No. 20-559

In the Supreme Court of the United States

JANE DOE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

For more than 70 years, this Court has held that the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, does not waive the United States' sovereign immunity from suit for injuries that "arise out of or are in the course of activity incident" to a person's active-duty service in the military. *Feres* v. *United States*, 340 U.S. 135, 146 (1950). The questions presented are:

1. Whether the Court should overrule its interpretation of the FTCA in *Feres*.

2. Whether the Court should create an exception to *Feres* that would authorize claims against the United States asserting violations of military regulations, injuries incurred during recreational activities, or injuries incurred while attending a military service academy.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):
Doe v. *Hagenbeck*, No. 13-cv-2802 (Nov. 21, 2017)

United States Court of Appeals (2d Cir.):
Doe v. *Hagenbeck*, No. 15-1890 (Aug. 30, 2017)
Doe v. *United States*, No. 18-185 (May 29, 2020)

United States Court of Appeals (Fed. Cir.):
Doe v. *United States*, No. 18-1246 (Jan. 18, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is reprinted at 815 Fed. Appx. 592. An earlier opinion of the court of appeals (Pet. App. 16a-66a) is reported at 870 F.3d 36. An additional order of the court of appeals (Pet. App. 11a-12a) is unreported. An order of the United States Court of Appeals for the Federal Circuit (Pet. App. 13a-15a) is unreported. The order and opinion of the district court (Pet. App. 69a-102a) is reported at 98 F. Supp. 3d 672.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2020. The petition for a writ of certiorari was filed on October 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a cadet at the United States Military Academy (West Point) from 2008 to 2010. Pet. App. 20a, 22a. As a West Point cadet, petitioner was an active duty member of the Army. See 10 U.S.C. 7075(a) and (b)(2).

Petitioner alleges that, during her time at West Point, the academy's administration took inadequate steps to address a misogynistic culture and to provide training and prevention regarding sexual harassment and sexual assault. Pet. App. 20a-21a. She further alleges that in May 2010, near the end of her second year, she was raped by a fellow cadet on the West Point campus. *Id.* at 21a. Shortly thereafter, petitioner twice visited the cadet health clinic, where she received emergency contraception and sexually-transmitted-disease testing. Petitioner also discussed the incident during counseling with a West Point psychiatrist. *Id.* at 21a-22a. Petitioner then met with a West Point sexual assault response counselor, who advised her that, if she wanted to report the incident to military authorities, she could file either an "unrestricted" report—which would trigger an investigation that could lead to disciplinary action against her assailant—or a "restricted" report—which would be confidential and would not trigger such an investigation. *Id.* at 22a. Petitioner chose to file a restricted report. *Ibid.* In August 2010, petitioner resigned from West Point and was honorably discharged. *Ibid.*

2. Petitioner filed this action in 2013, seeking money damages from the United States as well as two military officers with leadership roles at West Point. Petitioner's claims against the United States were brought under the Federal Tort Claims Act (FTCA), 28 U.S.C.

1346(b), 2671 *et seq.*, and the Little Tucker Act, 28 U.S.C. 1346(a)(2). Her claims against the officers in their personal capacity invoked the implied cause of action recognized by *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and alleged violations of her constitutional rights to equal protection and due process of law. Pet. App. 18a-19a, 23a-24a. As relevant here, petitioner's equal-protection *Bivens* claim against the officers and her FTCA claim against the United States both relied on a similar theory of liability: that West Point's military leaders had failed to provide appropriate training and prevention related to sexual harassment and assault, failed to provide sufficient support for cadets who are assaulted, tolerated a culture that was hostile toward women, and failed to recruit and retain an adequate number of female cadets and faculty. *Id.* at 5a, 33a-34a, 124a, 126a-131a. Petitioner did not assert any claims against the cadet who allegedly assaulted her. *Id.* at 18a.

The district court dismissed all but one of petitioner's claims. Pet. App. 69a-102a. The court dismissed both of petitioner's claims against the United States, holding that her FTCA claim fell within the "discretionary function" exception to the United States' waiver of sovereign immunity, 28 U.S.C. 2680(a), and her Little Tucker Act claim failed because her allegations "sound[ed] in tort," not contract, 28 U.S.C. 1346(a)(2). Pet. App. 96a-101a. The court also dismissed petitioner's due-process *Bivens* claim against the officers with leadership roles at West Point for failure to allege a sufficient nexus between the officers' actions and her rape. *Id.* at 90a-92a. The court held, however, that petitioner's equal-protection *Bivens*

claim could proceed, over the officers' objection that the court should not recognize a *Bivens* claim in this context, where petitioner asserted injuries incident to her military service. *Id.* at 92a-95a; see *United States* v. *Stanley*, 483 U.S. 669, 679 (1987) (holding that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers") (citation omitted).

3. The officers filed an interlocutory appeal, contending that the district court had erred in failing to dismiss petitioner's equal-protection claim under *Bivens*. The court of appeals agreed. Pet. App. 16a-41a.

To determine whether a *Bivens* remedy is available, the court of appeals looked to this Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950), which requires dismissal of FTCA claims for injuries to a military service member that "arise out of or are in the course of activity incident to service," *id.* at 146. See Pet. App. 31a n.6, 32a. The court of appeals based that analysis on this Court's decision in *Stanley*, which had relied on *Feres* to hold that "no *Bivens* remedy is available for injuries" arising out of or incident to military service. 483 U.S. at 684.

Applying that standard here, the court of appeals found that petitioner's alleged injuries "clearly are covered" by the incident-to-service bar. Pet. App. 32a. The court relied principally on *United States* v. *Shearer*, 473 U.S. 52 (1985), which held that a claim is incident to service where it calls into question "the 'management of the military'" and would "require[] the civilian court to

second-guess military decisions." Pet. App. 32a (quoting 473 U.S. at 58). Petitioner's allegations, the court of appeals explained, focused entirely on decisions made by West Point officers in connection with their management of that institution for military purposes, including their alleged failures to supervise programs to prevent and investigate sexual assault and harassment, and alleged failures to recruit and retain more female cadets and faculty members. *Id.* at 33a-34a. Such allegations would "not merely invite, but require a most wide-ranging inquiry into the commands of" military officers. *Id.* at 33a. The court therefore declined to recognize a *Bivens* claim for petitioner's alleged equal-protection violations, and it observed that two other courts of appeals had ruled similarly. *Id.* at 34a (citing *Klay* v. *Panetta*, 758 F.3d 369, 370, 375 (D.C. Cir. 2014), and *Cioca* v. *Rumsfeld*, 720 F.3d 505, 512 (4th Cir. 2013)).

Judge Chin dissented, Pet. App. 42a-66a, stating that although West Point is "a military facility" run by military officers, petitioner's challenge goes only to those officers' decisions in their "academic capacity overseeing a learning environment for students." *Id.* at 43a-44a.

4. Petitioner subsequently appealed the dismissal of her claims against the United States under the FTCA and Little Tucker Act. See Pet. App. 3a.[1]

A unanimous panel of the court of appeals affirmed in an unpublished decision. Pet. App. 1a-10a. Regarding petitioner's FTCA claim—the only claim at issue in

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[1] Petitioner attempted to appeal the dismissal of her claims against the United States to the United States Court of Appeals for the Federal Circuit, but that court found that it lacked jurisdiction over her appeal and transferred it to the Second Circuit. Pet. App. 13a-15a.

the petition for a writ of certiorari—the court determined that the claim was based on "the same purportedly wrongful conduct and the same injuries" that the court had previously found "incident to service," and was therefore barred under *Feres* for the reasons explained in the court's earlier opinion. *Id.* at 6a; see *id.* at 4a-7a. Because *Feres* compelled dismissal of petitioner's FTCA claim, the court declined to address whether, as the district court had held, that claim was barred on the independent ground that it fell within the FTCA's discretionary function exception. *Id.* at 7a.

ARGUMENT

The court of appeals correctly applied the FTCA as interpreted by this Court in *Feres* v. *United States*, 340 U.S. 135 (1950), and subsequent cases. Petitioner contends (Pet. i) that this Court should "overrule[]" *Feres*. But the Court's unanimous decision in *Feres* interpreting the FTCA was adopted shortly after the FTCA was enacted, has been the law for more than 70 years, and has been repeatedly reaffirmed by the Court, including in *United States* v. *Johnson*, 481 U.S. 681 (1987). Petitioner provides no sound basis for reconsidering those precedents, and this Court has consistently denied petitions for a writ of certiorari raising the same issue.

In the alternative, petitioner asks this Court (Pet. i) to grant review and hold that *Feres* does not apply to "claims brought by servicemembers injured by violations of military regulations, during recreational activities, or while attending a service academy." Nothing in the decisions of this Court or any court of appeals supports petitioner's invitation to carve out those exceptions to *Feres* "at this late date." *Johnson*, 481 U.S. at 687-688. And in any event, this case would be an unsuit-

able vehicle for considering petitioner's proposed exceptions to *Feres* because petitioner's suit challenges broad military-management decisions that do not depend on the specific circumstances surrounding her alleged rape while a service-academy cadet.

Moreover, this case would be an inappropriate vehicle for reviewing either of the questions presented for the additional reason that the FTCA's discretionary function exception would supply an independent basis for the judgment of the court of appeals. The petition for a writ of certiorari should be denied.

1. In *Feres*, this Court held that the FTCA does not waive the United States' sovereign immunity for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. Since then, this Court has repeatedly reaffirmed that interpretation of the FTCA. See *United States* v. *Stanley*, 483 U.S. 669 (1987); *Johnson*, *supra*; *United States* v. *Shearer*, 473 U.S. 52 (1985); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977); *United States* v. *Muniz*, 374 U.S. 150 (1963); *United States* v. *Brown*, 348 U.S. 110 (1954). The court of appeals correctly applied this Court's precedents, which should not be reconsidered after having been woven into the statutory fabric for more than 70 years.

a. This case is squarely controlled by *Feres* and its progeny—in particular, this Court's decision in *Shearer*. There, a service member was kidnapped and murdered by a fellow service member while off base and off duty. 473 U.S. at 53. The victim's estate sued the United States under the FTCA, claiming that the Army had known the murderer was dangerous but negligently failed to exert greater control over him and failed to warn others about his dangerousness. *Id.* at 53-54. This

Court determined that *Feres* barred the claim. *Id.* at 57-58. The estate's theory of negligence went "directly to the 'management' of the military," so permitting the suit to proceed "would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct." *Id.* at 58. As this Court explained, adjudication of such claims would "strike[] at the core of the[] concerns" that animate the *Feres* doctrine. *Ibid.*

Petitioner's FTCA claim is similarly at the "core" of *Feres*. Her claim focuses entirely on the injuries that she allegedly suffered while an active duty member of the Army, and she attributes those injuries to management decisions made by the senior officers who run West Point for military purposes. Those decisions included the officers' supervision of programs to prevent and investigate sexual harassment and assault, as well as their alleged role more broadly in West Point's culture. See Pet. App. 5a-6a, 33a-34a. As the court of appeals correctly explained, "[a]djudicating such a money damages claim would require a civilian court to engage in searching fact-finding about" these officers' "'basic choices about the discipline, supervision, and control' of the cadets that they were responsible for training as future officers." *Id.* at 34a (quoting *Shearer*, 473 U.S. at 58); see also *id.* at 5a-6a. Dismissing petitioner's claims "implies no tolerance for the misconduct alleged," but instead reflects the appropriate degree of "'judicial deference to Congress and the Executive Branch in matters of military oversight.'" *Id.* at 34a-35a

(quoting *Cioca* v. *Rumsfeld*, 720 F.3d 505, 518 (4th Cir. 2013)).

b. Petitioner seeks to avoid this Court's interpretation of the FTCA in *Feres*—which has been well established for more than 70 years—by urging the Court to overrule *Feres* in its entirety. The Court should decline that request once again.

i. This Court in *Johnson*—more than 30 years ago—specifically "reaffirm[ed] the holding of *Feres*," 481 U.S. at 692, including its rule that "service members cannot bring tort suits against the Government for injuries that 'arise out of or are in the course of activity incident to service,'" *id.* at 686 (quoting 340 U.S. at 146). And in the decades since *Johnson*, the Court has repeatedly denied petitions for a writ of certiorari urging that *Feres* be overruled, reexamined, or limited. See, *e.g.*, *Siddiqui* v. *United* States, 140 S. Ct. 2512 (2020) (No. 19-913); *Jones* v. *United States*, 139 S. Ct. 2615 (2019) (No. 18-981); *Daniel* v. *United States*, 139 S. Ct. 1713 (2019) (No. 18-460); *Buch* v. *United States*, 138 S. Ct. 746 (2018) (No. 17-744); *Futrell* v. *United States*, 138 S. Ct. 456 (2017) (No. 17-391); *Ford* v. *Artiga*, 137 S. Ct. 2308 (2017) (No. 16-1338); *Davidson* v. *United States*, 137 S. Ct. 480 (2016) (No. 16-375); *Ritchie* v. *United States*, 572 U.S. 1100 (2014) (No. 13-893); *Read* v. *United States*, 571 U.S. 1095 (2013) (No. 13-505); *Lanus* v. *United States*, 570 U.S. 932 (2013) (No. 12-862); *Purcell* v. *United States*, 565 U.S. 1261 (2012) (No. 11-929); *Witt* v. *United States*, 564 U.S. 1037 (2011) (No. 10-885); *Zmysly* v. *United States*, 560 U.S. 925 (2010) (No. 09-1108); *Matthew* v. *Department of the Army*, 558 U.S. 821 (2009) (No. 08-1451); *McConnell* v. *United States*, 552 U.S. 1038 (2007) (No. 07-240); *Costo* v. *United States*, 534 U.S. 1078 (2002)

(No. 01-526); *Richards* v. *United States*, 528 U.S. 1136 (2000) (No. 99-731); *O'Neill* v. *United States*, 525 U.S. 962 (1998) (No. 98-194); *George* v. *United States*, 522 U.S. 1116 (1998) (No. 97-1084); *Schoemer* v. *United States*, 516 U.S. 989 (1995) (No. 95-528); *Hayes* v. *United States*, 516 U.S. 814 (1995) (No. 94-1957); *Forgette* v. *United States*, 513 U.S. 1113 (1995) (No. 94-985); *Sonnenberg* v. *United States*, 498 U.S. 1067 (1991) (No. 90-539).

The Court should deny review here as well. Stare decisis "is 'a foundation stone of the rule of law.'" *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). Although "not an inexorable command," stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Ibid.* (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991)). Any decision to overrule precedent therefore requires "'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Id.* at 456 (quoting *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Stare decisis also has "enhanced force" in statutory interpretation cases because "Congress can correct any mistake it sees." *Ibid.*; see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) ("Congress remains free to alter what we have done.") (citation omitted). And that principle is especially acute in a case like this one, where the Court is asked to overturn a longstanding precedent and thereby expand the waiver of the United States' sovereign immunity to suit for money damages, given the central role of Congress in controlling the

public fisc and determining the United States' amenability to suit. Petitioner has not met the exceedingly high bar that would be necessary for the Court to abandon its established precedent in these circumstances, 70 years after *Feres* was decided and after the Court's repeated reaffirmation of its interpretation of the FTCA.

Petitioner argues that *Feres* was not correctly decided as an initial matter, and that supposed changes in the underpinnings of *Feres* over the years justify its reconsideration. But petitioner's arguments have already been considered and rejected by this Court. See pp. 12-16, *infra*. And just as important, this Court in *Johnson* observed that, as of that time, Congress had not "changed [the *Feres*] standard in the close to 40 years since it was articulated," even though "Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686 (quoting *Feres*, 340 U.S. at 138). The Court accordingly "decline[d] to modify the doctrine at th[at] late date." *Id.* at 688.

To reconsider *Feres* at this far later date (more than 30 additional years later), based on the same arguments that this Court rejected when it reaffirmed *Feres* in *Johnson*, would be particularly unwarranted. Since *Johnson*, "Congress has spurned multiple opportunities," *Kimble*, 576 U.S. at 456, to enact proposed legislation that would overrule or limit *Feres*.[2] Congress's

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[2] See, *e.g.*, S. 2451, 116th Cong., 1st Sess. (2019); H.R. 2422, 116th Cong., 1st Sess. (2019); H.R. 6585, 115th Cong., 2d Sess. (2018); H.R. 1517, 112th Cong., 1st Sess. (2011); H.R. 1478, 111th Cong., 1st Sess. (2009); S. 1347, 111th Cong., 1st Sess. (2009); H.R. 6093, 110th Cong., 2d Sess. (2008); H.R. 4603, 109th Cong., 1st Sess. 15-16 (2005) (proposed addition of Section 2161(c)(1)(E) to the Public Health Service Act, 42 U.S.C. 201 *et seq.*); H.R. 2684, 107th Cong., 1st Sess.

actions as recently as the National Defense Authorization Act for Fiscal Year 2020 (2020 Defense Act), Pub. L. No. 116-92, 133 Stat. 1198, confirm that it understands the *Feres* rule to be embedded in the FTCA's "statutory scheme, subject (just like the rest) to congressional change." *Kimble*, 576 U.S. at 456. In the course of considering that legislation, the House of Representatives passed an amendment that would have partially repealed the *Feres* rule by allowing service members to recover under the FTCA for certain service-related medical malpractice. See S. 1790, 116th Cong. § 729 (amendment as passed by House of Representatives, Sept. 17, 2019). The Senate, however, passed a bill with no similar provision. See H.R. Rep. No. 333, 116th Cong., 1st Sess. 1280 (2019) (Conf. Rep.). The House of Representatives and Senate ultimately reached a compromise, see *id.* at 1281: Congress declined to amend the FTCA, and instead amended the Military Claims Act, 10 U.S.C. 2731 *et seq.*, to authorize administrative review and payment of certain service members' medical-malpractice claims. See 2020 Defense Act § 731, 133 Stat. 1457-1460 (10 U.S.C. 2733a). This Court should not override Congress's judgment—recently reiterated—that the incident-to-service bar should be retained in the FTCA.

ii. Petitioner contends (Pet. 8-10, 17-18) that *Feres* is inconsistent with the FTCA's text and that the Court's reasoning there was flawed in various respects. In particular, she criticizes the Court's that there is "no parallel" between potential liability for injuries incident

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(2001); H.R. 3407, 102d Cong., 1st Sess. (1991); H.R. 536, 101st Cong., 1st Sess. (1989); S. 2490, 100th Cong., 2d Sess. (1988); S. 347, 100th Cong., 1st Sess. (1987); H.R. 1341, 100th Cong., 1st Sess. (1987); H.R. 1054, 100th Cong., 1st Sess. (1987).

to military service and the liability of "'a private individual under like circumstances,'" *Feres*, 340 U.S. at 141-142 (quoting 28 U.S.C. 2674), arguing that the Court's reasoning was later undermined by *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957), and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). But Justice Scalia made those same arguments in his *Johnson* dissent, see 481 U.S. at 693-695, and the majority of the Court was not persuaded. Instead, the majority identified "three broad rationales underlying the *Feres* decision" that remained good law: the distinctively federal character of the relationship between the military and service members, the availability of certain no-fault statutory benefits for service-related injuries, and the avoidance of judicial intrusion into military discipline and decision making. *Id.* at 688-691. Petitioner identifies nothing that would justify a different result here. Statutory stare decisis carries enhanced force "regardless whether [the Court's] decision focused only on statutory text or also relied * * * on the polices and purposes animating the law." *Kimble*, 576 U.S. at 456.

There is similarly nothing new about petitioner's contention (Pet. 18-20) that two of the rationales supporting *Feres*—the availability of no-fault statutory benefits for service-related injuries and the distinctively federal character of the relationship between the military and service members, see 340 U.S. at 143-145—have supposedly been rejected by this Court. The Court considered those arguments too in *Johnson*, and reaffirmed the continuing validity of both rationales. See 481 U.S. at 689-690. In arguing that those rationales fail to account for a handful of this Court's decisions (Pet. 18-19), petitioner merely echoes points raised by Justice Scalia's *Johnson* dissent, see 481 U.S. at 696-697,

and she offers no basis for accepting those arguments now when they were rejected by the Court more than 30 years ago in *Johnson*. Moreover, whatever might be said about other rationales for *Feres*, another of its core rationales—the need to avoid intrusion on military discipline and decision making—clearly supports the bar to suit in the circumstances of this case. See pp. 15-16, *infra*.[3]

Petitioner misses the mark in arguing (Pet. 19-20) that *Feres* is unjustified because there is no adequate alternative compensation available for service members who are victims of sexual assault. When this Court has referred to the "comprehensive system of benefits" available to service members, *Johnson*, 481 U.S. at 690, it has not made a judgment about the particular quantum of compensation that Congress has chosen to make available in a particular situation under the Veterans' Benefits Act of 1957 (Veterans' Benefits Act), Pub. L. No. 85-56, 71 Stat. 83, or otherwise. Rather, the Court has recognized that the very existence of such benefit programs—which do not require service members to

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[3] In *Shearer*, this Court stated that the distinctively-federal-character and alternative-compensation rationales for *Feres* were "no longer controlling." 473 U.S. at 58 n.4. As explained above, however, the FTCA claim in *Shearer* was precluded because the complaint in that case, like the complaint here, on its face challenged the management of the military and "basic choices about the discipline, supervision, and control of [servicemembers]." *Id.* at 58. The Court in *Johnson* subsequently clarified that *Shearer* did not, by holding that this additional rationale supported the *Feres* bar under the circumstances of that case, declare the other *Feres* rationales inapplicable where—as in *Johnson* and many other *Feres* cases—"military negligence is not specifically alleged" on the face of the complaint. *Johnson*, 481 U.S. at 691.

establish negligence—distinguishes remedies for injuries incident to service from the injuries that Congress sought to compensate through the FTCA: those that went categorically uncompensated before the FTCA's enactment. See *Johnson*, 481 U.S. at 689-690.

Moreover, Congress and the military have taken numerous steps to prevent sexual harassment and assault, and to address the needs of any service members who are harassed or assaulted. Service members are entitled to medical care, counseling, and legal support—regardless of whether they elect to file an unrestricted report and pursue a criminal investigation—as well as a robust legal process should they elect to file an unrestricted report (which petitioner was offered but declined to do). See, *e.g.*, 10 U.S.C. 1044, 1044e, 1565b; 32 C.F.R. 103.6. Depending on the circumstances, service members may also be entitled to compensation under the Veterans' Benefits Act. See, *e.g.*, 38 U.S.C. 1131. In addition, a spate of legislation enacted over the last several years is targeted at augmenting the tools available to prevent and remedy sexual assault in the military, and the Department of Defense (DoD) has similarly emphasized the crucial importance of these issues, including through a recent memorandum from the Secretary of Defense requiring a comprehensive review. See, *e.g.*, *Sexual Assault Prevention and Response (SAPR) Program*, 85 Fed. Reg. 42,707 (July 15, 2020) (32 C.F.R. Pt. 103) (rule updating DoD policy); *id.* at 42,708-42,709 (listing relevant legislation); Memorandum from the Sec'y of Def. to Senior Pentagon Leadership Commanders of the Combatant Commands Def. Agency & DoD Field Activity Dirs., *Re: Countering Sexual Assault and Harassment – Initial Tasking* (Jan. 23, 2021), https://go.usa.gov/xsTfB.

Petitioner asserts that the third rationale for *Feres*—avoiding intrusion into military discipline and decision making—"cannot coherently justify" the incident-to-service rule. Pet. 20. But that is precisely the assertion that this Court has emphatically rejected. As *Johnson* explained, "[e]ven if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." 481 U.S. at 691. And this case would present an especially poor vehicle for reassessing that rationale for *Feres*, because petitioner's complaint *does* "specifically allege[] "military negligence" in developing and managing programs to combat sexual harassment and assault. *Ibid.*; see Pet. App. 5a, 33a-34a, 124a, 126a-131a. As in *Shearer*, petitioner's suit "strikes at the core" of *Feres* by attempting to "require[] the civilian court to second-guess military decisions." 473 U.S. at 57-58. See pp. 7-8, *supra*.

Petitioner argues (Pet. 20-23) that litigating claims like hers would ultimately promote better military discipline by providing an external check (through damages claims in civilian courts) on the military's compliance with its own rules and regulations. That argument turns the logic of *Feres* and its progeny on its head. This Court has emphasized that the potential for "erroneous judicial conclusions" regarding matters of military discipline and management "would becloud military decisionmaking," and moreover, "the mere process" of allowing civilian courts to adjudicate claims that fall within the scope of the bright-line incident-to-service rule "would disrupt the military regime." *Stanley*, 483 U.S. at 683. Petitioner's objective to obtain a determination by a civilian court, in an action for money

damages, on whether the military properly adhered to its own "directives and instructions" in her case (Pet. 21) serves only to highlight the disruptive effects that would follow from allowing her claim to proceed.

iii. Petitioner next asserts (Pet. 25-29) that the rule established in *Feres* should be revisited because it leads to "inconsistent results" among the courts of appeals. Pet. 25 (capitalization altered). In fact, the courts uniformly understand that an FTCA claim is barred where the service member's alleged injury arose out of "activity incident to service." *Feres*, 340 U.S. at 146. And the circuit courts further understand that this inquiry "cannot be reduced to a few bright-line rules" because it requires analysis of the facts and circumstances of "each case," "examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." *Shearer*, 473 U.S. at 57.

Even if the decisions on which petitioner relies reflected true disagreements—rather than mere applications of *Feres* to differing facts and circumstances—those narrowly divergent outcomes would not justify overruling the fundamental framework that *Feres* provides. And this case, in particular, involves a context in which the application of *Feres* is well settled. As the court of appeals correctly explained, where, as here, a service member's claim on its face alleges military negligence in management and decisionmaking, *Shearer* requires dismissal. The decisions of other circuit courts addressing similar claims are in accord. See, *e.g.*, *Klay* v. *Panetta*, 758 F.3d 369, 375 (D.C. Cir. 2014); *Cioca*, 720 F.3d at 513-516 (4th Cir.); *Smith* v. *United States*, 196 F.3d 774, 777-778 (7th Cir. 1999), cert. denied, 529 U.S. 1068 (2000).

Most of the alleged divisions among the courts of appeals that petitioner invokes—involving the application of *Feres* to "dual status" members of the military, to claims on behalf of service members' children where the claim derives from negligent treatment of the service member, and to off-duty service members whose conduct does not involve military orders or training (Pet. 27-29)—are not even arguably implicated here. This case would therefore be an inadequate vehicle to resolve any disagreements that might exist in those contexts. Petitioner also contends (Pet. 25-27) that the circuits are divided over the application of *Feres* to cases involving recreational activities and violations of military regulations. As explained below, however, there is no genuine disagreement among the courts of appeals on those issues, and even if there were, any disagreement would not be implicated in this case. See pp. 19-23, *infra*. This Court has consistently denied petitions for a writ of certiorari invoking the alleged circuit conflicts identified by petitioner, and the Court should follow the same course here.[4]

iv. Petitioner acknowledges (Pet. 12) that, under long-standing FTCA precedent, the dismissal of her case is "not an outlier." She instead contends (Pet. 11-14) that *Feres* should be overruled because it produces "unjust[]" results. But this Court rejected that

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[4] See, *e.g.*, *Neville* v. *Dhillon*, 140 S. Ct. 2641 (2020) (No. 19-690); *Johnson* v. *Department of the Army*, 574 U.S. 1078 (2015) (No. 14-583); *Ritchie*, *supra* (No. 13-893); *Purcell*, *supra* (No. 11-929); *Witt*, *supra* (No. 10-885); *Wetherill* v. *McHugh*, 564 U.S. 1037 (2011) (No. 10-638); *Zuress* v. *Donley*, 564 U.S. 1037 (2011) (No. 10-374); *Zmysly*, *supra* (No. 09-1108); *Matthew*, *supra* (No. 08-1451); *McConnell*, *supra* (No. 07-240); *Richards*, *supra* (No. 99-731).

contention in *Johnson*, 481 U.S. at 688 n.9, partly in light of the "comprehensive system of [no-fault statutory] benefits" that Congress has provided for service members, *id.* at 690-691. And *Feres* has the additional virtue of ensuring equity among service members no matter where they are injured, see 340 U.S. at 143: Even without *Feres*, FTCA remedies are unavailable to service members who are injured in combat, 28 U.S.C. 2680(j), or in a foreign country, 28 U.S.C. 2680(k). If this Court were to overrule *Feres* and thereby afford a unique remedy only to service members who are injured stateside, the result would be a fundamental inequity that could cause serious morale problems in the military. Petitioner's policy arguments overlook these rationales—already recognized by this Court—and would be better directed to Congress, which "can correct any mistake it sees." *Kimble*, 576 U.S. at 456.

2. As an alternative to petitioner's request that this Court overrule *Feres* in its entirety, petitioner suggests (Pet. i) that this Court grant review to create an exception to *Feres* for claims arising during recreational activities, while attending service academies, or involving injuries due to violations of military regulations. But petitioner does not develop her argument in support of that request, relegating it to a single footnote. See Pet. 30 n.15. That is not sufficient to present an issue for review by this Court. And to the extent petitioner suggests that her request for any of several fact-specific exceptions to *Feres* is supported by alleged divisions among the circuit courts (Pet. 25-27), she is incorrect.

a. Petitioner argues (Pet. 25-26) that, because her alleged rape "did not occur while she was performing a military mission, nor did it serve a military purpose,"

this case implicates the question "whether injuries incurred during recreational activities" are incident to service. That description of the question fails to capture petitioner's own theory of FTCA liability. This suit does not "focus narrowly" on the single incident of her alleged assault, *Klay*, 758 F.3d at 375; rather, petitioner's claim against the United States concerns the military's decisions about how to manage a broad array of issues at West Point, ranging from administering policies on sexual harassment and assault, to the hiring of faculty, to the overall culture of the institution. See Pet. App. 5a-7a, 32a-35a. In *Shearer*, the off-duty and off-base kidnapping and murder of Private Shearer "plainly did not advance any military mission," yet *Feres* nevertheless applied. *Klay*, 758 F.3d at 374. *Feres* applies here, too, because petitioner's claim looks beyond the allegations concerning her particular assault and "goes directly to the management of the military." *Shearer*, 473 U.S. at 58 (internal quotation marks omitted). The cases cited by petitioner (Pet. 25-26), none of which involved a similar theory of liability, are therefore inapposite.

In any event, contrary to petitioner's contention, no genuine conflict exists among the courts of appeals concerning injuries that (unlike in this case) *do* arise out of recreational activities. In three of the cases cited by petitioner, *Feres* barred the suits because the service members were injured while taking advantage, in their military capacities, of recreational activities that were under military control. See *Costo* v. *United States*, 248 F.3d 863, 867 (9th Cir. 2001) (military rafting trip had been offered to the deceased service member "as a benefit of * * * military service," and the program "was under the command of the base's commanding officer"),

cert. denied, 534 U.S. 1078 (2002); *Bon* v. *United States*, 802 F.2d 1092, 1095 (9th Cir. 1986) (injured service member "enjoyed the use of the Special Services Center solely by virtue of her status as a member of the military," and the Center "was directly under the control of the commanding officer of the San Diego Naval Training Center"); *Hass* v. *United States*, 518 F.2d 1138, 1139, 1141 (4th Cir. 1975) (injured service member was riding a horse he had "rented from a stable owned and operated by the Marine Corps"; the service member "could be disciplined for misconduct while using it"; and such "[r]ecreational activity provided by the military can reinforce both morale and health and thus serve the overall military purpose").

In *Regan* v. *Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008), by contrast, *Feres* did not bar the suit of a service member who was a mere guest on a boat that another service member had rented from a military recreational facility. See *id.* at 640. The injured service member's presence served no military function, *ibid.*, and guests did not need to be affiliated with the military, so the service member's "relationship to the Army was coincidental to his injuries," *id.* at 643.

b. Petitioner provides no support for her suggestion (Pet. 30 n.15) that *Feres* should be held categorically inapplicable to injuries incurred while attending a service academy. Nor would such a rule be justified, including in the circumstances of this case. As the court of appeals explained, any attempt to "frame[] [petitioner's] suit as related to her role as a student and not her role a soldier" is wholly "unsupported," and any attempt to "disaggregate" West Point's educational functions from its military mission would be "fanciful, at best." Pet.

App. 6a, 39a (citations omitted). West Point has a "single, unitary mission": training cadets—who are active-duty members of the Army, 10 U.S.C. 7075(a) and (b)(2)—"to be future officers." Pet. App. 39a.

c. Petitioner also errs in contending (Pet. 26-27) that this case would be an appropriate vehicle for addressing whether *Feres* bars cases involving "tortious violations of [DoD] regulations." The only reference in the petition to any specific "regulation[]" appears once in a footnote in the statement of the case. See Pet. 5 n.4. This is therefore plainly not a case in which the core theory of negligence—which, as just mentioned, focuses on sweeping allegations concerning military-management decisions related to sexual assault and harassment—is tied to the military's violation of a specific and mandatory regulation.

Regardless, there is also no conflict among the courts of appeals in cases involving violations of military regulations. The circuit courts agree (correctly) that this Court's decisions require a civilian court to refrain from "involving itself in a military matter, *especially* where a military regulation is at issue." *Satterfield* v. *United States*, 788 F.2d 395, 398 (6th Cir. 1986) (emphasis added). As the court of appeals explained below, a novel *Feres* exception that "turns on" whether any military regulations have allegedly been violated would surely cause undue encroachment on military affairs, in conflict with this Court's decisions. Pet. App. 38a n.10.

This Court has explained that "[j]udges are not given the task of running the Army," *Chappell*, 462 U.S. at 301 (citation omitted), that service members' claims challenging "'management'" of the military "strike[] at the core" of *Feres*, *Shearer*, 473 U.S. at 58, and that the incident-to-service test avoids "extensive inquiry into

military matters," including both "discipline and decisionmaking," *Stanley*, 483 U.S. at 682-683. To the extent there is tension between these principles and the Ninth Circuit's stray reference in *Johnson* v. *United States*, 704 F.2d 1431 (1983), to the Government's "fail[ure] to follow established military rules and procedures" as one of several indicia that the injury in that case was not incident to service, *id.* at 1440, that reference was inessential to the outcome of that case and is inconsistent with this Court's subsequent decisions in *Chappell*, *Shearer*, and *Stanley*.

3. Even if either question presented could otherwise warrant this Court's review, this case would be an unsuitable vehicle because the FTCA's discretionary function exception would provide an independent basis for affirming the court of appeals' judgment affirming the dismissal of petitioner's FTCA claim. See 28 U.S.C. 2680(a) (the FTCA cause of action "shall not apply to * * * [a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"). The district court based its decision dismissing petitioner's FTCA claim entirely on the discretionary function exception, Pet. App. 96a-100a, and the parties fully briefed the issue in the court of appeals.

The district court correctly explained why the discretionary function exception squarely applies here: federal officers' management of the military-training institution at West Point—including specifically overseeing its programs to prevent and respond to sexual assault and sexual harassment—is not a ministerial

activity but involves substantial "element[s] of judgment or choice." *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991) (citation omitted). Petitioner's FTCA claim invoked not specific directives but rather "large, amorphous objectives and goals," and "criticize[d]" the military officers' "discretionary actions and decisions" in the performance of their responsibilities. Pet. App. 99a. Thus, resolution of the questions presented regarding *Feres* in petitioners' favor would not alter the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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