No. 10-885

IN THE

Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae*.[2] AAJ is a voluntary national bar association whose members represent plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to AAJ members and to the public. AAJ members routinely represent large numbers of persons in personal injury actions and represent members of the military in a wide range of actions.

REASONS FOR GRANTING THE WRIT

A service member is about as likely to die from medical malpractice in a military hospital as from enemy action on the battlefield in Afghanistan.[3]

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] All counsel of record were notified of *amici*'s intent to file an *amicus* brief pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

[3] *To Err is Human*, the Institute of Medicine's landmark study of medical errors, calculated that between 44,000 and 98,000 thousand deaths per year result from medical malpractice, based on 33.6 million hospital admissions, or a rate of 1.3 to 2.9 per thousand. Institute of Medicine, *To Err is Human: Building a Safer Health System* 1 (Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson, eds., 2000), http://books.nap.edu/openbook.php?record_id=9728. In 2009, 59,714 service members were admitted to military hospitals (86,542 total service-member admissions minus 31 percent, or 26,828, who were admitted to non-military hospitals where, invoking a conservative assumption, the *Feres* doctrine would

Death in battle is a risk service members shoulder, and their families understand there is no remedy for its realization. Death by malpractice, in a setting wholly analogous to civilian life, is a less obvious risk, and the absence of a remedy can be a bitter revelation and an unexpected burden. This Court created that burden, and this Court should lift it, vesting modern military families with the same rights other Americans enjoy.

The modern military is vastly different from the military that shaped the thinking of the 1950

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not apply). *Hospitalizations Among Members of the Active Component, U.S. Armed Forces*, 2009, Medical Surveillance Monthly Report (MSMR), Vol. 17, No. 4 (Armed Forces Health Surveillance Center), Apr. 2010, at 2-5, http://www.afhsc.mil/viewMSMR?file=2010/v17_n04.pdf#Page=03. (MSMR is "the publication of record of the Armed Forces Health Surveillance Center (AFHSC) regarding the incidence, impact, distribution, and trends of illnesses and injuries among all Reserve and active component members of the Army, Navy, Air Force, Marine Corps, and Coast Guard." *Id.* at 2), Applying the rates in the IOM study, which included military hospitals, yields from 78 to 174 deaths per year. Battlefield fatalities for U.S. forces in Afghanistan have averaged 145 per year over the last ten years, with the raw numbers as follows: 2001, 12; 2002, 49; 2003, 48; 2004, 52; 2005, 99; 2006, 98; 2007, 117; 2008, 155; 2009, 317; 2010, 499. Operation Iraqi Freedon and Operation Enduring Freedom, *Afghanistan Coalition Military Fatalities By Year*, http://icasualties.org (last visited Feb. 7, 2011). The figure for deaths by malpractice should be conservative, as there is reason to believe malpractice rates are higher in the military system than in the hospital system as a whole. *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, 57, 57-67 (2003) (because of *Feres*, "Medical malpractice is generally viewed as rampant in the military, which has been widely criticized for failing to adopt standards and systems that are common to the civilian sector.")

Feres[4] court. During World War II, "about 12 percent of the population" served in the military, including, remarkably, "56 percent of the men eligible for military service." David R. Segal & Mady Wechsler Segal, *America's Military Population*, 59 Population Bulletin, no. 4, Dec. 2004 at 4. When *Feres* was decided, President Truman had just ordered desegregation of the military, an order the military was still resisting. Charles C. Moskos & John Sibley Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* 30-31 (1996). Warfare was different, requiring more troops than are required for modern warfare, with the military relying on conscription to meet its needs. Segal & Segal, *supra*, at 3.

Today's volunteer military is smaller, the proportion of the population serving trimmed to about 0.5 percent. *Id.* at 5, Figure 1. It is different in kind. "The all-volunteer military is more educated, more married, more female, and less white than the draft-era military." *Id.* at 3. In fact, it is "one of the most integrated institutions in America." Br. for Amici Curiae Julius W. Becton, Jr., *et al.* at 13, *Grutter v. Bollinger* 539 U.S. 306, 331 (2003) (No. 02-241), *cited with approval in Grutter v. Bollinger.* Service members are "highly educated" and more likely to come from high-income neighborhoods than from low-income neighborhoods. Shanea Watkins & James Sherk, *Who Serves in the U.S. Military? The Demographics of Enlisted Troops and Officers*, Heritage Foundation Center for Data Analysis Report #08-05 (Aug. 2008), http://www.heritage.org/research/reports/2008/08/who-serves-in-the-us-

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[4] *Feres v. United States*, 340 U.S. 135 (1950).

military-the-demographics-of-enlisted-troops-and-officers. This "new generation of military recruits has aspirations and expectations for quality of life services and access to health care, education, and living conditions that are consistent with the American standard of living." Donald H. Rumsfeld, *The Annual Defense Report: 2004 Report to the President and to the Congress* 19 (Cosimo ed., 2005). Fulfilling their aspirations is necessary to assure our "continued readiness to fight and win the Nation's wars." Dep't of Defense, *Modernized Social Compact: Report of the First Quadrennial Quality of Life Review* ii (2004), http://militaryhomefront.dod.mil/mhf_reports/QQoLR/QQoLR-9Of13.pdf

Today's military focuses not just on these service members, but on the families they bring with them. Today 1.2 million active duty service members come with 700,000 spouses and 1.2 million children. Segal & Segal, *supra*, at 2. Their spouses work: "Like their civilian counterparts, most of today's military families rely on two incomes." *Modernized Social Compact*, at i. This new demographic situation led President George W. Bush in 2001 to issue a National Security Directive creating a "new social compact" between the Department of Defense and military families, recognizing that attention to families, not just individuals, was needed to meet the recruitment and retention needs of the services. Dep't of Defense, *A New Social Compact: A Reciprocal Partnership Between the Department of Defense, Service Members and Families* 2-3 (2002), http://www.militaryhomefront.dod.mil/portal/page/mhf/MHF/MHF_DETAIL_1?content_id=168190. The President's directive required DOD to reconfigure its support services appropriately. *Id.*

A new demographic reality has caused the social compact that underlay the thinking of *Feres* to be replaced, strongly suggesting that *Feres* should be revisited and re-tuned to match modern conditions. *See* Benjamin Nathan Cardozo, *The Growth of the Law* 136-37 (1924) ("A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience.") Like the order of battle rule created by this Court in *Saucier v. Katz*, 533 U.S. 194 (2001), and abandoned by it in *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 816 (2009), the *Feres* doctrine is "a judge-made rule . . . , and experience has pointed up [its] shortcomings."[5] Like the rule in *Pearson*, changing it does not "implicate 'the general presumption that legislative changes should be left to Congress,'" and "change should come from this Court, not Congress." *Id.* at 816-17.

Two legal matters of constitutional magnitude also counsel reconsidering the *Feres* doctrine. The doctrine deprives service members, for no rational reason, of remedies available to citizens in general and even to similarly situated employees of the United States.[6] It incurs on the constitutional rights

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[5] *See United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting) (*Feres* doctrine was created by Court, not Congress). As an example of shortcomings *see, e.g.*, Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 Mil. L. Rev. 1, 4 (2007) ("The *Feres* doctrine . . . is too broad in scope and goes beyond protecting military decision making and discipline."); Jonathan Turley, *Pax Militaris*, *supra* n. 3.

[6] *See* Turley, *Pax Militaris*, *supra* n. 3.

of service members and their families to seek justice in the courts and to be afforded equal protection of the laws. Its broad sweep serves no function important enough to render these incursions tolerable.

The *Feres* gloss on the Federal Tort Claims Act (FTCA) is not consistent with modern notions about the importance of remedies or about the extent of sovereign immunity. This Court early recognized that providing remedies for civil harms is "[o]ne of the first duties of government," *Marbury v. Madison*, 5 U.S. 137, 163 (1803) and in 1983 made crystal clear that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983). This Court noted in *Feres* that sovereign immunity was in tension with that right, *Feres*, 340 U.S. 139-40, but nonetheless allowed fewer persons than Congress intended through the courthouse door. Three years later the Court recognized a trend against sovereign immunity, hailing the FTCA as "another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule." *Dalehite v. United States*, 346 U.S. 15, 30 (1953). That relaxation has accelerated. Since 1946, numerous states have further abrogated sovereign immunity legislatively. *See* Restatement (Second) of Torts § 895B (1979) (Reporter's Note listing positions of all states). More significantly, at least 16 states have abrogated sovereign immunity judicially. Shawn A. Grinolds, *Sovereign Immunity—Judicial Abrogation of North Dakota's Sovereign Immunity Results In Its Possible Legislative Reassertion and Legislation to Provide Injured Parties a Remedy for the Torts Committed by the State or Its Agents*

Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632 (N.D. 1994), 71 N.D. L. Rev. 761, 779, nn. 107-08 (collecting decisions) (1995). Those state decisions further suggest that this Court need not wait for legislative action to reconsider its judicial extension of sovereign immunity.

Reconsideration is compelled, too, by constitutional doctrine that has evolved to protect the family unit, the unit now recognized as critical to the success of the military. Since *Feres* was decided, this Court has decided that the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right to privacy within marriage, *Griswold v. Connecticut*, 381 U.S. 479 (1965), are fundamental. It has evolved doctrine that forbids governmental infringement of such rights "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). *Feres* discriminates against service members and their families, depriving them of remedies secured to similarly situated civilians, *see* Turley, *Pax Militaris*, *supra* n. 3, and burdens their familial relations. It creates distinctions that cannot be viewed even as rational, much less narrowly tailored: if Alexis Witt had died under the same circumstances as Dean Witt did die, Dean Witt, as representative of her estate, could pursue the exact claim that *Feres* denies here. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 201, 203 (2d Cir. 1987).

Military families deserve to have this Court reappraise its ruling in *Feres*, looking at new facts through the lens of new law.

CONCLUSION

The Petition for a Writ of Certiorari should be **GRANTED**.

February 9, 2011

Respectfully submitted,

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