No. 15-488

IN THE

Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
BY AND THROUGH EVANS army COMMUNITY HOSPITAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA WOMEN'S LAW CENTER AND VETERANS LEGAL INSTITUTE IN SUPPORT OF PETITIONER

LAURA RILEY
CALIFORNIA WOMEN'S LAW CENTER
360 N. Sepulveda Blvd.
Suite 2070
El Segundo, CA 90245

DWIGHT STIRLING
VETERANS LEGAL INSTITUTE
2100 N. Broadway
Suite 209
Santa Ana, CA 92706

RASHA GERGES SHIELDS
Counsel of Record
RACHEL BLOOMEKATZ
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
(213) 243-2719
rgergesshields@jonesday.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

The California Women's Law Center ("CWLC") is a non-profit, public-interest law center focused on breaking down barriers and advancing the potential of women and girls. Established in 1989, CWLC addresses the comprehensive civil rights of women and has a particular interest in advocating for equality of healthcare and access, as well as eradicating gender discrimination.

Throughout the history of the United States, women have been subject to laws that deprived them of basic civil rights, including the rights to own property, to vote, and to access the courts. Women have greatly benefited from this Court's defense of their constitutional rights from legislative and executive overreach. In this matter, however, the Court's actions have inadvertently disadvantaged women. With the doctrine established in *Feres v. United States*, 340 U.S. 135 (1950), the Court has barred service women from bringing tort actions against the government for injuries that they or their children sustain during labor and delivery at military hospitals. What is more, this bar has been erected even though the *Feres* doctrine has no basis in the text or legislative history of the Federal Tort Claims Act.

---

[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to its filing. As required by Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici*, its members, and its counsel made any monetary contribution intended to fund this brief.

CWLC has a particular interest in this matter for three reasons. *First*, the Tenth Circuit's decision demonstrates that the *Feres* doctrine discriminates against women. Only birth injuries to children of active duty *mothers* (not fathers) are *Feres*-barred. Hence, service women bear the full brunt of the government's malpractice in labor and delivery cases.

Second, *Feres* threatens women's health because it gives military hospitals and military health practitioners immunity for damages arising out of negligence claims of active duty service members. Removing the deterrent effect of tort liability is particularly problematic here because the average rate of birth injuries in military hospitals is twice the national average. Patricia Kime, *Law prevents some family members from suing the military*, Military Times (July 6, 2015). Military hospitals must be held accountable for negligent birth injuries to deter future injuries.

Third, *Feres* places an unfair, unsustainable financial burden on military families with mothers who serve the nation. Without compensation through tort actions, military families like the Ortiz Family are left to cope on their own. There is no military compensation scheme for children disabled or harmed by military malpractice. The burden of caring for children like Baby I.O. may fall on State Medicaid systems, even though the federal government's malpractice caused the harm.

Veterans Legal Institute ("VLI") is a non-profit law firm and think tank advocating for military members and veterans, protecting the legal rights of the men and women who have sacrificed so much to

protect the Nation. VLI similarly believes the *Feres* doctrine has a detrimental effect on military members and veterans who are injured by the negligence of federal officials, barring legitimate claims for redress in the civilian legal system.

QUESTIONS PRESENTED

Amici adopt the questions presented by the Petitioner but add that this case is an optimal vehicle for deciding two further pressing questions with respect to the *Feres* doctrine:

1. Whether this Court's holding in *Feres v. United States*, 340 U.S. 135, 146 (1950), that damages cannot be recovered under the Federal Tort Claims Act for injuries to active duty servicepersons that "arise out of or are in the course of activity incident to service," should be overturned.

2. Whether this Court should limit *Feres*'s "incident to service test" so that it bars recovery only when the injured serviceperson was engaged in activities that fell within the scope of his or her military responsibilities.

SUMMARY OF THE ARGUMENT

Captain (now Major) Ortiz did not sustain injuries while on the battlefield, in combat training, or engaged in other activities that would naturally be described as "incident to service." Instead, she was given the wrong medicine at a military hospital when laboring and giving birth. Due to this negligence, Baby I.O. was born with cerebral palsy. Yet Baby I.O. cannot bring a suit against the government for basic negligence—the same way a

civilian child could—because, the Tenth Circuit held, those injuries were sustained "incident to [her mom's] service" as a Navy Captain. App. 2a.

That seemingly bizarre conclusion is based on this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court held that although the Federal Tort Claims Act ("FTCA") largely waived the federal government's sovereign immunity for negligence, it did not waive claims for injuries sustained by service members "incident to the service." *Id.* at 138. As the disconcerting application of the *Feres* doctrine to this case demonstrates, it is now necessary for this Court to reconsider and overturn the doctrine or, at the least, narrow its interpretation of "incident to service."

That Baby I.O.'s injuries could be considered "incident to service" may sound anomalous, as if this case is an outlier. But it is not; there are many such cases. The courts have read *Feres* to cover all injuries sustained by active duty service persons due to government negligence, even when the injuries do not stem from a service person's military duty, responsibilities, or employment. It is no wonder, then, that "criticism of the so-called *Feres* doctrine has become endemic." App. 2a. And that such "criticism is at its zenith in a case like this one—where a civilian third-party child is injured during childbirth, and suffers permanent disabilities," but cannot recover because her mother has devoted her life to serving our country. *Id.*

If such a result were dictated by Congress, the courts would be bound to apply this troubling doctrine. *See United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting). But *Feres*'s

incident-to-service test is found nowhere in the statute's text, nor in the legislative history. Rather, it was created by the Court based on rationales that the Court later deemed insufficient. The result is confusion and conflicting rulings among courts around the country. Respected jurists from various jurisprudential backgrounds now agree: *Feres* should be overturned.

To be sure, this is not the first petition asking the Court to overturn *Feres*. The Government will cite that these previous petitions have been "often and recently denied" as a basis in and of itself for denying this petition. That is no rationale; it urges an abdication of this Court's role to consider critically whether a doctrine warrants continued viability. Indeed, as courts continue to struggle with the unfair outcomes derived from applying *Feres*, litigants will repeatedly ask this Court to bring sense and reason into such an "exceedingly willful" reading of the FTCA. *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995).

Moreover, this case is a particularly good vehicle for reconsidering *Feres* because it involves conduct—giving birth—that is as far removed as possible from a service member's military duties. If *Feres* is to bar suit in such extreme situations, there must be text, historical bases, or logical rationales supporting it. There are none. This Court should grant certiorari and overrule *Feres*.

Should this Court decline to take this opportunity to abandon *Feres*, this case also presents an optimal vehicle for confining *Feres* so that it covers injuries to service members that are indeed sustained "incident to service," rather than to *all*

injuries sustained by active duty service members from government negligence. As applied today, the *Feres* doctrine is vastly overbroad, extending far beyond injuries sustained while performing military duties. And that overbroad application has created discriminatory and arbitrary results, as this case demonstrates. Children born to service fathers—but not service mothers—can recover for injuries during childbirth. And a child injured by government negligence just moments after birth can sustain tort suits under the FTCA. But if a nurse at a military hospital injures a mother *during childbirth*, causing harm to the child, that child is without redress. By limiting *Feres* to cover only injuries arising from or in the course of a service member's military employment, the Court could eliminate these discriminatory and arbitrary results.

Accordingly, the Court should grant Petitioner a writ of certiorari.

ARGUMENT

I. THE COURT SHOULD OVERTURN THE *FERES* DOCTRINE.

For the past sixty-five years, "the *Feres* doctrine has been criticized by countless courts and commentators across the jurisprudential spectrum." (App. 12a (quoting *Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013).) Justices Scalia and Marshall agree, as do Justice Thomas and Judge Guido Calabresi: *Feres* should be overturned. *See Johnson*, 481 U.S. at 692 (Scalia, J., dissenting, joined by Brennan, Marshall, Stevens, J.J.); *Lanus v. United States*, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting from denial of cert.); *Taber*, 67 F.3d

1029 (2d Cir. 1995) (Calabresi, J., joined by Leval, J.).

Every circuit that has applied *Feres* has expressed regret that it must follow this doctrine. *See, e.g.*, *Day v. Mass. Air. Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) ("*Feres* itself deserves reexamination by the Supreme Court"); *Taber*, 67 F.3d at 1038 (*Feres*'s "reading of the FTCA was exceedingly willful, and flew directly in the face of a relatively recent statute's language and legislative history"); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983) ("forced [by *Feres*] to decide a case where 'we sense the injustice' . . . but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the case differently."); *Appelhans v. United States*, 877 F.2d 309, 313 (4th Cir. 1989) ("undeniably harsh results [of *Feres* do] not relieve this court of its obligation to apply precedent"); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (court "compelled, however reluctantly, to . . . dismiss the claim as barred by *Feres*"); *France v. United States*, 225 F.3d 658 (6th Cir. 2000) (per curiam) ("many courts and commentators have strongly criticized the *Feres* decision"); *Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997) (despite "tenuous link" between *Feres* rationales and service member's injuries, suit barred); *Laswell v. Brown*, 683 F.2d 261, 265 (8th Cir. 1982) ("*Feres* doctrine has long been criticized by courts and commentators"); *Ritchie*, 733 F.3d at 873 ("regretfully" concluding suit barred by *Feres*); *Ortiz*, App. 3a ("facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule."); *McMahon v. Presidential Airways, Inc.*,

502 F.3d 1331, 1342 n.12 (11th Cir. 2007) (considering "the controversy surrounding the correctness of *Feres*, . . . when deciding whether to extend it to private contractors"); *Lombard v. United States*, 690 F.2d 215, 227 (D.C. Cir. 1982) (expressing "considerable sympathy" for plaintiff, but explaining that court "must adhere to *Feres*"); *Hercules Inc. v. United States*, 24 F.3d 188, 207 (Fed. Cir. 1994) (Plager, J., dissenting) ("difficulty the majority has in finding a satisfactory rationale for the outcome it supports is understandable" given that the Court has struggled to find a "reasoned basis" for *Feres*).

As this near-universal criticism indicates, *Feres* does not merit *stare decisis*. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). *Feres* was "wrongly decided and 'heartily deserves the widespread, almost universal criticism' it has received." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). That is clear for three reasons. *First*, there is no textual support for the doctrine—if anything, the text and statutory structure militates against it. *Second*, the original rationales for *Feres* have eroded, and the new ones cannot bear the doctrine's weight. *Third*, because there is no textual or logical basis for *Feres*, courts struggle to apply it, resulting in conflicting outcomes.

A. There Is No Textual Support For The *Feres* Doctrine.

There is no support in either the text or legislative history of the FTCA for excluding tort claims by service members for injuries sustained "incident to service." The FTCA, 28 U.S.C. § 1346(b), broadly waived the federal government's sovereign immunity from tort liability for the acts of federal

employees. Specifically, it stated that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. It includes thirteen enumerated exceptions to this waiver of sovereign immunity. Several aspects are notable about this provision.

First, this waiver of sovereign immunity applies to claims by service members, not just civilians. "Read as it is written" the FTCA "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting). This Court acknowledged that the FTCA's plain language does not bar all suits by service members. In *Brooks v. United States*, 337 U.S. 49 (1949), this Court held that an off duty serviceman could sue the government for injuries sustained in a collision with an Army truck. The Court recognized that the FTCA gave federal courts jurisdiction over "*any* claim founded on negligence brought against the United States," and "any claim" does not mean "any claim but that of servicemen." *Id.* at 51.

Second, none of the FTCA's thirteen enumerated exceptions bar all service member claims that are "incident to service." The most relevant exception states that the government is not liable for "[a]ny claim arising out of the combatant activities of the military . . . during time of war." 28 U.S.C. § 2680(j). Also excluded are claims arising in a foreign country.

Id. § 2680(k).[2] If anything, the fact that Congress enumerated "lengthy" and "specific" exceptions to the FTCA, and decided to exclude only claims "arising out of combatant activities" of the government, indicates that Congress did *not* intend to exclude most service member claims from the FTCA. *Brooks*, 337 U.S. at 51. As the Court stated in *Brooks*, from these exceptions, "[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." *Id*. Congress could have—but did not—exclude active duty service members from the FTCA's reach. *Feres* should not have added its own exception.

Third, the legislative history demonstrates that Congress did not intend to limit claims by service members beyond the enumerated exceptions. Congress considered precluding all lawsuits by service members prior to enacting the FTCA. *Feres*, 340 U.S. at 139. "[E]ighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted . . . made no exception." *Id*. (citing *Brooks*, 337 U.S. at 51). But when Congress enacted the FTCA, it decided to limit preclusion to combat injuries. 28 U.S.C. § 2680.

Irrespective of these facts, *Feres* extended the FTCA to exclude claims arising "incident to" a service member's service. *See Johnson*, 481 U.S. at 694 (Scalia, J., dissenting). There was no basis for

---

[2] Other relevant exceptions are for injuries caused through the enforcement of a statute or regulation or the discretionary conduct of the federal agency. *See* 28 U.S.C. § 2680(a), (h).

the Court's doing so then, and there remains no basis in text, statutory structure, or legislative history for the Court to preclude recovery today.

The Government will no doubt contend that Congress has had sixty years to amend the FTCA to eliminate the *Feres* doctrine. But the Court can discern little from the "unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA." *Id.* at 702-03 (Scalia, J., dissenting). The onus should not be on Congress to eliminate something it never legislated in the first place.

B. The Rationales Underpinning *Feres* Have Eroded.

Having no basis in text or legislative history, *Feres* and its progeny have rested the "incident to service" exception on four rationales. But those rationales have been abandoned or discredited. They cannot hold the weight of the unjust outcomes *Feres* has wreaked.

1. *Parallel Liability*. *Feres*'s only text-based rationale comes from the fact that the FTCA waived the government's sovereign immunity "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *Feres*, 340 U.S. at 141-42. Since private individuals cannot raise armies, the Court reasoned, the government should not be liable for negligent conduct soldiers suffer while on active duty. *Id.* But, as Justice Scalia articulated, many of the Act's exceptions are superfluous if the FTCA was not meant to cover conduct that is uniquely governmental, "since private individuals typically do not, for example, transmit postal matter, collect

taxes or customs duties, impose quarantines, or regulate the monetary system." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (citing 28 U.S.C. § 2680(b), (c), (f), (i)). Recognizing this error just a few years after *Feres*, the Court explicitly rejected this rationale. *Rayonier Inc. v. United States*, 352 U.S. 315, 319 (1957).

2. *Uniform Treatment Under Federal Law.* Next, *Feres* justified its judicially created exception by reasoning that, because the relationship between the government and military is "distinctively federal in character," it would be unfair to impose the law of a *state* where a tort occurred to assess the military's negligent conduct. *Feres*, 340 U.S. at 143-44. But this rationale is undercut by *Brooks*, where the Court allowed a furloughed serviceman to recover for injuries sustained in a collision with a military vehicle. By permitting some servicemen to recover under the FTCA for injuries suffered not incident to service, the military is denied a uniform remedy for tortious conduct to its personnel. So uniformity cannot be the real rationale at issue. Unsurprisingly, this rationale is "no longer controlling." *United States v. Shearer*, 473 U.S. 52, 58, n.4 (1985).

3. *Military Benefits*. The *Feres* Court further reasoned that Congress had already provided a "system of simple, certain, and uniform compensation" for service members killed or injured in the line of duty with the Veterans' Benefit Act ("VBA"), 38 U.S.C. § 101 et seq., so it was unlikely that Congress meant to permit additional recovery under the FTCA. *Feres*, 340 U.S. at 144. Specifically, the Court reasoned that "[i]f Congress had contemplated that [the FTCA] would be held to apply

[here] it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." *Id*. Accordingly, the VBA "provides an upper limit of liability for the Government" and is the "sole remedy for service-connected injuries." *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980) (per curiam).

This rationale too has been undercut because the Court has permitted injured servicemen to bring FTCA suits even though they had been or could be compensated under the VBA. In *Brooks*, for instance, the fact that the serviceman had "already received VBA benefits troubled [the Court] little," especially because nothing in the FTCA or VBA stated that its remedy was exclusive and the Court "refused to call either remedy exclusive when Congress had not done so." *Johnson*, 481 U.S. at 697 (Scalia, J., dissenting) (quoting *Brooks*, 337 U.S. at 53). And after *Feres*, the Court again noted that "Congress had given no indication that it made the right to compensation [under the VBA] . . . exclusive." *United States v. Brown*, 348 U.S. 110, 113 (1954).

Also undercutting this rationale is the fact that *Feres* bars recovery even when there are no VBA benefits available. The Ortiz Family is left to care for Baby I.O. with cerebral palsy—including expenses for physicians, hospitalizations, rehabilitation, medicines, and assistance in daily living to cope with her permanent brain injury and physical disfigurement—without any remedy. Even if (contrary to *Brooks* and *Brown*, *supra*) the *Feres* Court thought Congress was concerned with double

recovery, that rationale cannot support denying all recovery. At most, as Judge Calabresi explained, *Feres* is "best understood" as an attempt to preclude suits that paralleled claims barred by most workers' compensation system awards—i.e., claims for injuries that arise out of or in the course of military employment. *Taber*, 67 F.3d at 1038.

4. *Military Discipline*. Given the weakness of the three *Feres* rationales, the Court subsequently added a fourth explanation for *Feres*. *See Shearer*, 473 U.S. at 57; *Johnson*, 481 U.S. at 698-99 (Scalia, J., dissenting). The Court reasoned that claims raised by soldiers to redress injuries are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, 473 U.S. at 59.

This post-hoc rationalization is flawed. As an initial matter, it is doubtful that tort liability would have any adverse impact on military decision-making or discipline. *See Johnson*, 481 U.S. at 699 (Scalia, J., dissenting) (questioning whether "the effect upon military discipline is so certain"). There is no evidence that the military could not maintain sufficient discipline if civilian courts could impose monetary sanctions for tortious behavior, especially given the military's strong cultural identity that emphasizes discipline. *See* Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance,* 71 Geo. Wash. L. Rev. 1, 26-27 (2003). This is especially true for the many medical malpractice suits in the prenatal care or labor and delivery context, which "clearly cannot be said to

invite judicial interference in 'sensitive military affairs.'" *Brown v. United States*, 462 F.3d 609, 615 (6th Cir. 2006). More likely is that "Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline," including decisions in foreign countries, related to combat command, or arising from "discretionary" functions. *See Johnson*, 481 U.S. at 699-700 (Scalia, J. dissenting) (citing 28 U.S.C. § 2680 (a), (j), (k)).

Moreover, arguing that judicial scrutiny of military decisions outside these categories would "adversely affect discipline proves too much." *Lombard*, 690 F.2d at 233 (Ginsberg, J., dissenting). Courts already assess military conduct in the context of civilian suits "for damages resulting from military exercises." *Id.* Thus, this post-hoc rationalization cannot sustain *Feres* either.

C. Decisions From Circuit Courts Reflect Confusion And Conflict In Applying *Feres*.

Because the *Feres* doctrine lacks grounding in text and sound reasoning, courts have struggled to apply it to the myriad tort claims of active duty service members (and derivative third-party injuries) against the government. After over sixty years, no consistent definition of "incident to service" has been established. And, as the Second Circuit observed, the Court's failed attempt to solidify *Feres* in its *Johnson* decision only left "the lower courts more at loose ends than ever." *Taber*, 67 F.3d at 1043. "[T]he *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today." *Id.* at

1032. It is a "confusing area of law," *id*. at 1038, that has led to "inconsistent results that have no relation to the original purpose of *Feres*," *Costo v. United States*, 248 F.3d 863, 875 (9th Cir. 2001).

Perhaps the best evidence of the confusion surrounding *Feres* is that circuit splits abound on *Feres* questions. The Tenth Circuit acknowledged at least three splits it had to address to decide this single case. *See* App. 9a-10a (noting split on which factors to apply in deciding if *Feres* bars a service member's claim), *id*. at 16a (noting that not all circuits use "genesis test" to evaluate third party claims); *id*. at 17a-18a (noting that circuits have disparate approaches in applying "genesis test").

Indeed, circuits are split on the fundamental question of how to determine whether an injury is "incident to service." Some circuits implement a multi-factor test—but the factors vary. *Compare, e.g.*, *Day*, 167 F.3d at 682 (applying four factor test that includes location, whether the activity arose out of a military activity, and whether plaintiff is suing a superior), *with Brown*, 462 F.3d at 613 (evaluating whether claim barred with reference to three *Feres* rationales), *with Ritchie*, 733 F.3d at 874 (emphasizing military discipline rationale). Other circuits, rather than focus on the presence or absence of rationales or factors, ask only whether the injury was "incident to service"—though without defining the phrase. *See Tootle v. USDB Commandant*, 390 F.3d 1280, 1282 (10th Cir. 2004). The Second Circuit, by contrast, uses a respondeat superior analysis to determine whether *Feres* applies. *Taber*, 67 F.3d at 1045. The circuits are, quite simply, all over the map.

Courts also struggle to justify *Feres*'s unfair outcomes, such as leaving a family without recourse for negligence causing permanent disability. Like the Tenth Circuit below, some courts lament the unjust outcomes, but bar recovery. App. 3a. But in parallel circumstances, the Eleventh Circuit found *Feres* not to apply at all. *Del Rio v. United States*, 833 F.2d 282, 287 (11th Cir. 1987). Others carve out exceptions where the child's injury is independent from the mother's. *See, e.g.*, *Romero v. United States*, 954 F.2d 223, 226 (4th Cir. 1992); *Brown*, 462 F.3d at 615-16. Untethered from text or sound rationales, courts are confused and conflicted.

The disparate approaches by the circuits and widespread confusion belies the Government's contention that *Feres* is now an embedded area of law and overturning it would cause instability. As such, *stare decisis* cannot sustain it. Rather, given the criticism *Feres* has received, the unjust outcomes it requires, and the fact it has no textual basis, there is no justifiable reason to keep the *Feres* doctrine.

II. THIS CASE PRESENTS AN OPTIMAL VEHICLE FOR LIMITING *FERES*.

If the Court is not inclined to overturn *Feres*, the Court should still grant certiorari to provide clarity on the doctrine and limit its reach to cases involving a service member's duties or actions in his or her official capacity. This case provides an ideal vehicle for doing so. The Tenth Circuit barred Baby I.O.'s claim because Captain Ortiz's labor and delivery was "incident to [her] service" as an Air Force officer. App. 2a. That notion is ridiculous: giving birth is not part of, or even related to, one's service in the armed forces. *Feres* is overbroad. And the discriminatory

and arbitrary nature of the doctrine, as highlighted by the facts of this case, further demonstrates why this case is an ideal vehicle for limiting *Feres* to those injuries sustained while an active duty service member is acting within the scope of his or her military responsibilities.

A. The *Feres* Doctrine Is Overbroad.

Just as jurists and commentators have criticized *Feres* for having no legs, they have similarly criticized the doctrine for reaching too far. Then-Judge Ginsberg objected to the "expansive interpretation" of the *Feres* doctrine. *Lombard*, 690 F.2d at 227-28 (Ginsberg, J., dissenting). *See also Purcell v. United States*, 656 F.3d 463, 465 (7th Cir. 2011) (*Feres* "has been interpreted increasingly broadly over time."). More recently, Jonathan Turley noted: "The expansion of the original *Feres* doctrine . . . is an example of a judicial version of mission creep." *Turley*, *supra* at 9 n.45. "The *Feres* doctrine has been allowed to grow in scope to a degree that would have given a congressional committee pause as a legislative matter, let alone as a unilateral judicial decision." *Id.*

Under current jurisprudence, *Feres* acts to bar *all* suits against the government by service members for injuries sustained while on active duty. *Major v. United States*, 835 F.2d 641, 643 (6th Cir. 1987) (per curiam) (*Feres* "automatically equated events occurring while an employee was on 'active duty' with those 'incident to the service,' thereby effectively barring all claims for injuries taking place while one is on active duty.") The *Feres* doctrine also bars third-party claims that have their "genesis" in the service member's injury. App. 16a-19a. Thus,

Feres transcends claims for injuries sustained while training, *Ritchie*, 733 F.3d at 873, following military orders, *Laswell*, 683 F.2d at 262-63, lodging in barracks, *Feres*, 340 U.S. at 137, or conducting rescue missions, *Johnson*, 481 U.S. at 683. It even extends beyond claims that birth defects were caused by a service member's exposure to chemicals in preparation for combat, *Minns v. United States*, 155 F.3d 445 (4th Cir. 1998), or in a government lab, *Lombard*, 690 F.3d at 216. All those examples, even from a common sense perspective, could be viewed as "incident to service." But *Feres* bars suits even when an active duty service member is injured conducting activities that are far from his or her military duties—like giving birth. And it bars suit not just for the service-member mother, but for the civilian child who has been harmed by the government's negligence. App. 21a.

Applying *Feres* to bar Baby I.O.'s claim in this matter demonstrates how *Feres* has gone too far and has departed from its initial underpinnings. Granting certiorari here would provide an opportunity to limit the *Feres* doctrine.

B. The Discriminatory And Arbitrary Nature Of The *Feres* Doctrine Demonstrates That It Must Be Limited.

The Ortiz Family's claim in this matter demonstrates the discriminatory and arbitrary results of the *Feres* doctrine and why it must narrowed.

Particularly in the context of labor and delivery cases, *Feres* raises gender inequity concerns. Only children of active duty mothers—not fathers—who

sustain birth-injuries are *Feres*-barred. As described by the Tenth Circuit, to determine whether a civilian third-party's injury is barred by *Feres*, the court asks whether the civilian's injury has its origin or "genesis" in an incident-to-service injury to a service member. App. 16a. Thus, Baby I.O. cannot recover because her mother is a service member and her injuries are said to derive from her mother's. By contrast, if a service member's civilian wife went to the same hospital and received the same negligent care, the family would not be *Feres*-barred. Thus, for labor and delivery cases, service *women* and their children, but not service *men*, bear the hardship of *Feres*. (The same is true of negligent prenatal care.)

The overbroad application of the *Feres* doctrine also produces arbitrary results. As mentioned above, Baby I.O.'s claim was barred because it had its "genesis" in the mother's injury. App. 30a. But change the factual scenario just slightly, and the claim would be allowed. For instance, imagine if the hospital's negligent actions (giving improper medicine) had not harmed the mother at all, but only harmed Baby I.O. Then the child's injury would be independent from the mother, and could not have its "genesis" in the mother's injury. Circuits have concluded that children are not *Feres*-barred in such scenarios. *Romero*, 954 F.2d at 226. Next, imagine that the hospital's negligent administration of medicine was intended to benefit only Baby I.O. and not the mother. Under that scenario some courts would allow the child to recover. *See Mossow v. United States*, 987 F.2d 1365, 1369 (8th Cir. 1993). Lastly, imagine that the hospital personnel had administered improper medicine to the child, rather

than to the mother, just five minutes after birth. Again, the family could recover. Changing details that are immaterial to army structure, military decision making, or a service member's duties should not affect the outcome of the case if those are the principles *Feres* is meant to protect. But because *Feres* has been stretched so far, arbitrary details make all the difference.

Ironically (and unfortunately), the Ortiz Family is being harmed precisely because Captain Ortiz chose to serve our country. If she were a civilian, even married to a service father, brought to the hospital in labor by an ambulance, Baby I.O. would be able to recover for the hospital's malpractice and the Ortiz Family would have the monetary resources necessary to support a child with a permanent disability. But because Captain Ortiz devoted her life to serving in our country's Armed Forces, *Feres* denies her family recovery. *See Johnson*, 481 U.S. at 703 (Scalia, J., dissenting); *see also Costo*, 248 F.3d at 870 (Ferguson, J. dissenting) ("The doctrine effectively declares that the members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans."). *Feres* requires "counter-intuitive and inequitable result[s] simply because of [plaintiff's] military status." *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999). No wonder "court[s] repeatedly have expressed misgivings about it." *Id*. This case provides an opportunity for reforming a doctrine that, as it stands, disadvantages women who choose to serve.

C. The *Feres* Doctrine Can Be Limited To Injuries Sustained While A Service Member Was Acting Within The Scope Of His Or Her Military Responsibilities.

If the Court declines to overturn *Feres*, it can at minimum limit the doctrine so that it bars only claims that "arise out of or in the course of" a service member's military employment. This well-known test, derived from the doctrine of respondeat superior, comports with the aims of *Feres* and provides a workable standard for limiting *Feres*'s reach. *Taber*, 67 F.3d at 1046.

Barring service members' tort claims under *Feres* only when those claims arise out of or in the course of military employment grounds *Feres* in the relationship between a soldier and the military that originally motivated the doctrine. It also respects the role of *Feres* in preserving military discipline in matters related to military action. Imposing these limits would exclude from *Feres*'s reach situations entirely unconnected to a service member's actions qua service member—such as giving birth—eliminating the absurd and inequitable results produced in this and similar cases.

Notably, *Feres* itself indicated that its "incident to service" test should be tethered to a soldier's responsibilities and actions *in his or her capacity as a soldier*. The *Feres* Court distinguished the facts before it from those in *Brooks*. 340 U.S. at 146. The soldier in *Brooks* was hit by a military vehicle while "driving along the highway, under compulsion of no orders or duty and on no military mission." *Id.* The *Feres* Court emphasized that he was not "a soldier

injured while performing duties under orders." *Id.* Therefore, his injury was not "incident to service."

Moreover, as Judge Calabresi articulated, limiting *Feres* to claims by soldiers "injured while performing duties under orders" or "on a military mission" comports with the *Feres* Court's desire to create a "rough parity" with worker's compensation laws. *Taber*, 67 F.3d at 1045. As described above, *Feres* can be "understood as an attempt to preclude suits by servicemembers against the government because, as military *employees*, they received government disability and death benefits—the benefits that the Court observed were similar to (and if anything more generous than) most civilian workers' compensation awards." *Id.* at 1038. By limiting *Feres* to injuries sustained in the scope of military employment, "*Feres* [would bar] suits where compensation is given under a military analogue to worker's compensation." *Id.* at 1045.

Accordingly, the Court should grant certiorari at minimum to limit *Feres* to those injuries that are truly "incident to service," rather than just sustained while on active duty. Without textual support or viable rationales, the doctrine lacks grounding even in the context of injuries arising from one's military duties. It certainly should not hold outside that arena. After sixty years of growing confusion and uncertainty, the time is now to overturn—or at least rein in—*Feres*.

CONCLUSION

For these reasons, and those advanced by the Petitioner, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LAURA RILEY
CALIFORNIA WOMEN'S
LAW CENTER
360 N. Sepulveda Blvd.
Suite 2070
El Segundo, CA 90245

DWIGHT STIRLING
VETERANS LEGAL
INSTITUTE
2100 N. Broadway
Suite 209
Santa Ana, CA 92706

RASHA GERGES SHIELDS
Counsel of Record
RACHEL BLOOMEKATZ
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
(213) 243-2719
rgergesshields@jonesday.com

Counsel for Amici Curiae

NOVEMBER 12, 2015