No. 20-56180

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHRYN SPLETSTOSER

Plaintiff-Appellee,

---v.---

JOHN HYTEN, *et al.*,

Defendant-Appellants.

Appeal from a Decision of the United States District Court for the Central District of California, Western Division, Case No. 2:19-cv-10076-MWF-AGRx
Honorable Michael W. Fitzgerald

BRIEF OF PLAINTIFF-APPELLEE KATHRYN SPLETSTOSER

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellee Kathryn Spletstoser, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: September 17, 2021

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STATEMENT OF JURISDICTION

On November 25, 2019, Appellee, Army Colonel Kathryn Spletstoser (ret.), filed an action against Appellant, Air Force General John E. Hyten, in his personal capacity, alleging California common law and statutory causes of action. Subject matter jurisdiction was asserted on the basis of diversity of citizenship under 28 U.S.C. § 1332. *See* Compl. ¶ 6 Excerpts of Record ("ER") 86. The United States filed a Westfall Certification (ER 76-83) pursuant to 28 U.S.C. § 2679(d)(1) and 28 C.F.R. § 15.4. The Government's first motion to dismiss was granted on July 23, 2020, with leave for Spletstoser to file a First Amended Complaint ("FAC"). ER 53. The Government was substituted for the Defendant in that same Order under *Osborn v. Haley*, 549 U.S. 225 (2007). ER 52.

The FAC was filed against Hyten in his personal capacity on July 30, 2020. ER 32-51. The Government's second motion to dismiss and motion to transfer venue were denied, on the basis that: (1) the *Feres* doctrine does not confer immunity where an injury is not sustained incident to military service (*Lutz v. Sec'y of Air Force*, 944 F.2d 1477 (9th Cir. 1991)); (2) Spletstoser successfully rebutted the presumption created by the Government's Westfall Certification where allegations, when proven true, are beyond the scope of employment under state law theories of *respondeat superior* (*Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 436-37 (1995)); and, (3) venue was improper in the District of Nebraska because the FAC

does not put at issue any matter occurring in the District of Nebraska, and could have never been brought there. (*Rolling v. E*Trade Secs., LLC,* 756 F. Supp. 2d 1179, 1184 (N.D. Cal. 2010)). ER 4, 27-30.

The Government appeals only that part of the Order declining to dismiss based on the *Feres* doctrine. Principal Brief at 7, f.n. 1. This Court has jurisdiction over the Government's appeal pursuant to the collateral-order doctrine. *Lutz,* 944 F.2d at 1483-84.

STATEMENT OF THE ISSUE

There is not a single person in the United States—not Military servicemembers or anyone else— whose job description, or activities incident to their work, include sexual assault. This should not be a controversial proposition. Remarkably, however, the Justice Department seeks to prove it wrong.

When the Supreme Court created *Feres* it could have barred all suits against the military, but it declined to do so. It declined to do so precisely because some behavior, some activity, irrespective of the actors involved, simply cannot be considered "incident to military service." The Government limits its appeal to the application of the *Feres* doctrine alone. Therefore, the question before this Court is whether the district court correctly denied the Government's motion to dismiss under *Feres*, exercising subject matter jurisdiction over Spletstoser's state law causes of action against Hyten when Hyten sexually assaulted Spletstoser during an activity

that was not even remotely "incident to military service," an inquiry that is broader and more critical than "any actual impact on military discipline." *Lutz*, 944 F. 2d at 1485 (citing *United States v. Stanley*, 483 U.S. 669, 681 (1987)).

STATEMENT OF FACTS

A. Statutory Background

The Federal Tort Claims Act ("FTCA") broadly waives sovereign immunity against the United States arising from torts committed by federal employees. 28 U.S.C. § 1346(b)(1). The FTCA, which Section 314 incorporates by reference, permits the United States to be substituted as Defendant when the employee was "acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(2). "[T]he Attorney General's certification is 'the first, but not the final word' on whether the federal officer is immune from suit and correlatively, whether the United States is properly substituted as defendant." *Osborn v. Haley*, 549 U.S. 225, 246 (2007) (*quoting Gutierrez de Martinez*, 515 U.S. at 432).

The FTCA's "terms are clear." *Brooks v. United States*, 337 U.S. 49, 51 (1949). The statute provides that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674. The Act uses "neither intricate nor restrictive language in waiving . . . immunity." *United States v. Muniz*, 374 U.S. 150, 152 (1963). Critically, the FTCA expressly waives sovereign immunity for torts involving "members of the

military or naval forces" and "the military departments." 28 U.S.C. § 2671. This broad waiver of sovereign immunity is qualified by several enumerated exceptions, at least three of which indicate Congress specifically considered and provided for the needs of the military. *Id.* § 2680(j) (excepting "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"); *id.* § 2680(k) (excepting "[a]ny claim arising in a foreign country"); *id.* § 2680(a) (excepting "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function.").

These limited statutory exclusions do not encompass all claims incident to military service. In the first years after its adoption, the Supreme Court recognized that servicemembers were eligible for recovery under the FTCA. In 1949, the Supreme Court allowed servicemembers to bring claims for the actions of a civilian Army employee who struck their car with an Army truck. *Brooks*, 337 U.S. at 51. The *Brooks* Court was persuaded by the plain language of the statute, its structure, and its legislative history. *Id.* Observing the FTCA's numerous exceptions are "lengthy, specific, and close to the present problem," the Court noted "such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim' [to describe the scope of government liability for servicemember claims]." *Id.* The *Brooks* Court thus read the FTCA to permit servicemember claims not barred by a statutory exclusion, and rightly so. As the

Supreme Court repeatedly emphasized: "In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

Servicemembers are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on extratextual consideration. *See, e.g.*, *Carcieri v. Salazar*, 555 U. S. 379, 387 (2009); *Connecticut Nat'l Bank v. Germain*, 503 U. S. 249, 253-54 (1992); *Rubin v. United States*, 449 U. S. 424, 430 (1981).

Moreover, Congress considered—and rejected—a servicemember bar. *Lanus v. United States*, 570 U.S. 932 (2013) (Thomas, J., dissenting) ("Congress contemplated such an exception . . . but codified language that is far more limited.") (citations omitted). Indeed, "[t]here were eighteen tort claims bills introduced in Congress between 1925 and 1935," and "[a]ll but two contained exceptions denying recovery to members of the armed forces." *Brooks*, 337 U.S. at 51. Yet, the final text of the FTCA contained no such exception. *Id.* at 51-52. Accordingly, as the Supreme Court observed, "[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when [the FTCA] was passed." *Id.* at 51.

Yet, just one year after *Brooks*, and contrary to the plain language and legislative history of the FTCA, the *Feres* Court negated the FTCA's waiver of

sovereign immunity for servicemembers, creating an additional broad exception barring claims for injuries incurred "incident to service[,]" 340 U.S. at 146, a phrase that appears nowhere in the statute. In so doing, the *Feres* Court neglected the definition of servicemember employment in Section 2671 and rendered superfluous the combatant activities exception, 28 U.S.C. § 2680(k). "There is no support for [the incident to service bar] in the text of the statute . . . ." *Lanus*, 570 U.S. at 933 (Thomas, J. dissenting). The *Feres* Court's interpretation of the FTCA "flew directly in the face of a relatively recent statute's language," and "its willingness to ignore language, history, and the process of incremental law making . . . was . . . remarkable." *Taber v. Maine*, 67 F.3d 1029, 1038-39 (2d Cir. 1995); *see also McHugh v. University of Vermont*, 966 F.2d 67, 75 n.9 (2d Cir. 1992) (*citing McCall v. United States*, 338 F.2d 589 (9th Cir. 1964), *cert. denied*, 380 U.S. 974 (1965)).

Seven years after *Feres*, the Supreme Court acknowledged—in a case not brought by a servicemember—that "[t]here is no justification . . . to read exemptions into the [FTCA] beyond those provided by Congress." *Rayonier v. United States*, 352 U.S. 315, 320 (1957). "If the Act is to be altered that is a function for the same body that adopted it." *Id.* Nonetheless, for seventy years, the judicially created *Feres* doctrine, has wrongfully denied injured servicemembers access to civilian courts.

Auspiciously, whether *individuals* can be sued under state law in situations where *Feres* applies because the injury is incident to service (thus barring suits

against the government) but where the defendant's conduct is outside the scope of employment (thus eliminating a defense for the individual under the Westfall Act) has not yet been answered by the Supreme Court, even though this Circuit has extended the *Feres* doctrine in such a manner.

To do so means that "military service personnel who were the victims of serious intentional torts inflicted by other service personnel on base would effectively be denied any civil remedy against a wrongdoer who was *not* acting within the scope of his military employment—a result that has caused more than one court to blanch. *See, e.g.*, *Lutz v. Sec'y of Air Force*, 944 F.2d 1477 (9th Cir. 1991); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678 (1st Cir. 1999).

> "[The] Supreme Court may yet take the step of converting *Feres* into a formal immunity barring state law claims against individuals for conduct, however unauthorized and deliberate, that causes injury to the plaintiff incident to military service. But the risk of some injustice is manifest, the policy arguments for the extension are at the margin, and the Supreme Court has been increasingly loath to override state law in areas of traditional state responsibility without a clear Congressional mandate. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 115 L. Ed. 2d 532, 111 S. Ct. 2476 (1991). If the step is to be taken, it should be taken by the Supreme Court or upon more evidence that without it military autonomy will be seriously threatened.

Day, 167 F.3d at 685.

B. Factual Background

Spletstoser first served in the Armed Forces in 1989 as a reservist with the United States Army where she was an Airborne Parachute Rigger. *See* First Amended Compl. ("FAC") at ¶ 13, ER 34. Upon receiving her Commission as a Second Lieutenant in 1992, Spletstoser was selected to serve as an Officer on active duty. *See id.* at ¶ 14, ER 34. Spletstoser went on to serve in four separate combat deployments, first in Afghanistan (2002, 2005-06), and then in Iraq (2004, 2006-07). *See id.* at ¶ 15, ER 34. She was promoted early to the rank of Major in 2003, to the rank of Lieutenant Colonel on July 1, 2009, and to the rank of Colonel on September 1, 2014. *See id.* at ¶ 16, ER 34. During the course of her career, Spletstoser sustained combat related injuries, including a traumatic brain injury ("TBI"), of which the Hyten was aware. *See id.* at ¶ 17, ER 34.

In May of 2016, Spletstoser was assigned to STRATCOM as the Director of the Commander's Action Group ("CAG") under Admiral Cecil Hanley. *See id.* at ¶¶ 15, 18, ER 34. She was chosen for this role based on her record of exemplary leadership, education, and accomplishment. *See id.* at ¶ 19, ER 34. On or about November 3, 2016, Hyten became the STRATCOM Commander and kept Spletstoser on as his CAG Director, per the recommendation of Admiral Hanley. *See id.* at ¶ 20, ER 34.

Notwithstanding assignment to STRATCOM, Spletstoser remained a member with the United States Army. *See id.* at ¶ 21, ER 34. Notwithstanding assignment to STRATCOM, Hyten was a member of the United States Air Force. *See id.* at ¶ 22, ER 35. Although Hyten maintained the rank of General Officer, which is superior to that of Colonel, he was not Spletstoser's supervisor for disciplinary purposes. *See id.* at ¶ 23, ER 35. STRATCOM's stated mission is to deter strategic attack and employ forces, as directed, to guarantee the security of our nation and allies. *See id.* at ¶ 24, ER 35. STRATCOM is a combatant command, meaning it operates at the strategic level, also called the "Policy Level." *See id.* at ¶ 25, ER 35. The primary actors at this level are Congress, the Executive Branch led by civilians, ambassadors, and ultimately the National Command Authority (POTUS). *See id.* at ¶ 26, ER 35. At this level, the military is directly subordinate to civilian oversight and interfaces with civilian agencies, interagency organizations, and the international community. *See id.* at ¶ 27, ER 35. For example, STRATCOM Headquarters in Offutt is a primarily civilian, general schedule ("GS") run organization. *Id.* ¶ 28, ER 35. Upon information and belief, military servicemembers comprise approximately 30% of the workforce at STRATCOM Headquarters. *See id.* at ¶ 29, ER 35.

In 2017, STRATCOM was invited to attend the Reagan National Defense Forum ("RNDF" or "Event"), which was held in Simi Valley, California, from

December 1-2, 2017. *See id.* at ¶ 30, ER 35. The RNDF is hosted and run by the Reagan Presidential Library ("RPL"), a civilian organization. *See id.* at ¶ 31, ER 35. The RNDF is a bipartisan annual event held at the Ronald Reagan Presidential Library in Simi Valley, California, where key stakeholders come together to address issues pertaining to national defense and peacetime efforts. *See id.* at 32, ER 35. The military had no input as to whom was invited. *See id.* at. ¶ 33, ER 36. The RNDF is primarily financed and paid for by sponsors in the private sector. *See id.* at ¶ 34, ER 36. Representative sponsors of the event included, but were not limited to: Boeing, General Electric, General Dynamics, Global Foundries, Deloitte, Lockheed Martin, Northrop Grumman, and Rolls-Royce. *See id.* at ¶ 35, ER 36.

Spletstoser attended the RNDF in Simi Valley, California from December 1-2, 2017. *See id.* at ¶ 36, ER 36. Upon information and belief, those present for the RNDF included current and former senior civilian government officials, and business and media leaders, with a comparatively low percentage of military officials in attendance. *See id.* at ¶ 37, ER 36. The Event was attended by non-military attendees like Mark Aslett, President/CEO of Mercury Systems, Julian Barnes, a Wall Street Journal reporter, the Honorable Marion C. Blakey, CEO of Rolls-Royce North America, Congressman Anthony Brown, Congressman Bradley Byrne, Congressman Ken Calvert, Congressman John Carter, Congresswoman Liz Cheney, Senator Joni Ernst, Tom Gentile of Spirit AeroSystems, R.D. Geveden of

BWX Technologies, musical artist Lee Greenwood, Jennifer Griffin from Fox News, David Martin of CBS News, Josh Rogin of The Washington Post, Frederick J. Ryan., Jr. of The Washington Post, and Gary Sinise. *See id.* at ¶ 38, ER 36-37. Security at the Event was maintained by private security personnel, contracted directly by the RPL. *See id.* at ¶ 39, ER 37. In the event of emergency, attendees were to contact the security personnel or dial 911 to summon local law enforcement. *See id.* at ¶ 40, ER 37. Event attendees were not segregated on the basis of their military status. *See id.* at ¶ 41, ER 37.

During the Event, Spletstoser mingled and conversed with civilian attendees. *See id.* at ¶ 42, ER 37. Spletstoser's schedule during the conference included breakfast, various panel discussions, a guided tour of the Reagan Library with civilians, and an awards dinner. Spletstoser's schedule during the conference included breakfast, various panel discussions, a guided tour of the RPL with civilians, and an awards dinner. *See id.* at ¶ 43, ER 37-38. During the Event, Spletstoser moved around freely to interact and network with civilian attendees. *See id.* at ¶ 44, ER 38. Spletstoser sat through receptions, panels, a luncheon hosted by Fox News host, Bret Baier, an awards ceremony, and a meeting with a United States Senator. Spletstoser sat through receptions, panels, a luncheon hosted by Fox News host Bret Baier, an awards ceremony, and a meeting with a United States Senator. *See id.* at ¶ 45, ER 38. After the Event was over, Spletstoser returned to her hotel

room at the Hyatt Regency Westlake, located at 880 S. Westlake Boulevard, Westlake Village, California. *See id.* at ¶¶ 38, 46-47.

The Hyatt Regency is a company owned by Hyatt Hotels Corporation, which owns and operates hotels and franchisees located throughout California. *See id.* at ¶ 48-49, ER 39. Upon information and belief, the majority of guests at the Hyatt Regency Westlake from December 1-2, 2017, were civilians, including civilian attendees of the RNDF, couples, and families. *See id.* at ¶ 51, ER 39. During Spletstoser's stay, the hotel was equally open to members of the military and non-military guests, including equal access to entrances, hallways, elevators, private rooms, and facilities. *See id.* at ¶ 52, ER 39. Hyten's hotel room was directly across the hall from Spletstoser's. *See id.* at ¶ 53, ER 39. The military neither managed nor dictated the day-to-day operations of the hotel. *See id.* at ¶ 54, ER 39. Similarly, the military was not responsible for policing the hotel or responding to emergencies during Spletstoser's stay and hotel employees were to contact local authorities in Westlake Village or dial 911. *See id.* at ¶¶ 55-56, ER 39. There was nothing unique about the room Spletstoser stayed in as it related to her status as a servicemember. *See id.* at ¶ 57, ER 39. Access to Spletstoser's room and the hallway leading to her room was unrestricted, and her room could be accessed just as easily as the rooms of any other civilian guest of the hotel during the same timeframe. *See id.* at ¶ 58, ER 39. Housekeeping had access to both Spletstoser's and Hyten's room. *See id.* at

¶ 59-60, ER 39-40. Upon information and belief, Spletstoser's room was (nearly) identical to every other civilian's room staying at the hotel during the same timeframe. *See id.* at ¶ 61, ER 40.

On or about December 2, 2017, late in the evening and after the Event had concluded, Hyten knocked on Spletstoser's hotel room door. *See id.* at ¶ 62, ER 40. At this time, Spletstoser was retiring for the evening, applying face cream and readying herself for bed. *See id.* at ¶ 63, ER 40. She was not expecting any visitors. *See id.* at ¶ 64, ER 40. Upon opening the door, Hyten entered Spletstoser's private hotel room, wearing workout clothes, not a military uniform. *See id.* at ¶ 65, ER 40. Hyten did not "order" Spletstoser to open the door, nor did Hyten "order" Spletstoser to grant him access to her room. *See id.* at ¶¶ 66-67, ER 40. Spletstoser could have declined Hyten's entry into her room had she elected to do so. *See id.* at ¶ 68, ER 40. Upon entering Spletstoser's room, Hyten did not discuss any military matters. *See id.* at ¶ 69, ER 40. Instead, Hyten grabbed Spletstoser so closely and tightly she was unable to move. *See id.* at ¶ 70, ER 40. Hyten began to kiss her on the lips and grabbed her buttocks. *Id.*

Hyten is approximately 6', 4" in stature. *See id.* at ¶ 71, ER 40. He is a man of considerable strength in comparison to Spletstoser, who is 5', 7". *See id.* at ¶ 72, ER 40. While restraining Spletstoser, Hyten uttered something to the effect of, "I want to make love to you." *See id.* at ¶ 73, ER 40. Spletstoser stated "that is not

going to happen" or words to that effect. *See id.* at ¶ 74, ER 40. However, Hyten restrained Spletstoser, grabbed her buttocks, kissed her against her will and rubbed his penis against her until he ejaculated. *See id.* at ¶ 75, ER 40-41.

Hyten's conduct was a substantial deviation from Hyten's duties and was carried out for his own personal gratification, and sexual activity does not fall within the scope of employment of any individual employed by the United States Air Force. *See id.* at ¶¶ 76-77, ER 41. Nonconsensual sexual acts toward the plaintiff do not fall within the scope of any employment with the United States Air Force, and Hyten's conduct was outside the scope of his employment with the United States Air Force. *See id.* at ¶¶ 78-79, ER 41. Further, sexual activity does not implicate military decision making, nor does sexual activity implicate military judgment. *See id.* at ¶¶ 80-81, ER 41. Nonconsensual sexual activity toward Spletstoser does not implicate military judgment, nor does nonconsensual sexual activity toward Spletstoser implicate military decision making. *See id.* at ¶¶ 82-83, ER 41. Nonconsensual sexual activity toward Spletstoser is not an activity incident to military service, therefore Hyten's conduct toward Spletstoser not an activity performed incident to his military service. *See id.* at ¶¶ 84-85, ER 41. Hyten was not subjected to military discipline for the nonconsensual acts taken against Spletstoser. *See id.* at ¶ 86, ER 41.

As a direct and proximate result of Hyten's intentional and reckless conduct, Spletstoser alleges she has sustained and will continue to sustain injury, including severe emotional distress, physical and mental health problems, and legal expenses, all of which have caused permanent injury in an amount to be determined at trial. *See id.* at ¶ 87, ER 41. None of the injuries sustained by Spletstoser occurred in an activity incident to her military service. *See id.* at ¶ 88, ER 41. The Amended Complaint omits any reference to other tortious conduct. And omits allegations of damage to Spletstoser's military career she may have suffered as a result of Hyten's alleged misconduct. Based solely on the alleged misconduct occurring on December 2, 2017, the FAC alleges seven state law claims for relief: (1) sexual battery, Cal. Civ. Code § 1708.5; (2) assault; (3) gender violence, Cal. Civ. Code § 52.4; (4) intentional infliction of emotional distress; (5) battery; (6) the Ralph Act, Cal. Civ. Code § 51.7; and (7) the Tom Banes Civil Rights Act, Cal. Civ. Code § 52.1. *Id.* at ¶¶ 89-148.

SUMMARY OF THE ARGUMENT

The district court correctly denied the Government's motion to dismiss. Under *Feres* and its lengthy progeny, Spletstoser's injury from the December 2, 2017, sexual assault cannot be characterized as incident to her military service. Spletstoser was attending a non-military, off-base event and staying at a private hotel where she was sexually assaulted off-duty in the course of readying herself for bed—

conduct indistinguishable from that of any other civilian. At no time did these actions involve military orders, regulations, judgment, or procedure. *See* FAC at ¶¶ 30-86, ER 35-41.

The Government's reliance on *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988) is unavailing. Spletstoser alleges a single instance of sexual assault, which patently, and indisputably, occurred off-base and off-duty. *Lutz*, 944 F.2d at 1487; *Pugliese v. Superior Court*, 146 Cal. App. 4th 1444, 1453 (Cal. Ct. App. 2007); *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984). When applying *Feres*, courts engage in a multifactorial balancing test to determine whether an injury is incident to military service. Activity at the time of injury is of paramount consideration under *Feres*. *Green v. Hall*, 8 F.3d 695 (9th Cir. 1993); *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983). The activity during which Spletstoser's injury arose is being sexually assaulted while retiring for the evening in a private hotel. Importantly, there is no uniform application of *Feres* that confers immunity for sexual assault claims. This Court can, and should, hold that under *Feres* sexual assault is <u>never</u> a factor considered incident to military service, thereby counseling against application of *Feres* immunity.

This Court's analysis under *Feres* is limited to the factual allegations in the FAC, which is the operative pleading.[1] *PAE Gov't Servs. v. MPRI, Inc.*,514 F.3d 856, 859 (9th Cir. 2007). However, even when the district court considered allegations previously withdrawn, it failed to sway the weight of analysis in favor of *Feres* immunity. Importantly, prospective interference with military discipline is not a "critical" consideration for the Court as the Government suggests, it is but one of several factors considered. Principal Brief at 17-19. More unavailing still, is the importance of a military investigation, which occurred nearly two years *after* the injury giving rise to causes of action alleged in Spletstoser's FAC. Lastly, the doctrine of *stare decisis* allows this Court to revisit its application of *Feres* to state law causes of actions against individuals who are not covered under the Westfall Act when the lessons of "subsequent experience" render its application "unworkable." *Johnson v. United States*, 576 U.S. 591, 605-06 (2015).

STANDARD OF REVIEW

Although a district court's determination of federal subject matter jurisdiction is reviewed *de novo*, factual findings on the jurisdictional issue must be accepted unless clearly erroneous. *See United States v. McConney*, 728 F.2d 1195, 1200 (9th

[1] The district court found to the contrary, but otherwise reached the correct conclusion when denying the Government's motion to dismiss.

Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985).

ARGUMENT

I. THE *FERES* DOCTRINE DOES NOT BAR SUIT

Before reaching the threshold question of *Feres* immunity, the Government disputes the scope of factual allegations that can be considered for purposes of evaluating subject matter jurisdiction under *Feres;* more specifically, which allegations can be relied on for the Court's incident to military service analysis. The originating complaint was withdrawn and superseded by the FAC. The FAC withdrew allegations that were *not* related to the injury Spletstoser sustained and causes of action alleged. Allegations relating to the non-military nature of the injury were also added. For example, that the military exercised no control over the Hyatt Regency Westlake, and civilians enjoyed the same access as military members. Spletstoser withdrew allegations that were not related to the sexual assault at the Westlake Hyatt. She added allegations that the off-base, off-duty injury occurred on a *situs* over which the military has no control, during a time period in which she acted in a manner indistinguishable from that of a civilian hotel guest. *See* FAC at ¶¶ 47-61, ER 38-40. These allegations were not withdrawn to avoid *Feres*. Conspicuously, and as materially relied on by the Government, the FAC

unambiguously alleges both Spletstoser and Hyten were members of the military. This is the only fact that could be withdrawn to avoid a *Feres* challenge.

A. The First Amended Complaint Supersedes the Originating Pleading and Renders it of No Legal Consequence.

An amendment of a complaint or petition constitutes waiver of any omitted arguments or claims from previous versions of the complaint or petition they are rendered of no legal consequence. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997). The filing of a new petition cancels out and waives any claims from the old petition. The cases establishing these rules, however, all deal with *voluntary* waiver. *See, e.g., London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981); *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Sechrest v. Ignacio*, 549 F.3d 789, 804 (9th Cir. 2008). Although a district court's determination of federal subject matter jurisdiction is reviewed *de novo*, the district court's factual findings on the jurisdictional issue must be accepted unless clearly erroneous. *See United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985).

The Government is therefore incorrect when it argues that "[S]pletstoser has never withdrawn or recanted those allegations" and that "her omission of those allegations from the amended complaint does not render them irrelevant here."

Principal Brief at 25. The Government proceeds to argue that information was "omitted," rather than withdrawn, from the FAC in order to circumvent *Feres.* This is both incorrect and inconsistent with this Court's holding in *PAE Government Services v. MPRI, Inc.*, 514 F.3d 856 (9th Cir. 2007), which stated in pertinent part that:

> Parties usually abandon claims because, over the passage of time and through diligent work, they have learned more about the available evidence and viable legal theories, and wish to shape their allegations to conform to these newly discovered realities. We do not call this process sham pleading; we call it litigation.

Id. at 859.

Spletstoser did not "omit" information necessary to evaluate the Government's motion to dismiss, rather, the complaint was amended to conform to the pleadings and causes of action alleged, consistent with the singular injury sustained on December 2, 2017. The Government asks this Court to overturn the district court's decision by relying on injuries and causes of action that are not the subject of this litigation. To the extent there were prior assaults referenced in a withdrawn pleading, no separate causes of action or injury were pending before the district court when it held *Feres* immunity did not attach; and to that end, no damages commensurate with other assaults were claimed. Moreover, neither Spletstoser's originating complaint nor FAC brought a cause of action for a course of conduct type claim that involved allegations as the plaintiff did in *Stauber*.

Courts in California do not rule any differently on this issue when the amended complaint is relied on to establish subject matter jurisdiction under the FTCA.[2] In a case involving the FTCA, the Eastern District of California instructed:

> If Plaintiffs file a Second Amended Complaint, the Second Amended Complaint will supersede any earlier papers filed in this case. Plaintiffs must include any and all allegations and claims they wish to assert in the Second Amended Complaint, as the court will not consider or refer to prior submissions. Any claim or allegations included in the original or First Amended Complaint will be deemed waived.

Soghomonian v. United States, 82 F. Supp. 2d 1134, 1150 (E.D Cal. 1999) (internal citations omitted). The Government's principal brief relied on *Huey*, which held in pertinent part that when a "pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission . . . ." *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996). That the originating pleading or sworn statement could be considered as "any other extrajudicial admission made by a party," does not impute causes of action to a complaint that were never alleged; nor does it permit a party to recover damages or empower a court to considered allegations deemed waived. *Id.*

[2] The Order denying the motion to dismiss and to change venue considered a prior factual allegation relating to the December 2, 2017, assault, however, a cross-appeal was not filed because the district court correctly held that the factual allegation at issue did not change the outcome of the court's *Feres* analysis. ER 27.

The Court cannot suspend its belief and understanding of pleadings to convert the intentional torts alleged against Hyten in his personal capacity, to a negligent investigation claim against the United States Air Force, or to a cause of action for harassment (FED. R. CIV. P. 8(d), (e)). The Government asks this Court to amend the complaint, to the Government's liking, in order to circumvent the district court's *Feres* analysis. In this endeavor, it cites to no precedent that would support such an anomalous approach to the *Feres* doctrine, or any other area of litigation for that matter.

B. The Court's Consideration of the Withdrawn Allegations Will Not Change the Outcome of the District Court's Decision.

The district court correctly held that it has subject matter jurisdiction over the claims in the FAC. In making this determination, only the allegations asserted in the FAC can be considered by the Court for purposes of the *Feres* doctrine. *PAE Gov't Servs.*, 514 F.3d at 859. Yet, the Government puts at issue the following references that were made in the originating, now withdrawn, superseded complaint: (i) Hyten as a first-line supervisor; (ii) Spletstoser directly reporting to Hyten; (iii) Hyten engaged in improper sexual conduct during trips that pre-dated the December 2, 2017 injury; (iv) Hyten worked in hotel rooms that were not the Hyatt Regency Westlake; and (v) two years after the assault, the eve of Hyten's confirmation hearing, the military conducted an investigation. Principal Brief at 5-7, 23-25; ER 5.

Even if this Court were to find that district courts have an affirmative obligation under *Feres* to independently search the record, including withdrawn allegations unrelated to the causes of action, the expansive holding would have no bearing on the district court's decision. However, the district court did consider the omission of specific factual allegations raised by the Government during oral argument, none of which swayed the weight of analysis in favor *Feres* immunity. The district court also considered that Hyten was of superior rank, finding that it is "undisputed that General Hyten was superior in rank to Plaintiff . . . ." ER 26.

This was considered by the district court even though, just as the servicemember in *Stanely* was not directly ordered by a superior officer to take LSD, Spletstoser was not under the compulsion of order from superior officers to engage in sexual conduct. *United States v. Stanley*, 483 U.S. 669, 680-81 (1987) (holding that *Feres* did not consider the officer-subordinate relationship crucial but established instead an "incident to service" test, making it "plain" that the reasoning in *Chappell v. Wallace*, 462 U.S. 296 (1983) does not support distinctions related to the officer-subordinate relationship).

The district court also considered that Hyten went to Spletstoser's room on December 2, 2017, "under the pretense of work-related purposes." ER 27. Even though there were no allegations in the original complaint establishing how, if at all, Spletstoser understood the visit to be "work-related." Contradictorily, Spletstoser's

FAC alleged that upon entering her hotel room, Hyten "did not discuss or address a single matter remotely military in nature." ¶ 69 ER 40.

When the Government asserts the FAC omitted allegations incident to Spletstoser's military activity (Principal Brief at 9), the Government posits a *Feres* analysis unsupported by Ninth Circuit precedent. Specifically, the Government ignores that: (i) sexual assaults are discreet acts and prior assaults do not relegate Hyten's subsequent assaults to a course of conduct that traverses the amorphic line of "incident to military service," conferring immunity for all future attacks, irrespective of time, place, and circumstance (*Pugliese*, 146 Cal. App. 4th at 1453); (ii) the withdrawn factual allegations relating to the Air Force's investigation do not implicate military decision making, because the Court cannot suspend its belief and understanding of pleadings to convert the intentional torts alleged against Hyten in his personal capacity to a negligent investigation claim against the United States Air Force (FED. R. CIV. P. 8(d), (e)); (iii) Hyten's status as a commanding officer is not dispositive when none of his orders are implicated in the action resulting in injury (*Dreier v. United States*, 106 F.3d 844, 853 (9th Cir. 1996); *see also Brown* 739 F.2d at 369); (iv) Spletstoser's injury while acting in the same capacity as any other civilian hotel guest is a persuasive factor (*Schoenfeld v. Quamme*, 492 F.3d 1016, 1020-21 (9th Cir. 2007)); (v) whether a servicemember is acting in a civilian capacity is dictated by the amount of control the military has over the *situs* of injury

(*Costo v. United States*, 248 F.3d 863, 868 (9th Cir. 2001) (*citing Johnson*, 704 F.2d at 1436)); (vi) injuries resulting from activities that are palpably distinguishable from military activity do not implicate *Feres* (*Dreier*, 106 F.3d at 853; *Lutz*, 944 F.2d 1477; *see also Brown* 739 F.2d at 369); and (vii) Spletstoser's allegations represent an even more compelling bar to the application of *Feres* than those raised by *Lutz* because her injury occurred off-base, during activity indistinguishable to that of a civilian, and the location of injury is not under the military's control. *Lutz v. Sec'y of Air Force*, 944 F.2d 1477 (9th Cir. 1991) (injury occurring in military office, on a military base, under military command).

C. The Impact to Military Discipline is Not the "Critical" Factor.

The Government also opined that "most telling," was the withdrawn allegation that the military investigation was "unfair." Principal Brief at 13. To be clear, the investigation was indeed unfair. Equally true is that there is not a single cause of action, in the original or amended complaint, sounding in negligence or otherwise, that challenges any military investigation.

Further, *Stanley* distinguished *Chappell*, with the Supreme Court making it clear that courts "should answer the broader question of whether 'the injury arises incident to service' rather than considering any actual impact on military discipline." *Lutz*, 944 F.2d at 1485 (*citing Stanley*, 483 U.S. at 683). The Government, however, heralds judicial interference with military decision making and discipline as the

"critical" element of the Court's analysis, focusing the majority of its brief on a belated military investigation, the omission of any disciplinary action whatsoever, and a partisan Senate hearing to support this contention.

Weightier on the Court's conscience is the prospect of extending immunity for a sexual assault that had nothing to do with the Air Force's judgment or decision making. The Government does not cite to any precedent that requires this Court to consider events occurring *after* an injury, to determine whether it is incident to military service. Although consideration of judicial interference with military discipline is a consideration, it is but one factor in the Court's analysis. *Lutz*, 944 F.2d at 1484 (concluding that the district court focused its inquiry too narrowly on whether judicial scrutiny would actually impact military discipline, rather than the broader question of whether injury was "incident to service"); *see also Stanley*, 483 U.S. at 683.

When no actual military disciplinary action is implicated, potential interference by the courts is not a persuasive factor:

> [T]he prosecution of this action will not impair the functioning of the military justice system. Defendants contend that because the Air Force conducted investigations into the incident underlying this action and **decided not to bring charges**, that the present suit will undermine Air Force discipline. This argument is not supported by the record in this action. Although there were four separate investigations carried out by the Air Force before plaintiff's superior officer, Colonel Dempsy, made his decision not to take action against defendants, three of these investigations focused on plaintiff's alleged involvement with her civilian secretary, not defendants' conduct. The fourth investigation

> was an EEO investigation carried out by a Major Volz following the filing of an EEO complaint by plaintiff against defendants and Colonel Dempsey. This final investigation occurred *six months after* defendants broke into plaintiff's office and *did not fully examine* the events underlying this action. *The investigation appears to have been undertaken solely to generate written documentation of the incident supporting the Air Force's treatment of Major Lutz.*

Lutz v. Ivory, No. C87-0679-DLJ, 1989 U.S. Dist. LEXIS 14159, at *7 (N.D. Cal. Aug. 1, 1989) (emphasis added).

The Government asks this Court to adopt the same argument the *Lutz* court already rejected, again, in a case involving the Air Force. In *Lutz*, there was an Air Force Complaint, a belated Air Force Investigation, and an Air Force decision not to discipline two officers for breaking into a military office where they stole and disseminated private communications purportedly relating to Lutz's sexual orientation, directly implicating the Uniform Code of Military Justice ("UCMJ"). *Id.* As here, the Government argued that failure to apply *Feres* would interfere with its decision not to discipline the *Lutz* defendants. *Id.*

This is the situation we have here. There was an investigation into Spletstoser's complaint and a decision to do nothing. The *Lutz* court rejected the proposition that a decision to do nothing could be disturbed at all. On appeal, the Ninth Circuit diminished further the suggestion that military discipline was weighted with any additional level of import than any other factor when considering if *Feres* applies and criticized the district court for placing too much emphasis on the issue

of military discipline. *See Stanley*, 483 U.S. at 683. Here, Hyten was not subjected to military discipline, thereby undermining this factor in its entirety. *See* FAC at ¶ 86, ER 41.

Spletstoser was injured at a private hotel, while acting in a civilian capacity, at the conclusion of the RNDF (*see id.* at ¶¶ 46, 63-88, ER 38, 40-41), which contrary to its given name, is sponsored by private sector industry and cannot be characterized as a forum under the military's command or subject to military procedure and decision-making. *See id.* at ¶¶ 31-41, ER 35-37. Also relevant, the Westlake Hyatt is a wholly civilian entity, unaffiliated with the military (*see id.* at ¶¶ 47-61, ER 38-40), and located in Ventura County where the military's reach is subject to oversight by the Ventura County Police Department. *See id.* at ¶¶ 39-40, 54-56, ER 37, 39; *Lutz*, 944 F.2d at 1485 n.10 (limiting its reading of *Trerice v. Pederson*, 769 F.2d 1398 (9th Cir. 1985), to the proposition that an intentional tort is not excluded from the incident to service test).

II. THE *FERES* DOCTRINE DOES NOT APPLY BECAUSE THE INJURY WAS NOT INCIDENT TO MILITARY SERVICE.

Every *Feres* doctrine analysis commences with an initial presumption that "[n]ot every action by one member of the armed services against another implicates military decision making, relates to the military mission, or is incident to service." *Lutz*, 944 F.2d at 1484; *see also McGowan v. Scoggins*, 890 F.2d 128, 129 (9th Cir.

1989) (holding the Court must review independently the question of whether the *Feres* doctrine is applicable on a case-by-case basis).

> There are three rationales which have been recognized as the foundation for the Feres doctrine: "(1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure." This circuit at one time focused on the military discipline rationale to the exclusion of the others. *See, e.g., Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

Lutz, 944 F.2d at 1484.

Notwithstanding precedent prior to 1987, emphasizing the importance of avoiding interference with military disciplinary structure, the Supreme Court in *United States v. Johnson*, 481 U.S. 681 (1987) brought "new life" to the first two *Feres* rationales. *Atkinson v. United States*, 825 F.2d 202, 205-06 (9th Cir. 1987). "The Supreme Court made plain in *Stanley* that in deciding whether Feres applies, courts should answer the broader question of whether 'the injury arises out of activity "incident to service,"' 483 U.S. at 681, *rather than considering any actual impact on military discipline.*" *Lutz*, 944 F.2d at 1485 (emphasis added). The Government's opening brief argues to the contrary, maintaining the military disciplinary structure is "most critical." Principal Brief at 15.

A. Spletstoser's Injury Was Not Incident to Military Service.

Courts rely on a balancing test to determine whether *Feres* applies. This Circuit relies on the *Johnson* factors. *Johnson v. United States*, 704 F.2d 1431, 1436-39 (9th Cir. 1983). Courts engage in a case-by-case analysis, but consistently find at least four factors to be critical: the location of the tort; duty status of plaintiff; whether plaintiff was conferred a benefit when injured that was not available to members of the civilian population;[3] and the activity at the time of the injury. *Id.*

For intentional torts, the Ninth Circuit looks to the activity of the Defendant at the time of injury. *Lutz*, 944 F.2d at 1486.[4] Precedent informing application of *Feres* has become muddled because *Feres* immunity, specifically created for negligence claims against the military, a legal theory which requires inquiry into the military's judgment and standard of care, is also applied to intentional torts brought against individuals whose actions do not draw into question military standard of care.

Although a legal precedent created for negligence causes of actions, creates

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[3] *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001); *Millang v. United States*, 817 F.2d 533 (9th Cir. 1987); *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986); *Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991) (finding injury incident to military service when it occurs at a military hospital or facility that is completely controlled by the military and only accessible because of plaintiff's military status).

[4] *See Lutz*, applying *Johnson* factors in its balancing test. *Lutz*, 944 F.2d at 1485 (duty status), 1486 (defendant's activity), 1487 (location of injury), 1486 n. 11 (accrued benefit).

seemingly irreconcilable results when applied in equal measure to intentional torts, the Ninth Circuit sets forth the following analytical framework: (1) off-base injury is an important factor suggesting nonmilitary related activity (*Bon v. United States*, 802 F.2d 1092, 1094-95 (9th Cir. 1986)); (2) off-duty injury suggests nonmilitary activity when that activity is indistinguishable from a civilian (*Johnson*, 704 F.2d at 1437-38); (3) on-base injury involving an act obviously unrelated to military service does not implicate *Feres*, *unless* the injurious act is "subject to military orders and regulations for the *particular activity in which [he] was engaged"* (*Dreier,* 106 F.3d at 851-52; *Lutz*, 944 F.2d at 1485; *Brown*, 739 F.2d at 369); (4) on-base injury does not implicate *Feres* when the injured servicemember engages in activity as any other civilian—acting as a civilian is defined by whether the military exercises exclusive command over the location or activity associated with the injury (*Schoenfeld,* 492 F.3d at 1020); and (5) Defendant as a commanding officer is not determinative when neither the commanding officer's Order, nor specific military procedure creates the injury at issue, as is more often implicated with negligence causes of action (*Dreier,* 106 F.3d at 853; *Lutz,* 944 F.2d at 1486-87; *Brown* 739 F.2d at 369).

This case is the archetypal example of why *Feres* was not meant to be a complete bar to suits against the military. Spletstoser was sexually assaulted by Hyten, while staying at the Hyatt Regency Westlake. ER 32 at ¶¶ 47, 69-75. She was in town for the RNDF, a two-day professional conference hosted by the RPL

(*id.* at ¶¶ 30-36), and the Event was not limited to military personnel. *Id.* at ¶¶ 37-42. Spletstoser stayed at the Hyatt Regency in Westlake Village in a private hotel room that anyone in the public could have stayed in. *Id.* at ¶¶ 47, 50, 51-52, 57-61. Once the Event was over, on December 2, 2017, she was sexually assaulted by Hyten. The activity she was engaged in when she was sexually assaulted was readying herself for bed, an activity which is replicated by nearly every traveler on any given day in all hotels and is not even remotely military in nature. *Id.* at ¶¶ 63-64.

There is nothing uniquely military about a man sexually assaulting a woman in her hotel room after attending a professional conference. *Id.* at ¶¶ 76-88. Nothing about a sexual assault–off-base while Spletstoser was acting as any other civilian hotel guest, in a private room, equally accessible to the general public–renders it an off-base act occurring in a sphere occupied and controlled by the military or otherwise.[5] *Costo*, 248 F.3d at 867. Staying as a guest in a private hotel room was not made accessible solely because of her military status. *Bon*, 802 F.2d at 1095; ER 32 at ¶¶ 51-52. Rather, she occupied a status similar to that of any other civilian hotel guest. ER 32 at ¶¶ 55-61, 66-68. Moreover, Spletstoser's allegations do not

[5] TDY orders, reassigning to another base, carry no greater import or significance than any other order of enlistment for a soldier, it establishes, merely, that Spletstoser was in the military on active duty, just as *Lutz* was in the military.

draw into question "the wisdom of a wide range of military disciplinary decisions"[6] (ER 32 at ¶ 86) as would be implicated in a negligence cause of action which challenges "management" of the military.[7] The only relevant aspect of Spletstoser's military status for purposes of this Court's analysis, is that it is because of this common membership Spletstoser knew her attacker.

B. *Stauber* Does Not Apply.

The Government essentially argues for the following standard under *Stauber*: sexually assaulting someone, once, off-base, may survive *Feres*, but for the serial offender, who commits multiple sexual assaults, some of which are "on-base," discretely actionable claims are converted to a "course of conduct," incident to military service, which originated on base and therefore implicates *Feres.* The irrationality of this standard finds its origins in a misinterpretation of the *Stauber* ruling.

When a servicemember "commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility for his act just because those involved were wearing military uniforms at the time of the act. When military personnel are engaged in distinctly nonmilitary acts, they are acting, in

[6] *United States v. Shearer*, 473 U.S. 52, 58 (1985).
[7] *Becker v. Pena*, No. 95-36172, 1997 U.S. App. LEXIS 4054, at *2 (9th Cir. Feb. 28, 1997).

effect, as civilians and should be subject to civil authority." *Lutz*, 944 F.2d at 1487 (citing *Durant v. Neneman*, 884 F.2d 1350, 1353, 1354 (10th Cir. 1989).

Stauber holds only that

> [W]here it is sufficiently ambiguous whether challenged actions were "incident to military service," and the process of disentangling conduct not incident to service from that incident to service would itself work an impermissible intrusion upon military matters, *Feres* must be applied to the whole course of conduct. However, where, as in *Brown* and as in the present case, the actions were completely separate from on-the-job activities, the rationale of *Stauber* does not apply.

Lutz, 944 F.2d at 1487. Assaults are separate discrete acts and do not establish a course of conduct. *Pugliese*, 146 Cal. App. 4th at 1453. A prior act of sexual misconduct does not render Hyten immune from all future suits by creating a course of conduct originating on-base like a workplace harassment claim. *See generally Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988). *Stauber* is limited to the proposition that when an injury results from an activity indistinguishable from daily on base military activity, as is often the case with dual-status National Guard technicians, *Feres* will apply. A dual status military technician is a Federal civilian employee required to maintain membership in the military. 10 U.S.C. § 10216. They are involved with organizing, administering, instructing, and training of the armed forces, or maintenance and repair of supplies or equipment issued by the military. 10 U.S.C. § 10216; 32 U.S.C. § 709. In *Stauber:*

> The record reflected that the employment and command structure, and the relative rank of the technicians, was the same whether the parties

> were on *active duty on weekends or in civilian status during the week.* During both periods, work in the on-base maintenance shop was *essentially the same,* and was governed by military regulations and standard operating procedures. The court assumed that, for some purposes, the parties were civilian employees of the Army, but nonetheless held that this does not alter the fact that Plaintiff and Defendants were also Army National Guardsmen who performed the maintenance and repair work on vehicles and equipment used by the Army National Guard [in their civilian capacity]. Indeed, Plaintiff and Defendants used this equipment on weekends when they were on active duty. The work performed by Plaintiff and Defendants was beyond any question incident to military service. The *Feres* doctrine therefore applies, and Defendants are immune from suit.

Stauber, 837 F.2d at 397 (emphasis added).

Ultimately the *Stauber* Court held intra-military immunity applied to a claim of continuous harassment spanning the course of five years regardless of employment as a civilian on certain days; acts of harassment, which in *isolation* were unlikely to be actionable and did not result in specific injury. *Stauber* was brought by a dual-status employee of the National Guard, against other dual-status employees of the National Guard, all of whom worked together in a National Guard maintenance shop under the National Guard's command. *Stauber*, 837 F.2d at 396. Even though the parties were civilian employees at times, and argued as much,[8]

[8] *Stauber*, 837 F.2d at 399 ("Stauber seeks to escape the doctrine on the ground that his claims arose while he and the defendants were civilian employees. Although the technicians had dual status for some purposes, the defendants respond that military regulations, standard operating procedures, and active-duty military officers controlled how the shop was run.").

resisting removal and twice moving for remand to state court,[9] the Ninth Circuit declined to adopt this technicality to the *Feres* doctrine. *Stauber*, 837 F.2d at 399 (noting Stauber sought to escape *Feres* because employment status was sometimes a civilian).

Stauber performed the same military job, for the same military purpose, for the same military supervisors, on the same military base, but some days he was characterized as military and other days as a civilian employee. *Id.* at 397. Stauber argued that because some of his hostile working environment occurred on days he was working in a civilian capacity, *Feres* did not apply. *Id.* at 400. The argument was soundly rejected by this Court, which found critical that when an injury resulted from work performed for the same military purpose, in the same military environment, with the same military supervisors, whether the plaintiff was technically in civilian rather than military status, had no bearing on the incident to service test and would not bar application of *Feres*. *Id.*

Stauber's injury also arose from conduct governed by military regulations, military standard operating procedures, and military officers. Specifically, the harm incurred in both civilian and military capacities included:

> [H]arassment and intimidation in the use of sirens and horns and other noisemaking devices, all directed at plaintiff; forcing plaintiff to leave his work area door open so as not to be able to shut the noise out while others were allowed to close their doors;

[9] *Stauber*, 837 F.2d at 397 n.4.

> allowing everyone in the work area except plaintiff to use ear protectors; forbidding plaintiff from working outside; following plaintiff in his automobile with sirens and horns directed at plaintiff; physically pushing plaintiff; threatening to make negative reports about plaintiff to plaintiff's superiors; maliciously and intentionally disrupting, disorganizing, and sabotaging plaintiff's work area; hiding and rearranging parts and tools and jamming plaintiff's toolbox closed; excluding only plaintiff from use and possession of keys to the common work area; driving back and forth in front of plaintiff's [off-base] home; and representing to plaintiff that eventually defendants would succeed in getting plaintiff fired from his position as a civilian technician.

Stauber, 837 F.2d a 396 n.2.

Although the harm included physically pushing Stauber, his claims did not include a separate cause of action for assault or battery. *Id.* at 396-97. Therefore, the Ninth Circuit has never held that a separately actionable claim like sexual assault, which occurs off-base, off-duty, and in a location, like a hotel not subject to military judgment or operating procedures, could originate "on-base" during working hours. *Id.*

Regarding the course of conduct claim, *Stauber* holds only that: "where it is sufficiently ambiguous whether challenged actions were 'incident to military service,' and the process of disentangling conduct not incident to service from that incident to service would itself work an impermissible intrusion upon military matters, *Feres* must be applied to the whole course of conduct." *Lutz*, 944 F.2d at 1487. Yet, where as in "*Brown* and as in the present case, the actions were

completely separate from on-the-job activities, the rationale of *Stauber* does not apply." *Id.* (emphasis added). The same logic articulated by the *Lutz* Court also applies to individually actionable claims occurring off-base, during the time Spletstoser acted in the same capacity as any other civilian hotel guest.

Spletstoser was sexually assaulted in a public hotel in Simi Valley when: (i) she was in town for the RNDF, a two-day professional conference hosted by the RPL, an event that was not limited to military personnel; (ii) she stayed at the Hyatt Regency in Westlake Village, in a private hotel room that anyone in the public could have stayed in; and (iii) once the Event was over, on December 2, 2017, she was sexually assaulted by Hyten. The activity she was engaged in when sexually assaulted was readying herself for bed, an activity which is replicated by nearly every traveler on any given day in all hotels and is not even remotely military in nature. These factors alone require the Court to affirm the district court's decision.

Nothing about that sexual assault occurred in a sphere solely occupied and controlled by the military. Nothing about that assault implicated Hyten's military judgment or the distinctly federal nature of the military. Nor was it perpetrated to advance a military purpose or initiative.

Critically, *Stauber* does not establish, as the Government suggests, that an act of harassment occurring on base means that all acts of harassment occurring off-base are born out of and therefore incident to military service. Stauber was harassed over

a period of years in the workplace, while also citing a handful of examples where the continued harassment also happened off base. *Stauber*, 837 F.2d at 396.

C. The *Johnson* Factors Require Finding that Spletstoser's Injuries Were *Not* Incident to Military Service.

This Circuit will look to the totality of the circumstances, and in doing so will review: (1) the location where the tortious act occurred; (2) the plaintiff's duty status when the tortious act occurred; (3) the benefits accruing to the plaintiff because of her status as a service member; and (4) the nature of the plaintiff's activities at the time of the tortious act. *E.g.*, *Johnson*, 704 F.2d at 1436-39; *Schoenfeld*, 492 F.3d at 1019.

In *Johnson v. United States*, the active-duty plaintiff and other employees, also servicemembers, had a party during hours at an on-base club that was supposed to be closed pursuant to military regulations and state law. *Id.* at 1433. After the party, an intoxicated servicemember endeavored to drive the plaintiff home but hit a tree about a mile outside of the base, and caused injury to plaintiff, resulting in quadriplegia. *Id*. In determining whether *Feres* barred plaintiff's claim, the Ninth Circuit considered whether military discipline could be impeded by permitting the suit to continue, citing concerns about military decision-makers becoming hesitant to act as quickly and forcefully if their actions were second-guessed in civilian court and servicemembers potentially being encouraged to question their supervisor's

decisions and diminish their willingness to follow orders. *Id.* at 1439 (internal citations omitted).

In *Johnson,* as here, *Feres* did not bar suit because it did not impede military discipline. The plaintiff's actions did not involve the sort of close military judgment the *Feres* doctrine was designed to insulate from judicial review. *Id*. at 1439-40 (rejecting the argument that being subject to military discipline led to a finding that plaintiff's injury arose incident to service, as plaintiff was off duty and consequently subject to discipline "only in the very remotest sense.").

Subsequent decisions in this Circuit have found it improper to heavily focus on the question of whether a suit requires a "civilian court to second-guess military decisions and impair essential military discipline." *Lutz*, 944 F.2d at 1484-85 (holding that courts should answer the broader question of whether "the injury arises out of activity 'incident to service,' rather than considering any actual impact on military discipline.") (*citing Stanley*, 483 U.S. at 681, 682).

1. The location of the tortious activity weighs against the application of *Feres*.

The location of the tortious act is an important indicator of the status of the injured service member. *Johnson v. United States*, 704 F.2d at 1436. When examining this factor, an act occurring on military property weighs in favor of a *Feres* bar. *Id*. at 1436-37. Here, Spletstoser was sexually assaulted in a private hotel room in a hotel civilians occupied contemporaneously, with equal access to the hotel

and the floors where the assaults occurred. For this reason, the first factor weighs against applying the *Feres* doctrine.

2. The duty status weighs against the application of *Feres*.

Spletstoser's active-duty status—but off-duty, for the day—counsels against application of the *Feres* doctrine. The fact that Spletstoser was in an active status at all is not strongly considered given that she was on personal time when assaulted. In *Green v. Hall*, 8 F.3d 695 (9th Cir. 1993), the Court found a claim was not barred where the plaintiff, who was on duty for a parachute jump at 3AM, and due at morning formation by 9:30AM, sustained injuries during the intervening period while running errands off-base, even if he was also buying donuts for his fellow servicemen. *Id.* at 697-98. The Court held the injuries were not incident to service because they related to plaintiff's military status only "in the sense that all human events depend upon what has already transpired," and because the plaintiff's running of errands was not done under orders, not intended to benefit the military, did not occur on military property, and did not occur at a time he was required to report. *Id.* at 700 (*citing Brooks*, 337 U.S. at 52). Similarly, in *Johnson*, the Court held: "In and of itself . . . [plaintiff's] active duty status is not relevant to our inquiry . . . the important question is whether the service member on active duty status was engaging in an activity that is related in some relevant way to his military duties." *Johnson*, 704 F.2d at 1438; *see also Schoenfeld*, 492 F.3d at 1020; *Green*, 8 F.3d at 700. While

the Ninth Circuit also looks to the defendant's activity for claims involving intentional torts. *Lutz*, 944 F.2d at 1487 (finding activities "distinctly nonmilitary act[]," since it was not done under orders, was not intended to benefit the military, and did not occur on military property) (citing *Durant*, 884 F.2d at 1354).

This factor weighs against application of the *Feres* doctrine. For example, allegations of traversing a hotel hallway, clad in gym shorts, gaining access to Spletstoser's private hotel room, a venue open to and accessed by the civilian population, sexually assaulting Spletstoser whilst restraining her, grabbing her buttocks and ejaculating on her—after hours, on personal time—during a moment of relaxing, applying facial moisturizer and readying herself for sleep, is a far cry from allegations challenging an "order given" or "acts committed in the course of military duty." It is inconceivable that Hyten's conduct or the resulting injury to Spletstoser "arises out of or is incident to [military] service." *Lutz*, 944 F.2d 1477 at 1484; *see also Durant*, 884 F.2d at 1351 ("[I]ntra-military immunity should not be applied to shield military personnel from common-law actions based on their nonmilitary conduct."). Therefore, Spletstoser's "duty status is at best marginally relevant to the *Feres* analysis." *See Schoenfeld*, 492 F.3d at 1023.

3. The lack of accrued benefits weighs against application of *Feres*.

The third factor looks at whether the activity out of which the action arose was the type to which civilians would ordinarily have access. For example, where

an injury arose from employment at an on-base club, which the Court characterized as the type of employment civilians commonly held, this weighed against a *Feres* bar (*Johnson*, 492 F.3d at 1438-39), but where injury occurred as a result of renting a boat where boat rentals were restricted to military personnel, this weighed in favor of a *Feres* bar. *Bon*, 802 F.2d at 1093, 1095. An injury occurring where servicemembers and civilians both have access weighs against a *Feres* bar, even if civilians have more limited access than members of the military. *See Dreier*, 106 F.3d at 853 (finding civilian access to a beach weighed against a *Feres* bar for injury occurring there, even though civilians required a pass to access it). The Ninth Circuit noted that this factor includes considering whether the *nature* of the activity is military or non-military. *Schoenfeld*, 492 F.3d at 1021 (*citing Johnson*, 704 F.2d at 1439). In *Johnson*, the club at which the plaintiff worked was staffed by servicemembers, suggesting this could have been perceived as a benefit of service, but the Court held that the situation leading to the injury at issue was analogous to one in which civilian employees might find themselves, just as Spletstoser's injury was one which a civilian employee could just as easily have suffered. *Johnson*, 704 F.2d at 1437-39.

In the present case, there was no uniquely military benefit accruing to Spletstoser while at a public hotel, which was also open and available to civilians. Moreover, while on TDY Spletstoser routinely traveled with civilian GS grade federal

employees, and private contractors, demonstrating these trips were not uniquely military in nature. ¶ 19 ER 59. Therefore, this factor also weighs against application of the *Feres* doctrine. To the extent it can be argued that the military's payment for her hotel room availed Spletstoser of some military "benefit" on the Simi Valley trip, her injury did not arise directly out of her use of the hotel room. *Lutz*, 704 F.2d at 1486 n.11 (noting injury did not arise directly from plaintiff's use of her military office, but rather from defendant's breaking into the office). As in *Lutz,* Spletstoser's injury did not arise through the use of her hotel room, it occurred when Hyten gained access to her hotel room and stole both her dignity and sense of safety.

4. Spletstoser's activities at the time in question weighs against application of *Feres*.

The last factor considered in determining whether certain activity is incident to military service is an analysis of the plaintiff's specific activities at the time of the incident in question. This factor weighs heavily against application of *Feres* to Spletstoser's suit against Hyten. As in *Johnson, Feres* is inapplicable when the plaintiff is not subject "in any real way to the compulsion of military orders or performing any sort of military mission" at the time the allegations arose. *Johnson,* 704 F.2d at 1439 (citations omitted). Hyten's sexual abuse of Spletstoser occurred off-base and after-hours in a hotel equally accessible to the public as it was to the military, during trips on which civilians traveled the same as military personnel, and after Spletstoser retired for the evening. There was no conceivable implication of

military orders or decisions, Hyten was not even a first level supervisor of Spletstoser for disciplinary purposes. *See also, Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974) (finding active duty petty officer killed in a car accident on a road maintained by the military adjacent to the base, while returning to his on-base quarters, was not barred by *Feres* because at the time of the accident he was "only in the remotest sense subject to military discipline."); *see also Dreier*, 106 F.3d at 849-50.

In analyzing this issue, the court looks at whether the plaintiff was "subject in any real way to the compulsion of military orders or performing any sort of military mission." *Johnson*, 704 F.2d at 1439 (citations omitted). To the extent the fundamental goal of the *Feres* doctrine is "to safeguard the military disciplinary structure from disruptive civil suits…the most relevant line of inquiry is whether or not the [plaintiff's] activities at the time of injury are of the sort that could harm the disciplinary system if litigated in a civil action." *Dreier*, 106 F.3d at 849 (citing *Johnson*, 704 F.2d at 1439).

Contrary to the Government's position, the Court in *Lutz* emphasized that this inquiry is not dispositive, and that the actual inquiry into whether the disciplinary structure of the military would be affected by a particular case is inappropriate, as courts must instead focus on the broader question of whether the injury arises out of activity incident to service, based on the totality of circumstances. *Lutz*, 944 F.2d at

1484-85 (citing *Stanley*, 483 U.S. at 681, 682), 1486 n.11 (citing *Johnson*, 704 F.2d at 1437).

Moreover, the partisan centric investigation of Spletstoser's claims during Hyten's confirmation process does not require the Court to interfere or second guess the military's investigation or decision, when no disciplinary action is at issue. Spletstoser asks this Court only to exercise jurisdiction over a private cause of action for damages that resulted from injuries not incident to military service. *See Lutz,* 944 F.2d at 1485-86 n.10. (limiting its reading of *Trerice v. Pederson,* 769 F.2d 1398 (9th Cir. 1985) to the proposition that an intentional tort is not excluded from the incident to service test and finding that to do so would be overbroad and conflict with Supreme court's findings in *Stanley*, 483 U.S. at 681). Nor, as the Government argues, does being subject to the Uniform Code of Military Justice ("UCMJ") preclude suit against service members, it is one consideration when looking at the larger question of activity "incident to service," only. *See Lutz,* 944 F.2d at 1485 n.8 (noting that nothing in *Shearer* suggested survivors of a murdered service member would have no claim against the murderer, who is also subject to the UCMJ). Therefore, Hyten's being subject to the UCMJ, the military's decision not to prosecute (which is not an issue in this case), and any damages sustained that were military in nature, does not support application of *Feres.*

In support of their argument to the contrary, the Government cites to grossly distinguishable case law. *Zaputil v. Cowgill,* 335 F.3d 885, 887 (9th Cir. 2003) (involving a plaintiff forced to return to duty after she was discharged implicated *Feres* because "decisions and orders to recall her into the California Air National Guard necessarily implicate military decisions, affairs and discipline.") (*citing Jackson,* 110 F.3d at 1487 (9th Cir. 1997)); s*ee also Hodges v. Dalton,* 107 F.3d 705, 707 (9th Cir. 1997) (holding *Feres* immunity applied where plaintiff filed a claim for mandamus, asking this Court to compel a decision to process a discrimination complaint brought against a facility controlled by the military); *McGowan v. Scoggins,* 890 F.2 128 (9th Cir. 1989) (noting importance of the absence of a command relationship when the injury occurs *on* base).

Jackson v. Brigle, 17 F.3d 280 (9th Cir. 1994) is likewise inapposite. Jackson argued that *Feres* was inapplicable where a search of his off-base dwelling, resulting from an investigation into his housemate's illegal conduct, unearthed evidence of Jackson's "homosexual lifestyle" which, in turn, lead to his discharge. *Id.* at 282. The Court applied *Feres* to Jackson's claims because "agents were acting under color of their authority as military law enforcement officers." *Id.* at 284. "The fact that the agents' actions were in response to a military officer's order sets this case apart from *Lutz* and others in which *Feres* immunity has been held inapplicable." *Id.* (citations omitted).

Similarly, *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987) also fails to further the Government's argument. The Court explicitly noted that the *Feres* doctrine must be applied on a case-by-case basis, rather than a *per se* approach, and specifically made reference to the "novel situation" posed by *Atkinson* which involved a pregnant service-woman's claims of medical malpractice. *Id.* at 205. The Court further held that the military discipline rationale did not support application of *Feres* in this case, but the other two rationales (relating to nature of the federal relationship and availability of alternative compensation systems) did. *Id.* at 206. Although an example of yet another miscarriage of justice under *Feres*, *Atkinson* is patently distinguishable. *Atkinson* was a medical malpractice case involving the death of a newborn following failure to provide appropriate prenatal care. *Atkinson* is premised on the concept of *situs* of the negligence, implicated a course of conduct relating to prenatal care (not the actual delivery) that led to the death of an infant. *Id.* at 295. The physician's negligence while performing their actual military role (medical care of pregnant women) caused the injury that was the subject of the litigation. See also, *Persons v. United States*, 925 F.2d 292 (9th Cir. 1991)[holding that *Feres* barred a negligence suit, where military doctors failed to admit a suicidal servicemember who committed suicide three months after the negligent care.]

The withdrawn factual allegations regarding Hyten's attempt to hug Spletstoser in Seoul, South Korea, and the like, did not cause the injury leading to

the December 2, 2017 sexual assault (¶ 40, ER 91); not in the same manner physician negligence (failure to diagnose) created a course of conduct the resulted in injury during child birth. The nearly exclusive military role of the negligent physicians was to provide medical care to pregnant women. Conflictingly, Hyten's role was not to sexually assault Spletstoser; it was not to check in on her in her hotel room; it was not to oversee the hotel in which Splestoser resided with civilians.

The Government's reliance on *Stencel Aero Engineering Corporation v. United States*, 431 U.S. 666 (1977) is also inapposite. *Stencel* involved a servicemember injured on-duty when the ejection system of a fighter aircraft malfunctioned during a mid-air emergency. *Id*. at 667, 674-75. Application of *Feres* in *Stencel* was commensurate with the Supreme Court's application of the doctrine in *Boyle v. United Technologies Corporation*, 487 U.S. 500, 506 (1988) (noting military equipment and its procurement are a matter of uniquely federal interest). Conspicuously, Spletstoser was not sexually assaulted while flying a fighter jet.

D. Sexual Assault is <u>Never</u> Incident to Military Service.

The Government errs when it argues: "That this suit involves allegations of harassment and assault does not alter the *Feres* analysis here." Principal Brief at 19. Similarly, other circuits have *not* applied Feres in a uniform way to bar sexual assault claims. Principal Brief at 23, n. 4. This statement is patently false. When actions are completely separate from military service, they are t a factor that weighs *against*

application of the Feres doctrine, thereby fundamentally impacting the Court's analysis. *Lutz*, 944 F.2d at 1487.

Dexheimer v. United States, 608 F.2d 765 (9th Cir. 1979) is a negligence case (under the FTCA) which specifically called into question the entire system of military discipline because the injury was suffered while the plaintiff was a prisoner in the military's disciplinary barracks. *Id.* at 765-57. This Court never held that sexual assault was a factor incident to military service.

Stubbs v. United States, 744 F.2d 58 (8th Cir. 1984), *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013), and *Becker v. Pena*, No. 95-36172, 1997 U.S. App. LEXIS 4054 (9th Cir. Feb. 28, 1997), are non-precedential, and involved negligence claims for failing to prevent harm,[10] which examined broad military decisions regarding widespread supervision and discipline. These cases may have been decided differently if the claims were for intentional conduct. *See Lutz*, 944 F.2d at 1485-86. In *Stubbs*, the only abuse at issue occurred on-base (on a military barracks that civilians did not have access to and was of exclusively military domain) while the victim was on duty, and the perpetrator invoked military discipline and procedures to coerce cooperation and intercourse. *Stubbs*, 744. F2.d at 60. These cases do not stand for the proposition that sexual assault is a factor incident to military service.

[10] The plaintiff's claims against the abuser in *Stubbs*, in his personal capacity under state law claims, were dismissed due to lack of personal jurisdiction. *See Stubbs*, 744 F.2d at 60 n.2.

Day v. Massachusetts National Guard, 167 F.3d 678 (1st Cir. 1999) did not bar jurisdiction for the sexual assault; to the contrary, the causes of actions against the individuals were permitted to go forward. This court held, as the Ninth Circuit should here, that sexual assault was *not* a factor incident to military service.

Hyten sexually assaulted Spletstoser in a private hotel run and operated by civilians, while civilians were residing in the hotel, following a conference attended by civilian employees, where Spletstoser and Hyten stayed after attending a conference that was exclusively operated and controlled by civilians.

This Court can hold that under the balancing test used to determine when an injury is incident to military service, pursuant to *Feres*, sexual assault is never a factor incident to military service.

Presumably the Government will not so dishonor the United States Military, its many servicemen and women, and this Administration's humanity, by arguing to the contrary.

III. THE *FERES* DOCTRINE SHOULD NOT APPLY TO STATE LAW CLAIMS POST-WESTFALL AND SHOULD NOT OVERRIDE STATE LAW IN AREAS OF TRADITIONAL STATE RESPONSIBILITY

The Supreme Court has consistently held that circuit courts and district judges should not depart from prior Supreme Court precedent. *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), *rev'd on other grounds,* 522 U.S. 3 (1997). The Supreme Court has not "taken this step of converting *Feres* into an immunity for

individuals against the state law claims." *See Day*, 167 F.3d at 684. Other circuits have declined to extend *Feres* immunity to state law claims. *Id.* at 685 ("[T]he Supreme Court has been increasingly loath to override state law in areas of traditional state responsibility without a Congressional mandate.") (internal citations omitted).

The doctrine of *stare decisis* allows courts to revisit an earlier decision where experience with its application reveals that it is unworkable. *Payne* v. *Tennessee*, 501 U.S. 808, 827, (1991); *Johnson*, 576 U.S. at 605. "Even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience." *Johnson*, 576 U.S. at 606.

In 1988, Congress specifically identified when servicemembers can be sued in their personal capacity for state law causes of action. "Under the FTCA, Congress waived immunity for the tortious conduct of employees of the Government including 'a member of the military or naval forces of the United States' acting 'in the line of duty.'" The FTCA allows civil actions against the government based on the negligent acts or omissions of its employees (*see* 28 U.S.C. § 1346(b)), including those of members of the Armed Services who are acting "in the line of duty." 28 U.S.C. § 2671. The courts have uniformly equated the FTCA's "line of duty" language with the phrase "scope of employment," as that concept is defined by the *respondeat superior* law of the jurisdiction in which the accident

occurred. *See McHugh*, 966 F.2d at 75 n.9 (citing *McCall v. United States*, 338 F.2d 589 (9th Cir. 1965), *cert. denied*, 380 U.S. 974 (1965)).

The Ninth Circuit, as other circuits, have extended *Feres* to state law causes of action against individual service members. *See generally Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988). *Feres* was concerned only with the vicarious liability of the United States under the FTCA. However, this Circuit was asked to decide the question of whether to convert *Feres* immunity to state law causes of action, prior to the enactment of the Westfall Act. 28 U.S.C. § 2679 (amending the FTCA to supersede the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), and creating immunity for government employees). The Westfall Act requires that the United States be substituted as the defendant in any tort suit brought against a "government employee" *acting within the scope of his employment*. *Id.* (emphasis added).

"We begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Congress included all members of the "military" and "naval forces" in its definition of an employee of the government under the Westfall Act. 28 U.S.C. § 2671; *see also* 28 U.S.C.S. § 2679. "When a statute includes an explicit definition…we must follow that definition…" *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir. 2001). Therefore, Westfall provides that members of the military, as government employees, are immune from suit, when

they are performing a nondiscretionary duty and their conduct falls within the scope of their employment. Congress *did not* adopt an "incident to service" test when defining when a servicemember is immune from suit. The unambiguous language of the statute must be read to mean what it plainly states: the scope of employment test, not the *Feres* incident to service test, is used when evaluating the immunity of military members from suit. Therefore, the immunity of Defendant hinges on whether his non-discretionary actions fell beyond the scope of his employment, not whether an injury was incident to Plaintiff's military service.

Servicemembers are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on extratextual consideration. *See*, *e.g.*, *Carcieri*, 555 U.S. at 387; *Connecticut Nat'l Bank*, 503 U.S. at 253-54; *Rubin*, 449 U.S. at 430.

In *Day*, the court declined to forge immunities not specifically sanctioned by the Supreme Court and found that their decision did not offend *Feres* because, under the Westfall Act, the United States may certify state-law claims against military personnel, "which it believes are sufficiently related to the defendant's duties," as to fall within the scope of defendant's employment, rendering the military member immune from suit. *Day*, 167 F.3d at 684 (stating, the use of force by a superior to compel obedience to an order, no matter how mistaken, would be certifiable as within scope of employment). Therefore, extending the *Feres* doctrine to state law

torts, especially after the Westfall Act, improperly overrides state law in areas of traditional state responsibility, without Congressional mandate. *See Wisconsin Pub. Intervenor*, 501 U.S. 597, 604 (1991). That part of the Court's decision in *Stauber*, which relied on an extension of *Feres* immunity to state law causes of action, should be overturned, since the *Stauber* Court did not have the benefit of the Westfall Act when deciding this issue.

"'*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.'" *Lanus* v. *United States*, 570 U.S. at 933 (Thomas, J., dissenting) (*quoting Johnson*, 481 U.S. at 700); *Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019). Its inequities should not be extended further to state law causes of action, especially when *Feres* itself requires no such mandate. "Revisiting the prior precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . ., and experience has pointed up the precedent's shortcomings." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 470 (2015).

CONCLUSION

In aggregate, these factors require that the Court DENY the Appellant's appeal and AFFIRM the district court's Order denying the Government's motion to dismiss for lack of jurisdiction. Equally as critical, consistent with the multifactorial balancing test articulated in *Lutz*, involving injury that is distinctly nonmilitary, this

Court can hold that *under the Feres doctrine, sexual assault is never a factor incident to military service.* ER 27.

Dated: September 17, 2021

Respectfully submitted,

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By: 
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STATEMENT OF RELATED CASES

Counsel are aware of no related cases within the meaning of Ninth Circuit Rule 28-2.6.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 13,844 words, excluding the items exempted by Fed. R. App. P. 32(f). This brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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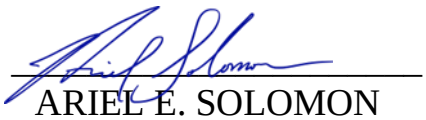
By: 
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Brief of Plaintiff-Appellee 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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