No.

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER DANIEL, individually and as Personal Representative of the Estate of Rebekah Daniel,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Feres v. United States*, 340 U.S. 135 (1950), and its companion medical malpractice cases, *Jefferson v. United States*, and *United States v. Griggs*, this Court held that service members were barred from bringing tort claims under the Federal Tort Claims Act where the injury or death arose out of or in the course of activities incident to service. In subsequent cases, this Court abandoned the primary rationale supporting the *Feres* doctrine. Further, it adopted the military discipline rationale as the most important consideration in in determining whether *Feres* bars a claim. This Court has never considered whether the *Feres* doctrine should apply to medical malpractice cases given the intervening development of the law.

The questions presented are:

1. Does the *Feres* doctrine bar service members, or their estates, from bringing claims for medical malpractice under the Federal Tort Claims Act where the medical treatment did not involve any military exigencies, decisions, or considerations, and where the service member was not engaged in military duty or a military mission at the time of the injury or death?

2. Should *Feres* be overruled for medical malpractice claims brought under the Federal Tort Claims Act where the medical treatment did not involve any military exigencies, decisions, or considerations, and where the service member was not engaged in military duty or a military mission at the time of the injury or death?

TABLES OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORI

INTRODUCTION

In *Feres v. United States*, 340 U.S. 135 (1950), this Court held that service members were barred from bringing suit against the United States under the Federal Tort Claims Act (FTCA) for injuries occurring "incident to service. *Id.*, at 136-37. The Court took this action even though the Act (1) effected a broad waiver of sovereign immunity; (2) did not include "incident to service" as one of its twelve express statutory exceptions; (3) expressly authorized claims against the United States for acts or omissions of members of the military; and (4) did not exclude claims brought by members of the military, although earlier bills had excluded service members.

Few decisions of the Supreme Court have been subjected to such extensive criticism "by 'countless courts and commentators' across the jurisprudential spectrum" as has *Feres*. *Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013). As Justice Scalia stated in his dissent in *United States v. Johnson,* 481 U.S. 681, 700, (1987), "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *See also*, *Lanus v. United States*, 570 U.S. 932 (2013) (Thomas J., dissenting from denial of certiorari); *Taber v. Maine*, 67 F.3d 1029, 1037-1049 (2d Cir. 1995).

This case demonstrates the manifest injustice of applying the *Feres* doctrine in medical malpractice cases. Navy Lieutenant Rebekah Daniel died from

postpartum bleeding shortly after giving birth. From the time she entered Naval Hospital Bremerton as a patient on March 8, 2014 until her death the next day, she was not engaged in her military duties, nor was she on a military mission. Her death did not result from any military exigencies or considerations. She died because her military doctors failed to follow basic standards of care for postpartum bleeding applicable to any health care provider, military or civilian, in treating mothers following childbirth.

Naval Hospital Bremerton and other military hospitals also provide comprehensive medical care for service member dependents, as well as for retirees and their dependents. The type of treatment Rebekah Daniel received was no different from the type of medical treatment afforded any similarly situated civilian pregnant patient treated at Naval Hospital Bremerton. Had a civilian patient in the next room in the labor and delivery unit died from the same medical treatment administered to Rebekah Daniel, the family could have brought a wrongful death claim under the FTCA. But because Rebekah Daniel wore the bars of a Navy Lieutenant and served her country, her family is denied this right.

In dismissing the Daniels' complaint, the Ninth Circuit stated: "If ever there were a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so." *Daniel v. United States*, 889 F.3d 978, 982 (9th Cir. 2018). The Ninth Circuit itself was constrained because the two companion cases to *Feres*, *Jefferson v. United States* and *United States v. Griggs*, involved medical

malpractice claims. These companion cases alone are outcome determinative in the Ninth Circuit. Whatever else *Feres* meant by its "incident to service" test, so this reasoning goes, it surely must include medical malpractice actions.

This result is no longer compelled by *Feres*. The doctrinal underpinnings of *Feres* underwent fundamental changes *after* the decision. The central justification supporting *Feres* in 1950 was the absence of any parallel private liability, as *Feres* then construed the statutory language imposing liability on the government "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674. But the Supreme Court subsequently rejected *Feres* interpretation of parallel private liability in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *Rayonier v. United States,* 352 U.S. 315 (1957). Since then, no court has considered *Feres*' parallel private liability theory as anything other than a relic of legal history. And yet the *result* of that theory has become the primary basis for application of *Feres* to medical malpractice cases.

Further, in a series of cases decided after *Feres*, the Supreme Court adopted a new rationale, military discipline, which it held "best explained" *Feres.* Service member claims were barred because "the suit requires the civilian court to second-guess military decisions" and "the suit might impair essential military discipline." *United States v. Shearer*, 473 U.S. 52, 57 (1985). *Feres* did not consider this rationale in 1950 when it barred service member claims for medical malpractice, and has not done so since. To put the issue in the

context of the facts here, the Court has never held that medical decisions made to stop postpartum bleeding are military decisions barred by *Feres* if the patient is on active duty, but are medical and subject to suit if the patient is the spouse of a service member.

In short, the legal landscape has undergone a sea change since 1950. Theories once central to *Feres* no longer matter. Rationales not considered in *Feres* are now central.

This change in the legal basis for *Feres* has been accompanied by a radical change in the nature of military health care since 1950, in a way that highlights the inequity of applying *Feres* across the board to medical malpractice cases. Combat care, or operational care, is and will remain a central mission of military medicine. But it is no longer the only mission for military medicine.

The Department of Defense now operates a comprehensive health care system with a mission of providing quality comprehensive non-combat related health care to active duty service members and their dependents, as well as retirees and their dependents at military health care facilities. Beginning with the 1956 Dependents' Medical Care Act, the non-combat component of the military health system has grown enormously. Active duty service members now represent only 15% of the persons eligible for treatment in the Military Health System.[1] Military

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[1] Congressional Research Service, Defense Primer: Military Health System, CRS Report at 1, found https://fas.org/sgp/crs/natsec/IF10530.pdf (hereinafter Defense Primer).

health care facilities, for instance, deliver around 50,000 babies annually.[2] The vast majority of children born in military treatment facilities are born to civilian mothers.

This system does not exist in isolation from civilian health care. "[A]s a comprehensive health system, it is influenced by, and must be responsive to, improvements in the civilian health care sector."[3] Its own studies compare its system to large civilian health care systems, such as Geisinger Health System, Intermountain Healthcare, and Kaiser Permanente

It is the development and expansion of this non-combat military health care mission, providing care to active duty service members and non-service members alike, which renders the starkly different outcomes for medical malpractice claims between the two groups under the FTCA so unjustifiable. The only difference in the two groups is that a member of one group has a uniform hanging in the hospital room closet, while the other one does not.

This case gives the Court the opportunity to right a long-standing wrong. Of course, the fact that a decision is erroneous—and Justice Scalia's dissent in *Johnson* thoroughly lays out the case for the original error—is not in itself enough to justify overturning the decision. But the fundamental

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[2] Military Health System Review—Final Report 102 (August 29, 2014), found at .http://archive.defense.gov/pubs/140930_MHS_Review_Final_Report_Main_Body.pdf (hereinafter Military Health System Review).

[3] Military Health System Review at 23.

changes in the legal bases for the *Feres* doctrine and in the realities of military health care since *Feres*, gives the Court the "special justification" for overturning *Feres* with respect to medical malpractice cases.

OPINIONS BELOW

The Court of Appeals opinion is reported at 889 F.3d 978 (2018). Appendix A-1—A-8. The District Court opinion is not reported. Appendix A-10—A-25.

JURISDICTION

The Court of Appeals entered its judgment on May 7, 2018. A petition for rehearing en banc was denied on July 16, 2018. Appendix. A-26. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a claim brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346, U.S.C. §2671, 28 U.S.C. §2674, and 28 U.S.C. §2680. The pertinent provisions of the FTCA are reproduced at Appendix A-27—A-32.

STATEMENT OF THE CASE

Rebekah Daniel was at the time of her death a thirty-three-year-old Lieutenant in the United States Navy, stationed at Naval Hospital Bremerton in Bremerton, Washington, as a labor and delivery nurse. She was married to Walter Daniel, a Lieutenant Commander in the United States Coast Guard.

Rebekah Daniel became pregnant in 2013. The pregnancy was considered low-risk, and proceeded

without complications. Rebekah Daniel entered Naval Hospital Bremerton as a patient on March 8, 2014. The next day she delivered a healthy baby girl. A few minutes later, she began to have postpartum bleeding, a dangerous but not uncommon complication of childbirth. Her providers, however, never stopped the bleeding. Rebekah was pronounced dead four hours after she gave birth.

Rebekah bled to death because her healthcare team failed to follow specific, well-known, standards of care for postpartum hemorrhage. These standards are clearly spelled out in the American College of Obstetricians and Gynecologists' Patient Safety Checklist for Postpartum Hemorrhage from Vaginal Delivery.

Rebekah held a commission as an officer in the United States Navy, and had active duty status at the time of her death. At all times relevant to the foregoing treatment, however, she was off-duty. From the time she arrived at the hospital on March 8, 2014, until her death on March 9, 2014, Rebekah Daniel's role was that of a patient: an expectant mother, a mother giving birth, and then a mother with postpartum complications that proved deadly.

Petitioner Walter Daniel, personal representative of the Estate of Rebekah Daniel, administratively submitted claims to the Department of the Navy on April 1, 2015 pursuant to 28 U.S.C. §§ 2672 and 2675(a) of the Federal Tort Claims Act. The Navy denied the claim on April 23, 2015.

Petitioner filed suit on October 15, 2015, under the Federal Tort Claims Act, 28 U.S.C. §2671, et seq, in the United States District Court for the Western District of Washington. On January 21, 2016, the District Court granted the United States' motion to dismiss for lack of jurisdiction. Appendix A-10—A-25.

On appeal, the Ninth Circuit Court of Appeals affirmed the District Court. *Daniel v. United States*, 889 F.3d 978 (2018). The Ninth Circuit died a Petition for Rehearing En Banc on July 16, 2018. Appendix A-26.

REASONS FOR GRANTING THE PETITION

1. The *Feres* Doctrine should be Overturned in Medical Malpractice Cases Because of Fundamental Changes in its Doctrinal Underpinnings since 1950.

A. The FTCA and Pre-*Feres* Case Law Permit Service Members to Recover on FTCA Claims Against the Government.

The Federal Tort Claims Act, enacted in 1946, subjects the United States to liability for tort claims "in the same manner and to the same extent as a private individual under like circumstances," i.e., parallel private liability. 28 U.S.C. §2674. *See also* 28 U.S.C. §1346(b) (district court has jurisdiction "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.").

The statute effects "a broad waiver of sovereign immunity" from suits in tort. *Millbrook v. United States*, 569 U.S. 50, 52 (2013). It allows suit for

negligent acts or omissions of government employees, a category specifically defined to include "members of the military or naval forces of the United States." 28 U.S.C. §2671. It does not bar recovery by members of the armed forces. Although earlier versions of tort claim bills contained exceptions barring recovery by service members, the 1946 Act omitted these exceptions. *See Brooks v. United States*, 337 U.S. 49, 51 (1949) ("We are not persuaded that 'any claim' means 'any claim but that of servicemen.'").

The Act contained twelve exceptions to the waiver of sovereign immunity claim. 28 U.S.C. §2680.[4] Two exceptions are pertinent to service-related injuries. The Act excludes claims arising out of "combatant activities . . . during time of war", 28 U.S.C. §2680(j); and it excludes claims arising in foreign countries, §2680(k). Neither exception applies here.

The Court first addressed the government's liability to service members under the FTCA in *Brooks v. United States*, 337 U.S. 49 (1949). An army truck ran through an intersection, striking a vehicle carrying two service members and their father. One service member was killed, and the others were injured.

Brooks held that the language of the statutory waiver of immunity included service members and that the exceptions did not bar a service member's suit:

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[4]There are now thirteen exceptions. The changes are unrelated to service-related injuries.

> It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

Id. at 51. The Court also determined that the history of Congressional proposals for a tort claims act, and the availability of alternative veterans' benefits did not bar a service member from bringing suit. *Id.* The Court, however, did leave an opening for the government. "Were the accident incident to the Brooks' service, a wholly different case would be presented." *Id.* at 52.

The Court has never overruled *Brooks*. *Feres* simply distinguished it. 340 U.S. at 146. *United States v. Brown*, 348 U.S. 110, 112 (1954), allowing veterans to sue under the FTCA, held that the case was "governed by *Brooks,* not by *Feres*." *Id.*

Because of *Brooks*, there has always been a subset of cases allowing service members to sue the government. The Second Circuit recognized one aspect of the distinction between *Feres* and *Brooks* relevant here:

> Brooks' father, riding in the same car recovered for his injuries...." 340 U.S. at 146, 71 S.Ct. at 159. This fact implied that the Brooks brothers' own FTCA recovery—given the time, place, and manner of their injuries—involved no more military second guessing or interference with discipline than did their civilian father's award.

Taber v. Maine, 67 F.3d at 1041 (2d Cir. 1995). The situation in *Brooks* is at least analogous to the one

here, where a military patient is denied redress for negligent medical treatment, while a civilian patient in the same military hospital receiving the same medical care may sue.

B. The Medical Malpractice Cases in *Feres* were Primarily Based upon a Doctrine of Parallel Private Liability which the Court Subsequently Abandoned.

Feres itself arose out of a service member's death in a barracks fire. The companion cases of *Jefferson v. United States* and *United States v. Griggs* involved medical malpractice. *Id.*, at 136-37. Finding that this was *Brooks*' "wholly different case," *Feres* held that the claims in all three cases were barred because the injuries or deaths occurred "in the course of activity incident to service." *Id.* at 146.

Absent an express statutory exception to the broad waiver of immunity, *Feres*' central justification for the result was the failure to establish "parallel private liability" required by the statute.[5]

> [P]laintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there

[5] Not only was this the central holding, but it was the only part of the opinion which "purports to be textually based." *United States v. Johnson*, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting).

> any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command. But if we indulge plaintiffs the benefit of this comparison, claimants cite us no state, and we know of none, which has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state the contrary has been held to be the case. It is true that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability. ***In the usual civilian doctor and patient relationship, there is of course a liability for malpractice***. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. ***We find no parallel liability before, and we think no new one has been created by, this Act.***

Feres, 340 U.S. at 141-42 (emphasis added). Finding no parallel liability, the Court concluded that the effect of the FTCA "is to waive immunity from recognized causes of action and was not to visit the

Government with ***novel and unprecedented liabilities***." *Id.* at 142 (emphasis added).

Feres' textual interpretation of "parallel liability" applied equally ***outside the military context***, as the Court recognized in *Dalehite v. United States*, 346 U.S. 15 (1953). After a massive explosion in Texas City, Texas, plaintiffs brought suit under the FTCA claiming *inter alia* that government firefighting activities were negligent. Public fire fighters, like the military, had never been subject to suit. Accordingly, the Court, ***relying on Feres,*** held that there was no existing parallel liability to extend to the government under the FTCA.

> ***We find no parallel liability*** before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' ***Feres v. United States***, 340 U.S. 135, 142.
>
> It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. ***Our analysis of the question is determined by what was said in the Feres case***. . . . . if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. ***This case, then, is much stronger than Feres***."

Id. at 43-44 (emphasis added).

But *Feres*' parallel liability edifice began to crumble in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). At issue was the negligence of the Coast Guard in the operation of a lighthouse. As with firefighting, no parallel liability for the uniquely governmental function of lighthouse operations existed. Nevertheless, the Court's 5-4 opinion held that even if an activity was "uniquely governmental," the government could be held liable if a private person in like circumstances could be held liable. *Id.* at 64.

The dissent relied upon *Feres* and *Delahite*:

> ***In Feres we talked of private liability and came to a conclusion which is contrary to that reached by the Court today.*** See 76 S.Ct. 128, *supra*. We held that because surgeons in private practice or private landlords were liable for negligence did not mean the United States was.

Id. at 75 (emphasis added) (Reed J., dissenting).

Rayonier v. United States, 352 U.S. 315 (1957), completed the Court's sea change on parallel liability. *Rayonier* again addressed firefighter liability under the FTCA, an issue presumably laid to rest in *Dalehite*. The government, relying on *Dalehite*, argued that the FTCA "only imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees." *Rayonier,* 352 U.S. at 318.

The Court's 7-2 majority rejected the government's argument, holding that *Indian Towing* had overruled this aspect of *Dalehite*.[6] "[T]he test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred," not whether a municipal corporation or other public body would have been liable. *Id.* at 319.

But the Court did not simply reject the language from *Feres* eschewing "novel and unprecedented liabilities." It stood the language on its head: "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish ***novel and unprecedented governmental liability***." *Id.* at 319 (emphasis added).

And the dissent again voiced its objection to this departure from *Feres*:

> The immunity of public bodies for injuries due to fighting fire was then well settled. *Dalehite v. United States*, 346 U.S. 15, 43. Private organizations, except as community volunteers, for fire fighting were hardly known. *The situation was like* ***private military forces***. Cf. *Feres v. United States*, 340 U.S. 135, 142.

Rayonier, 352 U.S. at 321 (Reed, J. dissenting).

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[6] "To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*." *Rayonier,* 352 U.S. at 319.

With the demise of *Feres*' parallel private liability theory, the central reason for barring medical malpractice claims in *Feres* no longer holds. The government should be liable for the negligence of military doctors because private physicians in like circumstances would be liable. And the government is liable for the negligence of military doctors if the patient is not an active duty service member. The Court has never addressed the issue of medical malpractice after *Indian Towing* and *Rayonier*. This case gives the Court that opportunity.

C. The Two Other Rationales for *Feres*, Availability of Alternative Benefits and the Distinctly Federal Character of the Relationship between the Government and Service Members, are no Longer Controlling.

Feres itself had two other rationales: the availability of alternative benefits and the distinctly federal character of the relationship between the government and service members. 340 U.S. at 143-145. Neither rationale accounts for the results in cases such as *Brooks*, where service members were permitted to recover for injuries caused by military negligence. *United States v. Johnson*, 481 U.S. 681, 696–97 (1987) (Scalia, J. dissenting); *see also Taber v. Maine*, 67 F.3d at 1039.

In *Brooks* and cases following it, the Court pointed out that the statutes providing for veterans' benefits, unlike other workers' compensation laws, did not have exclusivity provisions. *United States v. Brown*, 348 U.S. 110, 113 (1954) ("Congress could, of course, make the compensation system the exclusive remedy."). *See also Stencel Aero Engineering Corp.*

v. United States, 431 U.S. 666, 675 (1977); (Marshall J., dissenting); *United States v. Johnson, supra*, 481 U.S. at 696-96 (Scalia J., dissenting).

In *United States v. Shearer*, 473 U.S. 52, 57 & n. 4 (1985), the Court recognized and held that these two rationales were "no longer controlling." Although the Court did not elaborate its reasons, it is clear that these rationales could not coherently account for the results under the *Feres* doctrine. The Court has never questioned, much less overruled, this holding in *Shearer*.

D. The Military Discipline Rationale Developed after *Feres* and never Considered by this Court in a Medical Malpractice Case does not Support a Prohibition on FTCA Medical Malpractice Claims by Service Members.

After *Feres*, the Supreme Court adopted a new rationale for considering whether service member suits should be barred, military discipline. First articulated in *United States v. Brown*, 348 U.S. 110, 112 (1954), the Court held that veterans could bring suit for service-related injuries incurred when they were no longer on active duty.

> [These suits did not involve the] peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty…
>
> *Id.* (Brackets added)

In *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 675 (1977), the Court refined the military discipline rationale. In *Stencel*, a pilot was permanently injured in the course of a clear military mission, flying an F-100 when a sudden emergency required ejection. *Id.* at 668. The pilot brought suit against the civilian manufacturer of the ejection system, as well as the government.

The distinctive issue in *Stencel* was whether *Feres* barred the civilian manufacturer's third-party cross claim against the government for indemnity for any liability it might have to the service member, where *Feres* barred the service member's own claim against the government was barred.[7] In holding that the civilian claim was barred, the Court ruled that it did not matter whether the claim was brought by the soldier or a third party: "The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Id.* at 673 (1977).

In *United States v. Shearer*, 473 U.S. 52 (1985), the Court held the third rationale involving military discipline was the most important, and that the first two rationales in *Feres* in *Shearer*, were "no longer controlling." *Id.* at 57 & n. 4. The critical consideration in determining whether a claim is barred is "whether the suit requires the civilian court to second-guess ***military*** decisions [citation omitted], and whether the suit might impair

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[7] The service member also brought a claim against the government, but that claim was dismissed under *Feres*, and was not at issue in this Court. *Id.* at 669.

essential ***military*** discipline, [citation omitted]." *Id.* at 57 (emphasis added).

Finally, *United States v. Johnson*, 481 U.S. 681, 682 (1987) held that *Feres* bars suits by service members based upon "negligence on the part of ***civilian*** employees of the Federal Government." *Johnson,* 481 U.S. at 682 (emphasis added). A Coast Guard helicopter pilot and crew died when their helicopter crashed on a rescue mission as a result of FAA negligence. The crew members were unquestionably acting in the course of their military duties. *Id.*, at 690-91. *Johnson* did not overrule or modify or even criticize *Shearer*. It never questioned *Shearer's* holding that the first two rationales were no longer controlling; all three rationales were present.

This Court has never considered whether medical malpractice claims of the type presented here can be justified under the military discipline rationale. These cases do not implicate any legitimate military discipline claim, as circuit courts have determined even when otherwise constrained in their results reached because of *Jefferson* and *Griggs*.

In *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987), a service member was injured by negligent medical care in the course of giving birth. The Ninth Circuit held that the military discipline rationale had no application to these facts:

> No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a

> conscientious physician will provide in this situation. Thus, in treating Atkinson for complications of her pregnancy, Atkinson's doctor was implementing decisions of military judgment only in the remotest sense....

Atkinson, 825 F.2d at 205.

There is a fundamental difference between a claim for injuries caused by, for example, a negligently aimed howitzer in a live fire training exercise, and the negligent failure of health care providers to stop postpartum bleeding. The former is clearly a military decision; the latter is clearly not.

Further, the military discipline rationale reflects the hesitancy of courts to "require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel,* 431 U.S. at 673. But in medical malpractice cases brought by civilians treated in military facilities, service members already testify in court as to each other's decisions and actions under the FTCA. That is the nature of the effort to provide comprehensive health care to service members and civilians alike. The care is the same. It is simply a fortuity whether the patient is a civilian or a service member.

2. Stare Decisis Does Not Bar This Court from Overturning *Feres* and its Companion Cases in Medical Malpractice Cases.

The Government's perennial opposition to any alteration of *Feres* is stare decisis, and the failure of Congress to legislatively overrule *Feres*.[8]

A. Stare Decisis does not Apply where the Doctrinal Underpinnings of a Case involving Statutory Interpretation have Substantially Changed

"*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *accord* Garner, et al., *The Law of Judicial Precedent* 388 (2016) ("stare decisis isn't an ineluctable doctrine to be applied with procrustean rigor."). "[W]e do no violence to the doctrine of *stare decisis* when we recognize bona fide changes in our decisional law. And in those circumstances, we do no violence to the legitimacy we derive from reliance on that doctrine." *Agostini v. Felton*, 521 U.S. 203, 239 (1997).

The *Feres* doctrine interprets a statute, even if it is a purely judicial exception without anchor in the language of the statute. "In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the

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[8] *See e.g.*, Brief for the United States in Opposition to Petition for Writ of Certiorari, Alexis Witt v. United States, Supreme Court No. 10-885, filed May 17, 2011. https://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-0885.resp.pdf.

intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). This is "'the primary reason' for overruling statutory precedent." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410 (2015).

In the case of the *Feres* doctrine as it applies to medical malpractice cases, the doctrinal bases has changed dramatically over time. But the results in *Griggs* and *Jefferson* remain dispositive in the lower courts. Thus, in dismissing the present case, the Ninth Circuit held that "analysis begins and ends with *Atkinson*, 825 F.2d 202." *Daniel*, 889 F.3d at 982. As discussed above, *Atkinson* also involved a service member injured in childbirth. The dispositive language from *Atkinson* is as follows:

> Although we believe that the military discipline rationale does not support application of the *Feres* doctrine in this case, the first two rationales support its application. *Griggs v. United States,* 178 F.2d 1, 2 (10th Cir.1949), *rev'd sub nom. Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950); *Jefferson v. United States,* 77 F.Supp. 706, 708 (D.Md.1948), *aff'd,* 178 F.2d 518 (4th Cir.1949), *aff'd sub nom. Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

This highly unusual citation to *Griggs* and *Jefferson* as dispositive precedent, relegating *Feres* to "sub nom." status, is no accident. It manifests the

Ninth Circuit's conclusion that the results of these 1950 medical malpractice cases are outcome determinative, regardless of the underlying reasoning. These companion cases are binding upon the Ninth Circuit because of principles of vertical stare decisis. See Garner, et al., *The Law of Judicial Precedent* 29 (2016) ("Lower courts are bound even by old and crumbling high-court precedent—until the high court changes direction."). But given the fundamental changes to the doctrinal underpinnings in *Grigg*s and *Jefferson*, articulated above, this Court may change the results of these cases without doing violence to stare decisis.

This case presents as strong an argument for departing from stare decisis as did the Court's decision in *South Dakota v. Wayfair,* 138 S.Ct. 2080 (2018). *Wayfair* overturned two precedents going back fifty-one years, prohibiting states under the dormant commerce clause from requiring retailers to collect sales and use taxes unless the retailer has a physical presence in the taxing state: *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992).

Bellas Hess required physical presence under both the dormant commerce clause and the due process clause. In *Quill*, the Court overturned its due process holding in *Bellas Hess*, but retained the physical presence rule under the dormant commerce clause.

In overturning *Quill*, *Wayfair* did not point to any intervening case law subsequent to *Quill* changing the doctrinal underpinnings of the Court's

dormant commerce clause jurisprudence. The Court came closest with its discussion of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). *Wayfair*, 138 S.Ct. at 2092. But the Court decided *Complete Auto* in 1977, fifteen years before *Quill*. *Quill* explicitly considered *Complete Auto* in reaffirming *Bellas Hess* on dormant commerce grounds. "While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases." *Quill*, 504 U.S. at 311. Nevertheless, the Court in *Wayfair* overturned a twenty-six year old precedent based upon a forty-one year old precedent.

In the present case, the change in the doctrinal underpinnings of *Feres* are manifest. Here this Court has never addressed the medical malpractice holdings of *Feres* after the demise of *Feres* theory on parallel liability and the adoption of the military discipline rationale. This is precisely the type of change in the doctrinal underpinnings of a case that warrant reexamination and departure from stare decisis.

B. The Failure of Congress to Amend the FTCA Subsequent to *Feres* does not Constitute Legislative Acquiescence in the *Feres* Doctrine as it has been Applied to Medical Malpractice Cases.

The argument that Congress could have amended the FTCA after *Feres* does not touch petitioner's central contention here. The only part of *Feres* which "purports to be textually based", is its holding on parallel private liability. *United States v.*

Johnson, 481 U.S. at 694 (Scalia, J., dissenting). The doctrinal basis for *Feres'* parallel private doctrine, however, did not survive the decade. *Indian Towing* and *Rayonier* laid it to rest.

This leaves the question, if Congress acquiesced, then in what did it acquiesce? Did it acquiesce in the specific holdings in the *Feres*' cases, barring medical malpractice claims? Did it acquiesce in the textual holding on the meaning of parallel liability in *Feres,* a doctrine since rejected? Or did it acquiesce in the Court's interpretation of parallel private liability in *Indian Towing* and *Rayonier,* rejecting the doctrine underlying *Feres*, leaving it to the Court to decide how the change should apply in particular types of cases?

The government's argument is the same made by the four-justice ***dissent*** in *Indian Towing*.

> These two interpretive decisions [*Feres* and *Dalehite]* have not caused Congress to amend the Federal Tort Claims Act. … ***Congress must have accepted the rulings relating to the issues here involved as in accord with its understanding of the Tort Claims Act***. One cannot say that when a statute is interpreted by this Court we must follow that interpretation in subsequent cases unless Congress has amended the statute. ***On this our cases conflict***. … ***The nonaction of Congress should decide this controversy in the light of the previous rulings***.

Indian Towing Co., 350 U.S. at 74 (Reed, J. dissenting) (emphasis and brackets added).

Of particular relevance is the dissent's observation that "our cases conflict" on congressional acquiescence. *Id.* But since 1955, and indeed, after the Court's 1987 decision in *Johnson*, that conflict has been resolved ***against*** the assumption that legislative inaction means legislative acquiescence.

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court addressed whether it should overturn *Runyon v. McCrary*, 427 U.S. 160 (1976), holding that 42 U.S.C. §1981 prohibited racial discrimination in private contracts. Although reaffirming *Runyon* on stare decisis grounds, the majority held that the failure of Congress to change the statute after *Runyon* played no role in its decision, specifically rejecting an argument from legislative acquiescence or ratification.

> It is "impossible to assert with any degree of assurance that congressional failure to act represents" affirmative congressional approval of the Court's statutory interpretation. [citation omitted] Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U.S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute.

Patterson, 491 U.S. at 175 n. 1. The Court has repeatedly cited and followed *Patterson* and its reasoning. *See e.g., Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (no legislative acquiescence where "Congress has not comprehensively revised a statutory scheme but has made only isolated

amendments."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 173 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction ….").

If anything illustrates the Court's observations regarding Congressional inaction, it is the fate of H.R. 3471 in 1985, a bill permitting service members to bring an action under the FTCA for medical malpractice committed at military medical facilities. The House of Representatives passed H.R. 3471 by a bipartisan majority of 317-90. 131 Cong. Rec. 26414, 26465. The Senate took no action. According to press reports, the "bill never made it "out of the [Senate] Judiciary Committee because of the strong opposition" of the committee chair.[9] Whether or not the report is accurate, the suggested reason is at least as "equally tenable," as other possible explanations for legislative inaction. The failure of the Congress to enact the bill into law does not mean that Congress has acquiesced in the status quo ante much less expressed its will against the measure.

Wayfair is again instructive. Congress could have acted at any time after *Quill* to change the physical presence rule, but it did not. The Court in *Wayfair* specifically recognized that "Congress may legislate to address these problems if it deems it necessary and fit to do so." *Id.* at 2098. The Court's statement that "Congress cannot change the constitutional default rule" did not alter the plenary

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[9] Linda Greenhouse, *Washington Talk; On Allowing Soldiers to Sue*, N.Y. Times, Dec. 16, 1986, https://www.nytimes.com/1986/12/16/us/washington-talk-on-allowing-soldiers-to-sue.html.

power of Congress to legislate on interstate commerce regardless of the default rule. *Id.* at 2096. The dissent y cited pending legislation to alter *Bellas Hess*, and stated: "Nothing in today's decision precludes Congress from continuing to seek a legislative solution." *Id.* at 2102 (2018) (Roberts, C.J., dissenting).

Congressional failure to change the physical presence rule did not ultimately preclude the Court from changing the rule the Court itself had created. "In effect, *Quill* has come to serve as a judicially created tax shelter for businesses …." *Wayfair*, 138 S. Ct. at 2094 (emphasis added). Likewise, *Feres* is a judicially created exception to the FTCA. As the Court observed in *Patterson v. McLean Credit Union*, 491 U.S. at 200: "To be sure, the absence of legislative correction is by no means in all cases determinative, for where our prior interpretation of a statute was plainly a mistake, we are reluctant to 'place on the shoulders of Congress the burden of the Court's own error.'" *See also Kimble v. Marvel, supra,* 135 S.Ct. at 2417 ("'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 up the precedent's shortcomings.'") (Alito J., dissenting).

C. The Circumstances and "Present Realities" of Military Health Care Have Drastically Changed Since *Feres* Undermining the Stare Decisis Effect of that Decision.

This Court also justified its decision in *Wayfair* to overturn *Quill* because the "*Quill* Court did not

have before it the present realities of the interstate marketplace. … When it decided *Quill,* the Court could not have envisioned a world in which the world's largest retailer would be a remote seller." *Wayfair* at 2097.

The "present realities" of the military health care system are vastly different from the realities at the time *Feres, Jefferson* and *Griggs* were decided. The Court in 1950 did not have before it a comprehensive military health care system providing medical care as a matter of right to active duty service members, their dependents, retirees and their dependents. It did not have before it a military health care system in which persons who were not active duty service members constituted by far the largest percentage of persons eligible for treatment in military facilities. It did not address a system in which active duty members and civilians received identical treatment with identical standards of care, in a setting intended to provide the same level of medical care available in comparable civilian health care systems. And thus, it did not have to consider the anomaly of allowing one group of patients to sue, calling the military providers to account for medical negligence, while denying that right to service member patients.

In 1950, civilians had no right to military health care. The authority to provide medical care to civilian dependents at that time still rested on an 1884 Act which provided: "The medical officers of the Army and contract surgeons shall ***whenever practicable*** attend the families of the officers and soldiers free of charge." 23 Stat. 112 (July 5, 1884) (emphasis added).

This health care regime was less than ideal. An estimated 40% of dependents could not obtain care "because of overcrowding, physician shortages or residence outside those served by those [military] facilities." *Barnett v. Weinberger*, 818 F.2d 953, 958 (D.C. Cir. 1987). Where care could be obtained, there were vast disparities in the type of treatment available. *Id.*

In response, Congress in 1956, passed the Military Dependents Act. Pub. L. 84-569, 70 Stat. 250 (1956). Its broad purpose was "to create and maintain high morale throughout the uniformed services by providing an improved and uniform program of medical care for members of the uniformed services and their dependents." *Id.*, Title I, Sec. 101; *Barnett,* 818 F.2d at 957. The "truly outstanding feature" of the Act was that it "converted the provision of military-dependent medical care from a mere act of grace to a full-fledged matter of right." *Barnett*, 818 F.2d at 957. An eligible dependent could elect to receive treatment at either a military facility or a facility with which the Defense Department had contracts. *Barnett*, 818 F.2d at 958; Title II, Sec. 201(c).

Congress expanded these services with passage of the Military Medical Benefits Amendments of 1966, "to authorize an improved health benefits program for retired members of the uniformed services and their dependents, and the dependents of active duty members of the uniformed services."

Pub. L. 89-614, 80 Stat. 862 (1966); 10 U.S.C. §1071.[10]

These acts and subsequent legislation have redefined the nature of the military health system, expanding military health care far beyond what was envisioned by *Feres* in 1950. By Fiscal Year 2017, there were a total of 9.42 million eligible beneficiaries in the Military Health System.[11] Of this number, 15% were active duty service members. The rest are family members of active duty service members, 18%; reserve members and families, 10%; retirees and families, 58%. *Id.*[12]

Pursuant to these various legislative authorities, the Department of Defense has set up a comprehensive health care system for its beneficiaries, now known as TRICARE, similar to civilian health care.[13] For instance, TRICARE Prime

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[10] The category of "retiree" is a subset of the broader category of "veterans," and generally refers to former members of service who are entitled to retirement pay typically with 20 or more years of service. §1074(b)(1). All retirees are veterans, but not all veterans are retirees.

[11] Defense Primer at 1.

[12] This is not to suggest that the percentages for the actual number treated at Military Treatment Facilities. Active duty service members have priority and a right to treatment at an MTF under 10 U.S.C. §1074. Military Health System Review at 34. Dependents and other non-active duty members have a right to treatment, subject to availability of space and facilities. *Id.*, 10 U.S.C. §1076. Both groups, however may be treated by civilian or military providers, in civilian or military facilities.

[13] *See* Don J. Jansen, Congressional Research Service, Military Medical Care: Questions and Answers, CRS Report RL33537 at 7-10 (Jan. 2, 2014) found at

is required for all active duty members, and is available to all others eligible for military healthcare.

> TRICARE Prime is a managed healthcare option similar to a health maintenance organization. Like such civilian arrangements, the plan's features include a primary healthcare provider (either a military or a civilian health care provider) who manages care and provides or facilitates referrals to specialists.[14]

Beneficiaries are provided care "purchased from private providers as well as directly through a system of DOD military treatment facilities that currently includes some 56 hospitals and 365 clinics. It operates worldwide and employs approximately 68,000 civilians and 86,000 military personnel."[15]

In terms of this health care—and Lieutenant Daniel's treatment would be a prime example—there is no distinction between the health care received by active duty service members and all other eligible persons.

This is not to take away from or minimize the distinctly military mission of the Military Health System. But the operative distinction is not between civilians and active duty service members. Rather, it is the distinction between combat and non-combat care, or operational and non-operational care. When the Pentagon undertook a major review of

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https://fas.org/sgp/crs/misc/RL33537.pdf (hereinafter Military Medical Care: Questions and Answers).

[14] *Id.* at 7.

[15] *Id.* at 3.

military health care systems in 2014, it focused on the comprehensive system for both military and civilians, a system comparable to civilian systems.[16] It did not review combat or operational care because that care could be separated out:

> "The scope of this review does not include health care provided in support of the Combatant Commands and deployed operational forces. … ***Moreover, the policies and organizational structures governing health care provided during military operations differ significantly enough from the nonoperational setting to warrant exclusion from this review."***[17]

(emphasis added).

The care at issue here unequivocally falls on the non-combat, non-operational side of the line. No one suggests that any of the decisions related to the death of Lieutenant Rebekah Daniel involved any military considerations. The decisions and the failures leading to her death were entirely medical.

There will be no "parade of military horribles" if *Feres* is overturned in this type of non-combat, non-

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[16] The Report compared the Military Health system to three civilian health care systems, Geisinger Health System, Intermountain Healthcare, and Kaiser Permanente, "selected for the purpose of comparing the MHS against health systems with similar structure (providers and health plan), size and scope of care." Military Health System Review—Final Report 16 (August 29, 2014).

[17] Military Health System Review—Final Report 12 (August 29, 2014).

operational medical malpractice case. And as *Brooks* observed in 1949, the FTCA itself contains specific limits—though not a ban—on service member suits. The FTCA does not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. §2680(k). A decision overturning *Feres* in medical malpractice cases will not open the door to claims arising out of treatment in facilities such as Landstuhl Regional Medical Center in Germany, or other oversees facilities treating American service members. The FTCA excludes claims for injury or death "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680. For injuries or death occurring in the event of hostilities, the courts cannot intervene. The military will not be deterred from doing its job if the petition is granted and the decision of the lower court reversed.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED this 11th day of October, 2018.

Respectfully submitted,

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APPENDIX

889 F.3d 978

United States Court of Appeals, Ninth Circuit.

Walter DANIEL, individually and as personal representative of the estate of Rebekah Daniel, Plaintiff-Appellant,
v.
UNITED STATES of America, Defendant-Appellee.

No. 16-35203
|
Argued and Submitted April 11, 2018, Seattle, Washington
|
Filed May 7, 2018

Synopsis

Background: Personal representative of Navy officer's estate brought action against the United States, under Federal Tort Claims Act (FTCA), seeking to recover damages for officer's death due to complication following childbirth at Naval hospital. The United States District Court for the Western District of Washington, No. 3:15-cv-05748-RJB, Robert J. Bryan, Senior District Judge, 2016 WL 258619, dismissed the complaint for lack of subject matter jurisdiction. Representative appealed.

The Court of Appeals, Hawkins, Circuit Judge, held that *Feres* doctrine barred representative's medical malpractice claim against United States.
Affirmed.

***979** Appeal from the United States District Court for the Western District of Washington, Robert J. Bryan, Senior District Judge, Presiding, D.C. No. 3:15-cv-05748-RJB

OPINION

HAWKINS, Circuit Judge:

***980** We must determine whether the oft-criticized jurisdictional bar recognized in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950)[1] (commonly known as the "*Feres* doctrine")—providing governmental immunity from tort claims involving injuries to service members that are "incident to military service"—bars Walter Daniel's tort action against the United States for the tragic death of his wife, Navy Lieutenant Rebekah Daniel, due to a complication following childbirth. As we have done many times before, we regretfully reach the conclusion that his claims are barred by the *Feres* doctrine and, therefore, affirm.

BACKGROUND

Like most cases implicating the *Feres* doctrine, the claims at issue here arise out of personal tragedy. *See, e.g.*, *Ritchie v. United States*, 733 F.3d 871, 873 (9th Cir. 2013); *Costo v. United States*, 248 F.3d 863, 864 (9th Cir. 2001). Rebekah Daniel served honorably as a Lieutenant in the United States

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[1] *See United States v. Johnson*, 481 U.S. 681, 700, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." (internal quotation marks omitted)).

Navy, and she worked as a labor and delivery nurse stationed at the Naval Hospital in Bremerton, Washington. Walter Daniel is a Lieutenant Commander in the United States Coast Guard.

In 2013, Rebekah and Walter learned that they were expecting a daughter. Rebekah made arrangements to resign from her post, and with the family leave she planned to take following the birth of her daughter, she did not expect to resume her duties prior to her anticipated detachment from service in May 2014. On March 9, 2014, while still on active duty status, Rebekah was admitted to Naval Hospital Bremerton as a patient and gave birth to her daughter. Although her pregnancy had been considered low-risk, Rebekah experienced postpartum hemorrhaging and died approximately four hours after delivery.

Following Rebekah's sudden death, Walter initiated the proceedings giving rise to this appeal. In his complaint, Walter, individually and acting as the personal representative of Rebekah's estate, asserted claims of medical malpractice and wrongful death premised on allegations that Rebekah's death resulted from the negligence of the medical staff at Naval Hospital Bremerton. On a motion by the Government under Federal Rule of Civil Procedure 12(b)(1), the district court dismissed the complaint on the ground that the *Feres* doctrine barred the claims.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We

review de novo issues regarding subject matter jurisdiction and *981regarding the applicability of the *Feres* doctrine. *Ritchie*, 733 F.3d at 874.

DISCUSSION

The Federal Tort Claims Act ("FTCA") effected a broad waiver of sovereign immunity, rendering the United States liable for the tortious acts of its employees "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Shortly after the FTCA's enactment, however, the Supreme Court held that the Act's waiver of sovereign immunity does not extend to "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, 71 S.Ct. 153.

Over time, the Supreme Court has articulated three policy rationales supporting the *Feres* doctrine: "1) the distinctively federal nature of the relationship between the Government and the armed forces requires a uniform system of compensation for soldiers stationed around the country and around the world; 2) a generous compensation scheme for soldiers (the Veterans' Benefits Act) serves as an ample alternative to tort recovery; and 3) permitting military personnel to sue the armed forces would endanger discipline." *Costo*, 248 F.3d at 866 (citing *Johnson*, 481 U.S. at 684 n.2, 107 S.Ct. 2063).

Because of extensive criticism of the doctrine and its underlying justifications, we have "shied away from attempts to apply these policy rationales." *Id.* at 867

(citing *Taber v. Maine*, 67 F.3d 1029, 1043 (2d Cir. 1995)). Instead, when determining whether an injury occurred "incident to service," thereby implicating the *Feres* doctrine, we engage in a case-specific analysis focusing on four factors:

> (1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.

McConnell v. United States, 478 F.3d 1092, 1095 (9th Cir. 2007) (internal quotation marks omitted). Yet, no factor is dispositive, and we must consider the totality of the circumstances. *Id.*

Recognizing that our cases have consistently applied the *Feres* doctrine to bar medical malpractice claims predicated on treatment provided at military hospitals to active duty service members,[2] Walter

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[2] *See Jackson v. United States*, 110 F.3d 1484, 1489 (9th Cir. 1997) (hand injury); *Hata v. United States*, 23 F.3d 230, 235 (9th Cir. 1994) (heart attack); *Grosinsky v. United States*, 947 F.2d 417, 418 (9th Cir. 1991) (per curiam) (vasectomy); *Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991) (treatment following suicide attempt); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987) (preeclampsia); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980) (injuries sustained in motorcycle accident). *Feres* itself also involved medical malpractice claims for treatment of active duty service members at military hospitals. *See* 340 U.S. at 137, 71 S.Ct. 153.

nevertheless argues that application of the doctrine to the facts of this case runs contrary to precedent suggesting that the military discipline rationale is the most important justification for the doctrine. *See, e.g.*, *Ritchie*, 733 F.3d at 874–75. He emphasizes that the claims at issue involve medical care for a condition unrelated to military service, rendered at a domestic military hospital, indistinguishable from treatment that any civilian spouse might seek at that same facility. Walter argues that application of the *Feres* doctrine in this medical malpractice case cannot be reconciled with caselaw finding it inapplicable in certain non-medical malpractice ***982** cases. *See Schoenfeld v. Quamme*, 492 F.3d 1016, 1023–26 (9th Cir. 2007) (no *Feres* bar for claim regarding injury sustained in auto accident on base road, accessible to public, that occurred while the plaintiff was "on liberty"); *Johnson v. United States*, 704 F.2d 1431, 1436–39 (9th Cir. 1983) (no *Feres* bar for claim regarding injury sustained due to negligence at on-base club where the plaintiff worked in essentially civilian capacity while off duty).

We, too, previously "have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable." *Costo*, 248 F.3d at 867. Because "the various cases applying the *Feres* doctrine may defy reconciliation," *McConnell*, 478 F.3d at 1095, our precedent dictates that "comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve

Feres doctrine cases," *Costo*, 248 F.3d at 867 (quoting *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1997)). And, here, that analysis begins and ends with *Atkinson*, 825 F.2d 202.

Atkinson held that the *Feres* doctrine barred a medical malpractice claim by a servicewoman who alleged that she received negligent prenatal treatment at a domestic military hospital. *Id.* at 205–06. There, the plaintiff, who was an active duty U.S. Army Specialist, went to Tripler Army Medical Center during the second trimester of her pregnancy complaining of multiple symptoms. *Id.* at 203. She was sent home twice without treatment, but after her third visit, she was hospitalized for preeclampsia and delivered a stillborn child. *Id.* She alleged that the medical center's failure to diagnose and treat her condition resulted in the stillbirth of her child and caused her permanent bodily injuries and emotional distress. *Id.*

As here, *Atkinson* involved medical treatment of an active duty servicewoman at a domestic military hospital for a condition of pregnancy unrelated to military service. Moreover, *Atkinson* held specifically that the claim was barred despite the court's belief "that the military discipline rationale [did] not support application of the *Feres* doctrine" in the circumstances. *Id.* at 206. We must follow *Atkinson*'s holding here.

CONCLUSION

Lieutenant Daniel served honorably and well, ironically professionally trained to render the same

type of care that led to her death. If ever there were a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA

WALTER DANIEL, individually as personal representative of the estate of REBEKAH DANIEL,	CASE NO. 15-5748 RJB
Plaintiff,	JUDGMENT
v.	
UNITED STATES OF AMERICA,	
Defendant.	

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X___ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

THE COURT HAS ORDERED THAT

Defendant United States' Motion to Dismiss (Dkt 6) is GRANTED. This case is CLOSED.

January 21, 2016 WILLIAM M. McCOOL, Clerk

/s/ Dara Kaleel
By Dara L. Kaleel, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA

WALTER DANIEL, individually as personal representative of the estate of REBEKAH DANIEL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CASE NO. 15-5748 RJB ORDER ON DEF'S MOTION TO DISMISS

This matter comes before the Court on Defendant United States' Motion to Dismiss. Dkt. 6. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

Plaintiff, individually and on behalf of the estate of his late wife, filed this Federal Tort Claim Act ("FTCA") case against the United States asserting claims for medical negligence, corporate negligence, and wrongful death based on health care provided at U.S. Naval Hospital Bremerton ("NHB") in connection with the death of Lieutenant Rebekah Daniel shortly after she gave birth to a child.

The Defendant now moves for dismissal of this case, arguing that the Court does not have subject matter jurisdiction because the United States has sovereign immunity. Dkt. 6. For the reasons set forth below, the motion should be granted.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

A. BACKGROUND FACTS

At the time of her death on March 9, 2014, Lt. Daniel was a commissioned officer on active duty status in the United States Navy. Dkt. 1. She was stationed at NHB as a labor and delivery nurse. Id., at 3. Her husband, the Plaintiff, Walter Daniel, was a Lieutenant Commander in the United States Coast Guard. Id.

In June of 2013, Lt. Daniel submitted her resignation, indicating that she wished to detach from the Navy in May 2014. Dkt. 6-3, at 3-5. Her resignation was approved, and separation orders were issued with an Estimated Detachment Date of May 2014. Id., at 2 and 9- 11. Her separation orders provided that "[w]hen directed by reporting senior, detach May 14." Id., 9. Those orders also specified that separation processing must occur, and "upon completion and when directed detach." Id. Prior to her death, Lt. Daniel had not initiated separation processing. Dkt. 6-1. She was receiving her regular pay and benefits, including accumulation of annual (vacation) leave and creditable service toward retirement. Id.

Lt. Daniel checked into NHB as a patient on March 8, 2014 and went into labor on March 9, 2014. Dkt. 1, at 3. She was off duty at the time, and was not serving on a military mission. Id. Her pregnancy was considered a low-risk pregnancy. Id. She had a healthy baby girl at 3:38 PM by vaginal delivery. Id.,

at 4. A few minutes later, she began to have postpartum bleeding. Id. Lt. Daniel was pronounced dead at 7:34 PM, four hours after she gave birth. Id., at 6.

Plaintiff asserts that Lt. Daniel bled to death because her healthcare team failed to follow specific well-known standards of care for postpartum hemorrhage. Dkt. 1.

NHB is a military hospital that provides care to service members, retirees, their eligible dependents, and some disabled veterans. Dkts. 1, at 7 and 6-1, at 4. It does not provide care to members of the general public. Dkt. 6-1.

B. PROCEDURAL HISTORY

On April 1, 2015, Plaintiff filed an administrative claim with the Defendant. Dkt. 1. Defendant denied the claim on April 23, 2015. Id. Plaintiff filed this case on October 15, 2015. *Id.*

C. MOTION TO DISMISS, PLAINTIFF'S RESPONSE, AND DEFENDANT'S REPLY

Defendant moves to dismiss the claims against it for **lack of** subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendant asserts that it enjoys sovereign immunity except to the extent that it consents to be sued. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The FTCA constitutes a partial waiver of this sovereign immunity. 28 U.S.C § 2679(b). Defendant argues that the FTCA is not applicable to this case

because the rule announced in *Feres* v. United States, 340 U.S. 135 (1950) bars claims arising out of injuries that are "incident to service" in the military. Dkt. 6.

Defendant argues that because Rebekah Daniel was an active duty service member receiving care at a military hospital when she died, the analogous cases, the Ninth Circuit's four-factor test, and the policy rationales underlying *Feres* support the application of *Feres* in this case. Dkt. 6.

In response, Plaintiff argues that *Feres* should not apply to medical malpractice cases, particularly those involving pregnant service members, because cases which apply the *Feres* bar o medical malpractice claims "cannot be reconciled with the analysis adopted by the Ninth Circuit." Dkt. 8. Plaintiff further contends that *Feres* does not apply to this case because, although Ninth Circuit cases are arguably inconsistent, "the Ninth Circuit's analysis of the rationales and factors to be considered" support denial of Defendant's motion. *Id.* Plaintiff points out that although this Court is bound by Ninth Circuit and United States Supreme Court precedent, "the Ninth Circuit sitting en banc has not considered the *Feres* rule in the present context." *Id.* Plaintiff preserves an argument that *Feres* should be reversed or modified, while recognizing that such an action can only be taken by the appellate courts. Id.

Defendant filed a reply in support of the Motion to Dismiss. Dkt. 10. In it, Defendant disputes Plaintiff's assertion that *Feres* should not apply to medical malpractice claims by pointing out that both

the Ninth Circuit and the Supreme Court have applied *Feres* in such cases, and that those cases have upheld the validity of applying the *Feres* doctrine. Id. Defendant also argues that the four-factor test and policy rationales support application of *Feres* under these circumstances. Id.

II. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

A complaint must be dismissed under Fed.R.Civ.P.12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); see 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v.*

Guardian Life Ins. Co. of America, 511 U.S. 375 (1994); Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

B. SOVEREIGN IMMUNITY AND THE FTCA

The United States, as sovereign, is immune from suit unless it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). If a claim does not fall squarely within the strict terms of a waiver of sovereign immunity, a district court is without subject matter jurisdiction. *See, e.g., Mundy v. United States*, 983 F.2d 950, 952 (9th Cir. 1993).

The FTCA is the exclusive remedy for state law torts committed by federal employees within the scope of their employment. 28 U.S.C. § 2679(b)(1). The FTCA is a limited waiver of sovereign immunity, rendering the United States liable for certain torts of federal employees. See 28 U.S.C. § 1346(b). The FTCA provides,

> Subject to the provisions of chapter 171 of this title, the district courts, . . ., shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or

> omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The statute specifically excludes military service related injuries for claims arising out of "combatant activities," 28 U.S.C. § 2680(j), and claims arising in foreign countries, 28 U.S.C. § 2680(j).

The Supreme Court significantly broadened the "combatant activities" exception in *Feres* v United States, 340 U.S. 135 (1950). See also Costo v. United States, 248 F.3d 863, 866 (9th Cir. 2001). The *Feres* court held that FTCA waiver of sovereign immunity does not apply to the claims "for injuries to servicemen where the injuries arise out of or are incident to service." Id., at 146. This doctrine is referred to as the *Feres* doctrine. Costo, at 866. The *Feres* doctrine is based on three policy rationales:

> (1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure.

Ritchie v. United States, 733 F.3d 871, 874 (9th Cir. 2013)(quoting *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72 (1977)).

For the past sixty-six years, the *Feres* doctrine and its policy considerations have "been criticized by 'countless courts and commentators' across the jurisprudential spectrum." *Ritchie*, at 874; *Costo*, at 866. (9th Cir. 2013). "However, neither Congress nor the Supreme Court has seen fit to reverse course." *Ritchie*, at 874. Due to the heavy criticism of the doctrine and its policy considerations, the Ninth Circuit applies a four factor test to determine whether a service member's injury is "incident to service." *Costo*, at 866. The four factors are:

> (1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.

Costo, at 867 (internal citation omitted). None of these factors are dispositive. *McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007) (internal citation omitted). Rather than seizing on any particular combination of factors, the focus is on the totality of the circumstances. Id.

Additionally, because the Ninth Circuit has "reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable," a

"comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases." *Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007)(internal quotation marks omitted). Therefore, courts "examine the Ninth Circuit cases that are most factually analogous to the case at bar to determine whether the *Feres* doctrine bars [Plaintiff Daniel's] suit." *Id.*, at 1019-1020.

C. APPLICATION OF *FERES* DOCTRINE

For clarity, the Ninth Circuit's most favored method of *Feres* analysis (analogous cases) will be considered first, followed by the four-factor test established by the Ninth Circuit, then by the disfavored policy rationales.

1. Other Ninth Circuit Cases

The Ninth Circuit compares "fact patterns to outcomes in cases that have applied the *Feres* doctrine." *Costo*, at 867. Similar medical malpractice claims arising out of injury to active duty service members from care received at a military hospital have been found to be barred by *Feres*. *Persons v. United States*, 925 F.2d 292 (9th Cir. 1991); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980).

In *Persons*, the court found that although the service member was off-duty, he "enjoyed the use of the naval hospital solely by virtue of his status as a serviceman and the doctors who treated him were

subject to military orders." *Persons*, at 296. The *Persons* court noted, "courts have consistently accorded these factors decisive weight in determining whether activity was 'incident to service,'" and so, it held that medical malpractice claims against the U.S. were barred by *Feres*. Id. That court found that the *Feres* doctrine barred negligence claims, and that "this is especially true in cases alleging medical malpractice in a military facility." *Id.*

The *Atkinson* court decided that although a medical malpractice claim arising out of negligent prenatal care did not support application of *Feres* according to the third *Feres* rationale, military discipline, the other two *Feres* rationales supported its application. *Atkinson*, at 206. It held the *Feres* doctrine barred suit by a service woman asserting that negligent medical treatment at a military healthcare facility caused her child to be stillborn. *Id.*

In *Veillette*, the Ninth Circuit found that since the service member's death was attributable to the negligence of Navy hospital personnel, the injury was "incident to service" even though civilians also had access to that facility. *Veillette*, at 507. The *Veillette* court held that negligence claims against employees of military hospitals are barred by the *Feres* doctrine. *Id.*

The case law supports the application of the *Feres* doctrine to medical malpractice cases brought by service members, or their heirs, against military hospital personnel. Lt. Daniel's care should be

regarded as "incident to service," and under binding Ninth Circuit precedent, her claims are barred by *Feres*.

2. Ninth Circuit's Four Factor Test

a. *The Place where the Negligent Act Occurred*

In evaluating this factor, courts consider whether the location is open to the public. *See, e.g., Dreier v. United States*, 106 F.3d 844. 853 (9th Cir. 1996). In this case, treatment took place at NHB, a Naval medical facility. Dkt. 6-1. Only active duty service members and their dependents may receive their care at that facility. Id. at 11. This factor weighs in favor of a *Feres* bar. However, this factor is not determinative, and precedent indicates that "where the nature of the plaintiff's activities at the time of injury are only minimally related to [her] military service, we have declined to give much weight to this factor." *Schoenfeld*, at 1023. Consequently, the fourth factor may have an effect on analysis of the first factor.

b. *Lt. Daniel's Duty Status*

Lt. Daniel was an active duty service member at the time of treatment, and was not on leave or furlough. Dkt 6-1 at 8. This factor also weighs in favor of a *Feres* bar. However, if the service member is not "engaged in military activity" at the time of injury, "duty status is at best marginally relevant to the *Feres* analysis." Schoenfeld, at 1023. "The important question is whether the service member

on active duty status was engaging in an activity that is related in some relevant way to his military duties." *Johnson v. United States*, 704 F.2d 1431, 1438 (9th Cir. 1983). Again, to determine whether this factor will be strongly considered, the nature of the service member's activity under the fourth factor is relevant.

c. *Benefits Accruing to Lt. Daniel because of her Status as a Service Member*

"Benefits," under the third factor, can encompass benefits received both before and after injury, including the benefit of being able to participate in the activity that led to injury and any compensation arising out of that injury. *Schoenfeld*, at 1024. Lt. Daniel received her care at NHB because of her status as a service member. Additionally, her family received benefits following her death because she was on active duty status. This factor weighs in favor of applying the *Feres* bar. It is not dispositive, however, as the payment of benefits alone does not preclude a service member from recovery under the FTCA. See, e.g., *Schoenfeld* at 1024.

d. *Nature of Lt. Daniel's Activities at the Time the Negligent Act Occurred*

In analyzing this fourth factor, courts consider whether the activities of the service member are "meaningfully distinguishable from those of a civilian." *Schoenfeld*, at 1025. Although a pregnant service woman would expect to receive care at a military hospital that is substantially similar to the

care a civilian would receive at a civilian hospital, it is relevant that the service woman is at that particular military facility being treated by military personnel because of her status in the military. *See, e.g., Persons*, at 296. In its analysis of the fourth factor in *Jackson v. United States*, the Ninth Circuit stated as follows: "[O]btaining medical care is neither inherently military nor inherently civilian. However, we have held that *Feres* bars suits for medical malpractice even when the treatment was *not for military-related injuries." Jackson v. United States, 110 F.3d 1484 (9th Cir. 1997).* This factor also weighs in favor of applying *Feres.*

3. *Feres Policy Considerations*

The Feres doctrine bars recovery under the FTCA for injuries that are "incident to service" based on three policy rationales:

> (1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure.

Ritchie, at 874. The Ninth Circuit has "shied away from attempts to apply these policy rationales." *Costo*, at 867. They are broadly encompassed by the four-factor test that the Ninth Circuit favors in making determinations on the applicability of the

Feres bar.

The first policy consideration, the situs of the injury, is intended to offer some uniformity in light of the global nature of U.S. military operations. United States v. Johnson, 481 U.S. 681 (1987). The idea is that active duty service men and women will be treated the same regardless of where the alleged negligence took place. Because Lt. Daniel was an active duty service woman being treated at a military facility, this policy consideration favors application of Feres. However, as discussed in relation to the first factor of the Ninth Circuit's test, military status and location of alleged negligence may have diminished relevance in relation to other considerations. *See, e.g., Schoenfeld*, at 1023.

The second consideration recognizes the existence of "generous statutory disability and death benefits" available to service members. Johnson, 481 at 689. Lt. Daniel's heirs have received, and will continue to receive, these benefits. Dkt. 6-1. As discussed under the third factor of the Ninth Circuit's test, this policy consideration favors application of the Feres bar, but does not necessarily preclude recovery under the FTCA.

The third policy, military discipline, centers on "the need to avoid the inquiry into military orders," and is specifically concerned with officers testifying in court with regard to the actions and decisions of other officers. Id. at 876. The goal is to limit involvement by the judiciary into "sensitive military affairs at the expense of military discipline and effectiveness." Johnson, at 690 (internal citations

omitted). In evaluating this rationale, the Ninth Circuit has distinguished the doctor-patient relationship in medical malpractice cases from the military supervisor-subordinate relationship in other FTCA claims. Id. at 876-77. Courts also focus on the status of the alleged victim rather than the military status of the alleged tortfeaser in Feres cases. Johnson, at 686. The facts of this case do not involve inquiry into the military orders of a superior to a subordinate, but rather into the treatment given by a doctor to a patient of the kind that the doctor might also provide to a civilian. Furthermore, Lt. Daniel was not under orders at the time of her treatment, so any impact on military discipline would be remote. This consideration weighs against application of Feres.

Feres, and the policy rationales for the *Feres* bar, have resulted in much criticism and inconsistency. The third rationale, which pertains to military discipline, is emphasized as the most important of the three, and military discipline is only minimally impacted by this case. *See, e. g., Ritchie*, at 874. However, the other two Feres rationales counsel that the Plaintiff's claims are barred.

D. CONCLUSION

The Ninth Circuit has relied on two methods – analogous case analysis and the four-factor test – to alleviate some of the inconsistency resulting from application of the *Feres* policy considerations. Both of these methods favor application of the *Feres* doctrine. Absent intervening controlling authority,

the undersigned is bound by the decisions of the Ninth Circuit and the Supreme Court. "[U]nless and until Congress or the Supreme Court choose to confine the unfairness and irrationality that Feres has bred," Ritchie, at 878, the doctrine applies here. Regretfully, this suit is barred by *Feres*. Defendant's motion to dismiss should be granted.

III. ORDER

Therefore, it is hereby **ORDERED** that:

Defendant United States' Motion to Dismiss (Dkt. 6) IS GRANTED. This case is **CLOSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 21st day of January, 2016.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

Case 3:15-cv-05748-RJB Document 16
Filed 07/16/18 Page 1 of 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER DANIEL, individually as Personal representative of the estate of REBEKAH DANIEL,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 16-35203

ORDER

Before: HAWKINS and GRABER, Circuit Judges, and TEILBORG,* District Judge.

Judge Graber has voted to deny the petition for rehearing en banc, and Judges Hawkins and Teilborg have so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing en banc is DENIED.

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* The Honorable James A. Teilborg, United States District Judge for the District of Arizona, sitting by designation.

STATUTES INVOLVED

28 U.S.C. § 1346:

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. § 2674:

The 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, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is

empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.