No. 15-488

In the

# Supreme Court of the United States

JORGE ORTIZ,
AS NEXT FRIEND AND PARENT OF I.O., A MINOR
PETITIONER,
*v.*
UNITED STATES,
RESPONDENT.

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

## BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND ITS PRESIDENT AND VICE PRESIDENT, DRU BRENNER-BECK AND RACHEL VANLANDINGHAM, AND SOUTHWESTERN LAW STUDENT MELISSA A. AGNETTI, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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## QUESTIONS PRESENTED

1. Does the FTCA allow children of active-duty mothers to bring birth-injury claims against the federal government as the Fourth, Eighth, and Eleventh Circuits have held, or should the *Feres* doctrine be expanded to bar a child's birth-injury claim when government negligence injures the child of an active-duty mother, as the Tenth Circuit has held?

2. Does treating birth-injury claims of the children of active-duty military mothers differently than the children of active-duty military fathers constitute unconstitutional gender discrimination?

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## INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioner.

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers. Dru Brenner-Beck, LTC, U.S. Army, (ret.), currently serves as NIMJ's President and served as a judge advocate while in uniform.

Amicus Melissa A. Agnetti is an upper-division J.D. candidate at Southwestern Law School with extensive academic interest in national security matters.

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[1] All parties have received timely notice and have consented in writing to the filing of this brief. No counsel for a party authored 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. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel have made a monetary contribution intended to fund the preparation or submission of this brief. This brief was researched and prepared in the Amicus Project Practicum at Southwestern Law School.

Professor Rachel E. VanLandingham, Lt Col, USAF (ret.), served as a judge advocate while in uniform, is the current Vice President of NIMJ, and teaches criminal law and national security law at Southwestern Law School.

Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in an appropriate, nuanced, and consistent interpretation of the *Feres* doctrine, one that bars claims related to the performance of military duties or obedience to orders—in order to preserve and promote good order and discipline—while allowing those that are unrelated to the same. Revisiting the *Feres* doctrine would signal to service members that the United States government is committed to promoting fairness and justice in resolving military personnel matters.

## SUMMARY OF THE ARGUMENT

The ever-expanding *Feres* doctrine, a judicially created exception to a broad congressional waiver of sovereign immunity, has become ever more removed from the factors justifying its creation. The growing number of murky tests used by the lower courts to determine the meaning of "incident to service" reveals both the reigning confusion as well as the underlying schism between the *Feres* doctrine's animating purposes and the tests' unjust results.

Adding insult to literal injury, appellate courts have broadly expanded *Feres'* scope to produce case law that bears no rational relationship to the maintenance of good order and discipline in the military, which is the *amici's* primary concern and one of the primary purposes of the *Feres* doctrine.

Clarification by this Court of the tests that should be used by federal courts to determine when the *Feres* bar appropriately protects good order and discipline in the military is critically necessary.

Specifically, this Court should grant writ of certiorari in order to resolve the confusion and disagreement among the lower courts by articulating which test should apply to evaluate claims, particularly third-party claims, under *Feres'* jurisdictional bar. The divergent approaches taken by federal courts in determining whether *Feres* bars in utero injuries to term infants, and the lower courts' repeated noting of the injustice resulting from their application of the *Feres* bar in such cases, further support grant of review in this case.

## ARGUMENT

### I. THE *FERES* DOCTRINE REMAINS INTEGRAL TO PROMOTING MILITARY DISCIPLINE.

At its core, the *Feres* doctrine safeguards the military's ability to implement and execute its essential operational function—to fight and win the nation's wars. The United States military routinely engages in many activities that are inherently dangerous and which often require military members to risk life and limb to realistically train for and execute their missions. Using explosives and ammunition, parachuting, conducting live fire ranges, maneuvering tanks and other large armored vehicles, flying helicopters using night vision goggles, and scuba diving are only a few examples of these inherently risky activities.

Preserving the ability of commanders to inculcate discipline and obedience and engage in realistic training so that the military is mission-ready is an important national interest, and remains one of the objectives this Court has noted is advanced by the *Feres* doctrine's bar on claims for injuries incurred incident to service. *See Feres v. United States*, 340 U.S. 135, 143, 145 (1950) (identifying two rationales underlying its decision to bar service-related claims, including (1) the "distinctively federal" relationship between the Government and members of the armed forces, and (2) the existence of veteran's benefits and an alternative compensation system); *United States v. Brown*, 348 U.S. 110, 112 (1954) (discussing the detrimental effect of tort suits by service members against their superiors on good order and discipline in the armed forces).

Relied upon by the Tenth Circuit in this case, this Court in *United States v. Stanley* highlighted that, "the concern for the instinctive obedience of soldiers to orders, is of central importance in the *Feres* doctrine." 483 U.S. 669, 702-04 (1987) (identifying *Feres'* "solicitude for military discipline" to consist of concern for instinctual obedience, the maintenance of the rigor of military decision-making, and the disruption to the military entailed by the factual inquiries involved in lawsuits). Having to defend itself from tort suits each time a service member is injured while training or engaged in other military activities would degrade the military's mission readiness.

## II. THE *FERES* DOCTRINE HAS BEEN UNREASONABLY EXPANDED.

The *Feres* doctrine is a judicially-crafted exception to the FTCA's broad waiver of sovereign immunity for injuries to service members "where the injuries *arise out of or are in the course of activity incident to service*." *Feres*, 340 U.S. at 146 (emphasis added). Since its inception, however, the doctrine's application has been gradually expanded to bar third party claims arising from a service member's injuries, however tangentially related such a broad prohibition is to the doctrine's original purpose.

This expansion has led to the inequitable inclusion of cases unrelated to the doctrine's original purposes and unsupported by the special factors underlying its creation. This extension has encompassed cases that have little to no effect on good order and discipline within the military. *See Ortiz v. United States*, 786 F.3d 817, 823 (10th Cir. 2015). The continued widening of this judicial exception is seen in the Tenth Circuit's recent adoption of its version of the genesis test. While attempting to simplify the *Feres* doctrine's application to third party claims in the birth injury context, this test has instead contributed to disagreement among the Circuit Courts of Appeal on the appropriate reach of *Feres*; more alarmingly, it promotes injustice.

## III. THE PRESENT CASE EXEMPLIFIES THE INEQUITIES OF *FERES'* EXPANSION.

The circumstances of this case exemplify the

inequitable outcomes resulting from this expansion of *Feres*. Captain Heather Ortiz, an active duty Air Force member, gave birth to her baby, I.O., at Evans Army Community Hospital at Fort Carson, Colorado. Alleged breaches of the applicable medical standard of care to both Captain Ortiz and her baby I.O. are claimed to have caused I.O. significant brain injury, one with lifetime consequences. Barring this claim is the *Feres* doctrine, at issue solely because of the active duty status of Captain Ortiz and the characterization of her entitlement to medical care as a benefit of her military service. Had Captain Ortiz instead been Mrs. Ortiz, a civilian spouse receiving obstetrical care at Ft. Carson as a result of her husband's military service, I.O.'s claim would not be *Feres* barred. Instead, in a claim identical in all particulars to that of the hypothetical Mrs. Ortiz—the same medical standard of care owed to both the mother and the child, the same physicians, the same negligent acts, the same mechanism of injury, the same injuries—I.O.'s claims are barred solely because Captain Ortiz was the laboring mother, rather than the solicitous father.

Clearly a tort claim emanating from such a fact pattern has no impact on military discipline; this is a straightforward medical malpractice claim of a child of an active duty Air Force officer against the staff of an Army community hospital. It requires no additional factual inquiry other than one any obstetrician is normally subject to; there is no impact on the rigor of military decision making; and even more tragic, and legally significant, there is no compensation scheme to address I.O.'s significant injuries. Unlike an active duty service member injured incident to his or her service, I.O.'s injuries

will not be recompensed by a congressionally authorized veteran's injury and death compensation scheme. It is these inequities that have motivated many federal courts to seek interpretations of *Feres* that militate against leaving I.O.'s claims unaddressed and her injuries without remedy solely because of her being born to a mother in uniform.

This case illustrates how the expansion of *Feres*, particularly in the context of third-party claims, has metastasized this doctrine, losing all connection to its most important function—the maintenance of good order and discipline in the armed forces of the United States. In order to resolve the conflicting circuit precedent regarding the appropriate mechanism to evaluate third party claims under *Feres*' jurisdictional bar, this Court should grant petitioner's writ: to both preserve *Feres'* important function, and to appropriately limit it.

## IV. CONGRESS DID NOT INTEND FOR SUCH AN EXPANSION OF THE FTCA.

In the 1946 Federal Tort Claims Act (FTCA), Congress granted federal district courts specific subject matter jurisdiction and passed an explicit waiver of sovereign immunity for tort claims against the United States. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.); H. Rep. No. 79-1287, at 5 (1945); *see Feres*, 340 U.S. at 140 n.9. The underlying purpose of the statute was to compensate victims of negligence harmed by the conduct of governmental activities. *See Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). As enacted, the FTCA

contained explicit exceptions to its waiver of immunity, including a specific bar on claims arising out of combatant activities during time of war, as well as a bar on claims based on acts or omissions involving the exercise of discretionary duty in the furtherance of public policy goals. 28 U.S.C. § 2680(a), (j) (2012). The statute, however, did not contain any explicit bar to tort claims by military service members.

### A. The Purpose Of The FTCA Was To Reduce Congress' Burden Of Private Bills, Not To Provide An Additional Remedy For Service Members.

Representing Congress's primary purpose to "extend a remedy to those who had been without," the FTCA "mark[ed] the culmination of a long effort [by Congress] to mitigate unjust consequences of sovereign immunity from suit." *Feres*, 340 U.S. at 139-40. Evaluating FTCA tort claims by service members in *Feres*, the Supreme Court construed the FTCA "to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Id.* Especially relevant to this inquiry was the existence of systems of "simple, certain, and uniform compensation for injuries or death of those in armed services." *Id.* at 156-58.

Prior to the FTCA's waiver of sovereign immunity, parties injured by the United States would seek private relief bills through Congress to obtain recompense for their injuries. Congress's intent in passing the FTCA was to shift the burden

of examining these numerous private relief claims to the judiciary because of the "inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results." *Id.* at 140. Because of the existence of a comprehensive scheme of relief for "incident to service" injuries for military service members, there were few such requests to Congress from service members prior to the FTCA.

Recognizing both the swiftness and efficiency of the "simple, certain, and uniform compensation for injuries or death of those in armed services" and the lack of any provision adjusting the potential FTCA tort and military compensation and pension remedies, the Court held that Congress had implicitly excluded military claims for injuries incurred incident to service from the FTCA's waiver of sovereign immunity. *Id.* at 158. Key to this interpretation was the Court's evaluation of the comparative fairness of the military injury and pension compensation scheme to the tort recovery schemes available under state law referenced by the FTCA. *Id.* at 145. Thus, the *Feres* bar depended at its origin on both the existence and fairness of the alternate compensation scheme applicable to the armed forces.

### B. The Government Does Not Share An Analogous Private Liability With Private Individuals.

To further support its interpretation of the limited scope of the Act's waiver of immunity for members of the armed forces, the Court looked to the

language of the FTCA, which subjected the Government to the same measure of liability as a private individual in "like circumstances." *See Feres*, 340 U.S. at 141. For the *Feres* Court, there was no private person who had analogous authority to that the Government exercised over members of the armed forces, and no previous American precedent had been established allowing a soldier to recover for the negligence of either his commanding officers, or the Government. *Id.* at 141-42.

### C. The Relationship Between The Government And Military Personnel Is Distinctly Federal In Nature.

Moreover, the status of the military was a determinative factor in concluding that no analogous private liability existed for service-related injuries. *See Indian Towing Co.*, 350 U.S. at 69. The military relationship between the Government and service members is "unlike any relationship between private individuals," *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 670-71 (1977), and is "distinctly federal" in character, "fundamentally derived from federal sources and governed by federal authority." *Feres*, 340 U.S. at 143-44 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305-06 (1947) (citing *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871); *Kurtz v. Moffitt*, 115 U.S. 487 (1885)). This "federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service." *United States v. Johnson*, 481 U.S. 681, 689 (1987).

Where a service member is injured incident to service, it makes no sense to hold the Government liable for the fortuity of the situs of the alleged negligence under the FTCA. *Stencel*, 431 U.S. at 672. Instead, applying a federal remedy that provides "simple, certain, and uniform compensation" is appropriate. *See Johnson*, 481 U.S. at 689; *Feres*, 340 U.S. at 144. The veterans' compensation scheme serves a dual purpose, providing a swift efficient remedy to the injured service member, while also "cloth[ing] the Government in the 'protective mantle of the [veteran compensatory scheme's] limitation-of-liability provisions.'" *Stencel*, 431 U.S. at 673 (citations omitted).

## V. MILITARY DISCIPLINE WILL NOT BE DEGRADED BY A LIMITATION ON THE *FERES* DOCTRINE.

Although not expressly articulated in the *Feres* decision, a third factor underlying the *Feres* bar was later explained in *United States v. Brown*, namely:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .

*Brown*, 348 U.S. at 112. Throughout the *Brown* opinion, this Court consistently referred to the unique nature of the military relationship and

acknowledged the importance of discipline. *Id.* at 112; *United States v. Muniz*, 374 U.S. 150, 162 (1963); *see also Chappell v. Wallace*, 462 U.S. 296, 299 (1983). Hence the need for special regulations and the consequent justification for an exclusive system of military justice is "too obvious to require extensive discussion." *Chappell*, 462 U.S. at 300. Military organizations would be unable to function without adherence to strict discipline and regulation. *Id.*; *see Parker v. Levy*, 417 U.S. 733, 743-44 (1974). Moreover, this Court has held that "the rights of men in armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Burns v. Wilson*, 346 U.S. 137, 140 (1953). Accordingly, while civilian courts must be cautious when entertaining suits that request interference with the long established relationship at the heart of the unique structure of military establishment, they need not be concerned when military discipline, like in the present case, is not impacted. *See Chappell*, 462 U.S. at 300.

## VI. THIS COURT SHOULD GRANT PETITIONER'S WRIT IN ORDER TO RESOLVE THE EXISTING CONFUSION AND INCONSISTENCY REGARDING THE DETERMINATION OF "INCIDENT TO SERVICE" THROUGHOUT THE LOWER COURTS.

The lower courts continue to struggle with the question of when it is appropriate to extend the *Feres* bar to claims that are "derivative of" or "connected" in some way to a service member's "incident to service" injury. Federal courts' differing application

of the *Feres* bar in medical malpractice birth injuries represents some of the most difficult of these cases, resulting in the same capricious and unjust results that Congress sought to avoid in passing the FTCA

Moreover, the tenuous or non-existent connection to *Feres'* most fundamental justification—the maintenance of good order and discipline in the military—makes the application of the *Feres* bar in birth injury cases unjust as well as inappropriate. Since *Feres* itself is the result of the Supreme Court's interpretation of an implied Congressional exception to the FTCA's explicit broad waiver of sovereign immunity, it is even more imperative that the Supreme Court clarify the guidance it provides to federal courts in its application.

Admittedly, given the myriad number of factors that should be considered in determining whether an injury is service connected, the *Feres* doctrine itself cannot be reduced to a few simple bright-line rules; each claim must be thoroughly examined in light of the FTCA as construed in *Feres* and subsequent cases. *See United States v. Shearer*, 473 U.S. 52, 57 (1985). The lack of clarity, however, on how to define and apply this doctrine has resulted in vastly inconsistent decisions throughout the lower courts. *See Hale v. United States*, 416 F.2d 355, 358 (6th Cir. 1969); *compare Parker v. United States*, 611 F.2d 1007, 1008 (5th Cir. 1980), *with Camassar v. United States*, 400 F. Supp. 894, 895 (D. Conn. 1975), a*ff'd*, 531 F.2d 1149 (2d Cir. 1976) (per curiam).

The Tenth Circuit itself determined that *United States v. Stanley* had effectively merged the "special factors" analysis with the "incident to service" test. *Ricks v. United States*, 295 F.3d 1124, 1130 (10th Cir. 2002) (*citing Stanley*, 483 U.S. at

681), while other courts continue to apply the special factors in their determinations of when an injury is incident to service. *See, e.g.*, *Purcell v. United States*, 656 F.3d 463, 465-66 (7th Cir. 2011). Further, although the Tenth Circuit held that the "incident to service test rests squarely on the third 'special factor' of preserving the military's disciplinary structure and Congress' prerogative in regulating intramilitary affairs," *Ricks*, 295 F.3d at 1130 (*citing Stanley*, 483 U.S. at 683), it declined, again based on its interpretation of *Stanley*, to engage in a case-by-case examination of the effect on military discipline in a particular claim. *Id.* Thus, the relationship between *Feres'* most relevant justification, the effect on good order and discipline, and the incident to service test has grown so generalized as to rob it of any probity.

The continuing extension of *Feres* to bar derivative and ancillary claims, no matter how tangentially related to the service person's incident to service injury, particularly when applied to the "dilemma of the inherently-inseparable nature of prenatal and neonatal treatment,"[2] has sowed greater confusion among federal courts as they struggle to faithfully apply *Feres* to these challenging claims. Moreover, many courts applying this bar do so only after noting the resulting injustice of such an application. *See, e.g.*, *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) ("[W]e apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this

[2] Ortiz v. United States, 786 F.3d 817, 828 (10th Cir. 2015).

doctrine to a range of situations that seem far removed from the doctrine's original purposes."); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983) ("We are forced once again to decide a case where we sense the injustice of the result but where nevertheless we have no legal authority . . . to decide the case differently."); *Ortiz*, 786 F.3d at 823.

### A. The Term "Incident to Service" Has Been Broadly And Inconsistently Applied.

Without sufficient guidance as to what specific claims are barred by this "incident to service" standard, confusion as to its applicability has escalated throughout the lower courts. *See Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987) (per curiam) (describing the standard to be "somewhat elusive"), *cert. denied*, 485 U.S. 987 (1988); *see also Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) (indicating the notion of 'incident to service' to be a "repository of ambiguity"). As a result, courts have broadly expanded its meaning to produce case law that bears no rational relationship to military discipline. *See, e.g.*, *Estate of McAllister v. United States*, 942 F.2d 1473 (9th Cir. 1991); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987). Accordingly, a growing number of injuries suffered incident to military service have been routinely barred, including personal injuries arising from medical malpractice, as well as for genetic injuries sustained by children of injured service members.

*1. Courts Have Improperly Expanded the "Incident to Service" Standard to Include Medical Malpractice Claims.*

Lower courts have consistently applied the *Feres* doctrine to bar service members' claims arising from the medical malpractice of government healthcare providers. *See* Hearing on H.R. 1478 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 111th Cong. 243, at *9 (2009); *Smith v. Saraf*, 148 F. Supp. 2d 504, 514 (D.N.J. 2001) (recognizing that since medical care is a military benefit, medical malpractice cases should be barred). While this Court in *Feres* precluded two malpractice suits, the doctrine itself does not support the proposition that such claims negatively impact military discipline, though such claims may, depending on the status of the injured party, be able to be remedied through the military's compensatory scheme, thus resting on that separate *Feres* justification. *See Hall v. United States*, 528 F. Supp. 963, 967-68 (D.N.J. 1981).

The underlying essence of the discipline rationale is the fear that constant litigation by military personnel would not only disrupt effective command, but also allow civil courts to second-guess and review military decisions. *See Shearer*, 473 U.S. at 58; *Stencel*, 431 U.S. at 673. This Court repeatedly upheld this rationale by emphasizing the need to protect the "peculiar and special relationship" between superior and soldier, *see Shearer*, 473 U.S. at 57; *Chappell*, 462 U.S. at 299, 300 (1983); *Stencel*, 431 U.S. at 671-672; *Muniz*, 374 U.S. at 162; *Brown*,

348 U.S. at 112, and the concern that an onslaught of potential lawsuits would negatively interfere with military commanders' need for "unhesitating and decisive action." *Chappell*, 462 U.S. at 304 (1983).

Yet the physician-patient relationship does not necessarily, or even usually, involve a relationship between superior and subordinate; the patient may in fact be superior in rank to the physician. The doctor-patient treatment relationship (as opposed to the military superior-subordinate relationship) is the relevant relationship to assess in medical malpractice cases, such as the present case. Critically, the doctor-patient relationship does not implicate the military discipline rationale—at least for medical malpractice claims in fixed stateside military medical facilities.

Furthermore, medical malpractice actions differ from those typically asserted by service members since the medical environment is usually removed from primary military activities. *See* Hearings on H.R. 1161 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 83 (1985). Military hospitals are recognized as commands separate from operations within the structure of the armed forces. *See* U.S. Dep't of Air Force, Instr. 44-102, Medical Care Management (17 Mar. 2015) (hereinafter AFI 44-102); U.S. Dep't of Army, Army Regulation 40-1, Composition, Mission and Function of the Army Medical Department (1 July 1983) (hereinafter AR 40-1). Personnel assigned to these stateside fixed hospitals operate within an internal command structure closely resembling units in the military; this structure is for medical personnel, **not** for medical personnel and their patients. *See*

*generally* AFI 44-102; AR 40-1.

Command belongs to the unit to which a service member is assigned. U.S. Dep't of Army, Army Regulation 600-20, Army Command Policy, ¶ 1-5 (6 Nov. 2014) (hereinafter AR 600-20). As such, personnel who voluntarily use military hospital facilities are not typically under the control of the healthcare provider. *Id.* Hospital personnel have no direct authority to discipline service members outside their command. *Id.* Similarly, military medical personnel may not order service members to undergo invasive surgery or unwanted treatment. *See e.g.* AR 600-20, ¶ 5-4.[3] Without direct authority over those reporting to the facility for personal medical care, allowing recovery for negligent care is unlikely to impact good order and discipline, and may contribute to the improvement of the quality of military medicine. *See, e.g.*, *Atkinson*, 804 F.2d at 565 (recognizing that military discipline was unaffected by the treatment of a pregnant service member).

[3] Under AR 600-20, the unit commander may order involuntary emergency medical care if necessary to save the life, health, or fitness for duty of a Soldier; if unit commander is not available, the hospital commander [not the treating physician] may order the treatment given. Involuntary inoculations may only be ordered by the General Court-Martial Convening Authority of the soldier. Alternatively, unit commanders may order the service member to undergo medical treatment, and any refusal may be used as a basis for discharge or disciplinary action under the Uniform Code of Military Justice.

*2. The "Incident to Service" Standard Has Been Inappropriately Expanded by Applying the Genesis of the Injury Test to Prenatal Negligence Claims.*

Similar to the medical malpractice line of cases, several courts have barred recovery for derivative injury actions brought by third party claimants. *See Minns v. United States*, 155 F.3d 445, 449 (4th Cir. 1998), *cert. denied*, 525 U.S. 1106 (1999). The prohibition extends to prevent non-service members from bringing claims that find their genesis in injuries sustained by military personnel. *See, e.g.*, *Hinkie*, 715 F.2d 96; *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981). For example, several courts have barred recovery for service members' children suffering from genetic injury allegedly due to their parent's service-related exposure to radiation or herbicides. *See, e.g.*, *Monaco*, 661 F.2d 129 (prior exposure to radiation during World War II led to birth defects); In re *Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980) (exposure to herbicides during Vietnam War led to subsequent birth defects). Although the children suffered direct injuries, these courts reasoned that the allegations fell within the purview of the *Feres* doctrine since the injuries had their genesis in the parents' initial exposure to chemicals while in military service.

However, unlike such exposure claims, the *Ortiz* case is factually distinguishable. In *Ortiz v. United States*, the service woman, an Air Force

Captain, voluntarily entered the military hospital for a planned full-term[4] Caesarian section delivery. Contrary to the exposure cases, the physician performing the operation owed a duty of care under the applicable state law and medical ethics to two patients, both the mother and the child. *See* James J. Nocon, *Physicians and Maternal-Fetal Conflicts: Duties, Rights and Responsibilities*, 5 J.L. & Health 1, 15-19 (1990);[5] *see also* Restatement (Second) of Torts § 869 (1979); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1215 (Colo. 1988) (Mullarkey, J. concurring). As a result of the physician's negligent administration of Zantac, the mother suffered from an allergic reaction causing her blood pressure to significantly drop, allegedly causing the hypoxia that resulted in the child's severe brain injury. Rather than merely incidental, the negligent failure by the hospital staff to maintain the mother's blood pressure, a duty also directly owed to the unborn child, is alleged to have directly caused the foreseeable injury to the child. Any injury to the mother is irrelevant, as it is the breach of the duty to the child to maintain adequate oxygen during delivery that is alleged to have proximately caused

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[4] A viable fetus or full-term baby is a person to whom a separate duty of care is owed by the treating physician. *See* Roe v. Wade, 410 U.S. 113, 163-64 (1973); *see also* Gonzales v. Mascarenas, 190 P.3d 826, 830 (Colo. App. 2008). Here the negligent administration of medication to Captain Ortiz violated the standard of care separately owed to both patients—mother and child.

[5] Congress has established those who are entitled to military medical care, and their determination includes the children of active duty military members. *See* U.S. Dep't of Air Force, Instr. 41-210, Tricare Operations and Patient Administration Functions (6 June 2012).

the injury to the child in this case. The genesis test, as applied by the Tenth Circuit, inappropriately bars this child's claim, solely because the mechanism of injury also constituted a breach of the duty of care to the active duty mother.

### B. The Approaches Promulgated By The Tenth Circuit Are Inadequate To Determine Whether A Claim Occurred Incident To Service.

The Tenth Circuit purports to follow the "dominant understanding" of the *Feres* doctrine. *Ortiz*, 786 F.3d at 821. According to the court's reasoning, this understanding encompasses all "remotely related" injuries suffered by military personnel in connection to their individual status as service members. *Id.* Yet in its opinion the court impermissibly simplifies the doctrine, thereby converting the incident to service test to a status-based test, resulting in a rejection of the distinctions made by this Court in *Brooks* and *Feres*. While the approach taken by the Tenth Circuit is certainly one that can be discerned from this Court's jurisprudence, the alternate approaches taken by other federal courts illustrate the need for guidance clarifying *Feres'* applicability. To alleviate the confusion throughout the circuits, this Court must clarify the proper tests or mechanisms courts should use to determine whether direct or third-party claims are "incident to service" and thus barred by *Feres*.

*1. The Approaches Offered by the Tenth Circuit's Majority and Concurrence are Unpersuasive and Inappropriately Expand Upon the Original Intent of the Feres Doctrine.*

In determining its holding, the Tenth Circuit effectively eliminated the three-factor analysis of *Feres'* rationales and merged the factors into one "incident to service" test. *Ortiz*, 786 F.3d at 822; *see Ricks v. Nickels*, 295 F.3d 1124, 1130 (10th Cir. 2002). The court found the focus on special factors to be "unduly redundant" and reasoned that the more relevant question was to solely determine whether the claimant's injuries arose "incident to service." *Ortiz*, 786 F.3d at 822; *see Tootle v. USDB Commandant*, 390 F.3d 1280, 1282 (10th Cir. 2004). In rejecting a case-by-case analysis of the effect of a lawsuit on military discipline (the only relevant factor under the Tenth Circuit's analysis), the Tenth Circuit further unmoors *Feres* from its justifications. *See Feres*, 340 U.S. 135; *Brown*, 348 U.S. at 112 (1954); *see also Shearer*, 473 U.S. at 58-59 (indicating that the focus of judicial inquiries should be to ensure military effectiveness).

For claims asserted by third-party civilians, the Tenth Circuit adopts the genesis test as the standard mechanism for determining whether claims are barred under the FTCA. *Ortiz*, 786 F.3d at 823; *see Stencel*, 431 U.S. 666. The genesis test focuses on the specific injury, inquiring into whether the harm caused to the civilian third party originated in a service member's incident-to-service injury. *Ortiz*, 786 F.3d at 824; *see, e.g.*, *Ritchie v. United States*,

733 F.3d 871, 875 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 2135 (2014). If it does, the same jurisdictional bar would apply to third party claims as to a service member's claims. *Ortiz*, 786 F.3d at 824; *see Minns*, 155 F.3d at 449.

However, the court went further when applying the approach to in utero cases. *Ortiz*, 786 F.3d at 826. In doing so, the court rejected other federal courts' approaches that resist application of the genesis test in prenatal, in utero, or birth circumstances. *Id.*; *see, e.g.*, *Brown*, 462 F.3d at 616 (focusing on the nature of the injury and concluding that the child's claim was not barred since the child sustained an "independent injury" from the mother); *Romero v. United States*, 954 F.2d 223, 226 (4th Cir. 1992) (finding the relevant inquiry was to determine whether the service member was injured during active duty service); *Lewis v. United States*, 173 F. Supp. 2d 52, 56-57 (D.D.C. 2001), *vacated in part on other grounds*, 290 F. Supp. 2d 1 (D.D.C. 2003) (determining the crucial issue to be whether the negligent medical treatment was provided to the child or to his mother). The inherently inseparable nature of prenatal and neonatal treatment underscores that the Tenth Circuit's approach grossly simplifies the complex analysis that should be required before *Feres* is determined to bar a child's injuries by extending it to all birth injuries due to their interrelated nature with the active duty mother's obstetrical care.

Justice Ebel's concurring opinion offers a different approach to determining whether third-party claims are barred under the FTCA. *Ortiz*, 786 F.3d at 833 (Ebel, J. concurring). Using a "conduct-focused approach," this standard considers whether

the third-party claimant's in utero injuries stemmed directly from immunized military conduct towards the pregnant service member. *Id.* Yet while certain third party actions do pose a risk to good order and discipline, the concurrence was incorrect in believing civilian claims for in utero injuries call for such a broad extension and application of the doctrine. Medical malpractice claims for pregnancy-related injuries do not generally pose a threat to the inter-military-service member relationship. Moreover, the concurrence argues that a conduct-focused approach ensures the military remains immune from liability not only when its provision of service-related medical care injures a pregnant service member, but also when the *exact same conduct* causes in utero injuries to the unborn child. *Id.* at 838. Such bars are over-inclusive, resulting in a *Feres* bar when there is no effect on military discipline.

In this case, the physician owed an independent duty of care to *both* the mother and child. Regardless of whether the physician's negligent treatment proximately injured the mother, the child was owed a separate duty of care by the physician: in this case to maintain adequate oxygen perfusion for the baby, or emergently deliver the baby to avoid harm. *See Lininger v. Eisenbaum*, 764 P.2d 1202, 1215 (Colo. 1988) (Mullarkey, J. concurring) (stating that an infant has an independent claim for relief based on the breach of the physician's duty of care). The physician's negligent failure to maintain the mother's blood pressure, whether or not it "injured" the mother, proximately caused his other patient, the child, to, it is alleged, directly suffer brain trauma. It was also entirely foreseeable that such a breach of the

physician's duty could cause the alleged resulting injuries.

*2. Use of a Tort Law Approach May Be an Appropriate Mechanism to Determine Whether Third-Party Claims Are Barred Under the FTCA.*

The enactment of the FTCA did not create a substantive cause of action against the United States, but rather a procedural remedy by which the substantive law of the states could be applied against the federal government. *Certain Underwriters at Lloyds' v. United States*, 511 F.2d 159, 162-163 (5th Cir. 1975); *Weber v. United States*, 991 F. Supp. 694, 696 (D.N.J. 1998). Under the FTCA, the Government is liable for personal injury caused by the negligent or wrongful act or omission of any Government employee, under circumstances in which liability is found in accordance with "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (2012); *Johnson*, 481 U.S. at 693 (1987). In order to determine an appropriate mechanism with which to establish when service-related injuries to the mother would bar injuries to her child under the FTCA, it is essential to return to the fundamentals of tort law.

Colorado law treats medical malpractice claims as a particular type of negligence action. *Day v. Johnson*, 255 P.3d 1064, 1068-1069 (Colo. 2011). As with other negligence causes of action, the complainant must demonstrate a legal duty of care on the defendant's part, breach of that duty, injury to the plaintiff, and that the breach proximately caused the injury. *See id.* at 1068-69; *see also Ayala v.*

*United States*, 846 F. Supp. 1431, 1437 (D. Colo. 1993). Here, the physician had a legal duty of care to two patients, the mother and child. He breached both duties by his negligent actions in administering medication to the mother, proximately causing the mother's allergic reaction, drop in blood pressure and ultimately the child's brain trauma, alleged breaches that also proximately caused the child's injuries.

The genesis test promoted by the Tenth Circuit does not adequately contemplate the unique situations posed by tort claims regarding in utero birth injuries; such claims stand apart from traditional derivative third-party tort claims, such as loss of consortium, infliction of emotional distress, or indemnification. The Tenth Circuit genesis-injury test not only fails to articulate how military discipline is affected by tort claims by a live infant, it also differs from the tests used by other federal courts to analyze whether the *Feres* bar applies to in utero injuries.

## CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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