligence of the Government or its employees.” *Lanus v. United States*, 570 U.S. 932, 932 (2013) (Thomas, J., dissenting) (discussing *Johnson*). Undoubtedly, “the analytical underpinning[s]” of *Feres* have been “substantially weakened.” *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997).

Second, overruling *Feres* implicates no meaningful reliance interests. There are no private reliance interests at stake—private interests plainly favor overruling *Feres* so that service-members can have their day in court. And whatever interest the federal government has in avoiding tort liability, there is no principled basis for continuing to shield the military from tort liability for sexual assault when all manner of

other federal agencies, like the federal prison system, would be subject to liability for the same actions. *Johnson*, 481 U.S. at 697; *accord id.* at 700 (rejecting reliance on “military discipline” to justify *Feres*).

Lastly, it is beyond dispute that *Feres* has been “tested by experience [and] has been found to be inconsistent with the sense of justice or with the social welfare.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989). For more than 70 years, the men and women who sacrifice so much for our country have had the courthouse doors barred to them, including when they are sexually assaulted on a college campus. *See supra* Part I; *accord* Pet. 11-14. This Court’s decision in *Feres* is responsible for that ongoing injustice, and the time has come for the Court to correct its “own error.” *Girouard v. United States*, 328 U.S. 61, 69-70 (1946).



CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MAYA M. ECKSTEIN

Counsel of Record

MATTHEW R. MCGUIRE

KELLY R. OELTJENBRUNS

HUNTON ANDREWS KURTH LLP

Riverfront Plaza, East Tower

951 East Byrd Street

Richmond, VA 23219

(804) 788-8788

meckstein@huntonAK.com

November 30, 2020