No. _____

In The
Supreme Court of the United States

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THERESA JONES, A.J. (A MINOR), H.J. (A MINOR), CHRISTINA GIBSON, M.G. (A MINOR), AND A.G. (A MINOR),
***Petitioners*,**

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the *Feres* doctrine be revisited and limited to the legislative purpose underlining the Federal Tort Claims Act, such that a negligence action for the death of U.S. military servicemembers can be brought against the United States in certain instances?

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INTRODUCTION

Petitioners Theresa Jones, A.J. (a minor), H.J. (a minor), Christina Gibson, M.G. (a minor), and A.G. (a minor) respectfully submit this petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.

This case involves the *Feres* doctrine, which is derived from this Court's decision in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) ("*Feres*"). In *Feres*, the Court limited the waiver of sovereign immunity that Congress provided in the Federal Tort Claims Act ("FTCA") and held that the FTCA bars suits against the United States by U.S. military servicemembers in certain settings.

There is a compelling need for this Court to grant certiorari and reverse or least revisit the *Feres* doctrine, a judicially created exception to the FTCA which is universally loathed and which, as it has evolved, now goes far beyond what Congress ever imagined or intended when it enacted the FTCA.

Feres has, in more recent times, been upheld by this Court by the slimmest of margins. Justice Scalia's scathing dissent in a 5-4 decision in 1987 provides sounds reason for reversing *Feres* or at the very least, revisiting it. Constrained by *stare decisis*, the courts of appeals have frequently applied the *Feres* doctrine with great reluctance. The appellate courts have practically begged this Court to act to reverse or alter the *Feres* doctrine and ameliorate its unjust impact.

The *Feres* doctrine mandates that certain servicemembers be denied a remedy and denied justice when injured or killed by the negligence and

carelessness of the very country they serve. Rather than promoting morale and military discipline, *Feres* sends the message to servicemembers that their nation will abandon them and their families if they are ever injured or killed through the United States' negligence. Our nation should, and for the most part does, cherish those who serve in the military. The *Feres* doctrine runs contrary to the very fiber of our national spirit and our national interests.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-4a) is unreported. The district court's opinion (App. 5a-21a) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 9, 2018, and denied a petition for rehearing *en banc* on October 16, 2018 (App. 22a-23a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346 (which is reproduced in full at App. 24a-26a states, in relevant part:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

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> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

> liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 2674 (which is reproduced in full at App. 27a states, in relevant part:

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.

STATEMENT OF THE CASE

I. The Deaths of Jones and Gibson

Lieutenant Commander Landon Jones and Chief Warrant Officer 3 Jonathan Gibson died when the helicopter they had safely landed was struck by a wave that crashed over the flightdeck of the USS William P. Lawrence and washed the helicopter and the two pilots into the Red Sea.

The Lawrence was a variant (Flight IIA variant) of the Arleigh Burke Class Destroyer that had a low freeboard. The freeboard is the distance between the waterline and the flightdeck. The lower the freeboard, the closer the flightdeck is to the water. Thus, aircrew and flightdeck crews on low-freeboard ships are more vulnerable to waves washing over the flightdeck and injuring or killing them, or damaging equipment and aircraft.

The Lawrence was conducting operations in the Red Sea. Jones and Gibson were to land their helicopter, Indian 617, pick up three Lawrence sailors, and depart.

As Indian 617 prepared to land, sea conditions were rough, and the Lawrence's wake was nearly at the flight deck level. After Indian 617 landed, the Lawrence's commanding officer ordered maximum speed, and turned the ship so the waves were coming from the aft (back) of the ship. This ship rolled from side to side, 13 degrees to port and then 17 degrees to starboard, with Jones and Gibson still inside Indian 617. The helicopter began to buckle, its main rotor blades and tail rotor still spinning.

A wave struck Indian 617, disintegrating its tail rotor assembly. The helicopter tipped over. Its rotor blades struck the flight deck, causing the helicopter to tear itself from its chains. The ship rolled one more time, and Indian 617, with Jones and Gibson inside, slid off the ship and into the Sea.

Since 1983, at least 13 Hazard Reports were written about waves damaging helicopters and flight deck nets aboard low-freeboard destroyers and frigates. Many Navy personnel reported that rolling

and waves caused damage to these flight decks. Additionally, between January 2003 and March 2013, the Navy documented at least nine mishaps involving waves washing over destroyer flightdecks.

Nevertheless, the Navy never published quantified parameters for reasonable and safe ship handling to prevent future occurrences of this well-documented hazard. In fact, the Navy published no guidance beyond merely using "caution" when maneuvering with a spinning helicopter on deck.

Additionally, Navy Surface Warfare Officer training on flight operations is focused solely on creating a safe flight envelope for launch and recovery, but had no other restrictions on what to do with the ship after the recovery of aircraft.

Pilots who are strapped into their helicopter while the main rotor blades are spinning are particularly vulnerable on the Flight IIA destroyers, which have a history of waves coming over the flightdeck.

This systemic disregard for the safety of its personnel places the culpability for the deaths of these two pilots squarely on the Navy's shoulders. The Navy chose to ignore this known hazard.

II. The Lawsuit

Petitioners here are the wives and children of Jones and Gibson. After the accident in which Jones and Gibson died, Petitioners filed suit against the United States of America in the U.S. District Court for the Southern District of California. Pertinent to this Petition, Petitioners asserted a claim against the

United States for negligence – specifically, that the United States breached its duty of care, in part, in failing to address the hazards to aircrews in helicopters operating on the low-freeboard destroyers.

The United States moved to dismiss the negligence claim for lack of subject matter jurisdiction based on the *Feres* doctrine. The District Court granted the motion, and entered judgment in the United States' favor on Petitioners' negligence claim.

Petitioners appealed to the U.S. Ninth Circuit Court of Appeals. The three-judge panel affirmed the judgment. Petitioners filed a petition for rehearing *en banc*, which the Court of Appeals denied.

REASONS FOR GRANTING THE PETITION

There is a compelling need to review this case and either reverse or revisit the *Feres* doctrine, to avoid or at least ameliorate its deleterious impact.

I. The *Feres* doctrine has evolved and expanded far beyond what *Feres* identified as the legislative intent behind the FTCA.

The FTCA was enacted in 1948 as a "broad waiver of the Federal Government's sovereign immunity." *Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001). "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…." 28 U.S.C. § 2674.

One year later, this Court held that two servicemen injured off duty by a civilian Army

employee could sue the Government. *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949) ("*Brooks*"). The Court left open what might result where servicemen are injured while on duty, finding that to present "a wholly different case." *Id.*, 337 U.S. at 52.

One year after *Brooks*, this Court decided *Feres*. Most courts have described *Feres* as "a judicially created exception" to Congress's FTCA. *See*, e.g., *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000); *Schoemer v. United States*, 59 F.3d 26, 28 (5th Cir. 1995); *Romero by Romero v. United States*, 954 F.2d 223, 224 (4th Cir. 1992); Even this Court's Justices have sometimes characterized *Feres* this way. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 674, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) (Marshall, J., dissenting).

In *Feres*, the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146.

The Court provided three reasons for its decision. First, the "parallel private liability" required by the FTCA was absent. *Id.*, 340 U.S. at 141-142. Second, Congress could not have intended that local tort law govern the "distinctively federal" relationship between the Government and enlisted personnel. *Id.* at 142-144. Third, Congress could not have intended to make FTCA suits available to servicemen who have already received veterans' benefits to compensate for injuries suffered incident to service. *Id.* at 144-145.

As discussed by Justice Scalia in his frequently cited Dissent, this Court has, over time, denounced or declared as "no longer controlling" all three of these rationales. *United States v. Johnson*, 481 U.S. 681, 694-696, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (Scalia, J., dissenting).

The Court rejected *Feres*' "parallel private liability" rationale in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957), citing *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

Feres' second rationale – the "distinctively federal" relationship between the Government and enlisted personnel – was diminished to the status of "no longer controlling" in *United States v. Shearer*, 473 U.S. 52, 58, 105 S.Ct. 3039, 87 L.Ed.2d 38, fn. 4 (1985) ("*Shearer*").

The third rationale – the availability of veteran's benefits – was also designated as "no longer controlling" in *Shearer*, 473 U.S. at 58, fn 4. As Justice Scalia noted, this Court allowed an action against the United States by the servicemen in *Brooks*. "The fact that they had already received VBA benefits troubled us little." *United States v. Johnson*, *supra*, 481 U.S. at 696 (Scalia, J., dissenting).

Relying in part on the Dissent in *Johnson*, appellate courts, including the Ninth Circuit, have also acknowledged that the veterans-benefits rationale is "incoherent, given the fact that in certain cases, soldiers have been permitted to recover under ***both*** the VBA and the FTCA." *Costo v. United States*, *supra*, 248 F.3d at 866 (emphasis in original).

Four years after *Feres*, this Court announced a new rationale for the *Feres* doctrine: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline. *United States v. Brown*, 348 U.S. 110, 112, 348 S.Ct. 110, 99 L.Ed. 139 (1954).

This rationale has, over time, become a more central focus: "But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions [citation], and whether the suit might impair essential military discipline [citation]." *Shearer*, 473 U.S. at 57, citing *Stencel Aero Engineering Corp. v. United States*, *supra*, 431 U.S. at 673, and *Chappell v. Wallace*, 462 U.S. 296, 300, 304, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).

It has now reached the point where this factor – the potential impact on military discipline – is ***the most important factor*** in determining if a claim is *Feres*-barred. *Schoenfeld v. Quamme*, 492 F.3d 1016, 1025 (9th Cir. 2007); *Davis v. United States*, 667 F.2d 822, 825 (9th Cir. 1982); *Costo v. United States*, *supra*, 248 F.3d at 866 ("[T]he danger to discipline … has been identified as the best explanation for *Feres*").

As Justice Scalia noted, it is indeed "strange" that the primary and "most important" rationale for the *Feres* doctrine is a rationale not even once mentioned in the very decision of the doctrine's namesake. *See*, *United States v. Johnson*, *supra*, 481 U.S. at 699 (Scalia, J., dissenting).

Nevertheless, *Feres* lives on. The evolution of the *Feres* doctrine to the point where this is now the

most important factor becomes critical, further below, as the specific facts of this case are discussed.

II. The *Feres* doctrine has been universally criticized by the courts of appeal, and Justices of this Court have called for its demise.

The *Feres* doctrine has received near-unanimous criticism, and a dearth of any real praise. Appellate courts have noted "the injustice of the result" where *Feres* is applied. *Hinkie v. United States,* 715 F.2d 96, 97 (3d Cir.1983). Courts are also "not blind to the tragedy" of *Feres'* effects. *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982). Courts have said that "*Feres* should be reconsidered." *Peluso v. United States,* 474 F.2d 605, 606 (3d Cir. 1973). "[T]he *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today." *Taber v. Maine*, 67 F.3d 1029, 1032 (2d Cir. 1995).

Some have discussed that the *Feres* doctrine may violate a soldier's right to equal protection under the Constitution. *Tootle v. USDB Commandant*, 390 F.3d 1280, 1282 (10th Cir. 2004); *Costo v. United States*, *supra*, 248 F.3d at 870 (Ferguson, J. dissenting).

The Ninth Circuit, from which the judgment sought to be reviewed here stems, has discussed repeatedly how "reluctant" the Court has been to apply *Feres* to bar a claim before it. *Veillette v. United States,* 615 F.2d 505, 506 (9th Cir. 1980); *Costo v. United States*, *supra*, 248 F.3d at 864; *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1986).

Feres has not been immune from attack by this Court's Justices. Justice Scalia's Dissent, joined by three other Justices, in *United States v. Johnson*, *supra*, is perhaps the most cited criticism: "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Id.*, 481 U.S. at 700 (internal quotations omitted).

Justice Thomas echoed the critique when he dissented from a decision to deny certiorari in a *Feres*-based case: "I tend to agree with Justice Scalia that *Feres* was wrongly decided…. At a bare minimum, it should be reconsidered." *Lanus v. United States*, 133 S.Ct. 2731, (Mem)–2732 (2013) (internal quotations omitted).

III. It is time to eliminate the *Feres* doctrine or, at the very least, significantly limit its reach.

There can be no question that the rights and morale of our nation's military servicemembers should be safeguarded. Because it impacts servicemembers so significantly, the *Feres* doctrine – or whatever law might replace it – should not broaden the exception to the FTCA's immunity waiver any more than absolutely necessary.

There is at least one practical reason why *Feres* needs to be, at the very least, revisited and revamped. As the Ninth Circuit noted, "we have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable…." *Costo v. United States*, *supra*, 248 F.3d at 867.

The other reason why this Court should act now goes more to notions of justice and fairness to those who choose to service this country and risk their lives to safeguard our freedom.

The *Feres* doctrine, how broadly or narrowly it is applied, and how it relates to the facts of a specific case, is a critically important issue. The doctrine relates to injuries that occur to members of our nation's military. If our country is to be protected adequately, it is imperative that servicemembers be treated with respect, and accorded all proper justice. If servicemembers are injured in combat, and as a result of combat – as much as we might abhor it when it happens – that is an inherent risk of service. But when servicemembers are injured by their own country's negligence – when they are injured because the policies and conduct of the nation whose interests they serve at risk of their very lives – we must ensure that justice is done. If we as a nation do not provide that justice, our military will suffer. Qualified candidates for the military may choose not to serve. Those who already serve and are injured, and who are denied justice, may choose to end their service through a feeling that their country lacks gratitude. Those who already serve but have not been injured, but have heard of justice denied to their injured comrades, may choose to end their service, as well.

Thus, how courts apply the *Feres* doctrine is inextricably linked to this nation's safety and survival. Such an issue is unquestionably of exceptional importance. Nothing will change unless this Court acts because, as the appellate courts have noted, they are powerless to do so.

As noted, the *Feres* doctrine has evolved such that its primary justification is the notion that Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline. *United States v. Brown*, *supra*, 348 U.S. at 110. Application of *Feres* depends on whether a court must second-guess military decisions, and whether the suit might impair essential military discipline." *Shearer*, 473 U.S. at 57. Indeed, the potential impact on military discipline has been noted as ***the most important factor*** in determining if a claim is *Feres*-barred. *Schoenfeld v. Quamme*, *supra*, 492 F.3d at 1025.

However, not all suits against the United States that stem from service-related incidents will negatively impact military discipline. In fact, there are some instances – as in this case – where military discipline and morale will be ***enhanced*** if suit against the United States is permitted.

The heart of Petitioners' claim here is quite simple: in the 30 years before Jones' and Gibson's' deaths, the Navy did not properly evaluate or address the hazards to aircrews in helicopters operating on the low-freeboard Arleigh Burke Class destroyers like the Lawrence.

That has nothing to do with second-guessing military orders, and there is nothing about holding the United States liable for that which would "impair" military discipline. To the contrary. There have been dozens of documented reports about waves crashing over the flight decks of Flight IIA variant destroyers, and it is surely only by happenstance and good fortune that no one else has died as a result. Flying

helicopters off warships in combat conditions is a dangerous enough job. The Navy's callous disregard for the unreasonably dangerous condition of the low-freeboard flightdecks has made it more so.

If the United States cannot be held liable where deaths have resulted because the Navy has for decades ignored a dangerous and life-threatening condition on its ships, the morale of military personnel will decrease with the realization that there is no accountability. Military discipline will suffer because military personnel may start to question whether – as is the circumstance here – the Navy is ignoring longstanding and well-known conditions that risk their health and their very lives, because the United States cannot be held accountable.

Subjecting the United States to a claim for its negligence will thus not harm military discipline, it will likely improve military discipline because it will act as an incentive to the Navy to operate more responsibly and safely which will save lives, money, equipment and materiel. Two sailors are gone and without fixing that which killed them, more could – and likely will – certainly follow. And this would be the greatest injustice of all: more preventable deaths.

Additionally, holding the United States responsible in this case for the Navy's conduct does not implicate command decisions. The heart of Petitioners' negligence claim is not about a specific command given by any specific person, be it the Lawrence's commanding officer or the admiral commanding the strike group, as the United States has suggested in earlier briefings. This is about the

overall negligence of the Navy, as a whole, in neglecting information showing the hazards of these low-freeboard flightdecks, and in failing to take any steps to ensure that Navy personnel were aware of and trained to respond to these well-known hazards.

Courts have summed up where the concern lies with the factor regarding "military discipline": "[t]he 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…." *Ritchie v. United States*, 733 F.3d 871, 874-875 (9th Cir. 2013).

There is no "peculiar and special relationship" between a soldier and his superior officer that is at issue in Petitioners' negligence claim. This is about the decades-long negligence of the Navy as a whole, and its inaction in the face of overwhelming evidence of the extreme hazards presented with these low-freeboard flightdecks. Military discipline does not come into play here.

In earlier briefings, the United States submitted a declaration from a senior Navy officer, Captain Paul H. Hogue. The declaration set forth facts relating to the specific events in the hours leading up to the deaths of Jones and Gibson. Captain Hogue's Declaration contains no evidence that relates to the issue of the decades-long negligence of the Navy in ignoring the well-known hazards presented by the low-freeboard decks. That negligence, if nothing else, does not relate to a command decision, does not impact military

discipline, and thus should not fall within the *Feres* doctrine.

The orders in this case evidence some historical irony. Typically, *Feres* has been applied to bar cases out of the concern that allowing the case to proceed will impair military discipline. Here, however, there is a greater threat to military discipline if *Feres* is applied and the case is ***not*** allowed to proceed. Petitioners seek accountability from the United States for the Navy's long-term, systemic negligence in failing to provide a safe operating environment to its aviators and sailors and specifically for the deaths of their husbands and fathers. Flying a helicopter and operating onboard a ship are dangerous tasks by their nature; the Navy made them unreasonably so through its own indifference and inaction. If servicemembers know that the Navy can engage in long-term negligence, and can disregard conditions known to be unreasonably dangerous to its servicemembers, morale will suffer. Military discipline will suffer. Our nation's safety will suffer.

The time has come to eliminate or at the very least seriously revise and limit the *Feres* doctrine. Our country faces perilous times. How we as a national treat our military servicemembers will impact not only this country's safety, but the overall sense of our nation's integrity in ensuring fairness and justice toward those who have chosen to risk the ultimate sacrifice in the good name of The United States of America.

CONCLUSION

The existence or proper scope of the *Feres* doctrine is a compelling reason for this case to grant certiorari. The *Feres* doctrine is confusing and unevenly applied, and has grown beyond the purpose stated in its namesake. Petitioners respectfully request that the Court grant certiorari here to re-examine this doctrine.

Respectfully Submitted,

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