No. 20-56180

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHRYN SPLETSTOSER,
Plaintiff-Appellee,

v.

JOHN HYTEN, *et al.*,
Defendants-Appellants,

On Appeal from the United States District Court
for the Central District of California, Case No.
The Honorable Michael W. Fitzgerald, District Judge

BRIEF OF *AMICI CURIAE* PROTECT OUR DEFENDERS, NOT IN MY MARINE CORPS, SERVICE WOMEN'S ACTION NETWORK IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state that they do not have any parent corporations, and that no publicly held corporation owns a 10% or more ownership interest in any *amicus curiae*.

Dated: September 24, 2021.

Respectfully submitted,

/s/ Don Christensen

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INTEREST OF *AMICI CURIAE*

Amici Curiae to vindicate the public interest in the advancement of ending sexual assault and harassment within the United States Military.

Protect Our Defenders ("POD") is a 501(c)(3) non-profit 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.

Not In My Marine Corps is a group of retired, veteran, and civilian members dedicated to ending sexual harassment and assault in the Armed Forces. Not In My Marine Corps' mission is to advocate for survivors of sexual assault and harassment among military service members, and expose the pervasive behaviors and attitudes that have been ingrained by complacent and dismissive military leadership. Not In My Marine Corps aims to provide resources for service women and men to report harassment or assault, take action to help themselves, and stand up for others.

Service Women's Action Network ("SWAN"), since its founding, 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.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no person other than *amici curiae* and their counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The United States Air Force declined to provide COL. Spletstoser proper redress for her sexual assault under the Uniform Code of Military Justice ("UCMJ"). Due to this failure, COL. Spletstoser brought a civil suit under the Federal Tort Claims Act ("FTCA"). Judge Michael W. Fitzgerald's ruling correctly

determined that the sexual assault in this case falls outside the scope of "incident to service" and is therefore not protected under the *Feres* doctrine. The Court should uphold the district court's ruling because *Feres* should be construed narrowly, limiting its applicability, to provide proper redress in civil court for military victims of sexual assault. The United States military does not provide proper redress for victims under the UCMJ. Therefore, narrowly interpreting *Feres* would allow victims to seek proper redress in civil court in the same manner as survivors who are not members of the military.

ARGUMENT

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

The scourge of sexual violence in the United States Military is no secret. In 2015 there were 2,828 reported cases of sexual assault by service members for incidents that occurred during military service, but by 2020, there were 6,290 cases reported, a 122.41% increase. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 5 (2020). Despite an increase in sexual assault reports since 2015, convictions have plummeted by almost 80% in the same timeframe. Military Sexual Assault Fact Sheet, PROTECT OUR DEFENDERS (May 2021), https://www.protectourdefenders.com/wp-content/uploads/2021/05/MSA-Fact-Sheet-2021.pdf. In fiscal year 2020, of the 5,640 unrestricted reports of sexual assault, 225

(4.0%) of cases were tried by court martial, and a mere 50 (0.8%) offenders were convicted of a nonconsensual sex offense. *Id.*; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY APPENDIX B: STATISTICAL DATA ON SEXUAL ASSAULT 25-26 (2020).

Due to pervasive retaliation, the military justice system provides little recourse usually afforded to survivors of sexual assault in almost all other workplace environments. While the military and lawmakers attempt to eliminate sexual assault and provide victims with redress, the judicial branch can reexamine the *Feres* doctrine to apply it narrowly. The judicially created *Feres* doctrine was not meant to create an escape route for perpetrators of sexual assault within the military. Until the judiciary reexamines *Feres* doctrine, virtually all military perpetrators of sexual assault will continue to escape liability.

A. Sexual Violence Is Pervasive In The Military.

Despite sustained congressional oversight and Department of Defense ("DoD") actions, reports of sexual assault in the military continue to rise. As detailed in the 2019 DoD Sexual Assault Prevention and Response Office report evaluating the prevalence of sexual assault in the military, 20,500 service members claimed to have been sexually assaulted or raped in 2018. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 6 (2019); U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY APPENDIX B:

STATISTICAL DATA ON SEXUAL ASSAULT 11 (2019). Additionally, nearly one-fourth of active-duty women reported being sexually harassed in 2018, and women who were victims of harassment were three times more likely to be assaulted. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 11 (2019). These statistics indicate the continued pervasiveness of sexual assault within the military.

From 2010 to 2019, reports of sexual assault increased from approximately 2,500 to approximately 6,500, respectively. U.S. GOV'T ACCOUNTABILITY OFF., BRENDA S. FARRELL TESTIMONY BEFORE THE SUBCOMM. ON PERS., COMM. ON ARMED SERV., U.S. SEN., SEXUAL ASSAULT IN THE MILITARY CONTINUED CONG. OVERSIGHT AND ADDITIONAL DOD FOCUS ON PREVENTION COULD AID DOD'S EFFORTS 1 (2021). In October 2020, the DoD Inspector General noted that sexual assault remains a persistent challenge for the department. *Id.* In a January 2021 memo, the Secretary of Defense spoke of the scourge of sexual assault within the ranks of the armed forces, noting that despite years of work in the area, the department must do more. *Id.*

As dire as these statistics are, they still do not accurately portray the depth of the problem. In 2019, only 30% of service members who were sexually assaulted reported the crimes committed against them. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 14 (2019). Sexual assault remains

underreported in both the military and the civilian world due to privacy concerns of fear that the system will not hold perpetrators accountable. However, military personnel who survive sexual assault also face the additional concern of retaliation that keeps survivors from coming forward. Victims can be treated "like a leper" and face both in-person and online ostracization, victims and perpetrators can continue to work in the same unit, and victims can be passed over for promotions for reporting. U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MILITARY 10, 21 (2021); U.S. DEP'T OF DEF., HONORING OUR DUTY TO SURVIVORS OF MILITARY SEXUAL ASSAULT: RECOMMENDATIONS ON VICTIM CARE & SUPPORT 10 (2021). Of the eighty-two allegations of retaliation made in 2019, sixty-four, or about 73%, were against a superior within the victim's chain of command. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY APPENDIX B: STATISTICAL DATA ON SEXUAL ASSAULT 38 (2019).These startling numbers are not just anonymous statistics. They represent individuals who voluntarily swore oaths to defend this nation and its citizens, even if it may cost them their lives. However, they did not anticipate that it might cost them their dignity and bodily autonomy or that their perpetrators would be fellow service members.

B. The Military Justice System Does Not Provide An Effective Remedy To Service Member Victims Of Sexual Assault.

Before her disappearance in April 2020, SPC Vanessa Guillén faced sexual harassment from a superior who created an intimidating and hostile environment. U.S. ARMY, FORT HOOD AR 15-6 INVESTIGATION EXECUTIVE SUMMARY 1 (2021). Although unit leadership was made aware of the sexual harassment, leadership failed to take appropriate action. *Id.* at 3. Following the disappearance and murder of SPC Guillén, a Fort Hood Independent Review Committee ("FHIRC") conducted a three-month-long investigation examining whether command climate and culture at Fort Hood and the surrounding military community reflected the Army's commitment to safety, respect, inclusiveness, diversity, and freedom from sexual harassment. In December 2020, after a comprehensive review, the FHIRC found that there was a "permissive environment for sexual assault and sexual harassment" and that command culture regarding the Sexual Harassment/Assault Response and Prevention Program ("SHARP") was ineffective. U.S. ARMY, REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE ii (2020). No Commanding General or subordinate echelon commander intervened proactively and mitigated known sexual harassment and assault risks. *Id.* Without intervention from leadership to whom soldiers entrust their safety and wellbeing, victims "feared the inevitable consequences of reporting: ostracism, shunning and shaming, harsh treatment, and indelible damage to their career." *Id.* Consequently,

the ineffective implementation of SHARP led to significant underreporting of sexual harassment and sexual assault. *Id.*

The report not only confirmed that sexual harassment and assault continue to be pervasive in the military but also highlighted the military's failure to provide victims with proper redress. The FHIRC found that command climate fostered an environment that was permissive of sexual harassment "over a series of commands that predated 2018," which allowed "a toxic culture to harden and set." *Id.* at 114. The command climate has been "neither conducive to nor adequately supportive" of preventing incidents of sexual harassment and assault or in the treatment of reporters, adequacy and timeliness of the ensuing investigation, or the adjudication of cases and investigation. *Id.* at 115. As a result, it is not surprising that there is a general fear of reporting. However, the testimony from interviewees from the Fort Hood community further points to the military's failure to provide victims of sexual harassment and assault with proper remedies. According to the interviewees, there is an overwhelming perception that victims who report sexual assault would likely be subject to "direct or indirect retaliation, reprisal, intimidation or adverse reputational impact by their respective chains of command." *Id.* The report indicates that despite having programs like SHARP designed to eliminate sexual assaults and sexual harassment by creating a climate

that respects the dignity of every member of the Army, in reality, service members who are sexually harassed or assault are provided with little to no justice.

The independent, impartial assessment of the military's current treatment of sexual assault and sexual harassment established by Secretary of Defense Llyod Austin at the direction of President Biden on February 26, 2021, revealed that victims carry a heavy burden whether they report sexual assault or not. U.S. DEP'T OF DEF., WRITTEN TESTIMONY OF LYNN ROSENTHAL, CHAIR INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MILITARY, BEFORE THE HOUSE ARMED SERV. MILITARY PERS. SUB COMM. 5 (2021). Every sexual assault survivor interviewed who made an unrestricted report stated, "they regretted doing so" and most who had made restricted reports stated that their assaults were not kept confidential. *Id.* Nearly all survivors interviewed said they had "contemplated or attempted suicide," with most victims noting "they regretted making a report, either Restricted or Unrestricted" because there was "no confidentiality in the process - everyone in the unit learned about the report, one way or another" and that victims were "often shunned and ostracized" by both peers and leadership. *Id.* at 5; U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MILITARY 25 (2021). In addition, victims had trouble getting time off to go to medical and legal appointments in the aftermath of the assault, and some victims faced accusations of lying to harm

someone's career or to get out of work. U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MILITARY 25 (2021). The backlash service members receive for coming forward, and leadership's failure to fairly address sexual assault cases has caused enlisted service members to lose confidence in the fairness of sexual assault case outcomes. Ellen Mitchell, *Milley drops objection to change in military's sexual assault policy*, THE HILL (May 3, 2021), https://thehill.com/policy/defense/551574-milley-drops-objection-to-change-in-militarys-sexual-assault-policy?rl=1. As Joint Chiefs of Staff Chairman General Mark Milley notes, the enlisted force "lacks confidence in their chain of command" to "effectively deal" with sexual assault. *Id.* Many victims of sexual assault who loved being in the military felt they had no choice but to separate from the military due to how inept, hostile, and retaliatory the aftermath of their assault or harassment was, not the assault or harassment itself. U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MILITARY 24 (2021). Considering this, it is not surprising, but it is nonetheless disappointing that brave service members who come forward to report sexual assault face the injustice of not only the military's failure to provide support but its allowance of retaliation for reporting.

C. *Feres* Create a Fictional Dichotomy Between Civilians, Who May Seek Judicial Relief for Sexual Violence, and Service Members, Who May Not.

In the civilian justice system, prosecutors play a crucial role, acting as gatekeepers of the criminal justice system. On the other hand, the military justice system continues to be overly deferential to commanders, giving them almost complete control over charging decisions under the UCMJ. *Military Justice Overview*, PROTECT OUR DEFENDERS 1 (2015), https://www.protectourdefenders.com/downloads/Military_Justice_Overiew.pdf. Allowing commanders who are complicit in sexual harassment and assault and are "more focused on combat readiness, logistics, and other higher priority matters than on caring for their troops" to determine the outcome of a sexual assault case deprives victims of an impartial prosecutor. U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MILITARY 18 (2021).

Sexual assault victims require and deserve a highly trained special victim prosecutor independent from the chain of command to determine all critical decisions about their case. Commanders do not receive adequate training regarding victimization, implicit bias, and the impact these concepts have on the administration of justice. They are not trained like prosecutors to make purely legal decisions. *Id.* Unlike commanders, prosecutors are uniquely positioned to decide

whether there is a case and what charges to pursue, determine the likelihood of conviction, engage with other lawyers in plea negotiations, offer grants of immunity to trial witnesses, and issue subpoenas. *Id.* These decisions should be at the sole discretion of lawyers who, unlike commanders, are directly involved in interviewing witnesses, reviewing all available evidence, and preparing the case for trial. *Id.* The allowance of commanders to oversee and control the outcome of a sexual assault case has caused victims to raise concerns. *Id.* Victims question "how a commander with limited legal training can be trusted to make quintessential legal decisions such as deciding whether there is probable cause to charge someone with a crime and whether there is evidence sufficient to obtain and sustain a conviction to warrant sending a charge to a court-martial." *Id.* Even victims who respected their commanders said their commanders "should not be making those decisions." *Id.*

In addition to commanders' lack of training to properly determine the outcome of a sexual assault case, a commander's position of power and personal bias can cause a conflict of interest, leading to an unjust result in the case. While service members have the expectation of trust in their commanders to respond fairly to allegations of sexual harassment and sexual assault, "too many commanders have failed to do so." *Id.* Victims reported that they "do not trust commanders to do justice in sexual harassment and sexual assault cases for a

variety of reasons." *Id.* One reason is that a commander's position within the unit leads to an inherent conflict of interest since the command's performance is considered a reflection of the commander's promotion evaluations. *Id.* at 19. In addition to a perceived conflict of interest, victims see commanders as complicit by "allowing precursor demeaning language and actions to go unchecked." *Id.*

Despite numerous reports and the Department of Defense's admissions that sexual assault cases are not appropriately evaluated and leave victims with little justice or recourse, Appellants now claim, "The Department of Defense takes very seriously allegations of sexual assault by members of the military and for that reason undertook an extensive investigation in this case. Under established precedent, that investigation cannot be second-guessed in a tort suit against the United States." Brief for Appellant at 2, Spletstoser v. Hyten, No. 20-56180 (9th Cir. 2021). However, the Independent Review Commission has determined that sexual assault investigations have not been properly handled because leadership is neither trained nor equipped to deal with sexual assault cases. *See* U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MILITARY (2021). Commanding officers have a conflict of interest in determining the outcome of a case. *Id.* As such, the original investigation conducted by the military leadership and the decision not to hold Hyten accountable made by a fellow general officer are

inadequate and suspect. Therefore, they are of little value and unworthy of serving as an excuse to deny COL Spletstoser access to a civil remedy.

Based on the Independent Review Commission's findings, Secretary of Defense Austin recommended "removing the prosecution of sexual assaults and related crimes, domestic violence, child abuse, and retaliation from the military chain of command." Memorandum from U.S. Sec'y of Def. Lloyd Austin to Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DOD Field Activity Directors (July 2, 2021). Additionally, in recent years, even lawmakers, notably Sen. Kirsten Gillibrand, D-New York, have called for sexual assault prosecution to be taken out of the chain of command. They argue that commanding officers have proven that they lack the will or the understanding to adjudicate sexual assaults properly. Meghann Myers, *A culture that fosters sexual assaults and sexual harassment persists despite prevention efforts, a new Pentagon study shows*, MILITARY TIMES (Apr. 30, 2020), https://www.militarytimes.com/news/your-military/2020/04/30/a-culture-that-fosters-sexual-assaults-and-sexual-harassment-persists-despite-prevention-efforts-a-new-pentagon-study-shows/. Only by removing sexual assault prosecution from the chain of command will survivors of sexual assault in the military be given the same impartiality as their civilian counterparts, but that has not yet been done. Consequently, survivors such as COL Spletstoser have no real hope their offender

will be held accountable through the military justice system. At the same time, *Feres* has been used to deny access to civil remedies.

II. Congress Has Indicated A Clear Intent To Improve Protections Against Sexual Assault For Service Members.

The government asserts that this case should not be heard in a civil court because "the Department of Defense takes very seriously allegations of sexual assault by members of the military and for that reason undertook an extensive investigation in this case." Brief for Appellant at 2, Spletstoser v. Hyten, No. 20-56180 (9th Cir. 2021). As previously demonstrated, the United States military has failed to provide victims of sexual assault proper redress. When the criminal justice system fails to achieve justice for survivors, the civil courts act as a path to alternative remedies. However, the door to civil courts is closed to members of the military. Judge Michael W. Fitzgerald's ruling places a common-sense limit to the scope of "incident to service" applied to sexual assaults that occur off duty, off base, and unrelated to military duties. Such a limit provides an avenue for COL. Spletstoser that the Air Force denied her.

Judge Michael W. Fitzgerald correctly asserts that the sexual assault perpetrated by General Hyten does not fall under the scope of "incident to service." Spletstoser v. United States, No. CV 19-10076-MWF (AGRx) slip op. at 26 (C.D. Cal. Oct. 22, 2020). Therefore, the *Feres* doctrine does not protect General Hyten from being accountable for his actions in a civil court. The incident, in this case,

happened off-duty, off-base, and while the victim and the accused were wearing civilian clothing. The district court cited *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991) to further the notion that "intentional tortious and unconstitutional acts directed by one service member against another which furthers no conceivable military purpose and are not perpetrated during a military activity surely are past the reach of *Feres*." Spletstoser v. United States, No. CV 19-10076-MWF (AGRx) slip op. at 26 (C.D. Cal. Oct. 22, 2020). The district court correctly recognized that the sexual assault perpetrated by General Hyten has no conceivable military purpose and did not occur through the course of military activity as General Hyten's actions were not in the course of his employment. *Id.* at 27. Under these circumstances, the *Feres* doctrine does not protect General Hyten's actions.

Congress has indicated an intent to narrow the *Feres* doctrine generally in recent years. While Congress pursues legislative remedies for victims of sexual assault, the Judiciary must protect victims of sexual assault now. Congress recognizes that the military does not provide proper redress for victims of sexual assault. Further, passing legislation to narrow the *Feres* doctrine for medical malpractice was a twenty-one-year process. At this time, victims of sexual assault are left to seek justice in civil courts.

A. When The Legislature Fails To Adequately Protect Citizens, It Falls To The Courts To Provide Redress.

In Federalist No. 78, Alexander Hamilton notes the responsibility of the Judicial Branch to safeguard the rights of individuals from "dangerous innovations in the government." THE FEDERALIST NO. 78 (ALEXANDER HAMILTON) 468 (Clinton Rossiter ed., 1961). In writing about the importance of an independent Judiciary, he goes on to explicitly note that "injury to the private rights of particular classes of citizens by unjust and partial laws" are included in the infractions to the Constitution that the Judiciary must guard against. *Id.* at 469.

Alexander Hamilton explained that the design of Congress would produce, consequently, a slow legislative process. Alexander Hamilton, *Federalist Papers No. 70,* BILL OF RIGHTS INST. (1788), https://billofrightsinstitute.org/primary-sources/federalist-no-70. In the case of the *Feres* doctrine, Congress introduced legislation in 1999 that would narrow the scope of the *Feres*, allowing victims of medical malpractice to bring claims in civil court. Legislation that achieved this goal, however, was not passed until 2020. If the timeline of legislation to exempt medical malpractice from the *Feres* doctrine is to be a model, legislation exempting sexual assault from *Feres* is potentially twenty-one years away. An estimated 430,500 reports of sexual assaults, based on 2018 statistics, will be filed within the U.S. military over twenty-one years before legislation passes to exempt sexual assault from the *Feres* doctrine. Military Sexual Assault Fact Sheet,

PROTECT OUR DEFENDERS (May 2021), https://www.protectourdefenders.com/wp-content/uploads/2021/05/MSA-Fact-Sheet-2021.pdf.

The Supreme Court has recognized on numerous occasions that irreparable harm may be done by waiting too long for Congress to act on matters involving fundamental rights. *See Obergefell v. Hodges,* 576 U.S. 644, 678 (2015); *see also Bowers v. Hardwick,* 478 U.S. 186, 202 (1986) (Blackmun, J., dissenting) (predicting that harm will come from the Majority's deference to the legislature). When the NDAA provided an exemption for medical malpractice, the legislation allowed the exemption to be retroactive only back to 2018. Again, using the medical malpractice exemption as the model timeline, 389,500 potential incidents of sexual assault will remain without civil redress between now and then, even after Congress passes potential legislation narrowing *Feres* to allow civil claims for victims of sexual assault. Military Sexual Assault Fact Sheet, PROTECT OUR DEFENDERS (May 2021), https://www.protectourdefenders.com/wp-content/uploads/2021/05/MSA-Fact-Sheet-2021.pdf.

In the interim, the Judiciary can protect the rights of survivors of sexual assault and prevent irreparable harm that the epidemic of sexual assault within the military creates. In dismissing the notion that the Courts should wait for Congress to act, the *Obergefell* majority wrote that "the Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our

basic charter." *Obergefell*, 576 U.S. 644 at 677. Yet, *Feres* closes those courts to citizens who have sworn their lives to the protection of that basic charter, even when the harm done is a violation of their most basic right to bodily autonomy.

B. Congress Has Indicated a Clear Intent to Support and Protect Survivors of Sexual Assault Within the Military.

The legislative history of the FTCA, especially the provision regarding military personnel, gives no indication that Congress meant to protect the government from liability in cases of sexual assault. Further, the actions and statements of members of Congress provide a clear intent to provide avenues for survivors of sexual assault to seek justice, even when they are members of the military.

1. The Legislative History of the Federal Torts Claims Act suggests that the military exception provision be applied narrowly.

The *Feres* doctrine exemplifies how judicial overreach can create anomalous results that conflict with the intention of a federal statute. The legislative history of the FTCA, and Tort statutes in general, concerning the military exemption show a progression toward a narrow military exception. S. 1833, 73rd Cong. (1933); H.R. 129, 73rd Cong. (1933); S. 1043, 74th Cong. (1935); 28 U.S.C. § 2680. The FTCA today has two notable provisions to this case. First, the definition provided for

"acting within the scope of his office or employment" concerning military service members. Second, the military exception itself.

The language outlining the definition of "acting within the scope of his office or employment" remained consistent throughout drafts of federal tort statutes. An early definition read, "(c) the term "acting in the scope of his office or employment in the case of any member of the military or naval forces of the United States, means acting in the line of duty. S. 211, 72nd Cong., 16 (1932). This bill was not passed into law, but the language of the definition was adopted within the FTCA Congress enacted that remains in effect today. 28 U.S.C. § 2671.

The definition outlined within the FTCA provides a jarring contrast to the judicially created definition of "incident to service" related to the *Feres* doctrine. A definition that restricts activity to "line of duty" is far narrower than the overly broad "incident to service" definition that has led to a far-reaching block of lawsuits from military service members under the FTCA. 28 U.S.C. § 2671; *Feres v. United* States, 340 U.S. 135, 144 (1950). The inclusion of this definition in the FTCA both provides a conflict with the definition of "incident to service" and shows that Congress enacted today's FTCA with full knowledge of its earlier drafts.

Unlike the definition of "acting within the scope of his office or employment," the language of the military exception in the FTCA did not remain

consistent throughout the drafts of federal tort statutes. In earlier bills introduced that did not pass into law, the provision read, "The provisions of the Act shall not apply to—…Any claim for injury or death incurred by any member of the military or naval forces of the United States in cases where relief is provided by other law." S. 1833, 73rd Cong. (1933); H.R. 129, 73rd Cong. 9 (1933); S. 1043, 74th Cong. 11 (1935). The language here is broad and would provide an exception far more aligned with the one *Feres* creates. Congress rejected legislation that included this language multiple times. *Id.*

In contrast, the military exception in the FTCA reads, "The provision of this chapter and section 1346(b) of this title shall not apply to—…any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680. The language here is narrow is scope. The inclusion if "combatant activities" and "during time war" severely narrow the scope of this exception, especially in the context of earlier iterations of this exception. *Id.* The language of this provision, combined with the existence of broad language in earlier exception provisions, shows a progression toward a narrow scope for the military exception provision. S. 1833, 73rd Cong. 11 (1933); H.R. 129, 73rd Cong. 9 (1933); S. 1043, 74th Cong. 11, 18 (1935); 28 U.S.C. § 2680. Sexual assault is not a "combatant activity…during time of war."

The judicially created doctrine of *Feres* and with it a judicially created definition of "incident to service" is judicial overreach that conflicts with both the plain language of the statute and its legislative history. The overbroad scope of *Feres* in this regard has led to anomalous results in multiple contexts under the FTCA, including sexual assault within the military.

2. Congress Has Publicly Criticized the *Feres* Doctrine and Attempted to Narrow the Scope of "Incident to Service" to Allow Other Tort Claims, Notably Medical Practice Claims, to be Brought in Court.

To narrow the *Feres* doctrine, Congress passed the NDAA of 2020, which carved out an exception to Feres for medical malpractice. Members of Congress publicly criticized the *Feres* doctrine for barring military members from bringing medical practice lawsuits in 2002 during a hearing before the Committee on the Judiciary in the Senate of the United States. The *Feres Doctrine: An Examination of This Military Exception to the Federal Torts Claims Act: Hearing Before the S. Comm. on the Judiciary,* 107th Cong. 1 (2002).

During opening statements, Senator Specter from Pennsylvania criticized the *Feres* when he stated, "I have introduced legislation to amend the so-called *Feres* doctrine because it seems to me that the doctrine has produced anomalous results that reflect neither the will of Congress nor common sense." *The Feres Doctrine: An Examination of This Military Exception to the Federal Torts Claims Act:*

Hearing Before the S. Comm. on the Judiciary, 107th Cong. 1 (2002) (Opening Statement of Sen. Arlen Specter, Member, S. Comm. of the Judiciary).

At the same hearing, Senator Leahy gave testimony saying, "our civil justice system forces individuals and organizations to behave with care by punishing negligence. By adopting the FTCA, Congress sought to impose the same discipline on government agencies." *The Feres Doctrine: An Examination of This Military Exception to the Federal Torts Claims Act: Hearing Before the S. Comm. on the Judiciary,* 107th Cong. (2002) (Testimony of Patrick Leahy, Chairman, S. Comm. on the Judiciary). Senator Leahy also observed that he could not "see how allowing medical malpractice suits, for example, would harm military morale." *Id* at 2.

Seventeen years later, Congress held another hearing before the House Armed Services Committee to discuss narrowing the scope of the *Feres* doctrine to allow victims of medical malpractice to pursue claims in civil court. *Feres Doctrine - A Policy in Need of Reform?*, HOUSE ARMED SERV. COMM. (Apr. 30, 2019), https://armedservices.house.gov/2019/4/feres-doctrine-a-policy-in-need-of-reform. In his opening remarks, Congressman Kelly stated that "We as an institution have let you down." He also explained that "We [Congress] must focus on preventing these mistakes from happening again." *Id.* Medical malpractice claims were exempted from the *Feres* doctrine in 2020, eighteen years after Senator Specter called for just that in 2002.

It took Congress eighteen years to pass legislation that exempted medical malpractice from the *Feres* doctrine. Suppose the approach taken by Congress is to pass legislation that slowly carves out exemptions to the *Feres* doctrine one by one. In that case, the Court should note that the Committee on Armed Services in the Senate held a hearing on Sexual Assault in the military that directly discussed the merits of the *Feres* doctrine and its application to sexual assault cases.

During the hearing, Ms. Khawam, a witness before the committee, stated, "We need to, as we did with the Richard Stayskal Military Medical Accountability act, where we made a narrow exemption to the *Feres* doctrine, we need to do the same, provide the same rights to our victims of sexual assault." *To Receive Testimony on Sexual Assault in the Military: Hearing Before S. Comm. on Armed Services,* 117th Cong. 42 (2021) (Testimony of Natalie Khawam, President, Whistleblower Law Firm).

In response to Ms. Khawam, Senator Hirono stated, "I agree with you, and that is one of the provisions of the I am Vanessa Guillen Act, and I think we need to enable victims of sexual assault and harassment to be able to pursue claims outside the military." *To Receive Testimony on Sexual Assault in the Military: Hearing Before S. Comm. on Armed Services,* 117th Cong. 42-43 (2021) (Statement of Sen. Thom Tillis, Member, S. Comm. on Armed Services).

Congress criticized the inclusion of medical malpractice in the scope of "incident to service" because the FTCA and civil liability, in general, is a mechanism in our society that holds people responsible and prevents mistakes from being repeated. *The Feres Doctrine: An Examination of This Military Exception to the Federal Torts Claims Act: Hearing Before the S. Comm. on the Judiciary,* 107th Cong. (2002) (Testimony of Patrick Leahy, Chairman, S. Comm. on the Judiciary). Consequences prevent people from repeatedly making the same mistakes. The goals are similar to sexual assault. Consequences stemming from civil lawsuits will deter sexual perpetrators in the future. The judiciary can both provide victims of sexual assault proper redress and act as a preventative measure. As Senator Leahy testified, "our civil justice system forces individuals and organizations to behave with care by punishing negligence." The civil justice system can have the same effect on perpetrators of sexual assault. *Id.*

Congress also noted that allowing medical malpractice claims, a tort that is not related to nor furthers a military purpose, would not "harm military morale." *Id.* Like medical malpractice, it is not conceivable that the allowance of sexual assault claims in civil court would harm military morale. Steps taken to protect service personnel, promote safety and trust, and prevent survivors from deciding to leave active duty would logically have a positive effect on the military's morale.

Just as the *Feres* doctrine created "anomalous results" within the outcome of medical malpractice, the same holds with sexual assault claims. *The Feres Doctrine: An Examination of This Military Exception to the Federal Torts Claims Act: Hearing Before the S. Comm. on the Judiciary,* 107th Cong. 1 (2002) (Opening Statement of Sen. Arlen Specter, Member, S. Comm. of the Judiciary). The *Feres* doctrine has created a loophole that prevents perpetrators from being held accountable. That outcome is anomalous to the intent of Congress and when compared to what is traditionally considered "incident to service." The sexual assault, in this case, was perpetrated off-duty, off-base, and in civilian clothing. A result that treats the sexual assault case as an "incident to service" and allows the perpetrator to escape liability, just like medical malpractice, is an anomaly when considered within the *Feres* doctrine as a whole.

C. The Military Justice Improvement Act Has Been Introduced Repeatedly Over The Past Decade But Has Struggled To Garner Sufficient Support.

Senate Bill 967, or the Military Justice Improvement Act ("MJIA"), was first introduced in 2013 by New York Senator Kristen Gillibrand. Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013). The bill sought to improve how the UCMJ deals with sexual assault cases y empowering experienced and neutral Military prosecutors to make the decisions instead of allowing the authority to rest within the Chain of Command. S. 967 § 2(a)(3)(A). Gillibrand attempted to

include the MJIA, now titled Military Justice Improvement and Increasing Prevention Act, as an amendment to the National Defense Authorization Act (NDAA) of 2014 but was denied by a closed amendment process, with the Senate preferring to include provisions from Sen. McCaskill's bill. Jordain Carney et al., *Defense Bill Near Finish Line as Senators Renew Fight for Military Sexual-Assault Reform*, THE ATLANTIC (Dec. 3, 2014), https://www.theatlantic.com/politics/archive/2014/12/defense-bill-nears-finish-line-as-senators-renew-fight-for-military-sexual-assault-reform/441219/.

The Introduction of the MJIIPA and its growing support shows that Congress is aware that the military does not provide adequate avenues of justice for those who have survived sexual assault within the military. Congress is currently fighting this battle on two fronts. On the one hand, they are trying to reform the military to be self-sufficient in handling these issues, but that takes time. In pursuit of that goal, Senator Gillibrand has achieved enough momentum for her bill to be included in the Senate Armed Services Committee's markup of the FY22 NDAA. *Gillibrand Statement On Inclusion Of Military Justice Improvement And Increasing Prevention Act In NDAA*, KIRSTEN GILLIBRAND U.S. SEN. FOR N.Y. (July 22, 2021), https://www.gillibrand.senate.gov/news/press/release/gillibrand-statement-on-inclusion-of-military-justice-improvement-and-increasing-prevention-act-in-ndaa.

On the other hand, they are attempting to narrow the scope of *Feres* generally so that members of the military have access to the courts just as civilians do. Achieving both goals will create a high level of accountability and prevent such high rates of sexual assault in the future. Until that time, military survivors such as COL Spletstoser must have access to civil courts for redress.

CONSENT OF THE PARTIES

Amici Curiae files this brief with the consent of all parties.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge this Court to uphold the decision of the district court.

Dated: September 24, 2021.

Respectfully submitted,

/s/ Don Christensen

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,212 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief complies with the type size requirements Fed. R. App. P. 32(a)(5) and the typeface requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, I electronically filed the foregoing Amici Curiae Brief in support of the Apellee Kathryn Spletstoser with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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