No.

IN THE

Supreme Court of the United States

JORGE ORTIZ, AS NEXT FRIEND AND PARENT OF I.O., A MINOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

LAURIE M. HIGGINBOTHAM
WHITEHURST, HARKNESS, BREES, CHENG, ALSAFFAR & HIGGINBOTHAM, PLLC
7500 Rialto Boulevard
Building 2, Suite 250
Austin, TX 78735

ROBERT S. PECK
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W.
Suite 520
Washington, DC 20001
Phone: (202) 944-2874
robert.peck@cclfirm.com

Counsel for Petitioner
(additional counsel listed on inside cover)

JAMES E. PUGA
BRUCE BRALEY
LEVENTHAL & PUGA, P.C.
900 South Cherry Street, Suite 600
Denver, CO 80246

JOSEPH F. BENNETT
CROSS & BENNETT, LLC
108 East St. Vrain Street, Suite 20
Colorado Springs, CO 80903

QUESTIONS PRESENTED

In *Feres v. United States*, 340 U.S. 135 (1950), this Court created an exception to the FTCA's broad waiver of sovereign immunity, barring active-duty military personnel from bringing claims against the government for their own injuries arising out of activity incident to service. *Feres* has never barred birth-injury claims by children with active-duty fathers, but the Circuits are split on whether *Feres* should be expanded to bar birth-injury claims of children with active-duty mothers when injured during labor and delivery by government negligence.

The Questions Presented are:

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?

PARTIES TO THE PROCEEDINGS

Petitioner is Jorge Ortiz, as next friend and parent of I.O., a minor. Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Jorge Ortiz, as next friend and parent of I.O., a minor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a-54a) is reported at *Ortiz v. United States*, 786 F.3d 817 (10th Cir. 2015). The order of the United States District Court for the District of Colorado (App. 57a-76a) is not reported.

JURISDICTION

The court of appeals entered its judgment on May 15, 2015. On July 27, 2015, Justice Sotomayor extended the time to file a petition for certiorari until October 12, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case involves a judicially created exception to the Federal Tort Claims Act, 28 U.S.C. § 1346 *et*

seq. The pertinent provision of the FTCA is reproduced at App. 79a-80a.

INTRODUCTION

Under the *Feres* doctrine, the availability of compensation for a child's injury *in utero* should not depend on which circuit her delivery takes place in or which parent is the active-duty member of a military service. If the newborn here, I.O., delivered at a military hospital because her father was an active-duty service member, then the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), would readily give her the relief that she seeks. But because she has an active-duty Air Force mother, the courthouse doors are closed for I.O. in the Tenth Circuit, and she is denied any remedy for the permanent, severe injuries that she sustained in labor and delivery. Children of active-duty fathers have recovered for birth-injury claims under the FTCA since its inception, but circuits are deeply split over whether children of active-duty mothers are permitted to bring birth-injury claims. The Fourth, Eighth, and Eleventh Circuits allow children of military mothers to bring claims for birth injuries, but the Tenth Circuit has expanded *Feres* to bar birth-injury claims by children of active-duty mothers. On the other hand, the Fifth, Sixth, and Ninth Circuits fail to have a consistent answer to this question of liability. In addition, the circuits are irreconcilably split on how to analyze the issue and inconsistent on the implications of the chosen test, leading to widely differing results on similar facts.

The issue arises and continues to plague the circuits because in *Feres v. United States*, 340 U.S. 135 (1950), this Court announced a judicial gloss on the FTCA, to bar tort claims against the government by

active-duty military personnel injured incident to service. At the time of *Feres*, there were far fewer women in military service, and active-duty women were automatically discharged upon becoming pregnant. *See* Exec. Order No. 10240, 16 Fed. Reg. 3689 (Apr. 27, 1951) (giving the services permission to discharge a woman if she became pregnant, gave birth, or became a parent by adoption or marriage). The *Feres* Court never contemplated barring birth-injury claims of children with active-duty mothers because at the time, there were none. Nor did it anticipate the revolution in our gender-equality jurisprudence.

For years, *Feres* has engendered widespread disapproval, from Justice Scalia's vigorous dissent in *United States v. Johnson*, 481 U.S. 681 (1987), and Justice Thomas' recent dissent in *Lanus v. United States*, 133 S. Ct. 2731, 2732 (2013) (Thomas, J. dissenting from denial of certiorari), down to lower courts' regular calls for this Court to reconsider *Feres*. Both the district court and the Tenth Circuit below acknowledged the great injustice of applying *Feres* to bar this claim, indicating that the justifications for *Feres* were at its "zenith" under these facts. App. 2a, 53a n.6.

Given the circuit split, this case is an excellent vehicle for the Court to make it clear that birth-injury claims of children of military mothers are not *Feres*-barred. It also affords the Court the opportunity to revisit the inequities and confusion spawned by the confusion and disarray among the circuits about the proper test to use in birth-injury claims. Because of the circuit split and the national and recurring importance of the issue, the petition should be granted.

STATEMENT OF THE CASE

A. Underlying Facts

In March 2009, Captain (now Major) Heather Ortiz was an officer on active duty serving in the Air Force. She was admitted to Evans Army Community Hospital in Colorado to deliver I.O. by scheduled Caesarean section. In preparation for the delivery of I.O., Heather Ortiz was given Zantac, despite medical records that clearly indicated that she was allergic to Zantac. Upon realization of the error, to prevent an allergic reaction, hospital staff administered Benadryl via IV push, which resulted in a drop in Heather's blood pressure.

Around the same time, the fetal monitoring strips for I.O. demonstrated a nonreassuring pattern, but medical personnel failed to respond timely. As a result, I.O. suffered a lack of oxygen that caused severe, permanent brain injury.

B. Proceedings Below

I.O's civilian father, Jorge Ortiz, presented an administrative claim on her behalf to the Department of the Army on July 11, 2011. On July 3, 2012, after the Army denied the administrative claim, Ortiz filed suit under the FTCA in the United States District Court for the District of Colorado. Captain Ortiz did not present any claim for injury.

In his complaint, Ortiz alleged that medical providers at Evans Army Community Hospital breached the standard of care in the labor and delivery of his child. The complaint alleged that the government medical providers knew or should have known that administering Zantac and Benadryl

would injure the baby. It also alleged that after a nonreassuring fetal heart pattern developed, government providers then committed a new act of negligence harmful only to I.O. by failing to monitor and respond to the nonreassuring fetal heart rate pattern.

On October 9, 2012, the Government filed a motion to dismiss for lack of subject matter jurisdiction, claiming that I.O.'s claims were barred under the *Feres* doctrine, which holds that the United States is not liable under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. App. 57a-58a, 63a.

On September 30, 2013, the District Court converted the Government's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) into a motion for summary judgment under Rule 56 and reluctantly granted the converted summary judgment motion on the same date. App. 58a, 76a, 78a. The district court concluded that the administration of Zantac harmed Heather Ortiz, and that the administration of Benadryl was given for the benefit of both Heather Ortiz and I.O. *Id*. at 73a-74a. The district court held that I.O.'s injuries, including injuries related to improper fetal monitoring, were derivative of an injury to Heather Ortiz, caused by administering Zantac and Benadryl. *Id*.

Ortiz timely appealed. The Tenth Circuit reluctantly affirmed the District Court, finding the "genesis test" for the application of the *Feres* doctrine most appropriate and holding that I.O's injuries were inseparable from that of her active-duty mother. *Id*. at 30a-34a Highlighting the existing circuit split, the

Tenth Circuit acknowledged that that other circuits have rejected application of the "genesis" test in birth-injury claims "to counterbalance the harsh results often associated with the application of *Feres* to third parties." *Id*. at 19a-20a. The Tenth Circuit further criticized the harshness of this result, signaling that further review of the application of *Feres* to a case like this one was appropriate. *Id*. at 21-34a.

REASONS FOR GRANTING THE PETITION

This case presents an issue upon which the Circuits are irretrievably split, despite repeated reexaminations within those Circuits. It also presents an important and recurring question of federal law. The FTCA broadly waives government immunity and subjects the United States to tort liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. In *Feres v. United States*, this Court created a judicial exception to this waiver of immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 146. This Court has provided three rationales, of varying importance, to support the exception: 1) the distinctly federal nature of the relationship between the government and members of its armed forces; 2) the existence of the Veterans' Benefits Act, which provides a form of no-fault compensation to injured members of the military; and, 3) the special relationship of a service member to his or her superiors and the "effects of the maintenance of such suits on discipline." *United States v. Shearer*, 473 U.S. 52, 57 (1985). *See also United States v. Johnson*, 481 U.S. 681, 684 n.2 (1987).

This case presents an excellent vehicle for this Court to resolve a deep circuit split about the applicability of the *Feres* doctrine to birth injuries of children of military mothers. Not only have the Circuits reached varying conclusions on this question, they have struggled to find the proper test to resolve the issue, invoking inconsistent standards even when purportedly applying the same test and producing wildly inconsistent results.

Even those courts, like the one below which found the child's claims to be barred by *Feres*, have urged this Court to resolve the "overbreadth (and unfairness) of the doctrine" as applied to cases like this one. App. 3a. Moreover, the application of the existing blunt tools utilized by some courts to deny a cause of action to the injured child creates an inherently discriminatory outcome, institutionalizing a form of gender discrimination, whereby the child of a serviceman injured during prenatal care or delivery at a military hospital will always be eligible to bring an FTCA action, while the child of a servicewoman injured in precisely the same way may not. This form of gender discrimination, resulting from the misapplication of *Feres* in some courts, demands correction. This case provides an excellent vehicle for this Court's consideration of the harsh, unjustified, and improper application of *Feres* to children of military mothers in some circuits.

I. The Circuits Are Deeply Divided and Need Guidance About Whether a Newborn Is *Feres*-Barred From Pursuing a Medical Malpractice Claim When the Mother Is an Active Member of the Military Service.

The Tenth Circuit's decision in this case, holding that no FTCA claim may be brought for injuries sustained as a result of medical malpractice in delivery on behalf of a child of a military mother, stands in sharp conflict with decisions of the Fourth, Eighth, and Eleventh Circuits, as well as district court decisions in the First, Third, and Seventh Circuits. Even as the Tenth Circuit felt compelled to steer a different path from these sister circuits and other courts, it noted its own regret in reaching its result and further stated that the courts' and commentators' longstanding and deep criticism of the *Feres* doctrine "is at its zenith in a case like this one—where a civilian third-party child is injured during childbirth, and suffers permanent disabilities" while the "facts here exemplify the overbreadth (and unfairness) of the doctrine."[1] App. 2a, 3a.

The difficulties a court faces in applying *Feres* to this situation, the Tenth Circuit stated, is further compounded by widespread "confusion and lack of uniform standards." *Id*. at 11a. It opined that "[o]ur task in this case would be difficult enough if we simply had to navigate the conflicting interpretations of *Feres*

[1] Similarly, the District Court in this case lamented that the "application of *Feres* to this case . . . would have a devastating effect on [Petitioner's] family. [I.O. suffers] a disabling condition that has undoubtedly greatly diminished the quality of I.O.'s life and burdened her family with enormous medical costs." App. 64a-65a.

and the genesis test," but a further level of complication, described as an "additional (and significant) variable requires further explanation: the fact that I.O.'s injuries were suffered in utero." *Id*. at 19a.

This Court, too, has recognized the difficulties the lower courts face, even in less challenging cases, by stating that the "*Feres* doctrine cannot be reduced to a few bright-line rules." *Shearer*, 473 U.S. at 57. However, the limited general guidance that this Court has provided has led to inconsistent and anomalous results in the various circuits[2] that are particularly apparent in childbirth cases like this one, and has engendered repeated pleas from the lower courts for this Court's intervention. The lower courts have taken at least three distinct approaches, with inconsistent conclusions, to resolving the *Feres* issue in *in utero* cases: (1) relying solely on the three *Feres* factors; (2) utilizing a "genesis" test but still recognizing the independent claim of the child; and (3) relying on a "genesis" test that considers treatment of mother and baby as inseparable. The confusion and inconsistency of the various approaches utilized and the results they produce begs for this Court's intervention.

[2] *See* App. 9a ("In many jurisdictions, the extent to which these factors still bear on the *Feres* analysis is an open question.").

A. The Fourth, Eighth, and Eleventh Circuits hold that the child, as a civilian, has a distinctive claim, separate from a mother's possible claim, and reject use of the "genesis" test.

In this case, the Tenth Circuit held that the "most appropriate" test was the "genesis" test, App. 16a, 30a, relying on the approach taken in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), a case in which this Court held that "the third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action by [the serviceman] is barred by *Feres*." *Id.* at 673. The "genesis" test, based on that statement, "asks whether the civilian injury has its origin in an incident-to-service injury to a service member." App. 15a.

The question answers itself, when, as the Tenth Circuit erroneously held, an "injured child's in utero injuries are unmistakably derivative of an injury to her mother," thereby treating mother and child as one patient during labor. *Id.* at 3a. In contrast, the leading case from the Fourth Circuit explicitly rejected application of the "genesis" test, because its application is properly reserved for a "purely derivative injury—civilian injury that derives from a service-related injury to a service person," which has generally involved "an injury to the service person with consequent genetic injury to offspring." *Romero v. United States*, 954 F.2d 223, 225-26 (4th Cir. 1992). Contrary to the Tenth Circuit, *Romero* holds that a "genesis analysis is inappropriate here," as the newborn's "injury did not derive from any injury suffered by a service member, but was caused when

the government breached an affirmative duty of care owed directly to him." *Id.* at 226.

Instead of applying a "genesis" analysis, *Romero* held that "application of the three *Feres* factors supports our conclusion that [the child's] claim is not barred," as the child has no federal relationship, has no other form of military compensation for the injuries, and, permitting the medical malpractice lawsuit, will not "impair the discipline necessary for effective service" or "second-guess a decision of the military necessary to the accomplishment of a military mission." *Id.* (citing *Johnson*, 481 U.S. at 689).

The Eighth Circuit reached similar conclusions in another *in utero* case. In *Mossow v. United States*, 987 F.2d 1365 (8th Cir. 1993), the court held that a child's lawsuit for neonatal injuries as a result of medical malpractice is not barred by *Feres*. Both *Mossow* parents were on active duty in the Air Force. As a result of alleged negligent medical care, the child was born with cerebral palsy, mental retardation, blindness, and seizures. Applying precedent that "claims are not barred under *Feres* when brought by civilians or civilian dependents of service members who have sustained a direct injury from military personnel," *id.* at 1368, the court adopted the Fourth Circuit's approach in *Romero*, looking to the "duty of care owed directly to the infant." *Id.* at 1369. In contrast to the Tenth Circuit here, it held that an "infant suing a physician for birth injuries is a patient in his own right, the cause of action for injuries he sustained belongs to him, is separate from any cause of action the mother may have for negligent care, and is not derivative of the mother's claim for injuries." *Id.*

at 1369 n.4 (citing *Bulala v. Boyd*, 389 S.E.2d 670, 675-76 (1990)).[3]

The Eighth Circuit signaled its agreement with the Fourth Circuit's rejection of the "genesis" test, but went on to hold that the child's cause of action "is not barred by the genesis test under *Feres*." *Id.* at 1370. As the Fourth Circuit did in *Romero*, the Eighth Circuit surveyed the three rationales behind *Feres* and found none applicable.

Finally, in a case that the Tenth Circuit specifically noted its disagreement with, App. 23a n.9, the Eleventh Circuit held that, even if the military mother was injured and her own claim was precluded by *Feres*, her injured child may still bring an action for injuries resulting from negligent prenatal care. In *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), a Navy hospital corpsman brought an action for injuries to herself and her twin newborns, one of whom died shortly thereafter, as a result of negligent medical care that resulted in premature labor. Finding that Ms. Del Rio's military status entitled her to seek care at a military hospital, the court determined that her past and continuing medical treatment was "incident to her military service" and, permitting her claim would require courts to "second-guess the medical decisions of the military physicians," which was

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[3] In *Mossow*, the child discovered his cause of action years after birth but brought the action as an instance of legal malpractice because a government lawyer advised his parents that he had no claim because of *Feres*. *Id.* at 1367. The Eighth Circuit held that the cause of action for legal malpractice was "not barred by the genesis test under *Feres*," after examining the underlying medical-malpractice claim. *Id.* at 1370 (footnote omitted).

particularly true in this instance because Ms. Del Rio was a Navy hospital worker. *Id*. at 286 (citations omitted).

Nonetheless, the Eleventh Circuit held, as the Fourth Circuit did in *Romero*, none of the "three broad rationales" justifying *Feres* applied to the claims of her surviving newborn. *Id*. at 287. First, it recognized the child "'hardly bears the relationship to government that a soldier on duty does.'" *Id*. (quoting *Lombard v. United States*, 690 F.2d 215, 232 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part)). Second, children are not eligible for the same statutory benefits as the member of the service. *Id*. Moreover, a lawsuit inquiring into military physicians' decisions does not implicate military discipline in the same manner as a mother's lawsuit, does not impair the "*esprit de corps* necessary for effective military service," and does not require the court to second-guess decisions "unique to the accomplishment of a military mission." *Id*. On the other hand, the court determined that the military mother's claim as personal representative for recovery as a surviving parent in connection to the wrongful death of her other twin child "resembles the analysis of Ms. Del Rio's personal injury claim" and was thus barred. *Id*. at 288.

In reaching the conclusion that the surviving child's action was not precluded, the Eleventh Circuit considered the relevant state law, which provided that a "child who suffers prenatal injuries and is born alive has an independent cause of action for the negligence." *Id*. at 286 n.7 (citation omitted). The Tenth Circuit, in the instant case, gave no notice to Colorado's similar recognition that a child has an independent cause of action for prenatal injuries. *See*

Pizza Hut of Am., Inc. v. Keefe, 900 P.2d 97, 101 (Colo. 1995).

These decisions from the Fourth, Eighth, and Eleventh Circuits stand in stark contrast to the decision rendered by the Tenth Circuit in this case and provides ample reason to exercise jurisdiction over this matter.

B. In several circuits where there are no relevant decisions, district courts have also applied the three-factor test, rather than a "genesis" approach, and permit the claims.

While the issue remains undetermined in a number of federal circuits, several district courts have adopted the same rationale that prevails in the Fourth, Eighth, and Eleventh Circuits, in contrast to the approach taken by the Tenth Circuit below. For example, in *Lewis v. United States*, 173 F. Supp. 2d 52 (D.D.C. 2001), *vacated in part on reconsideration relating solely to the statute of limitations question,* 290 F. Supp. 2d 1 (D.D.C. 2003), and relying on the Fourth Circuit's *Romero* decision, which the court found "provides the most extensive analysis" of the issue, held "while both Regina [the mother in labor] and Clayton [the child] received medical care at Walter Reed, only Clayton's medical treatment was negligent" and thus not precluded by *Feres*. *Id*. at 57.

Similarly, a district court in the Third Circuit explicitly adopted "the Fourth Circuit's reasoning in *Romero* and the Eleventh Circuit's reasoning in *Del Rio*, [to] conclude that [a child's] wrongful life claim [for failing to advise the service member mother of test results that would have led to the prenatal diagnosis

of spina bifida] does not implicate any of the three factors supporting the *Feres* doctrine," thereby permitting the child's claim while denying the parents' claims. *Smith v. Saraf*, 148 F. Supp. 2d 504, 521 (D.N.J. 2001).

Although not addressing a childbirth case, but a genetic-injury claim, the Third Circuit critically noted the "injustice" of a result that "visit[s] upon a child the consequences of actions attributed to the parents," calling it rare in the law. *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983). Reluctantly, the court concluded that "the Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline" and bar that claim. *Id.* at 570. While it is unclear whether those same considerations would attend a claim more like I.O.'s, it is safe to speculate that the court's expressed reticence in applying the "genesis" approach in the genetic injury cases would only be enlarged in an *in utero* injury case.

In *Graham v. United States*, 753 F. Supp. 994 (D. Me. 1990), the district court found no *Feres*-bar to allegations that a child's permanent brain damage and cerebral palsy resulted from a military hospital's failure to recognize and respond to danger signs during the active-duty mother's labor, inappropriate use of a forceps delivery, and failure to perform a timely Caesarian section. After reviewing the *Feres* rationales and the conflicting caselaw, the *Graham* Court concluded that the "minor Plaintiff here is a civilian without any other remedy than a tort suit for injuries allegedly inflicted upon her by military medical personnel. Surely, allowing her suit will serve justice," thereby fulfilling the primary purpose of the

Federal Tort Claims Act "to extend a remedy to those who had been without." *Id*. at 1000 (quoting *Feres*, 340 U.S. at 140). *Graham* also criticized cases that applied the "genesis" test for foregoing analysis of the *Feres* factors. *Id*. at 997.

In *Utley v. United States*, 624 F. Supp. 641 (S.D. Ind. 1985), the district court permitted the case of a child, injured by negligent prenatal care, but not that of the child's military parents, to go forward as not implicating any of the *Feres* rationales,[4] just as the Eleventh Circuit did in *Del Rio*.

These district court decisions, emanating from within the District of Columbia, First, Third, and Seventh Circuits, demonstrate further the deep divide among the circuits in determining the application of *Feres* to *in utero* cases and warrants the exercise of this Court's discretion to resolve the conflict. As a result, if I.O.'s mother were stationed in the majority of circuits, I.O. would be eligible for relief under the FTCA. Because her mother was stationed in the Tenth

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[4] The *Utley* Court relied heavily on a Seventh Circuit decision that the Army's negligent mistyping of their father's blood during a pre-induction physical and led to birth defects in his children was not barred by *Feres*. Subsequent to the *Utley* decision, however, the Seventh Circuit case was reheard *en banc*, where the panel divided evenly, thereby overturning the early panel's decision and reinstating the District Court's decision dismissing the matter on the basis of *Feres*. *See West v. United States*, 729 F.2d 1120 (7th Cir.), *vacated*, 744 F.2d 1317 (7th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1053 (1985). *West* is inapposite to this matter as the allegedly negligent action was directed at the serviceman and his injured daughters, born six years after the alleged negligence, who were not the subject of any government-sponsored medical care.

Circuit, she falls on the side of a circuit split that denies her access to the courts.

C. The Sixth Circuit denies *Feres* immunity in some *in utero* lawsuits.

The leading case in the Sixth Circuit upheld the right of the child of a military mother to bring an FTCA action for inadequate prenatal care in *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006). *Brown* held that the injury to the child, allegedly resulting from an erroneous medical recommendation that the mother stop taking prenatal vitamins, which help both mother and child, during her pregnancy, "was direct and not derivative" and did not implicate the *Feres* rationales. *Id*. at 614-15. The *Brown* Court found *Romero* "most persuasive" of the cases holding "*Feres* did not bar recovery for injuries to the child of active members" of the service. *Id*. at 615.

Significantly, in reaching the conclusion that the child's action was not *Feres*-barred, the Sixth Circuit not only distinguished its earlier, apparently adverse decision in *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988), as actually involving recovery for injury solely to the plaintiff active-duty mother, but also asserted that *Irvin* rested "on shaky ground" because it relied upon *dictum* in a then-recent Fifth Circuit decision that that court and others had "undercut by subsequent decisions." *Brown*, 462 F.3d at 614. In doing so, the Sixth Circuit noted that the Fifth Circuit had "joined the other courts that have distinguished claims involving injury to a child that derives from an injury to a service-member parent, such as a birth defect caused by a parent's exposure to radiation, *see*, *e.g.*, *Mondelli* [*v. United States*], 711 F.2d [567,] 568 [(3d Cir. 1983), *cert. denied*, 465 U.S.

1021 (1984)], from those claims for negligent medical care administered *solely* to the detriment of a civilian child." *Id*. (citing *Romero*, 954 F.2d at 226, and *Mossow*, 987 F.2d at 1369-70).

D. Only the Tenth Circuit uses the "genesis" test and treats the mother and child as a single entity.

The Tenth Circuit held that the "most appropriate mechanism" was the "genesis" test, that "in utero cases do not require a unique standard," and the test's "purpose is not undercut simply because the plaintiff's injuries arose in utero." App. 30a. That conclusion flowed from the court's determination that treatment of the mother and child, as well as the duties owed both by medical personnel, were inseparable.

Even so, the Tenth Circuit recognized that "courts have inconsistently described the threshold or starting point for scrutiny of a civilian plaintiff's claims under the "genesis" test—sometimes underscoring the government's negligent conduct and other times the service member's injury." *Id*. at 17a. The court described the varying approaches as focused on "where the negligent act or behavior was directed" or "whether there was an actual injury to the serviceman that, based on typical causation principles, ultimately generated an injury to the third party."[5] *Id*. at 17a-18a n.6. Adopting the latter, which

[5] Judge Ebel concurred in the decision, but advocated a third approach he called the "conduct-focused approach," stating that "it seems odd to make an injury to another person essential to resolving the jurisdictional question of *Feres* immunity." App. 41a (Ebel, J., concurring) (citations omitted). He rationalized that "[s]ince the military is immune from

it called an "injury-focused approach," entails asking "first whether there was an incident-to-service injury to the service member, and second, whether the injury to the third party was derivative of that injury." *Id.* 18a (internal citation omitted). Only if both questions are answered negatively may a claim survive a *Feres* objection. *Id.*

E. Decisions within the Fifth Circuit appear to conflict internally.

The Fifth Circuit approached a similar issue in its closest analogous case in similar fashion, though the facts are closer to cases involving a genetic injury that causes injuries later to a newborn[6] than the type of *in utero* case this is. In *Scales v. United States*, 685 F.2d 970, 971 (5th Cir. 1982), a member of the Air Force, unaware that she was one-month pregnant, began basic training. Because of a base-wide outbreak of rubella, she alleged she was given a vaccination, which she asserted caused congenital defects in the son who was born later (before his birth, she was

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liability when its provision of service-related medical care causes injuries to a pregnant servicemember, a conduct-focused approach ensures that the military is also immune from liability when that *exact same conduct* causes in utero injuries to the servicemember's unborn child." *Id.* at 46a (Ebel, J., concurring) (internal citation omitted) (emphasis in original).

[6] The *Scales* Court referenced one of the genetic cases in its opinion, calling it "a case very similar to the one before us." 685 F.2d at 973 (citing *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981) (involving a newborn's injuries attributed to a serviceman's earlier exposure to radiation while on active duty).

discharged from the Air Force specifically because of her pregnancy). *Id*. at 971-72.

To the Fifth Circuit, because there was no question that the active-duty mother's claim was foreclosed by *Feres*, "the only question that remains is whether a suit initiated by [the baby] would have the same disruptive effect on military discipline as a suit brought by his mother." *Id*. at 973. In answering that question, like the Tenth Circuit but unlike the Eleventh, the Fifth Circuit held that it did not matter that the baby "has an independent cause of action under state tort law." *Id*. Instead, it concluded that "[i]f we accept the argument that a suit brought by Charles' mother would tend to undermine military discipline, which we must since it is the law, then it is impossible to see how the result should be different if Charles sues the government instead." *Id*. at 974. Thus, *Scales* did not apply the "genesis" test but instead focused solely on the third of the *Feres* factors. It conceded that negligent conduct "directed to the dependent alone and [that] does not involve any decisions by the military toward enlisted personnel" would fall outside of *Feres*, but that the "treatment accorded his mother is inherently inseparable from the treatment accorded Charles as a fetus in his mother's body." *Id*.

The Sixth Circuit, in *Brown*, suggested that "*Scales* has since been undercut by subsequent decisions in the Fifth Circuit and elsewhere," and chose not to follow it as it had when the decision was freshly minted. *Brown*, 462 F.3d at 614 (6th Cir. 2006). Subsequent to the decision in *Scales*, a district court within the Fifth Circuit chose not to rely on it, but instead found the Eleventh Circuit's *Del Rio* decision more valid to hold that the service-member

plaintiff-parents were *Feres*-barred, but the child's survival action, which was not the subject of the government's motion to dismiss, could be maintained. *Pearcy v. United States*, No. Civ. A. 02-2257, 2005 WL 2105979 (W.D. La. Aug. 29, 2005). Thus, the viability of *Scales*,[7] decided before this Court's guidance in *Johnson*, is open to question.

F. The Ninth Circuit uses the *Feres* factors, but differently than other circuits.

The Ninth Circuit, which originally found no bar to a claim for *in utero* injuries, vacated that decision in light of *Johnson*, 481 U.S. 681. In *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987), a pregnant Army specialist was hospitalized for pre-eclampsia, a condition occurring in pregnancy that is life-threatening to both mother and fetus because of associated kidney failure, high blood pressure, stroke, and premature birth. She claimed that, as a result of negligent medical treatment, she delivered a stillborn child and suffered physical and emotional injuries of her own.

In its original opinion, the Ninth Circuit concluded that "[t]here is simply no connection between Atkinson's medical treatment and the

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[7] In an unreported decision, another district court within the Fifth Circuit, distinguished *Scales*, did not apply the "genesis" test, and concluded, under the *Feres* factors, that labor injuries to the child of an active-duty mother resulting in the newborn's death, "does not implicate a military mission and any second-guessing would be of a decision that affects primarily the health of a civilian baby." *Browner v. United States*, Case No. A-03-CA-422-SS (W.D. Tex. May 14, 2004) (unpublished).

decisional or disciplinary interest protected by the *Feres* doctrine," applying the third *Feres* factor. *Id*. at 205. Upon rehearing in light of *Johnson*, the Ninth Circuit adhered to its conclusion that the third factor did not support immunity, but now considering the first two factors (federal relationship and availability of other benefits) for the first time, held that these "rationales support its application." *Id*. at 206.

Concurring, Judge Noonan felt compelled to follow this Court's continuing support for *Feres*, but criticized the "anomalies" it creates. First, he said "[c]ommon sense suggests that a single tortious act should not result in different legal consequences for different victims." *Id*. (Noonan, J., concurring). Second, he wrote, "[t]o visit the status of a parent upon a child and so bar recovery by the child seems to be as primitive as punishing a child for his or her parents' fault—an outmoded and unconstitutional procedure." *Id*. Finally, he added, the "child [a mother] is carrying is not of course a portion of her body like a limb or an organ." *Id*. at 207. While that idea "was common in nineteenth century biology, [it] has been exploded by twentieth-century advances in biology and fetology." *Id*. (Noonan, J., concurring). The concurrence made clear that Judge Noonan was following the dictates of fresh precedent from this Court, but that he also considered its application to these facts insensible.

G. The Second Circuit has not addressed application of the *Feres* doctrine to *in utero* injury cases.

No Second Circuit decision or district court decision within that circuit supplies guidance on how that court might view this question.

II. The Question Presented on Gender Discrimination Is a Recurring One of Great National Importance.

A virulent form of gender discrimination is inherent in the Tenth Circuit's approach to the type of in utero injury at issue in this case, which becomes evident when one realizes that I.O's compensatory claim would have gone unchallenged on *Feres* grounds if her active-duty parent was her father, rather than her mother. *See*, *e.g.*, *Herrring v. United States*, 98 F. Supp. 69, 70 (D. Colo. 1951) ("Surely, it cannot be stated as a matter of law that where a civilian obtains entrance to a government hospital, because a member of her family is in the military service, or because she herself is a veteran, any injury she might suffer as a patient in that hospital arises out of or is incidental to the military service. The *Feres* case, on which the government relies, does certainly not promulgate such a rule."). Thus, the adopted *Feres* regime treats the childbirth injury of the newborn of an active-duty military mother differently from the injured newborn of an active-duty military father. Such a gender-based distinction is at odds with this Court's precedents.

Gender distinctions can have a significant impact on our military population. A growing number of women have joined the military ranks, as the Defense Department's 2013 profile of the military community shows that 203,895 women are active-duty members of the armed forces, representing 14.9 percent of all active-duty members. Office of the Deputy Assistant Secretary of Defense (Military Community and Family Policy), *2013 Demographics: Profile of the Military Community*, at 7, *available at* http://download.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf. Some 55.2

percent of active-duty members of our armed forces are married. *Id*. at 40. By gender, that breaks down to 57.1 percent of active-duty men and 44.5 percent of active-duty women. *Id*. at 42. Though the Department of Defense does not break down age by gender, it does report that 75.5 percent of active-duty members of the military are under the age of 35. *Id*. at 7. It is safe to assume on the basis of that number that the vast majority of our active-duty women service members are of child-bearing age. *See* Medical News Today, *Best Age for Childbearing Remains 20-35—Delaying Risks Heartbreak, Say Experts*, Sept. 16, 2005, *available at* http://www.medicalnewstoday.com/releases/30737.php.

A. The distinction drawn based on parental gender raises an important issue of gender discrimination.

In *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), this Court observed that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[8] However, in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977), this Court subsequently recognized that gender discrimination does occur when a defendant refuses to extend a benefit to women that men receive or when the defendant imposes a substantial burden on women that men need not suffer. Here, treating the

[8] Nonetheless, with passage of the Pregnancy Discrimination Act, it is now "clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684 (1983).

child *in utero* as inseparable from the mother for purposes of the *Feres* doctrine and adopting the "genesis" test to effectuate that determination, as the Tenth Circuit did, not only creates a conflict with the *in utero* cases that reject the application of the "genesis" test, it conflicts with the decisions that animate our gender-discrimination jurisprudence. After all, if every fact in I.O's birth was the same except the gender of her active-duty parent (changed from female to male), she unquestionably could recover under the FTCA under longstanding precedent that establishes that *Feres* does not bar lawsuits by dependents for their direct injuries. *See*, *e.g.*, *Herring*, 98 F. Supp. at 70. *See also Costley v. United States*, 181 F.2d 723, 726 (5th Cir. 1950); *Bravo v. United States*, 403 F. Supp. 2d 1182 (S.D. Fla. 2005), *vacated and remanded on other grounds*, 532 F.3d 1154 (11th Cir. 2008); *Wareing v. United* States, 943 F. Supp. 1504, 1545 (S.D. Fla. 1996); *Grigalauskas v. United States*, 103 F. Supp. 543, 549 (D. Mass. 1951), *aff'd*, 195 F.2d 494 (1st Cir. 1952). The mere fact that a father's military service confers family access to a military hospital has never been enough to invoke *Feres* to bar a child's birth injury claim. But because I.O. was injured minutes before delivery with an active-duty mother, she was denied any remedy for her severe injuries.

Thus, I.O.'s eligibility to bring a claim turns on the gender of her active-duty parent, even if the medical treatment that resulted in the injury was negligent in precisely the same manner. The distinction drawn raises precisely the problem this Court identified in *Frontiero v. Richardson*, 411 U.S. 677 (1973), where this Court invalidated a law that allowed male members of the Air Force to claim their wives as dependents and obtain housing and medical

benefits, but denied the same benefits to husbands of female active-duty members without proof that their husbands depended on them for more than half of their financial support. *Id*. at 680. *Frontiero* advanced non-discrimination principles in a doctrinally new fashion, while applying to military personnel in a manner unforeseen by the *Feres* Court.

Plainly, government may not deny benefits or place burdens on account of sex. *See Reed v. Reed*, 404 U.S. 71, 76-77 (1971) ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause"). The treatment of newborns as eligible to make a tort claim based on the gender of their parent may fairly be characterized as mandating "dissimilar treatment for men and women who are . . . similarly situated." *Id*. at 77. "Statutory classifications that distinguish between males and females" are presumptively invalid, and to overcome the presumption, the classification must be "substantially related" to the achievement of "important governmental objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). The required explanation is a "demanding burden," *United States v. Virginia*, 518 U.S. 515, 531 (1996), requiring the State to show an "exceedingly persuasive justification" for the classification. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Here, the three *Feres* factors provide the governmental justification, yet the majority of circuits have concluded that they do not justify barring claims on behalf of newborns injured in delivery. In contrast, application of the "genesis" test, as effectuated by the Tenth Circuit in this case, tees up the gender discrimination issue in a manner

that conflicts in a previously unrealized and unremarked manner with this Court's precedents and those of every circuit.

B. Reliance on the "genesis" test exacerbates the conflict with gender-discrimination jurisprudence.

The discriminatory fashion in which *Feres* is applied is exacerbated by the Tenth Circuit's conclusions that the treatment of mother and newborn is inseparable and that the "genesis" test is the "appropriate mechanism to apply to third-party *Feres* claims." App. 16a-17a. The first conclusion is at odds both with those of other circuits, established law, and medical science, while the second conclusion cannot be reconciled with modern gender-discrimination jurisprudence already cited.

The Tenth Circuit departed from its sister circuits by adopting the outdated *dicta* of *Scales*, by assuming "the treatment accorded his mother is inherently inseparable from the treatment accorded . . . a fetus in his mother's body." App. 21a. *Cf. Scales*, 685 F.2d at 974. However, it is well established that in pregnancy, a physician owes a duty of care to an infant who is born alive and the infant has an independent claim for relief based on the breach of that duty. *Restatement (Second) of Torts* § 869(1) (1977) ("One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive."); *see generally* Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971).

Thus, Colorado, the jurisdiction whose law provides the basis for this tort claim, holds that an employee's claim against an employer for the wrongful death of a child is not barred because it is not "for and on account of" the personal injury or death of an employee." *Keefe v. Pizza Hut of Am.*, 868 P.2d 1092, 1094 (Colo. Ct. App. 1993), *aff'd*, 900 P.2d 97 (Colo. 1995). That court added, "it makes no difference that the injury was sustained before the child's birth. Colorado, like virtually all other jurisdictions, has recognized a child's right to recover for prenatal injuries." *Id*.

The Tenth Circuit's contrary decision tracks outdated, earlier decisions on prenatal injuries, when courts typically denied recovery to infants for labor and delivery injuries. *See Atkinson*, 825 F.2d at 207 (Noonan, J., concurring) (the idea that the child carried by a mother is merely a portion of her body "was common in nineteenth century biology, [but it] has been exploded by twentieth-century advances in biology and fetology."). Previously some courts struggled with the question of whether a duty could be owed to a person not yet in existence. Decisions based on that notion, however, "were attacked by legal commentators with the argument that the unborn child is in fact a legal entity, recognized as such for numerous purposes of the law of property and even the criminal law." *Restatement (Second) of Torts* § 869, comm. 1. With considerable progress in medical understanding of embryology, courts made an abrupt, "all but universal" change to acknowledge that a child is permitted to recover for prenatal injury. *See id*.

Under the Tenth Circuit's approach, the "genesis" test creates a gender-based exception that swallows the rule, barring the vast majority, if not the

totality, of birth-injury claims of children with military mothers. In virtually every delivery where a child suffers a birth injury, the mother may be "injured" in a manner similar to Heather Ortiz. "Injury" could be defined as a temporary elevation or drop in maternal blood pressure, heart rate, temperature, white blood cell count, or contractions. An "injury" to a laboring mother could come in the form of an untreated infection, an undiagnosed condition, or a failure to treat a placental abruption, placental previa, or placenta accreta. Any change in maternal condition, however slight, could trigger a "genesis"-based *Feres*-bar under the Tenth Circuit's analysis. But in all of these scenarios, an injured child of an active duty father could recover damages.

This broad-sweeping "genesis" test operates as a sex-based classification because it will never apply to bar birth-injury claims of children with an active-duty father. The Tenth Circuit sidestepped this concern, claiming that under any application of the "genesis" test, treatment- or injury-focused, the outcome would be the same for I.O. App. 32a-33a. This begs the question that any form of the "genesis" test should be applied. It is the wrong test, rejected by the majority of circuits and counter to the instructions of this Court. Applying the "special factors" test this Court has previously described, creates a different outcome that avoids the gender-based result that is inherent in the "genesis" test, one identical to the outcome of a child with an active-duty father. In *Johnson* and in *Stencel*, this Court required weighing all three "special factors" in context before concluding that *Feres* barred the claim. *See Stencel*, 431 U.S. at 672-73; *Johnson*, 481 U.S. at 688-89.

This Court should grant review to consider the issue of whether the application of the "genesis" test in cases of medically negligent prenatal, neonatal, and delivery treatment, as well as the Tenth Circuit's consideration of mother and fetus as a single patient creates an impermissible sex-based classification.

III. The Decision Below Is Wrong.

The Tenth Circuit truncated its *Feres* analysis and reflexively applied the "genesis" test, straying from this Court's instructions in *Johnson* and *Stencel* to analyze a claim considering all three special factors under *Feres*. *Stencel*, 431 U.S. at 672-73; *Johnson*, 481 U.S. at 688-89. Failing to apply the *Feres* special factors to I.O.'s claim, the Tenth Circuit only considered whether the "genesis" test should be a conduct-based focus or an injury-based focus, ultimately settling on an injury-based focus. App. 16a, 29a. The court then concluded that a temporary drop in Heather Ortiz's blood pressure was a maternal "injury" sufficient to invoke the *Feres*-bar for her child. *Id.* This broad definition of "injury" considerably widens the field in terms of how many birth-injury claims will be caught in the "genesis" net.

The Tenth Circuit acknowledged that "very recent cases have stressed that the Supreme Court's guidance requires that all the *Feres* factors must still be analyzed to determine whether the claims are prohibited," but then brushed aside the special-factors analysis: "Our circuit has simplified the equation, concluding that all the special factors 'effectively merged . . . with the incident to service test.'" App. 10a-11a (citing *Purcell v. United States*, 656 F.3d 463, 465-66 (7th Cir. 2011), and *Ricks v. Nickels*, 295 F.3d 1124, 1130 (10th Cir. 2002)). Ignoring this Court's

directive to apply the "special factors" test, the Tenth Circuit also overlooked the fact that the "genesis" test applied to labor and delivery claims creates gender-based discrimination of children of military mothers.

Analyzed under the special-factors approach, as occurred in *Romero*, *Mossow*, and *Del Rio*, inexorably leads to the conclusion that I.O.'s claim can be litigated. I.O., an infant, had no federal relationship, was ineligible for veteran's benefits, and could not be said to cause judicial interference or second-guessing of the military command. She was not engaged in any military activities when she was injured, nor was her active-duty mother. The medical negligence claims underlying this suit are identical to those brought by children of military fathers, and are typical of claims brought by private parties under similar circumstances. Review of Petitioner's claims would not undermine military discipline.

While the "genesis" test may be appropriate to consideration of "genetic injuries stemming from alleged government negligence in exposing their service-member fathers to radiation or chemical weapons," or when a relative seeks compensation for "loss of consortium or mental anguish" due to a service member's injury or death, App. 16a-17a, it makes no sense here. The "genesis" test comprises an additional judicial gloss layered on the judge-made *Feres* doctrine, and extends the *Feres*-bar to civilian claims.

IV. This Case Also Presents an Excellent Vehicle to Limit or Revisit *Feres*.

While this Court need not overturn *Feres* to resolve this case in favor of Petitioner,[9] this case

[9] This Court could maintain *Feres* and hold that, while

presents the Court with an opportunity to reexamine or limit the *Feres* doctrine, should it choose to do so.

The court below joined the steady chorus that has urged this Court to reexamine *Feres*, acknowledging that the doctrine "has received steady disapproval from the Supreme Court on down." App. 11a. As four members in dissent declared, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (quotation omitted). The *Johnson* dissenters variously termed the doctrine's various rationales "absurd," "unpersuasive," and lacking textual support. *Id.* at 695-96 (Scalia, J., dissenting). Justice Thomas recently urged this Court, "[a]t a bare minimum, [*Feres*] should be reconsidered." *Lanus*, 133 S. Ct. at 2732 (Thomas, J. dissenting from denial of certiorari).

Because *Feres* was engrafted upon the FTCA by this Court rather than Congress, this Court should address the multitude of problems that have arisen from the original decision. "'Revisiting 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

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an active-duty mother's claim for her own injuries is *Feres*-barred, the child's injury claim is not. *See*, *e.g.*, *Orken v. United States*, 239 F. 2d 850 (6th Cir. 1956) (When military plane crashed into base housing killing an officer and his family, the officer's claim was *Feres*-barred but *Feres* did not apply to claims for the death of wife and children); *see also Del Rio*, 833 F.2d at 286-87 (barring active duty mother's labor and delivery injury claim but allowing surviving child's birth injury claim).

up the precedent's shortcomings.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2417 (2015) (Alito, J., dissenting) (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

Under *Feres* and *Johnson*, "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Johnson*, 481 U.S. at 692. What constitutes "incident to service" is vexingly vague, often producing "curious results that members of this court repeatedly have expressed misgivings about." *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999). For more than 65 years lower courts have struggled to apply it fairly and consistently, while begging for its reconsideration or internment. *See*, *e.g.*, *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995) (urging this Court to "abandon the doctrine" altogether). This Court has largely abandoned the original justifications for the *Feres* doctrine, and rationalizations for *Feres* offered in subsequent cases no longer withstand scrutiny. The lack of textual guidance and the shifting, unpersuasive rationales have made it impossible for lower courts to implement the *Feres* doctrine consistently and fairly.

Because application of *Feres* "cannot be reduced to a few bright-line rules," but instead involves a fact-intensive inquiry, *Shearer*, 473 U.S. at 57, the lower courts have struggled, producing only "confusion and [a] lack of uniform standards." App. 11a. Not surprisingly, the variety of tests that the lower courts have adopted has generated a variety of irreconcilable outcomes. These inconsistencies highlight the failure to achieve one of the *Johnson* Court's stated justifications for affirming the *Feres* doctrine—the need for uniformity. *See* 481 U.S. at 689. The

divergence in outcomes among virtually identical cases undermines the integrity of the entire doctrine. Confusion generated by the vague *Feres* standard extends far beyond the labor and delivery context. Courts also struggle to determine whether a service member injured while off duty or during recreational activities is *Feres*-barred, again with irreconcilable outcomes.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

ROBERT S. PECK
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W.
Suite 520
Washington, DC 20001
Phone: (202) 944-2874
robert.peck@cclfirm.com

LAURIE M. HIGGINBOTHAM
WHITEHURST, HARKNESS, BREES, CHENG, ALSAFFAR & HIGGINBOTHAM, PLLC
7500 Rialto Boulevard
Building 2, Suite 250
Austin, TX 78735

October 13, 2015

JAMES E. PUGA
BRUCE BRALEY
LEVENTHAL & PUGA, P.C.
900 South Cherry Street
Suite 600
Denver, CO 80246

JOSEPH F. BENNETT
CROSS & BENNETT, LLC
108 East St. Vrain Street
Suite 20
Colorado Springs, CO 80903

Counsel for Petitioner